

# It's Been 4380 Days and Counting Since EXXON VALDEZ: Is It Time to Change the Oil Pollution Act of 1990?

Browne Lewis\*

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## I. INTRODUCTION

In light of the highly publicized energy shortages in California and the high fuel prices nationwide, the Bush Administration wants Congress to pass legislation that would permit oil exploration in the Alaskan Arctic

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\* Instructor, Hamline University School of Law; B.A. 1983, Grambling State University; J.D. 1988, University of Minnesota; M.P.A. 1989, Hubert H. Humphrey Institute of Public Affairs, University of Minnesota; LL.M. 1997, University of Houston.

National Wildlife Refuge.<sup>1</sup> President Bush has been able to make a strong case for his position because oil is an important part of our daily lives. We use it to run our cars, to heat our homes, and to cook our food. Thus, any action that would make the price of oil cheaper appears to be a good idea. The Bush Administration's proposal has also received support from natives of Alaska because of the promise of economic prosperity in the region.<sup>2</sup>

However, the Bush Administration's desire to allow drilling in Alaska has not gone unchallenged.<sup>3</sup> Environmentalists who oppose drilling in Alaska have been quick to point out that pollution from petroleum products is one of the most widespread problems in pollution of the ocean.<sup>4</sup> They also emphasize that oil pollution can have devastating effects on the marine environment.<sup>5</sup> For example, the discharge of oil into the ocean may disrupt the food chain by poisoning algae, kelp, phytoplankton, benthic organisms, clams, crabs, lobsters, and sea birds.<sup>6</sup> In addition, the destruction of marine habitats and the poisoning of many millions of invertebrates can ruin the breeding grounds of many birds and fish.<sup>7</sup> Physical damage to the marine environment from oil spills can also cripple the local fishing industry.<sup>8</sup> Aside from causing physical damage to the environment, an oil spill can destroy the aesthetic beauty of the coastal area.<sup>9</sup> As a result, tourism in the coastal areas near an oil spill is often adversely affected.

Every year thousands of oil spills are reported that either pollute, or threaten to pollute, the waters of the United States.<sup>10</sup> From 1973 through 1984, the United States experienced between 9000 and 12,000 oil spills in its waters each year.<sup>11</sup> Most of those spills were small enough that no

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1. See Robert Schlesinger, *Citing Oil Need, Bush Pushes Energy Bill; Senate Seeks Block on Arctic Drilling*, BOSTON GLOBE, Oct. 12, 2001, at A6.

2. See *id.*

3. See *id.*

4. See David P. Berschauer, *Oil and Water Don't Mix: Federal Private Causes of Action for Oil Spill Damages*, 20 SW. U. L. REV. 395, 397 (1991) (discussing the hazards of oil pollution).

5. See *id.*

6. *Id.* at 397-98.

7. B. MCCONNAUGHEY & R. ZOTTOLI, INTRODUCTION TO MARINE BIOLOGY 478-80 (4th ed. 1983).

8. See *Union Oil Co. v. Oppen*, 501 F.2d 558, 560 (9th Cir. 1974) (discussing damage to fishing grounds as a result of a Santa Barbara oil spill).

9. Dan McFadden, *Paradise Lost: EXXON VALDEZ 10 Years Later*, MSNBC, at <http://www.msnbc.com/news/252314.asp> (Mar. 24, 2001).

10. For example, in 1989, the Coast Guard investigated 7859 marine pollution incidents. R. Michael Underhill, *The Sovereign As Plaintiff: Clean Seas and Other Coin of the Realm*, 3 U.S.F. MAR. L.J. 37, 37 (1991).

11. H.R. REP. NO. 101-1026, at 26 (1990), reprinted in 1990 U.S.C.C.A.N. 727, 750.

cleanup effort was deemed necessary.<sup>12</sup> Nevertheless, during that time period, the total amount of oil released into the United States marine environment from oil spills ranged from a low of 8.2 million gallons in 1977 to a high of 21.5 million gallons in 1975.<sup>13</sup> According to the United States Coast Guard (U.S.C.G.), from 1980 to 1986, 91 million gallons of oil spilled into U.S. waters.<sup>14</sup>

According to statistics maintained by the U.S.C.G., there have been no spills of over one million gallons since 1990.<sup>15</sup> The volume of oil spilled into United States waters has continued to decline.<sup>16</sup> However, the largest oil spill into United States waters, since 1996, occurred on November 28, 2000.<sup>17</sup> That spill happened when a tank ship, WESTCHESTER, grounded in the Mississippi River.<sup>18</sup> As a result of the accident, approximately 538,000 gallons of crude oil were spilled into the river from the number one cargo tank.<sup>19</sup>

In order to further bolster their position that oil spills pose a significant threat, environmentalists have raised the specter of the EXXON VALDEZ.<sup>20</sup> On March 24, 1989, the tanker EXXON VALDEZ<sup>21</sup> ran aground on Bligh Reef, Prince William Sound, Alaska.<sup>22</sup> The result was the worst oil spill disaster in the nation's history.<sup>23</sup> Almost eleven million gallons of crude oil poured into one of the most sensitive ecosystems in the country in less than five hours.<sup>24</sup> The damage to the environment was immediate and severe. An estimated 250,000 seabirds, 2800 sea otters, 300 harbor seals, 250 bald eagles, and 22 killer whales were killed as a result of the spill.<sup>25</sup> The oil washed up on approximately

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12. *Id.*

13. *Id.*

14. Underhill, *supra* note 10, at 37.

15. *Id.*

16. See United States Coast Guard, Oil Spill Report: Annual Data and Graphics (1969-2000), at <http://www.uscg.mil/hq/gm/nwc/response/stats/ac.htm> (last visited Feb. 15, 2002).

17. *Id.*

18. *Id.*

19. *Id.*

20. See *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773 (9th Cir. 1994), *cert. denied*, 513 U.S. 1102 (1994).

21. The ship has been renamed SEA RIVER MEDITERRANEAN and carries crude between the Middle East and Europe. See *Seariver Mar. Fin. Holdings, Inc. v. Pena*, 952 F. Supp. 9, 10 (D.D.C. 1997).

22. McFadden, *supra* note 9, at <http://www.msnbc.com/news/252314.asp>.

23. *Id.*

24. *Id.*

25. The state of Alaska and the United States sued Exxon for the injury to the environment. In order to resolve those cases, Exxon signed a consent decree on October 8, 1991, agreeing to pay at least \$900 million to restore the damaged natural resources. See *Eyak Native Vill.*, 25 F.3d at 775.

1300 miles of shoreline and drifted as far west as the Aleutian Peninsula.<sup>26</sup> According to a reporter on the scene, the oil was everywhere, even tracked into the hotels.<sup>27</sup> In addition to the EXXON VALDEZ incident, persons against drilling in Alaska have pointed to a recent oil spill into Prince William Sound, Alaska to demonstrate that the area is still vulnerable to oil spills.<sup>28</sup>

Industry leaders and others who support oil exploration in Alaska have countered the environmentalists by noting that the likelihood of another EXXON VALDEZ is remote. Moreover, persons in favor of drilling in Alaska contend that Congress has taken the necessary steps to deal with oil spills.<sup>29</sup> They claim that one of those steps taken was when Congress unanimously passed the Oil Pollution Act of 1990 (OPA).<sup>30</sup> In signing the OPA into law, President George Bush declared it to be a means of providing “the prevention, response, liability, and compensation components [which] fit together into a compatible and workable system that strengthens the protection of our environment.”<sup>31</sup>

The enactment of the OPA was a step in the right direction, but the OPA is not a cure-all. One of the key purposes of the OPA was to respond to the problems created by the EXXON VALDEZ spill.<sup>32</sup> The preventative measures were designed to avoid another oil spill of that magnitude.<sup>33</sup> Unfortunately, as long as oil products are transported over the water, there is the potential for a major oil spill. Consequently, before relying upon the safeguards of the OPA, the supporters of oil drilling in Alaska need to take a hard look at the liability scheme established by the OPA.

The purpose of this Article is to analyze the liability scheme established by the OPA to determine if it is adequate to deal with another

26. McFadden, *supra* note 9, at <http://www.msnbc.com/news/252314.asp>.

27. Bruce Gray reported, “The oil was everywhere. . . . I had not imagined that ten years later there still could be oil on the beach. The oil looks exactly like it did, only in smaller amounts. It was just as disgusting looking and it still has that toxic smell,” McFadden, *supra* note 9, at <http://www.msnbc.com/news/252314.asp>.

28. On August 4, 2001, a sunken fishing vessel spilled about 35,000 gallons of diesel—the entire contents of the boat’s fuel tank—into Prince William Sound. See Associated Press, *Workers Mopping Up Diesel Spilled in Prince William Sound*, CHI. TRIB., Aug. 8, 2001, at A12.

29. See 147 CONG. REC. 58,373 (daily ed. July 30, 2001) (statement of Sen. Murkowski).

30. *Id.*

31. Statement by President George Bush Upon Signing H.R. 1465, 1990 U.S.C.C.A.N. 861-1; see also Daniel Kopec & Philip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 598 (1992).

32. See Steven R. Swanson, *OPA +10: The Oil Pollution Control Act of 1990 After 10 Years*, 32 J. MAR. L. & COM. 135, 142 (2001).

