THE CERCLA-OPA90 CONUNDRUM: DOES CERCLA PRIME OPA90 OR CAN BOTH APPLY IN MIXED SPILLS?

Hannah Alonzo*

Table of Contents

* J.D. Candidate 2025, Loyola University New Orleans College of Law; B.A. 2022, Azusa Pacific University.

I. Introduction

Texas Aromatics, LP[1] is a successful petrochemical marketing company specializing in aromatic feedstocks, aromatics, olefins, gasoline blend stocks, heavy fuels, NGLs, and crude oil.[2] Operating within the highly competitive petrochemical industry, Texas Aromatics' annual revenue was $26.9 million last year.[3] Established in 1980, the business is situated in a prime location along the Houston Ship Channel (HSC), located in Houston, Texas.[4] The 52-mile ship channel is the busiest waterway in the country and holds $906 billion in nationwide economic value.[5] Home to the nation's largest petrochemical hub, the HSC has more than 200 public and private facilities along the channel that support more than three million jobs.[6]

On March 17, 2019, a fire erupted in a nearby storage tank facility due to an unrestrained release emerging from a faulty pump in one of the above-ground tanks.[7] Three days after the fire, when the fire finally subsided, a wall in the terminal collapsed and nearly 20 million gallons of a mixture flooded into the channel.[8] The mixture consisted of 91% oil and 9% hazardous substances.[9] The United States Coast Guard promptly closed a portion of the channel and adjacent waterfront parks.[10] The closure lasted nearly a month, restricting both traffic and shipments.[11]

This closure had Texas Aromatics in a headlock, suspending its main source of engagement in commerce. The company suffered significant losses due to delays, use of unfamiliar suppliers, and incurred higher costs from diversion efforts.[12] In total, Texas Aromatics suffered nearly

---

[1] Texas Aromatics is one of the many plaintiffs in the consolidated case of *Munoz v. Intercontinental Terminals Co.*, 85 F.4th 343 (5th Cir. 2023). I will be addressing the case throughout the entire Comment, beginning with a short summary in this section.

[2] *Tex. Aromatics, LP Info.*, ROCKETREACH, https://rocketreach.co/texas-aromatics-lp-profile_b5d472baf42e3fe0 (last visited Mar. 1, 2025).

[3] *Id.*

[4] *Id.*

[5] *Accelerating Houston Ship Channel Expansion for Reg'l Econ. and Env't Benefits*, GREATER HOUSTON PORT BUREAU, https://www.txgulf.org/news/accelerating-houston-ship-channel-expansion-for-regional-economic-and-environmental-benefits#:~:text=The%20eight%20public%20terminals%20and,billion%20in%20national%20economic%20benefits (last visited Apr. 8, 2024).

[6] *Id.*

[7] Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 347 (5th Cir. 2023).

[8] *Id.*

[9] Munoz v. Intercontinental Terminals Co., Appellant's Br., 2023 WL 2203937 (5th Cir. 2023).

[10] *Munoz*, 85 F.4th at 347.

[11] Sergio Chapa, *Ship Channel Closure After ITC Fire Could Be Costly for Energy Industry*, HOUS. CHRON., Apr. 4, 2019, 10:37 AM, https://www.chron.com/business/energy/article/Ship-channel-closure-after-ITC-fire-could-be-13800658.php.

[12] Erin Douglas, *ITC Sued by Energy Companies Over Tank Fires That Closed Houston Ship Channel*, HOUS. CHRON., May 29, 2020 (updated May 30, 2020, 5:00 a.m.), https://www.houstonchronicle.com/business/energy/article/ITC-sued-by-energy-companies-over-tank-fires-that-15304461.php#.

$381,027.67 in damages and sought recovery.[13] Texas Aromatics initiated a lawsuit against the storage tank company, seeking recovery for economic damages under the Oil Pollution Act of 1990 (OPA).[14] But was OPA the obvious choice for recovery, or would the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) be better suited given the presence of non-oil, hazardous substances? If both could be applied, would each statute's limitation of liability apply, considering both statutes were violated? This conundrum—an issue of first impression for the United States Fifth Circuit Court of Appeals—was addressed in *Munoz v. Intercontinental Terminals Company*. Ultimately, the Fifth Circuit answered found that CERCLA would apply.[15]

This Comment criticizes that Fifth Circuit opinion. Recovery should be allowed under both OPA and CERCLA in circumstances such as the Texas Aromatics incident. Because this Comment involves the interplay of CERCLA and the OPA, I will provide a brief overview of the two statutes and the *Munoz* decision in Part II. Part III provides an analysis of the relevant legislative history, statutory text and structure, and agency deference that the Fifth Circuit relied on in its reasoning in *Munoz*. Finally, Part IV will conclude with a summary of why CERCLA and OPA are mutually inclusive liability regimes and the important objectives served by this conclusion.

II. Background

a. The History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Ten years after the creation of the Environmental Protection Agency (EPA),[16] Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in December 1980 in the aftermath of the Love Canal disaster.[17] Founded in the early twentieth century, the city of Love Canal, New York, was a community where many young families hoped to build a future.[18] The canal, located between the Upper and Lower Niagara Rivers, was initially designated to provide power to this "dream community."[19] However, by the 1920's, the canal's main use had transformed into a chemical and industrial dumping site.[20] Children played amongst some of the most toxic substances that were buried in the site.[21] Residents

---

[13] Civil Cover Sheet, Texas Aromatics' Damages at 15, Tex. Aromatics v. Intercontinental Terminals Co., L.L.C., Case No. 420-cv-01387 (S.D. Tex. Apr. 17, 2020).

[14] Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 345 (5th Cir. 2023).

[15] *Id.* at 343.

[16] *U.S. Env't Prot. Agency*, U.S. DEP'T INTERIOR, https://www.doi.gov/recovery/about-us/primary-agencies/EPA#:~:text=The%20U.S.%20Environmental%20Protection%20Agency,human%20health%20and%20the%20environment (last visited Mar. 1, 2025) ("The Environmental Protection Agency is a federal agency of the United States government that is responsible of the protection of heath in humans and the environment").

[17] Eckardt C. Beck, *The Love Canal Tragedy*, US ENVIRONMENTAL PROTECTION AGENCY (Jan. 1979), https://www.epa.gov/archive/epa/aboutepa/love-canal-tragedy.html.

[18] *Id.*

[19] Donald Borenstein, *A Vicious CERCLA, Or The Twilight of the Superfund*, STUDENT THESES 2001-2013, 2013, at 9.

