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Proving Natural Resource Damage Under OPA 90: Out with the Rebuttable Presumption, in with APA-Style Judicial Review?

Craig H. Allen

University of Washington School of Law

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Proving Natural Resource Damage Under OPA 90: Out with the Rebuttable Presumption, in with APA-Style Judicial Review?

Craig H. Allen*

In the aftermath of the Deepwater Horizon oil spill of 2010, President Obama urged Congress to amend the natural resource damage provisions of the Oil Pollution Act of 1990 to replace the rebuttable presumption of validity the law presently accords to damage assessments by the designated natural resource trustees that were conducted in accordance with regulations promulgated by the National Oceanic and Atmospheric Administration with the standard of judicial review prescribed by the Administrative Procedures Act (APA). Although the House of Representatives passed such an amendment in 2010, the Senate failed to act on the amendment before the 111th congressional term ended. Nevertheless, White House and congressional support in the wake of the 2010 spill suggests that the proposal is likely to resurface in the near future. Accordingly, this Article examines the meaning and effect of the proposed substitution of APA review for the existing rebuttable presumption, potential difficulties in implementing the new standard, and whether the amendment might unconstitutionally deprive spillers of the right to a jury trial.

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* © 2011 Craig H. Allen. Judson Falknor Professor of Law and Adjunct Professor of Marine Affairs, University of Washington, Seattle, Washington.

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I. INTRODUCTION

On April 20, 2010, forty-one miles off the coast of Louisiana, an explosion ripped through the mobile offshore drilling unit Deepwater Horizon,¹ just as the rig was wrapping up the drilling phase of one of the country's "deepwater" outer continental shelf (OCS)² wells for the lead operator of the site, BP Exploration and Production, Incorporated.³ The explosion and fire took the lives of eleven workers on the Deepwater Horizon, injured seventeen others, and opened the new wellhead to the waters of the Gulf of Mexico. When the well's blowout preventer failed, crude oil spewed into the Gulf waters at a rate estimated at 1000, 5000, and then more than 35,000 barrels (1.47 million gallons) per day.⁴ As the oil spread across the Gulf, the

1. Deepwater Horizon was an ultra-deepwater, dynamically positioned, semi-submersible drilling rig built in 2001. The rig, flagged in the Marshall Islands and classed by the American Bureau of Shipping, was owned by Transocean, Ltd. On April 22, 2010, the rig sank in 5000 feet of water, about one-quarter of a mile northwest of the well.

2. The lease was issued by the Department of Interior's Minerals Management Service pursuant to authority granted by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2006); 30 C.F.R. pt. 260 (2010). See generally ADAM VANN, CONG. RESEARCH SERV., RL 33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK (2010).

3. BP Exploration and Production, Inc., is a subsidiary of BP plc (formerly known as "British Petroleum"). The lease area from which the oil was spilled, known to the relevant players as the "Macondo" site, is formally designated as Mississippi Canyon Block 252.

4. One barrel is equal to 42 U.S. gallons. See 33 U.S.C. § 2701(2) (2006). National Oceanic and Atmospheric Administration (NOAA) scientists were criticized early on for estimates of the oil spilled that other scientists concluded were unreasonably low. See Justin Gillis, *Doubts Are Raised on Accuracy of Government's Spill Estimate*, N.Y. TIMES, May 14, 2010, at A1, available at <http://www.nytimes.com/2010/05/14/us/14oil.html>. In contrast to estimates of discharges from tanks, tankers, or pipelines, where the quantities of oil in the system before and after the discharge are known or measurable, accurate estimates for discharges from oil wells are more difficult to make. Eventually, the government formed a twenty-two-member Flow Rate Technical Group to provide more accurate estimates of the oil being discharged. See *Flow Rate Group Provides Preliminary Best Estimate of Oil Flowing from BP Oil Well*, RESTORETHEGULF.GOV (May 27, 2010), <http://www.restorethegulf.gov/>

National Oceanic and Atmospheric Administration (NOAA) closed offshore fisheries from the mouth of the Mississippi River east to Florida's Pensacola Bay.⁵

On April 29, the Secretary of Homeland Security signaled the urgency and magnitude of the situation when she declared the incident a "spill of national significance" (SONS) and appointed Coast Guard Admiral Thad Allen the National Incident Commander.⁶ By mid-May, the response team of 20,000 personnel and 950 vessels had deployed over 1.8 million feet of containment boom, injected nearly 600,000 gallons of oil dispersant into the waters and had recovered more than 7.65 million gallons of oil.⁷ Yet, through May and June, the oil continued to gush out, severely challenging the growing flotilla of response resources. Some analysts predicted that it was only a matter of time before the oil reached the Atlantic Ocean and foreign state waters.⁸

The well was not capped until mid-July.⁹ By that time, an estimated 4.9 million barrels (205.8 million gallons) of crude oil had been released into the marine environment,¹⁰ leaving many wondering how much remained to be cleaned up. The federal government's

release/2010/05/27/flow-rate-group-provides-preliminary-best-estimate-oil-flowing-bp-oil-well.

5. By May 18, 2010, over 45,000 square miles of the U.S. waters of the Gulf (nearly nineteen percent of the total) were closed to fishing. See *NOAA Extends Fishing Closed Area*, NOAA (May 18, 2010), http://www.noaanews.noaa.gov/stories2010/20100518_closure.html.

6. For the consequences of a SONS designation, see 40 C.F.R. § 300.323 (2009).

7. Daily inventories of response resources were posted on the Deepwater Horizon Unified Command's Web site, *Current Operations*, RESTORETHEGULF.GOV, <http://www.restorethegulf.gov/response/current-operations> (last updated Jan. 13, 2011).

8. On July 30, 2010, NOAA concluded that there was no risk of oil pollution to the Florida Keys or the U.S. east coast. See *NOAA: Gulf's Surface Oil Not a Threat to Southern Florida, Keys, and East Coast*, NOAA (July 30, 2010), http://www.noaanews.noaa.gov/stories2010/20100730_threat.html.

9. On August 4, 2010, following a test evaluation of the so-called "static kill" procedure used to temporarily cap the well in mid-July, BP was authorized to cement the well. See *Statement by National Incident Commander Admiral Thad Allen*, RESTORETHEGULF.GOV (Aug. 4, 2010), <http://www.restorethegulf.gov/release/2010/08/04/statement-national-incident-commander-admiral-thad-allen>. Six weeks later, following completion and testing of the relief well, Admiral Allen declared that "the Macondo 252 well is effectively dead." *Statement from Admiral Allen on the Successful Completion of the Relief Well*, RESTORETHEGULF.GOV (Sept. 19, 2010), <http://www.restorethegulf.gov/release/2010/09/19/statement-national-incident-commander-admiral-thad-allen>.

10. See JANE LUBCHENCO, NOAA ET AL., BP DEEPWATER HORIZON OIL BUDGET: WHAT HAPPENED TO THE OIL? 3 (2010), available at <http://www.restorethegulf.gov/release/2010/09/09/bp-deepwater-horizon-oil-budget-what-happened-oil>.

surprisingly low estimate of the amount of oil remaining in the water¹¹ came under immediate attack by scientists and environmentalists, undermining public confidence in the federal government's oil spill experts.¹²

Soon after it became apparent that oil was leaking from the well, the President (through the Coast Guard) designated the Macondo well as the "source" of the oil and BP was notified that it was considered the legally "responsible party" for the spill.¹³ As such, BP was subject to liability under the Oil Pollution Act of 1990 (OPA 90) for the costs of removing the oil and for damages caused by the spill. Under OPA 90 as presently written, an offshore facility operator's liability for removal costs is unlimited; however, its liability for damages caused by the incident is limited to \$75 million.¹⁴ There are, however, several grounds, proof of which can result in imposition of unlimited liability for damages under OPA 90. In addition, OPA 90 does not preempt state liability laws, some of which impose unlimited liability.¹⁵ As it turned out, however, resorting to those alternatives was rendered largely unnecessary after BP announced that it would take full responsibility for the oil spill damages, notwithstanding the OPA 90 limits of liability, and followed through by establishing a \$20 billion claims fund.¹⁶

11. See *id.* The August 2, 2010, report, prepared by NOAA and the U.S. Geological Survey, and later defended by NOAA Administrator Jane Lubchenco, estimated that only 26% of the oil discharged from the well remained in the water. It concluded that, of the estimated 205.8 million gallons of oil discharged, 17% was captured directly from the well head; 5% was burned; 3% was skimmed; 24% was either chemically or naturally dispersed, and 25% either evaporated or dissolved.

12. See John Collins Rudolf, *Scientists Tussle over Gulf Oil Tally*, N.Y. TIMES GREEN BLOG (Aug. 17, 2010, 6:24 PM), <http://green.blogs.nytimes.com/2010/08/17/tussle-over-gulf-oil-tally-drags-on/>.

13. See 33 U.S.C. § 2714 (2006); 33 C.F.R. § 136.305 (2010) (designating the source and notification to responsible party). Because the sunken Deepwater Horizon was presumed to be leaking oil from onboard tanks (which contained 700,000 gallons of diesel fuel), the vessel was designated a source of oil and the vessel's owner, Transocean, was designated the responsible party. At this time it is uncertain whether any of the oil from the vessel has, in fact, escaped. Given the principal "source" of the oil and its "responsible party," it is more accurate to refer to the incident at the "BP Macondo spill" rather than the Deepwater Horizon spill.

14. 33 U.S.C. § 2704(a)(3). The \$75 million limit on liability for damages has not been adjusted since OPA 90 was enacted. "Offshore facility" is defined in 33 U.S.C. § 2701(22). "Outer Continental Shelf facility" is defined in 33 U.S.C. § 2701(25).

15. See *id.* § 2718(a)(1). For an example of unlimited oil spill liability under state law, see WASH. REV. CODE ANN. § 90.56.370 (West 2011).

16. See Ben Feller, *BP Agrees to \$20B Fund for Spill Victims*, WASH. TIMES, June 16, 2010, <http://www.washingtontimes.com/news/2010/jun/16/bp-executives-arrive-meeting-obama/>.

No sooner had the public and private components of the national response system mobilized to arrest the discharge and contain and remove the escaped oil than the inevitable images of living and other natural resource casualties hit the news services. Endangered and threatened turtle species¹⁷ and recently recovered pelican and other bird species were early victims of the spill. Coastal states from Texas to Florida girded for the coming onslaught of oil on their beaches and in their coastal wetlands. The unfolding disaster mobilized another group of players: natural resource trustees, whom OPA 90 charged with representing federal, state, tribal, and foreign interests in assessing the damage to natural resources and implementing appropriate restoration. NOAA took the lead in assessing the spill's impact on fish, shellfish, marine mammals, turtles, birds, and other sensitive resources, as well as their habitats.¹⁸

Awakened from its twenty-year hiatus on marine environmental protection oversight and legislative development, Congress moved swiftly to fix the blame. Calling in oil company executives and various government officials, committees in both houses held televised hearings during which they expressed shock that drilling for oil in waters roughly one mile deep and more than forty miles offshore posed unique technological challenges and a higher degree of oil spill risk.¹⁹ Legislative bills with election-year titles like the "Big Oil Bailout Prevention Act of 2010"²⁰ promised anxious voters sweeping changes to the OCS leasing and oil spill liability regimes.²¹

17. See U.S. FISH & WILDLIFE SERV., FEDERALLY LISTED WILDLIFE AND PLANTS THREATENED BY GULF OIL SPILL (2010), available at <http://www.fws.gov/home/dhoilspill/pdfs/FedListedBirdsGulf.pdf>.

