

NOTE

ASSESSING ENVIRONMENTAL DAMAGES AFTER OIL SPILL DISASTERS: HOW COURTS SHOULD CONSTRUE THE REBUTTABLE PRESUMPTION UNDER THE OIL POLLUTION ACT

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The recent Deepwater Horizon oil spill in the Gulf of Mexico underscores the need for those seeking natural resource damages (NRD) to resolve a critical ambiguity in the Oil Pollution Act of 1990 (OPA): the legal weight of the rebuttable presumption of correctness accorded to NRD assessments made by public trustees. This presumption is available to the trustees if they comply with the National Oceanic and Atmospheric Administration’s (NOAA) regulations. No courts, however, have decided what legal weight this presumption carries. NOAA’s view is that responsible parties must present both rebutting evidence and prove that the trustees’ NRD determinations are incorrect. This view is novel and aggressive. Considering, however, Congress’s intent to favor trustee NRD recovery, to induce trustees to use certain assessment methods, and to discourage litigation, NOAA’s view is consistent with the OPA’s purposes. When ruling on public trustees’ NRD assessments and determinations, courts should reject the traditional approach and construe the presumption to have greater force than merely shifting the burden of production. Without this interpretation, a key incentive for parties to engage in cooperative NRD assessment would be undermined and the opportunity for prompt and economically-efficient assessment would be lost.

INTRODUCTION ..... 1471
I. STATUTORY AND REGULATORY BACKGROUND ..... 1475
A. The Oil Pollution Act of 1990 ..... 1475
B. Natural Resource Damage Assessment Under the OPA..... 1476
C. NOAA’s Cooperative-Assessment Procedure ..... 1477
D. Compliance with the NOAA’s NRD Assessment Procedure Entitles Trustees to a Rebuttable Presumption..... 1478

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|                  |   |      |
|------------------|---|------|
| E.               | The Rebuttable Presumption Is Triggered When Trustees Meet Their Burden of Production .....                           | 1479 |
| II.              | DOCTRINAL BACKGROUND .....  | 1480 |
| A.               | What is a Rebuttable Presumption? .....   | 1480 |
| B.               | What Functions Do Rebuttable Presumptions Serve? .....  | 1480 |
| C.               | What Are the Potential Burden-Shifting Effects of a Rebuttable Presumption? .....                                     | 1481 |
| 1.               | <i>Bursting Bubble</i> .....  | 1481 |
| 2.               | <i>Morgan-McCormick</i> .....   | 1482 |
| 3.               | <i>Federal Rules of Evidence</i> .....  | 1482 |
| 4.               | <i>FRE 301 Does Not Endorse the Bursting-Bubble Approach</i> .....  | 1483 |
| III.             | CURRENT VIEWS ON THE LEGAL WEIGHT OF THE OPA REBUTTABLE PRESUMPTION .....   | 1484 |
| A.               | Statutory Language and NOAA's Interpretation .....  | 1484 |
| B.               | Relevant Case Law .....   | 1485 |
| C.               | Recent Scholarship .....  | 1485 |
| IV.              | APPLICATION OF THE DIFFERENT PRESUMPTION THEORIES TO THE OPA REBUTTABLE PRESUMPTION .....                             | 1487 |
| A.               | The Bursting-Bubble Approach .....  | 1487 |
| B.               | The Morgan-McCormick Approach .....   | 1488 |
| C.               | FRE 301 .....   | 1489 |
| DISCUSSION ..... |   | 1490 |
| V.               | COURTS SHOULD ADOPT NOAA'S INTERPRETATION OF THE OPA REBUTTABLE PRESUMPTION .....                                     | 1490 |
| A.               | The OPA Rebuttable Presumption's Statutory Purposes .....   | 1491 |
| 1.               | <i>Favoring Trustee NRD Recovery</i> .....  | 1491 |
| 2.               | <i>Encouraging the Use of "Accurate and Defensible" Assessment Methods</i> .....                                      | 1492 |
| 3.               | <i>Discouraging Litigation</i> .....  | 1493 |
| B.               | NOAA's Interpretation Is Consistent with the OPA's Goals .....  | 1494 |
| C.               | Chevron Deference? .....  | 1495 |
| 1.               | <i>The Force of Law</i> .....   | 1495 |
| 2.               | <i>Separation of Powers</i> .....   | 1496 |
| VI.              | FRE 301 DOES NOT AND SHOULD NOT GOVERN THE EFFECTS OF THE OPA REBUTTABLE PRESUMPTION .....                            | 1497 |
| A.               | The OPA Rebuttable Presumption Falls Under FRE 301's "Act of Congress" Exception .....                                | 1497 |
| B.               | Had Congress Intended for FRE 301 to Govern the Effects of the OPA Rebuttable Presumption It Would Have Said So ..... | 1498 |

|  |      |
|--|------|
| C. FRE 301 Undercuts Congress's Purposes for the<br>OPA Rebuttable Presumption.....                                  | 1499 |
| VII. APPLICATION OF THE "BURSTING-BUBBLE" APPROACH<br>WOULD RENDER THE OPA REBUTTABLE PRESUMPTION<br>TOOTHLESS ..... | 1500 |
| CONCLUSION .....   | 1501 |

## INTRODUCTION

The recent *Deepwater Horizon* oil spill in the Gulf of Mexico—today the largest accidental marine spill in history<sup>1</sup>—highlights the necessity to resolve a critical question of statutory interpretation: what is the legal weight of the rebuttable presumption accorded to natural-resource damage assessments made by public trustees under the OPA? How courts construe this term could mean the difference between an NRD assessment process that is prompt, cooperative, and economically efficient and one that is more reminiscent of the drawn-out and bitterly contentious NRD assessment that followed the *Exxon Valdez* oil spill of 1989.

History shows that those seeking to recover NRD from oil or chemical spills often face litigation that can last over a decade. For example, of the three hundred lawsuits that were filed in 1989 when the *Exxon Valdez* tanker ran aground in Prince William Sound, Alaska, and spilled nearly eleven million gallons of oil,<sup>2</sup> many plaintiffs were still in court through June 15, 2009, trying to recover damages that the Ninth Circuit had awarded them.<sup>3</sup> While oil spills like the *Exxon Valdez* affair can result in lengthy litigation for many reasons, one common cause of delay is that the parties often must undertake costly and highly complex studies spanning many years to put a dollar value on natural resource injuries.<sup>4</sup> For example, when the United States sought to recover damages caused by toxic discharges into the Los Angeles Harbor in *United States v. Montrose Chemical Corp.*,<sup>5</sup> the litiga-

<sup>1</sup> *Gulf of Mexico Oil Spill*, N.Y. TIMES, Oct. 12, 2010, [http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil\\_spills/gulf\\_of\\_mexico\\_2010/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html).

<sup>2</sup> See, e.g., EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, LEGACY OF AN OIL SPILL: 2009 STATUS REPORT 4 (2009), available at <http://www.evostc.state.ak.us/> (follow "VIEW THE 2009: 20th ANNIVERSARY REPORT" hyperlink).

<sup>3</sup> See *Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1079 (9th Cir. 2009); see also Robert E. Jenkins & Jill Watry Kastner, Case Comment, *Running Aground in a Sea of Complex Litigation: A Case Comment on the Exxon Valdez Litigation*, 18 UCLA J. ENVTL. L. & POL'Y 151, 153, 167 (2000); Steve Keeva, *After the Spill*, A.B.A. J., Feb. 1991, at 66 (noting that thousands of plaintiffs filed 181 separate suits in state and federal courts).

<sup>4</sup> See VALERIE ANN LEE & P.J. BRIDGEN, THE NATURAL RESOURCE DAMAGE ASSESSMENT DESKBOOK 339 (2002).

<sup>5</sup> The U.S. government initiated a suit for NRD against Montrose Chemical Corporation of California and other corporate defendants in 1990; the last of the claims did not settle until 2001. See 104 F.3d 1507, 1511 (9th Cir. 1997); Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Lia-

tion lasted eleven years and the responsible parties spent an estimated \$100 million on assessment costs and legal fees.<sup>6</sup> Of the \$225 million of NRD sought, the Government plaintiffs recovered \$30 million.<sup>7</sup> Furthermore, it took over a decade of legal and scientific wrangling for the parties to finally reach a settlement, without which meaningful restoration of the injured natural resources could not begin.<sup>8</sup>

Recognizing the magnitude of the *Exxon Valdez* spill and the delays and difficulty that federal and state governments can face in seeking compensation for injuries to natural resources, Congress enacted the OPA.<sup>9</sup> The OPA made the parties responsible for oil spills liable for those spills<sup>10</sup> and empowered federal, state, and tribal officials appointed as public trustees to recover the damages inflicted on the natural resources under their trusteeship.<sup>11</sup> To facilitate full and prompt NRD recovery, the OPA directed the National Oceanic and Atmospheric Administration (NOAA) to promulgate regulations for NRD assessments resulting from oil spills.<sup>12</sup> Under the OPA, the trustees must assess damages to the natural resources under their trusteeship,<sup>13</sup> and any determination and assessments they make in accordance with such regulations would enjoy “the force and effect of a rebuttable presumption”<sup>14</sup> of correctness in a judicial or administrative recovery proceeding.<sup>15</sup> Precisely what “force and effect” courts

bility Act and the Resource Conservation and Recovery Act, 67 Fed. Reg. 109, 109 (Jan. 2, 2002).

<sup>6</sup> LEE & BRIDGEN, *supra* note 4, at 400.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See 33 U.S.C. §§ 2701–2762 (2006); S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.A.N. 722, 723 (“What the Nation needs is a package of . . . laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, [and] minimize damage to . . . natural resources and internalize those costs within the oil industry . . .”).

<sup>10</sup> See 33 U.S.C. § 2702(a).

<sup>11</sup> See *id.* § 2706(b)(1).

<sup>12</sup> *Id.* § 2706(e)(1); see *Gen. Elec. Co. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 770 (D.C. Cir. 1997); see also, e.g., 135 CONG. REC. S9689 (daily ed. Aug. 3, 1989) (detailing Senate debate on the OPA).

<sup>13</sup> 33 U.S.C. § 2706(c)(1)(A)–(C).

<sup>14</sup> *Id.* § 2706(e)(2).