[20] Borenstein, *supra* note 20, at 9.

[21] Borenstein, *supra* note 20, at 10.

eventually complained about substantial health issues.[22] In 1978, a state of emergency was declared.[23] Consequently, President Carter signed a federal disaster order providing permanent relocation for the affected families.[24] In total, more than 800 lawsuits were filed against the largest contributor, Hooker Chemical Corporation, followed by the county, the board of education, and the city of Love Canal.[25] As similar tragedies began to occur and gain national attention, the demand for government action grew.[26]

One of the first attempts to address waste disposal was the Comprehensive Oil and Hazardous Substances Pollution Liability and Compensation Act, or H.R. 85,[27] which was novel "in its attempt to establish funding pools to address instances oil and toxic waste spills into navigable bodies of water" by taxing petroleum and toxic waste industries.[28] Introduced in January 1979, the bill fell flat in committee as the cleanup liability provisions sparked protest amongst the oil and chemical industry.[29] After repeated failed attempts, the Environmental Emergency Response Act, S. 1480,[30] was introduced.[31] Although the bill was met with the same resistance after President Carter lost the presidency to Ronald Reagan, the democratic Senate scurried to orchestrate and pass a bill before the end of 1980.[32] This Act combined with a similar bill that died earlier at committee level, the Hazardous Waste Containment Act of 1980, H.R. 7020,[33] and formed the basis of what would eventually be CERCLA.[34] However, the bill lacked positive governmental support, and it took major compromises to pass swiftly through Congress.[35] The

[22] Borenstein, *supra* note 20, at 11.
[23] Borenstein, *supra* note 20, at 11.
[24] Borenstein, *supra* note 20, at 11.
[25] Borenstein, *supra* note 20, at 13.
[26] Borenstein, *supra* note 20, at 13.
[27] FRANCIS S. BLAKE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 9838.1, MEMORANDUM ON SCOPE OF THE CERCLA PETROLEUM EXCLUSION UNDER SECTIONS 101(14) AND 104(A)(2) (1987). ("H.R. 85 was designed principally to provide compensation and assess liability for oil tanker spills in navigable waters. As discussed below, the omission of this "oil spill" coverage under the petroleum exclusion was believed to be the most significant omission in terms of response to environmental releases under the final Superfund bill."); *See also* H.R. 85, 96th Cong. (1979-1980).
[28] Borenstein, *supra* note 20, at 15.
[29] Borenstein, *supra* note 20, at 15.
[30] Louis Cordia, *Superfund Legislation (H.R.85 – H.R. 7020 – S.1480)*, HERITAGE FOUND., Sept. 17, 1980, at 2–3. ("S. 1480 (Environmental Emergency Response Act) is much more far-reaching than either House bill or the Carter Administration proposal. It would establish the most expensive fund ($4.1 billion) which would deal with the most broadly defined hazardous substances and would impose the strictest liability coverage, including victim compensation."); *See also* S. 1480, 96th Cong. (1979-1980).
[31] Borenstein, *supra* note 20, at 15.
[32] Borenstein, *supra* note 20, at 15.
[33] H.R. 7020, 96th Cong. (1980) ("An act to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.").
[34] Borenstein, *supra* note 20, at 16.
[35] Borenstein, *supra* note 20, at 16.

main reason the bill was able to pass before the end of the Senate term was the addition of what is known as the "petroleum exclusion."[36] Essentially, the passage of CERCLA was conditioned on Congress catering to petroleum company lobbyists who fought for the exclusion, with the hope to avoid further pressure.[37]

b. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980

CERCLA was directed to identify hazardous waste that was or is being released into the environment and subsequently poses a substantial threat to human and environmental health.[38] Specifically, Congress sought to facilitate the cleanup of abandoned toxic waste dumps by assisting the federal government with tools for immediate cleanup, while making those who created the harmful conditions pay.[39] The Act is designed to have responsible parties bear the costs derived from the environmental response.[40] To achieve this goal, CERCLA allows a private right of action to cost-recovery claims and incorporates provisions that authorize government reimbursement for cleanup of hazardous substances.[41]

Although responsible parties are legally obligated to bear the costs of the response, CERCLA has established a trust fund to cover the cleanup costs when responsible parties refuse to comply or are absent.[42] The trust fund, usually referred to as "Superfund," was established at $1.6 billion by fining petroleum and chemical companies due to their inadequate or lack of disposal practices.[43] However, the EPA is only permitted to tap into the fund minimally; thus, the agency prefers to stick to the predominant method—demanding and obtaining payment for cleanup from "potentially responsible parties" ("PRPs").[44] To recover cleanup costs, the claimant must show: (1) the defendant is a PRP; (2) a "hazardous substance" was disposed of or comes to be located at a "facility"; (3) there is a "release" or "threatened release" of hazardous substances from the facility into the environment; and (4) the release incurs "response costs."[45]

Because liability depends on the type of pollutant, CERCLA defines "hazardous substance" as "any element, compound, mixture, solution, or substance designated by the Environmental Protection Agency (EPA) as presenting substantial danger to the public health or

---

[36] Erin Kelly, *CERCLA and Exemption Oil and Gas Indus.*, KLEINMAN CTR. FOR ENERGY POL'Y (July 6, 2021), https://kleinmanenergy.upenn.edu/news-insights/cercla-and-the-exemption-of-the-oil-and-gas-industry/.
[37] Kelly, *supra* note 37.
[38] TOD I. ZUCKERMAN ET AL., ENVIRONMENTAL LIABILITY ALLOCATION: LAW AND PRACTICE § 3:3 (rev. Nov. 2024).
[39] Zuckerman, *supra* note 39; *See also* U.S. v. Charter Int'l Oil Co., 83 F.3d 510, 515 (1st Cir. 1996).
[40] Zuckerman, *supra* note 39.
[41] Zuckerman, *supra* note 39.
[42] Zuckerman, *supra* note 39.
[43] Zuckerman, *supra* note 39.
[44] Zuckerman, *supra* note 39.
[45] *See* 42 U.S.C. § 9607(a) (2018).

welfare or the environment when released to the environment."[46] It is also defined under other federal statutes.[47] However, "hazardous substances" do not include petroleum. As previously mentioned, the "petroleum exclusion," expressly excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance."[48]

c. Legislative History and Early Interpretation of CERCLA – Prior to the Enactment of the Oil Pollution Act

