

## STRANGER THAN FICTION: AN “INSIDE” LOOK AT ENVIRONMENTAL LIABILITY AND DEFENSE STRATEGY IN THE DEEPWATER HORIZON AFTERMATH

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Abstract: The Deepwater Horizon oil spill of April 20, 2010 initiated an environmental disaster that presented attorneys on both sides of the legal action with monumental challenges. Using the satirical format of a memo written by the corporate defense counsel to BP America four days after the spill began, this article investigates BP’s potential liability and strategic defense positions available in criminal and civil proceedings. Major federal environmental laws, including the Oil Pollution Act, the Clean Water Act and major wildlife protection statutes, are implicated by the Spill. The memo provides a clear picture of the existing opportunities for a responsible party to minimize liability in the face of incriminating evidence. This article argues that the successful use of legal precedents, tactical defenses and the enhanced role of the responsible party in response and restoration, will minimize BP America’s liability and civil and criminal penalties resulting from the Spill, to the detriment of the prevention of future environmental crimes.

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Author’s Note: *This is a completely fictional Memorandum of Law from BP Counsel to their clients on Day Four of the Macondo Well Oil Spill (April 24, 2010). That is, future events have not unfolded and must be predicted or imagined. The citations are not fictional.*

Date: April 24, 2010  
 To: BP America, Inc.  
 From: Bendini, Lambert & Locke, Attorneys at Law<sup>1</sup>  
 Re: Initial Memorandum of Law Discussing  
 Representation of BP on Matters Pertaining to  
 the Deepwater Horizon Oil Well Blowout

I. INTRODUCTION

As the lawyers for BP America (BP), this is our initial strategy memorandum discussing how we intend to address your company’s liability stemming from the sudden misfortune at your Macondo Well on April 20 of this year.

We must assure BP that in the post-*Exxon Valdez* Spill era, the U.S. system of environmental law is formidable and

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1. Bendini, Lambert & Locke is a fictional law firm featured in the John Grisham book and movie, *The Firm*. See Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1353 (2001).

punitive, and BP's potential liabilities are significant and vast. The system, however, is complex and full of legal defenses that our team is ready to exploit. BP faces risk on five legal fronts: criminal liability, civil penalties payable to the United States, civil damages owed to private parties, response costs and natural resource damages payable to the United States, the affected States and possibly Indian tribes.

The Gulf Oil Spill<sup>2</sup> caused ecological devastation, fatalities and significant economic loss to the Gulf coast. The case for criminal prosecution rests on the fact that the unprecedented damage caused by the disaster and the loss of eleven lives might have been avoided if BP had adhered to safety standards and a standard of care greater than that shown in the lead-up to the disaster. The spill caused catastrophic ecological devastation and BP is likely liable for violating wildlife statutes because of the harm and death of thousands of birds, sea turtles, marine mammals and fish. The culpability standard and our available defenses vary depending on the wildlife (birds, mammals, or endangered species) harmed.

BP is also vulnerable to criminal liability under the Clean Water Act (CWA) if there is any evidence of corner cutting, measured safety risks and deviation from industry standards. If the Department of Justice (DOJ) commences a suit, BP will be charged with violations of the Clean Water Act (CWA) for negligently discharging into navigable waters. If the DOJ can prove that the discharge occurred knowingly, BP will also be charged with a violation of the "knowing endangerment" provision of the CWA.<sup>3</sup> Further, ten or fifteen of your top executives and decision-makers ("responsible corporate officers") could be charged with offenses resulting in actual prison sentences for the felony of criminal endangerment. While it is within the realm of possibility, the likelihood that individual BP executives will be prosecuted is slim.

Finally, BP should assume that the Department of Justice (DOJ) is investigating the "debarment option," which could eliminate BP's current and future contracts with the American government and military.<sup>4</sup> BP's history of cost-cutting

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2. Though most people will call this the "BP Oil Spill" we urge you to use the term "Gulf Oil Spill."

3. 33 U.S.C § 1319(c)(2) (2006).

4. *E.g., id.* § 1368(a) (prohibiting federal contracting with any person under the Clean Water Act "until the Administrator certifies that the condition giving rise to

measures have led to three earlier criminal convictions—for activities in Endicott Bay, Texas City and Prudhoe Bay—which could be considered in weighing the more serious debarment option.<sup>5</sup> The sheer size and importance of BP to America’s economic and security interest will likely prevent these accumulated resentments from resulting in complete debarment.

BP’s negligence authorizes DOJ to seek hefty civil penalties under the CWA. The Act’s civil penalty provision will likely impose significant financial burdens for BP. The clear risk under the CWA is a civil fine of \$1,110 per barrel of oil spilled and \$4,300 per barrel if the company is proven to be grossly negligent.<sup>6</sup> Based on your early estimate that the Macondo Well is leaking five thousand barrels per day, civil penalties could reach \$21.5 million per day. If the spill continues for 100 days, or if your estimate is low by a factor of 100, the fine is \$2.15 billion; if both, the fine is \$21.5 billion.<sup>7</sup> Our firm will need to work closely with BP on this highly sensitive topic and must have a confidential discussion on the actual rate of flow and your methods for calculating it. Because the law uses

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such conviction has been corrected”). The federal government continues to award contracts to BP. *See Contracts for Thursday, May 12, 2011*, Department of Defense, <http://www.defense.gov/contracts/contract.aspx?contractid=4533> (last visited Dec. 2, 2011) (indicating that BP was awarded a Department of Defense contract in May 2011).

5. *See* Abraham Lustgarten, *Furious Growth and Cost Cuts Led to BP Accidents Past and Present*, PROPUBLICA (Oct. 26, 2010, 10:32 AM), <http://www.propublica.org/article/bp-accidents-past-and-present> (discussing, generally, debarment and the various problems that led to investigation).

6. *See* 33 U.S.C. § 1321(b)(7)(D) (2006); 26 U.S.C. § 9509 (2006) (stating that any discharge of oil that is a result of gross negligence of any owner or operator will toll toward the negligent party at a maximum of \$3,000); *see also* Civil Monetary Penalty Inflation Adjustment Rule, 60 Fed. Reg. 30, 7121, 7124 (Feb. 13, 2004) (codified at 40 C.F.R. pts. 19, 27) (stating that the §1321 civil penalty for oil discharge will have a new maximum violation amount of \$4,300 per barrel).

7. *See* NATIONAL INCIDENT COMMAND, INTERAGENCY SOLUTIONS GROUP, FLOW RATE TECHNICAL GROUP, ASSESSMENT OF FLOW RATE ESTIMATES FOR THE DEEPWATER HORIZON / MACONDO WELL OIL SPILL 1–2 (2011). Three days after a capping stack was installed on the well on July 12, 2010, the choke valve was closed and oil stopped flowing into the Gulf. Three different teams from Department of Energy (DOE) labs used pressure measurements recorded as the valve was closed to yield the most precise and accurate estimation of flow from the Macondo well: 53,000 barrels/day at the time just prior to shut in.; *see also* WILLIAM R. FREUDENBURG & ROBERT GRAMLING, BLOWOUT IN THE GULF: THE BP OIL SPILL DISASTER AND THE FUTURE OF ENERGY IN AMERICA 13 (MIT Press 2011) (stating BP’s initial estimates were two percent of actual volume).

various techniques for measuring and estimating flow, our firm must learn from BP about the fine distinctions between actual flow, measured flow, perceived flow and disguised flow. The law will permit any techniques for measuring and estimating flow that passes its gatekeeping test.<sup>8</sup> The ongoing flow from the Macondo Well represents a hemorrhaging of BP's financial resources.

All strategy and planning will be measured by reference to the 1989 spill of the *Exxon Valdez*, where a tanker collided with Bligh Reef and let loose eleven million gallons of North Slope crude oil into Prince William Sound. This oil spill has every prospect of surpassing *Exxon Valdez* in geography affected, amounts spilled, duration, impacts and legal and political retaliation.<sup>9</sup>

Civil damages, for matters such as lost profits for the Gulf tourism industry, curtailed fishing, lost tourism and destruction of personal livelihood, are potentially vast. BP should recognize, however, that the entire fury of the U.S. personal injury and class action bar limped home in the *Exxon Valdez* spill case with damages around \$500 million. Double that to account for the punitive damages, and the entire bill came to rest at a figure of perhaps one billion dollars.<sup>10</sup> BP's civil liability damages, for reasons of time of year (fishing and spawning seasons) and adjacency of the spill to heavy commercial and recreational activity, will be many times more extravagant than those suffered by Exxon—we will start with fifteen billion dollars as an early estimate. Our firm has developed several strategies for limiting this loss, explained in

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8. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592–95 (1993) (identifying the following four nonexclusive factors that contribute to judicial decisions on admissibility of scientific methodologies such as measuring flow rate: (1) whether the technique has been subjected to peer review or publications, (2) the “known or potential rate of error,” (3) a “reliability assessment,” in which the “degree of acceptance” within a scientific community may be determined, and (4) the “testability” of the technique).

9. *Compare THE SPILL: PERSONAL STORIES FROM THE EXXON VALDEZ DISASTER* 19–21 (Sharon Bushell & Stan Jones eds., Epicenter Press 2009) [hereinafter 2009 PERSONAL STORIES] with FREUDENBURG & GRAMLING, *supra* note 7, at 11–13 and NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE OIL DRILLING, REPORT TO THE PRESIDENT 129–71 (2011) [hereinafter 2011 NATIONAL COMMISSION REPORT].

10. See *Exxon Shipping v. Baker*, 554 U.S. 471, 515 (2008) (holding \$507.5 million in compensatory damages reasonable and 1:1 ratio of compensatory-to-punitive damages as the maximum punitive damage award).

Part III of this memo, that may ensure economic harms to the BP Corporation will be kept within reason.

In this respect, we recommend a national publicity campaign that duplicates the strategy successfully mounted by Exxon more than twenty years ago. You must pledge, in various open letters to the public, to pay all “legitimate claims” and to make everybody “whole.”<sup>11</sup> These pledges aim to build up public confidence and good will toward BP; we will strive to pay all legitimate claims. Additionally, Exxon’s success in curtailing punitive damages in U.S. maritime law is of direct legal benefit to BP in the Gulf. BP may recall that a federal jury returned a five billion dollar verdict against Exxon for punitive damages arising out of the 1989 spill.<sup>12</sup> Some fourteen years later the U.S. Supreme Court overturned this judgment.<sup>13</sup>

As you know, total liability under the Oil Pollution Act (OPA) shall not exceed “the total of all removal costs plus \$75,000,000.”<sup>14</sup> These limits on liability can be overcome if the incident was “proximately caused by” gross negligence or willful misconduct or by “the violation of an applicable Federal safety, construction, or operating regulation.”<sup>15</sup> BP is clearly on the hook for “all removal costs plus \$75,000,000” and might be potentially responsible for liabilities beyond that upon a showing of “gross negligence” and “willful misconduct.”<sup>16</sup>

We applaud BP’s initial response to this matter—declaring that any caps or limits are “not relevant” to your calculations.<sup>17</sup>

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11. *Compare* Press Release, BP America Inc., BP Pledges Collateral for Gulf of Mexico Oil Spill Trust, (Oct. 10, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7065280> with Jane Eisemann, Kodiak Resident, in 2009 PERSONAL STORIES, *supra* note 9, at 183 (“we will make you whole”).

12. *Exxon Shipping*, 554 U.S. at 480 (referencing jury award).

13. *Id.*

14. 33 U.S.C. § 2704(a)(3) (2006).

15. *Id.* § 2704(c)(1)(A), (B).

16. *See* 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 217-47 (explaining that much of the fault leading up to the disaster is the result of systemic problems in government oversight and industry/institutional culture, but also that BP’s “safety culture” had failed). *See also* 33 U.S.C. § 2704(a)(3) (2006).

17. *See White House: Lift Liability Cap for Gulf Oil Spill*, CBS (Mar. 25, 2010), <http://www.cbsnews.com/stories/2010/05/04/politics/main6460911.shtml> (“Asked whether the company expected to spend money beyond the \$75 million limit, Hayward said the cap was largely irrelevant. It’s got nothing to do with caps. All legitimate claims will be honored.”); *see also* Shaila Dewan, *Officials Ask BP to Assure It Will Cover Spill Claims*, N.Y. TIMES (May 16, 2010),

BP limited the amount of public information regarding its views on liability, but we have room to fill in the details. BP's position can be charitably characterized as declining to exploit legal technicalities that tilt in the company's direction.

The best way to control BP's "response costs" is to manage them adroitly and as cheaply as possible. BP took important steps in this direction by hiring work crews and sinking, burning or burying the oil and debris.<sup>18</sup> The more oil BP loses at sea, the less the company must bring ashore for what is likely an expensive disposal of "hazardous waste."<sup>19</sup> Similarly, in Part II, we demonstrate how to position BP within the multi-agency process measuring the spill's impact on nature known as the natural resource damage assessment. We emphasize minimizing interim resources losses—the lost value of natural resources tolling between the spill and restoration—will help BP's bottom line. This can be accomplished if we can start restoration projects as quickly as possible, regardless of how successful they might be. Moving through the "science" phase of the natural resource damage assessment process rapidly is in BP's best interest. Let us turn to the particulars of the five-front legal war BP is confronted with and our preliminary recommendations on how to proceed.

## II. THE *EXXON VALDEZ* SPILL AND ITS IMPLICATIONS FOR THE BP DEFENSE

The 1989 *Exxon Valdez* oil spill was brilliantly defended by Exxon. That experience created a useful collection of legal precedents and tactical advice for BP to employ in the current crisis. Exxon functionally escaped from any and all criminal sanctions<sup>20</sup>—a feat BP would be fortunate to replicate. Exxon

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<http://www.nytimes.com/2010/05/16/us/16spill.html> (\$75 million cap "irrelevant.").

18. CARL SAFINA, *A SEA IN FLAMES: THE DEEPWATER HORIZON BLOWOUT, PART II* (Random House 2011) ("A Season of Anguish").

19. See NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, CHIEF COUNSEL'S REPORT, *MACONDO: THE GULF OIL DISASTER* 151 (2011) (footnotes omitted) ("Rather, according to internal BP emails and the testimony of various witnesses, BP chose to use the lost circulation [materials] as a spacer in order to avoid having to dispose of the material as hazardous waste pursuant to the Resource Conservation and Recovery Act (RCRA).").

20. See William H. Rodgers, Jr. et al., *The Exxon Valdez Reopener: Natural Resources Damage Settlements and Roads Not Taken*, 22 *ALASKA L. REV.* 135, 149–51 (2005) [hereinafter *The Exxon Valdez Reopener*] (fines assessed are "remitted").

shattered the ambitions of the civil lawyers by destroying the cultural and subsistence claims of the one group enjoying widespread public support—Alaska natives<sup>21</sup>—and by undermining the natural resource claims of sport fishing interests, a group endowed with impressive political capital.<sup>22</sup> Exxon also inflicted irreparable damage to the U.S. jury system by the creative expedient of secretly “buying” a share of the “punitive damages” that was owned by the so-called Seattle Seven fishing companies.<sup>23</sup> This was done at substantial discount and inflicted disarray on the united front of the opposition. Further, it created a valuable example of the use of corporate buying power that can be invoked to undermine juries.<sup>24</sup>

Exxon’s success in curtailing punitive damages in U.S. maritime law creates a direct legal benefit for BP in the Gulf spill. BP may recall that a federal jury returned a five billion dollar verdict against Exxon for punitive damages arising out of the *Exxon Valdez* spill.<sup>25</sup> In hard-fought litigation, up and down in the courts, this \$5 billion judgment became \$4 billion, then \$4.5 billion, then \$2.5 billion<sup>26</sup> and eventually \$.5 billion in the U.S. Supreme Court.<sup>27</sup> In 2008, nineteen years after the initial spill, the U.S. Supreme Court overturned the \$5 billion verdict<sup>28</sup> and completely dashed the financial expectations and staying power of 32,000 out-of-work fishermen.<sup>29</sup> The “rule” of the case, for reasons of fairness to Exxon and the potential for odious overreaching by the common people of the jury, is that

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21. *Id.* at 144. *See also* Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997) (explaining that Alaska Native “subsistence lifestyle” claims arising out of the spill are not a special injury for purposes of a public nuisance action).

22. *Id.* at 180–81. *See also* Alaska Sport Fishing Ass’n v. Exxon Corp., 34 F.3d 769, 771–73 (9th Cir. 1994).

23. *The Exxon Valdez Reopener*, *supra* note 20, at 186–87.

24. *Id.*

25. *In Re The Exxon Valdez*, 472 F.3d 600, 602 (9th Cir. 2006).

26. *See id.* (explaining the different awards entered in the case).

27. *See Exxon Shipping v. Baker*, 554 U.S. 471, 515 (2008) (adopting the District Court’s calculation of total relevant compensatory damages).

28. *See id.*

29. Twenty-six thousand lived to see the ruling. *Compare* RIKI OTT, NOT ONE DROP: BETRAYAL AND COURAGE IN THE WAKE OF THE EXXON VALDEZ OIL SPILL, epilogue (Chelsea Green Pub. 2008) (discussing the “shock” of hearing about the Supreme Court decision) *with* 2009 PERSONAL STORIES, *supra* note 9, at 258–59 (quoting Dennis Kragin, a Kodiak Fisherman, “I used to say, ‘Exxon is going to pay us. We’ll get paid, we’ll get paid.’ . . . I’ll believe it when I see it.”).



punitive damages should not exceed the actual damages suffered by the fishermen. That is, the case set forth a one-to-one ratio for punitive and actual damages.<sup>30</sup>

This one-to-one ratio rule can be of considerable future benefit to BP if the case moves in the direction of punitive damages, which is likely.<sup>31</sup> For reasons that entirely escape our firm, damages to natural resources do *not* figure in the ratio calculations for determining punitive damages. Thus the one billion dollars Exxon committed for natural resource damages compensation did not earn one penny in punitive damages. (Let us assume that the beaches do not care that they were heavily oiled and the soiled birds are entirely indifferent to the prospects of vengeance). Thus, this one-to-one precedent is tantalizingly benign to our future legal prospects and we are happy to have it.