18. See generally DEEPWATER HORIZON OIL SPILL TRUSTEE COUNCIL, NRDAR: HOW IT WORKS (2010), available at <http://www.fws.gov/home/dhoilspill/pdfs/NRDARHowItWorks.pdf> (describing the Natural Resource Damage Assessment and Restoration process and participants, including the fourteen technical working groups established for the spill).

19. See Jad Mouawad & Barry Meier, *Risk-Taking Rises as Oil Rigs in Gulf Drill Deeper*, N.Y. TIMES, Aug. 29, 2010, <http://www.nytimes.com/2010/08/30/business/energy-environment/30deep.html> (reporting that the risks are "largely unscrutinized").

20. H.R. 5214, 111th Cong. (2010) (introduced by Rep. Rush Holt and 84 cosponsors on May 5, 2010); see also Big Oil Bailout Prevention Liability Act of 2010, S. 3305, 111th Cong. (2010) (introduced by Sen. Robert Menendez and twenty-three cosponsors on May 24, 2010). On June 9, 2010, Senator Menendez took his reform proposal one step further in S. 3472, which he styled the "Big Oil Bailout Prevention Unlimited Liability Act of 2010." S. 3472, 111th Cong. (2010).

21. The reformists frequently decried the \$75 million limit of liability for damages caused by an incident involving an offshore facility, often comparing that figure to the higher limits applicable to vessels and onshore facilities. They failed to acknowledge, however, that the higher OPA 90 limits applicable to vessels and onshore facilities apply to both removal costs and damages. The offshore facility owner's liability for removal costs is presently

On May 12, 2010, the White House transmitted to Congress an executive branch postspill legislative package.²² Like the many bills already introduced in Congress, the President's legislative package proposed an increase in the spiller's oil spill liability and the per-incident and natural resource damage (NRD) claim limits on expenditures from the Oil Spill Liability Trust Fund. In addition, the White House proposed a new standard of review for natural resource damage assessments made by designated trustees. Instead of the rebuttable presumption accorded to damage assessments under the current law, if the assessment is conducted in accordance with NOAA's regulations for assessing natural resource damage, the White House proposed to substitute judicial review under standards prescribed by the Administrative Procedures Act (APA).²³ The President's proposal was taken up by Rep. James Oberstar, who included it in H.R. 5629 on June 29, 2010.²⁴ An identical provision was eventually included in H.R. 3534 (the CLEAR Act), which passed the House by a narrow margin on July 30, 2010.²⁵ H.R. 3534 was placed on the Senate calendar on August 4, 2010; however, the Senate failed to take action on it before the 111th Congress ended. Although no similar amendment has yet been introduced in the current Congress, White House support for the amendment suggests the issue will likely resurface.

This Article examines the judicial review proposal in the White House's postspill legislative package and H.R. 3534, with particular attention to potential difficulties in applying an APA-style review to NRD determinations and assessments. It also examines whether limiting the scope of challenges to affirmative claims for NRD in this way might conflict with any applicable right to a jury trial. Part II of the Article provides a general background on oil spill liability. Part III

unlimited. Accordingly, in the case of the BP spill, the company's liability under the current law for cleanup costs and damages will plainly run into the billions.

22. Letter from Barack Obama, President, to Rep. Nancy Pelosi, Speaker of the House (May 12, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/supplemental_05_12_10.pdf.

23. *Id.* at 21 (enclosure).

24. Oil Spill Accountability and Environmental Protection Act of 2010, H.R. 5629, 111th Cong. (2010).

25. Consolidated Land, Energy, and Aquatic Resources Act of 2010, H.R. 3534, 111th Cong., tit. III, § 706 (2009). The bill passed 209 yeas to 193 nays. *See also* H.R. REP. NO. 111-575, pt. 1 (2010). The Senate failed to take companion action before the 111th Congress adjourned. Although no similar measure has yet been introduced in the 112th Congress, strong White House support for the amendment in the wake of the Gulf oil spill suggests that reform efforts are likely to resume in the current session.

then describes the present and proposed legal framework relevant to a natural resource trustee's "proof" of damage resulting from an oil spill incident. Next, Part IV examines some of the issues raised by the proposed change, including the appropriateness of an APA standard of review to natural resource damage assessment and its potential effect on any relevant rights to a jury trial.

II. RESPONSIBLE PARTY LIABILITY FOR "DAMAGES" CAUSED BY AN OIL SPILL

The 1989 oil spill from the EXXON VALDEZ demonstrated that the United States lacked adequate resources, including federal funds, to respond to significant oil spills.²⁶ It also became apparent that the existing hodgepodge of statutory and decisional law provided only poorly defined and limited compensation for those harmed by oil spills. Congress responded with OPA 90.²⁷ While largely leaving intact the discharge prohibitions and penalties in the Clean Water Act,²⁸ Congress substantially revised and codified the oil spill liability scheme. Title I of OPA 90 significantly expanded the range of compensable damages and raised the responsible party's limits of liability, while Title IX bolstered the Oil Spill Liability Trust Fund. OPA 90's liability provisions apply to discharges in the navigable waters of the United States, including the territorial sea and the exclusive economic zone.²⁹

Until 1990, the natural resource damage liability and cost recovery scheme for oil spills in U.S. navigable waters was defined by federal maritime law, as modified by the 1972 Federal Water Pollution Control Act and state law.³⁰ Claimants invoked a number of common

26. In 1980, CERCLA enacted broad reforms to the parallel legal framework for releases of hazardous substances. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (2006)). 42 U.S.C. § 9607(f) imposes liability for injury to, or destruction or loss of, natural resources.

27. See Pub. L. No. 101-380, 104 Stat. 484 (1990). The legislative history of the Oil Pollution Act is collected, in part, in 1990 U.S.C.C.A.N. 722.

28. See, e.g., 33 U.S.C. §§ 1319 (2006) (civil and criminal penalties); *id.* 1321 (discharge prohibitions).

29. See *id.* §§ 2701(8), (21), 2702(a).

30. Prior to 1990, liability for oil spills in navigable waters of the United States was established by the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 311, 94 Stat. 2767 (1972), amended by Clean Water Act, Pub. L. No. 95-217, § 58, 91 Stat. 1566 (1977). The allowable "costs of removal" included those costs or expenses incurred by the federal or state governments in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge. See 33 U.S.C. § 1321(f)(4). In addition, recovery was allowed for natural resource damage under various state law or general maritime law theories.

law theories, including *parens patriae*, public trust doctrine, and nuisance.³¹ In response to the EXXON VALDEZ incident, after which the federal and Alaska state governments settled their natural resource damage claims against Exxon for \$900 million,³² Congress moved to codify much, but not all, of the law on natural resource damage from oil spills. Importantly, in enacting OPA 90 Congress expressly “saved” application of state law and admiralty and maritime law.³³ Thus, those evolving bodies of law may yet provide a basis for natural resource damage remedies. At the same time, however, given the seaward reach of its liability regime, OPA 90’s consistency with relevant international law—particularly the 1982 United Nations Convention on the Law of the Sea—must also be considered.³⁴

A. *Responsible Party Liability for “Damages” Under OPA 90*

OPA 90 imposes liability on the responsible party (RP)³⁵ for the costs of removal and certain specified “damages.”³⁶ Those “damages”

31. See, e.g., *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1098-99, 1973 AMC 1131, 1131-32 (D. Me. 1973) (*parens patriae*); *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1065-66, 1974 AMC 1003, 1009-11 (D. Md. 1972) (public trust doctrine); *In re Oswego Barge Corp.*, 439 F. Supp. 312, 314-15, 1978 AMC 392, 393-94 (N.D.N.Y. 1977) (nuisance); see also *Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 672, 1981 AMC 2185, 2212 (1st Cir. 1980) (“An oil spill on the navigable waters is a breach of federal maritime law. Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction.” (internal quotation marks omitted)).

32. See Agreement and Consent Decree, *United States v. Exxon Corp.*, Nos. A91-082 & A91-083 (D. Alaska Oct. 19, 1991), available at http://www.evostc.state.ak.us/Universal/Documents/History/Agree_CD.pdf.

33. See 33 U.S.C. §§ 2718(a), 2751(e). One district court has held that the only maritime law claims “preserved” under 33 U.S.C. § 2751 are “admiralty claims which are not addressed in OPA.” *Nat’l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp.*, 924 F. Supp. 1436, 1447, 1996 AMC 2604, 2618 (E.D. Va. 1996) (holding that “[b]ecause OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages”), *aff’d*, 122 F.3d 1062, 1998 AMC 163 (4th Cir. 1997).

34. See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS Convention]. Although the United States is not a party to the UNCLOS Convention, it considers much of the convention binding as a matter of customary law. See Presidential Statement on United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983). The UNCLOS Convention does not expressly address coastal State jurisdiction to impose liability for oil discharges in the State’s Exclusive Economic Zone. See UNCLOS Convention, *supra*, arts. 56(1)(b)(iii), 229, 235(2)-(3), 304.

35. “Responsible party” is defined in 33 U.S.C. § 2701(32).

36. *Id.* § 2702. The Act defines “damages” to include the cost of assessing those damages. *Id.* § 2701(5).

include any injury to natural resources, loss of personal property (and resultant economic losses), loss of subsistence use of natural resources, lost revenues resulting from destruction of property or natural resource injury, lost profits resulting from property loss or natural resource injury, and the costs of providing extra public services during or after the spill response.³⁷

The RP's liability under OPA 90 is strict,³⁸ but subject to certain enumerated affirmative defenses³⁹ and a complex schedule of statutory limits.⁴⁰ The statutory limits may, however, be "broken." Under the "exceptions" to limited liability in 33 U.S.C. § 2704(c), the RP's liability limits may be broken if

- (1) . . . the incident⁴¹ was proximately caused⁴² by—
 - (A) gross negligence or willful misconduct of, or
 - (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party[; or]

37. *Id.* § 2702(b).

38. *See id.* §§ 1321(f) (strict liability under the CWA), 2701(17) (incorporating the Clean Water Act liability provision); *see also* *Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001); *Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818, 820, 1998 AMC 635, 638 (1st Cir. 1997).

39. 33 U.S.C. § 2703.

40. *Id.* § 2704; *see also* *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1347, 1998 AMC 2409, 2411-12 (11th Cir. 1998). Title VI of the Coast Guard and Maritime Transportation Act of 2006 increased the limits of liability for vessels but not for offshore facilities. Pub. L. No. 109-241, § 603, 120 Stat. 516, 553-54 (2006) (amending 33 U.S.C. § 2704). The Act did, however, require the secretary to produce annual reports, which among other things, was intended to ensure the liability limits were periodically reassessed to determine whether they were adequate to the risk. *Id.* § 603(c). OPA 90 does not permit recovery of punitive damages and it has been held to preempt punitive damage claims under general maritime law. *See* *S. Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 64-65, 2001 AMC 609, 617 (1st Cir. 2000); *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001). *But see* *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2618-19, 2008 AMC 1521, 1531-32 (2008) (holding that the Clean Water Act's water pollution penalties, 33 U.S.C. § 1321, do not preempt punitive damages awards in maritime spill cases).

