

A Report by a Advisory Panel of the

**NATIONAL ACADEMY OF
PUBLIC ADMINISTRATION**

for the Financial Services Division,

National Marine Fisheries Service,

National Oceanographic and Atmospheric Administration

**ASSESSING
THE NEED
FOR THE
FISHERMEN'S
CONTINGENCY
FUND**



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March 2000

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TABLE OF CONTENTS

FOREWORD	v
EXECUTIVE SUMMARY	vii
BACKGROUND	1
Legislative History.....	1
Rationale for a Federal Role.....	4
The Fund and Its Operation.....	5
Claim Filing and Review Processes.....	7
Patterns of Claims and Claim Actions	9
EVALUATION and ANALYSIS	12
Internal Controls.....	12
Investigations of Possible Fraud	14
Presumption of Causation.....	15
Trends Influencing Fund Claims.....	17
OPTIONS	21
Terminate the Fund	21
Privatize the Fund.....	22
Devolve Fund Responsibilities to the States and/or Counties.....	22
Continue the Fund with Modifications.....	23
CONCLUSIONS and RECOMMENDATIONS	24
APPENDICES	27
APPENDIX A: Shrimp Landings Gulf of Mexico: 1980-1998.....	27
APPENDIX B: Commercial Fishing Craft Gulf States, 1990-97.....	29
APPENDIX C: Bibliographical Sources and Interviews	31
APPENDIX D: Acronyms	35
APPENDIX E: Panel and Staff.....	37
TABLES and FIGURES	
TABLE 1: Receipts, Obligations, and Balances (in thousands of \$)	6
TABLE 2: Value of Claims and Dispositions (in thousands of \$), 1990-99	9
TABLE 3: Number of Claims and Claims Rejected, 1990-99	9
TABLE 4: Claims and Claim Approvals (in thousands of \$), 1990-99.....	11

TABLE 5: OCS Activities in the Gulf of Mexico, 1990-98.....20

FIGURE 1: Shrimp Landings Gulf of Mexico, 1980-1998: Bay Areas.....18

FIGURE 2: Shrimp Landings Gulf of Mexico: 1980-1998, Off Shore18

FIGURE 3: Commercial Fishing Craft Gulf States 1990-1997.....19

FOREWORD

By federal government standards, the Fishermen's Contingency Fund is a small program—a little over \$1 million in the fund and current annual spending of about \$300,000. But its size belies the importance of the public purposes it has served over several decades. In the absence of insurance and because of the cost and difficulty of litigation, the fund has, for over 20 years, served to reimburse fishermen for losses attributable to offshore oil industry activities and the obstructions they created.

The Academy was asked by the National Marine Fisheries Service (NMFS) to review the fund and determine whether it should be terminated. A June, 1999 Inspector General's report had suggested that NMFS should examine whether the fund should be terminated because of declining claims. Elsewhere, it had been identified as a "corporate welfare" program, the kind of activity that, according to some, government should no longer conduct. Accordingly, the program raised fundamental questions about government, its role as an intermediary between potentially competitive industry interests, and the significance of size in determining federal responsibilities.

During the review, the Academy's Advisory Panel and staff explored these questions. They examined the legislative background and continuing rationale for a federal role, explored options for satisfying the needs that originally led to the fund's creation, and assessed the future directions the fund might take to continue to satisfy its public policy objectives. It concluded that it was premature to eliminate the fund, but that its ability to continue to fulfill its original public purpose was eroding. The Panel pointedly recommended that participating industries and government agencies increasingly focus future offshore activities on hazard mitigation and obstruction removal.

The Fishermen's Contingency Fund, as noted throughout the report, enjoys an excellent reputation for integrity, fairness, and responsiveness by the industries it serves. In an era when many government programs and institutions are often subjected to criticism and disdain, it is refreshing to find one that receives wide acclaim and respect. The Department of Commerce and NMFS deserve commendation for their success.

We appreciate the assistance and cooperation of the Department of Commerce, NMFS, and the many industry representatives we contacted in preparing this report. We hope this study will serve as a basis for the government agencies and the offshore oil and fishing industries to extend their coordination and cooperation to the even more challenging tasks the report recommends.

Robert J. O'Neill, Jr.
President

EXECUTIVE SUMMARY

The Fishermen's Contingency Fund was established in 1978 to reimburse commercial fishermen for damages incurred in areas of commercial offshore oil and gas activities. Its revenues come predominantly from assessments against the offshore oil industry, and its expenditures consist largely of claim payments to fishermen. The bulk of claims against the fund are in federal waters in the Gulf of Mexico, associated with bottom trawl shrimp fishing, and result from damages to fishing nets and other gear. Additional revenues come from interest on fund balances; administrative costs account for approximately 15 percent of expenditures.

By statute and regulation, the fund relies heavily on the presumption that damages occurring in areas of oil and gas activities are caused by those activities because the actual items or obstructions causing damages to nets and gear are rarely recovered or identifiable. While offshore oil and gas operators invariably deny responsibility for individual claims, the offshore oil industry seems to accept a significant degree of responsibility for the damages associated with fishermen's claims. While this "presumption of causality" could lead to false or excessive claims, the weight of the evidence and most interviewees contacted during this study estimate that a very high percentage of the claims reflect legitimate losses. In addition, the documentation required for loss verification, field investigations, and prosecutions for possible fraud appear to have prevented significant program abuse. Fraud convictions are at an extremely low rate—less than seven-tenths of one percent of claims paid and four-tenths of one percent of total claims.

There has been a marked and continuing decline in obligations for claims from an average of \$700,000 annually early in the 1990s to less than \$300,000 annually in recent years. Once a claim is paid in a given area, other claims within a quarter of a mile of the same location are largely precluded by regulation. Thus, there is a natural tendency for the area eligible for claims to continuously decrease. This, as well as some other trends in Gulf shrimp fishing, appear to account for the declining levels of claims and fund activities. These trends are likely to continue and portend a continuing gradual, further reduction of claims and fund activities. Claims are unlikely to increase, much less return to the level of the early 1990s.

The rationale for a continuing federal role in the Fishermen's Contingency Fund is compelling. Substantial hazards attributable to oil and gas activities continue to adversely affect fishermen, and exploration activities continue to expand. As in 1978, other remedies, such as legal actions through the courts or private insurance, are either extremely costly or not readily available. A nongovernmental insurance-type mechanism similar to the current fund, but operated by the oil or insurance industry, is likely to be slow and unresponsive to fishermen's needs. The economic benefits associated with offshore oil and gas development extend broadly across the nation. In several similar circumstances, such as Vaccine Injury Compensation and Pension Benefit Guaranty programs, the federal government acts as the administrative intermediary to compensate for injuries or insure against losses. Options, such as privatization or devolution, were

examined, but appear unattainable at present. In addition, the political forces that prompted the fund's enactment remain basically intact today.

Nonetheless, the ability of the fund to fulfill its original public purpose may not be sustainable over the long term. The use and importance of the fund is declining as the area eligible for claims continues to diminish. The oil industry's liability and assessments are continuously reduced. Fishing industry losses, on the other hand, are increasingly uncompensated. These losses are only partially offset by an increasing environmental consciousness in the offshore oil and gas industry and improving federal regulations addressing drilling site clean-up and preventative actions, such as net guards.

As obstructions are charted and claim reimbursements are increasingly unavailable, approaches, such as obstruction removal and mitigation of hazards, become more attractive alternatives. To fulfill the original public purpose of the fund, its principal participants—the offshore oil and fishing industries, Interior's Mineral Management Service (MMS), and Commerce's National Marine Fisheries Service (NMFS)—should re-focus their efforts from damage compensation to mitigation of obstructions.

The Academy recommends that:

- **The Fishermen's Contingency Fund should not be discontinued.**
- **Because the fund's ability to continue to fulfill its original public purpose is eroding and may not be sustainable over the long term, the principal participants in the fund—the offshore oil and fishing industries, MMS, and NMFS—should increasingly focus their future activities on mitigating fishing hazards, including removal of existing, and reduction of future, obstructions.**

BACKGROUND

LEGISLATIVE HISTORY

Two landmark statutes—the *Submerged Lands Act* and the *Outer Continental Shelf Lands Act (OCSLA)*—enacted in 1953 opened up development of the outer continental shelf. The *Submerged Lands Act*, resolved an ongoing political and judicial dispute over state and federal jurisdictions over the outer continental shelf. It established state jurisdiction up to 3 miles from the coastline except when state constitutions or laws that were enacted prior to or when a state entered the Union provided a greater jurisdiction. Thus, a 3 league (or nine nautical mile) limit was recognized for Texas and Florida. Federal jurisdiction seaward of the state boundaries, originally asserted in a 1945 Presidential Proclamation (2667), was confirmed legislatively.¹

The companion *Outer Continental Shelf Lands Act* provided for the exploration and exploitation of gas and oil reserves on the outer continental shelf.² It assigned responsibilities for oil and gas development, which was then focused in the Gulf of Mexico, to the Department of Interior. It served to divide revenue between the federal and state governments, determine royalty formulas, and reconcile other matters between competing federal and state claims. A key provision provided that proceeds from the cash bids and royalties of 12.5 percent by value would be deposited in miscellaneous Treasury receipts.

The Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372) provided the first major revisions of these statutes in 25 years. They were enacted when the expansion of offshore drilling to the Atlantic from the Gulf of Mexico was anticipated. The U.S. Geological Survey estimated large recoverable reserves of oil and gas off the East Coast, including tracts off New England in the Georges Bank. The major provisions provided for greater consultation with the states on leasing activities, changes to the bidding system which would give potential new entries greater prospects of exploration contracts, and potential revenue sharing by the states through authorization (but requiring separate appropriation) of funds for a Coastal Zone Impact Fund.

Massachusetts, other East Coast states, and conservationists, however, also wanted to protect healthy resort and fishing industries. To alleviate the concerns of coastal states and specific constituencies about the impact of oil and gas drilling, these OCSLA Amendments established two free-standing funds—the Offshore Oil Spill Pollution Fund and the Fishermen’s Contingency Fund—in Titles III and IV respectively. The former, responding to environmental concerns, was established as a revolving fund of up to \$200 million funded by a three-cent per barrel production fee. This fund was to be used to

¹ 1953 US Code Congressional and Administrative News, p. 1385

² 1953 US Code Congressional and Administrative News, p. 2177

clean up an oil spill if the operator responsible could not be identified or would not clean it up. Damaged parties could also claim reimbursement from the fund.

Finally, Title IV established another revolving fund - the Fishermen's Contingency Fund - to reimburse fishermen adversely affected by obstructions resulting from oil exploration and exploitation activities.³ The initial \$1 million fund was to be assessed by Interior against companies participating in offshore oil and gas activities and administered by the National Marine Fisheries Service of the Department of Commerce.

As originally enacted, Title IV established a series of regional area accounts of \$100,000 each to reimburse fishermen for property losses and "loss of profits" attributable to damages from outer continental shelf (OCS) oil and gas activities. It also established a 15 percent cap on administrative expenses to be covered by the fund, a process of administrative law hearings to adjudicate claims, and annual reports to Congress by the Secretary of Commerce. Witnesses at congressional hearings in 1981 complained that final regulations regarding the funds operation and claim procedures were not promulgated until 1980, had converted the 5-page statute into 50 pages of regulations, and that a single guide to file a claim was not available until mid-1981. At the time of the 1981 hearings, 176 claims had been filed under Title IV, but only 11 had been paid, 126 were pending, 33 had been abandoned, and 6 had been dismissed. Congress was clearly concerned that fears of the fishermen about OCS oil and gas activities had not been alleviated, but intensified by the manner in which the contingency fund was being administered.

As a result, in 1982, a series of amendments (P.L. 97-212) to Title IV were enacted that significantly simplified the operation of the contingency fund and the process for claim adjudication and review, increased the limits on, and modified the definition, of consequential losses, and reduced reporting requirements.⁴ The major changes resulting from these amendments were:

- 1) "Areas affected by Outer Continental Shelf activities" were expanded to include areas previously, not just currently, active. Report language encouraged an expansion of the then-current regulation's limit on damages to areas within one-half geographical mile of existing activities.

³ Title IV was apparently modeled on an earlier statute, the Fishermen's Protective Act, which had originally provided low-cost loans to U.S. fishermen for gear lost because of foreign fishing activities (Russian and Polish vessels were often cited) within the newly established 200-mile exclusive economic zone. This act was amended in 1978 to establish a Fishing Vessel and Gear Damage Compensation Fund, collected from fees imposed on foreign vessels fishing within the new 200-mile limit. Because of the difficulty of proving loss to foreign fishing vessels of lobster pots and long-line fishing, a 1980 amendment added a provision that "there shall be a rebuttable presumption that any damage, loss, or destruction of fishing gear is attributable to another vessel." (1980 US Code Congressional and Administrative News, p. 6793)

⁴ 1982 US Code Congressional and Administrative News, p.423

- 2) The regional area accounts were abolished in favor of a single Treasury fund, the fund limit increased to \$2 million, and Treasury interest on fund balances was provided.
- 3) Fund administrative expenses were limited to 8 percent of the total fund balance.
- 4) "Resulting economic loss" was defined as gross income, as opposed to the original "loss of profits" formulation.
- 5) The payment of damages was separated from the process of collecting claims from the potentially responsible party.
- 6) The filing deadline for a presumption of oil and gas causality was changed from five days after discovering damage to 15 days of trip completion.
- 7) Requirements for a formal "on the record" administrative law judge hearings were deleted in favor of simplified administrative procedures.

Finally, in 1984, in PL 98-498, the limit on claim payments of 25 percent of resulting economic loss, defined as gross income, was increased to 50 percent.⁵

There have been no legislative changes to the contingency fund since 1984, and there is no pending legislation to modify it. In addition, regulations for the program have remained unchanged since the 1984 amendments were incorporated in revised 1985 regulations. Several actions that are indirectly related to the contingency fund could be pertinent:

- First, another fishermen's compensation fund, the Fishing Vessel and Gear Damage Compensation Fund, which reimbursed fishermen for damages resulting from foreign vessels fishing in the U.S. exclusive economic zone (EEZ), was de facto abolished in 1996. By Federal Register notice,⁶ Commerce advised that the fund was depleted because fees, formerly collected from foreign vessels fishing within the 200-mile EEZ, had dried up. The fund, lacking alternative sources of capital, was bankrupt and, therefore, would cease to do business. There has been virtually no adverse reaction to abandoning this fund.
- Second, there are bills affecting the broader operation of the OCSLA, particularly the application of revenues to state needs; these might serve as vehicles for consideration of changes in the Fishermen's Contingency Fund. Two pending bill, S. 25 sponsored by Senator Landrieu of Louisiana, and a companion house bill, H.R. 701, introduced by Representative Young of Alaska, propose authorization, without further appropriation, for assistance to state and local governments and for funding the Land and Water Conservation Fund and the Federal Aid to Wildlife Restoration Fund. This

⁵ 1984 US Code Congressional and Administrative News, p. 3909

⁶ Federal Register, Vol. 61, No. 129, July 3, 1996, p. 34798-99

approach requires offsetting budgetary reductions under current budget procedures. Nonetheless, Senator Lott has indicated that Congress will address these bills in 2000.

Interests in at least one state, Louisiana, are actively seeking to use these funds to remove bottom obstructions within the three-mile jurisdiction over coastal waters. Some interviewees have suggested that the Fishermen's Contingency Fund should emulate the State of Louisiana Gear Compensation Fund, which was established to cover similar damages to fishermen's gear in Louisiana state waters in 1978. This fund was modified in 1999, with oil industry support, to fund underwater obstruction removal. These interviewees favor a proactive clean-up in federal waters as well.

RATIONALE FOR A FEDERAL ROLE

Prior to establishment of the Fishermen's Contingency Fund in 1978, fishermen who encountered hazard attributable to oil and gas activity had little recourse. The "wildcatting" era of offshore oil industry development dates to the 1950s and 60s when, according to interviewees, the industry deposited considerable debris on the ocean floor. Fishermen whose gear, boats, and/or rigging were damaged by this debris could successfully pursue reimbursement from the oil industry if they could present reasonably convincing evidence that a specific obstruction was at fault and that the obstruction was attributable to a specific company. Fishermen faced the daunting task of demonstrating individual corporate liability. The costs of pursuing a legal remedy were extremely high, and lawsuits were effectively discouraged because of the burden in terms of evidence, cost, and time needed to pursue action through the courts.

Private insurance was also not a viable alternative for the fishing industry. Traditional marine insurance policies cover damage to (1) hull and machinery, which includes fishing vessels, engines, and attached rigging and (2) cargo, which includes stowed nets, equipment, and even stored fish catch. Policies almost never cover gear and equipment in the water nor business income losses resulting from lay-ups needed for fixing repairable, or acquiring replacement, gear. Thus, the option of insuring against possible damage from oil industry-related obstructions was not available. Finally, the oil industry evidenced no interest in administering an industry fund to reimburse fishermen; in turn, the latter viewed such an alternative as likely to be too slow and not sufficiently responsive to the economic interests of the fishing industry.

The broad economic benefits associated with oil and gas development in the outer continental shelf clearly supported an active federal government role in the 1970s, and continues to favor this approach today. The societal benefits from the easy access and closer availability of offshore oil and gas supplies extend broadly across the economy, and the OCS now accounts for almost a quarter of domestic oil and gas production. Given this broad good, there is ample precedent for a federal government role in similar programs. It operates similar "insurance-type" program intended to mitigate private sector liability, such as the Vaccine Injury Compensation, the Federal Deposit Insurance, and Pensions Benefit Guaranty programs. Like the Fishermen's Contingency Fund,

these programs collect premiums from private sector industries; in the absence of availability of private insurance, these programs protect participants against catastrophic loss and alleviate private sector industries from potential liabilities against claims litigation.

In the absence of private alternatives to reconciling the competing objectives of maintaining viable fishing industries while promoting the development of economical sources of energy, the federal government clearly chose to serve as a financial intermediary and arbiter between the two industries through the Fishermen's Contingency Fund. Clearly, this has worked reasonably well to this point in satisfying the needs of both industries, and the federal government has earned considerable respect for its perceived objectivity and neutrality.

THE FUND AND ITS OPERATION

Since 1985, the fund has operated as a revolving fund in the Treasury under the control of the Secretary of Commerce. Funds are available without fiscal year limitation, but subject to annual appropriation. The fund is administered by the Financial Services Division (FSD) of the National Marine Fisheries Service (NMFS) from its headquarters in Silver Springs, Maryland.

