Penn State Environmental Law Review

Volume 19 | Number 3 Article 5

9-1-2011

Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990

Jay Angle

Anna Leonenko

Katelyn Overmiller

Rebecca Ternes

Katie Wagner

See next page for additional authors

Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990

Authors

Jay Angle, Anna Leonenko, Katelyn Overmiller, Rebecca Ternes, Katie Wagner, and Kenneth Stark

Developments

Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990

Jay Angle, Anna Leonenko, Katelyn Overmiller, Rebecca Ternes, Katie Wagner,* and Kenneth Stark**

Table of Contents

* J.D. Candidates, The Dickinson School of Law of the Pennsylvania State University, 2012.

** Comments Editor, *Penn State Environmental Law Review*; J.D., The Dickinson School of Law of the Pennsylvania State University, 2011.

I. INTRODUCTION

On April 10, 2010, a blowout on the Deepwater Horizon oil rig caused an explosion that led to an unprecedented oil spill in the Gulf of Mexico.[1] This blowout caused the deaths of eleven people.[2] Oil continued to spill into the Gulf for months, until the federal government officially deemed the oil well "dead" on September 19, 2010.[3] Over a period of months, 186 million gallons of oil gushed into the Gulf.[4] The technologies used in the response and cleanup of the Deepwater Horizon spill remained largely the same as those used in the Exxon Valdez spill twenty-one years ago.[5]

The instability of deepwater drilling leads to potentially hazardous situations on oil rigs like the Deepwater Horizon.[6] Deepwater drilling operates under the conditions of unpredictable geological forces, as well as pressures that can build in an oil and gas reservoir three miles deep.[7] Given the inherent dangers of deepwater drilling, BP has denied pressuring the Deepwater Horizon crew to cut corners prior to the oil spill.[8] However, changes in the drilling plans and timelines for

1. Henry Fountain, *U.S. Says BP Well Is Finally Dead*, N.Y. TIMES, September 19, 2010, *available at* http://www.nytimes.com/2010/09/20/us/20well.html?_r=1&scp=1&sq=US%20says%20BP%20well%20finally%20dead&st=cse.

2. David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, December 25, 2010, *available at* http://www.nytimes.com/2010/12/26/us/26spill.html?_r=2&hp.

3. Fountain, *supra* note 1.

4. The Associated Press, *Oil Spill Count Was Right, Study Finds*, N.Y. TIMES, September 23, 2010, *available at* http://www.nytimes.com/2010/09/24/us/24brfs-OILSPILLCOUN_BRF.html?scp=1&sq=%22oil%20spill%20count%20was%20right%22&st=cse.

5. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING 133 (2011), *available at* https://s3.amazonaws.com/pdf_final/DEEPWATER_ReporttothePresident_FINAL.pdf.

6. Barstow, *supra* note 2.

7. *Id.*

8. *Id.*

extracting oil on the Deepwater Horizon often "saved time but increased risk."[9]

The main federal law governing the Deepwater Horizon spill and its aftermath is the Oil Pollution Act of 1990 ("OPA").[10] The OPA was intended to be comprehensive oil spill legislation, focusing on prevention, containment, cleanup, and liability.[11] Before enactment of the OPA, federal legislation regarding oil spills was a patchwork of various federal laws, the mess of which was highlighted by the Exxon Valdez spill. Before the OPA, the Federal Water Pollution Control Act ("FWPCA") was the largest source of oil spill liability legislation.[12] The FWPCA mandated oil spill cleanups, as well as means to recover cleanup costs, natural resource damages, and civil penalties. It imposed liability for the spill on the owner or operator of the facility or vessel.[13]

Piecemeal legislation followed the FWPCA, covering smaller issues in oil spills and liability.[14] The Trans-Alaska Pipeline Authorization Act taxed oil coming through the Alaska Pipeline, using the funds for oil spill cleanup and damages.[15] Further, the Deepwater Port Act imposed strict liability on the licensees of deepwater ports in the case of oil spills.[16] The Outer Continental Shelf Lands Act extended strict liability on the owners and operators of offshore facilities.[17] The Refuse Act prohibited discharging refuse into navigable waters of the United States without a permit,[18] and the Supreme Court has included oil spills within the definition of refuse.[19] Finally, the Limitation of Liability Act limited recoverable damages of an oil spill that was not within the owner's knowledge up to the value of the vessel and freight at the time of the

9. *Id.*

10. 33 U.S.C. §§ 2701-27 (1990). *See generally* John M. Woods, *Going on Twenty Years—The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323 (2009); Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135 (2001); Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481 (1999-2000); J.B. Ruhl & Michael J. Jewell, *Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 476 (1990-91).

11. S. REP. NO. 101-94, at 2-3 (1989).

12. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (2006).

13. *Id.* § 1321.

14. *See* Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (2006); Deepwater Port Act, 33 U.S.C. §§ 1501-1524 (2006); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, 1801-1866 (2006); Refuse Act, 33 U.S.C. § 407 (2006); Limitation of Liability Act of 1851, 46 U.S.C. app. §§ 181-96 (2006).

15. 43 U.S.C. § 1653 (2006).

16. 33 U.S.C. § 1517 (2006).

17. 43 U.S.C. § 1814 (2006).

18. 33 U.S.C. § 407 (2006).

19. U.S. v. Pa. Indus. Chem. Corp., 411 U.S. 655, 670-73 (1973).

damage,[20] which possibly limited the recovery of damages under state law.

II. STANDING: OPA'S CLAIMS PROCEDURE

Under the United States Constitution, a citizen must have standing in order to sue any party in court.[21] A citizen must have standing under the Constitution and under the OPA in order to sue for damages relating to an oil spill. A three-part test is utilized in order to determine whether a party has standing under the Constitution: (1) the plaintiff must have suffered an "injury in fact" which is concrete and particularized and not "hypothetical"; (2) there must be a causal connection between the injury and the conduct; and (3) it must be "likely" as opposed to "speculative" that the injury will be "redressed by a favorable decision."[22] Section 1013 of the OPA discusses the standing procedure under the statute.

Under the Section 1013 claims procedure, the President of the United States must first identify the responsible party for the oil discharge, and subsequently notify the responsible party and their guarantor.[23] The responsible party then has fifteen days to advertise a procedure for paying claims.[24] If the responsible party does not advertise their procedure, then the President will determine the appropriate procedures for them.[25] If the party denies culpability, the President will advertise the availability of the Federal Fund to pay claims within five days of receiving a notice of designation.[26] The Federal Fund was included in the OPA bill and was authorized when the bill was signed into law. The fund was made up of one billion dollars and its purpose was to be used for "removal costs incurred by the Coast Guard and EPA, state access for removal activities, payments to federal, state, and Indian tribe trustees to conduct natural resource damage assessments and restorations, payment of claims for uncompensated removal costs and damages, research and development, and other specific appropriations."[27]

---

20. 46 U.S.C. app. § 183(a) (2006).
21. U.S. CONST. art. III.
22. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
23. OPA § 1014(c) (West Supp. 1991); DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS (2010), *available at* http://www.restorethegulf.gov/sites/default/files/documents/pdf/claims-fact-sheet-state-and-local-govts.pdf.
24. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.
25. *Id.*
26. *Id.*
27. NATIONAL POLLUTION FUND CENTER. THE OIL SPILL LIABILITY TRUST FUND (OSLTF). *available at* http://www.uscg.mil/npfc/About_NPFC/osltf.asp.

Claims must be presented to the responsible party first, unless the responsible party is presenting a claim, or the President has advertised the availability of the Federal Fund.[28] If the claim is not settled by the responsible party within ninety days after the presentation of advertisement, the claimant may pursue litigation or seek reimbursement from the Federal Fund.[29] The claimant cannot be reimbursed by the Federal Fund while there is pending litigation on the same claim.[30] Essentially, the Section 1013 claims procedure is for any claimant who wants to make a claim against the Oil Spill Liability Trust Fund. Citizens must present claims first to responsible parties, unless it falls under 1013(b).[31] Furthermore, "there shall be no double recovery for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, or acquisition for the same incident and natural resources."[32] Double recovery is the principle that a plaintiff cannot be compensated more than is necessary to make the plaintiff whole due to an alleged injury.[33]

A. Deepwater Horizon Oil Funding and Claims Process

The Coast Guard has developed a claims process for suits filed by injured parties against BP. States, parishes, counties, local governments and subunits of local governments may file claims against BP.[34] Governments may file claims for property damages, loss of government revenue, removal costs, and public services.[35] Parties with standing may choose to mail or email claims, or they may call the government claims line.[36] If a claim is denied or not settled within ninety days, the claimant may contact the United States Coast Guard's National Pollution Funds Center ("NPFC").[37]

---

28. *Id.*

29. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.

30. *Id.*

31. U.S.C. § 1013(b) (2006).

32. *Id.* § 1006(d)(3).

33. Forster v. Boss, 97 F.3d 1127 (8th Cir. 1996).

34. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.

35. *Id.*; BP GULF OF MEXICO RESPONSE (2010), *available at* http://www.bp.com/bodycopyarticle.do?categoryId=1&contentId=7052055&nicam=USCSBaselineCrisisJune&nisrc=Google&nigrp=Branded_Crisis_General&niadv=General&nipkw=Deepwater_Horizon.

36. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.

37. *Id.*; BP GULF OF MEXICO RESPONSE, *supra* note 35.

Governments must file a claim with BP first if they wish to receive funds from the NPFC.[38] Governments may only file directly with the NPFC for removal costs. Such filings may only be submitted by governments that have already filed claims with BP.[39] These claims must be submitted in writing.[40]

B. Background of Deepwater Horizon Spill

BP has been designated one of the responsible parties for the Deepwater Horizon Spill.[41] As a result, BP has developed a claims process for litigation purposes.[42] BP established "a network of key personnel within the United Command and throughout the imparted region in order to work with States and local governments to address their needs and concerns."[43] In addition, BP utilized sub-sea robots that have effectively stopped the flow of oil at approximately 42,000 gallons a day.[44] If BP does not meet their obligations for payment under the OPA, the Oil Spill Liability Trust Fund may be responsible for compensating removal costs.[45]

BP has volunteered to contribute $20 billion dollars in total, or $5 billion dollars per year for four years to pay for all compensable costs incurred by the spill.[46] BP has been paying claims from individuals, businesses, NGOs, governments, and other parties impacted by the spill.[47]

Compensable costs may include "additional administrative costs, costs of additional personnel, and other out of pocket costs incurred for material and equipment that are incurred by a local government entity as a result of its response to the Deepwater Horizon Oil Spill."[48] Compensable costs do not include administrative, personnel, or equipment costs that would be incurred regardless of the oil spill. Also, compensable costs also do not include lease or capital purchases for

38. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.
39. *Id.*
40. *Id.*
41. THE GULF OF MEXICO DEEPWATER HORIZON OIL SPILL: SOME BACKGROUND AND WHAT IT MEANS (2010), *available at* http://www.theoildrum.com/node/6407.
42. *Id.*
43. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.
44. THE GULF OF MEXICO DEEPWATER HORIZON OIL SPILL: SOME BACKGROUND AND WHAT IT MEANS, *supra* note 41.
45. DEEPWATER HORIZON OIL SPILL FUNDING FACT SHEET FOR STATE AND LOCAL GOVERNMENTS, *supra* note 23.
46. *Id.*
47. *Id.*
48. *Id.* at 3.

buildings, vehicles, or equipment, unless they are approved by BP or the responsible party.[49]

A Local Government Entity ("LGE") seeking removal action should coordinate its efforts with the Federal On-Site Coordinator and Unified Command ("FOSC").[50] Reimbursable costs include costs involved with preventing, minimizing, or mitigating impact to natural resources as a result of the Deepwater Horizon spill.[51] If costs have not yet been reimbursed by BP, these costs should be submitted to the Government Entity and will be paid through their claims process.[52] If there are costs incurred that were not coordinated with the FOSC or BP, the parties involved should submit claims to BP along with an explanation for why the costs were necessary for spill removal or response.[53]

Additionally, lost revenue claims may be made against BP for "taxes, royalties, rents, fees, and net profit shares" that a local government agency was unable to collect as a result of the spill.[54] Damages for economic loss or destruction to government-owned or leased property may also be claimed against the company.[55] Costs that were not incurred as a direct result of the spill, or costs that were not necessary to respond to the spill, will not be reimbursed by BP.[56]

In sum, parties must have standing and must satisfy the OPA's claims procedure in order to obtain relief in court. Ultimately, claims for OPA removal costs that have not been settled after ninety days may be presented to the NPFC for consideration.[57] Under the OPA, a claim must be a demand for a sum certain; therefore, the government must present an exact dollar amount to the responsible party.[58] As discussed, states may directly present claims to the NPFC before presenting such claims to the responsible parties.[59] The government must first submit the claim in writing, then document any changes incurred from the spill, and finally forward the claims package to the NPFC.[60] BP continues to compensate businesses, NGOs, governments, and other parties impacted by the spill by awarding them monetary damages for all of their compensable costs.[61]

---

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

III. CIVIL LIABILITY

A. Elements of Liability

Title I of the OPA addresses issues such as who is liable, who will be compensated, when, and for what amount. The main liability provision states that "each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge" is liable for the removal costs and the specified damages resulting from the incident.[62] Thus, four elements are required to establish liability under the OPA: (1) a responsible party, (2) a vessel or facility, (3) a discharge or a substantial threat of discharge of oil into navigable waters, and (4) damages.[63] The state official conducts the investigation determining the source of the incident and the responsible party.[64] Once the responsible party or parties are identified, each responsible party is jointly and severally liable for removal costs and damages that are specified in section 2702(b).[65]

1. Responsible Party

a. Defining "Responsible Party"

The term "responsible party" is broadly defined and varies depending on the structure used.[66] In order to hold a person(s) liable as

---

62. 33 U.S.C. § 2702(a) (2006).

63. *Id.*

64. 33 C.F.R. § 133.23 (2000). Investigation to determine the source and responsible party:

> (a) The State official shall promptly make a thorough investigation to determine the source of the incident and the responsible party.
>
> (b) Upon completion of the investigation, the State official shall forward the results of the investigation and copies of the supporting evidence identifying the source and the responsible party to both the cognizant OSC and the NPFC official specified in § 133.25(c).

65. 33 U.S.C. § 2702(b)(1)-(2); Kiern, *supra* note 10, at 508 (OPA provides strict joint and several liability for responsible parties).

66. 33 U.S.C. § 2701(32) defines "responsible party" as:

> (A) VESSELS.—In the case of a vessel, any person owning, operating, or demise chartering the vessel.
>
> (B) ONSHORE FACILITIES.—In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.
>
> (C) OFFSHORE FACILITIES.—In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), 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

the responsible party, the person must be (1) an "owner or operator" and (2) in charge of a "vessel or facility" as defined in the statute. "Responsible party" in the case of a vessel was amended on January 2011 to include owners of oil being transported in single hull tank vessels.[67] The subsections below will discuss the definitions of "owner or operator," "vessel or facility," and the degree of control necessary for operation of the structure at issue.

i. "Owner or Operator"

The OPA circularly defines "owner and operator" as any person owning or operating the structure at issue and does not explain what constitutes owning or what actions amount to operation of the structure.[68] According to the legislative history of the OPA, the definition of "owner or operator" was taken verbatim from the Clean Water Act ("CWA") and was intended to have the same meaning under the OPA.[69] In determining the "owner and operator" under the OPA, courts have borrowed the interpretations of "owner and operator" from other statutes including the

---

applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) DEEPWATER PORTS.—In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(E) PIPELINES.—In the case of a pipeline, any person owning or operating the pipeline.

(F) ABANDONEMENT.—In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

67. Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, 124 Stat. 2905 (2010) ("the owner of oil being transported in a tank vessel with a single hull after December 31, 2010 (other than a vessel described in section 3703a(b)(3) of title 46, United States Code).").

68. 33 U.S.C. § 2701(26).

