Congressional Research Service
Informing the legislative debate since 1914

Oil Sands and the Oil Spill Liability Trust Fund: The Definition of "Oil" and Related Issues for Congress

Updated February 15, 2017

Congressional Research Service
https://crsreports.congress.gov
R43128

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

In 2005, the United States imported approximately 217 million barrels of oil-sands-derived crude oils from Canada. In 2015, that figure increased to 587 million barrels, accounting for approximately 22% of crude oil imports from all nations. Pipeline oil spills, including the 2010 Enbridge spill in Michigan and the 2013 ExxonMobil spill in Arkansas, involved this material and generated interest from policymakers and a variety of stakeholders.

The Oil Spill Liability Trust Fund (OSLTF) provides an immediate source of federal funding to respond to oil spills in a timely manner. Monies from the OSLTF can be used to respond to a wide variety of oil types, including oil-sands-derived crude oils. The OSLTF is primarily financed by a 9-cents-per-barrel tax on domestic crude oil and imported crude oil and petroleum products (up from 8 cents per barrel in 2016). In the context of the per-barrel OSLTF tax provision, a 1980 House committee report stated that "the term crude oil does not include synthetic petroleum, e.g., shale oil, liquids from coal, tar sands, or biomass, or refined oil."

Based on that statement, the Internal Revenue Service (IRS) concluded that oil-sands-derived crude oils are not subject to the OSLTF excise tax. This determination raises several issues. Perhaps the foremost issue is one of equity. Policymakers may consider whether there is a rationale for exempting certain types of crude oils from the excise tax. At present, it is unclear to what degree importers of oil-sands-derived crude oils are paying the OSLTF excise tax.

The different contexts for "oil" could lead to situations in which expenditures from the trust fund are used to clean up oil that was not subject to the tax. However, the OSLTF arguably plays a backup role in terms of response funding during many oil spills. The responsible party for an oil spill often provides the primary source of response (i.e., cleanup) funding, and the federal government may recover costs or damages paid from the OSLTF. Thus, the financial impact to the trust fund could be minimal if the majority of its payments are reimbursed by the responsible parties. Nonetheless, the liability of responsible parties may be limited under certain conditions. In those situations, the OSLTF could effectively pay—up to a per-incident cap of $1 billion—for response costs and applicable damages above the liability limit.

In the 114th Congress, Members offered several legislative proposals that would have specifically included oil-sands-derived crude oils within the scope of the per-barrel tax. In general, the proposals would have modified the definition of "crude oil" in the OSLTF tax authority (26 U.S.C. §4612) to include oil-sands-derived crude oil, often described in the amendments as "any bitumen or bituminous mixture, any oil derived from a bitumen or bituminous mixture."

In addition, recent budget proposals from the Obama Administration called for statutory changes that would subject oil sands to the per-barrel tax.

If Congress were to explicitly include oil-sands-derived crude oils within the scope of the per-barrel OSLTF tax, the revenue supporting the OSLTF would likely increase. Over the last five fiscal years, this tax has generated, on average, about $500 million per year. Based on import data of Canadian oil-sands-derived crude oil, the tax would have increased by approximately $47 million in 2016, assuming that 100% of the imports of Canadian oil sands crude oils are currently not paying the tax.

Contents

Introduction 1
Oil Sands—Background 2
Oil Spill Liability Trust Fund 5
Uses of the Fund 5
Sources of Fund Revenue 6
Does the Trust Fund Have a Ceiling? 7
Scope of Taxed Oil vs. Scope of Spilled Oil 8
Oil in the Context of the Internal Revenue Code 8
Oil in the Context of OPA 9
Implications of the Different Scopes 10
Estimated Tax Revenues 11
Additional OSLTF Tax Scope Issues 12
Crude Produced from a Well 12
Shale Oil ("Tight Oil") 13
Legislative Activities 14
Concluding Observations 15

Figures

Figure 1. U.S. Imports of Canadian Crude Oil by Type 4
Figure 2. Oil Spill Liability Trust Fund 7

Tables

Table 1. OSLTF Excise Tax Revenues and Oil Sands Crude Oil Imports from Canada 11

Contacts

Author Information 15

Introduction

Imports of crude oil derived from Canadian oil sands have increased dramatically over the past decade. Oil spills involving oil-sands-derived crude oils have generated interest from policymakers and a variety of stakeholders. Several oil spills, including both the 2010 Enbridge pipeline spill in Michigan and the 2013 ExxonMobil pipeline spill in Arkansas, involved this material. (See text box below.)

Oil spill liability, cleanup, and compensation issues are addressed by the Oil Pollution Act of 1990. The Oil Spill Liability Trust Fund (OSLTF) provides an immediate source of federal funding to respond to oil spills in a timely manner. The National Pollution Funds Center (NPFC), an office within the Coast Guard, manages the trust fund.[1] The monies from the OSLTF can be used to respond to a wide variety of oil types, including oil-sands-derived crude oils. The OSLTF is financed primarily by a per-barrel tax on domestic crude oil and imported crude oil and petroleum products. In 2017, the tax increased from 8 cents to 9 cents per barrel.

Based on language in a 1980 House committee report, the Internal Revenue Service (IRS) concluded in 2011 that oil-sands-derived crude oils are not subject to this excise tax.[2]

This issue received attention in recent Congresses and from the prior Administration. The Obama Administration's budget proposals in recent years called for statutory changes that would have subjected oil sands to the per-barrel tax.[3]

Members in the 113th Congress introduced several proposals to address this issue, but the bills did not receive committee action. This issue has received considerable interest in the 114th Congress, as policymakers debated the approval of the Keystone XL pipeline, which would transport 830,000 barrels of oil-sands-derived crude from Canada to U.S. refineries.[4] On November 6, 2015, Secretary of State John Kerry announced that "the national interest of the United States would be best served by denying TransCanada a presidential permit for the Keystone XL pipeline." Members of Congress and stakeholder groups have expressed both support for, and opposition to, the State Department's decision.[5]

The first section of this report provides a background of oil sands resources. The second section discusses the OSLTF, including authorized uses and revenue sources. The third section compares the scope of oil subject to the per-barrel tax (which funds the OSLTF) versus the scope of oil that triggers activities under the Oil Pollution Act and discusses the potential implications of the different scopes. The fourth section provides details of recent legislative activity. The final section offers concluding observations.

---

[1] Pursuant to Executive Order 12777, 56 *Federal Register* 54,757 (1991).

