BLOWOUT: THE LEGAL LEGACY OF THE DEEPWATER HORIZON CATASTROPHE

BACKGROUND DOCUMENT ON NATURAL RESOURCE DAMAGES

APRIL 13, 2011
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I. INTRODUCTION

On or about April 20 of 2010, the mobile offshore oil-drilling rig Deepwater Horizon had an explosion that caused an estimated 4.9 million barrels of oil to spill into the Gulf of Mexico.[1] BP Exploration and Production, Inc. (BP), the company that owned the oil well, has been named a responsible party.[2] This paper provides background information on Natural Resource Damage Assessment (NRDA); a federally imposed process by which a federal or individual state government agency[3] will assess the costs of restoring the Gulf's natural resources, then implement and execute plans for restoration. The costs of this NRDA process of assessment and restoration may then be recovered in part or in full from BP by an appointed federal agency.

II. BACKGROUND

The BP oil spill has caused environmental damage to the natural resources throughout the Gulf of Mexico, negatively impacting the ocean and coastal environments surrounding the site of the spill, as well as the animals and plant life that inhabit these areas. A large portion of these natural resources are controlled by the federal government. It is the duty of the federal government to protect these resources, including the plant and animal life, from damage, whether by regulation and enforcement, or by ensuring the resources are restored in the event that they are damaged or lost. Damages to the natural resources resulting in a loss of their value, such as the damages which were the result of the BP oil spill, must be restored, and it is the federal government's duty to ensure that this happens and that the responsible parties are held financially

[1] Deepwater Horizon Oil Spill - Notice of Intent to Conduct Restoration Planning at 1 (issued on or about Sept. 29, 2010), *available at* www.darrp.noaa.gov (last visited Nov. 16, 2010); Official Site of the Deepwater Horizon Unified Command, at http://www.restorethegulf.gov/release/2010/08/04/federal-science-report-details-fate-oil-bp-spill (last visited Nov. 16, 2010).

[2] Notice of Intent, supra note 1, at 1. See also, 15 C.F.R. § 990.30, definition of *responsible parties* - "the lessee or permittee of the area in which the facility is located or the holder of a right to use an[] easement granted under applicable state law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the are in which the facility is located." Note: There have been other responsible parties identified by the government, but for the sake of space, BP will represent the responsible party for the rest of the paper.

[3] Note: Again, for the sake of space, there will be no further references to state government agencies. However keep in mind that the state governments and their appointed agencies are entitled to similar rights and responsibilities as their federal counterparts under the same federal regulations.

accountable for the damage the spill has caused. The process by which the damages are evaluated and the restorations are implemented is called Natural Resource Damage Assessment (NRDA). The costs incurred by the federal government in undertaking the NRDA process are recoverable under federal regulation from the responsible party.

The NRDA process is used to determine the values of the lost or damaged resources, and then to develop a plan, or multiple plans, to restore or replace the damaged resources.[4] NRDAs are an integral part of an array of federal and state regulations aimed at protecting the environment. The NRDA process that will be employed for the BP oil spill is regulated by the Oil Pollution Act of 1990 (OPA)[5], a federal statute that regulates legal actions resulting from oil spills that occur in federally controlled oceans and waterways. Under OPA there are several categories[6] of claims for which monetary damages may be recovered in the event of an oil spill, including: 1) the claims for damages to individual persons, or property owned by private individuals and other entities, who are then responsible individually for bringing their own claims against a responsible party; 2) the costs for clean-up and recovery of the oil, a duty that is assigned to various federal agencies, state agencies and the responsible parties; and 3) the damages associated with the loss of, and injury to, natural resources, which are determined by government agencies through the use of NRDAs.[7]

For the BP oil spill, the lead federal agency in charge of the NRDA process is the National Oceanic and Atmospheric Administration (NOAA),[8] which has been designated a

[4] Charles B. Anderson, *Damage to Natural Resource and the Costs of Restoration*, 72 Tul. L. Rev. 417, 464 (1997).

