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ANALYSIS: THE OIL POLLUTION ACT OF 1990

MICHAEL ATKINS*

Introduction

In March 1968, crude oil was discovered on Alaska's North Slope. The field, at Prudhoe Bay on the Beaufort Sea, was estimated to contain 9.7 billion barrels' worth of the fossil fuel.¹ In July 1977, one of those barrels emerged at a terminal in Valdez, on the opposite end of America's largest state, having flowed southward for 38 days through an 800-mile-long, 48-inch-diameter pipeline that took two years to construct.² That barrel was followed by many more. Soon, the sleepy port town of Valdez was bustling with massive oil tankers, which maneuvered around the islands of Prince William Sound, negotiated through the Valdez Narrows, filled their tanks with the coveted commodity, and then navigated along carefully plotted tracklines back south, onward to refineries in warmer climes. Late in the evening on March 23, 1989, one of these ships topped off its tanks, cast off its mooring lines, cleared its berth at the Valdez terminal, and set sail for the southern California port of Long Beach. The *Exxon Valdez* was a colossal structure, a so-called supertanker, measuring 987 feet long and 166 feet wide, powered by a 31,000-horsepower main engine and boasting a

* Juris Doctor, Notre Dame Law School, 2022. I am grateful to Prof. Bruce Huber for his guidance and instruction throughout this research. Special thanks also to the ONE J staff for the thoughtful edits and insights.

1. See Wallace Turner, *The Man Who Built Alyeska*, N.Y. TIMES (Jun. 26, 1977), <https://www.nytimes.com/1977/06/26/archives/spotlight-the-man-who-built-alyeska.html>.

2. See ANDREW INKPEN & MICHAEL H. MOFFETT, *THE GLOBAL OIL & GAS INDUSTRY: MANAGEMENT, STRATEGY AND FINANCE* 409 (2011).

deadweight capacity of 214,861 tons.³ When delivered in 1986, it was the largest ship ever built on the west coast of the United States. Around midnight, the ship had cleared the Narrows, and Captain Joseph Hazelwood, a good sailor with a bad drinking problem, took the conn from the state-licensed harbor pilot. Hazelwood radioed the Coast Guard, requesting and receiving permission to cross over to the inbound shipping lane to avoid icy conditions along the outbound track. This diversion was a standard move, but it put the *Exxon Valdez* in the path of an underwater reef off Bligh Island, necessitating an abrupt change in course around Busby Island, north of the reef. Two minutes before the required turn, Hazelwood inexplicably left the navigation bridge, descending to his stateroom below and leaving the helm to an inexperienced and overworked third mate. The turn was missed. The ship struck the reef. Eight of its 11 cargo tanks ruptured, spilling 258,000 barrels of Alaskan North Slope crude oil into the pristine waters of Prince William Sound.⁴

The grounding of the *Exxon Valdez* is still regarded as the worst oil spill ever from a ship. Westerly currents carried much of the 11 million gallons of unrefined petroleum onto the coasts of Kenai Peninsula, Cook Inlet, and Kodiak Island, soiling 1,300 miles of shoreline.⁵ Effects on fishing, both commercial and subsistence, as well as local businesses ashore, ranged from disruptive to devastating. An estimated 250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, and 22 killer whales died, along with an untold number of salmon and herring eggs.⁶ Thousands mobilized for the herculean task of cleaning up the mess. Controversies emerged over chemical dispersants and corporate obfuscations. Finger-pointing and blame-shifting spread as perniciously as an oil slick in water, keeping a frenzied media well-fed. Hazelwood proved a serviceable villain. An official inquiry revealed two drunken driving arrests on his record, including one in New Hampshire just six months before the accident in Valdez.⁷ He had completed a month-long alcohol treatment program while at Exxon but had stopped attending Alcoholics Anonymous meetings. Internal medical records, dated 1985, revealed he was “depressed and

3. See NAT'L TRANSP. SAFETY BD. (NTSB), MARINE ACCIDENT REPORT NO. NTSB/MAR-90/04, at 15-24 (Jul. 31, 1990).

4. See *id.* at 28.

5. In re *Exxon Valdez*, 236 F. Supp. 2d 1043, 1047 (D. Alaska 2002), *vacated and remanded* (Aug. 18, 2003).

6. *Exxon Valdez*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://darrp.noaa.gov/oil-spills/exxon-valdez> (last visited May 12, 2022).

7. NTSB, *supra* note 3, at 31-33.

demoralized” and had taken to “drinking excessively, episodically, which resulted in familial and vocational dysfunction.”⁸ At a trial, witnesses testified Hazelwood spent the evening hours of March 23 at the waterfront bars in Valdez, consuming at least five double vodkas before taking command of the ship.⁹ Hazelwood’s penchant for alcohol, however, was only part of the story. A National Transportation Safety Board (NTSB) investigation ultimately found a litany of probable causes:

[T]he failure of the third mate to properly maneuver the vessel because of fatigue and excessive workload; the failure of the master to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the [ship]; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and the lack of effective pilotage services.¹⁰

The scale of this ecological disaster, the preventability of its causes, and the inadequacy of the response all captured national attention, sowing anger and frustration, and catalyzed political will in Washington. The legislation that resulted, the Oil Pollution Act of 1990 (OPA),¹¹ is the subject of this paper. Congress enacted OPA “to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry.”¹² Indeed, OPA created a comprehensive oil spill liability and compensation scheme, activated a fund for response efforts and damages in the aftermath of such an event, and imposed upon the industry a suite of rules aimed at preventing

8. *Id.*

9. Exxon Shipping Co. v. Baker, 554 US 471, 476-78 (2008); see also NTSB, *supra* note 3, at 31. Blood samples collected 11 hours after the grounding indicated a .061 blood alcohol content (BAC). Captain Hazelwood was prosecuted by the State of Alaska for operating a watercraft while intoxicated, reckless endangerment, negligent discharge of oil and three felony counts of criminal mischief. Nine years after the grounding, a single misdemeanor conviction was affirmed on appeal. See *In re Exxon Valdez*, 236 F.Supp. 2d at 1047-48. The Coast Guard suspended Hazelwood’s mariner license for nine months. See Seth Mydans, *Captain in Alaska Oil Spill Loses License for 9 Months*, N.Y. TIMES (Jul. 26, 1990), <https://www.nytimes.com/1990/07/26/us/captain-in-alaska-oil-spill-loses-license-for-9-months.html>.

10. NTSB, *supra* note 3, at v.

11. Pub. L. No. 101-380, 104 Stat. 484 (1990).

12. Rice v. Harken Expl. Co., 250 F.3d 264, 266 (5th Cir. 2001).

or mitigating damage in future oil pollution incidents. In many ways, OPA amalgamated the legal patchwork that preceded it. In others, it reached far beyond the status quo of March 1989, overcoming political partisanship to marshal needed improvements in global shipping. This paper focuses on two of OPA's nine titles: Title I, which covers liability and compensation resulting from the release of oil into U.S. waters, and Title IV, which specifies measures of prevention and removal of oil, as well as penalties for non-compliance. The effort here is expository, and apart from a nod to the bipartisanship of a bygone era, no grand arguments or cutting critiques are being advanced in these pages. The aim is simply to outline the main provisions and the case law, as well as provide an overview of the legal and regulatory framework existing before and after the *Exxon Valdez* ran aground that calm, chilly night at Prince William Sound.

The Background

The inadequacies of existing law and the risks associated with the shipment of oil by sea entered the collective consciousness in March 1967, when the *Torrey Canyon*, an American-built, Liberian-flagged tanker, struck Pollard's Rock, a reef off the coast of Cornwall, England, and spilled more than 100,000 tons of crude oil into the English Channel.¹³ The sludge fouled British and French beaches, killing thousands of sea birds, and the misadventures that followed might have been amusing in any other context. To burn off oil seeping from the wreckage, the Royal Air Force dropped 42 bombs, a quarter of which missed the target, while a contingent of French soldiers deployed to the beaches of Perros-Guirec armed with rakes and shovels.¹⁴ Less comical and more consternating was the agedness of applicable law. The Limitation of Liability Act (Limitation Act), enacted in 1851, limited a vessel owner's liability to the post-casualty value of the vessel.¹⁵ Conceived as a means "to encourage ship-building and to induce capitalists to invest money in this branch of industry," the Limitation Act was not a model of clarity, "badly drafted even by the standards of the time."¹⁶ In the case of the *Torrey Canyon*, under the Limitation Act, compensation for an \$8 million cleanup operation would have been limited

13. Bethan Bell & Mario Cacciottolo, *Torrey Canyon oil spill: The day the sea turned black*, BBC NEWS (Mar. 17, 2017), <https://www.bbc.com/news/uk-england-39223308>.