[2] Internal Revenue Service (IRS) Office of Technical Advice, *Private Letter Ruling 201120019*, January 12, 2011.

[3] See, for example, Office of Management and Budget (OMB), *Budget of the United States Government, Fiscal Year 2017*, Analytical Perspectives, p. 189; OMB, *Budget of the United States Government, Fiscal Year 2016*, Analytical Perspectives, p. 184; and OMB, *Budget of the United States Government, Fiscal Year 2015*, Analytical Perspectives, p. 166.

[4] See CRS Report R43787, *Keystone XL Pipeline: Overview and Recent Developments*, by Paul W. Parfomak et al.

[5] See CRS Legal Sidebar WSLG1482, *Not Over 'Til It's Over, Part 1: TransCanada to Seek $15 Billion in NAFTA Lawsuit over Denial of Keystone XL Permit Request*, by Brandon J. Murrill; and CRS Legal Sidebar WSLG1483, *Not Over 'Til It's Over, Part 2: TransCanada Files Second Legal Challenge to State Department's Keystone XL Permit Denial*, by Adam Vann.

Selected Pipeline Spills Involving Oil Sand Crude Oils

2010 Enbridge Spill in Michigan

On July 26, 2010, an Enbridge pipeline released oil sands crude oil[6] into Talmadge Creek, a waterway that flows into the Kalamazoo River (Michigan).[7] The spill volume was estimated at almost 850,000 gallons.[8] As of September 30, 2016, Enbridge estimated the cost of the spill to be approximately $1.2 billion.[9] The National Transportation Safety Board (NTSB) issued an accident report in July 2012.[10] The United States and Enbridge reached a settlement agreement in 2016.[11]

2013 ExxonMobil Spill in Arkansas

On March 29, 2013, an ExxonMobil pipeline released approximately 210,000 gallons of oil-sands-derived crude oil in a residential area in Mayflower, AR.[12] The classification of the material has been a subject of some dispute.[13] ExxonMobil provided a Material Safety Data Sheet to the Pipeline and Hazardous Materials Safety Administration listing the spilled material as "Wabasca Heavy Crude Oil."[14] Crude Quality Inc. categorizes this material as diluted bitumen or dilbit (i.e., oil-sands-derived crude oil).[15]

Oil Sands—Background

The terms "oil sands" and "tar sands" are often used interchangeably to describe a particular type of nonconventional oil deposit that is found throughout the world in varying quantities.[16] Opponents of the resource's development often use the term "tar sands," which arguably carries a negative connotation. Proponents typically refer to the material as oil sands. Some federal government resources refer to the deposits as "tar sands," some use "oil sands," and some have used both terms. In its documents evaluating the Keystone XL pipeline, the Department of State refers to the material as oil sands. EPA has followed suit in its letters to the Department of State concerning the pipeline's environmental impacts. In general, this report uses the term "oil sands" to describe the deposits in the ground and "oil-sands-derived crude oil" to describe the material imported into the United States. The use of this term is not intended to reflect a point of view but to adopt the term most commonly used by the primary executive agencies involved in recent oil sands policy issues.

---

[6] See National Transportation Safety Board (NTSB), *Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release- Marshall, Michigan, July 25, 2010*, July 2012, http://www.ntsb.gov/; the Enbridge response website "Frequently Asked Questions," http://www.response.enbridgeus.com; and NRDC et al., *Tar Sands Pipelines Safety Risks*, 2011 (citing a conference call with Enbridge CEO), http://www.nrdc.org.

[7] For more up-to-date information, see EPA's Enbridge oil spill website at https://www.epa.gov/enbridge-spill-michigan.

[8] NTSB, *Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release- Marshall, Michigan, July 25, 2010*, July 2012, http://www.ntsb.gov/.

[9] See Enbridge Inc., Third Quarter Financial Report, 2016.

[10] NTSB, *Accident Report*.

[11] Available at https://www.epa.gov/enbridge-spill-michigan.

[12] Mayflower Incident Unified Command Joint Information Center, Cleanup Operations Update, April 16, 2013, http://www.epa.gov/region6/newsevents/index.html.

[13] See, for example, letter from Richard Byrne (ExxonMobil) to Edwin Quinones (EPA), April 10, 2013.

[14] See http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/ExxonMobil_MSDS_Sheet_for_Wabasca_Crude_Oil.pdf.

[15] Canadian Crude Quick Reference Guide, http://www.crudemonitor.ca/tools/Quick_Reference_Guide.pdf.

[16] By far, the largest proven reserve is in Alberta, Canada, but estimates indicate the resource is also located in several U.S. states, particularly Utah. For more information, see CRS Report R42611, *Oil Sands and the Keystone XL Pipeline: Background and Selected Environmental Issues*, coordinated by Jonathan L. Ramseur.

These terms generally refer to a mixture of sand, clay and other minerals, water, and bitumen. The bitumen component of this mixture is a form of crude oil that has undergone degradation over millions of years. After oil producers separate the bitumen from the mixture, it is very dense and highly viscous (i.e., resistant to flow), having the consistency of molasses at room temperature.[17] This property lends itself well to making asphalt: Bitumen deposits have been mined since antiquity for use as sealants and paving materials.[18]

In recent decades, the natural bitumen in oil sands—particularly deposits in Alberta, Canada—has been extracted to generate substantial quantities of crude oil and related substances. The Alberta deposits are estimated to be one of the largest accumulations of oil in the world, contributing to Canada's third-place ranking for estimated proven oil reserves (behind Venezuela and Saudi Arabia).[19] Canadian production of oil-sands-derived crude oil has increased dramatically in recent years. If approved and constructed, the Keystone XL pipeline would add to existing cross-border pipelines in transporting oil-sands-derived crude oils from Alberta into the United States.[20]

Companies developing Alberta's oil sands resources process or dilute the natural bitumen in order to transport it via pipeline.[21] This processed/diluted bitumen falls into three general categories:

1. **Upgraded bitumen, or synthetic crude oil (SCO)** is produced from bitumen at a refinery that turns the very heavy hydrocarbons into a lighter material.
2. **Diluted bitumen (Dilbit)** is bitumen that is blended with lighter hydrocarbons—typically natural gas condensates—to create a lighter, less viscous, and more easily transportable material. Dilbit may be blended as 25% to 30% condensate and 70% to 75% bitumen.
3. **Synthetic bitumen (Synbit)** is typically a combination of bitumen and SCO. Blending the lighter SCO with the heavier bitumen results in a product that more closely resembles conventional crude oil. Typically the ratio is 50% synthetic crude and 50% bitumen, but blends—and their resulting properties—may vary significantly.

