

[Code of Federal Regulations]
[Title 33, Volume 2, Parts 125 to 199]
[Revised as of July 1, 1997]
From the U.S. Government Printing Office via GPO Access
[CITE: 33CFR138]

TITLE 33--NAVIGATION AND NAVIGABLE WATERS

CHAPTER I--COAST GUARD, DEPARTMENT OF TRANSPORTATION (CONTINUED)

PART 138--FINANCIAL RESPONSIBILITY FOR WATER POLLUTION (VESSELS)

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Authority: 33 U.S.C. 2716, 2716a; 42 U.S.C. 9608, 9609; sec. 7(b),
E.O. 12580, 3 CFR, 1987 Comp., p. 198; E.O. 12777, 3 CFR 1991 Comp., p.
351; 49 CFR 1.46.

Section 138.30 also issued under the authority of 46 U.S.C. 2103, 14302.

Source: CGD 91-005, 59 FR 34227, July 1, 1994, unless otherwise
noted.

Sec. 138.10 Scope.

This part sets forth the procedures by which an operator of a vessel may establish and maintain, for itself, and, where the operator is not the owner or demise charterer, for the owner and demise charterer of the vessel, evidence of financial responsibility to cover liability of the owner, operator, and demise charterer arising under--

(a) Section 1002 of the Oil Pollution Act of 1990 (OPA 90) (33 U.S.C. 2702); and

(b) Section 107(a)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA) (42 U.S.C. 9607(a)(1)).

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended by CGD 91-005, 61 FR 9274, Mar. 7, 1996]

Sec. 138.12 Applicability.

(a) This part applies to--

(1) A tank vessel of any size, and to a foreign-flag vessel of any size, using

the waters of the exclusive economic zone to transship or lighter oil (whether delivering or receiving) destined for a place subject to the jurisdiction of the United States; and

(2) A vessel using the navigable waters of the United States or any port or place subject to the jurisdiction of the United States, including an offshore facility subject to the jurisdiction of the United States, except--

(i) A vessel that is 300 gross tons or less; and

(ii) A non-self-propelled barge that does not carry oil as cargo or fuel and does not carry hazardous substances as cargo.

(b) For the purposes of financial responsibility under OPA 90, a mobile offshore drilling unit is treated as a tank vessel when it is being used as an offshore facility and there is a discharge, or a substantial threat of a discharge, of oil on or above the surface of the water. A mobile offshore drilling unit is treated as a vessel other than a tank vessel when it is not being used as an offshore facility.

(c) In addition to a non-self-propelled barge over 300 gross tons that carries hazardous substances as cargo, for the purposes of financial responsibility under CERCLA, this part applies to a self-propelled vessel over 300 gross tons, even if it does not carry hazardous substances.

(d) This part does not apply to a public vessel.

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended at 61 FR 9274, Mar. 7, 1996]

Sec. 138.15 Implementation schedule.

(a) A tank vessel is subject to the following implementation schedule:

(1) Until December 28, 1994, a tank vessel is required to carry a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel. On or after that date, and until July 1, 1995, a non-self-propelled tank vessel must carry a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel, unless it carries a Certificate issued under this part.

(2) A self-propelled tank vessel to which this part applies and which carries a valid Certificate issued under part 130 of this chapter may not operate on or after December 28, 1994, unless the operator of that vessel has submitted to the Director, NPFC, before that date acceptable evidence of financial responsibility applicable to that vessel under this part. A self-propelled tank vessel covered by that evidence of financial responsibility before December 28, 1994, may continue to operate with the Certificate issued under part 130 of this chapter. The expiration date of the Certificate issued under part 130 of this chapter for that vessel will be deemed to be December 28, 1995, regardless of the expiration date appearing on the Certificate. Thereafter, a Certificate issued under this part is required.

(3) A self-propelled tank vessel to which this part applies, but which does not carry a valid Certificate issued under part 130 of this chapter before December 28, 1994, may not operate on or after that date unless it carries a Certificate under this part.

(4) A non-self-propelled tank vessel to which this part applies may not operate on or after July 1, 1995, without a Certificate issued under this part. A non-self-propelled tank vessel may continue to operate with a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel, until that date.

(b) A vessel that is not a tank vessel (non-tank vessel) is subject to the following implementation schedule:

(1) Until December 28, 1997, a non-tank vessel is required to carry a Certificate issued under parts 130 and 132 of this chapter, as may be applicable to that vessel, unless that vessel carries a Certificate issued under this part. On or after December 28, 1997, each non-tank vessel subject to this part must carry a Certificate issued under this part.

(2) A Certificate is issued, on and after December 28, 1994, and before December 28, 1997, under parts 130 and 132 of this chapter only to replace a lost Certificate or to replace a Certificate due to a vessel or operator name change (a change of legal identity, such as reincorporation or other reorganization, is not considered a name change). The expiration date that will appear on the replacement Certificate will be the same as the expiration date of the Certificate being replaced. During that

three-year time period, with respect to part 132 of this chapter, the expiration date that will appear on a Certificate being replaced, or on an existing Certificate being renewed, will be adjusted to coincide with the expiration date of the Certificate, if any, for that vessel issued under part 130 of this chapter.

(3) A non-tank vessel that has a Certificate issued before December

28, 1994, under part 130 of this chapter is not required to carry a Certificate under this part until the date of expiration of the Certificate issued under part 130 of this chapter.

(4) Except as provided in paragraph (b)(5) of this section, a Certificate issued on and after July 1, 1994, and before December 28, 1994, under parts 130 and 132 of this chapter is issued with an expiration date three years from the date of issuance.