33. Paul A.C. Jaffe & Antonio J. Rodriguez, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 23 (1990).

major oil spill. To that end, this Article is divided into three Parts. The first Part examines the liability scheme that existed prior to the EXXON VALDEZ oil spill. In the second Part, the Article analyzes the liability scheme that was created by the OPA. The final Part of the Article evaluates whether the OPA's liability scheme would be able to effectively deal with an oil spill of the magnitude of the EXXON VALDEZ oil spill.

## II. HISTORY OF OIL SPILLS AND THE PRE-OPA LIABILITY REGIME

The public became more aware of the environmental dangers of oil transportation after the TORREY CANYON disaster off the southwest coast of England on March 18, 1967.<sup>34</sup> The grounded oil supertanker TORREY CANYON poured 120,000 tons of heavy crude oil onto a hundred miles of British and French coasts.<sup>35</sup> The clean-up problems and costs became a public concern.<sup>36</sup> The TORREY CANYON incident was followed by an oil spill that occurred off the coast of Santa Barbara, California, in 1969.<sup>37</sup> Because the Santa Barbara spill occurred in the United States, the American public opinion focused upon the additional hazards associated with exploration facilities.<sup>38</sup> Therefore, the public looked to the United States Congress to enact legislation to address the problem.

Congressional response to the American people's desire for legislation that addressed oil spill liability proceeded at an irregular pace.<sup>39</sup> Hence, the end result was a group of statutes that established a patchwork scheme of liability limits, legal defenses, and compensation programs.<sup>40</sup> The requirements of those statutes were amended, expanded, and strengthened by the OPA.<sup>41</sup> Although the major parts of those statutes still have application in admiralty law, their liability provisions

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34. MICHAEL M'GONIGLE & MARK W. ZACHER, POLLUTION, POLITICS AND INTERNATIONAL LAW 5 (1979).

35. *Id.*

36. After the supertanker TORREY CANYON spilled crude oil off the coast of England in 1967, Congress enacted the Port and Waterways Safety Act of 1972 to require more stringent regulations for tankers and to provide for more comprehensive remedies in the event of an oil spill. 33 U.S.C. § 1221 (1994).

37. Thomas J. Wagner, *The Oil Pollution Act of 1990: An Analysis*, 21 J. MAR. L. & COM. 569, 570-71 (1990).

38. *Id.*

39. Note, *Statutory Liability for Oil Pollution from Vessels in Marine Environments*, 3 U.S.F. MAR. L.J. 267, 269 (1991).

40. *Id.*

41. *United States v. Murphy Exploration & Prod. Co.*, 939 F. Supp. 489, 491 (E.D. La. 1996).

have been affected by the OPA.<sup>42</sup> Thus, any article analyzing the impact of the OPA must include some discussion of the relevant parts of those statutes.

A. *Federal Water Pollution Control Act*

Congress's passing the Federal Water Pollution Control Act (FWPCA) of 1970 began the modern era of domestic oil legislation.<sup>43</sup> The law, as expanded by the FWPCA Amendments of 1972, declared a national policy that prohibited discharges of oil and imposed civil penalties and strict liability for federal cleanup costs.<sup>44</sup> Section 311 of the FWPCA addressed oil and hazardous substance spill liability.<sup>45</sup> Under the Act, the responsible parties included owners, operators, or any onshore or offshore facility from which oil was discharged into or upon the navigable waters of the United States, the adjoining shorelines, or the waters of the contiguous zone.<sup>46</sup>

The FWPCA authorized, but did not mandate, federal removal of oil spills and approval of response plans.<sup>47</sup> The Act gave the federal government the authority to remove or arrange for the removal of oil unless it was determined that the owner or operator of the responsible facility or vessel would properly undertake the removal.<sup>48</sup> The federal government was entitled to recover the full amount of the costs it incurred while cleaning up any oil spill which resulted from willful negligence or misconduct within the knowledge of the owner.<sup>49</sup> If the government could not show willful negligence or misconduct, the FWPCA provided for a specific dollar limit of liability for removal costs based upon the type of facility or vessel.<sup>50</sup> The removal costs included any costs or expenses the government incurred when it restored or replaced natural resources that were damaged or destroyed by the

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42. See 33 U.S.C. § 2004 (1994) (repealing 43 U.S.C. §§ 1811-1824 of the OSCA); 33 U.S.C. § 4302(m) (amending § 1514(a) of the Deepwater Port Act); *id.* § 8102(a)(1) (amending, then repealing TAPAA, 43 U.S.C. § 1653(c)).

43. See 33 U.S.C. §§ 1251-1276.

44. See *id.* Prior to the passage of the OPA, the FWPCA was the sole federal law that allowed for the recovery of damages after oil spills.

45. See *id.* § 1321.

46. *Id.* § 1321(f)(1), (f)(2).

47. *United States v. Murphy Exploration & Prod. Co.*, 939 F. Supp. 489, 491 (E.D. La. 1996). The OPA amended the FWPCA to require such efforts and to expand the oversight and cleanup responsibilities of the federal government. The OPA also increased potential liabilities of responsible parties and significantly broadened financial responsibility requirements. *Id.*

48. See 33 U.S.C. § 1321(c)(1), (c)(3).

49. See *id.* § 1321(f)(1).

50. See *id.* § 1321(f)(1)-(f)(3).

discharge of oil.<sup>51</sup> However, the owner or operator could avoid liability for those removal costs if it could establish that the discharge of oil was caused solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party.<sup>52</sup>

Under the FWPCA, private parties could not recover damages or cleanup costs caused by an oil spill from a vessel.<sup>53</sup> Private parties usually had to recover their losses under maritime tort principles.<sup>54</sup> Consequently, in order to recover for damages caused by an oil discharge, the private plaintiff had to establish culpable negligence.<sup>55</sup> The right of recovery was commonly based upon damage to property in which the claimant had a proprietary interest.<sup>56</sup> In the absence of such an interest, the private party did not have a right of action to recover for purely economic losses or losses caused by interference with contractual rights.<sup>57</sup> An exception to this general principle was recognized in favor of fishermen.<sup>58</sup> The fact that private parties had to rely on tort principles to establish liability for marine pollution damages was a major weakness in the application of the FWPCA.<sup>59</sup>

The 1972 FWPCA amendments were subsequently amended by the Clean Water Act (CWA) of 1977.<sup>60</sup> Although those amendments have undergone substantial changes, they largely remain in force today.<sup>61</sup> The CWA specifically prohibits “the discharge of any oil or hazardous substances in or upon the navigable waters of the United States, its shorelines, or its contiguous zone subject to certain limited exceptions.”<sup>62</sup> The 1977 amendments to the Act increased the liability limits for seagoing vessels from \$100 per gross registered ton (GRT) to \$150 per GRT and removed the \$14 million ceiling on liability.<sup>63</sup> Under the CWA, states that had been affected by a discharge of oil are allowed to act where necessary to remove such discharge and to be reimbursed, from

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51. *See id.* § 1321(f)(4).

52. *See id.* § 1321(f)(1).

53. *See id.* § 1321(o)(1).

54. Edgar Gold, *Marine Pollution Liability After “Exxon Valdez”: The U.S. “All-Or-Nothing” Lottery!*, 22 J. MAR. L. & COM., 423, 435 (1991); *see also In re Cleveland Tankers, Inc.*, 791 F. Supp. 669, 674 (E.D. Mich. 1992).

55. *See Cleveland Tankers*, 791 F. Supp. at 674.

56. *See id.*

57. *See, e.g., Conner v. Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985).

58. *See Union Oil Co. v. Oppen*, 501 F.2d 567 (9th Cir. 1974).

59. Gold, *supra* note 54, at 436.

60. *See* 33 U.S.C. §§ 1281-1297 (1994).

61. *See id.*

62. *Id.* § 1321(b)(3).

63. *Id.* § 1321(f)(1).

the fund established under section 1321(k) of the FWPCA, for the reasonable costs incurred in the removal.<sup>64</sup> A key weakness of the CWA is that it fails to establish effective preventive and immediate response mechanisms which would prevent spills altogether or provide for a prompt response that is critical in limiting the effects of a spill.<sup>65</sup>

*B. Comprehensive Environmental Response, Compensation and Liability Act*

CERCLA was passed in 1980 to provide a broad system of liabilities and responsibilities for damages arising from the release of hazardous substances into the environment.<sup>66</sup> The term “environment” includes the navigable waters, the waters of the contiguous zone, and the ocean waters in which the natural resources are under the exclusive management of the United States.<sup>67</sup> The Act imposes liability upon the owner or operator of vessels used to transport hazardous substances to disposal or treatment sites.<sup>68</sup>

CERCLA regulates discharges of hazardous substances onto land or into groundwater.<sup>69</sup> According to the statute, the term “hazardous substance” does not include petroleum (including crude oil, or any fraction thereof) which is not otherwise specifically listed or designated as a hazardous substance.<sup>70</sup> Therefore, liability for discharges of oil from vessels into marine environments are not covered by CERCLA.<sup>71</sup>

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64. The OPA repealed section (k) of the FWPCA. Additionally, the OPA authorizes the transfer of revenues remaining in the FWPCA fund to the fund established by the OPA. *See id.* § 2002(b)(2).