The fund has three statutorily-prescribed sources of income:

- 1) deposits of OCS lease and permit holder assessments collected by the Secretary of the Interior upon the request of the Secretary of Commerce
- 2) interest revenue from investing the fund's assets in U.S. Government obligations
- 3) payments from OCS lease and permit holders found responsible for damages, acquired by the Secretary of Commerce through subrogation from claimants

In practice, deposits from lease and permit holders are the predominant source of revenue, accounting for almost 85 percent of fund receipts between 1990 and 1999. Interest on the assets in the fund, limited by statute to a maximum of \$2 million, is comparatively small, averaging about \$72,000 annually over the past decade. In addition, the oil industry has denied (or not admitted) responsibility in all but a single case during the history of the program, resulting in zero income from that source between 1990-99. Table 1 below provides receipts, obligations, and end-of-year fund balances for 1990 to 1999.

TABLE 1
Fishermen's Contingency Fund
Receipts, Obligations, and Balances (in thousands of \$)
1990-99 (Actual)

RECEIPTS	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
Assessments	157	903	1802	126	-	-	-	939	117	25
Invt. Income	<u>100</u>	<u>76</u>	<u>73</u>	<u>62</u>	<u>68</u>	<u>76</u>	<u>66</u>	<u>52</u>	<u>77</u>	<u>69</u>
TOTAL	257	979	1875	188	68	76	66	991	194	94
OBLIGATIONS										
Administration	48	60	62	69	101	126	79	82	84	64
Claims	<u>668</u>	<u>845</u>	<u>575</u>	<u>435</u>	<u>515</u>	<u>267</u>	<u>225</u>	<u>238</u>	<u>311</u>	<u>293</u>
TOTAL	716	904	636	504	616	392	303	321	395	356
FUND BALANCE	1171	1246	2485	2169	1621	1305	1068	1739	1538	1275
(End of Year)										

At the end of FY 1999, the fund has a current balance of \$1.3 million. A Commerce request to Interior's Mineral Management Service (MMS), to increase the fund by replenishment assessments against oil and gas companies is anticipated later this year or early in 2001, when the fund balance is expected to slip to below \$1.0 million. These assessments, limited by statute to no more than \$5,000 per year for lease and permit holders, are levied equally by MMS on each lease for the approximately 8,000 current OCS leases and right-of-way permit holders in the Gulf, California, and Alaska after Commerce requests fund replenishment. Assessments average \$119 per lease with levies approximately every three to five years at current fund expenditure levels. This aperiodic levy is small when compared to the billions in annual royalties collected by MMS. MMS receives few complaints about the assessments, and estimates its administrative costs for collection at approximately \$10,000 for each re-assessment.

Fund obligations consist of:

- 1) payments of claims for property losses and business economic losses, defined as gross income lost because of gear or vessel damage caused
- 2) administrative expenses directly associated with FSD's handling of claims⁷

Table 1 above provides a breakout of fund obligations for 1990-99. Over 85 percent of total obligations are for payment of claims. There has been a marked, continuing decline

⁷ There are additional administrative expenses associated with the fund that are not reimbursed from the fund. These include: NOS' determination if obstructions are recorded in a claim area (estimated at \$10,000 annually); MMS' determination of relevant oil and gas activities in the area and its notification of potentially responsible parties (estimated at less than \$5,000 annually); and MMS' costs associated with replenishment assessments (estimated at approximately \$10,000 per assessment).

in obligations for claims, from an average of \$700,000 annually early in the decade to less than \$300,000 annually in the later years.

Obligations for administrative expenses account for the remaining 15 percent of total obligations. There has been a slight increase in the percentage of obligations devoted to FSD fund administration as claims payments have declined; administrative expenses, less than 10 percent in 1990, have grown to over 20 percent in 1999. Over 80 percent of the administrative expenses are for personnel salaries and expenses. In the 1980s, program administration required several staff workyears. Currently, claim processing involves less than a full workyear of one staff specialist who handles claims review and processing. About 17 percent is for other miscellaneous administrative costs, including mailings, information brochures, communications, and other expenses.

CLAIM FILING AND REVIEW PROCESSES

Because the 1982 and 1984 amendments implicitly endorsed a process solution to adjudicating claims against the fund, it is useful to review the current (and long-standing) processes established by FSD to implement this approach. FSD's regulations for implementing the Title IV are spelled out in 50 CFR Part 296, as revised in 1982 and modified in 1985 for the 1984 statutory changes. No changes have been made since 1985.

Damages or losses eligible for compensation must be to a commercial fishing vessel operated by a U.S. citizen and must be caused by items associated with OCS oil and gas activities or in an area affected by OCS activities. The latter is defined as within a three-mile radius of a leased block, pipeline, easement or other OCS oil and gas activity. Damage or loss covered by insurance or caused by the negligence or fault of the claimant is excluded.

The principal features of the filing and claim review process prescribed in the CFR are:

- 1) An initial report filing must be filed within 15 days of trip completion, to gain a presumption of causation by OCS oil and gas activities. This report must include basic information about the claimant, the fishing vessel, and the time, place, and nature of damage or loss. FSD implements this rigidly through procedures noting, if necessary, the postmark on initial correspondence reporting a loss. Reports beyond the 15-day limit and subsequent claims require convincing evidence, such as recovery of the object that caused the damage, that the loss is related to oil and gas activities.
- 2) A claim filing must be filed to within 90 days of trip completion, that, in addition to the above, must include activities of the fishing vessel at the time of casualty, witnesses' statements, description of item or obstruction (if known) at time of damage, and proof of purchase cost or estimated repair cost. If a claim for economic loss is made, evidence of gross income from three

immediately preceding vessel trips and a justification for the duration of time required for gear replacement and/or vessel repair must be provided.

- 3) FSD's notification to:
 - a) NOAA's National Ocean Service (NOS) of the location of the claim in Loran C readings or the next most accurate positioning fixing method available to the claimant in order for NOS to determine the location of obstructions already charted or included in the National Imagery and Mapping Agency's (NIMA's) Notice to Mariners within one-quarter mile. (NOS also notifies NIMA of the location of any newly-located hazard or obstruction that was not recovered.)
 - b) Interior's MMS of the location of the claim in Loran C readings or the next most accurate positioning fixing method available to the claimant in order for MMS to determine whether the casualty site is within three-miles of an area affected by OCS activities. If so, MMS also requests the companies that engaged in oil and gas activities in the area to affirm or deny their responsibility; the companies, in turn, advise FSD whether they admit or deny responsibility for the damages claimed, except that, by regulation, failure to respond is presumed to deny responsibility.
- 4) FSD's initial determination and payment of approved claims, subject to certain legal conditions, must take place within 60 days of receipt of the claim.
- 5) Claimant's petition for review must occur within 30 days and NMFS' Assistant Administrator's final determination within 60 days of receipt of that petition. The claimant may subsequently seek judicial review.

The regulations elaborate on the explicit presumptions of causation included in the 1982 statute revisions, namely, that the damage or loss is presumed to be associated with oil and gas activities under certain conditions. This presumption applies if the claimant establishes that:

- 1) The commercial fishing vessel was fishing in an area affected by OCS oil and gas activities. The regulation specifies that this means within three miles of any past or present OCS oil and gas activity. Since any previously leased area, whether or not oil or gas drilling actually occurred, is assumed to have had some activity, the percentage of the Gulf area with past or present oil and gas activity is very large—about 85 percent of the Gulf.
- 2) The initial report of location and nature of damages was made within 15 days.
- 3) There was no record on nautical charts or Notice to Mariners (NTMs) of a hazard or obstruction, except that, for pipelines, the presumption applies irrespective of such a record. (By definition, losses that can be demonstrated to be associated with a recovered object, fall outside the presumption of causation provision and are payable irrespective of location.)

- 4) There was no surface marker or lighted buoy warning of a danger.

For the last two, the regulations add a presumption that a damage or loss location within one-quarter mile of a recorded obstruction was caused by that obstruction and, therefore, ineligible for claim. Since a previously reported non-pipeline location where prior claims had been approved automatically results in an NTM, multiple claims against the same reported obstruction are precluded.

PATTERNS OF CLAIMS AND CLAIM ACTIONS

Claims made against the fund by commercial fishermen who are U.S. citizens can cover damages to fishing equipment (nets, tackle, and vessels), resulting economic losses (defined as gross income), and other miscellaneous expenditures incurred during the claim process, such as attorney fees, notary expenses, and copying expenses. Table 2 and Table 3 below summarize 1990-1999 claims and claim actions in dollars and number of claims respectively.

TABLE 2
Fishermen's Contingency Fund
Value of Claims and Dispositions (in thousands of \$), 1990-99⁸

	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
Total Claims	1301	960	707	1091	592	635	394	592	703	525
Claims Approved	860	531	396	561	348	206	225	337	304	177 ⁹
Claims Adjustment	----	-NA-	-----	228	117	206	77	147	49	NA
Claims Rejected	----	-NA-	-----	302	127	223	92	108	350	285

Table 2 confirms the long-term downward trend in the dollar value of claims approved, similar to the trend in obligations. There has also been a marked reduction in both the amount of total claims and the number of claims, as shown in Tables 2 and 3.