[5] 33 U.S.C. § 2701 et seq.

[6] Note: For the purposes of this paper, there are three only categories of recovery discussed. However OPA does provide for other types of recovery not relevant to the subject of this paper. *See* 33 U.S.C. § 2702(b)(2)(B-F).

[7] Anderson, *supra* note 4, at 464-66.

[8] Notice of Intent to Conduct Restoration Planning, *supra* note 1, at 1.

trustee,[9] to act on behalf of the federal government to implement NRDA procedures and recover the costs from BP.[10] In order to complete the NRDA process, NOAA will use various methods of assessing the damages that have occurred in order to determine the value of the lost natural resources, and to devise and implement a plan to restore or replace the natural resources. NOAA may then seek reimbursement for the entire NRDA process from the responsible parties, or if need be, use money from the federally controlled Oil Spill Liability Trust Fund (OSLT Fund) to supplement, or in lieu of recovery.[11] However, the maximum contribution the OSLT Fund can make to NRDA is 500 million dollars.[12] Once the restoration of the natural resources is accomplished and all costs accounted for, the NRDA process in regards to OPA is complete.

III. A HISTORY OF NATURAL RESOURCE DAMAGE ASSESSMENTS

A. Pre-Oil Pollution Act of 1990 Sources of Recovery for Natural Resource Damages

Prior to 1990, NRDA claims stemming from oil spills and other similar toxic discharges were handled either by traditional maritime law, state and local laws, or by various federal regulations included the Clean Water Act of 1972 (CWA)[13], the Trans-Alaska Pipeline Authorization Act of 1973[14], the Outer Continental Shelf Lands Act Amendments of 1978[15], the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[16], and the National Oil and Hazardous Substances Pollution Contingency Plan.[17]

[9] 15 C.F.R. § 990.30; 33 U.S.C. § 2706(b) definition of *trustee* - "those officials of the federal and state governments, of Indian tribes, and of foreign governments, designated under 33 U.S.C. 2706(b) of OPA."

[10] Note: There are also several different state agencies designated as trustees for their respective states for the purpose of NRDAs of state natural resources not necessarily protected by OPA. They are governed by each states' own regulations on recovery of natural resource damages. See CRS Report R41369 at 1, *The 2010 Oil Spill: Natural Resource Damage Assessment Under the Oil Pollution Act*, by Kristina Alexander.

[11] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509). Note: This is a federally controlled fund created to ensure financial support for oil spill cleanup and NRDA implementation.

[12] 26 U.S.C. § 9509(c)(2)(A)(ii).

[13] 33 U.S.C. § 1251, et seq.

[14] 43 U.S.C. § 1651, et seq.

[15] 43 U.S.C. § 1801, et seq.

[16] 42 U.S.C. § 1601, et seq.

This assortment of regulation proved to be inefficient and complicated, as was evidenced by the lengthy litigation and inefficient use of settlement money and damage awards that arose in the wake of the Exxon Valdez oil spill in Prince Edward Sound off the coast of Alaska in 1989.[18] Congress attempted to rectify the problems associated with competing, confusing statutes by passing OPA, which created one uniform law for the regulation of maritime oil spills. Since its adoption, the improvements OPA is purported to have made have been a subject of much debate.[19] At the very least, OPA has made it clear that it is the sole legal authority concerning legal action that may be taken in the aftermath of oil spills affecting federally controlled waters and coastlines, such as the BP oil spill.[20]

1. Regulation under the Clean Water Act

NRDA regulation was first enacted by the passage of the CWA, as a means by which the federal government could recover in monetary damages for loss or damage to the nation's natural resources.[21] Under the CWA, the United States was named the trustee of federally controlled natural resources, and the Federal Government was given the authority to delegate to its agencies the power to seek redress for damages to natural resources caused by, among other things, oil spills.[22] The CWA was the main statutory authority used for the federal claims brought in the

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[18] 40 C.F.R. Part 300.