41. "[I]ncident' 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." 33 U.S.C. § 2701(14).

42. Congress considered the question of proximate causation particularly important. *See* H.R. REP. NO. 101-242, at 30-31 (1989). The proximate cause test has also been adopted by the Supreme Court as the standard of causation under the Admiralty Jurisdiction Extension Act, Pub. L. No. 109-304, 120 Stat. 1485 (2006) (codified at 46 U.S.C. § 30101 (2006)); *see* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-37, 1995 AMC 913, 920-21 (1995). The superseding cause "wrinkle" of the proximate cause doctrine was analyzed by the Court in *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 836-39, 1996 AMC 1817, 1821-23 (1996).

- (2) . . . the responsible party fails or refuses—
 - (A) to report the incident . . . ;
 - (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
 - (C) without sufficient cause, to comply with an order issued under [33 U.S.C. § 1321](c) or (e)⁴³

Additionally, the Act does not preempt additional or even unlimited liability under state law.⁴⁴ Injured parties may bring OPA 90 claims for removal costs or damages directly against the RP or against the RP's guarantor.⁴⁵ If there are multiple RPs, liability is joint and several.⁴⁶

B. The Oil Spill Liability Trust Fund

The Oil Spill Liability Trust Fund (Fund) was originally established in 1986; however, it was largely unfunded until Congress enacted OPA 90, consolidating existing funds and imposing a tax to replenish the Fund.⁴⁷ The Fund is administered by the National Pollution Funds Center (NPFC).⁴⁸ The original 1990 Act imposed a five-cent/barrel tax on oil imports to support the Fund and established an upper limit both on the Fund and on the amount that could be paid out for each incident.⁴⁹ The Energy Policy Act of 2005 raised the limit of the Fund to \$2.7 billion,⁵⁰ and the Emergency Economic Stabilization Act of 2008 increased the per-barrel tax rate to eight cents

43. 33 U.S.C. § 2704.

44. *Id.* § 2718(a)(1).

45. *See id.* § 2716(f).

46. *See id.* § 2702(a), which provides that "each" responsible party is liable for the relevant removal costs and damages, up to the limits of liability in the Act. The Act also includes provisions for contribution. *See id.* §§ 2709, 2717(f)(3). Joint and several liability, which has long been a principle in general maritime law, is confirmed by OPA 90's legislative history. *See* H.R. REP. NO. 101-653, 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 780; S. REP. NO. 101-94, at 11 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 733.

47. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, tit. VIII, § 8033(a), 100 Stat. 1874, 1959 (1986). OPA 90 repealed the former Offshore Oil Spill Pollution Fund and consolidated the remaining funds in the Oil Spill Liability Trust Fund. Offshore Oil Spill Pollution Fund, 43 U.S.C. §§ 1811-1824 (1988) (repealed by the Oil Pollution Act of 1990, Pub. L. No. 101-380, tit. II, § 2004, 104 Stat. 484, 507 (1990)).

48. *See* Exec. Order No. 12,777, 56 Fed. Reg. 54,757, 54,766 (Oct. 22, 1991). The NPFC is an independent Coast Guard unit that serves as fiduciary for the OSLTF. The center's claims procedures are set out in 33 C.F.R. pt. 136 (2010).

49. *See* 26 U.S.C. § 9509 (2006); JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS 15-17 (2010).

50. Pub. L. No. 109-58, § 1361, 119 Stat. 594, 1058-59 (2005) (amending 26 U.S.C. § 4611(f) (2000)).

through 2016.⁵¹ Although the Fund will be rebuilt to \$2.7 billion, OPA 90 still limits the amount that can be committed to a single spill to \$1 billion overall, of which not more than \$500 million is available for natural resource damages.⁵²

With limited exceptions, any claim for removal costs or damages must first be presented to the RP or the RP's guarantor before it may be presented to the NPFC for payment from the Fund.⁵³ Presentment to the RP is also a prerequisite to filing a civil action against the RP in court.⁵⁴ Claimants may assert claims against the Fund or file suit in court ninety days after filing their claims with the RP or immediately if the RP denies all liability for the claim.⁵⁵ A claimant, including a natural resource damage (NRD) trustee claimant, may not present a claim against the Fund if it has already filed a lawsuit against the RP for those same damages.⁵⁶

C. *Responsible Party Liability for Natural Resources Damages*

The "polluter pays" principle, which advocates measures for imposing liability and a duty of compensation for the adverse effects of "environmental damage,"⁵⁷ has been only partially implemented in international law.⁵⁸ By expressly imposing upon the RP liability for "injury to, destruction of, loss of, or loss of use of, natural resources,"⁵⁹

51. See Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, div. B, § 405, Oct. 3, 2008, 122 Stat. 3765, 3860 (2008).

52. 26 U.S.C. § 9509(c)(2).

53. See 33 U.S.C. § 2713(c) (2006); 33 C.F.R. § 136.103(c).

54. See 33 U.S.C. § 2713(a); *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11th Cir. 1995) (dismissing plaintiffs' suit after holding that presentment under 33 U.S.C. § 2713(a) is a prerequisite to suit).

55. See 33 U.S.C. § 2713(c); 33 C.F.R. § 136.103(c).

56. See 33 U.S.C. § 2713(d); 33 C.F.R. § 136.103(d).

57. See, e.g., Rio Declaration on Environment and Development, princ. 13, June 14, 1992, 31 I.L.M. 874.

58. See, e.g., International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, art. 4, Dec. 18, 1971, 1110 U.N.T.S. 57 [hereinafter Fund Convention]; International Convention on Civil Liability for Oil Pollution Damage, arts. I, III, Nov. 29, 1969, 973 U.N.T.S. 3 [hereinafter CLC]. In imposing liability for environmental damage, the CLC provides that "compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken." Protocol To Amend the CLC, art. I.6, Nov. 27, 1992, 1956 U.N.T.S. 255; see CLC, *supra*, arts. I.6 (defining "pollution damage"), III (liability for "pollution damage"). The United States is not a party to the CLC or Fund conventions.

59. 33 U.S.C. § 2702(b)(2)(A). "Natural Resources" are defined in 33 U.S.C. § 2701(20). The purpose of imposing NRD liability is compensatory, not punitive. See generally VALERIE ANN LEE, P.J. BRIDGEN & ENV'T INT'L LTD., THE NATURAL RESOURCE DAMAGE ASSESSMENT DESKBOOK: A LEGAL AND TECHNICAL ANALYSIS 49-50 (2002); Charles

OPA 90 comes closer to realizing that principle, but it applies only to oil spill incidents and does not address the vast quantities of nutrients, pesticides, pathogens, acidifiers, and other pollutants that find their way into the ocean from rivers, outfalls, aquaculture farms, and the atmosphere.⁶⁰ Before a party can be held liable for any of OPA 90's remedies, including the legal component of a natural resource damage remedy, the party asserting the claim must prove that (1) the defendant is a "responsible party" (2) for the ship or facility (3) from which oil was discharged (4) into or upon covered waters or adjoining shorelines, and (5) that an injury to natural resources "resulted from" the incident.⁶¹

The amount of compensation allowed for NRD claims is the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources and the reasonable cost of assessing damages.⁶² Only natural resource trustees have standing to assert claims for damage to natural resources.⁶³ Trustees for natural resources belonging to, managed or controlled by, or appertaining to the federal government (federal trustees) are designated by the President;⁶⁴ state trustees by the governors; and tribal trustees by the governing body of the affected tribes.⁶⁵ Provision is also made for foreign governments to designate trustees where an incident damages natural resources of the foreign state.⁶⁶

For "damage" claims, including claims for natural resource damage, the damage must "result from" the spill incident.⁶⁷ At the same time, however, because liability is joint and several, the fact that

B. Anderson, *Damage to Natural Resources and the Cost of Restoration*, 72 TUL. L. REV. 417 (1997); James L. Nicoll, Jr., *Marine Pollution and Natural Resource Damages: The Multi-Million Dollar Damage Award and Beyond*, 5 U.S.F. MAR. L.J. 323 (1993).

60. See generally UNCLOS Convention, *supra* note 34, art. 1.14 (defining "pollution of the marine environment").

61. See 33 U.S.C. § 2702(a).

62. *Id.* § 2706(c).

63. *Id.* § 2702(c)(1)(A).

64. Federal trustees are listed in the National Contingency Plan. See 40 C.F.R. § 300.600 (2009). For marine spills, the majority of federal natural resources come under the Department of Commerce (NOAA) or Department of Interior (FWS). Where there is more than one federal trustee for a given incident, Executive Order 12,777 requires appointment of a "Lead Administrative Trustee." Exec. Order No. 12,777, *supra* note 48, at 54,759; 56 Fed. Reg. 54,759 (Oct. 22, 1991); 15 C.F.R. § 990.14(a) (2010).

65. See 33 U.S.C. § 2706(b); 40 C.F.R. § 300.605, 300.610. The trustees' functions and duties are prescribed in 33 U.S.C. § 2706(c) and the National Contingency Plan. See 40 C.F.R. § 300.615.

66. 33 U.S.C. § 2706(b)(5).

67. *Id.* §§ 2702(a) (removal costs and damages that "result from" the incident), 2706(e)(1).

there may have been other concurrent causes of the damage may give the RP a right of contribution,⁶⁸ but it should not constitute a defense to liability.⁶⁹ The 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) adopts identical “result from” language in its provisions on liability for natural resource damage in cases involving the release of a hazardous substance.⁷⁰ Given the lack of cases that construe the “result from” causation standard in a claim under the NRDA section of OPA 90, analogous CERCLA cases may be persuasive authority in construing the OPA 90 standard.⁷¹ The CERCLA cases are not entirely consistent, however. One district court, applying the CERCLA standard to an NRD claim, held that the trustee need only prove that the release was a “contributing factor.”⁷² Another district court construed CERCLA to require the NRD claimant to “show a defendant’s release . . . was the sole or substantially contributing cause of each alleged injury to natural resources.”⁷³

Among other things, NOAA’s regulations on NRD assessments and restoration require trustees espousing NRD claims to “determine if injuries to natural resources and/or services have resulted from the incident.”⁷⁴ In the subsequent challenge to the NOAA final rule in the

68. *Id.* § 2709.

69. *See* *Coeur d’Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1119-21 (D. Idaho 2003), *modified*, *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063 (D. Idaho 2005) (relying on RESTATEMENT (SECOND) OF TORTS § 433A(1) (1965) and rejecting joint and several liability for natural resource damages under CERCLA where there was a reasonable basis for allocating the damage among the potentially responsible parties).

70. *See* 42 U.S.C. § 9607(a) (2006). Accordingly, CERCLA cases on NRD claims, some of which adopt a relaxed causation standard or suggest the need for a reversal of the burden of proof, may serve as persuasive but not binding authority on OPA 90 NRD liability. *See, e.g., In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893, 897 (D. Mass. 1989); BRIAN D. ISRAEL, 5 ENVIRONMENTAL LAW PRACTICE GUIDE § 32B.05[4] (2010).