65. The OPA’s purpose was not to supplant the CWA’s governance over oil discharges, but to provide more extensive and effective legislative means of dealing with oil spills by doing things like establishing Coast Guard response teams and requiring the use of double hull tankers.

66. *See* 42 U.S.C. §§ 9601-9675 (1994).

67. *Id.* § 9601(8).

68. *Id.* § 9607(a).

69. *See id.* § 9602.

70. *Id.* § 9601(8), (14).

71. Under the OPA, the term “oil” refers to all types of petroleum, crude, and fuel oil not covered in section 101(14) of CERCLA. 33 U.S.C. § 2701(23) (1994). By defining the term in that manner, Congress intended to give the OPA the “broadest possible coverage without causing confusion and conflict with CERCLA, which is limited to hazardous substances excluding oil and other forms of petroleum.” Damon L. Vickers, *Deterrence or Prevention—Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and Oregon Senate Bill 242*, 28 WILLAMETTE L. REV. 405, 406 (1992); *Sun Pipe Line Co. v. Conewago Contractors, Inc.*, No. 4:CV-93-1995, 1994 WL 539326, at \*12 (M.D. Pa. 1994).

*C. Source Specific Legislation*

CERCLA and the CWA are two major pieces of federal environmental legislation of general application. Other federal statutes of more limited application have, in the past, governed pollution located in certain geographic areas or pollution resulting from certain activities. These statutes are referred to as source-specific legislation.<sup>72</sup> As source-specific pollution hazards were identified, Congress passed special measures to deal with those hazards.<sup>73</sup> The three main statutes enacted to deal with oil pollution were the Trans-Alaska Pipeline Authorization Act, the Deepwater Port Act, and the Outer Continental Shelf Lands Act.<sup>74</sup>

1. Trans-Alaska Pipeline Authorization Act

The Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA) was the first law enacted supplementing section 311 of the FWPCA.<sup>75</sup> The Act imposes strict liability for damages caused by marine spills of Alaska crude oil transported through the Trans-Alaska pipeline and loaded onto vessels at the pipeline terminal.<sup>76</sup> The TAPAA established a \$100 million fund by imposing a tax on all oil transported through the Trans-Alaska pipeline.<sup>77</sup> The fund can be used to finance or reimburse cleanup costs for oil spills occurring from oil transported along, or in the vicinity of, the pipeline,<sup>78</sup> including oil from vessels loaded at the pipeline's terminal facilities.<sup>79</sup> The TAPAA fund can also be used to compensate for damages in excess of the government's cleanup costs, including natural resource damages and private property and economic damages.<sup>80</sup> Vessel owners are strictly liable for the first \$14 million of all such cleanup costs and other damages.<sup>81</sup> The fund may be used to cover the remainder of the costs up to \$100 million per incident.<sup>82</sup>

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72. 42 U.S.C. § 9601-9675.

73. *Id.*

74. Many of the provisions of those statutes were affected or consolidated by the OPA. *See* 43 U.S.C. §§ 1651-1655 (1994); 33 U.S.C. §§ 1501-1024; 43 U.S.C. §§ 1331-1333.

75. 43 U.S.C. §§ 1651-1655.

76. *See id.* § 1653(c).

77. *Id.* § 1653(c)(5).

78. *Id.* § 1653(a)(1).

79. *Id.* § 1653(c)(1).

80. *Id.* § 1653(a)(1).

81. *Id.* § 1653(c)(3).

82. *Id.*

## 2. The Deepwater Port Act

On January 3, 1975, the President signed the Deepwater Port Act of 1974 (DWPA).<sup>83</sup> The purpose of the DWPA was to establish a licensing and regulatory program governing offshore deepwater port development beyond the territorial limits and off the coast of the United States.<sup>84</sup> Such facilities would be used to transfer oil and natural gas supplies transported by tanker to and from states of the United States.<sup>85</sup> DWPA makes the owner or operator of a vessel or the licensee of a deepwater port<sup>86</sup> liable for cleanup costs and damages resulting from oil spilled from deepwater ports, from vessels carrying oil from a deepwater port, or from any vessel located in a deepwater port's safety zone.<sup>87</sup> A deepwater port safety zone is "the safety zone established around a deepwater port as determined by the Secretary."<sup>88</sup> Relying upon the DWPA, the government can recover natural resources damages for injury to the marine environment.<sup>89</sup> The DWPA also extends recovery rights to individuals<sup>90</sup> and allows the United States Attorney General to pursue class actions for property damages.<sup>91</sup>

## 3. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act of 1953 (OCSLA) established federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline.<sup>92</sup> In 1978, with the increased risk of damage to marine and coastal environments caused by expanded development of oil and gas resources on the outer continental shelf (OCS), the OCSLA of 1953 was amended.<sup>93</sup> The amendment imposed strict liability for oil spills on owners and operators of any offshore

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83. *See* 33 U.S.C. §§ 1501-1524 (1994).

84. *See id.* § 1501(b).

85. S. REP. NO. 93-1217, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7529, 7531.

86. A deepwater port is defined as any fixed or floating manmade structure other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States and which are used, or intended for use, as a port or terminal for the loading and further handling of oil for transportation to any state. *See* 33 U.S.C. § 1502(9).

87. *See id.* § 1518(a)(3)(A).

88. *Id.* § 1502(16).

89. *See id.* § 1517(1)(3).

90. *See id.* § 1515(a).

91. *See id.*

92. *See* 43 U.S.C. §§ 1331-1333 (1994).

93. *See id.* § 1801.

facility located on the OCS<sup>94</sup> and on vessels carrying oil from the OCS.<sup>95</sup> The United States has jurisdiction over oil spills that occur on the continental shelf beyond three miles from the coastline.<sup>96</sup> Individual coastal states have jurisdiction over submerged lands within the three mile limit.<sup>97</sup> Individuals or the United States Attorney General can recover damages for economic losses arising out of or directly resulting from oil pollution.<sup>98</sup>

### III. THE OPA AND ITS LIABILITY SCHEME

#### A. *Legislative History of the OPA*

Prior to 1990, whenever there was an oil spill, the parties involved had to rely on the various legal regimes discussed in the previous Part of this Article to determine liability. Those regimes formed a hodgepodge of sometimes conflicting laws concerning liability for oil discharges. Matters were further complicated by the assorted state statutes pertaining to oil spill liability, which had widely different standards. Congress, recognizing the conflicts and the deficiencies in the existing laws, directed the Attorney General to study the matter and to make recommendations for legislation that would provide a comprehensive system of oil spill liability.<sup>99</sup> The Attorney General completed a study that was entitled *Methods and Procedures for Implementing a Uniform Law Providing for Cleanup Costs and Damages Caused by Oil Spills from Ocean Related Sources*.<sup>100</sup> Based upon this study, the Attorney General submitted his report.<sup>101</sup> In an attempt to have the recommendations of that report implemented, President Gerald Ford forwarded proposed legislation to Congress.<sup>102</sup>

Despite presidential pressure, Congress did not pass the comprehensive oil legislation urged by the report.<sup>103</sup> Nonetheless, most members of Congress agreed that a more comprehensive system needed

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94. The OCS is "all submerged lands lying seaward and outside the area beneath navigable waters and of which the subsoil and seabed appertain to the US and are subject to its jurisdiction and control." *Id.* § 1331(a)(1).

95. *See id.* § 1801.

96. *See id.*

97. *See id.* §§ 1301, 1331(a).

98. *See id.* § 1813(b)(4).

99. *See* Walter B. Jones, *Oil Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10,333, 10,334 (1989).

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.*

to be put in place.<sup>104</sup> The problems arose because the members disagreed about the type of provisions that legislation should contain.<sup>105</sup> Consequently, for several years, Congress considered some comprehensive oil spill measures to combine all state and federal oil liability laws into a uniform national program.<sup>106</sup> While several comprehensive measures were approved in the House, the Senate could not agree on any of those measures.<sup>107</sup> This legislative gridlock prevented any comprehensive legislation from being enacted.<sup>108</sup>

Persons who wanted Congress to enact some type of far-reaching statute to deal with oil pollution were reinvigorated when the EXXON VALDEZ oil spill occurred in March of 1989.<sup>109</sup> Even persons who had previously opposed a comprehensive oil pollution act jumped on the bandwagon when the true depth of the damage caused by the oil spill was exposed.<sup>110</sup> By August 1989, oil had traversed nearly ten thousand square miles of water in Prince William Sound and the Gulf of Alaska.<sup>111</sup> More than twelve hundred miles of shoreline was oiled, causing serious damage to the many natural resources of the area.<sup>112</sup> Millions of Americans saw images on the nightly news of cleanup crews tolling on miles of oil covered beaches, dead otters washing ashore, and birds struggling to fly with their black matted feathers.<sup>113</sup> The oil spill compelled the state of Alaska to cancel its fishing season in Prince William Sound, bringing untold financial hardship to those whose livelihood depended on the ocean.<sup>114</sup>

The EXXON VALDEZ oil spill highlighted the inadequacies of the legal regime existing at that time and raised the level of national concern. In addition, only months after the EXXON VALDEZ incident, three large spills occurred in rapid succession in distant locations, dumping a total of almost one million gallons of additional oil into the nation's

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104. *See id.*

105. J.V. Ruhl & Michael J. Jewell, *Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 475, 478-80 (1991).

106. *Id.*

107. *See* S. REP. NO. 101-94, at 1, 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722.