On the natural resource damages front, Exxon arguably outgunned the natural resource “trustees”—the sobriquet extended to the United States and the State of Alaska. Out of the one billion dollar settlement for natural resources damages, \$900 million was distributed over time to the Exxon Valdez Trustee Council.<sup>32</sup> In a novel move, Exxon deferred payment of \$100 million of these funds under a seemingly “harmless” reopener provision.<sup>33</sup> The “trustees” struggled to meet a fifteen-year deadline to seek additional damages by June 1, 2006. The hastily framed “demand” that was developed was never paid or pursued; Exxon successfully stonewalled the whole affair.<sup>34</sup> This bold corporate display of determination and conviction bought several more years of legal paralysis.<sup>35</sup> Right now, important legal and scientific elements of the natural resource damages remain entirely unresolved, well past the twenty-first anniversary of the *Exxon Valdez* oil spill. Time is on our side, and the Exxon experience underscores the

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30. See *Exxon Shipping v. Baker*, 554 U.S. 471, 512–513 (2008) (stating that a 1:1 ratio is a “fair upper limit in maritime cases.”).

31. *Id.*

32. *The Exxon Valdez Reopener*, *supra* note 20, at 135.

33. *Id.* at 138–39.

34. See generally William Yardley, *22 Years Later, the Exxon Valdez Case is Back in Court*, N.Y. TIMES (Mar. 3, 2011), <http://www.nytimes.com/2011/03/04/us/04/exxon.html>.

35. Def.’s Mot. to Enforce Consent Decree, *United States v. Exxon Corp.*, No. 3:91-sv-0082 Civil (HRH) (D.Alaska, Aug. 9, 2011) (an affirmative ruling here would bring an end to the “reopener”).

legal arsenal that can be put to the ready service of extended delay. Though we cannot bet on the reliable bungling of our adversaries, we are ready to exploit these opportunities if the occasion arises. Based on this approach, we recommend the following defenses addressing the five legal categories BP will likely confront.

### III. RECOMMENDED DEFENSES IN THE FIVE MAJOR CATEGORIES

#### A. *BP's Criminal Liability*

The Gulf Oil Spill has been called America's "worst environmental disaster."<sup>36</sup> If the Department of Justice (DOJ) brings criminal charges against BP, the charges will likely allege violations of several wildlife statutes, which are misdemeanors, and violations of the Clean Water Act (CWA), which may be more severe. The DOJ will likely charge BP with violations of the CWA for negligently and/or knowingly discharging into navigable waters. The DOJ may charge BP's executives with criminal fraud based on evidence that they exaggerated the company's cleanup capacity and the time needed for spilled oil to reach the shore. Additionally, BP may be charged with violating the Seaman's Manslaughter Statute,<sup>37</sup> which provides felony sanctions for a vessel owner whose negligence causes the death of a worker on board the vessel. BP's potential criminal liability, applicable defenses and our recommendations follow.

#### 1. *The Wildlife Statutes*

As BP knows, the Gulf is home to an array of sensitive and valuable species, many of which have been adversely affected by the current spill. The U.S. government has three applicable statutes aimed at protecting these species, which may create some liability for BP. First, if the DOJ commences a criminal suit, BP will likely be liable for violating the Migratory Bird

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36. See 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 173 (quoting President Obama, Oval Office Speech of June 15, 2010); see also Jerry Cope, *The Crime of the Century: What BP and the US Government Don't Want You to Know*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/jerry-cope/the-crime-of-the-century\\_b\\_662971.html](http://www.huffingtonpost.com/jerry-cope/the-crime-of-the-century_b_662971.html) (last visited June 16, 2011).

37. 18 U.S.C. § 1115 (2006).

Treaty Act (MBTA). Under the MBTA, the “taking” of a migratory bird “by any means or in any manner” is unlawful.<sup>38</sup> For misdemeanors, liability is strict,<sup>39</sup> which means it is unnecessary to prove intent to cause the death of birds. The Gulf Oil Spill has already killed thousands of birds, making BP liable under this Act.<sup>40</sup>

Additionally, because the Gulf Oil Spill killed marine mammals, BP may be liable for violating the Marine Mammal Protection Act (MMPA).<sup>41</sup> Like the MBTA, violations of the MMPA are misdemeanors, but the MMPA imposes a higher culpability standard by requiring violations to be done “knowingly.”<sup>42</sup> This higher standard does not place such a charge out of reach, especially with the spilling of large amounts of oil. BP may also be liable for violating the Endangered Species Act (ESA). Under the ESA, it is a misdemeanor<sup>43</sup> to “take,” meaning to wound, harass, or kill,<sup>44</sup> a member of a species protected by the Act.<sup>45</sup> Here, too, the prosecution must establish a knowing violation.<sup>46</sup> This means the actor must anticipate the spill and know that it will cause harm to the species.<sup>47</sup>

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38. 16 U.S.C. § 703(a) (2006); 50 C.F.R. § 10.12 (2010) (defining “take” as “pursue, hunt, shoot, wound, kill, trap, capture, or collect.”).

39. 16 U.S.C. § 707(a).

40. A CENTER FOR BIOLOGICAL DIVERSITY REPORT, A DEADLY TOLL: THE GULF OIL SPILL AND THE UNFOLDING WILDLIFE DISASTER 1 (2011) (estimating death or harm to 82,000 birds).

41. 16 U.S.C. §§ 1362(13), 1362(18)(A) (2006) (defining harassment as “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal . . . or (ii) has the potential to disturb a marine mammal . . . by causing disruption of behavioral patterns.”).

42. 16 U.S.C. § 1375(b) (under the MMPA, a “person who knowingly violates any provision of this subchapter or of any permit or regulation issued thereunder [not including takings by commercial fishing operations] shall, upon conviction, be fined not more than \$20,000 for each such violation, or imprisoned for not more than one year, or both”); *see also* United States v. Hayashi, 22 F.3d 859, 862 (9th Cir. 1994) (“Under the MMPA, no criminal penalty can attach for negligent conduct.”).

43. 16 U.S.C. § 1540(b) (2006) (limiting the punishment for violation to one year in prison and/or a fine of \$50,000).

44. 16 U.S.C. § 1532(19) (2006) (defining the term “take” to mean, *inter alia*, harassing, harming, killing, or wounding).

45. *Id.* § 1538(a)(1)(A)–(B) (stating that it is unlawful to “take” any endangered species within the United States or the territorial Seas of the United States or to take endangered species on the high seas).

46. *Id.* § 1540(b) (2006) (“*Knowingly* violate . . . any provision of this chapter, or any provision of any permit or certificate issued hereunder.”) (emphasis added).

47. *See* United States v. McKittrick, 142 F.3d 1170, 1176–77 (9th Cir. 1998)

## 2. *Clean Water Act*

Under the CWA, it is a misdemeanor to discharge a pollutant negligently into navigable waters<sup>48</sup> and a felony to do so knowingly.<sup>49</sup> BP is vulnerable to a criminal suit under the negligence provisions because the evidence suggests that it took measurable safety risks and exercised a lack of reasonable care in observing industry standards leading up to the Deepwater Horizon rig explosion and after the blowout. With damage estimates upwards of twenty billion dollars, BP is potentially on the hook to receive the largest corporate criminal fine imposed in U.S. history.<sup>50</sup> This fine is imposed based on an ordinary negligence standard. Such negligence is not difficult to prove<sup>51</sup> and it may be coincidentally established in the course of the ongoing investigations of the accident.<sup>52</sup>

BP should be concerned with this relaxed liability standard in light of the prospect that BP's management process failed to adequately identify or address the risks created by late changes to well design and procedures.<sup>53</sup> Evidence is accumulating on your company's failure to evaluate adequately cumulative risks stemming from the cement job, including dangerous drilling decisions, a low rate of cement flow and cement volume and fewer centralizers than were anticipated in

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(explaining that the ESA required only that defendant knew he was shooting an animal when defendant shot a protected wolf); *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (holding that it was sufficient to show that the defendant knowingly took an animal even though he thought he was taking a different unprotected species); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (holding that in prosecution under the ESA, government need only prove that the hunter acted with general intent when he shot animal in question); *see also* KRISTINA ALEXANDER, CONGRESSIONAL RESEARCH SERVICE, R41308, *THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS* (2010).

48. 33 U.S.C. § 1319(c)(1) (2006).

49. *Id.* § 1319(c)(2).

50. *Id.* § 1319(c)(3)(A). *See* 18 U.S.C. § 3571 (2006) (stating that under the Alternative Fines Act the maximum criminal penalty for the Clean Water Act violations is twice the losses resulting from the oil spill).

51. 33 U.S.C. § 1319(c)(1). *See* *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005) (stating that a person “violates the Clean Water Act by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, and, in so doing discharges [in violation of the Act]”).

52. *See* THE NATIONAL ACADEMIES, INTERIM REPORT ON CAUSES OF THE DEEPWATER OIL SPILL AND WAYS TO PREVENT SUCH EVENTS 5–9 (Nov. 16, 2010), *available at* <http://www.nap.edu/catalog/13047.html> [hereinafter 2010 INTERIM REPORT].

53. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 125.

the original design.<sup>54</sup> Thus, as investigations continue, we fear the doors will close on the defenses to negligence.<sup>55</sup>

Additionally, the CWA has long been celebrated for its invention of the crime of “knowing endangerment.”<sup>56</sup> Conviction requires proof of violation of the no-discharge provisions coupled with additional evidence that the doer of the deed “knows at that time that he thereby places another person in imminent danger of death or serious bodily injury.”<sup>57</sup> Penalties include fines up to \$250,000 (one million dollars for an “organization”) “or imprisonment of not more than 15 years, or both.”<sup>58</sup> If the DOJ can prove that BP knew that the company’s failure to take reasonable care in its offshore drilling operations would result in the Spill, then it may be able to prove “knowing endangerment” under the CWA.<sup>59</sup> Frankly, the knowing and negligence provisions of the CWA place the future of BP—and any number of its executives—firmly within the discretionary mercy of the DOJ.

The felony provisions of the CWA establish two prominent proof advantages for environmental prosecutors. One is a tempered version of “knowingly” that appears in the context of environmental crime.<sup>60</sup> The other is the so-called “responsible corporate officer” doctrine.<sup>61</sup>

The leading decision is Judge Betty Fletcher’s ruling in *United States v. Weitzenhoff*,<sup>62</sup> which comes down in favor of the prosecution on the question of “whether ‘knowingly’ means a knowing violation of the law or simply knowing conduct that

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54. *Id.* at 97–98. (finding “BP installed only six centralizer subs on the Macondo production casing. BP’s original designs called for 16 or more centralizers to be placed along the long string.”).

55. 2010 INTERIM REPORT, *supra* note 52, at 5–9.

56. 33 U.S.C. § 1319(c)(3)(A) (2006).

57. *Id.*

58. *Id.*

59. See David Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Act*, 109 MICH. L. REV. 1413, 1431 (2011) (suggesting that the DOJ could allege BP knowingly discharged oil into the Gulf due to the risks taken by the company and its partners).

60. *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) (en banc) (holding “knowingly” language in CWA does not require proof that defendant knew he was violating the law).

61. 33 U.S.C. § 1319 (c)(5) (defining “person” to include a “responsible corporate officer.”).

62. 35 F.3d 1275 (9th Cir. 1993) (en banc).

is violative of the law.”<sup>63</sup> This ruling deprives a CWA defendant of any number of the “didn’t-know,” “unaware-of-the-technicalities,” “nobody-told-me,” or “just-doing-my-job” defenses that customarily surface in any “complex” technological undertaking such as offshore oil drilling. Indeed, Judge Kleinfeld said in his *Weitzenhoff* dissent that the CWA reaches too far, declaring that “[t]his statute has tremendous sweep. Most statutes permit anything except what is prohibited, but this one prohibits all regulated conduct involving waters and wetlands except what is permitted.”<sup>64</sup> Judge Kleinfeld also argued that the CWA regulates “[m]uch more ordinary, innocent, productive activity. . . than people not versed in environmental law might imagine,”<sup>65</sup> and that it “makes felons of a large number of innocent people doing socially valuable work.”<sup>66</sup>

In *Weitzenhoff*, admittedly, this “socially valuable work” was done by “midnight dumpers.”<sup>67</sup> The defendants “managed a sewer plant and told their employees to dump 436,000 pounds of sewage into the ocean, mostly at night, fouling a nearby beach.”<sup>68</sup> It is difficult to sympathize with a manager who ordered his employees to dump intentionally hazardous sewage. While our firm will strongly advocate that the Gulf Oil Spill was a terrible accident, many will feel the same lack of sympathy about BP’s corner-cutting on the Deepwater Horizon.

The *Weitzenhoff* holding continues to aid prosecutors by squeezing “knowingly” defenses down to something closer to sleepwalking and inviting convictions for public welfare wrongs that are designed to stem the abuses of modern industrialism.<sup>69</sup> However, under *Wietzenhoff*, we will claim that the prosecutor must prove that “knowingly” committed cost-cutting measures resulted in a discharge of oil into the Gulf. However, BP cannot claim any “socially valuable work” or “unfortunate accident” defenses.

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63. *Id.* at 1283.

64. *Id.* at 1293.

65. *Id.*

66. *Id.*

67. *Id.* at 1294.

68. *Id.*

69. *United States v. Hoffin*, 880 F.2d 1033, 1037–38 (9th Cir. 1989).

Similarly, environmental prosecution is aided by the CWA's recognition that a "person" vulnerable to criminal prosecution includes "any responsible corporate officer."<sup>70</sup> Again, this undercuts the ignorance defense for those who might not have known but should have known of the circumstances. A number of mid-level and other managers have met their felony fates under the criminal environmental laws that have told them that their knowledge of serious environmental risks is not up to par.<sup>71</sup> Reluctantly, we read the case law as allowing U.S. prosecutors to thrust criminal environmental law deeply into the ranks of BP's onshore management should they choose to go there.<sup>72</sup>

### 3. *Criminal Fraud*

Additionally, as your counsel, we are concerned that adversaries will contend that BP seized the basic planning and licensing process of offshore oil development and turned it into a fabrication factory. Every business executive who aspires to tangle with the United States should memorize the criminal fraud provisions of 18 U.S.C. § 1001(a), which reads in pertinent part:

. . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

1. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
2. makes any materially false, fictitious, or fraudulent statement or representation; or
3. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

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70. Clean Water Act § 309(c)(6), 33 U.S.C. § 1319(c)(6) (2006). See also Nancy Mullikan, *Holding the "Responsible Corporate Officer" Responsible: Addressing the Need for Expansion of Criminal Liability For Corporate Environmental Violators*, 3 GOLDEN GATE U. ENVTL. L. J. 395 (Spring 2010).

71. See, e.g., *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) (convicting three civilian managers and contractors of knowingly managing hazardous wastes without a permit).

72. We understand that "BP onshore" participated in the vital decisions at Macondo. See 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 125 (Fig. 4.10: Examples of Decisions That Increased Risk at Macondo While Potentially Saving Time).

shall be fined under this title or imprisoned not more than 5 years, or both.<sup>73</sup>

To this end, it is imperative that BP's management understands that it is a felony to falsify a material fact in any document submitted to an agency of the United States and that filling a report with fabrications might lead to multiple felony charges. Thus, evidence that BP employees' falsified conditions at the well, either in the amount of oil discharged or in the response plan, could result in a felony charge.<sup>74</sup>

Based on this law, BP will perhaps appreciate why our firm must scrutinize, with a growing sense of apprehension, BP's 582-page Oil Spill Response Plan covering all BP operations in the Gulf of Mexico. This document has not received glowing reviews from our associates because of its far-fetched and unsupported claims.<sup>75</sup> The document asserts, for example, that BP has an "amazing collection of skimming equipment" that would enable it to clean up an incredible 20,652,282 gallons of oil per day—roughly twice the volume of the *Exxon Valdez* spill.<sup>76</sup> How could this possibly be true? The plan also "claimed there would be only a 21 percent chance that oil from a spill would reach the Louisiana coast within a month."<sup>77</sup> But this cannot be true either.<sup>78</sup> This spill response plan refers readers to experts long since dead<sup>79</sup> and expresses "concern for walruses, sea otters, sea lions and seals, including all of them under the heading 'sensitive biological resources'—even though not a single one of them has lived in the Gulf for the last several million years."<sup>80</sup> Despite these lapses, we are confident in our firm's ability to defend any fraud charges based on our considerable past successes. In these cases, our general tactic

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73. 18 U.S.C. § 1001(a) (2006).

74. *Id.* See also *id.* §§ 1503, 1505, 1512, and 1519 (obstructing justice).

75. See FREUDENBURG & GRAMLING, *supra* note 7, at 53–55 (quoting LEE CLARKE, MISSION IMPROBABLE: USING FANTASY DOCUMENTS TO TAME DISASTER (1999 U. Chicago Press)).

76. *Id.* at 53.

77. *Id.* at 54.

78. See *id.* ("[T]he actual spill, with a probability of 100 percent, took only nine days to start fouling the coastline").

79. See *id.* ("The go-to wildlife expert listed in the plan, Professor Peter Lutz of the University of Miami, had left that institution twenty years earlier, and in a particularly inconvenient detail, he had died four years before the plan was approved.").

80. *Id.*



is to argue that a particularly outrageous false statement is not a fact but an opinion, that if it is a fact it is not material, that if it is material, it was not relied upon, and that if it is relied upon, the statement was not uttered with the requisite degree of culpability.

