

Escaping the “Black Hole” in the Gulf

Stanley A. Millan*

I. GENERAL	42
II. OPA PRIVATE DAMAGES.....	47
III. STATE MINI-OPAS.....	66
IV. CONCLUSION	67
APPENDIX.....	69

“The most merciful thing in the world, I think, is the inability of the human mind to correlate all its contents. We live on a placid island of ignorance in the midst of black seas of infinity, and it was not meant that we should voyage far. The sciences, each straining in its own direction, have hitherto harmed us little; but some day the piecing together of dissociated knowledge will open up such terrifying vistas of reality, and of our frightful position therein, that we shall either go mad from the revelation or flee from the deadly light into the peace and safety of a new dark age.”

—H.P. Lovecraft (1926)¹

The author interprets this quote as Lovecraft’s first law: never release a thing that you cannot control. Lovecraft wrote about science fantasy and supernatural horror, but his first law applies with equal dignity to environmental horror. Whether the environmental horrors emanated from the Ixtoc 1979 oil spill in the Gulf, the 1984 chemical factory explosion in Bopal, the 1986 meltdown of the nuclear power plant in Chernobyl, the EXXON VALDEZ oil spill in Prince William Sound in 1989, or more recent “unnamable” disasters like oil spills off the Gulf Coast, they all involve releases of substances that are largely beyond mankind’s control. Truly, hell has no fury like a mother earth scorned.

This Article focuses on oil spills, but no one spill in particular is dissected. There are plenty of oil spills to choose from, including the recent DEEPWATER HORIZON oil spill in the Gulf of Mexico. This

* © 2010 Stanley A. Millan. S.J.D. Lecturer in environmental and administrative law at Loyola College of Law, New Orleans, adjunct professor of law at Tulane University Law School and Loyola Institute of Environmental Communications Fellow (2010). The author practices environmental and administrative law and is licensed in Louisiana and Texas. The views herein are his alone. He is not a litigant in the DEEPWATER HORIZON disaster.

1. H.P. LOVECRAFT, *THE CALL OF CTHULHU* (1928), *reprinted in* THE BEST OF H.P. LOVECRAFT: BLOODCURDLING TALES OF HORROR AND THE MACABRE 72 (1982).

Article will explore the reaches of the Oil Pollution Act of 1990² and state analogs and how they address damages that flow from oil disasters. This discussion may not apply to all oil spills, as some have specially tailored procedures, i.e., the Gulf Coast Fund managed by Mediator Kenneth Feinberg.³

I. GENERAL

The Oil Pollution Act (OPA) sets forth elements of liability for “each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil.”⁴ OPA covers navigable waters, adjoining shorelines, and the exclusive economic zone.⁵

Shoreline is not defined in OPA but at least encompasses land linked to the shore.⁶ “Navigable waters” is a broad term covering the waters of the United States including the territorial sea.⁷ The exclusive economic zone generally extends 200 nautical miles offshore of the coastal continental United States.⁸ The responsible party is a term of liability under OPA and varies to the extent different vessels, onshore

2. 33 U.S.C. § 2701 (2006).

3. On June 18, 2010, Feinberg was appointed by the President to head a \$20 billion fund to compensate victims of the ongoing oil spill in the Gulf. David Gura, *Kenneth Feinberg Overseeing Gulf Coast Fund, Ready To Deal with “Thorny Issues,”* NPR’s NEWS BLOG, THE TWO-WAY (June 18, 2010, 2:59 PM), <http://www.npr.org/blogs/thetwo-way/2010/06/18/127935044/kenneth-feinberg-overseeing-gulf-coast-fund-ready-to-deal-with-thorny-issues>. Feinberg oversaw the September 11th Victim Compensation Fund, which paid out more than \$7 billion to 5560 voluntary claimants in just under three years, and only ninety-four lawsuits for damages were ever filed. Kenneth R. Feinberg, *9/11 Fund: Once Was Enough*, WASH. POST, Sept. 11, 2008, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091002721.html>. However, Feinberg did not recommend establishing a similar compensation program in the future. KENNETH R. FEINBERG, DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 83-84 (2001), available at <http://www.glad.org/30years/pdfs/walsh-victim-fund-report.pdf>. It is interesting that a total of \$38.1 billion was paid to persons and businesses impacted by 9/11, from insurance, government, and charitable group sources, as well as from the 9/11 Fund. Robert Langley, *RAND Report Details 9-11 Victims Compensation*, ABOUT.COM: U.S. GOVERNMENT INFO (Jan. 2005), <http://usgovinfo.about.com/od/defenseandsecurityla/randon911.htm>. Feinberg indicated he will look to state law for indirect OPA claims. Rebecca Mowbray, *How Far Can BP Fund Go? Maybe to Tanning Beds or Waxing Salons*, TIMES-PICAYUNE (New Orleans), Aug. 3, 2010, at A1, available at <http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-15/1280817117194950.xml&coll=1>. This is a problematic view.

4. 33 U.S.C. § 2702(a). Liability is strict. *In re Needham*, 354 F.3d 340, 344 (5th Cir. 2003).

5. 33 U.S.C. § 2702(a).

6. *GMD Shipyard Corp. v. M/V Anthea Y*, No. 03 Civ.2748 RWS, 2004 WL 2251670, at *10 n.1 (S.D.N.Y. Oct. 6, 2004).

7. 33 U.S.C. § 2701(21).

8. *Id.* § 2701(8); see Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

facilities, offshore facilities, deepwater ports, and pipelines are involved in an oil spill incident.⁹ The discharge of oil must be tied to an incident.¹⁰ An incident “means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.”¹¹

OPA’s liability extends to removal costs and damages.¹² Removal costs, of course, refer to oil spill cleanup costs.¹³ Penalties and fines are also available in the form of sanctions.¹⁴ Damages are more far-reaching.

Damages under OPA include both natural resource damages and what the author calls private damages.¹⁵ Natural resources “include[] land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States,” state or local governments or Indian tribes, or foreign governments.¹⁶ Designated trustees are the only parties that may recover for the natural resource damages.¹⁷ Private damages include damages to real or personal property, loss of subsistence from natural resources, loss of revenues, loss of profits and earnings, and increased or additional public service costs.¹⁸

The measure of natural resource damages includes “the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources.”¹⁹ The damages also include “the diminution in value of those natural resources pending restoration” plus “the reasonable cost of assessing those damages.”²⁰ OPA’s regulations dealing with the assessment of natural resource damages are promulgated by the

9. 33 U.S.C. § 2701(32).

10. *Id.* §§ 2701(14), 2702(a).

11. *Id.* § 2701(14).

12. *Id.* § 2702(a).

13. *Id.* § 2701(31) (defining removal costs as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, [including] the costs to prevent, minimize, or mitigate oil pollution from such an incident”). The blueprint for removal actions is the National Oil and Hazardous Substances Pollution Contingency Plan. 40 C.F.R. pt. 300 (2010).

14. 33 U.S.C. §§ 1319, 1321. Congressional action is pending on various oil related legislation. *See, e.g.*, Environmental Crimes Enforcement Act of 2010, S. 3466, 111th Cong. (2010) (ratcheting up penalties for oil spills).

15. 33 U.S.C. § 2702(b)(2).

16. *Id.* § 2701(20).

17. *Id.* § 2702(b)(2)(A).

18. *Id.* § 2702(b)(2)(B)-(F).

19. *Id.* § 2706(d)(1)(A).

20. *Id.* § 2706(d)(1)(B)-(C).

National Oceanic and Atmospheric Administration (NOAA), under the U.S. Department of Commerce.²¹

The NOAA's rules discuss alternate means of natural resource restoration including natural attenuation, compensation for lost value, active restoration or remediation, and the reasonable cost of the alternative selected.²² The compensable value lost would be valued under market and contingent evaluation survey techniques. Then the best alternative for restoration of the damaged natural resources would be determined by natural resource trustees. A ratio between fair market value and resources lost and the cost of restoration would not be an absolute guide.²³ If long-term natural restoration is selected, restoration costs could be low, but then the loss of use and nonuse values (existence value, etc.) could be higher. Immediate restoration might increase restoration costs but would result in less loss of use (hunting, fishing, etc.) and nonuse values.²⁴ A hypothetical can illustrate the complexity of natural resource damage assessments and how they differ from other private damages.²⁵

For example, assume the *M* Reserve in Louisiana consists of over 1000 acres of pristine wetlands owned by *M*. The site is subject to permitting under section 404 of the Clean Water Act for excavating and dredging.²⁶

Students and scientists frequently visit the area for observation and study. *M* does not charge these groups anything. Seasonally, *M* leases duck blinds there for hunting. *M* serves as a guide for a fee on these hunting trips. The site also has (1) ancient Indian mounds that are reputed to be haunted, that nobody to date has visited or wants to, and (2) an interesting array of birds and waterfowl during nonhunting periods that private groups and vacationers have paid *M* to conduct tours of for their observation purposes. Many mud or elevated wooden paths are available for people to visit the mounds, observe the birds, and take pictures.

