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## INTERPRETING THE OIL POLLUTION ACT OF 1990 (OPA 90) AS INAPPLICABLE TO THE NATURAL GAS INDUSTRY AND DEEPWATER LNG PORTS

PATRICK R. PENNELLA<sup>1</sup>

### *Introduction*

The ELLEN G. TITAN navigates the Charles River towards Everett, Massachusetts, carrying 210 thousand cubic meters of liquefied natural gas (“LNG”).<sup>2</sup> Coast Guard patrol craft flank the vessel.<sup>3</sup> Massachusetts state police secure the shore and bridges. It is just one delivery of many shipments that supply LNG to the northeast United States. The ELLEN G. TITAN passes abeam of the U.S.S. CONSTITUTION, a wooden naval

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1. George Mason University School of Law, J.D. Candidate, May 2018; United States Coast Guard Academy, B.S., Government, May 2007. The views expressed herein are solely those of the author and are not to be construed as official or reflecting the views of the Commandant, the U.S. Coast Guard, or the U.S. Government. I am grateful for the assistance of Professor Jeremy Rabkin, Mr. Michael Goad, Douglas Brooking and Samuel Jimison in preparing this article. Any errors that remain are my own.

2. The *Titan* is a fictional LNG tanker. The Q-Flex class of LNG tankers carries between 210 and 216 thousand cubic meters of LNG and have been arriving in the United States since 2008. See Qatargas, *First Qatargas Q-Flex Reaches US*, DOWNSTREAM TODAY, June 25, 2008, [http://www.downstreamtoday.com/news/article.aspx?a\\_id=11548](http://www.downstreamtoday.com/news/article.aspx?a_id=11548). The Distrigas LNG Import Terminal in Everett, Massachusetts is the longest operating LNG import facility in the United States and serves nearly all of the gas utilities in New England. See, e.g., *About LNG: The Role of LNG in the Northeast Natural Gas (and Energy) Market*, NAT. GAS ASS’N, [http://www.northeastgas.org/about\\_lng.php](http://www.northeastgas.org/about_lng.php) (last visited Mar. 30, 2018).

3. Following the September 11, 2001 terrorist attacks, the Coast Guard began escorting LNG tankers through Boston Harbor. See, e.g., 147 Cong. Rec. S27739 (daily ed. Dec. 20, 2001) (statement of Sen. Kerry).

sailing ship from the early days of the Republic. To the northeast, Logan International Airport. To the southwest, Boston's historic North End. Half a million people. Then, the LNG containment is breached, followed by a spark. And in a flash, literally, this entire area is leveled. A humanitarian cataclysm. An environmental catastrophe. An economic calamity. Such has been the fear since 2001.<sup>4</sup> Perhaps an accident. Perhaps terrorism. Perhaps some evidence survived vaporization, such as legislative breadcrumb trail. Perhaps there was a way to avoid this catastrophe, but the Oil Pollution Act of 1990 ("OPA 90"), and the Deepwater Port Act of 1974 ("DPWA"), as amended by the Maritime Transportation Security Act of 2002 ("MTSA"), acts meant to protect the environment and promote security, may thwart the solution.

LNG is generally safe. The above scenario would occur only under rare conditions. While the likelihood of the above disaster is small, it is nevertheless possible. What if the ELLEN G. TITAN never entered the harbor, but could still transfer its clean energy? Rather than enter port, what if the ELLEN G. TITAN could hook into a pipeline miles into the ocean, far from terrorist threats and far from the navigation hazards common when approaching land, such as currents, shoals, and other vessels? This is the deepwater port concept. It has been around for decades, though usage is minimal. Despite the benefits to security and safety from deep-water location and benefits to the environment by reducing marine accidents and using cleaning-burning LNG whose accidental discharge would have minimal environmental impact, especially compared to oil, those who seek to construct deepwater ports face regulatory obstacles. From a complex licensing process to approval from the coastal state, many laws and regulations govern the process. While their merits are debatable, they are the law. However, one significant burden is not the law, but a questionable interpretation and application of OPA 90, a law seemingly inapplicable to the natural gas industry.

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4. *See generally*, MIKE HIGHTOWER ET AL., GUIDANCE ON RISK ANALYSIS AND SAFETY IMPLICATIONS OF A LARGE LIQUEFIED NATURAL GAS (LNG) SPILL OVER WATER (Sandia National Laboratories, Dec 2004). In 2004, the Sandia National Laboratory, a division of the Department of Energy, assessed the danger posed by an intentional breach of an LNG carrier. It concluded that major injuries and significant structural damage would occur within a 500-meter radius, with a significant potential for injuries and structural damage existing within a 1600-meter radius. Parts of Boston could fall within a 500-meter radius of an LNG carrier transiting the Charles River en route to its terminal at Everett, Massachusetts. *See also* Sean T. Dixon, *Deepwater Liquefied Natural Gas Ports and the Shifting U.S. Liquefied Natural Gas Market*, 17 OCEAN & COASTAL L.J. 1, 16-17 (2011).

Misinterpretation of one provision of the Act may result in imposing a \$373 million barrier to construction. A natural gas facility that handles natural gas must maintain this sum. Why? To fund clean-up costs in the event of an oil spill. Although the requirement far exceeds of any risk of oil pollution, if that is what the law unambiguously requires, then that is what the law requires. This result, however, is unintended and unnecessary. And, this provision is only applicable to the LNG industry because Congress amended a different law to which OPA 90 refers to incentivize deepwater LNG ports.

Fortunately for the American energy renaissance,<sup>5</sup> this comment maintains that OPA 90 is inapplicable to deepwater LNG ports. Based on the (1) plain meaning of the text of OPA 90, (2) the clear intent of Congress when enacting OPA 90 and two related statutes, and (3) the purpose of all three acts, a deepwater LNG port should not be governed OPA 90. Thus, the government should find inapplicable the requirement that deepwater LNG port operators certify the availability of hundreds of millions of dollars in order to obtain a permit to operate.

The inapplicability of OPA 90 does not mean a LNG facility would be exempt from liability if it causes environmental damage. Rather, the operator would foot the minimal remediation costs when pollution occurred.<sup>6</sup> However, an author's reasoned opinion is hardly sufficient; either the applicable regulatory agency – the United States Coast Guard – or a federal court would have to reach the same conclusion. Or, Congress could amend Title 33 of the U.S. Code to remove any doubt. The Coast Guard's position fuels the uncertainty, likely caught unaware of the natural gas industry's interest in deepwater LNG ports. The same is true for the courts, though relevant litigation is sparse and what little does exist does not directly address the LNG applicability aspect. This result effectively requires each deepwater LNG port to seek a written exemption to OPA 90 from the Coast Guard before starting construction or maintain hundreds of millions of dollars.<sup>7</sup> Unfortunately, powerful interests may array against this reasonable interpretation.

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5. See discussion *infra* Section I.0.

6. These ports would still be considered an offshore facility under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012), and specifically under 33 U.S.C. § 1321 (2012).

7. *E.g.*, Letter from Daron T. Threet, counsel for Liberty Natural Gas, LLC to Curtis E. Borland, Vessel and Facility Operating Standards Division, U.S. Coast Guard, regarding the Port Ambrose Project; Determination of Non-Applicability of OPA 90 Financial Responsibility Provisions (Mar. 16, 2015).

Divided into three subparts, Part I of this comment provides relevant background. Subpart A briefly traces the history of relevant legislation to identify the obscure connection to the natural gas industry. Subpart B next examines the American energy renaissance and threats to its realizations. Part I finally concludes with Subpart C, which discusses both the future potential of the natural gas industry and transportation of LNG by sea. Part II examines the regulatory figures and environment in which these figures regulate. Part II continues by explaining the history of the relevant statutes and the statutory text at issue. Part III discusses the flawed current application of OPA 90 to deepwater LNG ports and the potential for inconsistent application, unclear rules, and harmful outcomes from the current interpretative approach. Part IV applies common methods of statutory interpretation to the relevant statutes to argue that the financial obligations imposed by OPA 90 on deepwater LNG ports are inapplicable given the text, intent, and purpose of the statute. Part IV recommends that the Coast Guard exercise its interpretative discretion to find deepwater LNG ports outside OPA 90 and that federal regulators base OPA 90 applicability determinations on an oil-centric commercial purpose test.

### *I. The American Energy Renaissance and the Green Death*

In the 1300, the Black Death left a wake of death and destruction throughout Europe. Some historians hypothesize that ships spread the disease from Asia into Europe. But, from death springs life. The shortage of labor transformed Europe, leading to an age of prosperity, innovation, and discovery that continues to this day. In an interesting historical twist, while the European renaissance resulted from one colorful plague spread by ships, another may kill an American renaissance reliant on ships. Natural gas is major energy source, competing against traditional fossil fuels, nuclear energy, and newer renewable sources. Application of OPA 90 represents an indirect method of attack for natural gas opponents; literal OPA 90 enforcement would impose an onerous cost on deepwater LNG ports far exceeding any risk posed to the marine environment.

#### *A. The Rest of the Story*

The story begins in 1975, when Congress enacted the Deepwater Port Act of 1974 (“DWPA”)<sup>8</sup> to regulate offshore oil terminals. In 1989, the *Exxon Valdez* spills 11 million gallons of crude oil into Alaskan waters after

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8. Deepwater Port Act of 1974, Pub. L. No. 93-627, 89 Stat. 2126 (Jan. 3, 1975), codified as 33 U.S.C. §§ 1501-24.

negligent operation runs it aground in Prince William Sound.<sup>9</sup> In response, Congress enacted OPA 90<sup>10</sup> to mitigate future oil spills into the oceans.<sup>11</sup> In 2001, 19 terrorists perpetrated the largest terrorist attack in U.S. history. Congress responded by enacting the Maritime Transportation Security Act of 2002 (“MTSA”)<sup>12</sup> to secure maritime commerce and port facilities.<sup>13</sup> And in this decade, these three events may conspire to thwart the development of the natural gas industry, which is poised to lead the American “Energy Renaissance.”<sup>14</sup>

Could this seemingly inexplicable connection to the natural gas industry, which resulted in the aforementioned potential destruction of Boston, be the work of the Illuminati, its goal still shrouded? No, no need to reach for your tin-foil hat just yet. The story is far less fascinating despite the significance of the impacts. Rather, accidental convergence of legislation

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9. H.R. REP. NO. 101-241, pt. 1, at 30 (1989); H.R. REP. NO. 101-241, pt. 2, at 9-10 (1989); S. REP. NO. 101-94, at 2 (1989).

10. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (Aug. 18, 1990), codified primarily under 33 U.S.C. §§ 2701-62. Other provisions were codified under Titles: 14 – Coast Guard (spill response technologies); 26 – Internal Revenue Code (regarding the Oil Spill Liability Trust Fund); 33 U.S.C. 1203, 1321, 1503, and 1517 (vessel communication equipment, spill contingency plans, and transfer of funds to the Oil Spill Liability Trust Fund); 43 – Public Lands (regarding the Trans-Alaska pipeline); and 46 – Shipping (new regulations on vessels transporting oil).

11. H.R. REP. NO. 101-241, pt. 1, 30; H.R. REP. NO. 101-241, pt. 2, at 10; S. REP. 101-94, at 2-3. Congress has been working on several provisions to expand liability for oil discharges for more than a decade, but this disaster provided the public attention and pressure necessary to enact statutory changes. *E.g.*, David H. Sump, *The Oil Pollution Act of 1990: A Glance in the Rearview Mirror*, 85 TUL. L. REV. 1101, 1103-04 (2011).

12. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (Nov. 25, 2002). While the Act was introduced on 20 July 2001, prior to the September 11, 2001 attacks, major changes to the language followed the attacks. For example, the original senate bill and accompanying report had no reference to deepwater ports or LNG. *See* S. REP. 107-64, at 15-20 (2001); S. 1214, 107th Cong., Cong. Rec. S8015-23 (2001) (as reported by S. Comm. on Commerce, Sci. & Transp.).

13. H.R. REP. NO. 107-777 § 101, at 3-5 (Nov. 13, 2002).

14. The “American Energy Renaissance” generally refers to a resurgence in U.S. oil and gas production beginning in the 2000s that may result in the U.S. being one of the largest, if not the largest, producer. Production may exceed consumption by 2020. It has been spurred by new technological developments that has made previously unrecoverable quantities of oil and gas recoverable. The term has been adopted by the media, industry, and even Congress. *See, e.g.*, Stephen Blank, “U.S. energy renaissance ruffles OPEC,” BALTIMORESUN.COM (Dec. 7, 2014, 6:00 AM), <http://touch.baltimoresun.com/#section/-1/article/p2p-82200550/>; ADM Paul F. Zukunft, Commandant, United States Coast Guard, Address at U.S. Coast Guard Headquarters: The State of the United States Coast Guard 2015 (Feb. 24, 2015), <https://www.uscg.mil/Leaders/Senior-Leadership/Commandant/>.

may breach the hull of OPA 90, its mandates seeping into the regulatory environment to pollute related industries. The security, economic, and environment implications, though dwarfed by the impending New World Order, may nonetheless be significant. In the interim, we must examine our energy regulations so as not to incidentally channel our energy industry into insecure and inefficient routes.

One must drill deep into legislation to find the circuitous connection. Natural gas is transported over long distances often as liquefied natural gas (“LNG”).<sup>15</sup> Maritime transportation of LNG is common<sup>16</sup> and these shipments are transferred pier-side. But if thousands of miles of pipelines already transport energy across the country, why not extend these pipes into the ocean? The oil industry asked this question and developed the deepwater port concept. Though usage never became widespread, the idea is for oil tankers to discharge their oil into pipelines that extend miles into the ocean along the sea floor and then rise to the surface at a fixed location.<sup>17</sup> A deepwater port is not a port in the traditional sense; it has no piers, buildings, or cranes. It is essentially a very long pipeline that transports oil – or LNG – from tankers at sea to shore-side facilities. This method not only saves transit time, but keeps these vessels from hazards found when approaching land.

Obviously, deepwater ports handling oil present a risk of a massive oil spill to the marine environment. Realizing this risk, Congress enacted the DWPA to regulate these offshore ports. At enactment in 1975, a deepwater port was limited to handling oil; no other cargo could be licensed.<sup>18</sup> In response to the *Exxon Valdez* oil spill, OPA 90 sought to ensure that those who discharged oil into the marine environment – “responsible parties” – could meet the financial liability associated with a discharge.<sup>19</sup> OPA 90

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15. Sheila Slocum Hollis, *Liquefied Natural Gas: “The Big Picture” for Future Development in North America*, 2 ENV'T'L & ENERGY L. & POL'Y J. 5, 7 (2007); Robert H. Nicholas, Jr., *Ocean Transportation of Oil and Gas and Hard Minerals*, 51 ROCKY MT. MIN. L. INST. 17B-1 (2005).