71. *Cf. United States v. Hyundai Merch. Marine Co.*, NO. A94-0391-CV, 1997 WL 612790, 1997 AMC 2333, 2348 (D. Alaska Mar. 31, 1997) (determining an RP’s liability for removal costs under the “result from” statutory causation element by adopting a “nexus” requirement, which the government could satisfy by showing either “cause in fact” or “but for” causation), *aff’d*, 172 F.3d 1187 (9th Cir. 1999). Interestingly, the court treated its causation discussion as a conclusion of law rather than a finding of fact.

72. *In re Acushnet River*, 722 F. Supp. at 897.

73. *United States v. Montrose Chem. Corp.*, No. CV 90 3122-AAH, 1991 U.S. Dist. LEXIS 10128, at *2 (C.D. Cal. Mar. 27, 1991); *see also Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986) (holding that strict liability does not abrogate the necessity of showing causation and “the damage for which recovery is sought must still be causally linked to the act of the defendant”). *See generally* James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL’Y 217 (2000/2001).

74. 15 C.F.R. § 990.51(a) (2010).

Court of Appeals for the District of Columbia, the petitioners' position that the trustee could meet its proof requirement merely by demonstrating "injury," "exposure," and a "pathway" failed to satisfy the court.⁷⁵ NOAA's brief conceded that "[t]he trustee must establish causation to the satisfaction of the district court,"⁷⁶ a position the agency reiterated during oral argument, while also acknowledging that this interpretation of the final rule would bind the agency in any future proceedings.⁷⁷ The court expressly adopted NOAA's construction of its final rule that the trustee must "prove causation."⁷⁸

An action for natural resource damages under OPA 90 must be brought within three years of the date of completion of the natural resources damage assessment.⁷⁹ The assessment for the relatively small (53,000 gallons) and more localized spill from the COSCO BUSAN in San Francisco Bay was expected to take up to five years to complete.⁸⁰ It therefore seems likely that the completion date for the BP Macondo oil spill assessments will be a decade or more away. NRD claim litigation might therefore stretch into the 2020s.

D. Assessing Natural Resources Damage: The NOAA Regulations

Recognizing the complexity of natural resource damage assessment and restoration planning, Congress, in OPA 90, directed the Secretary of Commerce to promulgate regulations for carrying out such assessments and restoration planning for spills covered by the

75. *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 776-77, 779 (D.C. Cir. 1997); Appendix at 780-81, *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767 (D.C. Cir. 1997) (No. 96-1096). Although the NOAA regulations treated this as an "injury" determination, it is more properly viewed as a causation test, particularly because it apparently presumes an adverse change in the resource. See 15 C.F.R. § 990.51(b)(2); 61 Fed. Reg. 440, 450-51 (1996) (to be codified at 15 C.F.R. pt. 990).

76. *Gen. Elec. Co.*, 128 F.3d at 777 (internal quotation marks omitted). In response to a suggestion that the NOAA final rule adopted a "contributing factor" standard of causation, the agency stated that "NOAA does not believe it is appropriate to advocate legal standards of causation in the rule." 61 Fed. Reg. at 479.

77. *Gen. Elec. Co.*, 128 F.3d at 777.

78. *Id.* at 779.

79. 33 U.S.C. § 2717(f)(1)(B) (2006); see also *id.* § 2712(h)(2) (limitation period for NRD claims against the Oil Spill Liability Trust Fund). Claims for other damages must be brought within three years after the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care. *Id.* § 2717(f)(1)(A).

80. See *United States v. M/V Cosco Busan*, 557 F. Supp. 2d 1058, 1066, 2008 AMC 1360, 1370 (N.D. Cal. 2008); see also *In re Settoon Towing LLC*, No. 07-1263, 2009 U.S. Dist. LEXIS 113530, at *15-16 (E.D. La. Dec. 4, 2009) (observing that NRDA can take "quite some time").

Act.⁸¹ After a lengthy development, deliberation, and challenge process, NOAA promulgated the final rule called for by OPA 90 in 1996,⁸² and amended it in 2002.⁸³ The NOAA regulations divide NRD assessment into three phases: Phase I Preassessment,⁸⁴ Phase II Restoration Planning,⁸⁵ and Phase III Restoration and Implementation.⁸⁶ The NOAA regulations must be read in conjunction with guidance available in NOAA's Damage Assessment, Remediation, and Restoration Program (DARRP) manuals⁸⁷ and the NPFC's rules on NRD claims against the Fund.⁸⁸

Several aspects of the NOAA regulations deserve close attention. Under the regulations, "[i]njury means an observable or measurable adverse change in a natural resource or impairment of a natural resource service."⁸⁹ NOAA explained that injury to resources will not be presumed and that the injury must be observable (i.e., qualitative) or measurable (i.e., quantitative).⁹⁰ The regulations also establish a "reliable and valid" standard for NRD assessments.⁹¹ In the absence of

81. See 33 U.S.C. § 2706(e)(1).

82. See generally 61 Fed. Reg. 440-510 (1996) (to be codified at 15 C.F.R. pt. 990); 60 Fed. Reg. 39,804-834 (1995) (to be codified at 15 C.F.R. pt. 990).

83. Upon challenge by a number of industry groups, the 1996 regulations were, for the most part, upheld. See *Gen. Elec. Co.*, 128 F.3d at 779. In response to the court's vacatur and remand of selected parts of the 1996 final rule, NOAA promulgated amendments to selected parts of the regulations in 2002. See 67 Fed. Reg. 61,483 (2002) (to be codified at 15 C.F.R. pt. 990).

84. 15 C.F.R. § 990.40-45 (2010).

85. *Id.* § 990.50-.56.

86. *Id.* § 990.60-.66.

87. *OPA Guidance About DARRP*, NOAA (July 19, 2010), http://www.darrp.noaa.gov/library/1_d.html. As of 2010, NOAA had published five manuals titled "NOAA Guidance Document[s] for Natural Resource Damage Assessments [NRDA] Under the Oil Pollution Act of 1990." *Id.*

88. See 33 C.F.R. pt. 136 (2010).

89. 15 C.F.R. § 990.30 ("injury" not defined in OPA 90). The NOAA regulations go on to say: "Injury may occur directly or indirectly to a natural resource and/or service. Injury incorporates the terms 'destruction,' 'loss,' and 'loss of use' as provided in OPA." *Id.* The NOAA definition of "injury" represents a departure from Clean Water Act thinking, under which harm is presumed if oil is visible on or in the water. *Cf.* 40 C.F.R. § 110.3(b) (2010). The visible sheen test was upheld in *Chevron, U.S.A., Inc. v. Yost (Chevron II)*, 919 F.2d 27, 28 (5th Cir. 1990) (upholding civil penalty based on visible sheen), overruling *United States v. Chevron Oil Co. (Chevron I)*, 583 F.2d 1357, 1359, 1979 AMC 602, 603 (5th Cir. 1978) (holding that visible sheen creates only a rebuttable presumption of harm).

90. 61 Fed. Reg. 440, 447 (1996) (to be codified at 15 C.F.R. pt. 990).

91. 15 C.F.R. § 990.27(a)(3). The terms "reliable" and "valid" "refer to technical judgments by experts in a particular field that a procedure is consistent with best practices for the measure being investigated under the circumstances." 61 Fed. Reg. at 465. NOAA did not discuss where such "best practices" might be found. The court held that the most important factor in evaluating the rebuttable presumption given to NRD assessment under the NOAA regulations was that the assessment procedures must be reliable and valid for the

reliable baseline data, this standard will be difficult to meet. Nearly two decades ago, NOAA encouraged all natural resource trustees to obtain baseline data on their resources at risk and to identify areas of particular sensitivity.⁹² From the trustee's point of view, the requirement imposes a Catch-22: to be able to determine whether an injury occurred, the trustee needs baseline data for comparison. By definition, such data must be obtained before the oil impacts the resource. OPA 90 provides no mechanism for trustees to be reimbursed for obtaining that baseline data at the time it is obtained. Nor may the trustee recover the costs of historical baseline data collection as part of its NRD assessment because those prespill costs did not "result from" the spill incident.⁹³ It is also noteworthy that the NOAA regulations impose a cost-effectiveness consideration on the trustees' approach to NRD assessment.⁹⁴ An assessment method is cost-effective if it is "the least costly activity . . . that provide[s] the same or a comparable level of benefits."⁹⁵ OPA 90's NRD assessment provisions are not a license for far-reaching environmental studies at the RP's expense.⁹⁶

OPA 90 specifies that trustees may recover only "reasonable" assessment costs.⁹⁷ Significantly, the "reasonableness" qualification is not included in OPA 90's provisions on recovering removal costs.⁹⁸ Attorney's fees that may be necessary to enforce a claim against an RP are not recoverable assessment costs.⁹⁹ The 1996 NOAA rule's definition of "reasonable assessment costs" originally included both "legal" and "enforcement" costs;¹⁰⁰ however, the United States Court of

particular incident. *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 771 (D.C. Cir. 1997).

92. See 57 Fed. Reg. 8964, 8984-85 (1992) (to be codified at 15 C.F.R. ch. IX).

93. The cost of obtaining baseline data after the spill incident begins, but before the oil impacts the natural resource, should be recoverable.

94. 15 C.F.R. § 990.27; 61 Fed. Reg. at 464.

95. 15 C.F.R. § 990.30; see also 61 Fed. Reg. at 448-49, 451 (listing the factors for identifying natural resources and services at risk and the selection of injuries to include in the assessment).

96. See 61 Fed. Reg. at 451 ("[D]eveloping scientific knowledge for its own sake is not part of an assessment under this rule."). NOAA has taken the position that its "focus on restoration will eliminate unneeded assessment studies." *Id.* at 459. The rule "clearly constrain[s] trustees' actions to those necessary to achieve OPA's restoration goals." *Id.*

97. See 33 U.S.C. § 2706(d)(1)(C) (2006).

98. See *id.* § 2702(b)(1).

99. *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 776 (D.C. Cir. 1997). Left open is whether an RP who challenges a trustee's administrative determination and qualifies as a "prevailing party" within the meaning of the EAJA, might be able to recover some of its attorney's fees. See 28 U.S.C. § 2412 (2006).

100. 60 Fed. Reg. 39,804, 39,810 (1995) (to be codified at 15 C.F.R. pt. 990).