<sup>15</sup> Congress modeled these OPA provisions after the NRD provisions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under CERCLA, parties responsible for the release of a hazardous substance are liable for NRD resulting from such a release. See 42 U.S.C. § 9607(a)(4)(C). Acting as public trustees, state and federal officials are empowered to recover compensation for NRD resulting from a hazardous release. See *id.* § 9607(f)(2)(A)–(B). CERCLA requires the President to promulgate regulations for NRD assessment. See *id.* § 9651(c). The President has delegated this authority to the Department of Interior (DOI). See Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), *amended by* Exec. Order No. 13016, 61 Fed. Reg. 45871 (Aug. 30, 1996). As under section 1006(e)(2) of the OPA, section 107(f)(2)(C) of CERCLA provides that a damages assessment conducted by a trustee in accordance with the DOI regulations has “the force and effect of a rebuttable presumption . . . in any administrative or judicial proceeding under [CERCLA].” 42 U.S.C. § 9607(f)(2)(C). Trustee compliance

should give this presumption, particularly in light of Congress's policy goals for the OPA, remains unresolved.

Seeking to effectuate the OPA's goal of minimizing the costs, contention, and delays like those that accompanied the Exxon *Valdez* affair, NOAA promulgated a set of assessment regulations it calls collectively the "Final Rule."<sup>16</sup> The Final Rule sets out an administrative framework known as "cooperative assessment," which generally "refers to activities conducted by [potentially responsible parties] and trustees in a collaborative context to assess injury and . . . damages with a focus on achieving 'early' restoration and resolution of liability without litigation."<sup>17</sup> One mandatory cooperative-assessment activity under the Final Rule, for example, is that trustees must give responsible parties the opportunity to participate in the assessments they conduct prior to bringing an NRD recovery claim under the OPA.<sup>18</sup>

Although NOAA "delineates a set process for conducting assessments" under the Final Rule, the Agency has also, "in light of the myriad of facts and circumstances unique to each oil spill [,] . . . decided to allow [trustees] the discretion to decide, on a case-by-case basis, which specific assessment procedures or methodologies are most appropriate in a given setting."<sup>19</sup> That is, compliance with the Final Rule is not mandatory for trustees.<sup>20</sup> If, for example, the trustees decide to pursue an assessment procedure that deviates from the cooperative-assessment procedure specified in the Final Rule, their ability to bring an NRD claim under section 1002(a) of the OPA is not af-

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with the DOI assessment regulations is voluntary; noncompliance does not affect recoverability. See 43 C.F.R. § 11.10 (2010). However, any assessment that is not done pursuant to the DOI assessment regulations will not enjoy the CERCLA rebuttable presumption. See 42 U.S.C. § 9607(f)(2)(C); 43 C.F.R. § 11.10. Thus, given the similarity in the statutory language and structure of the CERCLA and OPA NRD provisions, it is reasonable to draw general comparisons, for the purpose of analyzing the OPA rebuttable presumption, to academic works and case law on the CERCLA NRD provisions and particularly the CERCLA rebuttable presumption. It is important to note, however, that the legislative motivations behind the two statutes and their implementing regulations are not the same, and as such, the comparison is limited.

<sup>16</sup> Natural Resource Damage Assessments, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).

<sup>17</sup> LEE & BRIDGEN, *supra* note 4, at 401-02; see 15 C.F.R. § 990.41-990.45 (2009).

<sup>18</sup> See 15 C.F.R. §§ 990.14(c)(1), 990.45(d).

<sup>19</sup> Brief for Respondent at 23, *General Electric v. U.S. Department of Commerce*, 128 F.3d 767 (D.C. Cir. 1997) (No. 96-1096), 1997 WL 34647675. NOAA takes the view that this decision is within the broad rulemaking authority given to it by Congress in section 1006(e)(1) of the OPA. Particularly, NOAA argues that the OPA requires only that it promulgate regulations for the assessment of NRD and does not specify how it should approach its task or what specific procedures such regulations must contain. See *id.* at 32.

<sup>20</sup> 15 C.F.R. § 990.11 ("This part may be used by these officials in conducting natural resource damage assessments when natural resources and/or services are injured as a result of an incident involving . . . a discharge of oil. This part is not intended to affect the recoverability of natural resource damages when recoveries are sought other than in accordance with this part.").

fect; the only consequence is that they would lose whatever advantage the rebuttable presumption provided under section 1006(e) might confer.<sup>21</sup> For the purposes of this Note, I assume that this position is correct.<sup>22</sup>

It follows, then, that the OPA's incentive structure for trustees to undertake NOAA's cooperative-assessment procedure critically rests on whatever practical advantages the rebuttable presumption might confer on the correctness of their NRD assessments and determinations. Moreover, what legal weight this presumption might carry has practical implications for the trustees and responsible parties as they craft their litigation strategy. Unfortunately, neither the language nor legislative history of the OPA has explicated the specific legal weight of the OPA rebuttable presumption. Some guidance exists, however, in NOAA's regulations. In the preamble of the Final Rule, NOAA "interprets" the OPA rebuttable presumption "to mean that the responsible parties have the burdens of presenting alternative evidence on damages and of persuading the fact finder that the damages presented by the trustees are not an appropriate measure of damages."<sup>23</sup>

In this Note, I survey and discuss potential theories of what burden-shifting effects the OPA rebuttable presumption might have, consider its legislative history and policy goals, and conclude by proposing that courts adopt NOAA's interpretation. In Part I, I describe the major goals of the OPA and its NRD provision. I then describe NOAA's regulations for NRD assessment, focusing on the cooperative-assessment procedure with which trustees must comply to benefit from the OPA rebuttable presumption. In Part II, I review the doctrinal background of rebuttable presumptions, setting out two leading views on what burden-shifting effects rebuttable presumptions have—the "bursting-bubble" theory and the Morgan-McCormick theory. I then discuss Federal Rule of Evidence 301 (FRE 301) and observe that it adopts a third "intermediate" approach to explaining the effects of rebuttable presumptions. In this Part, I also discuss current views on the burden-shifting effects of the OPA rebuttable presumption and note that the interpretation NOAA has adopted mirrors the Morgan-McCormick theory.

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<sup>21</sup> See *id.* § 990.13 (asserting that only an assessment made in accordance with this section "shall have the force and effect of a rebuttable presumption").

<sup>22</sup> The DOI has also explicitly stated that its assessment regulations under CERCLA, after which the NOAA assessment regulations are modeled, are voluntary and that non-compliance would not disqualify trustees from bringing a suit for NRD under CERCLA. See 43 C.F.R. § 11.10; see also Brief for Respondent, *supra* note 19, at 32.

<sup>23</sup> Natural Resource Damage Assessments, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).

Using a hypothetical, I explore in Part IV how the bursting-bubble, Morgan-McCormick, and the FRE 301 approaches might apply to the OPA rebuttable presumption. I observe in Part IV that the bursting-bubble theory and FRE 301, if applicable, would significantly limit the OPA rebuttable presumption's potential force and effect. Then upon examining the legislative history of the OPA, I suggest in Part V that Congress adopted the OPA rebuttable presumption to favor trustees' recovery of NRD, to incentivize the use of accurate assessment methods, and to discourage costly litigation through compliance with NOAA's cooperative assessment procedures. In light of these statutory purposes, I argue in Part VI that courts should adopt NOAA's interpretation, which effectuates the full force and effect of the OPA rebuttable presumption, because this interpretation is reasonable and consistent with the presumption's statutory purposes. Reinforcing this argument, I discuss in Part VII why courts should find that FRE 301 does not govern the effects of the OPA rebuttable presumption—because the presumption falls under the Rule's "Act of Congress" exception, and because such a reading would significantly limit the functions that Congress had intended the presumption to accomplish.

## I.

### STATUTORY AND REGULATORY BACKGROUND

#### A. The Oil Pollution Act of 1990

In the wake of the Exxon *Valdez* oil spill of March 1989, Congress enacted the OPA as a comprehensive scheme to consolidate and improve existing federal laws that address liability for hazardous releases, such as the CERCLA and the Clean Water Act. The goal of the OPA is to prevent future oil spills and to "make the environment and public whole" for resulting injuries to natural resources.<sup>24</sup> Using restoration costs instead of market value as the metric for measuring injuries to natural resources, the OPA's focus is to facilitate prompt restoration.<sup>25</sup> To these ends, Title I of the OPA creates a comprehensive liability and compensation scheme for oil spills. In particular, section 1006(a) pro-

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<sup>24</sup> See *id.* at 440. See also S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.A.N. 722, 723 ("What the Nation needs is a package of . . . laws that will adequately compensate victims of oil spills, provide quick, efficient clean up, minimize damage to fisheries, wildlife and other natural resources and internalize those costs within the oil industry and its transportation sector."); 136 CONG. REC. H6935 (daily ed. Aug. 3, 1990) (statement of Rep. Jones) ("[This bill makes] it easier for victims of oil spills to recover for economic damages, natural resource damages, subsistence loss, and others. They can seek reimbursement from the spiller or directly from the \$1 billion Federal trust fund. The 1978 *Amoco Cadiz* spill off the coast of France was the biggest spill in history to come ashore. The litigation on that spill is still going on after 12 years, and not one penny in damages has yet been paid. This bill will make sure that doesn't happen here.").

<sup>25</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. at 440.

vides for recovery by the federal government, states, tribes, and private parties that respond to oil spills.<sup>26</sup> It also created a \$1 billion Oil Spill Liability Trust Fund to which trustees can turn for funding to restore natural resources injured by oil spills.<sup>27</sup> The trustees must, however, first seek damages from the responsible parties.<sup>28</sup>

## B. Natural Resource Damage Assessment Under the OPA

Under section 1006(e) of the OPA, Congress requires the President through the undersecretary for oceans and atmosphere to promulgate regulations for the assessment of natural resource injuries resulting from oil spills.<sup>29</sup> In January 1996, NOAA issued the Final Rule to this effect, setting out a process for NRD assessment and for developing plans to restore injured natural resources.<sup>30</sup> The NRD assessment process as established by the Final Rule consists of three phases: (1) preassessment; (2) restoration planning; and (3) restoration implementation.<sup>31</sup> In the preassessment phase, trustees must among other things collect and analyze pertinent data, prepare a Notice of Intent to Conduct Restoration Planning, and open a publicly available administrative record.<sup>32</sup> In the restoration planning phase, trustees must determine whether natural resource injuries have occurred and quantify the nature and extent of such injuries.<sup>33</sup> If trustees determine that restoration activities are necessary, they must identify a “reasonable range” of restoration alternatives and then develop a Draft Restoration Plan.<sup>34</sup> After public review and incorporation of public comments, the Draft Restoration Plan becomes the Final Restoration Plan.<sup>35</sup> At the conclusion of the restoration planning phase, the trustees present a written demand to the responsible parties, requesting either implementation of the Final Restoration Plan or damage payment based on their assessments.<sup>36</sup> If the responsible parties refuse to meet this demand and if neither side can agree

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<sup>26</sup> See 33 U.S.C. § 2706(a) (2006).