In the early stages of development, the Environmental Emergency Response Act (S. 1480) which later was molded into CERCLA had the familiar "petroleum exception."[49] This exception was read narrowly even in those early stages to exclude spills that consisted strictly of oil.[50] Senate Reports explicitly state that the "bill does not cover spills or other releases strictly of oil."[51]

In a 1987 memorandum, the EPA addressed the scope of the petroleum exclusion and confirmed this understanding of it.[52] Parallel to legislative history, the EPA mentioned how the petroleum exclusion includes hazardous substances (such as benzene) which are indigenous in petroleum or hazardous substances that are usually mixed with petroleum during the refining process.[53] While these substances are generally covered by the petroleum exclusion, CERCLA still applies if they are present in amounts higher than what is normally found in petroleum, or if other hazardous substances not typically present in petroleum are detected.[54] The source of the contamination is irrelevant, whether the hazardous substances were intentionally added or were introduced through the use of the petroleum.[55] The EPA also acknowledged two of its viewpoints related to mixed spills. First, "if the petroleum product and an added hazardous substance are so commingled that, as a practical matter, they cannot be separated, then the entire oil spill is subject to CERCLA response authority."[56] There is a second scenario in which CERCLA will apply to petroleum substances:

> hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are *not* part of the "petroleum" and thus are not excluded from CERCLA under the

---

[46] William B. Johnson, Annotation, *Determination whether substance is "hazardous substance" within meaning of § 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601(14))*, 118 A.L.R. Fed. 293 (1994); 42 U.S.C. § 9601(14) (2022).
[47] Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 346 (5th Cir. 2023); *see also* 42 U.S.C. § 9601(14) (2022).
[48] *See* 42 U.S.C. § 9601(14) (2022).
[49] S. REP. NO. 96-848, at 30–31 (1980).
[50] *Id.* at 31.
[51] *Id.*
[52] Blake, *supra* note 28.
[53] Blake, *supra* note 28, at 5.
[54] Blake, *supra* note 28, at 5.
[55] Blake, *supra* note 28, at 5.
[56] Blake, *supra* note 28, at 3.

> exclusion. In such cases, EPA may respond to releases of the added hazardous substance, but not the oil itself.[57]

In *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, the Ninth Circuit became the first circuit to approach CERCLA's petroleum exclusion.[58] The court held that the exclusion does apply and excludes unrefined and refined gasoline despite there being certain indigenous components and additives acquired during the refining process that are CERCLA-designated hazardous substances.[59] That same year in *Amoco Oil Co. v Borden, Inc.*, the Fifth Circuit addressed the meaning of "hazardous substance" under CERCLA.[60] The court held that the "plain statutory language fails to impose any quantitative requirement on the term hazardous substance and we decline to imply that any is necessary."[61] Essentially, this means that the specific portion "regardless of how low a percentage" of hazardous substances is irrelevant to liability under CERCLA.[62] Accordingly, when a mixture (or waste solution) contains a hazardous substance, that mixture itself is a hazardous substance.[63]

d. The Oil Pollution Act of 1990

The Oil Pollution Act of 1990 (OPA90) was the nation's response to the lack of regulatory oversight over the oil and gas industry, as seen in one of the largest environmental disasters in United States history—the Exxon Valdez oil spill.[64] In March of 1989, the oil tanker EXXON VALDEZ ran aground, spilling approximately 11 million gallons of crude oil into the Prince William Sound.[65] The spill affected more than 1,300 miles of Alaskan shoreline and negatively impacted wildlife, local industries, and communities.[66] Exxon undertook efforts to make amends by providing fishermen with immediate relief, paying for their damages, and leading cleanup efforts.[67]

Almost eighteen months after the spill, Congress enacted OPA90 to broaden the government's ability to provide methodical and rapid responses to oil spills, expand claims and compensation to injured parties, and provide resources for oil spill response, consisting of the Oil Spill Liability Trust Fund ("Fund").[68] Mandated by an Executive order, the United States Coast

---

[57] Blake, *supra* note 28, at 5–6.
[58] *See* Wilshire Westwood Assocs. v. Atl. Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989).
[59] *Id.*
[60] *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989).
[61] *Id.* at 669.
[62] *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1200 (2d Cir. 1992).
[63] *Id.*
[64] *See* In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).
[65] Andrew J. Torrant, *The Oil Pollution Act of 1990: A Year in The Spotlight*, 48 APR HOUS. L. 10, 11 (2011).
[66] Torrant, *supra* note 66, at 11.
[67] Torrant, *supra* note 66, at 11.
[68] Torrant, *supra* note 66, at 11.

Guard (USCG) is in charge of operating the OPA.[69] To recover under the statute, a claimant must establish that:

> "(1) Defendant is a 'responsible party,' (2) for the 'facility,' (3) from which oil was discharged, or from which there was a substantial threat of discharge, (4) 'into or upon the navigable waters or adjoining shorelines,' and (5) that the discharge resulted in 'removal costs and damages."[70]

Most importantly, OPA90 defines "oil" as:

> oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act.[71]

Additionally, like CERCLA, OPA90 has an exclusion clause within the oil definition, specifically known as the hazardous substance exception.[72]

Similar to CERCLA, a "responsible party" is strictly liable for cleanup costs and damages incidental to the spill and is at the forefront of paying any claim related to removal or damages under OPA90.[73] Under the Act, a "responsible party" for an "onshore facility"[74] (other than a pipeline), is defined as "any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit."[75] The statute supplies the "responsible party" with three absolute defenses: (1) an act of God; (2) an act of war; or (3) or an act or omission by a third party, with certain exceptions.[76]

---

[69] *See* Implementation of Section 311 of the Fed. Water Pollution Control Act of Oct. 18, 1972, As Amended, and the Oil Pollution Act of 1990, 56 Fed. Reg. 54757 (Oct. 22, 1991); Exec. Order No. 12777, 56 Fed. Reg. 54757 (Oct. 22, 1991).

[70] In re Intercontinental Terminals Co., No. 4:19-cv-1460, 2021 WL 4081575, at *4 (S.D. Tex. July 2, 2021) [hereinafter referred to as *Deer Park Fire Litig.*] (citing United States v. Viking Resources, Inc., 607 F. Supp. 2d 808, 815 (S.D. Tex. 2009)).

[71] Oil Pollution Act of 1990, 33 U.S.C. § 2701(23) (2018).