14. *Id.*

15. See 46 U.S.C. § 30505(a).

16. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 447 (2001) (quoting 2 T. Schoenbaum, *ADMIRALTY AND MARITIME LAW* 299 (2d ed. 1994)).

to \$50, the value of the ship's sole surviving lifeboat.¹⁷ By the late-twentieth century, such a scheme was particularly anachronistic, given the intervening evolution of the industry. A glance at this history underscores the point. The first modern tanker, the British-built German *Glückauf*, was launched in 1886 and rated at 2,300 gross tons.¹⁸ By the 1920s, the maximum size had reached 20,000 deadweight tons (dwt).¹⁹ For reference, the American T-2 tankers that provided underway replenishment vital to the Allied effort in World War II had a capacity of 16,500 dwt.²⁰ The post-war expansion of the global oil trade ushered in staggering increases in tanker size. In 1959, the *Universe Apollo* became the first 100,000 dwt ship. Seven years later, the *Idemitsu Maru* reached 210,000 dwt. In the 1970s, tank ships of 300,000 dwt were not uncommon.²¹ The era of the supertanker had dawned. And while the extreme growth in physical size and carrying capacity eventually plateaued,²² the state of oil spill liability law, as drawn up in the mid-1800s, was untenable.

Following the *Torrey Canyon* and a spate of other disasters,²³ Congress passed a number of environmental laws, and by 1989, no fewer than five federal statutes governed, to some degree, oil spill liability and compensation in the United States: the Clean Water Act (CWA),²⁴ a 1972 amendment of the Federal Water Pollution Control Act (FWPCA); the Outer Continental Shelf Lands Act (OCSLA),²⁵ the primary pollution provisions of which had been added in 1978; the Deepwater Port Act of 1974 (DWPA);²⁶ the Trans-Alaska Pipeline Authorization Act of 1993 (TAPAA);²⁷ and the outmoded Limitation Act. More law did not

17. Jeffrey D. Morgan, *The Oil Pollution Act of 1990*, 6 FORDHAM ENVTL. L. J. 1, 2 (1994).

18. VACLAV SMIL, *ENERGY AND CIVILIZATION: A HISTORY* 278 (2018).

19. *Id.*

20. *Id.*

21. *Id.* The world's largest tanker ever was the *Seawise Giant*, at 564,763 dwt. *Id.*

22. This happened for several reasons, including size constraints on vessels traversing the Suez and Panama canals.

23. See, e.g., Christine Mai-Duc, *The 1969 Santa Barbara oil spill that changed oil and gas exploration forever*, L.A. TIMES (May 20, 2015), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmllstory.html>.

24. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

25. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629.

26. Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126.

27. Trans-Alaska Pipeline Authorization Act of 1993, Pub. L. No. 93-153, 87 Stat. 576.

necessarily mean good law. While the CWA imposed strict liability and cleanup costs on a spiller of oil, there were distinct, dollar-amount limits to that liability unless the spill was caused by willful negligence or misconduct.²⁸ And apart from the Limitation Act, the other laws on the books were narrowly suited to particular activities or locations. A congressional report summarized: “[T]here is a fragmented collection of . . . laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries – such as legal defenses, statutes of limitation, the corporate form, and the burdens of proof that favor those responsible for the spill.”²⁹ Of note, there had been at least one prior attempt to enact a comprehensive oil pollution liability and compensation measure. During the drafting of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),³⁰ lawmakers had included oil-specific measures, but ultimately these were dropped in favor of rules for hazardous substances.³¹

Before outlining the buildup to OPA’s enactment, it is worthwhile to review the legal consequences that befell Exxon in the years that followed the grounding and spill at Prince William Sound. A necessary preface: Under the CWA, state-imposed liability for spills were not preempted, and private parties could still recover losses, but only under the principles of maritime tort law.³² To start with the ending of this two-decade drama: In 2008, a split Supreme Court held in *Exxon Shipping Co. v. Baker* that a shipowner (like Exxon) could be derivatively liable for punitive damages when a managerial employee (like Hazelwood) engaged in reckless acts (like spilling 11 million gallons of oil), but maritime common law limited those damages to the amount of compensatory damages awarded by the jury.³³ The decision arose from a consolidated civil action against Exxon and Hazelwood, brought by more than 32,000 commercial fishermen, Native Alaskans, business owners, and others. At trial, the jury had awarded \$5,000 in punitive damages against Hazelwood and \$5 billion

28. 33 U.S.C. § 1321(f)(1). An oil-carrying vessel, for example, would only be required to cover \$250,000 or \$150 per gross ton, whichever was greater. *Id.*

29. S. REP. NO. 101-94 (1989).

30. Pub. L. No. 96-510, 94 Stat. 2767.

31. Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 VILL. ENVTL. L.J. 283, 288 (1992).

32. 33 U.S.C. § 1321(o).

33. 554 U.S. 471 (2008).

against Exxon.³⁴ The Ninth Circuit remanded twice, and the award had been lowered to \$2.5 billion by the time it reached the high court. In a characteristically detailed decision by Justice Souter, the Court fashioned a common law rule that limited punitive awards in maritime cases to a 1:1 ratio with total compensatory damages, in this case, \$507.5 million. The Ninth Circuit applied the ruling on remand, compelling payment in that amount plus 5.9 percent interest that ran from the original 1996 trial judgment.³⁵

The ledger of remittances Exxon made after the grounding included: \$2.1 billion in cleanup costs; \$125 million in criminal fines and restitution for violations of the CWA and other laws; \$900 million in civil penalties for restoration of natural resources – land, water, wildlife – under a consent decree with the United States and Alaska; \$303 million in voluntary settlements with fishermen, property owners, and other claimants; \$507.5 million in compensatory damages, which represents an aggregation of 21 distinct payouts, settlements, and verdicts;³⁶ \$507.5 million in punitive damages, in accord with the Supreme Court’s 1:1 maritime common law rule; \$470 million in interest that compounded annually at 5.9 percent after 1996; and \$70 million in court costs.³⁷

Doing the math, one arrives at a very large sum – right around \$5 billion – and the above list likely fails to account for other ancillary costs incurred along the way. But to be sure, this defendant is doing just dandy. In a recent 90-day span, for reference, Exxon collected a net profit of \$2.7 billion.³⁸ Indeed, those feeling sympathy for Exxon should take the rag away from their faces, to paraphrase Bob Dylan, because now ain’t the time for tears. And, to double down on poetic allusions from the 1960s, this legal saga ended not with a bang but a whimper: In 2015, the Department of

34. For practical reasons, this paper refers simply to “Exxon” as the corporate owner of the *Exxon Valdez*. In the aftermath of the spill, Exxon rebranded its subsidiary Exxon Shipping as SeaRiver Maritime. In 1999, Exxon Corporation merged with Mobil to form ExxonMobil Corporation.

35. *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077 (9th Cir. 2009).

36. *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1047 (D. Alaska 2002), *vacated and remanded* (Aug. 18, 2003).

37. On remand, the Ninth Circuit panel determined Exxon was on the hook for its own court costs, which became a contentious point because of the size of a supersedeas security bond Exxon posted to sustain its appeals, as well as the duration of appeals. *See Exxon Valdez*, 568 F.3d at 1082 (9th Cir. 2009).

38. Christopher M. Matthews, *Big Oil Companies Recover as Prices Rebound*, THE WALL STREET JOURNAL (Apr. 30, 2021), <https://www.wsj.com/articles/chevron-returns-to-profit-as-oil-rebounds-from-pandemic-11619778764>.