<sup>27</sup> See LEE & BRIDGEN, *supra* note 4, at 111. Congress established the Fund as a source of money to pay removal and other costs and damages resulting from oil spills. It is “used for costs not directly paid by a responsible party or guarantor, including costs to respond to spills for which there is no identified responsible party.” *Id.*

<sup>28</sup> See 15 C.F.R. § 990.64(a) (2010); LEE & BRIDGEN, *supra* note 4, at 111.

<sup>29</sup> See 33 U.S.C. § 2706(e)(1).

<sup>30</sup> 15 C.F.R. § 990.12 (giving an overview of the three phases of NRD assessment set forth); Natural Resource Damage Assessments, 61 Fed. Reg. at 444.

<sup>31</sup> See 15 C.F.R. § 990.12.

<sup>32</sup> See *id.* §§ 990.41–990.45.

<sup>33</sup> See *id.* §§ 990.51(a)–(b), 990.52(a)–(b).

<sup>34</sup> See *id.* §§ 990.54(a), 990.55(b).

<sup>35</sup> See *id.* § 990.55(a), (d).

<sup>36</sup> See *id.* § 990.62(b).



on an alternative amount, the trustees may sue the responsible parties for the amount assessed.<sup>37</sup>

### C. NOAA's Cooperative-Assessment Procedure

NOAA's Final Rule aims to promote the OPA's goal of expeditious and cost-effective restoration of injured natural resources and services.<sup>38</sup> To this end, the regulation sets forth an administrative procedure known as cooperative assessment, which enables trustees to involve interested responsible parties in assessment activities undertaken during the restoration planning phase.<sup>39</sup> NOAA reasons that such cooperative assessments can avoid duplicate studies and promote overall efficiency and cost-effectiveness.<sup>40</sup> Furthermore, assessments made with inputs from the public and the participation of responsible parties will help achieve NOAA's three major goals: validating trustee damage determinations, ensuring that trustees follow appropriate assessment procedures, and reducing transaction costs.<sup>41</sup> NOAA nevertheless recognizes that cooperative assessment risks compromising the trustees' statutory obligations to act on behalf of the public trust by potentially creating the opportunity for responsible parties to interfere with or delay trustees' assessment activities.<sup>42</sup> This cooperative-assessment procedure is described below.

*Invitation.* First, the trustees must invite responsible parties in writing to participate in the NRD assessment process as soon as practicable but no later than delivery of the Notice of Intent to Conduct Restoration Planning.<sup>43</sup>

*Scope of Responsible Parties' Participation.* If the responsible parties agree to participate in the assessment process, trustees must determine the extent of their participation. At a minimum, the responsible parties' participation must include the opportunity to comment on documents or plans that significantly affect the nature and extent of the assessment; the trustees' objective consideration of all written comments, recommendations, or proposals that the responsible parties submitted; and notice of the trustees' determinations under the regulation.<sup>44</sup>

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<sup>37</sup> See *id.* § 990.64(a).

<sup>38</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. 440, 440 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990) ("The goal of the [OPA] is to make the environment and public whole for injuries to natural resources and natural resource services . . .").

<sup>39</sup> See *id.* at 443 ("[T]he rule requires the trustees to invite the responsible parties to participate in the assessment.").

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 441.

<sup>42</sup> See *id.* at 443 (outlining factors the trustees may use to determine the appropriate scope of participation by responsible parties).

<sup>43</sup> See 15 C.F.R. § 990.14(c)(1)-(2) (2010).

<sup>44</sup> See *id.* § 990.14(c)(4).

*Agreement.* Beyond the minimal participation requirements, the Final Rule also encourages, but does not require, trustees and participating responsible parties to “develop a set of agreed-upon facts concerning the incident and/or assessment.”<sup>45</sup> Stipulated facts might, for example, specify the types of injured natural resources and services, the extent of injury, the most appropriate assessment procedures to determine injury, and how to interpret the results of the chosen procedures.<sup>46</sup> Also, the parties have the option of entering into binding agreements to facilitate their interactions.<sup>47</sup>

*Proposals for Alternative Assessment Methods.* Responsible parties may request the use of assessment methods other than those selected by the trustees if those methods meet the conditions in part 990, section 14(c) (6) (i) of the Final Rule, if the parties agree not to challenge the results of the requested alternate procedure, and if the parties agree to fund the alternate procedure.<sup>48</sup> Trustees can reject such proposals if, in the sole judgment of the trustees, the proposals are either not feasible or scientifically or technically sound, or if they would not adequately address the appropriate natural resources and services.<sup>49</sup> Trustees must document the request and their response in the administrative record.<sup>50</sup>

*Termination of Participation and Disclosure.* Trustees may end participation by responsible parties who interfere with their ability to fulfill responsibilities under the OPA and the Final Rule during the assessment process.<sup>51</sup>

*Public Review.* Finally, trustees must provide opportunities for public involvement after they make the decision to develop restoration plans or issue related notices.<sup>52</sup> Trustees may also allow public involvement at any time prior to this decision if it could enhance the trustees’ decision making or help to avoid delays in restoration.<sup>53</sup>

#### D. Compliance with the NOAA’s NRD Assessment Procedure Entitles Trustees to a Rebuttable Presumption

As described above, the Final Rule provides a process for conducting NRD assessments, including specific determinations and their sequence, as well as the trustees’ obligation to document their choices and to provide an opportunity for public and responsible-party input.

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<sup>45</sup> See *id.* § 990.14(c) (3).

<sup>46</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. at 443.

<sup>47</sup> See *id.*

<sup>48</sup> See 15 C.F.R. § 990.14(c) (6) (i).

<sup>49</sup> See *id.* § 990.14(c) (6) (ii).

<sup>50</sup> See *id.* § 990.14(c) (7).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* § 990.14(d).

<sup>53</sup> *Id.*

Furthermore, it sets a standard for NRD assessments, requiring that they be “capable of providing assessment information of use in determining the type and scale of restoration appropriate for a particular injury,” and “reliable and valid for the particular incident” in order for trustees to recover from responsible parties.<sup>54</sup> The Final Rule, however, does not require *any* specific assessment procedures or methodologies.<sup>55</sup> Trustees have the discretion to decide, on a case-by-case basis, what particular assessment procedures to use in a given setting.<sup>56</sup> However, any determination or assessment of damages made in accordance with the Final Rule that NOAA promulgated has “the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding.”<sup>57</sup> Conversely, noncompliance disqualifies the trustees from availing themselves of the rebuttable presumption<sup>58</sup> but otherwise does not affect their ability to collect damages.<sup>59</sup>

#### E. The Rebuttable Presumption Is Triggered When Trustees Meet Their Burden of Production

Once the trustees have completed their NRD assessment and presented a written demand to the responsible parties requesting either implementation of the Restoration Plan or a payment, the trustees may take their claim to court if the responsible parties refuse to meet the demand or if neither side can agree on an alternative amount.<sup>60</sup> In their case-in-chief, the trustees can rest after producing evidence to establish the responsible parties’ liability and after introducing their damage assessment and demonstrating that it had been conducted in accordance with the Final Rule. The OPA rebuttable presumption is triggered at that point, and the burden shifts to the responsible parties to produce evidence rebutting either the trustees’ claim that the assessment had been conducted in accordance with the Final Rule or the trustees’ NRD determinations.<sup>61</sup> After this burden-

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<sup>54</sup> See *id.* § 990.27(a), (a)(3); *accord* Gen. Elec. Co. v. U.S. Dep’t of Commerce, 128 F.3d 767, 773 (D.C. Cir. 1997).

<sup>55</sup> See Brief for Respondent, *supra* note 19, at 23–24 and accompanying text.

<sup>56</sup> See *id.*

<sup>57</sup> 33 U.S.C. § 2706(e)(2) (2006); 15 C.F.R. § 990.13.

<sup>58</sup> Oil Pollution Act, Pub. L. No. 101-380, § 1006(e)(2) (codified at 33 U.S.C. § 2706(e)(2) (2006)); Natural Resource Damage Assessments, 61 Fed. Reg. 440, 444 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990) (“If natural resources and/or services are injured by a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 CFR part 11 in order to obtain a rebuttable presumption.”).

<sup>59</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. at 442 (“The process described in the rule is not intended to affect the recoverability of natural resource damages when recoveries are sought other than in accordance with this rule.”).

<sup>60</sup> See 15 C.F.R. § 990.64(a).

<sup>61</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. at 443 (“NOAA interprets this presumption to mean that the responsible parties have the burdens of presenting al-

shifting exercise, the practical effects of the OPA rebuttable presumption are unclear.

## II.

### DOCTRINAL BACKGROUND

Before delving into the potential effects of the OPA rebuttable presumption, I first discuss the definition, functions, and potential burden-shifting effects of rebuttable presumptions in general.

#### A. What Is a Rebuttable Presumption?

A rebuttable presumption is a rule of evidence under which, once a basic fact or a group of basic facts (Fact[s] A) have been established, the fact finder also must accept the presumed fact (Fact B) that follows from the basic fact unless the presumption is rebutted.<sup>62</sup> A rebuttable presumption is different from an inference. In an inference, “the existence of Fact B *may be deduced* from Fact A by the ordinary rules of reasoning and logic.”<sup>63</sup> In a rebuttable presumption, however, “the existence of Fact B must be assumed because of a rule of law.”<sup>64</sup>

#### B. What Functions Do Rebuttable Presumptions Serve?

Relying on common-law doctrines, courts traditionally use rebuttable presumptions in jury trials to reallocate power between the judge and the jury.<sup>65</sup> Usually, the effect of a common-law rebuttable presumption is “getting the claim to the jury more rapidly and under more favorable jury instructions than would otherwise be the case.”<sup>66</sup> This serves the judicial policy of reducing the power of judges in deciding factual controversies.<sup>67</sup>

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ternative evidence on damages and of persuading the fact finder that the damages presented by the trustees are not an appropriate measure of damages.”).

<sup>62</sup> I JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 301.02[1] (2d ed. 2000); see *Take v. Comm’r*, 804 F.2d 553, 557–58 (9th Cir. 1986).