[19] Note: The Exxon Valdez spilled 11 million gallons of oil making it the largest oil spill in the US up to that point. The costs for clean up and natural resource damages totaled approximately 3 billion dollars. The litigation and settlement process was criticized by members of government and the oil industry as being to cost inefficient and lengthy. The settlement agreement resulted in 900 million dollars paid by Exxon for NRDA. The final case addressing the incident concluded 19 years after the spill in 2008. See Exxon Shipping Co. v. Baker, 128 S.Ct 2605 (2008); CRS Report RL33705 at 1, 21, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress*, by Jonathan Ramseur; Grayson Reed Cecil and Nancy Foster, *Natural Resource Injury at Oil Spills: A New Approach*, 45 Baylor L. Rev. 423, 424-25 (1993).

[20] See, e.g., Zygmunt J.B. Plater, *Will Laxity and Collusion Now Come to an End?*, The Environmental Forum, Sept.-Oct. 2010, at 50.

[21] See 33 U.S.C. § 2702(a). See, e.g., 15 C.F.R. § 990.20; Complaint of MetLife Capital Corp., 132 F.3d 818, 822 (1st Cir 1997). Note: However, OPA does provide for states to recover under their own regulations where the affected area is under state control. See 33 U.S.C. § 2702(b)(1)(A).

[22] Cecil and Foster, *supra* note 18, at 423.

[23] Id. at 423-24.

Exxon Valdez litigation.[23] The government agencies' NRDA process during the Exxon Valdez litigation was kept secret from the public, as well as from the responsible party, which resulted in a settlement that was arguably not cost-effective.[24] Included in CWA was the 311(k) fund, which Congress created so that federal agencies could tap it to finance clean-up efforts and restoration, but the fund was not available to reimburse expenses incurred by the assessment of the natural resource damages.[25] Subsequently, similar funds were created through later federal legislation, but now all of those funds have been consolidated into the OSLT Fund.[26]

2. Regulation under the Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA, a statute enacted after the CWA, but before the Exxon Valdez spill, had a more detailed NRDA regulation regime for evaluating natural resource damages caused by toxic chemical spills. It is considered to be the main influence on the NRDA regulations incorporated by OPA. In fact, when OPA's NRDA provisions were under judicial review, the court in that case recognized "the similarity of the two statutory schemes," thus "find[ing] [CERCLA] cases instructive" regarding the interpretation of NRDA regulations as they apply to OPA.[27] Therefore, the case history of CERCLA's NRDA provisions will be given substantial authoritative weight by the courts when they must interpret OPA's NRDA provisions.

3. Legal challenges to CERCLA and the use of Contingent Valuation

The most important case to interpret CERCLA's NRDA provisions, as well as other

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Ramseur, *supra* note 18, at 7.

Cecil and Foster, *supra* note 18, at 424-25.

Id. at 427. Note: The 311 fund could be used to clean up other toxic spills as well, but it was criticized as being inadequate, so Congress consolidated it with other clean up funds to create the OSLT Fund and that fund is now almost exclusively regulated by OPA, which has increased the amount of money in the fund through taxes on oil and has extended its funding to the assessment process. *See* Ramseur, supra note 18, at 13.

Ramseur, *supra* note 20, at 13.

US v. Viking Resources, 607 F.Supp.2d 808, 831 (S.D. Texas 2009).

provisions of CERCLA, was State of Ohio v. United States Department of the Interior (DOI).[28] The most relevant aspect of that case regarding NRDAs, was the petitioners' challenge to the Department of Interior's decision to allow the use of a method of NRDA known as contingent valuation (CV) as a way to determine the value of natural resources. CV is used as a way to ascribe value to natural resources when there is no available market value for the natural resource, and no similar resources exist that have a value for comparison.[29] It entails use of hypothetical scenarios posed to individuals about the monetary values they would ascribe to these resources, and from their responses a value is determined.[30] This value can then be used to calculate the monetary damages owed for the loss or damage done to the natural resource.