16. See Zukunft, *supra* note 14; Nicholas, *supra* note 15.

17. Interesting, only 2 of the 20 applications received by the Maritime Administration (MARAD) were for deepwater oil ports. The remaining 18 were for LNG ports. See DEEPWATER PORT LICENSING PROGRAM, UNITED STATES MARITIME ADMINISTRATION, MARAD.DOT.GOV, <http://www.marad.dot.gov/ports> (last visited Jan. 2, 2016).

18. Deepwater Port Act of 1974, Pub. L. No. 93-627, 89 Stat. 2126 (Jan. 3, 1975), codified as 33 U.S.C. §§ 1501-24.

19. 33 U.S.C. § 2716 (2012); see also H.R. REP. NO. 101-241, Pt. 1, at 38. Exxon was eventually held liable for \$2 billion, including \$1 billion in clean-up costs, \$500 million in

required oil tankers and facilities to certify availability of funds to cover liability up to a statutory liability cap.<sup>20</sup> As potential responsible parties, deepwater ports were specifically covered by OPA 90.<sup>21</sup> OPA 90 defined deepwater ports by referencing the definition established by the DWPA.<sup>22</sup> A deepwater port has the highest maximum liability of all entities covered by the Act, initially \$350 million dollars.<sup>23</sup>

At this point, you are probably wondering what relevance an act that serves to mitigate oil pollution while also referring to another act that exclusively applies to oil facilities bears to the LNG industry. This relevance was non-existent until at least until 2002. Following the terrorist attacks on September 11, 2001, Congress enacted the MTSA. One of its many provisions amended the DWPA to expand the definition of a deepwater port to permit LNG transportation. The growing importance of LNG, and the perceived security risk posed by LNG tankers operating near major cities, made the deepwater oil port concept attractive for LNG.

You are probably still wondering the applicability to LNG. Although OPA 90 refers to deepwater ports, and deepwater ports can now be licensed for LNG transportation, LNG ports do not deal in oil; OPA 90 should be irrelevant. Except, a deepwater LNG port may involve oil. For example, it may use trace amounts of oil for hydraulics or as a lubricant. And unlike for shore-side facilities and oil tankers, OPA 90 neither distinguishes the quantity of oil handled for deepwater ports nor does it distinguish the amount of funds facilities must certify based on quantity of oil or risk posed. Two barrels of oil might as well be two hundred thousand. Does the statutory language of OPA 90, applicable to a “facility” is “used for” the “purposes” of “handling” oil, cover deepwater LNG ports that make incident use of small amounts of oil? The answer, much like the controversial decision in *King v. Burwell*,<sup>24</sup> turns on the meaning of a few words. Is a deepwater LNG port a “facility” “used for” the “purposes” of

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damages to commercial fisherman and locals, and \$500 million in punitive damages. *E.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476, 515 (2008) (discussing Exxon’s liability).

20. 33 U.S.C. § 2716(c)(2).

21. 33 U.S.C. § 2701(6), (9), (22) (2012); 33 U.S.C. § 2716(c).

22. 33 U.S.C. § 2701(6).

23. 33 U.S.C. § 2704 (2012).

24. *King v. Burwell*, 576 U.S. \_\_\_, 135 S. Ct. 2480 (2015) (finding that a health care exchange established by the Federal government was an exchange “established by the State”).



“handling” oil, per the meaning of OPA 90? That’s the 373.8 million dollar question.<sup>25</sup>

The application of OPA 90 to deepwater LNG ports imposes a tremendous burden on this nascent industry, thwarting its development. A deepwater LNG port that uses a barrel or two of oil must assure the availability of more than a third of a billion dollars just to get a permit to operate, around \$4 million per gallon of oil. This is well in excess of the per-gallon cleanup cost. It would be ironic if one statute meant to lessen pollution and another meant to increase security united to hinder a time-saving and security-enhancing process for tapping a cleaner energy source that would have a minimal impact on the marine environment if discharged. But, unforeseeable consequences tend to accompany complex laws.

### *B. The Energy Renaissance*

In the last thirty years, domestic energy extraction declined, forcing the U.S. to rely on imported oil, and to a lesser extent, natural gas.<sup>26</sup> The first two decades of the twenty-first century, however, may result in another reversal.<sup>27</sup> New technologies may transform the United States from the world’s largest importer of oil and gas into the world’s largest producer and, potentially, exporter.<sup>28</sup> After more than 40 years of extraction, proven domestic oil reserves have approached their 1973 level and proven domestic reserves of natural gas is at an all-time high, 40 percent higher

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25. The statutory maximum liability for deepwater ports is \$373.8 million dollars as of 2014. This amount is more than four times the requirement for the next highest facility, the deepwater Louisiana Offshore Oil Port (LOOP), which has a special statutory cap among deepwater ports. *See* 33 C.F.R. § 138.230 (2014). The initial statutory cap was set at \$350 million and has been increased periodically for inflation, as permitted by law. *See* 33 U.S.C. §§ 2701(a)(4), 2704(d)(4). A deepwater port is required to certify funds to meet its maximum liability. *See* 33 U.S.C. § 2716 (c)(2). However, the secretary of the department in which the Coast Guard is operating (currently the Department of Homeland Security) may lower the liability limit to not less than \$50 million if risk so warrants (approximately \$53 million adjusted for inflation). 33 U.S.C. § 2704(d)(2). This has not occurred.

26. U.S. ENERGY INFO. ADMIN., U.S. CRUDE OIL AND NATURAL GAS PROVED RESERVES, Year-end 2016, 2, 5 (Feb. 2018) [hereinafter EIA, PROVED RESERVES 2016]; U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2015 WITH PROJECTIONS TO 2040, 17 (Apr. 2015) [hereinafter EIA, ENERGY OUTLOOK 2015].

27. *See* EIA, PROVED RESERVES 2016, *supra* note 26; EIA, ENERGY OUTLOOK 2015, *supra* note 26, at 21-22.

28. *See* Zukunft, *supra* note 14.

than in 1973.<sup>29</sup> This reversal only commenced in the last decade and identification of new proven reserves shows no signs of abating.<sup>30</sup> The American energy industry is experiencing a rebirth, an “energy renaissance.”

The U.S. and other nations may turn to natural gas as a cleaner alternative to oil, a “bridging strategy” to renewable forms of energy.<sup>31</sup> Before recent discoveries, a shift to natural gas required the U.S. to be a net importer natural gas. But now, the U.S. is poised to become a major exporter of natural gas. Domestic consumption of natural gas has steadily increased since the 1980s.<sup>32</sup> Currently, the vast majority of imports and exports are to or from Canada and Mexico and are via pipeline.<sup>33</sup> Higher domestic production has resulted in sharply declining net imports.<sup>34</sup> If this trend continues, exporting natural may become increasingly lucrative,<sup>35</sup> especially if other countries supplement natural gas for oil or coal. Since 2010, the Department of Energy, who must approve exports of natural gas, has received more than 300 requests to authorize exportation of natural gas.<sup>36</sup>

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29. See EIA, PROVED RESERVES 2016, *supra* note 26; U.S. ENERGY INFO. ADMIN., U.S. CRUDE OIL, NATURAL GAS, AND NATURAL GAS LIQUIDS RESERVES, 2000 ANNUAL REPORT (Dec. 2001).

30. See EIA, PROVED RESERVES 2016, *supra* note 26.

31. See Josh Lute, *LNG Terminals: Future or Folly?*, 43 WILLAMETTE L. REV. 621, 624-25 (2007); Matt Salo et al., *U.S. LNG Export Projects: Regulatory Outlook and Contracting Mechanism*, 8 TEX. J. OIL GAS & ENERGY L. 61, 63-64 (2012-2013); U.S. ENERGY INFO. ADMIN., NATURAL GAS EXPLAINED: NATURAL GAS AND THE ENVIRONMENT, EIA.GOV, [http://www.eia.gov/energyexplained/index.cfm?page=natural\\_gas\\_environment](http://www.eia.gov/energyexplained/index.cfm?page=natural_gas_environment) (last visited Mar. 26, 2018) (noting that natural gas produces nearly half the CO<sub>2</sub> as coal and a quarter of the CO<sub>2</sub> as oil); David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 441 (2013) (detailing the substantially lower emission of various pollutants by natural gas as compared to coal and oil).

32. See EIA, PROVED RESERVES 2016, *supra* note 26.

33. *Id.*

34. U.S. ENERGY INFO. ADMIN., U.S. NATURAL GAS IMPORTS & EXPORTS 2014 (May 11, 2015).

35. See, e.g., Dixon, *supra* note 4, at 29-30.

36. See Salo, *supra* note 31, at 66, 68. 33 U.S.C. § 1502(9) was amended in 2012 in anticipation of exports by the Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, 124 Stat. 1540 (Dec. 20, 2012). See also Northeast Natural Gas Association, *About LNG: The Role of LNG in the Northeast Natural Gas (and Energy) Market*, [http://www.northeastgas.org/about\\_lng.php](http://www.northeastgas.org/about_lng.php) (last visited Mar. 26, 2018).

Maritime transportation represents an efficient and common method of long distance transportation, whether for importation or exportation.<sup>37</sup> When transported via ship, natural gas is first liquefied.<sup>38</sup> Currently, maritime LNG shipments are generally transferred pier-side. Pier-side infrastructure requires large tankers to navigate through shallow waters and moor at major port facilities located in major population centers or in key shipping chokepoints.

A deepwater LNG port has several advantages over traditional land-based facilities. First, a deepwater port reduces the chance that a large, deep-draft LNG tanker will run aground in shallow waters or collide with other vessels in narrow waterways. Second, LNG is highly explosive in gaseous form, making LNG tankers potential floating bombs.<sup>39</sup> Bringing these vessels into port creates a tremendous risk from accidental explosions and presents an enticing target for terrorists.<sup>40</sup> Third, mooring in port has costs, namely extra transit time, compulsory pilotage charges, and docking fees. A deepwater port eliminates or minimizes these costs.

Construction of a deepwater port requires approval by the U.S. Maritime Administration (“MARAD”).<sup>41</sup> There have been twenty-one attempts to construct deepwater ports, either for oil or LNG, through the end of 2017.<sup>42</sup> MARAD approved ten of these ports for construction and denied two, whereas the applicants on the remaining nine applications withdrew entirely,<sup>43</sup> including one pending application that a coastal state later rejected in November 2015.<sup>44</sup> While the DWPA only included LNG ports

37. *Id.*; Zukunft, *supra* note 14; Nicholas, *supra* note 15.

38. See Slocum Hollis, *supra* note 15, at 7; Nicholas, *supra* note 15.

39. See HIGHTOWER, *supra* note 4; Dixon, *supra* note 4, at 16-17. To liquefy, natural gas must be super-cooled. One coolant containment is breached, it will rapidly re-gasify. *E.g.*, Nicholas, *supra* note 15, at 17B-4.

40. See HIGHTOWER, *supra* note 4; Dixon, *supra* note 4, at 16-17.

41. 33 U.S.C. § 1503 (2012); Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 36,496 (June 18, 2003) (to be codified at 49 C.F.R. pt. 1).

42. U.S. MAR. ADMIN., DEEPWATER PORT LOCATIONS & STATUS MAP, MARAD.DOT.GOV, <http://www.marad.dot.gov/ports/> (last visited Mar. 2, 2018) [hereinafter MARAD, DEEPWATER PORT MAP]; FEDERAL ENERGY REG. COMMISSION, NORTH AMERICAN LNG IMPORT/EXPORT TERMINALS: EXISTING, FERC.GOV, <http://www.ferc.gov/industries/gas/industryact/lng.asp> (last visited Mar 2, 2018) [hereinafter FERC, TERMINALS].

43. *Id.*

44. Letter from Andrew M. Cuomo, Governor of the State of New York, to Paul N. Jaenichen, Sr., Administrator of the U.S. Maritime Admin. regarding the Application of Liberty Natural Gas L.L.C. for the Port Ambrose Deepwater Port, Docket Number USCG-2013-0363 (Nov. 12, 2015).

since 2002, nineteen of the twenty-one total applications have been for deepwater LNG ports.<sup>45</sup> Of the ten approved, three are operational, one LNG port is under construction, and six LNG ports voluntarily surrendered their operating licenses.<sup>46</sup> Of the three operational deepwater ports, two handle LNG and one handles oil.<sup>47</sup> The one port under construction is approved to handle LNG.<sup>48</sup>

There are twelve operational domestic LNG import and export terminals; two are the deepwater LNG ports and the remaining ten are shore-side facilities.<sup>49</sup> Only one facility is currently authorized to export domestic LNG and three are permitted to re-export imported LNG.<sup>50</sup> There are four other LNG terminals in the remainder of North America: one in Canada and three in Mexico.<sup>51</sup> The location of ten shore-side facilities require LNG tankers to transit or moor near major population centers, critical infrastructure, or key waterways.<sup>52</sup> Despite the benefits from locating LNG terminals offshore and the potential for a major import or export market, opponents of natural gas or its exportation may sink the deepwater LNG port concept.

### *C. The Green Death*

One seemingly obvious potential threat to the natural gas industry is the oil industry. Gas and oil are substitute goods. However, while the major oil companies might seem to be the biggest threat, many are also in the natural gas business.<sup>53</sup> Instead of thwarting natural gas development, these companies may facilitate it. If the threat were to come from the oil industry, it would likely originate from smaller producers who are unable to produce natural gas profitably or from oil equipment or services providers that cannot adapt their business to service natural gas.

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45. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (Nov. 25, 2002); FERC, TERMINALS.

46. MARAD, DEEPWATER PORT MAP, *supra* note 42; FERC, TERMINALS, *supra* note 42.

47. MARAD, DEEPWATER PORT MAP, *supra* note 42.

48. *Id.*

49. FERC, TERMINALS, *supra* note 42.

50. *Id.*

51. *Id.*

52. *Id.*; see also U.S. ENERGY INFO. ADMIN., U.S. ENERGY MAPPING SYSTEM, EIA.GOV, <http://www.eia.gov/state/maps.php?v=Natural%20Gas> (last visited Jan. 2, 2016).

53. For example, Shell and Exxon Mobile are major natural gas producers. Rakteem Katakey & Tara Petel, "Big Oil's Plan to Become Big Gas," BLOOMBERG.COM (June 1, 2015, 6:00 PM), [www.bloomberg.com/news/articles/2015-06-01/big-oil-becomes-big-gas-as-climate-threat-spurs-tussle-with-coal](http://www.bloomberg.com/news/articles/2015-06-01/big-oil-becomes-big-gas-as-climate-threat-spurs-tussle-with-coal) (last updated June 2, 2015, 5:04 AM).

A more likely scenario is protectionist economic policies thwarting the exportation of LNG. Given the boon in domestic supplies and production, exporting natural gas looks more likely than importing it. Congress has already displayed a penchant for protectionism by banning most exports of oil or natural gas and requiring permission from the Federal Energy Regulatory Commission (“FERC”) before exporting natural gas.<sup>54</sup> The flawed rationale is that by banning exports, domestic energy prices will fall, to the benefit of domestic consumers.<sup>55</sup> Of course, falling prices may make production uneconomical and mitigate the expected dip in prices. Regardless, strong political forces exist to prevent natural gas exportation.