TABLE 3
Fishermen's Contingency Fund
Number of Claims and Claims Rejected, 1990-99 (Actual)

	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999⁹</u>
Total Claims	239	161	152	175	141	86	69	73	66	44
Claims Rejected	44	84	87	66	62	43	24	24	26	11

⁸ Based on claims during each fiscal year and claim actions irrespective of year taken; data can not be directly correlated with obligations data in Table 1 above.

⁹ Four 1999 claims were pending at end of year.

The number, but not the dollar amount, of claims that were totally rejected has declined, having peaked at about 50 percent of claims in 1991, 1992, and 1995. The amount of claims totally rejected exceeded 50 percent of total claims in 1998-99.

There are several reasons for complete rejection of claims:

1. Some 15-day initial reports are never followed up with submission of a formal claim filing. In 1998, for example, 9 of the 26 claims that were rejected (out of 66 total claims) never submitted claim forms, apparently deciding, for whatever reason, not to seek reimbursement. The 15-day reports do not reflect amount of claimed damages, and these rejected claims have no dollar amount associated with the claim.
2. Two additional claims in 1998 were rejected for failure to submit claim forms prior to the 90-day deadline.
3. A few claims are rejected (though none in 1998) for being outside the jurisdiction of the fund because the casualty location was either in state waters or outside areas of oil and gas activity.
4. Four 1998 claims were rejected for failure to respond to requests for additional information after an initial denial based on the information submitted.
5. Finally, 10 of the 26 claims in 1998 were rejected because they did not fall within the three-mile and quarter-mile radius based on claim location.

On the other hand, the claims approved are based almost exclusively on the presumption of causation inherent in the statute and the program's regulations. There are very few instances over the last 10 years in which the fishermen return with definitive evidence of direct involvement of oil and gas activity. Occasionally, a buoy, drum, tire, or piece of platform grating is recovered, but very few claims provide any physical evidence. Sometimes, the offending item tears through the net and is never recovered. Often, according to interviewees, offending objects are simply redeposited in the deep, usually within the quarter-mile radius of a platform. Reportedly, the option of using valuable shipboard space to return retrieved objects is rarely followed. In all of the 1998 approved claims, the presumption of causation, including proximity to pipelines, came into play.

There are also adjustments to claims based on the documentation provided and FSD calculations of insurance, economic loss, and other damages. Table 4 below summarizes claim adjustments for fishing gear, vessel damage, economic loss, and other expenses for the period 1990-1999.

The table shows that the largest adjustments to claims are for vessel damage and economic loss. Vessel damage often results from the collapse of heavy rigging that is

used to deploy and retrieve fishing nets. Vessel damage claims accounted for 22 percent of claims, but only 9 percent of payments during the 1990s. Only 22 percent of total vessel damage claims were paid. These adjustments result from the common practice of submitting the full amount of any vessel damage, pending possible insurance coverage. These large claims for vessel damage are usually adjusted for insurance reimbursement, and actual payments often limited to the deductible, usually \$5,000 or \$10,000, though larger payments have been made when a vessel is uninsured. Significant vessel damage is reasonably easy to verify through repair yard invoices.

TABLE 4
Fishermen's Contingency Fund
Claims and Claim Approvals (in thousands of dollars), 1990-1999

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Claims	1301	960	707	1091	592	635	394	592	703	355
Gear	746	464	407	600	363	291	200	366	257	170
Vessel	144	212	77	208	53	191	71	79	199	257
Economic Loss	349	244	200	234	163	133	111	121	217	89
Miscellaneous	62	41	22	49	14	21	13	26	29	9
Claim Approvals	860	531	396	561	348	206	225	337	304	177
Gear	556	333	271	397	259	138	151	229	203	116
Vessel	87	37	39	61	8	17	20	22	23	28
Economic Loss	191	142	78	90	75	45	48	77	72	29
Miscellaneous	27	15	9	12	6	7	6	9	6	3

The economic loss claims also are often subject to considerable adjustment by FSD because adjudication guidelines provide reimbursement for economic loss only for the period a vessel is disabled for repair or for gear replacement. Only about 45 percent of these claims were paid during the 1990s. Fishermen often claim longer periods of downtime from a casualty because, they argue, they are unable to pay for damage repair or net replacement prior to claim settlement. FSD disallows these claims, and uses a reasonably strict test of limiting damage-induced downtime to reasonable repair or replacement criteria. As stated above, economic loss is verified through the inspection of prior trip tickets that must be provided.

The largest claim category, 57 percent of total claims, and the area with the smallest claim adjustment, is for fishing gear, primarily trawl nets and rigging that are cut, or tear loose, when severely snagged. Almost 69 percent of the claimed amount is paid. Paid receipts for repairs or replacement invoices are generally required to approve these claims. Miscellaneous damage-related expenses, including attorney fees, copying, notary fees, and mailing expenses account for less than 4 percent of claims and payments; slightly more than a one-third of claimed amounts are paid.

EVALUATION AND ANALYSIS

INTERNAL CONTROLS

The fund has internal controls to ensure that claims are not paid that are ineligible because they are not related to, or in areas not affected by, OCS oil and gas activities or because the claim is false or misleading. These controls also serve to ensure that claimants are treated equitably, fairly, and in conformance with the intent of the legislation that established the fund. Among the internal controls in force are the following:

- A claim file is opened and records are created to confirm that the claimant has conformed to the 15-day initial report deadline that makes the claimant eligible for the presumption of causation provisions of the legislation. The time of initial telephonic or written reporting is carefully noted in all claim files. The claimant is advised by letter that he has met that condition and advised of the 90-day deadline for filing a claim.
- Abstracts of the potential claim (based on the 15-day initial report, including the date, location, and cause of damage, if known) are sent to NOS to determine if the hazard or obstruction was charted, included in Notices to Mariners (NTMs), or otherwise marked at the reported time of the incident. Simultaneously, the claim abstract is sent to the appropriate MMS regional office to determine if the location of the reported hazard or obstruction was within three miles of current or past oil and gas activity. MMS produces an automated map identifying the reported location and past or current activities, including pipelines, platforms, wells, leases, and other oil and gas activity, within a one-quarter and three mile radius. Both NOS and MMS respond to FSD by completing the claim abstract. MMS also asks operators within the claim area to accept or deny responsibility; these Declarations of Liability/Non-Liability are filed with FSD.
- The full claim filing is reviewed for eligibility and completeness. Necessary supporting documentation includes proof of claimant's ownership, witness statements, estimates or receipts for repair or replacement, insurance policies, and, to verify the gross income lost as a result of the casualty, trip tickets for the three previous and one subsequent trips. Ineligible filings are rejected, or claimants notified of incomplete claims and given 30 days to refile an acceptable claim or submit additional information.
- An initial determination is made within 60 days of receipt of a completed claim; the claimant is advised of that determination. If the claimant signs the settlement and the subrogation agreement, the initial determination becomes final and the claimant is paid immediately.

- The claimant may appeal an initial determination within 30 days, submit additional evidence, and is notified within 60 days of the final determination. The claimant may ultimately seek judicial review of the final determination in a federal court.

The available evidence demonstrates that the claims review process is complete, thorough, and recorded:

- The 1985 audit report by the Department of Commerce's Inspector General stated that "our review did not disclose evidence of invalid claims or program abuse." As a result, the audit report recommended that claims of less than \$1,500 should be reviewed only on a sample basis because they "were easier to verify [and] most ... were adequately supported with invoice or work orders." FSD did not adopt this recommendation, however, because it felt this approach might encourage program abuse.
- An internal control review was conducted by NMFS in 1992. The review included examination of a stratified sample of 30 fund claims between 1989 and 1991. The review found:
 - In 29 of 30 cases, the 15-day initial report deadline was treated properly. One case erroneously noted that the 15-day filing was late, but the claimant had provided evidence that the casualty was related to oil and gas activity, and, therefore, not subject to the 15-day deadline.
 - In 29 of the 30 cases, the 90-day claim deadline was properly addressed. One otherwise eligible claim that was eight days late was paid. In three of the cases, the NOS and/or MSS reports on location within the one-quarter and three-mile radius of oil and gas activities were misinterpreted; in all three cases, however, the error was not essential to proper claim adjudication.
 - All 30 cases were properly logged. In one case, a required checklist was not completed. In four, an automated spreadsheet used to aid in calculating payments was missing; and, in ten cases, the initial determination was several days late.
 - Three of the 30 cases did not have statements from all witnesses, though those available corroborated the facts of the casualty. Purchase receipts for all major gear components were included in all cases, and these receipts appeared valid. In three of the 30 cases, crew settlement sheets rather than trip tickets were used to compute economic loss.

The internal control review made 12 recommendations to tighten up the claims review process to ensure that all claims were properly adjudicated with appropriate documentation to trace claim actions. There were, however, no cases in which there was evidence of improper claim action on the part of FSD in this internal NMFS review.

- The 1999 Department of Commerce IG's draft audit report that requested this study also discussed the results of reviewing a judgmental sample of 24 claims

processed and paid during 1997 and 1998 (out of a total of 95 paid claims) and assessed the effectiveness of FSD's internal controls. The report stated that "the 24 claims paid in fiscal year 1997 and 1998 were in compliance with applicable rules and regulations, as well as the recommendations [on internal control procedures] made by the NMFS review team." There was "no evidence of illegible or altered receipts for purchases, supplies, and equipment; claims that did not meet program requirements and regulations; or conflicting dates and times of losses, and locations of incidents." The draft audit report concluded that FSD actions to correct past control deficiencies have been effective and commended FSD.