(5) If a Certificate issued under part 130 of this chapter with an expiration date of December 28, 1994, or later is surrendered, and a new Certificate is requested for the same non-tank vessel before December 28, 1994, the new Certificate will have the same expiration date as that of the surrendered Certificate.

(c) On or after July 1, 1994, a vessel that is subject to either part 131 or 132, or both, of this chapter but that is not subject to part 130 of this chapter because the vessel is 300 gross tons or less is not required to comply with part 131 or 132 of this chapter, unless that vessel is subject to this part under Sec. 138.12(a)(1).

Sec. 138.20 Definitions.

(a) As used in this part (including the appendices to this part), the following terms have the same meaning as set forth in--

(1) Section 1001 of the Oil Pollution Act of 1990 (33 U.S.C. 2701), respecting the financial responsibility referred to in Sec. 138.10(b)(1): claimant, damages, discharge, exclusive economic zone, navigable waters, mobile offshore drilling unit, natural resources, offshore facility, oil, person, remove, removal, removal costs, and United States; and

(2) Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), respecting the financial responsibility referred to in Sec. 138.10(b)(2): claimant, damages, environment, hazardous substance, navigable waters, natural resources, person, release, remove, removal, and United States.

(b) As used in this part (including the appendices to this part)--
Acts means OPA 90 and CERCLA.

Applicant means an operator who has applied for a Certificate or for the renewal of a Certificate under this part.

Application means "Application for Vessel Certificate of Financial Responsibility (Water Pollution)", as illustrated in Appendix A of this part.

Cargo means goods or materials on board a vessel for purposes of transportation, whether proprietary or nonproprietary. A hazardous substance or oil carried solely for use aboard the carrying vessel is not "cargo".

CERCLA means title I of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 et seq.).

Certificant means an operator who has been issued a Certificate under this part.

Certificate means a "Vessel Certificate of Financial Responsibility (Water Pollution)" issued under this part, unless otherwise indicated.

Director, NPFCL, means the head of the U.S. Coast Guard National Pollution Funds Center (NPFCL).

Financial responsibility means statutorily required financial ability to meet liability under the Acts.

Fish tender vessel and fishing vessel have the same meaning as set forth in 46 U.S.C. 2101.

Fuel means any oil or hazardous substance used or capable of being used to produce heat or power by burning, including power to operate equipment. A hand-carried pump with not more than five gallons of fuel capacity, that is neither integral to nor regularly stored aboard a non-self-propelled barge, is not equipment.

Guarantor means any person who provides evidence of financial responsibility, under the Acts, on behalf of a vessel owner, operator, and demise charterer. A vessel operator who can qualify as a self-insurer may act as both a self-insurer of vessels it operates and as a financial guarantor of other vessels, under Sec. 138.80(b)(4).

Hazardous material means a liquid material or substance that is--

- (1) Flammable or combustible;
- (2) Designated a hazardous substance under section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1221); or
- (3) Designated a hazardous material under section 104 of the Hazardous Material Transportation Act (49 App. U.S.C. 1803).

Incident means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone.

Insurer is a type of guarantor and means one or more insurance companies, associations of underwriters, shipowners' protection and indemnity associations, or other persons, each of which must be acceptable to the Coast Guard.

Master Certificate means a Certificate issued under this part to a person acting as vessel operator in its capacity as a builder, repairer, scrapper, or seller of vessels.

Offshore supply vessel has the same meaning as set forth in 46 U.S.C. 2101.

OPA 90 means title I of the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

Operator means a person who is an owner, a demise charterer, or other contractor, who conducts the operation of, or who is responsible for the operation of, a vessel. A builder, repairer, scrapper, lessor, or seller who is responsible, or who agrees by contract to become responsible, for a vessel is an operator.

Owner means any person holding legal or equitable title to a vessel. In a case where a Certificate of Documentation or equivalent document has been issued, the owner is considered to be the person or persons whose name or names appear thereon as owner. For purposes of CERCLA only, "owner" does not include a person who, without participating in the management of a vessel, holds indicia of ownership primarily to protect the owner's security interest in the vessel.

Public vessel means a vessel

Owned or bareboat chartered by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.

Self-elevating lift vessel means a vessel with movable legs capable of raising its hull above the surface of the sea and that is an offshore

work boat (such as a work barge) that does not engage in drilling operations.

Tank vessel means a vessel (other than an offshore supply vessel, a fishing or fish tender vessel of 750 gross tons or less that transfers fuel without charge to a fishing vessel owned by the same person, or a towing or pushing vessel (tug) simply because it has in its custody a tank barge) that is constructed or adapted to carry, or that carries, oil or liquid hazardous material in bulk as cargo or cargo residue, and that--

- (1) Is a vessel of the United States;
- (2) Operates on the navigable waters; or
- (3) Transfers oil or hazardous material in a place subject to the jurisdiction of the United States.

Total Applicable Amount means the amount determined under Sec. 138.80(f)(3).

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended by CGD 91-005, 61 FR 9274, Mar. 7, 1996]

Sec. 138.30 General.

