OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years

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I
INTRODUCTION

Ten years ago, after the Exxon Valdez incident in Prince William Sound, Congress quickly passed, and President Bush promptly signed, the Oil Pollution Act of 1990 (OPA). The Act was meant to be the primary federal legislation addressing oil spills into United States navigable waters and onto its shorelines. At the time of OPA's passage, the major issues confronting the Congress included the interplay of federal and state law on the subject, United States participation in international efforts to deal with oil spills, the continuing viability of the Shipowner's Limitation of Liability Act of 1851 (Limitation Act), and the nature and extent of recoverable damages, particularly for injured natural resources and purely economic losses.

In order for a maritime oil spill regime to work effectively, it must provide uniform and predictable rules that encourage prevention, quick cleanup, and reasonable compensation. A decade after OPA's enactment, this article

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4 The Senate report stated that, "[w]hat the nation needs is a package of complementary international, national, and state laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, minimize damages to fisheries, wildlife and other natural resources and internalize those costs within the oil industry and its transportation division." S. Rep. No. 94, 101st Cong., 2d Sess. 4 (1990)(Committee on Environmental and Public Works), reprinted in 1990 U.S.C.C.A.N. 722, 723.
assesses how well the Act has met these criteria.\(^5\) Reviewing the setting in which OPA became law, the relevant statutory provisions, and the body of case law that has developed since OPA’s passage, this analysis reveals that, by and large, OPA has failed to meet fully the desirable standards of predictability and uniformity.

II

THE OIL POLLUTION ACT OF 1990

A. Background

Prior to OPA’s enactment, the law relating to oil spills affecting the waterways of the United States was in disarray.\(^6\) The federal regulatory regime centered on the somewhat limited Clean Water Act provisions,\(^7\) even though other applicable federal statutes included the Deepwater Port Act,\(^8\) the Outer Continental Shelf Lands Act,\(^9\) the Trans-Alaska Pipeline Authorization Act,\(^10\) and the Limitation Act.\(^11\) At the same time, the general maritime law often came into play. As if this menagerie of federal standards and remedies was not enough, many states had their own laws relating to oil spill removal and liability.\(^12\) Finally, an international regime also dealt with civil liability issues, although the United States had chosen not to participate because of concern that international liability limits were too low and might preempt inconsistent federal and state laws.\(^13\) For more than fifteen years before the *Exxon Valdez* disaster, Congress had struggled to create a more unified federal system, but the proposed legislation foundered in the face of

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\(^7\) 33 U.S.C. § 1321.

\(^8\) 33 U.S.C. §§ 1501-1524.


major conflicts about American federalism and international uniformity. It took the drama of Exxon Valdez to power OPA through Congress.

B. OPA Provisions

Congress’ goal in enacting OPA was to vastly improve the cleanup system that had proven inadequate in the Exxon Valdez disaster, while providing substantial liabilities for the industry, including the possibility of unlimited liability under state law. Consequently, OPA is a massive piece of legislation, covering numerous issues arising out of oil spills. Although a thorough review of all its provisions is beyond this article’s scope, a quick presentation of the major liability, removal, and prevention sections should prove helpful. The Act requires so-called “responsible parties,” which include vessels, onshore facilities, offshore facilities, deepwater ports, and pipelines, to pay the expenses of removing spilled oil and to compensate for the damage from oil discharges or from substantial threats of discharge into navigable waters, onto adjoining shorelines, or into the exclusive economic zone. Removal costs include those of federal, state, or tribal governments, as well as anyone else’s removal costs pursuant to the National Contingency Plan. Damages include those to natural resources, actual damages to real or personal property, as well as economic losses related to loss of real property,

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1833 U.S.C. § 2702(b)(1). Prompted by the Torrey Canyon oil spill in 1968, and prepared by the President, the National Contingency Plan ensures a coordinated response by government to an oil spill. After passage of the Clean Water Act, 33 U.S.C. §§ 1251-1387, in 1972, the Plan was enlarged to encompass spills of other hazardous substances. See U.S. Environmental Protection Agency, NCP Overview (last updated March 1, 1999) <http://www.epa.gov/oilspill/ncpover.htm>; Rodriguez and Jaffe, supra note 6, at 23.
personal property, or natural resources, loss of subsistence use, loss of revenues to federal or state governments, and the cost of public services attributable to the discharge.\textsuperscript{19} Where a third party is solely at fault, it becomes the responsible party.\textsuperscript{20} OPA does provide certain defenses: a responsible party is not liable for the damage from a spill caused by an act of God or war, or a third party.\textsuperscript{21} Moreover, the Act sets limits to liability. In the case of tankers, for example, these limitations are based on the tanker’s size.\textsuperscript{22} When the responsible party is guilty of gross negligence or willful misconduct, violates federal safety, construction, or operating regulations, fails to report the discharge, or refuses to cooperate with removal activities, it loses the protection of limitation.\textsuperscript{23} The Act also provides for contribution actions against entities that have violated its provisions.\textsuperscript{24}

With regard to damages to natural resources, the Act includes restoration or replacement costs, diminution of value pending restoration, and the costs of assessing the damage.\textsuperscript{25} In addition, the Act requires the executive branch to develop procedures for assessing natural resources damages, and to publish them as regulations. The Act then dictates that, in administrative and judicial proceedings, assessments in accordance with these regulations shall have the force and effect of rebuttable presumptions.\textsuperscript{26}

Anticipating that responsible parties might be unable in every case to make full compensation for damages from spills, the Act establishes the Oil Spill Liability Trust Fund.\textsuperscript{27} The Fund is financed primarily through a tax on crude oil at U.S. refineries and petroleum products brought into the United States.\textsuperscript{28} Prior to looking to the Fund for compensation, the claimant must normally present the claim to the responsible party; only if full compensation is not available, can the claimant seek relief from the Fund.\textsuperscript{29} From tankers and offshore facilities, OPA requires evidence of financial responsibility to the maximum extent possible under the Act’s limitation of liability.

\textsuperscript{19}33 U.S.C. § 2702(b).
\textsuperscript{21}33 U.S.C. § 2703(a). Indeed, if the responsible party has such a defense it can recover its costs from the OPA Fund. 33 U.S.C. § 2708.
\textsuperscript{22}33 U.S.C. § 2704(a). Where a responsible party’s costs have exceeded its liability limitation, it can recover those costs from the OPA Fund. 33 U.S.C. § 2708(a)(2).
\textsuperscript{23}33 U.S.C. § 2704(c).
\textsuperscript{24}33 U.S.C. § 2709.
\textsuperscript{25}33 U.S.C. § 2706(d).
\textsuperscript{26}33 U.S.C. § 2706(e).
\textsuperscript{27}33 U.S.C. § 2712.
\textsuperscript{28}36 U.S.C. § 4611.
\textsuperscript{29}33 U.S.C. § 2713(a).
\textsuperscript{30}33 U.S.C. § 2713(d).
provisions. If a third party guarantor is used to establish financial responsibility, OPA claims may be made directly against that guarantor. OPA claims may be brought in federal or state court. Of particular interest are the provisions on state law non-preemption. Section 1018(a) of OPA provides:

Nothing in this chapter or the Act of March 3, 1851 shall—
(1) affect, or be construed or interpreted as preemting, 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…or State law, including common law.

Other sections of OPA require the gradual substitution of double-hulled tankers and barges, contain oil spill prevention measures, and provide for cleanup planning and equipment. OPA amends the Clean Water Act to allow the government to undertake cleanup efforts, and modifies the National Contingency Plan to establish a national planning and response system and to require that vessels create their own individual response plans. The Act provides both criminal and civil penalties for the violation of its provisions.

On the international level, the Act does nothing to implement the International Convention on Civil Liability for Oil Pollution Damage, the International Convention on the Establishment of an International Fund for

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33 U.S.C. § 2716(a),(c).
33 U.S.C. § 2717(b),(c).
See Rodriguez and Jaffe, supra note 6, at 22-23.
See Rodriguez and Jaffe, supra note 6, at 23.
Id.
Compensation for Oil Pollution Damage,42 or the 1984 Protocols to these conventions.43 OPA does, however, contain the following sense-of-Congress language:

It is the sense of Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from such incidents.44

Given that some state statutes provide for unlimited strict liability, it is highly unlikely that any international approach would be considered "at least as effective" in the foreseeable future.

Notwithstanding calls from Presidents Bush45 and Reagan,46 the international community, and the shipping industry,47 the United States has yet to sign the international conventions addressing oil spill response and liability. Because of U.S. recalcitrance in acceding to the 1984 Protocols, which required U.S. participation to become effective, the international community decided to move ahead without the United States. U.S. participation is not required for the 1992 Protocols48 to become effective. Notwithstanding the desirability of an international solution to what is certainly a world-wide problem, the unwillingness of the United States to act jointly with other concerned nations has obliged vessels and insurers to comply with separate liability regimes and financial responsibility requirements. In addition, the continued absence of the United States from this regime impairs its ability to exercise leadership in international oil pollution matters.

From the beginning, the Oil Pollution Act of 1990 was controversial. Some argued that its high liability limits might scare away insurers or cause

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42Reprinted in 11 I.L.M. 284 (1972) and 6A Benedict on Admiralty, supra note 41, at Doc. 6-8.
46See Oil Pollution Civil Liability Conventions, 1985 Pub. Papers 1354 (Message to the Senate Transmitting Protocols to the Convention).
48Protocol to the International Convention on Civil Liability for Oil Pollution Damage (1992) reprinted in 6A Benedict on Admiralty, supra note 41, at Doc. 6-4B.
oil importers to avoid the United States. Others thought the double-hull requirement might prove too difficult to implement, and that double hulls might prove to be more dangerous for oil carriage than single hulls. Others have expressed concern over the failure of the United States to assume a leadership role in the adoption of international standards. There was also substantial disagreement on whether the federal law should preempt state and local rules relating to oil spills, given the unique nature of admiralty in the federal system. Some argued that OPA’s economic loss provisions created uncertainty. To date, many of the dire predictions surrounding OPA, including that the flow of oil into the United States would dry up, have failed to materialize; nevertheless, there is merit to the criticism that OPA makes transporting oil into this country more expensive and unnecessarily difficult. Although OPA may yet prove instrumentally effective for cleanup and compensation, it fails to accommodate sufficiently the important policy interests of uniformity and predictability.