Specifically, to defend matters mentioned above, we will argue that BP's overestimation of cleanup capacity and the time needed for spilled oil to reach the shore are matters of opinion and references to available experts and walruses are entirely immaterial. It helps in cases of this sort to have an agency so complacent<sup>81</sup> as to be information-oblivious. Fraud as a legal concept is fundamentally designed to prevent miscalculations by the party deceived.<sup>82</sup> No one believes the Minerals Management Service (MMS) could be led astray by a few careless references to walruses.

But we insist that you understand that deception cannot be the policy of choice when dealing with the federal government. As a matter of principle, our firm might agree with BP that a freedom to fabricate is part and parcel of corporate free speech on the international stage.<sup>83</sup> We point out to you that there is a right way and a wrong way to change these rules. The path is open for BP to diminish the importance of the "material false statement" law<sup>84</sup> by dissuading the Attorney General from

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81. Ronald J. Krotoszynski, Jr., *Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance*, 65 U. MIAMI L. REV. 449, 455 (2011) ("MMS employees received free trips and even illicit drugs and the services of paid sex workers from industry representatives. In turn, the MMS turned a blind eye on various and sundry applications for drilling permits."); Tim Dickinson, *The Spill, The Scandal and the President*, ROLLING STONE, June 24, 2010, at 54 ("[President Obama] acknowledged that his administration had failed to adequately reform the Minerals Management Service, the scandal-ridden federal agency that for years had essentially allowed the oil industry to self-regulate.").

82. See generally *N. Anna Env'tl. Coal. v. U.S. Nuclear Regulatory Comm'n*, 533 F.2d 655 (D.C. Cir. 1976) (no loss of license for facility because the fault on which it was sited was not "capable"); *Va. Elec. & Power Co. v. U.S. Nuclear Regulatory Comm'n*, 571 F.2d 1289, 1291-92 (4th Cir. 1978) (*per curiam*) (affirming civil penalties of \$32,500 for the making of false statements in connection with an application for a license to construct a nuclear power plant).

83. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961) (Black, J.) (stating that no Sherman Act violation can be premised upon a "no-holds-barred fight" between railroads and truckers to influence the passage of state laws); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

84. 18 U.S.C. § 1001(a) (2006).

enforcing this law. Unfortunately, it is beyond the power of BP to wash this law away with a flood of indifferent violations.

#### 4. *Defenses to Criminal Liability*

If BP is rendered criminally vulnerable by tough environmental laws, prosecution-friendly doctrines, and the familiar practice of multiple counts,<sup>85</sup> are they then protected by some generic soft-on-crime public sentimentality? It appears not. Today's U.S. culture is not soft on crime but hard on crime. "Three strikes and you're out" has been a steady refrain in U.S. criminal law for a generation or more.<sup>86</sup> Tony Hayward himself has predicted a punitive streak in U.S. law because this is America, after all.<sup>87</sup> We predict that the public will expect the President to be tough on BP<sup>88</sup> and that it should be made to pay even if it goes bankrupt in the process.<sup>89</sup>

"Three strikes and you're out" has particular irony when applied to BP.<sup>90</sup> The company has enjoyed the benefits of its three strikes and is not yet out. Strike one was the so-called Texas City disaster that killed fifteen workers (injured 170) and earned record-setting penalties from the Occupational Health and Safety Administration (OSHA).<sup>91</sup> Strike two was

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85. See, e.g., Clean Water Act § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B) (2006) (a Class II civil penalty may be assessed "per day for each day during which the violation continues.").

86. See Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 23, 2010, § 6 (Magazine), at 40 (describing the case of Norman Williams, who was sentenced to life in prison under California's repeat-offender law for stealing a floor jack from a tow truck).

87. *BP CEO Predicts 'Illegitimate' Oil Lawsuit Because 'This is America'*, THE HUFFINGTON POST (May 6, 2010), [http://www.huffingtonpost.com/2010/05/06/bp-ceo-predicts-illegitim\\_n\\_566429.html](http://www.huffingtonpost.com/2010/05/06/bp-ceo-predicts-illegitim_n_566429.html).

88. See Stephanie Condon, *Americans Don't Care if BP Goes Bankrupt Paying for Oil Spill, Poll Shows*, CBS NEWS POLITICAL HOTSHEET (June 15, 2010), [http://www.cbsnews.com/8301-503544\\_162-20007755-503544.html](http://www.cbsnews.com/8301-503544_162-20007755-503544.html) (reporting that seven out of ten Americans in the Gallup/USA Today poll say Mr. Obama has not been tough enough on BP).

89. *Id.*

90. Jane F. Barrett, *When Business Conduct Turns Violent: Bringing BP, Massey and Other Scofflaws to Justice*, 48 AM. CRIM. L. REV. 287, 295-307 (2011) (indicating BP has had six strikes and is still not out).

91. In 2007, BP pleaded guilty to a felony and paid a \$50 million penalty for failing to maintain equipment at a Texas City, Texas oil refinery and causing an explosion. See *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009). See also *Texas City Refinery Explosion, Texas: Safety Failure on March 23, 2005*, in WHAT WENT WRONG: INVESTIGATING THE WORST MAN-MADE AND NATURAL DISASTERS

the Greater Prudhoe Bay pipeline disaster that put sixty-three workers at risk and earned huge penalties from the Environmental Protection Agency (EPA).<sup>92</sup> Strike three is the Gulf Oil Spill disaster, which killed eleven workers and threatens to earn record-setting civil penalties under the CWA.<sup>93</sup> After the first two calamities, BP shuffled a few administrators, handed down a few “be careful” directives, and pursued a public relations binge to repair the company’s reputation.<sup>94</sup> As you well know, the Greater Prudhoe Bay disaster unleashed a debarment proceeding before the EPA.<sup>95</sup> That prospect was economically dangerous for the company and our firm is surprised that BP survived that experience by walking away with an ill-defined program for reform and a mild admonition.<sup>96</sup>

The EPA’s surprisingly mild disposition was no doubt a satisfactory outcome for your company and for the attorneys who achieved this resolution. But we implore you not to rely on past experience. BP has been lifted by the tides of tolerance and the impulses of mercy. But never doubt that these expressions of benign discretion can desert you quickly in the

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204 (2011 Hearst Communications) (quoting the U.S. Chemical Safety & Hazard Investigation Board “concluded that BP failed to heed or implement safety procedures that had been recommended before the explosion.”).

92. BP pleaded guilty to a misdemeanor, paid a twelve million dollar fine, four million dollars in restitution to the state of Alaska, and made a four million dollar payment to a nonprofit wildlife fund. *See* Plea Agreement at 2, 16–18, *United States v. BP Exploration (Alaska), Inc.*, No. 3:07-cr-00125 (D. Alaska Oct. 25, 2007).

93. *See* Complaint, *Center for Biological Diversity, Inc., v. BP America, Inc. et al.*, No. 2:10-cv-01768 (E.D. La. Jun. 18, 2010), *reprinted in* PHYLLIS SKUPIEN & RITA CICERO EDS., 2010 GULF COAST OIL DISASTER: LITIGATION AND LIABILITY (Thomson West 2010) [hereinafter 2010 GULF COAST OIL DISASTER]; *see also* Complaint of the United States of America, *United States v. BP Exploration and Production, Inc. et al.*, No. 2:10-cv-04536 (E.D. La. Dec. 12, 2010), *available at* <http://www.scribd.com/doc/45341375/USA-Complaint-Against-BP-Et-Al>.

94. The N.Y. TIMES reported on the latest breezes of reform that have swept the decks of BP, but noted wryly that the man in charge of BP’s new safety division was the same fellow who had detected conspicuous innocence in BP’s role in the Transocean disaster. *See* Clifford Krauss & Julia Werdigier, *BP’s New Chief, Not Formally in the Role, Is Already Realigning Managers*, N.Y. TIMES (Sept. 29, 2010), <http://www.nytimes.com/2010/09/30/business/energy-environment/30safety.html>.

95. *See* Lustgarten, *supra* note 5.

96. *Id.* (According to Environmental Protection Agency (EPA) Senior Attorney Jeanne Pascal, by 2009 EPA’s demands included extra regulations and oversight of BP operations not just in Texas and Alaska, but also in the Gulf. EPA also insisted that the company move the Health, Safety and Environmental director back up the chain of command to a Vice President position).

corridors of the U.S. government.

In the end, we believe, BP's best defense against criminal charges and debarment is not its long record but its large size. The "too big to fail" argument has worked on Wall Street to defeat the draconian remedies of "debarment."<sup>97</sup> Prior to the Gulf Oil Spill, the Greater Prudhoe Bay pipeline disaster inspired debarment proceedings, but the Pentagon stepped in and objected as BP was the largest supplier of oil.<sup>98</sup> In a much quieter fashion, corporate defense attorneys have invented a comparable concept "too big to prosecute," which is an excellent description of the defense we intend to develop. Fortunately, our firm has considerable experience with these transactions that are called "deferred prosecution agreements." These agreements work as follows:

If companies pay the fine set by the prosecutor and submit to probationary terms for good behavior, perhaps an outside monitor, then government will defer prosecution indefinitely or even drop it entirely. The corporation thus avoids the stigma of a criminal trial and the bad headlines that depress stock prices.<sup>99</sup>

The government needs its offshore oil revenues now more than ever. To this end, the DOJ has little incentive to force BP to the mat, whether in the name of "Old Testament Justice" under the criminal laws or regulatory honor under the civil laws. The government's financial realities afford a partial explanation as to why the DOJ previously succumbed so easily to the path of "deferred prosecution."<sup>100</sup>

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97. Compare ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* (2008 Princeton U. Press) with *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, PROJECT ON GOVERNMENT OVERSIGHT, May 10, 2002, available at <http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html> (finding that, since 1990, forty-three of the government's top contractors paid approximately \$3.4 billion in fines/penalties, restitution, and settlements and four of the top ten government contractors have at least two criminal convictions. Only one of the top forty-three contractors has been suspended or debarred from doing business with the government, and then, for only five days).

98. Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. TIMES (Dec. 17, 2010), <http://www.nytimes.com/2010/12/18/us/politics/18contractor.html?scp=1&sq=%22Size%20Protects%20Government%20Contractors%20That%20Stray%22&st=cs>.

99. William Greider, *How Wall Street Crooks Get Out of Jail Free*, THE NATION (Mar. 23, 2011), <http://www.thenation.com/article/159433/how-wall-street-crooks-get-out-jail-free?page=0,0>.

100. See Press Release, BP America Inc., BP America announces resolution of Texas

Like many attorneys, while we are comfortable arguing what is right, we are most confident in being able to rest upon precedent. We like the precedent of the “deferred prosecution agreement.”<sup>101</sup> We also can benefit from the lenient treatment of past oil spillers. The convenient truth is that robust environmental laws and vigorous prosecutors likely will not suffice to bring criminal enforcement to the doorsteps of BP. The best preview of the matter is the resolution of the *Exxon Valdez* liabilities. In that case, Exxon Shipping pled guilty to three misdemeanors and agreed to pay a fine of \$150 million.<sup>102</sup> Of this fine, \$125 million vanished and was “remitted” (“to forgive or pardon”) to the company because it had behaved so nobly in agreeing to pay private claims and cleaning up the spill.<sup>103</sup> Another \$100 million that might have been collected for the taxpayers was declared “restitution” and went to federal and state governments as might be done in the case of stolen automobiles.<sup>104</sup> The sole function of the “crime” in the *Exxon* case was to keep ongoing settlement discussion of civil damages and natural resource damages on a productive note. There is no evidence in the *Exxon* context of tough-minded prosecutors seeking retribution and holding corporate offenders accountable. The only crime that received legal notice was that of the bedraggled scapegoat for the whole affair, Capt. Joseph Hazelwood.<sup>105</sup> Liability never reached Exxon “onshore.”

The U.S. Supreme Court has also been helpful to BP’s legal defense. The Court’s decision in *Exxon Shipping v. Baker* left open the question of whether a ship owner can be liable under

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City, Alaska, propane trading, law enforcement investigations (Oct. 25, 2007), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7037819>.

101. *Id.*

102. See William H. Rodgers, Jr., *Punitive Decisionmaking*, 7 U. ST. THOMAS L. J. 89, 93 (2009) (explaining that on October 9, 1991 the United States Government and State of Alaska settled their claims against Exxon Shipping Company and Exxon Corporation. Exxon pleaded guilty to three misdemeanor counts, including violations of the Migratory Bird Act, the Clean Water Act and the Refuse Act. The plea agreement resulted in a criminal fine of \$150 million, with \$125 million forgiven).

103. *Id.*

104. *Id.*

105. See *Hazelwood v. State of Alaska*, 962 P.2d 196, 197–98 (1998); see also 2009 PERSONAL STORIES, *supra* note 9, at 279–82 (Joe Hazelwood, Captain of the Exxon Valdez was acquitted of three of four charges, convicted of one misdemeanor; sentenced to \$50,000 fine and 1000 hours of community service).

maritime law for punitive damages without “acquiescence in the actions causing harm.”<sup>106</sup> The court was divided four to four on this matter of “derivative” liability<sup>107</sup> and no one doubts that the missing vote (Justice Alito) would have favored the “corporate” view.

*Exxon Shipping* should be applied to limit liability on both the civil and criminal fronts. If Exxon cannot be held liable without explicit “acquiescence” in the misdeeds of Captain Hazelwood, then BP should have clear sailing under both civil and criminal law absent proof of an explicit directive from top management to cut corners. Our overall strategy, as it was in *Exxon Shipping*,<sup>108</sup> is to confine liabilities to the management and crew on the vessel itself. To this end, our firm needs every shred of evidence (e.g. directives, manuals, announcements, or instructions) given to your employees and your contractors urging them to “follow the rules,” “put safety first,” or “take pride in the job.”

BP should be aware that the stronger the preachment, the greater the distance between liability derived from the scene of the accident and liability derived from a corporate relationship. The Supreme Court has shown itself to be vulnerable to assurances of worthy environmental intent<sup>109</sup> and we hope to give them assurances galore.

We advise BP to take advantage of two defensive tactics on the criminal front. First, you must implicate others partially responsible for the spill in all versions of this mishap. The “others” should include the U.S. government, the company’s employees and its contractors. Some might call this “finger pointing” or “scapegoating,” but our firm views the tactic as a just and appropriate allocation of responsibility. It is quite possible, for example, that Transocean failed to prevent the blast and that Halliburton was responsible for errors in the cement job and testing that allowed the explosive natural gas

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106. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008).

107. *Id.*

108. *Id.*

109. See *Burlington N. and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 129 S.Ct. 1870, 1873, 1875–76, 1880 (2009) (8-1 decision) (holding that Shell Oil did not “arrange” for the disposal of hazardous substances because it did not intentionally pollute the groundwater at a chemical distribution business though it dictated the transfer arrangements, knew of the spills, and provided advice and supervision; Shell had a convincing campaign of preachment, instructions, and advice to avoid the pollution its behavior virtually guaranteed).

to seep into the well.<sup>110</sup>

Our strategy is to rerun the legal trajectory of the *Exxon* case and have the “buck” stop with Hazelwood. We do not yet know who the “Hazelwood” is in our case, but we implore BP to help us identify this man and bring him to justice.<sup>111</sup> Remember, Exxon took unilateral punitive action against Hazelwood (he eventually was fired for violation of company rules)<sup>112</sup> and Exxon executives succeeded in shielding themselves.

Second, in each and every step of the cleanup, BP should collect and hide behind “permissions” granted by the United States. In the early stages of the accident-to-be, BP “onshore” brought the United States into the liability picture with a telephone inquiry to MMS to secure a “waiver” in regard to a revision in well cementing practices.<sup>113</sup> We advise you to repeat this move because it will dilute BP’s responsibility.

What does one expect of the criminal law and BP? Guilty pleas on a half-dozen criminal charges that manifest our social commitment to human life, wildlife and our environment? A billion-dollar fine for the BP? Jail time totaling 100–200 years for ten different “responsible corporate officers?” This would be

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110. Krauss & Werdigier, *supra* note 94.

111. See ROWAN JACOBSEN, *SHADOWS ON THE GULF: A JOURNEY THROUGH OUR LAST GREAT WETLANDS* 60–66 (Bloomsbury USA 2011) (on the roles of BP well site leaders, Bob Kaluza and Don Vidrine). We recognize the evidentiary value of the two witnesses in the lifeboat who overheard Jimmy Harrell on his phone telling Houston, “I told you this was gonna happen.” *Id.* at 65–66. Our problem with this evidence is that if liability moves “to somebody in Houston,” it has moved to BP onshore. Again, our goal is to confine the scapegoats to the vessel. See Editorial, *Industry Doesn’t Step Up*, N.Y. TIMES (May 11, 2010), <http://www.nytimes.com/2010/05/12/opinion/12wed1.html> (“Who is to blame for last month’s catastrophic oil spill in the Gulf of Mexico? The other guy. At least that’s what three oil executives, predictably and cynically, told a Senate hearing on Tuesday.”).

112. See 2009 PERSONAL STORIES, *supra* note 9, at 279–81; see also JOHN KONRAD & TOM SHRODER, *FIRE ON THE HORIZON: THE UNTOLD STORY OF THE GULF OIL DISASTER* 261 (2011 Harper Collins) (Transocean survivor, Buddy Trahan stated that the “crew and equipment were not at fault” and that “it was a “screwed-up plan.” The sister of one of the victims “felt rage at the accusations against the drill crew” and felt that the 193-page BP report “that parceled out blame among “multiple companies and work teams” meant. . . . that the drill floor crew . . . was being saddled with ultimate responsibility. . . . “How can somebody sit there and blame the victims when they’re not here to defend themselves?”).

113. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 126–27 (approval of BP request to set the temporary abandonment plug 3,300 feet below the mudline, a departure from the usual 1,000 feet, approved by telephone in less than ninety minutes).

our “worst case” scenario. But we are confident that very little of this will happen. One or two underlings, as Joseph Hazelwood learned, should take the fall for the unfortunate deaths at the Deepwater Horizon. BP will be asked to sign a “deferred prosecution agreement.” Debarment will not happen. Heads will not roll on this occasion.