Crude oil imports from Canada accounted for the largest percentage (43%) of imports by nation (based on 2015 data).[22] In 2005, the United States imported approximately 217 million barrels of

[17] Bitumen viscosity is related to temperature. When heated to 50° C (approximately 112° F), bitumen's viscosity decreases dramatically (by 100-fold) and its flow resembles that of a heavy crude oil (P. Gosselin et al., *Environmental and Health Impacts of Canada's Oil Sands Industry*, The Royal Society of Canada, Expert Panel Report, Ottawa, Ontario, December 15, 2010). Conversely, at 10° C (approximately 50° F) bitumen has the hardness of a hockey puck (Canadian Association of Petroleum Producers, *The Facts on Oil Sands*, April 2012, http://www.capp.ca).

[18] E. D. Attanasi et al., *Natural Bitumen and Extra-Heavy Oil, World Energy Council, 2010 Survey of Energy Resources*, 2010, http://energy.usgs.gov/portals/0/Rooms/economics/text/WEC10NBEHO.pdf.

[19] EIA, "International Energy Statistics," http://www.eia.gov/.

[20] See CRS Report R43787, *Keystone XL Pipeline: Overview and Recent Developments*, by Paul W. Parfomak et al.; and CRS Report R42611, *Oil Sands and the Keystone XL Pipeline: Background and Selected Environmental Issues*, coordinated by Jonathan L. Ramseur.

[21] The vast majority of oil-sands-derived crude oils is transported via pipeline. However, crude oil rail imports from Canada have increased dramatically since 2012. See data from Canada's National Energy Board, at http://www.neb-one.gc.ca/nrg/sttstc/crdlndptrlmprdct/stt/2014/cndncrdlxprtsrl-eng.html. For further discussion, see CRS Report R43390, *U.S. Rail Transportation of Crude Oil: Background and Issues for Congress*, by John Frittelli et al.

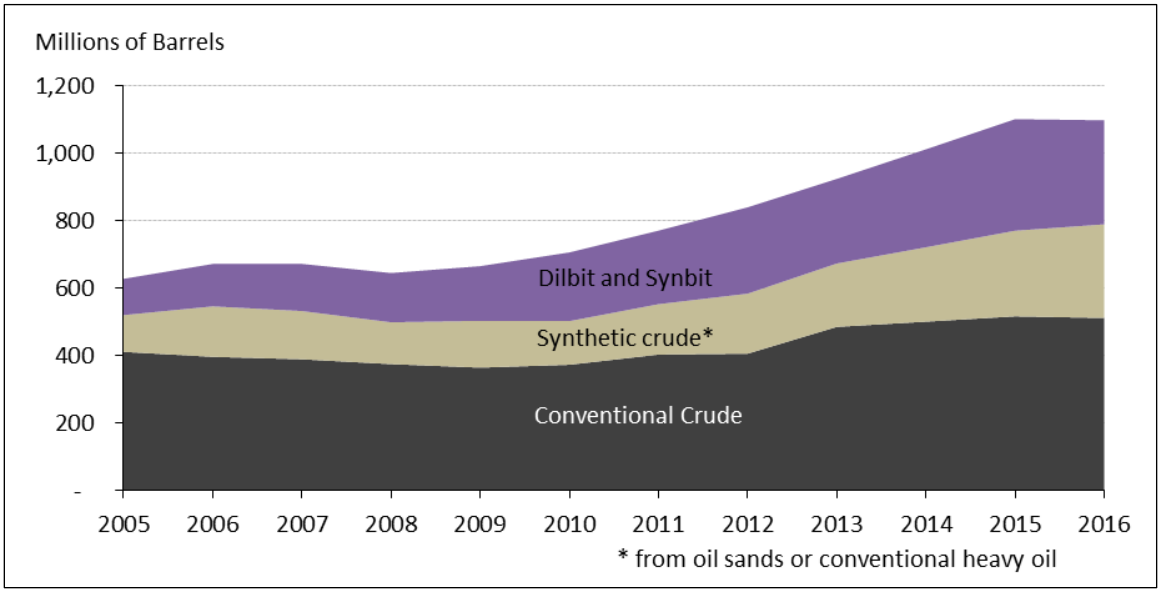
[22] Saudi Arabia is second with 14%. See EIA, U.S. Imports by Country of Origin, http://www.eia.gov.

oil-sands-derived crude oils from Canada. In 2015, that figure increased to 587 million barrels,[23] accounting for approximately 22% of crude oil imports from all nations.[24]

Figure 1 illustrates the proportions of crude oil types that Canada has exported to the United States in recent years. The figure indicates that "blended bitumen" exports, which include both Dilbit and Synbit, have more than tripled since 2005. They are also expected to constitute most of the growth in oil sands production in the foreseeable future.[25]

Figure 1. U.S. Imports of Canadian Crude Oil by Type

2005-2016



Source: Prepared by CRS; data from Canada's National Energy Board, http://www.neb-one.gc.ca/nrg/sttstc/crdlndptrlmprdct/index-eng.html. The 2016 data are based on an average of barrels-per-day data from the first three quarters in 2016.

Notes: Conventional crude includes conventional light, medium, and heavy crude oil. Synthetic Crude Oil includes crude oil produced from both oil sands and conventional heavy oil. According to Canada's National Energy Board, approximately 90% of the synthetic crude oil comes from oil sands (personal communication June 14, 2013).

[23] Data from Canada's National Energy Board. These figures include imports of both "blended bitumen" (which includes Dilbit and Synbit in the figure above) and "synthetic crude oil," the vast majority of which is produced from oil sands.

[24] CRS calculation based on data from EIA, "U.S. Imports by Country of Origin," http://www.eia.gov/. Oil Sands data from Canada's National Energy Board.

[25] Canadian Association of Petroleum Producers, *Crude Oil: Forecast, Markets & Transportation*, 2016, http://www.capp.ca.