III
SIGNIFICANT CASE LAW

After ten years, courts have still failed to address many important OPA issues. Nevertheless, a small, but significant, corpus of case law has begun to develop. In particular, issues of state law preemption, limitation of liability, damages, removal costs, claim presentation requirements, and the scope of OPA coverage have all received meaningful judicial consideration. Less controversial OPA decisions, not warranting extensive treatment here, have addressed the availability of in rem actions, the right to a jury

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50Donaldson, supra note 13, at 318; Smith, supra note 15, at 150. But see, Holt and Cecil, Natural Resource Damages for Oil Spills: The International Context, Nat. Resources & Env’t., Spring 1995. 28 (arguing that OPA has had an impact on the development of international oil pollution standards).
51See Harrington, supra note 3, at 3; Kopec and Peterson, supra note 6, at 599; Millard, supra note 11, at 351-54; Swanson, Federalism, the Admiralty, and Oil Spills, 27 J. Mar. L. & Com. 379, 380-395 (1996).
52See Wagner, supra note 15, at 294, 300.
53In Commonwealth of Puerto Rico v. the M/V Emily S, No. CIV. 94-1019CCC, 1998 WL 938585, 1998 AMC 2726 (D.P.R. 1998), the court determined that although OPA contains no express in rem remedy, in rem remedies are preserved for both general maritime claims and OPA claims. The court pointed out that maritime liens for oil pollution have traditionally been allowed and found that OPA’s savings provisions found in 33 U.S.C. §§ 2718 and 2751(e) preserve these liens. In particular, the court relied on the following language from § 2751(e):

   Except as otherwise provided in this chapter, this chapter does not affect—
trial, federal sovereign immunity and claims under the Administrative Procedure Act, the availability of a third party defense in bailment situations, tugboats as responsible parties, contribution from a non-responsible

(1) admiralty and maritime law;
(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

33 U.S.C. § 2751(e). Section 1018, 33 U.S.C. § 2718, was found by the court to "provide for preservation of additional requirements and liabilities under state and federal laws for oil spill discharges and the threat of oil spill discharges. 1998 WL 938585 at *1. The court found unpersuasive the argument that the Federal Water Pollution Control Act had included a specific in rem provision; thus, the failure to include it in OPA must be intentional. Indeed, the court pointed out that the Federal Water Pollution Control Act had not originally contained such a provision. That provision was added later to clarify that the in rem remedy remained, not to create that remedy. 1998 WL 938585 at *2. Thus, the court determined that an in rem action for oil pollution had existed before OPA, and that such a remedy still exists both under general maritime law.

35 In South Port Marine, LLC v. Gulf Oil Ltd. Partnership, 73 F. Supp. 2d 17, 2000 AMC 658 (D. Me. 1999), aff'd in part, rev'd in part, and remanded, Nos. 99-2369, 99-2370, 2000 U.S. App. LEXIS 31178 (1st Cir. Dec. 7, 2000), the court determined that there was no right to a jury trial in an action applying OPA to a spill by a vessel causing damage to shoreline structures. The court of appeals found defendant entitled to consideration by a jury of claims relating to its docks, which, as extensions of the land, could have been the subjects of claims at common law. 2000 U.S. App. LEXIS 31178, *11-*14.

36 In International Marine Carriers v. The Oil Spill Liability Trust Fund, 903 F. Supp. 1097, 1995 AMC 2072 (S.D. Tex. 1994), the court concluded that OPA's Oil Spill Liability Trust Fund has sovereign immunity against claims for reimbursement for removal costs. That did not mean, however, that no claim could be brought under the Administrative Procedure Act, which waives that immunity to allow judicial review of final agency actions for which no other legal remedy exists. 5 U.S.C. § 704. Nevertheless, the court upheld the Fund's rejection of plaintiff's reimbursement claims because OPA § 2708 provides no defense to liability when the third party has a contractual relationship with the responsible party. Here, the Fund's determination that a contractual relationship had existed was not unreasonable. 903 F. Supp. at 1104-05. For additional discussion of this case, see Woods, Third Party Liability Under OPA 90: Have the Courts Veered Off-Course?, 73 Tul. L. Rev. 1863 (1999).

37 The court refused to find a defense to liability when the owner places his vessel in the hands of a bailee in U.S. v. J.R. Nelson Vessel, Ltd., 1 F. Supp. 2d 172, 1998 AMC 2249 (E.D. N.Y. 1998), aff'd, 173 F.3d 847 (2d Cir. 1999). Similar to the International Marine Carriers case, supra note 36, the court here found that although third party negligence can be a complete defense under OPA, this defense is lost when the negligent third party has a contractual relationship with the responsible party. Here the bailment created such a contractual relationship.

38 In Commonwealth of Puerto Rico v. the M/V Emily, 13 F. Supp. 2d 147, 1998 AMC 2020 (D.P.R. 1998), the owner of the tugboat towing a barge that leaked oil moved for summary judgment on the ground that no oil was discharged from the tug. The court framed the issue as whether the towboat and the barge should be considered one vessel or two for the purpose of determining the responsible party. The district court noted that the barge was unmanned and had no means of propulsion other than the tug, which was in complete control of navigation. Given these circumstances, the court found that the two should be considered a single entity. It therefore denied owner's motion for partial summary judgment.
party, the application of a bankruptcy stay, the double-hull requirement as an unconstitutional taking, and the effect of well abandonment on a former lessee’s status as a responsible party.

A. Preemption of State Laws

1. State Liability Legislation

The saving provision in OPA’s section 1018(a) raises a real issue as to how far the states can supplement OPA in particular, and admiralty law in general. Although Congress clearly wanted the states to enjoy considerable latitude in creating additional requirements, the courts have struggled to define exactly what should happen when federal and state laws conflict. In addition, OPA’s language of preemption invites renewed consideration of whether, in a marine matter, the Constitution permits a diversity of state regimes at the expense of uniformity.

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39In Texas Trading & Transp. Inc. v. Laine Constr. Co., No. CIV. A. 98-1473, CIV. A. 98-2682, CIV. A. 98-2683, 1998 WL 814615 (E.D. La. 1998), the court addressed the issue of whether someone other than an OPA responsible party could seek contribution for removal costs or damages under section 1009. That section provides, “[a] person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law.” 33 U.S.C. § 2709. The court held that, under OPA’s provisions, only a responsible party could be forced to pay damages or removal costs. Since the plaintiff was not a responsible party, it could not seek contribution for OPA damages.

40In U.S. v. Oil Transp. Co., 172 B.R. 834, 1995 AMC 170 (E.D. La. 1994), the court found that the bankruptcy automatic stay did not apply to the entry of a “monetary judgment for response costs associated with environmental clean-up operations conducted pursuant to OPA’s statutory authority.” Id.

41In two decisions from the United States Court of Federal Claims, the court addressed whether OPA provisions requiring the gradual phase-out of single-hull vessels in favor of double hulls constituted a Fifth Amendment taking without compensation. In the first case, Maritrans, Inc. v. U.S., 40 Fed. Cl. 790, (1998), the government had argued that the plaintiff had no cognizable property right protected under the Fifth Amendment because it is involved in a heavily-regulated industry and because personal property interests are not protected to the same extent as real property. The court disagreed, concluding that, to the contrary, there was no general rule of law protecting the government from Fifth Amendment attack in cases arising from heavily regulated industries. Id. at 797. The court also concluded that, although personal property may receive less protection, each case should be decided on its own merits. Here, depending on the foreseeability of a requirement for double hulls, the plaintiff could have a property interest in the form of reasonable investment-backed expectations for the service life of its single-hull barges. Id. at 801. In Maritrans, Inc. v. U.S., 43 Fed. Cl. 86, 1999 AMC 2157 (1999), the court concluded that the tanker owner’s expectations about the useful life of its tankers were reasonable, but that OPA merely diminished the value of the single-hulled tankers; it did not take them. In the event that the tankers were forced to prematurely retire their vessels, their owner could return to court.


Dostie Development, Inc. v. Arctic Peace Shipping Co.\textsuperscript{64} illustrates a relatively simple application of OPA's non-preemption rule. In that case, the United States District Court for the Middle District of Florida held that the Act did not preempt negligence claims sounding in state common law, relying on the clear language of section 1018(a)(2),\textsuperscript{65} which allows states to impose liabilities in addition to those of the Act.

In National Shipping Co. of Saudi Arabia v. Moran Trade Corp.,\textsuperscript{66} federal courts in Virginia faced a more challenging interpretation. Collision with a tug owned by Moran led to a fuel spill from a container vessel owned by National Shipping Company (NSC). Clean up followed, at the expense of NSC, the responsible party under OPA. NSC later sued Moran to recover the costs of clean up and compensation paid to third parties, alleging that the negligence of the tug captain was the sole cause of the collision and therefore the spill. NSC's complaint included claims under both OPA and the law of Virginia, in whose waters the spill occurred. Under OPA, NSC made one claim based on subrogation,\textsuperscript{67} and another, in the alternative, for contribution.\textsuperscript{68} Relying on Virginia law, NSC also made a claim based on common law principles of subrogation.

The United States District Court for the Eastern District of Virginia found that subrogation pursuant to OPA was inappropriate, because Moran could not be a responsible party under OPA for a spill from NSC's vessel.\textsuperscript{69} This left NSC to its contribution alternative under the federal statute.\textsuperscript{70} The limitation in OPA of the liability of a responsible person for clean up costs applies also to the liability of a party from whom contribution is sought.

\textsuperscript{64}No. 95-808-CIV-J-MMP, 1996 WL 866119 (M.D. Fla. 1996).
\textsuperscript{65}Id. at *3.
\textsuperscript{67}Section 1002 of the Act says, in pertinent part:
Subrogation of responsible party. If the responsible party alleges that the discharge or threat of a discharge was caused solely by act or omission of a third party, the responsible party—
(i) in accordance with section 1013, shall pay removal costs and damages to any claimant; and
(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.
\textsuperscript{68}33 U.S.C. § 2702(d)(1)(B).
\textsuperscript{70}According to section 1009 of the Act: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law." 33 U.S.C. § 2709.
under the statute.\textsuperscript{71} Because of the disparate sizes of the container vessel and the tug, NSC therefore was obliged by OPA to assume considerably more liability as responsible party than NSC could recover from Moran by way of contribution, even if Moran's captain was the sole cause of the spill. For this reason, NSC added its state law claim of subrogation.\textsuperscript{72}

Neither party could offer the court any case addressing the relationship between OPA's contribution provision and state common law, but NSC argued that OPA's saving provisions authorized it to add common law claims against a responsible third party to claims arising from OPA itself. The court disagreed, finding that the legislative history of the saving provisions proved their purpose was to afford adequate protection for the environment and for victims damaged by an oil spill.\textsuperscript{73} Therefore NSC could not take advantage of the saving provisions in its action against Moran because NSC itself had not been damaged by the spill (as distinct from the collision).

