1980 to 1990, and 89 percent of all oil spilled in incidents of at least 100,000 gallons. Although cleanup costs and third-party damages are well documented, natural resource damage settlements are relatively few.

The study determined that location of a spill was a significant factor in cleanup and third party costs. For example, the weighted average cost for a dirty product spill in internal or headland waters was $41,652 per metric ton but only $8,364 per metric ton for spills 12 to 200 miles offshore (costs in 1992 dollars for U.S. spills 1980–1990, weighted by spill size). The study developed a range of unit cost values for ''clean'' and ''dirty'' product spills. For dirty product spills, which would include crude oil, the range of unit values was from $121 to $264 per gallon ($5,082 to $11,088 per barrel).

It is noted that several recent spills are in the process of litigation or settlement, and may therefore provide more-current cost data by the time of the final rule for this rulemaking. Accordingly, the Department may find it appropriate to use the more current cost data for its limit of liability determination.

17. LOOP's certification of financial responsibility

Under the original Deepwater Port Act of 1974 (DPA), the deepwater port had a liability limit of $50 million except for spills caused by gross negligence or willful misconduct, whereupon liability was unlimited. Section 18 of the DPA required the deepwater port to ''carry insurance or give evidence of other financial responsibility in an amount sufficient to meet the liabilities imposed by [the DPA].'' In 1980, LOOP and the Department of Transportation signed a memorandum of understanding (MOU) which established that LOOP must provide annually evidence of financial responsibility in the amount of $150 million. The MOU outlines a two-part requirement: that LOOP must maintain 1) a net worth, including fixed assets, of $50 million, and 2) a combination of working capital and insurance totalling $100 million (after deducting any claims and insurance deductibles). Shortfalls in these minimum levels must be made up with insurance. Thus, the MOU established a minimum financial worth of LOOP of $150 million. LOOP submits quarterly reports to the Department demonstrating that it is meeting the minimum requirements as set forth in the MOU. Although OPA 90 revised the DPA (specifically deleting section 18) and established a new liability limit at $350 million, the terms of the MOU are still being observed, pending the outcome of this rulemaking.

Adoption of a $150 million liability limit would confirm DOT's past requirement for LOOP's financial responsibility. DOT's assessment was that $150 million would suffice for most oil spills. A liability limit in the $150 million range would not cause additional expense for LOOP.

18. Background on the $350 million statutory limit on liability for negligence

OPA 90, Section 1004, establishes a liability limit of $350 million ''for any onshore facility and a deepwater port.'' In the context of the Exxon Valdez oil spill which significantly influenced the shaping of OPA 90, Congress decided that the $350 million level of liability fitted into the other liability provisions of OPA 90, in particular the liability for tank vessels. The Congress believed that the risk of oil spills of deepwater ports warranted a $350 million limit and it believed that insurance would be available to support liability up to this level. For damages above the $350 million limit OPA granted the deepwater ports the benefit of payment of the damage claims out of the Oil Spill Liability Trust Fund. Deepwater ports have been subject to this level of liability for their negligence since 1990.

In OPA 90, Section 1004(d), Congress gave the Executive Branch authority to adjust the liability limit for onshore and deepwater port facilities downwards if such an adjustment could be justified. The assumption of OPA 90 is that the liability limit set by the law remains as provided by the statute, unless good reason can be established for a lower limitation. At this time, the limit of liability for onshore facilities remains at $350 million.

Congress did not require the Executive Branch to study adjustment of the limit for onshore facilities within any specific time limit. The authority to study may be used at any time. However, in regard to deepwater ports, OPA 90 requires a study of oil spill risks in one year after enactment of OPA 90. The results of that study are described elsewhere in this NPRM. Thus the question becomes whether the DOT study has uncovered new information which would cause the Secretary to establish liability limits lower than those established by Congress. If new information of sufficient weight and magnitude showing that the risk of ''transportation of oil by vessel results in a lower operational or environmental risk than the use of other ports,'' then the Secretary may initiate rulemaking to find the level of liability which is more appropriate than the level established by the statute.

19. Proposed § 137.603 Limit of Lability

The Department has determined that it is not appropriate to assign a single, universal limit of liability for all deepwater ports. Rather, a limit should be set individually for each deepwater port, on the basis of its design, location, spillage risk, and estimated costs (clean up costs, third party compensation, and natural resource damages). Therefore, through this proposed rule, the Secretary of Transportation would establish an appropriate limit of liability for negligence, between the statutory limits of $350 million and $50 million, for individual deepwater ports.

Although the regulatory text section of this NPRM proposes a range of possible limits of liability for LOOP ($50–$350 million), the Department is particularly focusing on three possible limits, as follows:

(1) Maintain the present limit of liability for negligence at $350 million, as established by OPA 90; or

(2) Establish a limit of liability for negligence at $58 million, based on LOOP's maximum pipeline spill of 5,194 barrels and the TSC recommended worst-case cost of $11,088 per barrel for dirty product spills; or

(3) Establish a limit of liability for negligence at $150 million, reflective of the 1980 memorandum of understanding between the Department and LOOP. It reflects DOT's risk assessment in 1980, based upon the TSC range of spill unit costs for dirty products ($5,082 to $11,088 per barrel), this limit of liability would provide for a spill of 13,500 barrels to 29,500 barrels.

The Department presents these three limits, but may select a limit within the $50–$350 million range in the final rule after reviewing specific public comments on these limits. Additionally, the Department seeks comments on whether it should reassess and possibly readjust the liability limit at fixed time intervals.

It is reiterated here that the unlimited liability provisions of the law are not affected by this rulemaking. LOOP would not be allowed to limit its liability for spills caused by gross negligence, willful misconduct, or violation of certain Federal regulations in accordance with section 1004 of OPA 90 (33 U.S.C. 2704).