

**NATURAL RESOURCE DAMAGES UNDER THE  
OIL POLLUTION ACT OF 1990**

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Since it was unanimously enacted by the Congress and signed into law by President George Bush, the United States Oil Pollution Act of 1990 ("OPA" or the "Act")<sup>1</sup> has been the subject of much discussion concerning its potential long term effect on the movement of crude oil and petroleum products by sea.

Essentially a patchwork of amendments to existing statutes,<sup>2</sup> OPA covers a broad range of environmental issues. Its provisions include measures designed to prevent the occurrence of oil pollution incidents, regulate the response to any such incidents that do occur, mandate construction and operating standards for tankers trading in United States waters, and establish a liability and compensation scheme for damages sustained as a result of oil spills.

Given the ambitious goals behind its numerous statutory requirements and policy pronouncements, few would deny that OPA has brought significant changes in the way owners and operators of tank vessels trade in U.S. waters. However, questions still remain as to the ultimate impact this landmark legislation will have on the international oil, shipping and insurance industries.

This lingering uncertainty stems from the scarcity of judicial opinion interpreting OPA's statutory provisions and the protracted nature of the process of drafting and issuing dozens of administrative regulations designed to implement the Act's more complex technical aspects.

This paper will concentrate solely upon the Act's liability and damage assessment provisions, in particular, the continuing controversies surrounding the development of regulations governing natural resource damage assessments.

#### I. OVERVIEW OF OIL POLLUTION LIABILITY UNDER OPA

OPA is a purely national oil pollution liability regime. By enacting this law, Congress opted not to ratify the two principal international conventions dealing with oil pollution liability, the International Convention on Civil Liability for Oil Pollution Damage ("CLC") and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("Fund Convention").<sup>3</sup>

Congressional opponents of the Conventions had long argued that they were too limited in the scope of damages allowed.<sup>4</sup> Even with the increases contained in the abortive 1984 Protocols to the Conventions, the limits of a shipowner's CLC liability were considered too low (about \$84,000,000 maximum) and too difficult to break. Similarly, the compensation fund

established under the Fund Convention was said to be too small (about \$260,000,000 maximum) to offer adequate coverage for a catastrophic spill.<sup>5</sup>

Any hope for United States ratification of the Conventions disappeared when the EXXON VALDEZ impaled herself on Bligh Reef in Prince William Sound, followed in short order by other tanker casualties: the WORLD PRODIGY and PRESIDENTE RIVERA groundings on the East Coast of the United States; the MEGA BORG explosion and fire in the Gulf of Mexico; and the AMERICAN TRADER spill off California.

Driven by a groundswell of public concern for the environment, Congress quickly chose to implement a purely national oil spill liability and compensation scheme designed to provide what Congress was believed to be a more comprehensive system for adequately compensating oil pollution damages than would be available under the Conventions.

#### Scope of Applicability

OPA is applicable within the navigable and tidal waters of the United States and the Exclusive Economic Zone which extends 200 nautical miles from the shoreline of the continental United States. This statutory jurisdiction also includes American Samoa, the Marianas, Guam, the U.S. Virgin Islands and Puerto Rico.

Any intentional or unintentional discharge of oil, or substantial threat of a discharge of oil, into these protected waters will expose the "responsible party" to liability for the removal costs and damages that result from such an incident. The "responsible party" is defined as the owner, operator and/or bareboat charterer of any vessel (tanker or non-tanker) that discharged oil into U.S. waters.<sup>6</sup> Although OPA also governs the imposition of oil spill liability on the owners and operators of offshore and onshore oil facilities, deepwater ports, pipelines and abandoned vessels, this discussion of the Act will be limited to its impact upon vessel owners and operators.<sup>7</sup>

#### Statutory Damages

The removal costs which are recoverable under OPA include the actual cost of containing and removing oil from the water and any expenses arising from an effort to minimize or mitigate damage to public health and welfare and the affected area's natural resources and wildlife. In cases where there is only a substantial threat of an oil spill, removal costs would include the cost of preventing, minimizing or mitigating any possible pollution.<sup>8</sup> Removal costs may be recovered by the U.S. Government, any state government and any other party which incurs costs in accordance with the National or an Area Contingency Plan.<sup>9</sup>

In addition to the actual cost of containing and removing discharged oil from affected waters and shorelines, the responsible party would also face potential liability for the following categories of consequential damages:

- (A) NATURAL RESOURCES.-Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.
- (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,<sup>10</sup> or a political subdivision of a State.

### Statutory Defenses and Limitation of Liability

Proof that the discharge of oil and resulting damage were caused solely by an act of God, act of war or act or omission of an unrelated third party provides a complete defense to the responsible party's potential liability under OPA.<sup>11</sup>

The Act also establishes limits on the responsible party's total liability for removal costs and damages. The limit of liability for tankers greater than 3,000 gross tons is \$1,200 per gross ton or \$10,000,000, whichever is greater.<sup>12</sup> Applied to a 50,000 gross ton tanker (approximately 100,000 DWT), the limit of liability would be \$60,000,000.<sup>13</sup>

Limitation will be lost and liability will be unlimited if the discharge was caused by gross negligence or willful misconduct or, most significantly, by violation of a federal safety, construction or operating regulation by the responsible party or an agent, employee or contractor hired by the responsible party. For example, if due to ordinary negligence, one of the Rules of the Nautical Road is violated, limitation of liability will be lost. A simple error of navigation, something that is common to any marine casualty, can easily spell financial ruin for a shipowner.

