
Lawrence I. Kiern*

This Article is a companion to the author’s article published in this Journal in the spring of 2000 analyzing the liability, compensation, and financial responsibility aspects of the first decade of the Oil Pollution Act of 1990 (OPA or OPA 90). This Article resumes the story of the statute’s promise versus its performance with respect to those subjects where the previous article left off and carries it forward through the Deepwater Horizon incident and its aftermath as of August 26, 2011.

I. INTRODUCTION: PROMISE VERSUS PERFORMANCE
II. LEGISLATIVE CHANGE
   A. Deepwater Horizon Reforms
      1. Emergency Funding Increased
      2. Proposals To Remove or Lift Limitation of Liability Caps
   B. Other Legislative Changes over the Second Decade
      1. Maritime Transportation Security Act of 2002
      2. Coast Guard and Maritime Transportation Act of 2004
         a. Lender Liability and Innocent Owner Protections
         b. Speeding Claims Payments for Fishermen

* © 2011 Lawrence I. Kiern. Partner, Winston & Strawn (Washington, D.C.). B.S., U.S. Coast Guard Academy; M.A., Wesleyan University; Ph.D., University of Connecticut; J.D., University of Michigan. Member of the District of Columbia Bar. Captain (Ret.) U.S. Coast Guard, former Deputy Chief and Legislative Counsel for U.S. Coast Guard Congressional Affairs Staff, and Chief of Operational Law, the National Pollution Funds Center.

I. INTRODUCTION: PROMISE VERSUS PERFORMANCE

On April 20, 2010, the Deepwater Horizon mobile offshore drilling unit exploded and sank approximately forty miles off the southern coast of Louisiana while working on the Macondo/MC252 oil well. According to federal government estimates, over the next eighty-seven days the well discharged over 200 million gallons of crude oil into the ecologically rich waters of the Gulf of Mexico.\(^3\) BP disputed this estimate as between twenty percent and fifty percent too high in comments submitted to the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, which was responsible for investigating the incident.\(^4\)

\(^3\) Federal government scientists estimated the total discharge from the well at a range of approximately 185-226 million gallons, of which approximately 30 million gallons were discharged into vessels via the caps and piping secured to the well as part of the oil spill response effort. The Deepwater Horizon Oil Budget—What Do the Numbers Really Mean?, Oil Spill Intelligence Rep., Aug. 12, 2010, at 1–3.

As of this writing, the dispute between the federal government and BP persists over the amount of oil actually discharged into the Gulf of Mexico. No matter the precise amount of the spill, few could have accurately forecast how this oil pollution incident and the events of the following months would unfold. The total cost of the incident remains uncertain and will likely not be known for many years. For example, the State of Louisiana has called for a multiyear program to certify the safety of seafood in order to restore public confidence in the state’s seafood industry.

However, on July 27, 2010, BP announced that it had “tak[en] a [pre-tax] charge of $32.2 billion to reflect the impact of the Gulf of Mexico oil spill, including costs to date of $2.9 billion for the response and a charge of $29.3 billion for future costs, including the funding of the $20 billion escrow fund [for claims].” In its 2010 annual report and required filing with the Securities and Exchange Commission for 2010, BP’s own estimate of its liability for the spill had grown to $40.9 billion and the company acknowledged the “significant uncertainty” surrounding the estimate. For example, if the federal government assesses civil penalties under OPA for the volume of oil allegedly discharged at the statutory rate of $1100 per barrel, that penalty alone would total $4.1 billion. But, if the federal government assesses the penalty based on an allegation of gross negligence at the statutory rate of $4300 per barrel for the same alleged volume of discharge, the civil penalty could increase to $21.5 billion. Furthermore, these estimates do not include the loss of life, the emotional toll on the citizens of the Gulf Region injured by the accident, and the ecological harm that will likely

11. Id.
12. Id.
require years of study to understand and estimate accurately. Surely, the
toll of this disaster when finally tallied will reach historic proportions.

The Congressional Research Service has reported that the costs of
cleanup and damages to natural resources from the eleven-million-gallon
EXXON VALDEZ oil spill of March 1989 “equate[d] to approximately
$5 billion in today’s dollars.”\textsuperscript{13} Other estimates put the cost as high as
$6.3 billion in today’s dollars.\textsuperscript{14} Sources have estimated the total economic
cost of EXXON VALDEZ at approximately $12 billion in 1997 dollars, which equates to approximately $16.5 billion in 2011
dollars.\textsuperscript{15} Thus, both in terms of the amount of oil discharged and total
economic costs, the Deepwater Horizon oil spill dwarfs what previously
was the largest and most costly oil pollution disaster in American history.

Still, the true cost of such a massive oil spill can remain unclear
long after the event. EXXON VALDEZ illustrates that even after the
passage of twenty-one years, spilled oil remains just beneath the surface
of the rocky shoreline of Prince William Sound and the region’s famed
herring runs have still not returned to their prespill levels.\textsuperscript{16} According to
a recent report on the aftermath of that oil spill, despite the appearance
of Prince William Sound today, “the area has not fully recovered.”\textsuperscript{17}

In the midst of a charged 2010 political season, featuring
congressional midterm primary and general elections, uncertainty over
the true economic cost of the BP incident proved particularly fertile
ground for controversy. For example, the Center for Biological Diversity
filed a citizen suit against BP and Transocean seeking $19 billion in civil
penalties.\textsuperscript{18} At the same time, critics of the Obama Administration
decreed its “bureaucratic meddling” and advanced the countervailing

\textsuperscript{13} CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R 41262,
DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 13 (2010).

\textsuperscript{14} See Shelley DuBois, Six Big Oil Spills, and What They Cost, CNNMONEY.COM,
(last updated May 19, 2010, 12:28 PM).

\textsuperscript{15} DAGMAN SCHMIDT ETKIN, FINANCIAL COSTS OF OIL SPILLS IN THE UNITED STATES 224
(1998). The figure $16.5 billion is calculated using the “Inflation Calculator” at www.dollar
www.dollartimes.com/calculators/inflation.htm (search “12,000,000,000” in “1997” converted to

\textsuperscript{16} See EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, LEGACY OF AN OIL SPILL—20
YEARS AFTER THE EXXON VALDEZ 10-16 (2010), available at http://www.evostc.state.ak.us

\textsuperscript{17} Id. at 2 (“In some areas, Exxon Valdez oil still remains and is toxic. Some injured
species have yet to recover to pre-spill levels. This long-term damage was not expected at the
time of the spill and was only just starting to be recognized in 1999, at the 10th Anniversary.”).

\textsuperscript{18} See Suit Seeks $19 Billion in Clean Water Act Penalties from BP, ENERGY DAILY,
view that “spills caused by humans are . . . more short-lived and do not wreak the amount of environmental damage mainstream media reports claim.”

Amidst controversy over its impact, the Deepwater Horizon spill unfolded dramatically before the nation as the news media provided graphic coverage that stunned many and profoundly influenced public opinion in favor of reform. Investigations launched in the wake of the spill quickly identified serious flaws in the nation’s oil exploration, pollution prevention, and response systems, particularly those pertaining to deepwater offshore drilling.

Two decades earlier, the EXXON VALDEZ spill and a succession of other vessel spills in the United States, such as the June 1989 WORLD PRODIGY oil spill off the coast of Rhode Island, the February 1990 AMERICAN TRADER oil spill along the coast of California, and the June 1990 MEGA BORG explosion, fire, and oil spill in the Gulf of Mexico, collectively prodded Congress to enact OPA. Passed by unanimous votes in both the House of Representatives and the Senate, President George H.W. Bush signed the legislation into law on August 18, 1990. OPA proved to be a watershed event in the history of modern oil pollution law in the United States. But as the Deepwater Horizon incident underscored, OPA’s success did not guarantee the United States protection from the devastating consequences of a major oil spill from a blown-out deep-sea oil well.

In OPA, Congress sought to harness the enormous but sometimes elusive power of economic self-interest for the purpose of environmental protection by making it more difficult for potentially responsible parties to avoid liability.

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pays” approach are evident in the Deepwater Horizon incident, given that BP quickly accepted the designation as the “responsible party” under OPA and committed publicly to pay both for the cleanup and all “legitimate claims.”23 Under the legal regime established by OPA, when the incident occurred there was no serious doubt which corporate entity was the “responsible party” for the statutory purposes of conducting the removal action and accepting claims for removal costs and damages. Issues surrounding ultimate liability will be resolved over time through the legal process, which now includes over 400 lawsuits pending in the federal multidistrict proceeding.

This Article analyzes key developments of the second decade of OPA regarding this critically important aspect of oil pollution prevention. Additionally, it recounts related new steps proposed and taken by Congress and federal authorities to amend OPA in response to the Deepwater Horizon oil spill.

As a matter of public policy, the importance of OPA’s performance as well as the promise of recently proposed and adopted reform measures are essential to how our nation responds to oil pollution. Today and for the foreseeable future, the United States remains firmly dependent on fossil fuels—including oil—to drive our modern economy. Despite having only four percent of the world’s population, the United States consumes twenty percent of its petroleum. While coal generates most of our domestic electricity, about seventy percent of the oil consumed in the United States powers our modern transportation systems.24

Despite repeated calls for energy independence dating back to President Richard Nixon, the United States’ dependence on imported foreign oil chronically persists, and the goal of energy independence remains unachieved. Today, the United States still consumes approximately twenty million barrels of oil every day, about the same amount it consumed a decade ago.25 After peaking in August 2006 during the economic boom, today the United States also imports

12 (1990) (explaining that OPA “substantially alters and increases the pollution liabilities” of responsible parties).

23. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R 41679, LIABILITY AND COMPENSATION ISSUES RAISED BY THE 2010 GULF OIL SPILL 14-15 (2011); see also In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866, at *1 (E.D. La. Feb. 2, 2010) (“BP, as the designated ‘responsible party’ . . . establish[ed] a procedure for the payment or settlement of claims [pursuant to OPA].” (internal quotation marks omitted)).


25. See id. at 18.
approximately the same amount of foreign oil that it did in mid-2000. Additionally, the share of America’s domestic oil production derived from deepwater offshore drilling has the potential to increase dramatically in the coming years as other terrestrial and shallow-water domestic sources dry up. Therefore, with the passage of the twentieth anniversary of OPA’s enactment and in the wake of the Deepwater Horizon incident, it is important to consider carefully how the statute’s liability, compensation, and financial responsibility provisions have worked and how they have been recently amended by Congress.

In the Water Improvement Quality Act of 1970 and again in the Federal Water Pollution Control Act Amendments of 1972, Congress declared that “it is the policy of the United States that there should be no discharges of oil . . . into or upon the navigable waters of the United States.” However, as the Deepwater Horizon incident starkly illustrates, despite the passage of forty years, we have not yet achieved this national goal.

Before the Deepwater Horizon incident, the record during the two decades since the EXXON VALDEZ incident was portrayed as one of remarkable progress in reducing oil spills in the United States. In testimony before several House Subcommittees in 1999, the Commandant of the United States Coast Guard highlighted OPA’s record of success. According to Admiral James M. Loy, since the enactment of OPA: (1) the number of large spills (over 10,000 gallons) dropped “by approximately two-thirds,” (2) the rate of spills per million gallons of oil shipped plummeted sixty-four percent, and (3) perhaps most importantly from a political perspective, at that point there had been no spills over one million gallons in the United States. To put matters in perspective, in 1996 the United States sustained approximately 6185 oil spills, but by 2004 the number had dropped to 2514. Likewise, the annual volume of oil spilled in the coastal waters of the United States dropped from

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30. Id. at 7-11.
approximately thirteen million gallons in 1989 to approximately one million gallons in 2004. For the first seventeen years after OPA's enactment, the United States experienced only fifty-one major oil spills, or only about three per year on average. These results were all the more impressive because they were achieved within the context of an expanding economy that featured increased offshore oil production and transportation in the United States.

However, OPA's record of success was quickly overshadowed by the Deepwater Horizon incident. According to estimates provided by the federal government, the amount of oil discharged daily from the Deepwater Horizon wellhead, approximately 50,000-60,000 barrels, was more than twice the volume discharged in the United States in the entire year of 1997. The impact of a catastrophic spill on the previous successes advanced by the Coast Guard was foretold by an evaluation of the National Research Council, which observed that a single major spill would dramatically affect the statistics and significantly alter the trends portrayed by the Coast Guard.

One of the important consequences of the Deepwater Horizon spill was to refocus attention on the source of the majority of the oil discharged in the United States, nonvessel sources, such as oil pipelines, production, and storage facilities. While oil spills from vessels represented only about forty percent of the total amount discharged in recent years, they attracted disproportionate media scrutiny and public attention because they were more likely to be dramatic events in sensitive coastal waters affecting America's shorelines. For example, while the COSCO BUSCAN spilled only about 54,000 gallons of oil in San Francisco Bay, California, in November 2007, it captured extensive media attention, prompted congressional hearings, and resulted in

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34. RAMSEUR, supra note 32. During 1997, only about one million gallons were spilled, compared to over two million gallons per day in the Deepwater Horizon incident. Id.

criminal convictions for both the vessel-operating company and the pilot.\textsuperscript{36}

By comparison, oil spills from nonvessel sources, which have typically been more localized, have attracted less national media attention. For example, the discharge of over 800,000 gallons of crude oil into the Kalamazoo River in Michigan on July 26, 2010,\textsuperscript{37} garnered little national media attention and it soon faded from the attention of policy makers. More recently, the July 6, 2011, discharge of approximately 42,000 gallons of crude oil from Exxon Mobil’s Silvertip pipeline into the Yellowstone River in Montana\textsuperscript{38} attracted only modest media attention and appeared to be handled as a routine response by both the responsible party and government officials.

In recent years, proponents of offshore oil production advocated an end to the twenty-year-long moratorium on offshore drilling in most of the coastal waters of the United States by emphasizing a record of success in avoiding major oil spills, especially following Hurricanes Katrina and Rita. The Minerals Management Service (now the Bureau of Ocean Energy Management, Regulation and Enforcement) highlighted that the hurricanes ravaged the Gulf of Mexico “without causing a single significant spill from Outer Continental Shelf wells.”\textsuperscript{39} No doubt, this influenced the Obama Administration, which announced its plans to expand offshore exploration and production on March 31, 2010,\textsuperscript{40} but revised that decision several months after the Deepwater Horizon incident, in December 2010.\textsuperscript{41}

The author’s prior article in this Journal expressed concerns about OPA’s implementation with regard to key liability and compensation issues.\textsuperscript{42} It explained that the Coast Guard and the courts had become “unreasonably onerous” in their interpretations and applications of the statute by generously allowing the government to recover costs.


\textsuperscript{37} Oil Spills into the Kalamazoo River, OIL SPILL INTELLIGENCE REP., July 29, 2010, at 3.


\textsuperscript{40} See John M. Broder, Obama To Open Offshore Areas to Oil Drilling, N.Y. TIMES, Mar. 31, 2010, at A1.


\textsuperscript{42} See Kiern, supra note 1, at 589-90.
However, they persisted in a “parsimonious” approach to claims by others, including responsible parties who qualified for recovery when they had a statutory defense or exceeded their statutory limit of liability.\(^\text{43}\) It also highlighted the chronic failure of OPA to provide swift financial relief to claimants who were forced to endure a protracted and overly bureaucratic claims process.\(^\text{44}\) So, as we consider OPA’s second decade, how does the statute’s record of performance compare to its promise? With another decade elapsed, is the record one of success or failure? Still, the question remains whether that record can be improved.