The nuclear and coal energy industries have voiced general concerns regarding greater use of natural gas. Coal and nuclear power facilities have sought, some successfully, subsidies and protection from state governments.<sup>56</sup> In 2017, FERC convened a technical conference and received 79 detailed post-conference public comments from states, utilities, and power generators regarding state support for certain forms of energy.<sup>57</sup> Many participants and commenters represented traditional energy, renewable energy, and environmental interest; these interests generally found natural gas as exerting a tremendous downward pressure on electric prices and argued for FERC to allow states to support non-natural gas generators.<sup>58</sup> These same actors may seek other methods of thwarting the natural gas industry if FERC resists state efforts to thwart market forces.

Another likely opponent to the natural gas industry comes from the radical wing of the environmental movement. Natural gas burns cleaner than oil and accidental releases would evaporate harmlessly rather than gather on birds and beaches, but burning natural gas still releases greenhouse gases. Some environmentalists oppose any use of fossil fuels.<sup>59</sup>

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54. See Dixon, *supra* note 4, at 5-6.

55. See Salo, *supra* note 31, at 78-79.

56. See generally post-conference public comments regarding state policies and wholesale electric capacity markets under FERC Docket AD17-11.

57. State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C., Notice Inviting Post-Technical Conference Comments, 82 Fed. Reg. 24,966, 24,966 (May 31, 2017); FERC Docket AD17-11.

58. FERC Docket AD17-11.

59. See, e.g., Linda Krop, *Deepwater Port LNG Licensing Decisions: A Case Study Involving the Deepwater Port Act and the Coastal Zone Management Act*, 5 GOLDEN GATE U. ENVTL. L.J. 227, 249-50 (2011) (stating that any greenhouse gas emission should be considered “as part of a cumulative problem that warrants consideration” when permitting

Also opposed by many environmentalists is the common method of extraction that has driven the resurgence of the domestic industry, hydraulic fracturing (or fracking).<sup>60</sup> Natural gas is abundant and cheap, and thus presents an attractive alternative to more expensive wind and solar energy. The allure of cheap and cleaner natural gas undermines arguments that more expensive renewable sources are the only option to address environmental concerns or dwindling resources.

Unlike a potential threat from energy competitors, environmental opposition to deepwater ports is not merely speculative. For example, California rejected a deepwater port application in 2007 due to concerns over anticipated air pollution from vessels using the port.<sup>61</sup> In November 2015, New York similarly rejected a deepwater LNG port application for several reasons, including environmental concerns.<sup>62</sup> The DWPA requires applicants to obtain the approval of the coastal state, though MARAD can overrule an environmental protection-based disapproval if it makes the license conditional on conformance to state environmental programs.<sup>63</sup> MARAD, however, did not overrule California's disapproval, and offered no reason for rejecting the application other than California's disapproval on environmental grounds.<sup>64</sup> The Sierra Club, a prominent environmentalist organization, has also stated its opposition to increased natural gas production and has tried unsuccessfully to block LNG terminals.<sup>65</sup>

Opponents could resort to traditional methods of competition, namely lobbying the legislature. Such motives, once made apparent, may be

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projects); Salo, *supra* note 31, at 81. *See also* public comments from environmental groups under FERC Docket AD17-11.

60. David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 433-34 (2013).

61. SEAN T. CONNAUGHTON, THE SECRETARY'S DECISION ON THE DEEPWATER PORT LICENSE APPLICATION OF BHP BILLITON LNG INTERNATIONAL INC., U.S. Maritime Administration (June 5, 2007) [hereinafter CONNAUGHTON, DECISION ON BHP BILLITON]; *see also* Dixon, *supra* note 4, at 15; Krop, *supra* note 59, at 239-51.

62. *See* Letter from Andrew M. Cuomo, *supra* note 44. The rejection letter cited risk from terrorism and natural disasters, interference with maritime traffic, and obstructing proposed offshore clean energy (wind) projects, and expressed skepticism that the natural gas would benefit New York consumers.

63. 33 U.S.C. § 1508 (2012); *see also* Dixon, *supra* note 4, at 15.

64. *See* CONNAUGHTON, DECISION ON BHP BILLITON, *supra* note 61.

65. *See* Salo, *supra* note 31, at 65-66, 77, 81, 93-94; Ayesha Rascoe, *Sierra Club Opposes Maryland LNG Export Terminal*, REUTERS.COM (Feb. 7, 2012, 4:45 PM), <http://www.reuters.com/article/usa-lng-exports/sierra-club-opposes-maryland-lng-export-terminal-idUSL2E8D771D20120207>.

insufficient to halt political forces in favor of LNG use. Intervention in the administrative process is another option, such as the Sierra Club's unsuccessful attempts to block LNG terminals in the Chesapeake Bay and on the Louisiana/Texas border.<sup>66</sup> But administrative agencies are subject to political pressure too, even if less so than Congress.

The federal courts, however, represent another avenue of attack, one that is less responsive to political and public pressure. LNG opponents, rather than directly opposing LNG, could instead go for the soft-kill. Opponents could insist on an expansive interpretation of OPA 90 that imposes exorbitant financial requirements on deepwater LNG ports. Thus, the projects would be permissible, though uneconomical.<sup>67</sup> Especially in the wake of the Deepwater Horizon disaster in 2010, what could be controversial about enforcing our oil pollution laws? Any move to amend OPA 90 to set more equitable requirements for deepwater LNG ports would likely be controversial as the nuance of a highly technical change would likely be lost in the debate. Thus, the LNG option goes up in smoke, or rather, gasifies and evaporates.

*II. Text and Context: Key Actors, Historical Circumstances, and the Text of the Deepwater Port Act of 1974, Oil Pollution Act of 1990, the Maritime Transportation Security Act of 2002, and the Clean Water Act*

The applicability of OPA 90 to deepwater LNG ports turns on statutory interpretation. Therefore, the apparent first place to consult is the statutory text. In this case, the statute directly at issue is OPA 90. However, properly interpreting OPA 90 and determining what the law encompasses requires a deeper analysis into its background and the meaning of the chosen words and phrases. This background includes the history and purpose of OPA 90 as well as the DWPA and the MTSA. One must also examine the different regulatory actors who interpret the statute. This section begins by discussing who is responsible for interpreting the relevant statutes and the environment in which they interpret. It then outlines the relevant text of the three relevant acts.

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66. See Salo, *supra* note 31, at 65.

67. Applicants for deepwater LNG ports have sought and received determinations from the U.S. Coast Guard that exempt their proposed ports from OPA 90 financial certification requirements. That applicants seek specific determination of exemptions prior to proceeding indicates that the certification of financial responsibility imposes costs significant enough to likely be determinative of the applicant's decision to build. Note that the exemption would not exempt them from liability from a discharge of oil, only exempt them from having to certify \$373 million in readily available funds. See discussion *infra* Sections III.0-0, IV.0.

## A. Context

### 1. Regulatory Actors

OPA 90, the DWPA, and the MTSA are three legislative acts covering a 40-year span. These acts confer regulatory power on executive agencies, notably FERC, MARAD, and the U.S. Coast Guard. FERC is the primary regulator of the natural gas industry.<sup>68</sup> Natural gas exports require an authorization order from FERC, with the determining criteria being whether exportation is “consistent with the public interest.”<sup>69</sup> FERC’s reach does not extend to licensing deepwater LNG ports,<sup>70</sup> though its approval remains relevant for ports that seek to export.

Per the DWPA, MARAD issues licenses to construct deepwater ports.<sup>71</sup> However, MARAD does not make determination of compliance with applicable environmental regulations. Instead, MARAD relies on the U.S. Coast Guard<sup>72</sup> for such determinations, including applicability of OPA 90.<sup>73</sup> The determinative factor is whether a deepwater LNG port is a facility that is used for handling oil.<sup>74</sup>

The final relevant regulatory actor is the federal courts, under which the Coast Guard’s interpretation of applicability can be challenged, either by a deepwater LNG port applicant upon who the Coast Guard foisted OPA 90’s financial certification requirement or by those opposed to the licensing. Judicial precedent generally grants executive agencies wide latitude in

68. 15 U.S.C. 717 (2012).

69. 15 U.S.C. 717(b), (f) (2012).

70. 33 U.S.C. §§ 1503, 1504 (2012); Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 36,496; *see also* Slocum Hollis, *supra* note 15, at 9-10.

71. 33 U.S.C. §§ 1503, 1504; Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 36,496.

72. In addition to being a regulatory agency, the Coast Guard is a federal law enforcement agency and the smallest of the five armed services. Unlike the other four services, the Coast Guard falls under the Department of Homeland Security. Its varied mission portfolio includes defense operations, law enforcement, search and rescue, facilitating maritime transportation, pollution response, and drafting and enforcing a variety of waterway, shipping, and maritime safety regulations.

73. *See, e.g.*, DAVID T. MATSUDA, THE SECRETARY’S DECISION ON THE DEEPWATER PORT LICENSE APPLICATION OF PORT DOLPHIN ENERGY LLC, U.S. Maritime Administration, 21 (Oct. 26, 2009) [hereinafter MATSUDA, DECISION ON PORT DOLPHIN]; SEAN T. CONNAUGHTON, THE SECRETARY’S DECISION ON THE DEEPWATER PORT LICENSE APPLICATION OF NEPTUNE LNG LLC, U.S. Maritime Administration (Jan. 29, 2007) [hereinafter CONNAUGHTON, DECISION ON NEPTUNE LNG].

74. 33 U.S.C. § 2701(6), (9).



interpreting statutes, with the degree of deference based on the degree of formality in the decision-making.<sup>75</sup>

## 2. Deepwater Horizon

In 2010, the Mobile Offshore Drilling Unit DEEPWATER HORIZON exploded in the Gulf of Mexico, resulting in the worst oil spill in U.S. history.<sup>76</sup> More than three million barrels of oil poured into the Gulf of Mexico over the 87 days until the wellhead could be capped,<sup>77</sup> making the discharge more than 10 times that of the EXXON VALDEZ.<sup>78</sup> As a result, any legislative push to revise OPA 90's liability limits to exempt deepwater LNG ports or to set a more appropriate liability limit is unlikely despite the vast difference between this accident and an accident from a deepwater LNG port.<sup>79</sup> Given opposition of many environmental groups to weakening environmental regulations or to the use of fossil fuels, these groups will likely lobby strongly against a change in legislation even if the intent of OPA 90 remains intact or is even facilitated.<sup>80</sup> The political optics are too charged and the benefits too concentrated to generate legislative interest.<sup>81</sup> Therefore, if more natural gas companies push for deepwater LNG ports, the most likely avenue of resolution is either the Coast Guard or the courts.

### B. Text

The primary text at issue is OPA 90. However, understanding the applicability of OPA 90 to deepwater LNG ports also depends upon the

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75. See discussion *infra* Section III.0.

76. GULF OIL SPILL, THE SMITHSONIAN NATIONAL MUSEUM OF NATURAL HISTORY, <http://ocean.si.edu/gulf-oil-spill> (Last visited Oct. 16, 2015); see also Jay Angle et al., *Legal Developments Since the Enactment of the Oil Spill Liability Act of 1990*, Note, 19 PA. ST. ENVTL. L. REV. 403, 405 (2011).

77. GULF OIL SPILL, *supra* note 76.

78. H.R. REP. 101-241, pt. 1, at 30; H.R. REP. 101-241, pt. 2, at 9-10; S. REP. 101-94, at 2.

79. The major difference is between the fuel at issue, LNG, which has substantially different characteristics than oil. Additionally, the wellhead in the Deepwater Horizon incident was nearly a mile below the surface whereas the pipeline for a deepwater LNG port would be only a few hundred feet below the surface.

80. See, e.g., Krop, *supra* note 59, at 249-50; Salo, *supra* note 31, at 81; Rascoe, *supra* note 65.

81. A public-choice grounded "transactional" view of the legislative process posits "continuous organized conflict" in such situations; Congress will produce no legislation or delegate to agency action. See WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 43-48 (2014).

purpose of the DWPA, which regulates deepwater ports, and the MTSA, which amended the DWPA to permit deepwater ports to handle LNG. Additionally, the Clean Water Act (“CWA”) exists alongside OPA 90, ensuring that discharges not covered by OPA 90 are still covered by law.

### *1. The Oil Pollution Act of 1990*

OPA 90 is an extensive regulatory scheme to reduce the chances and mitigate the impact of a discharge of oil into the environment. Reducing the likelihood of discharge occurs through regulations on the construction of oil tankers, pilotage requirements for oil tankers, mariner licensing requirements, and a communications equipment requirement.<sup>82</sup> Mitigating the impact occurs by requiring operators to have oil spill response plans, ensuring that industries that handle oil have sufficient funds to meet liability requirements, and creating a fund<sup>83</sup> to handle clean-up costs if a responsible party cannot be found or is insolvent.<sup>84</sup>

OPA 90 contains specific provisions for deepwater ports. The statute defines a deepwater port as a “facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524).”<sup>85</sup> Thus, for OPA 90 to apply to deepwater LNG ports, a port must be both licensed under the DWPA and a “facility” as defined by OPA 90. OPA 90, 33 U.S.C. § 2701, defines “facility” as a

structure [or group], equipment, or device (other than a vessel) which is *used for one or more of the following purposes*: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil . . . and includes any motor vehicle, rolling stock, or pipeline . . . .<sup>86</sup>

The statute requires all facilities to maintain a certificate of financial responsibility (“COFR”) up to a statutory maximum to meet financial liability resulting from a spill. A deepwater port must maintain a COFR up to its maximum limit of liability, which is approximately \$373 million.<sup>87</sup> This limit is the highest imposed by the statute and equal only to onshore

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82. 33 U.S.C. §§ 2701-62 (2012); Oil Pollution Act of 1990, Pub. L. 101-380, § 2 (Aug. 18, 1990).

83. The Oil Spill Liability Trust Fund, established by 26 U.S.C. § 9509 (2012) and maintained by the Coast Guard’s National Pollution Fund Center.

84. Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 484, § 2 (Aug. 18, 1990).

85. 33 U.S.C. § 2701(6).

86. 33 U.S.C. § 2701(9) (emphasis added).

87. 33 U.S.C. §§ 2704(a)(4), 2716(c)(2); 33 C.F.R. § 138.230.

facilities.<sup>88</sup> The Louisiana Offshore Oil Port, a deepwater port that handles the largest oil tankers in operation, has a liability limit of less than one quarter of that required for other deepwater ports.<sup>89</sup> The secretary of the department in which the Coast Guard operates may lower the statutory minimum to \$50 million through informal (notice-and-comment) rulemaking and after receiving a report regarding the risk of oil discharge from a deepwater port.<sup>90</sup> This rulemaking has not occurred and is not planned.