Justice announced it was abandoning efforts to collect further damages by way of a reopener clause included in the consent decree referenced above. That clause, titled “Reopener for Unknown Injury,” allowed the state and federal governments to pursue, with conditions, an additional \$100 million for any unforeseen, substantial damage to populations, habitats, or species not anticipated when the parties settled in federal district court in 1991. In 2006, surveys conducted as part of a habitat restoration plan identified patches of oil in subsurface sediments and rocks on beaches within the spill zone. Of particular concern were two species – harlequin ducks and sea otters – that foraged in the beach sediment along Prince William Sound. Further research, however, revealed the animals had recovered to their pre-spill population levels.³⁹

Rewinding to March 1989, Democrats at the time were in control of both the House of Representatives and Senate, while George H.W. Bush, a Republican, was President. Bipartisanship of that era, unrecognizable by today’s standards, sustained the inertia needed to enact OPA. Even still, it took 18 months. One sticking point during congressional debates was the inclusion of a \$75 million cap on oil spill damages resulting from offshore drilling accidents.⁴⁰ A concern was that without such a cap, small, independent drillers would be effectively eliminated from the industry.⁴¹ Although smaller companies lobbied successfully for that limit, as enacted, the cap applies to drilling operations of all sizes. And while \$75 million might have seemed like a healthy amount in 1990, by the time an explosion rocked the semi-submersible rig *Deepwater Horizon*, spewing nearly 5 million barrels of oil into the Gulf of Mexico two decades later, the sum seemed rather paltry.⁴² Other areas of disagreement in Congress involved the implementation schedule for double-hull requirements for tank vessels and the absence of any preemptive effect on state liability schemes. Both issues – discussed in more detail below – had stalled earlier attempts to create a singular regulation covering all spills.

39. Press Release, U.S. Department of Justice, United States and the State of Alaska Opt Not to Recover Additional Damages from Exxon Mobil Under Reopener Provision of 1991 Exxon Valdez Oil Spill Settlement (Oct. 15, 2015), <https://www.justice.gov/opa/pr/united-states-and-state-alaska-opt-not-recover-additional-damages-exxon-mobil-under-reopener>.

40. 33 U.S.C. § 2704(a)(3).

41. Anne C. Mulkern, *How Long to Pass an Oil Spill Bill? Try 18 Months*, N.Y. TIMES (Aug. 13, 2010), <https://archive.nytimes.com/www.nytimes.com/gwire/2010/08/12/green-wire-how-long-to-pass-an-oil-spill-bill-try-18-month-13939.html>.

42. BP waived this limit after the *Deepwater Horizon* incident. *See id.* The limit applicable to offshore facilities has since been increased by regulatory action.

OPA was a popular bill, no doubt buoyed by still-fresh memories of the disaster in Alaska and even amassed support from representatives of the oil and natural gas industry. The House bill passed 375 to 5, while the Senate version passed by voice vote. The final bill out of committee passed both chambers unanimously.⁴³ President Bush signed OPA into law in August 1990. Below is a summary of the main statutory provisions, followed by a discussion of criticisms that appeared in a signing statement from the President.

Provisions of Consequence

OPA brought to bear conventional elements of environmental law, such as the well-established “polluter pays” principle, but eschewed other long-held doctrines, like the *Robins Dry Dock* common law rule narrowing recovery of economic losses in marine casualty suits to damage to property owned by the plaintiff.⁴⁴ Many provisions of OPA have been implemented by agencies and interpreted by courts as complementary to existing laws, like the CWA and CERCLA, while other provisions, like the requirement that vessel and facility operators secure insurance coverage at the uppermost limits of potential liability⁴⁵ have elicited some industry backlash,

Title I, captioned “Oil Pollution Liability and Compensation,” contains the law’s most novel provisions, imposing on designated responsible parties (RPs) liability for both removal costs and damages, as well as providing defenses and limitations on the liability established. The provisions of Title IV, titled “Prevention and Removal,” amend existing statutory measures – relating to mariner qualifications and licenses, vessel operational and design requirements, marine casualty reporting, and more – and direct the Secretary of the department in which the Coast Guard is operating to implement restrictions on single-hulled tanker operations.⁴⁶ Indeed, the Coast Guard is the principal government agency responsible for carrying into effect OPA’s provisions, both by regulation and enforcement. Where relevant, notes on the implementing actions are included here.

Other parts of the law are area-specific – provisions applicable only to Alaskan waters, for example – or are more procedural than substantive,

43. *See id.*

44. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

45. 33 C.F.R. pt. 138 (2020).

46. 33 U.S.C. § 2701(33). At present, the Coast Guard operates within the Department of Homeland Security. *See* 14 U.S.C. § 103.

such as addressing the relationship with international regimes. Titles I and IV, however, contain the most consequential provisions, replete with narrowly defined, precisely tailored language. Statutory analysis at any depth can be a fraught undertaking, and the goal here is simply to unpack OPA's most important rules, as currently codified, in a simple, mechanical manner, with the best interests (i.e., sanity) of both author and reader at heart.

Title I: Oil Pollution Liability and Compensation

When a vessel or facility discharges oil, or when there is a substantial threat of such a discharge, into the navigable waters,⁴⁷ adjoining shorelines, or the exclusive economic zone (EEZ)⁴⁸ of the United States, the RP is liable for both the costs to remove that oil and damages caused by the discharge.⁴⁹ The enactment made RPs "strictly liable for cleanup costs and damages and first in line to pay any claims for removal costs or damages that may arise under" the law.⁵⁰ Indeed, Congress adopted the standard that existed under section 311 of the CWA: "strict, joint, and several liability" for "economic damages, as well as for removal costs and natural resource damages."⁵¹ Determining which party is responsible depends on the platform involved. In the case of vessels, the RP is "any person owning, operating, or demise chartering the vessel."⁵² For offshore facilities, such as an oil rig operating on the Outer Continental Shelf (OCS), the RP would be the "lessee or permittee of the area in which the facility is located or the holder of a right of use and easement" granted under state or federal law. The text also specifies RPs applicable to onshore facilities, foreign facilities, deepwater ports, pipelines, and abandoned vessels or facilities.⁵³

47. The term "navigable waters" is defined in this context as "waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21). This definition has been the subject of much case law. The "territorial sea" is defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles." *Id.* § 2701(35).

48. The EEZ, generally, extends 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. *See* Presidential Proclamation 5030 of Mar. 10, 1983, at 48 FR 10605.

49. 33 U.S.C. § 2702.

50. *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420, 422 n.2 (5th Cir. 2014).

51. S. REP. NO. 101-94 (1989); 33 U.S.C. § 1321.

52. 33 U.S.C. § 2701(32).

53. *Id.*

Expressly excluded from liability are discharges that are otherwise legally permitted, or those originating from a public vessel⁵⁴ or an onshore facility subject to TAPAA.⁵⁵ A third party may be treated as an RP if the original RP can establish that a discharge and resulting removal costs or damages were caused solely by the act or omission of the third party.⁵⁶ If the original RP already incurred removal costs and damages in such a case, that RP is entitled by subrogation to all rights of the United States and other claimants to recover removal costs and damages against the third party.⁵⁷ As detailed below, certain statutory defenses to liability may be invoked, and liability limits are set according to the size and type of vessel or facility.

Liability under OPA, as noted, extends to both removal costs and damages. Removal costs include those incurred – to prevent, minimize or mitigate pollution after an oil discharge or substantial threat of discharge⁵⁸ – by the federal government, a state, or Indian tribe, acting under the CWA, the Intervention on the High Seas Act⁵⁹ or state law.⁶⁰ Cleanup costs incurred by anyone acting in accord with the National Contingency Plan (NCP) are likewise covered.⁶¹ The NCP is essentially the blueprint for the federal response to oil pollution incidents.⁶² An RP may also voluntarily undertake removal operations, the costs of which could be credited against the total liability imposed by OPA.⁶³ An RP may also be liable for damages that result from an oil spill incident. This provision, at 33 U.S.C. § 2702(b)(2), is of arguably more consequence than any other in the post-*Exxon Valdez* era of oil transport, as it expanded the scope of compensable losses resulting from an oil spill to an unprecedented class of claimants. The available damages were divided into six categories:

54. Under OPA, a “public vessel” would be “a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.” 33 U.S.C. § 2701(29).