CERCLA's NRDA provision allowing the use of CV was challenged in Ohio because, according to the petitioners, CV was "inharmonious with common law damage assessment principles, [] considerably less than a 'best available procedure,' [and] [the] extension of CERCLA's rebuttable presumption to CV assessments [was] arbitrary and capricious."[31] The court held that the "strictures of the common law" do not apply to CERCLA, that use of CV methodology "in the [(NRDA)] regulations was entirely proper," and that there was "nothing arbitrary or irrational about the rebuttable presumption conferred upon . . . utilizing CV methodology."[32] Thus, the use of CV has been met with criticism from its inception, and

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[redacted] 880 F.2d 432 (D.C. Cir 1989), a review of regulations promulgated by the DOI pursuant to CERCLA governing recoverable damages from responsible parties of leaks of oil and hazardous substances. The court held: the limitation of damages recoverable by the trustees for harmed natural resources was contrary to intent of Congress and invalid, the record would be remanded to DOI for clarification of its interpretation of its regulations about CERCLA natural resource damage provisions and the applicability to private owned land, and regulation prescribing hierarchy of methodologies by which lost use value could be measured that relied on market values when market values were available was not a reasonable interpretation of CERCLA.

Cecil and Foster, supra note 18, at 424-25.

Id.

Ohio, 880 F.2d

continues to come under criticism to this day, in both the courtroom and academic publications.[33] Although the use of CV has been rejected under the circumstances of a specific case[34], the use of CV as a method of NRDA has yet to be rejected by the courts.

B. Oil Pollution Act of 1990: Purpose, Provisions and Legal Ramifications

In the aftermath of the Exxon Valdez oil spill, the aforementioned statutory regimes came under fire as ineffective and inefficient, which resulted in wasted compensation intended for restoration to damaged natural resources, and lengthy trials that wasted too much time and taxpayer money.[35] In light of the many criticisms, the United States Congress passed OPA. Congress intended to provide a means by which the responsible party could be held accountable for proper oil clean-up and removal, individuals could be fairly compensated for their losses, and natural resources could be restored to pre-spill conditions, with as little litigation as possible.[36] OPA was intended to be the one clear authority on maritime oil spills by which these goals could be attained.[37] Whether OPA has actually accomplished this goal is still disputed to this day.[38] However, since the BP spill will be the largest oil spill since the enactment of OPA, it will probably prove to be the most significant and revealing test of the purported improvements.

Through OPA, Congress stated that natural resource damages were recoverable in the event of an oil spill, and delegated the authority to the President to author the specific regulations

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[33] *See, e.g.*, State of Idaho v. Southern Refrigerated Transp., 1991 WL 22479 at *18-19; Allan Kanner and Tibor Nagy, *Measuring Loss of Use Damages in Natural Resource Damage Actions*, 30 Colum. J. Envtl. L. 417, 433-438 (2005); Murray B. Rutheford, Jack L. Knetsch, and Thomas C. Brown, *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 Harv. Envtl. L. Rev. 51, 66-69 (1998).

[34] Southern Refrigerated, 1991 WL 22479 at *18-19. Note: This is the only case as of 2005 to have rejected the admissibility of CV. Research as of this date found no other examples.

[35] Ramseur, *supra* note 18, at 8-9. *See* also Cecil and Foster, *supra* note 18, at 424-25.

[36] Alexander, *supra* note 10, at 1-2.

[37] Ramseur, *supra* note 18, at 9.

[38] *See*, e.g., Keith B. Letourneau and Wesley T. Welmaker, *The Oil Pollution Act of 1990: Federal Judicial Interpretation Through the End of the Millennium*, 12 U.S.F. Mar. L.J. 147, 223-25 (2000); Anderson, supra note 4, at 484.

that would provide for the recovery of those damages.[39] The President subsequently delegated his authority to write and regulate the NRDA provisions of OPA to NOAA.[40] In 1996, NOAA published its "final rule" on the use of NRDAs as they applied to OPA.[41] The provisions of the final rule on NRDA include the guidelines by which a federally appointed trustee will assess and recover the damages resulting from the oil spill from the responsible party.[42] Invoking similar language as provided by the CERCLA's NRDA provisions, NOAA's final rule states that there are several methods available that may be employed by the trustee in order to determine how much a responsible party owes for the damages to and loss of natural resources, many of which are listed in the appendix to the final rule, including the use of CV.[43]

1. Provisions of the Final Rule

i. The Rebuttable Presumption.