With this, the United States Court of Appeals for the Fourth Circuit subsequently agreed.\textsuperscript{74} That court rejected NSC's argument that OPA allowed recovery in excess of the limit specified in the statute by resort to state law. According to the appellate court, both NSC's liability for the cleanup, and Moran's liability to NSC, arose solely from the OPA, and the act itself provided the only exceptions to its limitation provision.\textsuperscript{75} Although NSC argued that section 1018(a)(2) preserved the right to state law remedies,\textsuperscript{76} the court of appeals agreed with the court below that OPA preserves state law claims only for those damaged by the spill.\textsuperscript{77} Since it was only as a responsible party, rather than as a spill victim, that NSC sought compensation from Moran, NSC's recovery was necessarily subject to OPA's limitation; other-

\textsuperscript{71}924 F. Supp. at 1446.

According to the pertinent part of Section 1002 of the Act: "If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 1004 as applied with respect to the vessel or facility," 33 U.S.C. § 2702(2)(B).

\textsuperscript{72}924 F. Supp. at 1446. NSC also argued that its claim against Moran was not subject to OPA limitation because of the exception for "violation of an applicable Federal safety, construction, or operating regulation" 33 U.S.C. § 2704(C)(1)(b). The district court was not persuaded that, under the circumstances of the collision, the tug captain's failure to post a lookout aft amounted to a violation of the Rule 5 of the Inland Rules, 33 U.S.C. 2005, nor that the failure contributed to the collision. 924 F.Supp. at 1450. The court of appeals left this judgment undisturbed. 1998 AMC at 167.


\textsuperscript{75}Id. at 168-9.

\textsuperscript{76}According to the pertinent part of section 1018: "Nothing in this Act or the Act of March 3, 1851 shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law." 33 U.S.C. § 2718.

\textsuperscript{77}1998 AMC at 168-9.
wise the liability cap would be meaningless. In other words, while OPA’s limitation provision does not limit recovery by spill victims pressing state law, it does set a limit for responsible parties who rely on the Act for contribution from third parties.

2. State Oil Spill Prevention Rules

State of Washington laws obliged those operating oil tankers in the state’s waters to develop spill prevention plans conforming to state standards directed toward achieving the best protection for the environment, and to comply with regulations promulgated by the Office of Marine Safety (OMS). These regulations imposed standards for navigation, vessel management, equipment, manning, training, and record keeping, and required operators to report spills and other safety incidents, wherever in the world they might occur. The International Association of Independent Tanker Owners (Intertanko) challenged the regulations, on the grounds that they were preempted by OPA, the Port and Tanker Safety Act of 1978 (PTSA), the Ports and Waterways Safety Act of 1972 (PWSA), and the Tank Vessel Act of 1936. Intertanko also argued that the regulations otherwise offended the Commerce and Treaty Clauses of the Constitution of the United States. The United States District Court for the Western District of Washington upheld the state regulations, relying primarily on section 1018 of OPA, which explicitly preserved from preemption by the Act certain state laws and regulations.

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41 33 U.S.C. § 3701 et seq.
43 49 Stat. 1889.
44 Art. I, § 8, Cl. 8.
45 Art. II, § 2, Cl. 2.
47 33 U.S.C. § 2718. The pertinent part of section 1018 reads:
(a) Preservation of State authorities; Solid Waste Disposal Act. Nothing in this Act . . . 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 . . . .
On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision respecting all of the OMS regulations save one. From *Ray v. Atlantic Richfield Co.*, the court of appeals inferred a presumption that state police powers are not derogated by federal law in the absence of clear evidence that Congress intended to do so. In this light, the court found that OPA's section 1018 evidenced congressional intent to allow the states to pass their own laws and regulations for the prevention of oil spills. Intertanko had argued for a narrower reading of the saving provision. According to Intertanko, the fact that the saving provision appeared in Title I proved it was intended to apply only to state laws pertaining to the subjects of Title I, that is, to state laws about liability and compensation, rather than to laws pertaining to the subjects of Title IV, that is, laws for spill prevention. Rejecting with little discussion the industry's structural approach to interpreting the scope of section 1018, the Ninth Circuit noted that the plain meaning of the general words of the saving section ("nothing in this Act") embraced the entire Act, not just Title I. The court of appeals then rejected the state's contention that, because OPA amended PTSA, PWSA, and the Tank Vessel Act, section 1018 saved the OMS regulations from the preemptive effects of those laws as well. The court found no authority for the argument that OPA's saving provisions "necessarily" related back, especially since they referred more than once to "this Act." This left the Ninth Circuit to decide whether any of these older federal statutes preempted the OMS regulations.

The Ninth Circuit first inventoried three theories of federal preemption: conflict preemption, field preemption, and express preemption. Conflict preemption occurs when it is impossible to comply with both state and federal law, or when state law frustrates congressional purpose manifest in federal law. The court of appeals found that the Tank Vessel Act, PWSA, and PTSA together established federal regulatory systems for tanker design, construction, and management, including training, manning, English language profi-

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(c) Additional requirements and liabilities; penalties. Nothing in this Act . . . 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.


*148 F.3d at 1059.

*1id.

*2Id. at 1060.

*3Id.
ciency and other watch standing qualifications, as well as casualty reporting. With respect to conflict preemption, Intertanko had not argued the impossibility of complying with any of the OMS regulations and its federal counterpart, but that the OMS regulations on these subjects frustrated congressional intent that the regulation of such things be exclusively federal. Although the court of appeals found that section 1018 did not limit by its own terms the preemptive power of the other three relevant federal laws, the court nevertheless viewed the saving provision as evidence that Congress had not intended to completely exclude states from regulating matters addressed by OPA, including the prevention of spills. For the court of appeals, section 1018 proved that, to the contrary, Congress welcomed additional state regulation, so that there was no frustration of purpose from which conflict preemption could follow.

Intertanko also argued preemption based on conflict between the OMS regulations and U.S. treaty obligations. In *Chevron U.S.A., Inc. v. Hammond*, the Ninth Circuit had sustained an Alaska law prohibiting the discharge of ballast water into state waters against a claim of preemption by the same international agreements, finding in PWSA and PTSA evidence that Congress had not intended to achieve uniformity with the standards set forth in the international agreements, but rather to treat those standards only as minima on which stricter U.S. rules could be built through Coast Guard rule making. In this case, the Ninth Circuit found the wording of section 1018 to be additional support for the inference about congressional intent the court had drawn earlier in *Hammond*. If Congress had intended that states regulate only when there was no treaty-based standard, section 1018 would have read, "nothing in the Act shall be interpreted to prohibit states from imposing... 'additional liability or requirements that would not conflict with an international treaty.'"
The court of appeals next took up Intertanko’s claim of field preemption, which occurs when “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”\textsuperscript{99} The decision of the U.S. Supreme Court in \textit{Ray v. Atlantic Richfield Co.}\textsuperscript{100} supplied the relevant distinction. In \textit{Ray}, the Supreme Court had held that PWSA preempted design requirements imposed by the state of Washington on tankers operating in Puget Sound. According to the Ninth Circuit, the Supreme Court had in \textit{Ray} ruled out state design and construction requirements for tankers, because that field was fully occupied by federal regulation, but not operating rules, because that field was open to state regulations arising from the “peculiarities of local waters.” Turning to the OMS regulations challenged by Intertanko, the Ninth Circuit found most of them to be unpreempted operating rules.\textsuperscript{101}

Having found that most of the OMS regulations withstood attacks based on theories of conflict and field preemption, the Ninth Circuit next addressed the claim that they were expressly preempted by federal law, including various Coast Guard regulations. The court acknowledged that a regulation can have the same preemptive effect as a statute,\textsuperscript{102} and noted that Congress had granted the Coast Guard wide ranging regulatory power under OPA. Nevertheless, on the basis of the court’s conclusion that Congress had not intended that OPA itself preempt state law, the court of appeals also decided that Congress had not intended in OPA to so empower the Coast Guard.\textsuperscript{103}

The court then addressed Intertanko’s arguments that the OMS regulations violated the Commerce Clause and interfered with federal foreign relations power. Because the state statute and related regulations were not discriminatory, they could not be per se violations of the Commerce Clause. Nor were their burdens excessive for those engaged in interstate commerce, especially when weighed against the benefits they afforded the environment. For these reasons, the court found no Commerce Clause violation.\textsuperscript{104} As for the foreign

\textsuperscript{100}435 U.S. 151, 1978 AMC 527 (1978).
\textsuperscript{99}The court found the following to be operational requirements: accident reporting, watch practices, navigation procedures, engineering procedures, prearrival tests and inspections, emergency procedures, rules against altering or destroying records, training programs, illicit drugs and alcohol use, personnel evaluation, work hours, language requirements, training records for crew members, management, and advance notice of entry and safety reports. Requirements that tankers be equipped with global positioning satellite receivers and two radars, however, were struck down, as design requirements within the field left exclusively to federal regulation by PWSA according to \textit{Ray}. The court was also unpersuaded by Washington’s assertion that a requirement that tankers be equipped with a certain emergency towing package was not a requirement pertaining to tanker design. 148 F.3d at 1065-66.
\textsuperscript{104}Id. at 1067.
\textsuperscript{105}Id.
\textsuperscript{106}Id. at 1069.
affairs argument, the Ninth Circuit dealt with it but briefly, finding the extra-
territorial impact of the OMS regulations no more than incidental or indirect.\textsuperscript{105}

The Supreme Court reversed and remanded, holding a number of the
OMS regulations preempted, and calling for reconsideration of the others.
Writing for a unanimous Court, Justice Kennedy pointed out the strong and
long standing federal interest in both interstate and foreign commerce, as
evidenced by comprehensive legislative schemes such as the Tank Vessel
Act, the PWSA, and the OPA, as well as the various international agree-
ments in which the United States had entered.\textsuperscript{106} Any notion that the reten-
tion by states of police powers in our constitutional system obliges courts to
assume state law is not preempted by federal law unless Congress’s inten-
tion to do so is clear and manifest, is inapposite when the state ventures into
an area with a “history of significant federal presence.”\textsuperscript{107} The relevant ques-
tion in this case was therefore whether the OMS rules were consistent with
federal law and the need for maritime uniformity.