55. 33 U.S.C. § 2702.

56. *Id.*

57. *Id.*

58. *Id.* § 2701(31).

59. *Id.* § 1471.

60. *Id.* § 2702.

61. *Id.* The NCP, first promulgated by the President after the *Torrey Canyon* incident, derives from section 311(d) of the CWA.

62. *See* 40 C.F.R. pt. 300 (2021). Under the NCP, a response involves four sequential phases: discovery or notification; preliminary assessment and initiation of action; containment, countermeasures, cleanup, and disposal; and documentation and cost recovery. *See id.*

63. 33 U.S.C. § 2704(a).

- (A) Natural resources: Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.
- (B) Real or personal property: Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.
- (C) Subsistence use: Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
- (D) Revenues: Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
- (E) Profits and earning capacity: Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.
- (F) Public services: Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.⁶⁴

To spare the reader from a lengthy transcription of less-than-exciting statutory text, this list suffices to demonstrate the expansive breadth of qualifying claims under OPA. A few brief clarifying remarks, however, are warranted. While the scope of each category is provided, one must thumb through the Title to discern the important meanings of included terms. As an example, Congress defined “natural resources,” from paragraph (A), as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies,

64. *Id.* § 2702(b)(2).

and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by” the federal, state or local government, Indian tribe or foreign government.⁶⁵ Natural resource damage assessments are carried out in accord with the regulations at 15 C.F.R. § 990. Also noteworthy is the inclusion of damages for profit losses and the impairment of earning capacity, in paragraph (E). Under the pre-OPA *Robins Dry Dock* precedent, economic losses – absent direct physical harm or damage to person or proprietary assets – were not compensable. Available defenses are provided: An RP may present evidence the discharge or threat of discharge was caused solely by an act of God, an act of war, an act or omission of a third party.⁶⁶ However, defenses are not available should an RP fail or refuse to report an incident or cooperate and assist with removal activities as directed by a responsible official, or otherwise fail to comply with applicable orders issued.⁶⁷ Importantly, states are free to impose additional liability or requirements, as well as establish and maintain funds related to oil pollution in respective jurisdictional waters.⁶⁸

Congress increased the limits of liability previously available under the CWA in the case of an oil spill, as well as expressly superseded the marine casualty limits imposed by the Limitation Act.⁶⁹ Particular limits vary according to size and type of vessel or facility. Under the current scheme, an RP’s liability after an incident involving a double-hulled tank vessel would be the greater of \$2,300 per gross ton of the vessel or \$19.9 million.⁷⁰ For such vessels measuring 3,000 gross tons or less, the cap is set at \$4.9 million.⁷¹ In the case of an offshore facility (e.g., a drilling platform on the OCS), liability is limited to the total of all removal costs plus \$137.6 million.⁷² These amounts reflect the regulatory inflation increases as implemented by the Coast Guard in 2019⁷³ and the Bureau of Ocean Energy

65. *Id.* § 2701(20).

66. *Id.* § 2703.

67. *Id.*

68. *See id.* § 2718.

69. *Id.* 2718(c).

70. 33 C.F.R. § 138.230 (2020).

71. *Id.*

72. 30 C.F.R. § 553.702 (2021).

73. *See* Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels, Deepwater Ports and Onshore Facilities, 84 Fed. Reg. 39970 (Aug. 13, 2019).

Management (BOEM) in 2018.⁷⁴ These liability limits would not apply if the incident were proximately caused by the RP's gross negligence or willful misconduct, or violation of an applicable federal safety, construction, or operating regulation.⁷⁵ Nor is liability limited when the RP fails or refuses to report the incident as required, to cooperate and assist as requested by a responsible official, or fails to comply with a lawful order.⁷⁶ Under OPA, most vessels operating in U.S. waters must obtain "evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected" under the law.⁷⁷ The requirement applies to all vessels over 300 gross tons and tank vessels of more than 100 gross tons.⁷⁸ Non-compliance could result in a vessel's clearance being withheld by the federal government, the denial or detention of the vessel, or the seizure and forfeiture of the vessel to the United States.⁷⁹

Finally, OPA activated the Oil Spill Liability Trust Fund (OSLTF), which had lain dormant since being established by the Internal Revenue Code of 1986,⁸⁰ as the primary federal funding source for oil removal and uncompensated damages.⁸¹ In 1991, the President delegated administration of the OSLTF to the Coast Guard, which stood up the National Pollution Funds Center (NPFC) to manage the fund.⁸² Under OPA, uses of the fund include: payment of removal costs as determined by Federal On-Scene Coordinators (FOSCs) consistent with the NCP, payment to states for removal actions, and payment of claims for uncompensated removal costs and damages.⁸³ The fund has derived revenue from sources such as a per-barrel tax imposed on the industry, transfers from other pollution funds, and the recovery from RPs of costs incurred by the fund.⁸⁴ Expenditures from the OSLTF for any singular oil pollution incident are limited by statute to

74. *See* Oil Spill Financial Responsibility Adjustment of the Limit of Liability for Offshore Facilities, 83 Fed. Reg. 2540 (Jan. 18, 2018).

75. 33 U.S.C. § 2704(c)(1).

76. *Id.* § 2704(c)(2).

77. *Id.* § 2716(a).

78. *Id.*

79. *Id.* § 2716(b).

80. 26 U.S.C. § 9509.

81. 33 U.S.C. § 2712.

82. *See* Exec. Order No. 12777, 56 Fed. Reg. 54,757 (Oct. 22, 1991).

83. 33 U.S.C. § 2712.

84. *See* U.S. COAST GUARD, NPFC MISSION OVERVIEW, https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/Reports/Mission_Overview_2008.pdf.

\$1 billion.⁸⁵ States may access up to \$250,000 for immediate response to an oil spill incident.⁸⁶ Costs of containing and removing oil from water and shorelines, preventing or minimizing a substantial threat of discharge, and monitoring the activities of RPs are authorized.⁸⁷ Removal costs may include cleanup contract services, equipment for removal, chemical testing to determine the source of oil, disposal of oil and debris, costs of government personnel for the duration of response, among others.⁸⁸

Title IV: Prevention and Removal

OPA's first title is primarily concerned with adjudicative and administrative activities associated with an oil spill. The content of its fourth title, by contrast, is mostly of practical, rubber-meets-road orientation, laying out requirements for vessel operations and design characteristics, along with provisions that pertain to disaster planning and response.⁸⁹ Many of the rules hearken directly back to the details of the *Exxon Valdez* grounding. Procedurally, Title IV amends various existing statutes, including the CWA, the National Driver Register Act,⁹⁰ the Ports and Waterways Safety Act (PWSA),⁹¹ and the Merchant Marine Act.⁹² These amendments were enacted in a scattershot sequence; Title IV is more practical in substance than Title I and less natural in form.

The manning of tank vessels is a central concern. The issuance and renewal, at five-year intervals, of merchant mariner documents became contingent upon motor vehicle driving and criminal records checks, as well as chemical testing for dangerous drugs.⁹³ A suspension and revocation process was also established, under which mariners must undergo preemployment, periodic, random, reasonable cause, and post-accident alcohol and drug testing.⁹⁴ Suspension or revocation could also result from "an act of incompetence, misconduct, or negligence" when acting under the authority of a license.⁹⁵ Another provision prescribes mutinous procedures

85. 26 U.S.C. § 9509(c).

86. 33 C.F.R. pt. 133 (2020).

87. See U.S. COAST GUARD, *supra* note 84.

88. See *id.*

89. The title is divided into three sections, titled "Prevention," "Removal," and "Penalties and Miscellaneous."

90. Pub. L. No. 97-364, 96 Stat. 1740 (1982).

91. Pub. L. No. 92-340, 86 Stat. 424 (1972).

92. Ch. 858, 49 Stat. 1985 (1936).

93. 46 U.S.C. § 7101.

94. *Id.* § 7702.