<sup>63</sup> WEINSTEIN & BERGER, *supra* note 62 (“For example, in most jurisdictions the tort rule of *res ipsa loquitur* provides that if certain basic facts are proven, a jury may—but need not—find negligence. It is an inference (permissive), not a presumption (mandatory).”); see also *Cnty. Court v. Allen*, 442 U.S. 140, 157 (1979) (asserting that the permissive inference, or presumption, allows but does not require the trier of fact to infer the elemental fact from the proof of the basic fact and does not place a burden on the defendant).

<sup>64</sup> WEINSTEIN & BERGER, *supra* note 62.

<sup>65</sup> See CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122.1, at 439 (2d ed. 2005).

<sup>66</sup> Frederick R. Anderson, *Natural Resource Damages, Superfund, and the Courts*, 16 B.C. ENVTL. AFF. L. REV. 405, 437 (1989).

<sup>67</sup> See WRIGHT & GRAHAM, *supra* note 65, § 5122.2, at 449 (“The underlying policy increases the power of the jury to decide facts by restricting the powers of judges to take cases away from the verdict [sic] by the use of directed verdicts . . .”).

Rebuttable presumptions do more than reallocate judge and jury power, however.<sup>68</sup> Indeed, legislative bodies are “free to adopt presumptions for policy reasons.”<sup>69</sup> Such reasons might be to “correct the imbalance resulting from one party’s superior access to the evidence, to facilitate the prompt resolution of claims, and to favor certain claims for social and economic reasons.”<sup>70</sup> As Frederick Anderson observed, whereas common law conceptions might “act as a brake” upon recovery for certain claims,<sup>71</sup> legislatures have maneuvered around such constraints by employing statutory rebuttable presumptions to achieve their objectives of favoring recovery for such claims.<sup>72</sup>

### C. What Are the Potential Burden-Shifting Effects of a Rebuttable Presumption?

A rebuttable presumption “has the effect of shifting the burden of proof.”<sup>73</sup> There are, however, two aspects of the burden of proof: (1) the burden of production and (2) the burden of persuasion. The burden of production—that is, the burden of coming forward with the evidence—determines whether a case reaches the jury.<sup>74</sup> The burden of persuasion refers to the degree to which a party must prove to the jury each element of the case.<sup>75</sup> As a result, a rebuttable presumption can either shift only the burden of production or both the burden of production and burden of persuasion.<sup>76</sup> There is substantial disagreement, generally falling into three distinct views, as to which of these effects a given rebuttable presumption may have. A discussion of these views follows below.

#### 1. *Bursting Bubble*

The bursting-bubble approach holds that a rebuttable presumption only shifts the burden of production so that one’s opponent need

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<sup>68</sup> See Anderson, *supra* note 66, at 438 (“Modern legislative burden shifting has served not only to reallocate power between judge and jury but to move well beyond the strictures of causal proof which the common law requires.”).

<sup>69</sup> Gen. Elec. Co. v. U.S. Dep’t of Commerce, 128 F.3d 767, 772 (D.C. Cir. 1997) (quoting Chem. Mfrs. Ass’n v. Dep’t of Transp., 105 F.3d 702, 705 (D.C. Cir. 1997)).

<sup>70</sup> Anderson, *supra* note 66, at 436.

<sup>71</sup> See *id.* at 427.

<sup>72</sup> See *id.* at 439–40 (discussing how state worker compensation laws and federal social welfare legislation, such as the Black Lung Benefits Reform Act of 1977, have accorded generous presumptions of correctness to favor compensation for victims of black-lung disease).

<sup>73</sup> Heiner v. Donnan, 285 U.S. 312, 329 (1932).

<sup>74</sup> See C. McCORMICK, EVIDENCE § 336, at 783–84 & n.3 (2d ed. 1972) (“One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue . . .”).

<sup>75</sup> See *id.* § 336, at 783–84 (“The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence.”).

<sup>76</sup> See WEINSTEIN & BERGER, *supra* note 62.

only bring forward enough rebutting evidence to avoid a directed verdict.<sup>77</sup> It does not shift the burden of persuasion. Under the bursting-bubble theory, the rebuttable presumption merely serves procedural convenience and “bursts” upon the presentation of rebutting evidence—leaving the court to decide the case as if the presumption never existed.<sup>78</sup> Thus, a court applying the bursting-bubble approach will, upon sufficient rebutting evidence, require the proponent of a rebuttable presumption to put on further evidence of the presumed fact; otherwise, the opponent is entitled to a directed verdict on that issue.<sup>79</sup>

## 2. *Morgan-McCormick*

The Morgan-McCormick approach emphasizes that rebuttable presumptions are usually created for substantive policy reasons, not merely for procedural convenience.<sup>80</sup> Under the Morgan-McCormick approach, a rebuttable presumption has great weight and would either (a) shift not only the burden of production but also the burden of persuasion or (b) require the court to inform the jury that the presumption exists and to instruct the jury that it can find contrary to the rebutting evidence.<sup>81</sup> Thus, even if rebutting evidence is introduced, the rebuttable presumption does not burst.<sup>82</sup> The issue would go to the jury and the judge would instruct the jury about the existence of the presumption. Therefore, unless the opponent of the presumption *persuades* the fact finder of the *nonexistence* of the presumed fact, the fact finder must accept the presumed fact as true.<sup>83</sup>

## 3. *Federal Rules of Evidence*

FRE 301 provides:

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<sup>77</sup> See WRIGHT & GRAHAM, *supra* note 65, § 5126, at 550 (stating that under the “bursting bubble” theory, contrary evidence “destroy[s] the presumption”); see also JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 339 (Boston, Little, Brown, & Co. 1898) (asserting that the purpose of a presumption is to place the burden of going forward with evidence on the party the presumption operates against).

<sup>78</sup> See WRIGHT & GRAHAM, *supra* note 65, § 5126, at 550; see also *Nunley v. City of L.A.*, 52 F.3d 792, 795–96 & n.5 (9th Cir. 1995) (discussing the common-law mailbox presumption and stating that “[u]nder the so-called ‘bursting bubble’ approach to presumptions, a presumption disappears where rebuttal evidence is presented”).

<sup>79</sup> See WEINSTEIN & BERGER, *supra* note 62 § 301 app. 100[2] (a).

<sup>80</sup> See WRIGHT & GRAHAM, *supra* note 65, § 5126, at 540; see also Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82 (1933) (rejecting the bursting-bubble theory and noting that “it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect”).

<sup>81</sup> See WRIGHT & GRAHAM, *supra* note 65, at 430–31.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 431 (noting that upon contrary evidence the judge will send “the case to the jury with an instruction that the burden of persuasion is on the opponent”).

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.<sup>84</sup>

Where FRE 301 applies, a presumption, while shifting only the burden of production, “does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead [it] is merely deemed sufficient evidence of the fact presumed to be considered by the jury or other finder of fact.”<sup>85</sup> In other words, “the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may *infer* the existence of the presumed fact from proof of the basic facts.”<sup>86</sup> Unlike the Morgan-McCormick approach, FRE 301 in effect provides that it is discretionary and not mandatory for a judge to instruct the jury on the existence of the presumption.<sup>87</sup>

#### 4. *FRE 301 Does Not Endorse the Bursting-Bubble Approach*

Courts have asserted that FRE 301 is similar to the bursting-bubble approach in its treatment of presumptions.<sup>88</sup> Most of these cases can be distinguished in that they deal with common-law presumptions or administratively-created presumptions where FRE 301 definitely applies.<sup>89</sup> Statutory presumptions such as the OPA rebuttable presumption, in contrast, are not necessarily governed by FRE 301.<sup>90</sup>

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<sup>84</sup> FED. R. EVID. 301.

<sup>85</sup> See *id.* and accompanying committee reports; Hearings on Proposed Rules of Evidence Before the Subcommittee on Criminal Justice of the House Comm. on the Judiciary (Supp.), 93d Cong., 1st Sess., ser. 2, at 364 (Comm. Print 1973); Notes of Committee on the Judiciary, H. Rep. No. 93-650; see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989) (“[T]o the extent that [prior] cases speak of an employer’s ‘burden of proof’ with respect to a legitimate business justification defense, they should have been understood to mean an employer’s production—but not persuasion—burden.” (citation omitted)).

<sup>86</sup> WRIGHT & GRAHAM, *supra* note 65, at 344 (emphasis added) (quoting the Conference Comm. Rep. on FRE Rule 301).

<sup>87</sup> See *id.*

<sup>88</sup> See *Nunley v. City of L.A.*, 52 F.3d 792, 796 (9th Cir. 1995) (concluding that FRE 301 adopts the bursting-bubble approach with regard to the common-law mailbox presumption); see also McCORMICK, *supra* note 74, § 345, at 821 (asserting that the bursting-bubble theory is “the most widely followed theory of presumptions in American law”); see generally *Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1119 (6th Cir. 1985) (“Most commentators have concluded that Rule 301 as enacted embodies the Thayer or ‘bursting bubble’ approach.”).

<sup>89</sup> See, e.g., *Nunley*, 52 F.3d at 793 (noting that the case concerns an issue of first impression regarding FED. R. APP. P. 4(a)(6)).

<sup>90</sup> See *infra* Part VI.C.

Legislative history does not support the idea that Congress endorsed the bursting-bubble approach in enacting FRE 301. The House Judiciary Committee, in its report on FRE 301, found that the bursting-bubble approach gives presumptions “too slight an effect.”<sup>91</sup> On the other hand, the Committee also rejected the Morgan-McCormick view, finding that it “lends too great a force to presumptions.”<sup>92</sup> Accordingly, the best view is that FRE 301 endorses an “intermediate” approach to presumptions because it contains elements of both the bursting-bubble approach and the Morgan-McCormick approach.<sup>93</sup> Courts following the “intermediate” approach recognize that allowing a statutory presumption to disappear from a case under the bursting-bubble approach merely because a party presents some conflicting evidence “could undercut the legislative purpose in creating the presumption.”<sup>94</sup>

### III.

#### CURRENT VIEWS ON THE LEGAL WEIGHT OF THE OPA REBUTTABLE PRESUMPTION

##### A. Statutory Language and NOAA’s Interpretation

While section 1006(e)(2) of the OPA accords “the force and effect of a rebuttable presumption” to any trustee determination and assessment of damages made in accordance with the Final Rule, neither the Act nor its legislative history explicates the legal weight of this rebuttable presumption.

In the preamble of the Final Rule, NOAA “interprets” the OPA rebuttable presumption “to mean that the responsible parties have the burdens of presenting alternative evidence on damages and of persuading the fact finder that the damages presented by the trustees are not an appropriate measure of damages.”<sup>95</sup> In NOAA’s view, then,

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<sup>91</sup> See Notes of Committee on the Judiciary, H. REP. NO. 93-650 (1973).