According to the Supreme Court, the courts below had read too much into
the non-preemption language of OPA’s section 1018, which the Supreme
Court found applied only to state laws implicating Title I issues, namely, lia-
ibility rules and financial requirements. Title I of OPA allows recovery of
damages from vessels “from which oil is discharged, or which pose the sub-
stantial threat of a discharge of oil,”\textsuperscript{108} and the saving provisions permit states
to provide additional requirements, “relating to the discharge, or substantial
threat of a discharge of oil.”\textsuperscript{109} For the Court, the similarity of the language
proves Congress intended the saving provisions to protect only state laws on
the subjects of Title I. Moreover, the broad coverage of the other OPA titles
made it doubtful that Congress would have acted to manifest an intent to
“disrupt national uniformity” by locating more comprehensive saving provi-
sions in one title, i.e., in Title I.\textsuperscript{110} For the Court, this narrower interpretation
of the saving provisions in section 1018 afforded more respect for the bal-
ance struck between federal and state interests.\textsuperscript{111} Thus, Justice Kennedy and
the rest of the Court concluded that OPA had not changed the legal land-
scape of tanker regulation since Ray. Indeed, for the Court, the interpretation
in Ray of PWSA’s preemptive effect on state regulation of tanker manage-
ment controlled this case.\textsuperscript{112}

\textsuperscript{105}Id.
\textsuperscript{106}120 S. Ct. 1143-45.
\textsuperscript{107}Id. at 1147-48.
\textsuperscript{108}Id. at 1146.
\textsuperscript{109}Id.
\textsuperscript{110}Id. at 1145.
\textsuperscript{111}Id. at 1147.
\textsuperscript{112}Id.
As for PWSA's preemptive effect, the Court noted that Title I of PWSA itself preserved state powers to regulate local issues, in contrast to Title II, which covered important matters of federal concern, i.e., matters of vessel design and operation.\textsuperscript{113} According to the Court, the courts below took too narrow a view of the field intended by Congress in Title II to be regulated exclusively by the federal government. Rather than reserving for exclusively federal regulation only the limited fields of tanker design and construction, Congress, when it passed PWSA, intended to allow state regulation of tanker operations only as dictated by the peculiarities of local waters.\textsuperscript{114} The manifest congressional desire for national and international uniformity otherwise dictated exclusive federal control over matters relating to tanker "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning."\textsuperscript{115} Viewed in this light, several of the OMS regulations are preempted by PWSA's Title II. The crew training requirement did not relate to matters unique to Puget Sound and controlled vessel activities outside Washington's jurisdiction.\textsuperscript{116} The English language proficiency requirement would affect vessel staffing outside Washington, and was unrelated to local conditions.\textsuperscript{117} The state's navigation watch requirement was similarly struck because it applied at all times, rather than just under certain circumstances peculiar to Puget Sound.\textsuperscript{118} Washington's requirement that vessels report all marine casualties anywhere in the world to Washington authorities was also found defective. Although the state argued that its reporting requirement aped the federal one and thus should be allowed, the Court found that Congress had intended that the vessel's Coast Guard report be the sole such requirement, making the state's requirement an additional and significant burden, with extraterritorial effect.\textsuperscript{119} Intertanko's claims respecting other OMS regulations were remanded for reconsideration by the courts below in light of the new analytical framework set out in the Supreme Court's decision.\textsuperscript{120}

\textsuperscript{113}Id.
\textsuperscript{114}Justice Kennedy quoted from Ray:

The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. Enforcement of the state requirements would at least frustrate what seems to us to be evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.

120 S.Ct. at 1149, quoting from 435 U.S. at 165.

\textsuperscript{115}Id. at 1149.

\textsuperscript{116}Id.

\textsuperscript{117}Id.

\textsuperscript{118}Id. at 1149-50.

\textsuperscript{119}Id. at 1151.

\textsuperscript{120}Id. at 1150. The Court found it unnecessary to discuss whether U.S. treaties preempted the state rules since federal law and regulations already achieved that result. Justice Kennedy did point out that this issue may have to be addressed at some later date in these proceedings. Id. at 1145.
So far, no court has seriously considered the implications for admiralty uniformity from disparate state liability rules immunized from preemption by OPA’s savings provisions. When Congress in section 1018 afforded states wide latitude in creating spill remedies, Congress drifted off the course toward national maritime uniformity. The Supreme Court’s rejection in *Locke* of an expansive reading of OPA’s savings provisions proves that the Court, on the other hand, is unwilling to entirely ignore the constitutional value of admiralty uniformity. It remains for some future case to communicate more clearly judicial reaction to the threat for uniformity from OPA’s provisions for non-preemption.

**B. Damages**

1. **Economic Losses**

Prior to OPA’s adoption, one vexing judicial uncertainty was the continued viability of the Supreme Court’s decision in *Robins Dry Dock and Repair Co. v. Flint*,\(^{121}\) which held that, absent some physical harm, purely economic losses are not recoverable in admiralty tort actions.\(^{122}\) This had been a particularly difficult issue in the litigation arising from the *Exxon Valdez* spill,\(^{123}\) and Congress sought to clear up the matter in OPA’s section 1002, which makes the responsible party liable for certain sorts of economic damages caused by spills.\(^{124}\) This statutory statement of congressional intent that economic losses be recoverable left unresolved however the thorny question of exactly when should such damages would be recoverable.\(^{125}\)

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\(^{121}\)275 U.S. 303, 1928 AMC 61 (U.S. 1927).


\(^{123}\)See Swanson, supra note 52, at 395-404.

\(^{124}\)Section 1002, in pertinent part, makes the responsible party liable, notwithstanding any other provision or rule of law, for damages as described below:

(B) Real or Personal Property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases the property.

(C) Subsistence Use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to ownership or management of the resources.

(E) Profits and Earning Capacity

Damages equal to the net loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.


\(^{125}\)For a discussion of the numerous difficulties created by this language, see Wagner, supra note 15, at 297-300.
In *Petition of Cleveland Tankers, Inc.*\(^{126}\) commercial interests harmed by the *M/V JUPITER*’s explosion sought to recover for their purely economic losses. The plaintiffs included various entities doing business along the channel which was closed by the accident. The damages they claimed included lost charter hire and increased costs due to delay and loss of business, and the shipowner moved for dismissal of their claims on the ground that *Robins Dry Dock* precluded recovery. Plaintiffs countered that section 1002 of OPA authorizes recovery for economic loss in the context of a spill, and that liability in this case stemmed from both subsections (B)(2)(C) and (B)(2)(E). Nevertheless, the United States District Court for the Middle District of Michigan dismissed, finding OPA’s economic loss provisions inapplicable. According to the court, plaintiff’s losses were not recoverable under subsection (B)(2)(C), because claimants’ uses were commercial, rather than “to obtain the minimum necessities of life.”\(^{127}\) Nor were they recoverable under subsection (B)(2)(E), because claimants had not alleged injury, destruction, or loss to their property.\(^{128}\)

In *Sekco Energy, Inc. v. M/V Margaret Chouest*,\(^{129}\) the owner of a drilling platform in the Gulf of Mexico, brought suit for economic losses against the charterer and owner of a vessel that had towed a seismic cable into the leg of plaintiff’s platform. The cable burst and spilled oil in the ocean, and drilling had to be halted while the spill’s source was investigated. Among other claims, plaintiff argued that it should recover under section 1002 of OPA, specifically subsections (B)(2)(B), (B)(2)(C), and (B)(2)(E). The United States District Court for the Eastern District of Louisiana dismissed the claim under subsection (B)(2)(B), on the grounds that plaintiff’s alleged economic losses occurred without concomitant destruction of real or personal property,\(^{130}\) and the claim under subsection (B)(2)(C), on the grounds that plaintiff had not been engaged in subsistence use. The court refused, however, to dismiss the claim under subsection (B)(2)(E), finding that plaintiff could recover for lost profits from drilling because future earnings from


\(^{127}\)Id. at 678.

\(^{128}\)Id. at 678-79. Without the benefit of OPA, claimants were left to urge that the court interpret *Robins Dry Dock* as leaving open the recovery of some purely economic losses based upon foreseeability, proximate cause, and remoteness. Instead, the court adhered to the bright line of *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (en banc), cert. denied sub nom. *White v. M/V Testbank*, 477 U.S. 903, 1986 AMC 2704 (1986).


\(^{130}\)820 F. Supp. at 1014.
drilling on the outer continental shelf are property of the sort contemplated by subsection (B)(2)(E).\textsuperscript{131}

In Ballard Shipping Co. v. Beach Shellfish,\textsuperscript{132} the United States Court of Appeals for the First Circuit referred to OPA's remedy provisions when considering claims for purely economic losses from the 1989 World Prodigy spill in Narragansett Bay. Although the case involved a pre-OPA spill, the court found OPA relevant when determining whether Robins Dry Dock limited a state statute allowing recovery for purely economic losses in oil spill cases. Disagreeing with the decision in Cleveland Tankers, the First Circuit concluded that Congress did authorize recovery of purely economic damages pursuant to subsection (B)(2)(E), which provides that, "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, personal property, or natural resources . . . shall be recoverable by any claimant."\textsuperscript{133} In the view of the First Circuit, the House Conference Report supported this conclusion, when it stated that the claimant need not be the owner of the damaged property or resources.\textsuperscript{134} That OPA permitted recovery for solely economic losses proved for the court that Congress does not regard expansion of liability in this way as excessively burdensome to interstate commerce. Deferring to Congress's judgment, the court then concluded that the general maritime law of Robins Dry Dock does not preempt Rhode Island law authorizing recovery for purely economic loss.\textsuperscript{135}

In South Port Marine, LLC v. Gulf Oil Ltd. Pshp.,\textsuperscript{136} the United States District Court for the District of Maine refused to set aside a jury's award of damages for loss of goodwill or business stress. A gasoline spill in the harbor had drifted to plaintiff's marina, where it dissolved styrofoam floats and damaged the dock. Plaintiff had relied on subsection (B)(2)(B) which authorized recovery for economic loss "resulting from destruction of, real or personal property," but defendant argued that the subsection applied only in

\textsuperscript{131}820 F. Supp. at 1015. Ultimately, however, the court denied plaintiff's claim for lost drilling profits, for want of proximate cause. Sekco Energy, Inc. v. M/V Margaret Chouest, 1994 AMC 1515 (E.D. La. 1993).

\textsuperscript{132}32 F.3d 623, 1994 AMC 2705 (1st Cir. 1994). For a detailed discussion of this case, see Womer, Ballard Shipping Co. v. Beach Shellfish: The End of the Era When Robins Dry Dock Foreclosed State Jurisdiction Over the Recover of Economic Damages from Oil Spills, 2 Ocean & Coastal L.J. 435 (1997). In addition to discussing OPA, the Beach Shellfish decision contains an interesting application of the Supreme Court's admiralty preemption analysis in American Dredging Co. v. Miller, 510 U.S. 443, 1994 AMC 913 (1994).

\textsuperscript{133}32 F.3d at 630, n. 6.


\textsuperscript{135}32 F.3d at 631.

cases of total loss. The court disagreed, interpreting the subsection as applying even when some, but not all, of plaintiff’s property was destroyed.\textsuperscript{137}

The key issue that has arisen from OPA’s economic loss provision is whether plaintiff must show property damage in order to recover for economic losses. \textit{Cleveland Tanker} seems to be out of step; most decisions relating to economic loss have liberally allowed recovery under the Act. The First Circuit got it right in \textit{Ballard}, implementing Congress’ intent that the rule of \textit{Robins Dry Dock} not apply in OPA cases. Nevertheless, OPA’s language permits uncertainty with regard to this important question. The Act should be amended to make it clear that economic losses are generally recoverable under OPA. This would lead to greater predictability and uniformity. Short of amending the Act, the courts need to develop consistency in its application.