95. *Id.* § 7703.

to be taken when the two “next most senior licensed officers on a vessel reasonably believe that the master or individual in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel.”⁹⁶ In such an instance, the next most senior master, mate, or operator is to take command of the ship and report the incident to the Coast Guard.⁹⁷ Another provision requires any instance of “significant harm to the environment” to be reported.⁹⁸ Watches are also restricted: “On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or a drill.”⁹⁹ Congress also directed the Coast Guard to evaluate and prioritize ports and channels in need of expanded vessel traffic service (VTS) systems, which monitor and control vessel movements in designated zones.¹⁰⁰

There are also extensive design and construction requirements, such as rules for periodic gauging of hull thickness on tank vessels, aimed at the timely diagnosis of steel corrosion and deterioration, and the installation of cargo level monitoring and tank pressure warning devices.¹⁰¹ In 1993, the Coast Guard published a final rule modifying 46 C.F.R. Subchapter D to establish minimum longitudinal strength and plating thickness standards and require periodic gauging for tank vessels.¹⁰² Section 4115 of OPA outlined an incremental, 25-year phase-out schedule for single-skin barges and tankers, a rule implemented by the Coast Guard at 33 C.F.R. § 157. And, since the start of 2015, in accord therewith, only double-hull vessels have been permitted to carry oil as cargo in the United States. The move to decommission single-hulled tank vessels, adding an extra barrier between oil and sea, was ahead of its time – the international maritime community took another two years to adopt similar standards¹⁰³ – and has proved beneficial. A 2019 study found that as oil trade volume has increased

96. *Id.* § 8101(i).

97. *Id.*

98. *Id.* § 6101.

99. Oil Pollution Act of 1990 § 4114(b).

100. *Id.* § 4107(b).

101. *Id.* §§ 4109, 4110.

102. *See* Requirements for Longitudinal Strength, Plating Thickness, and Periodic Gauging for Certain Tank Vessels, 58 Fed. Reg. 52,602 (Oct. 8, 1993).

103. *See* Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, INT’L MARITIME ORG., MEPC.52(32) (Mar. 6, 1992), [https://wwwcdn.imo.org/localresources/en/Knowledge Centre/IndexofIMOResolutions/MEPCDocuments/MEPC.52\(32\).pdf](https://wwwcdn.imo.org/localresources/en/Knowledge%20Centre/IndexofIMOResolutions/MEPCDocuments/MEPC.52(32).pdf).

worldwide, oil spillage from tankers has steadily declined.¹⁰⁴ The study identified 19 major accidents, causing upward of 2.3 million tons of oil spilled, that occurred between 1970 and 2000.¹⁰⁵ Over the two decades that followed, there had been only two such accidents, spilling 74,000 tons of oil.¹⁰⁶ The researchers noted that this trend occurred as “tankers began to adopt double-hull design . . . which can greatly reduce oil pollution after accidents.”¹⁰⁷ As of February 2021, there had been 83 vessel discharge incidents in U.S. waters resulting in damages that exceeded OPA liability limits since 1991, and none of these was caused by a double-hull tanker.¹⁰⁸

Provisions that concern planning and response consist almost exclusively of amendments to the FWPCA. Congress painted with broad strokes here, directing the President “to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge” of oil, following the NCP.¹⁰⁹ The requisite content of that plan is specified, including the assignment of duties and responsibilities to various federal, state, and local agencies to “provide for efficient, coordinated, and effective action to minimize” oil spill damage.¹¹⁰ Other NCP elements: a ready supply of removal assets and chemicals, deployable “strike teams” in the Coast Guard, designated FOSCs assigned to subordinate Area Contingency Plans (ACPs), and a fish and wildlife response plan.¹¹¹ Congress also called for a national response office, to coordinate and assist area committees and area-specific FOSCs, and response groups at Coast Guard district offices.¹¹² Tank vessels, offshore facilities, and some onshore facilities must produce response plans, subject to government review and approval, as well as maintain relevant equipment, conduct periodic response drills, and more.¹¹³ Finally, OPA established a schedule of administrative penalties for non-compliance¹¹⁴ and civil penalties for

104. Jihong Chen, et al., *Oil spills from global tankers: Status review and future governance*, 227 JOURNAL OF CLEANER PRODUCTION 22-24 (2019).

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* U.S. COAST GUARD, OIL POLLUTION ACT LIABILITY LIMITS IN 2020 (Feb. 22, 2021).

109. 33 U.S.C. § 1321(c).

110. *Id.* § 1321(d).

111. *Id.*

112. *Id.* § 1321(j).

113. 33 C.F.R. pt. 155 (2020).

114. 33 U.S.C. § 1321(b)(6).

discharges.¹¹⁵ While maximum amounts of these penalties are stipulated, factors to be considered in the actual imposition of administrative or civil penalties are given.¹¹⁶ The FWPCA was also amended to add negligent and knowing discharges to its criminal enforcement section, codified at 33 U.S.C. § 1319.¹¹⁷

Concerns and Commentary

After the conference committee produced a consolidated bill that both chambers approved, not quite 18 months after the *Exxon Valdez* weighed anchor and set sail from the port of Valdez, President Bush signed OPA into law on August 18, 1990.¹¹⁸ In a signing statement, the President remarked the legislation “strengthen[ed] the protection of our environment.”¹¹⁹ More ink, however, was devoted to shortcomings than superlatives. Thus, oddly enough, a convenient approach to outlining the contemporary criticisms of OPA is to consider those expressed by the man whose signature turned H.R. 1465 into Public Law 101-380.

President Bush laid out three primary concerns. First, section 6003 introduced a moratorium on oil and gas exploration off North Carolina’s shores. The restriction, President Bush argued, was antithetical to the policy objective of energy independence, the primacy of which had been articulated by President Nixon soon after an oil embargo in the Middle East in the early 1970s.¹²⁰ Within section 6003, titled the Outer Banks Protection Act (OBPA), Congress noted inadequate environmental impact research off North Carolina’s shores, an area of “exceptional environmental fragility and beauty.”¹²¹ President Bush, on the other hand, focused on the reserves of natural gas trapped beneath that beauty, the extraction of which “could be

115. *Id.* § 1321(b)(7).

116. *Id.* § 1321(b)(8). Relevant factors include the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require. *Id.*

117. Oil Pollution Act of 1990 § 4301(c).

118. To become law, a bill that has passed through the House of Representatives and the Senate must be presented to and signed by the President. U.S. CONST. art. I, § 7, cl. 2.

119. Presidential Statement on Signing the Oil Pollution Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1265 (Aug. 27, 1990).

120. Gordon L. James, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 LA. L. REV. 177, 185 (1979).

121. Oil Pollution Act of 1990 § 6003(b)(1).

used to offset our dependence on foreign energy sources.”¹²² Moreover, he wrote, “exploration for gas this far offshore carries little environmental risk.” He called the provision “short-sighted” and “highly objectionable.” Next, the President lamented the Senate’s failure to ratify and implement certain international compensation regimes, citing concern over access to those funding sources and timely recouping of damages in the case of a foreign tanker spilling oil in U.S. waters. Inaction, he added, could lead to diminished American influence in global maritime rulemaking or perhaps lead larger oil shippers, wary of risk, to avoid U.S. ports, “replaced by smaller companies with limited assets and reduced ability to pay for the cleanup of oil spills.”¹²³ Finally, President Bush highlighted another provision, section 3004, which violated the separation of powers in his estimation. As enacted, that section could be interpreted as *requiring* the President to “encourage appropriate international organizations to establish an international inventory of spill removal equipment and personnel.”¹²⁴ As implemented, the mandate would be construed as merely advisory, according to the signing statement.

It is worthwhile to consider whether fears ever materialized into fact and whether foresight in the past aligns with hindsight in the present. In this case, such a retrospective analysis would necessarily owe a degree of deference to the 41st chief executive, whose concerns were conveyed without the clarity afforded by the past three decades of lived experience. That said, the first prediction – that a conditional prohibition on drilling off North Carolina would likely prevent or forestall a reduction in foreign oil dependence – seems to have been both unfounded and overstated. OBPA did not establish an unqualified ban on drilling in the area specified. Instead, the law stipulated a series of steps and studies to be completed before the Secretary of the Interior could conduct a lease sale, issue any new leases, approve any exploration plan, approve any development and production plan, approve any application for a permit to drill, or permit any drilling on the OCS offshore North Carolina.¹²⁵ Specifically, an Environmental Sciences Review Panel would first produce a report with recommendations. Then, the Interior Secretary, the executive officer charged with leasing oversight under OCSLA, would certify to Congress – which must have been in continuous session for 45 days – that ecological,

122. Presidential Statement on Signing the Oil Pollution Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1265 (Aug. 27, 1990).