As was the case with the three defenses to liability, limitation will also be lost where the responsible party fails to report the oil spill, fails to cooperate in its removal or fails to comply with an authorized removal order.<sup>14</sup>

### State Oil Pollution Liability Laws

The Supremacy Clause of the federal Constitution provides that the Constitution itself and laws enacted by the federal government pursuant to its enumerated powers are the supreme law of the land. State laws which conflict with federal laws and regulations frustrate the scheme of governance provided by the Constitution and are said to be preempted or invalidated by federal law. Preemption occurs when Congress either expressly or implicitly states that the federal government will exclusively regulate a particular subject or field.<sup>15</sup>

OPA expressly rejects the preemption of state legislation that imposes additional liabilities or requirements regarding the discharge and removal of oil within state waters.<sup>16</sup>

With this door left open, there are, at last count, thirty-two separate state laws governing liability for oil spills.<sup>17</sup> While outlining the provisions of each of these anti-pollution laws is beyond the scope of this paper, it should be noted that the civil and criminal penalties<sup>18</sup> imposed by these laws would be applied in addition to the various federal penalties and damages. Moreover, several of the state laws go beyond

OPA by imposing liability upon a broader range of potentially responsible parties<sup>19</sup> and by refusing to allow any provision for limitation of liability.<sup>20</sup>

Needless to say, the existence of potentially duplicative or conflicting bodies of oil pollution law can create extra burdens for ship owners and operators. As will be discussed later, Congress' decision not to preempt state regulation in this field can also pose problems in assessing oil pollution damage to natural resources over which there are multiple claims of jurisdiction.

## II. NATURAL RESOURCE DAMAGE

### Statutory Provisions

Of the six categories of recoverable damages enumerated by OPA, natural resource damages are perhaps the most complex and clearly the most difficult to quantify.<sup>21</sup> The Act defines the measure of natural resource damage as consisting of three components:

- (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources;
- (B) the diminution in value of those natural resources pending restoration; plus



(C) the reasonable cost of assessing those damages.<sup>22</sup>

Such damages may be recovered by the United States, any state, Indian tribe or foreign nation for oil pollution-related injuries to natural resources belonging to, managed by, controlled by or appertaining to such claimant.<sup>23</sup> Trustees appointed by the governmental claimants are responsible for conducting a natural resource damage assessment ("NRDA"), pursuing a recovery on behalf of their respective public beneficiaries and developing and implementing a restoration plan for the damaged resource.<sup>24</sup>

Monies recovered by the trustees must be placed in a revolving trust account for use only in reimbursing or paying costs incurred by the trustees in the execution of the statutory responsibilities listed above. Any remaining surplus must be deposited in the Oil Spill Liability Trust Fund.<sup>25</sup>

#### **Background: CERCLA Rules**

As is common in legislation involving complex social, technical or economic issues, Congress delegated authority for the issuance of many detailed pollution prevention, compensation and remediation regulations to a number of specialized federal agencies. Responsibility for the development of NRDA regulations has been assigned to the National Oceanographic and Atmospheric Administration ("NOAA").<sup>26</sup>

Recovery of monetary damages by a public trustee for natural resource damage is not a novel concept in U.S. law.<sup>27</sup> In fact, a clear precedent for the development of NRDA rules under OPA was found in similar regulations promulgated by the Department of the Interior ("DOI") in 1987 under the Comprehensive Environmental Response, Compensation and Liability Act of 1990 ("CERCLA").<sup>28</sup>

The CERCLA regulations established an administrative process for the assessment of damages to natural resources and provided trustees with two distinct types of assessment procedures: "Type A", a simplified assessment model utilizing a data base built upon standardized chemical, biological and economic information and requiring minimal field observation, and Type B, a more complex, comprehensive and incident specific process.<sup>29</sup>

A short time after the issuance of the CERCLA regulations, the validity of the Type B assessment procedures were challenged in the courts. In Ohio v. U.S. Department of the Interior,<sup>30</sup> the Court of Appeals for the District of Columbia Circuit, among other things, invalidated the Type "B" procedure to the extent that it limited recoverable natural resource damages to the lesser of either restoration or replacement costs or the diminution of the damaged resource's use value.<sup>31</sup> This was held to be in conflict with a clear Congressional preference, expressed in CERCLA, for the recovery of full restoration costs even when this would exceed the economic value of the damaged resource.<sup>32</sup>

The manner in which the Type B regulations calculated a damaged resource's lost use value was also reviewed by the court. As originally published, the regulations effectively limited lost use recoveries to the market value of the resource, permitting the use of non-market assessment methods only when the market for that resource was not reasonably competitive.<sup>33</sup> Stating that Congress had intended the development of assessment regulations which would capture all aspects of a particular loss, the Court remanded the regulations back to DOI and directed that it consider a rule that would allow trustees to calculate lost use values as the sum of all reliably calculated use values including not only "direct" but also "passive" uses.<sup>34</sup>

#### NRDA Regulations Under OPA

##### *General Provisions*

As required by federal law, NOAA embarked on its rulemaking process by aggressively soliciting information and comments from the public on ways to develop damage assessment procedures.<sup>35</sup> Taking, as its starting point, those parts of the CERCLA regulations which were not invalidated by Ohio v. Department of the Interior,<sup>36</sup> NOAA published, on January 7, 1994, a set of proposed regulations which were intended to provide a flexible and logical process for assessing natural resource damage.<sup>37</sup>

NOAA's proposal encourages the preparation of pre-spill damage assessment contingency plans and establishes a three phase assessment process for measuring the diminution in value of an affected resource and choosing the most appropriate plan for its restoration.

The proposed rules seek to promote cooperation and consensus decisionmaking among trustees and, where it is deemed practicable and appropriate, even encourage participation of responsible parties in the NRDA process.<sup>38</sup> Although it would obviously be in the interest of a responsible party to exert a downward influence on damage assessments, NOAA believes that, through their involvement, cooperative responsible parties can contribute needed resources and expertise to the NRDA process, avoid duplicative assessment studies and foster early settlement of claims without litigation.<sup>39</sup> The proposed rules authorize the trustees to enter into enforceable agreements with responsible parties (or prospective responsible parties in the case of pre-spill planning) formalizing their cooperation in any phase of an NRDA.<sup>40</sup>

Once the period for public comment has ended and the regulations are published in their final form, they will provide detailed, though optional, guidance to public trustees in performing damage assessments.<sup>41</sup> While use of the regulations is not mandatory, only damage assessments conducted pursuant to the NRDA rules shall have the force and effect of a rebuttable

presumption of accuracy in administrative and judicial proceedings commenced under the Act.<sup>42</sup> How closely an assessment must conform to the rules to qualify for the presumption remains an open question.