2. Punitive Damages

Although OPA provides a claimant with a laundry list of compensable damages, the Act makes no mention of punitive damages. \textit{In South Port Marine LLC v. Gulf Oil Ltd. Pshp.},\textsuperscript{138} the United States Court of Appeals for the First Circuit considered whether punitive damages are available under OPA. The court noted that under general maritime law, punitive damages would be available in cases of reckless behavior. The First Circuit held that Congress intended OPA’s damages scheme to be comprehensive, and thus to supplant the general maritime law on punitive damages.\textsuperscript{139} The court also rejected the argument that OPA should be read broadly to reflect its remedial purpose, noting that the Act represented a delicate balancing of interests that should not be disrupted lightly by courts.\textsuperscript{140} Of course, this did not mean that OPA preempts the states from including punitive damages in their laws under OPA’s savings provisions.

3. Natural Resources Damages

One of the more difficult areas of OPA’s interpretation has been the extent of recovery for damage to natural resources.\textsuperscript{141} OPA requires that the

\textsuperscript{137}Id. at 19. Ultimately, the court determined that there was insufficient evidence to support the jury’s award for loss of goodwill and business stress.


\textsuperscript{139}Id. at *17-18. The court felt that its holding on this issue was dictated by the Supreme Court’s decision in Miles v. Apex Marine Corp., 498 U.S. 19, 1991 AMC 1 (1990)(general maritime law could not be used as a basis for recovering damages for loss of society in an action for wrongful death subject to the Death on the High Seas Act, 46 U.S.C. App. §§ 761-68).

\textsuperscript{140}Id. at *21.

\textsuperscript{141}See Kiern, Damages in Maritime Cases: Environmental Damages Under Federal Law, 72 Tul. L. Rev. 693, 711 (1997).
President (through the National Oceanic and Atmospheric Administration (NOAA)) create regulations for the assessment of natural resources damages. After five years of rule making, NOAA promulgated its final rules in 1996. These provided, inter alia, that trustees evaluating natural resource damages could consider both “active-use” and “passive-use” losses. Active-use describes the loss of actual use of the resource; passive-use, on the other hand, describes the loss suffered by those who never use, or plan to use the resource, but nevertheless appreciate its availability. One approach to assessing passive-use losses is contingent evaluation, in which members of a hypothetical market are surveyed to determine how much they would pay to preserve the resource in question. In the course of developing its rules, NOAA commissioned a study of contingent valuation, which concluded that the assessment method could prove useful and reliable if strict guidelines were applied. As first proposed, the rules had included contingent valuation in the damage assessment process, but contingent valuation did not appear in the final version of the rules. Instead, the pertinent rule afforded to the trustees discretion to use any appropriate valuation technique, and an appendix to the rule explicitly authorized them to use contingent valuation.

The rule was challenged in General Electric Co. v. United States Department of Commerce. General Electric and others from industry argued in this case that NOAA had acted arbitrarily and capriciously in failing to consider the special study’s caution that strict standards should be used in applying contingent valuation. The United States Court of Appeals for the District of Columbia Circuit rejected this argument, noting that NOAA had considered these warnings, but had decided to give to the trustees discretion to use the method to reach results. That a disgruntled responsible party could refuse to pay allegedly unreliable results, forcing suit to test the measure’s application in a particular case was enough of a basis for NOAA’s decision to leave it to the trustees. The industry petitioners also argued that it was arbitrary and capricious to allow the use of contingent valuation at all. The court disagreed, finding that there was nothing in the special study or any other part of the administrative record leaving in question the value of a properly performed contingent valuation.

143See Anderson, Damage to Natural Resources and the Costs of Restoration, 72 Tul. L. Rev. 417, 466 (1997).
14415 C.F.R. §§ 990.10-990.66.
146Id. at 772-73.
147128 F.3d 767 (D.C. Cir. 1997).
148Id. at 773.
149Id. at 773-74.
Petitioners also contended that NOAA had been arbitrary and capricious in fashioning the rule that permitted passive-use recovery for temporary losses of natural resources. The court of appeals punted, finding that, although the administrative record supported NOAA’s inclusion of such losses, the issue was not ripe for review because the court lacked the necessary factual basis.150

The industry petitioners had better luck with their challenge to the rule allowing trustees to remove residual oil left behind by EPA or Coast Guard cleanups. The D.C. Circuit remanded this provision to the agency for lack of reasoned decision making. NOAA’s failure to explain the relationship between the trustee’s removal powers under the rule and those of the EPA and Coast Guard under the statute provided the basis for the remand.151

The mixed result in General Electric Co. v. United States Department of Commerce undermines significant policies underlying admiralty law and OPA, especially in the key area of damages. Allowing the trustees such broad discretion to choose a methodology for assessing natural resources damages runs counter to the need for predictability and uniformity in this context. It seems likely that many exercises of this discretion in the context of a particular spill will prompt litigation over natural resource damages. Although a more certain standard might appear less flexible in application, it should prove more efficient in the long run.

4. Cleanup Costs

Courts have had to define reasonable cleanup costs under OPA.152 In United States v. Conoco,153 the United States District Court for the Eastern District of Louisiana faced the question of whether Conoco must pay for the Coast Guard’s monitoring of two spills that occurred from Conoco pipelines in the Gulf of Mexico. OPA’s section 1001(30) defines removal as “containment and removal of oil or a hazardous substance from water . . . or the tak-

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150Id. at 774.
151Id. at 775.
152See, e.g., Alabama State Docks Dept. v. Water Quality Ins. Syndicate, Civ. Action No. 97-427-CB-C, 1998 U.S. Dist. LEXIS 13973, 1999 AMC 309 (S.D. Al. 1998), where the court refused to allow a dock to recover its fees for dockage of a vessel that had been leaking oil and was considered unseaworthy by the Coast Guard. The court found that this dockage could not be considered a removal expense. The pollution threat from the vessel was that it would sink, rather than leak oil. The court decided that all cleanup responsibility had been left to the Coast Guard, making dockage unworthy of any OPA recovery.
ing of other actions as may be necessary to minimize or mitigate damage . . . ." The government argued that monitoring was necessary to “minimize or mitigate damage,” while Conoco countered that qualifying government conduct would have to be tantamount to direct removal actions. Conoco responded that, even if OPA authorizes government action to monitor a spill, that does not necessarily mean the associated costs are recoverable.

Both sides contended that OPA’s provision relating to the creation of the Oil Spill Liability Trust Fund provided guidance. Section 1012(a)(1) states that the fund can be used for “the payment of removal costs, including the costs of monitoring removal actions . . . .” The government urged that this language proved that monitoring costs were removal costs. Conoco, on the other hand, contended that monitoring would not have been included in this provision if monitoring were already a component of removal costs; indeed, its inclusion here indicated congressional intent that such costs be recoverable only from the trust fund. The court found the government’s argument more persuasive. According to the court, the section’s language indicated that Congress intended removal costs to include monitoring costs, and although the fund was an appropriate source for compensation of government monitoring costs, that expense could be recovered as well from the responsible parties.

Conoco also argued that the National Contingency Plan (NCP) supported its position on monitoring costs. Under the NCP, the On-Scene Coordinator (OSC) must supervise the responsible party’s actions to assure an effective cleanup. If the OSC determines that the responsible party’s efforts are inadequate, the OSC is to take “appropriate response actions.” In so responding, the OSC may monitor the responsible party. Therefore, argued Conoco, the OSC first would have to find private efforts ineffective before the government would be entitled to collect monitoring costs. The government disagreed, contending that whether private acts are ultimately successful should not matter; in either event, the Act still requires the OSC to make certain that the removal actions are effective. Again, the court embraced the government’s interpretation, finding that the legislative history was “not inconsistent” with the government’s approach, and that the government’s position on this matter had been consistent since the Act’s passage. The court concluded that the government’s practice of seeking com-

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155 581 F. Supp. at 583.
157 16 F. Supp. at 584.
158 40 C.F.R. § 300.300 et seq.
159 300.305(d).
pensation for monitoring costs first from the fund, and then looking to the responsible party, was a rational approach entitled to judicial deference.\footnote{916 F. Supp. at 585.}

The Ninth Circuit agreed in \textit{United States v. Hyundai Merchant Marine Co.}\footnote{172 F.3d 1187, 1999 AMC 1521 (9th Cir.), cert. denied, 528 U.S. 963 (1999).} Hyundai opposed recovery by the United States of costs relating to the Coast Guard’s monitoring of Hyundai’s successful efforts to free a grounded ship containing 200,000 gallons of bunker oil. As the responsible party under OPA, Hyundai was liable for removal costs. Section 1002(b) defines removal costs to include “all removal costs incurred by the United States . . . under subsection (c), (d), (e), or (1) of section 1321 of this title.”\footnote{33 U.S.C. § 2702(b).} Section 1321 is a provision of the Federal Water Pollution Control Act, which provides, in part, that the President may, “direct or monitor all Federal, State, and private actions to remove a discharge . . . .”\footnote{33 U.S.C. § 1321(c)(1)(B)(ii).} It also requires that the President “direct all federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of discharge” in cases posing a substantial threat to the health or welfare of the United States.\footnote{33 U.S.C. § 1321(c)(2)(A).} Based on these cross-referenced provisions, the court of appeals affirmed award to the United States of its monitoring costs. The court found that the Coast Guard was monitoring under section 1321, and that the monitoring amounted to an attempt by the Coast Guard to mitigate or prevent a threat of discharge. In addition, the court pointed to the general definition of removal costs found in OPA’s section 1001(31),\footnote{33 U.S.C. § 2701(31).} which includes “the costs to prevent, minimize, or mitigate oil pollution from such an incident.”\footnote{172 F.3d at 1190-91.}

Viewing monitoring as an attempt to prevent or minimize a spill, the Ninth Circuit rejected Hyundai’s argument that the definition excludes such conduct.\footnote{Id. at 1191.} Hyundai argued that the definition of removal in section 1001(30)\footnote{That section states that, “removal” means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to public health or welfare” 33 U.S.C. § 2701(30).} required a showing of the necessity of any action other than removal itself before its costs could be recouped. The appellate court found to the contrary that the section’s language did not limit reimbursement; rather, it recognized the executive branch’s need for discretion appropriate to handling oil spills. Indeed, the court did not even consider relevant the definition of removal in section 1001(30), preferring instead the more general definition of “removal costs” in section 1001(31), which includes “costs
to prevent, minimize, or mitigate oil pollution” with no mention of the word “necessary.”