(a) The regulations in this part set forth the procedures whereby an operator of a vessel subject to this part can demonstrate that it and the owner and demise charterer of the vessel are financially able to meet potential liability for costs and damages in the amounts established by this part. The owner, operator, and demise charterer are strictly, jointly, and severally liable for the costs and damages resulting from an incident or a release or threatened release, but together they need only establish and maintain an amount of financial responsibility equal to the single limit of liability per incident, release, or threatened release. Only

that portion of the evidence of financial responsibility under this part with respect to--

- (1) OPA 90 is required to be made available by a guarantor for the costs and damages related to an incident where there is not also a release or threatened release; and
- (2) CERCLA is required to be made available by a guarantor for the costs and damages related to a release or threatened release where there is not also an incident. A guarantor (or a self-insurer for whom the exceptions to limitations of liability are not applicable), therefore, is not required to apply the entire amount of financial responsibility to an incident involving oil alone or a release or threatened release involving a hazardous substance alone.

(b) Where a vessel is operated by its owner, or the owner is responsible for its operation, the owner is considered to be the operator and shall submit the application for a Certificate. In all other cases, the vessel operator shall submit the application. A time or voyage charterer that does not assume responsibility for the operation of the vessel is not considered an operator for the purposes of this

part.

(c) For a United States-flag vessel, the applicable gross tons or gross tonnage, as referred to in this part, is determined as follows:

(1) For a documented U.S. vessel measured under both 46 U.S.C. Chapters 143 (Convention Measurement) and 145 (Regulatory Measurement).

The vessel's regulatory gross tonnage is used to determine whether the vessel exceeds 300 gross tons where that threshold applies under the Acts. If the vessel's regulatory tonnage is determined under the Dual Measurement System in 46 CFR part 69, subpart D, the higher gross tonnage is the regulatory tonnage for the purposes of the 300 gross ton threshold. The vessel's gross tonnage as measured under the International Convention on Tonnage Measurement of Ships, 1969 ("Convention"), is used to determine the vessel's required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA.

(2) For all other United States vessels. The vessel's gross tonnage under 46 CFR part 69 is used for determining both the 300 gross ton threshold, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. If the vessel is measured under the Dual Measurement System, the higher gross tonnage is used in all determinations.

(d) For a vessel of a foreign country that is a party to the Convention, gross tonnage, as referred to in this part, is determined as follows:

(1) For a vessel assigned, or presently required to be assigned, gross tonnage under Annex I of the Convention. The vessel's gross tonnage as measured under Annex I of the Convention is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA.

(2) For a vessel not presently required to be assigned gross tonnage under Annex I of the Convention. The highest gross tonnage that appears on the vessel's certificate of documentation or equivalent document and that is acceptable to the Coast Guard under 46 U.S.C. chapter 143 is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. If the vessel has no document or the gross tonnage appearing on the document is not acceptable under 46 U.S.C. chapter 143, the vessel's gross tonnage is determined by applying the Convention Measurement System under 46 CFR part 69, subpart B, or if applicable, the Simplified Measurement System under 46 CFR part 69, subpart E. The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(e) For a vessel of a foreign country that is not a party to the Convention, gross tonnage, as referred to in this part, is determined as follows:

(1) For a vessel measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention. The vessel's gross tonnage under the similar laws and regulations

is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability

under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(2) For a vessel not measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention. The vessel's gross tonnage under 46 CFR part 69, subpart B, or, if applicable, subpart E, is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. The measurement standards applied are subject to applicable international agreements to which the United States is a party.

(f) A person who agrees to act as a guarantor or a self-insurer is bound by the vessel's gross tonnage as determined under paragraphs (c), (d), or (e) of this section, regardless of what gross tonnage is specified in an application or guaranty form illustrated in the appendices to this part. Guarantors, however, may limit their liability under a guaranty of financial responsibility to the applicable gross tonnage appearing on a vessel's International Tonnage Certificate or other official, applicable certificate of measurement and shall not incur any greater liability with respect to that guaranty, except when the guarantors knew or should have known that the applicable tonnage certificate was incorrect.

Sec. 138.40 Where to apply for and obtain forms.

(a) An operator shall file an application for a Certificate and a renewal of a Certificate together with fees and evidence of financial responsibility, with the Coast Guard National Pollution Funds Center at the following address: U.S. Coast Guard, National Pollution Funds Center (cv), 4200 Wilson Boulevard, Suite 1000, Arlington, VA 22203-1804, telephone (703) 235-4813, Telex 248324 (Answerback CGNPFC UR), Telefax (703) 235-4835.

(b) Forms may be obtained at the address in paragraph (a) of this section, and all requests for assistance, including telephone inquiries, in completing applications should be directed to the U.S. Coast Guard at that same address.

Sec. 138.50 Time to apply.

(a) A vessel operator who wishes to obtain a Certificate shall file a completed application form, evidence of financial responsibility and appropriate fees at least 21 days prior to the date the Certificate is required. The Director, NPFC, may waive this 21-day requirement.

(b) The Director, NPFC, generally processes applications in the order in which they are received at the National Pollution Funds Center.

Sec. 138.60 Applications, general instructions.

(a) The application for a Certificate (Form CG-5585) is illustrated in Appendix A of this part. An application and all supporting documents must be in English. All monetary terms must be expressed in United States dollars.

(b) An authorized official of the applicant shall sign the application. The title of the signer must be shown in the space provided

on the application.

(c) The application must be accompanied by a written statement providing authority to sign, where the signer is not disclosed as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director, chief executive officer, or any other duly authorized officer of a corporate applicant.

(d) If, before the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall, within five business days of becoming aware of the change, notify the Director, NPFC, in writing, of the change.

Sec. 138.65 Issuance and carriage of Certificates.

