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Gatlin Oil Co. v. United States: A Myopic View of OPA Liability

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NOTES

GATLIN OIL CO. V. UNITED STATES: A MYOPIC VIEW OF OPA LIABILITY

Under the cover of darkness on March 13, 1994, a vandal opened the fuel tanks on the premises of Gatlin Oil Company, a small fuel distribution business located in rural North Carolina.[1] The incident led to the discharge of approximately 20,000-30,000 gallons of oil.[2] Unfortunately, thousands of gallons reached ditches near a navigable river, a fire raged for several hours, and some of the oil reached the navigable river.[3]

The threat of an oil discharge into the navigable waterway, combined with the actual discharge of oil into the waterway, subjected the facility owner to the provisions of the Oil Pollution Act of 1990 (OPA or Act).[4] A North Carolina District Court, basing its holding on the language of the OPA, awarded Gatlin compensation from the OPA Trust Fund for its costs associated with the spill cleanup; the court found that Gatlin was not responsible for the incident.[5]

In *Gatlin Oil Co. v. United States*,[6] the Fourth Circuit vacated the district court holding. The appellate court took a much narrower view of recoverable costs than the one urged by Gatlin Oil and accepted by the district court, severely restricting the definition of qualifying damages under the Act. On the surface, the decision

1. *See* Brief of Gatlin Oil Co. at 3, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079).

2. *See Gatlin*, 169 F.3d at 209.

3. *See id.*

4. *See* 33 U.S.C. §§ 2701-2761 (1994 & Supp. IV 1998); *Gatlin*, 169 F.3d at 209.

5. *See* Order at 11-12, *Gatlin*, 169 F.3d at 207 (No. 97-2079), *in* Joint Appendix at 327-28, *Gatlin*, 169 F.3d at 207 (No. 97-2079).

6. 169 F.3d 207 (4th Cir. 1999).

appears to be consistent with one of the stated purposes of OPA: increasing the financial responsibility of a polluting party.[7] A survey of the Act's language, legislative history, and OPA liability holdings, however, supports the conclusion that the Fourth Circuit engaged in an unsupportable analysis of OPA's liability scheme.

This Note suggests that the majority's interpretation of the OPA in *Gatlin* was inconsistent with the language and intent of the Act. To demonstrate this, the Note first briefly describes the history of some of the relevant oil pollution statutes that existed prior to the enactment of OPA and the circumstances surrounding the passage of the Act. The Note outlines the relevant portions of OPA and then summarizes the Fourth Circuit's holding. The Note evaluates the statute to demonstrate that the Fourth Circuit's holding was not consistent with the plain language of the text or with the legislative intent of the Act. A review of prior OPA liability holdings further reveals that *Gatlin* is inconsistent with the established interpretations of the statute, and, indeed, ultimately limits liability through a provision designed to expand liability of polluting parties. Finally, the Note recommends that courts employ a consistently broad interpretation of the Act's liability provisions. A court attempting to limit compensation from the Trust Fund should focus on the defense to liability provisions within the OPA.

HISTORY OF RELEVANT U.S. OIL POLLUTION LAWS

Prior to the enactment of the OPA, numerous disjointed federal statutes governed oil spill liability, creating a "patchwork" of legislation that often proved to be confusing and ineffectual.[8] Because

7. *See* S. REP. NO. 101-94, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (noting that the inability of victims to claim compensation from responsible parties constituted a problem with federal law prior to OPA).

8. *See* J.B. Ruhl & Michael J. Jewell, *Oil Pollution Act of 1990: Opening A New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 475, 480 (1991). The mere fact that liability prior to OPA was based on a "patchwork" of legislation is not sufficient to conclude automatically that the legislation was ineffective. The common perception, however, is that pre-OPA legislation failed even in the "patchwork" of coverage it did provide. *See id.* at 480-81; *see also* S. REP. NO. 101-94, at 3, *reprinted in* 1990 U.S.C.C.A.N. at 724 ("Under existing Federal law, at least five statutes deal with the issue of oil spill liability and compensation. Each is different, and each is inadequate.").

these federal laws formed the backdrop against which the OPA was enacted, a brief summary of the pre-OPA laws in existence is warranted.

The Federal Water Pollution Control Act

The Federal Water Pollution Control Act Amendments of 1972[9] (FWPCA) provided an important oil pollution provision in section 311.[10] One of the important features of section 311 is that it allowed for an absolute defense to liability if a polluting party could show that a discharge resulting in pollution was caused by an act of God, an act of war, or an act or omission of a third party.[11] Unlike the OPA, section 311 provided a fourth defense to liability: negligence on behalf of the United States.[12] The nearly identical formulation of defenses under the FWPCA and OPA makes judicial interpretation of defenses under FWPCA a good source of interpretation for OPA liability defense cases.[13] Another noteworthy feature of the Act is that it established a 35 million dollar Trust Fund to assist in administration, recovery, and removal costs associated with an oil spill. Years later OPA would follow this model.[14]

Prior to the enactment of OPA, Congress passed three important Acts to supplement section 311 of the FWPCA: the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA),[15] the Deepwater Port

9. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1994 & Supp. IV 1998)). The FWPCA is commonly known as the Clean Water Act (CWA).

10. *See* 33 U.S.C. § 1321.

11. *See id.* § 1321(f).

12. *See id.*

13. *See* MICHAEL M. GIBSON, ENVIRONMENTAL REGULATION OF PETROLEUM SPILLS AND WASTES § 4.6, at 88 (1993) (noting that FWPCA and OPA defenses to liability are "practically identical" and that case law under the FWPCA "likely will control the interpretation of these defenses under the OPA"). Numerous definitions within OPA are taken directly from FWPCA, and the liability section of the OPA cross-references section 311 of the FWPCA, further indicating the interrelationship of these two Acts. *See* 33 U.S.C. § 2702(b)(1); S. REP. NO. 101-94, at 102, *reprinted in* 1990 U.S.C.C.A.N. at 780.

14. *See* 33 U.S.C. § 1321(k)(1), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, §2002(b)(2), 104 Stat. 507 (1990).

15. Pub. L. No. 93-153, 87 Stat. 576 (1973) (current version at 43 U.S.C. §§ 1651-1656 (1994)).

Act of 1974 (DWPA),[16] and the Outer Continental Shelf Lands Act Amendments of 1978 (OCLSA).[17]

Trans-Alaska Pipeline Act

TAAPA provided a strict liability scheme for vessels carrying oil transported via the Trans-Alaska Pipeline and loaded at the pipeline terminal facility.[18] The Act capped a vessel's absolute liability for a spill at 100 million dollars and created a Trust Fund to pay the balance of uncompensated claims up to that limit.[19] TAAPA, similar to FWPCA, provided for specifically enumerated defenses to liability.[20]

Deepwater Port Act

DWPA provided liability for an oil discharge "from a vessel within any safety zone, from a vessel which has received oil from another vessel at a deepwater port, or from a deepwater port."[21] The Act limited liability for discharges and also provided for enumerated defenses to liability.[22]

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16. Pub. L. No. 93-627, 88 Stat. 2126 (1974) (current version at 33 U.S.C. §§ 1501-1524 (1994)).

17. Pub. L. No. 95-372, 92 Stat. 629 (1978) (current version at 43 U.S.C. §§ 1801-1866 (1994)).

18. *See* 43 U.S.C. § 1653(c)(1)-(2).

19. *See id.* § 1356(c)(3), (5).

20. *See id.* § 1653(c)(1)-(2). The Act did not provide a defense against liability for an act of God. *See id.* Under the current version of section 1653, all of subsection c will be repealed 60 days after the Comptroller General certifies to Congress that all claims arising under the subsection have been resolved, all actions for recovery under the subsection are resolved, and all "reasonably necessary" expenses to implement subsection c have been resolved. The current annotated supplement of this Act contains subsection c, so presumably the provisions for repeal have yet to be met. *See id.* § 1653(c) (West Supp. 2000). The OPA would now cover a tanker spill within Alaskan waters.

21. 33 U.S.C. § 1517(a) (1975), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, Title II, § 2003(a)(2), 104 Stat. 507 (1990). Under the Act, a deepwater port refers to "floating manmade structures . . . located beyond the territorial sea and off the coast of the United States and which are used or intended for use as a port or terminal for the . . . handling of oil for transportation to any State." *Id.* § 1502(10) (1994).

22. *See id.* § 1517(b), (g) (repealed 1990).