[72] Y Fire Litig., 4:19-cv-1460, 2021 WL 4081575, at *4; *see also* 33 U.S.C. § 2701(23).

[73] Joint Opening Brief of Plaintiffs-Appellants at 39, Munoz v. Intercontinental Terminals Co., 85 F.4th 343 (5th Circ. 2023) (No. 22-20456); *See also* Buffalo Marine Servs., Inc. v. United States, 663 F.3d 750, 752 (5th Cir. 2011).

[74] 33 U.S.C. § 2701(24) (2018). "Onshore facility" means any facility "located in, on, or under, any land within the United States other than submerged land."

[75] 33 U.S.C. § 2701(32) (2018).

[76] *See* 33 U.S.C. § 2703(a) (2018).

These defenses are also present in CERCLA, having the same preponderance of the evidence standard.[77]

Furthermore, a significant difference between CERCLA and OPA90 is that OPA90 provides a private right to recover economic losses while CERCLA does not. OPA90 permits the recovery of "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources. . . ."[78] To recover, claimants must follow the statute's presentment requirement.[79] The essential purpose of this requirement is to reduce litigation by encouraging settlement.[80] Before filing suit, the claimant must first present the claim to the "responsible party" and either wait 90 days or until that party denies liability, whichever is first.[81]

OPA90 also established the Oil Spill Liability Trust Fund (OSLTF), managed by the Director of USCG's National Pollution Center.[82] Instead of taking legal action, claimants may, in some cases, submit claims to the OSTLF.[83] "If a claimant accepts payment from the OSLTF, the government is then "subrogated" to the claimant's rights under the OPA and may later assert those rights in litigation against a "responsible party" and thereby recoup any payments on those claims."[84]

e. Are CERCLA and OPA Mutually Exclusive or Inclusive Liability Regimes?

A few weeks before OPA was publicly announced, in a joint explanatory statement, the congressional conference committee emphasized that the statutory definition of "oil" excludes any "constituent or component of oil which may fall within the definition of 'hazardous substances,' as that is left in the hands of CERCLA."[85] Throughout the development of OPA90, it could easily be inferred that the statute was created to fill in the gaps left by CERCLA. In a conference report, Representative Stangeland described that the "conferees have defined the term 'oil' to clarify that the term is mutually exclusive from hazardous substances subject to regulation under [CERCLA]. In fact, the conferees have focused on oil spills rather than hazardous substances or hazardous materials spills throughout development of the legislation."[86] This exclusion within the "oil" definition was said to guarantee "that there will be no overlap in the liability provisions of CERCLA and the OPA."[87]

---

[77] 44 U.S.C. § 9607(b) (2018); Deer Park Fire Litig., No. 4:19-cv-1460, 2021 WL 4081575, at *3 (S.D. Tex. July 2, 2021).
[78] 33 U.S.C. § 2702(b)(2)(E) (2018).
[79] *Deer Park Fire Litig.*, 2021 WL 4081575, at *3.
[80] *Id.* (citing Nguyen v. Am. Com. Lines, Civ. Action Nos. 11-1799, 11-2705, 2014 WL 3587490, at *3 (E.D. La. July 17, 2014)).
[81] *Id.* (citing 33 U.S.C. § 2713 (2018)).
[82] *Id.*
[83] *Id.* (citing 33 U.S.C. §§ 2701(11)–2713(b) (2018)).
[84] *Deer Park Fire Litig.*, 2021 WL 4081575, at *3; *see also* 33 U.S.C. § 2715 (2018).
[85] 136 CONG. REC. H6210-03, at 21650 (Aug. 1, 1990) (Joint Explanatory Statement of the Committee of Conference); H.R. REP. NO. 101-653, at 102 (1990) (Conf. Rep.).
[86] 136 CONG. REC. 6933-02, at 22289 (1990) (statement of Rep. Stangeland).
[87] 136 CONG. REC. H6210-03, at 21650; H.R. REP. No. 101-653, at 102.

Almost a decade after the previous statement was made, the United States District Court for the District of Hawaii in *United States v. English*[88] held that both CERCLA and OPA could be applied to the same spill.[89] The spill included both the direct discharge of oil from a hydraulic system in navigable waters and free-floating hazardous substances in the drums of the vessel.[90] The Pacific Environmental Corporation (PENCO) provided removal services and removed a total of approximately 50,000 gallons of oils and 8,415 gallons of hazardous substances, resulting in a total cleanup cost of $240,661.22.[91] The United States filed a complaint under OPA and CERCLA, and the court held that the defendant vessel owner was strictly liable under both statutes for the removal costs incurred by the United States.[92]

In another case, *United States v. Mare Island Sales, LLC*, the federal government invoked both OPA and CERCLA and obtained a default judgment under OPA for removal costs arising from a mixed spill of oil and hazardous substances.[93] The federal government pursued costs to remove around 47,000 gallons of "oil, oily waste and hazardous substances from the vessel and approximately 100,000 gallons of oily water and 4,900 gallons of diesel, oil, and hazardous substance from the second vessel at issue."[94]

f. Storage Tank Fire at the ITC Terminal

i. The Incident

Founded in 1972, Intercontinental Terminals Company, LLC (ITC) is a subsidiary of Mitsui & Co. USA, Inc.[95] As a storage facility operator, the company's focal point is providing logistical services to customers who operate within the petrochemical industry.[96] Currently serving customers along the United States Gulf Coast, ITC owns and manages two terminals outside of Houston, Texas—ITC Deer Park and Pasadena.[97] Specifically, ITC Deer Park Terminal is labeled as a bulk liquid storage terminal and itself "handles approximately 70 ships, 3,700 barges, 12,000 rail tank cars, and 33,600 cargo tank trucks annually, with a total throughput of roughly 144-million barrels annually."[98] The terminal is highly equipped, consisting of five ship docks, rail and truck access, and several pipeline connections.[99] When the 2019 incident took place, the terminal accommodated 242 storage tanks, each ranging in size from around 8,000 to 160,000

[88] United States v. English, No. CV00–00016ACKBMK, 2001 WL 940946 (D. Haw. 2001).
[89] *Id.* at *1.
[90] *Id.*
[91] *Id.*
[92] *Id.* at *5–6.
[93] United States v. Mare Islands, No. CIV S-07-2378 GEB EFB, 2008 WL 4279406, at *4 (E.D. Cal. 2008).
[94] *Id.*
[95] UNITED STATES CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD (CSB), No. 2019-01-I-TX, STORAGE TANK FIRE AT INTERCONTINENTAL TERMINALS COMPANY, LLC (ITC) TERMINAL (2019), at 6 [hereinafter "CBS"].
[96] CSB, *supra* note 96, at 6.
[97] CSB, *supra* note 96, at 6.
[98] CSB, *supra* note 96, at 6.
[99] CSB, *supra* note 96, at 6.