69. H.R. CONF. REP. NO. 101-653 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779 stated that:

> The terms 'vessel,' 'public vessel,' 'owner or operator,' 'onshore facility,' 'offshore facility,' 'barrel,' 'person,' 'navigable waters,' 'remove' and 'removal' and 'territorial seas' are defined by reference to definitions under section 311 or section 502 of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. §§ 1321, 1362). The terms 'offshore facility,' 'onshore facility,' 'owner or operator,' 'public vessel' and 'vessel' are re-stated verbatim from section 311(a) of the FWPCA. The terms 'navigable waters,' 'person' and 'territorial seas' are re-stated verbatim from section 502 of the FWPCA. In each case, these FWPCA definitions shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly.

CWA and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") either by the text of the statute or its case application. Identical to the OPA's definition of "owner or operator," both the CWA and CERCLA define "owner or operator" as "any person owning or operating."[70] The OPA's definition of "person" includes corporations;[71] therefore, a corporate entity can also be a responsible party.[72] Shareholders of a corporation, who may not have any role in the operations, are still considered owners of the corporation. In addition, if a corporation uses a subsidiary that owns the polluting structure, it becomes harder to identify the person owning or operating the facility for purposes of establishing the responsible party under the OPA. In identifying the responsible party, the OPA focuses on the degree of control a party has over the structure.[73] Additionally, cases defining "responsible party" under the CWA and CERCLA indicate that courts will look to the amount of control exercised by that party over the vessel or facility.[74]

ii. "Vessel or Facility"

In addition to establishing who is the "owner or operator," there must be an identified vessel or facility from which the oil is discharged or which poses a substantial threat of oil being discharged.[75] A "vessel" is "every definition of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[76] The definition does not include public vessels. "Tank vessel" is defined as "any vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo."[77] "Facility" means "any structure, group of structures, equipment, or device (other than a vessel)" which is used for one of the listed purposes in section 1001(9).[78] A mobile offshore drilling unit capable of use as an offshore facility is considered a

70. Federal Water Pollution Control Act (FWPCA) § 311(a)(6), 33 U.S.C. 1321(a)(6) (2006); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 § 101(20), 42 U.S.C. § 9601(20) (2006).

71. 33 U.S.C. § 2701(27) (The term "person" includes individual, corporation, partnership, association, municipality, commission, political subdivision, or interstate body).

72. *Id.*

73. 33 U.S.C. § 2701(32)(A)-(F) (whether a party is the responsible party depends on whether the party is an owner, operator, demise charterer, lessee, assignee, or permittee of the structure).

74. Hutson Smelley, *OPA '90 Liability in the Aftermath of an Oil Spill*, 12 U.S.F. MAR. L.J. 1 (1999-2000).

75. 33 U.S.C. § 2702(a).

76. *Id.* § 2701(37).

77. *Id.* § 2701(34).

78. *Id.* § 2701(9).

vessel.[79] A tugboat and a barge were deemed a single vessel when the barge was entirely dependant on the tug for propulsion and navigation.[80] When the tug and its barge are treated as a single unit they both constitute the "discharging vessel" and the tug's owner is thus the responsible party by virtue of having complete control over the barge.[81]

In *United States v. West Indies Transport*, the Third Circuit interpreted the statutory definition of "vessel" under the CWA.[82] The barge was half submerged in water, permanently moored to shore and was used to house workers, not as a means of transport.[83] The Third Circuit held that the barge in question was not a "vessel" within the meaning of the CWA.[84]

In the Deepwater Horizon oil spill, the drilling rig was a semi-submersible mobile offshore drilling unit, and it "relied on thrusters and satellite-positioning technology to stay in place."[85] Therefore, according to the definition utilized in *West Indies Transport*, the Deepwater Horizon drilling rig would be considered a vessel.

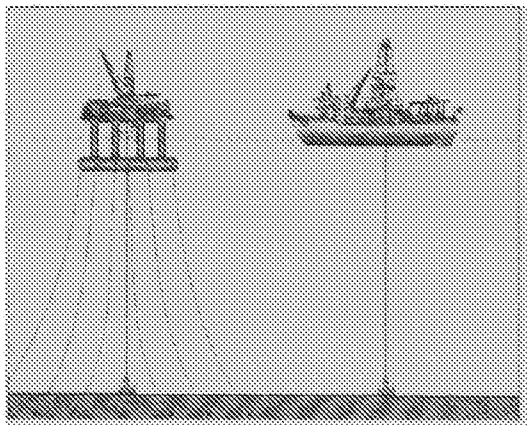

Figure 1: Deepwater drilling vessel compared to a drillship[86]

79. *Id.* § 2701(18).

80. Puerto Rico v. M/V Emily S, 13 F. Supp. 2d 147, 150 (D.P.R. 1998); Olympic Tug & Barge Co. v. United States, 1990 WL 166368 (W.D. Wash. 1990) ("A tug is thus a necessary adjunct to a barge, and seems natural to consider the two as a single entity.").

81. *Emily S*, 13 F. Supp. 2d at 150.

82. United States v. West Indies Transp., Inc., 127 F.3d 299, 309 (3rd Cir. 1997).

83. *Id.*

84. *Id.*

85. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 5, at 2, 92.

86. Minerals and Management Service Gulf of Mexico OCS Region, Environmental Assessment (2000).

iii. Operator Analysis

Determining the owner or operator of a polluting vessel or facility under the OPA becomes even more difficult when the owner is not the operator or when the operator does not directly own the vessel or facility. When a party that owns a vessel or facility does not also operate it, there is the issue of determining the "operator" and what actions constitute operation. In determining the responsible party under the CWA, courts often use a three-part test which characterizes an operator as having: (1) the capacity to make timely discovery of oil discharges, (2) the power to direct the activities of persons in control of the mechanisms causing the pollution, and (3) the capacity to prevent and abate damage.[87] The test is focused on the amount of involvement and control.[88] Under the CERCLA, the interpretation of the person "in charge" is also borrowed directly from section 311 of the CWA, and the factors considered in determining whether a person is "in charge" include: (1) occupying a position of responsibility and power, (2) having the capacity to direct activities that result in pollution, (3) making timely discovery of a release, and (4) preventing and abating the damage.[89]

In determining "operator" liability under the OPA, courts have adopted the analysis established by the Supreme Court decision under the CERCLA.[90] In *United States v. Bestfoods*, the Supreme Court separated the "owner or operator" analysis into two separate evaluations to determine the responsible party: (1) the person is an owner, or (2) the person is an operator.[91] The Supreme Court also distinguished between derivative and direct liability cases.[92] Direct liability involves liability for one's own actions as an "operator" resulting from the direct control a party exercises over the facility, while derivative liability can only be asserted by piercing the corporate veil.[93] The Supreme Court held that direct liability must be distinct and separate from derivative liability.

87. United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976); Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1293 (D. Mont. 1995).

88. *Beartooth Alliance*, 904 F. Supp. at 1293.

89. United States v. Carr, 880 F.2d 1550, 1554 (2d Cir. 1989); Sierra Club, Inc. v. Tyson Foods, Inc., 299 F. Supp. 2d 693 (W.D. Ky. 2003).

90. United States v. Jones, 267 F. Supp. 2d 1349 (M.D. Ga. 2003) ("Courts have recognized that the *Bestfoods* discussion of 'owner and operator' liability should be applied to OPA."). *See* Harris v. Oil Reclaiming Co., 94 F. Supp. 2d 1210, 1213 (D. Kan. 2000) (applying the *Bestfoods* operator analysis to define operator under OPA). *See also* United States v. Viking Res., Inc., 607 F. Supp. 2d 808 (S.D. Tex. 2009).

91. United States v. Bestfoods, 524 U.S. 51, 64 (1998).

92. *Id.* at 66.

93. *Id.* at 67-68.

The following sections will discuss direct liability followed by derivative liability and piercing the corporate veil.

BP became the legal "operator" of Block 252 after it purchased the rights to drill on that block, even though BP did not own or operate the rig.[94] BP's "engineering team designed the well and specified in detail how it was to be drilled. A team of specialized contractors would then do the physical work of actually drilling the well."[95] Transocean was the owner of the rig, and Transocean provided BP with the rig and the crew to run the rig.[96] BP had two of its company men, the "Well Site Leaders," on the rig at all times directing the work of the crew and contractors.[97]

b. Direct Liability: as an "Operator"

In determining what actions constitute operation, the Supreme Court in *Bestfoods* held that an operator under the CERCLA is "someone who directs the workings of, manages, or conducts the affairs of a facility."[98] Additionally, the Supreme Court clarified the "operator" definition concerning environmental contamination, stating that an "operator" "must manage, direct, or conduct operations specifically related to the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[99] In *United States v. Jones*, the Middle District of Georgia adopted the *Bestfoods* operator analysis to determine the responsible party under the OPA.[100] The court stated that a person is liable as an operator when the person "is someone who directs the workings of, manages, or conducts the affairs of the facility."[101]

i. Individuals

The *Bestfoods* operator analysis is also applicable to shareholder or director liability under the CERCLA, and therefore the OPA, when "he himself operates a facility, rather than merely directs the business of the corporation."[102] The court stated that "shareholders could not lose this limited liability only because they exercised the control to which they were entitled by virtue of their stock ownership, such as electing

94. *Id.* at 92.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 52.
99. *Id.*
100. United States v. Jones, 267 F. Supp. 2d 1349, 1355 (M.D. Ga. 2003).
101. *Id.*
102. *Id.*

directors, making by-laws, or any other acts incident to their legal status as shareholders."[103]

In *Jones*, the court held that a principal stockholder of a corporation owning an oil facility could be held individually liable as an operator under the OPA. The court explained that a shareholder could be individually liable under the OPA when the shareholder is the president and chief executive officer of the corporation, is the primary decision maker over the facility's environmental compliance, and is directly involved in the facility's environmental compliance.[104]

In *Harris v. Oil Reclaiming Co.*, the District of Kansas held that a former vice-president did not qualify as an "operator" of the facility under the OPA by being a general partner of the corporation and having general management responsibilities, in the absence of evidence that he participated in direct operation of the polluting facility.[105]

ii. Corporations

A parent corporation using a subsidiary that owns the polluting facility can be held directly liable as an operator if the court finds that the parent corporation was an operator of the polluting facility.[106] To establish liability of the parent corporation, there must be a finding of actual control by the parent company over the polluting facility. Mere ownership of the structure will not suffice.[107]

c. Derivative Liability: Piercing the Corporate Veil

The doctrine of piercing the corporate veil is a common law theory under which the corporate existence, providing limited liability protection, is disregarded.[108] The doctrine is an exception to the general principle that a corporation is a separate legal entity that provides limited liability to its owners for the debts of the corporation. It is applied in cases of fraud or limited exceptional circumstances.[109] State law governs the determination of whether the corporate veil can be pierced and which factors should be considered.[110] If a corporate veil can be pierced, the parent corporation will be derivatively liable for the actions of the subsidiary.

---

103. *Bestfoods*, 524 U.S. 51.
104. *See Jones*, 267 F. Supp. 2d 1349.
105. Harris v. Oil Reclaiming Co., 94 F. Supp. 2d 1210 (D. Kan. 2000).
106. *Bestfoods*, 524 U.S. at 68.
107. *Id.*
108. 18 AM. JUR. 2D *Corporations* § 47 (2010).
109. *Id.*
110. *Id.*

The corporate veil can be pierced to derivatively hold responsible an individual owner of a corporation or a corporate entity using a subsidiary.[111] The analysis for determining whether the corporate veil can be pierced is taken from cases addressing the issue under the CERCLA.[112] The level of difficulty in piercing the corporate veil may differ between the OPA and CERCLA depending on the facts and circumstances of each case. In *Bestfoods*, the Supreme Court addressed derivative liability when the corporate veil can be pierced, which has been incorporated by case law into the "owner or operator" analysis under the OPA.[113]

In *U.S. v. Viking Resources*, the government raised two theories for finding the sole shareholder and director of Viking to be an owner and operator under the OPA.[114] They argued that he was an alter-ego of Viking and that he was an operator of the facility in his individual capacity, therefore the corporate veil should be pieced. In determining whether the corporate veil should be pierced, the court concluded that the *Jon-T Chemicals* analysis used under the CERCLA should apply.[115] The *Jon-T Chemicals* analysis provides two situations when the corporate veil can be pierced: (1) if the corporation "is established for a fraudulent purpose or is used to commit an illegal act," or (2) if the corporation is the "alter-ego" of the parent corporation."[116] The Fifth Circuit provided 12 factors to consider in determining whether a subsidiary is an alter-ego of its parent.[117] In *Viking*, the court used the factors from *Jon-T Chemicals* and summarized them into ten factors to determine whether a director was the alter-ego of the corporation. The factors included stock ownership, number of directors, financing, incorporation, capital structure, payment of salaries and expenses, how business is obtained, use of the corporation's property, and corporate formalities.[118] If the

111. *See, e.g.*, United States v. Jones, 267 F. Supp. 2d 1349. (M.D. Ga. 2003). *See also Bestfoods*, 524 U.S. 51.

112. *See Jones*, 267 F. Supp. 2d 1349. *See also Bestfoods*, 524 U.S. 51.

113. *Jones*, 267 F. Supp. 2d at 1354; United States v. Viking Res., Inc., 607 F. Supp. 2d 808, 822 (S.D. Tex. 2009).

114. *Viking Res,, Inc.*, 607 F. Supp. 2d 808 (citing *Bestfoods*, 524 U.S. 51 and *Jones*, 267 F. Supp. 2d 1349).

115. *Id.* at 823; Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80, 83 (5th Cir. 1990) (holding that the *Jon-T Chemicals* analysis should be applied in CERCLA cases determining whether the corporate veils should be pierced).

116. *Viking Res., Inc.*, 607 F. Supp. 2d at 823 (citing United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985)).

117. *Jon-T Chem.*, 768 F.2d at 691-92 (listing the factors used in determining whether the subsidiary is the alter-ego of its parent corporation to hold the parent corporation liable).

118. *Viking Res., Inc.*, 607 F. Supp. 2d at 823.

corporate veil can be pierced, the director and sole shareholder would be derivatively taking the corporation's status of a responsible party.[119]

In January 2011, an amendment was proposed to extend liability to owners with more than a 25% interest in a responsible party.[120]

d. Parties Not Treated as Responsible Parties

i. Cargo Owners

Cargo owners are exempt from OPA liabilities as long as they are not owners or operators.[121] The legislative history reveals that the original draft included liability for cargo owners, but such liability was not included in the enacted version. This omission could indicate that Congress intended to exclude cargo owners from liability.[122]

ii. Vessel Captains

In *Green Atlas Shipping*, the District Court of Oregon held that the captain of the vessel was not an "operator" within the meaning of the OPA.[123] The government argued that the captain was the responsible party because the captain was a "person" within the meaning of the statute, and the captain literally operated the vessel.[124] The court looked to the legislative history and concluded that in the case of vessels, the general maritime understanding of "operators" should apply.[125] The court interpreted "operators" as those "entities that are ultimately responsible for the vessel's overall operation, including the direction of the captain and crew, but not the captain himself."[126]

119. *Id.* at 822.

120. H.R. 54, 111th Cong. (2nd Sess. 2011) (The amendment, if enacted would modify section 2701(32) for defining the responsible party, and would add persons having more than 25% ownership interest in a responsible party).

121. M.J. Wyatt, *Financing the Clean up: Cargo Owner Liability for Vessel Spills*, 7 U.S.F. MAR. L.J. 353 (1995).

122. H.R. Conf. Rep. No. 101-653, 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

123. Green Atlas Shipping S.A. v. U.S., 306 F. Supp. 2d 974 (D. Or. 2003).

124. *Id.* at 980.

125. *Id.* at 981 (explaining that OPA's financial requirements for responsible parties indicate that vessel captains were not intended to be subject to liability).