## *2. The Deepwater Port Act of 1974 and Subsequent Amendments*

The DWPA protects the maritime environment and coastal states from potential oil spills by regulating offshore facilities that transport oil.<sup>91</sup> The introductory section of the original enactment declares that the DWPA's purpose is to regulate deepwater ports and protect the marine environment.<sup>92</sup> Later amendments in 1996 and 2002 expanded the purpose to include promoting construction of deepwater ports and promoting offshore oil and gas development.<sup>93</sup>

The original DWPA applied only to facilities that transferred oil<sup>94</sup> and specifically barred deepwater ports from handling anything but oil.<sup>95</sup> Oil referred only to petroleum, crude oil, or any products refined from either;<sup>96</sup> thus, the original DWPA excluded natural gas. Congress expanded the

88. See 33 U.S.C. § 2704; 33 C.F.R. § 138.230; see also 33 U.S.C. § 2716 (showing that while the liability limits for a deepwater port and an onshore facility are equal, onshore facilities do not have to maintain a COFR).

89. 33 C.F.R. § 138.230; LOOP LLC, "About LOOP," [www.loopllc.com/About-Loop/Story](http://www.loopllc.com/About-Loop/Story) (last visited Nov. 5, 2015).

90. 33 U.S.C. § 2704(d)(2); see also Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (noting that, once adjusted for inflation, this lowered statutory minimum would be \$53 million; since 2002, the Coast Guard has operated under the Department of Homeland Security).

91. Deepwater Port Act of 1974, Pub. L. No. 93-627, 89 Stat. 2126 (Jan. 3, 1975), codified as 33 U.S.C. §§ 1501-24.

92. *Id.*

93. See Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3901, § 501-08 (Oct. 19, 1996) (adding these additional purposes); Maritime Transportation Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, § 106 (Nov. 25, 2002) (adding "natural gas" after all references to oil); see also 33 U.S.C. § 1501(a)(5), (6) (2012) (expressing the amended purpose of the DPWA as promoting natural gas use).

94. Deepwater Port Act of 1974.

95. *Id.* § 4(a).

96. *Id.* § 3(14).

DWPA to permit importation of natural gas in 2002 through the MTSA.<sup>97</sup> In 2012 during the Energy Renaissance, Congress authorized deepwater ports to export natural gas.<sup>98</sup> The DWPA, as amended, now both permits deepwater ports to be licensed to transport LNG exclusively and requires these ports to be licensed under its regime.<sup>99</sup>

### 3. *The Clean Water Act*

OPA 90 is not the only federal statute to regulate the discharge of oil into U.S. waters. The CWA concurrently governs discharges of hazardous waste into the ocean or navigable waters.<sup>100</sup> Oil is specifically covered at length by 33 U.S.C. § 1321.<sup>101</sup> This section declares U.S. policy to be to eliminate all discharges of oil into navigable waters,<sup>102</sup> prohibits discharge of oil into these waters in quantities determined by the President to be harmful,<sup>103</sup> and assesses administrative<sup>104</sup> and civil<sup>105</sup> penalties for oil discharges by a vessel or facility. The CWA does not define “facility” and the OPA 90’s definition applies only to the OPA 90 sections of Title 33: §§ 2701-62. Liability limits are lower than those established under OPA 90, but remain a still a significant \$50 million for offshore facilities.<sup>106</sup> The CWA, including § 1321, remains in force even after enactment of OPA 90; even if response costs for oil discharges are not covered under OPA 90, the federal government can still hold liable those who discharge oil into the water.

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97. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, § 106 (Nov. 25, 2002); Deepwater Port Act of 1974, at § 3(1). The original act and the act upon amendment in 2002 defined a deepwater port as a facility for the “transportation to any State . . .” (Emphasis added.)

98. Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, 124 Stat. 1540, § 312 (Dec. 20, 2012).

99. 33 U.S.C. §§ 1502(9), 1503 (2012).

100. 33 U.S.C. §§ 1251-1387. The Clean Water Act is the colloquial name. The statute is technically the Federal Water Pollution Control Act.

101. *Id.* § 1321 (2012).

102. *Id.* § 1321(b)(1).

103. *Id.* § 1321(b)(3).

104. *Id.* § 1321(b)(6).

105. *Id.* § 1321(b)(7).

106. 33 U.S.C. § 1321(f). Although this article argues that a deepwater LNG port is not a facility under OPA 90, it is nonetheless an offshore facility for purposes of the CWA.

*C. Pretext*

Statutory interpreters, such as courts and regulatory agencies, approach interpretation generally using four interpretative models, or a combination thereof. The primary approach is a textual approach, where the interpreter interprets the statute consistent with the plain meanings of the text, seeing the law as what was actually enacted and not what was potentially intended to be enacted.<sup>107</sup> However, the courts sometimes look to interpret the statute consistent with the intent of the enacting legislature even if that interpretation is not fully reflected in the plain language, through examination of legislative history.<sup>108</sup> A related approach is the purposive approach, where the interpreter tries to interpret the statute consistent with the general reasons underlying enactment.<sup>109</sup> A final approach is the dynamic approach, where interpreters seek to balance the text, the enactment context, and the current context of the case, rather than favor one approach over the others.<sup>110</sup>

Additionally, statutory interpreters also use guidelines – canons – to provide a more uniform approach to statutory interpretation. Canons represent widely shared conventional pre-understandings about linguistic, procedural, and policy presumptions. Canons of construction, as opposed to substantive canons, are neutral guides in interpreting ambiguous provisions.<sup>111</sup> As guides, canons are persuasive authority to help resolve ambiguity.<sup>112</sup> Relevant canons include interpreting provisions to avoid absurd results, defining one ambiguous word in a list consistent with the others in the list, utilizing the ordinary meaning of words unless specifically defined, considering the context of the entire act to inform the meaning of ambiguities, advising how to incorporate references to another statute when

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107. See, e.g., William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 610 (1990) (discussing the textualist approach); see also Kevin M. Stack, *The Interpretative Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 683 (2015).

108. Eskridge, *Gadamer/Statutory Interpretation*, *supra* note 107, at 611.

109. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Stack, *supra* note 107, at 683.

110. E.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482-84 (1987) (seminal work on the dynamic approach).

111. E.g., Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends* 4, Congressional Research Service (2011); Eskridge, *Gadamer/Statutory Interpretation*, *supra* note 107, at 633.

112. E.g., *id.*

that statute is amended, and interpreting statutory coverage expansively if designed to remediate specific problems.

Courts will apply varying levels of deference to the agency's interpretations of the law and its regulations, and agency determinations made pursuant to these. Courts may also allow agencies to make minor exceptions to the law if benefits of application in certain circumstances are trivial.

This article does not discuss the relative merits and critiques of each method or canon; rather, it examines OPA 90 consistent with each approach or canon to see how each would resolve the application of the deepwater port provision to natural gas. It also examines what level of deference a court would afford and whether an agency determination of inapplicability would survive judicial scrutiny. Sections III.C and IV.A provide detailed discussion on and application of these approaches, canons, and the varying degrees of deference.

### *III. Current Application of The Oil Pollution Act to Offshore LNG Facilities*

OPA 90's current applicability, as well as its COFR provision, to deepwater LNG ports is unclear. All deepwater LNG ports have sought and, for those who were licensed to operate, received exemptions from OPA 90. However, each decision was made on a case-by-case basis that affords no rule of general applicability.<sup>113</sup> The lack of clarity may dissuade some companies from pursuing a deepwater port option, complicates the approval process for those that do, and increase the likelihood of litigation. It would also complicate adjudication if an applicability decision were ever challenged in court. In short, the current state of the legal and regulatory reach is uncertain. Given the potential for significant natural gas development, the uncertainty ought to be resolved before an unhappy party turns to the courts.

#### *A. Current Interpretation: Your Gas is as Good as Mine*

OPA 90 applies to deepwater LNG ports because of the 2002 amendment to the DWPA. Interpretation of the applicability rests upon the following question: Does OPA 90 apply to a deepwater port whose purpose is to transport only LNG, but where incidental to its operation, it may use small quantities of oil?

There is no official Coast Guard interpretation, but current practice regarding the deepwater port licensing process appears to definitively say

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113. See discussion *infra* Section III.0.

yes, except for all applications thus received. A 2009 interim rule implied that in general, OPA 90 applies to the licensing process for deepwater LNG ports, but due to specifics of the constructions of LNG ports reviewed, none met the criteria to be considered a facility.<sup>114</sup> No rationale or standard was given; the rule merely stated that based on a case-by-case analysis, these deepwater LNG ports were not facilities.<sup>115</sup> The Coast Guard implied that if more oil was used for fuel or servicing equipment, these deepwater ports may well be facilities, but gave no further clarity.<sup>116</sup> The licensing approval for the Port Dolphin LNG facility granted in 2009 noted that because the port would “operate exclusively as a LNG deepwater port, and only small amounts of non-persistent oil would be stored and used to operate and maintain equipment, there would be little or no threat of an oil spill at the Port.”<sup>117</sup> This reasoning implies that OPA 90 applies if a certain threshold of oil is present. However, neither the statute nor regulations, nor any other agency determination specifies what quantity or usage triggers the requirement. Yet two earlier licensing approvals initially required a deepwater LNG port operator to obtain a COFR to satisfy the OPA 90 liability limit.<sup>118</sup> The latest licensing applicant also sought a similar determination.<sup>119</sup>

Judicial decisions oil the waters. Decisions are sparse and appear in differing unreported district court decisions. In *United States v. Southern Pacific Transportation Co.*, a district court held that a freight train that discharged oil from its fuel tanks during derailment was not a facility per OPA 90.<sup>120</sup> Even though “facility,” per the statute, is broad enough to

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114. Consumer Price Index Adjustment of Oil Pollution Act of 1990 Limits of Liability – Vessels and Deepwater Ports, 74 Fed. Reg. 31,357, 31,363 (interim rule with request for comment of July 1, 2009) (to be codified at 33 C.F.R. pt. 138); *see also* Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability – Vessels, Deepwater Ports and Onshore Facilities, 79 Fed. Reg. 49,206, 49,213, 49,213 n.23 (proposed Aug. 19, 2014) (to be codified at 33 C.F.R. pt. 138).

115. *Id.*

116. Consumer Price Index Adjustment of Oil Pollution Act of 1990 Limits of Liability – Vessels and Deepwater Ports, 74 Fed. Reg. 31,357, 31,363.

117. MATSUDA, DECISION ON PORT DOLPHIN, *supra* note 73, at 21.

118. SEAN T. CONNAUGHTON, LICENSE TO OWN, CONSTRUCT AND OPERATE A DEEPWATER PORT ISSUED TO NORTHEAST GATEWAY ENERGY BRIDGE L.L.C., 4, Annex D (May 14, 2007) [hereinafter CONNAUGHTON, LICENSE FOR NORTHEAST GATEWAY]; CONNAUGHTON, DECISION ON NEPTUNE LNG, *supra* note 73, at 18-19, 23-24.

119. *See* Letter from Daron T. Threet, *supra* note 7.

120. *United States v. So. Pac. Trans. Co.*, No. 94-6176-HO., 1995 WL 84193, at \*2 (D. Or. Feb. 20, 1995).

cover train cars,<sup>121</sup> the court held that OPA 90 is only applicable to the “commercial production and transportation of oil” and not to consumer use.<sup>122</sup> Fourteen years later in *Red River Farms v. United States*, a different district court held that oil leaking from a fuel line to an irrigation pump did make the farm a responsible party under OPA 90, implicitly ignoring the consumer use of the oil.<sup>123</sup> However, it is possible to reconcile the cases. In *Southern Pacific*, the locomotive was not used for the purposes of handling oil; oil was incidental, even if necessary, to the locomotive’s purpose of pulling train cars. In *Red River Farms*, the fuel line was used for the purpose of transporting oil, qualifying it as a facility under OPA 90.

A district court found the Coast Guard’s definition of facility to be “overly-broad” in *United States v. Viking Resources Inc* when the Coast Guard defined facility to include all structures within the geographic bounds of the defendant’s lease even though the statute limits liability to ownership operation.<sup>124</sup> As the *Viking* court noted when determining what constitutes a facility, “there is virtually no applicable case law elaborating on this definition.”<sup>125</sup>

In summary, there is no published rule or standard that clarifies what amount of oil or what uses of oil trigger the application of OPA 90 to a deepwater port. The only obtainable guidance is from inferences made from reading case-by-case determinations; these imply that OPA 90 does apply in principle to any facility that has oil present, but the COFR requirements are not triggered when a facility uses only minimal amounts of oil and perhaps when such minimal use is merely incidental to the facility’s purpose. Judicial decisions are mixed on whether mere consumption of oil is dispositive, but the Coast Guard seems to reject that approach in favor of its case-by-case approach, apparently based on quantity or risk.

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121. 33 U.S.C. § 2701(9).

122. *So. Pac. Trans. Co.*, 1995 WL 84193, at \*2.

123. *Red River Farms v. United States*, No. CV 08-2078-PHX-NVW, 2009 WL 2983195, at \*1-2 (D. Ariz. Sept. 17, 2009).

124. *United States v. Viking Res. Inc.*, 607 F. Supp. 2d 808, 816-17 (S.D. Tex. 2009). The court denied the government’s summary judgment motion because the government failed to show no material dispute existed on whether the defendant owned or operated certain structures. For an onshore facility, merely leasing the land upon which pre-existing structures existed was insufficient for liability and the defendant disputed some of the structures grouped by the government into the “facility.”

125. *Id.* at 816 n.24.



*B. Problems with the Current Interpretation*

The implications of interpreting the applicability of OPA 90 to deepwater ports are not merely academic. Several LNG deepwater ports have been constructed or proposed; all have sought and, for those where MARAD approve the license, received exemptions from the COFR before proceeding with construction. Finding that OPA 90 does apply comes with an onerous requirement to maintain \$373 million of free cash or insuring to that amount, a heavy counterbalance to the benefits of a deepwater location.

The Coast Guard's practice has been to examine each application on a case-by-case basis, and it has found that the deepwater LNG ports in each application were not "facilities" per OPA 90, and thus the statute is inapplicable.<sup>126</sup> However, the rationale for these determinations is unclear. Is it that these facilities do not handle or store oil despite using it because the purpose of these facilities is unrelated to oil? Or, is it a practical decision that recognizes as illogical a financial requirement far in excess of the risk against which the requirement is meant to insure? The descriptions given by the Coast Guard in July 2009, when it sought to increase the liability limit because of inflation, inclined towards the first reason.<sup>127</sup> However, both the reason cited in the October 2009 approval decision for Neptune LNG and the brief mention in 2014 when the Coast Guard sought to increase the liability limit inclined towards the second reason.<sup>128</sup> Inapplicability because these ports do not handle oil is a defensible reading of the statute. Inapplicability because of low risk is questionable. The statute neither sets an applicability threshold, nor gives permission to grant exemptions, nor permits adjusting COFR requirements or limiting liability based on overall risks. Perhaps the decision relies on the *de minimis* exemption,<sup>129</sup> but that rationale is unstated.

The reason for the ambiguity might be uncertainty over the applicability of the law or a desire for flexibility. Stating that the act excludes deepwater

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126. Consumer Price Index Adjustment of Oil Pollution Act of 1990 Limits of Liability – Vessels and Deepwater Ports, 74 Fed. Reg. 31,357, 31,363.