It is worth noting that the Ninth Circuit considered OPA’s liability provisions more instructive for determining which Coast Guard costs are recoverable than the definitions included by Congress in the Act. The court noted that section 1002(a) provides for recovery of “all removal costs incurred by the United States,” not just those found to be necessary, and concluded that OPA nowhere requires that recoverable costs be “prudent, or necessary, or reasonable.” According to the court, this does not necessarily mean that the government’s ability to recover is unlimited; the government cannot recover if, on judicial review, it is found to have acted arbitrarily or capriciously. In this case, however, Hyundai made no appeal of the district court’s judgment to the contrary.

Hyundai also argued that it should only be required to compensate the Coast Guard for its “incremental costs”, that is, those beyond the “base costs” (such as salaries) the Coast Guard would have had to pay had it not responded to the oil spill. The Ninth Circuit rejected this argument, finding that the so-called “base costs” were also attributable to particular spills. The court reasoned that, because of the spill, Coast Guard employees, who could have been performing other duties, were required to monitor the oil spill and so their wages became expenses of the Coast Guard attributable to the accident.

In Gatlin Oil Co. v. U.S., the company sought review of the Coast Guard’s determination that the company could not recover OPA removal costs from the Oil Spill Liability Trust Fund. The case arose when a vandal opened valves on plaintiff’s oil storage tanks, allowing 20-30,000 gallons of oil to leak out. A subsequent fire consumed most of the oil and destroyed a great deal of property. Responding to the disaster, federal and state officials estimated that 5,000 gallons remained in ditches, while 10 gallons had escaped into the navigable waterways. After ordering Gatlin to undertake a number of cleanup efforts, the federal coordinator departed, leaving state

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169 Id. at 1191.
171 Id.
172 Id.
173 Id.
174 Id. at 1192.
175 The court found that interest and penalties provided for in the Debt Collection Act, 31 U.S.C. § 3717, were inapplicable to OPA cases because OPA has its own scheme. It allowed the recovery of the government’s attorney’s fees and found that an updated rate schedule applied to the costs of monitoring this event.
176 169 F.3d 207 (4th Cir. 1999).
177 Id. at 209.
officials in charge of monitoring the cleanup. The state officials then imposed additional requirements on Gatlin’s cleanup, to protect soil and groundwater. Gatlin completed the cleanup several months later.

Under OPA, Gatlin is excused from liability for removal costs because a vandal caused the spill.\textsuperscript{178} Gatlin presented a claim to the Fund for all its removal costs, about $850,000, including those relating to fire, soil, and groundwater cleanup. The Coast Guard denied the claim, except for about $7000, the amount related to cleaning up 10 gallons spilled into navigable waters and 5500 gallons of oil spilled in a ditch and under the tanks, which might have polluted navigable waters. Gatlin appealed this administrative decision to the United States Court of Appeals for the Fourth Circuit, on the grounds that it was arbitrary in capricious.

The dispute between Gatlin and the Coast Guard centered on what constitutes an “incident” for compensating removal costs under the Act. Gatlin argued that according to the definition in section 1001(14), an incident is “any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.”\textsuperscript{179} The Coast Guard countered that section 1001(14) was not the appropriate standard for assessing compensable removal costs, referring instead to section 1002(a)\textsuperscript{180} as authority for the proposition that only those costs incurred to protect navigable waters from discharge or threat of discharge could be recovered as removal costs. According to the Coast Guard, the phrase “such discharge” in section 1002(a) refers back only to discharge or threat of discharge into navigable waters. The Fourth Circuit found this interpretation both grammatically correct and in line with the policies underlying OPA.\textsuperscript{181} Thus, Gatlin could recover only for those removal costs related to a threat or discharge of oil into navigable waters.\textsuperscript{182}

\textsuperscript{178}Id. at 210. According to OPA’s § 1002(d)(1)(A):

[I]n 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 1003(a) . . . , the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this title.


\textsuperscript{179}33 U.S.C. § 2701(14).

\textsuperscript{180}33 U.S.C. § 2702(a).

\textsuperscript{181} 169 F.3d at 211.

\textsuperscript{182}The court remanded the case for a determination that the Fund Director’s allowance was reasonable: Gatlin Oil is entitled to full compensation for removal costs that the federal coordinator determined were consistent with the National Contingency Plan and for costs resulting from actions he directed. Gatlin Oil is also entitled to full compensation for loss of earnings and earning capacity caused by the necessity to carry out the directions of the federal coordinator, including removal of gravel under two of the tanks. Furthermore, the underlying findings of the federal coordinator must not be arbitrary, capricious, or an abuse of discretion.

Id. at 212. The court also determined that plaintiff could not recover any of the costs of fire damage because there was no evidence that the fire caused a navigable waters discharge. Id. In dissent, Judge
Arguing that the federal coordinator had assumed responsibility for the entire cleanup and that the total spill presented a threat to navigable waters, Gatlin sought unsuccessfully to persuade the Fourth Circuit that it was entitled to recoup its costs of complying with the state official’s orders relating to ground water and soil pollution. For the court, OPA section 1018 evidenced Congressional intent to the contrary, because that section expressly preserves state authority to require additional measures with respect to oil spills.\textsuperscript{183} In addition, in OPA’s section 1012(d)(1),\textsuperscript{184} Congress had specifically provided for use of the Fund in certain state actions, that is, when requested by a state governor or agreed upon by a governor and the President of the United States. Neither circumstance existed here. The court found that Gatlin had failed to show that a threat to navigable waters compelled the state ordered actions.\textsuperscript{185} The argument that the federal coordinator was responsible for the entire cleanup was similarly dismissed because the coordinator had not determined that all the costs were consistent with the National Contingency Plan and had not ordered Gatlin to comply with state directives. Finally, the court determined that Gatlin was not entitled to interest from the United States because OPA does not waive immunity for that expense.\textsuperscript{186}

The courts’ decisions on cleanup costs, including government monitoring, are in line with OPA’s goals. Coast Guard monitoring helps assure that a spill is removed quickly and efficiently, and the responsible party should be forced to shoulder these costs. Requiring the government to prove that its expenses are necessary could lead to delay in removal efforts and extended litigation second-guessing Coast Guard decisions made in emergency situations.

\textbf{C. Limitation of Liability and Rule F}

Under the Limitation of Liability Act,\textsuperscript{187} a vessel owner can limit its liability for damages to the vessel’s value at the voyage’s end plus any freight owing. Rule F\textsuperscript{188} provides the process used in limitation actions. Rule F’s

\textsuperscript{183}Id. at 212.

\textsuperscript{184}33 U.S.C. § 2712 (d) (1).

\textsuperscript{185}Id. at 213.

\textsuperscript{186}Id.


purpose is to create a concursus for claims against the party seeking exoneration and limitation.

Although it seems clear that Congress did not intend the Limitation Act to apply to OPA claims, an issue remains as to whether the multiplicity of claims allowed by OPA makes a concursus a necessity.

In *In re Jahre Spray II K/S*, the tanker *Spray*’s owner petitioned pursuant to the Limitation Act for restriction of its liability arising out of a relatively small oil spill that occurred while the vessel was docked at the Coastal Eagle Point Oil Company in New Jersey. The United States District Court for the District of New Jersey granted the limitation petition and ordered all those with claims to join the proceeding. The Coast Guard initially named Coastal the responsible party, and Coastal managed the cleanup, but the Coast Guard later decided that the owner, Jahre Spray II K/S, was also a responsible party. Consequently the Coast Guard filed both an answer and a claim in the limitation proceeding, as did Coastal and the State of New Jersey. The various claims were based on OPA, the Clean Water Act, the Rivers and Harbors Act, state law, and general maritime law. Some months later, the claimants moved for release from the order restraining them from proceeding with their claims in other courts.

The question before the district court was whether it had jurisdiction under the Limitation Act to continue staying the claimants from proceeding elsewhere, once the limitation petitioner had been named a responsible party under OPA. The owner conceded that neither responsible parties nor “sole cause third parties” under OPA were entitled to limit claims, but argued that, in this case, the disagreement as to whether Jahre Spray II K/S fit in either category warranted continuing the stay. The court disagreed, finding that the “notwithstanding” language of OPA’s section 1002(a), as well as OPA’s specification in other provisions of particular defenses and limitations of liability, made it clear that OPA preempts the Limitation Act in spill cases.

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189 According to § 1002 (a) of OPA:

Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which the oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.


192 Id. at 848.


For additional support, the court referred to OPA's legislative history. Because OPA's purpose is to cope with major environmental harms by encouraging rapid private cleanup, OPA must supersede the Limitation Act.\textsuperscript{195} The court accordingly concluded that the Limitation Act was inapplicable to OPA claims, and that the owner of the Spray therefore had no right to limitation or concursus for claims covered by OPA.\textsuperscript{196}

Looking at section 1018(a),\textsuperscript{197} the court found that OPA also preempted application of the Limitation Act to other spill-related claims arising under federal or state law. That section covers claims "with respect to" oil discharges, which the court interpreted as more than just those arising out of a discharge itself.\textsuperscript{198} The court also took note of the decisions of other courts that the Clean Water Act and the Rivers and Harbors Act themselves preempted the Limitation Act.\textsuperscript{199}

The U. S. Court of Appeals for the First Circuit echoed the Jahre Spray court in Complaint of Metlife Capital Corp.,\textsuperscript{200} a case involving the grounding of a fuel oil barge off the Puerto Rican coast after a tow line between the barge, the Morris J. Berman, and its tug, the M/V Emily S, parted. Puerto Rico sued the owners, charterers, and operators of both the barge and the towboat, and arrested the Emily S, asserting claims under OPA, general maritime law, and Puerto Rican law. The defendants filed Limitation Act proceedings, attempting a concursus. Puerto Rico, the United States, and others then filed claims in the limitation proceeding, seeking damages under OPA and general maritime law, as well as other laws. At the same time, they argued that OPA claims should not be included in the limitation proceedings.\textsuperscript{201} The district court agreed, and the limitation plaintiffs appealed.

The First Circuit affirmed, holding that, as to claims for damages from oil spills and the costs of their cleanup, OPA preempted not only the liability limits in the Limitation Act, but also its concursus requirement. Because

\textsuperscript{195}1997 AMC at 852.

\textsuperscript{196}This case also involved non-superseded claims arguably outside OPA's coverage, including claims relating to a charter party breach and physical dock damages. The owner of the Spray argued for the limitation suit's dismissal (and the return of the bond), while Coastal argued to retain the bond as security for the claimants. The court granted the request to end the limitation proceeding because only two minor claims existed, but allowed limitation defendants to move for security or appeal the decision prior to the bond's release. Id.

\textsuperscript{197}33 U.S.C. § 2718(a).

\textsuperscript{198}1997 AMC at 853.