Upon the satisfactory demonstration of financial responsibility and payment of fees, the Director, NPFC, issues a Vessel Certificate of Financial Responsibility (Water Pollution), the original of which (except as provided in Secs. 138.90

(a) and (b) and 138.110(f)) is to be carried aboard the vessel covered by the Certificate. The carriage of a valid Certificate or authorized copy indicates compliance with these regulations. Failure to carry a valid Certificate or authorized copy subjects the vessel to enforcement action, except where a Certificate is removed temporarily from a vessel for inspection by a United States Government official.

Sec. 138.70 Renewal of Certificates.

(a) An operator shall file a written application for the renewal of a Certificate at least 21 days, but not earlier than 90 days, before the expiration date of the Certificate. Except as provided in paragraph (c) of this section, a letter may be used for this purpose. The Director, NPFC, may waive this 21-day requirement.

(b) The applicant shall identify in the renewal application any changes which have occurred since the original application for a Certificate was filed, and set forth the correct information in full.

(c) An applicant that applies for the first time for a Certificate issued under this part to replace a Certificate issued under part 130 of this chapter shall submit an application form illustrated in Appendix A of this part. An applicant is not required to pay an application fee under Sec. 138.130(c) for this first-time application.

Sec. 138.80 Financial responsibility, how established.

(a) General. In addition to submitting an application and fees, an applicant shall submit, or cause to be submitted, evidence of financial responsibility in an amount determined under Sec. 138.80(f). A guarantor may submit directly to the Director, NPFC, the evidence of financial responsibility.

(b) Methods. An applicant shall establish evidence of financial responsibility by one or more of the following methods:

(1) Insurance. By filing with the Director, NPFC, an insurance guaranty form CG-5586, illustrated in Appendix B of this part (or, when

applying for a Master Certificate, a master insurance guaranty form CG-5586-1, illustrated in Appendix C of this part), executed by not more than four insurers that have been found acceptable by and remain acceptable to the Director, NPFC, for purposes of this part.

(2) Surety bond. By filing with the Director, NPFC, a surety bond guaranty form CG-5586-2, illustrated in Appendix D of this part, executed by not more than 10 acceptable surety companies certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the maximum penal sum of each bond to be issued under this part.

(3) Self-insurance. By filing the financial statements specified in paragraph (b)(3)(i) of this section for the applicant's last fiscal year preceding the date of application and by demonstrating that the applicant maintains, in the United States, working capital and net worth each in amounts equal to or greater than the total applicable amount calculated in accordance with Sec. 138.80(f), based on a vessel carrying hazardous substances as cargo. As used in this paragraph, working capital means the amount of current assets located in the United States, less all current liabilities anywhere in the world; and net worth means the amount of all assets located in the United States, less all liabilities anywhere in the world. After the initial submission, for each of the applicant's fiscal years, the applicant or certificant shall submit statements as follows:

(i) Initial and annual submissions. An applicant or certificant shall submit annual, current, and audited non-consolidated financial statements prepared in accordance with Generally Accepted Accounting Principles, and audited by an independent Certified Public Accountant. These financial statements must be audited in accordance with Generally Accepted Auditing Standards. These financial statements must be accompanied by an additional statement from the Treasurer (or equivalent official) of the applicant or certificant certifying both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States. If the financial statements cannot be submitted in non-consolidated form, a consolidated

statement may be submitted if accompanied by an additional statement prepared by the same Certified Public Accountant, verifying the amount by which the applicant's or certificant's--

(A) Total assets, located in the United States, exceed its total (i.e., worldwide) liabilities; and

(B) Current assets, located in the United States, exceed its total (i.e., worldwide) current liabilities. This additional statement must specifically name the applicant or certificant, indicate that the amounts so verified relate only to the applicant or certificant, apart from any other affiliated entity, and identify the consolidated financial statement to which it applies.

(ii) Semiannual submissions. When the applicant's or certificant's demonstrated net worth is not at least ten times the total applicable amount of financial responsibility, the applicant's or certificant's Treasurer (or equivalent official) shall file affidavits covering the first six months of the applicant's or certificant's fiscal year. The affidavits must state that neither the working capital nor the net worth

have, during the first six months of the current fiscal year, fallen below the applicant's or certificant's required amount of financial responsibility as determined in accordance with this part.

(iii) Additional submissions. An applicant or certificant--

(A) Shall, upon request of the Director, NPFC, submit additional financial information; and

(B) Who establishes financial responsibility under paragraph (b)(3) of this section shall notify the Director, NPFC, within five business days of the date the applicant or certificant knows, or has reason to believe, that the working capital or net worth has fallen below the amounts required by this part.

(iv) Time for submissions. All required annual financial statements must be received by the Director, NPFC, within 90 days after the close of the applicant's or certificant's fiscal year, and all affidavits required by paragraph (b)(3)(ii) of this section within 30 days after the close of the applicable six-month period. Upon written request, the Director, NPFC, may grant an extension of the time limits for filing the annual financial statements or affidavits. An applicant or certificant that requests an extension must set forth the reason for the extension and deliver the request at least 15 days before the statements or affidavits are due. The Director, NPFC, will not consider a request for an extension of more than 60 days.

(v) Failure to submit. The Director, NPFC, may revoke a certificate for failure of the certificant to submit any statement, data, notification, or affidavit required by paragraph (b)(3) of this section.