126. *Id.*

2. Discharge of Oil or Substantial Threat of Discharge upon Navigable Waters

a. Defining "Oil"

It is critical to determine the nature of the substance discharged because nearly every piece of legislation concerning oil and the environment defines the substance differently.[127] Therefore, a substance that qualifies as "oil" under the OPA may not satisfy the definition under another statute.[128] In addition, liability and the imposition of civil and criminal penalties differ between statutes.[129]

The OPA applies to "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil."[130] The OPA also includes vegetable oils, animal fats, and petroleum-based oils such as coal tar.[131] However, Congress refused to specify an exclusive list of substances that qualify as oil,[132] preferring instead to defer to the Coast Guard and the EPA to determine which substances are specifically covered under the OPA.[133]

b. Defining "Discharge"

The OPA defines a "discharge" as "any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping."[134] "Discharge" includes any oil release that leaves "a film or sheen upon or discoloration of the surface of the water . . . or cause[s] sludge or emulsion beneath the surface."[135] Therefore, if a "discharge" of oil

127. *See* Kiern, *supra* note 10, at 509-10. *See also* 33 U.S.C. §§ 1901-1915 (2006) (providing three different definitions of oil in the OPA, the FWPCA, and the Act to Prevent Pollution to Ships ("APPS")).

128. *See* Kiern, *supra* note 10, at 509. *See, e.g.*, United States v. Apex Oil Co., 132 F.3d 1287, 1290 (9th Cir. 1997) (concluding that "oil" and "petroleum" may have different meanings).

129. *See* Kiern, *supra* note 10, at 509.

130. 33 U.S.C. § 2701(23) (2006). *See* Kiern, *supra* note 10, at 509.

131. *See* Designation of Hazardous Substances, 40 C.F.R. § 302.4 (2010); Kiern, *supra* note 10, at 509.

132. *See* Kiern, *supra* note 10, at 509.

133. *See id. See, e.g.*, Coast Guard Authorization Act of 1998, Pub. L. No. 105-308, 112 Stat. 3411, 3421 (1998) (amending the definition of oil in 33 U.S.C. § 2701(23) (1994) and directing the Coast Guard and EPA to evaluate substances that should be classified as oil under OPA).

134. 33 U.S.C. § 2701(7).

135. Discharges of oil in such quantities as "may be harmful" pursuant to section 311(b)(4) of the Act, 40 C.F.R. § 110.3 (2010). *See* United States v. Choptin Transp. Inc., 649 F. Supp. 356, 360 (S.D. Ohio 1986) (interpreting the same); Kiern, *supra* note 10, at 510.

falls within this definition, the spill is deemed harmful by the EPA's regulations, and the discharge is subject to the CWA and OPA.[136] However, liability does not apply to a "discharge" covered by a government-issued permit, a discharge from a public vessel, or a discharge from an onshore facility subject to the Trans-Alaska Pipeline Authorizations Act.[137]

c. Defining "Substantial Threat of Discharge"

The term "substantial threat of discharge" is not defined by the OPA, the CWA, or Coast Guard and Environmental Protection Agency regulations.[138] Furthermore, an examination of legislative history and case law provides little help in defining a "substantial threat of discharge" by failing to specify the magnitude and duration of a threat for determining when liability will attach.[139] When the OPA was enacted in 1990, Congress determined:

> [L]iability for removal costs resulting from a threat of discharge of oil should attach in the event that the threat is substantial. Thus liability may exist if a vessel were aground and actions were taken to prevent the vessel from breaking up and spill the oil. No liability would result however from the presence of tanker traffic alongside waterfront property resulting in reduced property values because of the potential for a discharge of oil.[140]

In *Avitts v. Amoco Production Co.*, a district court in Texas considered whether oil production operations posed a substantial threat of discharge into navigable waters.[141] The court relied heavily on the proximity of the threat to surface waters when imposing liability.[142] The court stressed that "OPA is a remedial statute" that is "broadly designed to address the nationwide and pernicious threat to coastal waters posed by unnecessary pollution."[143] "Substantial threat of discharge" is interpreted liberally and applied in a fact-specific manner[144] consistent

136. *See* 40 C.F.R. § 110.3; *Choptin Transp. Inc.*, 649 F. Supp. at 360; Kiern, *supra* note 10, at 510.

137. 33 U.S.C. § 2702(c).

138. *See id.* § 2702(a); Kiern, *supra* note 10, at 510.

139. *See* Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1121-22 (S.D. Tex. 1994); H.R. REP. NO. 101-242, pt. 2, at 56 (1989); Kiern, *supra* note 10, at 511.

140. H.R. REP. No. 101-242, pt. 2, at 56.

141. *See Avitts*, 840 F. Supp. at 1121-22; Kiern, *supra* note 10, at 511.

142. *See Avitts*, 840 F. Supp. at 1121-22; Kiern, *supra* note 10, at 511.

143. *Avitts*, 840 F. Supp. at 1121-22. *See* Kiern, *supra* note 10, at 511.

144. *See Avitts*, 840 F. Supp. at 1121-22; H.R. REP. No. 101-242, pt. 2, at 56; Kiern, *supra* note 10, at 511. *See, e.g.*, United States v. Ne. Pharm. & Chem. Co., 579 F. Supp. 823, 845-86 (W.D. Mo. 1984) (applying CERCLA); United States v. Seymour Recycling Corp., 618 F. Supp. 1, 4-6 (S.D. Ind. 1984) (applying CERCLA).

with the treatment of similar environmental statutes, such as the Clean Water Act.[145] Therefore, the Coast Guard or EPA officials will likely be responsible for declaring the existence of a substantial threat and ordering removal action or ordering a responsible party to take removal action.[146] In reality, the lack of a concrete definition for a "substantial threat of discharge" may give rise to an intense debate between those enforcing the OPA and responsible parties claiming they did not meet the threshold of danger necessary for liability.

Costs and claims may arise from previously sunken vessels that discharge oil, representing ongoing liability for the responsible party.[147] Over 1,000 sunken vessels pose a threat of discharge to navigable waters.[148] In many cases, a responsible party is unavailable and thus unable to be held liable for the removal costs.[149] Therefore, the Oil Spill Liability Trust Fund ("Fund") would likely bear the burden of the removal and cleanup costs.[150] The primary purposes of the Fund are to aid in removal costs, pay claims for uncompensated costs and damages, and conduct research concerning spill prevention.[151] The Fund receives revenue from liable responsible parties' costs, a five-cent-per-barrel tax collected from the oil industry on petroleum produced or imported to the United States, and civil penalties incurred by responsible parties under the OPA and other environmental statutes.[152]

d. Defining "Navigable Waters"

i. "Navigable Waters" Before *United States v. Rapanos*

The OPA applies to the "navigable waters or adjoining shorelines or exclusive economic zone" of the United States.[153] The OPA defines "navigable waters" as the "waters of the United States, including the

145. *See* Kiern, *supra* note 10, at 511. *See, e.g.*, Reserve Mining Co. v. Envtl. Prot. Agency, 514 F.2d 528-29 (8th Cir. 1975) (interpreting term of the FWPCA liberally); United States v. Conservation Chem. Co., 619 F. 162, 192-97 (W.D. Mo. 1985) (construing "substantial threat of discharge" under CERCLA).

146. *See* Kiern, *supra* note 10, at 513. *See, e.g.*, Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader, 795 F Supp. 1046, 1048 (W.D. Wash. 1991).

147. *See* U.S. Government Accountability Office, GAO-07-1085, Maritime Transportation: Major Oil Spill Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain 33 (2007).

148. *See* J. Michel et al., Potentially Polluting Wrecks in Marine Waters: An Issue Paper Prepared for the 2005 International Oil Spill Conference (2005); U.S. Government Accountability Office, supra note 147, at 33.

149. *See* U.S. Government Accountability Office, *supra* note 147, at 34.

150. *See id.*

151. *See* NATIONAL POLLUTION FUND CENTER, *supra* note 27.

152. *See id.*

153. 33 U.S.C. § 2702(a) (2006).

territorial seas."[154] However, this definition is open to many interpretations,[155] including: (1) the "minimum nexus" test, (2) the broad definition construed under the Clean Water Act, (3) the well-settled principle of "navigable in fact" waters adopted from maritime and admiralty law, and (4) the two approaches the Supreme Court articulated in *United States v. Rapanos*.[156]

(a) Minimum Nexus Approach

The "minimum nexus" test is an approach used by the majority of courts interpreting "navigable waters" under the OPA.[157] *Avitts v. Amoco Production Co.* first employed the test when evaluating an OPA claim arising from a spill in a creek which drained into a bay of the Gulf of Mexico.[158] The court determined that the OPA did not apply because the creeks were not "navigable in fact."[159] The court examined the relationship between the incident and the coastline concluding that, "the only minimum nexus an incident must have to the coastline is that the facility poses a substantial threat of discharge of oil, into or upon the navigable waters or adjoining shorelines."[160] Under this test, the court determined that the OPA applies to the release of oil into a drainage basin of navigable waters.[161] Another court applied this "minimum nexus" test with respect to a spill at an oil processing plant in Kansas.[162] The court found that the OPA was inapplicable under the "minimum nexus" test because there was no evidence the oil was discharged into "navigable waters."[163] Therefore, the "minimum nexus" test is less likely to apply if the spill occurs at a great distance inland from oceans, bays, shores, and beaches.[164]

---

154. *Id.* § 2701(21); *Id.* § 2701(35) (defining "territorial seas" 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 seas and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles").

155. *See* Kevin Batik, *OPA's Reach: The Geographic Scope of "Navigable Waters" Under the Oil Pollution Act of 1990*, 21 REV. LITIG. 419, 424-42 (2002). *See also* United States v. Rapanos, 547 U.S. 715 (2006).

156. *See* Batik, *supra* note 155, at 424-44. *See also Rapanos*, 547 U.S. at 715-812.

157. *See* Harris v. Oil Reclaiming Co., 94 F. Supp. 2d 1210, 1214 (D. Kan. 2000); Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1122 (S.D. Tex. 1994); Batik, *supra* note 155, at 438.

158. *Avitts*, 840 F. Supp. at 1122. *See* Batik, *supra* note 155, at 438.

159. *Avitts*, 840 F. Supp. at 1122. *See* Batik, *supra* note 155, at 438.

160. *Avitts*, 840 F. Supp. at 1122. *See* Batik, *supra* note 155, at 438.

161. *Avitts*, 840 F. Supp. at 1122. *See* Batik, *supra* note 155, at 438.

162. *Harris*, 94 F. Supp. 2d at 1213. *See* Batik, *supra* note 155, at 441.

163. *Harris*, 94 F. Supp. 2d at 1214. *See* Batik, *supra* note 155, at 441.

164. *Harris*, 94 F. Supp. 2d at 1214. *See* Batik, *supra* note 155, at 441.

(b) The Clean Water Act

The OPA borrowed the term "navigable waters" from the Clean Water Act. Many courts have interpreted the OPA's "navigable waters" similarly to the Clean Water Act.[165] In the Clean Water Act, "navigable waters" may be defined very broadly, including all surface waters such as oceans, creeks, and wetlands.[166] Applying the Clean Water Act's definition, there are few waters out of the OPA's reach.[167]

Courts have applied the broad definition derived from the Clean Water Act when analyzing an issue under the OPA.[168] The court in *Mizhir* relied on other court interpretations of the term "waters of the United States" in the Clean Water Act to be applied in "broad terms."[169] In doing so, the *Mizhir* court concluded that the expansive term employed by both the OPA and the Clean Water Act meant "all waters and wetlands," not necessarily those waters that were navigable in fact.[170] The court in *Harken II* concluded that "[t]he legislative history of the OPA and the textually identical definitions of 'navigable waters' in the OPA and the CWA strongly indicate that Congress generally intended the term to have the same meaning."[171]

However, other courts have rejected this analysis of "navigable waters," reasoning that the Clean Water Act and the OPA should employ different definitions of "navigable waters" because the two statutes served different purposes.[172] The Clean Water Act served the broader purpose of eradicating pollution from all the nation's waterways,[173] while the OPA was "enacted to address a problem of more limited geographic scope"[174] and only intended to protect the nation's shorelines, or coastal waterways, from oil spills.[175] However, in stark contrast to the stated

165. *See* Batik, *supra* note 155, at 425-33. *See also*, United States v. Mizhir, 106 F. Supp. 2d 124, 125 (D. Mass 2000); Rice v. Harken Exploration Co. (*Harken II*), 250 F. 2d 264, 272 (5th Cir. 2001).

166. 33 U.S.C. § 2701(21) (2006); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (noting that in the Clean Water Act Congress intended the term "navigable waters" to have "the broadest possible constitutional interpretation"). *See* H.R. CONF. REP. NO. 101-653, at 102 (1990) (explaining "navigable waters" derived from Clean Water Act); Kiern, *supra* note 10, at 516.

167. *See* Kiern, *supra* note 10, at 516.

168. *Mizhir*, 106 F Supp. 2d at 125; *Harken II*, 250 F.2d at 272. *See* Batik, *supra* note 155, at 425-42.

169. *Mizhir*, 106 F. Supp. 2d at 125. *See* Batik, *supra* note 155, at 427.

170. *Mizhir*, 106 F. Supp. 2d at 125. *See* Batik, *supra* note 155, at 427.

171. *Harken II*, 250 F.2d at 267. *See* Batik, *supra* note 29, at 432.

172. Sun Pipe Line Co. v. Conewago Contractors, Inc., 1994 WL 539326, at *5 (M.D. Pa. Aug. 22, 1994). *See* Batik, *supra* note 155, at 433.

173. *See Sun Pipe Line Co.*, 1994 WL 539326, at *5; Batik, *supra* note 155, at 434.

174. *Sun Pipe Line Co.*, 1994 WL 539326, at *5. *See* Batik, *supra* note 155, at 434.

175. *See Sun Pipe Line Co.*, 1994 WL 539326, at *5; Batik, *supra* note 155, at 434.

limited geographic scope, a district court has concluded that a direct or indirect link to the coastal waters could also be demonstrated to invoke the protections of the OPA.[176]

(c) Maritime and Admiralty Law

Maritime and admiralty laws have a well-settled definition of "navigable waters" that refers to any area of water suitable for commercial use.[177] This definition rests on the theory that the waters are "navigable in fact."[178] Currently, no courts have interpreted the OPA to include this narrow definition of "navigable waters,"[179] preferring instead a broader geographic scope.[180]

ii. *United States v. Rapanos*: Two Tests?