### B. *Civil Penalties*

The prospect of civil penalties is more than meets the eye. Section 309(d) of the CWA, which applies to fundamental offenses such as discharging a “pollutant” without a permit, states that “any person who violates [the CWA] . . . shall be subject to a civil penalty not to exceed \$25,000 per day (adjusted to \$37,500)<sup>114</sup> for each violation.”<sup>115</sup> It would appear firmly within the realm of possibility that there is but a single violation in this matter—the Macondo well blowout—albeit with ongoing effects, and thus, we could defend against charges of violating Section 301(a)<sup>116</sup> of the CWA by claiming that any penalties are capped at \$25,000 (adjusted to \$37,500) per day.<sup>117</sup> This would be a trivial toll for a company the size of BP.

Unfortunately, Section 311 of the CWA opens the door to liability that is far more economically dangerous to BP. In addition to discharging “pollutants” into the Gulf of Mexico without a permit, we will need to defend BP against violations of Section 311(b)(3) of the CWA.<sup>118</sup> This subsection prohibits the “discharge of oil or hazardous substances” into a variety of waters that include “activities under the Outer Continental Shelf Lands Act” in amounts that are “harmful” or in ways that “may affect natural resources belonging to the United

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114. See EPA Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (2009) (adjusting the statutory penalty found in 33 U.S.C. § 1319(d) from \$25,000 per day to \$37,500 per day).

115. Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (2006). BP is the “operator” of the oil rig and thus would be responsible for the discharge of pollutants from a point source.

116. Our firm will argue that the spill constitutes just one discharge under the CWA. See 33 U.S.C. 1311(a).

117. See 33 U.S.C. § 1321(b)(7)(A) (2006) (setting civil penalties for per day violations of the CWA at \$25,000); 40 C.F.R. § 19.4 (2011) (adjusting penalties to \$37,000 after January 12, 2009).

118. 33 U.S.C. § 311(b)(3).



States.”<sup>119</sup> Try as we might, and conceding the clumsy wording of Section 311, we do not see a way to defend BP against violations of this statute.

Ineluctably, then, one is drawn to the civil penalty provisions of Section 311(b)(7)(A), which state that a person who is an operator of an “offshore facility” from which oil is discharged “*shall be subject* to a civil penalty in an amount up to \$25,000 (adjusted to \$37,500)<sup>120</sup> per day of violation *or* an amount of up to \$1,000 (adjusted to \$1,100)<sup>121</sup> per barrel of oil . . . discharged.”<sup>122</sup> If the federal government can prove “gross negligence or willful misconduct,” a legal prospect that appears quite plausible at this moment, the financial tally rises to a civil penalty “of not less than \$100,000 (adjusted to \$140,000),<sup>123</sup> *and* not more than \$3,000 (adjusted to \$4,300)<sup>124</sup> per barrel of oil . . . discharged.”<sup>125</sup> The first formulation (using the disjunctive *either/or*) affords us room to argue that a \$37,500 per day penalty should suffice to send any message that needs to be sent. Considering the severity of the spill, the second formulation, \$140,000 *and* a per barrel charge of \$4,300, is a conceivable legal nightmare that could attend a finding of “gross negligence or willful misconduct.”<sup>126</sup>

The following factors must be considered when the court determines the amount of a civil judicial penalty: the seriousness of the violation or violations; the economic benefit to the violator, if any, resulting from the violation; the degree of culpability involved; any other penalty for the same incident; any history of prior violations; the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; the economic impact of the penalty on the violator; and any other matters as justice may require.<sup>127</sup> None of these factors clearly support BP’s defense. To aid the court’s considerations, nonetheless, our

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119. *Id.*

120. 40 C.F.R. § 19.4 (adjusting penalties found in Clean Water Act § 311(b)(7)(A)).

121. *Id.*

122. 33 U.S.C. § 1321(b)(7)(A) (emphasis added).

123. 40 C.F.R. § 19.4 (adjusting penalties found in Clean Water Act § 311(b)(7)(D)).

124. *Id.*

125. *See* 33 U.S.C. § 1321(b)(7)(D) (relating to proof of gross negligence and willful misconduct).

126. *Id.*

127. *Id.* § 1321(b)(8).

firm will argue against the seriousness of the violation and that neither “negligence” nor “misconduct” occurred. We will further contend that the civil penalties, like any criminal charges, are a measure of vindictive “piling on,” allowing the United States to recover three times for the same disaster—once for the cleanup, again for the criminal law and yet again for the civil penalties.

Two features of this environmental law of civil penalties could significantly increase BP’s fine. The first is the barrel-by-barrel sum found in Subsection 311(b)(7)(A) of the CWA. The quantitative precision of this numerical device cannot help but give confidence to government negotiators who only can be emboldened when it comes time to “make a deal.” We prefer to frame the company negotiations, and draw on client-specific needs, without a discordant dollars-per-barrel tune playing in the background.

Second, enforcement of the environmental laws, including the CWA, can be initiated by citizens.<sup>128</sup> The CWA authorizes citizens to bring suit for civil penalties or enforce compliance with effluent standards issued by the EPA Administrator or a state. These citizens can bring to the table time-tested and experienced attorneys. In this matter, we fully expect a citizen suit to be filed and we anticipate that it will seek a “calculation” of civil penalties under that dollars-per-barrel formula.<sup>129</sup> As a result, BP may hear more than it wishes about “doing the math” which can drive civil penalties into the billions.<sup>130</sup>

Fortunately for BP’s defense, the U.S. Supreme Court has provided ample advantages for defendants to resist citizen suits,<sup>131</sup> and we will spare no energy in seeking to curtail this

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128. WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: AIR & WATER*, Vol. 2 § 4.5 (West 1986) (with semi-annual updates). The danger of these sorts of lawsuits is illustrated by *Meister v. U.S. Dep’t of Agriculture*, 623 F.3d 363 (6th Cir. 2010).

129. Complaint, *Center for Biological Diversity, Inc. v. BP America, Inc.*, No. 10CV01768 (E.D. La. June 18, 2010) *reprinted in* 2010 GULF COAST OIL DISASTER, *supra* note 93.

130. *Can BP Ever Get It Right?*, N.Y. TIMES (June 8, 2010) <http://www.nytimes.com/2010/06/08/opinion/08tue3.html> (“do the math”). *See also* Campbell Robertson & Clifford Krauss, *Gulf Spill is the Largest of its Kind, Scientists Say*, N.Y. TIMES (Aug. 2, 2010) <http://www.nytimes.com/2010/08/03/us/03spill.html> (discussing the magnitude of the Gulf Spill).

131. *See* William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENVTL. L. 1, 33–35 (2010) (discussing standing, ripeness, notice, not continuing, and counsel fees as bars or deterrents to citizen suits).

symbolic feature of U.S. environmental law. Generally, the strategies we expect to pursue are to win the support of the U.S. government and to enlist the defenses, provided by Supreme Court decisions, to deprive the citizens of a meaningful forum to seek relief.<sup>132</sup> We also expect to establish that, under Section 311 of the CWA, the prohibitions on oil discharges are not enforceable by citizen suit.<sup>133</sup>

Right now, we are confident in defending the initial estimate of 5,000 gallons per day that you provided our law firm and are not displeased that considerable uncertainty surrounds this figure.<sup>134</sup> If this figure grows over time,<sup>135</sup> however, our anxiety will grow with it. We hope we have said enough on this topic of civil penalties to convince you of the considerable value of not knowing and never knowing the actual amount of oil spilled from the Macondo Well. As your advocates, we are in the curious position of advising you that the higher the volume of this spill, the steeper the penalty you will pay.

We recommend that you quickly implement three policies to mitigate the impact of high civil penalties. First, the company's

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132. *See id.*

133. *See In re Oil Spill by Oil Rig Deepwater Horizon*, 792 F. Supp. 2d 926 (E.D. La., 2011) (dismissing CWA suit claims on multiple grounds including standing, mootness, and the holding in *Gwaltney*).

134. Compare FREUDENBURG & GRAMLING, *supra* note 7, at 12–13 (initial estimates were 2% of actual volume; 5000 barrels per day); Justin Gillis & Henry Fountain, *Rate of Oil Leak, Still Not Clear, Puts Doubt on BP*, N.Y. TIMES (June 7, 2010), <http://www.nytimes.com/2010/06/08/us/08flow.html>; *Day 48: The Latest on the Oil Spill*, N.Y. TIMES (June 7, 2010) <http://www.nytimes.com/2010/06/08/science/earth/08latest.html> (“The amount of oil being collected as a result of a containment cap placed on the ruptured well last week has increased and is now up to 11,000 barrels a day. . . .”); with Justin Gills, *Size of Spill Underestimated, Scientists Say*, N.Y. TIMES (May 13, 2010) <http://www.nytimes.com/2010/05/14/us/14oil.html> (“There’s just no way to measure it,” [statement of BP senior vice president Kent Wells]); RestoreTheGulf.gov, *United Command Continues to Respond to the Deepwater Horizon* (Apr. 25, 2010), <http://www.restorethegulf.gov/release/2010/04/25/update-8-unified-command-continues-respond-deepwater-horizon>; Tim Dickinson, *The Spill, the Scandal, and the President*, ROLLING STONE (June 8, 2010), <http://www.rollingstone.com/politics/news/the-spill-the-scandal-and-the-president-20100608>.

135. It does:

We’re all much too familiar with the aftermath. The Coast Guard’s initial claims that the leaking oil was merely what was stored on the rig. Then the “discovery” that 1,000 barrels per day were leaking. (A “game changer,” the Coast Guard called it.) Then BP’s denial that 5,000 barrels per day were flowing. Then the poignant absurdity of BP clinging to the 5,000-barrels-per-day estimate while it was capturing around 15,000 barrels per day through a tube—and barely making a dent in the flow.

*See* JACOBSEN, *supra* note 111, at 66–67.

immediate use of dispersants, quickly, massively, and at depth was—and is—a stroke of genius. The National Research Council made clear years ago that dispersants function to redistribute spilled oil on a zero-sum basis.<sup>136</sup> That is, it is possible to keep oil off the surface and out of the wetlands by sinking it to depths. We point out that, fortuitously perhaps, oil off the surface and out of sight might not be incorporated into the calculation of BP's liability.

Second, the civil penalties you will pay are likely to be linked not to the amount that will be spilled, but to estimates of that amount from the government, your company, or other sources. To this end, it would be within your obvious interest to stop the flow and to curtail it if it cannot be stopped. The less obvious strategy is for you to explore, investigate and develop methodologies for estimating the amounts of oil lost at Macondo. In this context, doubt (and perhaps its close cousins, controversy, uncertainty, and opinion) can be serviceable.<sup>137</sup>

Third, if the clock keeps ticking and the spill remains unabated, BP may have nothing to gain from controlled, scientifically reliable measures of the flow. A successful capping of the well could afford an opportunity to measure the flow as final preparations are made.<sup>138</sup> Please understand that a measurement such as this could be a disservice to BP's overall defense. If, in the end, there remains considerable

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136. NATIONAL ACADEMY OF SCIENCES, UNDERSTANDING OIL SPILL DISPERSANTS: EFFICACY AND EFFECTS, *Executive Summary* at 2, 10 (2005), available at <http://www.nap.edu/catalog/11283.html> (describing dispersants as chemical mixtures sprayed onto a spill (usually from aircraft) to disperse the oil in the water column, thus keeping it off surface waters and beaches). See also 2009 PERSONAL STORIES, *supra* note 9, at 54.

137. Compare SAFINA, *supra* note 18, at 92 (BP spokesman stated “We are focused on stopping the leak and not measuring it.”) with THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH 97-127 (2008) (on hiding science and strategies of deliberate ignorance).

138. Discussing the decision-making process that kept the well shut:

BP shut the stack and began the well integrity test at about 2:25 pm on July 15. For the first time in 87 days, no oil flowed into the Gulf of Mexico. . . . Later that afternoon, the science advisors, including McNutt and Hunter, met with Secretaries Salazar and Chu to determine whether to keep the well shut in. Based on the early pressure data, the group appears to have been firmly in favor of reopening the well [thus presenting an occasion to measure the flow]. Garwin, who had opposed even undertaking the well integrity test, voiced the strongest opinion, arguing BP ought to stop the test immediately and wondering whether it was already too late. No one at the meeting appears to have argued in favor of keeping the well closed.

2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 165 (footnotes omitted).

uncertainty about the rate and amount of the flow, we are confident that a company with the size of BP might get the benefit of the doubt from one or another federal agency.<sup>139</sup>

If this citizen suit for civil penalties proceeds against you as we expect it to, we are ready to undermine it with a barrage of motions and technicalities that the U.S. Supreme Court has provided over the years. First, no matter how the suit is framed or who the plaintiff is, we will argue that notice is inadequate. The 1989 Supreme Court decision in *Hallstrom v. Tillamook County* has evolved into the requirement that notice is jurisdictional, and courts have insisted upon a precision of notice that is not easily satisfied.<sup>140</sup> (Thankfully, no one has seemed to notice a later case in which the Court distinguished the ongoing violation requirement of citizen suit provisions as not jurisdictional.)<sup>141</sup> We will further argue that citizens lack standing to bring the suit. The Supreme Court has said that standing is “jurisdictional” and a constitutional necessity<sup>142</sup> and many courts have argued that environmental plaintiffs cannot show injury.<sup>143</sup> In every case, we will argue that the citizen suit is foreclosed by “diligent” action by the government.<sup>144</sup>

BP might further lobby the United States to bring a more realistic and responsible civil penalty action to foreclose

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139. See Robert L. Cavnar, *BP Wins: EPA Will Agree to Cut Oil Spill Estimate*, HUFFINGTON POST (Feb. 2, 2011, 9:07 AM), [http://www.huffingtonpost.com/robert-l-cavnar/bp-wins-epa-will-agree-to\\_b\\_817327.html](http://www.huffingtonpost.com/robert-l-cavnar/bp-wins-epa-will-agree-to_b_817327.html).

140. See *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989); see also:

Although the *Hallstrom* decision came down firmly on the side of holding that notice is an absolute precondition to commencement of a citizen suit, the Court carefully, and explicitly, stopped short of holding that the notice requirement ‘is jurisdictional in the strict sense of the term.’ Nevertheless, courts applying *Hallstrom* frequently characterize the notice requirement as a jurisdictional requirement, and many cite *Hallstrom* specifically for this proposition, despite the reservation in the Court’s *Hallstrom* decision.

Karl S. Coplan, *Is Citizen Suit Notice Jurisdictional and Why Does It Matter?*, 10 WIDENER L. REV. 49, 49 (2003).

141. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 92–93 (1998). See also Coplan, *supra* note 140, at 49.

142. See *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

143. See WILLIAM H. RODGERS, JR., 2 ENVIRONMENTAL LAW: AIR AND WATER 84–85 n.19 (1986 & Supp. 2010) (collecting “no injury” and other standing cases).

144. Our experience is that the statutory term “diligently prosecuting” found in 33 U.S.C. § 1365(b)(1)(B) (2006) can be satisfied by the most pedestrian, knee-jerk, and wanton actions, so long as there is something that looks like a “decision to enforce” by the U.S. or a state.

environmental plaintiffs (such as the Center for Biological Diversity) who argue that civil penalties should approach the statutory maxima prescribed by law.<sup>145</sup> Further, we should seek to recover our counsel fees from the environmental plaintiff who started the suit in the first place.<sup>146</sup> Finally, as soon as the company stops the flow (or perhaps curtails it substantially), we will move to dismiss any CWA citizen suits.<sup>147</sup> The Supreme Court has held that jurisdiction for citizen suits exists only so long as the action complained of, here the flow of oil, continues.<sup>148</sup> A strange rule—but we are happy to support its enforcement.

BP civil penalties are likely to land where the United States says they should land—at one billion dollars. All contingencies on this front commend a policy of remaining on good terms with the United States. It is to our advantage that the adversary we most respect—the Center for Biological Diversity—is pursuing you not in the fertile fields of California but in the bogged-down swamp of multi-district litigation in Louisiana.<sup>149</sup>

### C. *Potential Civil Damages*

We are concerned about BP's civil liability to injured individuals and businesses as a result of the spill. The civil liabilities of Exxon landed at approximately one billion dollars for its 1989 spill.<sup>150</sup> The liabilities for Saddam Hussein's destructive ruination of the Kuwaiti oil fields at the end of the Gulf War in 1991 have run past five billion dollars.<sup>151</sup> BP's

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145. 2010 GULF COAST OIL DISASTER, *supra* note 93, at 341.

146. 33 U.S.C. § 1365(d) allows an award of attorney fees “to any prevailing or substantially prevailing party” if such an award is deemed “appropriate.” Several successful defendants have recovered attorney fees. *See* Save Our Springs Alliance, Inc. v. City of Dripping Springs, 304 S.W.3d 871 (Tex. App. 2009) (assessing the protectors of Edwards Aquifer \$86,200 for their trouble).

147. 33 U.S.C. § 1365 (2006).

148. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). Following cessation of the leak, Judge Barbier dismissed CWA citizens' suit claims under *Gwaltney* because the Court did not have subject matter jurisdiction for Clean Water Act suits when there were no ongoing violations. *See* *In re Oil Spill by Oil Rig Deepwater Horizon*, 792 F. Supp. 2d 926, 932 (E.D. La., 2011).

149. *See generally* *In re Oil Spill by Oil Rig Deepwater Horizon*, 792 F. Supp. 2d 926. (dismissing citizen suit Master Complaint in its entirety).

150. *See* *Exxon Shipping v. Baker*, 554 U.S. 471, 471 (2008).