Appeals for the D.C. Circuit invalidated that part of the final rule.¹⁰¹ The superseding regulations promulgated by NOAA in 2002 clarified the matter by deleting “enforcement” costs in the definition of “reasonable assessment costs” and adding a definition of “legal costs” that did not include attorney’s fees necessary to bring an enforcement action.¹⁰² The 2002 Federal Register discussion acknowledged that “NOAA agreed that attorneys’ costs incurred in pursuing litigation of a natural resource damages claim are not recoverable as assessment costs.”¹⁰³ By contrast, courts have ruled that the government is entitled, under some circumstances, to recover its attorney’s fees in an action to enforce a claim to recover its removal costs.¹⁰⁴

III. JUDICIAL REVIEW OF NRD ASSESSMENTS

Most potential NRD assessment and restoration claims are obviated either by cooperation and negotiation between the trustees and the RP or by settlement.¹⁰⁵ The NOAA regulations require the trustees to invite the RP to participate in NRD assessments “as soon as practicable.”¹⁰⁶ Indeed, NOAA envisions early and active involvement of the RP.¹⁰⁷ Accordingly, an RP has several options for approaching NRD assessments and restoration planning following a spill incident. First, the RP can simply trust the trustees to assess the damages correctly and then pay the amount demanded when the trustees complete the task. Alternatively, the RP can stand on the sidelines while the trustees conduct their assessment, but then challenge the trustees’ findings when a claim is presented. A third option open to the RP is to retain an independent NRD assessment team to conduct an assessment and then use those findings to contest the trustees’ assessment. The fourth, and more common approach, is for the RP to

101. See *Gen. Elec. Co.*, 128 F.3d at 776 (observing that NOAA “does not oppose a vacatur of the definition of assessment costs to the extent that it refers to attorneys’ fees incurred in pursuing litigation of a [NRD] claim”).

102. See 67 Fed. Reg. 61,483, 61,490 (2002) (to be codified at 15 C.F.R. pt. 990); see also 33 C.F.R. § 136.105(e)(8) (2010) (excluding “attorney’s fees or other administrative costs associated with preparation of the claim” under NPFC rules for claims against the Fund).

103. 67 Fed. Reg. at 61,490; *Gen. Elec. Co.*, 128 F.3d at 776.

104. See *United States v. Hyundai Merch. Marine Co.*, 172 F.3d 1187, 1192-93, 1999 AMC 1521, 1528 (9th Cir. 1999).

105. 15 C.F.R. § 990.25 (2010) permits settlement at any time, “provided that the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest.” See also 61 Fed. Reg. 440, 446 (1996) (to be codified at 15 C.F.R. pt. 990).

106. 15 C.F.R. § 990.14(c).

107. 61 Fed. Reg. at 443.

cooperate with the trustees in conducting the assessment and restoration planning (as the NOAA regulations encourage), share and compare data with the trustees, and raise any objections to the trustees' methods or findings immediately.¹⁰⁸ For obvious reasons, trustees (and, probably, the courts), knowing that the RP will likely reject first approach, favor the fourth approach over the second or third.¹⁰⁹

Those NRD claims that fail to settle may lead to claims against the Fund or a civil suit by the trustees against the RP or its guarantor. Under those circumstances, the NPFC or a court will be called upon to determine the validity of the asserted claims and to grant relief in a way that guards against "double recovery" by two or more trustees for the same damage.¹¹⁰ The judicial reception (and the reception by the NPFC) given to the trustees' NRD assessment will depend in large measure on whether the assessment was conducted in accordance with the NOAA regulations for NRD assessments. The effect of such assessments was the focus of one section of H.R. 3534.

A. Judicial Review Under the Present Regime: The Rebuttable Presumption

At present, NRD determinations or assessments prepared in accordance with the NOAA regulations are entitled to a rebuttable presumption. More specifically, OPA 90 provides:

Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) of this section by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.¹¹¹

The Act does not specify the content of that presumption, and the NOAA regulations simply repeat the terms of the Act.¹¹² In the related

108. Because most NRD claims for incidents falling under OPA 90 are resolved short of litigation, there are few cases construing and applying the NOAA regulations on NRD assessments.

109. The Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-584 (2006), may provide for options short of litigation to resolve disputes with federal agencies serving as trustees. Section 572(a) provides that upon agreement of the parties, agencies "may" use ADR methods to resolve disputes that relate to "administrative programs."

110. See 33 U.S.C. § 2706(d)(3) (2006).

111. *Id.* § 2706(e)(2); 15 C.F.R. § 990.13.

112. See 15 C.F.R. § 990.13. The presumption applies even to assessments by state and tribal trustees (but not foreign trustees) if they were made in accordance with the NOAA regulations. See 60 Fed. Reg. 39,804, 39,808 (1995) (to be codified at 15 C.F.R. pt. 990).

Federal Register explanation of the final rule, NOAA asserted that it “interprets this presumption to mean that the responsible parties have the burdens of presenting alternative evidence on damages and of *persuading* the fact finder that the damages presented by the trustees are not an appropriate measure of damages.”¹¹³ That characterization appears to overstate the effect of a rebuttable presumption—at least under federal law.¹¹⁴ Presumptions in federal question cases in federal courts are governed by Federal Rule of Evidence 301.

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.¹¹⁵

Putting aside for now the question “presumption of *what?*” left unanswered by the statute, close inspection of Rule 301 reveals that a rebuttable presumption in a federal question matter like OPA 90 NRD liability shifts to the RP only the burden of production, not the risk of nonpersuasion, which would remain on the trustee. To meet the burden of persuasion, the trustee must persuade the trier of fact as to each element of its claim by the governing legal standard.¹¹⁶ Typically, the most difficult elements for the trustee to prove are extent of injury and causation.¹¹⁷ The D.C. Circuit’s decision in *General Electric Co. v.*

The regulations set out a five-part test for determining whether assessments by state, local, and tribal trustees were conducted in accordance with the NOAA regulations. *Id.*

113. See 61 Fed. Reg. 440, 443 (1996) (emphasis added) (to be codified at 15 C.F.R. pt. 990). It goes on to add “[t]his presumption applies to all assessment procedures conducted in accordance with this rule.” *Id.*

114. In part I of the Federal Register materials on the final rule, NOAA took the position that the “[rebuttable] presumption means that the responsible parties have the burden of proving that the trustees’ *claim* and determinations are incorrect.” 60 Fed. Reg. at 39807 (emphasis added). However, many of the elements of a “claim” for natural resource damage are beyond the scope of an “assessment” of that damage. Those elements must be considered in pleadings (see FED. R. CIV. P. 8, 9; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) and motion practice under FED. R. CIV. P. 12(b)(6), 56.

115. FED. R. EVID. 301.

116. See *Gen. Elec. Co. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 772 (D.C. Cir. 1997).

117. This is true even if the trustees followed the NOAA NRDA rule in 15 C.F.R. pt. 990 because any presumption that arises under 33 U.S.C. § 2706(e)(2) (2006) is rebuttable. Accordingly, the methods and models adopted by the trustee must be evaluated not only under the NOAA NRDA regulations but also the Federal Rule of Evidence 702—*Daubert* factors, to predict the likelihood that a court will deem the trustee’s proof admissible and

U.S. Department of Commerce took care to record that NOAA conceded in oral argument before the court that before it could recover for NRD, it would have to prove that the damage claimed was caused by the incident.¹¹⁸

B. Judicial Review Under the Proposed Amendment: The APA Standard

Section 706 of H.R. 3534 would have implemented the White House proposal to revise the legal effect of NRD assessments made for spills falling within OPA 90. As amended, the relevant OPA 90 subsection would substitute APA-style judicial review of NRD assessments for the rebuttable presumption. The amended version (in redline format) would provide:

33 U.S.C. § 2706(e)(2) ~~Rebuttable presumption~~ *Judicial review of assessments*

Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) of this section by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall ~~have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act~~ *be subject to judicial review under subchapter II of chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), on the basis of the administrative record developed by the lead Federal trustee as provided in such regulations.*¹¹⁹

In replacing the presumption with judicial review under the APA in this way, the proposed amendment suffers from poor drafting, presents application problems, and may prove vulnerable to constitutional challenge if it is applied in a way that relieves a trustee of its burden of proof on a claim for NRD. The drafting problems are immediately apparent. First, the new provision, like the White House proposal, was captioned “judicial review,” a phrase that, under the APA, is normally confined to final agency action carrying inherent legal effect (e.g.,

adequate. *See* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 (1993); *see also* U.S. DEP’T OF INTERIOR, NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION FEDERAL ADVISORY COMMITTEE FINAL REPORT 15 (2007), *available at* http://restoration.doi.gov/Assets/UploadedFiles/Library/facamtg5_finalreport.pdf (“It is important for DOI to consider the standards for reliability embodied in the Federal Rules of Evidence and the often novel scientific and technical issues confronted in NRDAR.”).

118. *See Gen. Elec. Co.*, 128 F.3d at 777.

119. Consolidated Land, Energy, and Aquatic Resources Act of 2010, H.R. 3534, 111th Cong., tit. III, § 706 (2009).

rules, orders, licenses, sanctions), not to damage assessments that are given binding legal effect only by later court judgment.¹²⁰ It thus leaves unclear the relationship between “judicial review” and proof of claim for damages and might be applied in a way that confuses and ultimately debases both.¹²¹ Nothing in the language of the amendment directly speaks to the burden of production or persuasion in a civil action to collect natural resource restoration costs and damages.¹²² Additionally, the amended section does not say that the trustee’s decisions and assessments are subject to judicial review “only” under the APA, or what standard will be applied if the administrative record developed by the lead federal trustee fails to address evidentiary questions essential to a damage liability finding.¹²³ The amendment also does not limit the opportunity to demand judicial review of a trustee’s NRD determinations or assessments to challenges by the RP or its guarantor in response to a demand for payment by the trustee. It could therefore be read to create a new basis for members of the public¹²⁴ (or other trustees) to challenge a federal, state, or tribal trustee’s determination or assessment (and, perhaps, to recover their attorney’s fees if they prevail).¹²⁵ Finally, the amended statute would be

120. See 5 U.S.C. §§ 701, 703-704 (2006).

121. It is important to note that the amendment would not alter the elements of a NRD claim, the standing requirement for such claims, or the OPA 90 jurisdiction and venue provisions. Thus, it would still be true that only trustees could bring claims for NRD resulting from a spill by the RP and that such claims could be brought in federal or state court. Upon proof of the elements of a claim (and subject to any available affirmative defenses), the trustee may recover for the damage, including reasonable assessment costs, up to the RP’s limits of liability.

122. It is not clear how the amendment would affect the burden allocation in a motion for summary judgment under FED. R. CIV. P. 56 or in a declaratory action under 33 U.S.C. § 2717(f)(2). For example, in reviewing evidence in a summary judgment motion, “the court must draw all reasonable inferences in favor of the nonmoving party.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). 33 U.S.C. § 2717(f)(2) appears to create a right to request a declaratory judgment on liability for removal costs and *damages* “any time after [removal] costs have been incurred.” Thus, a court might be called upon to enter a binding judgment on damages early in the case, a situation not well-suited to APA-style “judicial review.”

123. The controversy over the relationship of compliance with the NOAA regulations and the necessity of proving causation in a NRD claim is described *supra* Part II.D. Similarly, a trustee would ordinarily not be called upon to determine whether an affirmative defense was available to the RP.

124. Trustees have been criticized from both sides: by RPs and public interest advocates. See, e.g., Kevin R. Murray et al., *Natural Resource Damage Trustees: Whose Side Are They Really On?*, 5 ENVTL. LAW 407 (1999); Laura Rowley, Note, *NRD Trustees: To What Extent Are They Truly Trustees?*, 28 B.C. ENVTL. AFF. L. REV. 459 (2001).