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*; *United States v. Jessup*, 757 F.2d 378, 382–83 (1st Cir. 1985).

<sup>94</sup> *Jessup*, 757 F.2d at 383 (applying the “intermediate” approach to determine the burden-shifting effect of a rebuttable presumption under the Bail Reform Act and citing *WRIGHT & GRAHAM*, *supra* note 65, § 5122, at 566, for the proposition that “while courts pay ‘lip service’ to ‘bursting bubble’ [sic] approach, ‘most of them [have] felt compelled to deviate from the ‘bursting bubble’ theory at one time or another in order to give greater effect to presumptions” (alteration in original)); see also *Wright v. State Accident Ins. Fund*, 613 P.2d 755, 759–60 (Or. 1980) (“If there is opposing evidence, the trier of fact must weigh the evidence, giving the presumption the value of evidence, and determine upon which side the evidence preponderates.”); *Montgomery Cnty. Fire Bd. v. Fisher*, 454 A.2d 394, 400 (Md. Ct. Spec. App. 1983) (finding that the statutory presumption that a firefighter’s heart disease is job related “does not disappear like the bursting bubble upon generation of a jury issue; rather it remains in the case as one of the elements to be considered”).

<sup>95</sup> *Natural Resource Damage Assessments*, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).



the rebuttable presumption shifts the burden of production and the burden of persuasion to the responsible parties once the trustees demonstrate that their NRD assessment procedure complies with the Final Rule.

## B. Relevant Case Law

Courts have given the burden-shifting effects of the OPA rebuttable presumptions some but not much attention. In *General Electric Co. v. U.S. Department of Commerce*, the D.C. Circuit noted NOAA's counsel's description of the OPA rebuttable presumption as a "burden shifting exercise" and observed that the presumption did not appear to confer a "powerful advantage" to trustees as the opposing counsel had argued that it would.<sup>96</sup> The court, however, also ruled that it did not need to resolve the question of what legal weight this presumption carries.<sup>97</sup> Thus, other than some preliminary treatment, there has been limited detailed explanation of how and on what grounds a court would interpret the OPA rebuttable presumption. I suggest in Part V that future courts should be mindful of the presumption's statutory goals in performing this task.

As noted, section 107(f)(2)(C) of CERCLA accords a virtually identical rebuttable presumption to trustees' NRD assessment and determinations.<sup>98</sup> Courts also have not, however, resolved the burden-shifting effects of the CERCLA rebuttable presumption. In *Ohio v. U.S. Department of the Interior*, the court described the CERCLA rebuttable presumption for NRD assessment and determination as a "presumption of correctness" but did not address its burden-shifting effects.<sup>99</sup> In *United States v. Asarco Inc.*, the court discussed the scope of the CERCLA rebuttable presumption to determine whether it affected all or only final NRD determinations; however, it, too, did not address the presumption's burden-shifting effects.<sup>100</sup>

## C. Recent Scholarship

After considering the OPA rebuttable presumption in light of the bursting-bubble approach, the Morgan-McCormick approach, and FRE 301, some commentators have predicted that its only effect is shifting the burden of production from the trustee to the responsible party.<sup>101</sup> This view presupposes that the traditional common-law

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<sup>96</sup> *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 772 (D.C. Cir. 1997) (internal quotation marks omitted).

<sup>97</sup> *See id.*

<sup>98</sup> *See* 42 U.S.C. § 9607(f)(2)(C) (2006).

<sup>99</sup> *See* 880 F.2d 432, 472 (D.C. Cir. 1989).

<sup>100</sup> *See* Nos. 96-cv-0122, 91-cv-342, 1998 WL 1799392, at \*2-3 (D. Idaho Mar. 31, 1998).

<sup>101</sup> *See, e.g.,* Craig R. O'Connor, *Natural Resource Damage Actions Under the Oil Pollution Act of 1990: A Litigation Perspective*, 45 BAYLOR L. REV. 441, 450-53 (1993) ("The trustee

norms for rebuttable presumptions would continue to govern when courts seek to determine the effects of the OPA rebuttable presumption. Legislation such as CERCLA, the Surface Mining Control and Reclamation Act, and the Black Lung Benefits Act remind us, however, that Congress has on multiple occasions relaxed common-law standards of proof and procedure to favor certain compensatory and remedial outcomes for the litigants it sought to benefit.<sup>102</sup> Thus, in light of the goals of these statutes, the analysis supporting the common-law view of the presumption is incomplete without further discussion of the OPA's statutory scheme, Congress's goals for the OPA's rebuttable presumption, and the potential reasons why courts should treat the OPA rebuttable presumption as they would any other ordinary common-law rebuttable presumption.

Commentators have, in contrast, explored the potential burden-shifting effects of the analogous CERCLA rebuttable presumption.<sup>103</sup> Indeed, while there is arguably no final word on the issue, Mark Menefee and others have argued that the CERCLA rebuttable presumption likely has little evidentiary value because it would, assuming that FRE 301 applies, shift only the burden of producing evidence to the responsible party but not the burden of persuasion.<sup>104</sup> On the other hand, in positing that Congress adopted the CERCLA rebuttable presumption to "give the trustees a better chance of prevailing in cases involving difficult-to-prove ecological damage,"<sup>105</sup> Anderson has laid the foundation for my argument in Part V that, considering the OPA's legislative history and policy goals, courts should interpret the OPA

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need only prove that it conducted the damage assessment in accordance with the natural resource damages regulations to establish a prima facie case . . . . The burden of proof then shifts to the responsible party to rebut the presumption and prevail in the battle of persuasion."); Danielle Marie Stager, Note, *From Kepone to Exxon Valdez Oil and Beyond: An Overview of Natural Resource Damage Assessment*, 29 U. RICH. L. REV. 751, 762 (1995) (arguing that if the trustees follow the regulatory guidelines in their assessment, the responsible parties must then show "errors or unreliability in assessment and valuation methods").

<sup>102</sup> See Anderson, *supra* note 66, at 421-26 & nn.71-72 (discussing compensatory and remedial federal legislation where Congress "deliberately" altered and thus supplanted traditional common-law standards of fault and causation to facilitate recovery).

<sup>103</sup> The language of this presumption is virtually identical to that of the OPA. See discussion *infra* Part IV.A.2.

<sup>104</sup> See Mark Menefee, *Recovery for Natural Resource Damages Under Superfund: The Role of the Rebuttable Presumption*, 12 ENVTL. L. REP. 15,057, 15,061-64 (1982) (asserting that if the government chooses to litigate in federal court, FRE 301 would apply and once the opponent produces rebutting evidence, the issue becomes an issue of fact and goes to the jury); accord Duane Woodard & Michael R. Hope, *Natural Resource Damage Litigation Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 14 HARV. ENVTL. L. REV. 189, 210-11 (1990) (citing Menefee and noting that, under FRE 301, the plaintiff retains the burden of proof throughout the trial).

<sup>105</sup> Anderson, *supra* note 66; see also David Elbaum, *Judicial Review of Natural Resource Damage Assessments under CERCLA: Implications of the Right to Trial by Jury*, 70 N.Y.U. L. REV. 352, 386 (1995) (arguing that Congress enacted the rebuttable presumption to increase the chances the trustees would recover damages).

rebuttable presumption—one analogous to the CERCLA rebuttable presumption—to have great evidentiary value. Moreover, departing from Menefee's analysis of the CERCLA rebuttable presumption, I propose in Part VI of this Note that FRE 301 does not apply to the OPA rebuttable presumption and that the policy purposes of the OPA rebuttable presumption should compel courts to find that it shifts the burden of persuasion to the responsible parties.

#### IV.

##### APPLICATION OF THE DIFFERENT PRESUMPTION THEORIES TO THE OPA REBUTTABLE PRESUMPTION

This Part illustrates how the different presumption theories previously discussed apply to the OPA rebuttable presumption.<sup>106</sup>

Suppose that in a federal district jury trial on the issue of NRD resulting from an oil spill, the trustees present evidence that: (1) There is a rebuttable presumption under the OPA in favor of the trustees' NRD assessment and determinations; (2) The trustees complied with NOAA's regulations in assessing damages (for example, they met the Final Rule's validity-and-reliability standard and followed the procedure for involving responsible parties in assessment activities); (3) The trustees' field studies indicated that 250 acres of rocky intertidal habitats suffered loss of service due to exposure to oil; and (4) The trustees' Habitat Equivalency Analysis yielded an appropriate restoration project for those habitats, under which the restoration cost is \$4,000 per acre or \$1 million in total.

##### A. The Bursting-Bubble Approach

The OPA rebuttable presumption will have minimal weight under the bursting-bubble approach. Under this approach, the trustees will have met their burden of production in their case-in-chief by presenting the above evidence. If the responsible parties present any rebutting evidence (for example, that restoration cost is actually \$3900 per acre instead of \$4000 per acre), the presumption that the trustees came up with the correct damage determination via the NOAA cooperative-assessment procedure immediately ceases to have any effect.<sup>107</sup> Thus, the trustees must present evidence above and beyond what they elucidated through the NOAA cooperative-assessment procedure (to show that restoration cost is actually \$4000) in order to avoid a directed verdict in favor of the responsible parties on the is-

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<sup>106</sup> Because of the similarity in language and statutory structure between the OPA and CERCLA rebuttable presumptions, the analysis here follows the same theoretical structure Mark Menefee used to explore the burden-shifting effects of the CERCLA rebuttable presumption. See Menefee, *supra* note 104, at 15,060–63.

<sup>107</sup> See *supra* notes 77–79 and accompanying text.

sue. Assuming that the OPA rebuttable presumption, like the CERCLA rebuttable presumption, applies to any determination by the trustees,<sup>108</sup> it is likely that a court will find that only the final NRD assessment, that is, the restoration cost, has been burst. All of the lesser determinations (which make up the final NRD assessment) thus enjoy the rebuttable presumption, which should not burst and must be individually rebutted. On the other hand, if the responsible parties present no rebutting evidence, the OPA rebuttable presumption remains, and the trustees are entitled to a directed verdict on the issue.

Whether it is a jury or bench trial, the OPA rebuttable presumption will likely have the same effects under the bursting-bubble approach. If the responsible parties present rebutting evidence, the judge or fact finder will treat the OPA rebuttable presumption as non-existent, and the trustees must persuade the fact finder by the weight of the evidence<sup>109</sup> that their NRD determinations are correct. If the opposing party presents no rebutting evidence, the judge will find in favor of the trustees' NRD determinations.