barrels.[100] All storage tanks together equated to an overall capacity of 13.1 million barrels, which were used to store petrochemical liquids and gases, fuel oil, bunker oil, and distillates.[101]

Tank 80-8, original to the ITC Deer Park Terminal, was an aboveground, 80,000-barrel atmospheric storage tank that neighbored other 80,000-barrel storage tanks.[102] Within the tank farm, "eleven tanks contained petroleum products, two contained hazardous substances, and two tanks were empty."[103]

On March 17, 2019, around 10:00 a.m., a fire erupted near Tank 80-8's piping manifold.[104] Promptly after the eruption, the ITC Emergency Response Team responded by directing water sources toward the Tank 80-8 piping manifold.[105] Unfortunately, due to Tank 80-8's placement, ITC was unable to isolate the naphtha release from Tank 80-8, and the fire continued to intensify.[106] The fire continued throughout the day, and on the evening of March 17, an adjacent tank became engulfed in the fire.[107] Response efforts were still present at the time, but veering wind caused the fire to advance into the morning.[108] By March 18, six more tanks near Tank 80-8 caught on fire.[109] Despite all efforts to combat the fire by applying water and firefighting foam, the tanks continued to burn.[110] The next morning, two more tanks caught fire. Finally, at 3:03 a.m. on March 20, the tank farm fire was put out.[111] However, the destruction did not stop there.

On March 22, a section of the tank farm dike (secondary containment) wall collapsed,[112] releasing 470,000 to 523,000 barrels of the mixture (including chemicals of the tanks, water, and firefighting foam) into the Tucker Bayou, Buffalo Bayou, San Jacinto River, and Houston Ship Channel (HSC).[113] The discharge contained fire water, firefighting aqueous film forming foams, benzene, ethylbenzene, naphtha, xylene, toluene, pyrolysis gas, and refined oils.[114] The local community was impacted by a shelter-in-place orders lasting a day, and a highway and school district closure.[115] However, the most substantial consequence of the discharge was the closure of a seven-mile stretch of the HSC, restricting traffic and nearly a month of shipping.[116]

---

[100] CSB, *supra* note 96, at 6.
[101] CSB, *supra* note 96, at 6.
[102] CSB, *supra* note 96, at 7, 10.
[103] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 35.
[104] *See* CSB, *supra* note 96, at 9.
[105] *See* CSB, *supra* note 96, at 10.
[106] CSB, *supra* note 96, at 10.
[107] CSB, *supra* note 96, at 10-11.
[108] CSB, *supra* note 96, at 11.
[109] CSB, *supra* note 96, at 12.
[110] CSB, *supra* note 96, at 12.
[111] CSB, *supra* note 96, at 12.
[112] Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 347 (5th Cir. 2023).
[113] *Id.*
[114] *Id.*
[115] CSB, *supra* note 96, at 14.
[116] *Id.*; Marissa Luck, *Ship channel closure after ITC fire could be costly for LyondellBasell*, HOUSTON CHRONICLE, (Apr. 28, 2019) https://www.chron.com/business/energy/article/Ship-channel-closure-after-ITC-fire-could-be-13800658.php.

The EPA organized response efforts with several state and federal agencies, including the United States Coast Guard (USCG) and the Texas Commission on Environmental Quality (TCEQ).[117] In a pre-assessment screening, participants in the cleanup determined that the mixture was composed of fifty chemicals—seventeen being hazardous substances on CERCLA's Consolidated List and five being on OPA's List of Petroleum and Non-Petroleum Oils.[118] Due to this initial determination, the EPA opened a "CERCLA fund" account, whereas, in contrast, the USCG unlocked an OSLTF account under the OPA.[119] Subsequent testing by the TCEQ confirmed that the spill was oil mixed with hazardous substances.[120] Thereafter, EPA and the USCG determined it was a CERCLA incident and the USCG then transferred costs to the CERCLA fund account, closing the OSTLF account.[121] EPA then continued cleanup operations under CERCLA rather than OPA.[122]

Some claimants unsuccessfully applied for compensation from the Coast Guard's National Fund Center (NPFC), which distributes the OSLTF.[123] The claims were denied because NPFC concluded that CERCLA, rather than OPA, governed.[124] Other claimants sued under OPA, asserting economic losses due to the HSC closure affecting their business operations.[125]

ii. Deer Park Fire Litigation

Four months after the discharge, Plaintiffs[126] sent demand letters ordering OPA damages from ITC, which it denied.[127] Consequently, litigation surfaced involving claims against ITC for monetary damages under OPA.[128] In the district court proceedings, ITC filed a motion for summary judgment asking the court to determine whether OPA applied in the case.[129] ITC's argument was simple. It argued that OPA did not apply because the spill included both oil and CERCLA regulated hazardous substances; thus, CERCLA should govern the matter.[130] Plaintiffs claimed that ITC's motion was without merit and that ITC was fully liable under OPA for any economic damages that resulted from the closing of the channel.[131] Arguing that the applicability of CERCLA did not negate accountability under OPA, Plaintiffs asserted that both statutes should

---

[117] Munoz, 85 F.4th at 347.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Munoz, 85 F.4th at 347.
[123] *Id.* at 348.
[124] *Id.*
[125] *Id.*
[126] Deer Park Fire Litig., No. 4:19-cv-1460, 2021 WL 4081575, at *2 (S.D. Tex. July 2, 2021). Affected by the spill, Plaintiffs collectively are merchants, traders, and marketing companies who allege that the spill caused them significant economic loss in business due to the closure.
[127] *Id.*
[128] Munoz, 85 F.4th at 348.
[129] *Id.*
[130] *Deer Park Fire Litig.*, 2021 WL 4081575, at *2.
[131] *Id.*

apply in a mixed condition.[132] Plaintiffs further advanced that there was no place for agency interpretation in the case.[133]