A tug owned by *A*, with a barge loaded of *A*'s chemicals (solvents, acids, etc.), collides with a tug owned by *B*, with barge loads of *B*'s petroleum products, in the lake adjacent to the *M* Reserve. A spill of

21. See 15 C.F.R. pt. 990 (2010). Phases include preassessment, restoration planning, and implementation. *Id.*

22. See STANLEY A. MILLAN, LOUISIANA ENVIRONMENTAL COMPLIANCE § 2:23 (2009–2010 ed. 2009).

23. *Id.*

24. *Id.*

25. See STANLEY A. MILLAN, LOUISIANA ENVIRONMENTAL HANDBOOK § 26:39 (1999).

26. 33 U.S.C. § 1344 (2006).

both cargoes occurs in the lake. Wind blows the spilled materials toward the *M* Reserve. The lake water is high and it carries the debris well into the wetlands and onto the paths. Before a spill response is effective, about 500 to 600 acres of the *M* Reserve are covered with a mixture of the spilled chemicals and oil.

Assume the bird and duck resting and rearing areas are contaminated. The grounds surrounding the Indian mounds are covered with debris, oil, and chemicals. To restore the area fully, soil will have to be excavated over hundreds of acres, vegetation will have to be cleaned and/or replanted over many hundreds of acres, new paths for bird watching and around the Indian mounds will have to be reconstructed, and eventually species will have to be restocked in the area. This work will likely cost \$11 million and take one to two years of work to complete. Alternatively, with cleaning of vegetation and fixing some paths (costing \$1 million total), contamination within the area could naturally attenuate within ten years.

M's touring and hunting guide fees total \$30,000 annually, and *M*'s rentals total \$20,000 annually. About 5000 people visit the site annually, not only from Louisiana, but also from all over the country. They fly and drive down, bring equipment (guns, gear, binoculars, cameras, etc.), and some even write nature stories. What are the natural resource damages?

This hypothetical covers aspects of a natural resource damages case. Natural resource damages assessments must cover both use and nonuse values. Computer models, on-site investigations, and economic methods are used in the assessment.

Use value is mostly associated with consumptive and nonconsumptive uses. This value includes fishing and hunting. Market values are associated with these uses, and these values can be estimated as part of the natural resource damages assessment. The annual rent and hunting fees (for example, assume \$50,000), other costs associated with travel to, and equipment used at the tract fall into this estimate. Nonconsumptive values include observations, tours, and bird watching.

Nonuse or passive "use" relates to the public's desire to keep the wetland tract and its haunted Indian burial grounds in existence; public members may want the option to visit the site one day or just may want to preserve the area. This aspect has no inherent market value, and contingent valuation techniques of the area's worth (and damage) may be obtained from objective surveys of individuals, i.e., asking them hypothetically what the lost resource is worth to them. Intrinsic values of resources within an ecosystem, for example, what is the true economic

impact to society from loss of a wetland or waterfowl, are not covered. Nonuse value is the surrogate for intrinsic values.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),²⁷ the entire area, insofar as it is contaminated with hazardous chemicals, is subject to natural resource damages. However, the owner's loss of profit and fees is irrelevant because only the trustee may recover natural resource damages to restore the area. The owner may recover lost profits and fees under state law or OPA.²⁸ Under OPA, natural resource damages can be recovered by the trustee for damages to the water and possibly wetlands associated with the oil spill, and the owner may recover his or her damages too.²⁹

In the above hypothetical, perhaps the Louisiana Department of Wildlife and Fisheries or Department of Natural Resources or NOAA would be the trustees. The trustee may favor natural restoration, costing \$1 million, loss of use and nonuse values (\$100,000 a year for ten years), plus \$100,000 for the assessment. Natural resource damages would equal \$2.1 million in the hypothetical. The test of "reasonableness" would be applied to the trustee's assessment. The landowner may consent to the trustee's restoration in this example. In other scenarios, the baseline of the resources damaged may not be as clear-cut, with pre-spill issues of historic spills and coastal erosion haunting the natural resource injury assessment.³⁰ Such assessments are also time consuming.³¹

This Article will focus on the private damages aspects of OPA and state analogs. Other issues of maritime law and tort liability, i.e., personal injury, limitation of liability, insurance, contribution, responder immunity, government cost recovery, and subrogation, are not the focus of this Article.

27. 42 U.S.C. §§ 9601-9675 (2006) (covering the release of hazardous substances like the solvents and acids).

28. 33 U.S.C. § 2702(b)(2)(D).

29. *Id.* § 2702(b)(2).

30. 15 C.F.R. §§ 990.30, .51 (2010); LA. ADMIN. CODE tit. 43:XXIX, §§ 109, 121 (2007). Department of Interior rules cover CERCLA natural resource damages. 43 C.F.R. pt. 11 (2009). Though these procedures are not exclusive, an assessment based on these rules is entitled to a rebuttable presumption of accuracy in court.

31. Mark Schleifstein, *It May Take 10 Years To Tally Damage to Natural Resources*, TIMES-PICAYUNE (New Orleans), July 29, 2010, at A1, available at <http://www.nola.com/news/t-p/frontpage/index.ssf?base/news-15/128038507940560.xml&coll=1>.

II. OPA PRIVATE DAMAGES

OPA shares a goal of environmental restoration with many other environmental statutes.³² CERCLA, for instance, also provides for both removal of hazardous substance contamination and natural resource restoration.³³ However, CERCLA's goal of restoration is more singular than OPA.³⁴ The Clean Water Act provides for improvement of water quality through its own regime of total maximum daily loads.³⁵ The Clean Water Act also provides for wetland restoration, monitoring, and mitigation.³⁶ The Endangered Species Act provides for protected species recovery plans.³⁷ The Clean Air Act provides for cleanup of dirty ambient air known as nonattainment areas.³⁸ The Resources Conservation Recovery Act provides for corrective action at contaminated areas of regulated hazardous waste sites.³⁹ There are also a variety of federal programs providing for restoration, such as the Comprehensive Everglades Restoration Program⁴⁰ and Louisiana Coastal Restoration.⁴¹ However, OPA goes beyond these environmental statutes in that it does provide for private damages. Otherwise, private damages are mostly a private law game under maritime and tort law.

In discussing private damages, an analysis of punitive damages is beyond the scope of this Article. It is noted that the United States Supreme Court in *Exxon Shipping Co. v. Baker*⁴² found that a one-to-one ratio of compensatory damages to punitive damages represents a fair upper limit in most maritime cases.⁴³ This leaves open the question of whether OPA saves or preempts punitive damages. This would be a

32. Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 *FORDHAM ENVTL. L. REV.* 183, 188 (2005).

33. 42 U.S.C. §§ 9601, 9607 (2006).

34. For instance, OPA also provides for tanker designs, insurance coverage, response plans, etc. See 33 U.S.C. §§ 1321(j)(5), 2716, 2761-2762 (2006).

35. *Id.* § 1313(d).

36. MILLAN, *supra* note 22, § 5:45; 33 C.F.R. pt. 332 (2009); 40 C.F.R. pt. 230 subd. J (2009).

37. 16 U.S.C. § 1533(f) (2006).

38. 42 U.S.C. § 7501 (2006).

39. *Id.* § 6924.

40. THE COMPREHENSIVE EVERGLADES RESTORATION PLAN (CERP), <http://www.evergladesplan.org> (last visited Sept. 1, 2010).

41. See COASTAL WETLANDS PLANNING, PROTECTION AND RESTORATION ACT (CWPPRA), <http://lacoast.gov/new> (last visited Sept. 1, 2010).

42. 128 S. Ct. 2605 (2008) (holding that the Clean Water Act's water pollution penalties do not preempt punitive damage awards in maritime oil spill cases).