## B. The Morgan-McCormick Approach

The Morgan-McCormick approach, like NOAA's, effectuates the full "force and effect" of the OPA rebuttable presumption.<sup>110</sup> Under this approach, even if the responsible parties present some rebutting evidence, the OPA presumption does not simply vanish.<sup>111</sup> The trustees upon meeting their burden of production will either: (a) have a directed verdict in their favor on the \$1 million damage determination unless the responsible parties present enough evidence to reasonably prove the *nonexistence* of the presumed fact (i.e., the trustees' \$1 million total damage determination is incorrect), or (b) have the judge issue a mandatory jury instruction that the jury could find contrary to the responsible parties' rebutting evidence. In the example above, scenario (a) illustrates the shifting of both the burden of production and persuasion; it is essentially the NOAA interpretation of the OPA rebuttable presumption.<sup>112</sup> Whether the court follows scenario (a) or (b), however, the result is that the OPA rebuttable presump-

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<sup>108</sup> In *United States v. Asarco*, Nos. 96-cv-0122, 91-cv-342, 1998 WL 1799392, at \*2-3 (D. Idaho), defendant Arsaco argued that upon introduction of rebuttal evidence, that evidence could be used to rebut the entire assessment process, not just the final results of the assessment. The court agreed.

<sup>109</sup> Presumably the standard of proof here, as a civil case, is the preponderance of evidence.

<sup>110</sup> See 33 U.S.C. § 2706(e)(2) (2006).

<sup>111</sup> See *supra* notes 80-83 and accompanying text.

<sup>112</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).

tion operates in its full force and the trustees' recovery claim has a greater chance of success.

### C. FRE 301

While application of FRE 301, assuming that it applies, would give the OPA rebuttable presumption slightly greater "force and effect" than the bursting-bubble approach, the Rule would still significantly limit the weight of the OPA rebuttable presumption. Under FRE 301, the trustees have met their burden of production on the issue by presenting the above evidence. Even if the responsible parties do not present rebutting evidence after the trustees rest, however, the trustees are not entitled to a directed verdict in favor of their damage determination under FRE 301. A court following the "intermediate" approach to presumptions would read FRE 301 to entitle the trustees only to the instruction that the jury *may presume* the existence of the asserted fact (i.e., the total cost for restoring 250 acres of rocky intertidal habitats is \$1 million, or 250 multiplied by \$4000).<sup>113</sup> FRE 301 does not have a mandatory effect on the jury; it does not require that the jury *must* presume the correctness of the trustees' \$1 million determination.<sup>114</sup> To receive a directed verdict in their favor, the trustees must still persuade the jury that the number of injured acres of rocky intertidal habitats that their field studies produced, as well as the restoration costs that their Habitat Equivalency Analysis calculated, is credible evidence supporting the \$1 million damage determination. In contrast, under both the bursting-bubble approach and the Morgan-McCormick approach, absent rebuttal evidence, the trustees would be entitled to a directed verdict in their favor on the issue.

If the responsible parties present some rebutting evidence (for example, evidence that their own surveys indicated injuries to only 100 instead of 250 acres of rocky intertidal habitats), the \$1 million damage determination presumption in favor of the trustees does not disappear or "burst" completely under FRE 301. Because FRE 301 takes the "intermediate" approach, the presumption still has evidentiary weight under the Rule and will go to the jury.<sup>115</sup> The jury, however, is no longer instructed that it *may presume* that the trustees' \$1 million damage determination is correct, only that it *may infer* such correctness.<sup>116</sup> Because an inference is defined as a deduction based on the common rules of reasoning and logic, rather than a mandatory assumption dictated by the rules of law,<sup>117</sup> this means that the jury

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<sup>113</sup> See Menefee, *supra* note 104, at 15,062–63.

<sup>114</sup> See *id.*

<sup>115</sup> See WRIGHT & GRAHAM, *supra* note 63, at 541, 544–54.

<sup>116</sup> See *id.* at 344.

<sup>117</sup> See *supra* notes 63–64 and accompanying text.

does not have to assume that the trustees' NRD determinations are correct. Instead, they may use their own power of logic and reasoning to determine whether they believe or disbelieve the trustees on this issue. Thus, it is likely that if the evidence presented to a juror were: (a) the trustees' determination that 250 acres of rocky intertidal habitats were injured, (b) the responsible parties' rebuttal that only 100 acres were injured, and (c) the assumption that the OPA rebuttable presumption exists, then the juror would probably use the existence of the OPA rebuttable presumption as one piece of evidence militating against the responsible parties' 100-acre determination that is to be weighed against other evidence. Furthermore, as the presumption has no mandatory effect on the jury under FRE 301, the judge has the discretion to give this instruction.<sup>118</sup>

In sum, while FRE 301 gives the OPA rebuttable presumption slightly greater "force and effect" than the bursting-bubble approach, it still significantly limits the legal weight of this presumption as an "Act of Congress." Under FRE 301, the OPA rebuttable presumption's most powerful effect, achieved when the responsible parties present no rebutting evidence, is to entitle the trustees to a jury instruction that the jury may (rather than must) presume the correctness of the trustees' damage determinations. In other words, even without any rebutting evidence and even where trustees conducted their NRD assessment in compliance with NOAA's regulations, the jury can still question the trustees' assessment and determinations.<sup>119</sup>

## DISCUSSION

### V.

#### COURTS SHOULD ADOPT NOAA'S INTERPRETATION OF THE OPA REBUTTABLE PRESUMPTION

NOAA states that it "interprets" the OPA rebuttable presumption "to mean that the responsible parties have the burdens of presenting alternative evidence on damages and of persuading the fact finder that the damages presented by the trustees are not an appropriate measure of damages."<sup>120</sup> That is, in NOAA's view, the rebuttable presumption shifts the burden of production and the burden of persuasion to the responsible parties once the trustees demonstrate that their NRD assessment procedure complies with the Final Rule. As discussed in Part IV, application of either FRE 301 or the bursting-bub-

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<sup>118</sup> See Menefee, *supra* note 104, at 15,063.

<sup>119</sup> Cf. Menefee, *supra* note 104 (arguing that, assuming FRE 301 applies, the CERCLA presumption should only shift the burden of coming forward with evidence to the defendant and should leave the burden of persuasion on the government plaintiffs).

<sup>120</sup> Natural Resource Damage Assessments, 61 Fed. Reg. 440, 443 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).

ble approach would likely limit the burden-shifting effects of the OPA rebuttable presumption. Here, I argue that Congress adopted the OPA rebuttable presumption for substantive policy goals, one of which is to give trustees a powerful litigation advantage so as to maximize their chance of fully and promptly recovering compensation for the injuries that oil spills inflict on natural resources. Allowing common-law constraints like the bursting-bubble approach and FRE 301 to limit the OPA rebuttable presumption's burden-shifting effects would undermine these goals. Thus, assuming that a court would not defer to NOAA's interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>121</sup> it should still adopt NOAA's construction because doing so is reasonable and consistent with Congress's purposes for adopting the OPA rebuttable presumption. Without this interpretation, a key incentive for parties to engage in cooperative NRD assessment and the opportunity for prompt and economically efficient assessment that Congress sought to create by enacting the OPA would be lost.

### A. The OPA Rebuttable Presumption's Statutory Purposes

In contrast to administrative bodies, legislative bodies may "adopt presumptions for policy reasons."<sup>122</sup> While the OPA does not explicate which policy purposes the rebuttable presumption serves, the structure and legislative history of the Act, set forth in section 1006(e) and titled "Natural Damage Assessment Regulations," show that Congress adopted this rebuttable presumption primarily for three substantive policy purposes.<sup>123</sup>

#### 1. Favoring Trustee NRD Recovery

Congress enacted the OPA in the wake of the *Exxon Valdez* oil spill of March 1989 as a comprehensive scheme to consolidate and improve existing federal liability laws for hazardous releases, such as CERCLA and the Clean Water Act.<sup>124</sup> In fact, it was originally titled "a [b]ill [t]o consolidate and improve [f]ederal laws providing compensation and establishing liability for oil spills."<sup>125</sup> By adopting OPA section 1006, which seeks to "ensure[ ] that Federal agencies, States, and citizens are compensated for . . . damages from oilspills" caused by responsible parties, and by subjecting responsible parties to strict liability, Congress made clear its intent to favor the trustees' claims for

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<sup>121</sup> 467 U.S. 837 (1984).

<sup>122</sup> *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 772 (D.C. Cir. 1997) (quoting *Chem. Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997)).

<sup>123</sup> See 33 U.S.C. § 2706(e) (2006).

<sup>124</sup> See *supra* notes 9–11 and accompanying text.

<sup>125</sup> S. 686, 101st Cong. (1989).

oil-spill damage recovery.<sup>126</sup> This intent was apparent during floor debate in the Senate, where members expressed their approval of various state “unlimited liability” schemes for oil spills and their willingness to exact “heavy damages” from responsible parties to discourage them from “walk[ing] away from the mess they . . . created.”<sup>127</sup> To accomplish this, Congress directed NOAA to promulgate “regulations [that] should provide for full and prompt compensation of all natural resources.”<sup>128</sup> Given such legislative goals, it follows that Congress adopted the OPA rebuttable presumption as a mechanism to make it easier for trustees to establish oil-spill liability and to recover damages against responsible parties.<sup>129</sup> Any judicial construction that would render the presumption incapable of performing this function is contrary to legislative intent.

## 2. *Encouraging the Use of “Accurate and Defensible” Assessment Methods*

The legislative history of the rebuttable presumption accorded to NRD assessments and determinations by trustees under subsection 107(f)(2)(C) of CERCLA is also instructive in determining congressional intent for the OPA rebuttable presumption. It reinforces the idea that Congress adopted the OPA presumption to encourage trustees to use assessment procedures that meet the standards set by NOAA, a federal agency with expertise in NRD assessment.

Congress modeled the OPA provision for NRD liability after a similar provision under CERCLA. Indeed, the structure and statutory language of the two statutes’ respective NRD liability provisions, 42 U.S.C. §§ 9601–9675 (CERCLA) and 33 U.S.C. §§ 2701–2761 (OPA), are virtually identical.<sup>130</sup> Moreover, it was under subsection 107(f)(2)(C) of CERCLA that Congress first introduced the concept of according a rebuttable presumption to NRD assessments and determinations made by trustees.<sup>131</sup> Subsection 107(f)(2)(C) provides: “Any determination or assessment of damages to natural resources . . . made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trust-

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<sup>126</sup> See 135 CONG. REC. 18,285, 18,287 (August 3, 1989).