In an Report and Recommendation (R&R) by a magistrate judge, the magistrate judge recommended that the district court grant ITC's motion for summary judgement.[134] The R&R established that the spill was not "oil" as defined by the OPA, that OPA and CERCLA are mutually exclusive remedies, and that if the spill is CERCLA regulated, liability under OPA is infeasible.[135] The recommended judgment focused substantially on legislative history, the text and structure of the statues, and administrative guidance, specifically EPA's "so commingled" standard.[136] Furthermore, the R&R made clear that Plaintiffs were barred from bringing their OPA claim because the spill was not in the reach of the OPA's definition of "oil."[137]

Roughly a year after the issuance of the R&R, in a three-page order, the district court adopted the R&R and granted ITC's motion for summary judgment.[138] The final judgement in Plaintiffs' consolidated case dismissed all OPA claims, and an appeal followed.[139] The Fifth Circuit affirmed, unable to agree that the OPA's hazardous substance exclusion only precludes unadulterated hazardous substance spills.[140] The Fifth Circuit cited both caselaw and EPA interpretations, concluding that a spill of 91% oil and 9% hazardous substances was exclusively CERCLA territory.[141] Drawing the opinion to a close, the appellate court rejected Plaintiffs' argument that reading the OPA and CERCLA as mutually exclusive liability regimes would lead to absurd results.[142] On March 25, 2024, the United States Supreme Court denied Plaintiffs' petition for writ of certiorari.[143]

III. *Munoz* Analysis: The Fifth Circuit erred: Both CERCLA and OPA can apply to Mixed Spills involving Oil and Hazardous Substances

a. Text and Structure of CERCLA and OPA

In the case of statutory interpretation, the analysis "begins with the language of the statute, and, in the absence of ambiguity, often ends there."[144] To reiterate, CERCLA defines "hazardous substance" as "any element, compound, mixture, solution, or substance designated by the EPA as presenting substantial danger to the public health or welfare or the environment when released to

---

[132] *Id.*
[133] *Id.*
[134] Munoz, 85 F.4th at 348.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Munoz, 85 F.4th at 348.
[140] *Id.* at 351.
[141] *Id.* at 350.
[142] *Id.* at 351.
[143] Petition for Writ of Certiorari, Texas Aromatics, L.P., et al. v. Intercontinental Terminals Co., No. 23-948, 2024 WL 1241405 (U.S. March 25, 2024).
[144] *Deer Park Fire Litig.*, 2021 WL 4081575, at *4 (*citing* In re Deepwater Horizon, 745 F.3d 157, 173 (5th Cir. 2014)).

the environment."[145] CERCLA also expressly excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance."[146] Likewise, OPA's definition of "oil" excludes any substance which is specifically listed or designated as a hazardous substance in CERCLA.[147] The plaintiffs in the Deer Park Fire Litigation argued that OPA's "hazardous substance" exclusion is inherently plain and unambiguous[148] because the definition of "hazardous substance" excludes mixtures of hazardous substances where oil is also present; thus, CERCLA cannot govern.[149] Further, they asserted that the OPA's hazardous substance exclusion should be narrowly construed, insisting that spills consisting of hazardous substances alone are disqualified from OPA coverage.[150] The Fifth Circuit, in *Munoz*, never explicitly concluded that a mixed spill of oil and hazardous substance falls within the textual parameters of CERCLA, but instead struck down the plaintiffs' textual reading of the statutes and turned to legislative history.[151]

A close reading of CERCLA and OPA confirm that both are ambiguous statutes. Neither statute explicitly covers a spill involving both mixed oil and hazardous substances within its statutory text. Therefore, it would be unreasonable to assume, for example, that OPA governs because mixed oil and hazardous substances aren't specifically listed in CERCLA and vice versa. The ambiguity was intentional and derives from misunderstandings about language, specifically the phrase "designated by the EPA."[152] This carefully crafted phrase in CERCLA was imputed there for one sole reason: to make CERCLA's scope unrestricted. Not only does it allow for a broad interpretation, through EPA discretion and flexibility, but it also reflects a deliberate limitation to its emulation, OPA. OPA's ambiguity is rooted in its intrinsic dependance on CERCLA, specifically the EPA's ability to expand the scope of coverage.

Because the two statutes use similar terms and are structured in parallel, plaintiffs argued that a narrow reading of CERCLA's petroleum exclusion warranted a narrow reading of OPA's hazardous substance exclusion.[153] However, the exclusions are not mirror images of each other. It is true that "both CERCLA and OPA cover one and exclude the other."[154] However, the plaintiffs failed to highlight the authoritative phrase, "designated by the EPA," which substantially transforms CERCLA's scope. This interpretation allows for a broader coverage by CERCLA of substances that OPA cannot cover. In any event, even if CERCLA and OPA are in a way mutually exclusive to each other in regulatory matters, such a conclusion does not necessarily render the same outcome in the context of liability.

b. Abuse of Legislative History

In *Munoz*, The Fifth Circuit erred when it disregarded countless arguments brought by the plaintiffs and instead relied heavily on legislative history when it held that CERCLA governed the

[145] 42 U.S.C § 9601(14) (2022).
[146] *Id.*
[147] 33 U.S.C. § 2701(23) (2018).
[148] *Munoz*, 85 F.4th at 349.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *See* Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1077 (2010)
[153] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 48.
[154] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 24.

case. The legislative history relied upon in the opinion include statements made in floor debates, committee reports, and committee testimony leading up to the enactment of CERCLA and OPA.[155] Supporters of legislative history usage argue that it is an essential and valuable tool for statutory interpretation when an ambiguous statute is at issue.[156]

On the contrary, opponents, such as Justice Scalia, have argued that legislative history should not be used as an authoritative manifestation of a statute's meaning.[157] Frustrated by its normalcy, Justice Scalia acknowledged how the use of legislative history is illogical for those who accept legislative intent as the criterion.[158] Furthermore he claimed, "with respect to 99.99 percent of issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false."[159] Justice Scalia also points to Congress's day-to-day to show why reliance on legislative may be inaccurate: The floor is rarely occupied for debate, usually occupied only with committee business and reporting to the floor only when a quorum call is demanded, and a vote is to be taken.[160] In regard to committee reports, it is not even definite that the members of the issuing committees have found time to read them.[161]

Since there are no rules established as to how much weight is afforded to legislative history, it should not be the sole indicator when trying to assess the true meaning of a statute.[162] "If the willful judge does not like the committee report, he will not follow it; he will call the statute not ambiguous enough, the committee report too ambiguous, or the legislative history (this is a favorite phrase) 'as a whole, inconclusive.'"[163] In line with these arguments, the Fifth Circuit was inaccurate when it used CERCLA's and OPA's legislative history as its primary basis; other portions within this analysis should have been granted more weight.