Building on the IG study, this Academy did not review FSD internal control processes or audit its claims actions as part of this study. It did, however, ask questions about the adequacy of FSD processes, as well as perceptions about the overall incidence of fraud notwithstanding the apparent adequacy of FSD controls. All interviewees believed that a very high percentage of claims were legitimate, irrespective of whether they met the terms and conditions for payment spelled out in legislation and regulation. Most estimates were that 75 to 90 percent of the claims were legitimate; some estimates on possible fraud were as low as 2 to 4 percent. None of the interviewees felt that an additional review of internal controls or audits of individual claims would be fruitful courses of inquiry.

INVESTIGATIONS OF POSSIBLE FRAUD

The FCF claims review process is conducted from Silver Spring, Maryland. It includes detailed review of submitted reports, invoices and records, as well as telephone confirmation of claim evidence when required. It does not, however, include field investigation of claims. But, in addition to the periodic reviews cited above, there are procedures for referral of suspected fraud cases to the Department of Commerce's IG. FSD has used and continues to use this procedure for questionable claims. The IG's investigators have also selected specific claims for investigation based on their direct, independent examination of claim files. The process followed by IG investigators usually involves direct contact with claimants, witnesses, suppliers, repair yards, local law enforcement, and fishing industry personnel and inspection of physical evidence (if any), invoices, receipts, and records.

During the 10-year period (1990-99), 95 claims out of the 1,056 total claims were investigated for possible fraud by the IG. This represents 9 percent of total claims and 16 percent of claims paid. Seventy-five of these were referred for IG investigation by FSD, and 20 additional claims were selected by IG investigators based on their review of claim files. Of the 95 claims investigated, 15 were referred to federal attorneys for possible prosecution, and 12 cases prosecuted. Convictions were obtained in seven cases, including one under the comparable State of Louisiana's Gear Compensation Fund, where conviction was regarded as more probable. For six claims prosecuted and convicted of federal fraud, individuals were ordered to pay restitution of approximately \$28,000.

Most were also sentenced to probation; a few were fined, jailed, or received other penalties.

Restitution represents an extremely low rate of fraudulent claims - less than seven-tenths of one percent (0.7%) of claims paid and less than four-tenths of one percent (0.37%) of total claims. The available evidence supports an extremely low fraud rate for both filed and paid claims.

PRESUMPTION OF CAUSATION

Given the statutory and regulatory provisions (described above) that provide for a presumption of causation in areas of OCS oil and gas activities, very few FCF claims entail physical evidence that the damage was caused by oil and gas activities. It is possible, given the nature of the presumption of causation, that inappropriate or fraudulent claims are higher and the amount of casualty loss associated with actual oil and gas activities is less. Attempts during this study to obtain direct data that would tend to confirm or refute the causality of oil and gas exploration and exploitation activities in the reported claims were unsuccessful. The expanse of Gulf oil and gas activities and the common bottom trawl activities of shrimp fishing are not duplicated in other areas or at least not in areas where records of obstructions are routinely maintained.

The following areas were explored for direct evidence without success:

1. Records of damages within Texas' nine-mile state jurisdiction, which is covered by neither the federal nor a comparable state program. Reportedly, there are no consistent records of losses in these areas because fishermen know they do not have recourse to a compensation fund. The head of the Texas Shrimp Association estimated that there were about 20 damage incidents per year in these areas, but attributed most of them to the areas of Texas, adjacent to Louisiana, where oil and gas activities are most extensive.
2. Records of damages within Louisiana's three-mile state jurisdiction, which are covered by that state's Gear Compensation Fund. Like the federal program, Louisiana's program is based on the assumption that damage is attributable to oil and gas activity. This state program does, however, involve case-by-case, on-site investigation of claims by a trained investigator. Of the 129 claims in Louisiana's 1999 fiscal year, 111 were paid a total of \$310,000 and 18 were denied.
3. Marine insurance records. Marine insurance does not generally cover trawled nets or gear in the water. It provides hull coverage for commercial fishing vessels and, as separate coverage, cargo insurance for stored nets, gear, and the fish catch. Thus, insurers could not provide reasonably comparable data on gear loss rates outside of oil and gas areas.

On the other hand, there was considerable evidence that the presumption of causation, while it may not be universally valid, can be reasonably inferred in most cases. This evidence includes:

- Offshore petroleum industry activities. The petroleum industry is proactively involved in efforts to mitigate or correct causes of damage attributable to their industry that affect fishing activities. In 1999, the petroleum industry supported amendments to Louisiana's Gear Compensation Fund that makes \$250,000 available in both fiscal year 2000 and 2001 for underwater obstruction removal in state waters. These funds, like those of the Fishermen's Contingency Fund, come from levies on offshore operators. One oil industry official, who advocated the creation of a similar OCS program paid for out of the Fishermen's Contingency Fund, believed the petroleum industry might support such a federal program, as it did in Louisiana. In addition, the Fisheries Affairs Subcommittee of the Offshore Operators Committee, a coalition of companies engaged in offshore oil and gas activities, is currently attempting to define standards for "net guards" over underwater boreholes. These would allow bottom trawl nets to safely pass over these potential obstructions. The chairman of this subcommittee acknowledged that stubs from boreholes, especially those awaiting completion or abandonment, are a significant fishing hazard.
- Mineral Management Service regulations. MMS regulations and inspections focus heavily on offshore oil safety, and the Coast Guard enforces environmental regulations in the OCS. Neither, however, focuses directly on the impact on the fishing industry. A 1988 MMS regulation on site clearance, developed in conjunction with the oil industry, was the first of its kind; it specified acceptable techniques for verification of site clearance when exploratory or producing wells are plugged and abandoned. Though site clearance had always been required, no specific MMS site clearance standards existed for the more than 14,000 Gulf boreholes abandoned prior to 1990. The most common method of verification today is crisscrossing the site with bottom trawl nets for a quarter mile radius. Shrimp fishermen are often the contractors who perform this work. One site cleared in 1999 reportedly yielded over 200 tons of debris. In addition, an unusual MMS underwater inspection of oil pipelines in 1998 found that concrete mats used to cover pipe junctions were poorly placed and in fact had acted to expose pipelines otherwise required to be buried. The industry's current effort to develop net guards is a direct result of planned new MMS regulations that will specify standards for protecting nets from borehole obstructions.
- Oil industry and fishing industry interviews. There seemed to be little disagreement that the OCS is hazardous to shrimp fishermen because of the extensive oil and gas activities. Most interviewees felt that the offshore petroleum industry, though regulated, operated under very loose standards prior to the mid-1970s. Operators were more careless in the 1950s and 60s, and interviewees acknowledged the industry deposited considerable debris on the ocean floor. The industry was more environmentally conscious in the 1970s and 80s, and, according to these sources, became reasonably clean in the 1990s. Fishing industry sources consistently attributed their difficulties to the offshore oil activities; pipes, catwalk grating, tires

used as boat and barge bumpers, oil or drilling mud drums, batteries, and platform trash were commonly cited. Complaints of unburied pipelines and exposed valves were also common.

The evidence of considerable offshore debris and pipeline practices that pose a hazard to bottom trawl fishing is convincing. This might not, however, excuse the fishermen from all culpability. First, the platforms, pipelines, and even debris act to form artificial reefs conducive to promoting the growth of organisms on which fish and shrimp feed. There were several interviewees who stated that these environmental features are as much an attraction to the fishermen, as to the shrimp. Second, most fishermen stated that the risk of equipment damage and lost time associated with damage is enough to deter fishermen from deliberately trawling where there is a known hazard. But, in the late spring when shrimp leave the estuaries and bays of the coast and in late fall when they return, the shrimp are running. Some sources felt, fishermen might be reluctant to pass up the opportunity for a good catch even with a prospect of snagging their nets. Third, several sources implied that shrimp fishermen are not closely tied to nautical charts nor currently aware of published obstruction notices. They often operate more on tradition, instinct, and small-net sampling, than by carefully plotted routes.

TRENDS INFLUENCING FUND CLAIMS

The most common complaint of the fishing industry about the operation of the Fishermen's Contingency Fund is that the oil industry de facto "buys" ocean floor rights in perpetuity within a quarter mile radius of each claim. As obstructions, other than pipelines, are encountered and recorded in notices to mariners, future claims in these areas are effectively precluded. As the most heavily fished areas become dotted with obstructions, rejected claims would be expected to increase and the number of claims and number of paid claims expected to decrease. This is generally what seems to have happened in the 1990s.

There are other trends that could affect future fund activities, including:

- **Trends in shrimp fishing:** Data for 1990-98 shrimp landings in the Gulf of Mexico are shown in Figures 1 and 2 below and in Appendix A. While there has been some year-to-year fluctuation in the annual landings, the data indicate a fairly constant volume of Gulf shrimp landings. This is true of both bay and estuary (inshore) and offshore coastal landings. The most notable trend is to larger landings per trip as shown in the figures below.