Outer Continental Shelf Lands Act Amendments

The OCSLA Amendments of 1978 provided for joint, several, or strict liability for oil pollution, or threat of oil pollution, from a vessel[23] (not including a vessel owned, chartered, or operated by the United States)[24] or an offshore facility[25] covered under the Act.[26] The Amendments also established defenses to liability[27] and a Compensation Trust Fund.[28]

Along with the patchwork of Acts enacted to supplement the FWPCA, an antiquated Act remained (and still remains) in the U.S. Code that serves to limit liability of polluting vessels. The Limitation of Liability Act of 1851[29] (1851 Act) restricts the liability of sea-going vessels for a variety of incidents, including maritime accidents. At the time of passage of the 1851 Act, it served to stimulate growth in both shipbuilding and the employment of ships.[30] An important feature of the 1851 Act was that it could be invoked to limit the liability of vessels involved in accidents to "the amount or value of the interest of such owner in such vessel, and her freight then pending."[31] This effectively allowed owners of vessels lost in an accident to invoke the 1851 Act to escape most, if not all, of the financial liability of the accident.[32] Although the 1851 Act is not applicable under the FWPCA,[33] at least two courts held that in federal cases in which an owner invoked the limitation to

23. A vessel was defined as watercraft that operated in the waters above the Outer Continental Shelf. *See* 43 U.S.C. § 1811(5) (1988), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 2004, 104 Stat. 507 (1990). For the purposes of OSCLA, the Outer Continental Shelf meant "all submerged lands lying seaward and outside of the area of lands beneath navigable waters." *Id.* § 1331(a) (1994).

24. *See id.* §§ 1811(6), 1814(a) (repealed 1990).

25. An offshore facility was defined as apparatus used to drill, produce, handle, etc. oil produced from the Outer Continental Shelf. *See id.* § 1811(8) (repealed 1990).

26. *See id.* § 1814(a) (repealed 1990).

27. *See id.* § 1814(c) (repealed 1990).

28. *See id.* § 1812 (repealed 1990).

29. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (now codified at 46 U.S.C. app. §§ 181-96 (1994)).

30. *See* S. REP. NO. 101-94, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 725.

31. 46 U.S.C. app. § 183(a) (1994).

32. *See* S. REP. NO. 101-94, at 4. There is no "value" to a ship and cargo lost at sea, and therefore no basis of liability under the Act. *See id.*

33. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 16-2, at 836 n.27 (2d ed. 1994).

liability under the 1851 Act, the 1851 Act could be invoked to limit oil pollution liability under applicable state laws, even in a strict liability regime.[34]

Against the backdrop of this "patchwork" of oil pollution laws, the *Exxon Valdez*, an oil tanker bound for Long Beach, California, collided with a reef in Alaska's Prince William Sound on March 24, 1989.[35] The ecological impact of the spill proved to be disastrous: 11 million gallons of oil spread into the sound.[36] Oil company officials failed to take measures to contain the spill in the first hours after the accident, further compounding the effects of the spill.[37]

Unfortunately, the "patchwork" of oil pollution laws in existence at the time of the spill could have been grossly inadequate for such a disaster.[38] For example, if the spill had occurred off the coast of New Jersey, the government would have had access to only the 35 million dollar Trust Fund available under FWPCA to assist in cleanup operations, rather than the 100 million Trust Fund that was available under TAAPA.[39] With 80 to 91 million gallons spilled in U.S. waters between 1980 and 1986 alone,[40] available resources for cleanup literally depended on the factual fortuity of where the spill occurred. In the wake of "the nation's largest oil spill" and other similar spills closely following the *Exxon* incident,[41] Congress

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34. *See* S. REP. NO. 101-94, at 4; SCHOENBAUM, *supra* note 33, at 836 n.27.

35. *See* Maura Dolan & Ronald B. Taylor, *Alaska Oil Spill May Be Largest in U.S. Waters*, L.A. TIMES, Mar. 25, 1989, at 1.

36. *See* S. REP. NO. 101-94, at 2.

37. *See* Dolan & Taylor, *supra* note 35, at 1 (quoting a professor at the University of Alaska who quipped that "[t]here (was) no oil (cleanup equipment) out there, and it's been 14 hours"(alterations in original)); Timothy Egan, *Exxon: Oil Spill Out of Control*, SYDNEY MORNING HERALD, Mar. 31, 1989, at 9, *available in* 1989 WL 7737017 ("Oil company officials . . . acknowledged they did not begin to deploy cleanup booms around the ship until 10 hours after the accident-five hours past the deadline demanded by the contingency plan they are required to follow.").

38. *See supra* note 8 and accompanying text.

39. *See* Daniel Kopec & H. Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under The Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 617-18 (1992).

40. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.9, at 376 (2d ed.1994). For an example of a large post-OPA spill, see *Oil Spill Closes Stretch of Mississippi*, WASH. POST, Nov. 30, 2000, at A16 (discussing 554,000 gallon crude-oil spill in the Mississippi following the grounding of a tanker).

41. S. REP. NO. 101-94, at 2.

unanimously passed the Oil Pollution Act of 1990[42] to eliminate the pre-OPA "patchwork" liability scheme.[43] OPA's liability provisions were intended to accomplish this goal.[44]

OPA PROVISIONS

OPA's liability scheme is succinctly contained in section 2702 of the Act:

> Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.[45]

42. *See* Thomas J. Wagner, *Recoverable Damages Under The Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283, 285 (1993) (noting the unanimous votes for the passage of OPA). Despite the unanimous passage of the bill, President Bush, when he signed the bill into law on August 18, 1990, criticized a provision that required a moratorium on drilling off the North Carolina coast. *See* Statement by President George Bush Upon Signing H.R. 1465, *reprinted in* 1990 U.S.C.C.A.N. 861-1.

43. *See supra* note 8 and accompanying text.

44. *See, e.g.*, Sun Pipe Line Co. v. Conewago Contractors, Inc., No. 4:CV-93-1995, 1994 U.S. Dist. Lexis 104070, at *19 (M.D. Pa. Aug. 22, 1994) ("In voicing their support for the bill, legislators emphasized the importance of protecting the oceans and the United States coastline from oil spills, and stressed, above all, the need for preventive measures and for immediate, effective, responsive action in event of a spill.").

45. 33 U.S.C. § 2702(a) (1994). Subsection (b) deals with removal costs and damages under the Act. *See infra* notes 47-48.

Definitions pertaining to the Act are detailed in section 2701,including "responsible party,"[46] "damages,"[47] "removal costs,"[48] and "incident."[49]

If enumerated defenses are met,[50] section 2702 also allows a responsible party to shift liability to a third party and to seek subrogation to the rights of the United States to collect from third parties for payments made by the responsible party.[51] OPA also supersedes the Limited Liability Act of 1851 and does not limit liability for oil discharges under either federal or state liability regimes.[52]

Defenses to Liability

Section 2703 allows a responsible party to avoid liability for removal costs and damages if that party successfully establishes the discharge of oil, or substantial threat of discharge, was caused by an act of God, an act of war, or an act or omission of a third party.[53] A party who fails to report the incident, cooperate with officials in

46. Responsible parties include the owners and operators of vessels and onshore facilities. *See* 33 U.S.C. § 2701(32)(A)-(B). An onshore facility is one or more structures, pieces of equipment, or devices used to drill, produce, store, handle, transfer, process, or transport oil and located on, or under, any land with the United States other than submerged land. *See id.* § 2701(9), (24).

47. Damages include: "Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property." *Id.* § 2702(b)(2)(B). Loss of profits and revenues, as well as damages to natural resources are also covered under the definition. *See id.* § 2703(b)(2)(A), (C)-(E). Damages also "includes the cost of assessing these damages." *Id.* § 2701(5).

48. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." *Id.* § 2701(31).

49. The definition of "incident," which was at issue in *Gatlin*, is as follows: "'incident' means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil." *Id.* § 2701(14).

50. *See id.* § 2702(d)(1)(A). For a discussion of the enumerated defenses, see *infra* text accompanying note 53.

51. *See id.* § 2702(d)(1)(B).

52. *See id.* § 2718(c).

53. *See id.* § 2703(a)(1)-(3).

removal activities, or to follow enumerated procedures within the FWPCA loses the available defenses under the section.[54]

Section 2704 provides limitations on the liability of responsible parties, as well as third parties found liable under section 2703.[55] Total liability for tank vessels responsible under the Act is capped at the greater of $1200 per gross ton, or $10,000,000 for vessels over 3000 tons, or $2,000,000 for vessels under 3000 tons.[56] An onshore facility faces liability up to $350,000,000.[57]

Oil Spill Liability Trust Fund

Section 2708 allows a responsible party which successfully asserts a defense under section 2703 or which has paid the maximum liability under section 2704 to "assert a claim [against the Trust Fund] for removal costs and damages."[58] Section 2712 expressly makes the fund available to the President for the payment of claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP), or for uncompensated damages.[59] The procedure for making these claims is provided in section 2713.[60] The Trust Fund is financed with a five cent per-barrel tax on petroleum products received at a U.S.

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54. *See id.* § 2703(c).

55. *See id.* § 2704(a); *see, e.g.*, National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp., 924 F. Supp. 1436, 1453 (E.D. Va. 1996) (holding that, despite the fact that an oil spill from plaintiff's vessel in a maritime collision was caused completely by the negligence of the defendant, the OPA capped the amount that plaintiff could collect from defendant for its cleanup expenses).

56. *See* 33 U.S.C. § 2704(a)(1).