NOAA's final rule on NRDA has several provisions that will be quite significant to the BP spill. One such provision states that once the trustee has established that their assessments have addressed the "type and scale of restoration appropriate for a particular injury"; that the "additional cost[s] of a more complex procedure [are] reasonably related to the [] increase in quality and/or quantity of relevant information"; and that the assessments are "reliable and valid"; then the valuations determined by the trustee based on the NRDAs will have the benefit of a rebuttable presumption in court.[44] This means that should a responsible party challenge a trustee's decision regarding any aspect of the NRDA process, or the use of any method of valuation, the responsible party will have the burden of proving that the trustee's decisions are

[39] General Electric v. The United States Department of the Interior, 128 F.3d 767, 770 (D.C. Cir. 1997).

[40] Id.

[41] *See*, e.g., 15 C.F.R. § 990.24, 990.27, 990.40-66.

[42] *See* Letourneau and Welmaker, *supra* note 38, at 90-91

[43] 15 C.F.R. § 990.13; 15 C.F.R. § 990.27.

clearly erroneous or the assessment has obviously deviated from the guidelines of the final rule. So, unless there is credible evidence rebutting the presumption that the trustee's decisions have satisfied the guidelines of the final rule, the decisions regarding the methods used and value determinations of the assessment will be valid, and the costs will be enforced against the responsible party.

One commentator, however, has questioned whether this presumption will actually apply to the use of CV as an assessment technique under OPA because of subsequent changes in evidence law,[45] but as of yet there has been no court decision denying the trustee the benefit of the presumption for deciding to use CV as a method of NRDA. Nevertheless, the trustee still must act within other federal regulations. For instance, when implementing a plan for restoring the natural resource, the trustee must do so in a way that does not violate the protections accorded to other aspects of the environment by other federal laws.[46]

ii. The NRDA Process under the Final Rule - Phase One

NOAA's Final Rule has divided the NRDA process into three phases. In Phase One, the Pre-Assessment Phase, the trustee determines whether there is jurisdiction under OPA to pursue an investigation into the need for restoration projects, and if they do have jurisdiction, whether it is appropriate to do so.[47] To do this, a trustee must show that an incident has occurred that does not fall under a permitted exception, and that the extent or severity of the damages to natural resources cannot be remedied by clean-up procedures alone.[48] The trustee may opt to collect

[45] *See* Letourneau and Welmaker, *supra* note 38, at 196-200, which argues that the Supreme Court decision in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), has put a predicate requirement on expert testimony, such as a trustee, requiring the expert to pass a reliability evaluation by the judge; therefore, a decision by a trustee to use CV that does not pass this evaluation will not entitle that decision to the rebuttable presumption outlined in OPA.

[46] 15 C.F.R. § 990.23.

[47] 15 C.F.R. §§ 990.40-42.

[48] Id.

data to show this, for which it may recover costs from the responsible party.[49] Once a determination has been made, the trustee will then post a Notice of Intent to Conduct Restoration Planning, which essentially lets the responsible party know that the government will be proceeding further with its NRDAs, allowing the party a chance to participate should it choose to do so, as it will be financially responsible for the trustee's decisions and evaluations.[50] After the Notice of Intent has been issued, the trustee must open an administrative record so the public is aware of the trustee's decisions, and has a chance to comment on the process.[51] This provision was likely a response to criticisms of the Exxon Valdez NRDA settlements, where the NRDA process was kept a secret from the public, and resulted in a controversial settlement between the government and the responsible parties for the damages done to natural resources.