The Deepwater Horizon incident provides palpable evidence of areas ripe for improvement. Additionally, the unrealized potential of OPA’s “polluter pays” principle played a central role in the debate over reform proposals as multiple legislative proposals surfaced during the 111th Congress to hold responsible parties engaged in oil drilling liable without limitation. But, those proposals proved controversial and failed to gain the necessary political support to amend OPA significantly.\(^\text{45}\) The political currents shifted dramatically following the November 2010 congressional elections. With the arrival of a new majority in the United States House of Representatives of the 112th Congress, energy industry allies appeared ascendant and vigorously criticized the Obama Administration for delays in approving new requests for offshore drilling permits.\(^\text{46}\) By mid-2011, President Obama responded by announcing a resumption of offshore lease sales, approval of new permits for offshore drilling, and higher safety standards.\(^\text{47}\)

II. LEGISLATIVE CHANGE

A. Deepwater Horizon Reforms

1. Emergency Funding Increased

OPA was crafted principally in response to the series of oil tanker spills of 1989–1990 and not the kind of extraordinary deep-sea oil well

\(^{43}\) Id.

\(^{44}\) See id. at 551-58.


\(^{47}\) See President Barack Obama, Weekly Address: President Obama Announces New Plans To Increase Responsible Domestic Oil Production (May 14, 2011), available at http://m.whitehouse.gov/the-press-office/2011/05/14/weekly-address-president-obama-announces-new-plans-increase-responsible-.
spill that occurred in the Deepwater Horizon incident. The scope and nature of the Deepwater Horizon spill rapidly exhausted the $150 million in emergency funding available to the U.S. Coast Guard and other federal agencies through the Oil Spill Liability Trust Fund (OSLTF), prompting a warning on June 4, 2010, from U.S. Department of Homeland Security Secretary Janet Napolitano and Coast Guard Admiral Thad Allen that the Coast Guard expected to exhaust the annual cap within two weeks. 48 On June 15, 2010, Congress and the President responded by increasing emergency funding available from the OSLTF. 49 The Senate passed the measure by voice vote 50 and sent it to the House of Representatives, which quickly approved it by a vote of 410–0, 51 thereby ensuring uninterrupted funding for this unprecedented government response.

The legislation amended OPA to permit additional emergency advances to the Coast Guard and other federal agencies up to $100 million for each advance, but only for the Deepwater Horizon incident, and provided that Congress is notified “of the amount advanced and the facts and circumstances necessitating the advance.” 52 While releasing more emergency funds, a subsequent amendment reaffirmed OPA’s limit on the amount of funds available for a particular incident of $1 billion and $500 million for natural resource damage assessments and claims. 53 Additionally, that amendment also reaffirmed the prohibition on advances for costs other than removal, if the OSLTF would be left with only $30 million remaining. 54

2. Proposals To Remove or Lift Limitation of Liability Caps

Next, the Obama Administration and Congress proposed pollution liability measures aimed at BP and other operators of offshore facilities. The legislative frenzy featured over 150 legislative proposals and more

50. 156 CONG. REC. S4785 (daily ed. June 9, 2010).
51. 156 CONG. REC. H4365 (daily ed. June 10, 2010).
54. See id. (codified as amended at 26 U.S.C.A. § 9509(c)(2)(b)).
than 60 hearings before the close of the 111th Congress.\textsuperscript{55} The proposals extended beyond just the Deepwater Horizon incident; if adopted, they could have remade the legal liability seascape for oil pollution in the United States.

In May 2010, the White House announced support for legislation significantly raising the cap on damages for those liable for oil spills.\textsuperscript{56} Shortly thereafter, it asked Congress to raise the cap retroactively on damages above $75 million provided for by OPA, increasing the per-incident cap on claims from $1 billion to $1.5 billion and the cap on natural resource damage claims from $500 million to $750 million.\textsuperscript{57} The Obama Administration also proposed to accelerate implementation of a statutory increase in the per-barrel tax on oil funding the OSLTF which Congress had enacted in 2005.\textsuperscript{58} The importance of increasing the per-incident OSLTF caps is illustrated by the fact that as of May 10, 2011, the federal government had billed BP $711.8 million in costs,\textsuperscript{59} and on April 21, 2011, BP pledged $1 billion to natural resource trustees for restoration projects.\textsuperscript{60} There seems to be little doubt at this stage that absent a responsible party with enormous financial capacity, the OSLTF would have proven inadequate to fund a government response to the incident, and legislative intervention would have been required.

By way of example, the Big Oil Bailout Prevention Act of 2010 was introduced in the United States Senate to require BP to pay the entire cost of the Deepwater Horizon incident pollution cleanup and compensate victims without the benefit of any legal limitation of liability such as that provided by OPA or state law.\textsuperscript{61} Opponents of the proposal to remove the liability cap advanced several key arguments. Senator Lamar Alexander decried the retroactive nature of the legislation, arguing, “We’re not a

\textsuperscript{55} Jonathan L. Ramseur, Cong. Research Serv., R 41679, Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill 1 n.5 (2011).


\textsuperscript{58} Id.


\textsuperscript{61} S.3305, 111th Cong. (2010).
banana republic." He also warned of unintended consequences, including driving oil drilling out of the Gulf of Mexico and leaving the United States more dependent on foreign oil. Others argued that unlimited liability will make it impossible for smaller companies to obtain insurance to engage in oil exploration, leaving the business entirely to the oil majors. On June 30, 2010, the Senate Committee on Environment and Public Works approved the bill, but the measure stalled in the face of stiff opposition by oil producing state senators on both sides of the political aisle of the U.S. Senate where, as a practical matter, sixty votes were required to move any substantive legislation.

On the other side of Capitol Hill, on July 30, 2010, the U.S. House of Representatives passed H.R. 3534, referred to as the CLEAR Act, which among other things would have eliminated the $75 million damages liability cap under OPA. The relatively narrow margin of victory, 209–193, highlighted the disagreements within the Democratic Party caucus, which enjoyed a large majority of 255 members in the 111th Congress. But, many Democratic members from oil producing states crossed the political aisle of the House and voted against the measure sponsored by their leadership.

Yet, as a practical matter, the opponents of unlimited liability acknowledged the need to increase the existing OPA cap of $75 million for damages. Even key oil industry supporters, such as Senators Lisa Murkowski and Mark Begich, proposed enlarging the OSLTF to $10 billion financed by an increased tax on oil to ensure that there would be sufficient public resources available to cover a catastrophic oil spill. Senator Mary Landrieu introduced a proposal to allow the oil industry companies to share the liability of a major spill through a pooled insurance arrangement.

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63. See id.
65. Id at 9, 2010 WL 3070110, at *7.
68. See id.
Experienced political observers opined at the time that a reform measure was likely because of the pressing reelection calendar. But, their predictions proved wrong as other more pressing political and legislative priorities filled the calendar of the postelection lame-duck session. Nevertheless, the proposals that surfaced suggest the likely contours of future changes to OPA with respect to key provisions governing liability, compensation, and financial responsibility. Those proposals included an increase in the per-incident caps, another increase in the size of the OSLTF, an increase to the damages limitation of liability for offshore facilities, and an increase in the financial responsibility requirements on deep-sea drilling operators. As Congress considers reform to reduce the future occurrence and impact of oil spills in the United States, proposals aimed at strengthening the powerful polluter-pays policy of OPA are likely to be at the center of the debate.

B. Other Legislative Changes over the Second Decade

1. Maritime Transportation Security Act of 2002

Early on during OPA's second decade, the Coast Guard realized that the growing costs of oil pollution responses could easily exhaust the available emergency funds, which accrued annually at $50 million, even though the funds could be accumulated and remained available until expended. This led Congress to amend the statute in 2002 to allow the Coast Guard to receive an advance from the Oil Spill Liability Trust Fund, up to $100,000,000, if the available emergency funding was insufficient to respond to oil spills. However, setting a standard it later repeated in 2010 following the Deepwater Horizon incident, Congress required the Coast Guard to “notify Congress of the amount advanced and the facts and circumstances necessitating the advance.”

2. Coast Guard and Maritime Transportation Act of 2004

In 2004, for the first time since 1996, when it addressed offshore facility liability and financial responsibility issues, Congress enacted significant substantive amendments to the liability and cost recovery

73. Id. sec. 323, 116 Stat. at 2104 (codified as amended at 33 U.S.C. § 2752(b) (2006)).
components of OPA.\textsuperscript{75} Chronic concerns regarding the application of certain elements of these provisions led Congress to enact a narrowly focused bipartisan consensus addressing: (1) innocent owners and lender liability and (2) the painfully slow claims payment process that had become the rule rather than the exception under OPA.\textsuperscript{76}

Congress addressed concerns that emerged over time because they were not contemplated or specifically addressed in the original enactment. The original OPA legislative debate about liability, compensation, and financial responsibility centered primarily on liability issues surrounding large oil tankers, such as the double-hull requirement, cargo owner liability, and an overarching political question whether state oil pollution compensation laws would be preempted by the new federal regime.\textsuperscript{77} But, new issues emerged as OPA was implemented.

a. Lender Liability and Innocent Owner Protections

Experience soon revealed that oil discharges into U.S. navigable water from inland oil facilities, including abandoned oil wells, gave rise to OPA liability for removal costs and damages. Before long, the Coast Guard and the Environmental Protection Agency (EPA) found themselves dealing with thousands of abandoned oil wells that were the legacy of the nation’s early decades of domestic oil exploration. In many cases, government entities involuntarily acquired these wells by operation of law after they were abandoned by their owners.\textsuperscript{78}

This growing issue caused the lingering question regarding lender liability under OPA to resurface. Unlike the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),\textsuperscript{79} OPA did not provide for the express protection from liability of lenders. Therefore, using CERCLA as a model, Congress enacted an important amendment to OPA\textsuperscript{80} designed to “exempt from

\begin{itemize}
\item \textsuperscript{76} See Kierm, supra note 1, at 558-90.
\item \textsuperscript{78} See 33 C.F.R. § 137.1(c) (2010). This issue arose during the author’s tenure at the National Pollution Funds Center following oil pollution response actions by the EPA when it was discovered that government entities had involuntarily acquired ownership of the wells by operation of state laws of escheat, etc.
\end{itemize}
OPA 90 liability innocent facility purchasers, municipalities, and lenders to the same extent as under [CERCLA].\(^{81}\)

Congress amended the definition of an OPA “owner or operator” by specifically omitting certain innocent entities, e.g., state and local governments owning or controlling a facility due to operation of law.\(^{82}\) But, the provision still allowed these entities to be held liable if they “caused or contributed to a discharge or a substantial threat of a discharge.”\(^{83}\)

Concerning vessel lenders, the provision excluded from OPA’s “owner or operator” definitions of a responsible party “a person that is a lender that does not participate in management of a vessel or facility, but holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.”\(^{84}\) Before the amendment, OPA liability attached to any owner, operator, or demise charterer of a vessel.\(^{85}\)

The broad meaning of “owner or operator” had the potential for unintended consequences for unwary lenders that chose to be record “owners” to protect a security interest in a lease finance transaction, but failed to secure adequate insurance. For example, in the EMILY S/MORRIS J. BERMAN oil spill along the north coast of Puerto Rico at San Juan, the record owner of the tug EMILY S was the lender in a lease finance arrangement.\(^{86}\) While the lender protected its security interest in the tug in one respect, it found itself potentially exposed as the owner of the discharging vessel for purposes of OPA liability. Following years of litigation, the lender ultimately settled with the U.S. Government and Commonwealth of Puerto Rico for $83.5 million.\(^{87}\)

Lenders have traditionally attempted to protect themselves from OPA liability with indemnity agreements; however, such agreements are not completely effective because OPA does not permit a responsible party to avoid liability through indemnification. This situation may well

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83. Id (codified as amended at 33 U.S.C. § 2701(26)(A)(vi)).
84. Id (codified as amended at 33 U.S.C. § 2701(26)(B)(ii)).
leave a responsible party lender in a large spill paying the bill and holding an indemnity agreement with no remaining entity with assets to pursue.

Congress originally rejected CERCLA-like lender liability proposals when it enacted OPA into law. However, the 2004 amendment aimed to conform OPA to the defenses against liability then provided by CERCLA.\textsuperscript{88} The amendments afford lenders two tiers of OPA liability protection, depending on whether a borrower remains in possession of the vessel or if a lender has foreclosed.\textsuperscript{89}

The lender is protected from OPA liability when a borrower remains in possession of a vessel, provided the lender does not exercise decision-making control over a vessel’s environmental compliance activities or undertake day-to-day management of the vessel (other than financial or administrative matters). The amendment defines “participate in management” to “mean[] actually participating in the management . . . not . . . merely having the capacity to influence, or the unexercised right to control, vessel or facility operations.”\textsuperscript{90}

The amendment also provides a list of many actions a lender may take without participating in management, including, allowing certain terms in credit agreements, interacting and assisting a borrower with financial difficulties, and taking legal actions.\textsuperscript{91} Therefore, a lender who is also a record owner is not only excepted from liability as a result of its status as a lender, but it may also take certain statutorily permitted actions to protect its interests without incurring OPA liability. Importantly, these permitted actions also include conducting a removal action or requiring a removal action to be performed in response to oil pollution.\textsuperscript{92}

After foreclosure, a lender that did not participate in management prior to foreclosure is afforded broad liability protection, allowing the lender to sell, re-lease (in the case of lease financing), liquidate, maintain business activities, wind up operations, undertake an OPA removal action,

\begin{itemize}
  \item or take[] any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition, if the person seeks to sell, re-lease (in
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\textsuperscript{89} See Coast Guard and Maritime Transportation Act of 2004, sec. 703, 118 Stat. at 1069-72 (codified as amended at 33 U.S.C. § 2701(26), (38)).

\textsuperscript{90} Id., 118 Stat. at 1071 (codified as amended at 33 U.S.C. § 2701(38)(A)).

\textsuperscript{91} Id., 118 Stat. at 1071 (codified as amended at 33 U.S.C. § 2701(38)(B)(iii), (vii), (ix)).

\textsuperscript{92} Id., 118 Stat. at 1071 (codified as amended at 33 U.S.C. § 2701(38)(B)(vi), (x)).
the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.\footnote{Id. (codified as amended at 33 U.S.C. § 2701(26)(13)(iii)(II)).}

The provision permits a postforeclosure lender to control a vessel for an unlimited period of time, during which time the lender is protected from OPA liability in the event of a discharge (although claims under state law would likely still apply because OPA does not preempt state law remedies), even if exercising day-to-day management of the vessel. Because a lender satisfying this definition would not be an OPA owner or operator, it would also, apparently, not be required to provide evidence of financial responsibility. The statute and legislative history are otherwise silent on the subject, so it is unclear whether the Coast Guard would require the vessel to have an operator that does have a certificate of financial responsibility irrespective of the lender exemption.\footnote{See 33 C.F.R. § 138.20 (2010) (recognizing only a distinction between “operators” and “owners holding an indicia of ownership to protect a security interest”).} The Coast Guard regulations enforcing financial responsibility requirements extend to the vessel itself and its master and provide for its detention and denial of entry.\footnote{See 33 C.F.R. § 135.403.}

The amendments specifically refer to lease-finance ownership structures in the context of lender liability and define extensions of credit to include lease-finance transactions. Therefore, for vessels financed through lease-finance transactions, in which a leasing company is the record owner of the vessel, these amendments insulate the leasing company from OPA 90 liability. In this context, the legislation significantly reduces the OPA 90 liability exposure faced by leasing companies.\footnote{Papavizas & Kiern, supra note 81, at 388.} Of course, leasing companies should consider potential liability under state law and obtain an appropriate amount of insurance coverage, if for no other reason than to provide protection from claims and their resulting litigation.