57. *See id.* § 2704(a)(4). Another aspect of OPA is that Congress also adopted legislation requiring oil tankers operating in U.S. waters to have double hulls. *See* 46 U.S.C. § 3703a (1994 & Supp. 1998). Many ships will not have to comply before January 1, 2015, *see id.*, leaving U.S. waters vulnerable to catastrophic spills similar to that of the Valdez. *See, e.g.*, John Biers & Keith Darce, *Industry-wide reluctance to replace older oil tanks with newer, safer vessels is spotlighted in wake of Tuesday's massive oil spill*, TIMES-PICAYUNE, Dec. 3, 2000, at MONEY pg. 1 (noting that with pre-OPA single-hull vessels, "[t]he only thing separating thousands of barrels of oil from precious wetlands and wildlife [is] a layer of steel less than an inch thick").

58. 33 U.S.C. § 2708(a).

59. *See id.* § 2712(a)(1)(4). The Fund is available for numerous other uses, none of which were at issue in *Gatlin*.

60. *See id.* § 2713.

refinery or that enter into the United States for consumption, use, or storage.[61]

GATLIN OIL V. UNITED STATES

When a vandal opened seven of Gatlin Oil's above-ground fuel tanks, discharging 20,000-30,000 gallons of oil, some of which ran into a river located near the property,[62] Gatlin Oil became subject to the strict-liability provisions of the OPA. Along with the significant discharge of oil, the vapors ignited, causing significant damage to Gatlin's property.[63] The Coast Guard designated Gatlin as a responsible party under OPA and directed the company to undertake cleanup operations.[64]

Gatlin successfully claimed a complete defense to liability under the OPA and sought compensation from the Trust Fund for damages to its property and removal costs associated with the cleanup operations.[65] Although a North Carolina district court granted Gatlin compensation from the OPA Trust Fund, the Fourth Circuit vacated the holding and awarded Gatlin only the costs associated with the cleanup operations designated by the On-Scene Coordinator; it disallowed all other claims brought by Gatlin.[66]

In disallowing the claim for compensation, the Fourth Circuit adopted the Coast Guard's (the "agency") interpretation of OPA liability and compensation provisions.[67] The majority determined that the language of the statute was ambiguous. Citing the *Chevron*

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61. *See* 26 U.S.C. §§ 4611(a)(2),(c)(2)(B) (1994). The Trust Fund is established in another section of the the Internal Revenue Code. *See id.* § 9509.

62. *See* Gatlin Oil Co. v. United States, 169 F.3d 207, 209 (4th Cir. 1999).

63. *See id.* The fire destroyed a bulk plant, warehouse, inventory, a loading dock, numerous vehicles, and also consumed much of the discharged oil. *See id.*

64. *See id.* The Federal On-Scene Coordinator, dispatched by the Coast Guard, directed Gatlin to remove approximately 5500 gallons of oil from storm ditches and surface water to prevent further discharge of oil into the local river; it was determined that 10 gallons of fuel actually reached the river. *See id.*

65. *See id.* at 210. Gatlin sought to recover $850,000 plus interest from the Trust Fund. Both the majority and dissent agreed that Gatlin could not collect an award of interest from the United States. *See id.* at 210-14. The company also sought reimbursement for removal costs associated with directives given by federal and state officials, and the court disallowed reimbursement for cleanup operations designated by the latter. *See id.* at 212-13; *infra* text accompanying note 181.

66. *See Gatlin*, 169 F.3d at 212-14.

67. *See id.*

doctrine, it adopted the agency's interpretations because they were "grammatically correct and . . . accommodate[d] the purpose of the Act."[68] The first step a court must take under *Chevron* is to determine whether Congress has spoken on the contested issue.

Pursuant to this doctrine, *Gatlin* began its analysis by examining the text of the OPA. Interestingly, in reaching its decision to limit Gatlin Oil's recovery, the court took a narrow view of the liability provision of the Act. The argument was essentially that any compensable "removal costs" or "damages" under the Act must be a *direct* result of an oil spill into navigable waters or the adjacent shoreline, or a substantial threat of such a spill.[69] This reasoning is based on text of the Act, which states that liability for an oil spill ensues for damages "that result from such incident"; the court noted that the "antecedent of 'such incident' is the discharge or substantial threat of discharge into navigable waters or adjacent shorelines."[70] The court found that because the fire damage to

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68. *Id.* at 211. The *Chevron* doctrine, enumerated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a test used by courts to determine whether to adopt an executive agency's interpretation of a federal statute. *See, e.g.*, Kootenai Elec. Coop. v. Federal Energy Regulatory Comm'n, 1999 WL 798064, at *4 (D.C. Cir. 1999). A court determines whether to give deference to the agency through the use of a two-part test: it must first determine if Congress has spoken directly on the disputed issue; if Congressional intent on the issue is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see also* Walton v. Hammons, 1999 WL 731729, at *12 (6th Cir. 1999) (disregarding agency interpretation of statute and noting that "Chevron deference [was] not appropriate" because it went against the clear meaning of the statute).

If the statute is silent or ambiguous on the disputed issue, the court determines whether the agency interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Of course, there is often controversy over what constitutes a permissible agency construction of a statute. *Compare, e.g.*, Credit Union Ins. Co. v. United States, 86 F.3d 1326, 1332 (4th Cir. 1996) ("[W]e accord much less deference to an agency's interpretations of a statute that conflict with the agency's previous interpretations of that same statute."), *and* Wise v. Ruffin, 914 F.2d 570, 580 (4th Cir. 1990) (same), *with* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) ("[T]here is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law . . . [or] for holding an agency to its first answer, [and] penalizing it for a change of mind.").

69. *Gatlin*, 169 F.3d at 210-11. The court reasoned that the language of the liability provision, section 2702(a), limited the broad definition of "incident" given in the definition section of the Act, section 2701(14). For the language of the provisions in question, see *supra* notes 45-49 and accompanying text.

70. *Gatlin*, 169 F.3d at 210-11. The court accepted the government's position that the broad definition of "incident" in the Act was narrowed by the language "such incident" in

Gatlin's property did not constitute a threat of discharge of oil into navigable waters or the adjacent shoreline, Gatlin could not receive compensation for these damages from the Trust Fund.[71]

Although discounted by the Coast Guard and, ultimately, the Fourth Circuit majority, the definition of "incident" given in section 2701(14)[72] indicates an expansive interpretation of the word to be used "[f]or the purposes of th[e] [OPA] Act."[73] A principal interpretative problem is whether the reference in section 2702 to "such incident" significantly modifies the broad definition given to "incident" in section 2701. A review of the Act and its legislative history indicates that *Gatlin* ultimately strains to interpret the statute in such a way as to deny compensation for Gatlin Oil's property damage.

In its statutory construction, the Coast Guard, and consequently the Fourth Circuit, placed too much emphasis on the word "such" when it utilized two dictionaries to demonstrate how the word modified "incident." As noted in *United States v. Conoco, Inc.*,[74] "[i]n construing a statute, the court is 'guided not by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy.'"[75] Furthermore, in *Union Petroleum Corp. v. United States*,[76] a court reviewing liability under FWPCA, a precursor to OPA, opined that courts should avoid a "'hypertechnical approach' to the statutory definitions of the [FWPCA] Act that would be 'likely to delay cleanup operations

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section 2702, which rendered the text ambiguous and therefore the agency interpretation dictated under *Chevron*. *See* Brief for Appellants U.S. Department of Transportation at 26-27, *Gatlin*, 169 F.3d at 207 (No. 97-2079).

71. *See Gatlin*, 169 F.3d at 210-11.

72. *See supra* note 49.

73. 33 U.S.C. § 2701 (1994).

74. 916 F. Supp. 581 (E.D. La. 1996). The court in *Conoco* dealt with the issue of whether Coast Guard monitoring costs are recoverable under the OPA liability provisions. *See infra* notes 102-07 and accompanying text.

75. *Conoco*, 916 F. Supp. at 583 (quoting Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)); *see also* United States v. Bois D' Arc Operating Corp., No. 98-157, 1999 WL 130635, at *4 (E.D. La. Mar. 10, 1999) (quoting the same passage). *Conoco* and *Bois D' Arc* quoted this passage in holdings that read OPA liability expansively. *See also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 420 (1989) ("[C]ourts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them." (quoting Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting)).

76. 651 F.2d 734 (Ct. Cl. 1981).

while arguing over the responsibility."[77] This is particularly instructive because the court in *Petroleum Oil* faced an analogous issue to the one present in *Gatlin*.

In *Petroleum Oil*, vandals opened valves on two railroad tank cars during a labor strike, resulting in the discharge of approximately 60,000 gallons of oil.[78] Some of the oil reached a nearby creek, triggering the provisions of the FWPCA. Petroleum Oil undertook cleanup operations and then sought compensation under the FWPCA.[79] The issue facing the court was whether the railroad cars involved in the litigation qualified under the Act's definition of "onshore facility"; if not, the plaintiff would fail to qualify for compensation under the Act.