Oil Spill Liability Trust Fund

Prior to the Oil Pollution Act of 1990 (OPA),[26] federal funding for oil spill response was generally considered inadequate,[27] and damages recovery was difficult for parties affected by oil spills.[28] The 1989 *Exxon Valdez* oil spill highlighted many of these concerns. To help address these issues, Congress established the Oil Spill Liability Trust Fund (OSLTF). Although Congress created the OSLTF in 1986,[29] Congress did not authorize its use or provide its funding until after the 1989 *Exxon Valdez* oil spill. In 1990, OPA provided the statutory authorization necessary to put the fund in motion.[30] Executive Order 12777 (signed October 18, 1991) authorized the Coast Guard to create the National Pollution Funds Center (NPFC) to manage the trust fund.

Uses of the Fund

Pursuant to OPA Section 1012,[31] the trust fund may be used for several specific purposes:

- Payment of removal costs, including monitoring removal actions, by federal authorities or state officials;
- Payment of the costs incurred by the federal and state trustees of natural resources for assessing the injuries to natural resources caused by an oil spill and developing and implementing the plans to restore or replace the injured natural resources;
- Payment of removal costs related to a discharge from a foreign offshore unit;
- Payment of parties' claims for uncompensated removal costs and for uncompensated damages;[32]
- Payment of federal administrative and operational costs, including research and development;[33] and
- Payment of loans to provide interim assistance to fishermen and aquaculture claimants impacted by an oil spill.

[26] P.L. 101-380, primarily codified at 33 U.S.C. §2701 et seq. OPA amended other sections of the *U.S. Code*, including the Clean Water Act (e.g., 33 U.S.C. §1321) and portions of the tax code (26 U.S.C. §4611 and §9509).

[27] See, for example, Cynthia Wilkinson et al., "Slick Work: An Analysis of the Oil Pollution Act of 1990," *Journal of Energy, Natural Resources, and Environmental Law*, vol. 12 (1992), p. 188.

[28] U.S. Congress, House Committee on Merchant Marine and Fisheries, report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 35.

[29] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

[30] Pursuant to OPA authorization, Congress transferred monies from other federal liability funds into the OSLTF, including the CWA Section 311(k) revolving fund, the Deepwater Port Liability Fund, the Trans-Alaska Pipeline Liability Fund, and the Offshore Oil Pollution Compensation Fund. According to the trust fund managers (the National Pollution Funds Center), no additional funds remain to be transferred to the OSLTF. National Pollution Funds Center, *Oil Spill Liability Trust Fund (OSLTF) Annual Report FY 2004–FY 2008*.

[31] 33 U.S.C. §2712.

[32] Damages are defined as those listed in 33 U.S.C. §2702(b), including personal property loss and loss of profits and earning capacity.

[33] These payment authorities have further limitations. For example, oil spill research and development is authorized at $27.5 million per fiscal year.

The above funding authorities from the OSLTF are subject to appropriations, with several exceptions.[34] Two exceptions stand out: First, the NPFC has immediate access to $50 million each fiscal year for removal activities and natural resource damage assessment.[35] Although not described as such in the statute, the NPFC refers to this funding as the "Emergency Fund."[36] Second, the NPFC's payments of claims for removal costs or economic and natural resource damages are not subject to appropriations. However, the NPFC is limited in the total amount of payments—removal costs and natural resource and economic damages—that may be awarded for each incident.[37] Under current law, the per-incident cap is $1 billion.[38]

Sources of Fund Revenue

Although it created the OSLTF in 1986,[39] Congress did not authorize its use or provide its funding until after the 1989 *Exxon Valdez* incident. OPA provided the statutory authorization necessary to put the fund in motion. Through OPA, Congress transferred balances from other federal liability funds[40] into the OSLTF. In other legislation, Congress imposed a 5-cent-per-barrel tax on domestic and imported oil to support the fund.[41] This tax expired on December 31, 1994. However, in April 2006, the tax resumed as required by the Energy Policy Act of 2005 (P.L. 109-58). In addition, the Emergency Economic Stabilization Act of 2008 (P.L. 110-343) increased the tax rate to 8 cents through 2016. At the start of 2017, the rate increased to 9 cents. The tax is scheduled to terminate at the end of 2017.[42]

Figure 2 illustrates the receipts, expenditures, and balances of the OSLTF over time. The figure indicates that during the years the per-barrel tax was imposed, the tax was a primary source of revenue for the trust fund. For example, the per-barrel oil tax has provided approximately $499 million per year in the last four fiscal years.

As **Figure 2** indicates, the "other receipts" category has contributed a substantial portion of revenues in recent years, the vast majority stemming from the 2010 *Deepwater Horizon* oil spill. Other receipts include earned interest on the unexpended trust fund balance, fees from fines and penalties, and cost recovery from responsible parties. The trust fund will receive additional revenues related to that incident, particularly from Clean Water Act (CWA) civil penalties on BP.[43]

---

[34] 33 U.S.C. §2752.

[35] The Coast Guard may obtain an advance (not to exceed an additional $100 million) from the OSLTF. During the *Deepwater Horizon* incident, Congress enacted P.L. 111-191, which allowed for further advances (up to the $1 billion per-incident cap).

[36] See NPFC website at http://www.uscg.mil/npfc/About_NPFC/osltf.asp.

[37] "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. 33 U.S.C. §2701(14).

[38] 26 U.S.C. §9509(c).

[39] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

[40] The CWA Section 311(k) revolving fund, the Deepwater Port Liability Fund, the Trans-Alaska Pipeline Liability Fund, and the Offshore Oil Pollution Compensation Fund.

[41] Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239). Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected.