127. *Id.*

128. Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability – Vessels, Deepwater Ports and Onshore Facilities, 79 Fed. Reg. 49206, 49213, 49213 n.23; MATSUDA, DECISION ON PORT DOLPHIN, *supra* note 73, at 21. The Coast Guard issued its decision in August 2008.

129. The exemption allows agencies to not apply certain statutory provisions if application would have trivial benefits and would result in pointless expenditures. Courts imply applicability absent explicit contrary guidance. *See* discussion of the doctrine *infra* Section IV.C.0.

LNG ports might set the precedent for excluding other facilities, leading to unintended consequences. Stating that the act includes deepwater LNG ports even if the presence of oil is minimal and incidental, but then granting an exemption may be a practical accommodation. This interpretation is contrary to the text of OPA 90. OPA 90 has neither a waiver provision nor does it apply financial assurance requirements on a risk-based approach; if the act applies, the COFR requirement applies, and the amount required is the statutory maximum.<sup>130</sup> While larger companies may be able to set aside the necessary cash or acquire insurance to cover the COFR requirement,<sup>131</sup> smaller ones would likely be precluded. But for small and large entities alike, another alternative is to continue to locate LNG terminals onshore or to not build additional facilities. Unlike vessels, offshore facilities, and deepwater ports, onshore facilities have no COFR requirement.<sup>132</sup>

The absence of a COFR requirement does not mean that onshore facilities are exempt from liability for oil discharges. Onshore facilities remain subject to the CWA and to same \$373 million liability limit as deepwater ports,<sup>133</sup> except their maximum liability can be reduced through informal rulemaking to \$8 million based on risk. At issue is not whether deepwater LNG ports can or should be held liable for unauthorized discharges of oil; per the CWA, they will be.<sup>134</sup> Rather, the issue is simply whether deepwater LNG ports should be subject to a COFR requirement originally designed for a port handling incomparably greater quantities of oil, especially when other regulated entities that handle incomparably greater quantities of oil have lower liability limits and lower or no COFR requirement.

Deepwater LNG port operators need predictability and guidance prior to engaging in the costly approval process. Currently, no standard upon which to plan exists and decisions appear arbitrary and confusing. Given the substantial resources in question, if a deepwater LNG application is not

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130. 33 U.S.C. §§ 2704(a)(3), 2716(c)(2). 33 U.S.C. § 2704(d)(2)(C) does permit the Secretary of Homeland Security to reduce the liability limit for deepwater ports to not less than \$50 million, but such as reduction has not yet occurred nor is expected, nor does the statute allow for case-by-case reductions or waivers or give such authority to the Coast Guard.

131. *E.g.*, CONNAUGHTON, LICENSE FOR NORTHEAST GATEWAY, *supra* note 118, at 4, Annexes C & D.

132. 33 U.S.C. § 2716.

133. *Id.* § 2704(a)(4).

134. *Id.* § 1321.

exempted, a lawsuit will likely ensue.<sup>135</sup> However, if an exemption is granted, there is also a possibility of legal challenge.<sup>136</sup>

How is a deepwater LNG port applicant or a court to know what to do? Neither past deepwater LNG port licensing decisions nor court rulings provide clear guidance upon which potential LNG operators can plan or future courts can rely. An applicant will have to guess based on similarity of its designs and the quantity and use of oil as compared to previously-approved designs. The sparse judicial decisions are mixed and do not directly address the issue. The two more applicable decisions are unpublished district court decisions.<sup>137</sup>

Due to a decade of unresolved confusion and the high stakes, the issue should be addressed definitively. It is highly unlikely that Congress will amend the statute. As the lead regulatory agency, the Coast Guard is positioned best to resolve the confusion; it could use its authority to interpret the statute definitively. Otherwise, all interested parties roll the judicial dice. Nevertheless, resolving to answer the question requires knowing which answer is best.

### *C. Judicial Deference to the Current Interpretation*

Federal courts afford great deference to an agency's interpretation of statutes for which the agency is responsible. The Supreme Court expressed this deference in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*,<sup>138</sup> where it established a two-step inquiry for review of agency determinations.<sup>139</sup> The first step is to see if Congress has "directly spoken to the precise question at issue;" if Congress clearly expressed its intent, then the court and the agency must effectuate Congress's will.<sup>140</sup> If, however, Congress has not directly addressed the question, then the court must defer to the agency's reasonable interpretation of the statute.<sup>141</sup> However, the Court clarified scope of this rule in *United States v. Mead*

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135. As all proposed deepwater LNG ports have received exemptions or were cancelled for other reasons, this has yet to be tested.

136. While the COFR requirement has yet to be used as a weapon to thwart projects, environmental groups or environmental interest have had some success in blocking deepwater LNG port construction. See discussion *supra* Section I.0. Alternatively, protectionist groups may sue to make the statute applicable under the belief that it protects domestic consumers.

137. See discussion *supra* III.0.

138. 467 U.S. 837 (1984).

139. *Id.* at 842-43.

140. *Id.*

141. *Id.* at 843-44.

*Corp.*;<sup>142</sup> the *Chevron* inquiry applies only to situations where Congress intended for an agency's determinations to have the force of law.<sup>143</sup> Formality of the interpretative process, such as in a rulemaking process with its notice-and-comment requirement, or specific delegation in the statute would lead a court towards finding a "force of law" intent and applying *Chevron* deference.<sup>144</sup>

When an agency interpretation falls outside of *Chevron*, *Chevron's* predecessor, *Skidmore v. Swift & Co.* captures the fall-through cases.<sup>145</sup> Under *Skidmore*, agency interpretations remain, "entitled to respect."<sup>146</sup> The deference afforded depends upon the thoroughness of the agency's consideration, the "validity of its reasoning," consistency with earlier and later decisions, and the reasoning's persuasive power.<sup>147</sup>

If a party ever challenges the Coast Guard's decision in court, which deference should a court apply to the interpretation? With a circuitous application of COFR requirements to deepwater LNG ports caused by incorporation by an amended reference, it remains unlikely that a Court will find that Congress directly spoke to the issue. Thus, the question becomes one of reasonableness, but under the *Chevron* or *Skidmore* standard? After *Mead*, it appears that *Skidmore* applies since the Coast Guard's interpretation is hardly formal,<sup>148</sup> instead of a rulemaking or official interpretation of the statute, the Coast Guard decides COFR applicability to deepwater LNG port applications on a case-by-case basis and against no clear articulated standard.<sup>149</sup> Given terse explanation for finding the COFR requirement inapplicable in past applications, a court has little to work with concerning thoroughness, reasoning, or persuasion.<sup>150</sup> While continued exemptions from the COFR requirement would at least be consistent with earlier decisions, a contrary decision would be ripe for challenge and

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142. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

143. *Id.* at 226-27.

144. *Id.* at 231.

145. 323 U.S. 134 (1944).

146. *Id.* at 140.

147. *Id.*

148. *Mead Corp.*, 533 U.S. at 226-27, 231.

149. Deference under *Skidmore* is based upon the thoroughness of the agency's consideration, the "validity of its reasoning," consistency with earlier and later decisions, and the reasoning's persuasive power. *Skidmore*, 323 U.S. at 140. For the case-by-case decision process and limited rationale, see Consumer Price Index Adjustment of Oil Pollution Act of 1990 Limits of Liability – Vessels and Deepwater Ports, 74 Fed. Reg. 31,357, 31,363.

150. *Skidmore*, 323 U.S. at 140.

judicial invalidation. Yet, a court interpreting this remedial statute liberally<sup>151</sup> could also find that the COFR requirement should apply, especially given the absence of justification for inapplicability. Even approved facilities granted the exemption could then find the requirement imposed long after making large capital investments in reliance of the requirement's inapplicability.

#### *IV. A Sound Interpretation of the OPA 90 COFR Requirement*

While several schools of thought regarding statutory interpretation exist, interpreters, whether the courts or administrative agencies, must interpret statutes consistent with the intent of the legislature. As deepwater LNG ports were included in the DWPA through a 2002 amendment, there are four possible intents. First, Congress intended that deepwater LNG facilities be licensed under the DWPA, fully aware that OPA 90 might apply to such facilities despite their not handling oil. Second, Congress did not know that OPA 90 would capture deepwater LNG ports, but Congress focused more on eliminating oil pollution than incentivizing the transportation of LNG, so OPA 90 should apply if the facility uses any oil. Third, Congress amended the DWPA to incentivize maritime transportation of LNG without realizing that OPA 90 would apply, and having no intent to have it apply. Fourth, Congress knew of the reference to the DWPA by OPA 90 at the time of amendment but thought the issue irrelevant because no agency would find a natural gas facility covered by an oil pollution statute. For the purposes of this argument, the first and second possibilities are a distinction without a difference, as are the third and fourth. Either Congress intended for OPA 90 to apply or it did not; the Coast Guard and the courts must effectuate whichever possibility reflects Congressional intent.

##### *A. Interpretation of the COFR Requirement*

###### *1. The Text of OPA 90 – You Can Handle the Truth*

The textualist approach interprets statutes based on the common meaning of the words used at the time of enactment. The idea is to identify an objective intent based on the text of the statute. What Congress intended is what Congress enacted. The approach focuses on the original meaning of the text to obtain intent to the exclusion of non-statutory indicators, such as legislative history.<sup>152</sup> Textualists eschew legislative history because they are

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151. See discussion *infra* Section IV.A.0.

152. See Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 VT. LAW. REV. 611, 613 (2005); Jennifer M. Brandy, Note,

skeptical that there is such a thing as a single intent for such a diverse body.<sup>153</sup> Rather, textual ambiguities should first be addressed using dictionaries from the enactment period, grammar rules, the structure of the statute and related provisions, and interpretative canons.<sup>154</sup>

The Ordinary Meaning canon directs that unless a statute defines a term, a specialized term of art definition exists, or the term has an accepted legal meaning, interpreters should assume that the statute used the word in its ordinary – or dictionary – meaning at the time of enactment.<sup>155</sup> When multiple definitions admit to a word, the choice of appropriate definitions is limited by context as informed by the rest of the statute.<sup>156</sup>

The Whole Act canon advises interpreters to interpret provisions not in isolation, but in the context of the entire statute.<sup>157</sup> The interpreter assumes that the statute is a coherent work, and looks to other provisions or uses of words or phrases to resolve the current ambiguity.<sup>158</sup> The text of one part of the statute should be used to elucidate ambiguities in other parts.<sup>159</sup> Corollaries include using the title and textual statements of purpose of the statute; while neither generally can limit clear statutory language, they can be employed to resolve ambiguities.<sup>160</sup> An additional corollary is the rule against surplusage, which presumes that every word or phrase in a statute adds something new; courts should not construe provisions to be repetitive or redundant.<sup>161</sup>

From a plain reading of the text, does the language fairly indicate that COFR requirements designed for deepwater oil ports apply to deepwater

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*Interpretative Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 655-56 (2011).

153. See, e.g., Rosensaft, *supra* note 152, at 626-27; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 62-63 (1994).

154. Eskridge, Jr., *Gadamer/Statutory Interpretation*, *supra* note 107, at 610; Brandy, *supra* note 152, at 655-56.

155. See Eig, *supra* note 111, at 6-7; see also *Watson v. United States*, 552 U.S. 74, 79 (2007) (holding that absent a specialized or defined meaning, word interpretation “must turn on the language as we normally speak it”).

156. See Eig, *supra* note 111, at 7-8.

157. E.g., Eskridge, Jr., *Gadamer/Statutory Interpretation*, *supra* note 107, at 663.

158. *Id.*

159. See Eig, *supra* note 111, at 3-4.

160. E.g., ESKRIDGE, CASES AND MATERIALS, *supra* note 81, at 676; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2434-35 & n.179 (2003); Eig, *supra* note 111, at 33-34.

161. E.g., Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 11 n.38 (2003); Eig, *supra* note 111, at 13-14.

LNG ports that use minimal amounts of oil incidental to their LNG operations? The question appears deceptively simple.

The COFR requirement turns on the interpretation of the “facility” definition. A deepwater port is subject to the COFR requirement if it is a facility licensed “under the DWPA of 1974 (33 U.S.C. 1501-1524).”<sup>162</sup> A deepwater LNG port is licensed under the DWPA, as amended.<sup>163</sup> Assuming 33 U.S.C. § 2701 incorporates the amended DWPA,<sup>164</sup> a textual analysis requires determining whether a deepwater LNG port is a facility. The statute defines “facility” for the purposes of the act as a structure, equipment, or device “used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.”<sup>165</sup> Deepwater LNG ports are not used to explore for, drill for, produce, transport, or process oil. Transferring, storing, and handling, however, may give some pause. When statutes group words in a list like here, the *Noscitur a Sociis* canon advises that an interpreter should give all words a related meaning.<sup>166</sup> Thus, one word with divergent definitions can be constrained, its ambiguity reduced, by ensuring consistency with less ambiguous terms. In general, the interpreter finds the common thread that unites the words and applies it to all.

“Transferring” and “storing” seems inapplicable. Transferring generally connotes the passing of an object from one person or object to another, especially in the context of a commercial transaction.<sup>167</sup> While a deepwater LNG port may use oil, and while oil must be transferred to it for its use, a deepwater LNG port neither transfers oil to another object nor is it used to affect any transfer. Plus, any oil transferred to the deepwater port happens incidental to its purpose. Storing connotes the keeping of a thing for safe custody, where the intent is to hold until future delivery rather than to consume or sell.<sup>168</sup> The oil present in deepwater LNG ports is for use, and not for future transportation or sale.<sup>169</sup> However, the common usage of

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162. 33 U.S.C. § 2701(6).

163. *Id.* § 1502(9), (13).

164. See discussion *infra* Section IV.C.2.

165. 33 U.S.C. § 2701(9).

166. See Eig, *supra* note 111, at 10-11.

167. *Transfer*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Transfer*, BALLETTINE’S LAW DICTIONARY (3d ed. 2010).

168. *Store*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Store*, BALLETTINE’S LAW DICTIONARY (3d ed. 2010); *Store*, OXFORD AMERICAN DICTIONARY (3d ed. 2010).

169. Consumer Price Index Adjustment of Oil Pollution Act of 1990 Limits of Liability – Vessels and Deepwater Ports, 74 Fed. Reg. 31,357, 31,363; see also MATSUDA, DECISION ON PORT DOLPHIN, *supra* note 73, at 21. However, for an initial contrary position, changed by

“storing” might also include holding for one’s later use, in which case trace amounts of oil held on site to replenish oil as equipment uses it might constitute storing. Yet, to qualify as a facility, the deepwater LNG port must not just store oil, its purpose must be to store oil. Deepwater LNG ports are not used to store oil; any oil stored is incidental to its purpose of transferring LNG.