The court chose to interpret "onshore facility" broadly and specifically declined to find that "the tank cars can be properly regarded as a facility wholly segregable from the storage and distribution facility plaintiff operated."[80] Rather than find that the storage and distribution facilities constituted the entire "onshore facility" under the Act (thus excluding the tank cars), the court utilized a broader definition of the term in order to comport with "[t]he clearly expressed overall policy embodied in the Act."[81] Just as in *Gatlin*, Petroleum Oil had to be found responsible for the spill in order to qualify for a defense under the Act.

In light of the congressional intent that the FWPCA provide the framework for OPA,[82] and specific references to the Act within the

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77. *Id.* at 744. As noted above, FWPCA cases provide useful precedent for issues arising under the OPA. *See supra* note 13. Gatlin initially disputed his liability under the Act, refusing to cooperate with federal officials. *See infra* note 173.

78. *See Union Petroleum Corp.*, 651 F.2d at 736.

79. *See id.* Although disputed by the parties, the Coast Guard apparently designated Petroleum Oil as the responsible party for the spill; the total cost of Petroleum Oil's efforts amounted to $99,952.17. *See id.* at 741.

80. *Id.* at 743. It is significant that the court declined to sever the definition of facility under the Act; the court noted that not reading the provision broadly "would . . . discourage immediate cleanup operations which is the main thrust of the Act." *Id.* For this same reason, *Gatlin* should not have severed the definition of "incident" under the OPA. *See* text accompanying notes 123-25.

81. *Union Petroleum Corp.*, 651 F.2d at 743.

82. *See* S. REP. NO. 101-94 at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 726 ("The body of law already established under section 311 of the Clean Water Act is the foundation of the reported bill. Many of that section's concepts and provisions are adopted directly or by reference."); GIBSON, *supra* note 13, § 4.6, at 88.

OPA,[83] the policy of a broad reading of the liability provisions under the FWPCA should guide a court interpreting OPA provisions.

If the court in *Petroleum Oil* had read "onshore facility" narrowly, a polluting party without a defense to liability could have used the holding to escape liability. For example, had the court held that railroad tank cars did not qualify as part of the plaintiff's facility, a negligent railroad that polluted a waterway through the discharge of oil from a tank car could have used the *Petroleum Oil* holding to escape FWPCA liability. In essence, if railroad cars are not an "onshore facility" under the Act, then a polluter does not fall within the Act's provisions, thereby escaping liability.

This problem is highlighted in the *Gatlin* holding: a polluting party that seeks to escape responsibility by arguing that not all of its discharge is part of an OPA "incident" now has a holding with which it can challenge its liability under the Act, a course of action that may delay cleanup operations.[84]

A review of the broad OPA definitions given for "damages,"[85] "removal costs,"[86] "responsible party,"[87] and "incident,"[88] as well as the statute's overruling of the Limitation of Liability Act of 1851 for OPA oil spills,[89] all indicate that the statute's liability provisions

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83. *See supra* note 53 and accompanying text.

84. Of course, a delay in cleanup operations is exactly what Congress wanted to avoid. *See supra* note 44. Interestingly, a party that fails to cooperate with officials loses its limits on liability under the Act and therefore has incentive to cooperate rather than challenge liability. *See* 33 U.S.C. § 2704(c)(2)(B) (1994) (disallowing limit on liability in event that discharging party fails "to provide all reasonable cooperation and assistance requested by responsible official in connection with removal activities"). Gatlin initially challenged his designation as the responsible party and delayed cleanup operations for several hours before discussing the issue with his attorney and accepting responsibility. *See* Brief for Appellants U.S. Department of Transportation at 7-8, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079). The point is that even a small amount of time that passes without initiating cleanup operations can lead to a significant increase in the amount of oil discharged, *see supra* note 37 and accompanying text, and courts should be consistent in liability holdings so that no questions of liability exist when a spill does occur. Gatlin's initial refusal to cooperate provided the court with a legitimate tool to deny the company's claim for compensation. *See supra* note 55 and accompanying text.

85. *See supra* note 47.

86. *See supra* note 48.

87. *See supra* note 46.

88. *See supra* note 49.

89. *See* 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, 328 (1993) (noting that OPA's language "notwithstanding any other provision of law" in the limits on liability

are intended to be read expansively. The history and backdrop against which the Act was passed also support this conclusion.[90]

Even assuming that the statute is not clear on its face, the *Chevron* doctrine indicates that a court may evaluate the legislative history of an Act in an attempt to discern congressional intent before accepting an agency's interpretation of that Act.[91] A review of the OPA legislative history is therefore warranted to demonstrate that the court should not have adopted the Coast Guard's interpretation of liability.

Congressional Intent

Although the government brief in *Gatlin* makes repeated references to the significance of the word "such"[92] in order to limit the boundaries of "incident" in section 2702, the legislative history indicates no congressional intent of such a narrow reading. For example, the definition of "incident" in the legislative history indicates congressional intent that the word be interpreted broadly:

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provision (section 2704) indicates congressional intent to exempt OPA claims from the 1851 Act).

90. *See supra* notes 35-44 and accompanying text. The history surrounding an Act's passage can be illuminating in supporting an interpretation of the text. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("The message conveyed by the plain language of the Act is confirmed by an examination of its history.").

91. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984) ("[W]e should not disturb [an agency's interpretation] unless it appears from the statute *or its legislative history* that the accomodation is not one that Congress would have sanctioned." (emphasis added) (quoting United States v. Skinner, 367 U.S. 374, 382 (1961))). Of course, with Justice Scalia now on the Court, there is much debate about his "textualist" influence on applications of the *Chevron* doctrine and to what extent this influence limits the Court from utilizing legislative history in *Chevron* decisions. *See generally* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393 (1996) (defending Justice Scalia against critics who either claim Scalia defers too much, or too little, under the *Chevron* doctrine); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L. Q. 351 (1994) (arguing that textualism, which disfavors the use of legislative history, threatens the future of the *Chevron* doctrine). Regardless of the extent of his influence on the Court, it has used legislative history to undertake *Chevron* analyses since his arrival. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 695 (1995) ("Our consideration of the text and structure of the Act, [and] *its legislative history* . . . persuades us that the Court of Appeals' judgment should be reversed." (emphasis added)). Thus, legislative history appears to be a legitimate tool of interpretation under the *Chevron* doctrine.

92. *See* Brief for Appellants U.S. Department of Transportation at 24-29, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079).

"'Incident' is defined to mean an occurrence or series of related occurrences because, *as under other Federal law it is the intent of the Conferees that the entire series of events resulting in the spill of oil comprises one 'incident.'*"[93] As for the modifier "such," the legislative history refers to "incident" with other modifiers. For example, the report indicates that the liability section 2702 of the OPA "creates a cause of action for removal costs and damages . . . that result from *an incident.*"[94] In describing section 2703 defenses to liability, the report notes that a defense is permissible if a party can prove that "*the incident*" was caused by an act of God, war, or third party.[95] In other words, "incident" is given an extremely broad definition in both the statute and legislative history, and nothing in the legislative history indicates that so much weight should be given to the modifier "such" in the liability provision.

In fact, two North Carolina Congressmen wrote letters to the National Pollution Funds Center (NPFC) on Gatlin's behalf, indicating that his situation was exactly the type of situation contemplated when the Oil Liability Trust Fund was established.[96] Congressman Walter B. Jones, Jr., the son of the House sponsor of the OPA, wrote to the NPFC in 1996 and stated that "there is no doubt in my mind that it was [Congress's] intention to include even those who have been victimized by the spilling of their own oil under circumstances beyond their control, and that such victims were entitled to be compensated for the damages incurred."[97]

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93. S. REP. NO. 101-94, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 780 (emphasis added). This language proved to be persuasive to the district court, which quoted part of the sentence in its order. *See* Order at 12, *Gatlin*, 169 F.3d at 207 (No. 97-2079); Joint Appendix at 328, *Gatlin*, 169 F.3d at 207 (No. 97-2079). The *Gatlin* dissent did not refer to the legislative history, but opined that the plain language of the statute supported the broad reading of the liability provision espoused by the district court. *See Gatlin*, 169 F.3d at 207, 214.

94. S. REP. NO. 101-94, at 103 (emphasis added).

95. *See id.* at 783 (emphasis added).

96. *See* Brief of Appellee Gatlin Oil Co. at 39, *Gatlin*, 169 F.3d at 207 (No. 97-2079). ("As a Member of the House Committee on Merchant Marine and Fisheries, which originated the legislation that became the [OPA], I believe that Congress set up the Fund to help in cases such as this."(letter from Congressman H. Martin Lancaster, Oct. 12, 1994)).

97. *Id.*

Although the views of specific legislators do not constitute "legislative intent,"[98] the letters certainly support the proposition that *Gatlin* is a strained interpretation of the Act. In sum, the statute's language and legislative history do not support the interpretation espoused by the Coast Guard (and adopted by *Gatlin*), and the court should not have adopted the agency's narrow definition of recoverable costs.[99] Furthermore, a review of the holdings in related OPA cases indicates that a strong consensus exists that OPA liability provisions should be read broadly by the judiciary.