43. *Id.* at 2634 (stating that "a single-digit maximum is appropriate in all but the most exceptional of cases").

matter of maritime and state law. Many states have punitive damages,⁴⁴ but Louisiana law does not allow punitive damages for new hazardous substance spills at this time.⁴⁵

Aside from narrow exceptions, such as solely economic damages because of fraud or for commercial fishermen, a more significant legal question is whether OPA broadly allows for recovery of purely economic losses in the event of an oil spill.⁴⁶ Under maritime law, generally at common law, and sometimes in Louisiana civil law, tort claims for purely economic damages are too remote and therefore precluded.⁴⁷ This is the common law “economic loss rule,” which arose from product liability and maritime cases but has been generally extended to other situations including chemical spills.⁴⁸ In other words, at least aside from statutes like OPA, only a party who has suffered physical damage, for example, someone who has a proprietary interest in an oiled vessel or oiled dock, can also pursue related economic damages. Absent physical damage, additional economic losses are not provided for under maritime law and most state tort laws. Although dicta and some case law suggests the answer under OPA is affirmative, that is it does allow for purely economic losses, further jurisprudential development in the area may be needed to make the answer crystal clear.⁴⁹ In *In re Ballard Shipping Co. v.*

44. See Brian B. O’Neill, *An Oil Spill Liability Primer*, NAT’L. L.J. (June 14, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462432212&An_oil_spi;;liability-primer.

45. *Ross v. Conoco Inc.*, 828 So.2d 546, 555 (La. 2002).

46. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (involving fishermen affected by an oil spill).

47. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1021 (5th Cir. 1985); *see Dempster v. Louis Eymard Towing Co.*, 503 So. 2d 99 (La. App. 5 Cir. 1987), *writ denied*, 505 So. 2d 1136 (La. 1987); *PPG Indus. v. Bean Dredging*, 447 So. 2d 1058, 1059-61 (La. 1984) (holding that duty-risk analysis does not extend duty and liability to indirect economic loss plaintiffs); *see also* AMERICAN LAW OF PRODUCTS LIABILITY 3D § 60.41 (2010); *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 388 (Miss. Ct. App. 1999); *Vesta Fire Ins. Corp. v. Millam & Co. Constr.*, 901 So. 2d 84, 106-07 (Ala. 2004). Unfortunately, Alabama and Mississippi have no mini-OPA at this time.

48. AMERICAN LAW OF PRODUCTS LIABILITY 3D, *supra* note 47, § 60.41; *see also In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 680 F. Supp. 2d 780, 790, 796-98 (E.D. La. 2010) (questioning the extension of the economic loss rule to situations other than cases where products fail to meet economic expectations of plaintiffs, i.e., Chinese drywall, asbestos, and formaldehyde cases that involve products that pose unreasonable health risks). Of course, most cases that involve products that pose unreasonable health risks involve personal injury as well. The court also discussed that while Florida and Alabama generally adopted the economic loss rule, Mississippi’s position was not clear cut, and Louisiana’s position was negative. Again, most of these health risk cases involve personal injury or property damages, while oil spill cases may not do so in all instances.

49. *See In re Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630 (1st Cir. 1994) (stating that OPA “certainly provides for recovery of purely economic damages in oil spill cases”); *see also In re Taira Lynn Marine Ltd. No. 5*, 444 F.3d 371, 382 (5th Cir. 2006)

Beach Shellfish, the United States Court of Appeals for the First Circuit held that OPA was not applicable to the spill in question because OPA does not apply retroactively.⁵⁰ In *In re Taira Lynn Marine*, the United States Court of Appeals for the Fifth Circuit denied damages based on a lack of proof of causation.⁵¹ This issue will be further addressed in this Article.

Another significant aspect of private damages under OPA is its claims procedure. Section 2713(a) of OPA provides that “all claims for removal costs or damages shall [first] be presented . . . to the responsible party.”⁵² This claim’s presentation requirement against the responsible party is jurisdictional, or at least a conditioned precedent to federal court action.⁵³ This presentation requirement is important because a general maritime tort law is preempted by OPA.⁵⁴ This is because OPA is a “comprehensive legislation addressing oil spill liability and compensation.”⁵⁵ The presentation requirement would not be applicable to non-OPA damages like bodily injury or collision claims under maritime law.⁵⁶ Additionally, OPA saves state law in imposing additional liability requirements with respect to pollution or removal activities in connection with oil discharges.⁵⁷ This means state law does not automatically have to have any claims presentation requirements for oil spill claims.⁵⁸ Of course, since most states generally have limited trust funds and limited access to an oil spill liability trust fund,⁵⁹ recourse may be needed in a state court in lieu of administrative claims.

(explaining that 33 U.S.C. § 2702(b)(2)(E) (2006) “allows a plaintiff to recover for economic losses resulting from damage to another’s property”).

50. *In re Ballard*, 32 F.3d at 630-31.

51. See *In re Settoon Towing, LLC*, No. 07-1263, 2009 WL 4730969, at *4 (E.D. La. Dec. 4, 2009), where the court more definitively stated that an OPA claimant need not be owner of the damaged property to recover loss of profit or earnings. In this case, the claimant’s inability to access its platform during oil spill cleanup was the basis for the lost profit or earnings. The Gulf Intracoastal Waterway was shut down during the oil spill cleanup.

52. 33 U.S.C. § 2713(a); see also 33 C.F.R. pt. 136 (2009).

53. See *Marathon Pipe Line Co. v. LaRoche Indus.*, 944 F. Supp. 476, 477-78 (E.D. La. 1996) (holding that the presentation requirement is inapplicable to a responsible party’s claim against another third party); *Leboeuf v. Texaco*, 9 F. Supp. 2d 661 (E.D. La. 1998).

54. *Gabarick v. Laurin Mar. (Am.) Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009).

55. *Id.* at 746.

56. *Id.* at 745.

57. 33 U.S.C. § 2718(a).

58. See, e.g., Oil Spill Prevention and Response Act, LA. REV. STAT. §§ 30:2451, :2500 (1991). Louisiana appears to have no such presentation requirement.

59. 33 U.S.C. § 2712(d)(1).

Besides procedural objections and causation arguments,⁶⁰ specific defenses are limited under OPA to damages or removal costs caused solely by act of God, an act of war, or an act or omission of a third party.⁶¹ These defenses are narrowly construed.⁶² For instance, in *Apex Oil, Inc. v. United States*, the court compared the act of God defense in CERCLA with OPA as follows:

Congressional intent is clearly that the “exceptional natural phenomenon” (*i.e.*, the “act of God”) defense be construed as much more limited in scope than the traditional common law “act of God” defense. The discharger’s burden of proof on the defense of “exceptional natural phenomena” is much more onerous than that required for common law or traditional “act of God” defense. The legislative history of CERCLA includes the following explanation regarding the *singular* “defense for exceptional natural phenomena”:

The defense for the exceptional natural phenomenon is similar to, but more limited in scope than, the traditional ‘act of God’ defense. It has three elements: the natural phenomenon must be exceptional, inevitable, and irresistible. Proof of all three elements is required for successful assertion of the defense. The ‘act of God’ defense is more nebulous, and many occurrences asserted as ‘acts of God’ would not qualify as ‘exceptional natural phenomenon.’ For example, a major hurricane may be an ‘act of God,’ but in an area (and at a time) where a hurricane should not be unexpected, it would not qualify as a ‘phenomenon of exceptional character.’⁶³

Other defenses include a three-year statute of limitation based on the various triggering events,⁶⁴ excluded oil discharges,⁶⁵ innocent landowners,⁶⁶ and OPA limitation of liability standards for various size

60. *G.E. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 777 (D.C. Cir. 1997). A responsible party is liable for damages that “result from” an oil discharge. 33 U.S.C. § 2702(a).

61. 33 U.S.C. § 2703(a).

62. See *International Marine Carriers v. Oil Spill Liability Trust Fund*, 903 F. Supp. 1097, 1105-06 (S.D. Tex. 1994), *reh’g denied*, 914 F. Supp. 149 (S.D. Tex. 1995), which held that “any contractual arrangement,” not just direct contracts, may bar the OPA third party defense, e.g., oil terminal agreement with vessel operator. The case also discussed the CERCLA third-party defense, 42 U.S.C. § 9607(b) (2006), which applies when there is no connection between the responsible party and a trespasser if the responsible party took adequate security precautions. Some CERCLA cases also examine if a release occurred “in connection” with the contract in question. See *Shapiro v. Alexanderson*, 743 F. Supp. 268, 271 (S.D.N.Y. 1990).

63. 208 F. Supp. 2d 642, 652-53 (E.D. La. 2002) (quoting H.R. REP. No. 99-253(IV), at 71 (1985)).

64. 33 U.S.C. § 2717(f).