“Handling” encompasses the broadest range of definitions among the terms. “Handle” could connote a more commercial meaning<sup>170</sup> or a more general holding or moving something.<sup>171</sup> One could argue that the drafters intended “handle” to be a catch-all term, but drafters generally do not place such catch-alls in the middle of the activity list. Under the *Noscitur a Sociis* canon, commercial activity appears as a unifying theme among all eight activities listed. While storing, handling, transferring, or transporting oil could refer to either commercial or non-commercial activities, acts of storing and transporting would more likely be commonly understood to imply some commercial activity. Exploring for, drilling for, producing, or processing oil clearly implicates commercial activity. With four of the list clearly demonstrating commercial activity and two others favoring commercial activity, the remaining two terms should also be interpreted to follow in the commercial vein.<sup>172</sup> Handle may well be a broad, catch-all term, but still be confined to commercial activity. A commercial activity theme inheres oil as the primary object of the action as opposed to oil serving an incidental and minimal function, and therefore, would argue against application of the COFR requirement.

Finally, the qualifying phrases may carry significant value in how the statute relates to deepwater LNG ports. The facility, to be covered by the act, must be “used for one or more of the following purposes . . .”<sup>173</sup>

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the time of the drafting of 74 Fed. Reg. 31363 in 2009, see CONNAUGHTON, DECISION ON NEPTUNE LNG, *supra* note 73, at 18-19 (finding in the initial approval decision that OPA 90 and the COFR requirement was applicable).

170. See, e.g., *Handle*, BALLETTINE’S LAW DICTIONARY (3d ed. 2010); *Handle*, OXFORD AMERICAN DICTIONARY (3d ed. 2010).

171. See, e.g., *Handle*, BALLETTINE’S LAW DICTIONARY (3d ed. 2010); *Handle*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

172. The court in *So. Pacific Trans. Co.* came to a similar conclusion, but under a different canon. *United States v. So. Pac. Trans. Co.*, No. 94-6176-HO., 1995 WL 84193, at \*2 (D. Or. Feb. 20, 1995) (finding because the enumerated purposes in the definition of facility “evidence a congressional intent that the OPA apply to . . . commercial production and transportation of oil,” the omission of consumer use means that consumer use is outside the scope of OPA 90).

173. 33 U.S.C. § 2701(9) (emphasis added).



Deepwater LNG ports are not “used for” any oil-related purpose, and therefore the subsequent list of actions should be held inapplicable. Can it be fairly reasoned that the incidental presence of oil satisfies the requirement that the port is used for the purpose of storing or handling oil? Rather, a plain reading of the statutorily enumerated activities reveals that each have oil as the object of the activity, and not merely present.

Applying the Whole Act canon, classifying a deepwater LNG port as a facility remains unsupported when considering the definition in the greater context of the remainder of the act, especially the sections on liability limits and COFR requirements, which differ depending on the type of facility or vessels. The act covers two main categories of oil-holding things: vessels and facilities.<sup>174</sup> The act distinguishes between types of vessels and facilities for liability limits and COFR requirements; those that pose the highest risk have the highest liability.<sup>175</sup> Small vessels and onshore facilities have no COFR requirements, the first likely due to low risk and the second likely due to assets and people that can be readily seized.<sup>176</sup> Offshore facilities only require a COFR if the worst-case discharge exceeds 1,000 barrels.<sup>177</sup> Application of the COFR requirement means that a TI supertanker, the largest in operation and carrying 3.1 million barrels of oil, would have a maximum liability limit and COFR requirement similar to a deepwater LNG port handling a million times fewer barrels of oil.<sup>178</sup> Finally, the statute authorizes lowering the liability limit for deepwater ports “in connection with the transportation of oil” to \$53 million.<sup>179</sup> While deepwater ports handling oil meet eligibility requirements for reduced liability, deepwater ports handling LNG would not be so eligible. Thus, subjecting a deepwater LNG port handling a few barrels of oil to a COFR and liability requirement in excess of those imposed on onshore oil storage facilities or supertankers seems like a questionable holistic reading of the textual requirements.

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174. *Id.* § 2702(a) (“each responsible party for a vessel or a facility from which oil is discharged”).

175. *Id.* §§ 2704, 2716.

176. *Id.* § 2716.

177. *Id.* § 2716(c)(1)(A).

178. See HELLESPONT TARA – IMO 9235268, <http://www.shipspotting.com/gallery/photo.php?lid=673543> (last visited Jan. 3, 2016). 33 U.S.C. § 2704(a)(1) imposes a liability of \$1,900 per gross ton for double-hull tank vessels, which equates to approximately \$450 million. The COFR requirement is approximately \$370 million.

179. 33 U.S.C. § 2704(d)(2)(C). \$53 million is an inflation adjusted approximation of the statutory \$50 million.

## 2. *The Purpose of OPA 90 and the DWPA Amendment – Reduce Oil Pollution*

The purposive approach looks to interpret statutory provisions consistent with the underlying reasons for enactment. The approach “looks at the aim of the statute first and only then applies it to the words that were enacted.”<sup>180</sup> A court may identify the problem that the legislature intended to solve as one method of identifying purpose absent specific statutory declaration.<sup>181</sup> Purpose may be also identified through several sources, such as the text of the statute itself (especially if it contains a statement of the purpose), or by examining the statute in its entirety, considering the legislative process and compromises in that process, using legislative history, and even consulting related case law.<sup>182</sup> Once the court ascertains the purpose, it would determine the text of the statute to best effectuate that purpose, but without giving the words a meaning “they will not bear, or . . . which would violate any established policy of clear statement.”<sup>183</sup> However, words should not be given a meaning that the purpose will not bear.<sup>184</sup>

Do the requirements that deepwater LNG ports to maintain a \$373 million COFR to ensure the ability to pay for cleanup costs within the purpose of OPA 90 and the MTSA amendment to the DWPA make sense when these ports contain minimal quantities of oil incidental to their natural gas purpose? Examining the problem targeted by OPA 90, the enactment sought to reduce the chances of the discharge of oil into the marine environment and to mitigate the impact of a discharge. Evidence does not exist that these laws exist to restrict natural gas transportation or even subject the natural gas industry to such detailed regulation. This purpose clearly follows from examination of the text of congressional reports on the act, a holistic reading of the new statutory requirements, and the proximity of enactment to the EXXON VALDEZ accident.<sup>185</sup>

The various House and Senate reports on the bills that would eventually comprise OPA 90 clearly identify the problem the Act addresses. “What the

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180. Rosensaft, *supra* note 152, at 612.

181. 2B SUTHERLAND STATUTORY CONSTRUCTION § 54:4 (Norman Singer, ed., 7th ed. 2015) [hereinafter SUTHERLAND]; *see also, e.g.*, Eskridge, *Gadamer/Statutory Interpretation*, *supra* note 107, at 667; Stack, *supra* note 107, at 683.

182. *See* Rosensaft, *supra* note 152, at 623.

183. HART, *supra* note 109, at 1374.

184. *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY* 85 (2005).

185. The statute as codified contains 11 references to the *Exxon Valdez* oil spill, including several provisions to respond directly to the spill and the area damaged. 33 U.S.C. §§ 2701-62.

Nation needs is a package of complementary . . . laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, minimize damage to [natural resources] and internalize those costs within the oil industry and its transportation sector,” proclaimed the Senate Committee on Environment and Public Works (“S. E&PW”).<sup>186</sup> S. E&PW also noted that their proposed bill would increase liability for the oil industry to encourage them to invest in greater prevention and response.<sup>187</sup> Reports of the Senate Commerce, Science, and Transportation Committee (“S. CS&T”)<sup>188</sup> and the House Committee on Public Works and Transportation (“H. PW&T”)<sup>189</sup> reflect similar themes.

All related acts specifically cite the EXXON VALDEZ oil spill and several other smaller contemporary spills as the motivation for this spate of legislative activity. H. PW&T’s bill identified the “need for legislation” as “the oil spill problem” and “inadequate” response capabilities, and then proceeded to discuss these problems over seven pages.<sup>190</sup> Concurrent with these major spills Congress recognized the insufficiencies of the CWA provisions to address major spills.<sup>191</sup> For example, H. PW&T identified the primary problem as large spills (of more than 1,200 barrels) “caused primarily by tanker and barge accidents.”<sup>192</sup> S. CS&T expressed similar

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186. S. REP. NO. 101-94, at 2. The committee also noted it has “long been concerned with the potential environmental dangers posed by the transportation, storage, and handling of oil.” *Id.* at 1.

187. *Id.* at 3-4 (noting also that an 1851 Act still in force limits the liability of vessel owners to the value of the cargo, which is far below the economic and environmental damage caused by a large oil spill).

188. S. REP. NO. 101-99, at 1-3 (1989) (The bill imposes “new requirements on the operations of oil tankers . . . .” There is a “need to improve the ability to prevent future spills and minimize the damage cause . . . when they occur.”)

189. H.R. REP. NO. 101-241, pt. 1, at 29-30 (The bill “provides a comprehensive legislative framework to prevent the spilling of oil into the waters . . . and to improve our preparedness and ability to respond to an oil spill . . . and assesses significant liability upon the spillers of oil and the oil industry” to incentivize prevention.); H.R. REP. NO. 101-241, pt. 2, at 7 (identifying four purposes of the bill, including a comprehensive liability system, a fund to pay for damages, improvements to oil pollution prevention and response, and research on prevention and mitigation); H.R. REP. NO. 101-242, pt. 1, at 27-29 (1989) (repeating the same introductory language as H.R. REP. NO. 101-241).

190. H.R. REP. NO. 101-241, pt. 2, at 8-16.

191. Sump, *supra* note 11, at 1103-04.

192. H.R. REP. NO. 101-241, pt. 2, at 8-9 (noting that of the 9,000 to 12,100 spills that occurred each year between 1973 and 1984, only a handful accounted for the majority of oil spilled).

views a month earlier.<sup>193</sup> The financial responsibility requirement of the final Act specifically targets these larger spills; the Act only covered vessels over 300 gross tons, vessels shipping oil, offshore facilities with discharge potential is greater than 1,000 barrels of oil, and deepwater ports.<sup>194</sup> OPA 90 gives a deepwater port the highest liability limit almost certainly because of the huge quantities of oil Congress expected it to handle.

The structure of OPA 90 reflects a purpose of mitigating the impact of oil in the marine environment. Its first operative provision creates a strict liability regime for oil discharges into the water,<sup>195</sup> but subsequent provisions limit liability and permit downwards adjustments<sup>196</sup> and create a financial responsibility requirement for certain potential responsible parties.<sup>197</sup> Subsequent provisions of the Act also include tighter regulations on licensing mariners, pilotage, and vessel manning;<sup>198</sup> new safety and communication equipment;<sup>199</sup> a requirement to phase-out single hull vessels;<sup>200</sup> response planning and management oversight;<sup>201</sup> and improved transit management in Prince William Sound.<sup>202</sup> The only content that touches on banning the use of oil or gas was a temporary moratorium on oil and gas development off the North Carolina coast.<sup>203</sup>

The proposed bills and the final product addressed oil pollution not by banning or limiting the use or transportation of oil, but by requiring oil companies to internalize the cost of oil spills and thereby incentivize better prevention and response. OPA 90 as a whole aims to reduce oil spills and mitigate their consequences, while the liability limit<sup>204</sup> and financial responsibility<sup>205</sup> provisions incentivize the oil industry to take effective

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193. S. REP. NO. 101-99, at 1-3 (“Since 1976, there have been ten major production or transportation accidents that have released almost 50 million gallons of oil into the United States.”).

194. 33 U.S.C. § 2716.

195. Oil Pollution Act of 1990, § 1002; 33 U.S.C. § 2702 (2012) (those responsible for discharging oil are liable for cleanup costs and damages).

196. Oil Pollution Act of 1990, § 1004; 33 U.S.C. § 2704 (2012).

197. Oil Pollution Act of 1990, § 1016; 33 U.S.C. § 2716.

198. Oil Pollution Act of 1990, §§ 4101-08, 4114, 4116.

199. *Id.* at §§ 4110, 4113, 4118.

200. *Id.* at § 4115.

201. *Id.* at §§ 5001-07.

202. *Id.* at §§ 4101-08, 4114, 4116.

203. *Id.* at § 6003.

204. *Id.* at § 1004; 33 U.S.C. § 2704 (2012).

205. *Id.* at § 1016; 33 U.S.C. § 2716.

preventative and response measures. The purpose was not to terminate the oil industry, much less obstruct the natural gas industry. More generally, the purpose was to reduce the impact of oil on the marine environment. Given the environmental benefits of natural gas compared to oil, incentivizing LNG use would be consistent with the Act's purpose of reducing oil pollution into the water. But did the MTSA intend to alter this purpose?

Title I of the MTSA, which amended the DWPA, attempted to secure maritime infrastructure. The MTSA consists of numerous findings that detail the importance and vulnerability of maritime facilities.<sup>206</sup> For example, Congress noted that the United States is "increasingly dependent on imported energy . . . and a disruption . . . would seriously harm consumers and the economy," and that port facilities are vulnerable to terrorism.<sup>207</sup>

While Congress began drafting the MTSA prior to the attacks of 2001, Congress only included the DWPA natural gas amendment subsequent to the attack.<sup>208</sup> In fact, the pre- and post- attack drafts looked substantially different; the alterations demonstrate a shift to preventing terrorist attacks against maritime infrastructure.<sup>209</sup> The original act focused on criminal acts at ports; it mentions terrorism a mere seven times<sup>210</sup> and contains only one operative provision relating to anti-terrorism measures.<sup>211</sup> The remaining references appear as either brief mentions in the "Findings" section or a requirement for the Coast Guard to submit a report on maritime security and terrorism.<sup>212</sup> In contrast, the Act as revised in the wake of September 11, 2001, mentions terrorism 34 times<sup>213</sup> and contains several anti-terrorism provisions including extensive new port security requirements, a sea-marshall program, cargo screening and identification procedures, and more resources for the Coast Guard to perform new counterterrorism missions.<sup>214</sup>

The conference report contains the only discussion regarding the DWPA natural gas amendment. Congress expressed that the purpose of the amendment was to "enable the timely development of offshore natural gas

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206. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, § 101 (Nov. 25, 2002).

207. *Id.* at § 101(4), (7), (10), (12).

208. Compare the original act as presented in the Senate on 20 July, 2001, S. 1214, 107th Cong., Cong. Rec. S8015-23, to the final act, Maritime Transportation Security Act of 2002.

209. *Id.*

210. S. 1214, 107th Cong., Cong. Rec. S8015-23.

211. *Id.* at § 6.

212. *Id.* at §§ 2, 12.

213. Maritime Transportation Security Act of 2002.

214. *Id.* at §§ 102, 105, 107, 111, 348.

facilities.<sup>215</sup> Further, it explicitly mentions that the amendment will allow deepwater ports to solely handle natural gas, something previously forbidden.<sup>216</sup> Given fears of energy insecurity and terrorism directed at critical infrastructure coupled with a language that supports expanding the use of natural gas, it is safe to say that the DWPA amendment sought to expand domestic use of natural gas and site natural gas facilities away from population centers. The MTSA had no intention to subject natural gas facilities to the regulatory scheme of OPA 90.