Judicial Interpretation of OPA Liability

It is important to note that *Gatlin*'s narrow interpretation of "incident" occurs in the *liability* section of the OPA. In other words, a polluting party with no defense to liability can utilize this holding in an attempt to escape from or narrow its liability for damages.[100] It is not difficult to imagine the government urging a broader definition of "incident" under a scenario in which a party is called upon to *pay* damages rather than receive compensation for them. What is striking about the Fourth Circuit's holding is that courts interpreting various aspects of OPA liability have almost universally read the text broadly.[101] These cases are therefore instructive in determining whether *Gatlin*'s interpretation of "incident" was reasonable.

A good example of an OPA issue that has been vigorously contested is whether section 2702 "removal costs" include Coast Guard monitoring costs.[102] The debate centers on the fact that

98. Admittedly, the Congressmen may have written the letters for the purely political motive of helping a constituent. While this possibility exists, Gatlin was a small business owner with arguably limited political clout; furthermore, both Congressmen had ties to OPA's passage (Congressmen Jones through his father), which supports the argument that their letters indicate their true beliefs concerning the legislative intent in passing the OPA.

99. *See supra* note 69 and accompanying text.

100. *See supra* note 84 and accompanying text.

101. *See, e.g.*, United States v. Bois D' Arc Operating Corp., No. 98-157, 1999 WL 130635, at * 4 (E.D. La. Mar. 10, 1999) ("In light of the legislative history and congressional intent, the *liability provisions* of the OPA . . . should be read as broadly as the plain language allows."(emphasis added)).

102. *See, e.g.*, United States v. Hyundai Merchant Marine Co., 172 F.3d 1187, 1189-90 (9th Cir. 1999).

removal costs, as defined in the Act,[103] do not expressly include the costs incurred by the Coast Guard to monitor a discharging party that undertakes cleanup operations without Coast Guard assistance.[104] This narrow view of what constitutes removal costs has not fared well in the courts. For example, in *United States v. Conoco, Inc.*,[105] the court noted that Conoco's strict reliance on the Act's definition of "removal" in an attempt to avoid paying Coast Guard monitoring costs was "too strained."[106] In upholding the Coast Guard's ability to collect these costs, the court referred to the legislative history and noted that "[t]he OPA . . . increased potential liabilities of responsible parties and significantly broadened financial responsibility requirements."[107] In *United States v. Murphy Exploration and Production Co.*,[108] the court adopted the reasoning of *Conoco*, and specifically noted that although the OPA "is not a 'model of clarity'" its reference to the FWPCA "is inclusive, rather than exclusive of monitoring costs."[109]

Based on statutory interpretation, however, the absence of monitoring costs in the OPA definition for "removal costs" may indicate that they are not recoverable under OPA.[110] Furthermore, the statute's explicit reference to monitoring costs in another section of the Act (section 2712, Uses of the Fund) arguably indicates that its omission from the liability provision is intentional.[111] Despite the potential ambiguity, courts no longer

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103. *See supra* note 48 and accompanying text.

104. *See* United States v. Conoco, Inc., 916 F. Supp. 581, 583 (E.D. La. 1996).

105. 916 F. Supp. 581 (E.D. La. 1996).

106. *See id.* at 583.

107. *Id.* at 585.

108. 939 F. Supp. 489 (E.D. La. 1996).

109. *Id.* at 491 (quoting *Conoco*, 916 F. Supp. at 583). OPA cross-references the FWPCA for monitoring costs; the fact that monitoring costs are specifically mentioned in FWPCA and omitted from the OPA did not sway the court.

110. *See* United States v. Southern Pac. Trans. Co., Civ. No. 94-6176-HO, 1995 WL 84193, at *2 (D. Or. Feb. 20, 1995) ("Where a statute designates certain . . . manners of operation, there is a presumption that omissions are exclusions ('expressio unius est exlusius alerius')." (quoting Boudette v. Barnette, 923 F.2d 754, 756-57 (9th Cir. 1991))). *See generally* Sergio J. Alarcorn & 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 (1997) (arguing that it is not clear that monitoring costs are included in OPA "removal costs").

111. *See* Immigration and Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 432 ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

question the recovery of monitoring costs.[112] The universal acceptance of monitoring costs under OPA provides a good example of broad judicial interpretation of the Act's liability provisions.

Another example of judicial interpretation of section 2702 liability occurred in *United States v. Hyundai Merchant Marine Co.*,[113] which dealt with the definition of "incident," the same language at issue in *Gatlin*. One aspect of the suit concerned the liability of Hyundai, the OPA responsible party, for the salaries of Coast Guard personnel who monitored Hyundai's cleanup operations after a spill.[114] Hyundai argued that the salaries were "not a cost that 'results from' the incident," because the government would incur these costs regardless of whether an oil spill occurred.[115] The court rejected this argument and noted that "[i]f personnel must be sent to monitor a potential spill, they must be paid."[116] In other words, the court implicitly avoided a narrow interpretation of "incident" in the OPA liability provision, which would have benefited the polluting party.

It is at least debatable whether the salaries are part of the OPA "incident," because the fact remains that whether the Coast Guard personnel sat in port or monitored Hyundai's cleanup operations, their salary is an expense to the government. Even though the statute does not expressly mention monitoring costs in the definition of "removal costs," *Hyundai* awarded the government not only the costs of monitoring the spill (presumably fuel for the ship and equipment costs), but also the *salaries* of all the personnel involved.[117] In essence, the court refused to narrowly construe "incident" to limit the costs recovered by the government.

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and purposely in the disparate inclusion or exclusion.'"(citation omitted)).

112. *See* United States v. J.R. Nelson Vessel, Ltd., 1 F. Supp. 2d 172, 176 n.2 (E.D.N.Y. 1998) ("[D]efendants also complain about the inclusion of the costs of the Coast Guard's monitoring of the cleanup as an element of damages, but they are clearly recoverable under OPA.").

113. 172 F.3d 1187 (9th Cir. 1999).

114. *See id.* at 1192.

115. *Id.* (quoting 33 U.S.C. § 2702(a)). Obviously, the court was not hung up on the technicalities of "such incident," as indicated by its casual reference to "*the* incident." *See id.*

116. *Id.*

117. *See id.*

Another example of broad judicial interpretation of OPA liability provisions is the landward expansion of OPA liability.[118] In *Avitts v. Amoco Production Co.*,[119] the court faced an OPA claim from an oil spill that occurred in a Texas oil field. In determining whether the OPA applied to the spill, the court rejected the defendant's "unduly narrow interpretation of the Act."[120] The defendant's argument was that although two creeks crossed the oil fields, they were not "navigable" within the meaning of OPA.[121] The court utilized broad language in holding that the OPA did apply to the spill:

> While the Act specifically provides for the liability of shore-based facility owners to the owners of real property damaged by the facilities' pollutants, nowhere does it indicate a requirement that either the facility or the property be located adjacent to, or even near to, navigable waters. Rather, *the only minimum nexus an incident must have to the coastline is that the facility "poses the substantial threat of discharge of oil, into or upon the navigable waters or adjoining shorelines."*[122]

The distinction from *Gatlin* is critical: in *Avitts*, the court held that in order to attach OPA liability, the *facility* must pose a threat of discharge of oil into navigable waters.[123] Because oil actually did reach navigable waters in *Gatlin*,[124] the facility obviously posed a threat of discharge into navigable waters, and, therefore, any oil spilled (and corresponding damages) would be covered under the OPA. Under the reasoning of *Gatlin*, that an oil spill can be divided into OPA and non-OPA components,[125] the *incident* determined

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118. *See* Francis J. Gonynor, *Six Years Before the Mast: The Evolution of the Oil Pollution Act of 1990*, 9 U.S.F. MAR. L.J. 105, 136-39 (1996).

119. 840 F. Supp. 1116 (S.D. Tex. 1994), *vacated on other grounds*, 53 F.3d 690 (5th Cir. 1995).

120. *Id.* at 1122.

121. *See id.* For an example of a court accepting the argument that waters need not be "navigable" for OPA liability to attach, see United States v. Mizhir, 106 F. Supp. 2d 124, 125 (D. Mass. 2000).

122. *Id.* (emphasis added).

123. *See id.*

124. *See supra* note 64 and accompanying text.

125. *See infra* note 130 and accompanying text.

OPA liability, and therefore only a portion of the oil discharged from Gatlin's *facility* was covered by the provisions of the OPA.

Another example of the landward expansion of OPA occurred in *Sun Pipe Line Co. v. Conewago Contractors, Inc.*[126] In determining the scope of "navigable waters" within OPA, the court concluded that "[w]hile the discharge, or threat of discharge, need not take place in or on a covered body of water, there must be some threat that the oil will make its way into protected areas."[127] The court ultimately granted the plaintiff leave to amend the complaint to plead an OPA violation in connection with an oil spill on a *golf course*.[128]

Again, the spill in *Gatlin* did reach navigable waters, as determined by the Federal On-Scene Coordinator.[129] If some oil reaches navigable waters, then the entire spill, if taken as a single event, poses a threat of reaching navigable waters. Therefore, under the holding in *Sun Pipe Line*, all of the spill in *Gatlin* would qualify as a "substantial threat" of discharge into navigable waters under OPA.