\textsuperscript{201}Id. at 820.
OPA was enacted in response to the *Exxon Valdez* disaster, the court of appeals reasoned that the statute was meant to provide comprehensively for removal cost and damage recovery. To these ends, the court of appeals acknowledged that OPA provided its own limits to liability, as well as a trust fund to pay costs when these limits were exceeded or when the defendant had a defense under OPA. Turning to the interrelationship of the two statutes, the court took note of section 1002(a).\textsuperscript{202} One appellant had argued that, while this provision might have substituted OPA’s liability limits for those of the Limitation Act, it did not interfere with the procedure set out in Rule F.\textsuperscript{203} The appellate court found that the plain language of OPA proved not only that the liability limits in the Limitation Act are preempted for cleanup and damages covered by OPA, but also that the Rule F concursus provisions are preempted for such claims as well. In support of this conclusion, the court cited prior decisions in which courts had found that the Federal Water Pollution Control Act preempted the Limitation Act.\textsuperscript{204}

Apart from section 1002(a), OPA contains at least four other sections that expressly preempt the Limitation Act.\textsuperscript{205} Appellants argued that these specific references should be regarded as proof that Congress did not intend the Limitation Act to be displaced in other contexts within the scope of both acts. The First Circuit dismissed this argument, instead finding the Limitation Act and OPA “in irreconcilable conflict, substantively, jurisdictionally, and procedurally.”\textsuperscript{206} While the Limitation Act limits the vessel’s liability to its value after the incident plus freight owing, OPA imposes different limits of liability, even liability with no limit at all. While the Limitation Act reserves jurisdiction for the federal courts, OPA authorizes both state and federal courts to address oil spill claims. The court of appeals also noted that the two statutes’ procedural approaches were at odds with one another.\textsuperscript{207} While Rule F restricts venue to any district in which the vessel has been seized, the owner has been sued, or, when suit cannot be brought in either of these two places, where the vessel can otherwise be found, OPA authorizes suit in any district where the spill or its damage occurs, or where the defendant resides, has its principal place of business, or an agent for service of

\textsuperscript{202} 33 U.S.C. § 2702(a).
\textsuperscript{203} 132 F.3d at 821.
\textsuperscript{205} See 33 U.S.C. § 2702(d)(1)(A) ( repealing the Limitation Act as to third parties solely responsible for a spill); § 2718(a) ( repealing the Limitation Act as to state and local statutory remedies); § 2718(c)(1) ( repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision); § 2718(c)(2) ( repealing the Limitation Act as to fines or penalties).
\textsuperscript{206} 132 F.3d 822.
\textsuperscript{207} Id.
process. While Rule F allows a court to set a claims deadline as short as thirty days after its notice to claimants, OPA allows claimants three years to commence their actions, and six years to present claims to the fund. For the First Circuit, there were simply too many such inconsistencies between the two limitation schemes for there to be a role for Rule F to play in OPA claims. Finally, the court observed that OPA's legislative history supported its conclusion.

Having found that OPA empowered claimants to bring their OPA claims outside the concursus of a limitation action, the First Circuit turned to the claimants' non-OPA claims, and found OPA no impediment to application of the Limitation Act and Rule F to them. Relying on OPA's section 6001(e), which provides that, "[e]xcept as otherwise provided in this chapter, this chapter does not affect...admiralty and maritime law," the court of appeals held that the concursus could continue for non-OPA claims.

In Bouchard Transportation Co. v. Updegraff, the United States Court of Appeals for the Eleventh Circuit weighed in on whether Rule F governs claims under OPA and state law for damages and cleanup costs. After a collision involving a freighter and two tugboats pushing oil-filled barges, the owners of the powered vessels brought Rule F actions to limit their liability. Each faced a myriad of claimants asserting claims derived from a myriad of laws, including OPA. Claims were filed against each vessel by the owners of the others under general maritime law, OPA, Florida's pollution control act, and the common law; by tug crew members under general maritime law and the Jones Act, for their injuries; by a member of the Coast Guard under general maritime law, for his injuries from exposure to the oil; by the United States under general maritime law, OPA, and the common law; for cleanup, supervision, natural resources damages, and subrogated claims; by Florida under general maritime law, OPA, and the state's pollution control act for cleanup and damages to natural resources; and by other private parties under

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208 Id. at 822-23.
210 33 U.S.C. § 2751(e).
211 132 F.3d at 823-24.
general maritime law, OPA, Florida’s pollution control act, and the common
law. The district court found the OPA claims and the state pollution control
act claims to be unrestricted by Rule F, and the Eleventh Circuit agreed. The
limitation plaintiffs had argued that Rule F should apply to claims under
any limitation act, including OPA, because Rule F does not specify any par-
ticular limitation act to which it applies. According to this theory, the dilem-
ma created by two different limited funds—that based, pursuant to the
Limitation Act, on the values of the vessel plus freight owing and that
defined by another legislative liability limiting scheme like OPA—ought to
be resolved by pro rata distribution, as required by Rule F.

The Eleventh Circuit found this argument meritless. First, unlike the
Limitation Act, OPA did not create a limited fund from which claimants
could recover. Although there was a limit to how much a responsible party
must pay, a claimant could seek full recovery beyond this limit from the Oil
Spill Liability Trust Fund. Thus, application of the concursus of Rule F to
OPA liability would not serve the Rule’s underlying purpose, i.e., fair di-
vision of a limited fund. Secondly, Congress has specified in OPA the claim
presentation procedure it prefers. For the court, the longer period afforded
claimants to bring claims under this procedure, and its provision for concur-
rent jurisdiction in state court, leave no room for application of Rule F. For
the court, the mandate of Congress so evident in OPA overrides any argu-
ment that concursus under Rule F might be more efficient, or better serve the
interest of the shipowner. In the view of the Eleventh Circuit, neither the
Limitation Act nor Rule F gave any vessel or her owner a right to concursus.
The Rule merely provides a procedure useful for distributing a limited fund,
when Congress has not provided otherwise. When claims are made under
OPA, however, the fund is not limited and there is no want of congression-
ally dictated process.

Similarly, the Eleventh Circuit concluded that Rule F did not apply to
claims by Florida based on that state’s pollution control act. The court noted
that OPA specifically allowed states to adopt their own liability laws for oil
spills without OPA limitations. In the absence of any specified limit on a
fund for satisfaction of these claims, the court again found Rule F inappli-
cable. Echoing its reasoning with respect to OPA, the Eleventh Circuit noted

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213The district court also held that Florida was not subject to the Rule F proceeding because of immu-
nity afforded the state by the 11th Amendment. The Eleventh Circuit reversed on this issue. 147 F.3d at
1348-49.

214Id. at 1350.

215Id at 1350-51. The court of appeals also found applicable the fundamental principle of statutory con-
struction favoring the more specific between two conflicting procedures.

216Id.
that the state pollution control act had its own procedures, and that vessel owners were not entitled thereby to a concursus.\textsuperscript{217}

The courts that have considered the matter substantially agree that OPA preempts the Limitation Act as to state and federal claims for cleanup and damages. Some ambiguity remains, however, as to exactly what state or general maritime law claims tangentially related to an oil spill remain susceptible to the Limitation Act. While claims under OPA and state oil pollution statutes should escape the Limitation Act, those based on other laws should continue under its sway, even when they arise from the same incident as the spill and cleanup claims.

As this discussion of the Limitation Act cases demonstrates, Congress has not in OPA provided for resolving all spill disputes in one forum. A single spill can prompt multiple suits in both state and federal courts, calling for application of different laws. Among the possibilities post-OPA, is that ancillary claims may be heard in a limitation proceeding. OPA could have been better structured to provide for a far more efficient resolution of issues in one forum. In this regard, also, Congress has failed to address adequately in OPA legitimate interests in uniformity and predictability.

\subsection{D. OPA Presentation Requirement}

Section 1013 of OPA requires that those making OPA claims present them to the responsible party prior to the institution of any legal action.\textsuperscript{218} Congress added this requirement to encourage early settlement. An issue for courts has been whether this mandate is jurisdictionally determinative or merely a condition precedent to bringing an action.

In \textit{Johnson v. Colonial Pipeline Co.},\textsuperscript{219} the United States District Court for the Eastern District of Virginia dismissed an OPA claim when the plaintiff failed to present the claim first to the defendant. Noting Congressional intent

\begin{itemize}
\item \textsuperscript{217} Id. at 1352.
\item \textsuperscript{218} 33 U.S.C. § 2713 provides in part:
\begin{quote}
\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{219} [Presentation]
\begin{quote}
Except as provided in subsection (b) of this section [delineating presentation to the Fund], all claims for removal costs or damages shall be presented first to the responsible party or guarantor.
\end{quote}
\item \textsuperscript{219} [Election]
\begin{quote}
If a claim is presented in accordance with subsection (a) of this section and each person to whom the claim is presented denies all liability for the claim, or the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714 (b), whichever is later the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.
\end{quote}
\end{itemize}
\end{footnotesize}
\end{quote}
\end{itemize}
to foster settlement and avoid litigation, the court held that, under section 1013(c), the plaintiff could only bring suit after the claim had been presented and the defendant had denied liability (or 90 days had passed following the presentation). In the instant case, the plaintiff had made no formal presentation prior to bringing the lawsuit, but had sent to the defendant a letter outlining the claim in a very general way. The district court found that, even if this presentation had been timely, it lacked the specificity required by the statute. The court held that, to satisfy section 1013(c), the presentation of a claim must contain enough information to allow the defendant to determine its liability and enter into settlement negotiations. In this case, the rather vague letter failed to specify the nature and extent of the damages alleged and the amount of monetary damages sought, and the court found the letter therefore inadequate.