(vi) Waiver of working capital. The Director, NPFC, may waive the working capital requirement for any applicant or certificant that--

(A) Is a regulated public utility, a municipal or higher-level governmental entity, or an entity operating solely as a charitable, non-profit making organization qualifying under section 501(c) Internal Revenue Code. The applicant or certificant must demonstrate in writing that the grant of a waiver would benefit a local public interest; or

(B) Demonstrates in writing that working capital is not a significant factor in the applicant's or certificant's financial condition. An applicant's or certificant's net worth in relation to the amount of its required amount of financial responsibility and a history of stable operations are the major elements considered by the Director, NPFC.

(4) Financial Guaranty. By filing with the Director, NPFC, a Financial Guaranty Form CG-5586-3, illustrated in Appendix E of this part (when applying for a Master Certificate, a Master Financial Guaranty Form CG-5586-4, illustrated in Appendix F of this part), executed by not more than four financial guarantors, such as a parent or affiliate acceptable to the Coast Guard. A financial guarantor shall comply with all of the self-insurance provisions of paragraph (b)(3) of this section. In addition, a person that is a financial guarantor for more than one applicant

or certificant shall have working capital and net worth no less than the aggregate total applicable amounts of financial responsibility provided as a guarantor for each applicant or certificant, plus the amount required to be demonstrated by a self-insurer under this part, if also acting as a self-insurer.

(5) Other evidence of financial responsibility. The Director, NPFC, will not accept a self-insurance method other than the one described in paragraph (b)(3) of this section. An applicant may in writing request the Director, NPFC, to accept a method different from one described in paragraph (b) (1), (2), or (4) of this section to demonstrate evidence of financial responsibility. An applicant submitting a request under this paragraph shall submit the request to the Director, NPFC, at least 45 days prior to the date the Certificate is required. The applicant shall describe in detail the method proposed, the reasons why the applicant does not wish to use or is unable to use one of the methods described in paragraph (b) (1), (2), or (4) of this section, and how the proposed method assures that the applicant is able to fulfill its obligation to pay costs and damages in the event of an incident or a release or threatened release. The Director, NPFC, will not accept a method under this paragraph that merely deletes or alters a provision of one of the methods described in paragraph (b) (1), (2), or (4) of this section (for example, one that alters the termination clause of the insurance guaranty form illustrated in Appendix B of this part). An applicant that makes a request under this paragraph shall provide the Director, NPFC, a proposed guaranty form that includes all the elements described in paragraphs (c) and (d) of this section. A decision of the Director, NPFC, not to accept a method requested by an applicant under this paragraph is final agency action.

(c) Forms--(1) Multiple guarantors. Four or fewer insurers (a lead underwriter is considered to be one insurer) may jointly execute an insurance guaranty form. Ten or fewer sureties (including lead sureties) may jointly execute a surety bond guaranty form. Four or fewer financial guarantors may jointly execute a financial guaranty form. If more than one insurer, surety, or financial guarantor executes the relevant form--

(i) Each is bound for the payment of sums only in accordance with the percentage of vertical participation specified on the relevant form for that insurer, surety, or financial guarantor. Participation in the form of layering (tiers, one in excess of another) is not acceptable; only vertical participation on a percentage basis is acceptable unless none of the participants specifies a percent of participation. If no percentage of participation is specified for an insurer, surety, or financial guarantor, the liability of that insurer, surety, or financial guarantor is joint and several for the total of the unspecified portions; and

(ii) The guarantors must designate a lead guarantor having authority to bind all guarantors for actions required of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims.

(2) Operator name. An applicant shall ensure that each form submitted under this part sets forth in full the correct legal name of the vessel operator to whom a certificate is to be issued.

(d) Direct Action. (1) Acknowledgment. Any evidence of financial responsibility submitted under this part must contain an acknowledgment by the insurer or other guarantor that an action in court by a claimant (including a claimant by right of subrogation) for costs and damage claims arising under the provisions of the Acts, may be brought directly against the insurer or other guarantor. The evidence of financial responsibility must also provide that, in the event an action is brought under the Acts directly against the insurer or other guarantor, the

insurer or other guarantor may invoke only the following rights and defenses:

(i) The incident, release, or threatened release was caused by the willful misconduct of the person for whom the guaranty is provided.

(ii) Any defense that the person for whom the guaranty is provided may raise under the Acts.

(iii) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of the guaranty with respect to an incident or with respect to a release or threatened release.

(iv) A defense relating to the amount of a claim or claims that exceeds the amount of the guaranty, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except when the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(v) The claim is not one made under either of the Acts.

(2) Limitation on guarantor liability. A guarantor that participates in any evidence of financial responsibility under this part shall be liable because of that participation, with respect to an incident or a release or threatened release, in any proceeding only for the amount and type of costs and damages specified in the evidence of financial responsibility. A guarantor shall not be considered to have consented to direct action under any law other than the Acts, or to unlimited liability under any law or in any venue, solely because of the guarantor's participation in providing any evidence of financial responsibility under this part. In the event of any finding that liability of a guarantor exceeds the amount of the guaranty provided under this part, that guaranty is considered null and void with respect to that excess.

(e) Public access to data. Financial data filed by an applicant, certificant, and any other person is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552a).

(f) Total applicable amount. (1) The applicable amount under OPA 90 is determined as follows:

(i) For a tank vessel (except a tank vessel on which no liquid hazardous material in bulk is being carried as cargo or cargo residue, and on which the only oil carried as cargo or cargo residue is an animal fat or vegetable oil, as those terms are used in section 2 of the Edible Oil Regulatory Reform Act (Pub. L. 104-55)).