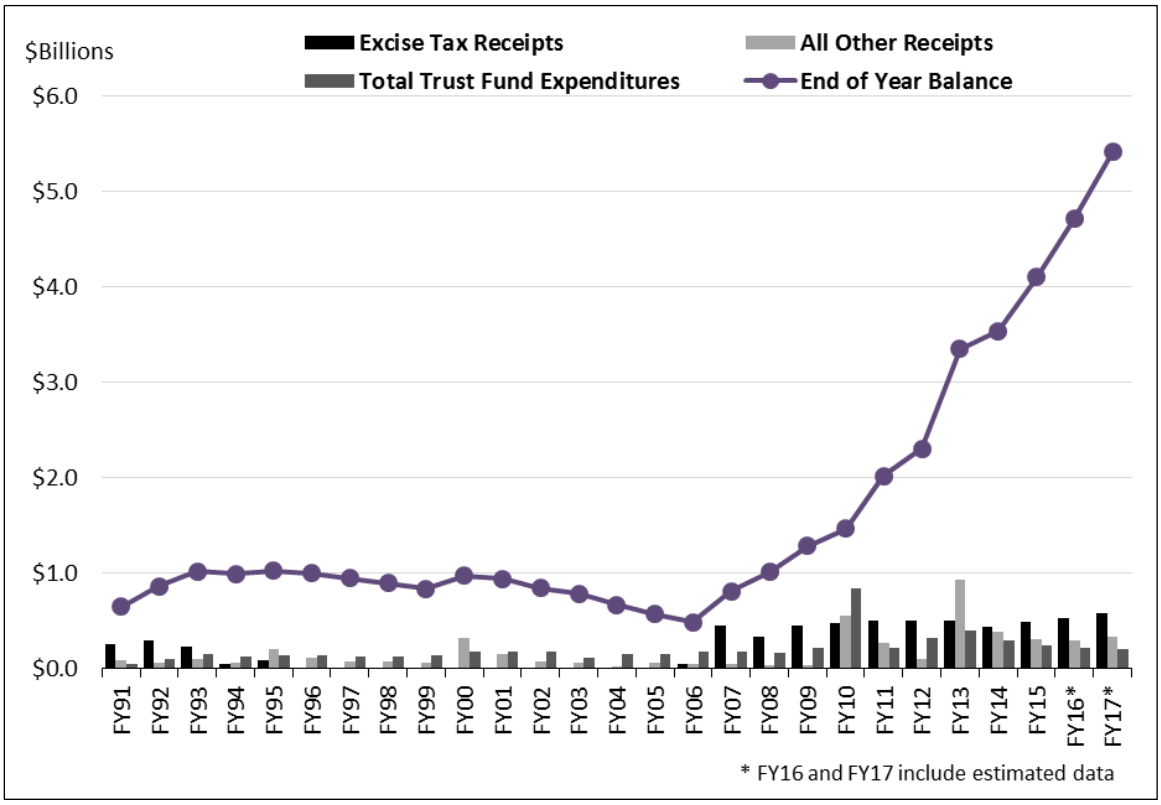
[42] P.L. 110-343, §405.

[43] See CRS Report R43380, *Gulf Coast Restoration: RESTORE Act and Related Efforts*, by Charles V. Stern, Pervaze A. Sheikh, and Jonathan L. Ramseur.

In April 2016, a federal court approved a settlement that involved several claims and penalties between BP and the United States and the Gulf of Mexico states impacted by the oil spill.[44] One component of the settlement involves CWA civil penalties. BP is scheduled to pay $5.5 billion in CWA penalties, of which 20% will be deposited into the OSLTF.[45] Per the settlement, BP will make annual payments between 2017 and 2031, depositing approximately $75 million each year into the trust fund.

Figure 2. Oil Spill Liability Trust Fund

Receipts, Expenditures, and End-of-Year Balances



Source: Prepared by CRS; data from annual Office of Management and Budget, *Budget of the United States Government*, Appendices.

Notes: The initial gap between the end-of-year balance (line) and the receipts-expenditures columns is due to the FY1991 starting balance of $358 million. The relative increases in "other receipts" in 1995 and 2000 are due to transfers from the Trans-Alaska pipeline fund of $119 million and $182 million, respectively. The increases in expenditures and "other receipts" between 2010 and 2013 are related to the 2010 *Deepwater Horizon* oil spill.

Does the Trust Fund Have a Ceiling?

Until 2008, the OSLTF tax provisions (26 U.S.C. §4611) included a mechanism that would suspend the per-barrel oil tax—the fund's primary source of revenue—if the fund's balance reached certain thresholds. This mechanism has been generally described as a "ceiling" for the OSLTF. Although this provision did not set a hard ceiling on the amount of revenue allotted to the fund, the provision had a similar effect.

[44] See https://www.justice.gov/enrd/deepwater-horizon.

[45] See CRS In Focus IF10255, *Deepwater Horizon Oil Spill: Gulf Coast Restoration Efforts*, by Charles V. Stern et al.

When Congress established the OSLTF in 1986, the statutory language included a provision to terminate the per-barrel oil tax if the tax revenue exceeded $300 million. However, this language was never put into practice. The OSLTF was effectively dormant until Congress passed OPA in 1990 and complementary tax legislation in 1989. Per the 1989 legislation (the Omnibus Budget Reconciliation Act of 1989; P.L. 101-239), Congress amended the "ceiling" provisions. The per-barrel tax would be suspended in any calendar quarter if the fund balance reached $1 billion, restarting again if it dipped below that number. In the Energy Policy Act of 2005 (P.L. 109-58), Congress raised this threshold from $1 billion to $2.7 billion.

The "ceiling" was eliminated in 2008. The Emergency Economic Stabilization Act of 2008 (P.L. 110-343; EESA) repealed the requirement that the tax be suspended if the unobligated balance of the fund exceeded $2.7 billion. In a report from the Senate Committee on Finance (S.Rept. 110-228), which discussed a provision similar to the repealing language of EESA, the committee stated that this change would simplify the administration of the tax.

Scope of Taxed Oil vs. Scope of Spilled Oil

"Oil" has different meanings in different legal or statutory contexts. For example, "oil" in the context of OPA and OSLTF response authority has a different meaning than "oil" in the context of the Internal Revenue Code (IRC) that established a per-barrel tax to help finance the OSLTF. This difference has generated considerable interest from policymakers in recent months.

Oil in the Context of the Internal Revenue Code

The statutory provisions that cover the per-barrel oil tax that helps fund the OSLTF are codified in the IRC (Title 26 of the *U.S. Code*). Section 4611(a) imposes a per-barrel tax on

- "crude oil received at a United States refinery;" and
- "petroleum products entered into the United States for consumption, use, or warehousing."[46]

Section 4612 includes definitions for "crude oil," "petroleum products," and "domestic crude oil" for the purposes of the applicability of the per-barrel tax:

- "The term 'crude oil' includes crude oil condensates and natural gasoline."
- "The term 'petroleum product' includes crude oil."[47]

Sections 4611 and 4612 were first enacted with the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund Act) on December 11, 1980.[48] CERCLA established the above per-barrel tax on oil (and chemical feedstocks and imported derivatives)[49] to support the Hazardous Substance Superfund Trust Fund.[50]

[46] 26 U.S.C. §4611(a).

[47] 26 U.S.C. §4612(a).

[48] P.L. 96-510 (December 11, 1980), codified generally at 42 U.S.C. 9601-9675.

[49] 26 U.S.C. §4661.