108. *See id.*

109. Bryan Hodgson, *Alaska's Big Spill—Can The Wilderness Heal?*, NAT'L GEOGRAPHIC, Jan. 1990, at 8, *cited in* Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 346 (1993).

110. *See* Hodgson, *supra* note 109, at 8.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

aquatic environment.<sup>115</sup> Within a twenty-four hour period, on June 23 and 24, 1989, the Greek-registered tanker WORLD PRODIGY struck a rock and spilled over 290,000 gallons of heating oil into Naragansett Bay in Newport, Rhode Island, the oil tanker RACHEL B. collided with an oil tanker in the Houston Ship Channel, spilling over 250,000 gallons of heavy crude oil, and over 300,000 gallons of heating oil was spilled into the Delaware River when the Uruguayan-registered tanker PRESIDENT RIVERA ran aground.<sup>116</sup>

The EXXON VALDEZ incident, in combination with three other spills that occurred that same year, provided the driving force for a revamped oil spill law. The public outcry following the disaster forced Congress to make a concerted effort to President George Bush with comprehensive legislation that dealt with the threat oil spills pose to the nation's waters.<sup>117</sup> As a result, on August 18, 1990, sixteen months and twenty-five days after the EXXON VALDEZ grounded in Prince William Sound, President George Bush finally signed the OPA into law.<sup>118</sup> The OPA specifically prohibited tank vessels that had spilled more than one million gallons of oil into the marine environment after March 22, 1989, from operating on the navigable waters of Prince William Sound.<sup>119</sup> This provision was an attempt to ensure that vessels like the one that caused the EXXON VALDEZ spill could never transport oil in the area again.<sup>120</sup>

### B. *The Liability Scheme of the OPA*

The OPA's provisions dealing with liability are located in Title I of the Act.<sup>121</sup> The OPA neither preempts state law<sup>122</sup> nor implements the international protocols.<sup>123</sup> It expands the liability and limitation programs of former laws and addresses particular concerns respecting prevention, removal, and civil penalty programs. The law channels liability to designated parties and provides a fund to be used as compensation for catastrophic losses and for claims which are not compensated by

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115. See H.R. REP. NO. 101-1018, at 36 (1990).

116. *Id.*

117. See Millard, *supra* note 109, at 339-43.

118. See *id.*

119. See 33 U.S.C. § 2737 (1994).

120. See *id.*

121. *Id.* §§ 2701-2720.

122. The OPA does not preempt "state laws of a scope similar to the matter contained in Title I of OPA." *Williams v. Potomac Elec. Power Co.*, 115 F. Supp. 2d 561, 565 (D. Md. 2000).

123. See generally *Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage*, 15 J. MAR. L. & COM. 613 (1984).

dischargers. Courts have concluded that Congress did not intend the OPA to bar the imposition of additional liability by the States.<sup>124</sup>

When Congress initially considered oil spill liability legislation, the focus was solely on liability for oil spills and compensation ensuing after a spill occurred. The EXXON VALDEZ situation highlighted the magnitude of possible spills and demonstrated that prevention of a spill should be the primary goal of oil spill legislation. Accordingly, under the OPA, the liability and compensation regime found in previous oil spill bills was expanded to include substantial prevention and improved planning provisions.<sup>125</sup> The key issues involving the OPA are (1) when the Act applies, (2) who is liable under the Act, (3) what are the limits of that liability, (4) what are the defenses to that liability, and (5) what damages are recoverable under the Act.

### *C. Applicability of the OPA*

Plaintiffs have tried to get the courts to apply the OPA to any situation involving an oil spill.<sup>126</sup> Thus, one of the most litigated issues involving the OPA is whether the Act applies to a specific situation. The OPA applies whenever there is a discharge, or a substantial threat of a discharge, of oil onto adjoining shorelines, into water within the exclusive economic zone of the United States, or into or upon the navigable waters of the United States.<sup>127</sup> The terms key to the determination of whether a claim exists under the OPA are: “adjoining shorelines,” “exclusive economic zone,” and “navigable waters.”<sup>128</sup> Unless the discharge of oil harms, or threatens to harm, one of these areas, the OPA does not apply to the situation.<sup>129</sup>

The term “adjoining shorelines” is not defined in the Act; however, courts have given the term its obvious meaning.<sup>130</sup> “Exclusive economic zone (EEZ)” is defined by the Act as “the zone established by Presidential Proclamation Numbered 5030 . . . including the ocean

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124. See *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630-31 (1st Cir. 1994) (using the OPA to support validity of state liability statute permitting recovery for purely economic loss); 33 U.S.C. § 2718(a)(2).

125. Cynthia M. Wilkinson et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 181, 189 (1992).

126. See *Sun Pipe Line Co. v. Conewago Contractors, Inc.*, No. 4:CV-93-1995, 1994 WL 539326, at \*1 (M.D. Pa. 1994) (refusing to apply the OPA to a spill of 12,000 gallons of petroleum on a golf course).

127. 33 U.S.C. § 2702(a); see A.F. Bessemer Clark, *The U.S. Oil Pollution Act of 1990*, LLOYD'S MAR. & COM. L.Q., May 1991, at 247.

128. 33 U.S.C. § 2701.

129. See *Sun Pipe Line*, 1994 WL 539326, at \*2.

130. See *Gatlin Oil Co. v. United States*, 169 F.3d 207, 211 (4th Cir. 1999).

waters of the areas referred to as ‘eastern special areas’ in Article 3(1) of the Agreement between United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990.”<sup>131</sup> Typically, the EEZ refers to the coastal waters surrounding the United States, extending seaward for a distance of two hundred miles from the United States coastline.<sup>132</sup>

Most of the litigation dealing with the applicability of the OPA involves the definition of “navigable water.” The OPA defines “navigable waters” as “the waters of the United States.”<sup>133</sup> Very few cases have addressed directly the term “waters of the United States” as used in the OPA, but courts have interpreted the term as defined in the CWA.<sup>134</sup> In its regulations, the EPA (the agency charged with enforcing the OPA) defines the term as including “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”<sup>135</sup>

The government has contended that the term “navigable waters” under the OPA should be interpreted similar to the way the term has been construed under the CWA.<sup>136</sup> The most recent court to address the issue agreed with the government and concluded that “‘waters of the United States’ as used in the OPA means all waters and wetlands, not necessarily navigable waters.”<sup>137</sup> However, even though courts have found that the OPA and the CWA should receive similar constructions, courts have ultimately concluded that the OPA’s legislative history requires a narrower reading of the Act.<sup>138</sup> Therefore, some link, direct or indirect, to

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131. 33 U.S.C. § 2701(8).

132. Jaffe & Rodriguez, *supra* note 33, at 12 n.69.

133. 33 U.S.C. § 2701(21).

134. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-39 (1985); *see also* Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 964-65 (7th Cir. 1994) (describing in both cases the term “waters of the United States” as used in the Clean Water Act in broad terms).

135. Guidelines for Specifications or Disposable Sites for Dredged or Filled Material, 40 C.F.R. § 230.3(s)(3) (1999).

136. The government has asserted that the term “waters of the United States” describes obviously navigable waters, and all waters and wetlands, including those that are not navigable or directly connected to navigable water. *See* United States v. Mizhir Oil Co., 106 F. Supp. 2d 124, 125 (D. Mass. 2000).

137. *See id.*

138. One court concluded that the defendant’s oil fields were “fields located so far from oceans, bays, shores, or beaches that any discharge of oil is simply too attenuated a threat to ‘navigable waters,’ to be covered by the OPA.” *Rice v. Harken Exploration Co.*, 89 F. Supp. 2d 820, 827 (N.D. Tex. 1999).

United States coastal or inland waterways must be demonstrated to invoke the protections of the OPA. While the discharge, or threat of discharge, need not take place in, or on, a covered body of water, there must be some threat that the oil will make its way into protected areas like coastal or inland waterways.<sup>139</sup>

#### *D. Liability Under the OPA*

In order to be liable under the OPA, the person or organization must be a responsible party.<sup>140</sup> Responsible parties are owners and operators<sup>141</sup> of vessels, onshore facilities, offshore facilities, and pipelines and licensees of deepwater ports.<sup>142</sup> In the case of an abandoned vessel, facility, deepwater port or pipeline, the persons who would have been responsible parties immediately prior to the abandonment are liable.<sup>143</sup> The OPA does not limit the number of responsible parties. By giving the term “responsible party” a broad definition, Congress made sure that more than one party could be held accountable for the costs of pollution stemming from oil spills.<sup>144</sup>

Discharges from public vessels are expressly excluded from the OPA cost recovery scheme.<sup>145</sup> The OPA defines a “public vessel” as “a vessel owned or bareboat chartered and operated by the United States.”<sup>146</sup> Therefore, owners and operators of public facilities and vessels are excluded, for the most part, from the OPA’s liability scheme.<sup>147</sup> Other excluded discharges are those allowed by a permit issued under federal, state or local law and those from an onshore facility which is subject to

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139. *See* Sun Pipe Line Co. v. Conewago Contractors, Inc., No. 4:CV-93-1995, 1994 WL 539326, at \*13 (M.D. Pa. 1994).

140. *See* 33 U.S.C. § 2702(a) (1994).