(A) Over 300 gross tons (and a vessel of 300 gross tons or less using the waters of the United States Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States, as specified in Sec. 138.12(a)(1)) but not exceeding 3,000 gross tons, the greater of \$2,000,000 or \$1,200 per gross ton; and

(B) Over 3,000 gross tons, the greater of \$10,000,000 or \$1,200 per gross ton.

(ii) For a vessel other than a tank vessel under paragraph (f)(1)(i) of this section that is over 300 gross tons or that is 300 gross tons or less using the waters of the Exclusive Economic Zone of the United

States to transship or lighter oil destined for a place subject to the jurisdiction of the United States, the greater of \$500,000 or \$600 per gross ton.

(2) The applicable amount under CERCLA is determined as follows:

(i) For a vessel over 300 gross tons carrying a hazardous substance as cargo, the greater of \$5,000,000 or \$300 per gross ton.

(ii) For any other vessel over 300 gross tons, the greater of \$500,000 or \$300 per gross ton.

(3) The total applicable amount is the maximum applicable amount calculated under paragraph (f)(1) of this section plus maximum applicable amount calculated under paragraph (f)(2) of this section.

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended by CGD 91-005, 61 FR 9274, Mar. 7, 1996]

Sec. 138.90 Individual and Fleet Certificates.

(a) The Director, NPFC, issues an individual Certificate for each vessel listed on a completed application when the Director, NPFC, determines that acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where a Fleet Certificate is issued under this section or where a Master Certificate is issued under Sec. 138.110. Each Certificate of any type issued under this part is issued only in the name of a vessel operator and is effective for not more than three years from the date of issue, as indicated on each

Certificate. An authorized official of the applicant may submit to the Director, NPFC, a letter requesting that additional vessels be added to a previously submitted application for an individual Certificate. The letter must set forth all information required in item 5 of the application form. The authorized official shall also submit or cause to be submitted acceptable evidence of financial responsibility, if required, and certification fees for these additional vessels. The certificant shall carry the original individual Certificate on the vessel named on the Certificate, except that a legible copy (certified as accurate by a notary public or other person authorized to take oaths in the United States) may be carried instead of the original if the vessel is an unmanned barge and does not have a document carrying device which the vessel operator believes would offer suitable protection for the original Certificate. If a notarized copy of an individual Certificate is carried aboard a barge, the Certificate shall retain the original in the United States and shall make it readily available for inspection by United States Government officials.

(b) An operator of two or more barges that are not tank vessels and that from time to time may be subject to this part (e.g., a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo), so long as the operator of such a fleet is a self-insurer or arranges with an acceptable guarantor to cover, automatically, all such barges for which the operator may from time to time be responsible, may apply to the Director, NPFC, for issuance of a Fleet Certificate. A legible copy of the Fleet Certificate, certified as accurate by a notary public or other person authorized to take oaths in the United States, must be

carried on each barge when subject to this part. In addition, the certificant shall retain in the United States the original Fleet Certificate and shall make it readily available for inspection by United States Government officials. The original Fleet Certificate, when invalid, must be completed on the reverse side and returned immediately to the Director, NPFC, and all copies must be destroyed. When the certificant ceases to be responsible for a barge covered by a Fleet Certificate, the certificant shall immediately destroy the copy of the Fleet Certificate carried aboard that barge.

(c) A person shall not make any alteration on any Certificate issued under this part or copy of that Certificate, except the notarized certifications permitted in Sec. 138.110(f) and paragraphs (a) and (b) of this section. A Certificate or copy containing any alteration is void.

(d) If, at any time after a Certificate has been issued, a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the certificant shall notify the Director, NPFC, in writing within 10 days of becoming aware of the change. A vessel or operator name change or change of a guarantor shall be reported as soon as possible by telefax or other electronic means to the Director, NPFC, and followed by a written notice sent within three business days.

(e) Except as provided in Sec. 138.90(f), at the moment a certificant ceases to be the operator of a vessel for any reason, including a vessel that is scrapped or transferred to a new operator, the individual Certificate naming the vessel, and any copies of the Certificate, are void and their further use is prohibited. In that case, the certificant shall, within 10 days of the Certificate becoming void, complete the reverse side of the original individual Certificate naming the involved vessel and return the Certificate to the Director, NPFC. If the Certificate cannot be returned because it has been lost or destroyed, the certificant shall, within three business days, submit the following information in writing to the Director, NPFC:

(1) The number of the individual Certificate and the name of the vessel.

(2) The date and reason why the certificant ceased to be the operator of the vessel.

(3) The location of the vessel on the date the certificant ceased to be the operator.

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of custody of an unmanned barge certificated under this part, where the certificant transferring the barge continues to be liable under the Acts and continues to maintain on file with the Director, NPFC, acceptable evidence of financial responsibility with respect to the barge, the existing individual Certificate remains in effect. A temporary new individual Certificate is not required. A transferee is encouraged to require the transferring certificant to acknowledge in writing that the transferring certificant agrees to remain responsible for pollution liabilities.

Sec. 138.100 Non-owning operator's responsibility for identification.

(a) Each operator that is not an owner of a vessel certificated under this part, other than an unmanned barge, shall ensure that the original or a legible copy of the demise charter-party (or other written document on the owner's letterhead, signed by the vessel owner, which specifically identifies the vessel operator named on the Certificate) is maintained on board the vessel.

(b) The demise charter-party or other document required by paragraph (a) of this section must be presented, upon request, for examination to a United States Government official.

Sec. 138.110 Master Certificates.