c. Mutually Inclusive Liability Regimes

CERCLA and OPA can be read together, formulating mutually inclusive liability regimes. The plaintiffs in the Deer Park Fire Litigation argued that if OPA did not apply in their case, then CERCLA precludes an OPA private right of action.[164] Plaintiffs cited *POM Wonderful L.L.C. v. Coca-Cola Co.* to support their argument—an analogous case involving a situation where two federal statutes intersected.[165]

---

[155] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (Amy Gutmann et al. eds., 1997).
[156] *See* James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 889 (1930); *see also* Sylvia Costelloe, *The Need for Conditions Limiting the Use of Legislative History in Statutory Interpretation: Lessons from the British Courts*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 299, 299 (2015).
[157] Scalia, *supra* note 156, at 29–31.
[158] Scalia, *supra* note 156, at 31–32.
[159] Scalia, *supra* note 156, at 32.
[160] Scalia, *supra* note 156, at 32.
[161] Scalia, *supra* note 156, at 32.
[162] Scalia, *supra* note 156, at 35–36.
[163] Scalia, *supra* note 156, at 36.
[164] Deer Park Fire Litig. No. 4:19-cv-1460, 2021 WL 4081575, at *6 (S.D. Tex. July 2, 2021).
[165] *Id.*; POM Wonderful v. Coca-Cola Co., 573 U.S. 102 (2014).

In *POM Wonderful*, the Supreme Court held that the "Food, Drug, and Cosmetic Act (FDCA) does not preclude a private party from bringing a Lanham Act claim, challenging a misleading food label that was regulated by the FDCA."[166] POM Wonderful filed a Lanham Act suit against Coca–Cola Company, claiming that Coca–Cola's Minute Maid juice label and advertising misled consumers.[167] POM Wonderful argued that Coca-Cola gave consumers the impression that its Minute Maid product consisted predominantly of pomegranate and blueberry juice, resulting in the decrease of POM Wonderful sales.[168] The Lanham Act allows a competitor to sue another for biased competition emerging from misleading or wrongful products,[169] whereas the FDCA prohibits the misbranding of food and drink.[170] Distinguishing the FDCA from the Lanham Act, the FDCA operates in a manner such that the United States government has nearly exclusive enforcement authority, foreclosing private enforcement suits.[171]

The Court looked at the structure and text of both statutes, focused on their ability to complement each other, but also fixed a keen eye on each statute's scope and purpose.[172] The *POM Wonderful* Court acknowledged that both statutes deal with food and beverage labeling, while distinguishing the two: The Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.[173] The Court further discussed the statutes' differing requirements and protections.[174] Textually, neither the Lanham Act nor the FDCA expressly forbids or limits Lanham Act claims for challenging labels, which are regulated by the FDCA.[175] The absence of the statutory prohibition was strong evidence that although Congress intended the FDCA serve an oversight right, it was not the exclusive mechanism for regulating proper food and beverage labeling.[176] Justice Kennedy, writing for the Court, concluded that "when two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."[177]

Ultimately, the Fifth Circuit's *Munoz* opinion is flawed and goes against the logic of *POM Wonderful* opinion. Like the Lanham Act and the FDCA, CERCLA and OPA structurally and textually complement each other, while simultaneously contributing to distinct domains. Circling back to the Deer Park Fire Litigation, the district court there held that the plaintiffs could not bring a reimbursement claim under OPA not because CERCLA precludes it, but because the spill was

---

166 *POM Wonderful,* 573 U.S. at 120–21.
167 *Id.* at 110.
168 *Id.*
169 *Id.* at 102; *see also* 15 U.S.C. § 1125 (2012).
170 *Id.* at 102; *see also* 21 U.S.C. §§ 321(f), 331 (2022).
171 *POM Wonderful*, 573 U.S. at 102.
172 *Id.* at 115.
173 *Id.*; *Compare* Lexmark Int'l v. Static Control Components, 572 U.S. 118, 131–132 (2014) (detailing purpose of the Act is to be able to bring claims against deception and misleading use in commerce), *with* 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951) (explaining the purpose of the Act was to protect people's health when it is largely beyond their protection).
174 *POM Wonderful*, 573 U.S. at 115 (citing J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc., 534 U.S. 124, 144 (2001)).
175 POM Wonderful, 573 U.S. at 103.
176 *Id.*
177 *Id.*; *see* J.E.M. Ag Supply, 534 U.S. at 144.

not within OPA's scope.[178] This line of reasoning is flawed, beginning with the presumption that CERCLA and OPA are not in the same playing field. They were both created to prevent, respond, and clean up pollutants spilled or released into navigable waters.[179] Although each statute textually carves out its respective pollutants, the district court in the Deer Park Fire Litigation failed to account for CERCLA's ability to regulate mixed spills consisting of hazardous substances and oil. In other words, OPA and CERCLA overlap in their ability to regulate spills consisting of oil. Lastly, like the statutes at issue in *POM Wonderful*, CERCLA does not expressly prohibit an OPA economic damage claim where a spill contains a mix of oil and hazardous substances as defined under CERCLA.[180] Furthermore, CERCLA doesn't even expressly claim its ability to regulate a mixed spill of oil and hazardous substances within its text.[181] Hence, CERCLA and OPA, like the statutes in *POM*, can be read together and applied simultaneously.

d. The EPA on the Spill being "*so commingled*"

The EPA's "so commingled" standard of a mixed spill should not have been dispositive in excluding an OPA private right of action. In a 1987 memorandum, the EPA coined the term "so commingled" in the CERCLA context, stating that "if the petroleum product and an added hazardous substance are *so commingled* that, as a practical matter, they cannot be separated, then the entire oil spill is subject to CERCLA response authority."[182] The district court in the Deer Park Fire Litigation relied heavily on the EPA and USCG in their determination that the mixture was "so commingled" such that CERCLA was compelled to regulate.[183] However, the Fifth Circuit's *Munoz* opinion failed to even address this aspect. By the grant of this substantial agency deference, crucial arguments and facts raised by the plaintiffs were inappropriately overlooked.