141. The OPA defines an “operator” of a facility as a person “operating such onshore facility.” *Id.* § 2701(26). In interpreting a similar definition of “operator” under CERCLA, the Supreme Court held that to be an “operator” within the meaning of the statute, the defendant “must manage, direct, or conduct operations specifically related to pollution.” *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998). Relying upon that decision, the court determined that a person was not an “operator,” under OPA, if the person did not play any role in the direct operation of those aspects of the oil reclaiming plant which led to the alleged discharges of oil. *Harris v. Oil Reclaiming Co.*, 94 F. Supp. 2d 1210, 1213 (D. Kan. 2000).

142. 33 U.S.C. § 2701 (32)(A)-(E).

143. *Id.* § 2701(32)(F).

144. *See id.* § 2701(32)(A)-(F); *see also* *United States v. Bois D’Arc Operating Corp.*, No. 98-157, 1999 WL 130635, at \*3 (E.D. La. Mar. 10, 1999).

145. 33 U.S.C. § 2702(c)(2).

146. *Id.* § 2701(29).

147. *See id.* § 2702(c)(2).

the TAPAA.<sup>148</sup> The OPA does not consider the owner of the oil to be a responsible party.<sup>149</sup>

*E. Recovery Under the OPA*

1. Removal Costs

The responsible party is liable for all removal costs and damages.<sup>150</sup> Removal costs are defined to include the costs of removal incurred after a discharge of oil.<sup>151</sup> In addition, removal costs cover costs to prevent, minimize, or mitigate oil pollution when there is a substantial threat of a discharge of oil.<sup>152</sup>

Two types of removal costs are compensable under the OPA: (1) removal costs incurred by a governmental entity,<sup>153</sup> and (2) any removal costs incurred by any other person while taking actions that are consistent with the National Contingency Plan (NCP).<sup>154</sup> The NCP is the set of regulations governing the administration of the government's response to environmental hazards.<sup>155</sup> The NCP serves as a guide to regulators and regulated parties in the enforcement, administration, and interpretation of environmental laws, including the OPA.<sup>156</sup> The NCP regulations deal with issues like the preliminary assessment and initiation of action by the appropriate government agencies after an oil spill.<sup>157</sup> The NCP response plan for oil discharges outlines a four phase response framework.

The first phase of the plan requires any persons in charge of a facility to notify the appropriate federal officials as soon as they discover an unlawful oil discharge.<sup>158</sup> If someone other than the person in charge discovers the discharge, that person is required to notify the National Response Center "as appropriate."<sup>159</sup> The second phase of the plan requires the federal coordinator to assess the level of the threat and the achievability of removal, to identify the responsible parties, to try to

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148. *Id.* § 2702(c)(1), (3).

149. *See id.* § 2701(32).

150. *Id.* § 2702(a).

151. *Id.* § 2701(31).

152. *Id.*

153. This includes a state government or a Native American tribe. *Id.* § 2702(b)(1)(A).

154. *Id.* § 2702(b)(1)(B).

155. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300 (1999).

156. *See id.*

157. *See* United States v. Conoco, Inc., 916 F. Supp. 581, 584 (E.D. La. 1996).

158. *See* 40 C.F.R. § 300.300(b) (1999).

159. *See id.* § 300.300(c).

prompt the discharger to start voluntary removal actions, and to otherwise “take appropriate response actions.”<sup>160</sup> The third phase of the plan instructs the coordinator to pursue containment, cleanup, and disposal measures.<sup>161</sup> The final phase of the plan deals with documentation and cost recovery.<sup>162</sup>

The OPA requires the United States to remove the discharged oil or oversee the removal by others.<sup>163</sup> Thus, the United States is entitled to recover its costs for directing and monitoring all actions to remove a discharge<sup>164</sup> and the interest on unpaid removal costs.<sup>165</sup> Those removal costs may also include attorneys’ fees incurred to recover the money expended by the Oil Spill Liability Fund from the responsible party.<sup>166</sup> Courts have concluded that Congress intended the enactment of the OPA to supplant the existing general admiralty and maritime law, which allowed punitive damages under certain circumstances in the area of oil pollution.<sup>167</sup> Thus, punitive damages are not available under the OPA.<sup>168</sup> Recoverable removal costs are not restricted to those incurred by the federal government.<sup>169</sup> Private parties are afforded protection under the OPA for their cleanup costs, as long as their actions are consistent with the NCP.<sup>170</sup>

## 2. Recoverable Damages

As far as damages are concerned, the OPA is all-embracing. Recoverable damages include: (1) natural resource damages, including loss of use and reasonable assessment costs recoverable by a government trustee;<sup>171</sup> (2) damages to real or personal property, including economic loss, recoverable by the owner or lessee of the property;<sup>172</sup> (3) damages for loss of subsistence use of natural resources, regardless of ownership

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160. *See id.* § 300.305.

161. *See id.* § 300.310.

162. *See id.* § 300.315.

163. “Removal” is defined as “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare.” 33 U.S.C. § 2701(30) (1999).

164. *See United States v. Hyundai Merch. Marine Co.*, 172 F.3d 1187, 1189 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 397 (1999).

165. *See* 33 U.S.C. § 2705.

166. *See Hyundai*, 172 F.3d at 1192-93.

167. *See, e.g., S. Port Marine, L.L.C. v. Gulf Oil Ltd.*, 234 F.3d 58, 65 (1st. Cir. 2000).

168. *Id.*

169. *See id.*

170. Under the previous CWA regime, liability to nonfederal parties could be based only on a showing of fault. *See Gold, supra* note 54, at 435.

171. 33 U.S.C. § 2702(b)(2)(A) (1994).

172. *Id.* § 2702(b)(2)(B).

or management;<sup>173</sup> (4) net losses of taxes, royalties, rents, fees or shares of net profits, due to damage to property or natural resources recoverable by a governmental entity;<sup>174</sup> (5) damages for loss of profits, or impairment of earning capacity, due to damage to property or natural resources;<sup>175</sup> and (6) damages for the net costs of increased public services caused by a discharge of oil.<sup>176</sup>

### 3. Natural Resource Damages

The EXXON VALDEZ spilled oil into one of the world's most productive fisheries; the region was abundant with wildlife and unspoiled by man's influence.<sup>177</sup> That tragedy caused the public to value natural resources more and to recognize the importance of recouping the full value of lost natural resources.<sup>178</sup> As a result, natural resources<sup>179</sup> were considered to be of such importance that they were given a separate section in the OPA.<sup>180</sup> One of OPA's main goals is to make the environment and the public whole for injuries to natural resources and services caused by a discharge of oil.<sup>181</sup>

Under the OPA, natural resources are given a broad definition. Specifically, natural resources include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, or held in trust by, or controlled by the United States, any state, local government, Native American tribe or foreign government.<sup>182</sup> The resources of the exclusive economic zone are also considered to be natural resources under the OPA.<sup>183</sup>

Natural resource damages include the cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damaged natural resources.<sup>184</sup> The damages also consist of the diminution in value of the natural resources pending restoration,<sup>185</sup> and the reasonable cost of assessing those damages.<sup>186</sup> These damages are in addition to the removal

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173. *Id.* § 2702(b)(2)(C).

174. *Id.* § 2702(b)(2)(D).

175. *Id.* § 2702(b)(2)(E).

176. *Id.* § 2702(b)(2)(F).

177. *See* Eyak Native Vill. v. Exxon Corp., 25 F.3d 773, 775 (9th Cir. 1994).

178. *See id.* at 775 (defining the term "natural resources").

179. *See* 33 U.S.C. § 2701(20).

180. *See id.* § 2706.

181. Natural Resources Damage Assessments (NRDA), 15 C.F.R. § 990.10 (1999).

182. 33 U.S.C. § 2701(20).

183. *Id.*

184. *Id.* § 2706(d)(1)(A).

185. *Id.* § 2706(d)(1)(B).

186. *Id.* § 2706(d)(1)(C).

and remediation work normally conducted on contaminated sites under the NCP.<sup>187</sup> Moreover, these claims are separate from criminal penalties, civil penalties, and private civil damage payments.<sup>188</sup> However, the OPA prohibits double recovery for damages for the same incident and natural resources.<sup>189</sup>

The most controversial aspect of natural resource damage recovery is assessing the damages. Many economists and attorneys disagree on the best method to use to determine the value of the natural resources lost as the result of an oil spill. The two primary components of that valuation are use values and nonuse values.

Use values are measured by “the worth of natural resources to people who use them.”<sup>190</sup> Use values are readily quantifiable. For example, as J.T. Smith II has observed in his article addressing natural resource damages under OPA that “conventional economic techniques can measure use values, such as foregone recreation opportunities due to the oiling of a beach, or interruption of commercial or sport fishing.”<sup>191</sup> On the contrary, the process of measuring nonuse values is complicated because natural resources that humans do not consume or rely upon have no conventional economic value.<sup>192</sup>

The most common method used to quantify nonuse values is the contingent valuation method (CVM).<sup>193</sup> Smith explains that “CVM is a survey technique by which citizens are asked to respond to hypothetical inquiries regarding their willingness to pay for the preservation of a particular resource.”<sup>194</sup> Based on the survey results, damages are calculated by multiplying the per-person valuation by the affected population.<sup>195</sup> Again, Smith explains that “in the case of living resources of more than merely local interest, such as marine mammals, the multiplier may be huge.”<sup>196</sup> Thus, the possibility of inflated damages is the main criticism of this method of valuation.