(a) A contractor or other person who is responsible for a vessel in the capacity of a builder, scrapper, lessor, or seller (including a repairer who agrees to be responsible for a vessel under its custody) may apply for a Master Certificate instead of applying for an individual Certificate for each vessel. A Master Certificate covers all of the vessels subject to this part held by the applicant solely for purposes of construction, repair, scrapping, lease, or sale. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, leasing, or selling (e.g., a slop barge used by a shipyard) cannot be covered by a Master Certificate. Any vessel for which a Certificate is required, but which is not eligible for a Master Certificate, must be covered by either an individual Certificate or a Fleet Certificate.

(b) An applicant for a Master Certificate shall submit an application form in the manner prescribed by Sec. 138.60. An applicant shall establish evidence of financial responsibility in accordance with Sec. 138.80, by submission, for example, of an acceptable Master Insurance Guaranty Form, Surety Bond Guaranty Form, Master Financial Guaranty Form, or acceptable self-insurance documentation. An application must be completed in full, except for Item 5. The applicant shall make the following statement in Item 5: ``This is an application for a Master Certificate. The largest tank vessel to be covered by this application is [insert applicable gross tons] gross tons. The largest vessel other than a tank vessel is [insert applicable gross tons] gross tons." The dollar amount of financial responsibility evidenced by the applicant must be sufficient to meet the amount required under this part.

(c) Each Master Certificate issued by the Director, NPFC, indicates--

(1) The name of the applicant (i.e., the builder, repairer, scrapper, lessor, or seller);

(2) The date of issuance and termination, encompassing a period of not more than three years; and

(3) The gross tons of the largest tank vessel and gross tons of the largest vessel other than a tank vessel eligible for coverage by that Master Certificate. The Master Certificate does not identify the name of each vessel covered by the Certificate.

(d) Each additional vessel which does not exceed the respective tonnages indicated on the Master Certificate and which is eligible for coverage by a Master Certificate is automatically covered by that Master Certificate. Before acquiring a vessel, by any means, including

conversion of an existing vessel, that would have the effect of increasing the certificant's required amount of financial responsibility (above that provided for issuance of the existing Master Certificate), the certificant shall submit to the Director, NPFC, the following:

- (1) Evidence of increased financial responsibility.
- (2) A new certification fee.

(3) Either a new application or a letter amending the existing application to reflect the new gross tonnage which is to be indicated on a new Master Certificate.

(e) A person to whom a Master Certificate has been issued shall submit to the Director, NPFC, every six months beginning the month after the month in which the Master Certificate is issued, a report indicating the name, previous name, type, and gross tonnage of each vessel covered by the Master Certificate during the preceding six-month reporting period and indicating which vessels, if any, are tank vessels.

(f) The certificant shall ensure that a legible copy of the Master Certificate (certified as accurate by a notary public or other person authorized to take oaths in the United States) is carried aboard each vessel covered by the Master Certificate. The certificant shall retain the original Master Certificate at a location in the United States and shall make it readily available for inspection by United States Government officials.

(g) Upon revocation or other invalidation of the Master Certificate, the certificant shall return the original Certificate within 10 days to the Director, NPFC. The certificant shall ensure that all copies of the Certificate are destroyed.

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended by CGD 91-005, 61 FR 9275, Mar. 7, 1996]

Sec. 138.120 Certificates, denial or revocation.

(a) The Director, NPFC, may deny a Certificate when an applicant--

- (1) Willfully or knowingly makes a false statement in connection with an application for an initial or renewal Certificate;
- (2) Fails to establish acceptable evidence of financial responsibility as required by this part;
- (3) Fails to pay the required application or certificate fees;
- (4) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this part; or
- (5) Fails to timely file required statements, data, notifications, or affidavits.

(b) The Director, NPFC, may revoke a Certificate when a certificant--

- (1) Willfully or knowingly makes a false statement in connection with an application for an initial or a renewal Certificate, or in connection with any other filing required by this part;
- (2) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this part; or
- (3) Fails to timely file required statements, data, notifications,

or affidavits.

(c) A Certificate is immediately invalid, and considered revoked, without prior notice, when the certificant--

(1) Fails to maintain acceptable evidence of financial responsibility as required by this part;

(2) Is no longer the responsible operator of the vessel in question;

or

(3) Alters any Certificate or copy of a Certificate except as permitted by this part in connection with notarized certifications of copies.

(d) The Director, NPFC, advises the applicant or certificant, in writing, of the intention to deny or revoke a Certificate under paragraph (a) or (b) of this section and states the reason therefor. Written advice from the Director, NPFC, that an incomplete application will be considered withdrawn unless it is completed within a stated period, is the equivalent of a denial.

(e) If the intended revocation under paragraph (b) of this section is based on failure to timely file the required financial statements, data, notifications, or affidavits, the revocation is effective 10 days after the date of the notice of intention to revoke, unless, before revocation, the certificant demonstrates to the satisfaction of the Director, NPFC, that the required documents were timely filed or have been filed.

(f) If the intended denial is based on paragraph (a)(1) or (a)(4) of this section, or the intended revocation is based on paragraph (b)(1) or (b)(2) of this section, the applicant or certificant may request, in writing, an opportunity to present information for the purpose of showing that the applicant or certificant is in compliance with the part. The request must be received by the Director, NPFC, within

10 days after the date of the notification of intention to deny or revoke. A Certificate subject to revocation under this paragraph remains valid until the Director, NPFC, issues a written decision revoking the Certificate.