Admittedly, the quoted language from *Sun Pipe Line* is susceptible to *Gatlin*'s severability analysis:[130] only the oil that *actually* threatens navigable waters is covered by the OPA. Consider, for example, a large spill from a facility on a hill. If 100 gallons runs down the hill and into ditches near a river, under the severability analysis, those 100 gallons pose a "substantial threat" of discharge into that river. The oil that did not run down the hill does not pose a threat.[131]

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126. No. 4:CV-93-1995, 1994 WL 539326 (M.D. Pa. Aug. 22, 1994).

127. *Id.* at *12.

128. *See id.* at *14; *see also* United States v. Mizhir, 106 F. Supp. 2d 124, 125 (D. Mass. 2000) (accepting a broad definition of "waters of the United States" for purposes of OPA liability); *cf. infra* note 134.

129. *See supra* note 64.

130. "Severability analysis" simply refers to *Gatlin's* use of the word "incident" to divide the oil spill into two components: the portion of the spill that caused the fire yet never approached the nearby ditches and river, and the portion of the spill that did approach the ditches and river (the OPA "incident"). *See* Gatlin Oil Co. v. United States, 169 F.3d 207, 210-11 (4th Cir. 1999).

131. For a brief argument supporting what I refer to as the "severing" of an OPA incident, see Timothy Semenaro, Note, *To Be an "Incident" or Not an "Incident," That Is the Question Under the Oil Pollution Act of 1990:* Gatlin Oil Co. v. United States *Revisited*, 24 TUL. MAR. L.J. 955, 966-67 (2000), who notes "the Fund is designed to address only the elements of an

It seems unlikely that *Sun Pipe Line* is susceptible to *Gatlin*'s severing of "incident," however, because the court refers to expansive interpretations under the OPA liability provisions, including the broad provision quoted from *Avitts*.[132] As noted above, *Avitts* indicated that a *facility* must pose a substantial threat of discharge for OPA liability to attach;[133] *Sun Pipe Line*'s favorable reference to this interpretation indicates its support for a broad reading of liability provisions under the Act. In other words, an expansive interpretation of "navigable waters,"[134] is inconsistent with a narrow reading of "incident," a closely related liability provision.[135]

Finally, the court in *In re Cleveland Tankers*[136] dealt with damages resulting from an OPA-related oil spill.[137] The essential facts were as follows: a vessel owned by Cleveland Tankers was unloading gasoline at a dock when an explosion occurred, causing the vessel to break from its mooring and partially sink in the river.[138] In ruling on the defendant's motion to dismiss, the court

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oil spill that directly affect or threaten to affect navigable waters."

132. *See Sun Pipe Line*, 1994 WL 539326 at *2-3 (quoting the broad language of *Avitts* extensively); *cf.* Gonynor, *supra* note 118, at 139 ("Reviewing the *Sun Pipeline* and *Avitts* decisions, it seems that the courts may indeed fashion the application of OPA '90 to facilities located many miles inland.").

133. *See supra* note 123 and accompanying text.

134. A broad reading of "navigable waters" is consistent with regulations promulgated by the Army Corps of Engineers under the Clean Water Act (CWA). *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) (noting that "the Corps issued interim final regulations redefining 'the waters of the United States' to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce"). Courts facing CWA claims also read "navigable waters" broadly. *See, e.g.*, Leslie Salt Co. v. United States, 896 F.2d 354, 357 (9th Cir. 1990) ("Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power."); Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) ("It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some.").

135. Congress's intent to cover expansively bodies of water under the CWA supports reading "incident" under OPA broadly, so as to bring more accidents within the scope of OPA's liability provisions. *See supra* note 134.

136. 791 F. Supp. 669 (E.D. Mich. 1992).

137. *See id.* at 671.

138. *See id.*

refused to dismiss OPA claims that were based on the "allegation of physical injury, [and] *smoke damage*, to [plaintiff's] facilities."[139]

Gatlin downplayed this ruling as not pertinent because "the marina did not seek compensation from the Fund. At most, all that can be gleaned from the case is that the marina's claim against the shipowner was not dismissed."[140] This is an extremely narrow view of the case.[141] By denying the motion to dismiss, *Cleveland Tankers* implicitly acknowledged that the claim for smoke damage was a potential cause of action *as a matter of law*. Even if the plaintiff ultimately lost on the *facts*, the claim still proceeded to trial.[142] Under *Gatlin*'s definition of "such incident," the smoke damage claim would not have proceeded because it was collateral to the discharge of oil into navigable waters, not a direct result of the discharge into navigable waters. In other words, the smoke damage did not directly result from oil in the water or a substantial threat of discharge of oil into the water.

Interestingly, *Gatlin* also distinguished its facts from *Cleveland Tankers* because the polluter in *Gatlin* was making a claim against the Fund rather than a private party.[143] *Gatlin* based its holding on the *liability* provision of OPA, however, which is the same provision at issue for the smoke damage in *Cleveland Tankers*.[144] Nothing in the statute's language supports the practice of utilizing differing interpretations of the liability provision based on the parties' intent in relying on that provision.[145] As discussed below, a court wishing to limit recovery from the Fund may do so through a narrow reading of OPA liability defenses.[146]

It is worth noting that the analysis of smoke damage in *Cleveland Tankers* was brief and the holding should not be given

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139. *Id.* at 679 n.8 (emphasis added).

140. Gatlin Oil Co. v. United States, 169 F.3d 207, 212 (4th Cir. 1999) (citation omitted).

141. Although the case involved a motion to dismiss, its holding has been recognized as relevant to OPA liability. *See* Gonynor, *supra* note 118, at 127-28 ("The court felt [the smoke damage] was a physical touching of the plaintiff's property in a tortious manner as allowed by OPA '90 . . . .").

142. *But see* Semenaro, *supra* note 131, at 967 (arguing that although the court in *Cleveland Tankers* did not dismiss the claims for smoke damages, it did not "otherwise address the claims" and therefore "Gatlin's reliance on *Cleveland Tankers* was misplaced").

143. *See Gatlin*, 169 F.3d at 212.

144. *See supra* notes 84-90 and accompanying text.

145. *See infra* note 150 and accompanying text.

146. *See infra* notes 160-81 and accompanying text.

too much weight in deciding OPA liability.[147] When the case is compared with the numerous other OPA decisions, however, it further illustrates the narrow stance taken in *Gatlin*.

These collective holdings indicate that courts deciding OPA liability cases take an expansive view of the statute's liability language. On the surface, the holding of *Gatlin* is consistent with all of these decisions: the polluting party finds no sympathy in the courts. *Gatlin*'s outcome is thus consistent with the notion that the "polluter pays." But, as noted above, the court relied on a narrow interpretation of language in the liability provision in its holding,[148] which places it at odds with the majority of OPA holdings.[149] The

147. Most of the discussion in *Cleveland Tankers* dealt with the motion to dismiss economic loss claims brought under maritime law. *See In re Cleveland Tankers*, 791 F. Supp. 669 (E.D. Mich. 1992). Also noteworthy is that the court took a restrictive view on the remainder of the plaintiffs' OPA claims under section 2702 for subsistence use (2702(b)(2)(c)), and profits and earning capacity (2702(b)(2)(E)). *See id.* at 678-79. The court's holding on these issues, however, suffers from the same problem as the holding in *Gatlin*: an overly narrow interpretation. "Thus far, there are no reported cases following the [subsistence use and profits and earning capacity] holding of *Cleveland Tankers*. Arguably, the reasoning behind the decision contradicts OPA '90's legislative history." Gonynor, *supra* note 118, at 128. Although Gonynor goes on to note that the disputed reasoning is defensible, *see id.*, the argument proposed in this Note suggests otherwise.

148. *See supra* note 69 and accompanying text.

149. *See, e.g.*, South Port Marine, LLC. v. Gulf Oil Ltd. Partnership, 73 F. Supp. 2d 17, 19 (D. Me. 1999) (refusing to adopt the interpretation of OPA liability proffered by the defense because the court "[saw] no basis in the statutory language for the defendants' narrow reading"), *aff'd in part, rev'd in part*, Nos. 99-2369, 99-2370, 2000 U.S. App. LEXIS 31178 (1st Cir. Dec. 7, 2000). The decision in *South Port Marine* is a good example because the polluter was held liable as a matter of law for both the tangible and intangible assets (i.e., economic loss) of the plaintiffs following an oil spill under section 2702(b)(2)(B); in other words, the "polluter paid," but through an expansive, rather than narrow, reading of OPA liability. Although the court reduced the defendant's liability based on the underlying facts of the case, the legal principle is consistent with the liability interpretation of other OPA cases.