151. *See* EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW

near-certain liabilities are potentially many times that amount, given the economic configuration of the Gulf, as fisheries are closed, lay-offs ensue and businesses hunker down. BP must think in terms of thirty to forty billion dollars in liability.

Fortunately, U.S. tort law has been infiltrated in recent years by various “alternative dispute mechanisms.”<sup>152</sup> These are customarily justified as beneficial improvements in efficiency and fairness in the delivery of compensation to victims.<sup>153</sup> Perhaps they are. But compared to what? The present system, of course: courts; juries; agencies; and lawyers.

Frankly, BP wants no part of this scene, populated as it is with fervent and able class action lawyers who are indefatigable investigators<sup>154</sup> and fearless federal judges brimming with compassion and confidence.<sup>155</sup> BP has no interest whatsoever in meeting an oil-spill jury in Louisiana, Mississippi, or Texas, recalling perhaps that the *Exxon Valdez* jury rang up a five billion dollar punitive damage award on Exxon. To be sure, the Supreme Court bailed Exxon out of its immediate punitive damage woes. The only consolation for BP is that its punitive-damages will be “limited” to whatever large sum the company is obliged to pay out in compensatory payments.

On this civil liability front, BP is already on the defensive as the lawsuits pour in. Tort lawyers are rounding up their clients, courts are clearing their dockets and Attorneys General are preparing suits against BP. We will work first and foremost to “contain” this flood of litigation with the same

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MACGRAW, A. DAN TARLOCK, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* 728 n.2 (2d ed. 2007). By the way, we are hoping against hope that BP acts so that this oil spill is stopped short of the records set by Saddam Hussein. Your attorneys cringe at the prospects of a “worse than Saddam” publicity campaign launched against BP. See FREUDENBURG & GRAMLING, *supra* note 7, at 13 (in the end, “Saddam Hussein had managed to spill more than escaped from Macondo, but that wasn’t easy”). Of course, Saddam was trying to spill the oil while BP is trying to stop it.

152. See Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Process*, 2 J. DISP. RES. 289 (2005).

153. See generally *id.*

154. See, e.g., Geov Parrish, *Brad Marten and Billy Plauche Tackle the Gulf Oil Crisis—From Seattle*, SUPER LAWYERS (July 2011), <http://www.superlawyers.com/washington/article/Battle-in-the-Bayou/659e064d-fb8d-4a18-b170-1952d0167dfd.html>; Scott Summy, Esq., Baron & Budd in 2010 GULF COAST OIL DISASTER, *supra* note 93.

155. For one among many profiles in judicial courage, see *Aquifer Guardians in Urban Areas v. Federal Highway Admin.*, 779 F.Supp. 2d 542 (W.D. Tex. 2011).

determination that the Corps of Engineers displays in dealing with record-high waters on the Mississippi.

Accordingly, on the matter of civil liability, we recommend a “breakout strategy,” something never tried before.<sup>156</sup> We recommend BP seek a meeting with the U.S. Attorney General, and hopefully the President. BP will pledge to establish, immediately and “without restriction,” a twenty billion dollar compensation fund to pay the accumulating claims. At this private meeting, all BP executives must demonstrate complete and unqualified remorse for the accident. Your company must pledge to set things right, to honor your commitments and to pay all legitimate claims.<sup>157</sup> BP must leave the distinct impression that no child goes hungry, no widow aggrieved, no business disadvantaged and no fisherman uncompensated.

We advise BP’s “first impression” meeting with the U.S. President and the Attorney General to come off as a generous display of corporate benevolence. BP may say that it is “on probation,” or that the company’s Board of Directors is “eager to make amends” and ready “to get on with the job of making everybody whole in the Gulf.” Your hosts in the White House will call this the “BP Oil Spill,” but we advise you to refer to it as the Gulf Oil Spill. We do not believe it would be appropriate at this first meeting to seek assurances (nor would they be granted) that your generosity on this matter of compensation be reciprocated on the topics of criminal law, civil penalties, or natural resource damages. Should these subjects arise at the meeting, you should say that BP wishes only to demonstrate its good faith, to earn trust and respect and to prove that it will be a reliable partner. We expect the federal government will accept your generous offer.<sup>158</sup> If accepted, the federal

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156. See Zyg Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 ENVTL. L. REP. 11041, 11045 (2010), available at <http://www.elr.info/articles/vol40/40.11041.pdf>; Kristen Choo, *The Price of Oil*, 96-Aug A.B.A. J. 34, 36 (2010), available at [http://www.abajournal.com/magazine/article/the\\_price\\_of\\_oil](http://www.abajournal.com/magazine/article/the_price_of_oil) (finding that the agreement between President Obama and BP Chairman Carl Henric-Svanburg is “unprecedented”).

157. See Press Release, *supra* note 11.

158. The government’s Oil Spill Liability Trust Fund contains limited funds. See 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 135 (explaining that the Oil Spill Liability Trust Fund held only \$18,600,000 on the day the rig exploded and highlighting that by November 2010, BP had paid the federal government over \$580 million in response costs).



government is free to announce the agreement in any way it chooses—hopefully through a Presidential Speech from the Oval Office.<sup>159</sup>

What are we hoping to achieve with our stunning offer of a “claims compensation arrangement?” We seek nothing less than the displacement of the current public compensation system based on legal and equitable theories with a private one of our own making. We see the present legal system as threatening to BP and advise the company to steer clear of the present system.

The time is now for BP to suggest such a compensation scheme, as U.S. tort law is vulnerable to this kind of wholesale transformation. The breakout strategy we recommend is that BP establishes its own compensation system capable of affording a BP forum, process and law. Its essential features are “independence,” private control, a capacity to say “no,” and the backing of the U.S. government.

### 1. *Developing an Independent Compensation System*

The requirement of an “independent” compensation system is an implacable necessity to gain any semblance of public acceptance. You must invent a compensation system that is “independent” of any government or corporate entity and start funneling your compensation efforts (apart from cleanup) to it. We recommend that your corporation stop calling its payouts “BP compensation” and start calling them compensation from the Independent Gulf Claims Facility Process.<sup>160</sup> BP must convince the world that this process is “independent,”<sup>161</sup> referring to the placement of space, distance, process and organization between BP and the compensatory payouts. As an “independent” compensation system, the administrator of the system must not be subject to “official legal status or court

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159. *Statement by the President After Meeting with BP Executives*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (June 16, 2010, 2:25 PM), <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>.

160. See GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com> (last visited June 5, 2011).

161. Convincing the world is achieved by convincing oneself first. See generally MICHAEL SHERMER, *THE BELIEVING BRAIN: FROM GHOSTS AND GODS TO POLITICS AND CONSPIRACIES—HOW WE CONSTRUCT BELIEFS AND REINFORCE THEM AS TRUTHS* (2011).

imposed authority.”<sup>162</sup> The compensation system is “independent” because its administration is not beholden to BP or the government, but only to the claimants.<sup>163</sup> This myth of “independence”<sup>164</sup> from legal or court-imposed authority is so serviceable to our cause that BP should persist in that characterization for as long as the courts allow.<sup>165</sup>

Ironically, your company’s criticism of its own compensation process reinforces the perception that the system is “independent.” To this end, you may criticize it for wasting BP money, for squandering good will, for undermining public confidence and for being hasty and imprudent in its accounting practices.<sup>166</sup> In a similar vein, it would not hurt BP if the generous compensation scheme were to be denounced by some established public figure as a “shakedown” by the U.S. government.<sup>167</sup> We believe this sub-theme of “coercion” and “reluctant unwillingness to submit” by BP can serve our interests in the longer haul. In response to charges of this ilk, our firm recommends a company policy of “coy denial.” For example, BP can discount critics as wrong, while pointing out that most companies are slow to celebrate an unanticipated expenditure of twenty billion dollars.

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162. Moira Herbst, *Pressure on Kenneth Feinberg to Disclose BP Pay Deal*, REUTERS (Nov. 23, 2010, 2:03 AM), <http://in.mobile.reuters.com/article/article/idINIndia-53083520101122>.

163. At a meeting with residents affected by the spill in Kenner, Louisiana, Kenneth Feinberg said of the Gulf Coast Claims Facility: “It is independent. It is not part of BP. It is not part of the government. It is an independent program and I am beholden to neither of them. I am working for you.” Lea Winerman, *BP Set to Hand Over Control of \$20B Gulf Coast Oil Claims Fund*, BPS NEWSHOUR (Aug. 20, 2010 4:07 PM), <http://www.BPs.org/newshour/rundown/2010/08/bp-to-hand-over-damage-claims-process-gulf-coast-claims-facility.html>.

164. *Gulf Coast Claims Facility Frequently Asked Questions*, in 2010 GULF COAST OIL DISASTER, *supra* note 93, at 291 (the GCCF is an “independent claims facility” and the Claims Administrator “is an independent, neutral fund administrator”).

165. On February 2, 2011, the District Court for the Eastern District of Louisiana ordered BP and its agents, including Kenneth Feinberg, to refrain from referring to Feinberg as “‘neutral’ or ‘completely independent’ of BP.” See *In re Oil Spill by Oil Rig Deepwater Horizon*, 792 F. Supp. 2d 926 (E.D. La., 2011) (order granting in part a motion to supervise ex parte communications with putative class).

166. See John Schwartz, *BP Says Spill Settlement Terms Are Too Generous*, N.Y. TIMES (Feb. 17, 2011), <http://www.nytimes.com/2011/02/18/us/18bp.html>.

167. See Richard Adams, *Joe Barton: The Republican Who Apologized to BP*, THE GUARDIAN (June 17, 2010, 6:12 PM), <http://www.guardian.co.uk/world/richard-adams-blog/2010/jun/17/joe-barton-bp-apology-oil-spill-republican>.

## 2. *Private Control of the Independent Claims Settlement Process*

The requirement that the compensation system be “private” is indispensable to its success. Our firm recommends that you hire a private law firm paid entirely by your company, charged with the responsibility of designing and processing all spill-related claims. This is a significant enterprise; we are recommending displacing overnight substantial portions of state legal systems with a privately administered compensation system. Not all attorneys are suited for this job and the choice must be carefully made.<sup>168</sup> We must warn you that each time the corporation chooses to exercise its “ownership” of this “private” claims process there will be a price exacted at the independence end of the spectrum. You are free to compensate this law firm as you choose, but the myth of independence will suffer a setback each time the public reads the compensation of the claims manager is a private matter between “me and BP.”<sup>169</sup>

That said, being “private” is the way this claims facility can remain free of legal rigidity or court-imposed authority. It must not be held back by the necessities of due process, notice or public participation. Quite the contrary, the process BP is inventing is filled with administrative black holes, expressed as endless confusion over claim forms, representation of claimants, referrals, fees, necessary documentation, waivers of the right to sue, procedures and constantly changing avenues of legitimacy.<sup>170</sup> The claims website will be humming with new

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168. See, e.g., Terry Carter, *Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Resolution?*, 97-Jan A.B.A. J. 32 (2011), available at [http://www.abajournal.com/magazine/article/master\\_of\\_disasters](http://www.abajournal.com/magazine/article/master_of_disasters).

169. Mr. Feinberg stated at a news conference that his compensation was “something between me and BP.” Frederic J. Frommer, *Administrator Has to ‘Sell’ BP Victims on Money*, MSNBC.COM (July 19, 2010 1:53 PM), [http://www.msnbc.msn.com/id/38311190/ns/business-oil\\_and\\_energy/t/administrator-has-sell-bp-victims-money](http://www.msnbc.msn.com/id/38311190/ns/business-oil_and_energy/t/administrator-has-sell-bp-victims-money). See also John Schwartz, *Comments by Overseer of BP Fund Irk Lawyers*, THE N.Y. TIMES (Dec. 21, 2010), <http://www.nytimes.com/2010/12/22/us/22feinberg.html> (reporting that “Mr. Feinberg has repeatedly said that he is acting independently of BP and the government, and he openly acknowledges that BP is paying for his work—‘who better?’ he says—saying taxpayers should not be footing the bill.”).

170. See Campbell Robertson & John Schwartz, *Many Hit By Spill Now Feel Caught in Claim Process*, N.Y. TIMES (Apr. 19, 2011), <http://www.nytimes.com/2011/04/19/us/19spill.html>; see also Alfred R. Light, *Protocols for the Gulf Coast Claims Facility: An*

business, but any change of direction is best justified by reference to the “private nature” of the process.

BP has three immediate problems. First, it needs a favorable forum. Second, it needs a favorable process for displacing other, more dangerous forums. And, third, it needs a favorable law that will work to minimize its liabilities.

We propose to solve all three of these problems for BP and can recommend the best man for the job: Kenneth Feinberg.<sup>171</sup> Feinberg is highly competent and anxious to undertake this important public service for BP. He has overseen a number of notable mediations and claim settlements in the past, including serving as Special Master of the seven billion dollar September 11th Victim Compensation Fund<sup>172</sup> and serving as Special Master in Agent Orange, asbestos personal injury, wrongful death, Dalkon shield and DES (pregnancy medication) cases. We have investigated the matter and understand that you can hire Feinberg’s six-lawyer Washington, D.C., firm, Feinberg Rozen, for a flat fee of \$850,000 per month for labor and overhead costs.<sup>173</sup> That would be thirty million dollars over a three-year period. The average hourly rate, were the firm paid on an hourly basis, would be about \$1,000 per hour—quite reasonable in the circumstances. Thus you can afford to pay this man what he deserves and provide him with necessary support that befits a “private” operation.<sup>174</sup>

Unlike the September 11th Victim Compensation Fund,

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*Etiquette of Equivocation*, 25 TOXICS LAW RPTR. 985 (2010) (examining Draft Protocol for GCFC released to state officials in July 201 and the Protocol for Emergency Advance Payments released in August 2010 and finding that provisions are becoming “less precise and more ambiguous”).

171. Kenneth Feinberg is the founder and managing partner of the alternative dispute resolution firm Feinberg Rozen, LLP. He is the current administrator of the Gulf Coast Claims Facility.

172. Working over a thirty-three-month period, Mr. Feinberg eventually convinced 97% of the eligible claimants to settle through the fund rather than file lawsuits. *The Price of Oil*, *supra* note 156, at 40.

173. See Herbst, *supra* note 162 (citing a report commissioned by Mr. Feinberg and created by former Attorney General Michael Mukasey, now a partner with Debevoise & Plimpton, that released some details about Feinberg’s compensation).

174. “On July 15, 2010, Feinberg, flying on a private jet paid for by BP, toured Louisiana and tried to assure affected residents they would be fairly compensated.” Brian J. Donovan, *Will Victims of the BP Oil Gusher Also Be Victims of Class Action Lawsuits and the BP Oil Spill Victim Compensation Fund?* (July 16, 2010), <http://donovanlawgroup.wordpress.com/2010/07/19/165>.

which was created by an Act of Congress and administered by the DOJ, the BP fund our firm proposes is fundamentally a “private” operation. It differs from trusts set up by companies to compensate victims, such as those created by asbestos and pharmaceutical companies, which have been overseen by judges. As administrator of this hypothetical compensation fund, Feinberg has told us that he would be operating under “no official legal statute or court-imposed authority.”<sup>175</sup> He is free of the Code of Ethics for Arbitrators in Commercial Disputes (and its disclosure provisions) because he is not a referee between adversaries. In other words, he would be a private party asked by both sides to design and implement the Gulf Coast Claims Facility on behalf of everyone involved.<sup>176</sup> He will be weighing the merits of individual claims and thus all BP fund claimants must trust the knowledge, experience, and fairness of our man. We are especially drawn to the “private party” pledge. This is a forum that could be tolerated by BP.

Mr. Feinberg will define his own process, make up his own law, and write his own rules. We are confident that the compensation scheme proposed will be the most fair to BP.

The public posture of the “private” claims facility is important because the claims facility will come under sustained criticism. It must be alert to fraud and quick to denounce it. Lists of proven cheaters could be sent to local prosecutors, who are ever ready to capitalize on “easy cases” with a high publicity value. The claims facility folks must be insistent upon high standards of proof because, no doubt, many deserving claimants will be turned away. The person who runs this operation must be ready for the inevitable battles over the private claims facility.<sup>177</sup>

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175. Herbst, *supra* note 162.

176. Compare John Schwartz, *Fund Official Not Neutral, Judge Rules*, N.Y. TIMES (Feb. 2, 2011), <http://www.nytimes.com/2011/02/03/us/03feinberg.html> (reporting that Judge Barbieri ordered Mr. Feinberg to make clear to potential litigants that he is acting on behalf of BP) with Alfred R. Light, *The Deepwater Horizon Oil Spill Trust and the Gulf Coast Claims Facility: The “Superfund” Myth and the Law of Unintended Consequences*, 5 ENVTL. L. J. 87 (2011).

177. See generally John Schwartz, *Man With \$20 Billion to Disburse Finds No Shortage of Claims or Critics*, N.Y. TIMES (Apr. 19, 2011), <http://www.nytimes.com/2011/04/19/us/19feinberg.html> (“In an interview, Mr. Feinberg was undaunted. ‘I will not pay claims that can’t be proven, that lack proof, that are not substantiated,’ he said. ‘I won’t do it!’”); *Master of Disasters*, *supra* note 168 (discussing Mr. Feinberg).

### 3. *The Capacity to Say “No”*

Like any legal arrangement, these three goals of ours, a BP forum, a BP process, and a BP law, are interrelated. These goals must function together to allow the BP claims administrator to say “no,” and send any claim back to the “black hole” (we prefer this characterization) of the conventional compensation system. Our goal is to set up an arrangement where we can pay the “easy” claims (at a discount, of course) and deny the hard claims.