### *3. The Intent of the Legislators – To Prevent and Mitigate Future Major Oil Spills*

Legislative intent looks to the reasons of the enacting legislatures for enacting certain provisions. If an ambiguity exists in the statutory language, the interpreter seeks to identify what the enacting legislature meant to do with the provisions or remedies it employed.<sup>217</sup> Similar to the purposive approach, interpreters would use legislative history to interpret provisions that are unclear or where application of the text would be novel.<sup>218</sup>

Examining the intent of Congress based on the legislative history and statements by members of Congress, did Congress intend to subject deepwater LNG ports to the COFR requirement designed for deepwater oil ports when it amended the DWPA through the MTSA, thereby bringing deepwater LNG ports under OPA 90's requirements? Little evidence suggests that Congress so intended; rather, the intent of Congress appears to be to expand the use of natural gas, including through deepwater ports.

Congress enacted OPA 90 in the wake of the EXXON VALDEZ oil spill in Alaska and several other significant oil spills. Legislators introducing their bills in both the House and Senate make repeated reference to these spills and how this congress will put an "end to these environmental disasters."<sup>219</sup> These introductions and debate identified stricter shipping requirements, requirements for cleanup plans, financial liability for cleanup

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215. Joint Explanatory Statement of the Committee of Conference, H.R. REP. NO. 107-777, § 106, at 85-86 (2002) (Conf. Rep.).

216. *Id.* § 106, at 86.

217. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 428-30 (2005).

218. *Id.* at 419, 420, 428-30 (2005); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437 (1988).

219. *E.g.*, 136 Cong. Rec. H6920 (daily ed. Aug. 3, 1990) (statement of Rep. Bonior).

costs for oil spillers, and limits to liability.<sup>220</sup> Sponsor and supporter statements indicate an intent to have oil companies internalize the cost of oil spills and take better preventative and response measures, but that the maritime transportation of oil should nonetheless continue. The legislation reflected a balance between environmental and economic interests; accept a reduced risk in return for strict liability for remediation. A hearing on the “rash of recent oil spills” focused heavily on the risk posed by marine transportation of oil while recognizing the importance of the oil shipping industry.<sup>221</sup> The hearing convened after the House and Senate formed a conference committee to discuss the bill that would become OPA 90, two months prior to enactment, and included sponsors of the various oil pollution bills that formed OPA 90. Understood in this light, OPA 90 did not make the CWA irrelevant. Instead, OPA 90 imposed stricter regulations and liability requirements on the oil production, processing, and transportation industry while leaving other discharges of oil covered by the CWA.

Following enactment of OPA 90, Congress amended the DWPA several times, all of which indicate a desire to expand deepwater port use. In 1996, Congress amended the DWPA to expand the statutory purpose to promoting greater use of deepwater ports for oil transportation.<sup>222</sup> In 2002, the MTSA amended the DWPA to allow deepwater ports to be built solely for LNG importation.<sup>223</sup> The change intended to incentivize LNG facilities to be

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220. *See, e.g.*, 135 Cong. Rec. H7893 (daily ed. Nov. 1, 1989) (statement of Rep. Bonior); 135 Cong. Rec. H7955 (daily ed. Nov. 2, 1989) (statement of Rep. Jones) (“tough standards” for oil tankers and “incumbent upon the Congress to [promote] environmentally safe transport of oil”); 136 Cong. Rec. S11536 (daily ed. Aug. 2, 1990) (statement of Sen. Mitchell) (“comprehensive legislation to prevent oil spills, improve preparedness and response capabilities, and ensure that shippers and oil companies pay the full cost of spills”); 136 Cong. Rec. H6920 (statement of Rep. Bonior); 136 Cong. Rec. H6933 (daily ed. Aug. 3, 1990) (statement of Rep. Jones).

221. *To Examine the Rash of Recent Oil Spills Along U.S. Coasts, Emphasizing the Need for Oil Spill Legislation and Ratification of International Protocols: Hearing Before the Subcomm. on Coast Guard and Navigation of the H. Comm. on Merchant Marine and Fisheries*, 101st Cong. 1-2 (1990) (statement of Billy Tauzin, Subcomm. Chairman). Many other representatives voiced similar sentiments. None called for banning maritime transportation of oil or even mentioned the natural gas industry.

222. The Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, 110 Stat. 3901, § 502 (Oct. 19, 1996).

223. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (Nov. 25, 2002); H.R. REP. NO. 107-777, § 106, at 86.

“built offshore – not in coastal cities” to reduce the risk from terrorism,<sup>224</sup> a clear post-September 11 addition.<sup>225</sup> In 2012, Congress permitted deepwater LNG ports to export natural gas.<sup>226</sup> Further, during these amendments, Congress subjected deepwater LNG ports to fewer regulations than deepwater oil ports. For example, the 2002 amendments to the DWPA specifically exempt deepwater LNG ports from common carrier status, unlike their oil-handling counterparts.<sup>227</sup>

A holistic reading of OPA 90 also indicates that Congress had no intent to impose regulations on the natural gas industry. For example, Congress exempted offshore facilities from the COFR requirement if their worst-case spill discharge was less than 42,000 gallons of oil.<sup>228</sup> To say that Congress intended for deepwater LNG ports whose worst-case spill would be less than one percent of that amount to be subjected to the maximum COFR requirement remains questionable. Offshore facilities covered by the law have substantially lower COFR requirements and onshore facilities have no requirements.<sup>229</sup> Further, at the time of enactment of OPA 90, deepwater ports could only be licensed to handle oil;<sup>230</sup> incorporation of natural gas facilities through reference of an amended statute whose purpose was to expand natural gas use hardly demonstrates an intent to regulate the natural gas industry.

A comprehensive reading of the MTSA indicates Congress intended to address national security and terrorism. The Act focuses on thwarting terrorist attacks against port infrastructure and marine transportation.<sup>231</sup> The DWPA provision can be seen as shoring up access to overseas energy markets and pushing critical infrastructure away from population center.

Statements of members of Congress, the text of various bills and statutes,<sup>232</sup> and the direction of legislation point towards Congress favoring

224. 148 Cong. Rec. H22397 (daily ed. Nov. 14, 2002) (statement of Rep. Oberstar); *see also* 147 Cong. Rec. S26917 (daily ed. Dec. 19, 2001) (statement of Sen. Hollings) (“protect against maritime terrorism”); 147 Cong. Rec. S27739 (statement of Sen. Kerry) (very real threat of terrorists targeting LNG carriers in ports).

225. *Compare* the Maritime Transportation Security Act of 2002, with S. REP. 107-64, at 15-20; S. 1214, 107th Cong., Cong. Rec. S8015-23.

226. Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, 124 Stat. 1540, § 312 (Dec. 20, 2012).

227. 33 U.S.C. § 1507 (2012).

228. 33 U.S.C. § 2716(c)(1)(A).

229. 33 U.S.C. § 2716(c)(1).

230. Maritime Transportation Security Act of 2002; H.R. REP. NO. 107-777, § 106, at 86.

231. *See discussion supra* Section IV.A.2.

232. *See id.*



expanded natural gas use and imposing regulations on the oil industry to incentivize better prevention of and response to oil spills. Given this position, effectuating the intent of Congress would point towards finding OPA 90's COFR requirement as inapplicable to deepwater LNG ports.

#### 4. *A Dynamic Interpretation*

The dynamic interpretive approach is a “process of understanding a text created in the past and applying it to a present problem.”<sup>233</sup> The interpreter seeks to reconcile the text, the history of enactment including the intent of the legislature, and the “evolution of the statute and its present context.” The text governs in correlation to its specificity.<sup>234</sup> If application of the text in a current situation is unclear, the interpreter turns first to a historical perspective. The more recent the enactment and the clearer the intent, the more weight an interpreter should accord to the history.<sup>235</sup> However, if the “original legislative expectations have been overtaken by subsequent changes in society and law,” the interpreter then examines how to adapt the statute to those subsequent societal and legal developments.<sup>236</sup> The more dramatic the evolution, the more weight a court should afford to those changes to the expense of the text and history.<sup>237</sup>

Approaching the COFR requirement from a dynamic interpretive approach, has the statutory environment evolved to require a deepwater LNG port to assure the ready availability of \$373 million when it uses minimal amounts of oil incidental to its operations if the original statute did not require it? A common understanding of the definition of facility in 33 U.S.C. § 2701(6) supported by other provisions favor finding deepwater LNG ports as outside the definition.<sup>238</sup> Any doubt is addressed by the oil-centric purpose of OPA 90 and the terrorism focus of the MTSA, and is further bolstered by the expressed intent of key sponsors and supporters of both acts.<sup>239</sup> Given the recent enactment of both acts – OPA 90 is 28 years old and the MTSA 16 years – and clear statements in the acts and the Congressional Record, a dynamic interpretation would afford great weight to these confirmations of the textual interpretation. Has society evolved to

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233. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 110, at 1483.

234. *Id.* at 1496-97.

235. *Id.*

236. *Id.* at 1484, 1494.

237. *Id.* at 1496-97.

238. *See* discussion *supra* Section IV.A.1.

239. *See* discussion *supra* Section IV.A.2-3.

where OPA 90's scope should expand beyond the oil industry to an LNG industry that merely uses small amounts of oil?

In the last two decades, newly identified sources of oil and natural gas makes the United States poised to become one of the largest, if not the largest, energy producer.<sup>240</sup> While society remains apprehensive about the environmental impact of fossil fuels, especially in the wake of the DEEPWATER HORIZON oil spill, some see LNG as a bridging strategy between oil and cleaner sources that poses minimal environmental risk if discharged into the waters.<sup>241</sup> Congress has repeatedly encouraged wider use of natural gas and transportation via deepwater ports.<sup>242</sup> Therefore, if there has been a societal evolution, it would trend toward greater use of natural gas. Interpreting the text in that context would argue for reading OPA 90's definition of facility as excluding deepwater LNG ports.

*5. Substantive Canon Fodder: Revisiting Interpretation due to a Remedial Nature*

Although the purpose of the act, the likely intent of the enacting legislature, and the plain meaning of the text make applying the COFR requirement dubious, might any of these interpretations be altered by widely interpreting the text owing to OPA 90's remedial nature? Courts generally construe remedial statutes, those enacted to rectify a specific problem or one caused by "unguided private conduct," liberally.<sup>243</sup> Unlike the other canons mentioned, this canon is substantive – i.e., not policy-neutral. It is akin to the purposive approach, where the interpreter identifies the problem to be fixed and then interprets the statute accordingly.<sup>244</sup>

At least one federal court identified explicitly OPA 90 as a remedial statute,<sup>245</sup> and that finding will likely survive scrutiny. Given the detailed definition of facility and the comprehensive regulatory scheme, however, there are few open-ended mandates amenable to an expansive construction. Further, the problem Congress sought to remedy was large discharges of oil

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240. See discussion *supra* Section I.0.

241. See *id.*

242. See discussion *supra* Section IV.A.3.

243. Frank H. Easterbrook, *The Supreme Court, 1983 Term – Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-15 (1984).

244. *Id.*

245. *Avitts v. Amoco Prod. Co.*, 840 F. Supp. 1116, 1121-22 (S.D. Tex. 1994) (OPA 90 is a "broadly designed" "remedial statute"), *vacated on other grounds*, 53 F.3d 690 (1995); see also Angle, *supra* note 76, at 405.

into oceans and rivers.<sup>246</sup> Encouraging greater use of LNG would reduce the amount of oil flowing over U.S. waters, reducing the potential for discharges. Encouraging greater use of deepwater ports would also reduce the likelihood of navigational accidents, a primary cause of oil spills. Deepwater LNG ports doubly serve the remedial aim of OPA 90. Thus, the remedial nature of OPA 90 would also advise exempting deepwater LNG ports from OPA 90's regulatory scheme.

*B. Recommended Rule and Deference Owed*

The best test to satisfy the purpose, intent, and text is to apply an oil-centric commercial purpose test to the presence of oil. It also represents the soundest policy. Essentially, the purpose of the structure, device, or equipment, whether for a transport or consumption, must be related directly to oil. Neither the purpose of OPA 90 nor the intent of the enacting Congress was to impose tremendous burdens on non-oil industries. This test has the added benefit of being the most natural reading of the requirements to meet the definition of "facility"; deepwater LNG ports are not used for the purposes of handling or storing oil or any other oil-related purpose, and thus these ports should not qualify as a "facility" within the Act.<sup>247</sup>

What implications might arise from employing an oil-centric purpose test? First, it will not admit to unreasonable scenarios where some facility handles OPA 90 quantities of oil without being subject to the law. One would have to watch a long parade of horrors to find a situation where a facility handles thousands of gallons of oil at sea for incidental use; such large quantities would likely trigger an oil-centric test. Second, the test would not exempt from cleanup costs those who discharge oil and are not subject to OPA 90. While OPA 90 would not cover oil discharges from a deepwater LNG port or a car negligently driven off a bridge or an old lawnmower disposed of in a tidal marsh, because none would constitute a facility, liability for such discharges would still be covered under the CWA.<sup>248</sup> Third, because the test would permit only incidental uses that admits to minimal quantities of oil, it would be highly unlikely that such users could not cover cleanup costs. Thus, the COFR requirement, intended to ensure that responsible parties can pay, adds unnecessary assurances.

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246. See discussion *supra* Section IV.A.2-3.

247. Because deepwater LNG ports would not be a facility at all for the purposes of OPA 90, they would also not be covered by the onshore facility or offshore facility requirements.

248. 33 U.S.C. §§ 1251-1387. Liability for the discharge of oil is specifically addressed by 33 U.S.C. § 1321.

And unlike a pure commercial activity test, those who consume large quantities of oil would still be covered under OPA 90.<sup>249</sup> Fourth, the test would give predictability to deepwater LNG port applicants and incentivize their development. Natural gas facilities can be built on the ocean away from population centers, mitigating security risks, reducing shipping accidents, and improving efficiency in marine transportation. Greater substitution of natural gas for oil would reduce carbon dioxide emissions and reduce the risk of oil spills by lessening the volume of oil that is transported on the ocean, thus fulfilling the purpose and intent of OPA 90.

Applying an oil-centric purpose test for a structure, equipment, or device to determine if it constitutes a facility under OPA 90 creates a test consistent with the text, intent, and purpose of the law. It establishes predictability for any party seeking to construct or use a structure, equipment, or device on or adjacent to navigable waters. And, it provides a coherent and defensible foundation for agency and judicial decisions.

Any intent to capture deepwater LNG ports under OPA 90's liability limits lacks a strong foundation. Courts will defer to agency interpretation if reasonable, unless Congress specifically spoke to the issue.<sup>250</sup> It would not be unreasonable for the Coast Guard to categorically exempt deepwater LNG ports from OPA 90 though an oil-centric purpose test. The Coast Guard has two options to issue the test. The first option would be to draft internal standards of review incorporating this test and then articulate the test whenever a party seeks a determination of the applicability of OPA 90, whether through the administrative or judicial process. Since it lacks formality, this process would be entitled to judicial respect under *Skidmore*.<sup>251</sup> The outcome would be consistent with previous determinations and could be strongly reasoned as effectuating the purpose of the statute. The multifaceted examination of the statute's text and the intent of the enacting Congress further add to the reasonableness of the outcome. A better alternative would be for the Coast Guard to promulgate this test though a rulemaking. The test would then receive substantial judicial deference under the *Chevron* doctrine of reasonableness.<sup>252</sup> Moreover, the rule would likely be favorably viewed in the current regulatory climate.