FIGURE 1
Shrimp Landings Gulf of Mexico: 1980-1998
BAY AREAS

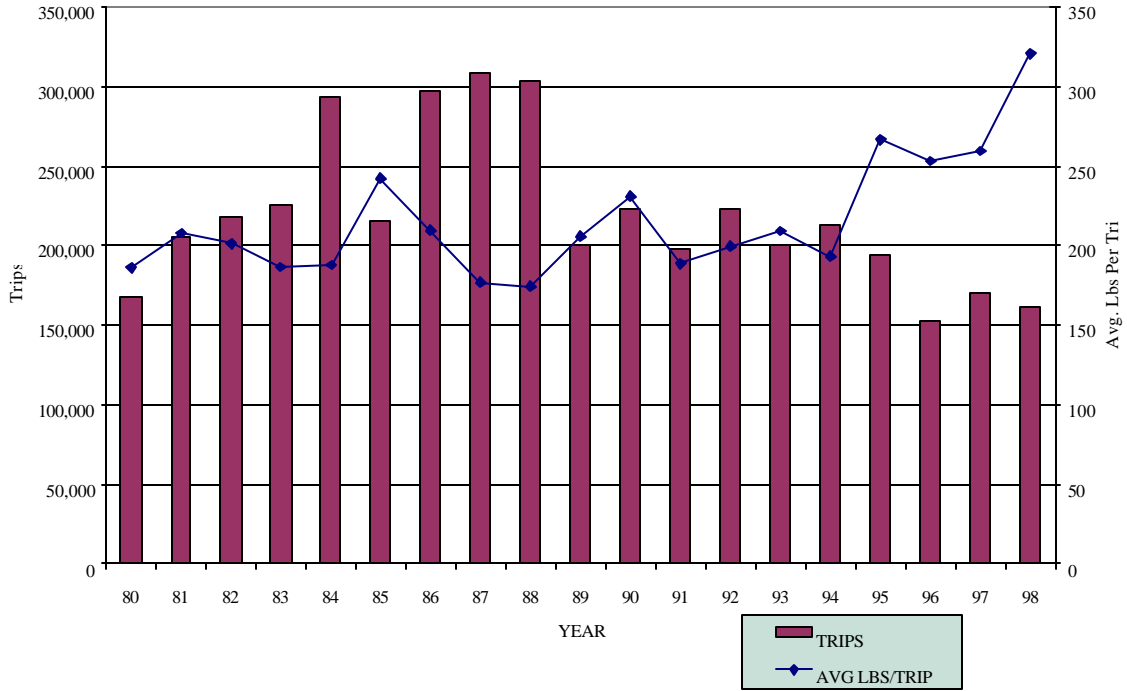
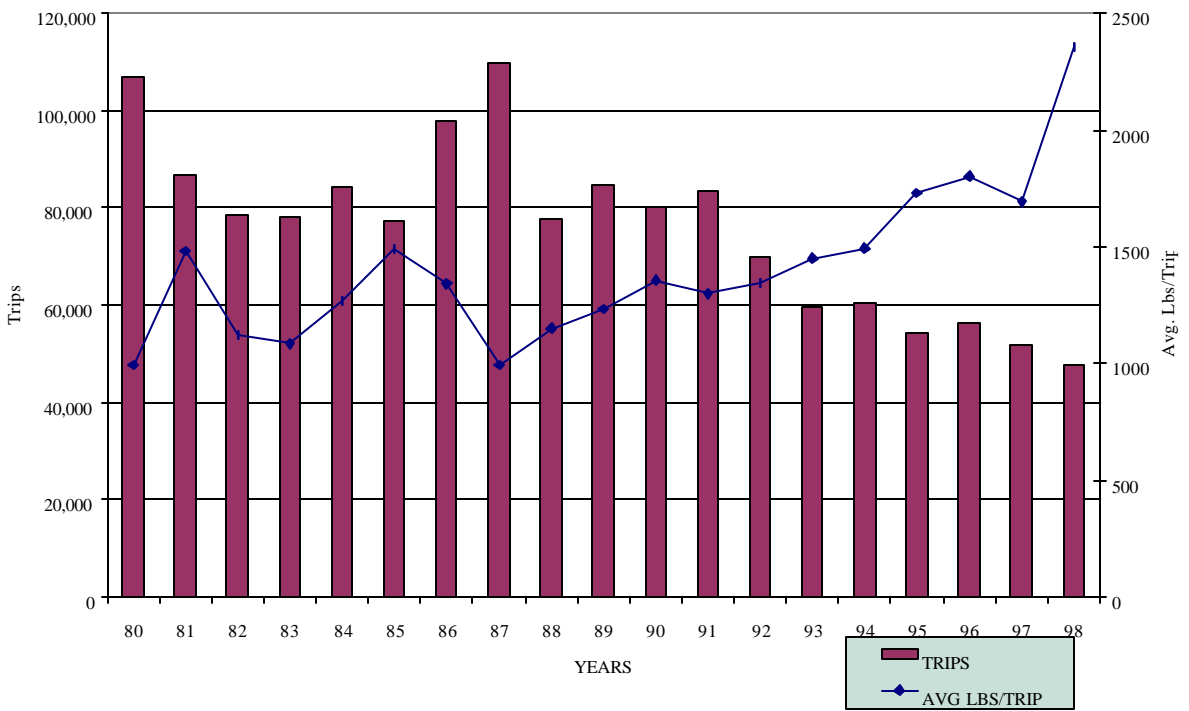


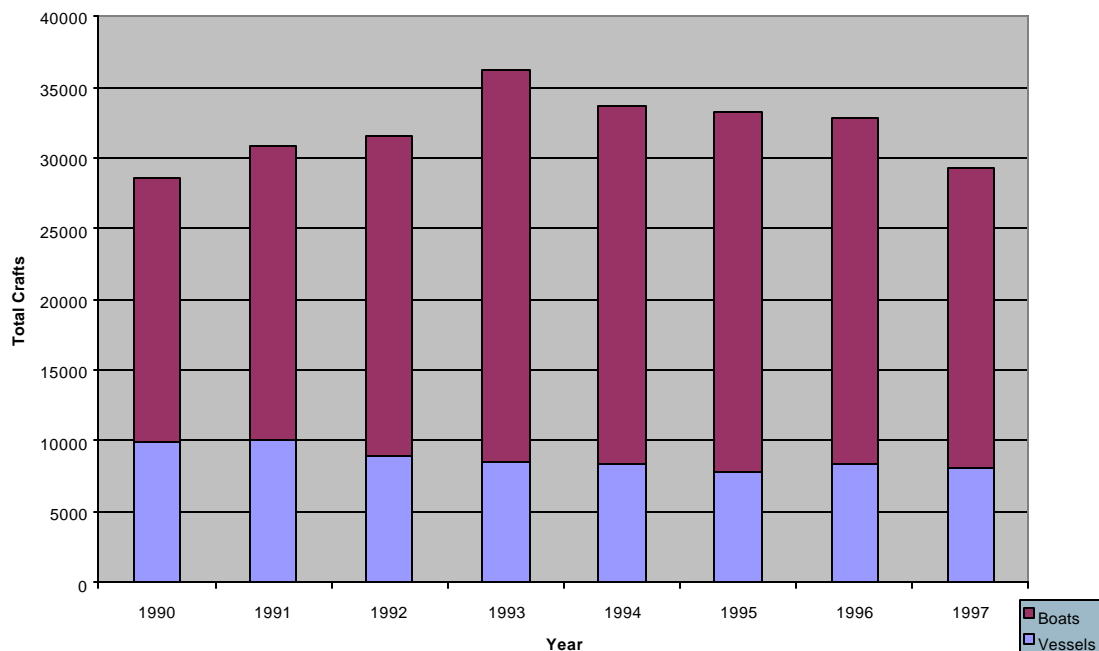
FIGURE 2
Shrimp Landings Gulf of Mexico: 1980-1998
OFF SHORE



Several reasons advanced for this trend include (a) the use of trawlers with more powerful engines that handle larger nets, (b) limited fishing hours in some bay areas to discourage illegal fishing practices, and (c) the seasonal closure of some Gulf areas to promote the growth of larger, higher value shrimp. These trends do not appear likely to have a significant impact on fund activities.

- Trends in fishing craft:** The numbers of fishing craft in the Gulf of Mexico have been declining, and this trend seems to be continuing. Restrictions on fishing activities for conservation reasons, the growth of aquaculture for both shrimp and some finfish, and declining prospects that sons will follow fathers in this traditional family business may explain this trend. As shown in Figure 3 below and in Appendix B, the decline in total fishing craft between 1993 and 1997 was almost 20 percent; the decline applies to both smaller near-shore boats and larger trawlers. This trend, if continued, would tend to reduce future claims on the fund and fund activity.

FIGURE 3
Commercial Fishing Craft Gulf States 1990-1997*



* Vessels are documented craft greater than 5 net registered tons.
Boats are craft less than 5 net registered tons.

- **Trends in offshore petroleum industry activities:** Offshore oil and gas activities in the Gulf of Mexico are continuing and expanding into deeper waters. The number of boreholes, number of new wells, number of abandoned wells, and miles of pipeline are all increasing as show in Table 5. These trends are likely to moderately increase claims and fund activity, although comparatively recent site clearance procedures and the reported improvement in environmental practices of the offshore oil industry may mitigate the impact of increased offshore oil and gas activities.