It is worth noting that the appellate court declined to support a universal expansive reading of OPA provisions:

> [W]e think it necessary to address plaintiff's contention that the OPA should be construed more liberally because it was enacted for the purposes of benefitting the victims of oil pollution and punishing its perpetrators. While we agree that such intentions were Congress's principal motivation in enacting the OPA, we think it would be naive to adopt to simpleminded a view of congressional policymaking in light of the competing interests addressed by the Act.

Id. at *20-21. Interestingly, the court evoked this language in reversing the portion of the district court ruling that *limited* damages awarded to the plaintiff. *See id.* at *22-26. Although the First Circuit's dicta appears to cut against the argument proposed in this Note, this Note does not propose a universal pro-plaintiff interpretation of OPA Provisions. It

fact that *Gatlin* involved a claim for compensation from the Trust Fund does not justify the Fourth Circuit's narrow reading of OPA liability provisions in comparison to other OPA holdings. Under the Act, a party with a complete defense to liability "is not liable for removal costs or damages under section 2702 of th[e OPA] title."[150] Once a complete defense is established, the party escapes all liability *as it is defined in the liability provision of the OPA.* Therefore, whether a party has a defense to liability, or has no defense due to its negligence in causing a spill, the liability analysis is exactly the same. For this reason, even a court dealing with a successful defense to liability should not read the liability provision narrowly in order to deny recovery from the Trust Fund.

Furthermore, because the defenses to OPA liability are so difficult to meet,[151] a consistent, broad reading of OPA liability is unlikely to open a "floodgate" of successful Trust Fund compensation claims.[152] In sum, it is better to allow one polluter to

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proposes a consistent broad reading of *liability* provisions, which does best serve the purpose behind the OPA. *See, e.g., supra* note 101. A consistent, broad reading of the liability provisions by the courts increases a polluter's incentive to commence cleanup operations in an effort to reduce exposure to collateral damages associated with an oil spill. *See supra* note 44; *supra* notes 77-84 and accompanying text; *see also* Unocal Corp. v. United States, 222 F.3d 528, 535 (9th Cir. 2000) (rejecting defendant's narrow interpretation of "responsible party" and noting that to do so "flies in the face of the goals of OPA. 'The purpose of OPA . . . was to encourage rapid private party responses'"(quoting Metlife Capital Corp. v. N/V Emily S., 132 F.3d 818, 822 (1st Cir. 1997))). For an example of a polluter refusing to commence cleanup operations due to its belief that it was not liabile for the spill, see *United States v. Mizhir*, 106 F. Supp. 2d 124 (D. Mass. 2000).

150. 33 U.S.C. § 2703(a) (1994).

151. *See, e.g., infra* notes 160-71 and accompanying text (discussing the difficulty of proving no contract exists between polluting party and OPA responsible party). Based on a LEXIS search, *Gatlin* is the only successful defense to OPA liability that I found.

152. *But see* Semanaro, *supra* note 131, at 968 ("Applying the [*Gatlin*] dissent's rationale, in the event that a large quantity of oil is discharged with only a slight fraction making its way into navigable waters, the entire amount of oil and resulting damages could be chargeable to the Fund."). Semanaro's analysis fails to consider that this would occur only if a polluter has a *complete defense* to liability—a rarity, at best. *See supra* note 151. In the overwhelming majority of cases in which a polluter has no defense to liability, the broad interpretation of liability proffered by the dissent gives the government a tool to collect for a spill in which only a portion reaches navigable waters. Focusing only on the one-in-a-million polluter with a statutory defense to liability overlooks the numerous polluters that would escape liability due to a narrow interpretation of OPA liability provisions.

Yet Semanaro does make a strong point: even if a polluter fails to shift its entire damage costs to the Trust Fund, its damages under OPA are capped. *See supra* note 56 and accompanying text. Under a broad interpretation of "incident," a polluter's damages increase;

collect damages,[153] rather than to produce a holding that will potentially allow dozens of polluters to escape liability completely.

Causation Analysis

Another particularly troubling aspect of the Fourth Circuit's holding is that it denied Gatlin's right to compensation from the Trust Fund for fire damage "[a]s a matter of law," because "the evidence did not establish that the fire *caused* the discharge of oil into navigable waters or posed a substantial threat to do so."[154] Although there must clearly be a causal relationship between the oil spill and compensable damages under the Act,[155] this interpretation severely limits the liability provision of the OPA.[156]

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if damages exceed the cap on OPA liability, the polluter may assert a claim against the Trust Fund for the remaining removal costs and damages. *See supra* note 58 and accompanying text. "Severing" the incident, *see supra* note 130, reduces the likelihood of a polluter collecting from the fund. *See* Semanaro, *supra* note 131, at 968.

This is a potential problem with my analysis. Yet, it seems there are at least three rejoinders to Semanaro's argument. First, a broad interpretation of "incident" reduces a polluter's incentive to delay cleanup procedures for portions of a spill it believes won't be subject to OPA liability. *See* discussion, *supra* note 149. One of Congress's main goals in passing OPA was to increase rapid private-party responses to a spill. *See Unocal Corp.*, 222 F.3d at 535. Second, OPA does not cap damages set by state authorities, nor does it allow collection from the Trust Fund for cleanup operations designated by state authorities, unless the Fund is obligated to do so by the President. *See supra* note 59 and accompanying text; *infra* notes 180-81 and accompanying text. Thus, much of the costs associated with cleanup (those designated by state officials) will not be recovered from the Fund. Third, the Trust Fund is financed by a tax on petroleum products entering into the United States. *See supra* note 61 and accompanying text. Thus, consumers ultimately finance any increase in Trust Fund compensation to polluters. It is not unreasonable for consumers to help pay for the negative externalities associated with their consumption.

153. The real and personal property damages claimed by Gatlin totaled $ 394,476.00. *See* Reply Brief for Appellants at 9, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079). Accepting Gatlin's damage claims as a matter of law, of course, does not mean that the court must a fortiori accept his estimates without a determination of their reasonableness.

154. *Gatlin*, 169 F.3d at 212 (emphasis added).

155. *See, e.g.*, S. REP. NO. 101-94, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 732 ("While the Fund must require some evidence of loss and the establishment of a causal connection with oil pollution, it should not routinely contest or delay the settlement of damage claims.").

156. Interestingly, at an earlier point in the opinion, the court concluded that Gatlin could not receive compensation for its damages from the Liability Trust Fund because "the removal costs and damages specified in section 2702(b) are those that *result from* a discharge of oil or from a substantial threat of a discharge of oil." *Gatlin*, 169 F.3d at 211 (emphasis added).

For example, consider the scenario of an oil tanker hitting a reef just off the coast of a popular vacation destination. Assume the tanker requires assistance to empty its tanks so that its cargo of oil does not spill into the ocean. If the accident is covered on the news and tourists choose to avoid the resort because of the event, the loss of tourism dollars is likely a "damage" that the resort owners could collect from the tanker's owner or operator because of the "substantial threat of discharge" of oil into navigable waters that resulted from the accident.[157] Under the *Gatlin* causation analysis, however, the news coverage of the event did not "cause" the discharge of oil into navigable waters (or the substantial threat of such a discharge), and the resulting loss of tourism dollars is not compensable under the OPA.[158]

This causation analysis is unfortunate because it compounds the court's narrow analysis of an OPA "incident" and it also may be used by polluting parties to escape liability; none of the liability decisions discussed above would pass this causation requirement. For example, Coast Guard monitoring costs do not "cause" a discharge or substantial threat of discharge of oil into navigable waters (nor do the coast personnel salaries)[159]; smoke damage to property is susceptible to a similar analogy.

Judicial Interpretation of Defense Provisions

Rather than limit compensation under the Trust Fund through narrow constructions of OPA liability provisions, courts should

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This is less onerous than the requirement that the *cause* of the damages, in this case the fire, must also be the cause of the discharge or threat of discharge.

157. This is a scenario used by the Government in its brief to indicate a clear case of when damages are compensable under the OPA. *See* Brief for Appellants U.S. Department of Transportation at 36, *Gatlin*, 207 F.3d at 207 (No. 97-2079); *see also* Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235 (11th Cir. 1995). In *Boca Ciega*, the plaintiffs brought a claim for damages against a responsible party for the loss of tourism dollars resulting from an oil spill. *See id.* at 236. The suit ultimately was dismissed for failure to follow OPA procedural requirements. *See id.* at 236, 240.

158. In other words, the fire in *Gatlin* caused the property damage, not the discharge or threat of discharge; in the posited scenario, the news coverage caused the loss of tourism dollars, not the discharge or threat of discharge.

159. Although the quoted provision in *Gatlin* dealt with damages, the narrow interpretation discussed applies to "removal costs," since they bear the same relationship as "damages" to an OPA "incident." *See* 33 U.S.C. § 2702(a) (1994).

focus instead on the defenses to liability in section 2703 of OPA. A party is liable under the Act unless one of these defenses is met, so, a fortiori, if a court does not find that a polluter met the requirements for a defense to liability, that party must pay for removal costs and damages under the Act.