[50] In general, CERCLA does not apply to oil, because the act excludes releases of petroleum, including crude oil and any fraction thereof, from the definition of a "hazardous substance." In addition, the taxing authority to finance the Superfund Trust Fund expired at the end of 1995. For more information, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related*

A 2011 Technical Advice Memorandum from the IRS stated that "tar sands imported into the United States are not subject to the excise tax imposed by § 4611 of the Internal Revenue Code" (i.e., the per-barrel tax that funds the OSLTF).[51] The 2011 IRS interpretation is based on language from a 1980 House Committee on Ways and Means report leading to the passage of CERCLA, which stated that "the term crude oil does not include synthetic petroleum, e.g., shale oil, liquids from coal, tar sands, or biomass, or refined oil."[52]

This committee statement is specifically cited in the IRS memorandum, supporting its conclusion that "tar sands" are not subject to the per-barrel tax. It is unclear whether the IRS means "tar sands" or "liquids from tar sands," as the committee report text suggests.

In 1985, leading up to the passage of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499; SARA), the same committee included identical statements in a House report.[53] In addition, the Senate Committee on Finance included identical text in its report during the SARA debate.[54] In 1986, Congress established the OSLTF and amended IRC Section 4611 by adding a separate tax rate that would fund the OSLTF, but the tax did not immediately take effect.[55] In 1989, Congress enacted legislation that required collections of the OSLTF tax (starting January 1, 1990).[56]

CRS searched the legislative histories of these acts and did not find further discussion concerning the scope and applicability of the per-barrel tax in Sections 4611 and 4612. However, several CRS reports written in the early 1980s indicate that certain tax code provisions were established to "subsidize synthetic fuels development at various stages of production." According to these reports, during that time period, liquid from tar sands was generally included in the "synthetic fuel" category.[57]

Oil in the Context of OPA

OPA liability and compensation provisions, including OSLTF expenditures, generally apply to a broader definition of oil.[58] In comparison to the IRC definition, the OPA definition of "oil" states:

> "[O]il" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act [42 U.S.C. 9601 et seq.].[59]

Provisions of the Act, by David M. Bearden.

[51] IRS Office of Technical Advice, *Private Letter Ruling 201120019*, January 12, 2011.

[52] H. Rept. 96-1016, Part II (June 20, 1980), p. 6.

[53] H. Rept. 99-253, Part 2 (October 28, 1985), p. 43.

[54] S. Rept. 99-73 (May 23, 1985), p. 6.

[55] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

[56] Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239).

[57] See, for example, CRS Report 83-231, *The Effects of Federal Tax Policy on the Development of Energy Resources: A Comparative Analysis of Oil/Gas and Synthetic Fuels* (available to congressional clients by request).

[58] 33 U.S.C. §2702.

[59] 33 U.S.C. §2701(23).

This first part of this definition—particularly, "oil of any kind or in any form"—comes from the CWA definition of oil.[60] The wording of that definition goes back to at least 1970.[61]

Implications of the Different Scopes

Based on the statutory definitions above and the committee report language, oil-sands-derived crude oil likely meets the OPA definition of "oil" but would not meet the definition of crude oil in the context of the OSLTF excise tax.

This difference raises several issues. Perhaps the foremost issue is one of equity. Policymakers may consider whether there is a rationale for exempting certain types of crude oils from the excise tax. On the other hand, some may contend the equity concern is overstated, considering the tax is relatively small (9 cents per barrel in 2017) compared to the recent per-barrel prices for crude oil. Although the price of crude oil fluctuates, over the past 10 years (2006-2015), the price of imported crude oil averaged about $85 per barrel (in 2015 dollars).[62]

At present, it is unclear to what degree importers of oil-sands-derived crude oils are paying the OSLTF excise tax. For example, ExxonMobil recently stated that it paid the excise tax on its oil-sands-derived crude oil that was involved in the 2013 pipeline spill in Arkansas.[63] Moreover, the IRS memorandum stated that "crude oil and/or petroleum products that are comingled with tar sands are subject to the excise tax on petroleum imposed by § 4611." This statement suggests that the bitumen component in dilbit would not be subject to the tax, while the non-bitumen component would. As mentioned above, the ratio of these components may vary: Dilbit typically includes a mixture of bitumen (70%-75%) and a non-bitumen component (25%-30%), often natural gas condensate.

Assuming most importers are not paying the OSLTF excise tax for imported oil sands, the difference in scope could lead to situations in which expenditures from the trust fund are used to clean up spilled oil that was not subject to the tax supporting the trust fund.

The OSLTF arguably plays a backup role in terms of response funding during many oil spills. Although the trust fund is available to support oil spill cleanup efforts, the responsible party for an oil spill often provides the primary source of response (i.e., cleanup) funding.[64] The federal government has the statutory authority to direct response activities, including those of the responsible party.[65] Moreover, OPA Section 1015 authorizes the Attorney General (at the request of the Secretary of Homeland Security) to recover costs or damages paid from the OSLTF.[66] Thus, the financial impact to the trust fund could be minimal if the majority of its payments are reimbursed by the responsible parties. This was the case with the 2010 *Deepwater Horizon* oil spill.

---

[60] 33 U.S.C. §1321.

[61] Water Quality Improvement Act of 1970 (P.L. 91-224).

[62] CRS calculation based on EIA imported crude oil prices in real dollars ($2015) at http://www.eia.gov/forecasts/steo/realprices/.

[63] Letter from Theresa M. Fariello (ExxonMobil) to Representative Ed Markey, May 28, 2013, http://markey.house.gov/sites/markey.house.gov/files/documents/Exxon_re_AR_OilSpill.pdf.

[64] Within the OPA liability framework (33 U.S.C. §2701 et. seq.), "responsible party" is a critical term and concept. The term has different meanings for different sources of oil spills: vessels, onshore facilities, offshore facilities, deepwater ports, and pipelines.

[65] 33 U.S.C. §1321(c).

[66] 33 U.S.C. §2715(c).

However, OPA provides liability limits (or caps) for responsible parties.[67] These limits vary by oil spill source. For example, onshore facilities, including pipelines, have a liability limit for response costs and applicable damages (e.g., natural resource damages and specific economic damages). The Coast Guard issued a final rule in November 2015 that increased this limit from $350 million to $634 million.[68]

Liability limits may be an issue at the Enbridge pipeline spill in Michigan. As noted above, Enbridge recently estimated that the company's response costs could reach approximately $1.2 billion, well above the liability limit for an onshore facility. OPA allows responsible parties to seek reimbursement from the trust fund if a party's response costs and damages exceed its liability limit.[69]

However, the limits are conditional. First, the liability limits do not apply to situations involving acts of gross negligence or willful misconduct. Second, liability limits do not apply if the violation of a federal safety, construction, or operating requirement proximately caused the spill. Third, parties must report the incident and cooperate with response officials to maintain their liability caps.