Strategically, in choosing its own law, BP will be able to circumvent pockets of law invented to aid claimants in recovery. For example, under the Oil Pollution Act (OPA), responsible parties like BP are liable for the removal costs and damages that result from the incident.<sup>178</sup> The OPA relaxes proximate cause defenses for subsistence claims.<sup>179</sup> Further, responsible party (RP) compensatory payments do not preclude additional recoveries under the generally available tort law.<sup>180</sup> To this end, OPA is especially solicitous of “subsistence” fishermen.<sup>181</sup>

This fine illustration of easier proof for subsistence claims and larger recoveries for all claimants underscores why BP must adopt a claims process empowered to say “No.” It is possible that OPA’s version of “subsistence” does not exist outside of Alaska, but we are reluctant to advance that legal argument in the presence of thousands of people in the Gulf who feel aggrieved because they have been deprived of their livelihoods.<sup>182</sup> We see no reason to be confrontational about a matter that we can bury through more subtle legal defenses.

The BP claims administrator needs a universal, pedestrian and familiar legal defense that allows the rejection of any and all claims as a matter of discretion. This generic defense is “proximate cause.” For example, damage from the spill to a New York fish company untouched by the oil is “distant, remote, and unforeseeable.” BP has done enormous damage

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178. 33 U.S.C. § 2702(a) (2006).

179. *Id.* § 2702(b)(2)(C).

180. *See id.* § 2718.

181. *Id.* § 2702(2)(A), (C).

182. *See id.* § 2702(b)(2)(C) (Damages “for loss of subsistence use of natural resources” are recoverable by any “claimant” who so uses them); *see also* JACOBSEN, *supra* note 111, 10-20.

throughout a highly integrated economy and thousands of businesses (think Florida resorts, New Orleans shippers, Chicago shrimp buyers) can prove this damage. The independent claims administrator needs to lay the groundwork for an assertion that the extent of BP's responsibility for potential claims can be reasonably curtailed by traditional notions of "proximate cause."

To develop this defense, we recommend BP hire a "distinguished Harvard Professor" to prepare a report arguing that "proximate cause" remains a viable defense even after the 1990 OPA. Thus the Harvard Law School will hand BP a universal proximate cause defense that will enable BP to say "no" for a substantial number of economic claimants whose injury is not closely linked to the oil spill. Though it might gloss over the distinctions we have mentioned between the "subsistence" and the other economic claimants, the report will merely confirm the state of the law.<sup>183</sup>

Despite these efforts, the "proximate cause" defense will not adequately address "subsistence" claimants. These claims must be defeated on alternative grounds. The economically strong and well-recorded claims based on damage farther from the spill must be denied on grounds of "proximate cause." But the subsistence people who are closer to the spill, with sympathies working in their favor, must be denied on grounds of "poor documentation."<sup>184</sup> This modest requirement of simple records is an insurmountable mountain to people who keep no records. A rule that paperwork be completed "in English" sounds simple enough even though it might entail a platoon of workers, helpers, law students or agents to meet the requirement.

In fashioning the company rules for the claims facility, BP should exclude attorneys in order to keep the process quick, simple, efficient, cheap, and down to earth. Remember, the alternative that BP is promising to avoid, and the one that

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183. See generally Memorandum from John C. P. Goldberg, Professor at Harvard Law School, to Kenneth Feinberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill* (Nov. 22, 2010), available at <http://gulfoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>.

184. GULF COAST CLAIMS FACILITY, FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY 2 (2011), available at [http://www.gulfoastclaimsfacility.com/FINAL\\_RULES.pdf](http://www.gulfoastclaimsfacility.com/FINAL_RULES.pdf) ("Adequate documentation of damage attributable to the Oil Spill is required.").

rushes into the minds of all claimants, is the prolonged legal disaster that befell the 32,000 plaintiffs in the *Exxon* case.<sup>185</sup> Let the world believe that this drawn-out process is what attorneys offer. Though, admittedly, Brian O’Neill and his team did a brilliant job on behalf of the fishing-class plaintiffs in *Exxon*,<sup>186</sup> the general public does not necessarily see it this way. The *Exxon* case ended badly for the fishermen and BP can improve upon this outcome.

It will be indispensable for the Gulf Claims Facility to develop, define, and enforce a complete system of “waivers” and “releases” that will protect BP from additional and future claims. Remember, the people you intend to pay have certain entitlements, such as tort remedies above and beyond those promised by the 1990 OPA,<sup>187</sup> and those people must surrender these rights “voluntarily” as a condition of accepting your compensation.

This “waiver” conditioned upon releases of all present and future claims represents the most effective way to implement a company policy of “our way or the highway.” Some courts do not like this coercive practice,<sup>188</sup> but it was widely used by Exxon in Alaska.<sup>189</sup> The special magic in this waiver is that it permits BP to exploit the very fear, frustration and economic devastation that the oil spill has spawned. We will offer the only way out for these claimants, money in the hand today; the greater their need, the more willing they will be to take what we offer and sell their future legal prospects.<sup>190</sup> This tactic enables BP to continue—and amplify—the campaigns it conducted historically against trial lawyers, class actions, and

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185. See generally 2009 PERSONAL STORIES, *supra* note 9.

186. See generally DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME (1997).

187. 33 U.S.C. §§ 2718, 2751 (2006).

188. *Alabamians Urged Not to Sign BP Waivers*, OIL SPILL CLAIMS FUND (Aug. 8, 2010), <http://oilspillclaimsfund.com/alabamians-urged-not-to-sign-bp-waivers>.

189. See J. Steven Picou, *When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 68 (2009).

190. See, e.g., *Gulf Oil Spill Damages, Phase Two*, N.Y. TIMES (Mar. 14, 2011), <http://www.nytimes.com/2011/03/14/opinion/14mon2.html>; Richard Fausset & Louis Sahagun, *Gulf Oil Spill: One Year Later and Portraits From the Gulf*, LOS ANGELES TIMES (Apr. 19, 2011), <http://www.latimes.com/news/nationworld/nation/la-oil-spill-html,0,6578241.htmlstory> (“The oil might not be as visible in the gulf, but the residents are still coping with effects of the nation’s largest offshore oil spill.”).



big government. Better yet, in this new light, Exxon's twenty-year war of attrition against the Alaska fishermen is not only a legal triumph for the oil industry—it is a threat and a promise of what happens to those who choose an alternative legal future to the one offered by your company's "independent" claims facility.

In this struggle for the loyalties of the oil spill victims, BP will discover creative ways to undermine the credibility of trial lawyers and others who are part of the "system" for helping real victims in real time. To mention one wild example, we fully expect one of your oil drilling partners—Transocean perhaps—to file suit against the widows of the men killed in the loss of the Macondo Well.<sup>191</sup> This would be part of a legal maneuver to limit liability under an archaic law. In its magnanimity, BP wants no part of this kind of widow-witching. BP is free to cite the tactic as illustrative of why your compensation system is superior to business as usual.

For an illustration of why the BP claims waivers must leave nothing to future legal happenstance, consider *Loretz v. Regal Stone, Ltd.*,<sup>192</sup> a class action brought by Dungeness Crab Skippers and Crew Members harmed by the COSCO BUSAN oil spill. The accident occurred when the cargo ship collided with the San Francisco-Oakland Bay Bridge on November 7, 2007. The case raised state law claims under the legal theories of negligence, nuisance and strict liability. These claimants had received over sixteen million dollars through the OPA Claims Process.<sup>193</sup> In *Loretz*, the court assessed additional damages of \$343,332.17, along with two attorneys' fee awards of \$854,842.95 and \$427,630. Your company must do all in its power to avoid this kind of serial assessment.

Congress said these fishermen had these "extra" rights. BP cannot affirmatively divest these people of their rights, but BP can squeeze them into submission—to the point that these rights are voluntarily surrendered. Persistent necessity will do the legal job for us.

We are confident that the disaster BP created, and the cascade of anxieties let loose by unpaid bills, lost jobs, and

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191. *Oil Spill Widow: Transocean is Suing Me*, CNN (Apr. 20, 2011), <http://mag.ma/cnn/1291071>.

192. 756 F. Supp. 2d 1203 (N.D. Cal. 2010).

193. *See id.*

missing fish will drive these people to BP's "independent" claims facility. BP might wish to invent a system of "partial payments," which will increase dependency and raise hopes. Additionally, BP should stay alert to moments of particular urgency, such as holidays, which multiply the stresses of closing opportunity. Throughout this process, BP will consistently offer these people a financial "bird in the hand." The proverbial alternative, "the two in the bush," is a distant and terrifying option of another Exxon "crash." Reasonable people will choose the BP option, "independent" or not, because it is the best one available.

When claimants sign their rights away, nobody will quibble about the scope of the release. Our motto is "the broader, the better." We further recommend inclusion of a hidden clause in the waiver form. If a claimant gives up the right to sue BP and other responsible parties and pursues a settlement amount, this claimant must sign off not only for him or herself, but for "affiliates" as well. This broad waiver covertly would force the individual to sign off for his or her spouse, parents and heirs. For commercial claimants, this rule also applies; the commercial claimants would be obliged to sign away the rights of their partners, shareholders and others to sue.

Finally, our firm must emphasize that it is imperative for BP to remain steadfast and firm in its administration of this claims process. Wal-Mart did not become the largest corporation in the world by readily paying off claimants. Everybody remembers that Exxon "won" its oil spill case, but few recall the fury with which it attacked that punitive award.<sup>194</sup> Your company's actions will attract critics, but you will have answers for them all.<sup>195</sup>

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194. *The Exxon Valdez Reopener*, *supra* note 20, at 184 (Exxon filed "more than 60 petitions and appeals, sought 23 time extensions and filed more than 1,000 motions, briefs, requests and demands" and claimed jury misconduct and jury tampering.).

195. See, e.g., *Troy King Blasts Oil Spill Compensation Plan; Attorney General and Surgeon General to Visit*, Al.com (July 14, 2010, 5:00 AM), [http://blog.al.com/live/2010/07/troy\\_king\\_blasts\\_oil\\_spill\\_com.html](http://blog.al.com/live/2010/07/troy_king_blasts_oil_spill_com.html) (Troy King, Alabama Attorney General stating that the BP compensation fund was "collusive (with BP) at best and contrary to the public interest at worst"); *BP Compensation Fund Controversy Addressed by Motley Rice Attorney Don Migliori*, MOTLEY RICE (September 13, 2010), <http://www.motleyrice.com/news/view/bp-compensation-fund-controversy-addressed-by-motley-rice-attorney-don-migliori> ("The special master is really there to get claims paid for as little as possible as quickly as possible so that that liability goes away."); BP Claims Report, *Gulf Coast Claims Facility Promises: A Timeline*, <http://bp-claims-report.com/gulf-coast-claims-facility> (last visited Nov. 14, 2011); Rachel Slajda,

#### 4. *The Backing of the U.S. Government*

It is important to underscore our legal conviction that all claims for “removal costs or damages shall be presented first to the responsible party.”<sup>196</sup> Shortly, the President will designate BP a responsible party.<sup>197</sup> Overall, it will be BP’s strategy to pay or deny these claims as quickly and completely as possible. It is important to secure—and maintain—U.S. support for our claims process and its preclusive effects throughout.

We believe the time is ripe for a wholesale displacement of public compensation measures with a “private” system, such as the one we are proposing here. Fortuitously for BP, corporate America long has been waging a war on the healthy features of the U.S. justice system that BP is most anxious to avoid. It is winning that war.<sup>198</sup> Tort lawyers, and class actions in particular, are a popular political target. BP should be most happy to do its duty to take on this “litigation monster.”

The twenty billion dollar down payment should suffice to cover these claims and allow you to prevent this process from spinning out of control. You have a direct pipeline to your “private” if not “independent” decision maker. If twenty billion dollars is an “overpayment,” and if Mr. Feinberg wields his “proximate cause” axe with sufficient enthusiasm, the unclaimed funds of course will be returned to BP.

In sum, we believe that twenty billion dollars will cover your civil liability. You can comfortably argue that the BP compensation system is superior to any alternatives. If you “underpay,” that is not BP’s problem. That is a problem for the states or for the federal government. BP cannot be fairly blamed for disadvantageous choices made by desperate people.

#### D. *Response Costs and the Cleanup*

In 1990, post-*Exxon Valdez*, Congress thrust responsible

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*BP: Spill Claimants Can't Sue Until They're Denied by the Escrow Fund First*, TPM Muckraker (Sept. 14, 2010), [http://tpmmuckraker.talkingpointsmemo.com/2010/09/bp\\_spill\\_claimants\\_cant\\_sue\\_unless\\_theyre\\_denied\\_b.php](http://tpmmuckraker.talkingpointsmemo.com/2010/09/bp_spill_claimants_cant_sue_unless_theyre_denied_b.php) (Kenneth Feinberg stating “If I don’t find you eligible, no court will find you eligible.”)

196. 33 U.S.C. § 2713(a) (2006).

197. *Id.* § 2714(a).

198. See e.g. *AT&T v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (allowing corporations to include in contracts with forced arbitration clauses language forbidding people from taking part in class-action lawsuits).

parties into a role of primary responsibility for the cleanup.<sup>199</sup> Your company is now in that primary responsibility category for the Gulf. Our firm believes, however, that this legal “disadvantage” can serve BP purposes spectacularly by providing autonomy over the events on the ground. Thus, our firm urges you to assert immediate and sweeping authority at the site so that no initiative starts, no policy happens, no rules transpire, no press releases issue unless your company is the initiating authority.

How can we dare to aspire to such a thing? The Oil Pollution Act of 1990 (OPA)<sup>200</sup> was the Congressional response to the 1989 *Exxon Valdez* spill and intended, in part, to extend the relatively longstanding “Superfund Model,” with its command structure and emergency response procedures, to the oil spill context. Responsible Parties (RP) are liable for “removal costs and damages” under OPA.<sup>201</sup> In the Gulf, BP bears responsibility for certain “removal costs” including “the costs incurred” after a discharge of oil and any costs “to prevent, minimize, or mitigate oil pollution” from the incident.<sup>202</sup> The geography of your company’s responsibility thus follows the oil and expands accordingly. The site of your obligation is the entire Gulf region impacted by the spill. The OPA imposes RP liability on any person owning, operating or chartering a vessel or facility that creates a spill, such as *Deepwater Horizon*.<sup>203</sup> There are other RPs that will be exposed through this litigation, but BP is in the point position, and you will see why that is helpful.

### 1. *BP as Co-Operator of the Incident Command Post*

RPs, under the National Contingency Plan (NCP), are preferred by the federal government to handle and fund all response activities while the Federal On-Scene Coordinator simply directs or supervises.<sup>204</sup> As an RP, according to the Unified Command framework, BP not only has a foot in the door at the Incident Command Post, but can promote and

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199. 33 U.S.C. § 2702(a).

200. *Id.*

201. *Id.*

202. *Id.* § 2701(31).

203. *Id.* § 2701(32).

204. 40 CFR § 300.305(e) (2010).

develop response actions virtually alongside the Federal On-Scene Coordinator as part of the government's Unified Command. The Coast Guard established a Unified Area Command—headquarters for the regional spill response—on April 23 in Robert, Louisiana, and will likely move it to New Orleans in the future. The Unified Area Command eventually will include representatives from the federal government, Louisiana, Alabama, Mississippi, Florida, Texas and BP.

It was wise and commendable for BP to rush into their position within the NCP to combat this spill. When the turmoil is greatest, all are wondering, "Who's in charge?" BP stepped up to say: "We are," combining words with actions. This fast action, based on good legal advice and responsive management, helped to save your company from a larger legal disaster. The corporation should give bonuses to employees who thought to anticipate the organizational ramping up of the Coast Guard:

[On April 22, the day the rig sank] the Coast Guard had established an Incident Command Post in a BP facility in Houma, Louisiana. BP had formed a command post in its corporate headquarters in Houston, Texas shortly after the [April 21] explosion, and the Coast Guard established an Incident Command Post there as well.<sup>205</sup>

Under OPA, we believe BP is a "co-owner," "co-operator," and "co-combatant"<sup>206</sup> in a joint enterprise to combat the oil spill.

Further, the Superfund model that Congress incorporated into the OPA will work to BP's advantage by allowing BP to take its own remedial actions and leave the larger mess to future happenstance. Under the Superfund laws, many of the RPs at various Superfund sites realized that it was virtually impossible to defeat EPA's 106 orders.<sup>207</sup> Knowing this and knowing that EPA could clean up the site itself and send the bill to the RP, many RPs undertook to do their own "remediation" action at their own pace, with their own contractors and with their own perspectives on what was necessary, under the watchful eye of EPA. These "voluntary"

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205. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 130–31.

206. *Id.* at 124 (photo caption); *see also id.* at 133–35.

207. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9606 (2006).

cleanups are conspicuous all over the United States, and are typically undertaken by large companies who know that they would be stuck with the costs in any event.

We advise BP, as a designated RP for the Gulf Oil Spill, to take over and manage the entire Gulf response action to the greatest extent allowed by the on-scene coordinator. This is a bold and sweeping initiative, but it is the best path for restricting and containing BP's liabilities. We are confident that, together, BP and our legal team can pull it off. It is likely that this strategy will attract many critics,<sup>208</sup> but we have a ready answer: *the law requires it*. OPA RP liability requires it. The law, in our experience, is a wonderful scapegoat and absorbs never-ending criticism without comment or objection. From this day forward, there is one and only one answer to a question you will often hear: "Who put BP in charge?" Your answer: "The law."<sup>209</sup>

The United States, particularly the Coast Guard, must be quickly incorporated into our scheme. The NCP fully anticipates arrangements where the federal on-scene coordinator supervises response activities while the RP carries out the duties and pays the bills. The Coast Guard always has the option to "federalize" the Spill, paying for the response with funds from the Oil Spill Liability Trust Fund, and later seeking reimbursement from the RP.<sup>210</sup> We do not want this to happen, and fortunately, neither does the Coast Guard. The Trust Fund is far from sufficient,<sup>211</sup> and the Coast Guard is

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208. Compare SAFINA, *supra* note 18, at 53 ("We don't normally put the criminal in charge of the crime scene.") with *id.* at 54 ("the government keeps deferring to BP"), and *id.* at 128 ("BP is obviously a company with a lot to hide. But how it's staged a coup of the Gulf and gained control of government—that, I don't get. . . why are any of our law enforcers, who should be guarding the coast against BP, so thoroughly and sickeningly capitulating, deferring, and letting themselves Be Played?") (emphasis in original). See also Peter Baker, *Obama Gives a Bipartisan Commission Six Months to Revise Drilling Rules*, N.Y. TIMES (May 23, 2010), <http://www.nytimes.com/2010/05/23/7s/23address.html> ("At his daily briefing on Friday, Robert Gibbs, the White House press secretary explained repeatedly that current law makes the company responsible for the recovery and cleanup, not taxpayers.").