Trustees conducting an NRDA under the proposed rules must establish and maintain an administrative record providing a central repository for scientific data collected during the NRDA and documenting the process behind the selection of a restoration plan.<sup>43</sup> The administrative record must be made available for public review and forms the basis of review of the trustees' selection of restoration measures, the cost of conducting the NRDA and the estimated cost of restoration in any subsequent judicial or administrative proceeding.<sup>44</sup> The standard of review in such a proceeding would be to determine, on the basis of the administrative record, whether the trustees' action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>45</sup>

Challenges to the actual content of the final regulations may only be brought to the Circuit Court of Appeals for the District of Columbia Circuit within ninety days of the issuance of the final rule.<sup>46</sup> This provision reflects the Congressional preference for the administrative regulatory process with its opportunity for public comment and final judicial review rather than the courts, as the most appropriate forum within which to debate the complex economic and scientific issues and methodologies employed in the NRDA process.<sup>47</sup>

### *Pre-Spill Planning*

The proposed rules recognize the value of prior consultations among parties, before events require the commencement of an NRDA, and recommend that trustees participate in formal pre-spilling planning.<sup>48</sup>

This optional<sup>49</sup> pre-spill planning process is intended to provide the trustee(s) with the opportunity to identify potential outside experts and support services, collect baseline data and develop a general approach to NRDAs.<sup>50</sup> In situations where multiple trustee involvement is anticipated, the proposed rule encourages coordination among the trustees and the designation of a "Lead Administrative Trustee" to formally administer and coordinate assessment activities.<sup>51</sup> The proposed rules further recommended that trustees formalize their plans and institutionalize the process of concensus decisionmaking by entering into a Memorandum of Understanding on "some logical geographic or political basis".<sup>52</sup>

Although NOAA strongly encourages cooperation among trustees it cannot require joint action since OPA itself specifically refrains from preempting state legislation imposing additional oil pollution liabilities or requirements.<sup>53</sup> NOAA maintains that past experience has shown that the common interests of fully informed trustees will lead to concensus decisionmaking.<sup>54</sup> Notwithstanding this official optimism, disputes among trustees and conflicts between federal and state law remain possible.

### *Pre-Assessment Phase*

NOAA's proposed NRDA process is divided into Pre-Assessment, Assessment and Post-Assessment phases.<sup>55</sup> The Pre-Assessment Phase commences with an oil pollution incident. During this phase, the trustees must first determine whether the incident is within OPA's statutory scope of applicability, whether trust natural resources are or may be affected and whether a reasonable probability exists for asserting a successful claim.<sup>56</sup> If all these conditions are met, the Pre-Assessment Phase would continue with the trustees conducting a damage assessment determination<sup>57</sup> deciding which of four damage assessment procedures, described below, would be most appropriate to the facts and circumstances of the incident.<sup>58</sup> At the conclusion of the Pre-Assessment Phase, the trustees are responsible for preparation of a Pre-Assessment Report documenting all Pre-Assessment actions and decisions to proceed with damage assessment and restoration actions.<sup>59</sup>

Following the completion of Pre-Assessment activities, the trustees must prepare a Draft Assessment/Restoration Plan ("DARP") to ensure that the assessment and restoration processes are performed in a planned, systematic and cost effective manner.<sup>60</sup> The DARP must address the major components of the assessment method chosen by the trustees.<sup>61</sup> It also includes the Pre-Assessment Report and a statement by the trustees explaining their authority for asserting a trusteeship over the affected natural resources.<sup>62</sup>

Finally, the DARP must provide for public review and an opportunity to comment upon the trustees' proposed restoration plan as required by OPA.<sup>63</sup>

### ***Assessment Phase***

During the Assessment Phase, the trustees would actually conduct the NRDA using the assessment procedure chosen during the Pre-Assessment Phase. These procedures are presented in the proposed regulations in ascending order of complexity and incident specificity, and somewhat simplified, may be described as follows:

1. **Compensation Formulas.**<sup>64</sup> These damage computations may be used for smaller discharges of oil ranging from ten to 50,000 gallons<sup>65</sup> and where it has been determined that there has not been a significant loss in passive use values.<sup>66</sup> The formulas provide an estimate of damages per gallon taking into account average restoration cost plus average lost direct use values pending restoration.<sup>67</sup>
2. **Type A Assessment.** This simplified assessment procedure uses computer models (more formally entitled Natural Resource Damage Assessment Model for Coastal and Marine Environments, Version 1.2) originally developed by DOI and described in regulations published under CERCLA.<sup>68</sup> DOI is presently in the process of revising the current Type A model, designed for use in coastal and marine environments,



to comply with the decision of the Court of Appeals in Colorado v. Department of the Interior<sup>69</sup> and is developing a second computer model for use in the Great Lakes and their connecting waterways. NOAA is working with DOI on these development projects and expects to adopt both models under its OPA NRDA rules.<sup>70</sup>

3. **Expedited Damage Assessment.** This procedure addresses more serious incidents and a broader range of natural resource injuries than a Type A model without incurring the time and expense of a full Comprehensive Damage Assessment (see below). The purpose of an Expedited Damage Assessment ("EDA") is to determine and quantify natural resource injury based upon limited, focused studies. A comprehensive or long term damage assessment is sacrificed in order to commence the restoration effort at the earliest possible moment.<sup>71</sup> The EDA procedure is intended to be a flexible process which could entail either supplementing the Type A model with field studies or conducting an abbreviated Comprehensive Damage Assessment ("CDA").<sup>72</sup> In its pure form, the EDA procedure consists of four steps:

- a. determining that an injury has occurred, identifying possible contributing factors and listing those natural resources and services of recreational, commercial, ecological or special significance, which have been damaged by the incident;<sup>73</sup>

- b. quantifying those injuries which have been identified through the injury determination process;<sup>74</sup>
- c. determining and establishing the cost of the most appropriate restoration alternative for the damaged natural resources and services;<sup>75</sup> and
- d. estimating the total diminution in value of resources and services affected by the discharge ("compensable values").<sup>76</sup>

4. **Comprehensive Damage Assessment.** Use of this fourth and final procedure is appropriate when the circumstances of the particular discharge require a more lengthy and detailed damage assessment.<sup>77</sup> As was the case with the EDA procedure, a CDA consists of injury determination<sup>78</sup> and quantification,<sup>79</sup> determination of the most appropriate restoration alternative<sup>80</sup> and finally a determination of the compensable values resulting from an oil discharge.<sup>81</sup>

#### *Post Assessment Phase*

At the conclusion of the assessment procedure chosen by the trustees, or upon reaching a settlement with the responsible party, the NRDA enters the Post Assessment Phase. During this portion of the process, the trustees prepare their final Report of Assessment containing the selected restoration approach, the estimated cost of implementing the restoration plan and an index to the administrative record compiled during the assessment process.<sup>82</sup>

If a financial settlement has not been reached with the responsible party, the trustees shall present a demand, in writing, for a sum certain representing the damages as determined by the trustees.<sup>83</sup> The damage figure may be divided into a figure for costs (costs of assessment and estimated cost of restoration) and compensable values. Any judicial review of the costs component will be conducted on the administrative record.<sup>84</sup> Review of the compensable value figure will be conducted with the trustee receiving the benefit of a rebuttable presumption of the accuracy of the assessment.<sup>85</sup>

Recovered damages may be placed in either a joint trustee account to be managed by all trustees or may be divided among the trustees and deposited into separate accounts.<sup>86</sup> The recovered funds may be used to pay the costs of the assessment, all emergency restoration actions and the development and implementation of the final restoration plan.<sup>87</sup>

#### *Compensable Values and Contingent Valuation*

One of the more controversial issues to emerge from NOAA's NRDA rulemaking process has been that of valuing damages sustained by natural resources as a result of oil pollution incidents. The proposed regulations define "compensable values" as:

. . . the total diminution in value of the injured natural resources and/or services as a result of the discharge, from the outset of the discharge until recovery to baseline or comparable conditions is deemed complete by the trustee(s).<sup>88</sup>

Compensable values, which must be measured during the course of either an EDA or CDA, consist of direct and passive use values.<sup>89</sup> "Direct use" is, quite literally, the value persons derive from direct use of a natural resource, including both consumptive and non-consumptive uses.<sup>90</sup> By way of illustration, one commentator has described fishing as a consumptive use of a natural resource and bird watching as a non-consumptive use.<sup>91</sup>

"Passive use" is the value an individual places on natural resources that is not connected to direct use of that resource by the individual. According to the proposed rules, this would include the value of knowing that the resource is available for use by family, friends or the public, the value derived from protecting the resource for its own sake and the value of knowing that the resource is available for use by future generations.<sup>92</sup>

While some may question the very notion of passive use values,<sup>93</sup> a far more contentious issue involves the means of measuring and assigning a monetary value to passive use losses. At the center of this debate is NOAA's proposed use of contingent valuation ("CV") methodology to produce assessments of the passive use value of damaged natural resources.<sup>94</sup>

A CV study is a survey-based approach to measuring both the direct and passive use value of non-market goods and services, such as natural resources. Within the context of an NRDA, a CV study would generally derive these values by asking peoples'

willingness to pay to either prevent injury to a natural resource or to affect its restoration.<sup>95</sup> According to NOAA, it is the only damage measurement technique currently available for the express purpose of estimating passive use values.<sup>96</sup>

However, CV is controversial because it is hypothetical and because it assumes that people will respond to survey inquiries as they would to a transaction in the market place.<sup>97</sup> Many critics of CV dispute this assumption, arguing that the respondents' willingness to pay can be inflated and that their unfamiliarity with the resource being valued could deprive them of any basis for articulating a value. Similarly, it is said that respondents may fail to take CV questions seriously because the implications of their responses are not binding.<sup>98</sup>

A recent case study noted that the accuracy of CV survey reports may also be seriously diminished by the controversy surrounding oil pollution incidents. Respondents in this particular case were found to have injected moral or ethical judgments into their survey responses and to have focused on a general concern for the environment rather than on the survey's specific queries regarding the pollution incident in question.<sup>99</sup>

In response to the widespread criticism of CV, NOAA established a panel of economic and survey experts led by Nobel Prize winning economists Kenneth Arrow and Robert Solow (the "Panel") to conduct a thorough, unbiased review of CV and to develop recommendations to enhance its reliability for use in NRDA's.<sup>100</sup>

The Panel accepted the existence of passive use values as an element of a natural resource's total value, but stated that difficulties were typically encountered in accurately measuring purported loss in those values.<sup>101</sup> It acknowledged that a number of the criticisms, directed at CV as a method of measuring passive use value, were particularly compelling.<sup>102</sup> Serious questions were raised about the rationality of responses to CV surveys and it was noted that few such surveys ever reminded respondents of the very real economic constraints within which they were asked to make spending decisions.<sup>103</sup>