At the same time that Congress provided lenders protection from liability, it plainly intended to hold lenders liable who exercise “control over the environmental compliance” or “at a level comparable to that of a manager of the vessel.”\footnote{Coast Guard and Maritime Transportation Act of 2004, sec. 703, 118 Stat. at 1070 (codified as amended at 33 U.S.C. § 2701(26)(A)(vi)(I)-(II)).} Thus, the amendment will be subject to judicial balancing of its competing purposes.
b. Speeding Claims Payments for Fishermen

In 2004, Congress also addressed the chronic failure of responsible parties and the OSLTF to pay the claims of the fishing and aquaculture industries quickly and efficiently. The damages incurred by these industries following the NEW CARISSA oil spill off the Oregon coast revived legislative concerns previously aroused by the NORTH CAPE incident in 1996. Following the NORTH CAPE incident, Congress amended OPA to expedite the claims process by requiring interim payments by a responsible party. But “[t]his approach apparently failed to provide sufficiently speedy compensation to the fishing and aquaculture industries” following the NEW CARISSA incident. Therefore, in 2004 Congress established a loan program whereby the OSLTF, not the responsible party, will award loans “to a fisherman or aquaculture producer.” The loans shall be for a period of five years and provide “a low interest rate, as determined by the President.”

The complaints of shrimpers, oystermen, fishermen, and other coastal workers and small businesses claiming damages from the Deepwater Horizon spill illustrate the difficult challenges that responsible parties and the OSLTF encounter when trying to make swift payments to deserving claimants facing severe economic distress. As President Obama explained: “For the small-business owners, for the fishermen, for the shrimpers, this is not just a matter of dollars and cents... A lot of these folks don’t have a cushion.” The harsh reality is that no emergency claims process that requires documentation of damages and careful review of claims is likely to be swift enough to satisfy desperate claimants in an economic crisis. Coastal and maritime workers, like fishermen, who may lack sufficient economic resources to carry them through a disastrous oil spill, frequently need compensation immediately. The extraordinary intervention of President Obama and BP Chairman Carl-Henric Svanberg to create a $20 billion compensation fund to expedite the claims process in the Deepwater Horizon incident highlights the need for more attention to be paid to expediting the payment of OPA claims, especially for those claimants without adequate

98. See id. sec. 708(a), 118 Stat. at 1077 (codified as amended at 33 U.S.C. § 2713(f)).
100. Papavizas & Kiern, supra note 81, at 395.
102. Id. (codified as amended at 33 U.S.C. 2713(f)(3)(B)(i), (c)).
resources to survive otherwise. According to the Gulf Coast Claims Facility, by October 10, 2011, it had received over 900,000 claims and had paid over 200,000 claimants more than $5.3 billion. These figures included approximately 170,000 emergency advance payments, totaling nearly $2.6 billion.

3. Energy Tax Incentives Act of 2005

Initially, the funding sources of the OSLTF provided by Congress—including the five-cents-per-barrel tax on petroleum products, interest, fines, penalties, and cost recovery from responsible parties—proved sufficient to cover OSLTF expenditures for removal costs, natural resource damage assessment, claims, and to fund hundreds of millions of dollars in appropriations made by Congress from the OSLTF. However, the per-barrel tax on petroleum products, which was the principal funding source of the OSLTF, expired in 1995 after the OSLTF reached its $1 billion target amount. By the year 2001, the cost of oil pollution incidents had risen dramatically and the expenditures from the OSLTF exceeded its income. As explained above, by 2002, the Coast Guard’s concerns about the availability of adequate emergency funding led Congress to allow the Coast Guard to borrow up to $100 million for emergency funding from the OSLTF; however, it did not address the larger fiscal problem facing the shrinking OSLTF. By 2005, the insufficiency of the funding mechanisms for the OSLTF had become palpable and the Coast Guard warned Congress that without legislative action the OSLTF would be depleted by 2009.

To address this serious problem, the Energy Policy Act of 2005 reinstated the five-cents-per-barrel tax. It took effect again on April 1, 2006, and was to be collected as necessary to maintain the balance of the OSLTF between $2 billion and $2.7 billion. “This action by Congress recognized both that the nation should have a robust dedicated fund

104. See id.
106. Id.
111. Id.
available to respond to oil pollution incidents and that the cost of accomplishing that task is rising."\footnote{112}

4. Delaware River Protection Act of 2006

One factor contributing to the depletion of the OSLTF was the failure to adjust the statute’s liability limits that were established in 1990. Although the cost of oil pollution cleanup and damages had increased dramatically, neither the executive nor the legislative branches had acted to increase the original liability limits enacted in 1990.\footnote{113} For vessels, the statute originally provided limits of $1200 per gross ton for tank vessels and $600 per gross ton for other vessels.\footnote{114} And for offshore facilities other than deepwater ports and associated vessels, it provided a limit of all removal costs plus $75 million for OPA damages.\footnote{115}

This failure to keep pace with the increasing cost of oil pollution incidents was highlighted by the ATHOS I oil spill that occurred on the Delaware River on November 26, 2004. This spill proved to be both difficult and expensive to clean up due to the nature of the oil and the environmental sensitivity of the affected coastal region. For these reasons, “[t]he incident attracted considerable public and congressional attention and, as frequently occurs in the field of pollution law, specific legislative proposals peculiar to this oil spill emerged and were subsequently enacted into law.”\footnote{116}

OPA capped the oil pollution liability limit of the single-hulled ATHOS I at approximately $113 million; however, the Coast Guard reported that the total incident cost arising from the incident amounted to more than $300 million.\footnote{117} The oil spill prompted New Jersey Senators Frank Lautenberg and John Corzine to introduce legislation that proposed to phase out the liability limits for single-hull tankers under OPA 90 to spur vessel operators to remove these vessels from service and also to double the liability limits for all other vessels and facilities to ease the financial strain on the OSLTF, which pays for OPA costs above the liability limit of the responsible party.\footnote{118}

\begin{footnotesize}
\begin{enumerate}
\item[113] See Jonathan L. Ramseur, Cong. Research Serv., R 41679, Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill 1, 6 (2011).
\item[115] Id., 104 Stat. at 492.
\item[116] Papavizas & Kiern, \textit{supra} note 112, at 284.
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Although the Lautenberg-Corzine proposal was not adopted, Congress finally raised the liability limits applicable to vessels and for the first time distinguished single-hull from double-hull tankers. The legislation established new liability limits for tank vessels as follows: (1) single-hull tank vessels greater than 3,000 gross tons: $3,000 per gross ton or $22,000,000; (2) single-hull tank vessels less than 3000 gross tons: $3,000 per gross ton or $6,000,000; (3) double-hull tank vessels greater than 3,000 gross tons: $1,900 per gross ton or $16,000,000; and (4) double-hull tank vessels less than 3,000 gross tons: $1,900 per gross ton or $4,000,000.119 The new limits for nontank vessels established were $950 per gross ton or $800,000.120 However, the legislation did not increase the limits of liability for other entities subject to OPA, including offshore facilities such as those that were involved in the Deepwater Horizon incident, onshore facilities, or deepwater ports.

Congress set the new limits for double-hulled tankers to reflect the increase in the consumer price index of approximately fifty percent since OPA’s enactment. However, by comparison it raised the limit of liability for single-hulled tankers by approximately 150%, far in excess of inflation, to spur the removal of such vessels from service. The Delaware River Protection Act also mandated inflation-based increases to the limits to be implemented by regulation every three years and imposed additional reporting requirements to the Congress by the executive branch on the effectiveness of these increases.121 As a result, for the first time on July 1, 2009, the Coast Guard amended OPA limits of liability to reflect significant increases in the consumer price index.122 The next round of increases is scheduled for 2012.123

That same year, the Coast Guard also reported to Congress its view that “[a]djustments to liability limits help more equitably divide liabilities between the [OSLTF] and [Responsible Parties].”124 The agency based its conclusion on the history of OSLTF claims activity up until May 2009, during which eighty-three percent of the claims paid were for vessel-based responsible parties exceeding their liability limits under the

120. Id., 120 Stat. at 554 (codified at 33 U.S.C. § 2704(a)(2)).
121. Id. (codified at 33 U.S.C. § 2704 note).
123. See id. at 31,361.
statute. Over eighteen years, there had been only fifty-one such incidents, or fewer than three per year. Nevertheless, the perception of the Coast Guard’s National Pollution Funds Center (NPFC) as reported to Congress is that vessel-based responsible parties were unfairly avoiding OPA liability. And this viewpoint appears to have influenced the NPFC’s parsimonious handling of responsible party claims as discussed below.


On October 3, 2008, Congress enacted into law the controversial Emergency Economic Stabilization Act of 2008 (EESA), more commonly known as Troubled Asset Relief Program or “TARP” legislation, which not only provided desperately needed aid to the strained financial system of the United States, but also changed the OSLTF in key respects. First, it increased the tax rate from five to eight cents per barrel through 2016 and then to nine cents per barrel in 2017. Second, it repealed the requirement that the tax be suspended if the unobligated balance of the fund exceeded the $2.7 billion threshold established by Congress in 2005. Consequently, the Congressional Research Service projected that the OSLTF will increase to $3.5 billion by 2016. Additionally, under current law, the OSLTF is supplemented by civil penalties assessed under the Clean Water Act and as discussed above, are likely to be substantial in the disposition of the Deepwater Horizon incident.

6. Coast Guard Authorization Act of 2010

Despite the preelection legislative gridlock that gripped Congress in the fall of 2010, the Coast Guard Authorization Act of 2010 enacted two modest OPA provisions aimed at promoting the use of double-hull tankers and expanding the scope of the statute’s financial responsibility requirement. But, despite their modesty, the measures are significant for

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>125</td>
<td>Id. at 6 &amp; fig.5.</td>
</tr>
<tr>
<td>127</td>
<td>Id. sec. 405, 122 Stat. at 3860 (codified at 26 U.S.C.A. § 4611(c)(2)(B) (West 2011)).</td>
</tr>
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<td>128</td>
<td>Id., 122 Stat. at 3861 (codified as amended at 26 U.S.C.A. § 4611(f)).</td>
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<tr>
<td>129</td>
<td>JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL 33705, OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS 20 fig.3 (2010).</td>
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</table>
the precedents they set relating to underlying compromises embodied in the statute.

a. Cargo Owner Liability for Single-Hull Tankers

Importantly, the legislation amended OPA’s liability provisions so that for the first time OPA liability was extended to include cargo owners for discharges from vessels.\(^{132}\) The provision amends the OPA definition of the term “responsible party” to include: “In the case of a vessel, the . . . owner of oil being transported in a tank vessel with a single hull after December 31, 2010.”\(^{133}\) The provision excludes until January 1, 2015, certain vessels unloading oil in bulk at a deepwater port or offloading in lightering activities within an established lightering zone more than sixty miles offshore.\(^{134}\) As a practical matter, the use of single hull tank vessels in the United States is already very limited.

However, this provision represents a fundamental departure from the original political compromise that was struck in OPA 90, which rejected cargo owner liability entirely. The practical implications of the provision on operators of the remaining single-hull vessels sailing in the United States remains unclear, but the provision establishes the precedent that OPA now extends liability to cargo owners in this limited circumstance.\(^{135}\) Because key coastal states, such as Alaska, California, Florida, Oregon, and Washington, already provide through state laws for the strict liability of cargo owners for oil discharges from vessels, the politically controversial nature of cargo owner liability may have diminished somewhat since OPA’s enactment in 1990, and this modest change may mark the way for a broader change in OPA’s liability framework to account for the role of cargo owners.

b. Expanded Financial Responsibility

The cost of oil pollution removal and damages in the United States has skyrocketed since 1990. For example, a discharge of approximately 60,000 gallons of fuel oil in Boston harbor in 2000 cost about $6 million in removal costs and damages, while a discharge of similar size from the

\(^{132}\) Id. sec. 713, 124 Stat. at 2988 (codified at 33 U.S.C.A. § 2701(32)(A)).

\(^{133}\) Id.

\(^{134}\) Id. (referencing 46 U.S.C.A. § 3703a(b)(3)).

\(^{135}\) See Kiern, supra note 45, at 40.
COSCO BUSAN in San Francisco Bay in 2007 cost more than $60 million in removal costs alone, greater than a tenfold increase.\footnote{See id.; see also OIL POLLUTION ACT (OPA) LIABILITY LIMITS: ANNUAL REPORT TO CONGRESS FISCAL YEAR 2009, supra note 117, at 15 attachment B (estimating total incident cost estimated at $99.7 million).}

Even discharges of relatively small size from small vessels can result in significant costs and damages to be incurred by the OSLTF in the absence of an OPA responsible party with the required evidence of financial responsibility. In recent years, Congress has expressed concern about the financial burden on the OSLTF resulting from oil spills for which there is no OPA 90 responsible party, in circumstances where a responsible party limits liability under OPA 90, and where the responsible party lacks financial capacity.\footnote{See Kiern, supra note 45, at 40.}

The Coast Guard Authorization Act of 2010 includes a measure that represents a small step in guaranteeing cost recovery by the OSLTF through expansion of the scope of the statute’s financial responsibility requirements.\footnote{See Pub. L. No. 111-281, sec. 712, 124 Stat. at 2988 (codified at 33 U.S.C.A. § 2716(a)(3)).} This amendment expands OPA’s financial responsibility requirements to include “any tank vessel over 100 gross tons using any place subject to the jurisdiction of the United States.”\footnote{Id. (amending 33 U.S.C. § 2716(a) (2006)).} Previously, this provision had only applied to vessels over 300 gross tons.\footnote{See id. (amending 33 U.S.C. § 2716(a) (2006)).} While modest in its reach, it also represents an area that reformers will likely revisit in the future to ensure that those transporting or producing oil maintain appropriate evidence of financial responsibility. Currently, OPA has no companion provision requiring evidence of financial responsibility for onshore facilities.\footnote{See 33 U.S.C. § 2716.}

III. JUDICIAL DECISIONS: JURISDICTION AND PROCEDURE

A. Jurisdiction

1. Navigable Waters

As a threshold matter, OPA jurisdiction has always required a “discharge[, or . . . substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone” of the United States.\footnote{Oil Pollution Act of 1990, Pub. L. No. 101-380, sec. 111-281, sec. 712, 124 Stat. at 2988 (codified at 33 U.S.C.A. § 2702(a))).} The statute’s geographic scope is broad,
extending seaward 200 nautical miles to the limits of the exclusive economic zone of the United States. But, it is not limitless.

For example, in *Rice v. Harken Exploration Co.*, the United States Court of Appeals for the Fifth Circuit held that the attempted application of OPA to an onshore oil production facility on Big Creek Ranch in the Texas Panhandle could not be sustained where the alleged discharge was via ground water. According to the court:

In light of Congress’s decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of “navigable waters.” We must construe the OPA in such a way as to respect Congress’s decision to leave the regulation of groundwater to the States.

The court’s analysis emphasized the plaintiffs’ failure to provide evidence that the impact on surface waters connected to U.S. “navigable waters” was sufficiently direct. It styled the plaintiffs allegation as merely a “generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater.”

Additionally, while affirming the lower court’s result, the Fifth Circuit rejected the analysis of the district court, which had dismissed the plaintiffs’ claims on the grounds that “[t]he Panhandle of Texas is hundreds of miles from coastal waters or ocean beaches. Discharges of oil and salt water onto land in the Panhandle of Texas are not the type of oil and waste-water spills targeted by the OPA.” As the Fifth Circuit explained, the district court’s conclusion that OPA cannot apply to any inland waters was erroneous because “the term ‘navigable waters’ is not limited to oceans and other very large bodies of water.”