In *United States v. Rapanos* the Supreme Court evaluated whether tributaries and wetlands are "waters of the United States," and thus "navigable waters" under the Clean Water Act.[181] However, the Supreme Court failed to issue a majority opinion, allowing for the possibility that district courts in the future could select one of two tests.[182] The plurality opinion rejected the maritime law theory of "waters of the United States" being limited to those that are navigable in fact.[183] The plurality extended the definition to "relatively permanent, standing or continuously flowing bodies of water," connected to navigable in fact waters and to "wetlands with a continuous surface connection to" such relatively permanent waters.[184]

In a concurring opinion for *Rapanos*, Justice Kennedy concluded that the definition extended beyond navigable in fact waters and included wetlands "if . . . either alone or in combination with similarly situated

176. *See Sun Pipe Line Co.*, 1994 WL 539326, at *12; Batik, *supra* note 155, at 437.
177. *See* Batik, *supra* note 155, at 424-25.
178. *See* Rice v. Harken Exploration Co. (*Harken I*), 89 F. Supp. 2d 820, 824 (N.D. Tex. 1999) (stating that the test for navigability "is whether the body of water 'in its natural state, is used, or capable of being used, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of travel in the water'") (quoting Econ. Light & Power Co. v. United States, 256 U.S. 113, 121-22 (1921)); Batik, *supra* note 155, at 425.
179. *See* Batik, *supra* note 155, at 425. *See also Harken I*, 89 F. Supp. 2d. at 826-27 (rejecting the admiralty interpretation of the term); Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1122 (S.D. Tex. 1994) (noting that such an interpretation would be "unduly narrow").
180. *See* Batik, *supra* note 155, at 425.
181. United States v. Rapanos, 547 U.S. 715, 730 (2006).
182. *Id.* at 715-812.
183. *Id.* at 730.
184. *Id.* at 739-42.

lands in the region, [the waters] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[185] This "significant nexus" test is based on the theory that a wetland adjacent to a navigable water will be covered under the Clean Water Act because "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in adjacent bodies."[186] Under this approach, if a body of water is an "integral part of the aquatic environment," a "significant nexus" between the wetland and the navigable water is established.[187] The "significant nexus" test is applied on a case-by-case basis.[188]

In conclusion, there is little consensus as to the appropriate interpretation of "navigable waters." The Supreme Court has not dealt with the OPA's "navigable waters" provision. In *Rapanos*, the Supreme Court came close to solidifying a definition with respect to the Clean Water Act, but, without a majority opinion, the appropriate test remains unclear.[189] Since 2006, seven federal circuit courts have struggled to determine which *Rapanos* test is controlling.[190] The majority of the circuits confronted with the issue found the "substantial nexus" test is controlling.[191] However, it is unclear whether either *Rapanos* test applies to the OPA.[192]

3. Damages: Covered Damages and Removal Costs

Under section 2702(b) of the OPA, each responsible party is jointly and severally liable for covered removal costs and specified damages resulting from the incident.[193] Covered removal costs include all removal costs incurred under listed sections of the Intervention on the

185. *Id.* at 779-80 (Kennedy, J., concurring).
186. *Id.*
187. *Id.*
188. *Id.*
189. *See id.* at 715-812.
190. *See* United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) (holding either *Rapanos* test may be used); United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (determining evidence presented sufficient under either *Rapanos* standard); United States v. Lucas, 516 F.3d 316 (5th Cir. 2008) (determining evidence presented sufficient under either *Rapanos* standard); United States v. Robinson, 521 F.3d 1319 (11th Cir. 2008) (holding "significant nexus" test controlled); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); United States v. Gerke, 464 F.3d 723 (7th Cir. 2006); United States v. Johnson, 467 F.3d 56 (1st Cir. 2008) (holding either *Rapanos* test may be used).
191. *See Robinson*, 521 F.3d at 1320; *Gerke*, 464 F.3d at 725; *N. Cal. River Watch*, 496 F.3d at 1003.
192. *See Rapanos*, 547 U.S. at 715-812.
193. 33 U.S.C. § 2702(a) (2006).

High Seas Act and any removal costs incurred pursuant to a National Contingency Plan.[194] Other covered damages are specifically listed and include compensation for natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services.[195]

In the absence of gross negligence or violation of the law, the total liability of a responsible party for both removal costs and damages is capped according to the structure at issue.[196] For example, in the case of an offshore facility, liability is limited to $75 million plus the total of all removal costs.[197] As a result, a large oil spill causing damages in excess of the liability cap presents the problem of determining which injured parties will be compensated and in what order.[198]

a. Natural Resource Damages

Natural resource damages were historically based on the right of a property owner in maritime tort law.[199] *California v. S.S. Bournemouth* established the government's right to bring suit seeking recovery for natural resource damages in the case of an oil spill.[200] The court held that the government can recover natural resource damages on behalf of the public when the public is viewed as the owner of the natural resources and this property was damaged by the oil spill.[201]

Further, States have the right to sue on behalf of the public for damage to water caused by oil spills in maritime common law[202] or through *parens patriae* in common law.[203] Regardless of whether the state has this *parens patriae* right or not, the First Circuit has held that a state can create the right to natural resources damages in admiralty through legislation in *Puerto Rico v. S.S. Zoe Colcotroni*.[204] However, the State action or legislation creating this right to natural resource damages cannot conflict with federal laws or jurisdiction.[205]

Under the OPA, natural resource damages are recoverable for "injury to, destruction of, loss of, or loss of use of natural resources."[206]

---

194. *Id.* § 2702(b)(1).
195. *Id.* § 2702(b)(2)(A)-(F).
196. *Id.* § 2704.
197. *Id.* §§ 2704(a)(3), 2704(c)(1).
198. *Id.*
199. California v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969).
200. *Id.*
201. *Id.*
202. Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1067 (D. Md. 1972).
203. Maine v. M/V Tamano, 357 F. Supp. 1097, 1102 (D. Me. 1973).
204. Puerto Rico v. S.S. Zoe Colcotroni, 628 F.2d 652, 671-72 (1st Cir. 1980).
205. *Id.* at 672.
206. 33 U.S.C. § 2702(b)(2)(A) (2006).

These damages also include reasonable assessment costs and are recoverable by trustees designated by the United States, an individual state, an Indian tribe, or a foreign nation.[207] These trustees are designated by the President or the authorized representative of the state, Indian tribe, or foreign government.[208] The trustee assesses the damages to natural resources then develops and implements a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under this trusteeship.[209]

The damage assessment process includes the pre-assessment phase, the restoration planning phase, and the restoration implementation phase.[210] The pre-assessment phase is used to determine if the proper jurisdiction is present. Proper jurisdiction is necessary to pursue restoration planning under the OPA.[211] To determine jurisdiction, the trustee must determine if the discharge of oil took place and if natural resources were damaged or may be damaged.[212] In the restoration planning phase, the trustee evaluates and quantifies potential injuries and determines the need for and scale of restoration.[213] Finally, the restoration implementation phase provides a process for executing the restoration.[214]

The measurement of natural resource damages consists of "the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; the diminution in value of those natural resources pending restoration; plus the reasonable cost of assessing those damages."[215] Recovery for natural resource damages seeks to restore the injured natural resource.[216] Compensable values of natural resources measure the diminution in value of the resources and include direct use values and passive use values.[217] Direct use values consist of the value derived directly from the use of a natural resource.[218] Passive use values include the value placed on a natural resource not linked to its direct use.[219]

Various measurement techniques exist for compensable values of natural resource damages. The trustee has the discretion to use any

207. *Id.*
208. *Id.* § 2706(b).
209. *Id.* § 2706(c).
210. 15 C.F.R. § 990 (2006).
211. *Id.* § 990.40.
212. *Id.* § 990.41.
213. *Id.* § 990.50.
214. *Id.* § 990.60.
215. 33 U.S.C. § 2706(d) (2006).
216. 15 C.F.R. § 900.10.
217. *Id.* § 990.77.
218. *Id.* § 990.77(g)(1).
219. *Id.* § 990.77(g)(2).

existing measurement technique.[220] These include the travel cost method, the factor income method, the hedonic price method, the market models of supply and demand, the benefits transfer approach, the habitat or species replacement cost method, and the contingent valuation method.[221] First, the travel cost method estimates the loss in value of recreational services by measuring the difference between the services provided by the area with and without the discharge and resulting natural resource damage.[222] The factor income method estimates the change in economic rent attributable to the injured natural resource as a result of the discharge.[223] The hedonic price method relates the price of a marketed commodity to the quality of the surrounding environment, where the quality functions as an attribute of private property.[224] Under this approach, environmental factors are considered to be amenities of private property that affect fluctuations in the value of the property.[225] The market models of supply and demand measure market prices or consumer surplus when natural resources are traded in markets.[226] The benefits transfer approach uses valuation estimates and data from one context, such as the valuation data from a previous oil spill, to value a similar resource or service.[227] Habitat or species replacement cost method estimates damages in terms of the cost of obtaining, from alternative sources, the equivalent of the quality and quantity of services diminished by the injury from the onset of the discharge through full recovery.[228] Finally, the contingent valuation method utilizes surveys to determine individuals' valuation of natural resources or services provided by natural resources.[229] Given the uncertainty of valuation techniques using surveys, guidelines have been provided by the regulations of the OPA to help ensure more accurate surveys.[230]

The National Oceanic and Atmospheric Administration ("NOAA") promulgates the regulations for assessing natural resource damages.[231] Damage assessments made in accordance with the NOAA's regulations also have a rebuttable presumption of validity on behalf of the trustee in

220. *Id.* § 990.78.
221. *Id.*
222. *Id.* § 990.78(b)(1).
223. *Id.* § 990.78(b)(2).
224. *Id.* § 900.78(b)(3).
225. Carol A. Jones et al, *Public and Private Claims in Natural Resource Damage Assessments*, 20 HARV. ENVTL. L. REV. 111, 131 (1996).
226. 15 C.F.R. § 990.78(b)(4).
227. *Id.* § 990.78(c)(1).
228. *Id.* § 990.78(c)(2).
229. *Id.* § 990.78(b)(5).
230. *Id.*
231. 33 U.S.C. § 2706(e)(1) (2006).

any administrative or judicial proceeding.[232] A similar rebuttable presumption provision of the CERCLA was upheld in *Ohio v. United States DOI*.[233] Congress intended the decision in *Ohio* upholding the rebuttable presumption of validity given to the trustee's assessment to be reflected in its passage of the OPA.[234] The rebuttable presumption of validity in the OPA was upheld in *GE v. United States DOC*.[235]

One of the most controversial parts of assessing natural resource damages is valuing passive use damages with the contingent valuation method.[236] The surveys used in contingent valuation are taken by questioning individuals with the purpose of ascertaining the values they attach to changes in particular resources, usually through questions about how much the individual is willing to pay for the resource.[237] Contingent valuation is a respected valuation technique and is used in situations where no other way to determine value exists,[238] such as with nonuse values.[239] This method is the only means of directly measuring existence values.[240] It also reflects a societal view that natural resources are worth more than just their market value,[241] and it recognizes natural resources as more than merely a source of industrial raw materials.[242]

Further, proponents of the contingent valuation method deny that values derived from the method should be excluded because of uncertainties in valuation.[243] Other areas of law accept damages that are uncertain, such as pain and suffering or emotional distress damages in torts.[244] In these situations, "a jury verdict on pain and suffering amounts to nothing more than the end result of an extremely unsophisticated,

232. *Id.* § 2706(e)(2); 15 C.F.R. § 990.13.

233. Ohio v. U.S. Dep't of Interior, 880 F.2d 432, 480 (D.C. Cir. 1989).

234. S. REP. NO. 101-94, at 15 (1989).

235. Gen. Elec. v. U.S. Dep't of Commerce, 128 F.3d 767, 772 (D.C. Cir. 1997).

236. *See generally* Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879 (1994) (supporting contingent valuation method and comparing it to other areas of law with uncertain damages); Comment, *"Ask a Silly Question...": Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981 (1992) (criticizing contingent valuation method as unreliable).

237. Ohio v. U.S. Dep't of Interior, 880 F.2d at 476.

238. Christine M. Augustyniak, *Economic Valuation of Services Provided by Natural Resources: Putting a Price on the "Priceless,"* 45 BAYLOR L. REV. 389, 400 (1993).

239. Nonuse values include those not requiring the direct use of a resource, such as the option of using the resource, knowledge of its existence, and its availability for future use. *See* Augustyniak, *supra* note 238, at n.13.

240. James Peck, Comment, *Measuring Justice for Nature: Issues in Evaluating and Litigating Natural Resources Damages*, 14 J. LAND USE & ENVTL. LAW 275, 284 (1999).

241. Dobbins, *supra* note 236, at 942.

242. Peck, *supra* note 240, at 277-78.

243. Dobbins, *supra* note 236, at 885.

244. *Id.* at 885.

extremely uncontrolled CV [contingent valuation] process."[245] Finally, not allowing nonuse values because of uncertainty in the valuation technique only guarantees that the plaintiff will absorb these costs, rather than the defendant.[246]

However, critics of the contingent valuation method look at the unreliability and uncertainty of this valuation technique as reasons for excluding existence values in natural resource damages.[247] Because contingent valuation is the only way to assess these damages, there is no way to verify the accuracy or reliability of the survey results.[248] Opponents of the contingent valuation method also cite a lack of knowledge on the part of the individuals surveyed as a reason not to trust their answers.[249] The survey process also allows for potential strategic behavior on the part of those surveyed; what the people say they would do is potentially much different than what they would actually do.[250] Thus, hypothetical questions will only receive hypothetical answers.[251] Due to increased costs for defendants that will eventually be passed to consumers, critics of contingent valuation argue that the societal costs of the uncertainty in this method are greater than the societal costs of ignoring nonuse values.[252]

In *Ohio v. United States DOI*, the contingent valuation method was challenged as one of the nonmarketed resource methodologies for passive use values under the CERCLA.[253] The court held the promulgation of the contingent valuation method to be reasonable, consistent with Congressional intent, and worthy of deference.[254] In doing so, the court noted that market values are not always effective in capturing the value of natural resources, giving rise to the need for the contingent valuation method.[255] The court also upheld the rebuttable presumption conferred upon natural resource assessments, including when the contingent valuation method is used.[256] Though the court in *Ohio* held contingent valuation to be an acceptable valuation method for

245. *Id.* at 939.
246. *Id.* at 938.
247. Peck, *supra* note 240, at 284.
248. *Id.*; Augustyniak, *supra* note 238, at 400; *"Ask a Silly Question...": Contingent Valuation of Natural Resource Damages*, *supra* note 236, at 1987.
249. Peck, *supra* note 240, at 284; *"Ask a Silly Question...": Contingent Valuation of Natural Resource Damages, supra* note 236, at 1985.
250. Augustyniak, *supra* note 238, at 400.
251. *Id.* at 401.
252. *"Ask a Silly Question...": Contingent Valuation of Natural Resource Damages, supra* note 236, at 1990.
253. Ohio v. U.S. Dep't of Interior, 880 F.2d 432, 475 (D.C. Cir. 1989).
254. *Id.* at 477.
255. *Id.* at 462-63.
256. *Id.* at 480.

the CERCLA, the case remains directly relevant to the OPA because Congress intended the OPA to be consistent with the court's ruling regarding the valuation methods used in natural resource damages assessment under the CERCLA.[257]

Despite Congressional indications that the contingent valuation method was to be an acceptable valuation technique under the OPA,[258] the method was challenged in *GE v. United States DOC*.[259] Specifically, the use of contingent valuation under the NOAA regulations and the recovery of passive use values were challenged.[260] The court held the inclusion of the contingent valuation method to be reasonable and affirmed its ruling in *Ohio*.[261] The court considered that the NOAA commissioned a panel to study the contingent valuation method, which found that it can be useful and reliable if conducted properly.[262] Further, in the final rule the NOAA promulgated, the NOAA allowed the trustee to choose its assessment method, with the contingent valuation method listed as one of many listed possible techniques.[263]

Courts have been more hesitant to accept the survey results of contingent valuation in actual trials for natural resource damages.[264] In *Idaho v. Southern Refrigerated Transport*, the contingent valuation study conducted for CERCLA natural resource damages was rejected as merely conjecture and speculation.[265] While the court did not hold that the natural resource had no existence value, it did hold that the study was "legally insufficient to establish existence value in this case."[266] The court, however, did not define what would be considered legally sufficient, and it merely focused on the fact that the study was not conducted specifically for the litigation.[267]

b. Real or Personal Property Damages

Recovery for real or personal property damages is available "for injury to, or economic losses resulting from destruction of, real or personal property."[268] However, these damages are only available to

257. S. REP. NO. 101-94 at 15 (1990).
258. *Id.*
259. Gen. Elec. v. U.S. Dep't of Commerce, 128 F.3d 767, 771 (D.C. Cir. 1997).
260. *Id.*
261. *Id.* at 773.
262. *Id.* at 772.
263. *Id.*
264. *See* Idaho v. S. Refrigerated Transp. Inc., 1991 U.S. Dist. LEXIS 1869, at *55-56 (D. Idaho 1991).
265. *Id.* at *55.
266. *Id.* at *56.
267. *Id.* at *55.
268. 33 U.S.C. § 2702(b)(2)(B) (2006).

claimants who own or lease property.[269] Further, the amount of damages recoverable for damaged property is limited to the lesser of the cost of repairs to restore the property to its previous condition, the difference in property value as a result of the damage, or the replacement value.[270]