In reviewing the weight that should be accorded to the agency's interpretation, the district court deployed *Skidmore* deference.[184] *Skidmore* deference commends an agency's judgment contingent on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control."[185]

First, plaintiffs called into question the composition of the spill at summary judgment level.[186] Ultimately, the district court granted summary judgment in favor of ITC because at least one hazardous substance was present in the channel after the spill,[187] which was composed of 91%

---

[178] *Id.*
[179] *See generally* Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990); *See also* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).
[180] *See generally* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).
[181] *See id.*
[182] Blake, *supra* note 28, at 2.
[183] *Deer Park Fire Litig.*, 2021 WL 4081575, at *9.
[184] *Id.* at *8 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[185] *Deer Park Fire Litig.*, 2021 WL 4081575, at *9; *Env't Integrity Project v. U.S. Env't Prot. Agency*, 969 F.3d 529, 540 (5th Cir. 2020) (quoting Dhuka v. Holder, 716 F.3d 149, 156 (5th Cir. 2013)).
[186] *Deer Park Fire Litig.*, 2021 WL 4081575, at *7.
[187] *Id.* at *8.

oil and 9% hazardous substances.[188] The Fifth Circuit failed to even acknowledge the actual makeup of the spill in the *Munoz* decision, but alternatively gave the impression that the majority of the spill consisted of CERCLA-regulated hazardous substances.[189]

Second, a close read of the 1987 memorandum that allowed the agencies—and ultimately the district court—to conclude that CERCLA regulates spills that are "so commingled," should have produced a contrary result in *Munoz*.[190] The ITC spill that was subject to CERCLA response authority, pursuant to the 1987 memorandum, could have equally been subjected to OPA response authority under the same exact memorandum.[191]

Lastly, at least two federal district courts in the Ninth Circuit have held that CERCLA and OPA can be applied to mixed spills. In *United States v. Mare Island Sales, LLC*, a federal district court in California granted a default judgment in favor of the U.S. government for the recovery of removal costs involving a mixed spill consisting of hazardous substances and oil.[192] Similarly, a federal district court in Hawaii ordered the reimbursements of removal costs incurred by the United States government pursuant under CERCLA and OPA.[193] However, *Munoz* is the law of the Fifth Circuit, and claimants in that circuit cannot pursue reimbursement claims for economic damages where a spill involves oil and hazardous substances.

e. Public Policy

The Fifth Circuit's *Munoz* decision has created a bypass and an incentive for liable parties, like ITC, to circumvent responsibility for economic losses under OPA by virtue of intentional or reckless commingling of oil and hazardous substances. The Fifth Circuit disregarded the above argument asserted by plaintiffs, labeling it as a "sinister characterization."[194] Although disturbing, it is not far reaching to anticipate that companies, like ITC, are capable of something like this to escape substantial economic damages under the OPA.

The Fifth Circuit attempted to minimize the consequences of its decision by highlighting how responsible parties are still liable for cleanup costs when a mixed spill occurs under CERCLA.[195] However, the reader should think about this from the perspective of a storage facility owner who is in the best position to mitigate a spill at the moment it begins at their facility. Wouldn't it be cost-effective to ensure that, if a spill were to occur, only mixed spills occur? It is true that a responsible party will be liable for cleanup costs, regardless; however, the responsible party need not pay economic damages if the chemical spill involves both oil and hazardous substances. Thus, facility owners are incentivized to spill hazardous substances *with* oil, should a spill occur in the first instance.

---

[188] CSB, *supra* note 96, at 12.
[189] Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 347 (5th Cir. 2023).
[190] *Deer Park Fire Litig.*, 2021 WL 4081575, at *8.
[191] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 50–51.
[192] United States v. Mare Island Sales, LLC, No. CIVS-07-2378GEB EFB, 2008 WL 4279406 (E.D. Cal. Sept. 16, 2008), report and recommendation adopted, No. 2:07-CV-2378-GEB-EFB, 2008 WL 11391411 (E.D. Cal. Sept. 30, 2008).
[193] United States v. English, No. CV00–00016ACKBMK, 2001 WL 940946 , at *5–6 (D. Haw. 2001).
[194] Munoz, 85 F.4th at 351.
[195] *Id.*

IV. Conclusion

The Fifth Circuit's decision in *Munoz* has stripped nearly sixteen different claimants of their economic loss remedy against ITC.[196] This decision wrongly relied on legislative history, and its disregarded several valid arguments presented by the plaintiffs. Moreover, the United States Supreme Court's failure to grant writ of certiorari on the matter has allowed the Fifth Circuit's decision to stand, strikingly underestimating this issue given the size of the oil industry in the Fifth Circuit.[197] The arguments espoused in this Comment advocates for the identical conclusion the Deer Park Fire Litigation plaintiffs sought, that both CERCLA and OPA can apply to mixed spills. Although the analysis includes several comparable arguments already made by plaintiffs, this comment diverges, beginning with the text and structure of the statutes.

Despite both statutes including similar definitions and exclusions of its respective pollutant, CERCLA possesses a clause that gives the EPA—an administrative agency—unrestricted discretion to change the scope of CERCLA—a statute enacted by Congress.[198] These designations left to the EPA is the root of ambiguity concerning the harmony between the statutes.[199] The *Munoz* reading of the statutes creates a new order of reasoning. Because both CERCLA and OPA overlap in their ability to regulate oil, they should be read together as mutually inclusive liability regimes.

Based upon *Skidmore* deference, reliance upon the "so commingled" standard in the Deer Park Fire Litigation was inaccurate.[200] The plaintiffs brought valid arguments concerning the composition of the spill that should have been evaluated further. One hazardous substance in question, toluene, never left its respective storage tank and the commingling of xylene was skeptical in nature, considering that it was found in an adjacent ditch to the containment wall that "ultimately" led into the HSC.[201]

The *Munoz* decision will likely set a precedent throughout the petrochemical industry, where storage facility operators are exonerated from economic damage liability because they are now put on notice of this potential scheme. Liable storage facility operators "should not be better off violating two federal environmental statutes instead of one."[202]

---

[196] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 28.
[197] *See* Petition for Writ of Certiorari, Texas Aromatics, L.P., et al. v. Intercontinental Terminals Co., No. 23-948, 2024 WL 1241405 (U.S. March 25, 2024).
[198] *See* 42 U.S.C. § 9602 (2025).
[199] *See id.*
[200] *See Deer Park Fire Litig.*, 2021 WL 4081575, at *8.
[201] *See* Munoz v. Intercontinental Terminals Co., 85 F.4th 343, 347 (5th Cir. 2023).
[202] Joint Opening Brief of Plaintiffs-Appellants, *supra* note 74, at 28.