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187. *Id.*

188. *See id.*

189. *Id.* § 2706(d)(3).

190. Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 281 (1981).

191. J.T. Smith II, *Natural Resource Damages Under CERCLA and OPA: Some Basics for Maritime Operators*, 18 TUL. MAR. L.J. 1, 3 (1993) (quoting Cross, *supra* note 190, at 281).

192. *See id.*

193. *See* ROBERT C. MITCHELL & RICHARD T. CARSON, *USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 2* (1989).

194. Smith, *supra* note 191, at 5.

195. *Id.*

196. *Id.* at 4.

The OPA designates the difficult task of assessing the value of natural resources to public trustees.<sup>197</sup> Trustees for natural resources are officials of federal and state governments, Native American tribes, and foreign governments.<sup>198</sup> For the most part, the Secretaries of the Interior, Commerce, Agriculture, Defense, and Energy act as federal trustees.<sup>199</sup> At the state level, governors designate the state and local government trustees.<sup>200</sup> State departments of land management, fish and game management, and attorney general offices typically act as state trustees.<sup>201</sup>

In order to offer some guidance to the trustees, the OPA called for the NOAA to write regulations governing Natural Resource Damage Assessments (NRDAs)<sup>202</sup> for oil spills. Even though these NRDA regulations were to be promulgated within two years of the passage of the OPA, NOAA was slow in starting the process.<sup>203</sup> Thus, trustees seeking direction had to rely upon the CERCLA rule for oil spills into navigable waters.<sup>204</sup>

On January 5, 1996, NOAA published its long-awaited final NRDA rule in the Federal Register.<sup>205</sup> NOAA's NRDA rule superseded the CERCLA rule published by the Department of Interior.<sup>206</sup> After February 5, 1996, in order to seek rebuttable presumption status for oil spill NRDAs, the trustee has to rely upon NOAA's rule.<sup>207</sup> However, the CERCLA rule applies to spills of mixtures of oil with hazardous substances.<sup>208</sup>

Pursuant to the OPA, if the trustee follows the NOAA's rule, he receives an administrative and judicial "rebuttable presumption" for the evidence underlying his damage assessment.<sup>209</sup> Thus, the administration agency, or the court, presumes that he used the correct factors to

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197. *See* NRDA, 15 C.F.R. § 990.11 (1999).

198. *Id.*

199. *See* Natural Resource Damage Assessments (NRDA), 61 Fed. Reg. 440 (Jan. 5, 1996) (to be codified at 15 C.F.R. pt. 990).

200. *Id.*

201. *See id.*

202. *See id.* (describing the use of NRDAs in dealing with the August 10, 1993, Mullet Key/Tampa Bay spill wherein 32,000 gallons of Jet A fuel, diesel, and gas were discharged into lower Tampa Bay).

203. OPA required promulgation of such regulations by August 18, 1992, two years after enactment. *See* 33 U.S.C. § 2706(e)(1) (1994).

204. *See* 43 C.F.R. § 11.10 (1994).

205. *See* NRDA, 61 Fed. Reg. at 440.

206. *See* NRDA, 15 C.F.R. § 990.11 (1999).

207. *See* 33 U.S.C. § 2706(e)(2).

208. NRDA, 15 C.F.R. § 990.20(a)-(c).

209. *See* 33 U.S.C. § 2706(e)(2).

calculate the damages. Consequently, the spiller has the burden of showing that the trustee's damage assessment is not appropriate. When assessing damages, a trustee is not required to use the procedures set out in the NOAA rule.<sup>210</sup> But, if he uses a different procedure, his damage assessment is not afforded a rebuttable presumption and the trustee has to prove that his assessment is accurate.<sup>211</sup> Even if they use the NOAA rule, foreign trustees' results do not get a rebuttable presumption.<sup>212</sup>

Under the NOAA rule, the only obligation that the responsible parties have is to pay claims.<sup>213</sup> Thus, the owners and operators of facilities and vessels are not required to participate in assessment or restoration planning before or after an oil spill. Nonetheless, the regulations outline options for owners and operators to participate in pre-spill planning and post-spill assessments, planning and restoration.<sup>214</sup>

NOAA's rule provides a new way to address injuries resulting from many small oil spills in an area. In the past, NOAA ignored small spills where assessment costs were too high relative to restoration cost.<sup>215</sup> To address that problem, the new rule allows regional restoration plans.<sup>216</sup> Hence, the cumulative injuries and lost uses from many small spills can be addressed through a single area-wide restoration effort.<sup>217</sup> As a result, an individual spiller may pay for its part of a larger restoration plan. This ensures that the damages caused by small oil spills are remedied.

NOAA's rule sets forth a three-phase process to prepare NRDAs.<sup>218</sup> The first phase is the pre-assessment phase, during which trustees determine whether to pursue restoration.<sup>219</sup> In the second phase, the restoration planning phase, the trustees evaluate information on potential injuries and use that information to determine the need for, type of, and scale of restoration.<sup>220</sup> The focus of that second phase determines if an injury has occurred,<sup>221</sup> and quantifies the degree, and spatial and temporal extent, of the injury.<sup>222</sup> During the final phase, the restoration

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210. *See id.*

211. *See id.*

212. *See* 15 C.F.R. § 990.13.

213. *See id.* § 990.14.

214. *See id.* § 990.14(c)(1).

215. NRDA, 61 Fed. Reg. 440, 444 (Jan. 5, 1996) (to be codified at 15 C.F.R. pt. 990).

216. *See id.*

217. *Id.*

218. *See* 15 C.F.R. § 990.12.

219. *Id.*

220. *Id.*

221. *Id.* § 990.51.

222. *See id.* § 990.52.

implementation phase, the trustees ensure that the restoration plan is implemented.<sup>223</sup>

#### 4. Economic Damages

The OPA deals directly with the issue of the economic impact of an oil spill. The Act expressly recognizes recovery by private parties of economic losses, lost profits and impairment of earning capacity due to an oil spill incident.<sup>224</sup> The legislative history of the OPA suggests that physical injury does not need to accompany a proprietary interest in order for the claimant to recover economic damages.<sup>225</sup>

Under the OPA, the class of claimants that can recover economic losses may be limited,<sup>226</sup> as the claimant must have suffered some type of foreseeable loss.<sup>227</sup> Application of this principle is demonstrated in *In re Cleveland Tankers, Inc.*<sup>228</sup>

In *Cleveland Tankers*, the M/V JUPITER was unloading gasoline at a dock in the Saginaw River in Bay City, Michigan, when it caught fire and spilled gasoline into the river.<sup>229</sup> The ship partially sank and the Coast Guard closed the channel.<sup>230</sup> Several parties whose business interests were adversely affected by the closure, but did not suffer any property damage, filed claims under the OPA against the owner of the vessel.<sup>231</sup> The court held that the OPA does not allow recovery for economic loss if the claimant does not allege “injury, destruction, or loss” to his property.<sup>232</sup>

This need to show some type of loss or injury to property may serve to limit the number of potential claimants.<sup>233</sup> Nevertheless, another court has held that the claimant stated a cause of action under the OPA when it lost its right to drill for oil under its platform because of the responsible party’s oil spill.<sup>234</sup> In reaching its decision, the court focused on the fact

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223. See *id.* § 990.

224. See 33 U.S.C. § 2702(b)(2)(B) (1994).

225. See H.R. CONF. REP. NO. 101-653, at 103 (1989), reprinted in 1990 U.S.C.C.A.N. 779, 781.

226. See *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1994).

227. See *id.*

228. See *id.*

229. *Id.* at 670-71.

230. *Id.* at 671.

231. *Id.* at 671.

232. *Id.* at 679.

233. See Cameron H. Totten, Note, *Recovery for Economic Loss Under Robins Dry Dock and the Oil Act of 1990: Sekco Energy, Inc. v. M/V Margaret Chouest*, 18 TUL. MAR. L.J. 167, 174-75 (1993).

234. See *Sekco Energy, Inc. v. M/V Margaret Chouest*, No. CIV. A.92-0420, 1993 WL 322942, at \*1, \*5 (E.D. La. Aug. 13, 1993).

that the claimant had an ownership interest in the platform and did not give much consideration to the fact that the claimant's property, the platform, had not sustained any physical damage.<sup>235</sup>

The OPA's economic damage provisions can be applied in a manner that is fair to all parties involved. This can be accomplished if the courts, in applying the OPA, define some reasonable and predictable limitation upon which claimants may base their claims for recovery of economic losses. Ultimately, the boundaries of the OPA's economic remedy may be derived from traditional causation principles and a strict adherence to "loss of profits and impairment of earning capacity" as the measure of recovery.<sup>236</sup> Such an approach would permit recovery of damages by any claimant whose business enterprise was so directly intertwined with the damaged property or resource that the claimant sustained immediate and predictable economic consequences.