Before 2001, the scope of OPA’s jurisdictional reach relying on the Clean Water Act’s definition of the term “navigable waters” appeared to extend to “the broadest possible constitutional interpretation.”

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144. 250 F.3d 264, 265 (5th Cir. 2001).
145. *Id.* at 272.
146. *Id.*
148. *Id.* at 269.
Nevertheless, doubt existed about the full extent of OPA’s reach. In two key decisions in 2001 and 2006, the United States Supreme Court delineated the Clean Water Act’s jurisdiction over wetlands.\(^ {150}\) Thereby, the court explained OPA’s reach in this respect.

In the more recent of the two, *Rapanos v. United States*, the Supreme Court interpreted the term “navigable waters” as defined in the Clean Water Act and applied by the United States Army Corps of Engineers (Corps) to wetlands.\(^ {151}\) The plurality opinion took the position that the Corps’ expansive interpretation was not based on a permissible construction of the statute. According to the plurality, “[N]avigable waters,” as defined in the Clean Water Act, pertains only to “relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water.”\(^ {152}\) As a practical matter, the court rejected the “hydrological connection” test applied by the agency for wetlands to be subject to Clean Water Act jurisdiction via the term “navigable waters.” A wetland cannot be considered “adjacent to” “waters of the United States” because of a “mere hydrologic connection.”\(^ {153}\) Thus, the position of the Corps and previous decisions by the lower courts that had suggested the term extended to virtually all surface waters of the United States\(^ {154}\) were no longer correct. Only wetlands with a “continuous surface connection” to “waters of the United States” are “adjacent” to these waters and are thus covered by the Clean Water Act.\(^ {155}\)

In his concurrence, Justice Kennedy disagreed with the plurality’s formulation of the proper test and concluded that a body of water is navigable only if it has a “significant nexus” to waters that are “navigable-in-fact.”\(^ {156}\) Unfortunately, the lack of a clear majority opinion leaves the rule somewhat murky, but the Supreme Court’s plurality plainly agreed to restrict the Corps’ previous expansive approach.

*Rapanos* followed the Supreme Court’s decision in *Solid Waste Agency v. U.S. Army Corps of Engineers.*\(^ {157}\) There, the Court struck down the Corps’ “Migratory Bird Rule” and explained that the agency’s jurisdiction did not extend to “nonnavigable, isolated, intrastate waters”

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\(^ {151}\) 547 U.S. 715 (2006) (plurality opinion).
\(^ {152}\) *Id* at 732-33.
\(^ {153}\) *Id* at 740, 757.
\(^ {154}\) See *Kiern*, *supra* note 1, at 515-16 (discussing numerous decisions that had broadly interpreted the term “navigable waters”).
\(^ {155}\) *Rapanos*, 547 U.S. at 742.
\(^ {156}\) *Id* at 786 (Kennedy, J., concurring).
that did not “actually abut[] on a navigable waterway.” The decision established the “significant nexus” standard later applied by Justice Kennedy in *Rapanos*. In both cases, the Supreme Court avoided the constitutional question concerning the greatest possible reach of federal authority.

Applying *Solid Waste Agency’s* reasoning to an OPA incident, the Fifth Circuit ruled in *In re Needham* that federal regulatory jurisdiction exists if oil is discharged into navigable-in-fact waters or nonnavigable waters that are “truly adjacent” to an open body of navigable water. To be truly adjacent, a “significant nexus” must be found between the polluted waters and the navigable waters. In *Needham*, the bankruptcy and district courts held that the EPA’s claim for cleanup costs of roughly $207,000 was not cognizable under OPA because the oil was not discharged into “navigable waters.” The Fifth Circuit reversed and explained that the oil spilled from the Thibodeaux Well oil facility in LaFourche Parish, Louisiana, discharged into a drainage ditch that flowed into Bayou Folse which in turn “flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico.” The Fifth Circuit criticized the lower courts’ “clear error” for limiting their analysis to only one of the two waterways into which oil was discharged and ignoring key facts.

Reaching a different result, the district court in *United States v. Chevron Pipe Line Co.* applied the Supreme Court’s decisions in *Solid Waste Agency* and *Rapanos* and the Fifth Circuit’s decision in *Needham* to reject OPA jurisdiction. In *Chevron*, the United States sought to assess civil penalties for a discharge of 3000 barrels of crude oil near Snyder, Texas. The company was cleaning up the spill, and there was no dispute about the company’s willingness to complete the cleanup. The discharged oil entered an unnamed tributary leading to Ennis Creek which in turn led to Rough Creek and the Brazos River. However, the evidence showed that these tributaries were “intermittent” and contained no water at the time of the spill. In considering Chevron’s motion for

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158. *Id.* at 167, 171.
159. *See id.* at 684; *Rapanos*, 547 U.S. at 782-83.
161. *Id.* at 347, 2004 AMC at 271.
163. *Id.* at 343, 347, 2004 AMC at 266, 271-72.
164. *Id.* at 346, 2004 AMC at 269-70.
166. *Id.* at 606-08.
summary judgment, the court rejected the government’s position, concluding that it relied on “speculation” and failed to provide “competent summary judgment evidence.”\(^{167}\) According to the court, “absent actual evidence that the site of the farthest traverse of the spill is navigable-in-fact or adjacent to an open body of navigable water, . . . a ‘significant nexus’ is not present under the law of this circuit.”\(^{168}\) Thus, these Fifth Circuit decisions underscore the critical importance of a clear evidentiary record of “significant nexus” to “navigable waters” when analyzing jurisdiction under OPA.

These cases did not address OPA’s statutory language that triggers jurisdiction based on a “substantial threat of a discharge of oil, into or upon the navigable waters.”\(^{169}\) Nor do they reflect any effort by the government to suggest that OPA’s jurisdiction enjoys a larger reach than the Clean Water Act through the Commerce Clause of the United States Constitution. Likewise, the courts saw fit not to opine on the constitutional question, electing instead to apply the doctrine of constitutional avoidance. Therefore, the answers to these questions remain unresolved. However, the Obama Administration has restarted the debate about the reach of Clean Water Act jurisdiction with its May 2011 publication of new Draft Guidance, which “will increase” jurisdiction under the Clean Water Act.\(^{170}\) Although the Administration downplayed the scope of its proposal as “not . . . massive,”\(^{171}\) it remains to be seen what final form the guidance will take and whether it will be challenged in court.

2. Responsible Parties

OPA defines the term “responsible party” broadly,\(^{172}\) and during its first decade, the courts consistently construed the term broadly.\(^{173}\) And as explained above, Congress amended the definition in 2004 to address

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167. Id. at 614-15.
168. Id. at 615.
173. See Kiern, supra note 1, at 516-25.
concerns about the overbroad scope of the definition and the resulting potential liability of innocent owners and lenders.\textsuperscript{174}

In \textit{Smith v. Mid-Valley Pipeline Co.}, in ruling on a motion to dismiss, the court addressed the question whether a previous owner or operator of a pipeline was an OPA “responsible party.”\textsuperscript{175} In the case of an oil discharge from a pipeline, OPA defines a responsible party as “any person owning or operating the pipeline.”\textsuperscript{176} The court held that because the defendant, Sun Pipeline Company, “neither owned nor operated the Pipeline at the time of the incident, [it was] not a responsible party under the OPA.”\textsuperscript{177} It was undisputed that Sun Pipeline Company had previously owned the pipeline; but importantly, according to the court, under OPA it did not own or operate the pipeline when the incident occurred. Relying on the lack of an ownership interest at the time of the incident, the court also dismissed most of the state law causes of action under Kentucky law. However, without providing a clear exposition of its reasons, it declined to dismiss claims grounded in strict liability, trespass, and nuisance.\textsuperscript{178} Because the decision does not discuss any argument that the defendant might be liable as an owner or operator “immediately prior to the abandonment of the . . . facility,”\textsuperscript{179} this OPA provision defining a responsible party does not appear to have been implicated.

In \textit{Gabarick v. Laurin Maritime (America) Inc.},\textsuperscript{180} there ruling on a motion for summary judgment, the court addressed OPA’s definition of “responsible party” in conjunction with the statute’s “sole fault” of a third-party defense.\textsuperscript{181} That case arose from an oil spill on the Mississippi River that occurred on July 23, 2008, following the collision of the tank barge DM-932, pushed by the towboat M/V MEL OLIVER, and the M/V TINTOMARA.\textsuperscript{182} According to the decision, American Commercial Lines (ACL) owned the tank barge and the towboat.\textsuperscript{183} In the incident, oil discharged from the tank barge, but not the TINTOMARA. Therefore, the TINTOMARA interests argued that it was not an OPA “responsible party” subject to an OPA claim in

\begin{thebibliography}{180}
\bibitem{174} See supra Part II.B.2.


\bibitem{176} Id. (quoting 33 U.S.C. § 2701(32)(E)).

\bibitem{177} Id. at *2.

\bibitem{178} See id. at *3-4.

\bibitem{179} See 33 U.S.C. § 2701(32)(F) (defining a responsible party for an abandoned facility or vessel).

\bibitem{180} No. 08-4007, 2010 WL 147216, at *1-2 (E.D. La. Jan. 11, 2010), rev’d 406 F. App’x 883 (5th Cir. 2010).


\bibitem{182} \textit{Gabarick}, 2010 WL 147216, at *1.

\bibitem{183} Id.
\end{thebibliography}
circumstances where the tank barge or a party with which the tank barge had a contractual relationship, such as the operator of the towboat, had any fault. The court agreed, ruling, “Under the OPA, Tintomara—a non-discharging party—would be liable as a responsible party only if there was no fault on the part of [the owner of the tank barge] and no fault on the part of [the operator of the towboat].”\(^{184}\) However, in granting the motion the court ruled that the responsible party “is not precluded from seeking contribution under any law other than the OPA.”\(^{185}\)

The Fifth Circuit subsequently reversed the district court’s grant of summary judgment in favor of the TINTOMARA interests as premature because the complexity of the case warranted further factual development.\(^{186}\) It did not, however, find any fault with the district court’s statement of the law. Importantly, in a case of first impression under OPA, ACL contested that it had a contractual relationship with DRD and so had “filed a declaratory judgment action to have its contracts with DRD declared void \textit{ab initio}.”\(^{187}\)

OPA’s definition of what constitutes a “vessel” for purposes of OPA liability arose in \textit{GMD Shipyard Corp. v. M/V Athena Y.}\(^{188}\) There, a discharge occurred from a vessel damaged in a grounding that then proceeded to drydock for repairs. Fuel oil from the vessel’s damaged double-bottom tanks discharged into the dry dock as the water level in the dry dock was lowered, and costs were incurred by the shipyard to remove the oil.

A dispute arose between the vessel and shipyard regarding responsibility for the removal costs. As a threshold matter, the vessel owner argued that OPA did not apply because (1) the vessel was not a “vessel” for purposes of OPA because it had been withdrawn from navigation, and (2) there was no discharge into navigable waters because the oil had been safely contained within the dry dock. The court rejected both arguments.\(^{189}\) First, it ruled that the authorities showed that the vessel had not been removed from navigation and the repairs were not extensive enough to rob it of its character as a vessel. Second, the court held that “[a]s a drydock . . . is understood to be within navigable waters for purposes of admiralty jurisdiction, and the definition of ‘navigable waters’ under OPA 90 is broader than the definition of that same term for

\(^{184}\) Id. at *2.

\(^{185}\) Id.


\(^{187}\) Id. at 889.


\(^{189}\) Id. at *8-12, 2004 AMC at 2770-76.
jurisdictional purposes, the discharge of oil . . . was ‘into or upon the navigable waters’ within the meaning of OPA 90.  

Importantly, the court held that under OPA, the vessel interests and shipyard interests were “all responsible parties” and “equally responsible for the oil discharge.” Accordingly, the court ordered that they “share equally in all damages related to the clean-up.” While the court’s decision that the vessel owner and operator were responsible parties accords with the plain language of the statute, its conclusion that the shipyard was also an OPA responsible party resulted from an unwarranted extension of the concept. OPA does not expressly provide that shipyards are liable either as vessels or facilities. Indeed, a shipyard is plainly not a vessel and OPA’s definition of a “facility” does not expressly include shipyards. Rather, it appears aimed at oil exploration, production, and transportation structures. However, in this instance the court concluded that the shipyard was an OPA responsible party as a vessel operator. It cited OPA’s financial responsibility regulations which encompassed a person “responsible for the operation of, a vessel” including a “repairer . . . who is responsible, or who agrees by contract to become responsible, for a vessel.” According to the court, the OPA financial responsibility regulations provide a “persuasive construction of the term ‘operator,’ one that will be employed here.”

The court’s approach unnecessarily strained the statute to achieve the apparent result of holding the parties equally at fault under OPA. First, the resort to OPA’s financial responsibility regulations was fundamentally misplaced. These regulations govern the requirements for issuance of certificates of financial responsibility (COFR), which was not at issue in the case. Undoubtedly, the vessel had a COFR issued by the Coast Guard, and the COFR did not identify the shipyard as the vessel’s operator because if it had, the court could have simply cited the COFR as evidence that the shipyard was the operator. Second, the court’s effort to do justice unnecessarily opens the door to future arguments by vessel and facility operators that their contractors are also OPA

190. Id. at *12, 2004 AMC at 2776 (quoting 33 U.S.C. § 2702(a) (2000)).
191. Id.
192. Id., 2004 AMC at 2776-77.
193. OPA defines “facility” as “any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes.” 33 U.S.C. § 2701(9) (2006).
195. Id (referencing 33 C.F.R. § 138.20).
responsible parties because they are “operating” the vessel or facility in some discreet respect. This splitting of the OPA concept of a responsible party to elevate the responsible party’s contractors to responsible-party status undermines the certainty afforded by the concept and as a practical matter allows vessel and facility owners and operators to subject contractors to primary OPA liability contrary to the statutory purpose. OPA expressly prohibits agreements “to transfer liability imposed under this Act from a responsible party . . . to any other person.”\textsuperscript{196} Additionally, OPA does not allow a responsible party to avoid liability under the Act for the actions of its contractors.\textsuperscript{197} Although the shipyard was removing the remaining oil from the damaged tanks to repair the ship, it cannot be said that the shipyard was operating the vessel in any conventional sense. Rather, it was providing a repair service to the vessel owner. According to the decision, the dispute arose because the parties “discussed the possibility of an oil spill, but there was no agreement with respect to payment of any clean-up costs of an oil spill if one should occur.”\textsuperscript{198} In these circumstances, the result should have been to hold liable the OPA responsible party, i.e., the vessel owner or operator identified on the COFR. The extent, if any, of the shipyard’s liability should have been the consequence of the governing provision of its repair services contract with the vessel owner and any other relevant provisions of general maritime law, such as the warranty of workmanlike performance. By ruling that the shipyard was an OPA responsible party, the court determined that the shipyard was strictly liable for an equal share of the damages, irrespective of other law.\textsuperscript{199}

Therefore, this decision serves as a cautionary tale to shipyards and other companies providing services to vessels and facilities. To avoid the risks and liability consequences of being treated as an OPA responsible party in similar circumstances, service providers should insist on agreements specifying that they are not operating the vessel or facility in any respect, and in all events they should insist to be held harmless, insured, and indemnified from the vessel or facility for any OPA damages.\textsuperscript{200}