TABLE 5
OCS Activities in the Gulf of Mexico, 1990-98

	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Boreholes ¹⁰									
Completed (cum)	13167	13184	13209	13181	13342	13495	-----NA-----		
Abandoned (cum)	14677	15430	16345	16709	17427	18086	-----NA-----		
Other ¹¹	1852	1749	1749	1755	1796	1893	-----NA-----		
Pipelines in miles									
New	803	844	844	607	948	1164	-----NA-----		
Cumulative	15130	15974	16581	17065	18013	19178	-----NA-----		
Exploratory wells	-----NA-----		210	318	387	361	446	460	480

The cumulative effect of the above trends, when combined with the natural tendency of the fund to increasingly limit the claims area, the improving environmental consciousness of the industry, and the gradual impact of site clearance activities, portend a continuing gradual reduction in claims and fund activities. The possibility of a marked change in these trends can not be precluded; a major hurricane in the Gulf, for example, can radically alter both the number and location of marine hazards, including those associated with oil and gas activities or in areas affected by oil and gas activities. It seems unlikely, however, that the number and amount of claims and fund activities will return to the level of the early 1990s.

¹⁰ Data is for total OCS, not just Gulf of Mexico; Gulf accounts for well over 90 percent of OCS activity in all categories.

¹¹ Includes wells with active drilling, wells with suspended activity awaiting further action, and wells not yet plugged and abandoned.

OPTIONS

Several options regarding the future of the FCF were examined and assessed. The major options considered were:

1. **Terminate the fund:** The decline in the 1990s in the number of claims, the amount of fund activity, and the likely long-term trend of reduced claims and fund activity raise the question of the future need for the Fishermen's Contingency Fund. The 1996 termination of the Fishing Vessel and Gear Compensation Fund resulted in few objections, and the number of beneficiaries of the Fishermen's Contingency Fund is small and highly localized.

Despite the small size of the fund, the arguments against fund termination are, however, reasonably compelling:

- The evidence supporting the legitimacy of the claims and the likelihood of oil industry culpability is strong. In the absence of some type of third-party mediation or dispute-resolution mechanism, fund termination is likely to increase the animosity between the two groups; it may result in increased and costly litigation, or, more likely, limited prospects for the fishing industry to receive reasonable reimbursement for damages. The disparity in size between individual fishermen and large oil corporations continues and is likely to promote a one-sided outcome in the absence of the fund.
- The case for termination is weak. The federal government operates similar "insurance-type" programs to mitigate potential private sector liability, such as the Vaccine Injury Compensation program, in order to support the common good. In this case, reliable access to offshore oil and gas can be considered a common good. In addition, the Federal Deposit Insurance, and Pensions Benefit Guaranty, and other government insurance programs are similar in purpose, even though they are operated by government corporations. Federal flood and crop insurance programs that cover catastrophic losses to natural, as opposed to manmade, hazards are not completely analogous to the Fishermen's Contingency Fund.
- Both the fishermen and the oil industry representatives that were interviewed appear to support the operation of the fund as a means to reconcile their potentially conflicting interests and roles in the Gulf. There are no apparent advocates for repeal, and none seems likely to emerge.
- Unlike NMFS' Fishing Vessel and Gear Compensation Fund that was terminated in 1996 because of the lack of funds, the Fishermen's Contingency Fund could be terminated only through repeal of the extant statute because the oil industry, as the designated source of funds, can continue to be assessed. As noted above, this is unlikely.

2. **Privatize the fund:** Since the federal government's role in the fund is largely administrative, private sector administration of the fund was explored. The United Kingdom's Offshore Operators Association has had a Fishermen's Compensation Fund, similar to the U.S. fund, since 1974. It covers OCS compensation claims similar to those in the U.S. (except for recorded pipelines), is financed by voluntary contributions from association members, and is managed by a committee composed of persons representing fishermen in an associated consultative group. The British fund has paid out compensation of about \$3.0 million between 1990 and 1999.

Interviewees were asked to identify third-party alternatives to the federal government whom they felt would be reasonably acceptable to both the offshore oil and fishing industries. They almost uniformly endorsed continued federal government operation. Most interviewees precluded assigning this task to either the fishing or oil industry because of the perceived bias each would have in the outcome of the administrator's decisions. They could identify no alternative administrator that would be more acceptable than the federal government. This may have been conditioned by their generally favorable experience under FSD administration of the program.

The possibility of using the insurance industry was explored, but concerns about its impartiality were raised. Their financial liability for other marine casualties, it was felt, might conflict with their objective administration of a fishermen's fund supported by the offshore oil industry. In addition, it seemed unlikely to interviewees both inside and outside the marine insurance industry that the insurance industry would be attracted to assume the burden of fund administration given the current financial picture. Current administrative costs of about \$50,000 annually, claim payments of \$300,000, and assessments against 8,000 offshore oil industry insurers do not appear to offer sufficient incentives to encourage a private insurance company to assume the burden of claims adjudication. Since the insurance industry does not now cover the type of gear damage that predominate in fund claims, it is unlikely that there would be any significant economies of scale in fund administration.

Other potential candidates to assume responsibility for fund administration include nonprofit entities such as the Gulf States Marine Fisheries Commission or the Louisiana-based Gulf of Mexico Underwater Obstruction Clearance Coalition. Without impugning the integrity of these or similar organizations, there was concern expressed about the potential objectivity of any other organization in comparison to the federal government.

3. **Devolve fund responsibilities to the states and/or counties:** This option is heavily dependent on the existence of operating programs, the availability of experienced personnel at those levels, and the willingness of non-federal jurisdictions to supplant federal administration. Unfortunately, only the State of Louisiana and the County of Santa Barbara, California, have reasonably comparable programs. Texas, Mississippi, Alabama, and Florida have no similar programs and appear unlikely to develop them. Their interest in assuming the administrative burden associated with the fund would appear to be remote. Similarly, the advantages to the federal

government of state administration of multiple programs directly affecting federal responsibilities over federal waters seem negligible.

4. **Continue the fund with modifications:** If the fund must continue largely under its present administrative arrangement, are there any significant modifications that could and should be pursued? In general, as this study confirmed, the fund has a solid reputation among those it serves in both the fishing and oil industries for fairness and integrity. The major complaints centered on:

- (1) the problem of a single claim per obstruction, i.e. the alleged unfairness of the oil industry acquiring, in perpetuity, claim-free "rights" within a quarter mile of any prior claim
- (2) the absence of any long-term obstruction removal program to return the ocean floor to its prior condition.

The 1988 MMS standards for site clearance verification respond in part to the latter complaint through the removal of obstructions from abandoned sites. It is one step in the direction of obstruction removal. Hazards or obstructions created prior to that date are not addressed, however, and these activities, by common judgment, appear to have been the most injurious to the fishing industry. In addition, MMS clearly plans to impose net guard standards, a move that encouraged cooperation from the offshore operators.

The Panel has not explored the economics of site clean-up and underwater obstruction removal. These would clearly be costly. However, it seems both possible and desirable to initiate remedial actions through the removal of existing obstructions and reduction or mitigation of additional obstructions by regulation and/or voluntary oil industry action. These might be funded by the FCF, the industry, and/or other federal resources and would provide alternative long-term benefits to commercial fishermen in lieu of continuing, but declining casualty benefits.

Unfortunately, FSD, NOS, and MMS have maintained readily accessible records of the frequency with which encounters with specific obstructions occur. Such data could provide an initial identification of the hazards most costly to fishermen and a list of potential candidates for clean-up. This approach would also respond to the fishermen's dissatisfaction with single incident liability. Repeated encounters with an obstruction would tend to highlight areas of danger for fishermen, as well as identify obstructions for possible removal.

CONCLUSIONS AND RECOMMENDATIONS

The rationale behind the Fishermen's Contingency Fund and the federal role in administering the fund remains valid. Fishermen, as a group, were, and remain, disadvantaged by a broad public good—offshore oil and gas exploration and exploitation activities—and have no reasonable recourse to alternative solutions. The private insurance industry, both in 1978 and now, offers no product to mitigate the effects of damage or loss. The legal system is likely to be as unsatisfactory today as it was in the 1950's and 60s in addressing the damages to the fishing industry attributable to offshore oil and gas activities. And, the offshore oil industry has not indicated any willingness to assume a more direct responsibility for addressing these losses without federal participation. Thus, privatization, devolution, or reliance on alternative dispute-resolution mechanisms are not realistic alternatives at present. In the absence of these alternative mechanisms, the fund provides a comparatively modest recompense to its primary beneficiary, the shrimp fishing industry.

In addition, the political forces that prompted the fund's enactment in 1978 remain basically intact today, and termination is highly improbable. There is essentially a federal moratorium on new offshore drilling except in the Gulf of Mexico, but fishermen from that area, who were among initial supporters of the fund, strongly support the fund. Their political representatives at the federal level, and in some states and counties, also continue to support the program. Further, the offshore oil industry, which funds the fishermen's benefits without direct return, seems to have increasingly accepted a significant degree of responsibility for damages, even though offshore operations routinely deny responsibility for individual claims. Despite its declining use, it would be extremely difficult to terminate the Fishermen's Contingency Fund under the current circumstances.

On the other hand, the use and importance of the fund are declining as the area eligible for claims continues to diminish, and this will increasingly undercutting its original purpose of compensating fishermen for damages attributable to increasing offshore oil and gas exploration and exploitation activities. There is a growing recognition on the part of fishermen and the offshore oil industry that the fund's benefits are inherently short-term. The fund ameliorates, but falls short of remedying the problems associated with underwater obstructions. The fund's ability to continue to fulfill its original public purpose, thus, may not be sustainable over the long term. Despite continuing increases in offshore oil and gas activities, the steady decline in claims paid and the declining area eligible for compensation underscore that the value of the fund to fishermen is eroding; this will continue.