In Boca Ciega Hotel v. Bouchard Transportation Co., the United States Court of Appeals for the Eleventh Circuit addressed the jurisdictional nature of the claim presentation requirement. The defendant argued that the requirement only applied to claims presented to the OPA cleanup fund, as opposed to actions against responsible parties. The court began with OPA’s language, which plainly required the presentation of all claims for cleanup costs. Nevertheless, the court considered the plaintiff’s argument that the Act’s history and purpose suggested that Congress only wished the presentation mandate to apply to Fund claims. The Eleventh Circuit first dismissed plaintiff’s argument that the Act’s overall purpose was to expand liability for responsible parties, finding that “vague notions” of Congressional purpose should not overcome the statute’s plain language. Even if the court were willing to consider these vague notions, it was not convinced that expanding liability for responsible parties was the Act’s primary purpose. Indeed, the court found evidence of Congressional intent to minimize litigation by encouraging negotiation and settlement. The court similarly dismissed the contention that the statute’s preservation of state remedies not requiring presentation suggests presentation need not be required in this case. The court found such an argument to be unconvincing in light of the statute’s clear language. Of course, nothing prevented the plaintiffs from complying with the presentation requirements and then proceeding with the suit.

\[^{220}\text{Id. at 310.}\]
\[^{221}\text{33 U.S.C. § 2713(c).}\]
\[^{222}\text{830 F. Supp. at 311.}\]
\[^{223}\text{51 F.3d 235 (11th Cir. 1995).}\]
\[^{224}\text{Id. at 237.}\]
\[^{225}\text{Id. at 238.}\]
\[^{226}\text{Id. at 239.}\]
\[^{227}\text{Id. at 240.}\]
The United States District Court for the Eastern District of Louisiana refused to apply the presentation requirement to a responsible party’s claim against a third party in Marathon Pipe Line Co. v. LaRoche Industries, Inc.\textsuperscript{228} Arguing that Johnson and Boca held that all claims first required presentation, the third party contended that the responsible party had not met this requirement. The court found that the portion of section 1013 pertaining to presentation simply did not address claims by a responsible party, but instead claims against responsible parties. The third party’s argument that Johnson and Boca required presentation ignored the fact that those cases involved only claims against a responsible party. The Marathon court specifically rejected the argument that those cases could stand for the broader proposition that OPA requires presentation of all claims. The court relied instead upon the language of section 1002(d)(1), which makes third parties “responsible parties” only for the limited purpose of determining liability under that section.\textsuperscript{229}

In Leboeuf v. Texaco,\textsuperscript{230} defendants tried to remove an oil spill action to federal court after thirty days had passed.\textsuperscript{231} Plaintiffs moved to remand on the grounds that removal was untimely. Defendants argued that until OPA’s presentation requirements had been met, the state court had lacked jurisdiction over OPA claims, so that removal was, for a while at least, impossible. Defendants contended that they should not have been forced to commence removal procedures until after the state court had determined that the OPA presentation requirements had been met. The United States District Court for the Eastern District of Louisiana disagreed, finding that the presentation requirement in section 1013 was not jurisdictional. In the course of doing so, the court in Leboeuf rejected the suggestion in Marathon (by another judge of the same court) that a court lacks jurisdiction over an oil spill action unless, or until, presentation in accordance with section 1013 has occurred. Instead, the Leboeuf court agreed with the Eleventh Circuit’s view, as articulated in Boca Ciega, that presentation is a condition precedent to filing OPA claims in either federal or state court. Consequently, the thirty-day period during which removal could be effected could begin before the state court had determined whether OPA’s presentation requirement had been met.

Although there is some disagreement as to whether the presentation requirement is jurisdictional or merely a condition precedent to the institu-

\begin{itemize}
\item\textsuperscript{228}44 F. Supp. 476 (E.D. La. 1996).
\item\textsuperscript{229}33 U.S.C. § 2702(d)(1).
\item\textsuperscript{230} F. Supp. 2d 661 (E.D. La. 1998).
\item\textsuperscript{231}In order to remove a civil action from state to federal court, the defendant must file notice within thirty days of receipt of the summons and complaint. If the summons is served first, notice of removal must be filed within thirty days of receipt of the complaint. 46 U.S.C. § 1446(b). See Murphy Bros. v. Michette Stringing, Inc., 526 U.S. 344 (1999).
\end{itemize}
tion of a legal action, courts certainly agree that the requirement has teeth. Those wishing to file suit against a responsible party must first present that party with a claim of sufficient specificity to allow a fair assessment of its claim’s merit. These decisions contribute to fulfilling the Congressional goal of minimizing litigation; they are in line with the overall policy of providing an effective means for resolving disputes.

E. OPA’s Coverage

Although Congress had major disasters like the Exxon Valdez in mind when it passed OPA, the statute is couched in terms that can be construed to cover a broad range of oil spills. Courts have dealt with issues at the fringe of Congressional attention relating to who can be a responsible party and where the spill can occur.

1. What is an OPA Facility?

In U.S. v. Southern Pacific Transportation Co. the United States sought to recover OPA administrative costs relating to the cleanup of a diesel fuel spill caused by the derailment of a freight train. The spilled fuel came from tanks powering the train’s locomotive. Defendant argued that OPA covered spills that occurred in the production and transportation of oil, but not those that occurred in the course of its use by the ultimate consumer. In an unpublished opinion, the United States District Court for the District of Oregon agreed. Cleanup costs could be recovered from OPA responsible parties, which, according to section 1002(32), can include the owner or operator of a vessel, a deep water port, or an onshore or offshore facility. In this context, OPA defines a facility as something used in exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. According to the district court, this definition evinces Congressional intent that OPA cover only those oil spills occurring in the commercial production or transportation of oil. Applying the statutory construction that an omission should be considered an exclusion, the court concluded that OPA’s narrow definition of a facility rules out as the owner of an onshore or offshore

\[\text{CIT. No. 94-6176-HO, 1995 WL 84193 (D. Oregon 1995).}\]
\[\text{Id. at *2. See 33 U.S.C. § 2702(32).}\]
\[\text{33 U.S.C. § 2701(9) defines facility as:}\]
\[\text{any structure, group of structures, equipment, or device (other than a vessel) which is used for}\]
\[\text{one or more of the following purposes: exploring for, drilling for, producing, storing, handling,}\]
\[\text{transferring, processing, or transporting oil. This term includes any motor vehicle, rolling}\]
\[\text{stock, or pipeline used for one or more of these purposes.}\]
\[\text{1995 WL 84193 at *2.}\]
facility (and therefore as a responsible party), any consumer of oil. The district court also found support for this interpretation in OPA's legislative history. An earlier draft of OPA had defined facility so broadly as to include the locomotive tank in this case. For the court, Congress's subsequent adoption of narrower language reflected a conscious choice to cover only commercial spills, and required dismissal of the government's OPA claim in this case.

2. How Far Inland Does OPA Apply?

In a questionable decision later vacated for lack of subject matter jurisdiction, the United States District Court for the Southern District of Texas in *Aviitts v. Amoco Production Co.* determined that OPA applied to oil spills into non-navigable waters that flow into navigable waters. According to the district court, the facility need not be directly adjacent to navigable waters; the fact that the discharging facility was in the drainage basin for a lake that was part of navigable waters was enough. In the view of the court, any other result would undercut Congress's purpose in OPA of addressing the national danger created by oil spills. In vacating the opinion, the United States Court of Appeals for the Fifth Circuit did not reach the OPA question, but that court's opinion per curiam did characterize the application of OPA in circumstances such as those in this case as "highly questionable."

In *Sun Pipe Line Co. v. Conewago Contractors, Inc.* the United States District Court for the Middle District of Pennsylvania also addressed the issue of how remote a oil spill can be from navigable waters or adjoining shorelines of the United States and still be governed by OPA. In this case, twelve thousand gallons spilled onto adjoining property when defendants ruptured a pipeline while digging a ditch. Plaintiff carried out the cleanup and then sought compensation in this action. Defendant responded by moving to dismiss, arguing that section 2702(a) only applies to discharges into

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238 Id.
240 The district court also found that a responsible party could be liable for the claimant's attorney's fees. Although attorney's fees are not provided for in the OPA provisions, the court found that the defendant could be required to pay attorney's fees as part of removal costs under the National Contingency Plan. In this case, plaintiffs had encouraged the defendants to study and take remedial steps. Defendants had refused. Plaintiffs then went to court. The court found this to be an "appropriate response action" as contemplated by the plan for which attorney's fees may be recovered. Id. at 1241.
241 53 F.3d at 691.
navigable waters, adjoining shorelines, or the exclusive economic zone. The court took judicial notice that the place where this spill occurred was not adjacent to a shoreline or within the exclusive economic zone. Noting that there was little precedent of assistance in deciding this issue of OPA's reach, the court reviewed several decisions interpreting similar language in the Clean Water Act. The court found that, in light of Congress' remedial intention of reducing greatly the amount of pollution in the country's water, courts in those cases had given "navigable waters" a very broad meaning, different from their normal interpretation. The Supreme Court had found wetlands to be navigable waters in United States v. Riverside Bayview Homes. Other courts had found arroyos, tributaries to navigable waters, and even groundwater (if there was a direct connection to navigable surface waters) to be navigable waters under the Clean Water Act. Although the Sun Pipe Line court acknowledged arguments in favor of giving OPA the same scope, it found that Congress pursued different goals in passing the two measures. Thus, the court found a purpose of the Clean Water Act to be elimination of pollution from all national waterways, but found the correlative purpose behind OPA to be narrower, the protection of national shorelines and coastal zones from oil spills. In reaching this conclusion, the court traced OPA's legislative history in great detail, finding that Congressional attention had been focused narrowly on these coastal waters. It followed for the court that, in order for OPA to apply to a spill, a plaintiff must allege a link between the discharge and navigable waterways. Plaintiff's inability to do so in this case dictated dismissal of its action. Other courts used similar reasoning to dismiss claims based on OPA in Harris v. Oil Reclaiming Co., which dealt with the spill of a very small amount of oil onto the grounds of a Kansas oil processing plant situated miles from any navigable waters, and Rice v. Harken Exploration Co., a claim for a spill at a place more than 500 miles from the nearest ocean or shore.

242Id.
243Interestingly, the court noted that the word "water" was not used in the complaint. 1994 WL 539326 at *12.
2471994 WL 539326 at *4.
248Id. at *5.
249Id. at *8.
These decisions about OPA's reach comport with the legislation's goals. After all, Congress passed the Act to deal with major oil spills like that from the *Exxon Valdez*, directly affecting the nation's shores, not small spills happening miles from navigable waters.

**IV**

**CONCLUSION**

Ten years after OPA's passage, much has changed, but much remains the same. OPA was meant to provide an effective system for prompt oil spill removal and fair compensation for those damaged by such spills. While the Act partially succeeds in doing this, troublesome problems remain. The goals of an oil spill liability and removal system should be uniformity and predictability, in order to provide for rapid cleanup and expeditious claim settlement. As measured with reference to these goals, OPA has largely failed. The Act's non-preemption provisions confuse the interaction of state and federal law. Delegation of admiralty powers to the states undercuts admiralty's traditional commitment to uniformity. As OPA stands, a tanker carrying oil to the United States faces a dizzying array of laws and jurisdictions as it passes from international waters into those of the United States. Although OPA purports to allow recovery for economic losses, the true scope of recoverable damages has perplexed some courts. OPA clearly ousts the Limitation Act for federal and state oil cleanup and removal actions, even though other state law and general maritime law claims are still limited. The line necessary to distinguishing these two categories of claims has been difficult for courts to draw. OPA's failure to provide for a concursus of claims is also unfortunate because it allows litigation relating to a single spill to proceed in multiple venues. Perhaps most importantly, and despite the sense of the Congress that efforts to enter into an international agreement should be pursued, the United States, a primary consumer of oil transported by tankers, continues to operate as an outsider. The United States has withheld its leadership and support for international efforts towards a truly comprehensive spill regime, even after liability limits were greatly increased in the 1984 and 1992 Protocols. The value of uniformity on both national and international levels continues to evade the United States, which will continue to feel the consequences until Congress acts to solve the problem.