125. The United States Court of Appeals for the Second Circuit recently declined to extend APA review to decisions by the Atlantic States Marine Fisheries Commission on the ground that it was not an “agency” under the APA. In doing so, it cast some doubt on the

unnecessarily confusing because the APA judicial review provisions are set out in chapter 7 of the Act, not chapter 5, as stated in the bill.¹²⁶ In particular, 5 U.S.C. § 706 prescribes the scope of review and the grounds for setting aside a covered agency's actions, findings, or conclusions. It provides in relevant part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"quasi-federal agency" doctrine. See *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 533-35 (2d Cir. 2010).

126. H.R. 3534 differed from the version submitted by the White House, which provided that such assessments and determinations would "be subject to judicial review under the Administrative Procedure Act (5 U.S.C. 551 et seq.) on the basis of the administrative record developed by the Lead Administrative Trustee as provided in such regulations." See Letter from Barack Obama, President, to Rep. Nancy Pelosi, Speaker of the House, *supra* note 22, at 21 (internal quotation marks omitted). If, upon presentment, the RP denies all liability for the claim or fails to settle it within 90 days, the Act's "election" provision gives the claimant two options: present the claim to the Fund (whereupon the Fund is subrogated to the claimant's claim against the RP under 33 U.S.C. § 2715) or "commence an action in court against the responsible party or guarantor." 33 U.S.C. § 2713(c). Presumably, the "action" contemplated by the statute is a "civil action" within the meaning of FED. R. CIV. P. 2, with the pleading and proof requirements, discovery, and motion practice that entails. Construing the amendment as replacing what is understood to be a civil action with an action merely for a review of an administrative record would have a number of consequences. For example, the lay-down disclosure obligations in FED. R. CIV. P. 26(a) do not apply to actions for review of an administrative record. See FED. R. CIV. P. 26(a)(1)(B)(i).

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.¹²⁷

Should Congress enact such an amendment without addressing these drafting problems, NOAA might be called upon to remedy some of those problems when it promulgates the conforming amendments to its NRD regulations.¹²⁸

Looking beyond the drafting problems raised above to how the new rule would work in practice, several additional problems present themselves. The first is one of symmetry among cognate acts designed to protect natural resources from pollution damage because the amendment would apply only to assessments conducted in response to OPA 90 oil spills. NRD assessments for hazardous substance releases under the Department of Interior regulations promulgated under CERCLA would still be governed by the rebuttable presumption.¹²⁹ Second, although the APA by its terms applies to federal agencies,¹³⁰ the proposed amendment would extend APA judicial review to “determinations” and “assessments” by state and tribal trustees, individuals or agencies that are generally not subject to the same congressional oversight and statutory safeguards that apply to federal administrative agencies.¹³¹ Third, it is unclear whether the jurisdictional and prudential limitations on judicial review that typically apply to APA cases will apply to NRD determinations and, if so, how they will relate to the jurisdiction and venue provisions of OPA 90.¹³² Fourth, the court reviews questions of law *de novo*, subject

127. 5 U.S.C. § 706 (2006).

128. The National Pollution Funds Center might also need to amend its rules for compensation from the Oil Spill Liability Trust Fund. *See generally* 33 C.F.R. § 136.209 (2010).

129. *See* 42 U.S.C. § 9607(f)(2)(C) (2006); 43 C.F.R. pt. 11 (2007); *see also* 16 U.S.C. §§ 1432(6), 1443 (2006) (NRD liability provisions of the National Marine Sanctuaries Act). Trustees who fail to comply with the DOI regulations for NRD assessments run a serious risk in litigating their NRD claim without the benefit of the presumption. *See, e.g.,* *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1242 (10th Cir. 2006).

130. *See* 5 U.S.C. §§ 551(1), 701(b)(1).

131. Any statute that purports to create a right to a civil action against a state must be mindful of the Eleventh Amendment.

132. The Supreme Court has held that 5 U.S.C. § 702 is not a jurisdictional statute for judicial review of agency actions. *See* *Califano v. Sanders*, 430 U.S. 99, 105 (1977). Accordingly, in the absence of a statute directly on point, federal jurisdiction will generally be based on 28 U.S.C. § 1331 (2006). *See generally* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 103 (6th ed. 2002). OPA 90 has its own jurisdiction and venue provisions for “all controversies arising under” the Act. 33 U.S.C. § 2717(b) (2006).

to applicable deference doctrines,¹³³ while the standard of review for findings of fact varies according to the form of the proceeding. As H.R. 3534 was drafted, it was unclear whether the NRD determinations or assessments would be subject to the substantial evidence standard under section 706(2)(e) of the APA¹³⁴ or some lesser standard.¹³⁵ If the “judicial review” prescribed by the amendment does not contemplate *de novo* review of the relevant facts (and nothing in the bill indicated that it would), an argument can be made that determinations and assessments should be carried out under procedures that conform to the APA adjudication requirements.¹³⁶ Fifth, it is not clear whether the APA review standard would be binding on the Oil Spill Liability Trust Fund managers if the trustee presents a NRD claim to the NPFC.¹³⁷ Sixth, there was nothing in the bill that suggests the sponsors carefully considered the potential preclusive effect of the trustee’s NRD determinations in any subsequent proceedings involving the trustee, RP, or third parties who might be liable on contribution or indemnity theories.¹³⁸

The proposed amendment might also be vulnerable to a constitutional challenge (implicating the other form of “judicial review”) if applied in a way that fails to meet due process

133. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

134. Section 706(2)(e) applies only when a “hearing” is required by 5 U.S.C. § 553(c) (when rules are required by statute to be made on the record after an opportunity for an agency hearing) or 5 U.S.C. § 554 (agency adjudications).

135. This, too, might be clarified by NOAA in the revision to its NRD regulations that would be required by this amendment.

136. *See* 5 U.S.C. § 554(a)(1) (explaining that the section on “adjudications” applies except, *inter alia*, where the “matter is subject to a subsequent trial of the law and the facts *de novo* in a court”).

137. The rebuttable presumption applies in both administrative and judicial proceedings. By contrast, the substitute provision is limited to “judicial” review. It is also significant that the Oil Spill Liability Trust Fund managers serve a fiduciary role. The deferential APA review standard may be inconsistent with the degree of care expected of a fiduciary before it pays out moneys from a public “trust fund.”

138. “An administrative decision commands preclusive effects only if it resulted from a procedure that seems an adequate substitute for judicial procedure.” 18B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4475 (2d ed. 2002). Preclusion may also extend beyond the agency directly involved. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (stating that litigation conducted before one agency or official is generally binding on another agency or official of the same government because officers of the same government are in privity with each other). Note, too, the preclusive effect accorded to state court judgments in 33 U.S.C. § 2717(c) (2006). *See also* 28 U.S.C. § 1738 (requiring that federal courts give full faith and credit to the judgments of state courts). Whether federal courts are bound by state administrative determinations is determined in part by legislative intent. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 110 (1991).

requirements¹³⁹ or infringes on an RP's right to trial by jury. Although Part IV of this Article concludes that the jury trial right is likely to attach in relatively few NRD claims, the proposed amendment failed to recognize or make accommodation for the right in those cases when it does apply. Courts adjudicating claims for NRD would therefore have been challenged to craft an approach that gave effect to the amendment without compromising jury trial rights.

IV. ANALYSIS OF THE PROPOSED AMENDMENT

The application and effect of the proposed amendment must be evaluated not only in terms of what it would add ("judicial review" under the APA) but also what it would strike from the statute: a rebuttable presumption, which may be applied in the context of a civil claim for damage to natural resources. The APA is understood to embrace three categories of administrative actions by federal agencies: rulemaking, adjudications, and a third category of actions consisting of agency decisions, sometimes referred to as "informal actions," that do not fall within the definition of rulemaking or adjudications.¹⁴⁰ The APA prescribes specific procedures for rulemaking and adjudications, but not for the third category of decisions. Nevertheless, the APA's judicial review provisions apply, at least in part, to all three categories of agency action.¹⁴¹ H.R. 3534 would have extended such review to a trustee's NRD "determinations and assessments," even if they were made or carried out by state or tribal trustees. It also appears that it would limit review to the "administrative record developed by the lead Federal trustee as provided in [the NOAA] regulations."¹⁴² This new approach to determining and assessing damages against private parties would raise significant due process and jury trial right questions.

139. Determinations regarding the level of process due before a person can be deprived of property include the public and private interests that may be affected by the decision, the risk of erroneous deprivation, and the probable value of additional or alternative safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

140. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 254-55 (2d ed. 2001). Other than development and implementation of restoration plans (discussed *infra* note 144 and accompanying text), trustee decisions with respect to NRD arising out of an OPA 90 spill incident likely do not fall within the definition of a "rule" under the APA. See 5 U.S.C. § 551(4). Nor do they constitute an "order" under 5 U.S.C. § 551(6) for purposes of applying the proposed amendment, which would trigger application of the agency adjudications requirements in 5 U.S.C. § 554.

141. See 5 U.S.C. §§ 702, 704.

142. Consolidated Land, Energy, and Aquatic Resources Act of 2010, H.R. 3534, 111th Cong., tit. III, § 706 (2009).

A. *Existing Application of APA Review Standards in OPA 90 Incidents*

Application of the APA to some aspects of OPA 90 spill incidents is hardly new. The OPA 90 process for obtaining compensation for damages to natural resources was described by one district court as a “hybrid administrative-judicial” process.¹⁴³ OPA 90 prescribes what amounts to a formal rulemaking process for NRD restoration plans, requiring that such plans be developed and implemented “only after adequate public notice, opportunity for a hearing, and consideration of all public comment.”¹⁴⁴ NOAA’s NRD regulations formalize that process and require trustees to compile an administrative record.¹⁴⁵ APA judicial review standards have been applied to the federal government’s claims for reimbursement of removal costs. In *United States v. Hyundai Merchant Marine Co.*, for example, the United States Court of Appeals for the Ninth Circuit applied the APA “arbitrary and capricious” standard and held that the government was entitled to recover all of its costs of removal, without first proving the costs were necessary or reasonable.¹⁴⁶ Recognizing that the actions were taken by an agency of the federal government, however, the court went on, in an attempt to allay the RP’s concerns, to explain:

143. *Prairie Band of Potawatomi Indians v. Glacier Petroleum, Inc.*, No. CIV.A. 00-2165-CM, 2001 U.S. Dist. LEXIS 6926, at *2 (D. Kan. May 2, 2001).

144. 33 U.S.C. § 2706(c)(5) (2006); *see id.* § 2706(c)(1)(C), (c)(2)(B), (c)(3)(B), (c)(4)(B). By providing an opportunity for a hearing, the statute triggers application of 5 U.S.C. §§ 556 and 557. *See* 5 U.S.C. § 553(c) (“When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply . . .”).

145. 15 C.F.R. §§ 990.45, 900.61 (2010); *see also* 40 C.F.R. § 300.800 (2010) (referring to NCP provisions for Administrative Record of response activities); William S. Roush, Jr., *Procedural Options for the Process of Assessing and Collecting Natural Resource Damages Under the Oil Pollution Act of 1990*, 45 BAYLOR L. REV. 315 (1993). Judicial review under the APA extends to the “whole record or those parts of it cited by a party.” 5 U.S.C. § 706; *see Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.”). In promulgating its final rule and NRD assessments, NOAA took no position on whether any judicial review of the trustees’ NRDA determinations will be limited to the administrative record. 61 Fed. Reg. 440, 479 (1996) (to be codified at 15 C.F.R. pt. 990).