\textsuperscript{196} 33 U.S.C. § 2710(b).
\textsuperscript{197} 33 U.S.C. § 2703 bars a responsible party’s complete defense resulting from the act or omission of “an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the third party.” \textit{Id} § 2703(a).
\textsuperscript{198} \textit{GMD Shipyard}, 2004 WL 2251670, at *4, 2004 AMC at 2764-65.
\textsuperscript{199} \textit{Id} at *12, 2004 AMC at 2776.
\textsuperscript{200} See 33 U.S.C. § 2710(a) (“Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.”).
In *United States v. Louisiana Land & Exploration Co.*, the United States sued Louisiana Land and Exploration Company (LLE), the land owner, to recover nearly $800,000 expended by the Coast Guard in response to a discharge of oil from a facility adjacent to Bayou Lafourche, Louisiana.\(^{201}\) In addition to cleaning out the leaking tank, the Coast Guard dismantled the facility and “performed a plugging and abandonment of three oil wells.”\(^{202}\)

The leaking facility was operated by other entities, including a partnership collectively referred to as O’Niell Oil Company. On cross-motions for summary judgment, the government argued that LLE was the responsible party because it was the owner of the leaking facility by operation of Louisiana law, while LLE argued that it did not own the facility and that under OPA’s abandonment provision, O’Niell was the responsible party.\(^{203}\)

The United States District Court for the Eastern District of Louisiana decided that neither party had met its burden on the question of ownership under Louisiana law, which turned on when O’Niell’s mineral lease terminated. However, it found sufficient evidence to show that LLE “never provided” the necessary notice required by Louisiana law to become owner of the facility.\(^{204}\)

Regarding LLE’s argument that O’Niell was the responsible party under OPA’s abandonment provision, the court decided that the evidence was insufficient to show that O’Niell had abandoned the facility “as a matter of law.”\(^{205}\) However, the court was not formally presented with the question whether O’Niell was an OPA responsible party as the facility operator, as suggested by the evidence referenced in the opinion. Neither the government nor LLE made the argument, apparently because they chose not to join O’Niell in the proceeding. O’Niell was apparently the subject of multiple state compliance orders for abandoned oil field sites, including at least eighty-five wells. It appears the government decided not to bring its action against O’Niell because that would divert attention from its central claim that LLE was the responsible party. However, it is less clear why LLE did not implead O’Niell into the proceeding since LLE’s defense included the argument that O’Niell was the responsible party via OPA’s abandonment provision, because O’Niell operated the

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202. Id. at *1.
203. Id. at *3-5.
204. Id. at *5-6.
205. Id. at *5.
facility immediately before abandonment.\textsuperscript{206} By joining O’Niell, it appears that LLE could have strengthened its position in the litigation and pursued in the same action any claim for attorney’s fees and costs incurred in resisting the government’s misdirected action. However, because O’Niell was apparently judgmentproof, LLE probably saw no reasonable likelihood of recovering its fees and costs.

Unfortunately, OPA does not mandate that operators of onshore facilities provide evidence of financial responsibility. To compound matters further, OPA provides no meaningful right of recovery for a party pursued erroneously by the government under OPA for a discharge by another responsible party.\textsuperscript{207} At the very least, in circumstances such as those presented in this case, OPA should afford the erroneously targeted party a right of recovery against the real responsible party and also against the OSLTF if the responsible party proves impecunious. While OPA provides that the OSLTF can recover for the government’s attorney’s fees incurred to collect claims paid by the OSLTF, it does not provide comparable protection for a party erroneously prosecuted by the government for the sums paid for the benefit of the real responsible party.\textsuperscript{208}

In another decision limiting the government’s overreach, the United States District Court for the Southern District of Texas in United States v. Viking Resources, Inc., rejected the government’s argument that the owner of an onshore oil and gas lease was the OPA responsible party as owner of a discharging onshore facility.\textsuperscript{209} That case involved a discharge of oil from an old “tank battery” facility located on land in Galveston County, Texas, into a nearby wetland adjacent to Highland Bayou, a navigable water, to which the Coast Guard and other agencies responded.\textsuperscript{210} The government brought suit against the defendants, owners of an oil and gas lease underlying the land, and alleged at trial that it incurred removal costs of $376,262.92 and $271,179.82 in natural resource damages.\textsuperscript{211}

\textsuperscript{206} Id.
\textsuperscript{207} See United States v. Viking Res., Inc., No. H-08-1291, 2009 WL 2605286 (S.D. Tex. Aug. 20, 2009). The recovery of attorneys’ fees and expenses from the government in a failed OPA cost recovery action is subject to the American rule for fee-shifting, i.e., only when the government “acted in bad faith, vexaciously, wantonly, or for oppressive reasons.” Id. at *1.
\textsuperscript{208} See 33 U.S.C. § 2715(b) (2006).
\textsuperscript{209} 607 F. Supp. 2d 808, 818 (S.D. Tex. 2009).
\textsuperscript{210} Id. at 812-14.
In its action, the government proposed a broad definition of the OPA term “facility,” which encompassed everything geographically bound by the underlying oil and gas lease, including the leaking tank battery. But, in ruling on cross-motions for summary judgment, the court correctly appreciated the OPA statutory differences between the definitions of responsible party for onshore and offshore facilities. The court ruled that the government’s expansive definition, which relied solely on geography, would erase the distinction provided in the statute, reasoning that Congress made a clear choice not to use geographical criterion to define an onshore facility responsible party. Consequently, the court ruled that the government must show that the defendants owned or operated the discharging tank battery, not just the surrounding oil and gas lease. At trial, the jury returned a verdict in favor of the defendants who denied that they had operated the discharging facility.

B. Procedure

1. Presentment

Although the statute and authorities could not be plainer, litigants during OPA’s second decade continued to run afoul of OPA’s presentment requirement. The statute expressly provides that “[e]xcept as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a).” In Abundiz v. Explorer Pipeline Co., the United States District Court for the Northern District of Texas granted the defendant’s motion to dismiss where the plaintiffs failed to meet OPA’s presentment requirement. The plaintiffs sought leave to cure the defect, but the court denied the request because over one year had passed since the complaint was filed, during which time the plaintiff could have cured, but did not. The court also declined to answer the question whether to treat multiple notices and statements submitted by plaintiffs to the defendant as satisfying the presentment requirement. Relying on the statute’s definition of a claim as “a request, made in

213. Id at 816-18 (interpreting 33 U.S.C. § 2701(9)(32)(B)-(C), (F)).
214. Id at 817-18.
215. Id at 818.
216. See Jenkins, supra note 211.
217. See Kiern, supra note 1, at 558.
220. Id at *3.
writing for a sum certain” and Johnson v. Colonial Pipeline Co., the court explained that the lack of a “sum certain” and “information as to the extent of damages suffered” failed to provide the defendant with enough information to settle the matter. The court’s decision correctly considered the motion in the spirit of OPA’s presentment requirement, which is to promote settlement. The presentment requirement is not a mere formalism, but it is a serious requirement that claimants should treat as such; courts have repeatedly demonstrated their willingness to dismiss complaints for failure to comply with it.

Likewise, in Russo v. M/T Dubai Star, the United States District Court for the Northern District of California dismissed OPA claims brought by plaintiff fishermen and a seafood processor who had not submitted the OPA claims to the responsible party. The dispute arose from an oil spill in San Francisco Bay on October 30, 2009, that occurred during the refueling of the vessel. Plaintiffs alleged injury and damages to their commercial fishing and crabbing operations. The court’s decision emphasized that the OPA presentment requirement could not be waived because it was jurisdictional. However, the court did not dismiss the plaintiffs’ state law claims, concluding that those claims were not subject to the OPA presentment requirement.

However, a recent decision shows that one court has not applied the presentment requirement to government entities seeking removal costs. In United States v. M/V Cosco Busan, the United States District Court for the Northern District of California ruled that governmental entities may commence an action for recovery of removal costs at any time, even though private parties seeking damages are bound by OPA’s presentment requirements. In the face of a civil action by the United States for recovery of OPA damages, the defendant filed a motion to dismiss alleging that the court lacked jurisdiction over the government’s OPA claim because the government failed to comply with OPA’s presentment requirements. The court opined that the general presentment requirement appeared to support defendant’s argument, but that the

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222. Id. at *2 (citing Johnson, 830 F. Supp. at 310).
225. Id., 2010 AMC at 1405; see discussion infra Part IV.
argument was foreclosed by a more specific OPA provision, 33 U.S.C. § 2717, which expressly permitted actions for recovery of removal costs.\textsuperscript{227} In the court’s view, § 2717, when read along with § 2702, allows governments or a person acting pursuant to the National Contingency Plan to commence an action for recovery of removal costs at any time after the costs have been incurred. Yet, despite the court’s reliance on the plain language of OPA to permit the government to file an action for removal costs, it proceeded to also allow the government’s claims for damages “in the interest of judicial economy” and to “streamline the recovery process for oil spill damages and cleanup costs.”\textsuperscript{228} It is striking how the court in this instance dispensed with the foregoing authorities and the statute’s plain language, which uniformly emphasize the mandatory nature of OPA’s presentment requirement to promote settlement, simply because the claimant was the government. Additionally, the court’s speculation that Congress intended to provide governments “greater flexibility” than individuals is contradicted by the statute itself, which according to the court’s interpretation also allows “person[s] acting pursuant to the National Contingency Plan” incurring removal costs to avoid the presentment requirement.\textsuperscript{229} Congress made no distinction between the government and a person in this respect, and the government apparently offered no explanation why it could not satisfy the presentment requirement, which it routinely has satisfied in the past. Therefore, the decision lacks a convincing basis for dispensing with the presentment requirement for the government’s damage claims other than for removal costs.

2. Removal of OPA Claims

In \textit{Tanguis v. M/V Westchester}, the Eastern District of Louisiana grappled with the question whether defendants could remove OPA claims filed against them in state court.\textsuperscript{230} Following an oil spill on the Mississippi River on December 1, 2000, a group of plaintiffs with fishing and oyster interests filed a putative class action lawsuit in Louisiana state court alleging, among other things, OPA claims. The defendants, comprised of the vessel interests, removed the case to federal district court and the plaintiffs moved to remand the case to state court. In what the court described as a question of first impression, it addressed the plaintiffs’ “novel theory that OPA, by its own terms, prevents

\begin{itemize}
\item \textsuperscript{227} \textit{Id.}, 2008 AMC at 1363.
\item \textsuperscript{228} \textit{Id.} at 1062–63, 2008 AMC at 1365.
\item \textsuperscript{229} \textit{Id.} at 1061, 2008 AMC at 1363-64.
\item \textsuperscript{230} 153 F. Supp. 2d 859, 862-69, 2001 AMC 2652, 2655-64 (E.D. La. 2001).
\end{itemize}
removal.”\textsuperscript{231} After an extensive analysis, the court concluded that OPA failed to satisfy the requirement of the removal statute “that an exception to removal be ‘express.’”\textsuperscript{232} Furthermore, the court concluded that OPA “establishes an entirely new, federal cause of action for oil spills” and rejected the plaintiffs’ argument that OPA’s legislative history manifested congressional intent to bar removal.\textsuperscript{233}

IV. JUDICIAL DECISIONS: LIABILITY, COMPENSATION, AND DAMAGES

A. Third-Party Liability

OPA’s liability provisions with respect to third parties are not a model of clarity, and despite several important decisions during OPA’s first decade, the provisions continue to present questions for the courts to resolve.\textsuperscript{234} In \textit{Unocal Corp. v. United States}, the United States Court of Appeals for the Ninth Circuit largely upheld the district court’s rulings and the jury’s verdict with respect to the questions surrounding OPA’s provisions governing the sole fault of a third party.\textsuperscript{235} That case arose from the discharge of over 45,000 gallons of crude oil from a pipeline in Norwalk, California, on February 20, 1995. The discharge occurred when a heavy equipment contractor punctured a pipeline during excavation associated with the construction of a railway station for Metrolink, the Southern California Regional Rail Authority. The plaintiff pipeline owner, Unocal, responded to the discharge and incurred costs of $4.66 million, $2.4 million of which was spent removing oil from the waterway. Following the incident, Metrolink rejected Unocal’s demand for reimbursement. Unocal also sought reimbursement from the OSLTF, but the Coast Guard likewise rejected Unocal’s claim. Unocal then brought a lawsuit against Metrolink, its contractors, and the OSLTF. Unocal agreed to stay its claims against the government pending resolution of its action against Metrolink and its contractors. Following a two-week trial, the jury returned a verdict in Unocal’s favor, found Metrolink and its contractor solely at fault, and also found that “Unocal had exercised due care and taken precautions against foreseeable risks.”\textsuperscript{236} On appeal, Metrolink sought to overturn the jury’s verdict, but the Ninth Circuit concluded that the verdict was supported by substantial evidence in the record. Unocal also prevailed as a practical matter on appeal by

\textsuperscript{231} Id. at 862, 2001 AMC at 2655.
\textsuperscript{232} Id. at 864, 2001 AMC at 2658 (applying 28 U.S.C. § 1441(a) (2000)).
\textsuperscript{233} Id. at 867, 2001 AMC at 2661.
\textsuperscript{234} See Kiern, supra note 1, at 525-29.
\textsuperscript{235} 222 F.3d 528, 535-36 (9th Cir. 2000).
\textsuperscript{236} Id. at 531-34.
persuading the court to remand the proceeding and require the district court to issue a declaratory judgment concluding that under 33 U.S.C. § 2717(f)(2), Unocal was not liable for removal costs and damages and that Metrolink and its contractors were.237 However, Unocal failed on its challenge to the district court’s decision not to award attorney’s fees.238 Unocal argued that OPA’s subrogation provision entitled it to an award of attorney’s fees because the government would have been entitled to recover its attorney’s fees in an action on behalf of the OSLTF.239 The court rejected Unocal’s argument because “[i]n the absence of congressional or contractual authority, the court cannot award fees to a prevailing party.”240 Thus, the decision provides additional answers regarding the application of OPA provisions governing declaratory judgments and attorneys’ fees.

While Unocal illustrates how a responsible party successfully pursued reimbursement from sole-fault third parties, it also highlights the difficulties of the process. It is notable that the Coast Guard’s NPFC denied Unocal’s claim while the jury approved it. It appears from the court’s decision that the NPFC did not conclude that Unocal satisfied the OPA standard to shift responsible-party liability to the sole-fault third parties, although the jury concluded the opposite. Given the evidence outlined and analyzed in the court’s decision, it also appears that Unocal would have been hard pressed to succeed in a challenge of the NPFC decision denying the claim. The determination of whether a third party was solely at fault is fact-intensive and can turn on whether the responsible party did everything it could to avoid the incident.241 This decision requires the exercise of judgment and inevitably is influenced by the decision maker’s opinion. In this instance, it appears the NPFC concluded that Unocal did not do all it could to avoid the accident, while the jury disagreed. In essence, it seems that the outcome turned largely on a more sympathetic decision maker, the jury, and the court’s deferential standard of review for the jury’s verdict. In these circumstances, if there is substantial evidence in the record supporting

237. Id. at 545.
238. Id. at 542-44.
239. Id. at 542 (referencing 33 U.S.C. § 2702(d)(1)(B) (2000)).
240. Id. at 543.
the decision of the jury or the NPFC, courts reviewing the decision should be expected to defer. The outcome also suggests that a jury trial may be a more hospitable forum than the NPFC, which as this case illustrates, continues to manifest a parsimonious outlook toward responsible-party claimants that undermines OPA’s legislative purpose “to encourage rapid private party responses.”