iii. NRDA under the Final Rule - Phase Two

Phase Two of the final rule is the Restoration Planning Phase, which is divided into two sub-phases. During the first sub-phase, the trustee must develop a process for evaluating the scope of the damage.[52] This sub-phase is where CV method may be used. This sub-phase also entails the determination of the type of damage that has occurred, and whether a causal connection can be made between the spilled oil and the damaged resource.[53] The trustee must elaborate on both the geographical extent of the damages and the degree of harm suffered.[54] In the next sub-phase, the trustee must determine the type of restoration actions that are possible, and decide which would be best for rehabilitating and replacing the natural resources.[55] In doing so, a series of guidelines must be followed in order to ensure that the restoration plan selected is

[49] 15 C.F.R. § 990.43.
[50] 15 C.F.R. § 990.44.
[51] 15 C.F.R. § 990.45.
[52] 15 C.F.R. § 990.51.
[53] Id.
[54] 15 C.F.R. § 990.52.
[55] 15 C.F.R. § 990.53.

as cost-efficient as possible, while at the same time ensuring the greatest level of recovery of natural resources.[56] The plans that have satisfied these guidelines and are selected by the trustee will then be compiled into a Draft Plan, which will also be published for public comment.[57]

iv. NRDA Under the Final Rule - Phase Three

In the final phase, Phase Three, or the Restoration Implementation Phase, the administrative record is closed and a demand is then presented to the responsible party to comply with the Draft Plan.[58] The responsible party then has 90 days to challenge the plan, begin implementation or compensate the government, or it risks incurring further liability.[59] However, should they refuse to comply, the government will then undertake the efforts outlined by the Draft Plan, and it can take the responsible party to court in order to recover the costs it incurs, as well as to potentially receive other damage awards.[60] The trustee's decisions, having the benefit of the presumption, are difficult to invalidate, unless some outrageous deviation from acceptable NRDA procedures can be shown.[61] Whether or not the responsible party implements the plan, challenges within the 90 days, or compensates the government, the NRDA process will still only be concluded once the conditions of the natural resources have reached their pre-spill status.[62]

2. The Liability Cap Provision of OPA

Another important provision in OPA has imposed a cap on the monetary amount that the responsible parties may pay out for NRDAs.[63] Congress included this cap in OPA, perhaps

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[56] Id. *See*, also, 15 C.F.R. § 990.54.
[57] 15 C.F.R. § 990.55.
[58] 15 C.F.R. § 990.61-62.
[59] 15 C.F.R. § 990.62; 15 C.F.R. § 990.64.
[60] 15 C.F.R. § 990.64.
[61] 15 C.F.R. § 990.13; Letourneau and Welmaker, *supra* note 38, at 191-92.
[62] 15 C.F.R. § 990.10.
[63] 33 U.S.C. § 2704.

influenced by the concerns of the industry about unpredictable awards.[64] When an oil spill involves an offshore drilling rig, as the BP oil spill did, the maximum amount recoverable from a responsible party for non-clean up costs, including NRDA, is 75 million dollars.[65] However, the liability cap provision provides that if the responsible party is found to be grossly negligent, to have acted willfully, or in violation of a federal statute, the cap will not apply.[66] This cap will not be applied to the amount paid by the responsible party for damages available under state law claims or clean-up costs.[67] There has been some public concern that the 75 million dollar cap will fall short of the amount needed to restore the natural resources, which has led to congressional debate over increasing the limit, but so far no new regulation has been implemented.[68]

3. OPA and the Courts

The only significant legal challenge to OPA regarding NRDA was in the General Electric v. the United States Department of Interior[69] case, where private interest parties challenged various provisions of NOAA's final rule in accordance with an OPA clause allowing for administrative review of NOAA's final rule provisions within 90 days of its promulgation.[70] The relevant challenges offered by the petitioners were their arguments against OPA's granting of a rebuttable presumption to the trustee's decisions and findings, and to NOAA's decision to

[64] *See*, e.g., Exxon v. Baker, 128 S.Ct at 2626-27; Note: The caps also apply to other monetary awards not discussed in this paper, such as loss of subsistence use damages. *See* 33 U.S.C. § 2702(b)(2)(B).