65. For example, public vessels or permits. *Id.* § 2702(c).

66. *Id.* § 2703(d).

vessels or facilities.⁶⁷ Such limitations do not apply in cases of gross negligence, willful misconduct, violation of applicable federal regulations,⁶⁸ or a failure of the responsible party to fulfill required reporting and to provide reasonable cooperation assistance to the government or to government orders.⁶⁹

OPA provides that a claimant may exclusively elect to commence an action in federal court against the responsible party or to present the claim to the Oil Spill Liability Trust Fund (Trust Fund or Fund) after exhaustion of the presentation procedures.⁷⁰ Those procedures are exhausted if the responsible party denies all liability for the claim or if the claim is not settled in a timely manner, generally within ninety days.⁷¹ A court action would result in judicial resolution of the claim. A claim against the Trust Fund would require administrative adjudication by the National Pollution Funds Center (NPFC).⁷² If the NPFC denies the claim, a cause of action for judiciary review may exist on the denial under the Administrative Procedures Act (APA).⁷³ One court held that a money award may be equitable relief under the APA where it results from an action enforcing a statutory mandate to pay money.⁷⁴ The court applied an arbitrary, capricious, and abuse of discretion standard to the Trust Fund’s determinations.⁷⁵ This is a deferential standard for agency action and not the same as a direct judicial determination when the claimant chooses to sue the responsible party in court. There would be no agency action to defer to in that case. This Article will further discuss different judicial and administrative determinations of private damage claims under OPA.

67. *Id.* § 2704(1). Congressional action is pending on removing OPA liability caps. *See* Oil Spill Accountability and Environmental Protection Act of 2010, H.R. 5629, 111th Cong. (2010).

68. 33 U.S.C. § 2704(c).

69. *Id.*

70. *Id.* § 2713(c). 33 C.F.R. § 136.103(d) (2009) indicates if a claimant elects court action and loses, the Fund may still certify the claim for payment. However, there would seem to be time limitation and possibly Fund exhaustion problems in such a case.

71. 33 C.F.R. § 136.103(c).

72. *Id.* § 136.3.

73. *See* Int’l Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097 (S.D. Tex. 1994). The court determined that a claim against the Fund for removal costs is a claim for equitable relief reviewable under the APA. The court did not address other private damages under OPA.

74. *Id.* at 1102.

75. *Id.* at 1104.

The NPFC has a Web site that illustrates the type of private damages payable under OPA.⁷⁶ Real property damages are illustrated as waterfront property that was oiled by an oil spill. The claim could include the cost of restoring the property to prespill condition or for the difference between the prespill market value of the property and the lower price received after the spill.⁷⁷

An example of personal property damage includes claims for cost of cleaning or replacing fishing tackle, equipment, or clothing that was oiled during a spill.⁷⁸ Proof includes photographs, official reports, invoices and receipts, proof of ownership (title or deeds), affidavits, property appraisals, and lease or rental agreements. Another example of property damage would be a boat damage claim, such as removing oil stains from the boat, including its upholstery, so that the boat is restored to its condition before the spill. Evidence includes photographs, date and evidence of last hull painting, vessel name, date vessel was built, copy of boat title, vessel length, vessel construction, location of boat at time of spill, date and location of boat cleaning, and hull identification or vessel identification numbers.

Examples of claims for lost profits include loss of cruises in a business of pleasure cruising or in a harbor where an oil spill closes the marina where the boat was docked.⁷⁹ Lost profit, not revenue, is recoverable. Proof would include photographs, tax returns for loss year and previous years, income statements, balance sheets, cash flow statements, receipts or other proof of revenue, official reports, Coast Guard or EPA information, and newspaper reports describing the spill.

An example of claims for lost government revenue would be of a city that does not collect as much revenue as usual from parking meters because of beaches not in use due to an oil spill cleanup.⁸⁰ Examples of supporting documentation includes log books, official reports, receipts, documents showing past used revenues, financial statements, witness statements, and newspaper reports describing the spill.

An example of a claim for increased public services includes a manager of a coastal town having to provide emergency traffic control in

76. NAT'L POLLUTION FUNDS CTR., *Oil Spill Claims*, U.S. COAST GUARD, <http://www.uscg.mil/npfc/Claims/default.asp> (last modified on Nov. 8, 2010); NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, CLAIMANT'S GUIDE: A COMPLIANCE GUIDE FOR SUBMITTING CLAIMS UNDER THE OIL POLLUTION ACT OF 1990 (2009), *available at* <http://www.uscg.mil/npfc/docs/PDFs/urg/Ch6/NPFCClaimantGuide.pdf>.

77. *Oil Spill Claims*, *supra* note 76 (click on "Properly Damage" hyperlink).

78. *Id.*

79. *Id.* (click on "Loss of Profits & Earning Capacity" hyperlink).

80. *Id.* (click on "Loss of Government Revenue" hyperlink).

the vicinity of an oil spill.⁸¹ Supporting documentation would include timesheets, payroll records, personal schedules, on scene coordinator reports, witness statements, and newspaper reports describing the spill.

As discussed, the Trust Fund covers removal cost and damages for an oil spill in amounts that exceed the responsible party’s liability limits. However, the Fund is limited to its available balance and covers only up to a \$1 billion limit per oil spill incident.⁸² There is also a \$500 million fund limit to natural resource damages per incident.⁸³

A sampling of judicial case law on OPA shows that jurisprudence is not finally developed on the scope of OPA’s private damages. 33 U.S.C. § 2702(b)(2)(B)-(F) (2006) provide as follows:

(2) Damages

The damages referred to in subsection (a) of this section are the following:

....

(B) Real or personal property

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

(C) Subsistence use

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

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity

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

(F) Public services

Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

81. *Id.* (click on “Increased Public Services” hyperlink).

82. 26 U.S.C. § 9509(c)(2), (e)(3) (2006).

83. *Id.* § 9509(c)(2).

In *In re Petition of Cleveland Tankers, Inc.*, the court addressed several economic claims by parties whose business interests were adversely affected by an accident and oil spill between Cleveland's vessel and a dock.⁸⁴ The accident involved the Cleveland vessel, M/V JUPITER, docked at Total's dock.⁸⁵ The M/V JUPITER was carrying a cargo of gasoline, and as it was unloading at Total an explosion and fire occurred.⁸⁶ The explosion and fire damaged the M/V JUPITER, which partially sank in the ship channel of the Saginaw River.⁸⁷ The claimants, inter alia, argued claims for economic losses under OPA because gasoline spilled into the river as a result of the accident.⁸⁸ Claimants claimed losses covered under OPA § 2701(b)(2)(C), loss of subsistence due to loss of use of a natural resource (the river), and subsection E, loss of profits or earning capacity due to damage to a natural resource (again the river).⁸⁹ The court narrowly interpreted OPA and found that there was no loss of subsistence of a natural resource in this case, as subsistence could not be stretched to cover any business activity.⁹⁰ The court indicated that subsistence would include food and shelter for support of life.⁹¹ Additionally, the court found that subsection E, loss of profits, would not apply to claimants who did not allege injury, destruction, or loss to *their property*.⁹² This case narrowly limited OPA to economic damages associated with property interest damage of the claimants.

In *Gatlin Oil Co. v. United States*, vandals opened some of Gatlin Oil's above ground fuel storage tanks causing an oil spill.⁹³ Vapors from the oil ignited and caused the fire that destroyed the warehouse, plant,

84. 791 F. Supp. 669, 670, 678-79 (E.D. Mich. 1992). Claimants included an operator of a marine terminal and commercial dock upstream of the accident who claimed increased operating costs during the closing of the channel. *Id.* at 671. Another commercial marine claimed it lost winter boat storage business as a result of the accident and closing of the channel. Other companies' facilities near the accident site had to be closed during a fire and incurred increased operating costs. A trucking company claimed increased costs and lost business due to the closing of the channel. A boat charterer claimed to have lost charters as a result of the closing of the channel. Another company claimed increased costs and lost business during the closing of the channel. Another company claimed damages for interruption of his trade due to the accident. A dredging company claimed uncompensated down time relating to the use of its equipment due to the closing of the channel. And another marina on the river claimed lost income and smoke damages to its facilities. *Id.*

85. *Id.* at 670.

86. *Id.* at 671.

87. *Id.*

88. *Id.*

89. *Id.* at 678.

90. *Id.*

91. *Id.*

92. *Id.* at 678-79.