While damages are available for injury to real or personal property, a plaintiff cannot recover under this damage provision for a loss of profits or earning under the OPA.[271] Though revenue might be considered personal property, the OPA requires an injury to either real or personal property.[272] The court in *Sekco Energy v. M/V Margaret Chouest* found that this requisite injury must be a physical injury that does not include economic loss.[273] Additionally, damage to real or personal property must actually be caused by the discharge or threatened discharge of oil into navigable waters.[274] For example, a plaintiff cannot recover for damages caused by a fire that ignited from vapors of discharged oil.[275]

c. Subsistence Use Damages

Subsistence use damages are recoverable following the destruction of natural resources. Subsistence has been defined by courts as the use of a natural resource to obtain the minimum necessities for life.[276] These damages are "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."[277] Further, the claimant must be one who actually uses the destroyed or lost natural resources for subsistence.[278] Courts have reinforced the availability of subsistence use damages to only those using the resources for subsistence, rejecting claims for these damages for business or purely commercial activity.[279] While the court in *Sekco Energy v. M/V Margaret Chouest* does not explicitly define the purely commercial activity excluded from

269. *Id.*
270. 33 C.F.R. § 136.217 (2006).
271. Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1015 (E.D. La. 1993).
272. *Id.*
273. *Id.*
274. *In re* Taira Lynn Marine Ltd., 444 F.3d 371, 382 (5th Cir. 2006); Gatlin Oil, Inc. v. United States, 169 F.3d 207, 212 (4th Cir. 1999).
275. *Gatlin Oil*, 169 F.3d at 209.
276. *In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 678 (E.D. Mich. 1992); *Sekco Energy*, 820 F. Supp. at 1015 (citing *In re Cleveland Tankers, Inc.*, 791 F. Supp. at 678).
277. 33 U.S.C. § 2702(b)(2)(C) (2006).
278. 33 C.F.R. § 136.219(a) (2006).
279. *Sekco Energy*, 820 F. Supp. at 1015; *In re* Cleveland Tankers, Inc., 791 F. Supp. at 678.

subsistence use, it does hold that the plaintiff's drilling for hydrocarbons is one such purely commercial activity.[280]

d. Revenues and Public Services Damages

Damages recoverable by government entities include revenues and public services damages. Revenues damages include "the net loss of taxes, royalties, rents, fees, or net profit shares,"[281] which are caused by "the injury, destruction, or loss of real property, personal property, or natural resources."[282] Public services damages consist of the "net costs of providing increased or additional public services during or after removal activities,"[283] which include "protection from fire, safety, or health hazards caused by a discharge of oil."[284] These damages are recoverable by the United States government, a State, or a further political subdivision.[285] The governmental entity can only recover the costs of the increase in services provided.[286]

e. Lost Profits and Earning Capacity

Section 2702(b)(2)(E) of the OPA states that any claimant may recover for "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."[287]

i. Purely Economic Damages

Before the OPA was enacted, the Supreme Court in *Robins Dry Dock and Repair Co. v. Flint* held that economic damages absent some physical harm were not recoverable.[288] After *Robins Dry Dock*, recovery for economic losses was available only to plaintiffs with a proprietary interest ("ownership" interest) in property that suffered damage.[289]

The OPA allows any claimant to recover profits and earning capacity "due to the injury, destruction or loss of real property, or natural

280. *Sekco Energy, Inc.*, 820 F. Supp. at 1015.
281. 33 U.S.C. § 2702(b)(2)(D).
282. *Id.*
283. *Id.* § 2702(b)(2)(F).
284. *Id.*
285. *Id.* § 2702(b)(2)(D),(F).
286. 33 C.F.R. § 136.241 (2006).
287. 33 U.S.C. § 2702(b)(2)(E).
288. Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303 (1927); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).
289. *Robins Dry Dock*, 275 U.S. at 303.

resources" and has also been interpreted to allow recovery of economic damages by persons indirectly affected by an oil spill.[290]

After the OPA was enacted, several courts continued to apply the *Robins Dry Dock* rule in cases seeking recovery of economic damages under the OPA. The District Court for the Eastern District of Michigan in *Cleveland Tankers* upheld the *Robins Dry Dock* rule and required physical damage to propriety interest in order to recover economic losses. Plaintiffs were doing business along the channel which was closed as a result of the accident.[291] Plaintiffs claimed damages for lost charter line hire, increased costs caused by the delay, and loss of business resulting from the incident. The court held that OPA's lost profit provision did not allow recovery for economic losses when no injury to the claimant's property was alleged.[292]

Sekco Energy, Inc. v. M/V Margeret Chouest broadened the scope of recovery for lost profits and earning capacity under the OPA to plaintiffs without property interests.[293] The Eastern District of Louisiana provided that in certain negligence actions the *Robins Dry Dock* rule would not bar recovery under the OPA for economic losses.[294] In *Sekco Energy*, the court permitted recovery for lost profits from the inability to drill during the oil spill investigation.[295] The court explained that because future earnings from drilling constitute property, the OPA's lost profit and earning capacity provision is applicable.[296] In allowing a cause of action for economic loss, the court found that Sekco Energy had an ownership interest in the offshore drilling platform.[297] This court stated that section (b)(2)(E) permits recovery regardless of the existence of ownership in the damaged property, and the *Robins Dry Dock* rule precluding recovery for purely economic loss in certain negligence actions would not bar recovery under the OPA.[298]

In *Alabama State Docks v. Compania Antares de Navegacion*, the Southern District of Alabama required an injury to the claimant before damages could be recovered under the OPA's lost profits and earning capacity provision.[299] The court emphasized the phrase "due to the

290. Francis J. Gonynor, *Six Years Before the Mast: The Evolution of the Oil Pollution Act of 1990*, 9 U.S.F. Mar. L.J. 105, 127 (Fall 1996).
291. *In re* Cleveland Tankers, Inc., 791 F. Supp. 669 (E.D. Mich. 1992).
292. *Id.* at 679.
293. Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1015 (E.D. La. 1993).
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. Alabama State Docks Dept. v. Compania Antares de Navegacion, 1998 WL 1749264 (S.D. Ala. 1998).

injury, destruction, or loss." The court concluded that because the claimant did not suffer an injury to his property or natural resources as a result of the spill, the claimant could not recover for lost profits or earning capacity under the OPA.[300]

Under the OPA's lost profits and earning capacity provision, it is unclear whether the phrase "which shall be recoverable by any claimant" applies to only natural resources, or to the entire paragraph of the provision.[301]

In *South Port Marine v. Gulf Oil*, the District Court of Maine declined to apply the *Robins Dry Dock* rule and concluded that under the OPA, recovery for economic losses is not limited to damage to the owner's physical property.[302]

The possible remaining issues include whether subsection (E) extends to plaintiffs suffering an economic loss as an indirect result of an oil spill, whether claims that exceed the maximum liability under the OPA must follow the *Robins Dry Dock* rule, and what level of causation is required to recover economic damages under the OPA.

ii. Recoverable Lost Profits and Earnings

The owner's recovery under the OPA's lost profits and earning capacity provision can include the loss of profits, earning capacity, goodwill, other intangibles, and future revenues. In addition, claims can be made for business stress or interruption as well as declines in the fair market value of assets.[303] In order to recover, the damage must be supported by substantial evidence.[304]

iii. Proving Lost Profits and Earnings Capacity

(a) Substantial Evidence

In *South Port Marine v. Gulf Oil*, the First Circuit held that the damages awarded for business interruption were supported by substantial evidence.[305] The court explained that sufficient evidence was introduced to support an award for lost slip revenues resulting from the delay in expansion caused by the oil spill. The claimant presented testimony establishing the marina's plan to expand the marina by twenty five slips,

300. *Id.*

301. 33 U.S.C. 2702(b)(2)(E) (2006); Kieth B. Letourneau & Wesley T. Welmaker, *The Oil Pollution Act of 1990: Federal Judicial Interpretation Through the End of the Millennium*, 12 U.S.F. MAR. L.J. 147, 202 (1990-2000).

302. S. Port Marine v. Gulf Oil, 73 F. Supp. 2d 17, 19 (D. Me. 1999).

303. *See id.*

304. S. Port Marine v. Gulf Oil, 234 F.3d 58 (1st Cir. 2000).

305. *Id.* at 66.

offered proof that the delay was caused at least in part by the oil spill, and the record substantially supported an inference that new slips would also be in demand.[306]

A ship-owner can recover lost profits by showing that its "vessel was active in a market ready for its services."[307] In *Maritrans Operating Partners v. Port of Pascagoula*, the ship owner was not required to prove that it lost particular charters when the vessel was out of service, and he sufficiently proved lost profits by showing that there was a steady, uninterrupted demand for the service of its vessels, both before and after the vessel was out of service.[308] The Fifth Circuit concluded that "uncontroverted proof that the ship owner's vessel operated in an active market is sufficient to establish lost profits."[309]

(b) Causation

In order for damages to be recoverable under the OPA's lost profits and earning capacity provision, there must be a showing that the economic losses were caused by the oil spill.[310]

In a case decided by the Eleventh Circuit, a grain elevator sought to recover damages from the ship owner for business delays caused by an oil spill.[311] The court of appeals found that the district court's determinations were based on inadequate proof of damages and remanded for recalculation.[312] The Court of Appeals applied the "reasonable certainty" standard of proof for damages, and the court concluded that speculative estimations of the delay without testimony or documentary evidence were insufficient.[313] The delay must be calculated by "counting the time between when the vessel was ready and able to move into the loading berth (but was prevented from doing so as a result of the closure of the loading berth) and when the vessel actually moved to the loading berth."[314] To determine the amount of damages due to the delay, the length of the delay must be used for each component of the damage award.[315]

306. *Id.*
307. Maritrans Operating Partners v. Port of Pascagoula, 73 F. App'x 733 (5th Cir. 2003). *See in re* M/V Nicole Trahan, 10 F.3d 1190, 1195 (5th Cir.1994).
308. *Maritrans*, 73 F. App'x 733.
309. *Id.*
310. *In re* Taira Lynn Marine Ltd. No. 5, 444 F.3d 371 (5th Cir. 2006).
311. FGDI, L.L.C. v. M/V Lorelay, 193 F. App'x 853 (11th Cir. 2006).
312. *Id.*
313. *Id.* at 856.
314. *Id.* at 857.
315. *Id.*

f. Future damages

To recover damages under the OPA's lost profit and earning capacity provision, the District Court for the Eastern District of Louisiana stated that the claimant does not need to be the actual owner of the damaged property or resources.[316] The "claimant must show that the damage resulted from a discharge or threatened discharge of oil into navigable waters or the adjacent shoreline."[317]

In *Settoon Towing*, the owner of a well that was struck by a vessel brought a damages claim against the vessel owner for potential Intracoastal Waterway (ICW) shutdown suits brought by other businesses suffering economic losses as a result of the shutdown.[318] The OPA permits claims by other businesses suffering economic losses because they could not conduct business due to the ICW shutdown.[319] The District Court for the Eastern District of Louisiana concluded that the well owner can maintain its claims for potential ICW suits until the end of the three year time frame from bringing claims against the responsible party, and if no claims are made by then, the vessel owner can move for summary judgment on those claims at that time.[320] The vessel owner also argued that claims for overhead increases and loss of business opportunity should be dismissed for being too speculative, and the District Court concluded that recovery of such damages depends on the sources of proof of such damages.[321]

g. Removal Costs

Responsible parties are liable for removal and the associated costs that result from an OPA claim.[322] The OPA defines "remove" or "removal" as "containment and removal of oil or hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the health and welfare, including, but not limited to, fish, shellfish, wildlife, public and private property, shorelines, and beaches."[323] "Removal costs" are "the costs of removal incurred after a discharge of oil has occurred or, in a case in

316. *In re* Settoon Towing L.L.C., 2009 WL 4730969 (E.D. La. 2009).
317. *Id.* at *4 (quoting Gatlin Oil Co. v. U.S., 169 F.3d 207, 212 (4th Cir.1999)).
318. *Id.*
319. *Id.* at *4.
320. *Id.*
321. *Id.* at *6-7.
322. 33 U.S.C. § 2702 (2006).
323. *Id.* § 2701(30).

which there is a substantial threat of discharge of oil, the costs to prevent, minimize, or mitigate oil from such an incident."[324]

i. Compensable Removal Costs

Removal costs are one of two types of compensable costs in the OPA.[325] Removal costs include costs associated with responding to, containing, and cleaning up an oil spill.[326] The OPA allows for recovery of removal costs incurred by the federal government, states, and persons acting in compliance with the National Contingency Plan ("NCP")[327] When a responsible party cannot be identified or does not pay, the Oil Spill Liability Trust Fund is made available for compensation for costs incurred by the federal government, states, and private parties.[328] Compensable removal costs include the removal of oil, disposal, personnel, and prevention.[329] Costs for containment and removal can include contract services (i.e., cleanup contractors and incident management support) and equipment used for removal (i.e., skimmers, booms, or planes for aerial observation of the spill).[330] Disposal costs are those incurred in providing proper disposal of oil and oily debris.[331] Personnel costs can include the salaries and lodging of government personnel and temporary government employees hired for the spill response.[332] Lastly, prevention costs are those which are incurred for the prevention and minimization of a substantial threat of an oil spill.[333]

ii. Whether Monitoring Costs are Included in Removal Costs

A major issue concerning removal costs has traditionally been whether monitoring costs are included.[334] Monitoring costs are important because such activity helps to assure that a spill is quickly and efficiently removed and often prevents spills from happening.[335] Generally, monitoring costs are included in removal costs. However, the courts

---

324. *Id.* § 2701(31).
325. *Id.* § 2702.
326. *See* U.S. Government Accountability Office, *supra* note 147, at 10-11.
327. 33 U.S.C. § 2702(b)(1)(A)-(B). *See* Antonio R. Rodriguez & A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 12 (1990).
328. *See* U.S. Government Accountability Office, *supra* note 147, at 12.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *See* Swanson, *supra* note 10.
335. *See id.*, at 162.

struggled with the issue throughout the 1990's.[336] The United States District Court for the Eastern District of Louisiana was confronted with this issue when it evaluated whether Conoco should pay for the Coast Guard's monitoring of two spills in the Gulf of Mexico.[337] The government argued that monitoring costs were necessary to minimize damage, which is an activity covered by the Act's definition of "removal."[338] The court reasoned that because the Fund can be used for "the payment of removal costs, including the costs of monitoring the removal activity," removal costs include monitoring costs.[339] The court concluded that because monitoring costs could be recovered from the Fund, the expense could also be recovered from responsible parties.[340]

The Ninth Circuit has authorized the reimbursement of monitoring costs incurred by the Coast Guard while freeing a grounded ship carrying 200,000 gallons of oil.[341] The court once again classified the conduct as attempting to prevent or minimize a spill, meeting the definition of "removal" under the OPA.[342] The Ninth Circuit went even further and found that all removal costs incurred were recoverable, not just those that are "permanent, necessary, or reasonable."

iii. Factors Affecting Removal Costs

Every oil spill is unique and removal costs are influenced by a number of factors including the location of a spill, the time of year, the type of oil, the effectiveness of the spill response, and the public interest in the spill.[343] The location of a spill determines the extent of the response effort and may drastically affect removal costs.[344] Spills that occur in remote areas hinder the ability to mobilize responders and equipment.[345] Significant costs are associated with spills that occur close to the shore because contamination of the shoreline requires manual labor and often affects sensitive areas such as wildlife habitats.[346] Costs

336. *See* United States v. Hyundai Merch. Marine Co., 172 F.3d 1187 (9th Cir. 1999); United States v. Conoco, 916 F Supp. 581 (E.D. La. 1996); Swanson, *supra* note 10, at 157.

337. *Conoco*, 916 F. Supp. at 583. *See* Swanson, *supra* note 10, at 157-58.

338. *Conoco*, 916 F. Supp. at 583. *See* Swanson, *supra* note 10, at 158.