[65] 33 U.S.C. § 2704(a)(3).

[66] 33 U.S.C. § 2704(c).

[67] Id.; 33 U.S.C. § 2718; Ramseur, *supra* note 18, at 7.

[68] *See* Alexander, *supra* note 10, at 14; Article, *Deepwater Horizon: Updating the OPA*, The Environmental Forum, Sept.-Oct. 2010, at 46.

[69] 128 F.3d 767, a petition by industrial parties for review of NOAA's final rule. Regarding the rule, the court held: the rule presumption was permissible; it properly allowed use of CV; it's authorization for removal of residual oil suffered from a lack of decision making; it properly held responsible parties accountable for monitoring and oversight costs; it need not preclude recovery of passive use values; and it did not violate a responsible party's rights to seek contribution from other parties.

[70] Id. at 771.

include CV as a method of NRDA.[71] The court reviewed these provisions under an "arbitrary and capricious" standard, meaning that the rules are to be upheld unless the court finds that NOAA's regulations had no rational connection to the subject they were intended to address.[72] This legal hurdle is rather difficult to overcome, and not surprisingly, the court upheld the validity of both of these provisions.[73]

The court recognized the fact that CV has been a source of controversy, but it would not go so far as to say that the decision to include it as a method of assessment was "arbitrary and capricious."[74] In developing the regulations, NOAA had commissioned a panel, which included two Nobel laureates, to determine the appropriateness of using CV in damage assessment.[75] The panel "concluded that if properly conducted under strict guidelines, the technique can convey useful and reliable information, . . . 'reliable enough to be the starting point of a judicial process of damage assessment.'"[76] The challengers argued that since there were no strict guidelines in the final rule regarding the use of CV, NOAA had disregarded the panel's recommendation, and therefore had acted arbitrarily and irrationally.[77] The court however, persuaded by NOAA's response, reasoned that since the provision in the final rule did not require the use of CV, but merely approved it as one of a number of methods that may be used for NRDAs, that its inclusion in the provision was not arbitrary and irrational.[78] The court explained that the proper time to challenge the use of CV would only come about in a specific case where it had been used

[71] Id. at 771-72.
[72] Id. at 771.
[73]
[74] Id. at 772-73.
[75] Id. at 772.
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[77] Id. at 773.
[78] Id. at 773-74.

as a method of damage assessment.[79] Thus, the door was left open for a responsible party, for instance BP, to challenge the particular valuations made by a trustee based on CV in its NRDAs, but could not succeed by merely challenging the use of CV as an NRDA method in general.

IV. NATURAL RESOURCE DAMAGE ASSESSMENTS AND THE BP OIL SPILL: THE PRESENT STATE OF AFFAIRS AND THEIR LEGAL IMPLICATIONS

Almost immediately after the spill, BP was named the responsible party and began working on clean-up activities alongside the Coast Guard and other government agencies.[80] Despite criticisms of BP for downplaying the extent of the spill in the days after the event, and the length of time it took to cap the leaky well, there has been little public criticism of BP's willingness to cooperate with government requests.[81] Clean-up efforts have yet to conclude, but when the efforts do cease and the costs are tallied, there may be some litigation between the government and BP. BP may make the argument that the clean-up costs the government seeks to impose upon BP could actually be NRDA costs, the latter being subject to the monetary cap, while the former has no such restriction, thereby lowering the amount of BP's clean up costs. The potential for dispute over the difference between clean-up costs and damage assessment costs is one criticism that has been leveled against OPA as one of its vagaries.[82]

As for the NRDA process itself, the Notice of Intent to Conduct Restoration Planning was presented on September 29, 2010, signifying the conclusion of the Pre-Assessment Phase of the final rule.[83] NOAA, as the trustee, has begun the Restoration Planning Phase and continues

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Id.