In re Alex C Corp. illustrates the courts’ continuing struggle with OPA’s provisions regarding third-party liability. The case arose from the discharge of approximately 60,000 gallons of fuel oil from the hull of a tanker that was punctured when the tanker and tugboat collided during an undocking maneuver in Boston Harbor. As contemplated by OPA, the tanker interests undertook an oil pollution cleanup response, reimbursed government expenses, and paid third-party damage claims. At stake in the case were OPA claims asserted by the tanker against the tug totaling more than $6 million for the removal costs and damages incurred.

Interests representing the tanker, M/T POSAVINA, and the tug, the ALEX C, disputed liability for the discharge and the applicable OPA limitation of liability. As the discharging vessel, the tanker apparently was the OPA-responsible party, and its OPA limitation of liability far exceeded the $6 million at issue. While denying OPA liability, the tug interests also argued that if liable, they should enjoy the OPA limitation of liability for the tug of $500,000. Not surprisingly, the tanker interests, which sought to recover approximately $6 million, argued that the tug’s $500,000 OPA limit did not apply in this circumstance where the responsible party sought recovery from a contractually related third party that caused the discharge.

In its first decision with respect to OPA’s third-party liability provision, 33 U.S.C. § 2702(d), the United States District Court for the District of Massachusetts ruled that the tug’s liability for the tanker’s claims was not subject to OPA’s $500,000 limitation provision for the tug, but instead coincided with that of the tanker. Upon reconsideration, the

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242. Unocal, 222 F.3d at 535 (quoting MetLife Capital Corp. v. M/V Emily S, 132 F.3d 818, 822, 1998 AMC 635, 641 (1st Cir. 1997) (internal quotation marks omitted)).
244. Id. at *1, 2003 AMC at 257.
246. At the time of the case, under 33 U.S.C. § 2704(a)(2), the then-applicable limit was the greater of $600 per gross ton or $500,000. 33 U.S.C. § 2704(a)(2).
248. Id. at *11, 2003 AMC at 271.
court not only ruled that the $500,000 OPA limitation did not apply, but also that there was no limit of liability for the tug at all. 249 According to the court:

In the 2003 Seaboats Memorandum, I concluded that the entirety of § 2702(d) is specifically limited to third parties who do not have a contractual relationship with the responsible party. Since the [tug interest] Defendants had a contractual relationship with the [tanker] Plaintiffs for the undocking of the M/T POSAVINA, they are not entitled to the limitation protection of § 2702(d)(2) . . . .

. . . When Congress enacted the OPA, it laid out a scheme for third party liability limitation but chose to exclude contractual third parties from these limitations. It also included a contribution provision allowing responsible parties to recover removal costs and damages from contractual third parties.  250

The result is that the tug, with a generally applicable $500,000 statutory OPA limit based on its vessel type and gross tonnage, was adjudged to enjoy no limitation of liability because it had a contractual relationship with the discharging vessel, even though there was no finding that would otherwise have deprived the tug of its OPA limit, such as gross negligence, willful misconduct, or violation of a relevant federal safety regulation.  251

However, the court provided no explanation why Congress chose to treat a contractually related third party so harshly with respect to limitation of liability as compared to a noncontractually related third party or even a sole-fault third party that is treated as an OPA responsible party, both of which OPA protected with statutory limits of liability. Indeed, in its initial decision, the court admitted that it found the issue of OPA's third-party limitation provisions “exceptionally challenging” and that the decision was “to some degree counterintuitive in that it leaves the partially responsible third party subject to greater potential liability than a solely responsible third party.” 252

Inexplicably, the court’s decision failed to mention the decisions of two other federal courts that previously had decided the same question and reached the opposite conclusion. In National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp., both the United States

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250. Id. at *11, *14, 2011 AMC at 181, 185.
251. Id., 2011 AMC at 178-79, 186.
District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit held in a like circumstance that a defendant tug was protected by OPA’s limitation of liability provision and limited its liability to $500,000. 253 Neither of these courts found the question “exceptionally challenging” or “counterintuitive.” Rather, the Fourth Circuit considered the analysis straightforward because it was mandated by OPA’s plain language:

Congress clearly intended for the cap to apply in situations like this one, since it established that “the liability of the third party shall be subject to the limits provided in section 2704 of the title.” 33 U.S.C. § 2702(d)(2)(A).

Under OPA’s limitations on liability, smaller vessels are subject to lesser liability. Even if we disagreed with this policy judgement, we are constrained by the text of the statute. 254

Additionally, there are other reasons to conclude that the court in Alex C erred. First, the court’s construction of OPA violated the statute’s express bar on resort to captions. OPA’s rule of construction provides, “An inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act.” 255 Yet, the court’s opinion principally relies on the statute’s “headings in § 2702(d), as a shorthand approach to understanding the structure of the statute.” 256

Second, the court’s superficial reference to the legislative history does not withstand scrutiny. The conference report language the court cites to support its interpretation is unhelpful. The report merely states that “[s]ubsection (d)(2) describes the liability of a third party under this section.” 257 It provides no reason justifying disparate treatment of contractual versus non-contractual third parties.

Third, a more searching analysis of the legislative history shows that if Congress meant to restrict the limitation of liability protections for third parties to only noncontractual third parties by reference to § 2702(d)(1), then it would have done so expressly in unambiguous language. Indeed, an examination of the full legislative history establishes that Congress intended the opposite. A primary purpose of the legislation was “[t]o establish limitations on liability for damages

256. Alex C, 2010 WL 4292328, at *12, 2011 AMC at 182.
resulting from oil pollution.” And, Congress amended the legislation to include statutory limits of liability for third-party vessels pursuant to submissions from the American Institute of Marine Underwriters (AIMU), the American Waterways Operators (AWO), and the Maritime Law Association (MLA). The leading Senate bill at the time, S. 686, provided that its limits applied to “an owner or operator of a vessel . . . for damages and removal costs under this section for each discharge or incident.” The referenced bill, section 102, was the liability section indicating the limitation applied irrespective of whether a vessel was a discharging or third-party vessel or a contracting or noncontracting third-party vessel. Thus, the key Senate proposal plainly limited the liability of a third-party vessel owner or operator whether it was a sole-fault noncontracting third party or not.

During hearings in 1989 on the leading legislative proposals, the AWO and the MLA explained why it was so important to specify limits of liability for vessel operators. On July 21, 1989, the AWO emphasized that limitation of liability in the proposed legislation “is not a limit on claims.” Rather, according to AWO:

Limitation is the device which allows the risk to be allocated between the shipowner and the cargo owner. Limitation facilitates the procurement of insurance at reasonable rates for shipowners, and it provides the cargo interests with a direct stake in the transportation of cargo and a strong incentive to use those transporters who maintain high standards of performance.

Likewise, for the September 7, 1989, hearing on H.R. 1465 that included consideration of the international protocols and their limits of liability, the MLA submitted a statement on September 12, 1989, which explained the importance of liability limits to vessel operators:

Except for very large corporations that can self-insure, responsible shipowners are able to operate ships on a viable basis only if they can obtain insurance in what is a risk-laden business. . . .

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259. See, e.g., 33 U.S.C. § 2702(d)(2)(A); see also supra notes 256-258 and accompanying text.
260. S. 686, 101st Cong. § 102(c)(1) (as passed by the Senate, Aug. 4, 1989).
262. Id.
The shipowner’s limitation of liability is not a limitation on recovery by claimants. More specifically, the limitation merely establishes the point at which payment of claims would shift from the vessel owner to the fund financed by cargo interests.263

Following these submissions, on October 3, 1989, the leading House sponsors introduced new legislation, H.R. 3394, which adopted the recommendation of AIMU and AWO to render the Federal Water Pollution Control Act § 1321(h) inapplicable to an oil spill to which the new legislation was applicable. This provision had previously allowed other nonstatutory remedies against third parties and its repeal protected the OPA statutory limitation of liability.264 As amended, this leading proposal in the House incorporated the recommendations of AIMU, AWO, and the MLA to protect third-party liability limits. It was adopted by the House on November 9, 1989, as part of the en bloc amendments to H.R. 1465 approved by the House, in this instance the conforming amendments to title II of the bill.265 Thereby, Congress took deliberate steps to enact legislation that provided to vessels the limits of liability, which industry representatives had explained were essential, irrespective of contractual relationships. Therefore, the legislative history contradicts the court’s decision in Alex C.

In Evergreen International, S.A. v. Norfolk Dredging Co., the Fourth Circuit declined to address arguments advanced on appeal that the district court had incorrectly calculated an OPA damages cap for a third party under 33 U.S.C. §§ 2702(d)(2) and 2704(c)(1)(B).266 The court concluded the issue was moot because it upheld the district court’s decision on apportionment of fault. However, the decision indicates that the district court had calculated an OPA limitation of liability pursuant to 33 U.S.C. § 2702(d)(2) for a noncontractually related third party (ten percent at fault) for a claim advanced by the responsible party to recover a portion of its oil pollution damages.267 The case arose from an oil spill of several thousand gallons of fuel oil following an allision between a container ship and a submerged dredge spoil pipeline. Among other


266. 531 F.3d 302, 312, 2008 AMC 1678, 1689-90 (4th Cir. 2008).

267. See id. at 311, 2008 AMC at 1688.
things, the vessel interests argued that the dredge operator had violated provisions of the safety manual of the Corps, which was incorporated into the dredging contract pursuant to Corps’ regulations. Therefore, they argued the dredge operator was not entitled to the benefit of an OPA damages cap. Importantly, the court rejected the argument that the Corps safety manual was a regulation for purposes of the Pennsylvania Rule and a fortiori that the dredge operator did not forfeit the benefit of an OPA damages cap for having violated a federal safety regulation.268

B. Preemption

OPA completely eliminated the protections traditionally afforded to vessel owners by the Limitation of Liability Act (Limitation Act).269 And in the second decade of OPA’s history, courts have continued to recognize the demise of the Limitation Act for OPA claims.270 Additionally, courts have recognized the vitality of state law claims preserved by OPA.

In Alex C, the court also addressed the interaction between OPA’s contribution provision, 33 U.S.C. § 2709, and the Limitation Act.271 The court rejected the Department of Justice’s argument that although OPA did not provide a contracting third party any limitation of liability protection, the Limitation Act did. Instead, the court reasoned that OPA was a “comprehensive framework [designed] to address all claims regarding removal costs and expenses incurred in cleaning up oil spills.”272 Furthermore, it cited the United States Court of Appeals for the First Circuit’s decision in Metlife Capital Corp. v. M/V Emily S for the proposition that “claims arising under the OPA (for pollution removal costs and damages) are not subject to the substantive or procedural law of the Limitation Act.”273

Recent decisions have gone even further, declaring that OPA preempts traditional general maritime law claims for oil pollution. The

268. Id. at 310-11, 2008 AMC at 1686-88.
270. See generally Kiern, supra note 1, at 530 (discussing OPA’s elimination of protections afforded by the Limitation of Liability Act).
272. Id., 2011 AMC at 185.
273. Id. (quoting 132 F.3d 818, 819, 1998 AMC 635, 636 (1st Cir. 1997) (internal quotation marks omitted)).
court in *National Shipping* previously opined that “OPA clearly preempts maritime law as to recovery of cleanup expenses and the cost of compensating injured persons” and “only preserves admiralty claims which are not addressed in OPA, such as [a] claim [for] collision damages.”

But that analysis concerned the plaintiff’s attempt to “escape OPA’s limitation provision by bringing multiple counts under general maritime law.”

The question was not considered in the appeal to the Fourth Circuit.

Addressing multiple claims arising from a major oil spill from the tank barge DM-932 on the Mississippi River in 2008, the Eastern District of Louisiana in *Gabarick v. Laurin Maritime (America) Inc.*, granted the vessel interests’ motions to dismiss certain general maritime claims based on OPA preemption. The court quoted the opinion in *Tanguis*, which described OPA’s “new scheme” as one “which, in many respects, preempt[s] traditional maritime remedies.” According to the court, “The text of OPA implies its mandatory and exclusive nature.”

The court found two OPA provisions particularly persuasive: (1) § 2702(a) of the statute, which “mandates the strict liability of the responsible party . . . ‘[n]otwithstanding any other provision or rule of law, and subject to the provisions of this Act’” and (2) § 2713(a), which “uses the absolute words ‘all’ and ‘shall,’ directing the course of action for ‘all claims’ and mandating that they ‘shall’ be presented first to the responsible party.”

The court expressly rejected the claimants’ argument “that OPA is a supplemental rather than exclusive avenue for the damages it covers.” To the contrary, the court stated that the plain language of OPA’s savings provision supported the conclusion that OPA preempts general maritime law claims for oil pollution damages.

The court also rejected the claimants’ arguments grounded in the Constitution, the preemption doctrine, and OPA’s legislative history.

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275. Id.


278. Id. at 746 (quoting Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 867, 2001 AMC 2652, 2662 (E.D. La. 2001)).

279. Id. at 745.

280. Id. (alterations in original) (quoting 33 U.S.C. §§ 2702(a), 2713(a) (2006)).

281. Id. at 746.

282. Id (referencing 33 U.S.C. § 2751(e)).

283. See id. at 746-50.
Importantly, the court underscored “Congress’s intent to minimize piecemeal lawsuits” and outlined the practical claims process provided by OPA. As the court explained:

Claimants should pursue claims covered under OPA only against the responsible party and in accordance with the procedures established by OPA. Then, the responsible party can take action to recover from third parties. Additionally, once claimants have exhausted the OPA administrative remedies, they are then entitled, under the statutory language expressed in OPA, to pursue their claims in federal court. One could interpret this to mean that all actions of claimants that allege damages which are covered by OPA would first go through the OPA claim process prior to any suit against any party.

Relying on the preemption analysis in Gabarick, the Eastern District of Louisiana in In re Settoon Towing LLC, ruled that the government’s oil pollution claims based on general maritime law were likewise preempted by OPA. The case involved an oil spill resulting from the allision of a tugboat, the M/V CATHY M. SETTOON, with an oil well in Bayou Perot in Jefferson Parish, Louisiana. Among others, the United States filed claims under OPA; the Rivers and Harbors Act, 33 U.S.C. § 401; and general maritime law.

Additionally, the court rejected the government’s argument that 33 U.S.C. § 2718(c) permitted the United States to bring general maritime law claims when ordinary claimants could not. Section 2718(c) provides in relevant part that “[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil.” The court distinguished the authorities cited by the government as relying on a Clean Water Act provision, 33 U.S.C. § 1321(h), which “is not included in OPA 90 and that jurisprudence cannot serve as the basis for permitting the United States to maintain general maritime law damage claims alongside identical OPA 90 damage claims.”

While these decisions have preempted general maritime law claims, other decisions have emphasized that OPA does not preempt state law claims. In Williams v. Potomac Electric Power Co., the United States

284. Id. at 750.
285. Id.
287. Id. at *1.
288. Id. at *3.
District Court for the District of Maryland denied the defendant’s motion to dismiss the plaintiffs’ complaint for oil pollution damages under state law on the grounds that OPA’s comprehensive scheme governed and plaintiffs had failed to satisfy OPA’s presentment requirement. In April 2000, approximately 100,000 gallons of oil spilled from a Potomac Electric Power Company (PEPCO) pipeline into the Patuxent River and washed ashore on land owned by plaintiffs, who brought suit in Maryland state court under state law. PEPCO removed the case to federal court and moved to dismiss the complaint for failure to satisfy OPA’s presentment requirement. However, the court rejected PEPCO’s arguments and explained that the question had effectively been put to rest by the Supreme Court’s decision in United States v. Locke. According to the court, although Locke did not decide the issue, the Supreme Court’s discussion of the scope of OPA’s preemption left no doubt regarding the result.