339. *Conoco*, 916 F. Supp. at 584. *See* Swanson, *supra* note 10, at 158.

340. *Conoco*, 916 F. Supp. at 584. *See* Swanson, *supra* note 10, at 158.

341. *Hyundai Merch. Marine Co.*, 172 F.3d at 1187. *See* Swanson, *supra* note 10, at 159.

342. *Hyundai Merch. Marine Co.*, 172 F.3d at 1190-91. *See* Swanson, *supra* note 10, at 159-60.

343. U.S. Gov't Accountability Office, *supra* note 147, at 20-27.

344. *Id.* at 21.

345. *Id.*

346. *Id.*

also increase when economic centers are affected and response is needed to resume local services and business activity.[347] Response efforts and removal costs are also affected by the time of year.[348] Spills occurring in the spring and summer in areas that rely on tourism incur significantly higher removal costs because of the need for quick and efficient cleanup.[349] Inclement weather, especially harsh winters, affect cleanup and removal costs because of the difficulty in mobilizing personnel and equipment.[350]

In addition, the type of oil that is spilled affects the degree to which oil can be cleaned up or removed.[351] Some types of oil readily evaporate or dissipate in the surrounding water, requiring little or no cleanup.[352] Other types of oil can sink in the water and do not evaporate thereby requiring prolonged response efforts and intensive cleanup.[353] The effectiveness of spill response and public attention to spills does not have as significant of an effect on removal costs.[354] The effectiveness of the spill response can affect costs because response can take longer with inexperienced personnel and prolonged assembly and planning.[355] Lastly, public attention can increase costs by pressuring responders and increasing the standards of cleanliness expected from the removal action.[356]

IV. CRIMINAL LIABILITY

A. Criminal Implications Under OPA

Individual responsible parties and corporations are both targets of criminal prosecution regarding oil spills.[357] Corporations, however, tend to be the primary target of criminal fines. Criminal penalties under the OPA serve to deter corporations from engaging in risky behavior that increases the likelihood of oil spills. Corporations generally engage in risky behavior because it is more cost effective and profitable for them to

347. *Id.* at 22.
348. *Id.* at 23.
349. *Id.*
350. *Id.*
351. *Id.* at 24-26.
352. *Id.* at 25.
353. *Id.* at 25-26.
354. *Id.* at 26-27.
355. *Id.*, at 27.
356. *Id.*
357. Kathleen A. Swanson, *The Cost of Doing Business: Corporate Vicarious Criminal Liability For the Negligent Discharge of Oil Under the Clean Water Act*, 84 WASH. L. REV. 555, 561-562 (2009).

do so.[358] As a vehicle for deterrence, the OPA allows for enhanced fines and prison time for responsible parties.[359] Criminal prosecutions under the OPA have raised both constitutional and vicarious liability concerns.

Critics are concerned about the severity of these laws because persons may be held criminally liable for negligent conduct.[360] Negligence is a standard that is typically used for civil, not criminal liability. The relevant section in the OPA states that any person who:

> [N]egligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage, or, on that in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; *shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 year, or by both.*[361]

In addition, fines and prison time are increased if the responsible party "knowingly violated" any of the provisions of the statute.[362] Typically, in tort cases, an intentional or "knowing" tort carries a higher penalty than mere negligence or "unintentional" torts.[363]

B. Constitutional Issues with Criminal Prosecutions by the Department of Justice and EPA in Environmental Law

The Fifth and Sixth Amendments provide protections to citizens regarding when they may be questioned by law enforcement officers. More specifically, the Fifth Amendment right against self-incrimination mandates an officer to read *Miranda* rights to a defendant before questioning in order to inform him of the right to remain silent. Similarly, the Sixth Amendment right to counsel attaches when a defendant is in custodial detention.[364]

---

358. *Id.*
359. 33 U.S.C. § 1319(c)(1) (2006).
360. *See* Swanson, *supra* note 357, 575-76.
361. 33 U.S.C. § 1319 (emphasis added).
362. *Id.* § 1319(c)(2).
363. *Id.*
364. Custodial detention requires an individual to be questioned after commencement of adversary judicial proceedings.

In the wake of the Deepwater Horizon incident, a dilemma arose regarding the proper time to question crew members without appropriate defense counsel present. Since admiralty lawyers are typically not prepared or equipped to deal with criminal law issues, commentators have recommended that crew members receive appointed criminal defense attorneys when proceedings commence.[365] Questioning responsible parties immediately after an incident raises Fifth and Sixth amendment issues such as whether the *Miranda* right to an attorney attaches before questioning.[366] These questions also raise the possibility that the exclusionary rule, which is the remedial measure for constitutional violations, might be invoked. The exclusionary rule is a remedy adopted by the courts relating to any constitutional violation. If a court determines that a constitutional right has been violated, courts will exclude evidence obtained as a result of the violation.[367]

In examining Fifth Amendment Miranda rights, the fact-finder must determine if the ship workers (defendants or responsible parties) are considered to be in custody at a particular period in time.[368] Typically, to determine if an individual is in custody, courts have examined factors such as time spent in detention, degree of pressure applied by the questioning party, physical surroundings of the party being questioned, whether or not the questioners were wearing a uniform, and whether or not the questioners were in a position of intimidation.[369] If a suspect is determined to be "in custody," his Miranda rights attach, meaning a law enforcement officer must read the Miranda rights before questioning commences. In determining whether or not a suspect is in custody, the fact-finder would examine the situation objectively and ask whether a reasonable person, in the suspect's position, would believe he was free to leave the questioning.[370] This poses additional implications for crew members, as one may argue that crew members would assume they would not be free to leave since the crew members work in an enclosed area. However, courts have routinely applied the principle that routine stops do not qualify as custodial detention for the purposes of Miranda.[371] Essentially, if courts find that Miranda does apply to these types of questionings, it may affect the future of both admiralty and environmental law.

---

365. *See generally* Francis J. Gonynor, *Dangerous Waters Without A Chart: Pollution Problems as They Relate to Tugs and Barges*, 70 TUL. L. REV. 549 (1995).
366. Miranda v. Arizona, 384 U.S. 497 (1966).
367. United States v. Leon, 468 U.S. 897 (1984).
368. *See generally* Gonynor, *supra* note 365.
369. United States v. Beraun-Panez, 812 F.2d 580 (9th Cir. 1987).
370. *Id.*
371. United States v. Magdaniel-Mora, 746 F.2d 723 (11th Cir. 1984).

If a crew member or captain is considered to be in custodial detention, the Sixth Amendment right to counsel attaches. A conflict of interest issue may arise in this instance, because a defense attorney hired by a captain or crew member has a duty to defend his or her client and, therefore, may not represent the corporation's best interest.[372] More specifically, the corporation's defense may be adversely affected if a particular claim is litigated. The attorney-client privilege prevents the attorney for the crew member or captain from sharing either potentially harmful, or even helpful, information with the company.[373] Furthermore, if questioning is delayed because crew members invoke their Sixth Amendment right to an attorney, the lack of questioning could be interpreted as a lack of cooperation with officials under the OPA, which could detrimentally affect their civil case.[374]

C. Vicarious Criminal Liability

Congress specifically increased criminal liability under the OPA in order to deter corporations from engaging in risky behavior that may result in disastrous oil spills.[375] The OPA allows prosecutors to seek a variety of criminal penalties in order to achieve this goal. Congress granted them the power to "impose additional liability or additional requirements, or to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of the law, relating to the discharge . . . of oil."[376] Therefore, prosecutors have significant discretion to determine the charges against responsible parties.

The doctrine of *respondeat superior* allows corporations to be held vicariously liable for their employees' actions.[377] *Respondeat superior* is a legal doctrine that states employers should be held liable of the tortuous acts committed by their employees within the scope of their employment. In applying this doctrine, courts will take into account whether the conduct is the general kind the employee is required to perform, whether the conduct occurred within the hours and ordinary spatial boundaries of the employment, and whether the conduct is motivated, at least in part, by serving the employer's interest.[378] Courts have applied this doctrine with respect to environmental statutes.[379]

372. *See generally* Gonynor, *supra* note 365, at 549 (1995).
373. *Id.*
374. *See* 33 U.S.C. § 2703(c) (1990).
375. Swanson, *supra* note 357, at 562.
376. S. Rep. No. 101-94, at 2.; Swanson, *supra* note 357, at 562
377. N.Y. Centr. & Hudson River R.R. Co. v. United States, 212 U.S. 494 (1909).
378. Doe v. Exxon Mobil Corp., 573 F.Supp.2d 16 (D.C. 2008).
379. Swanson, *supra* note 357, at 555

Congress has not yet addressed whether vicarious liability applies to criminal charges under environmental laws.[380] Congress may have intended for vicarious liability to apply when enacting stricter criminal penalties under the OPA, since Congress determined that corporations did not take oil spills seriously and did not take necessary precautions in order to prevent them.[381]

Critics may contend that applying vicarious criminal liability may violate due process under the Fourteenth Amendment, although this may be refuted because corporations have notice of oil pollution regulations.[382] With regard to the Deepwater Horizon incident, a reasonable fact-finder may inquire as to whether BP exercised the appropriate "control" over their employees to escape criminal liability, and if so, whether or not vicarious criminal liability should apply to BP corporate officers.

For example, another serious implication raised under the theory of vicarious liability for criminal acts is whether or not a court should be able to prosecute a Chief Executive Officer ("CEO") of a corporation for murder under the OPA. This theory has not yet been examined by the courts or by Congress.

Overall, criminal penalties have been imposed under the OPA in order to deter corporations from engaging in dangerous behavior. Prosecuting corporations criminally for negligent behavior has raised some potential constitutional concerns. Additionally, while the theory of *respondeat superior* dictates that corporations should be held vicariously liable for their actions regarding oil spills, this has not been addressed by Congress. Ultimately, the question of "how far" a prosecutor can prosecute a CEO of a corporation under the OPA is still undefined.[383]

V. DEFENSES TO LIABILITY

A. Complete Defenses to Liability

The OPA provides for both complete and partial defenses to liability. In three limited circumstances, the OPA provides for a complete defense to oil spill liability. These three instances are an act of war, an act of God, or an act of a third party. The courts have thoroughly examined the act of God and act of third party defenses. However, the act of war defense has been infrequently raised, and, therefore, there is little authority on this topic. In addition, limitations on liability may be

380. *Id.*
381. *Id.*
382. *Id.*
383. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

available for the complete defenses.[384] When there is a partial defense available, the oil spill liability trust fund compensates the parties for their claims.

1. Act of God

The OPA provides a complete defense to liability arising from an act of God.[385] The OPA states that a responsible party is not liable for removal costs or damages if that responsible party is able to prove, by a preponderance of the evidence, that the discharge of oil and resulting damages were caused solely by an act of God.[386] The OPA defines an "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[387] The terms "unanticipated" and "due care of foresight" suggest that the defense would be unavailable if the damages were foreseeable from the responsible party's conduct.[388] In addition, the phrase "solely by an act of God" implies that the responsible party cannot contribute to the discharge of oil in any way.[389]

The text and definition of the act of God defense found in the OPA is similar to the text and definition found for the same defense in the CERCLA.[390] The close similarities between the two defenses may allow for equivalent interpretations.[391] The district court in *Apex Oil Co. v. United States* determined that the OPA defense was equally limited in scope as the CERCLA defense.[392] The court used prior case law interpreting the CERCLA "act of God" defense to demonstrate the restrictive scope of the similar language.[393]

In *Apex Oil Co.*, Apex was towing barges up a river.[394] Apex was aware of the perilous river conditions and decided to proceed up the river

384. 33 U.S.C. § 2703(c) (2006) (limitation on complete defense).
385. *Id.* § 2703(a)(1).
386. *Id.*
387. *Id.* § 2701(1).
388. *See generally* Apex Oil Co. v. United States, 208 F Supp. 2d 642, 654-56 (E.D. La. 2002) (inferring from CERCLA case law that courts are reluctant to grant the "act of God" defense when the damage could have been foreseen).
389. *See generally id.* at 655-56 (inferring from CERCLA case law that courts are reluctant to grant the "act of God" defense when a responsible party contributes to cause of damage).
390. 42 U.S.C. § 9607(b)(1) (2006); 42 U.S.C. § 9601(1) (2006).
391. *See Apex Oil Co.*, 208 F. Supp. 2d at 654 (finding a close analogy of the two statutes).
392. *Id.*
393. *See generally id.* at 654-56 (considering the severity and commonality of occurrence, as well as the responsible party's contribution to the cause of damage).
394. *Id.* at 645.

even though the Apex crew had been cautioned against taking that course of action.[395] Apex's tug stalled in the strong currents and the barges broke free and collided with a nearby bridge, discharging 840,000 gallons of slurry oil into the river.[396] Apex funded the removal costs and later sought reimbursement, but the reimbursement was subsequently denied by the National Pollution Funds Center ("NPFC").[397] Apex argued that the strong river currents were an act of God and that Apex was entitled to the OPA's defense and reimbursement.[398] The court concluded that Apex could not utilize the OPA's "act of God" defense because the river conditions were anticipated and Apex contributed to the discharge of the oil.[399] The court found that Apex partly caused the damage when Apex utilized an underpowered tug and navigated too closely to the bridge.[400] The district court's ruling implies that, at least in the Eastern District of Louisiana, a court will not afford a liable party the "act of God" defense when that party partly caused the oil spill.

2. Act of a Third Party

A third party can become the responsible party if the originally alleged responsible party establishes that the discharge or threat of discharge and the resulting costs and damages were caused solely by a third party.[401] Under the OPA, an act or omission by a third party is a complete defense when "the responsible party establishes, by preponderance of the evidence, that the discharge of oil and the resulting damages or removal costs were caused solely by an act or omission of a third party."[402] If the third party defense is established, the third party is entitled by subrogation to all the rights of the responsible party.[403]

a. Causation: "Solely" by a Third Party

An important issue in establishing a third party defense is proving that a third party was the "sole" cause of the discharge. In *Gatlin Oil v.*

395. *Id.*
396. *Id.*
397. *Id.* at 645-46.
398. *Id.*
399. *Id.* at 657-58.
400. *Id.*
401. 33 U.S.C. § 2702(d) (2006) ("Third party treated as responsible party: Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) of this title.").
402. *Id.* § 2703(a)(3).
403. *Id.* § 2702(d)(1)(B).

United States, the Fourth Circuit held that the oil company was entitled to a complete defense when the oil spill was caused by vandalism and was thus entitled to present a claim to the Fund for uncompensated damages.[404] The oil company claimed that all damages caused by the spill, including fire damage and interest, should be compensated. The Fourth Circuit held that the oil company was entitled to full compensation for the loss of earnings and earning capacity resulting from carrying out the coordinator's directions.

In *United States v. Kilroy*, a party presented reports showing that third parties were present around the vessel in an attempt to show that a third party was responsible for the sinking of the vessel. The District Court for the Western District of Washington explained that "randomized, hypothetical accounts of third-party presence are insufficient to raise a genuine issue of material fact that the only reason the Vessel sank was an act of a third party."[405] The court held that the third party defense was not sufficiently supported to overcome summary judgment.

B. Limitations on Liability

Beyond the three complete defenses to liability, a responsible party may seek a limitation on their liability. As discussed above, in order for a responsible party to be completely relieved from liability as a result of the spill, the party must prove the spill was caused by either: (1) an act of God, (2) an act of war, or (3) an act or omission of a third party who is not in a contractual relationship with the responsible party.[406]

The General Recovery Provision under the OPA states that a responsible party may "assert a claim for removal costs and damages under section 2713 . . . only if the responsible party demonstrates that [it is] entitled to a defense to liability under section 2703, or . . . the responsible party is entitled to a limitation of liability under section 2704 of this title."[407] Thus, a responsible party cannot be responsible for even a fraction of the spill in order to receive complete immunity from liability. This notion is consistent with Congress's intent to hold responsible parties accountable for any contribution to devastating oil spills.[408]

---

404. Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999).
405. United States v. Kilroy & Assoc., Inc., 2009 WL 3633891 (W.D. Wash. 2009).
406. 33 U.S.C. § 2703(a).
407. *Id.* § 2708.
408. Cynthia Wilkinson, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 181 (1992).