(g) An applicant or certificant whose Certificate has been denied under paragraph (a) of this section or revoked under paragraph (b) or (c) of this section may request the Director, NPFC, to reconsider the denial or revocation. The certificant shall file a request for reconsideration, in writing, to the Director, NPFC, within 20 days of the date of the denial or revocation. The certificant shall state the reasons for reconsideration. The Director, NPFC, issues a written decision on the request within 30 days of receipt, except that failure to issue a decision within 30 days shall be deemed an affirmation of a denial or revocation. Until the Director, NPFC, issues this decision, a revoked certificate remains invalid. A decision by the Director, NPFC, affirming a denial or revocation, is final agency action.

Sec. 138.130 Fees.

(a) The Director, NPFC, will not issue a Certificate until the fees set forth in paragraphs (c) and (d) of this section have been paid.

(b) Fees must be paid in United States currency by check, draft, or postal money order made payable to the "U.S. Coast Guard". Cash will

not be accepted.

(c) Except as provided in Sec. 138.70(c), an applicant that submits an application for the first time under this part, shall pay an initial, non-refundable application fee of \$150 for each type of application (i.e., individual Certificate(s), Fleet Certificate, and Master Certificate). An applicant that submits an application for an additional (i.e., supplemental) individual Certificate, or to replace, amend or renew an existing Certificate, is not required to pay a new application fee. However, if an applicant for any reason withdraws or permits the withdrawal of an application for an individual Certificate(s) and the applicant holds no valid individual Certificate(s), in order to reapply for an individual Certificate(s) covering the same or different vessels the applicant shall submit a new application form and an application fee of \$150. Similarly, an applicant shall submit a new application form and fee to obtain a new Fleet or Master Certificate following invalidation of a Fleet or Master Certificate.

(d) In addition to the application fee of \$150, an applicant shall also pay a certification fee of \$80 for each Certificate requested. An applicant shall submit the certification fee for each vessel listed in, or later added to, an application for an individual Certificate(s). An applicant shall submit the \$80 certification fee to renew or to reissue a Certificate for any reason, including, but not limited to, a vessel or operator name change or a lost certificate.

(e) A certification fee is refunded, upon receipt of a written request, if the application is denied or withdrawn before issuance of the Certificate. Overpayments of application and certification fees are refunded, on request, only if the refund is for \$50 or more. However, any overpayments not refunded will be credited, for a period of three years from the date of receipt of the monies by the Coast Guard, for the applicant's possible future use or transfer to another applicant under this part.

Sec. 138.140 Enforcement.

(a) Any person who fails to comply with this part with respect to evidence of financial responsibility under section 1016 of OPA 90 (33 U.S.C. 2716) is subject to a civil penalty. In addition, under section 4303(b) of that Act (33 U.S.C. 2716a(b)), the Attorney General may secure such relief as may be necessary to compel compliance with this part including termination of operations. Further, any person who fails to comply with this part with respect to evidence of financial responsibility under section 108(a)(1) of CERCLA (42 U.S.C. 9608(a)(1)), is subject to a Class I administrative civil penalty and a Class II administrative civil penalty or judicial penalty.

(b) The Secretary of the Treasury shall withhold or revoke the clearance required by 46 U.S.C. App. 91 to any vessel subject to this part that does not produce evidence of financial responsibility required by this part.

(c) The Coast Guard may deny entry to any port or place in the United States or the navigable waters of the United States, and may detain at a port or place in the United States in which it is located, any vessel subject to this part, which, upon request, does not produce

evidence of financial responsibility required by this part.

(d) Any vessel subject to this part which is found in the navigable waters without the necessary evidence of financial responsibility is subject to seizure by and forfeiture to the United States.

(e) Knowingly and willfully using an invalid Certificate, or any copy thereof, is fraud.

[CGD 91-005, 59 FR 34227, July 1, 1994, as amended by CGD 96-052, 62 FR 16703, Apr. 8, 1997]

Sec. 138.150 Service of process.

(a) When executing the forms required by this part, each applicant and guarantor shall designate thereon a person located in the United States as its agent for service of process for purposes of this part and for receipt of notices of designations and presentations of claims under the Acts (collectively referred to as "service of process"). Each designated agent shall acknowledge the designation in writing unless the agent has already furnished the Director, NPFC, with a "master" (i.e., blanket) concurrence showing that it has agreed in advance to act as the United States agent for service of process for the applicant, certificant, or guarantor in question.

(b) If any applicant, certificant, or guarantor desires, for any reason, to change any designated agent, the applicant, certificant, or guarantor shall notify the Director, NPFC, of the change and furnish the relevant information, including the new agent's acknowledgment in accordance with paragraph (a) of this section, if a "master" concurrence is not applicable. In the event of death, disability, or unavailability of a designated agent, the applicant, certificant, or guarantor shall designate another agent in accordance with paragraph (a) of this section within 10 days of knowledge of any such event. The applicant, certificant, or guarantor shall submit the new designation to the Director, NPFC. The Director, NPFC, may revoke a certificate if an applicant, certificant, or guarantor fails to designate and maintain an agent for service of process.

(c) If a designated agent can not be served because of death, disability, unavailability, or similar event and another agent has not been designated under this section, then service of process on the Director, NPFC, will constitute valid service of process. Service of process on the Director, NPFC, will not be effective unless the server--

(1) Sends the applicant, certificant, or guarantor (by registered mail, at its last known address on file with the Director, NPFC), a copy of each document served on the Director, NPFC; and

(2) Attests to this registered mailing, at the time process is served upon the Director, NPFC, indicating that the intent of the mailing is to effect service of process on the applicant, certificant, or guarantor and that service on the designated agent is not possible, stating the reason why.