146. 172 F.3d 1187, 1191, 1999 AMC 1521, 1527 (9th Cir. 1999); *see also* H. REP. NO. 101-242 (1989) (intending that the definition of “removal costs” be interpreted liberally and that only measures that are clearly extravagant, clearly and predictably ineffectual, frivolous, or grossly out of proportion to the actual or threatened pollution should be excluded); Sergio J. Alarcon & Flynn M. Jennings, *Monitoring Costs Under the Oil Pollution Act of 1990: A Blank Check for the Coast Guard?*, 21 TUL. MAR. L.J. 419, 429-32 (1997).

Recovery under the OPA is not wholly unlimited, however. The government concedes that the general standard of the Administrative Procedure Act applies to its actions in seeking to prevent or contain an oil-spill disaster: the United States may recover its costs unless its actions were arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). The district court held that the actions of the United States for which it awarded recovery were not arbitrary or capricious. Hyundai does not challenge these rulings. The OPA does not authorize the imposition of any higher standard.¹⁴⁷

Other courts have followed the Ninth Circuit's approach. In *United States v. Jones*, the United States District Court for the Middle District of Georgia held that even if the Coast Guard's actions for which the reimbursement is sought were not "consistent" with the National Contingency Plan, they are recoverable unless the actions were arbitrary or capricious.¹⁴⁸ The court treated as affirmative defenses the defendant's claims that the government's costs were not recoverable because its removal actions were not consistent with the NCP, were unreasonable, or because a claim had not been properly presented to the RP.¹⁴⁹ The courts have also applied an APA review standard to NPFC actions.¹⁵⁰

B. Legal and Practical Challenges in Applying APA Standards in NRD Litigation

Given the likelihood that the new "judicial review" provisions of H.R. 3534 would have been clarified or fleshed out by NOAA (when called upon to amend its NRD regulations to conform to the amendments to OPA 90), it is premature to delve deeply into the APA issues the amendment would have raised. However, because it is likely that a similar amendment will be forthcoming, several issues should be

147. *Hyundai Merch. Marine*, 172 F.3d at 1191, 1999 AMC at 1526-27.

148. 267 F. Supp. 2d 1349, 1363 (M.D. Ga. 2003) ("[T]o say that the government has unlimited power to recover any costs is also unfounded. Defendants may subject the [government's] removal actions to judicial review under the Administrative Procedures Act."). The district court cited a decision of the United States Court of Appeals for the Fifth Circuit in support of the proposition that when an agency decision is challenged under the arbitrary and capricious standard the burden is on the challenging party to show that the agency's decision was either not based on a consideration of the relevant factors or amounted to a clear error of judgment. *Id.* (citing *Ward v. Campbell*, 610 F.2d 231, 235 (5th Cir. 1980)).

149. *Hyundai Merch. Marine*, 172 F.3d at 1362.

150. *Apex Oil Co. v. United States*, 208 F. Supp. 2d 642, 649, 2002 AMC 493, 500 (E.D. La. 2002); *see also* John M. Woods, *Going on Twenty Years—The Oil Spill Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1331-32, 1337 (2009) (concluding that courts are less willing to give deference to determinations by the NPFC).

flagged for continuing attention. To put the importance of this brief list of issues in perspective, it might be instructive to consider a possibility: the amendment could be adopted and applied in a manner that in a future NOAA (or state or tribal) natural resource damage claim against an RP (or its guarantor) for, say, \$1 billion, the RP may be afforded far less “process” than it would receive from the U.S. Coast Guard in assessing a Class II civil penalty of \$30,000 for the same oil spill. Comparison of the APA standards for agency adjudications,¹⁵¹ allied with the Coast Guard’s regulations prescribing the procedures and safeguards applicable in adjudications by administrative law judges to impose Class II civil penalties,¹⁵² to the procedures and safeguards applicable in trustee natural resource damage determinations and assessments, amply demonstrates that the former process is much more likely to produce reliable findings of fact and conclusions of law than the latter. The stark contrast and the appearance of unfairness it creates are almost sure to give pause to judges when asked to apply an APA “judicial review” standard to establish the essential elements of a billion dollar claim, particularly if the trustee is not a federal agency bound by the safeguards prescribed by the APA.¹⁵³

The APA judicial review standards themselves suggest several potential problems in applying the amendment. Under 5 U.S.C. § 706(2)(C), a court might well be asked to determine whether some parts of a trustee’s NRD determination or assessment are *ultra vires*, to the extent the trustee’s “determinations” or “assessments” extend to elements of a claim against the trustee that were not necessary determinations for the trustee to carry out its assigned responsibilities. NOAA could minimize this danger by defining “determination” and “assessment” in its revision of the NRD regulations to avoid determinations that overreach and by prescribing an appropriate

151. 5 U.S.C. § 554 (2006).

152. 33 C.F.R. pt. 20 (2010); *see also* 33 U.S.C. § 1321(b)(6) (providing authority for Class II civil penalties).

153. It is also noteworthy that the criminal fines for water pollution cases may, under the Alternative Fines Act (AFA), be assessed on the basis of the pecuniary harm suffered as a result of the violation. *See* 18 U.S.C. § 3571(d) (2006). Following the 2007 oil spill from the COSCO BUSAN in San Francisco Bay, the U.S. Department of Justice invoked the AFA and obtained a grand jury indictment alleging that the defendant’s negligent discharge of oil had caused at least \$20 million in pecuniary losses, presumably a figure that included the natural resource damages. *See* Third Superseding Indictment, *United States v. Fleet Mgmt. Ltd.*, CR 08-1050-SI, at 9 (N.D. Cal. May 26, 2009), *available at* http://www.justice.gov/usao/can/community/Notifications/documents/2009_08_07_third_sup_indictment.pdf.

process for each.¹⁵⁴ 5 U.S.C. § 706(2)(D) might also be construed to inject any number of federal and state procedural requirements beyond those in OPA 90 and the NOAA regulations. Application of 5 U.S.C. § 706(2)(E) and (F) will be particularly problematic, more so if the relevant trustee is a state or local government agency or a tribal representative. Under those circumstances, chapter V of the APA does not apply *ex proprio vigore*, and it is therefore unclear whether the substantial evidence standard or the de novo factual review standard would apply.¹⁵⁵ Once again, NOAA might be able to address this problem in rule amendments.

C. *Potential for Conflict with Jury Trial Rights*

The OPA 90 liability scheme must, of course, respect any relevant right to a jury trial that an alleged responsible party might have. The Act provides a basis for injured parties to bring claims for removal costs and damages in federal district courts or in state courts.¹⁵⁶ Accordingly, in assessing the substitution of judicial review for proof in a civil action using a rebuttable presumption, both federal and state laws on the right to a jury trial might be implicated by the amendment.¹⁵⁷ Within the federal courts, the right to a jury trial may be found in the Seventh Amendment or an applicable statute.¹⁵⁸

1. The Right to Trial by Jury in Federal Courts

The Seventh Amendment provides, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”¹⁵⁹ The amendment does not apply to cases within the federal courts’ admiralty and maritime

154. Neither OPA 90 nor the NOAA regulations presently define either term, nor does the APA define or use the term “determination” in its judicial review provisions (5 U.S.C. § 706(2) refers to agency “action, findings, and conclusion”), except in the last sentence of section 706, in reference to “determinations” by the court. The CEQ regulations implementing NEPA provide a definition of “environmental assessment.” See 40 C.F.R. § 1508.9 (2010) (emphasis added).

155. See 5 U.S.C. §§ 706(2)(F), 554(a)(1).

156. 33 U.S.C. § 2717(b)-(c) (2006).

157. The potential difficulties state courts might face if called upon to apply a federal APA review to actions by federal, state, and tribal trustees is beyond the scope of this Article.

158. See, e.g., FED. R. CIV. P. 38(a).

159. U.S. CONST. amend. VII.

jurisdiction, for which there is no right to a jury trial.¹⁶⁰ The Seventh Amendment does not create a jury trial right, but rather “preserves” that right.¹⁶¹ Congress may also expressly create a right to a jury trial by statute.¹⁶² In *Curtis v. Loether*, the United States Supreme Court held that even where the statute is silent, courts will find the right to a jury trial where the statute establishes “rights and remedies of the sort typically enforced in an action at law.”¹⁶³ Because the OPA 90 claim for natural resource damage is not a common law claim, and Congress did not expressly create a right to a jury trial on such claims, any right to a jury trial for an OPA 90 NRD claim must be founded on the presence of a “legal” claim or issue under the *Curtis v. Loether* rule.¹⁶⁴

Common law actions are those involving “suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] regarded.”¹⁶⁵ The Court has held that its Seventh Amendment cases require trial by jury “in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.”¹⁶⁶ On the other hand, the Court has also held that this requirement does not apply to statutory proceedings unknown to the common law, such as an application to enforce an order of an administrative body.¹⁶⁷ *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, a leading case involving findings by a federal administrative body, may prove relevant

160. See FED. R. CIV. P. 38(e); FED. R. CIV. P. 9(h) advisory committee’s note (1966). Congress has, by statute, created a right to a jury trial in admiralty cases arising on the Great Lakes. See Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (codified at 28 U.S.C. § 1873 (2006)); see also *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 371, 1959 AMC 832, 845 (1959). But see *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20-21, 1963 AMC 1093, 1096 (1963) (“While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. . . . Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments.” (footnote omitted)).

161. See generally 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 2302-2306 (3d ed. 2008).

162. FED. R. CIV. P. 38(a).

163. 415 U.S. 189, 195 (1974).

164. The Court concluded that the damages action created by the statute in that case “sounds basically in tort . . . [it] merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach. [The action] is analogous to a number of tort actions recognized at common law.” *Id.*

165. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 434 (1830); see also *Barton v. Barbour*, 104 U.S. 126, 133 (1881).

166. *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

167. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

to the OPA 90 NRD cases.¹⁶⁸ That case involved a jury demand by Atlas with respect to a fine assessed by an administrative body under authority of the Occupational Safety and Health Act (OSHA). In *Atlas*, Congress committed to an administrative body the authority to determine whether a violation of the Act had occurred and the amount of any penalty for the violation, while affording the party a right to seek judicial review of the administrative determination in a federal court of appeals. In ruling against Atlas's objection that the procedures established by the Act violated its right to a jury trial, the Court relied on the "public rights" rationale. The Court explained:

At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.¹⁶⁹

The "public rights" doctrine and its "sovereign capacity" underpinning do not exempt all penalty cases from the Seventh Amendment precedents. In *Tull v. United States*, for example, the Court held that an alleged polluter had the right to a trial by jury in an action to determine its *liability* for a civil penalty under the Clean Water Act; however, the right did not extend to the assessment of the *amount* of the penalty.¹⁷⁰

The line between public and private rights is not always clear. In *Granfinanciera, S.A. v. Nordberg*, a case involving a "private claim" in a bankruptcy court, the Court upheld Granfinanciera's assertion that it had a jury trial right on a claim against it by the bankruptcy trustee to recover funds fraudulently transferred.¹⁷¹ In doing so, the Court held that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" and then went on to clarify the difference between public and private rights, a distinction that could prove important in claims presented by tribal trustees.¹⁷² The Court also held that the Seventh Amendment test for

168. 430 U.S. 442 (1977).