123. *Id.*

124. *Id.*

125. Oil Pollution Act of 1990 § 6003(c).

socioeconomic, oceanographic, and environmental studies had been undertaken, yielding sufficient information on the impact of drilling off North Carolina.¹²⁶ Finally, even if all those boxes were checked, no approvals or permits were to be issued before October 1991.¹²⁷ Onerous as they were, these conditions hardly seem “short-sighted.” Consider that, according to OPA’s legislative history, section 6003 was the result of a particular proposal by Mobil Oil Corporation to drill an exploratory well 40 miles off Cape Hatteras.¹²⁸ And while President Bush singled out natural gas in the statement – calling it a “relatively clean energy source” – the House Conference Report noted: “While the Mobil Oil Company expects exploration offshore North Carolina to yield a natural gas discovery, they have indicated a possibility that oil may be discovered”¹²⁹ In his statement, President Bush also asserted that operations “over 38 miles offshore” presented a minimal environmental risk. Twenty years later, of course, an explosion on the *Deepwater Horizon* – 41 miles off Louisiana’s coast – resulted in the worst spill in U.S. history.¹³⁰ OBPA, incidentally, did not survive its first decade; section 6003 was unceremoniously repealed in 1996.¹³¹ Even so, there is no record of any exploration, let alone drilling, for oil or gas off North Carolina’s coast since OPA was enacted.¹³² Yet

126. *Id.* § 6003(d).

127. *Id.* § 6003(c)(3)(A)(i).

128. H.R. CONF. REP. NO. 101-653 (1990).

129. *Id.* Mobil Oil and its partners had actually paid the U.S. government \$156 million in 1981 for 10-year renewable lease contracts giving them rights to explore for and develop oil off the North Carolina coast. Citing OPA, the Secretary of the Interior suspended the leases. In 2000, the resulting dispute reached the Supreme Court. Justice Breyer, applying contract law principles, required restitution: “[T]he Government broke its promise; it repudiated the contracts; and it must give the companies their money back.” *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000).

130. See Lisa Friedman, *Ten Years After Deepwater Horizon, U.S. Is Still Vulnerable to Catastrophic Spills*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/19/climate/deepwater-horizon-anniversary.html>.

131. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 § 109.

132. Historical data from BOEM show the last lease sale in its Mid-Atlantic region, which includes the seabed off North Carolina, occurred in April 1983. See *Atlantic OCS Lease Status Information*, U.S. BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/oil-gas-energy/atlantic-ocs-lease-status-information> (last visited May 7, 2021). In 2000, the interests in the last remaining oil and natural gas leases off North Carolina were relinquished. *Atlantic OCS Facts and Figures*, U.S. BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/oil-gas-energy/atlantic-ocs-facts-and-figures> (last visited May 7, 2021).

America has indeed weaned itself off foreign oil, thanks largely to innovations in hydraulic fracturing and horizontal drilling. And while a deep dive into the global oil economy is beyond the scope of this paper (and the knowledge of its author), some perspective here is useful. Imports of crude oil and petroleum products have steadily trended downward since the mid-aughts. For reference, these imports averaged 6,350,000 barrels per day during the week ending February 19, 2021.¹³³ The last time a weekly average was that low was almost exactly 30 years before, in the week ending February 22, 1991.¹³⁴ Meanwhile, crude oil and petroleum exports have steadily trended upward, most dramatically since a four-decade ban on shipments to most countries was lifted in 2016.¹³⁵ On average, the United States exported 8,508,000 barrels of crude oil and petroleum products per day in 2020; in 1990, when OPA became law, those exports totaled 857,000 barrels per day.¹³⁶ Considering that the United States has become a net exporter, one might assume concern over untapped reserves in the mid-Atlantic would be suitably assuaged. Not so. The specter of ugly oil rigs spoiling beachfront views on the Outer Banks made headlines in 2018 when President Trump announced his Interior Department would renew offshore leasing activity along the Eastern Seaboard and elsewhere.¹³⁷ After intense opposition from the affected states, the President reversed course, imposing a 10-year moratorium on the exploration, development, or production of oil or gas off North Carolina.¹³⁸

President Bush referenced two international regimes in the signing statement, bemoaning Congress's failure to ratify either. The 1984 Protocols of the International Convention on Civil Liability for Oil Pollution Damage (CLC), adopted in 1969 after *Torrey Canyon*, established a strict liability scheme and imposed compulsory oil pollution insurance for

133. *Weekly U.S. Imports of Crude Oil and Petroleum Products*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=wttimus2&f=w> (last visited May 12, 2022).

134. *Id.*

135. *See Consolidated Appropriations Act, 2016*, Pub. L. No. 114-113, 129 Stat. 2242.

136. *U.S. Exports of Crude Oil and Petroleum Products*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/pet_move_exp_dc_NUS-Z00_mbbldpd_m.htm (last visited May 12, 2022).

137. *See Timothy Puko & Lynn Cook, Trump Administration Proposes Massive Expansion of Oil Drilling*, THE WALL STREET JOURNAL (Jan. 4, 2018), <https://www.wsj.com/articles/trump-administration-proposes-massive-expansion-of-oil-drilling-1515090515>.

138. *Trump extends drilling ban off North Carolina*, REUTERS (Sep. 25, 2020), <https://www.reuters.com/article/usa-offshore-drilling-north-carolina/trump-extends-drilling-ban-off-north-carolina-idINL2N2GN00H>.

shippers.¹³⁹ The CLC was augmented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND92), which adjusted liability limits and sought to ensure full compensation would be available to victims of oil pollution incidents.¹⁴⁰ Both conventions have undergone extensive revisions in the years since, yet the United States remains a party to neither.¹⁴¹ But non-ratification of these two schemes hardly points to a decline in U.S. influence at the International Maritime Organization (IMO), the United Nations (UN) agency responsible for the regulation of the global shipping industry. A member state since 1950, the United States has maintained a prominent presence at the biennial IMO Assembly and in policymaking committees, and the American delegation was reelected to the IMO Council, the agency's executive arm, in 2021.¹⁴² As of May 2022, the United States had ratified 28 other IMO conventions.¹⁴³ These include several of particular relevance here, such as the International Convention for the Safety of Life at Sea (SOLAS), which prescribes safety and security standards for merchant ships; Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL), which outlines design, equipment, operational and recordkeeping rules specific to oil tankers; and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW), which sets minimum training and watchkeeping standards for the crews of seagoing vessels. Moreover, the international community has acknowledged that hardy liability schemes adopted domestically can negate the need to contract and coordinate with other countries. In a 2012 report, the UN Conference on Trade and Development (UNCTD) noted that while, generally, contracting parties to such legal instruments are better positioned to deal with the financial consequences of a tanker spill, "in some cases, substantial compensation may be available under applicable national law, as for instance in the case of the United States Oil Pollution Act 1990."¹⁴⁴

139. See Donaldson, *supra* note 31, at 301-05.

140. See *id.*

141. *Status of Conventions*, INT'L MARITIME ORG., <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx> (last visited May 12, 2022).

142. See *IMO Council Members (2022-2023)*, INT'L MARITIME ORG., <https://www.imo.org/en/About/Pages/Council-2022-2023.aspx> (last visited May 12, 2022).

143. See INT'L MARITIME ORG, *supra* note 141.

144. *Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers*, UNCTAD (2012), https://unctad.org/system/files/official-document/dtlb20114_en.pdf.