93. 169 F.3d 207 (4th Cir. 1999).

inventory, and other property.⁹⁴ Federal officials instructed Gatlin Oil to remove oil from storm ditches and surface waters as a preventative measure.⁹⁵ Gatlin Oil presented its claim for damages to the Trust Fund.⁹⁶ Gatlin Oil was awarded its removal costs but was denied damages by the Trust Fund for compensation for the fire damage.⁹⁷ The court approved the Trust Fund’s decision under OPA § 2702, because the claimant did not present sufficient evidence to establish that the fire caused discharge of oil into navigable waters or posed such a threat.⁹⁸

In *In re Taira Lynn Marine Ltd. No. 5, LLC*, the court addressed purely economic losses under OPA arising from an allision between a tug and its tow and a bridge.⁹⁹ The allision resulted in an evacuation and cut-off of all means of transportation to and from an island where claimant’s businesses were located.¹⁰⁰ As a result of the collision, the cargo of the barge, a gaseous mixture of propylene and propane, was discharged into the air.¹⁰¹ Most of the claims did not involve physical damage but involved companies not being able to perform duties as a result of the allision and subsequent evacuation, for example, not being able to work on contracts as a result of the evacuation, lost revenues and sales at a convenience store as a result of the evacuation, lost charter revenues and sales due to the evacuation, abandoning equipment on the island during the evacuation and not being able to work for one week during the evacuation, inability to work and halt work in progress on two construction projects by a construction company during the evacuation, suspension of business operations due to the discharge of gas, and so forth.¹⁰² A few claimants did allege for legal damage to their property.¹⁰³ Additionally, seafood industries claimed lost profits from their wholesale fishing operations.¹⁰⁴ The court addressed subsections B and E of OPA § 2702 again with respect to companies that sustained no physical damage as a result of the OPA event.¹⁰⁵ The court found that the claimants that had no property damage had not raised an issue of fact as

94. *Id.* at 209.

95. *Id.*

96. *Id.* at 211.

97. *Id.* at 212.

98. *Id.*

99. 444 F.3d 371 (5th Cir. 2006).

100. *Id.* at 375-76.

101. *Id.* at 376.

102. *Id.* at 377.

103. *Id.*

104. *Id.*

105. *Id.* at 378-79.

to whether the gaseous cargo caused damage to their property.¹⁰⁶ Although the court also stated in dicta that § 2702 (E) allows the plaintiff to recover for economic losses resulting from damage to another property, the court found no cause or link between most of the claimants and the pollution incident involving the release of a gaseous cargo.¹⁰⁷

In *Dunham-Price Group, LLC v. Citgo Petroleum Corp.*, the claim arose out of a 2006 oil spill from Citgo's Lake Charles, Louisiana, refinery into the Calcasieu River.¹⁰⁸ As part of the cleanup efforts, the Coast Guard ordered the closure of approximately twenty-two miles of the Calcasieu River, including portions of the Intracoastal Waterway.¹⁰⁹ The court found that the Calcasieu River met OPA's definition of a natural resource, which includes land, fish, wildlife, biota, water, groundwater, and drinking water supplies.¹¹⁰ It also found that Citgo admitted that the discharge of its oil into the Calcasieu River polluted the navigable river, and as a result the Coast Guard issued a community advisory notifying the public of the spill and subsequently closed the river.¹¹¹ The court found that the claimant had submitted sufficient evidence of material fact to defeat a summary judgment and allowed the trier of fact to determine whether the claimants' economic losses were due to the oil spill.¹¹² This holding supports purely economic damages under OPA.

In dicta, in *In re Ballard Shipping Co. v. Beach Shellfish*, the court addressed the claims of shellfish dealers for losses as a result of the 1989 M/V WORLD PRODIGY spill.¹¹³ Although pre-OPA, an issue of preemption of state law was addressed favorably for the dealers, with the court addressing OPA § 2702(b)(2)(E) by analogy.¹¹⁴ The court stated that almost certainly OPA provides for recovery of purely economic damages in oil spill cases.¹¹⁵ The court also stressed that OPA also does

106. *Id.* at 382.

107. *Id.* at 383.

108. No. 2:07 CV 1019, 2010 WL 1285446 (W.D. La. Mar. 31, 2010). The case involved OPA damage claims under § 2702(b)(2)(E). This section permits recovery of damage equal to the loss of profits or impairments of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which will be covered by any claimant.

109. *Id.* at *1.

110. *Id.* at *3.

111. *Id.*

112. *Id.*

113. 32 F.3d 623 (1st Cir. 1994); see also Brian W. Burke, Case Comment, *Admiralty Law—A New Rule for Economic Loss from Pollution?*—Ballard Shipping Co. v. Beach Shellfish, 29 SUFFOLK U. L. REV. 1145 (1995) (summarizing the First Circuit's decision).

114. *In re Ballard*, 32 F.3d at 630-31.

115. *Id.* at 630.

not preempt state provisions of additional liability requirements.¹¹⁶ The court also found solace in OPA § 2707(b)(2)(E), which covers losses due to destruction of natural resources, in comparison to § 2707(b)(2)(B), which only applies to losses resulting from destruction of real or personal property by a claimant who owns or leases the property.¹¹⁷ The court found the natural resource provision in OPA subsection (E) to be broader.¹¹⁸

In *In re Settoon Towing LLC*, the court addressed the economic damage claim of ExPert as a result of an allision between the M/V CATHY M. SETTOON with ExPert’s well.¹¹⁹ The allision caused extensive damage to the wellhead resulting in a crude oil spill into Bayou Perot.¹²⁰ Settoon sought limitation of liability.¹²¹ Although ExPert’s claim also involved physical damage to its property, it also asserted purely economic claims for damages as a result of the shutdown of the Gulf Intracoastal Waterway.¹²² This claim involved ExPert’s relief from other potential suits seeking economic damages for the shutdown of the Gulf Intracoastal Waterway, even though only one such suit had been filed.¹²³ The court found the potential suits cognizable under § 2702(b)(2)(E).¹²⁴ The court held that the claimant need not be the owner of the damaged property resources to recover for loss of profits or income.¹²⁵ The court allowed the potential claims to survive in light of the three-year statute of limitation provided in OPA.¹²⁶ The court, citing dicta in *Taira Lynn*, clearly provided that OPA § 2702(b)(2)(E) allows for purely economic losses as a result of oil spills.¹²⁷

The concern about allowing purely economic damages under OPA would be over the potential opening of floodgates for a nation of plaintiffs.¹²⁸ In *Pruitt v. Allied Chemical Corp.*, the court faced the need to fashion some limitation on liability because of the large set of potential plaintiffs, especially when indirect damages are nevertheless

116. *Id.* at 631.

117. *Id.*

118. *Id.*

119. Civil Action No. 07-1263, 2009 WL 4730969 (E.D. La. Dec. 4, 2009).

120. *Id.* at *1-2.

121. *Id.* at *3.

122. *Id.* at *4.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at *5; 33 U.S.C. § 2717(f)(1) (2006).

127. *In re Settoon Towing*, 2009 WL 4730969, at *4.

128. *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979 (E.D. Va. 1981).

foreseeable.¹²⁹ The case involved Kepone pollution of the James River in Chesapeake Bay.¹³⁰ Although the oil spill was not covered by OPA, the case raises issues about chemicals discharged in water that cause enormous economic harm. The court acknowledged the principle purpose of tort law is to maximize social utility.¹³¹ Where the cost of accidents exceeds the cost of preventing them, the court stated that the law will impose liability.¹³² The court found it necessary to divide plaintiffs into various categories.¹³³ Category *A* plaintiffs were fishermen, shellfishermen, and lessors of oyster beds.¹³⁴ This category had legally cognizable claims that they were direct users of the Bay.¹³⁵ The next categories, *B* through *F*, included seafood wholesalers, retailers, processes, distributors, and restaurateurs.¹³⁶ Because employers as well as employees in this category were potentially involved, the court felt these categories included a set of potentially infinite plaintiffs.¹³⁷ The court was concerned about avoiding double counting in calculating damages.¹³⁸ The court concluded that plaintiffs who purchased and marketed seafood from commercial fishermen suffered damages that were not legally cognizable because they were insufficiently direct.¹³⁹ Finally, the court held that categories *G* through *I* (boat, tackle, and bait shop and marina owners) were the legitimate surrogate plaintiffs of sportfishing interest and should be equally protected in their claims.¹⁴⁰ Consequently, the court allowed tort claims under state law for only Category *A* (fishermen, etc.) and categories *G* through *I* (commercial sportfishing surrogate damages).¹⁴¹ Thus, faced with an infinite number of plaintiffs, the court fashioned a pragmatic causation rather than a “but for” test to award damages for economic harm.¹⁴²

The NPFC has decision memoranda on numerous OPA damage claims presented to it. These are available through a request under the Freedom of Information Act. A review of a select number of these

129. *Id.* at 981-82.