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* at 18,288.

<sup>129</sup> Cf. Anderson, *supra* note 66, at 437 (arguing that Congress adopted the analogous CERCLA rebuttable presumption to “give the trustees a better chance of prevailing in cases involving difficult-to-prove ecological damage”); Elbaum, *supra* note 105, at 386 (arguing that Congress adopted the CERCLA rebuttable presumption “to ease the trustee’s task by denominating the assessment record as prima facie proof of damages and thereby increasing the likelihood that the trustee would recover”).

<sup>130</sup> See discussion *supra* note 15.

<sup>131</sup> See 42 U.S.C. § 9607(f)(2)(C) (2006).



tee in any administrative or judicial proceeding . . . .”<sup>132</sup> This language is repeated almost verbatim in the provision setting forth the OPA rebuttable presumption.<sup>133</sup>

During debate over the CERCLA rebuttable presumption, the Senate Committee on Environment and Public Works expressed their view that “[t]he principal hindrance to attaining [an “improved, fair[,] and expeditious mechanism” for dealing with NRD] was the absence of a standardized system for assessing such damage which is efficient as to both time and cost.”<sup>134</sup> The Committee further stated that one aim of CERCLA was to promote “accurate and defensible assessments,” and that such assessments would have “the evidentiary status of a rebuttable presumption accorded to the results when the protocols are followed.”<sup>135</sup> When Congress enacted the OPA in 1990, it transplanted this exact statutory scheme (i.e., directing an agency with NRD expertise to develop an assessment procedure for trustees to use and then rewarding trustees with a rebuttable presumption for their compliance) into section 1006 of that statute. It is thus apparent that, as under CERCLA, Congress relied on and adopted a rebuttable presumption when it enacted the OPA in order to encourage the use of assessment procedures that it deemed reliable and trustworthy. Any construction that renders the OPA presumption incapable of performing this function is contrary to legislative intent.

### 3. *Discouraging Litigation*

In addition to Congress’s express emphasis on prompt resolution of NRD recovery claims,<sup>136</sup> the OPA’s overarching statutory scheme supports Congress’s intention to minimize delays in restoration activities by discouraging litigation. By requiring trustees to consider and reflect in their restoration plans on the input of the public and responsible parties under section 1006(c)(5) of the OPA, Congress intended that an open assessment-and-planning process would facilitate settlement.<sup>137</sup> By establishing the Oil Spill Liability Trust Fund and making it available to trustees for NRD in cases where responsible parties fail to settle or deny liability, Congress made clear that its end goal is not litigation but rather prompt restoration and compensation. In this context, the OPA rebuttable presumption is clearly another means for Congress to facilitate settlement of such recovery claims while discouraging costly litigation that inevitably delays restoration.

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<sup>132</sup> *Id.*

<sup>133</sup> 33 U.S.C. § 2706(e)(2).

<sup>134</sup> S. REP. NO. 96-848 at 85 (1980).

<sup>135</sup> *Id.* at 85–86.

<sup>136</sup> See generally *supra* notes 124–29 and accompanying text.

<sup>137</sup> See 33 U.S.C. § 2706(c)(5); Natural Resource Damage Assessments, 61 Fed. Reg. 440, 442 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990).

Indeed, by delegating to NOAA under section 1006(e) of the OPA both the power to promulgate regulations that require trustees to undertake cooperative NRD assessment activities with responsible parties and to condition the availability of the OPA rebuttable presumption on such cooperation, Congress's intention was two-fold: on the one hand, for trustees to quickly resolve their NRD recovery claims, and on the other hand, to warn responsible parties that if they litigate without considering settlement or without participating in the NOAA cooperative-assessment process, the trustees would enjoy a significant litigation advantage over them by way of the rebuttable presumption. Thus, any construction that diminishes the strength of the OPA rebuttable presumption would undercut this legislative goal.

### B. NOAA's Interpretation Is Consistent with the OPA's Goals

Given the many policy goals motivating its adoption of the OPA rebuttable presumption, Congress could not have intended for the presumption to have little practical effect. NOAA's interpretation, which gives the presumption its full "force and effect," is consistent with Congress's intent. With respect to Congress's goal of favoring the trustees' NRD recovery claims, NOAA's interpretation makes it easier for trustees to establish liability against responsible parties by placing on the responsible parties both the burden of producing rebutting evidence and the burden of persuading the jury of the incorrectness of the trustees' assessment and determinations. Because the trustees' determinations are backed by an administrative procedure developed by NOAA—an agency with specialized expertise in NRD assessment—and because the Final Rule gives responsible parties meaningful opportunities to actively participate in the assessment process, this scheme is consistent with the policy favoring accurate and defensible NRD assessment methods. Finally, with respect to Congress's goals of discouraging litigation and inducing trustees to comply with NOAA's assessment procedures, the OPA rebuttable presumption would have few practical effects if it did no more than shift the burden of production. From the trustees' perspective, if the only consequence of the rebuttable presumption is to shift the burden of production, compliance with NOAA's cooperative assessment procedure might even waste the trustees' time and resources, risk revealing to responsible parties information that might hurt the trustees if the matter went to trial, or force them to give up positions they would otherwise maintain. From the responsible parties' perspective, cooperation with the trustees presents, among other things, the risk that their involvement may improve the quality of the assessment and make it harder to challenge later in litigation. Thus, only the prospect of losing a powerful litigation advantage would induce the trust-

ees to comply with NOAA's assessment procedure; conversely, only the threat that the trustees will enjoy a litigation advantage by way of a powerful rebuttable presumption would induce responsible parties to participate in NOAA's assessment procedure. In recognizing this reality by according the OPA rebuttable presumption its full "force and effect," NOAA strikes an appropriate balance between practical considerations and Congress's policy goals.

### C. Chevron Deference?

Although NOAA's interpretation of the OPA rebuttable presumption is consistent with legislative intent, the suggestion that courts defer to NOAA's resolution of this statutory ambiguity is nevertheless discomfiting and worth addressing. In *Chevron*, the Supreme Court established that "[i]f . . . Congress has not directly addressed the precise question at issue," courts should defer to reasonable administrative interpretations of law.<sup>138</sup> This principle is applied using a two-step analysis: first, courts must ask whether Congress has left a statutory ambiguity for the relevant agency to resolve; and second, if a statutory ambiguity exists, courts must defer to the agency's reasonable interpretation of the ambiguity.<sup>139</sup> Here, I point out that even without deciding the questions of statutory ambiguity and reasonableness, separation-of-powers concerns might lead courts to find that the *Chevron* framework does not apply and hence to deny NOAA the deference it would want.

#### 1. *The Force of Law*

The Supreme Court in *Chevron* did not instruct the lower courts to apply its two-step analysis every time they review a statutory interpretation made by an agency. Rather, *Chevron* applies only to an

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<sup>138</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 (1984); see also Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990) ("The *Chevron* principle means that in the face of ambiguity, agency interpretations will prevail so long as they are 'reasonable.'").

<sup>139</sup> *Chevron*, 467 U.S. at 842-44 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

agency's interpretation of a "statute which it administers"<sup>140</sup>—in other words, a statute through which Congress has given the agency rulemaking and implementation power. This makes sense because, as Cass Sunstein observed, "the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering."<sup>141</sup> In *United States v. Mead Corp.*,<sup>142</sup> the Supreme Court refined this precondition by holding that *Chevron* applies only "when it appears that [1] Congress delegated authority to the agency generally to make rules carrying the force of law, and that [2] the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>143</sup> Although the Court did not say in *Mead* what constitutes the "force of law," its decision a year earlier in *Christensen v. Harris County* suggested that legislative rules that have gone through the notice-and-comment process would qualify.<sup>144</sup>

NOAA's interpretation of the OPA rebuttable presumption seems to satisfy the first *Mead* prerequisite for application of the *Chevron* framework. To achieve its goal of enabling public trustees to recover NRD from oil spills under the OPA, Congress not only expressly directed NOAA to promulgate regulations that govern the process of assessing such damages but also encouraged trustees to comply with these regulations by giving any assessments they made in accordance with such regulations the advantage of a rebuttable presumption. Under this statutory scheme, the OPA rebuttable presumption is more than a question of law; it is a policy mechanism central to NOAA's enforcement power over NRD assessments. Thus, NOAA's interpretation of the rebuttable presumption, which it has adopted as part of its NRD assessment regulations and which has gone through the notice-and-comment process,<sup>145</sup> meets *Mead's* "force of law" prong.

## 2. Separation of Powers

*Chevron* deference, however, is not likely because NOAA's interpretation arguably fails the second prong of *Mead*, which requires that the "agency interpretation claiming deference was promulgated in the

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<sup>140</sup> See *id.* at 842.

<sup>141</sup> Sunstein, *supra* note 138, at 2093.

<sup>142</sup> 533 U.S. 218 (2001).

<sup>143</sup> See *id.* at 226–27.

<sup>144</sup> See 529 U.S. 576, 587 (2000) ("Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference.")

<sup>145</sup> See Natural Resource Damage Assessments, 61 Fed. Reg. 440, 440 (Jan. 5, 1996) (codified at 15 C.F.R. pt. 990) (outlining the notice-and-comment process undertaken before promulgating the Final Rule).

exercise of that authority.”<sup>146</sup> More specifically, one can argue that although Congress gave NOAA power to promulgate NRD assessment regulations, this power does not include the authority to decide the effect of an evidentiary rule such as the OPA rebuttable presumption. Rather, given the established rule that it is judges who “say what the law is”<sup>147</sup> and who remain “the final authorities on issues of statutory construction,”<sup>148</sup> this authority belongs to the judiciary. Since Congress itself does not have the power to give NOAA authority to decide the legal effect of the OPA rebuttable presumption without violating Article III, Section 1 of the Constitution,<sup>149</sup> NOAA’s interpretation of the OPA rebuttable presumption could not have been “promulgated in the exercise of [its] authority” to put forward NRD assessment regulations.<sup>150</sup>

In sum, while the *Mead* standard will likely lead courts to deny NOAA the *Chevron* deference it would want for its interpretation of the OPA rebuttable presumption, courts should nevertheless adopt NOAA’s interpretation in order to effectuate the OPA’s statutory goals.