In order to limit their liability, the responsible party must show the party exercised appropriate judgment and due care regarding the oil cargo.[409] The party may lose the right to these defenses if the party does not cooperate with the proper officials or neglects to report the spill in a timely manner.[410] Finally, the responsible party may be able to limit their liability to an amount based on the size of the vessel involved.[411] For example, a single hulled vessel with double sides only or a double bottom only is limited to $3,000 per gross ton, whereas a single hulled vessel with double sides or a double bottom that is greater than 3,000 gross tons is limited to $22,000,000 in total.[412] Additionally, for offshore facilities, there is a limitation of $75 million plus removal costs, and onshore facilities are limited to $350 million.[413] These limits are much higher than those previously imposed under the Clean Water Act.[414] The burden of proof for establishing a claim for no liability is higher than establishing a claim for limited liability.[415] Ultimately, Congress established these limits to ensure accountability and to encourage responsible parties to take proper action following an oil spill.[416]

1. Determining the Degree of Liability

In determining a responsible party's degree of liability, the fact-finder must determine whether: (1) the operator was grossly negligent; (2) there is evidence of willful misconduct; and (3) there was a violation of a federal safety, construction, or operating regulation.[417] If the fact-finder finds that any one of these actions occurred, the responsible party will be held fully liable for all costs and damages resulting from the spill.[418] The burden of proof by preponderance of the evidence rests with the responsible party.[419] The fact-finder must also determine whether the responsible party complied with all requirements and whether the party assisted appropriate officials by reporting the spill and fulfilling any administrative requirements.[420] To be held liable, the responsible party must proximately cause the spill by violating a federal safety,

409. *Id.*
410. 33 U.S.C. § 2703(c).
411. *Id.* § 2704.
412. *Id.*
413. Wilkinson, *supra* note 408.
414. *Id.*
415. *Id.*; Woods, *supra* note 10, at 1326-27.
416. *See* 33 U.S.C. § 2701.
417. *Id.* § 2407(c).
418. *Id.*
419. Woods, *supra* note 10, at 1327-28.
420. 33 U.S.C. § 2407(c).

construction, or operating regulation.[421] If a responsible party violated a regulation that was unrelated to the spill itself, this limitation to liability would likely not apply.[422] Furthermore, if the responsible party does not report the spill to the proper officials or authorities, its limitation on liability will likely be revoked.[423] Overall, if one of the complete or partial defenses applies, and the responsible party complied with all requirements and was not determined to have been grossly negligent regarding the spill, the party will either be exempted from all liability, or under the Oil Pollution Act, will receive a limit on their liability.[424]

2. OPA 90's Limitations on Liability

The OPA states that the total liability of a responsible party will not exceed $1,900 per gross ton of oil spilled or $22,000,000 total for a single hulled vessel with double sides or a double bottom that is greater than 3,000 gross tons.[425]

A responsible party will not receive a limit on liability if the party: (1) fails or refuses to report the incident as required by law; (2) fails to provide all reasonable cooperation and assistance as requested by an incident as required by law; (3) fails to provide all reasonable cooperation and assistance as requested by an official in connection with removal activities; or (4) without sufficient cause, does not comply with an order issued under the National Contingency Plan.[426] The statute does not mention a specific burden of proof; the party must demonstrate a prima facie case.[427]

Congress amended the OPA in 2006 and increased the liability limits by 40 percent due to inflation.[428] Also, Congress implemented a provision adjusting for inflation in the future.[429] Ultimately, the new limits under the OPA require that no greater than $1,200 per gross ton of oil spilled or $10 million for vessels greater than 3,000 gross tons will be allocated to responsible parties, no greater than $1,200 per gross ton or $2 million for tank vessels 3,000 gross tons or less will be allocated, and for other vessels, no more than $600 per gross ton or $500,000 will be allocated.[430] These limits may be exceeded if "gross negligence or

421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.* § 2703(a).
425. *Id.* § 2704(a).
426. *Id.* § 2704(c)(2).
427. *Id.*
428. Blair N.C. Wood, *The Oil Pollution Act of 1990: Improper Expenses to Include in Reaching the Limit on Liability*, 8 APPALACHIAN J.L. 179, 187-88 (2009).
429. *Id.*
430. *Id.*

willful misconduct of the responsible party" is found.[431] The "gross negligence" standard does not require any sort of knowledge on the part of the responsible party. This standard differs from the Clean Water Act, which requires such gross negligence to be within the "privity or knowledge" of the responsible party.[432] As discussed previously, this raises implications regarding whether this standard is too high or too low, especially within the context of prosecuting responsible parties criminally for their "gross negligence."

C. Compensation by the Oil Spill Liability Trust Fund

If one of the aforementioned defenses applies, the responsible party will be compensated by the Oil Spill Liability Trust Fund.[433] This fund pays for damages when the responsible party cannot be identified, when the responsible party has pled one of the aforementioned defenses, when the responsible party is not a United States citizen, or when the party is insolvent.[434] The Environmental Protection Agency has the authority to oversee and manage the trust fund.[435] The President of the United States can access the fund for: (1) the payment of removal costs consistent with the National Contingency Plan ("NCP") incurred by federal authorities; (2) the payment of up to $250,000 to a state for removal costs consistent with the NCP for the immediate response to a discharge or threat of a discharge; (3) the payment of costs incurred by a natural resource trustee consistent with the NCP; (4) the payment of removal costs consistent with the NCP as a result of a discharge from a foreign offshore source; (5) the payment of uncompensated claims for removal costs determined by the President to be consistent with the NCP; (6) the payment of otherwise uncompensated damages; (7) the payment of federal administrative, operational, and personnel costs reasonably necessary for the implementation of the OPA; (8) expenses authorized under sections 5 and 7 of the Intervention on the High Seas Act; (9) the payment of costs necessary for carrying out subsections 311(b), (c), (d), (j) and (l) of the Clean Water Act; and (10) payment of liabilities incurred by other federal oil spill trust funds.[436] The states will likely bear a greater portion of the costs than the Federal Fund.[437]

---

431. 33 U.S.C. § 2704.
432. 33 U.S.C. § 1321(g) (1990).
433. 33 U.S.C. § 2708(a)(1); Woods, *supra* note 10, at 1332.
434. Wilkinson, *supra* note 408.
435. OIL SPILL LIABILITY TRUST FUND: EMERGENCY MANAGEMENT (2009), *available at* http://www.epa.gov/oem/content/learning/oilfund.htmhttp://www.epa.gov/oem/content/learning/oilfund.htm.
436. OPA § 1012 (West Supp.1991).
437. Wilkinson, *supra* note 408.

Restrictions, such as a $1 billion cap per incident, have been placed on payments from the Federal Fund.[438] Less than $500 million of the capped amount may be used toward natural resource damages.[439] The current maximum size of the fund is 2.7 billion dollars.[440]

The Fund is structured in two separate components: the emergency portion and the principal fund.[441] The emergency fund is composed of $50 million and is utilized to respond to discharges.[442] The remaining principal fund is utilized to pay claims brought against the responsible party and is administered to federal agencies responsible for implementing the OPA at the site of the spill.[443] If a responsible party is insolvent, the federal government has the authority to appropriate up to $50 million to fund removal expenses.[444]

As previously discussed, a responsible party for an oil spill may raise a complete or limited defense to their liability, provided that the responsible party meets all of the required conditions. Ultimately, if the responsible party is able to succeed on one of these defenses, the Oil Spill Liability Trust Fund will compensate the responsible party.

VI. FEDERALISM

The Supremacy Clause of United States Constitution provides that federal law "shall be the supreme Law of the Land."[445] After Congress enacted the OPA in 1990, the relationship between the OPA and state law has created several issues.[446] One pertinent issue is determining when the OPA preempts state law.[447] A second relevant issue is determining when the OPA allows state courts to retain jurisdiction over

438. *Id.*
439. *Id.*
440. NATIONAL POLLUTION FUND CENTER, *supra* note 27.
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. U.S. CONST. art. IV, cl. 2.
446. *See generally* United States v. Locke, 529 U.S. 89, 94 (2000) (deciding whether OPA preempted state laws regulating oil tanker design and operation); Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp., 1997 U.S. App. LEXIS 23648, at *13 (4th Cir. Sept. 9, 1997) (per curiam) (deciding whether a responsible party of an oil spill could recover cleanup costs from a contributing third party under state law); Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 861 (E.D. La. 2001) (deciding whether OPA prevented a defendant from removing the case to federal court when plaintiffs initially brought claims under state law, but later added an OPA claim); Williams v. Potomac Elec. Power Co., 115 F. Supp. 2d 561, 564 (D. Md. 2000) (deciding whether OPA preempted state law causes of action to allow a basis for removal to federal court).
447. *See generally Locke*, 529 U.S. at 94; *Nat'l Shipping Co. of Saudi Arabia*, 1997 U.S. App. LEXIS 23648, at *13; *Williams*, 115 F. Supp. 2d at 564.

claims stemming from both the OPA and state laws.[448] Oil spills similar to the BP Deepwater Horizon blowout can have far-reaching effects, and it is therefore important to understand how the OPA interacts with state law. A party responsible for an oil spill may have to defend against claims brought not only under the OPA, but also under various state laws.

A. Preemption

Express, implied, and conflict preemption can dictate when a federal statute preempts a state law.[449] Express preemption occurs when Congress has included explicit language within a federal statute that determines when a state statute is preempted.[450] Implied, or "field," preemption occurs when:

> [T]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[451]

Conflict preemption occurs when a state statute conflicts with a federal statute where compliance with both is physically impossible.[452] Conflict preemption can also arise when the state statute is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[453]

A state statute may avoid the three categories of preemption when the state law is equivalent to and fully consistent with the controlling federal statute[454] or when a state statute is protected by a saving clause. A saving clause is a statutory provision that exempts from coverage

---

448. *See generally Tanguis*, 153 F. Supp. 2d at 861.

449. *See* Ray v. Atl. Richfield Co., 435 U.S. 151, 157-58 (1978); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226-29 (2000).

450. *See Ray*, 435 U.S. at 157-58; Nelson, *supra* note 449, at 226-27.

451. *Ray*, 435 U.S. at 157-58 (citing Pa. R.R. Co. v. Pub. Serv. Comm'n, 250 U.S. 566, 569 (1919); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941)).

452. *Ray*, 435 U.S. at 158 (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

453. *Id.* at 158 (citing *Hines*, 312 U.S. at 67; Jones v. Rath Packing Co., 430 U.S. 519, 540-41 (1977)).

454. *See* Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447 (1995) (deciding that a state-labeling requirement would not be preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") if the state requirements were equivalent to and fully consistent with FIFRA's requirements).

something that would otherwise be included.[455] Congress expressed its intent to allow states to impose additional liability or requirements on responsible parties by including two saving clauses within Title I of the OPA.[456] Section 2718 of the OPA, titled "Relationship to other law," contains two saving clauses pertaining to state law. Section 2718 provides:

> (a) Preservation of State authorities; Solid Waste Disposal Act. Nothing in this Act or the Act of March 3, 1851 shall—
>
> > (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
> >
> > > (A) the discharge of oil or other pollution by oil within such State; or
> >
> > > (B) any removal activities in connection with such a discharge; or
> >
> > (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.[457]
>
> . .
>
> (c) Additional requirements and liabilities; penalties. Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—
>
> > (1) to impose additional liability or additional requirements; or
> >
> > (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.[458]

455. BLACK'S LAW DICTIONARY 1461 (9th ed. 2009).
456. *See* 33 U.S.C. § 2718(a) (2006).
457. *Id.*
458. *Id.* § 2718(c).

Since OPA's enactment, the extent of the protection provided to state laws by the two saving clauses has been the subject of much litigation.[459]

1. State Law Preemption Before OPA

An examination of pre-OPA case law interpreting other federal maritime statutes is important to understanding the relationship between the OPA and state law.[460] Prior to the passage of the OPA, courts generally recognized that a state may exercise its policing power with respect to admiralty law, unless that power conflicted with a federal statute.[461]

The Supreme Court allowed a state to exercise its policing power in *Askew v. American Waterways Operators, Inc.*[462] In *Askew*, a Florida statute imposed strict liability against a responsible party of an oil spill for the damage incurred by the State or private persons.[463] Plaintiffs moved to enjoin the application of the state statute.[464] The district court ruled that the Florida statute unconstitutionally impeded the federal Water Quality Improvement Act of 1970 ("Federal Act").[465] On direct appeal to the Supreme Court, the Court reversed, holding that the Florida statute did not unconstitutionally intrude on the Federal Act or on any other federal maritime law.[466] The Supreme Court reasoned that state regulation in the admiralty area is permissible if the regulation does not conflict with other acts of Congress.[467] The Court concluded that there was no conflict between the two statutes because the Florida statute only dealt with cleanup costs incurred by Florida, while the Federal Act dealt with cleanup costs incurred by the federal government.[468]

---

459. *See generally* United States v. Locke, 529 U.S. 89, 106-07 (2000) (holding that OPA preempted state statutes regulating oil tanker design and operation); Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp., 1997 U.S. App. LEXIS 23648, at *13 (4th Cir. Sept. 9, 1997) (holding that the saving clause only protects the rights of parties to bring additional claims based on liability that accrues under state law).

460. *See generally* Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978) (finding that absent of clear congressional intent, state police powers were not to be superseded by a Federal Act); Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 329-30 (1973) (holding that a state statute did not unconstitutionally impede on a federal law because the statutes did not conflict).

461. *See Askew*, 411 U.S. at 329-30.

462. *Id.* at 328-29.

463. *Id.* at 327.

464. *Id.* at 328.

465. *Id.*

466. *Id.* at 328-29.

467. *Id.* at 341.

468. *Id.* at 336.

When a state exercising its police power is challenged under the Supremacy Clause, courts start with the assumption that the police powers are not preempted, unless Congress provides a clear intent that a federal act should supersede.[469] In *Ray v. Atlantic Richfield Co.*, an oil company brought suit seeking a judgment to declare unconstitutional a Washington statute that regulated the design, size, and movement of oil tankers off of Washington's coast.[470] A federal statute, the Ports and Waterways Safety Act of 1962 ("PWSA"), also applied to the waters off of Washington's coast and regulated design and operation aspects of oil tankers.[471] The Supreme Court proclaimed that a state statute could still be preempted even if Congress did not completely bar state regulation in a certain area.[472] A state statute that conflicts with a federal statute by preventing complete compliance with the federal statute creates a risk for preemption of the state statute.[473] The Supreme Court held that the provisions of the Washington statute dictating design requirements of oil tankers would frustrate congressional intent to create uniform standards for the design of oil tankers under the PWSA.[474] However, the Court did find that the state's tug-escort provision was valid because it did not directly conflict with the PWSA.[475]

2. OPA and State Law Preemption

The state law protection that Congress established in the saving clauses of the OPA is not limitless.[476] A district court has limited the availability of the saving clauses to parties injured by the oil spill.[477] In *National Shipping Co. of Saudi Arabia*, the plaintiff owned a cargo vessel and hired the defendant tug boat owner to assist in moving the vessel upstream in the Elizabeth River.[478] During the move, the tug boat collided with the vessel, causing a gash in the vessel and a release of oil

469. Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

470. *Ray*, 435 U.S. at 156-57.

471. *Id.* at 154.

472. *Id.* at 158.

473. *Id.*

474. *Id.* at 164-65.

475. *Id.* at 172-73.

476. *See generally* United States v. Locke, 529 U.S. 89, 105 (2000) (finding that OPA still preempted state statutes regulating oil tanker design and operation); Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp., 1997 U.S. App. LEXIS 23648, at *13 (4th Cir. Sept. 9, 1997) (per curiam) (finding that the saving clauses only protect the rights of parties injured by oil spill).