#### *F. Defenses to Liability*

The OPA enumerates limited defenses to liability. A responsible party is not liable for removal costs and damages if the discharge was "solely" caused by an act of God,<sup>237</sup> an act of war, an act or omission of a third party, or a combination of those things.<sup>238</sup> The responsible party has the burden of establishing these limited defenses.<sup>239</sup>

The OPA provides for third-party liability consistent with the liability of the responsible party when the responsible party establishes that the discharge was solely caused by the act or omission of the third party.<sup>240</sup> In that instance, the third party may be treated as a responsible party.<sup>241</sup> Third-party is narrowly defined to exclude an employee or agent of the responsible party or of a party who acts pursuant to a contract with the responsible party.<sup>242</sup> The responsible party must also establish its own due care and precaution as to foreseeable third-party acts and consequences.<sup>243</sup> A claimant whose gross negligence or willful mis-

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235. *See id.* at \*3.

236. *See Cleveland Tankers*, 791 F. Supp. at 678.

237. "[A]ct of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 33 U.S.C. § 2701(1) (1994).

238. *Id.* § 2703(a)(1)-(4).

239. *See id.*

240. *See id.* § 2702(d)(1)(A).

241. *Id.*

242. *See id.* § 2703(a)(3).

243. *See id.*

conduct caused the incident does not have a cause of action under the OPA<sup>244</sup>

These defenses are not available if the responsible party fails or refuses: (1) to report an incident required by law, (2) to provide reasonable assistance requested by a responsible official in connection with the removal activities, or (3) to comply with an order issued under the FWPCA provisions or other federal statutes without sufficient cause.<sup>245</sup>

### G. *Limits on Liability*

In response to the concerns of persons in the shipping and oil industries, in the final version of the OPA, Congress set new limits on the statutory liability and removal costs incurred by the responsible party.<sup>246</sup> Under the OPA, a party's liability is limited in accordance with the type and size of vessel or facility involved in the spill.<sup>247</sup> One Court concluded that "the congressional decision to limit a vessel owner's liability under the OPA is firmly rooted in economic theory."<sup>248</sup>

Under the OPA, the owner of a large vessel is exposed to much greater liability than the owner of a small vessel.<sup>249</sup> This liability scheme exposes the party who is in the position to obtain the most benefit from maritime commerce to the greatest amount of liability.<sup>250</sup> For instance, the owner of a large cargo vessel receives a greater benefit from the vessel's commercial activity than the owner of the tug boat which assists with the cargo's vessel's docking procedure.<sup>251</sup> Thus, the owner of the large vessel is in a better position to safeguard against an oil spill or to bear the cost of a spill. By putting the greatest risks of operating a vessel in the navigable waters upon those who receive the greatest benefits from doing so, the OPA's liability scheme allows the costs associated with oil spills to be spread among all those who benefit from maritime commerce, including those who consume products which are shipped from overseas.<sup>252</sup>

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244. *See id.* § 2703(b).

245. *Id.* § 2703(c)(1)-(3).

246. *See id.* § 2704.

247. *See id.* § 2704(a).

248. *Nat'l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atl. Corp.*, 924 F. Supp. 1436, 1447 n.6 (E.D. Va. 1996).

249. *See* 33 U.S.C. § 2704(a).

250. *NSCSA*, 924 F. Supp. at 1447, n.6.

251. *See id.*

252. *See id.*

For a tank vessel, the responsible party's liability is limited to the greater of \$1200 per gross ton<sup>253</sup> or \$10,000,000 (if vessel is greater than 3,000 gross tons)<sup>254</sup> or \$2,000,000 (if vessel is 3,000 tons or less).<sup>255</sup> The recovery for damages caused by a nontank vessel is limited to the greater of \$600 per gross ton or \$500,000.<sup>256</sup> When the oil spill involves an offshore facility other than a deepwater port, the responsible party's liability is limited to the total of all removal costs plus \$75,000,000.<sup>257</sup> The liability limit for an oil spill caused by an onshore facility and deepwater port is \$350,000,000.<sup>258</sup>

The responsible party cannot limit his liability under the OPA if the oil spill was proximately caused by the gross negligence or willful misconduct of the responsible party, its agent, employee, or person acting pursuant to a contract with the responsible party.<sup>259</sup> In addition, if the oil spill is caused because one of those parties violated a federal safety, construction, or operation regulation, the responsible party cannot limit his liability under the statute.<sup>260</sup>

Additionally, there is no limitation available if a responsible party who knows, or has reason to know, of the incident refuses or fails to report it.<sup>261</sup> The limitations also do not apply if the responsible party refuses or fails to provide reasonable cooperation and assistance requested by a responsible official in connection with removal activities.<sup>262</sup> The responsible party cannot utilize the limitations if he or she fails, without sufficient cause, to comply with orders issued under the OPA or other federal statutes.<sup>263</sup>

In order to not appear to be catering to big industry, Congress expanded some liability under the OPA. Congress accomplished this by dealing with the Limitation of Shipowner's Liability Act of 1851 (LLA).<sup>264</sup> The LLA was passed to encourage shipbuilding and induce investment into the shipping industry by limiting the liability of ship owners.<sup>265</sup> Under the LLA, a party could enjoin all pending suits and

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253. 33 U.S.C. § 2704(a)(1)(A).

254. *Id.* § 2704(a)(1)(B)(i).

255. *Id.* § 2704(a)(1)(B)(ii).

256. *Id.* § 2704(a)(2).

257. *Id.* § 2704(a)(3).

258. *Id.* § 2704(a)(4).

259. *See id.* § 2704(c)(1)(A).

260. *See id.* § 2704(c)(1)(B).

261. *See id.* § 2704(c)(2)(A).

262. *See id.* § 2704(c)(2)(B).

263. *See id.* § 2704(c)(2)(C).

264. *See* 46 U.S.C. App. §§ 181-195 (1994).

265. *See* *Hartford Accident & Indem. Co. v. S. Pac. Co.*, 273 U.S. 207, 214 (1927).

compel them to be filed in a special limitation proceeding in order to limit its liability to the value of the vessel and any freight pending.<sup>266</sup>

In the years prior to the passage of the OPA, the appropriateness of the LLA was questioned. For example, one court indicated that the LLA was merely “a relic of an earlier era.”<sup>267</sup> Further, legislative schemes were devised to supersede the LLA and set more realistic liability limits when addressing an oil spill with a major environmental impact.<sup>268</sup>

The Senate report accompanying the OPA stated that “the 1851 statute virtually eliminates any meaningful liability on the part of the owner or operator and would unravel the balance of liability set forth herein.”<sup>269</sup> Therefore, the OPA explicitly supersedes the LLA’s liability limits with respect to claims for cleanup costs and damages resulting from a discharge of oil, and establishes its own schedule of liability limits for damages resulting from the oil discharge.<sup>270</sup> The OPA specifically prohibits the use of the LLA by an OPA “responsible party.”<sup>271</sup> Moreover, the LLA was superseded as to claims under state oil pollution statutes.<sup>272</sup>

One of the first cases to address the issue of whether the LLA still applies to claims relating to an oil spill was *In re Spray*.<sup>273</sup> The case began when, on July 1, 1995, the M/V JAHRE SPRAY, a self-propelled tank vessel owned by a Norwegian company, loaded a full cargo of Rabi light crude from West Africa and headed for Coastal Eagle Point Oil Company (Coastal) refinery in New Jersey.<sup>274</sup> The JAHRE SPRAY transferred the crude to the refinery from July 21 to the late afternoon of July 22.<sup>275</sup> That afternoon, when the transfer was nearly complete, personnel from the vessel observed an increase in wind and ordered a shut down of the vessel’s pumps.<sup>276</sup>

Later, after the vessel was struck by sudden high winds and heavy rain, it gradually moved off the dock.<sup>277</sup> At that time, two cargo hoses and

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266. 46 U.S.C. app. §§ 183, 186.

267. *See* *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989).

268. *See, e.g., In re Glacier Bay*, 944 F.2d 577 (9th Cir. 1991) (dismissing complaint for limitation or exoneration of liability pursuant to LLA because TAPAA implicitly repealed application of LLA in regard to transportation of trans-Alaskan oil).

269. S. REP. NO. 101-94, at 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 736.

270. *See* 33 U.S.C. § 2704 (1994); *see also* *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1347 (11th Cir. 1998).

271. 33 U.S.C. § 2704.

272. The OPA explicitly permits states to adopt laws imposing additional liability for oil spills above the liability limits established by the OPA and the LLA. *Id.* § 2718(c)(1).

273. *In re Spray*, No. 95-3495, 1996 WL 451315, at \*1 (D.N.J. Aug. 5, 1996).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

one bunker hose were connected to the shore manifold.<sup>278</sup> As the vessel was blown off berth, the three hoses parted and approximately 1000 barrels of oil flowed into the Delaware River from the Coastal facility onshore.<sup>279</sup> A small amount of oil also flowed from the vessel into the river.<sup>280</sup>

On July 26, 1995, Coastal filed a complaint seeking exoneration from, or limitation of, liability pursuant to the LLA.<sup>281</sup> The plaintiffs conceded that those who fall within the category of “responsible parties” or “sole cause third parties” under the OPA are not entitled to limit their liability under LLA for claims raised under OPA, but contended that they were neither the discharger, nor a sole cause third party, as defined by the OPA.<sup>282</sup> The court determined that the plaintiffs’ classification was irrelevant.<sup>283</sup> It held that, in light of the plain meaning of the OPA and its legislative history, the LLA does not apply to claims relating to an oil spill.<sup>284</sup>

In a more recent case, the court examined the interaction between the OPA and the LLA.<sup>285</sup> In determining that the OPA explicitly superseded the LLA, the court stated that “a plain reading of [the OPA] suggests that the OPA repealed the [LLA] with respect to removal cost and damages claims against responsible parties.”<sup>286</sup> In supporting its decision, the court concluded that at least four provisions of the OPA unequivocally revoked the LLA with respect to certain types of claims.<sup>287</sup> One provision of the OPA repealed the LLA “as to third parties solely responsible for an [oil] spill.”<sup>288</sup> A second provision of the Act repealed the LLA “as to state and local statutory remedies.”<sup>289</sup> Another OPA provision repealed the LLA “as to additional liability imposed by the United States, any state, or political subdivision.”<sup>290</sup> The OPA also repealed the LLA “as to fines and penalties.”<sup>291</sup>

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278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at \*2.