Therefore, if a party's liability limit remains valid, the OSLTF could effectively pay—up to a per-incident cap of $1 billion—for response costs and applicable damages above a responsible party's liability limit.

Estimated Tax Revenues

Table 1 lists the annual revenues the OSLTF excise tax has generated since FY2010. Over the last five fiscal years, this tax has generated, on average, $493 million per year.[70] If Congress were to amend the underlying IRC (26 U.S.C. §§4611-4612) to explicitly include oil-sands-derived crude oils, the tax revenue supporting the OSLTF would likely increase. Among other things, the level of the increase would depend upon the degree to which importers of oil sands crude oil are currently paying the excise tax. As mentioned above, it is uncertain whether importers of oil sands crude oils are taking advantage of the exemption.

Table 1 provides an estimate of the amount of additional revenue that could be obtained by subjecting oil-sands-derived crude oil to the excise tax. The below estimate assumes that 100% of the imports of Canadian oil sands crude oils are currently not contributing to the excise tax.

Table 1. OSLTF Excise Tax Revenues and Oil Sands Crude Oil Imports from Canada

FY2010-FY2016

	2010	2011	2012	2013	2014	2015	2016
Excise tax revenues ($ millions)	476	501	497	504	436	496	530

[67] 33 U.S.C. §2704.

[68] U.S. Coast Guard, "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels, Deepwater Ports and Onshore Facilities" 80 *Federal Register* 72342, November 19, 2015.

[69] 33 U.S.C. §2708.

[70] Calculation from CRS, using data from the annual U.S. budget appendices.

	2010	2011	2012	2013	2014	2015	2016
Estimates of additional excise tax revenues from Canadian exports of oil-sands-derived crude oil ($ millions)	27	29	35	34	41	47	47
Assuming that 100% of the imports of Canadian oil sands crude oils are currently not contributing to the excise tax							

Source: Prepared by CRS. Actual excise tax revenues from annual Office of Management and Budget, *Budget of the United States Government*, Appendices. Estimates of revenues from Canadian exports of oil sands materials based on export data from Canada's National Energy Board available at http://www.neb-one.gc.ca/clf-nsi/rnrgynfmtn/sttstc/crdlndptrlmprdct/stmtdcndncrdlxprttpdstn-eng.html. The 2016 data are based on an average of barrels-per-day data from the first three quarters in 2016.

Note: In this table, oil-sands-derived crude oil includes material classified by the National Energy Board as "blended bitumen" and "synthetic crude oil." Synthetic crude oil includes crude oil produced from both oil sands deposits and conventional heavy oil. According to Canada's National Energy Board, approximately 90% of the synthetic crude oil comes from oil sands (personal communication, June 14, 2013). Therefore, the above figures may be somewhat overestimated.

The Congressional Budget Office (CBO) estimated the additional revenue that would be received if S. 953 (113th Congress) were enacted. Section 5 of S. 953 would permanently extend the per-barrel financing rate and amend the definition of crude oil to include "any bitumen or bituminous mixture, and any oil derived from a bitumen or bituminous mixture." CBO estimated that this provision would generate $475 million of additional revenue, in aggregate, between 2013 and 2018.[71]

In addition, in the Obama Administration's FY2017 budget, the President proposed (1) to include in the OSLTF tax base "other sources of crudes such as those produced from bituminous deposits as well as kerogen-rich rock," and (2) to increase the tax rate to 10 cents per barrel starting in 2017.[72] The budget appendix estimates that this change would provide $127 million in additional revenue to the OSLTF in FY2017.[73]

Additional OSLTF Tax Scope Issues

Other issues may arise that relate to the scope of oil covered by the OSTLF excise tax. These issues are discussed below.

Crude Produced from a Well

Another OSLTF excise tax issue that could potentially arise was not considered in the IRS memorandum. In addition to the tax that applies to "crude oil" received at the refinery and imported "petroleum products" (which include crude oil), IRC Section 4611(b) imposes a tax if

> (A) any domestic crude oil is used in or exported from the United States, and (B) before such use or exportation, no tax was imposed on such crude oil [i.e., at the refinery].

Section 4612 includes a specific definition for "domestic crude oil," which states:

[71] Congressional Budget Office, *Estimate of the Budgetary Effects of, the Student Loan Affordability Act, as introduced in the Senate on May 14, 2013*, May 23, 2013, http://www.cbo.gov/sites/default/files/cbofiles/attachments/s953.pdf.

[72] OMB, *Budget of the United States Government, Fiscal Year 2017*, Analytical Perspectives, p. 189.

[73] Ibid., Appendix, Department of Homeland Security, p. 517.

> any crude oil produced *from a well* located in the United States (emphasis added).

The phrase "from a well" could be important at some juncture. This phrase is neither defined in Sections 4611 or 4612 nor discussed in congressional committee report language. Some may argue that this phrase would limit the scope of the tax on "domestic crude oil." Proposed projects to extract oil sands at several Utah locations would involve mining processes.[74] Currently, about 50% of the Alberta oil sands deposits are extracted through mining processes, and 50% are extracted with in situ operations.[75]

This issue may gain attention if Congress were to amend the clarifying statements concerning "crude oil" from the 1980 and 1986 committee report language. For instance, if the definition of "crude oil" in Section 4612 were modified to include tar/oil sands and/or liquids derived from tar/oil sands, such material from Canada would likely be subject to the tax in IRC Section 4611(a). In contrast, some might argue that "domestic crude oil" that is (1) extracted through mining techniques, and (2) used or exported (i.e., not sent to a U.S. refinery) would not meet the applicability of the tax in IRC Section 4611(b). Such a scenario could involve trade complications with Canada, an issue beyond the scope of this report. S. 953 would address this issue by amending Section 4611 to strike the phrase "from a well located."