In its final report to NOAA, the Panel recommended a series of stringent guidelines governing the design, development and administration of CV surveys. These recommendations included consultations with professional statisticians in the selection of a sampling method, careful pre-testing of surveys and the use of personal (or, at least, telephone) interviews to gather survey responses.<sup>104</sup> Where choices exist in formulating the survey, the Panel urged that they lean in a conservative direction to partially or totally offset the respondent's tendency to exaggerate his willingness to pay.<sup>105</sup>

The Panel gave CV a qualified endorsement stating that such studies can provide estimates which are sufficiently reliable to be the "starting point" of a judicial damage assessment process.<sup>106</sup> Apparently ignoring the rebuttable presumption accorded assessments (including CV survey results) performed

according to NOAA's rules, the Panel added that in each case the "judicial process" must form a conclusion as to the reliability of the any CV studies conducted. A well conducted study would provide an adequately reliable benchmark to begin such an inquiry containing information the court could use in combination with other evidence and expert witnesses.<sup>107</sup>

In drafting its proposed NRDA rules, NOAA "relied heavily" upon the CV Panel's recommendations, incorporating its CV survey guidelines into a set of standards for CV survey design, development and administration intended to ensure sufficient reliability for use in damage assessments.<sup>108</sup> NOAA has solicited additional comments on its proposal and a final rule will probably not be published in the near future. Nevertheless, several questions arise regarding the ultimate role of CV surveys and their evidentiary status in litigation.

The first question pertains to the potential cost of a properly conducted CV survey, i.e., one that conforms to the rigorous standards recommended by the CV Panel and subsequently inserted by NOAA in the proposed NRDA rules. It has been argued that these standards effectively limit the use of CV surveys by making them disproportionately and unreasonably expensive undertakings.<sup>109</sup> This possibility has predictably drawn the fire of a number of environmental groups who have criticized the "unreasonable and arbitrary" limits placed on CV by the proposed rule.<sup>110</sup>

The second question relates to the rebuttable presumption of accuracy accorded NRDA's conducted in conformity with the regulations issued pursuant to OPA.<sup>111</sup> In the view of the CV Panel, a well designed and developed survey, administered under ideal conditions, would only be considered a "starting point" in a judicial process of damage assessment.<sup>112</sup> Such findings are not consistent with NOAA's position on this question or the Court of Appeals decision in Ohio v. Department of the Interior, which not only accepted CV as a valid assessment method but also found nothing arbitrary or irrational in conferring a rebuttable presumption of accuracy upon the results of a CV survey.<sup>113</sup> This conflict, if not resolved, constitutes fertile ground for an eventual court challenge.

### III. CONCLUSION

The public comment period for NOAA's proposed NRDA regulations is presently scheduled to close on October 7, 1994. Until final rules are published and the time for judicial review expires, there will be some uncertainty as to the precise manner in which natural resource oil pollution damages will be assessed. However, regardless of the final form of NOAA's rules, it is clear that future NRDA's will undoubtedly be structured to recover the full value of the injury sustained by the environment.



The consequences for vessel owners and operators involved in major oil pollution incidents will be dire. Not only will the unfortunate owner or operator be exposed to potential damage awards of unprecedented magnitude but they will also find themselves entangled in a damage assessment process of hitherto unimagined complexity and expense.

As so many commentators have already warned, the best protection for vessel owners and operators will be to demand quality in the construction and operation of their vessels and to prepare for unforeseen calamities by ensuring their complete understanding of and compliance with the growing body of oil pollution laws and regulations.

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July 22, 1994

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## End Notes

1 Pub. Law 101-380, 104 Stat. 484 (1990). OPA's provisions, as codified, are found primarily in Titles 33 and 46 of the United States Code. All subsequent references will (when possible) be to the Act's codified provisions in the United States Code.

2 The principal existing statutes amended by OPA are: Federal Water Pollution Control Act ("FWPCA") 33 U.S.C. § 1251; Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. § 9601; Outer Continental Shelf Lands Act ("OCSLA") 43 U.S.C. § 1811; Trans-Alaska Pipeline Authorization Act ("TAPAA") 43 U.S.C. § 1651; and Deepwater Port Act ("DPA") 33 U.S.C. § 1501.

3 The version of OPA originally passed by the House of Representatives contained a provision which would have provided statutory authority to implement the CLC and Fund Convention. The Senate, which alone possesses constitutional authority to ratify treaties and international conventions, passed a version without this provision. The final version of the bill that emerged from the House-Senate conference deleted this provision. H.R. Conf. Rep. No. 653, 101st Cong. 2d. Sess., 125, 126. In its place was a statement expressing the "sense of Congress" that it would be in the United States' best interest to participate in an international regime that was at least as effective as domestic American law in preventing oil spill incidents and offering full and prompt compensation for damages from oil spills. Pub. Law 101-380, Title III, § 3001, August 18, 1990, 104 Stat. 507, 508.

4 Many of the Conventions' opponents also argued against the preemption of state oil pollution laws which would have resulted from ratification.

5 The 1984 Protocols never secured sufficient ratifications to come into force. At a diplomatic conference held in London in November 1992, new Protocols to both conventions were proposed. The new Protocols retain the substantive provisions of the 1984 Protocols, but reduce the ratification requirements necessary for them to enter into force. See Hawkes, J., ITOPF/CRISTAL and What You Need to Know About Compensation Schemes, Proceedings of the 1993 National Oil Pollution Claims and Litigation Conference, Washington, D.C., May 11-12, 1993 (hereinafter "1993 Claims Conference").

6 33 U.S.C. § 2701. This section defines a vessel as ". . . every description of watercraft or other artificial con-

trivance used, or capable of being used, as a means of transportation on water, other than a public vessel." Although OPA is viewed as being primarily directed at tanker spills, the owner or operator of a non-tanker which discharges bunkers would also incur liability under this Act. OPA liability, like FWPCA liability, is joint and several among all responsible parties.