See Alexander, *supra* note 10, at 6; Press Release, *BP Initiates Response to Gulf of Mexico Oil Spill*, released April 22, 2010, *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7061490.

See, e.g., Rebecca M. Bratspies, *Regulating by Regulators, Not Industry*, The Environmental Forum, Sept.-Oct. 2010, at 48; Russel V. Randle, *Contingency Planning - Lessons Learned*, The Environmental Forum, Sept.-Oct. 2010, at 51.

Anderson, *supra* note 4, at 490.

Notice of Intent, *supra* note 1.

to collect data in order to develop Restoration Plans for the area.[84] From all indications, BP has been complying with the process.[85] There has been no indication as of yet as to whether CV will be or is being used as a method to value damaged natural resources, but should it be used, it is likely that any costs based on the use of CV will be challenged by BP, as CV valuations have been successfully challenged in at least one case in the past, albeit under CERCLA.[86] Further, if it is indeed true, as posited earlier, that CV will not be entitled to the benefit of OPA's rebuttable presumption, then the chances of BP successfully invalidating a valuation determination based on CV greatly improves.[87]

Interestingly, there have also been reports that private environmental organizations are criticizing the data collection techniques employed by NOAA as being ineffective and likely to produce inaccurate NRDAs.[88] These groups allege that the techniques fail to properly identify damaged natural resources, and that this benefits BP by under-representing the amount of damage that has been done.[89] These organizations are not likely to have any type of legal action to enforce their claims, because the trustee, and in some cases the responsible party, will be the only entities legally entitled to evaluate and determine the damages to natural resources, so presumably the ability to comment on the public record will be the only redress these organizations have for their assertions.

The role that the monetary cap will have on the NRDA damage award is uncertain. BP has already committed 20 billion dollars to a fund that is managed by an independent firm, but that money has been reserved for settlements and liability awards for individual claims only, and

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[84] Press Release for Notice of Intent, *available at* http://www.darrp.noaa.gov/ (last visited Nov. 16, 2010).

[85] Id.

[86] *See* Southern Refrigerated, 1991 WL 22479 at *18-19.

[87] *See* Letourneau and Welmaker, *supra* note 38, at 199-200.

[88] Rick Jervais, *Research Teams Find Oil on Bottom of Gulf*, USAToday (Oct. 25, 2010), *available at* http://www.usatoday.com/news/nation/2010-10-25-oilresearch25_ST_N.htm.

[89] Id.

will not be used as a source of recovery for the costs and determinations of the NRDAs.[90] There has been growing public concern that the 75 million dollar cap will not cover the NRDA costs and the costs of restoration, which has led to some discussion in Congress about increasing the liability cap, but nothing further has developed.[91] However, the cap would not be applicable if BP is found to be grossly negligent, to have acted willfully, or in violation of a federal statute, so the issue may be moot, depending on the government's official investigation into the events leading up to the explosion.

According to NOAA representatives, most of the compensation for NRDA and implementation costs in the past has been obtained through negotiations and settlements with the responsible party.[92] These negotiations, unlike the NRDA process of the final rule, are usually privileged, and not subject to public input.[93] However, they often include a reopener clause as one of the conditions of the settlement, which would allow the government to recover more money should the amount settled upon prove to be deficient.[94] If this trend continues, BP and the federal government may merely agree on an amount projected to cover the cost of restoration, which would reduce the legal costs on both sides, and result in BP's dismissal from the NRDA and restoration efforts.

[redacted]

Alexander, *supra* note 10, at 10.

Karen Sloan, *After Oil Spill Disaster, Maritime Law is All at Sea*, The National Law Journal (July 30, 2010), *available at* http://www.law.com/jsp/article.jsp?id=12024639757174&pos=ataglance.

See Alexander, supra note 10, at 13-14; E-mail correspondence with Tom Brosnan, NOAA Communications and Outreach Manager (Oct. 13, 2010).

Alexander, *supra* note 10, at 14; Cecil and Foster, *supra* note 18, at 424-25.

Id. at 14-15.