Shale Oil ("Tight Oil")

The 1980 House committee report, upon which the IRS based its 2011 memorandum, lists other materials that would not be considered crude oil within the context of OSLTF excise tax provisions. For the reader's sake, the relevant statement is repeated: "the term crude oil does not include synthetic petroleum, e.g., shale oil, liquids from coal, tar sands, or biomass, or refined oil."[76]

Policymakers may be particularly interested in the inclusion of "shale oil" in the above list of examples. Shale oil or "tight oil" refers to crude oil trapped in particular geologic formations. In contrast, "oil shale" is a fine-grained sedimentary rock that contains kerogen. Kerogen is solid, insoluble organic matter that results from deposits of organic matter, such as those that eventually form crude oil. There are known deposits of both shale oil and oil shale in the United States. Significant and growing quantities of shale/tight oil are currently being produced. U.S. oil shale deposits, however, are not currently produced at commercial scale.

The EIA and industry stakeholders appear to be expressing a preference for the term "tight oil" instead of shale oil, because this material may be found in non-shale rock formations. Whether it is trapped in shale, dolomite, or dense sandstone, tight oil is being produced with similar processes, including horizontal drilling and hydraulic fracturing. Advances in these technologies in recent years have enabled rapid growth in tight oil (and natural gas) production. According to estimates, U.S. tight oil production surpassed 4.8 million barrels per day at the end of 2015, accounting for more than 50% of domestic crude oil production.[77]

---

[74] For more information on the status of these efforts, see the company's website at http://www.usoilsandsinc.com.

[75] Other deposits are extracted through processes that more closely resemble conventional crude oil well extraction. These include one of three in situ methods: primary production, cyclic steam stimulation (CSS), and steam-assisted gravity drainage, which accounts for the greatest percentage of in situ recovery and is the preferred method of recovery for most new projects. See CRS Report R42611, *Oil Sands and the Keystone XL Pipeline: Background and Selected Environmental Issues*, coordinated by Jonathan L. Ramseur.

[76] H. Rept. 96-1016, Part II (June 20, 1980), p. 6.

[77] EIA, *Annual Energy Outlook 2017*, Table 14, http://www.eia.gov/outlooks/aeo/tables_ref.cfm.

In 2014, the IRS issued a memorandum that addresses tight oil from the Bakken formation. The IRS concluded that the oil extracted from the Bakken is subject to the per-barrel tax.[78] The IRS memorandum highlighted the term "synthetic petroleum" from the 1980 House report discussed above. The IRS stated:

> Bakken tight oil is not synthetic petroleum, nor does it require upgrading before being refined. Bakken tight oil is crude oil that is usable by refineries immediately upon extraction. It is clear that Bakken tight oil is not the type of product that the legislative history to §§ 4611 and 4612 indicates should be exempt from tax.

Legislative Activities

As of the date of this report, Members in the 115th Congress have not proposed legislation addressing this issue. Members offered several proposals in prior Congresses, as discussed below.

114th Congress

Several Members proposed legislation that would have specifically included oil-sands-derived crude oils within the scope of the per-barrel tax. These bills are listed below in chronological order by their date of introduction:

- H.R. 214 (Blumenauer, introduced January 8, 2015), the Tar Sands Tax Loophole Elimination Act.
- S. 187 (Markey, introduced January 16, 2015), the Tar Sands Tax Loophole Elimination Act.
- H.R. 1930 (Ellison, introduced April 22, 2015), the End Polluter Welfare Act of 2015.
- S. 1041 (Sanders, introduced April 22, 2015), the End Polluter Welfare Act of 2015.
- H.R. 2768 (Blumenauer, introduced June 15, 2015), the Superfund Reinvestment Act.
- S. 2400 (Booker, introduced December 14, 2015), the Superfund Polluter Pays Restoration Act of 2015.

In addition, several Members offered OSLTF amendments (e.g., S.Amdt. 25, S.Amdt. 27, S.Amdt. 38, and S.Amdt. 50) to the Keystone XL Pipeline Act (S. 1), which would have authorized the construction and operation of the Keystone XL pipeline. S. 1 passed the Senate (January 29, 2015) and the House (February 11, 2015), but President Obama vetoed the legislation (February 24, 2015). A vote to overturn the veto failed in the Senate (March 4, 2015).

113th Congress

Several Members in the 113th Congress proposed legislation that would have specifically included oil-sands-derived crude oils within the scope of the per-barrel tax. These bills are listed below in chronological order by their date of introduction:

- S. 268 (Levin, introduced February 11, 2013).

[78] IRS, memorandum from Beker to Valdespino, June 23, 2014, https://www.irs.gov/pub/lanoa/PMTA-2014-10.pdf.

- H.R. 786 (Markey, introduced February 15, 2013), the Tar Sands Tax Loophole Elimination Act.
- S. 953 (Reed, introduced May 14, 2013), the Student Loan Affordability Act.

Concluding Observations

The different definitions of "oil" in two distinct but related contexts may create situations in which expenditures from the OSLTF are used to address discharges of "oil" that were not subject to the tax supporting the cleanup fund. As noted above, such a scenario may not substantially impact the OSLTF unless the federal government were unable to recover the trust fund's costs from a responsible party (or parties). Regardless, the different definitions raise a potential equity concern.

The IRS interpretation of the definition of "crude oil" is based on a statement from a committee report from 1980 that was repeated in 1986. At that time, U.S. deposits of oil sands were known but not extracted on a commercial scale for energy purposes. This remains the case today, although some parties are expected to begin operations to extract deposits in Utah.

Canadian oil sands accounted for a relatively minor proportion of Canadian crude oil production (0.6%) in 1980.[79] However, Canadian oil sands production has steadily increased since that time. Moreover, the 1980 committee report specifically exempted "synthetic petroleum, e.g., shale oil, liquids from coal, tar sands" from the definition of "crude oil." At that time, virtually all Canadian oil sands production involved mining operations that subsequently upgraded the bitumen to "synthetic crude oil" before transporting it to the United States. In more recent years, Canadian production of oil sands has included in situ operations that have predominantly employed the process of blending the bitumen with diluents to facilitate transport. Some may assert that blended bitumen would not be considered "synthetic petroleum," but others may argue that blended bitumen would still be considered "liquids from tar sands." Further, some Canadian mining operations have also begun to blend bitumen for transport as opposed to upgrading.

Policymakers may choose to reexamine the rationale for excluding particular materials from the definition of "crude oil" in the context of the IRC. The tax code's definition of "domestic crude oil" may also be subject to reassessment if U.S. oil sands resources become commercially viable for energy purposes.

Author Information

Jonathan L. Ramseur
Specialist in Environmental Policy

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and

[79] Canadian Association of Petroleum Producers, http://www.capp.ca/.

under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.