7 In addition, Title V of the Act (33 U.S.C. § 2731 et seq.) contains provisions applicable only to Prince William Sound. Title VI (33 U.S.C. § 2753) provides special protections for the Outer Banks of North Carolina. Title VII (33 U.S.C. § 2761) establishes an interagency Oil Pollution Research and Development Program. Title VIII (43 U.S.C. § 1651 et seq.) applies exclusively to the Trans-Alaska Pipeline System.

8 33 U.S.C. § 2701(30)&(31).

9 33 U.S.C. § 2702(b)(1).

10 33 U.S.C. § 2702(b)(2). Although outside the scope of this paper, it should be noted that two of these categories of damages, loss of subsistence use of natural resources, 33 U.S.C. § 2702(b)(2)(C), and loss of profits and earning capacity due to injury to real or personal property or natural resource, appear to represent a departure from the traditional bar, originally stated in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 72 L. Ed. 290 (1927), against recovery of purely economic loss unless accompanied by physical damage to the claimant's property. What little caselaw exists on this is contradictory. Compare In Re Cleveland Tankers, Inc., 791 F. Supp. 669 (E.D. Mich. 1992) [dismissing a claim under OPA for loss of profits and earning capacity where claimants had no ownership interest in the damaged property] with Sekco Energy, Inc. v. M/V MARGARET CHOUEST, 820 F. Supp. 1008 (E.D. LA 1993) [refusing to dismiss a similar OPA claim for loss of profits and earning capacity regardless of claimant's lack of an ownership interest in the damaged property. Claim subsequently dismissed for failure to establish proximate causation, 1993 U.S. Dist. LEXIS 11562]. Notwithstanding these inconsistent results, OPA's legislative history expresses a clear Congressional intent to provide a right of recovery for loss of subsistence and loss of profits and earning capacity regardless of the ownership of the damaged resource or property. H.R. Conf. Rep. No. 653 at 103.

11 33 U.S.C. § 2703(a). These general defenses will be lost if the responsible party fails to report the oil spill, fails to cooperate in its removal or fails to comply with an authorized removal order. Apart from the three complete defenses, the responsible party may also assert a defense against a particular

claimant to the extent that the oil spill is caused by that claimant's gross negligence or willful misconduct. 33 U.S.C. § 2703(b).

12 Here, the Act distinguishes between "tank vessels" and all other "vessels" (see note 7). 33 U.S.C. § 2701 provides the following definition:

"tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that -- (A) is a vessel of the United States; (B) operates on the navigable waters; or (C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States.

13 To put this example in perspective, prior to the enactment of OPA, the liability for a 50,000 gross ton tanker would have been limited by the former provisions of the FWPCA to \$7,500,000. Liability for a similarly sized tanker would be limited to \$27,500,000 under the 1984 Protocols to the CLC.

14 33 U.S.C. § 2704(c).

15 Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 368, 369, 90 L.Ed.2d 369, 381, 382 (1986); Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 152, 153, 73 L.Ed.2d 664, 674, 675 (1982)

16 33 U.S.C. § 2718.

17 In addition to the state laws, Puerto Rico and the U.S. Virgin Islands have also enacted oil pollution legislation.

18 Both OPA and the various state oil pollution laws provide for a variety of administrative, civil and criminal penalties which may be imposed on top of a shipowner's liability for removal costs and damages. For example, on the federal side, a failure to immediately notify the appropriate federal agency of a discharge of oil can expose the owner or operator to hefty, monetary fines and imprisonment of up to five years. 33 U.S.C. § 1321(b)(5).

19 California, Maryland, Oregon and Washington have laws which specifically impose liability on cargo owners. Many of the other state statutes provide that "any person who discharges" or "who causes a discharge" is liable, giving rise to potential liability on the part of cargo owners and others.

20 Alabama, Alaska, California, Connecticut, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina and Washington.

21 33 U.S.C. § 2702(b)(2)(A).

22 33 U.S.C. § 2706(d)(1).

23 33 U.S.C. § 2706(a).

24 33 U.S.C. § 2706(b).

25 33 U.S.C. § 2706(f). The Oil Spill Liability Fund was originally established in 1986 and was financed by a five cent per barrel tax on oil movements. OPA increased to \$1,000,000,000 the size of the Fund and the amount which may be paid from the Fund for any one incident. The Fund is available for payment of removal costs incurred by federal and, under some circumstances, state authorities and may also be used to pay other expenses related to natural resource damage assessments and remediation, implementation and enforcement of OPA and the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.). 33 U.S.C. § 2712.

26 33 U.S.C. § 2706(e)(1).

27 See, for example, Feather River Lumber Co. v. U.S., 30 F.2d 642 (9th Cir. 1929); Commonwealth of Puerto Rico v. S.S. ZOE COLOCOTRONI, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912, 67 L. Ed. 2d 336 (1981).

28 Pub. L. 96-510, 94 Stat. 2767 (1980); codified at 42 U.S.C. §9601 et seq. The NRDA regulations issued under CERCLA are codified at 43 C.F.R. Part II and apply to damage assessments resulting from discharges of both oil and hazardous substances.

29 Regulations governing "Type B" assessments were actually issued in 1986 and published in 51 Fed. Reg. 27,674 (1986).

30 880 F.2d 432 (D.C. Cir. 1989), reh'g denied, en banc, 897 F.2d 1151 (D.C. Cir. 1989). The Type A procedure was also challenged. In Colorado v. U.S. Department of the Interior, 880 F.2d 481 (D.C. Cir. 1989), a companion case argued before the same court, it was held that the Type A model was improperly based on lost use values as the sole measure of natural resource damage.

31 880 F.2d at 459. The challenged section of the Type "B" regulations stated that the trustee conducting the NRDA "shall select the lesser of: restoration or replacement costs; or dimi-

duction of use values as the measure of damages..." 43 C.F.R. § 11.35(b)(2).