President Bush's concern that larger oil shippers would be replaced by smaller, judgment-proof companies echoed murmurs that spread throughout the shipping industry in the early 1990s, during OPA's drafting and after its passage. While the President tethered this concern to congressional inaction vis-à-vis international protocols, there were specific conditions within OPA that presaged even more dramatic reactions from the industry. For example, OPA expressly preserved states' authority to impose additional liability, fines, or penalties relating to the discharge or substantial threat of a discharge of oil. These saving clauses, codified at 33 U.S.C. § 2718, meant state legislatures could adopt liability and cleanup schemes unfettered by either OPA or the Limitation Act. Another provision, at § 2716(a), required owners of larger vessels to produce evidence of financial responsibility sufficient to meet the liability limits to which an RP could be subjected under § 2704. In combination, these rules unsettled some regulated entities. Within a year of enactment, an association of tanker owners threatened to boycott U.S. ports because of the potentially unlimited liability created by the federal-state interplay.¹⁴⁵ Protection and indemnity (P&I) clubs, meanwhile, threatened not to issue the required documentation of financial responsibility required by OPA.¹⁴⁶ These threats did not materialize into any appreciable impact on the U.S. market,¹⁴⁷ although isolated avoidance activities have been observed in the industry, such as the trend of single-vessel corporations being established as a mode of limiting exposure.¹⁴⁸

Questions for Courts

Most recently, in its 2019-20 term, the Supreme Court took up a case in which OPA liability provisions were at issue, although Justice Sotomayor's majority decision hinged on maritime contract rather than statutory interpretation. Nevertheless, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd.*, bears emphasizing as its facts are paradigmatic of the sequences that give rise to liability under OPA.¹⁴⁹ The case is also noteworthy for its complex, serpentine procedural history – lasting 16 years – and the legislative response to the underlying oil spill. In November 2004, the *Athos I*, a Cypriot-flagged, Greek-owned, 748-foot, single-hulled oil tanker,

145. See Donaldson, *supra* note 31, at 313-17.

146. See *id.*

147. See *id.*

148. See generally, Inho Kim, *Financial Responsibility Rules under the Oil Pollution Act of 1990*, 42 NAT. RESOURCES J. 565 (2002).

149. 140 S. Ct. 1081 (2020).

laden with nearly 14 million gallons of crude oil, maneuvered on the Delaware River toward the CITGO terminal at Paulsboro, N.J.¹⁵⁰ The ship had sailed 1,900 miles from Venezuela and came within 900 tantalizing feet of its destination, a berth at an asphalt refinery dock when its bottom struck an abandoned anchor, known to have been lying on the riverbed since 2001.¹⁵¹ Its shell pierced, the *Athos I* released 264,321 gallons of Venezuelan crude into the channel that divides Pennsylvania and New Jersey.¹⁵² Frescati, the shipowner, ponied up \$45 million in cleanup costs – then the maximum liability for that type and size of the vessel – and the federal government, drawing from the OSLTF, reimbursed the company for another \$88 million expended to clean up the mess.¹⁵³ That’s where things get weird. Frescati had entered a contract with Star Tankers, an operator of tankships, under a time charter agreement. Star Tankers, as an intermediary, assigned the ship to a tanker pool, from which CARCO – the collective name of various CITGO entities – sub-chartered the ship to deliver crude oil from Puerto Miranda, Venezuela, to its berth in Paulsboro. At the time of the spill, CARCO functioned as both the shipping customer and the wharfinger operating the berth.¹⁵⁴ After the cleanup, Frescati and the United States, as subrogee, sued CARCO to recover their respective portions of cleanup expenses. CARCO advanced several defenses, including the theory that a safe-berth clause within the charter agreement, known in admiralty as a “charter party,” only imposed a duty of care in designating a safe berth at which the *Athos I* would conduct cargo operations. The matter bounced multiple times between the Eastern District of Pennsylvania and Third Circuit before reaching the Supreme Court, where seven justices agreed the dispute sounded in contract law rather than torts, and the charter party’s plain language imposed a warranty of safety, thereby imposing liability on CARCO.¹⁵⁵ Congress had already taken action, passing a law in 2006 to triple fines under OPA for single-hulled vessels and require anyone with

150. Jason George, *Delaware River Oil Spill Leaves Wildlife Imperiled*, N.Y. TIMES (Nov. 29, 2004), <https://www.nytimes.com/2004/11/29/nyregion/delaware-river-oil-spill-leaves-wildlife-imperiled.html>.

151. *See In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 297–98 (3d Cir. 2018), *aff’d sub nom.* CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd., 140 S. Ct. 1081 (2020); *see also Citgo cleared of \$177M cleanup of Delaware River in Paulsboro after 2004 oil spill*, ASSOCIATED PRESS (Apr. 15, 2011, updated Mar. 31, 2019), https://www.nj.com/news/2011/04/citgo_cleared_of_177m_cleanup.html.

152. *See CITGO*, 140 S. Ct. at 1085.

153. *Id.* at 1087.

154. *See id.* at 1085.

155. *See id.* at 1093.

knowledge of possible river obstructions to make a report to the Coast Guard and U.S. Army Corps of Engineers (USACE).¹⁵⁶

An RP, in the case of a vessel, is defined in OPA as “any person owning, operating, or demise chartering the vessel.”¹⁵⁷ The statutory definition of a vessel’s “owner or operator” is “any person owning, operating, or chartering by demise, the vessel.”¹⁵⁸ In 2018, the Fifth Circuit considered these circular definitions in a case that involved the assignment of liability to a tugboat attached to a barge that discharged oil while in tow. In *United States v. Nature’s Way Marine, L.L.C.*, a towing vessel was moving two oil-carrying barges – themselves not self-propelled – down the Mississippi River when one of the barges struck a bridge, spilling more than 7,000 gallons of its payload into the waterway.¹⁵⁹ The Coast Guard designated the respective owners of both tugboat and barge as RPs, and the tugboat owner ultimately spent \$2.99 million on the cleanup.¹⁶⁰ Various government entities spent another \$792,000.¹⁶¹ The tugboat owner then sought reimbursement from the NPFC, asserting that its liability ought to only be calculated based on the tonnage of the tugboat – not the towing package’s aggregate tonnage.¹⁶² As noted, in most cases, OPA limits an RP’s liability based on the tonnage of the vessel(s) being operated.¹⁶³ The NPFC denied the claim, determining the tugboat owner was indeed “operating” the barge by towing it, and the federal government moved to recover its costs.¹⁶⁴ To resolve the ambiguity presented by OPA, the Fifth Circuit panel looked to case law emanating from CERCLA, which presented identical definitional language.¹⁶⁵ The Supreme Court, in *United States v. Bestfoods*, had determined the ordinary, natural meaning of “operator” under CERCLA was “someone who directs the workings of, manages, or conducts the affairs of a facility.”¹⁶⁶ Adopting that standard, the Fifth Circuit held that the scope of OPA liability, as applied to “operators,” extended to the act of piloting or moving a vessel – in this case, exercising exclusive navigational

156. Coast Guard and Maritime Transportation Act of 2006, Pub. L. No. 109-241, 120 Stat. 516.

157. 33 U.S.C. § 2701(32)(A).

158. *Id.* § 2701(26)(A).

159. *United States v. Nature’s Way Marine, L.L.C.*, 904 F.3d 416, 418 (5th Cir. 2018).

160. *Id.*

161. *Id.*

162. *See id.*

163. 33 U.S.C. § 2704.

164. *See Nature’s Way Marine*, 904 F.3d at 418.

165. 42 U.S.C. § 9601(20).

166. 524 U.S. 51, 66 (1998).

control of a barge through a river.¹⁶⁷ Summary judgment for the government was affirmed.

OPA, as noted, imposes liability for removal costs and damages in the case of actual or threatened discharges of oil “into or upon the navigable waters or adjoining shorelines or the exclusive economic zone.”¹⁶⁸ The question of what constitutes “navigability” in the legal sense is a prickly one, and at the federal level, no fewer than four doctrinal foundations have been established. These pertain to: (1) the constitutional limits of Article III admiralty jurisdiction; (2) the federal regulatory authority under the Commerce Clause of Article I; (3) the navigational servitude and the potential imposition of federal projects on private parties; and (4) the determination of the ownership of the beds and banks of waters.¹⁶⁹ The traditional definition of navigability under the Commerce Clause formulation was laid out in 1870 by Justice Field, who pointed to “navigational capacity” in *The Daniel Ball*, a case involving a steamer that operated on an intrastate river in Michigan.¹⁷⁰ Such waterways were deemed “navigable” if they were navigable in fact, meaning “they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other State or foreign countries in the customary modes in which such commerce is conducted by water.”¹⁷¹ Aligning with the general expansion of congressional Commerce Clause power from the New Deal until the mid-1990s,¹⁷² the navigability framework established in *The Daniel Ball* broadened progressively during that period. For example, in 1940, the Supreme Court added the concept of potentiality, permitting regulation by the Federal Power Commission of hydroelectric dam

167. *See Nature’s Way Marine*, 904 F.3d at 421.