Likewise, in Isla Corp. v. Sundown Energy, LP, the Eastern District of Louisiana rejected the same argument advanced for the same purpose, i.e., seeking dismissal for failure to satisfy OPA’s presentment requirement. That case arose in August 2005 following an oil discharge that had occurred when oil storage tanks ruptured during Hurricane Katrina. The defendant argued that OPA provided the exclusive remedy and preempted state law remedies. Rather than relying on Locke, in this instance the court instead invoked Tanguis, stating, “[This] Court expressly recognized that the OPA ‘does not preempt state law in the area of oil spill liability and compensation.’” While the court in Tanguis ruled on the question of removal of OPA claims from a state court, its discussion reflected the view that OPA plainly did not preempt state law claims and referenced OPA legislative history to that effect.

Also, in the context of a removal proceeding arising from the Deepwater Horizon incident, the United States District Court for the District of Delaware in St. Joe Co. v. Transocean Offshore Deepwater

292. Id. at 562-65 (discussing United States v. Locke, 529 U.S. 89, 104-06, 2000 AMC 913, 922-24 (2000), which held that the savings clause in Title I of OPA preserves state law actions of a similar nature).
293. Id. at 565.
295. Id. at *1-2 (quoting Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 863, 2001 AMC 2652, 2657 (E.D. La. 2001)).
296. See Tanguis, 153 F. Supp. 2d at 863-64, 2001 AMC at 2657 (citing S. REP. No. 101-94, at 6 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 727 (indicating legislative intent to affirm rights of States to protect their resources by permitting them to establish more restrictive standards than federal standards)).
Drilling Inc. held that OPA did not preempt state tort claims based on oil pollution damage. That case arose from state law tort claims filed by a Florida company against certain defendants apparently related to the oil rig (collectively “Transocean”) in Delaware state court. Transocean removed the case to federal court and the Florida plaintiff sought to remand it to state court. Transocean argued that federal question jurisdiction existed to defeat remand because OPA preempts state tort claims. In rejecting that argument, the court underscored OPA's savings clauses that expressly preserve state law remedies for oil pollution. It also highlighted the legislative history and previous decisions of the Supreme Court and the First Circuit.

Considered together, these preemption decisions underscore the power of OPA's statutory provisions. On the one hand, they have been applied by the courts to restrict resort to traditional maritime remedies for oil pollution damages apart from OPA. On the other, they have preserved state remedies for oil pollution notwithstanding OPA's comprehensive nature.

C. Economic Loss Without Physical Damage to Claimant

As discussed in the companion article published in this Journal in the spring of 2000, OPA abrogated the traditional admiralty protection to vessel owners provided by the Supreme Court’s decision in Robins Dry Dock & Repair Co. v. Flint. OPA's legislative history explains:

Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the act of March 3, 1851 (46 U.S.C. 183), or under existing requirements that physical damage to the proprietary interest of the claimant be shown.

Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For

298. Id. at 598-99, 602.
300. See Kiern, supra note 1, at 531-32 (discussing Robins Dry Dock & Repair v. Flint, 275 U.S. 303, 1928 AMC 61 (1927)).
example, a fisherman may recover lost income due to damaged fisheries resources even though the fisherman does not own those resources. 301

Despite this plain statement of congressional intent, litigants have continued to seek protection from the Robins Dry Dock Rule and its progeny that state “physical injury to a proprietary interest is a prerequisite to recovery of economic damages in cases of unintentional maritime tort.” 302 In In re Settoon Towing LLC, ruling on a summary judgment motion, the Eastern District of Louisiana cited the decisions of three courts of appeals in rejecting the argument that physical injury to the claimant’s property was a prerequisite for economic damage claims under OPA. 303 The court refused to dismiss claims filed in the limitation proceeding by the owner and operator of the discharging well struck by the tug and barge. These included economic loss claims by third parties alleging an inability to access a nearby oil production platform; potential suits for economic damages for the shutdown of the Gulf Intracoastal Waterway; potential natural resource damage claims by the government; and potential increased costs for the well owner due to increased insurance, overhead, lost business opportunities, and potential cleanup costs if the well plugging failed. The court admitted the “speculative nature” of claims based on “‘potential’ suits,” but declined to dismiss the potential claims prior to the three year statute of limitations for the filing of OPA claims. 304 It did the same for potential natural resource damage claims. The court also allowed the other claims which lacked documentation to proceed subject to proof. 305

Likewise, in Dunham-Price Group, LLC v. Citgo Petroleum Corp., the United States District Court for the Western District of Louisiana rejected Citgo’s summary judgment motion, which argued that OPA required that the claimant sustain physical property damage to recover for economic loss. 306 In that case, the Coast Guard closed twenty-two miles of the Calcasieu River in response to an oil spill from Citgo’s oil refinery in Lake Charles, Louisiana. Dunham-Price, which operated a

304. Id.
305. Id. at *5-8.
concrete facility upriver from the oil spill, asserted a claim for “sustained loss of use, increased expense, business interruption and related damages.” 307 Although Dunham-Price had sustained no physical injury from the oil spill, it sued to collect its economic damages under OPA. Citgo argued that OPA’s plain language required that a claimant sustain physical injury. Citgo cited the statute’s text permitting “[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, or natural resources, which shall be recoverable by any claimant.” 308 Citgo argued that this language meant that “a plaintiff must prove that his injuries are directly ‘due to’ property damage resulting from an oil discharge.” 309 Further, Citgo argued that Dunham-Price’s damages were “due to the closure of the Calcasieu Ship Channel and not attributable to a physical injury to property or natural resources.” 310 Citing the legislative history and previous decisions, the court rejected Citgo’s argument and explained succinctly that the statute “allows a plaintiff to recover economic losses resulting from damage to another’s property.” 311 The court held that whether or not Dunham-Price’s damages were due to Citgo’s oil spill was a matter for the trier of fact. However, the court dismissed Dunham-Price’s state law claims because they were subject to the Robins Dry Dock Rule. 312

D. Punitive Damages

The availability of punitive damages under general maritime law after the enactment of OPA remained unclear after OPA’s first decade. 313 However, in South Port Marine, LLC v. Gulf Oil Ltd. Partnership, the First Circuit ruled that punitive damages are not part of OPA’s comprehensive scheme and therefore were not available under the general maritime law because Congress intended OPA to be the exclusive federal law governing oil spills. 314 The court began by posing the issue: “The question before us, therefore, is whether, by leaving punitive damages out of the OPA, Congress intended to supplant the general

307. Id. at *1 (internal quotation marks omitted).
308. Id. at *2 (alterations in original) (quoting 33 U.S.C. § 2702(b)(2)(E) (2006)) (internal quotation marks omitted).
309. Id.
310. Id.
311. Id.
312. Id. at *3.
314. 234 F.3d 58, 64-66, 2001 AMC 609. 616-19 (1st Cir. 2000).
admiralty and maritime law that existed prior to the enactment of the statute, which permitted the award of punitive damages for reckless behavior."\textsuperscript{315} The court’s analysis turned principally on its reading of the “text of the statute itself.”\textsuperscript{316} In that respect, the court found the statute’s listing of recoverable damages which omitted punitive damages to be decisive. The court acknowledged that OPA expressly does not preempt states from “imposing any additional liability,” but explained that the question before the court concerned general admiralty and maritime law, not the law of Maine.\textsuperscript{317} Therefore, the court looked to its own precedent interpreting the Supreme Court’s decision in Miles v. Apex Marine Corp., concluding that that authority “dictates deference to congressional judgment ‘where, at the very least, there is an overlap between statutory and decisional law.’”\textsuperscript{318} The court also rejected the plaintiff’s argument that Congress’s principal motivation in OPA was to benefit victims and punish perpetrators as “simpleminded.”\textsuperscript{319} The court explained that “OPA embodies Congress’s attempt to balance the various concerns at issue” and “that the resolution of these difficult policy questions is better suited to the political mechanisms of the legislature than to our deliberative process.”\textsuperscript{320} In Clausen v. M/V New Carissa, the United States District Court for the District of Oregon adopted the First Circuit’s rationale in another oil pollution incident along the Oregon coast where plaintiffs sought punitive damages for destruction of several million oysters.\textsuperscript{321} In its decision, the court went further however, concluding that “the relationship between . . . statutory provisions” concerning limitation makes it “unreasonable to read the statute as authorizing punitive damages.”\textsuperscript{322} Thus, taken together these decisions appeared to leave those seeking an award of punitive damages for oil pollution incidents to seek out state authorities.

However, subsequent decisions may signal a revival of punitive damages under general maritime law for oil pollution incidents. As an initial matter, twice in 2008 the Supreme Court reaffirmed the

\begin{footnotes}
\item[315] \textit{Id.} at 64-65, 2001 AMC at 617.
\item[316] \textit{Id.} at 65, 2001 AMC at 617.
\item[317] \textit{Id.} (quoting 33 U.S.C. § 2718(a) (2006)).
\item[318] \textit{Id.} at 66, 2001 AMC at 618 (quoting CEH, Inc. v. F/V Seafarer (ON 675048), 70 F.3d 694, 701, 1996 AMC 467, 476 (1st Cir. 1995)) (citing Miles v. Apex Marine, 498 U.S. 19, 31, 1991 AMC 1, 19 (1990)).
\item[319] \textit{Id.}, 2001 AMC at 619.
\item[320] \textit{Id.}
\item[321] 171 F. Supp. 2d 1127, 1133-34 (D. Or. 2001).
\item[322] \textit{Id.} at 1134 & n.4.
\end{footnotes}
availability of punitive damages under the general maritime law.\textsuperscript{323} Then, on August 26, 2011, the Eastern District of Louisiana issued an order in the Deepwater Horizon litigation disagreeing with the First Circuit’s reasoning in \textit{South Port}.\textsuperscript{324} According to the court, “[M]ore recent Supreme Court precedents cause this Court to question the notion that long-standing federal common law can be displaced by a statute that is silent on the issue.”\textsuperscript{325} Citing the Supreme Court’s decisions in \textit{Exxon Shipping Co. v. Baker} and \textit{Atlantic Sounding v. Townsend}, the court concluded that OPA did not bar punitive damages because (1) OPA does not occupy “the entire field of oil spill liability,” (2) Congress did not expressly “proscribe punitive damages,” and (3) punitive damages are consistent with OPA’s provision breaking limitation of liability for “gross negligence.”\textsuperscript{326} This decision will undoubtedly be appealed to the Fifth Circuit and perhaps the Supreme Court.

Although the court’s application of these more recent Supreme Court decisions presents an important development, it remains unclear if those decisions really dictate the outcome it reached. First, the Clean Water Act scheme at issue in \textit{Baker} was much less comprehensive than the OPA framework at issue here. Moreover, OPA’s statutory language preserving admiralty and maritime law is expressly limited by the all-important qualifier, “[e]xcept as otherwise provided,”\textsuperscript{327} which poses the essential question whether or not the statue otherwise provides. In this regard, because the first expressed purpose of OPA is to “establish limitations on liability for damages resulting from oil pollution,”\textsuperscript{328} those limitations should be respected. Furthermore, the statute separately provides an express \textit{civil} penalty provision for gross negligence of up to $4300 per barrel,\textsuperscript{329} which as we know, potentially amounts to $21.5 billion in this instance. Because the purposes of punitive damages are to punish and deter,\textsuperscript{330} it would appear that the statute already does that quite

\begin{itemize}
\item \textsuperscript{324} \textit{In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010}, No. MDL 2179, 2011 WL 3819196 (E.D. La. Aug. 26, 2011).
\item \textsuperscript{325} Id. at *12-15. The order also accorded with recent decisions regarding OPA’s preemptive effect regarding the general maritime law, but distinguished that effect between OPA responsible parties and non-responsible parties which retained rights to general maritime claims.
\item \textsuperscript{326} Id. at *14 (quoting \textit{Baker}, 554 U.S. 471; \textit{Atl. Sounding}, 128 S. Ct. 2561, 2009 AMC 1521).
\item \textsuperscript{327} See 33 U.S.C. § 2751(e) (2006).
\item \textsuperscript{328} \textit{Oil Pollution Act of 1990}, Pub. L. No. 101-380, pmbl., 104 Stat. 484.
\item \textsuperscript{329} \textit{Id.} sec. 4301(b)(7)(D), 104 Stat at 537 (codified as amended at 33 U.S.C. § 1321(b)(7)(D) (as modified by 40 C.F.R. § 19.4 (2010)); \textit{Nat’l Comm’n on the BP Deepwater Horizon Oil Spill & Offshore Drilling}, \textit{ supra} note 10, at 211.
\item \textsuperscript{330} See \textit{Baker}, 554 U.S. at 492.
\end{itemize}
effectively as written. Thus, as an initial matter it can be argued that the statute has “otherwise provided” and therefore, general maritime punitive damages are not available.

E. Oil Spill Liability Trust Fund

During OPA’s second decade, the OSLTF continued to be a less than hospitable source of relief for claimants seeking compensation and often a trap for the unwary. 331 To be sure, much of the problem flows from the statute itself, which makes recovery from the OSLTF difficult; however, the parsimonious approach of the Coast Guard’s NPFC has also caused claimants to continue to resort to the courts to provide oversight of the Coast Guard’s decision making with respect to administration of the OSLTF claims function.

In Apex Oil Co. v. United States, the Eastern District of Louisiana upheld the decision of the NPFC denying a claim for reimbursement of $2.7 million in oil pollution removal costs. 332 The plaintiff Apex Oil Co. (Apex) incurred the removal costs in response to its discharge of approximately 840,000 gallons of slurry oil on June 16, 1995, when two of its barges allided with a bridge crossing the Mississippi River near Vicksburg, Mississippi. The incident occurred amidst “the flood of 1995 and exceptionally strong and unpredictable currents in the Vicksburg area.” 333 Following a determination by the Coast Guard marine casualty investigation that “no negligence” was involved and that “a prudent mariner could not have foreseen the situation,” Apex submitted its claim for reimbursement to the NPFC. 334 The NPFC denied the claim because the plaintiff had failed to carry its burden of proof for the “act of God” defense by showing that an “act of God” was the sole cause of the discharge. 335 Furthermore, the NPFC rejected Apex’s argument that the extraordinary flood conditions constituted an OPA “act of God.” The NPFC also concluded that Apex’s decisions, including the use of an underpowered pushboat, contributed to the incident, and therefore, the requirements of OPA’s “act of God” defense were not satisfied. 336 The court applied the typical deferential standard of review accorded agencies in similar circumstances, but emphasized that its review of the agency’s

331. See, e.g., Kenan Transp. Co. v. U.S. Coast Guard, 211 F. App’x 902, 905 (11th Cir. 2006) (interpreting 33 U.S.C. § 2712(f) to deny claim for uncompensated removal costs because the claimant signed a release).
333. Id. at 645, 2002 AMC at 494.
334. Id.
335. Id. at 646, 2002 AMC at 495.
336. Id. at 647, 2002 AMC at 496-97.
interpretation of OPA was “plenary.” 337 With respect to the factual record, the court concluded that there was substantial evidence to support the agency’s decision that Apex contributed to the incident, and even went so far as to opine that “[t]he most apparent cause was the underpowered Apex tug.” 338 On the law, the court provided an extensive analysis that concluded that an OPA “‘act of God’ must result solely from a grave natural disaster, and be unanticipated.” 339 Importantly, the court stated that “in light of the legislative history and apparent Congressional intent, the OPA’s ‘act of God’ defense should be read to be at least as restrictive in its scope as it is under both the [Clean Water Act] and CERCLA.” 340 Consequently, the decision underscores the almost insurmountable obstacles that claimants face when trying to advance a claim based on OPA’s “act of God” defense.

In Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, the United States District Court for the District of Columbia granted summary judgment for the government where the plaintiff, pursuant to OPA, sought reimbursement of costs and lost profits relating to an oil spill on property it owned, which the plaintiff claimed came from another source. 341 The incident occurred on July 1, 1998, when oil discharged into Soapstone Creek from a construction site in Washington, D.C. The plaintiff property owner claimed that it incurred removal costs and damages of nearly $2 million because of the incident. The plaintiff also alleged that the oil originated from oil tanks at the nearby University of the District of Columbia. However, the NPFC concluded that there was no evidence in the record that the oil originated elsewhere other than the plaintiff’s property and denied the claim. 342

In reviewing the agency’s decision denying the claim, the court highlighted key points regarding judicial review in these cases: (1) the narrow nature of the standard of review, (2) that there must be a rational connection between the facts and the agency decision, (3) that the agency must submit a reasonable explanation, and (4) that the record must not belie the conclusion. 343 Applying that standard of review, the court held that the agency’s conclusion was reasonable and faulted the plaintiff for failing to sustain its burden of proof. 344

337. Id. at 648-50, 2002 AMC at 499-500.
338. Id. at 657, 2002 AMC at 510.
339. Id.
340. Id. at 654, 2002 AMC at 507.
342. Id. at 73-75.
343. Id. at 79.
344. Id. at 84.
Smith Property highlights the strict liability that OPA can visit upon innocent landowners who find that they have purchased a major hidden environmental liability. In that case, the plaintiff purchased the parcel from a realty company that had owned it for over forty years. The discharge occurred during excavation for the construction of a new apartment complex on the property and the plaintiff claimed that it knew nothing about the oil on the property that discharged. In these circumstances, there can be no substitute for thorough environmental due diligence, comprehensive insurance, and hold-harmless and indemnification agreements from the previous property owner.

In Water Quality Insurance Syndicate v. United States, the D.C. District Court overturned a decision by the NPFC that had denied a claim for reimbursement of removal costs incurred by an insurer where the incident was the result of willful misconduct by the responsible party. The claim arose on January 7, 1994, from the grounding of a tank barge carrying a cargo of fuel oil on a reef off the coast of Puerto Rico. The incident caused significant damages and resulted in an expensive removal operation that totaled over $100 million. The Water Quality Insurance Syndicate (WQIS), the plaintiff insurance company, provided oil pollution insurance to the responsible party barge owner. Ultimately, WQIS paid out approximately $9.5 million in the removal action. Subsequently, in 1996 the responsible party was convicted of knowingly sending to sea a vessel in an unseaworthy condition likely to endanger life. Following the conviction of its insured, in 1998 the plaintiff sought reimbursement from the OSLTF by invoking the OPA defense that the incident was caused by the willful misconduct of the responsible party. The NPFC denied the claim for two reasons: (1) the sole proximate cause of the discharge was a single negligent act, “improper repair of the tow wire,” not willful misconduct, and (2) the insurer of the responsible party had no claim for reimbursement because it “steps into the shoes” of the responsible party. The court soundly rejected the NPFC’s reasoning and agreed with the plaintiff’s arguments challenging the NPFC decision.

First, the court highlighted the NPFC’s statutory error in focusing on the cause of the “discharge” rather than the “incident,” which is a much broader concept. Second, the court criticized the NPFC for having shunned the authorities establishing that willful misconduct includes “a
series of negligent acts." Finally, the court concluded that the NPFC’s position that the insurer could not recover “contradicts the plain language of the OPA,” which “does not purport to exempt the Fund from liability for claims of guarantors and insurers such as plaintiff.” This case illustrates the willingness of a court to provide proper judicial oversight of the NPFC and demonstrates the proper role of the judicial branch in determining what the law means as compared to what the agency wishes the law to be.

In a separate case involving the same parties, Water Quality Insurance Syndicate v. United States, the District of Massachusetts upheld the NPFC decision that the responsible party did not enjoy the benefit of OPA’s limitation of liability cap of $500,000. The incident arose from the September 6, 2003, sinking of a tug boat off the coast of Massachusetts and the resulting oil spill and threat of a discharge of oil from the sunken vessel. The responsible party’s insurer, WQIS, paid the removal costs and then submitted a claim to the NPFC for reimbursement in the amount of approximately $492,000, which represented the portion of costs it incurred in excess of OPA’s statutory limitation of liability. The NPFC denied the claim on two bases: (1) the tug operator’s gross negligence caused the incident, and (2) he had violated the Coast Guard safety regulations requiring familiarity with the vessel and limiting work hours to twelve within a twenty-four-hour period. At the outset, the court emphasized that the burden of proof to establish limitation of liability under OPA rests with the claimant. The court also concluded that the administrative record amply supported the agency’s conclusions.

This case illustrates the courts’ remarkable deference to the agency in applying the legal standard of gross negligence to the facts of the case. Indeed, the court merely opined that the agency’s “application of the standard to the facts in this case is consistent with precedent,” and “[i]t is not this court’s role to substitute its judgment for that of the NPFC.” Notwithstanding this deference regarding the gross negligence standard, the result would not likely have changed under a more rigorous review. This is because the court also concluded that the evidence supported the NPFC’s conclusion that Coast Guard safety regulations had been

350. Id. at 228, 2008 AMC at 292-94.
351. Id. at 231-32, 2008 AMC at 295-96.
353. Id. at 112, 2009 AMC at 1946.
354. Id. at 115-16, 2009 AMC at 1952-54.
355. Id. at 115, 2009 AMC at 1953.
This case highlights the challenges responsible parties can encounter when attempting to limit liability in the face of deferential courts and a comprehensive regulatory regime. In most oil spill incidents, the vague standard of gross negligence will be liberally applied by the NPFC and the likelihood of some violation of safety regulations will be substantial as the next case illustrates.

In *Bean Dredging, LLC v. United States (Bean I)*, the D.C. District Court remanded the case “to the NPFC for further explanation of its interpretation of the relevant regulations and its reasons for rejecting the interpretation advanced by Bean Dredging.”357 The case arose following an oil spill from the dredge STUYVESANT in Humbolt Bay, California on September 6, 1999. The discharge occurred when a dredge head struck the STUYVESANT’s fuel oil tank as it was executing a 180-degree turn during dredging operations. The Coast Guard estimated that approximately 2100 gallons of oil spilled resulting in removal costs of $8.5 million and natural resources damages of $7.8 million. Subsequently, Bean Dredging submitted a claim to the NPFC for reimbursement of $11.7 million, representing its removal costs and damages in excess of its OPA limit of liability. The NPFC denied the claim because it concluded that the dredge had been operated in violation of two Coast Guard operating and safety regulations that prohibited the operation when the seas exceeded ten feet.358 The claimant sought judicial review, arguing that the agency departed from its own regulations by misinterpreting the term “seas.”359 The claimant explained that the agency’s own regulatory history established that the term “seas” was a term of art that meant “waves of more than 10 feet occur with a degree of regularity and not just occasionally.”360 The court faulted the NPFC’s written decision for “not contain[ing] any explicit discussion” of its decision to reject claimant’s argument.361 Despite the lack of explicit discussion, the government argued that the agency should be accorded substantial deference in the interpretation of its own regulations. The court rejected this argument explaining that “the Court cannot—without a forthright agency interpretation—determine whether deference is, in fact, appropriate in this case.”362

358. *Id* at 121-23.
359. *Id* at 123.
360. *Id*.
361. *Id* at 127.
362. *Id*.
The claimant also challenged the NPFC’s denial of its claim on the grounds that the NPFC’s determination of the violations of operating and safety regulations was contradicted by the Coast Guard’s Marine Casualty Investigation Report (MCIR). However, the court rejected this argument, explaining that simply because the MCIR did not find Bean Dredging in violation of the regulations did not mean that the NPFC was acting arbitrarily or capriciously. As the court explained, the NPFC has de novo authority for “review of the evidence and to reach its own conclusions” and “is not bound by such reports of investigation.”

This decision, remanding the matter to the agency for reconsideration, represents another positive but rare example of a court providing useful judicial review by requiring the NPFC to actually explain its decision and not allowing it to simply hide behind a vague assertion that it should be shown “deference.” Only when courts require the NPFC to justify its decisions by providing proper written explanations supported by both the law and the facts can the plight of prospective OSLTF claimants have any hope of improving.

On remand, the NPFC again denied the claim, and Bean Dredging challenged the new decision. In Bean Dredging, LLC v. United States (Bean II), the court upheld the NPFC’s decision denying the claim on the merits, and in doing so, highlighted the fundamental difficulty of a responsible-party claimant that bears the burden of showing that it is entitled to compensation under the statute.

In its reconsideration of the claim, the NPFC finally adopted Bean Dredging’s proposed interpretation of the term “seas.” With the dispute over the regulatory interpretation of that term resolved, the court emphasized that its role in judicial review was actually quite narrow and was limited to “whether the NPFC erred in making specific evidentiary determinations and whether its ultimate decision to deny Bean Dredging’s claim for reimbursement was arbitrary or capricious.”

In its new decision denying the claim, the NPFC also decided that the term “seas” would only be applied based upon “the informed observations of a ‘trained mariner’” and not “post hoc data collection and mathematical computation.” As a result, according to the court, the evidence in the record from the contemporaneous statements of the

363. Id. at 128.
364. Id. at 129 (referencing Use of Reports of Marine Casualty in Claims Processes by National Pollution Funds Center, 71 Fed. Reg. 60,553 (Oct. 13, 2006)).
366. Id. at 72.
367. Id. at 80.
368. Id. at 72.
vessel’s master provided the NPFC a basis upon which to conclude that Bean Dredging “failed to establish that it was not in violation of the relevant regulations.”

Bean Dredging took “issue with a number of evidentiary determinations made by the NPFC,” but as the court explained, “Bean Dredging fail[ed] to give due account to the scope of an agency’s discretion to evaluate the credibility and weight of evidence in the administrative record and to draw inferences therefrom.” The court emphasized that when it comes to matters of credibility, “absent clear error, ‘an agency’s credibility decision normally enjoys almost overwhelming deference.’” Furthermore, the court opined that the inferences the NPFC drew from the evidence in the record were permissible because they had support in the record, and the court would not second-guess the agency in this circumstance. As the court concluded:

> [T]he system of administrative action and judicial review fashioned by Congress vests in agencies the discretion to choose between competing inferences, provided that those inferences are reasonably based in the administrative record. For various reasons, the inference drawn by the NPFC in this instance was, if not the only one available, nevertheless a permissible one. . . .

Finally, the court criticized Bean Dredging for missing the overarching legislative framework at play: “Bean Dredging’s failure to fully acknowledge that it had the burden of proof of establishing its entitlement to reimbursement on the administrative level and the fact that it has the burden of proof of establishing agency error now.” According to the court, “[s]trictly speaking, the NPFC did not determine that the Humboldt Bay oil spill was proximately caused by the Stuyvesant’s violation of the applicable regulations,” but rather “that Bean Dredging had simply failed to carry its burden of proving that it was entitled to a limitation of liability under 33 U.S.C. § 2704.”

Therefore, Bean II underscores the very high barrier that a responsible party claimant faces when it seeks reimbursement from the OSLTF. According to that decision, OPA “created a default presumption assigning liability to the owners and operators of vessels that discharge

369. Id.
370. Id. at 80.
371. Id. at 81 (quoting Sasol N. Am. Inc. v. NLRB, 275 F.3d 1106, 1112 (D.C. Cir. 2002)).
372. Id. at 84.
373. Id. at 86.
374. Id. at 86-87.
oil into the navigable waters of the United States. That high barrier, combined with the low standard that the NPFC must satisfy and the courts’ deference accorded to the NPFC, have rendered the OSLTF an unlikely source of compensation for responsible parties claiming the benefits of statutory limitation or a complete defense. The NPFC has proven adept at finding bases upon which to deny claims that are very difficult to overturn through judicial review. Therefore, the NPFC will likely continue to render unsatisfactory decisions, relying principally on a minimal requirement for some evidence in the record and a highly deferential standard of review, knowing that the cost and burden that claimants must bear to challenge NPFC decisions will usually deter them in the first instance. Against this backdrop, responsible parties should generally not count on reimbursement from the OSLTF as a likely outcome if they step up and expend the funds necessary to respond to an oil spill, irrespective of fault and OPA’s limits of liability. While there may be other sound reasons for potential responsible parties to respond immediately and expend sums to remove oil and compensate claimants, the expectation that the OSLTF will reimburse them later for payments made beyond their legal responsibility is not a good reason anymore. In this respect, OPA has plainly failed to realize its promise of encouraging private party responses to oil pollution incidents.

V. CONCLUSION

At the end of its second decade, OPA’s record of performance with respect to liability, compensation, and financial responsibility matters remains mixed, and it continues to fall short of its promise. The Deepwater Horizon incident highlighted its most serious shortcomings. The limited amount of emergency funding available, the low per-incident caps, and the small size of the OSLTF all seem woefully inadequate when compared to the extraordinary costs and potential damages for which it may be responsible in a major oil spill. The Coast Guard should not have to get an act of Congress to be able to fund emergency response operations. The per-incident caps are either plainly exceeded, as in the case of natural resource damages, or about to be exceeded in the case of removal costs. Likewise, the $75 million limit of liability for damages from a discharge for an offshore facility seems tiny in the face of damages already paid approaching $5 billion and current damage estimates exceeding $40 billion. Legislative change is plainly warranted in these respects.

375. Id. at 86.
But other less dramatic problems also remain as courts have struggled to interpret key provisions of the statute. The results-oriented outcomes of some decisions are troubling as courts ignore the statute’s plain language to achieve a particular outcome. Legislative action appears warranted to resolve the nettlesome matter of limitation of liability for third parties and to eliminate the anomaly created by one court, whereby a mere contractual relationship destroyed the protection of limitation under the statute. Left uncorrected, this decision has the potential to result in unnecessary litigation resulting from conflicting decisions on the subject. As discussed above, the decision is contrary to congressional intent, and it makes no sense to penalize such third parties as compared to others, including responsible parties who enjoy the benefit of statutory limitation of liability.

Another area of useful reform would be for Congress to allow potential responsible parties erroneously targeted by the government to recover their attorney’s fees and costs from the OSLTF. It is one thing to require responsible parties to bear their own legal costs to internalize the costs of pollution, but it is entirely another to provide no remedy to parties incorrectly targeted by the government for oil pollution removal costs and damages in a strict liability regime. If the government cannot prevail in that setting, then the erroneously targeted party should recover its fees and costs to defend itself from such a baseless suit.

Finally, the parsimonious approach of the Coast Guard’s NPFC toward reimbursing responsible parties in the circumstances permitted by the statute threatens to undermine the willingness of responsible parties to respond to oil pollution incidents in circumstances where they have a potential defense or a limitation of liability under the statute. The incorrect legal positions that the NPFC has taken in the cases outlined above, coupled with the agency’s view that vessel responsible parties are benefiting inequitably from the OSLTF, suggests that the NPFC is either not doing its homework or that it is more interested in finding ways not to pay responsible parties than it is in honoring the statutory balance crafted by Congress, which seeks to encourage private parties to respond to incidents under the statute. In circumstances such as these, where there is evidence of a viable statutory defense or where liability should be limited to OPA’s statutory limits, responsible parties should seriously consider whether the better course at the outset is not to accept the designation as the responsible party and not to incur removal costs and damages, but instead to make the government prove its case later. Of course, other good reasons may lead a responsible party to accept the designation and respond to clean up the oil pollution, but the decision
should not be made on the basis of a reasonable likelihood that the costs incurred will be recoverable later from the OSLTF.