130. *Id.* at 976.

131. *Id.* at 978.

132. *Id.*

133. *Id.* at 979.

134. *Id.* at 976.

135. *Id.* at 978.

136. *Id.* at 979.

137. *Id.*

138. *Id.*

139. *Id.* at 980.

140. *Id.* at 980-81.

141. *Id.* at 978-79.

142. *Id.* at 979.

decision memoranda indicates that the Trust Fund’s interpretation of OPA may be broader than judicial decisions.

In NPFC decision memorandum dated June 18, 2008 on *Conoco Phillips, Trainery Refinery* (Claim No. P05005-026), the Trust Fund addressed a claim for loss of profits and earning capacity as a result of an oil spill in the Delaware River.¹⁴³ As a result of the oil spill, the Coast Guard established a safety zone up and down river of the spill site.¹⁴⁴ The safety zone extended to the claimant’s refinery.¹⁴⁵ The refinery distributed products in several states via pipeline, barge, railcar, and trucks.¹⁴⁶ The claimant’s loss of profits was due to the vessel EAGLE BEAUMONT being delayed in port and prevented from resuming its voyage to deliver products due to the oil spill response and cleanup.¹⁴⁷ The EAGLE BEAUMONT was also oiled as a result of the incident while it discharged cargo it stowed.¹⁴⁸

The Coast Guard ordered that all vessels be inspected and cleaned before being allowed to leave port.¹⁴⁹ The EAGLE BEAUMONT was delayed from November 27, 2004, and was not cleared to sail until December 3, 2004.¹⁵⁰ These dates were verified in pollution reports.¹⁵¹ The Trust Fund calculated the time it took the Coast Guard to clear the vessel.¹⁵² The Trust Fund calculated approximately a 6.5-day delay in the voyage as a result of the oil spill, and lost profit was calculated over that time.¹⁵³ The net loss was found to be approximately \$150,000.¹⁵⁴ This figure was substantiated with other documentation including financial statements.¹⁵⁵ The hire rate of the vessel was approximately \$24,000 per day.¹⁵⁶

The NPFC’s discussion of “causation” included delays because of Coast Guard inspection time.¹⁵⁷ Although this delay was above and

143. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. P05005-026 (June 18, 2008) (on file with author) [hereinafter Claim No. P05005-026].

144. *Id.* at 1.

145. *Id.*

146. *Id.*

147. *Id.* at 2-4.

148. *Id.*

149. *Id.* at 4.

150. *Id.*

151. *Id.*

152. *Id.* at 6.

153. *Id.* at 7.

154. *Id.*

155. *Id.*

156. *Id.* at 6.

157. *Id.* at 4.

beyond the actual down time as a result of the oil spill and cleanup, the Trust Fund nevertheless found that the evidence was sufficient to show that oil contamination of the EAGLE BEAUMONT delayed it in the port of the Delaware River.¹⁵⁸ As seen above, some judicial cases (for example, *Taira Lynn*), do not always recognize the intervention of government orders in the aftermath of an oil spill.¹⁵⁹ However, the order in the instant case was perhaps more direct than other cases. The claim also involved loss or damage to property owned by the claimant.¹⁶⁰

In *South Jersey Port Corp.* (Claim No. P05005-021), the decision memorandum dated April 1, 2008, the claimant sought lost government revenues related to a lease for a new pier that was under construction at its Broadway Terminal in New Jersey.¹⁶¹ The claimant alleged that an oil spill delayed the pier's construction with a work stoppage of thirty-eight days, and this caused the claimant's project to slip into a bad weather period and slow down further over the winter for thirty-eight days of additional construction time.¹⁶² The claimant sought rent it would have received from the tenant for the slowed down time and lost days.¹⁶³

The Trust Fund's discussion of causation confirmed that construction ceased on November 29, 2008, the date of the oil spill, until December 29, 2004.¹⁶⁴ Although the evidence supported that the oil spill caused the thirty-eight-day delay in the construction of the pier, the Trust Fund found that the evidence did not support the assertion that the construction was further delayed into winter months for an extra thirty-eight days.¹⁶⁵ The construction schedule reviewed by the Trust Fund indicated the project was already expected to continue into winter months.¹⁶⁶ Therefore, winter broke the chain of causation over the alleged seventy-six days of delay.¹⁶⁷ However, the Trust Fund found that a single monthly installment of \$115,000 (for May 1, 2005, to June 1, 2005) was due.¹⁶⁸ This case involves § 2702(b)(2)(D), which addresses

158. *Id.*

159. *See In re Taira Lynn Marine Ltd. No. 5, 444 F.3d 371 (5th Cir. 2006).*

160. Claim No. P05005-026, *supra* note 143, at 2.

161. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. P05005-021 (Apr. 1, 2008) (on file with the author).

162. *Id.* at 2-3.

163. *Id.* at 1.

164. *Id.* at 3-4.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 4-5.

purely economic loss of government revenues.¹⁶⁹ It also involved direct physical harm to pier construction equipment from the oil spill.¹⁷⁰

The case of *Guilford County Division of Environmental Health* (Claim No. 905119-002), subject to decision memorandum dated July 12, 2005, involved a claim for increased cost of public services under § 2702(b)(2)(F) of OPA.¹⁷¹ The Trust Fund recognized that the local response was necessitated by substantial discharge or the threat of oil spill which was reported to the National Response Center.¹⁷² The Trust Fund allowed the salary of a local government employee in responding to the spill plus allowed the invoice of the cleanup contractor utilized by the local government entity.¹⁷³

Likewise, the claim of *Encinitas City* (Claim No. A07011-002), under NPFC decision memorandum dated June 18, 2008, was for increased cost of public services.¹⁷⁴ The claimant received a call from the Coast Guard requesting use of lifeguards and lifeguard watercraft in order to take samples of a reported fuel spill.¹⁷⁵ The city joined in searching for the source of the spill and in warning people in the water about the spill.¹⁷⁶ These rescue boats and watercraft were used as well as city containment booms.¹⁷⁷ The NPFC recognized approximately \$13,000 of full compensation for the reimbursement of costs incurred by the claimant in response to the oil spill as removal costs.¹⁷⁸ Claim preparation costs were not allowed.¹⁷⁹

Houston and Rita Foret (Claim No. N03036-007 & 008), an NPFC decision memorandum dated December 9, 2008, involved a claim for loss of subsistence use, loss of profits and earnings capacity, and damage to real and personal property.¹⁸⁰ The claimants possessed Louisiana permits for cultivation of oysters for personal and commercial use.¹⁸¹ They claimed that the oyster beds were damaged by oil originating from

169. *Id.* at 1.

170. *Id.* at 1-2.

171. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. P05119-002 (July 12, 2005) (on file with the author).

172. *Id.* at 2-3.

173. *Id.* at 3.

174. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. A07011-002 (June 18, 2008) (on file with the author).

175. *Id.* at 1.

176. *Id.*

177. *Id.*

178. *Id.* at 3.

179. *Id.*

180. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim Nos. N03036-007 & 008 (Dec. 9, 2008) (on file with the author).

181. *Id.* at 3.

an oil spill.¹⁸² The NPFC stated that claims may include the expense for estimating damages but not legal fees or claim preparation cost.¹⁸³ The NPFC found that the claimants' submission failed to support their use of oysters as a natural resource for subsistence.¹⁸⁴ Rather, the NPFC considered the claim for business losses resulting from damage to claimants' oysters and oyster beds; however, the claimants again failed to provide sufficient proof of the productivity and value of leases prior to and after the spill.¹⁸⁵ On reconsideration, the claimant's scientific evidence presented to the NPFC still did not demonstrate evidence that the oil contamination was a result of the pipeline spill in question.¹⁸⁶ Tax records did not demonstrate an identifiable loss of profit or impairment of earnings following the spill, nor did they provide support by any evidence of damages for injury of their oyster leases at \$2000 per acre.¹⁸⁷ The claims were denied.¹⁸⁸ This case may be viewed as a failure in proof of loss.