International Marine Carriers v. Oil Spill Liability Trust Fund[160] is a good example of a court following this principle in dealing with a responsible party's claim of an absolute defense to liability under section 2703(a)(3).[161] The responsible party (USNS Sealift Atlantic) was receiving bunker fuel from a terminal in the Houston ship channel when, through the negligence of the terminal, twelve barrels of fuel spilled into the channel.[162] International Marine Carriers (IMC), the corporation which operated the ship, followed OPA cleanup procedures and then filed a claim against the Fund for oil removal costs.[163] The Fund denied the claim because it held that IMC failed to qualify for a defense to liability under 2703.[164]

In upholding the Fund's decision, the court reasoned that because the USNS Sealift Atlantic had executed a Declaration of Inspection with the terminal, a contract existed between the parties, which eliminated IMC's defense to liability.[165] OPA precludes a defense under the Act if "any contractual relationship" exists between the third party who caused the spill and the OPA responsible party.[166] The court noted that OPA does not define the phrase "any contractual relationship" and ultimately decided that, based on the broad interpretation afforded to the term in an analogous Act, the broader interpretation urged by the government—that a contract existed—should be adopted as reasonable under the *Chevron* doctrine.[167] The court's finding eliminated the IMC's claim for compensation under the Fund.[168]

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160. 903 F. Supp. 1097 (S.D. Tex. 1994).
161. *See id.* at 1104-06.
162. *See id.* at 1099.
163. *See id.*
164. *See id.* at 1100.
165. *See id.* at 1104.
166. 33 U.S.C. § 2703(a)(3) (1994).
167. *International Marine Carriers*, 903 F. Supp. at 1105-06 (discussing 42 U.S.C. § 9607(b), which deals with third-party defenses under CERCLA). The court noted that under CERCLA, "[e]ven an indirect contractual relationship may preclude the defense." *Id.* at 1106.
168. *See id.*

The existence of a contract, however, was not a straightforward issue: the defendant asserted that the Declaration was "merely a pre-bunkering check list . . . not a contract"[169] At least one commentator noted the court's interpretation is an expansive view of contractual relationships under the Act.[170] The important feature of this decision is that it demonstrates that a key judicial tool to limiting compensation under the Fund lies in a court's interpretation of the language in section 2703.[171]

Finding "contractual relationships" exist between parties is just one possibility for a court to limit defenses under the Act. Because a party must demonstrate that it "exercised due care with respect to the oil concerned, taking into consideration . . . all relevant facts and circumstances" in order to avoid liability, courts also have the ability to make a *fact-specific* inquiry into each defense claim.[172] Put simply, compensation may be denied *based on the associated facts* of a case that eliminate a polluter's ability to claim a defense to liability. By denying compensation in a situation that factually warrants liability, there is less likelihood of an opinion that sets inconsistent precedent through a narrow interpretation of section 2702.[173]

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169. *Id.* at 1105.

170. *See* Gonynor, *supra* note 118, at 119-20 ("Clearly, the . . . holding offers a broader definition of 'contractual relationship' between vessel interests and others . . . . [I]t seems that a simple safety meeting at sea could be elevated to a contractual negotiation.").

171. Finding the existence of a contract between an OPA liable party and a third party who negligently caused the spill is a common judicial tool to limit defenses to liability. *See, e.g.*, United States v. J.R. Nelson Vessel, Ltd., 1 F. Supp. 2d 172, 175 (E.D.N.Y. 1998) (holding that even if a bailee of an OPA liable party was the negligent party, "[a] bailment is a contractual arrangement," and therefore a defense of third-party negligence "fails as a matter of law").

172. 33 U.S.C. § 2703(a)(3)(A) (1994).

173. For example, taking into consideration the location of the oil tanks that "[sit] just above sea level between [a] creek and a more northern tributary to [a] river," did Gatlin take enough precautions against the potential for vandalism? Brief of Appellee at 3-4, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079). This is the kind of issue a court should carefully analyze in order to limit unwarranted compensation from the Trust Fund. Of course, the defenses to liability in the Code exist for a reason and if Gatlin took reasonable care in light of the relevant circumstances, a court should permit compensation. *See, e.g., infra* note 179 and accompanying text.

The appellate court could have *easily* prevented compensation to Gatlin without resorting to a narrow reading of OPA liability language. In order to preserve an absolute defense to liability, OPA requires a discharging party to "provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities." 33

An example of this principle is demonstrated in *Grundy Oil Co. v. United States*,[174] a case involving OPA's precursor, the FWPCA. *Grundy Oil* involved a traffic accident between a third party and a truck owned by the polluting party, resulting in the discharge of oil into a nearby river.[175] The parties did not dispute that provisions of the FWPCA applied to the incident; the only question was whether the polluting party qualified for compensation for the cleanup costs it incurred.[176] The plaintiff would qualify for compensation if it met the requirements for a defense under the FWPCA. In this case, the issue was whether the accident occurred solely due to the negligence of the third-party driver. The court undertook a detailed, fact-specific inquiry to determine if the polluter qualified for the defense, noting that "[f]or the plaintiff to prevail on its claim it must overcome a heavy burden."[177]

The polluting party ultimately prevailed in *Grundy Oil*, but the case exhibits a tool that courts may use to deny liability in cases such as *Gatlin*: a detailed, factual inquiry into whether the party qualifies for the defense.[178] It also demonstrates judicial willingness to compensate polluters if they do meet the high standards required by pollution act defense provisions.[179]

U.S.C. § 2703(c)(2). Despite the Federal On-Scene Coordinator's notice to Gatlin of this provision, "Mr. Gatlin refused to cooperate with the cleanup, claiming that since the spill was not his fault, it was not his responsibility," and even "promis[ed] certain death if [the Coast Guard pollution response team] didn't [leave]." Brief for Appellants U.S. Department of Transportation at 7, *Gatlin*, 169 F.3d at 207 (No. 97-2079). The Fourth Circuit could have dispatched the issue of a complete defense based on Gatlin's conduct alone.

174. 14 Cl. Ct. 759 (1988).

175. *See id.* at 759.

176. *See id.* at 760.

177. *Id.*

178. *See, e.g.*, Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. United States, 575 F.2d 839, 841-43 (1978) (undertaking detailed analysis of whether plaintiff undertook reasonable care against criminal intruders whose actions led to the discharge of oil into a nearby creek; the court ultimately found that reasonable care was taken and plaintiffs qualified for a defense under the FWPCA).

179. It should be noted that I found only three cases under the FWPCA granting compensation to polluters under the Act, all them discussed in this Note. In other words, a consistent, broad reading of liability provisions has not opened the floodgates for polluters to collect under the FWPCA, which supports the conclusion that Gatlin's interpretation of the OPA liability provision simililarly would not lead to voluminous claims against the Fund. *But cf.* Brief for Appellants U.S. Department of Transportation at 30-31, Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (No. 97-2079) (arguing that Gatlin's interpretation of OPA liability provisions "leads to absurd results" and that polluting parties

Another important aspect of the OPA is that parties often face unlimited liability for polluting waterways under state law. Allowing a party that qualifies for a complete defense to collect under the OPA does *not* mean it escapes liability for the pollution. For example, section 2718 of OPA specifically provides for state action against a polluter:

> Nothing in this Act . . . shall:
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to-
>
> (A) the discharge of oil or other pollution by oil within such State . . . .[180]

The holding in *Gatlin* demonstrates this fact: even though the company qualified for an *absolute* defense under OPA, it still could not collect from the Trust Fund for "expenditures that were directed by North Carolina authorities."[181] In short, qualifying for a defense under the federal statute does not mean that a polluter escapes state liability. It is possible that had the Fourth Circuit applied the near universal broad reading of OPA liability, the resulting compensation received by Gatlin Oil would have simply passed through the company en route to the state coffers.

CONCLUSION

When the Fourth Circuit vacated the district court's ruling in *Gatlin Oil Co. v. United States*, it engaged in an indefensible departure from the statutory language, legislative history, and judicial interpretations associated with the liability provisions of

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could use this interpretation to collect from the Trust Fund in scenarios that "[o]ne [could] scarcely imagine that Congress" intended).

180. 33 U.S.C. § 2718(a) (1994); *see also* National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp., 924 F. Supp. 1436, 1448 (E.D. Va. 1996) (noting that the purpose of section 2718(a) "is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA").

181. *Gatlin*, 169 F.3d at 213.

the OPA. The court, consistent with Congress's intent to punish oil polluters, rendered a holding that made the polluter pay. Unfortunately, the court also created precedent that will allow future polluting parties to escape liability under the OPA. Yet, the court's ability to construe the language in OPA defense provisions narrowly provided it with an effective tool to analyze Gatlin's claim against the OPA Trust Fund, without generating a judicial opinion favorable to polluters. Future courts should follow pre-*Gatlin* analysis when dealing with OPA compensation claims: *read the OPA liability provisions broadly*.

Brian Theodore Holmen