477. *Nat'l Shipping Co. of Saudi Arabia*, 1997 U.S. App. LEXIS 23648, at *13.

478. *Id.* at *3-4.

into the river.[479] Plaintiff paid for the cleanup and brought OPA and state law claims against the defendant to recover costs.[480] The district court found that the defendant's negligence was the cause of the spill and allowed the plaintiff to recover costs, subject to the OPA's limitation.[481] The district court did not allow the plaintiff to recover costs under Virginia law because the court determined that the saving clauses were not intended to affect liability between vessels involved in a spill.[482] The district court found that Congress intended victims of the oil spills to be the beneficiaries of the clauses.[483] On appeal, the Fourth Circuit affirmed the district court's holding that the plaintiff had not been damaged by the oil and that liability derived only under the OPA and not state law.[484]

The Supreme Court in *United States v. Locke* further limited the saving clauses when the Court determined that the two clauses did not extend to state laws "imposing substantive regulation of a vessel's primary conduct."[485] In *Locke*, the State of Washington enacted a regulation that established tanker design, equipment, reporting, and operating requirements.[486] Tanker operators claimed that the state regulations impeded in areas regulated by the Federal Government and brought suit seeking declaratory and injunctive relief.[487] The lower courts rejected the tanker operators' arguments, basing their conclusions partly on the OPA saving clauses.[488] The Supreme Court reversed, holding that the saving clauses did not preserve state laws concerning vessel conduct and design.[489] The Court found that the saving clauses are restricted to state laws relating to liability rules and financial requirements concerning an oil spill.[490] The Court was reluctant to extend the protection of the saving clauses to other Titles of the OPA where the clauses did not appear.[491] The saving clauses are found within Title I, Oil Pollution Liability and Compensation, which does not regulate vessel design and conduct.[492] The Court reasoned that the

479. *Id.*
480. *Id.* at *4.
481. Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1453-56 (E.D. Va. 1996).
482. *Id.* at 1448.
483. *Id.* (citing S. REP. NO. 94-101, (1990), *reprinted in* 1990 U.S.C.C.A.N. 728).
484. Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp., 1997 U.S. App. LEXIS 23648, at *11-12 (4th Cir. Sept. 9, 1997) (per curiam).
485. United States v. Locke, 529 U.S. 89, 105 (2000).
486. *Id.*
487. *Id.* at 97.
488. *Id.* at 105.
489. *Id.*
490. *Id.*
491. *Id.*
492. 33 U.S.C. § 2718 (2006).

inclusion of the saving clauses in Title I of the OPA, along with the exclusion of the clauses in other titles that actually do regulate vessel design and conduct, suggested that Congress intended to preserve state laws only pertaining to Title I.[493] The Court determined that if Congress wanted to extend the saving clauses to state laws not relating to liability and compensation, Congress would have clearly manifested its intent.[494] In addition, the Court interpreted Congress's use of similar key words within the saving clauses and the declaration of Title I's scope as further intent to limit the saving clauses to Title I.[495]

Subsequent case law reinforced *Locke* and the interpretation that the OPA's saving clauses are restricted to state laws relating to liability rules and financial requirements concerning an oil spill.[496] The district court in *Williams v. Potomac Electric Power Co.* applied the ruling in *Locke* to hold that the OPA did not provide a basis for removal[497] to federal court because the OPA did not preempt the state common law actions that were pled.[498] Plaintiffs brought state law causes of action claiming negligence, trespass, strict liability, and nuisance for an oil spill allegedly caused by the defendants.[499] Defendants wanted to remove the case to federal court, claiming that the case was based on diversity and that the OPA preempted state law, thus raising a federal question.[500] The court denied removal based on the theory that the OPA preempted the state law causes of action because the state laws in question related to removal costs and damages caused by an oil spill.[501] Applying the decision in *Locke*, the court found that state laws relating to Title I of the OPA were preserved.[502] The court followed the Supreme Court's holding in *Locke* that the scope of Title I established liability rules and financial requirements relating to the discharge of oil.[503]

Parties liable for large oil spills may face litigation and claims arising from both the OPA and various state laws. For example, because

493. *Locke*, 529 U.S. at 105-06.
494. *Id.* at 106.
495. *Id.* at 105-06.
496. *See* Williams v. Potomac Elec. Power Co., 115 F. Supp. 2d 561, 565 (D. Md. 2000) (holding that OPA did not preempt state law claims relating to Title I of OPA).
497. Removal "is the transfer of an action from state to federal court." BLACK'S LAW DICTIONARY 1409 (9th ed. 2009).
498. *Williams*, 115 F. Supp. 2d at 565.
499. *Id.* at 563.
500. *Id.* at 565. In litigation, federal question "is a legal issue involving the interpretation and application of the U.S. Constitution, an act of Congress, or treaty. Jurisdiction over federal questions rests with the federal courts." BLACK'S LAW DICTIONARY 688 (9th ed. 2009).
501. *Williams*, 115 F. Supp. 2d at 564-65.
502. *Id.*
503. *Id.*

the BP Deepwater Horizon spill largely affected the five Gulf States, Texas, Mississippi, Louisiana, Alabama, and Florida, liable parties may have to defend against OPA claims as well as against state law claims arising from the five Gulf States. However the claims would have to arise from state laws relating to liability, removal costs, or certain damages that had resulted from the oil spill. Otherwise, the state claims are at risk of being preempted by the OPA.

While the saving clauses may afford more remedies for injured parties, the lack of uniformity among different state laws may create daunting uncertainty.[504] Uncertainty can deter insurers from providing insurance to businesses dealing in oil (i.e. oil transport, oil drilling, etc.) because the possibility of having to defend against many different state law claims can make it difficult to calculate the costs of doing business.[505] Oil importers may also be deterred by the uncertain amount of potential liability.[506] Oil importers and insurers may compensate for this uncertainty by increasing the price of transporting oil to the United States.[507]

3. Preemption of Punitive Damages

Punitive damages have typically been available under general admiralty and maritime law for intentional or wanton and reckless conduct.[508] However, the OPA does not provide for punitive damages.[509] While the OPA preempts general maritime law in that area, the OPA will not preempt state laws providing punitive damages pursuant to the saving clauses.[510]

The First Circuit in *South Port Marine, LLC v. Gulf Oil Limited Partnership*, determined that the OPA preempted general maritime law, and, therefore, punitive damages were unavailable for claims covered by the OPA.[511] Plaintiffs attempted to recover punitive damages pursuant to the OPA and general maritime law for damages plaintiffs incurred from a gasoline spill caused by the defendants.[512] The court found that the text

504. *See* Swanson, *supra* note 10, at 141.
505. *See id.*
506. *See id.*
507. *See id.*
508. *See* CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 699 (1st Cir. 1995). "An act, or a failure to act when there is a duty to do so, in reckless disregard of another's rights, coupled with the knowledge that injury will probably result." BLACK'S LAW DICTIONARY 1089 (9th ed. 2009).
509. *See* S. Port Marine, LLC v. Gulf Oil Ltd. P'ship., 234 F.3d 58, 64-65 (1st Cir. 2000).
510. *See id.* at 65.
511. *Id.* at 64-65.
512. *Id.* at 60-61.

of the OPA contained an extensive list of recoverable damages, and punitive damages were absent.[513] The First Circuit reasoned that Congress intended for the OPA to be the sole applicable federal law in that area, and, since the text of the OPA did not provide for punitive damages, such damages were not available to the plaintiffs.[514] The plaintiffs argued that the OPA's saving clauses allowed punitive damages with respect to state laws.[515] The court recognized that the OPA did not impede a state's right to impose additional liability; however, the court found the issue immaterial because the state law claims were already dismissed, and the plaintiffs did not appeal that judgment.[516]

B. Jurisdiction

Section 2717(a)-(c) of the OPA sets forth state and federal court jurisdiction.[517] Section 2717(a)-(c) provides:

> (a) Review of regulations. Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.
>
> (b) Jurisdiction. Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.
>
> (c) State court jurisdiction. A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary

513. *Id.* at 64-65.
514. *Id.* at 65.
515. *Id.*
516. *Id.*
517. 33 U.S.C. § 2717(a)-(c) (2006).

> forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.[518]

Subsection (b) provides that United States district courts have original jurisdiction over OPA litigation.[519] Original jurisdiction is a court's power to hear and decide a matter before any other court can review the matter.[520] Subsection (c) gives state courts competent jurisdiction over claims relating to removal costs and damages.[521] Competent jurisdiction is defined as "the power and authority, at the time of acting, to do the particular act."[522] Subsections (b) and (c), read together, provide state and federal district courts with concurrent jurisdiction over removal costs and damage claims.[523] Litigants bringing claims concerning removal costs or damages under the OPA may initially file in state court, but the OPA still allows for the case to be removed to federal court.[524]

The district court in *Tanguis v. M/V Westchester* held that the OPA did not prohibit the removal to federal courts of OPA and state claims concerning removal costs or damages.[525] The court concluded that subsection (c) allows for the option of state or federal court for claims connected to removal costs or damages, instead of exclusively being brought in federal court.[526] The court found that the legislative history, in essence, described the two subsections as having concurrent jurisdiction.[527] The court reasoned that Congress could not have intended for the OPA to prohibit removal of certain claims to federal court because the legislative history did not mention preventing removal while providing state courts with concurrent jurisdiction.[528]

C. Conclusion

A party responsible for an oil spill may face claims arising under the OPA as well as state law claims protected by the OPA's saving clauses. The state law claims must relate to liability and compensation or risk being preempted by the OPA. While the OPA does not provide for punitive damages, it will not preempt punitive damages relating to

---

518. *Id.*
519. *Id.* § 2717(b).
520. BLACK'S LAW DICTIONARY 930 (9th ed. 2009).
521. 33 U.S.C. § 2717(b); 33 U.S.C. § 2717(c).
522. BALLENTINE'S LAW DICTIONARY (3d ed. 1969).
523. *See* Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 864 (E.D. La. 2001).
524. *See id.*
525. *Id.* at 864-65.
526. *Id.* at 864.
527. *Id.* (citing S. REP. NO. 94-101 (1990), *reprinted in* 1990 U.S.C.C.A.N. 728).
528. *Id.* at 863.

state liability and compensation claims. Although the OPA provides state and federal district courts with concurrent jurisdiction over removal costs and damage claims, a litigant bringing those claims in state court may risk being removed to federal court.

VII. PREVENTION

The OPA's primary goal is to protect the environment by minimizing and eventually eradicating the number of oil spills that threaten the nation's waters. The OPA contains an entire section of provisions enacted to prevent oil spills. These provisions pertain to personnel and manning requirements, monitoring and tracking vessels, and the construction of vessels.[529]

Under the extensive prevention provisions in the OPA, the legislature created new licensing and alcohol and drug abuse reporting requirements for mariners as well as manning requirements aimed at preventing spills through a properly manned vessel and trained crew.[530] When applying for a license, certificate of registry, or merchant's marine documents, the applicant must make available information regarding a conviction for operating a motor vehicle under the influence of, or impaired by alcohol or drugs or any traffic violation arising from a fatal accident, reckless driving, or racing.[531] The information the applicant provides can be used against the applicant in making a licensing or certification decision.[532] Applicants are also subject to drug tests upon application.[533]

In addition, the OPA subjects all mariners to a renewal of certification every five years, a requirement not included in previous maritime laws.[534] The OPA also established manning requirements for vessel officers and crew.[535] It mandates that officers and crew may not work more than fifteen hours in a twenty-four hour period or more than thirty-six hours in a seventy-two hour period.[536] The OPA's licensing and manning provisions ensure that mariners aboard vessels carrying oil are

529. 33 U.S.C. 1223(a) (2006); 46 U.S.C. §§ 3703(a), 3705, 7101, 7106, 7107, 7109, 7502-05, 8104, 9102 (2006).

530. 33 U.S.C. § 1223(a); 46 U.S.C. § 7101, 7106, 7107, 7109, 7502-05, 8104, 9102. *See* Ruhl & Jewell, *supra* note 10, at 509-10.

531. 33 U.S.C. § 1223(a); 46 U.S.C. § 7101, 7106, 7107, 7109, 7502-05, 8104, 9102. *See* Ruhl & Jewell, *supra* note 10, at 509.

532. 46 U.S.C. § 7101, 7106, 7107, 7109, 7502-05. *See* Ruhl & Jewell, *supra* note 10, at 509.

533. 46 U.S.C. § 7504. *See* Ruhl & Jewell, *supra* note 10, at 509.

534. 46 U.S.C. § 7106. *See* Ruhl & Jewell, *supra* note 10, at 509.

535. 46 U.S.C. § 9102. *See* Ruhl & Jewell, *supra* note 10, at 509.

536. 46 U.S.C. §§ 8104, 9102.

well-trained and vigilant to prevent spills and to respond quickly if a spill occurs.[537]

The OPA created a vessel monitoring and tracking system, known as the Vessel Traffic Service ("VTS").[538] The tracking system was enacted to prevent collisions between vessels in harbors.[539] The VTS is similar to air traffic control monitors and uses radar to monitor traffic in and out of busy harbors and ports.[540] The VTS's radar signal works from a fixed point in the harbor and transmits data concerning the location of other vessels and navigational hazards to ensure that vessels avoid collisions.[541] The VTS also allows larger vessels to broadcast a projected plan of movement to allow smaller ships to navigate around the vessel.[542] The VTS protects the marine environment and maintains vessel safety to prevent oil spills.[543]

Lastly, the OPA seeks to prevent oil spills through provisions addressing the construction and operation of vessels.[544] The OPA addresses construction of vessels by requiring fundamental changes in design characteristics of vessels that transport oil.[545] It requires vessels to be equipped with double-hulls that will help prevent spills in the event that the vessel collides with another ship or runs aground.[546] However, a double hull will not protect a vessel in a high-energy collision.[547] The theory behind the enactment of the double-hull requirement is that it will reduce the amount of oil spilled in a vessel collision.[548] The OPA established a time line for phasing out single-hull tankers by undergoing construction modification to meet the OPA's standards or replacing single-hull tankers with double-hull tankers.[549] The OPA envisioned that by 2015, all tankers would be double-hulled.[550] The OPA also requires the development of regulations, which establish minimum standards for

537. *See* Ruhl & Jewell, *supra* note 10, at 509.
538. 33 U.S.C. § 1223(a) (2006). *See* Paul S. Edelman, *The Oil Pollution Act of 1990*, 8 PACE ENVTL. L. REV.. 1, 17-18 (1990).
539. *See* Edelman, *supra* note 538, at 17-18.
540. *See id.*
541. *See id.*
542. *See id.*
543. *See id.*
544. 46 U.S.C. § 3703(a) (2006). *See* Ruhl & Jewell, *supra* note 10, at 511-13.
545. 46 U.S.C. § 3703(a). *See* Ruhl & Jewell, *supra* note 10, at 511-12.
546. *See* Ruhl & Jewell, *supra* note 10, at 512
547. *See id.*
548. *See* Committee on Oil Pollution Act of 1990, Implementation Review, Marine Board, National Research Council, Effects of Double Hull Requirements on Oil Spill Prevention: Interim Report 14 (The National Academies Press 1996).
549. *See id.*
550. *See id.*

plating thickness.[551] Regulations regarding plating thickness are also designed to prevent spills during either vessel or shore collisions.[552]

Since the enactment of the OPA, the number of major oil spills from tankers has drastically decreased, with zero major spills reported in 2009 from oil tankers.[553] The OPA's prevention provisions, which aim for eventually eradicating oil spills, impose efforts to reduce oil pollution by mandating major changes in the way tank vessels transport oil and specify which vessels can carry oil.

551. 46 U.S.C. § 3703(a) (2006). *See* Ruhl & Jewell, *supra* note 10, at 511.

552. *See* Ruhl & Jewell, *supra* note 10, at 511.

553. INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LIMITED, STATISTICS, *available at* http://www.itopf.com/information-services/data-and-statistics/statistics/-major.