## VI.

### FRE 301 DOES NOT AND SHOULD NOT GOVERN THE EFFECTS OF THE OPA REBUTTABLE PRESUMPTION

While NOAA’s interpretation of the OPA rebuttable presumption would accord the presumption its full “force and effect,” FRE 301, if applicable, would significantly limit whatever litigation advantage that Congress intended to confer on trustees in creating the presumption.<sup>151</sup> This result is not necessary. That is, courts need not apply FRE 301 to the OPA rebuttable presumption for the following reasons.

#### A. The OPA Rebuttable Presumption Falls Under FRE 301’s “Act of Congress” Exception

The Federal Rules of Evidence generally apply to civil claims brought in federal district courts.<sup>152</sup> Recognizing that Congress may choose to give different effects to a presumption depending on its

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<sup>146</sup> See *Mead*, 533 U.S. at 227.

<sup>147</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>148</sup> *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 272 (1968).

<sup>149</sup> U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court . . .”).

<sup>150</sup> See *Mead*, 533 U.S. at 227.

<sup>151</sup> See *supra* Part IV.C.

<sup>152</sup> See FED. R. EVID. 301.

legislative goals,<sup>153</sup> however, FRE 301 provides an exception for presumptions in connection with civil actions and proceedings “otherwise provided for by Act of Congress.”<sup>154</sup> Because the OPA rebuttable presumption is a statutory presumption, expressly created by Congress and not by judges or an administrative agency, it is an “Act of Congress” presumption, and FRE 301 thus does not control its burden-shifting effects.<sup>155</sup> While the precise “force and effect” of the OPA rebuttable presumption is not explicated by the statute, the plain language of FRE 301 is broad enough to exempt statutory presumptions like the OPA rebuttable presumption from the operation of the Rule. Any other reading would be contrary to congressional intent.

#### B. Had Congress Intended for FRE 301 to Govern the Effects of the OPA Rebuttable Presumption It Would Have Said So

There is no reference to FRE 301 anywhere in the OPA. Given that FRE 301 had long been in existence when the OPA was enacted, Congress must have been aware of its potential weakening effects on the OPA rebuttable presumption. Furthermore, Congress’s past practice with respect to the NRD rebuttable presumption under CERCLA suggests that had Congress intended for FRE 301 to govern the effects of the OPA rebuttable presumption, it would have at least mentioned the Rule. Indeed, when the Senate Environment and Public Works Committee considered the “causation presumption”<sup>156</sup> found in the proposed personal injury provisions of S. 1480—the 1979 Senate Bill “that formed the foundation of CERCLA”<sup>157</sup>—it did not shy away from discussing the effects of FRE 301. In particular, section 4(c)(3)(A) of S. 1480 established a presumption that a claimant’s exposure to a hazardous substance caused or significantly contributed to the claimant’s injury or disease.<sup>158</sup> Anticipating the FRE 301 issue, section 4(c)(3)(B) of S. 1480 then went on to clarify that the causation presumption “affects only the burden of going forward with the

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<sup>153</sup> See *Gen. Elec. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 772 (D.C. Cir. 1997) (“[L]egislative bodies, unlike administrative bodies, are ‘free to adopt presumptions for policy reasons.’” (quoting *Chem. Mfrs. Ass’n v. Dep’t of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997))). See generally *Steadman v. SEC*, 450 U.S. 91, 95–96 (1981) (discussing Congress’s power to prescribe standards of proof).

<sup>154</sup> See FED. R. EVID. 301.

<sup>155</sup> See *Ala. By-Prod. Corp. v. Killingsworth*, 733 F.2d 1511, 1515 (11th Cir. 1984) (holding that FRE 301 does not apply because the regulation requires an opposing party to “‘establish’ the rebutting factor” and that consequently the Act of Congress exception applies); cf. *Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1131 (W.D. Mich. 1996) (“Rule 301 does not technically dictate the effect of this presumption since this is an ‘Act of Congress’ presumption which is outside the scope of Rule 301.”).

<sup>156</sup> See Menefee, *supra* note 104, at 15,061 n.36.

<sup>157</sup> CAROLE STERN SWITZER & PETER GRAY, *CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (SUPERFUND)* 7 (2d ed. 2008).

<sup>158</sup> See S. REP. NO. 96-848, at 114 (1980) (supplemental views of Sen. Stafford).

presentation of the case. Nothing in this paragraph shall affect the burden of proof which shall remain with the claimant in accordance with rule 301 of the Federal Rules of Evidence.”<sup>159</sup> As Menefee noted, however, the personal injury provisions of S. 1480 and the “causation presumption” were not included in the final enactment of CERCLA.<sup>160</sup> In contrast, Congress retained the CERCLA natural resource damage rebuttable presumption, and significantly, without accompanying reference to FRE 301.<sup>161</sup> Had the FRE 301 issue never surfaced at all during CERCLA’s legislative history, then one could plausibly view the statutory silence regarding the Rule’s effect on the CERCLA NRD rebuttable presumption as a mere oversight. However, the fact that Congress considered language regarding the effects of FRE 301 but then did not include it in the final enactment of CERCLA suggests that it did not affirmatively intend for FRE 301 to govern the CERCLA NRD rebuttable presumption. Thus, insofar as the OPA NRD rebuttable presumption is analogous to the CERCLA NRD rebuttable presumption,<sup>162</sup> legislative history reinforces the proposition that had Congress intended for FRE 301 to operate on the OPA rebuttable presumption it would have provided so.

### C. FRE 301 Undercuts Congress’s Purposes for the OPA Rebuttable Presumption

In adopting the OPA, Congress intended that the rebuttable presumption it provided, exercised to its full “force and effect,” would favor the trustees’ claims for NRD recovery.<sup>163</sup> To facilitate cost-effective and prompt resolution of such claims, Congress intended that the rebuttable presumption would encourage trustees to use NRD assessment methods that meet NOAA’s standards and procedures. Implicitly Congress assumed that the rebuttable presumption would have evidentiary weight great enough to induce the trustees and responsible parties to promptly and cooperatively undertake restoration activities instead of litigating. Even though FRE 301 does not allow the OPA rebuttable presumption to disappear upon rebutting evidence, in this policy context, it still significantly weakens the presumption, contrary to legislative intent. As discussed in Parts II.C and III.C above, FRE 301 only entitles the trustees to a jury instruction that the jury may (rather than must) presume the correctness of the trustees’ damage determinations even where the trustees can show that their

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<sup>159</sup> *Id.*

<sup>160</sup> See Menefee, *supra* note 104, at 15,062 n.36.

<sup>161</sup> See *id.*

<sup>162</sup> See *supra* Part V.A.2 for a discussion of how the OPA NRD rebuttable presumption was modeled after the CERCLA NRD rebuttable presumption regarding.

<sup>163</sup> See *supra* notes 124–29 and accompanying text.

NRD assessments and determinations were in perfect compliance with NOAA's regulations. If the responsible parties present just a quantum of rebutting evidence, FRE 301 operates to leave it at the discretion of judges to keep the jury ignorant of the existence of the OPA rebuttable presumption. Such results are contrary to Congress's intent; they afford the trustees little litigation advantage, allow responsible parties the opportunity to question NRD determinations derived from the very assessment procedure in which they participated, and permit the jury to second-guess determinations that Congress intended for trustees to make and for NOAA to regulate.

Finally, "[i]t is a basic rule of statutory construction 'that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.'"<sup>164</sup> If the OPA rebuttable presumption, found in section 1006(e)(2) of the Act, is read to be governed by FRE 301, the effect of the preceding section 1006(e)(1) of the Act would be significantly limited. Congress adopted section 1006(e)(1) to delegate the power of regulating NRD assessments to NOAA, which includes the power to induce trustees to engage in cooperative-assessment activities with responsible parties. Yet, the only penalty Congress provided for noncompliance with these regulations is the inability to enjoy whatever litigation advantage the rebuttable presumption might offer. If one construes that presumption to shift only the burden of production under FRE 301, trustees will have little or no incentive to comply with, for example, NOAA's administrative procedure for cooperative assessment. Thus, although OPA section 1006(e)(1) purports to enable NOAA to promulgate NRD assessment regulations, and to penalize noncompliance with the unavailability of the rebuttable presumption in OPA section 1006(e)(2), the operation of FRE 301 would significantly limit any legal weight this presumption may have and thus render the preceding section 1006(e)(1) virtually meaningless.

## VII.

### APPLICATION OF THE "BURSTING-BUBBLE" APPROACH WOULD RENDER THE OPA REBUTTABLE PRESUMPTION TOOTHLESS

As FRE 301 would likely operate to significantly limit whatever litigation advantage Congress intended the OPA rebuttable presumption to offer trustees, so too would the bursting-bubble approach. As discussed in Part IV.A, under the bursting-bubble approach, the OPA rebuttable presumption disappears upon the presentation of any re-

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<sup>164</sup> *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) (quoting *Hughes Air Corp. v. Pub. Util. Comm'n*, 644 F.2d 1334, 1338 (9th Cir. 1981)).



butting evidence. Because oil-spill NRD recovery suits usually involve well-funded corporate defendants who can always provide the court with *some* rebutting evidence, this means that the trustees' NRD determinations, despite having met NOAA's standard of reliability and validity and the Agency's cooperative-assessment procedure, would carry minimal weight. This result undercuts Congress's purposes for adopting the OPA rebuttable presumption and thus should be rejected.

#### CONCLUSION

The OPA provides a comprehensive liability scheme under which trustees may bring recovery claims for NRD resulting from oil spills against responsible parties. A critical part of this scheme is the rebuttable presumption accorded to NRD determinations and assessments made by public trustees, available upon their compliance with the standard of validity and reliability and the cooperative-assessment procedure established by NOAA. While the OPA does not explicate the precise burden-shifting effects of the rebuttable presumption, NOAA interprets the presumption to mean that responsible parties must present both rebutting evidence and prove that the trustees' NRD determinations are incorrect. Compared to the views of courts and commentators who follow either the bursting-bubble approach or the FRE 301 approach to rebuttable presumptions, NOAA's view is aggressive. Considering, however, Congress's intent to leverage the full legal weight of the OPA rebuttable presumption to favor trustees' claims for NRD recovery, to induce trustees to use NRD assessment methods that meet NOAA's standard and procedure, and to discourage litigation, NOAA's view is consistent with the presumption's statutory purposes. Given the massive scale of the recent *Deepwater Horizon* oil spill in the Gulf of Mexico, it is likely that the effort of public trustees to recover NRD from responsible parties will turn into a long and expensive process precisely what Congress sought to prevent when it enacted the Oil Pollution Act of 1990. By adopting NOAA's interpretation of the OPA rebuttable presumption, courts can help public trustees avoid this outcome.