169. *Id.* at 450. It is noteworthy that the Court characterized the agency procedure as an "initial adjudication."

170. 481 U.S. 412, 420, 427-28 (1987).

171. 492 U.S. 33, 36 (1989).

172. *Id.* at 51-52 & n.8. In 1932, the Court in *Crowell v. Benson* upheld a statute that delegated adjudication authority over a "private" claim (by an injured worker against his employer) to an administrative agency, as long as Congress permitted a "full opportunity" for judicial review of the agency's legal conclusions and a less exacting review of its findings of

whether a party has a right to a jury trial is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal, such as a bankruptcy court or administrative tribunal.¹⁷³

Liberal claim and joinder rules may result in postspill cases that present a complex mix of common law, statutory and maritime claims for removal costs and damages and include requests for legal, equitable, and admiralty remedies.¹⁷⁴ In the so-called "mixed" cases, presenting some issues for which there is a jury trial right and other issues for which there is no such right, the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover* charts the appropriate course.¹⁷⁵ *Beacon Theatres* and its progeny stand for the proposition that the courts are to accord the utmost solicitude to jury trial rights. Rejecting the "cleanup doctrine," the Court in *Dairy Queen, Inc. v. Wood* emphasized that the presence of even one "legal" issue¹⁷⁶ for which there is a right to a jury trial requires that a jury trial be afforded on the factual questions related to that claim.¹⁷⁷ Under the federal rules, when a proper and timely jury demand has been made, all issues in the case are presumptively tried to the jury.¹⁷⁸ Even where there is no right to a jury trial, the rules permit the trial court to try issues with an advisory jury.¹⁷⁹

fact. 285 U.S. 22, 45-66, 1932 AMC 355, 363-78 (1932). With respect to findings of fact, the Court noted that an "administrative method" could satisfy due process requirements "assuming due notice, proper opportunity to be heard, and that findings are based upon evidence." *Id.* at 47, 1932 AMC at 364-65.

173. *Id.* at 51-54, 1932 AMC at 368-70.

174. Among the joined NRD claims by the various trustees, some might be based in part on determinations and assessments made in accordance with the NOAA regulations, while others were not. Accordingly, the former category of claims would be subject to the "judicial review" standard and the others would have to meet the applicable civil pleading and proof standards, without benefit of the rebuttable presumption.

175. 359 U.S. 500, 510-11 (1959).

176. The Court provided guidance on distinguishing legal and equitable issues in *Ross v. Bernhard*: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." 396 U.S. 531, 538 n.10 (1970). The Court later explained that characterizing the relief sought is more important than finding a precisely analogous common law cause of action. *Tull v. United States*, 481 U.S. 412, 421 (1987).

177. 369 U.S. 469, 479 (1962). Pure questions of law are for the court, even in cases in which questions of fact and mixed questions of law and fact are for the jury.

178. FED. R. CIV. P. 39(a). The general rule has two exceptions: (1) when the parties or their attorneys stipulate to a nonjury trial, and (2) when the court, on motion or on its own, finds that there is no right to a jury trial on some or all of those issues.

179. FED. R. CIV. P. 39(c)(1).

2. Jury Trials in OPA 90 and CERCLA NRD Cases

Responsible parties have, on occasion, demanded a jury trial in civil cases brought against them to recover removal costs or natural resource damages under CERCLA or OPA 90.¹⁸⁰ In response to motions by the government to strike the RP's demand for a jury trial, several federal district courts have been called upon to determine whether the RP has a right to trial by jury in such cases.¹⁸¹ The results in those cases cast some doubt on the constitutionality of the "judicial review" approach if it operates to defeat an RP's right to a jury trial on a legal issue.

With few OPA 90 cases directly on point, the courts may be forced to turn to CERCLA cases involving NRD claims for further guidance on the RP's right to a jury trial.¹⁸² For the most part, where those NRD claims were limited to recovery for restoration and rehabilitation costs, along with the cost of assessment, the courts denied the defendants' demand.¹⁸³ By contrast, where the trustees' claims were broadly stated to include all "damages" to "natural resources," the courts granted the jury trial demand on the grounds that some "legal" issues were included.¹⁸⁴

Like CERCLA, OPA 90 does not expressly create a statutory right to a trial by jury in claims for removal costs or damages.¹⁸⁵ Faced with the government's motion to strike an RP's jury trial demand in an OPA 90 case, a district court held that the recovery of *removal* costs under OPA 90 constitutes an equitable remedy, for which there is no Seventh Amendment right to a jury trial, but that is not necessarily true when the claim is for natural resource damage.¹⁸⁶ Finding no prior cases examining whether an RP has a right to a jury trial on NRD

180. Trial by jury must be timely demanded or it is waived. FED. R. CIV. P. 38(d), 39(b).

181. FED. R. CIV. P. 38(a) "preserves" the right as provided by the Seventh Amendment or federal statute.

182. Recall that the OPA 90 "judicial review" amendment would not apply to CERCLA cases for natural resource damage; those CERCLA cases will continue to be governed by the rebuttable presumption. Thus, the value of CERCLA cases as an analogy will be limited.

183. See, e.g., *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 994, 999 (D. Mass. 1989); *United States v. Wade*, 653 F. Supp. 11, 13 (E.D. Pa. 1984). See generally David Elbaum, Note, *Judicial Review of Natural Resource Damage Assessments Under CERCLA: Implications of the Right of Trial by Jury*, 70 N.Y.U. L. REV. 352 (1995).

184. See, e.g., *United States v. Allied Chem. Corp.*, No. 83-5898 SC (N.D. Cal. Sept. 14, 1984).

185. *United States v. Viking Res., Inc.*, 607 F. Supp. 2d 808, 830 (S.D. Tex. 2009).

186. *Id.* at 831-32 (analogizing to CERCLA cases).

claims, the United States District Court for the Southern District of Texas first noted that OPA 90 explicitly provides that the costs of restoring, rehabilitating, replacing, or acquiring the equivalent of damaged resources are to be included in the measure of natural resource damages.¹⁸⁷ Drawing on CERCLA cases, the court held that “at least one component of natural resource damages—the diminution in value of those natural resources pending restoration—is legal in nature.”¹⁸⁸ According to the court, “It amounts to compensating the plaintiff for injury to its property, much like damages recovered in nuisance or trespass—both classic *legal* causes of action.”¹⁸⁹ Finding that the trustee’s NRD claim included at least one legal component, the district court then applied the Supreme Court’s *Dairy Queen, Inc. v. Wood*¹⁹⁰ rule and denied the government’s motion to strike the RP’s demand for a trial by jury.¹⁹¹

D. A Possible Way To Give Effect to Both?

Should a court find that an RP (or guarantor) has the right to a jury trial on some or all of the issues in a trustee’s NRD claim, the federal courts will typically apply well-established canons of construction and attempt to construe the amended statute in a manner that would render its judicial review approach constitutional.¹⁹² Is it possible to give effect to the judicial review provision in a measure like H.R. 3534 while respecting the right to a jury trial? One possible way of doing so would be to apply the amendment in conjunction with summary judgment practice. To the extent that “judicial review” of the applicable administrative record establishes certain factual elements of the trustee’s claim against the RP by the evidentiary standards applicable in summary judgments, the court might then determine that there is no genuine issue of material fact as to those issues and that, as a matter of law, the trustee is entitled to partial summary judgment on

187. *Id.* (citing 33 U.S.C. § 2706(d)(1)(A) (2006)).

188. *Id.* at 832.

189. *Id.* (citing *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 994, 999 (D. Mass. 1989), a CERCLA case).

190. 369 U.S. 469, 470 (1962) (holding that the Seventh Amendment jury trial right is triggered by one legal component and is not lost even if that single legal issue is characterized as “incidental” to the equitable issues).

191. *Viking Res.*, 607 F. Supp. 2d at 832.

192. See *Crowell v. Benson*, 285 U.S. 22, 62, 1932 AMC 355, 376 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

the established facts.¹⁹³ Assuming that other factual elements of the trustee's claim would have to be proven by conventional means (evidence admitted at trial), the jury would then be instructed on the established facts and charged to combine them with their findings on the remainder of the factual elements and the instructions from the court to reach a verdict on liability and damages. Whether the courts would be willing to apply summary judgment procedure in this way is uncertain.

V. CONCLUSION

Natural resource damage liability regimes are not an end in themselves, but rather one means to restore and maintain the diversity and health of ecosystems. Accordingly, the priorities in any statutory scheme to protect the nation's natural resources from oil spills and hazardous substances releases should be, first, prompt and reasonably complete restoration and, second, prompt and accurate compensation for the costs of restoration, diminution of value, and loss of use. Trustees should also be compensated for the costs they incur in restoration planning and execution, and damage assessment and transaction costs should be minimized. These priorities must be pursued within established principles of due process and civil procedure practice and with respect for any applicable right to a jury trial.

It falls to Congress and the implementing agencies to craft a strategy to achieve the priorities, but in doing so they must be mindful that if deterrence fails and if the responsible party thereafter fails for some reason to agree to the trustees' restoration plans, it will fall to the courts adjudicating the claims against the responsible party to determine whether the resulting natural resource damage regime was applied in a manner that meets the governing legal standards. Congress and the trustees must appreciate that, in assessing preferences between a rebuttable presumption and a standard of judicial review, the trustees' choices grounded in a prevention-restoration focus may not be compelling for the courts, with their claims-litigation focus.

The White House and Congress might choose to call this new approach "judicial review," as if the action being reviewed were an ordinary APA rule or order, but the courts might see it as a problematic

193. Under FED. R. CIV. P. 56(e)(2), the RP would have the opportunity to demonstrate to the court that there was, in fact, a genuine issue of material fact.

departure from well-established procedures for proving the elements of an affirmative claim against a private party. In effect, the amendment would ask the courts to grant virtual issue preclusion to findings arrived at by a nonjudicial administrative process not bound by the APA safeguards applicable to agency adjudications and without any showing that those trustees are better prepared to grapple with the recurring uncertainties that have characterized NRD determinations on injury and causation. Given the federal government's poor track record in estimating both the volume of the oil spilled from the BP Macondo well and the amount of oil remaining in the Gulf waters when the well was finally capped, some might reasonably question whether the government trustees' NRD calculations should be subject only to a deferential standard of review.

In the absence of a better drafted bill by Congress or substantial rulemaking by NOAA that defines "determinations" and "assessments" and prescribes adequate procedural safeguards for trustees to follow in making such findings, federal and state courts would face a difficult task in adjudicating claims for natural resource damage where some elements of the claims find their source not in evidence admitted, cross-examined and tested against rebuttal evidence in court, but rather in a "review" of "determinations and assessments" by federal, state and local agencies, and tribal trustees, with such determinations to be found and substantiated in an as yet ill-defined "record." The fact that this new approach to proving claims would likely apply retroactively to the BP Macondo spill, the NRD claims of which may run into the billions of dollars and will be asserted by a multitude of trustees, should give pause to a serious student of due process and trial practice.