The claim of *Midwest Generation, LLC* (Claim No. G05002-007), under an NPFC decision memorandum of October 31, 2008, involved a claim for loss of profits and earning capacity.¹⁸⁹ The claimant owned six Illinois power plants, and alleged that two coal-fuel electrical generation plants were impacted by an oil spill and its effect on the Chicago Sanitary and Ship Canal and traffic thereon.¹⁹⁰ The claimant relied on coal shipments via barge on the canal.¹⁹¹ The claim included reduced operating levels, more expensive maintenance time, increased barging expense while the channel was constrained, increased cost to rebuild depleted coal inventory, and claims assessment costs.¹⁹²

In the NPFC's discussion of causation, it determined that the evidence in the record substantiated that the waterway was either closed to barge traffic or open to limited traffic during the oil response period.¹⁹³ It further determined that the oil spill incident was incapable of any reasonable division into periods that were solely vessel salvage related

182. *Id.*

183. *Id.* at 5.

184. *Id.* at 4.

185. *Id.*

186. *Id.* at 10-12.

187. *Id.*

188. *Id.* at 12.

189. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. G005002-007 (Oct. 31, 2008) (on file with the author).

190. *Id.* at 1.

191. *Id.*

192. *Id.*

193. *Id.* at 4-5.

versus actions that were solely pollution responses.¹⁹⁴ It found the actions taken to effect salvage operations were also necessary to the pollution response.¹⁹⁵ The NPFC found that the closure of the waterway was caused by the discharge of oil from January 19, 2005, until the response was completed on June 7, 2005.¹⁹⁶ The NPFC independently reviewed and determined that the closure and restrictions imposed on the waterway were in fact due to the oil removal efforts.¹⁹⁷ It concluded that removal activities in the waterway caused closures and restrictions that drove up barge transportation costs and also caused Midwest to pay additional transportation charges in the form of extra types of boats needed to navigate the restricted canal.¹⁹⁸ On the monetary claim, the NPFC viewed some of the costs as overstated and claimant also failed to take into account that other generating plants in claimant’s portfolio captured some of the profits lost by the facility in question.¹⁹⁹ The NPFC also found that there were increased towing costs as a result of compliance with Coast Guard orders, including the requirement that barge companies ensure that each single barge passing by the spill have a second boat alongside to assist in maneuvering past the site (bow boats or turn boats).²⁰⁰ The NPFC found that these bow boats and turn boats were necessitated by the oil spill and would not have been necessary absent the oil spill and Coast Guard-imposed restrictions.²⁰¹ Although not all costs were allowed, the NPFC recommended that claimant be paid approximately \$3 million for OPA compensatory damages suffered as a result of the oil spill.²⁰² This case did not involve physical damage to the claimant’s property but involved an allowance for costs increased due to Coast Guard restrictions that were necessitated by the spill.²⁰³ The NPFC independently reviewed the need for the Coast Guard restrictions before approving the claimed amounts thereon.²⁰⁴

In *Michael Brian Anderson* (Claim No. M06027-001), NPFC decision memorandum of October 6, 2008, there was a claim for loss of profits and earning capacity as a result of an oil spill in the Savannah

194. *Id.* at 4.

195. *Id.*

196. *Id.* at 5.

197. *Id.*

198. *Id.*

199. *Id.* at 7-8.

200. *Id.* at 9.

201. *Id.* at 9-10.

202. *Id.* at 13.

203. *Id.* at 9-10.

204. *Id.* at 11, 13.

River that lowered shrimp production.²⁰⁵ The NPFC reviewed evidence of monthly catch totals for the period in question, licenses and permits, and pertinent tax returns.²⁰⁶ The NPFC determined that the claimant had not shown that the oil spill caused him to lose money beyond a load of shrimp he lost because it was contaminated with oil.²⁰⁷ He was compensated for that load loss.²⁰⁸ His total sales in the spill year were over \$400,000, compared to a normal year of under \$400,000.²⁰⁹ The NPFC concluded that the spill year proved more lucrative to claimant (due to shrimping in deeper waters catching smaller loads but larger shrimp) and the tax returns for sale did not show a loss of sales caused by the oil spill.²¹⁰ Again, the claimant was unable to meet his burden of proof before the NPFC, and the claim for lost profits was denied.²¹¹

It is evident that the NPFC memorandum decisions are fact-specific, scrupulously examining pertinent records, and alternative revenues for money claims. However, the NPFC does not insist upon physical damage accompanying economic losses for the latter to be compensated by the Trust Fund. The Trust Fund also includes losses caused by government orders, but only when the NPFC independently assesses that the orders are necessitated by the oil spill. Nevertheless, the NPFC memorandum decisions indicate a somewhat broader view of OPA than taken by some of the court decisions previously discussed.

Thus, oil spill private damage claimants have a choice if their claims are denied or not timely settled by the responsible party upon initial presentation as required. They may sue the responsible party in court directly for their claims, subject to developing jurisprudence, or they may present their claim to the Trust Fund for resolution. The Trust Fund does not involve a defendant raising various defenses, including causation. However, the NPFC independently assesses causation and is rigorous in demanding documentation of losses. Nevertheless, it would seem that the Trust Fund provides a slightly more favorable venue for claimants, subject to the \$1 billion limitation per incident. In court, plaintiffs have an equal footing in prosecuting their claim against defendant's defenses. If a claimant is denied by the Trust Fund, the claimant faces a judicial deference standard in favor of the Fund under

205. Claims Adjudication Div., U.S. Coast Guard, Claim Summary/Determination Form, Claim No. M06027-001 (Oct. 6, 2008) (on file with the author).

206. *Id.* at 2.

207. *Id.* at 2-3.

208. *Id.* at 3.

209. *Id.*

210. *Id.*

211. *Id.*

the APA. There is a mixed bag of choices involved at the juncture past presentation of a claim to a responsible party.

To the extent that the NPFC decisions seem to favor allowing economic losses unaccompanied by physical damages and allowing for some delay damages by government orders following an oil spill, a plaintiff in court may argue, if it is suing a responsible party directly, that judicial deference, nevertheless, should be made to the Coast Guard's reasonable interpretation of OPA, which it administers.²¹² This deference would only be to the Fund's interpretations of covered damages and causation and not to any specific findings in fact-specific NPFC decision memoranda.

Some claims may also be problematic in that losses may not be realized immediately and may in fact take years to assess. We have seen that one case, *Settoon Towing*, allowed a party's case to remain even though some claims may have been premature.²¹³ The position of the Trust Fund is unclear in such matters, as it may view proof of future losses as speculative. If an interim claimant was to later and timely refile a supplemental claim before the Trust Fund, the claimant faces the prospect that the \$1 billion per incident limit on trust funds may be exhausted as time passes on large spills and before its claim is fully matured.

Complications for OPA civil damage suits could include prosecutorial probes for criminal violations.²¹⁴ Additionally, there are limited legal options left if oil spill damage claims do not legally cover some Coast Guard orders closing waterway activity. One option could be the Federal Tort Claims Act;²¹⁵ however, that Act excludes claims arising out of an act or omission of a federal employee exercising due care in the execution of a state statute or regulation, valid or not, and discretionary functions.²¹⁶ The latter exemption means the federal government is often not liable for its actions or decisions based on public policy considerations.²¹⁷ Additionally, the order could constitute a temporary regulatory

212. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (using federal agency interpretation to support a nonfederal litigant's position in a case in which the agency itself was not a party).

213. NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS 9 (Jan. 2006), available at http://www.uscg.mil/npfc/docs/PDFs/OSLTF_funding_for_oil_spills.pdf (allowing interim claim payments).

214. See David Ingram & Tresa Baldas, *DOJ Probe of Spill Could Delay Civil Litigation*, NAT'L L.J., June 7, 2010, at 1, 4, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202459270779&DOJ_of_spill_could_delay_civil_litigation&slreturn=/&hbxlogin=1.

215. 28 U.S.C. § 1346(b) (2006).

216. *Id.* § 2680(a)-(h).

217. See *United States v. Gaubert*, 499 U.S. 315 (1991).

taking or inverse condemnation.²¹⁸ Property rights impacted could be from forced parking of personal property (vessels) to diminished real property values of facilities impacted, but the relief would not include other damages. The courts examine the destruction of the owner's entire bundle of rights as a taking focus. Thus, if an action is a partial taking, a judicial balancing involving the need for the action and the extent of economic impact on reasonable investments is required before a taking exists.²¹⁹ The taking must be almost total to be able to press a taking case with confidence.

III. STATE MINI-OPAS

OPA saves state mini-OPA liability requirements.²²⁰ Unlike Alabama and Mississippi, Florida, Louisiana, and Texas along the Gulf Coast have such mini-OPAs.²²¹ Alabama and Mississippi would apparently have to rely on traditional common law remedies, like trespass. OPA's savings clause does not appear to differentiate between state oil spill liability based on a statute or state common law.²²² A state oil spill liability statute would more precisely avoid preemption issues.