168. 33 U.S.C. § 2702(a).

169. *See* ROBERT W. ADLER, ET AL., *MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS* 343 (2d ed. 2018).

170. 77 U.S. (10 Wall.) 557 (1870).

171. *Id.* at 563.

172. This period spanned from 1937 to 1995, bookended by a pair of Supreme Court decisions on the limits of congressional power. *See* *NLRB v Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *see also* *United States v Lopez*, 514 U.S. 549 (1995).

construction on waters that *could become* navigable after improvements.¹⁷³ Since the 1970s, most of the doctrinal movement in this area has resulted from the implementation of environmental protection laws like the CWA, in which “navigable waters” were defined by Congress as “the waters of the United States, including the territorial seas.”¹⁷⁴ In 1985, the Court upheld particularly expansive rules promulgated by the Environmental Protection Agency (EPA) and USACE in *United States v. Riverside Bayview Homes*, holding that wetlands adjacent to navigable waters or their tributaries were regulable under the CWA.¹⁷⁵ There, the lands at issue formed part of a wetland directly abutting a navigable-in-fact creek.¹⁷⁶ In 2001, this question arose yet again when the USACE asserted jurisdiction over an abandoned mining site with remnant excavation trenches that had “evolve[ed] into a scattering of permanent and seasonal ponds.”¹⁷⁷ The Court, tightening the regulatory leash, clarified that isolated, non-navigable waters such as these were beyond USACE’s jurisdiction.¹⁷⁸

Under OPA, the term “navigable waters” means “the waters of the United States, including the territorial sea.”¹⁷⁹ By design, this definition matches the definition appearing in the CWA. The House Conference Report on OPA explained that “navigable waters” and related terms “shall have the same meaning in this legislation as they do under the [CWA] and shall be interpreted accordingly.”¹⁸⁰ The Senate Report likewise noted that OPA “covers all the bodies of water and resources covered by section 311 [of the CWA], including the inland waters of the United States and the living and non-living resources of the [OCS] and of ocean waters out to 200 miles offshore.”¹⁸¹ OPA is a younger, smaller piece of legislation than the CWA, and accordingly, fewer cases dealing with the former than the latter have percolated in the federal judiciary. However, given the identical statutory language and the supporting legislative history, it stands to reason that interpretations of navigability, under both statutes, would dovetail in the courts. In one of the few OPA-specific cases on this issue, called *In re*

173. *See* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

174. 33 U.S.C. § 1362(7).

175. 474 U.S. 121 (1985).

176. *See id.* at 131.

177. *See* *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 163 (2001).

178. *See id.*

179. *Id.* § 2701(21).

180. H.R. CONF. REP. NO. 101-653 (1990).

181. S. REP. NO. 101-94 (1989).

Needham, the Fifth Circuit in 2003 considered whether the liability provisions applied when a pumper/gauger at a facility called Thibodeaux Well, in Lafourche Parish, Louisiana, pumped oil from a containment basin into an adjacent drainage ditch.¹⁸² The RP hired a private contractor to perform the necessary cleanup but lacked the resources to finish the job, so the EPA and Coast Guard assumed responsibility, drawing from the OSLTF. The RP then filed for bankruptcy, and the federal government sued to recoup \$207,000 in cleanup costs.¹⁸³ The Fifth Circuit clarified that OPA did not permit federal regulation over “puddles, sewers, roadside ditches and the like,”¹⁸⁴ but in this case, based on stipulated facts, liability was appropriate because the discharged oil had drained into Bayou Folse, which was adjacent (i.e., “sufficiently linked”) to an open body of navigable water, the Company Canal.¹⁸⁵ Yet the holding articulated by the court was rather narrow: “[T]he OPA permits the recovery of cleanup costs in only two instances: (1) if oil spills into navigable-in-fact waters or (2) if oil spills into non-navigable waters (or wetlands) that are truly adjacent to an open body of navigable water.”¹⁸⁶ Three years later, the Supreme Court ventured, once again, into this definitional fray, and in a 4-1-4 decision in *Rapanos v. United States*, tenuously settled the matter.¹⁸⁷ The plurality, led by Justice Scalia, parsed the statutory language in exacting detail. Observing the CWA defined “navigable waters” as “the waters of the United States,” Scalia seized upon the definite article (“the”) and plural number (“waters”) chosen by Congress to argue the statute applied to particular bodies of water – not water in general – meaning “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”¹⁸⁸ Federal regulatory jurisdiction, therefore, extended at its outermost reach to “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right.”¹⁸⁹ Justice Kennedy, the outlier, authored a concurring opinion in *Rapanos* that would become the leading interpretation for lower courts. He reasoned that water or a wetland would fall within the CWA’s ambit so

182. 354 F.3d 340, 343 (5th Cir. 2003).

183. *See id.*

184. *Id.* at 345-47.

185. *See id.*

186. *Id.*

187. 547 U.S. 715 (2006).

188. *Id.* at 739.

189. *Id.* at 742 (emphasis in original).

long as it possessed a “significant nexus” to waters that are navigable in fact or could reasonably become so.¹⁹⁰ A wetland would “possess the requisite nexus” if it “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁹¹ Not everyone was satisfied with the failure of consensus and clarity at the high court. In an OPA case two weeks after *Rapanos*, a federal judge in Texas observed that Justice Kennedy “advanced an ambiguous test – whether a ‘significant nexus’ exists to waters that are/were/might be navigable,” adding that “[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is ‘significant’ and how is a ‘nexus’ determined?”¹⁹²

A final case warranting inclusion here is *United States v. Locke*, from 2000, in which the Supreme Court considered whether states were free, based on the OPA saving clauses at 33 U.S.C. § 2702, to double down on oil tanker requirements.¹⁹³ Following the *Exxon Valdez* spill, the state of Washington created an agency called the Office of Marine Safety, which was tasked with establishing standards that provided the “best achievable protection” from oil spill damages.¹⁹⁴ The state agency promulgated tanker design, equipment, reporting, and operating requirements, and a trade group brought suit. A unanimous Court ruled that most of Washington’s rules, including those about navigation watch procedures, crew language skills and training, and maritime casualty reporting, were indeed preempted by federal law.¹⁹⁵ The OPA saving clauses were of no assistance to the state, primarily because of where they appeared in the statute – in Title I, which concerned liability and compensation for oil pollution, not vessel operation, design, or manning.¹⁹⁶ Those rules, as reflected above, appear principally in Title IV.

Conclusion

To the casual observer, OPA might be dismissed as just another environmental law, stuffed somewhere amid the heap of those passed in the

190. *Id.* at 787 (Kennedy, J. concurring).

191. *Id.* at 780.

192. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

193. 529 U.S. 89 (2000).

194. *Id.* at 97.

195. *See id.* at 116-17.

196. *See id.* at 105.

latter decades of the twentieth century. After all, distilled to its core components, OPA simply advanced the self-evident proposition that those who dump pollutants into the water ought to pay for the damage caused. Yet OPA stands for much more than just that. It represents an era in which government actors on opposing sides of the aisle could work together, fashion legislation, and fix problems, even setting the pace for the world writ large. Compromise is a precious commodity – more valuable than Alaskan North Slope crude – and demand has outpaced supply. The legacy of OPA is buttressed, not besmirched, by President Bush’s signing statement. His criticisms are a testament to a time when adversarial forces could align, maybe with a grumble here or there, to effectuate a purpose greater than party loyalties. In this era of entrenchment, OPA offers a profound lesson and a simple question. We’ve done this before. Could we do it again?