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249. See discussion *infra* Section IV.C.0.

250. See discussion *supra* Section III.0.

251. See *id.*

252. See *id.*

*C. Alternative Solutions*

Promulgation of a rule or policy that finds deepwater LNG ports as outside of the scope of OPA 90 is hardly the only option. Perhaps the energy renaissance will evaporate and future energy needs will require no action or the case-by-case approach of the last decade will suffice. If an angry environmentalist litigates, a defendant can also argue the absurd results doctrine, the *de minimis* exception, and non-incorporation by reference. A commercial activity test serves as an alternative option, but it may be both over- and under- inclusive. OPA 90 can be strictly applied, arguing that deepwater LNG ports are facilities, but stunting the industry until Congress acts. Or interested parties can petition Congress to clarify the statutory language. Unfortunately, each of these approaches has unacceptable shortcomings.

*1. Case-by-case, step-by-step, and hope we all don't fall down*

Doing nothing is always an option. Perhaps oil prices will remain depressed and by the time demand for natural gas recovers, solar, wind, cold fusion, or the apocalypse will have rendered null any need for LNG. In the interim, the Coast Guard can continue with their case-by-case decision with minimal rationale provided to applicants. But the current approach is ripe for judicial intervention and gives weak assurances to potential or approved applicants.<sup>253</sup> And, hope neither serves as a strategy nor makes for sound policy-making.

*2. Throw in the Kitchen Sink: absurd results, de minimis exemption, and non-incorporation by reference*

If deepwater LNG port applicants continue to get exemptions and a third-party eventually challenges it in court, the applicant or agency could defend with three additional, but less sound, arguments.

First, the Coast Guard or deepwater LNG port defendant could argue that application of an oil pollution statute created for the oil industry to a non-oil industry stands as an absurd application of the statute. The "Golden Rule," for statutory interpretation purposes, advises that interpreters should avoid a result that would produce an absurd result. Generally, interpreters apply this rule when adherence to the plain meaning of the text produces the absurd result, and will adjust the meaning only as much as necessary to get a more sensible one.<sup>254</sup> Traditionally, courts have applied the absurd results

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253. See discussion *supra* Part 0.

254. Manning, *supra* note 160, at 2395-96; Eig, *supra* note 111, at 42.

doctrine to not give effect to language that creates outcomes so “unthinkable” that the legislature could not have intended it; thus, by amending the language to remove the absurdity, proponents argue that the court would better effectuate legislative intent.<sup>255</sup>

One problem with the application comes from attempting to ascertain when a result is absurd. An easy answer is when the text creates a logical inconsistency or impossibility. Less certainty exists regarding whether the rule applies to unreasonable, but still possible, outcomes, or merely to odd outcomes. A provision may be unreasonable to some as a matter of public policy, but perfectly acceptable to another.<sup>256</sup> At potential odds with the absurd results doctrine as applied to unreasonable results, but not illogical ones, would be the rational basis standard of review used by the court to judge economic legislation.<sup>257</sup> Under this standard, courts generally defer to the law unless it “employ[s] suspect classifications or touch on fundamental rights.”<sup>258</sup> Additionally, while some textualists recognize the rule, the stronger the textualist bent of the interpreter, the more constrained the application of the rule.<sup>259</sup>

The application of the COFR requirement to deepwater LNG ports might seem absurd from a policy perspective. Apparently, the Coast Guard agrees; it has so far exempted every deepwater LNG port applicant. But those opposed to the use of any fossil fuels or those who want all corporations subject to stringent governmental oversight might disagree. So too might a court. While a particular industry may be disadvantaged unfairly, Congress can favor certain industries over others. And if Congress finds the COFR application problematic, Congress can correct the interpretation through legislation. Apart from a policy debate, application of the COFR requirement is neither logically impossible nor does it produce results directly contrary to the text. The absurd results doctrine is a risky gambit.

The *de minimis* exception assumes that the law ignore trifles. Courts apply the exception to all statues absent contrary indication.<sup>260</sup> The threshold for determining whether an activity is *de minimis* depends on the

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255. Manning, *supra* note 160, at 2394-95.

256. *Id.* at 2395; *see, e.g.*, *Barnhart v. Thomas*, 50 U.S. 20 (2003).

257. Manning, *supra* note 160, at 2446-52.

258. *Id.* at 2447-48.

259. *Id.* at 2391-92.

260. *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (“[It is] part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”).

purpose of the statute and the standard at issue.<sup>261</sup> This exemption extends to statutory interpretation by administrative agencies,<sup>262</sup> under the presumption that courts should not facilitate “pointless expenditures,” ones where the regulation would yield “trivial or no value” though “literal” adherence to a statute.<sup>263</sup> The exemption does not grant a license to depart from the statute, but a tool to implement legislative intent.<sup>264</sup> However, absent unambiguous legislative language to the contrary, the principle implicitly allows for agencies to exempt minimal risks from its regulatory scheme upon an “adequate factual showing.”<sup>265</sup>

As deepwater LNG ports handle minimal quantities of oil, might the *de minimis* doctrine provide an alternative exemption basis? This too is another unlikely avenue of success. OPA 90 creates a detailed and tiered liability regime for vessels, creates a two-tiered regime for offshore facilities, and creates absolute rules for onshore facilities and deepwater ports. OPA 90 also creates a process to lower the liability limit and COFR requirement for deepwater ports, at least the oil-handling kind.<sup>266</sup> Neither any type of vessel nor oil-handling facilities escape such liability. The text decidedly favors a contrary interpretation. The standard at issue in OPA 90 seems to be any discharge.<sup>267</sup> The CWA declares U.S. policy to be to permit zero discharge of oil into U.S. waters.<sup>268</sup> Adherence to the statute would have quantifiable value. While the risk of a deepwater LNG port being unable to pay relatively small cleanup costs, the application’s value resides in knowing that such costs will be paid and that these ports will well-capitalized professional operations capable of meeting any financial demands or regulatory mandates. Small discharges can cost thousands of dollars to remediate depending on the environmental sensitivity of the area, and small discharges in the aggregate can have a major impact. Or the value

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261. *Id.* at 231-32 (finding a state court unreasonably rejected the *de minimis* exemption when the law “operate[d] in such stark, all-or-nothing fashion”).

262. *E.g.*, *Federal Power Commission v. Texaco Inc.*, 417 U.S. 380, 399 (1974); *Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979); *see also* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1668-69 (2001).

263. *Ala. Power Co.*, 636 F.2d at 360-61.

264. *Id.*

265. Sunstein, *supra* note 262, at 1669-70 (2001).

266. *See* 33 U.S.C. § 2704(d)(2)(C).

267. 33 U.S.C. § 2702(a).

268. 33 U.S.C. § 1321(b)(1) (“Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . .”).

comes from deterring greater use of any kind of fossil fuel. While the value is disproportion to the heavy financial burden imposed on the natural gas industry, the *de minimis* doctrine does not requiring a weighing of the interests, only that there is trivial value in enforcement. There is arguably some value to the marine environment in strict enforcement.

Another more promising, but still uncertain, avenue to justify the inapplicability of the COFR requirement would be to argue that OPA 90 does not incorporate the reference to the DWPA as amended by the MTSA. Incorporation by reference refers to when a statute adopts a provision of another statute by referring to the other statute. For example, OPA 90 defines deepwater as a port licensed under the DWPA, a separate statute codified in the same title of the U.S. Code as OPA 90, thereby incorporating the terms of that statute.<sup>269</sup> Yet, when the referenced statute is amended, incorporation depends on whether the language is general, where the language refers generally to the law as it exists, or specific, where the language refers to a specific statute by name or number.<sup>270</sup> A general incorporation includes subsequent amendments. A specific incorporation does not unless the legislature expresses or implies that future amendments should be incorporated.<sup>271</sup> However, delineation between the two is not always clear, as “[f]acially specific references can . . . operate as general legislative references.”<sup>272</sup>

OPA 90 defines a deepwater port as one licensed under “the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524).”<sup>273</sup> Technically, a deepwater LNG port is not licensed under the 1974 DWPA, but the 2002 MTSA-amended version. The very specific incorporation language references a specific act by its formal title. Usually, specific incorporations exclude subsequent amendments.<sup>274</sup> However, inclusion of the U.S. Code sections might evidence a desire for the code to apply however amended in the future. While non-incorporation would be worth arguing to a court, it would not provide a basis for regulatory policy. Rather than interpreting a statute for which the Coast Guard is the responsible agency, the Coast Guard would be interpreting a general theory of statutory construction. This decision would likely then not receive the substantial deference afforded by *Chevron*, but rather only as much deference as its ability to persuade.

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269. 33 U.S.C. § 2701(6).

270. See SUTHERLAND, *supra* note 181, at § 51:7.

271. *Id.* at §§ 51:7-8.

272. See SUTHERLAND, *supra* note 181, at § 51:8.

273. 33 U.S.C. § 2701(6).

274. See discussion *supra* Section IV.C.0.



### 3. Commercial Activity Test: Potentially Over- and Under- Inclusive

A textual reading of the facility definition would provide a good foundation for a commercial activity test. However, does commercial activity refer to when oil is the direct object of the activity, or when oil is used for commercial purposes, even if such use is incidental to the overall purpose? The court in *Southern Pacific* limited commercial activity to oil being the direct object of the activity,<sup>275</sup> and such a rule would then exempt deepwater LNG ports. However, it would also exempt a large industrial plant that handles quantities of oil for its consumption as a lubricant or an ocean research laboratory with large fuel tanks or perhaps a farm with fuel lines running from storage tanks to irrigation pumping equipment,<sup>276</sup> while simultaneously including a marina with a public fueling station. Alternatively, commercial activity could be expanded to situations where the incidental use of oil would be covered if used by a commercial enterprise. This could cover the aforementioned industrial plant and farm, but would then also include deepwater LNG ports.<sup>277</sup> Essentially, either the industrial plant, the farm, and the deepwater LNG port are all facilities or none are facilities.<sup>278</sup> As discussed above, the different theories of statutory interpretation strongly favor excluding deepwater LNG ports.<sup>279</sup> Excluding the other two facilities and similar ones where oil use is only incidental to commercial activity might not have terrible consequences. The purpose of these laws is to incentivize prevention and ensure an effective response. These facilities would still be covered under the CWA, and due to the smaller discharge potential and the easier ability to seize domestic assets and people, the government could ensure cleanup costs are borne by the responsible party. However, politically, this approach might be a bridge too

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275. *United States v. So. Pac. Trans. Co.*, No. 94-6176-HO., 1995 WL 84193, at \*2 (D. Or. Feb. 20, 1995).

276. The fuel line to an irrigation pump was the fact pattern in *Red River Farms*, where the court found OPA 90 applicable. *Red River Farms v. United States*, No. CV 08-2078-PHX-NVW, 2009 WL 2983195, at \*1-2 (D. Ariz. Sept. 17, 2009).

277. It would also include the locomotive in *Southern Pacific*, as oil was incidental to its commercial activity. *So. Pac. Trans. Co.*, 1995 WL 84193, at \*2.

278. Perhaps the irrigation pump's fuel line could fall under OPA 90 as the fuel line itself is used for the purposes of handling or transferring oil. But, that would depend on the interpretation of "device" or "equipment;" is it the equipment as a whole, or does it connote individual pieces. Perhaps a fuel line within an engine does not qualify, whereas a separately installed fuel line from a storage tank to an engine would. But, that discussion is best left for another analysis.

279. See discussion *supra* Section IV.0.

far. Nevertheless, a commercial activity test with oil as the direct object of the commerce serves as a second-best option.

*4. Invisible Hand, meet Iron (or padded) Fist*

Another option would be to find that a deepwater LNG port meets the definition of a facility per OPA 90's definition and require applicants to fulfill the deepwater port COFR requirement. The result would be harsh, dis-incentivize deepwater LNG ports, and ensure that only major energy companies could afford to operate them. Perhaps one benefit would be that the natural gas industry, especially deepwater LNG ports with an exemption, would likely force judicial resolution. Of course, a court could uphold this harsh application, but inconsistency with previous agency determinations gives the court fertile grounds for rejecting the rule. Plus, exempted facilities might be able to make a due process argument if the new position terminates their exemption. Congress might also see fit to clarify the legislation.

A related possibility is that after applying the COFR requirement to deepwater LNG ports, the Coast Guard could reduce the liability limit, and thereby the COFR requirement, to \$53 million.<sup>280</sup> As mentioned earlier, one major problem is that this exemption only applies to deepwater ports that transport oil. Perhaps a dynamic reading of OPA 90, and evolution of the energy industry since enactment, would lead a court to expand the explicit and unambiguous statutory language to deepwater ports that handle LNG. However, given the clear statutory language, the *Chevron* doctrine would strongly argue against the Coast Guard issuing a rule on these grounds.

*5. Channel the Spirit of Lake Placid, 1980 (Congressional Action)*

The clearest way to resolve the uncertainty over whether OPA 90 includes a deepwater LNG port would be for Congress to amend Title 33 to address the issue explicitly. Congress has legislated on the issue three times since OPA 90. However, preemptive congressional action seems unlikely given interest concentrated in powerful environmental and energy interest groups where the technical nature of the issue will dissuade mass public involvement.<sup>281</sup> Further, in the wake of DEEPWATER HORIZON oil spill,

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280. 33 U.S.C. § 2704(d)(2). The lowered statutory minimum of \$50 million would be approximately \$53 million after adjustment for inflation.

281. A public-choice grounded "transactional" view of the legislative process posits "continuous organized conflict" in situations where burdens and benefits are concentrated and highly technical, where Congress will produce no legislation or delegate to agency

any action perceived as weakening oil spill regulation could be politically toxic.

### *Conclusion*

The natural gas industry may increase in importance and result in substantially greater maritime transportation of LNG. The safer and more economical methods of using deepwater ports by which to offload and on-load LNG requires firm guidance on the applicability of the statute or else the nascent transportation industry will turn to less safe and efficient solutions. A fair reading of the text of OPA 90 supported by the purpose of OPA 90, the DWPA, and the MSTA, and the intent of the enacting legislatures would justify an agency rule finding Congress intended the facility definition of OPA 90 to be oil-centric. Applying that rationale would exempt deepwater LNG ports from OPA 90, incentivizing their development while reducing reliance on oil, reducing the risk of an oil discharge, and still ensuring that a deepwater LNG port would be liable for discharges of oil into the environment.

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action. See ESKRIDGE, *CASES AND MATERIALS*, *supra* note 81, at 43-44; discussion *supra* Section II.A.3.