218. *See, e.g.*, *First English Evangelical Lutheran v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

219. *See Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

220. 33 U.S.C. § 2718(c) (2006). State operational and design requirements are, however, preempted by federal shipping law or OPA. *See Ray v. Atl. Richfield*, 435 U.S. 151 (1978) (invalidating state regulation of tanker design, size, and movement; the case was adopted in OPA Conference Report, H.R. REP. NO. 101-653, at 122 (1990) (Conf. Rep.)); *United States v. Locke*, 529 U.S. 89, 107 (2000) (invalidating state law on personal and training requirements on tankers); *United States v. Massachusetts*, 440 F. Supp. 2d 24 (D. Mass. 2006) (invalidating state law on tanker design, personnel qualifications, and navigation).

221. *See Oil Spill Prevention and Response Act*, LA. REV. STAT. §§ 30:2451:2496 (1991). Louisiana does not have a claims presentation requirement to the responsible party. Texas and Florida have such a claims presentation requirement. *Oil Spill Prevention and Response Act of 1991*, TEX. NAT. RES. CODE § 40.159 (1991); FLA. STAT. § 376.123 (2003). Mississippi and Alabama have more general oil spill requirements. Approximately twenty-four coastal states have various oil spill requirements. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV. #RL33705, OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE AND ISSUES FOR CONGRESS 23 (2009), available at http://assets.opencrs.com/rpts/RL33705_20090827.pdf; see also DAGMAR SCHMIDT ETKIN, ENVTL. RESEARCH CONSULTING, A WORLDWIDE REVIEW OF MARINE OIL SPILL FINES AND PENALTIES 20-44 (2003), available at <http://www.environmental-research.com/publications.php>; COLIN DE LA RUE & CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT app. 3 (2d ed. 2009).

222. *In re Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 631 (1st Cir. 1994) (holding, *in dicta*, that a state Environmental Injury Compensation Act was an "oil spill regime" not preempted by OPA). This is a similar issue as to whether OPA preempts state punitive damage regimes. *See also Dostie Dev. Corp. v. Arctic Peace Shipping, Co.*, No. 95-808-CIV-J-MMP, 1996 WL 866119, at *3 (M.D. Fla. Aug. 14, 1996) (holding that OPA's savings clause permits imposition of common law remedies on oil polluters); DE LA RUE & ANDERSON, *supra* note 221.

For instance, Louisiana statutes generally cover, besides removal costs, natural resource damages, property damages, loss of public use, loss of state revenue, loss of state profit, and cost of extra public service for oil spills into state-controlled inland or coastal waters (not the exclusive economic zone, but arguably extending out at least three miles offshore from the coastline).²²³ Of course, the downside is most states have limited trust funds and even more limited access to the Trust Fund. The upside is there is no absolute state requirement for presentation of a claim to a responsible party or to a trust fund. Therefore, some lawsuits may proceed directly in state court under a mini-OPA for oil spill damages within the territorial jurisdiction of the states. This is somewhat uncharted territory as there is a paucity of private damage case law under state mini-OPAs.²²⁴

IV. CONCLUSION

Despite recent catastrophes, oil spill frequencies and total spilling decreased from 1981 to 2001.²²⁵ Nevertheless, significant spills with OPA liability caps in place or with an owner/operator company going bankrupt threatens the \$1.5 billion Trust Fund.²²⁶ Options for resolution include increasing OPA liability limits, increasing the prebarrel oil tax for the Fund, expanding OPA liable parties to include owners of the oil, and increasing safety standards. All options will probably play out in favor of the polluter pays principle.²²⁷

A long-term option is to avoid scenarios where things are released that we cannot control. Unlike in Lovecraft's *From Beyond* (1934), we cannot instantly eliminate the machines that create inky monstrosities. Renewable energy and ingenuity must allow for the orderly development and practical application of solar, wind, geothermal, wave, hydrogen, and fusion power for the future. Meanwhile, we must live with the complexities of the OPA compensation scheme, relying on ragtag restitution and the hubris of restoration rather than avoidance, unless more plaintiffs and

223. See *United States v. Louisiana*, 363 U.S. 1 (1960). LA. REV. STAT. § 30.2454(5) (1995) deleted most Louisiana subsistence and economic damage oil claims, but LA. REV. STAT. § 30:2454.B (1991)'s proviso that the Act be "implemented . . . consistent with" OPA language lingers. The legislature should address this paradox.

224. DE LA RUE & ANDERSON, *supra* note 221, at 234.

225. DAGMAR SCHMIDT ETKIN, ENVTL. RESEARCH CONSULTING, ANALYSIS OF OIL SPILL TRENDS IN THE UNITED STATES AND WORLDWIDE (2001), available at <http://www.environmental-research.com/publications.php>.

226. RAMSEUR, *supra* note 221, at 21.

227. *Id.* Compare Clean Energy Jobs and Oil Company Accountability Act of 2010, S. 3663, 111th Cong. (2010), and Oil Spill Response Improvement Act of 2010, S. 3643, 111th Cong. (2010), for 2010 proposed OPA amendments.

states want to test the waters under more or new state laws. We do not always have to make a federal case out of everything. Put your faith elsewhere.

APPENDIX

State of Louisiana

Statutory Authority: La. R.S. 30:2451 *et seq.*

Lead Agency: Louisiana Oil Spill Coordinator—Section 2445

JURISDICTION	DAMAGES	FUNDS	DEFENSES
Coastal waters, § 2454(2) within jurisdiction of Louisiana, tidewaters, estuaries, and navigable waters.	§ 2454(5). Liability for Natural Resources— § 2480. Liability for immovable or corporeal movable property. Lost revenues due to injury,	Oil Spill Contingency Fund. § 2483(E). Balance not to exceed \$30 million.	Limitation of liability for both removal costs and damages unless gross negligence, willful misconduct, failure to report or failure to cooperate. § 2479.
	destruction, or loss of immovable or corporeal property or natural resources. Increased or additional public services. Remedies are exclusive. § 2491.	Natural Resources Restoration Trust Fund. § 2480.2.	Act of God, war or terrorism; act of government; unforeseeable occurrence due to violence of nature; willful misconduct of a third party. § 2481.

State of Texas

Statutory Authority: Oil Spill Prevention and Response Act of 1991;
Texas Nat. Res. Code § 40:001.

Lead Agency: Commission of the Texas Land Office

JURISDICTION	DAMAGES	FUNDS	DEFENSES
Coastal waters, including tidal and navigable waters. § 40.003(2).	Compensation to an owner, lessee, or trustee of any real or personal property or natural resources. Loss of taxes or net costs of increased entitlements or public services. Oyster leases or permits, commercial fishing, seafood processing, and others economically reliant on the use or acquisition of natural resources. §40.003(7).	Coastal Protection Fund. § 40.151(b). The fund shall not exceed \$50 million.	Statutory defenses—Act of God, act of war, act of government, unforeseen occurrence exclusively caused by act of nature, or willful act or negligence of a third party; or limitation of liability. Gross negligence, willful misconduct and failure to cooperate bar limitations. §§ 40.202 & 204.
	Administrative claims against the responsible party or federal Trust Fund or lastly the state fund. § 40.159(b(1)		
	Administrative claims not exclusive, as private right of court action exists. § 40.256.		

State of Florida

Statutory Authority: Florida Pollutant Discharge Prevention and Control Act, Fla. Stat. § 376-011 *et seq.*

Lead Agency: Florida Department of Environmental Protection

JURISDICTION	DAMAGES	FUNDS	DEFENSES
Territorial limits of state, including land and water §§ 376.031(7) & 376.12(1).	Liability for natural resource damages § 376.121, and damages, § 376.12.	Florida Coastal Protection Trust Fund, § 376.11. Presentation of claims to responsible party required before presenting claim to the fund. § 376.123. However, claims need not be presented to the fund.	Limitation of liability to the fund for clean-up costs, unless discharge due to gross negligence or willful misconduct by responsible party or failure of responsible party to report or cooperate. Act of government, God or third party defenses for actions for clean-up costs or damages unless responsible party fails to report or cooperate, § 376.12(3), (7) (8).
This includes coastal waters, estuaries, tidal flats, beaches and land adjoining the seacoast of the state §376.041.	Liability for property damage, § 376.031(5)& 376.12(5), including destruction or loss of any real or personal property or of the environment and natural resources.		