32 The Court's lengthy discussion of the rationale behind this portion of the decision and its interpretations of the intent of Congress on this particular question can be found in 880 F.2d at 441-459.

33 43 C.F.R. § 11.83(c)&(d).

34 880 F.2d at 463, 464.

35 The Administrative Procedure Act, Pub. L. 89-554, 80 Stat. 381 (1966), codified at 5 U.S.C. § 551 et seq., requires that agencies provide interested persons with an opportunity to participate in the administrative rulemaking process. 5 U.S.C. § 553.

36 Natural Resource Damage Assessment Regulations (NOAA) 59 Fed. Reg. 1062, 1079 (1994). The lessons of Ohio v. Department of the Interior were not lost upon the Congressional conferees that drafted the final version of OPA. Their conference report specifically defines "diminution of value" by referring to the standard used in Ohio v. Department of the Interior for measuring natural resource damage. H.R. Conf. Rep. No. 653 at 108 (1990).

37 59 Fed. Reg. 1167, to be codified at 15 C.F.R. Part 990.

38 Such participation would by no means be mandatory, rather, it would be left to the discretion of the trustees. 59 Fed. Reg. at 1171, to be codified at 15 C.F.R. § 990.17(a).

39 57 Fed. Reg. at 8970; 59 Fed. Reg. at 1103, 1104.

40 59 Fed. Reg. at 1171, to be codified at 15 C.F.R. § 990.17(f).

41 59 Fed. Reg. at 1168, to be codified at 15 C.F.R. § 990.10.

42 33 U.S.C. § 2706(e)(2). 59 Fed. Reg. at 1168, to be codified at 15 C.F.R. § 990.10.

43 59 Fed. Reg. at 1170, to be codified at 15 C.F.R. § 990.15.

44 *Id.* A *de novo* judicial review would circumvent the Congressional intent that the public participate in restoration planning by allowing the litigants and the Court to make the final choice of restoration approach. 59 Fed. Reg. at 1083.

- 45 5 U.S.C. § 706(2)(A).
- 46 33 U.S.C. § 2717(a) CERCLA contains a similar provision. 42  
U.S.C. § 9613(a).
- 47 O'Connor, C.R., Natural Resource Damage Actions Under the  
Oil Pollution Act of 1990: A Litigation Perspective, 45 Baylor  
L. Rev. 441, 444, 445 (1993).
- 48 59 Fed. Reg. at 1170-1171, to be codified at 15 C.F.R.  
§ 990.16.
- 49 The rebuttable presumption of accuracy for NRDA's performed  
in accordance with the proposed regulations does not hinge upon  
the presence or absence of coordination. 59 Fed. Reg. at  
1090-1091. Parallel assessments are permitted so long as they do  
not result in double recovery of damages. 59 Fed. Reg. at 1170,  
to be codified at 15 C.F. R. § 990.14(d).
- 50 59 Fed. Reg. at 1170-1171, to be codified at 15 C.F.R.  
§ 990.16.
- 51 59 Fed. Reg. at 1171, to be codified at 15 C.F.R.  
§ 990.16(b). Federal trustees are required to select a Lead  
Administrative Trustee. Executive Order No. 12777, 56 Fed. Reg.  
54, 757, reprinted in 33 U.S.C. § 1321 (1991). The rules cannot  
mandate this when non--federal trustees are involved. 59 Fed.  
Reg. at 1089.
- 52 59 Fed. Reg. at 1171, to be codified at 15 C.F.R.  
§ 990.16(d).
- 53 33 U.S.C. § 2718.
- 54 59 Fed. Reg. at 1092. Smith, J.T., Natural Resource Damages  
Under CERCLA and OPA: Some Basics for Maritime Operators, 18  
Tul. Mar. L.J. 1, 26, 27 (1993).
- 55 59 Fed. Reg. at 1168, to be codified at 15 C.F.R.  
§ 990.12(a).
- 56 59 Fed. Reg. at 1173, to be codified at 15 C.F.R. § 990.21.
- 57 59 Fed. Reg. at 1173, to be codified at 15 C.F.R. § 990.22.
- 58 59 Fed. Reg. at 1173, to be codified at 15 C.F.R. § 990.23.  
The choice of a damage assessment procedure is governed by a num-  
ber of variable considerations including, among other things, the  
size and nature of the discharge, its expected impact on natural

resources, the environmental or economic value of the affected resources, the extent to which injury to natural resources can be quantified and whether the anticipated damage assessment procedure is cost effective. *Id.*

59 59 Fed. Reg. at 1172, to be codified at 15 C.F.R. § 990.20(e).

60 59 Fed. Reg. at 1174, to be codified at 15 C.F.R. §990.30(a).

61 59 Fed. Reg. at 1175, to be codified at 15 C.F.R. § 990.31. See text accompanying notes 50-67 for descriptions of the assessment procedures.

62 *Id.* Trusteeship is not based solely upon ownership. Under OPA, liability for natural resource damage is to a public body or bodies for damage to natural resources ". . . belonging to, managed by, controlled by or appertaining to. . ." that body. 33 U.S.C. § 2706(a). The requirement that a statement of trusteeship authority be included in the DARP is intended to help sort out the possible overlapping governmental interests in a particular piece of property or natural resource. 59 Fed. Reg. at 1075.

63 59 Fed. Reg. at 1174, to be codified at 15 C.F.R. § 990.30(a). The statutory requirement for public notice is stated at 33 U.S.C. § 2706(c)(5).

64 59 Fed. Reg. at 1176-1177, to be codified at 15 C.F.R. §§ 990.40-990.42.

65 NOAA's analysis of reported coastal oil spills form 1973 to 1990 shows that 99.8% of the discharges were less than 50,000 gallons and 99% were less than 10,000 gallons. 59 Fed. Reg. at 1067.

66 For a discussion of compensable values and passive use values, see text accompanying notes 88-99 and accompanying text.