209. See SAFINA, *supra* note 18, at 278–80 (quoting Admiral Thad Allen, "That was what the law required.").

210. 40 CFR § 300.305(d) (2010).

211. Compare 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 135 (MMS had a "lack of resources"), with *id.* at 135 (the "emergency reserve" available to the federal on-scene coordinator the day the rig exploded was \$18,600,000. By Nov. 11, BP had paid \$580,977,461 to the federal government for response costs.).

unprepared in other ways for the enormous bureaucratic exertion a response of this size would entail.<sup>212</sup>

This “co-combatant” outcome places BP exactly where it wants to be, and again the Exxon model commends itself. In any “partnership,” the more aggressive of the two gets to lead. BP must aspire to influence, and if possible, to dominate, each and every aspect of the response: from the definition, release and control of information; to the choice, order and configuration of technology to stop the spill; and to the recruitment, gearing-up, priorities, and assignments of cleanup crews. BP must be in charge in every sense of the word. This way, BP can define, contain, and limit this oil spill by devoting its full economic strengths to three overarching goals: (1) defining the spill as a “mishap;” (2) defining its containment as “progress” and (3) defining the cleanup as “proceeding according to schedule.” If BP follows our firm’s advice by focusing its message and implementing policies aggressively and consistently, the law will shift to accommodate these policies.

In confidence, of course, while our firm believes characterizing BP as “in charge” and the “dominant partner” is correct and appropriate, we recommend that BP’s policy, beginning immediately, should be to use precise terminology when referring to the U.S. government and each of its agencies. These government actors are “partners,” “members of the same team,” or “co-leaders” of this enterprise. It is our firm’s hope that from this afternoon forward, all of BP’s major oil spill response policy decisions will enjoy, at least arguably, the “concurrence” of the U.S. government. This federal concurrence is important because BP must make as many friends as possible within the ranks of U.S. government agencies to ensure the company’s survival and prosperity. Praise, compliments, flattery, and thanks should be spread freely among your “partners” and “associates” within the U.S. government.

It might be a good idea for BP to establish a shadow

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212. See U.S. COAST GUARD, *Explosion, Fire, Sinking and Loss of Eleven Crew Members Aboard the Mobile Offshore Drilling Unit Deepwater Horizon in the Gulf of Mexico, April 20-22, 2010*, Action by the Commandant (2011), available at <http://www.uscg.mil/hq/cg5/cg545/dw/exhib/Volume%20I%20-%20Enclosure%20to%20Final%20Action%20Memo.pdf> (outlining the U.S. Coast Guard’s additional actions to improve safety and regulatory oversight in the wake of the disaster).

representative for each pivotal federal official encountered. We want the federal version of the facts to be your version. Functionally, any “joint information center” should become a BP information center.<sup>213</sup> Ideally, U.S. government officials should be knocking at BP’s door for information rather than the other way around.<sup>214</sup>

## 2. “Proprietary” Response Efforts

It is important for BP management and employees to recognize that, however unwillingly, our firm is already in discovery mode with respect to the many potential legal claims. Let us suppose that the Spill spreads to 88,000 square miles.<sup>215</sup> If this occurs, our firm would seek to “control” and “contain” all information about the impact and its consequences regarding the entire Gulf: on the sea, above it, and under it. Your company will not be served by indiscriminate public scrutiny of this scene. It will not be served by flyovers,<sup>216</sup> drive-bys, fortuitous sampling, eyewitnesses to wildlife suffering, and film of the all-too-normal feather-bedding.<sup>217</sup> It has been said that “safety is not

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213. On BP’s public relations efforts:

As with the cofferdam, BP struggled with public communications surrounding the top kill. At the time, both industry and government officials were highly uncertain about the operation’s probability of success. One MMS employee estimated that probability as less than 50 percent, while a BP contractor said that he only gave the top kill a “tiny” chance to succeed. But BP’s Hayward told reporters, “We rate the probability of success between 60 and 70 percent.” After the top kill failed, that prediction may have lessened public confidence in BP’s management of the effort to control the well.

2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 150 (footnotes omitted). *See also* SAFINA, *supra* note 18, at 51 (“We will now play a game called BP Says. BP says it’ll do this; BP says it’ll try that; BP says it has ideas; BP says it needs a month”); *id.* at 105 (quoting Admiral Allen on BP, “They are necessarily the modality by which this is going to get solved.”).

214. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 151 (footnote omitted) (“Most symbolically, the federal government stopped holding joint press conferences with BP. From June 1 on, Admiral Allen gave his own daily press briefing.”).

215. SAFINA, *supra* note 18, at 266 (88,000 square miles—37% of Gulf federal waters—closed to fishing at the height of the spill).

216. SAFINA, *supra* note 18, at 127 (“The flow BP is getting good at stopping is the flow of news. When folks at Southern Seaplane . . . call the local Coast Guard-Federal Aviation Administration command center for routine permission to fly a photographer . . . over part of the oily Gulf, a BP contractor answers the phone. His swift and absolute response: Permission denied.”).

217. *Compare* 2009 PERSONAL STORIES, *supra* note 9, at 98 (Don Cornett, Exxon Public Relations Manager stating “Our operation was enormous. At the peak, as I recall, we had over 12,000 employees in Alaska.”), *with id.* at 136 (Roy Robertson,



proprietary,”<sup>218</sup> but we suggest that BP implement a policy stating that all matters pertaining to response, cleanup, and damage assessment are entirely “proprietary.”<sup>219</sup>

The “Exxon Blueprint” will be highly useful in developing the corporate strategy for responding to this oil spill. Like Exxon, BP is starting from ground zero<sup>220</sup> and must make a good show of its cleanup efforts; Exxon was able to accomplish this by conspicuously moving bodies, and BP should follow in their footsteps.<sup>221</sup> Cleanup actions may be wildly experimental and reckless, focusing always on that which can be seen and not on that which matters.<sup>222</sup> In this way, managers of the cleanup enterprise can make ample use of fakes, feints and adjustments.<sup>223</sup> Appearances can be cleaned up with greater

Seldovia Resident stating that BP “just wanted to cover it up and say it was clean.”).

218. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 217.

219. David Carr, *A Disaster Privately Managed*, N.Y. TIMES (June 14, 2010), <http://www.nytimes.com/2010/06/14/business/media/14carr.html> (discussing whether BP could clarify the obvious failure of the top kill and quoting a BP official, who states that “[g]iven recent volatility in BP share price, I’m told that information related to top kill is now considered stock-market sensitive, which means it has to be managed under disclosure rules for the London and N.Y. stock exchanges”).

220. 2011 COMMISSION REPORT, *supra* note 9, at 51. *See also* 2009 PERSONAL STORIES, *supra* note 9, at 194, 195 (Walt Parker, Chair, Alaska Oil Spill Commission explaining that oversight of oil shipment was “completely disregarded” after an adverse court decision in 1979; and state that “all the recovery equipment was buried under several feet of snow when the *Exxon Valdez* hit the reef.”).

221. On the clean-up efforts, John Devens Jr., Cleanup “Scrounger:”

Most of us working on the cleanup understood right away that we were being paid to put on a big show. When the helicopter flew over and people saw lots of activity, they had no idea whether it was effective or not . . . We had been cleaning approximately 100 yards of beach per day, and suddenly Big Bob told us “At the rate you guys are going, this will take years to clean up. From now on we’re going to make a quarter-mile of beach a day” . . . I started thinking about it, and there was only one way we were going to make that quota. We started booming off clean beaches next to oiled beaches. . . we made our quota.

2009 PERSONAL STORIES, *supra* note 9, at 111–13.

222. Otto Harrison, Exxon Cleanup Manager on the clean-up efforts:

We decided that, although we didn’t have the equipment to clean up yet, we would provide workers with rags and towels, and put them to work as best we could. Almost everyone has seen photographs in which we had hundreds of men and women on the shoreline, wiping off rocks with rags.

*Id.* at 114–115.

223. *See, e.g. id.* at 99, 100, 102 (Stan Stephens, Valdez Tour Boat Operator stating that “The *Exxon Valdez* is a perfect example of no one taking blame or responsibility”); Harry Allen of EPA on the use of Corexit despite its toxicity:

Exxon had begun the beach cleaning process. When they brought in the cleaning agent, which was the oil dispersant Corexit, the EPA determined that it could be toxic to the intertidal invertebrates adjacent to the surfaces being cleaned, and the Regional Response Team (RRT) denied approval for its use as a surface washing agent. Exxon agreed to reformulate the dispersant and EPA agreed to help

ease and at lower cost than the reality of rocks and sand. In the end this “cleanup” will be conducted largely by the wind, the waves and the tides.<sup>224</sup>

For the moment, though, the old friends of the industry—boom, skimmers, dispersants and fires—will dominate cleanup efforts. BP’s claims of cleanup capacity have been a bit overwrought here, which will result in public relations issues. For example, in the recovery plan, BP stated it had the stunning capacity to remove 491,721 barrels of oil per day.<sup>225</sup> By our firm’s calculations, assuming a best-case scenario, BP might get halfway to that cleanup goal in seventy-five days.<sup>226</sup> BP has also laid claim to a significant mechanical recovery capacity, which could be true only if “significant” means capacity to remove less than 900 barrels per day.<sup>227</sup> Necessarily, BP will face other awkward moments because the preferred tertiary cleanup strategy (dispersants) will probably undercut the utility of BP’s primary (boom) and secondary (skimmers) cleanup techniques. Frankly, our firm knows that these boom and skimmers will be of little use in removing oil.<sup>228</sup>

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expedite its ‘relisting’ as a surface washing agent.

*Id.* at 103, 104; Joe Bridgman, Public Information Officer, Alaska Dep’t of Environmental Conservation on Exxon’s obfuscation:

I can’t recall the number of carcasses, but say by the middle of summer there were 135,000 carcasses. [We actually counted them.] Exxon came out in the media, saying essentially, “These are only estimates.” . . . It was that kind of endless dissembling by Exxon that we were battling . . . Every time Exxon told a lie, we would respond with the truth. . . . That’s when I realized that Exxon had done the old bait-and-switch trick. Through studying the photographs and comparing them, it was a certainty that their “before” pictures were of one beach and their “after” pictures were of another beach.

*Id.* at 118, 121–22. *See also id.* at 132, 134 (Charles Wohlforth, Reporter, *Anchorage Daily News* stating that “The animal rescue was another more harm than good story”).

224. 2009 PERSONAL STORIES, *supra* note 9, at 106, 107 (Clyde Robbins, Vice Admiral, West Coast, U.S. Coast Guard stating, “One of the things that some pretty important people said during those meetings was that we might be better off doing nothing and letting Mother Nature take care of it. But doing nothing wasn’t an option, ever. We had to do something even if it was just looking busy.”).

225. *See* FREUDENBURG & GRAMLING, *supra* note 7, at 14.

226. *See id.*

227. *Id.*

228. Quoting Thad Allen:

So we had eighty-five days of a different spill coming to the surface in a different way in a different place every day, depending on winds and current conditions. We had a hundred thousand different patches of oil from Louisiana to Florida. Because the oil spill contingency plan didn’t call for enough equipment, we were behind the power curve for six or seven weeks. We had three kinds of responses to the oil; skim it, burn it, or disperse it.

a. *Boom*

A boom is a “floating barrier serving to obstruct navigation”<sup>229</sup> and intercept oil. BP will need its own navy to pick up this boom, distribute it and place it where it might help the cleanup. Exxon saw this need in its day, recruited its own navy from parts unknown and from suddenly-out-of-work fishermen, paid them well, and put them to work on the boom and other matters. BP should follow the Exxon strategy by hiring a navy of vessels, calling it perhaps the “Vessels of Opportunity Program.”<sup>230</sup> BP should ensure the mariners on these vessels are well-trained,<sup>231</sup> well-dressed,<sup>232</sup> and comfortable.<sup>233</sup> Proper training should include instruction on the wisdom of not talking to the press.<sup>234</sup> These mariners should be well paid, even if the business of the day requires that they sit in port. In theory, these mariners will be paid and

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SAFINA, *supra* note 18, at 282. *See id.* at 277 (“Boom is easily defeated”); *id.* at 245 (quoting a worker: “every time we find a large enough mass to actually be able to do some productive skimming, they just hit it with dispersants.”); FREUDENBURG & GRAMLING, *supra* note 7, at 156 (emphasis in original) (“Skimmers work well with thick oil in swimming pools, and booms can cordon off oil spills in small ponds, *if* there is no wind.”); 2009 PERSONAL STORIES, *supra* note 9, at 140, 141 (“fish pump” actually “sucked up oil. But the minute the officials saw how well it worked, they pulled it off our boat and replaced it with a skimmer that could not pick up the heavy debris mixed with the now hardened oil.”); JACOBSEN, *supra* note 111, at 94 (finding that three percent of lost oil is skimmed, five percent is burned).

229. AMERICAN HERITAGE DICTIONARY 196 (2d college ed. 1982).

230. *See* 2011 COMMISSION REPORT, *supra* note 9, at 140–41. *Compare* JACOBSEN, *supra* note 111, at 73 (“there were about three thousand VOOs, as everyone called them, operating in Alabama, Mississippi, and Louisiana”), *with id.* at 74 (“All flew the triangular VOO flag and all seemed to be zipping about with minimal coordination.”).

231. On the “beauty” of training, *see* SAFINA, *supra* note 18, at 185.

232. On the clothing requirements *see*:

I notice that everyone aboard all the other boats wears a silly little orange life jacket, the uniform of Being Paid, even in water calm enough to reflect one’s tightening anger. Most professional fishermen have probably never in their lives worn a life jacket on a boat. But of course BP wants to ensure safety on the job. Unlike while drilling in mile-deep water and risks galore.

*Id.* at 143.

233. *Compare id.* at 160 (“If you come back here, you’d have to get a BP representative to come with ya. This is a BP safety area. You need a hard hat, steel-toed shoes, safety glasses”), *with id.* at 189 (“It’s hot. And because it’s so hot, BP’s beachside cleanup workers—30,000 of them—are told to work for twenty minutes and rest for forty. For \$12 an hour, the work is sweaty and uncomfortable, but not overly taxing.”).

234. *Id.* at 127–28 (discussing BP’s strategy of limiting journalist’s access to information).

trained to place boom.<sup>235</sup> In fact, boom will probably not figure in the outcome other than to satisfy the political cravings of the local parishes.<sup>236</sup>

b. *Skimmers and Controlled Burns*

Skimmers are devices for removing floating matter from liquid.<sup>237</sup> Despite the boastings of increases in size, strength and vast capacities, skimmers will never be able to pick up more than a tiny fraction of spilled and dispersed oil.<sup>238</sup> Recovering spilled milk from the sidewalk would be easier. Regardless of effectiveness, BP must use the skimmers because there are many available and they could be of marginal service for burning and targeting dispersant.

Two compelling legal reasons recommend a burn policy. One is that anything not burned will be hauled ashore. Once ashore, the collected oil will be subject to stringent and cumbersome laws regarding hazardous and solid waste. These are the lessons learned by Exxon in Prince William Sound and by the post-Katrina experience of the oil industry in the Gulf. First, a loud and angry constituency will advocate for treating this debris as “hazardous waste” under another federal law known as the Resource Conservation and Recovery Act (RCRA),<sup>239</sup> an outcome that would shrink your disposal options substantially. Even were we to prevail on that point, all things hauled ashore would be “solid waste,”<sup>240</sup> which triggers a

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235. 2011 COMMISSION REPORT, *supra* note 9, at 141 (explaining that “[p]lacing boom requires skill and training, and responders differed in their judgments of how much the vessels contributed.”).

236. *Compare* SAFINA, *supra* note 18, at 144 (“This boom is useless against [the oil]. You might as well stretch dental floss across your bathtub to hold soapy water to one side.”), *with* 2011 COMMISSION REPORT, *supra* note 9, at 151–54, (“eye candy” for the observer).

237. AMERICAN HERITAGE DICTIONARY 1147 (2d college ed. 1982).

238. *Compare* 2009 PERSONAL STORIES, *supra* note 9, at 185, 186 (quoting Al Burch, Kodiak Commercial Fisherman that “[o]nce we were able to get the oil, what do you do with it? There weren’t enough skimmers. The ones that were available didn’t work very well, once the oil got outside of Prince William Sound, because it was so thick.”), *with* JACOBSEN, *supra* note 111, at 94 (“That all those thousands of Vessels of Opportunity and professional skimming vessels had managed to skim only 3 percent of the oil strikes me as a debacle of the first order.”).

239. 42 U.S.C. § 6903(5) (2006) (defining hazardous waste).

240. *Id.* § 6903(27). We have asked Sen. James Inhofe to look into this matter on our behalf. *See Superfund: Information on the Nature and Costs of Cleanup Activities at Three Landfills in the Gulf Coast Region* (letter to Sen. Inhofe from David C. Trimble,

somewhat less onerous regime of regulatory oppression. Here, too, we propose a “burning at sea” cleanup strategy as a way to get around RCRA.