282. *Id.*

283. *Id.* at \*5.

284. *Id.* at \*3-\*5.

285. *See In re Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997).

286. *See id.* at 821.

287. *Id.*

288. *Id.* (citing 33 U.S.C. § 2702(d)(1)(A) (1994)).

289. *Id.* (citing 33 U.S.C. § 2718(a)).

290. *Id.* (citing 33 U.S.C. § 2718(c)(1)).

291. *Id.* (citing 33 U.S.C. § 2718(c)(2)).

The court also decided that the LLA had been repealed by implication.<sup>292</sup> The court reasoned that, since key provisions of the LLA and the OPA are inconsistent, the OPA, the later statute, should control.<sup>293</sup> For example, the first inconsistency noted by the court was that “the LLA limits the shipowner’s liability to the post-accident value of the vessel plus pending freight,<sup>294</sup> while the OPA contemplates a strict liability regime with statutory limits of at least \$2 million for tank vessels and \$5 million for all other vessels.”<sup>295</sup> The Court also pointed out that the provisions on jurisdiction in the two Acts conflict.<sup>296</sup> Proceedings under the LLA can only be held in federal court,<sup>297</sup> whereas, OPA claims can be litigated in federal or state court.<sup>298</sup>

#### IV. THE OPA: ARE CHANGES NEEDED?

When Congress passed the OPA, one of its principle goals was to create a comprehensive oil pollution liability scheme.<sup>299</sup> Congress achieved that goal by consolidating several disparate federal oil spill liability statutes into one comprehensive statute that sets out the liability for oil spills.<sup>300</sup> The end result was a legal regime that promotes efficiency and judicial economy. For example, the parties involved in an oil spill have to consult only one authority to determine their rights and responsibilities. Nonetheless, after more than 4380 days, the statute needs to be checked to see if changes are necessary. The statute was passed in response to the EXXON VALDEZ oil spill.<sup>301</sup> Thus, the benchmark for evaluating its effectiveness is if it contains the liability provisions necessary to deal with a similar type of incident.

The OPA provides the government access to a permanent domestic fund for removal operations.<sup>302</sup> The fund allows the government to undertake removal operations in emergency situations or when the responsible party fails to clean up the spill.<sup>303</sup> Congress established the OPA fund because the funds available under pre-OPA statutes contained

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292. *Id.*

293. *Id.*

294. *Id.*; see 46 U.S.C. app. § 183(a) (1994).

295. *In re Metlife*, 132 F.3d at 822; see 33 U.S.C. §§ 2702, 2704.

296. See *In re Metlife*, 132 F.3d at 822.

297. See *id.* (citing *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988)).

298. *In re Metlife*, 132 F.3d at 822; see 33 U.S.C. § 2717(b)-(c).

299. Jones, *supra* note 99, at 10,334.

300. *Id.* at 10,337.

301. See Swanson, *supra* note 32, at 142.

302. 33 U.S.C. § 1321(5).

303. *Id.* § 1321(c).

inadequate resources to fund the cleanup of a major oil spill.<sup>304</sup> It is important that the fund contain enough financial resources because there probably will be major oil spills in the future and there are few, if any, responsible parties who can afford to spend the amount of money that Exxon did.<sup>305</sup> Consequently, the government will be forced to contribute to the removal operations.

The current financial resources available under the OPA are not sufficient to clean up an oil spill the size of the EXXON VALDEZ oil spill. The magnitude of efforts of state and federal governments, the public, and Exxon to contain and clean up the spill, rescue wildlife, and study the effects of the spill was unprecedented.<sup>306</sup> The cleanup effort cost Exxon more than \$2 billion over four years.<sup>307</sup> In September of 1991, Exxon entered into a consent decree with the governments of the United States and Alaska to settle all pending civil and criminal matters arising out of the oil spill.<sup>308</sup>

Over ten years after the oil spill, the environment in Bligh Reef still bears the scars. In its February 1999 status report, the Exxon Valdez Oil Spill Trustee Council reported that of twenty-three species of living things adversely affected by the disaster only two—the bald eagle and the river otter—are fully recovered.<sup>309</sup> The fish that provided the livelihood for the sound are still recovering. Thus, limited commercial fishing has been allowed to resume after several years of closure. However, the fishing income has been cut in half, from an annual high of \$80 million the year before the spill to less than \$40 million in 2000.<sup>310</sup> Thus, before Congress agrees to allow drilling in Alaska, it needs to implement systems to increase the amount of money available in the fund.

The OPA attempts to fairly distribute liability. By making the amount of liability dependent upon the size of the vessel, the OPA tries to ensure that parties gaining the most benefit from oil transportation have

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304. See *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234 (9th Cir. 1989).

305. See *infra* text accompanying note 307.

306. See Hodgson, *supra* note 109, at 4.

307. *Id.* at 4. The fishing communities near the spill area sued Exxon and, on September 16, 1994, the jury awarded them \$5 billion in punitive damages. See *In re Exxon Valdez*, 229 F.3d 790, 794 (9th Cir. 2000). Exxon's motion to set aside the judgment was denied. *In re Exxon Valdez*, A89-0095-CV, 1995 WL 527989, at \*5 (D. Alaska Jan. 27, 1995).

308. See *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 775 (9th Cir. 1994), *cert. denied*, 513 U.S. 1102 (1994).

309. See McFadden, *supra* note 9, at <http://www.msnbc.com/news/252314.asp>.

310. George Lewis, *Alaska Lives With an Unwanted Legacy*, MSNBC, at <http://www.msnbc.com/news/252495.asp> (Mar. 24, 2001).

the most responsibility for keeping the navigable waters clean.<sup>311</sup> Further, the fact that the OPA repealed the LLA, with regard to oil spills, shows that Congress was serious about making parties who pollute pay for the damage they cause to the environment.<sup>312</sup> However, the current liability caps under the OPA are too low. Thus, if another EXXON VALDEZ-size oil spill occurs, the federal government will be forced to cover the cost of cleaning up the damage. For instance, had Exxon been allowed to limit its liability, Prince William Sound would be in worse environmental shape than it is now. Therefore, Congress should consider removing or increasing the liability allowance under the OPA.

The OPA does not preempt state oil pollution laws or specify a single forum for the adjudication of claims.<sup>313</sup> Because different state statutes have different liability standards from each other, and, in some cases, from the federal statutes, the responsible party will be unable to predict the possible outcome of its case.<sup>314</sup> As a result, Congress has failed to achieve its goal of creating a more comprehensive and predictable liability regime. Because states can institute liability standards that go beyond what is mandated by the OPA, the current liability regime is not much different from the one that existed prior to the passage of the OPA. In order to establish uniformity, Congress should change the OPA so that it preempts state oil pollution laws. The lack of a designated forum may lead to forum shopping. It could also lead to a lack of judicial economy because judges will not be able to gain expertise in dealing with the OPA. Hence, Congress should change the OPA to indicate that all claims under the Act must be filed in federal court since the liability regime is created by a federal statute.

The impact of the OPA is weakened by the Act's exclusion of discharges of oil from public vessels. Under the OPA, the definition of "public vessel" is extremely broad. It includes vessels the government owns and those the government charters.<sup>315</sup> This expansive definition could allow numerous vessels to escape liability for damage caused by oil spills. If oil drilling is allowed in the Arctic National Wildlife Refuge, the OPA may have to be amended to place some liability on public vessels in order to encourage the government to take extra care in the area. In the alternative, Congress should limit the definition of public

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311. *Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp.*, 924 F. Supp. 1436, 1447 n.6 (E.D. Va. 1996).

312. *See* 33 U.S.C. § 2718 (1994).

313. *See* Vickers, *supra* note 71, at 410-11.

314. *See id.*

315. 33 U.S.C. § 2701(29).

vessel, under the OPA, to only those vessels that are solely owned by the government.

Exxon has already spent more than \$2 billion dollars, an amount that exceeds the liability limits established by the OPA, to clean up Prince William Sound and the area still has not recovered from the oil spill.<sup>316</sup> Consequently, it is doubtful that the current liability scheme created by the OPA will have much of an impact on an oil spill of that magnitude. Thus, more than 4380 days after EXXON VALDEZ, it is time for Congress to make some changes to the OPA.

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316. See Theodore Roosevelt IV, *An Ecological Betrayal*, BOSTON GLOBE, Sept. 4, 2001, at A15.