As obstructions are charted, claim reimbursements become increasingly unavailable. Increasingly, approaches, such as obstruction removal and hazard mitigation, become more attractive alternatives. The industry, at least in Louisiana, and MMS increasingly seem to appreciate that a proactive strategy to remove, or minimize the effects of, obstructions provides a needed long-term complementary approach to damage compensation. In addition to the examples previously cited, joint industry-MMS efforts

to help the fishing industry artificial reefs as habitats for marine life are to be commended. Unfortunately, these organizations have yet to develop strong ties and support within the fishing industry.

Long-term remedial measures are increasingly likely to serve the purposes of compensating fishermen's for economic losses in the face of expanding offshore oil and gas activities. The time appears to have come when offshore oil, fishing, and government interests should increase their focus on obstruction removal, site clearance, and mitigation efforts, rather than rely solely on the fund to compensate the fishing industry for damages. This will require the active cooperation of NOS, NMFS, and MMS with their industry partners. Additional support for this approach may well come from conservationists. Eventually, this might enable the federal government to reduce or eliminate damage compensation in favor of more proactive approaches to hazard mitigation and obstruction removal.

The Academy recommends that:

- 1. Fishermen's Contingency Fund should not be discontinued.**
- 2. Because the fund's ability to continue to fulfill its original public purpose is eroding and may not be sustainable over the long term, the principal participants in the fund¾the offshore oil and fishing industries, MMS, and NMFS¾should increasingly focus their future activities on mitigating fishing hazards, including removal of existing, and reduction of future, obstructions.**

APPENDIX A

Shrimp Landings Gulf of Mexico: 1980-1998¹

BAYS

YEAR	POUNDS	TRIPS	AVG LBS/TRIP
1980	31,236,373	167,829	186.1
1981	42,612,792	204,877	208.0
1982	43,995,094	218,515	201.3
1983	42,077,302	225,378	186.7
1984	55,235,517	293,992	187.9
1985	52,156,359	215,128	242.4
1986	62,464,289	297,575	209.9
1987	54,560,649	307,986	177.2
1988	52,844,525	303,106	174.3
1989	41,341,824	200,823	205.9
1990	51,682,387	223,467	231.3
1991	37,460,424	198,423	188.8
1992	44,459,411	223,004	199.4
1993	42,042,388	200,929	209.2
1994	41,114,454	212,669	193.3
1995	51,722,873	194,030	266.6
1996	38,598,233	152,515	253.1
1997	44,293,034	170,659	259.5
1998	51,743,640	161,315	320.8
1980-98 AVG BAYS	46,402,188	219,591	215.9

OFFSHORE

1980	106,291,110	106,841	994.9
1981	128,390,895	86,693	1481.0
1982	88,102,841	78,383	1124.0
1983	84,667,111	78,100	1084.1
1984	106,714,674	84,115	1268.7
1985	114,913,954	77,128	1489.9
1986	130,894,398	97,655	1340.4
1987	109,203,711	109,947	993.2
1988	89,400,244	77,608	1151.9
1989	104,646,442	84,859	1233.2
1990	108,953,067	80,329	1356.3
1991	108,143,142	83,290	1298.4
1992	93,863,498	69,821	1344.3
1993	86,470,566	59,643	1449.8
1994	90,351,044	60,543	1492.3
1995	94,119,587	54,376	1730.9
1996	101,413,535	56,257	1802.7
1997	87,430,152	51,682	1691.7
1998	112,322,872	47,696	2355.0
1980-98 AVG OFFSHORE	102,436,465	76,051	1,404.4

¹From Margo Hightower, Fishery Reporting Specialist, Team Leader, Galveston, Texas

APPENDIX B

**Commercial Fishing Craft
Gulf States, 1990-97¹**

YEAR	1990	1991	1992	1993	1994	1995	1996	1997
Vessels,² Subtotal								
Total	9942	9999	8883	8563	8347	7834	8311	8087
Florida	2500	2394	2264	2248	2340	2311	2531	2437
Alabama	451	408	409	411	426	378	378	359
Mississippi	704	857	885	531	535	438	438	591
Louisiana	3628	3840	2824	2820	2846	2805	2839	2650
Texas	2659	2500	2501	2553	2200	1902	2125	2050
Boats,³ Subtotal								
Total	18684	20771	22615	27612	25349	25451	24532	21161
Florida	4800	6609	9409	9464	8439	8919	9425	6648
Alabama	587	531	694	676	644	720	720	1320
Mississippi	1199	1145	1003	976	934	874	874	856
Louisiana	9113	9786	8917	13737	12954	12969	11883	10987
Texas	2985	2700	2592	2759	2378	1969	1630	1350
Fishing Craft, TOTAL								
Total	28626	30770	31498	36175	33696	33285	32558	29248
Florida	7300	9003	11673	11712	10779	11230	11956	9085
Alabama	1038	939	1103	1087	1070	1098	1098	1679
Mississippi	1903	2002	1888	1507	1469	1312	1312	1447
Louisiana	12741	13626	11741	16557	15800	15774	14722	13637
Texas	5644	5200	5093	5312	4578	3871	3755	3400

¹ Estimates from NOAA, National Marine Fisheries Service, Annuals of Fisheries of the United States, 1991 to 1998.

² Vessels are documented craft greater than 5 net registered tons.

³ Boats are craft less than 5 net registered tons.

BIBLIOGRAPHIC SOURCES AND INTERVIEWS

BIBLIOGRAPHIC SOURCES

The legislative history of the Outer Continental Shelf Lands Act, subsequent amendments, and related acts was derived largely from the *U.S.C.A.* and annual editions of the *US Code Congressional and Administrative News* for relevant years.

The *Federal Register* includes the regulations that govern the operations of the Fishermen's Contingency Fund and other similar funds. In addition, NMFS provided the earlier (1980) regulations governing the fund prior to the issuance of the current version issued in 1985.

The Department of Commerce, Inspector General conducted reviews and issued reports on the Fishermen's Contingency Fund in 1985 and 1999. These reports and a report on internal controls produced by the National Marine Fisheries Service in 1992 provide excellent sources of information on the background and operation of the fund.

The annual *Fisheries of the United States*, published by the Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, between 1990 and 1998 provide statistics and other data relevant to U. S. fishing trends, in general, and shrimp fishing, in particular. These include data on annual shrimp and finfish catches, fishing vessels, and other commercial fishing in the U.S. and the Gulf of Mexico. These sources were supplemented by data acquired directly from NMFS field personnel.

The Financial Services Division, National Marine Fisheries Service provided extensive data on claims activity between 1990 and 1999. Data affecting the number and amount of claims, type of claim, geographic distribution of claims, claims adjudication, fraud incidence, revenues, obligations, and fund balances were compiled by FSD and provided to the Academy.

The *Federal Offshore Statistics*, published by the Department of Interior, Minerals Management Service, in 1995 provides data on federal offshore leasing, boreholes, pipelines, royalties, and other information on offshore oil and gas activities. Some recent data was acquired from the MMS website and congressional testimony.

The General Accounting Office published a September, 1997 report (GAO/AIMD-97-16) on *Budgeting for Federal Insurance Programs* that provides an excellent summary of insurance-type programs managed by the federal government.

APPENDIX C

The Cato Institute published *Ending Corporate Welfare As We Know It* (Policy Analysis No. 225, May 12, 1995) that included the Fishermen's Contingency Fund in a list of candidate corporate welfare programs that it identified for possible elimination.

INTERVIEWS

These major bibliographical sources were supplemented extensively by interviews with a wide range of sources. The following interviewees were particularly useful and helpful in providing additional detail on the nature and operation of the fund, the marine fishing, offshore oil, and marine insurance industries.

DEPARTMENT OF COMMERCE

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APPENDIX C

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John Flynn, Legislative Assistant, Staff of Senator John Breaux (LA).

Margaret Spring, Senior Counsel, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Oceans and Fisheries

Dave Whaley, House Committee on Resources, Subcommittee on Fisheries, Conservation, Wildlife, and Oceans

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APPENDIX C

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Jerald Horst, Associate Specialist (Fisheries), Louisiana State University Agricultural Center, Marrero, LA.

FISHING INDUSTRY

Wilma Anderson, President, Texas Shrimp Association, Corpus Christi, TX.

Robert Boudreaux, fishing equipment supplier, Lafitte, LA.

P. J. Martin, Contractor (offshore site clearance verification), Golden Meadows, LA.

Ricky Matherne, Barataria, LA.

John Nelson, Bon Secour Boats, Inc., Bon Secour, AL.

OTHER

Trisha O'Reilly, media relations, UK Offshore Operators Association, London, England.

Lisa de Kleyn, publications distribution, UK Offshore Operators Association, London, England.

Steve Johnson, Agent, Gulf Marine Insurance, Corpus Christi, TX

Steven Slovinski, economist, CATO Institute, Washington, DC.

ACRONYMS

CFR	Code of Federal Regulations
DOC	Department of Commerce
EEZ	Exclusive economic zone
FSD	Financial Services Division
IG	Inspector General
MMS	Minerals Management Service
NIMA	National Imagery and Mapping Agency
NMFS	National Marine Fisheries Service
NOAA	National Oceanographic and Atmospheric Administration
NOS	National Ocean Service
NTMs	Notices to Mariners
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
OOC	Offshore Operators Committee
UK	United Kingdom

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