67 59 Fed. Reg. 32,148, 32,150. Passive use values have not been included since NOAA determined that there is not yet sufficient data relating to average passive use values applicable to this approach. *Id.* at 32,151.

68 43 C.F.R. Part 11.

69 See note 32.

70 59 Fed. Reg. at 1124-1125.



- 71 59 Fed. Reg. at 1177, to be codified at 15 C.F.R. § 990.60.
- 72 59 Fed. Reg. at 1067.
- 73 59 Fed. Reg. at 1178, to be codified at 15 C.F.R. § 990.63.
- 74 59 Fed. Reg. at 1178, to be codified at C.F.R. § 990.64.
- 75 *Id.*
- 76 *Id.*
- 77 59 Fed. Reg. at 1174, to be codified at 15 C.F.R. § 990.23(f)(4).
- 78 59 Fed. Reg. at 1179, to be codified at 15 C.F.R. § 990.71.
- 79 59 Fed. Reg. at 1179, to be codified at 15 C.F.R. § 990.72.
- 80 59 Fed. Reg. at 1180-1181, to be codified at 15 C.F.R. §§ 990.73-990.75.
- 81 59 Fed. Reg. at 1181-1184, to be codified at 15 C.F.R. §§ 999.77-990.79.
- 82 59 Fed. Reg. at 1184, to be codified at 15 C.F.R. § 990.80.
- 83 59 Fed. Reg. at 1184, to be codified at 15 C.F.R. § 990.81. The demand shall identify the oil discharge from which the claim arose and the natural resource trustees asserting the claim. It shall describe the affected natural resources and services and include a copy of the Report of Assessment.
- 84 See notes 43-45 and accompanying text.
- 85 *Id.*
- 86 59 Fed. Reg. at 1185, to be codified at 15 C.F.R. § 990.82.
- 87 59 Fed. Reg. at 1185, to be codified at 15 C.F.R. § 990.83. The proposed rules allow the trustees to either develop and implement an incident specific restoration plan or to pool the recovered funds with other recoveries in a regional restoration plan. 59 Fed. Reg. 1185, to be codified at 15 C.F.R. § 990.84.
- 88 59 Fed. Reg. at 1168, to be codified at 15 C.F.R. § 990.13. OPA defines the measure of natural resource damage as the cost of restoring the affected natural resources, ". . . the diminution

in value of those natural resources pending restoration. . . " plus assessment costs." 33.U.S.C. § 2706(d).

89 59 Fed. Reg. at 1182, to be codified at 15 C.F.R. § 990.77(g).

90 *Id.*

91 Cross, Frank B., Natural Resource Damage Valuation, 42 Vand. L. Rev. 269, 281 (1989). Use value for public resources can approximate the market value of private resources. *Id.*

92 59 Fed. Reg. at 1182, to be codified at 15 C.F.R. § 990.77(g)(2). Cross describes these passive use values respectively as option, vicarious and intemporal values. Cross, *supra* note 76, at 285-286.

93 The concept of passive use values became an issue in Ohio v. Department of the Interior when a number of environmental groups challenged DOI's failure to include such values in the original Type B model. The court upheld their validity, stating that "[o]ption and existence values may represent 'passive' use, but they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment." 880 F.2d at 464.

94 59 Fed. Reg. at 1182, to be codified at 15 C.F.R. § 990.78(b)(5). The proposed rules offer two additional non-market valuation techniques. The "travel cost method" assesses an individual's willingness to travel further, and thereby incur higher travel costs to visit a recreational site similar to that damaged by oil pollution. The "Hedonic Price Model" used in an NRDA context will measure the reduction in property values (for example, privately owned beach front property) resulting from a discharge of oil. 59 Fed. Reg. at 1182, to be codified at 15 C.F.R. § 990.78(b)(1) and (3).

95 59 Fed. Reg. at 1142, 1143.

96 59 Fed. Reg. at 1142.

97 Cross, *supra* note 76, at 315.

98 59 Fed. Reg. at 1143.

99 Grigalunas, T. and Opaluch, J., Non-Use Value in Natural Resource Damage Assessments: The NESTUCCA Oil Spill, Proceedings of the 1993 International Oil Spill Conference, Tampa, Florida, March 29-April 1, 1993, pp. 689-693.

100 59 Fed. Reg. at 1143.

101 Contingent Valuation Methodology Report, 58 Fed. Reg. 4601, 4602, 4603 (1993). The Panel stated that it was difficult to measure lost passive use values because ". . . there exist no indirect methods through which market data can provide at least some clues as to lost values. In other words, there appear to be neither obvious nor even subtle behavioral trails that can provide information about lost passive use values. *Id.* at 4603.

102 *Id.*

103 *Id.* at 4604.

104 *Id.* at 4608.

105 *Id.* at 4610.

106 Substantial compliance with its recommended survey guidelines appears to be the Panel's definition of a reliable survey. "Many departures from the guidelines or even a single serious deviation would, however, suggest unreliability *prima facie.*" *Id.* at 4608.

107 *Id.* at 4610-4611.

108 59 Fed. Reg. at 1143. The standards themselves are provided in the text of the proposed rule. 59 Fed. Reg. at 1182-1184, to be codified at 15 C.F.R. § 990.78(b)(5).

109 Smith, *supra* at note 45, 25. OPA lists the reasonable cost of assessing damages as an element of natural resource damage. 33 U.S.C. § 2706(d)(1)(c). The proposed rules define reasonable costs as ". . . those incurred in performing a natural resource damage assessment, or any part thereof, in accordance with this rule." 59 Fed. Reg. at 1169, to be codified at 15 C.F.R. § 990.13.

110 Glass, J., Greens Raise Doubts Over Clinton Oil Aid, *Lloyds List*, June 30, 1994.

111 See Note 41.

112 See Note 106 and accompanying text.

113 880 F.2d at 478, 480.