There is a second important factor that recommends a thorough and sweeping burning strategy. Under the Endangered Species Act (ESA) it is a crime to “take,” or to solicit another to take, any individual member of an endangered or threatened species.<sup>241</sup> Similarly, it is a crime under the Marine Mammal Protection Act (MMPA) to engage in the “taking” of any marine mammal.<sup>242</sup> Substantial penalties and jail time accompany a conviction. But these laws generally do not condemn the “taking” of carcasses, endangered or otherwise. Thus, debris-burning of deceased wildlife is not hampered by these laws. While our firm cannot urge BP to commit a crime, we point out that this strategy of “cleansing by fire” collaterally works to remove evidence of forbidden “takes” that may be claimed against BP. Please note that there is an International Convention discouraging the burning of wastes at sea.<sup>243</sup> We will leave it to the State Department lawyers to determine whether the United States is violating this convention. BP certainly is not.

c. *Dispersants*

Dispersants appear to have fallen through a legal crack to BP’s advantage. There are several ways in which dispersants might have been classified that would have restricted their use; apparently, though, legal mechanisms have failed to detect their potential negative ramifications. First, the Clean Water Act (CWA) forbids the deliberate discharge of huge volumes of chemicals of unknown or poorly known ingredients so dispersants might have been treated as “pollutants.” If that had happened, the “effluent data” (knowledge on that which is discharged) in all likelihood would have been “available to the

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Acting Director, Natural Resources and Environment, U.S. Government Accountability Office) (Feb. 18, 2011) *available at* <http://www.gao.gov/new.items/d11287r.pdf>.

241. 16 U.S.C. § 1538(a)(1)(B), (g) (2006).

242. 16 U.S.C. § 1371(a) (2006).

243. 1996 Protocol to the Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter, As Adopted by the Special Meeting of Contracting Parties to the London Convention 1972 art. 5, Nov. 7, 1996 (contracting parties forbid “incineration at sea of wastes and other matter”).

public.”<sup>244</sup> This legal path was not followed. Dispersants could be treated as a “chemical substance or mixture” under Section 4 of the Toxic Substances Control Act,<sup>245</sup> which could have resulted in a stringent safety and environmental testing regime.<sup>246</sup> This did not happen either. Luckily for BP, the U.S. legal regime seems to allow the party responsible for an oil spill to attack it by any dispersant available, regardless of the hazard.<sup>247</sup>

How did BP emerge with such a favorable outcome? Legally, the oil industry has managed to sidetrack and insinuate the use of dispersants into the command structure of the National Contingency Plan. The oil industry has worked for years to make this happen in the United States. The efforts have invented “precedents” around the world (hundreds of oil spills have been treated with dispersants) and this has yielded a “customary” practice embraced by nations, advisory bodies and “scientific” enterprises.

Be that as it may, as we interpret the present legal landscape, the simple act of prelisting dispersants under the National Priorities List<sup>248</sup> invites BP to use any listed product,

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244. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER 589 (West 1986) (discussing Section 308(b)(2), 35 U.S.C. § 1318(b)(2) (still in effect)).

245. 15 U.S.C. § 2603 (2006).

246. John S. Applegate, *The Government Role in Scientific Research: Who Should Bridge the Data Gap in Chemical Regulation?*, in WENDY WAGNER & RENA STEINZOR, EDS., RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH 255, 268 (Cambridge U. Press 2006); see WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: PESTICIDES AND TOXIC SUBSTANCES, 427–28 (Thomson West 1988) (footnotes omitted). See also David Markell, *An Overview of TSCA: Its History and Key Underlying Assumptions, and Its Place in Environmental Regulation*, 32 WASH. U. J.L. & POL’Y 333 (2010).

247. SAFINA, *supra* note 18, at 197 (“taking bolt cutters to the food chain”). If people really are concerned about dispersants, we recommend that you bring your influence to bear on the Coast Guard to crack down on “cowboy” and “vigilante” usage:

The irony reached an apotheosis worthy of Kafka when, after its planes had carpet-bombed the Gulf with the world’s entire supply of Corexit, the Coast Guard delivered signs to Gulf Coast marinas that said “WARNING: THE USE OF SOAPS OR OTHER DISPERSING AGENTS TO DISSIPATE OIL IS MORE HARMFUL TO THE MARINE ENVIRONMENT THAN IF THE OIL HAD BEEN LEFT ALONE. USE OF THESE AGENTS WITHOUT THE PERMISSION OF THE CAPTAIN OF THE PORT IS AGAINST THE LAW. YOU MAY BE PENALIZED UP TO \$32,500 FOR EACH INCIDENT!!”

See JACOBSEN, *supra* note 111, at 141.

248. See UNDERSTANDING OIL SPILL DISPERSANTS, *supra* note 136, at 22 (2005) (describing processes for “pre-approval” and other authorizations); Helen Chapman et al., *The use of chemical dispersants to combat oil spills at sea: A review of practice and research needs in Europe*, 54 MARINE POLLUTION BULLETIN 827 (2007); INSTITUTE OF PETROLEUM, GUIDELINES ON THE USE OF OIL SPILL DISPERSANTS (2d ed. Aug. 1996).

trade-secret protected or not, regardless of unreasonable risk, available data on toxicity and effects on wildlife,<sup>249</sup> amounts used<sup>250</sup> or means applied. Frankly, we always have believed that the best way to hide something from the Coast Guard is to put it at the bottom of the sea.

This strategy has a substantial upside—liabilities are higher if the oil reaches sensitive environments, lower if it is made to disappear, lower yet if known damage is displaced by unknown damage and still lower if unseen damage creeps into and comes to rest in never-before-researched deepwater environments.

Environmentalists will criticize BP for unwarranted experimentation on the environment of the Gulf and its people. But there is no experiment because there is no baseline, no hypothesis, no orderly development of data and no plausible methodologies. BP will find, as Exxon did,<sup>251</sup> that public-spirited science has difficulty getting organized to investigate massive and far-reaching assaults on the physical environment. Even eye-witness accounts, normally of some import in law, can be dismissed as “anecdotal” in the context of dispersant use as these accounts are unscientific and therefore unreliable.<sup>252</sup> Which dispersant product should BP use? BP can

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See also Tip Wonhoff, *Chemical Dispersants & the BP Oil Spill: Never Before Used at Depth*, paper prepared for Law B565, U.S. Coastal & Ocean Law, Univ. of Washington School of Law, Spring 2010.

249. Quoting a tugboat Captain on an aerial bombardment with dispersants:

I don't know if those dolphins were around for that or not. I don't know if the pilots would have aborted the mission if they had spotted them in the target area. Probably not, I imagine. I only hope the dolphins somehow knew what was going to happen and got the hell out of there. I don't even want to think about what would have happened to them if they didn't.

SAFINA, *supra* note 18, at 245.

250. *Compare*:

By April 30, BP has begun sending dispersants down a mile-long tube from a ship. Releasing such chemicals on the deep seafloor—rather than spraying them on surface oil—has never been done before. It's a secondary toxic leak, this one intentional, sent from above to meet the oil coming from below.

SAFINA, *supra* note 18, at 54, *with id.* at 278 (quoting Thad Allen, “[T]wo things went off scale; one was the total amount of oil; the other was that when the protocols were written, no one envisioned injecting dispersants at depths of five thousand feet.”).

251. 2009 PERSONAL STORIES, *supra* note 9, at 53, 54–55 (discussing the experimental use of dispersants by Exxon to clean up the *Exxon Valdez* spills which were incredibly dysfunctional and included problems such as improperly working nozzles, a drop on a Coast Guard crew and several unsuccessful drops).

252. *Compare* SAFINA, *supra* note 18, at 113 (statement of Tony Hayward on worker safety: “Food poisoning is clearly a big issue.”), *with id.* at 109 (statement of Tony Hayward on the use of heavy drilling fluid: “[N]ever tried this before in water this

choose based on availability and cost, but need not consider environmental impact. Our firm understands that Corexit is available in volumes up to two million gallons.<sup>253</sup> BP may proceed immediately to pour the world's entire supply of Mr. Clean into the Gulf, which will significantly diminish removal costs.

In sum, our firm estimates that the "removal" costs BP will face should not exceed one billion dollars. As a bonus, a good portion of this spending on removal efforts will diminish the overall natural resource damages because, theoretically, the oil is being removed and our efforts will reduce the damage to the natural environment.

#### E. *Natural Resource Damages: Squaring Things with Nature*

BP's fifth category of liability is for natural resource damages (NRD). This theory of damages has been widely embraced by the U.S. legal system since it was introduced in the 1973 Trans-Alaska Pipeline Authorization Act.<sup>254</sup> This idea rests firmly upon a number of fashionable and dangerous notions—such as polluter pays, the precautionary principle, an eye-for-an-eye corrective justice and "restoration" to baseline.<sup>255</sup>

This so-called NRD regime threatens BP with losses of many billions of dollars, including "loss of use" claims, which will be especially daunting. There is, however, some good news, which is that Exxon succeeded in keeping its NRD liability under one

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deep.") and *id.* at 95 (statement of Tony Hayward: "There aren't any plumes.") and *id.* at 89 (statement of Tony Hayward: "[N]ot our accident.>").

253. Compare Mark Sappenfield, *New Gulf Oil Spill Mystery: How Much Dispersant Did BP Use?*, CHRISTIAN SCIENCE MONITOR (Aug. 1, 2010), <http://www.csmonitor.com/Environment/2010/0801/New-Gulf-oil-spill-mystery-How-much-dispersant-did-BP-use> (One estimate: 1.8 million gallons, with 800,000 gallons administered on the Gulf floor.), with Jeff Goodell, *The Poisoning*, ROLLING STONE (July 21, 2010), <http://www.rollingstone.com/politics/news/17390/183349> (The Corexit board includes several veterans of the oil industry.).

254. VALERIE ANN LEE & P.J. BRIDGEN, THE NATURAL RESOURCE DAMAGE ASSESSMENT DESKBOOK 9 (2002) (citing Pub. L. No. 93-153, tit. II, 87 Stat. 584 (1973) (codified as amended at 43 U.S.C. §§ 1651–65). Under this Act, the holder of the pipeline right-of-way was made "strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes."

255. See generally *id.*



billion dollars.<sup>256</sup> It has still been kept on the defensive, though—mostly as a result of its acceptance of the so-called “reopener clause” in its 1991 NRD settlement.<sup>257</sup>

Exxon was obliged to confront the 1977 Amendments to the Clean Water Act,<sup>258</sup> which said that the trustees can recover the costs of “replacing or restoring” lost natural resources.<sup>259</sup> BP is now up against the ghost of the Clean Water Act, which shows up conspicuously in the Oil Pollution Act’s (OPA) “measure of damages.”<sup>260</sup> It considers:

- A. the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- B. the diminution in value of those natural resources pending restoration; plus
- C. the reasonable cost of assessing those damages.<sup>261</sup>

Measuring damages by the “cost of restoring” is the clearest example of a Congressional purpose to protect “nature’s baseline” from unwelcome assault. The process of NRD focuses on corrective justice; that is, putting things back the way they were before the event occurred and compensating for losses that take place between the injury and the restoration. The statutory terms of “restoring, rehabilitating, replacing” frame a wounded nature nursed back to health. The deed of “acquiring the equivalent” declares casualties should be redressed by recruitment and replacement with new personnel. Together these terms, dangerously, constitute the boldest of pledges to a natural world: “We will protect you as if these vandals were never here.”

This NRD law is a righteous and reckless retribution machine. Our firm will endeavor to protect BP from being run over by it. The good news is that this dangerous NRD weapon

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256. *The Exxon Valdez Reopener*, *supra* note 20, at 149.

257. See Rhonda McBride, *ExxonMobil in \$93M Battle Over Unforeseen Damages in 1989 Spill*, KTUU.COM (November 13, 2011), <http://www.ktuu.com/news/ktuu-exxon-in-a-93-million-dollar-battle-over-unforeseen-damages-in-1989-spill-20111115,0,63740-25.story>; William Yardley, *22 Years Later, the Exxon Valdez Case is Back in Court*, N.Y. TIMES (Mar. 3, 2011), <http://www.nytimes.com/2011/03/04/us/04-exxon.html> (on the “reopener”).

258. Clean Water Act § 311(b)(3), 33 U.S.C. § 1321(b)(3) (2006).

259. *Id.* § 1321(f)(5).

260. *Id.* § 2706(d)(1)(A)–(C).

261. *Id.*

has been narrowed and blunted with the passage of time. Two major rulemakings have gone down the NRD road<sup>262</sup> and U.S. industry lawyers have succeeded in snatching back some of what appeared to have been ceded away by these dangerous acts of Congress. For example, OPA regulations define “injury” as “an *observable* or *measurable* adverse change in a natural resource or impairment of a natural resource service.”<sup>263</sup> Further, to establish injury trustees must determine whether there is:

- Exposure, a pathway, and an adverse change to a natural resource or service as a result of an actual discharge; or
- An injury to a natural resource or impairment of a natural resource service as a result of response actions or a substantial threat of a discharge.

To proceed with restoration planning, trustees also quantify the degree, and spatial and temporal extent of injuries. Injuries are quantified by comparing the condition of the injured natural resources or services to baseline, as necessary.<sup>264</sup>

These definitions alone would defeat many natural resource damage claims. Injury does not happen in the NRD framework unless the loss is observable or measurable. It is rarely either one.<sup>265</sup> Nature is notoriously uncooperative in these calculations. Determining “exposure, a pathway, and adverse change” might work for an auto accident, but the tactic is unlikely to work well for sensitive ecological damage. Life in the ocean is an evolutionary process, not a stable state, which makes change inevitable and judgments about the “adverse” direction informed guesses. Also, remember this “adverse

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262. LEE & BRIDGEN, *supra* note 254, ch. 10 (discussing content of both CERCLA and OPA natural resource damage assessment (NRDA) regulations).

263. 15 C.F.R. § 990.30 (2010) (emphasis added).

264. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, INJURY ASSESSMENT: GUIDANCE DOCUMENT FOR NATURAL RESOURCE DAMAGE ASSESSMENT UNDER THE OIL POLLUTION ACTION OF 1990 1–4 (1996).

265. *E.g.*, Susan Milius, *Scientists Try to Identify and Track Elusive Larvae in a Boundless Ocean*, SCIENCE NEWS, Jan. 15, 2011, at 19 (explaining the difficulties of studying larvae that are “mere squiggles of still-developing tissue,” are “fiendishly hard to identify,” “don’t carry a lot of diagnostic characteristics,” look like “cartoon aliens,” “are more like dandelion fluff blowing in the wind,” have to survive as “bite-sized nuggets in open water,” disperse widely and proceed unnoticed by “typical monitoring programs”).

change” must present itself “as a result of an actual discharge.” This little qualifier of causation hides a squadron of defenses dressed up as cause in fact or proximate cause. Exxon beat the rap for its destruction of the herring fishery with a version of a cause-in-fact defense.<sup>266</sup> And “proximate cause,” of course, is an open-ended defense allowing wrong-doers to walk away from any consequences deemed “surprising” to narrow-minded human beings.<sup>267</sup>

### 1. *Proximate Cause Defenses*

For restoration planning, the law requires a “quantification” of the injury and a comparison to the “baseline.” Corporate polluters such as BP can only relish the opportunity to contest these factors. Baselines for comparison rarely exist, and in all probability none exist at all for BP spill-impacted species in the Gulf of Mexico. Just what were the baseline populations for the world’s largest fish (the whale sharks), its most valuable (the Bluefin tuna), or the Kemps’ Ridley sea turtle or the brown pelican?

In a wonder of proven wonders, the Commonwealth of Puerto Rico once established that an oil spill caused the decline of 4,605,486 organisms per acre.<sup>268</sup> This calculation was achieved by surveys of oiled and unoled areas. The damage was not “observable,” but it presumably was “measurable.” With twenty acres affected, this meant that a grand total of 92,109,720 marine animals were killed by the *SS Zoe*

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266. Compare Sanne Knudsen, *A Precautionary Tale: Assessing Ecological Damages After the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L. J. 95 (2009), with Dr. Stanley D. Rice, *Persistence, Toxicity, and Long-Term Environmental Impact of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 55 (2009).

267. Compare *General Elec. Co. v. U.S. Dep’t of Commerce*, 128 F.3d 767, 776–77, 779 (D.C. Cir. 1997) (refusing to accept the government’s argument that a “trustee” could meet its proof requirement merely by demonstrating “injury,” “exposure,” and a “pathway.” A “causation” defense appears to be in order.), with:

NOAA’s brief conceded that “[t]he trustee must establish causation to the satisfaction of the district court,” a position the agency reiterated during oral argument, while also acknowledging that this interpretation of the final rule would bind the agency in any future proceedings. The court expressly adopted NOAA’s construction of its final rule that the trustee must “prove causation.”

Craig H. Allen, *Proving Natural Resource Damage Under OPA 90: Out with the Rebuttable Presumption, in with APA-Style Judicial Review?*, 85 TULANE L. REV. 1039, 1052 (2011) (footnotes omitted).

268. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 660–661 (1st Cir. 1980).

*Colocotroni* oil spill that precipitated the study.<sup>269</sup> But remember, any change must be adverse, and who is to say that fewer mollusks and more polychaete is an “adverse” outcome for an ecological condition?

The “exposure,” “pathway,” and “adverse injury” must occur “as a result of an actual discharge.” Here hide the mysteries of causation. Restoration planning requires quantification “by comparing the condition of the injured natural resource” to the “baseline.” We will happily contest this elusive “baseline.” Any “quantification” is an invitation to an argument—an argument that our firm expects to win. In *Zoe* itself, the court of appeals disapproved—much to our delight—a very clever valuation technique that assigned a loss of at least six cents to each and every organism killed.<sup>270</sup>

Frankly, the members of our firm are licking our chops to defend BP in this NRD context. We expect ours to be the first case where the court acknowledges that the spill killed billions of organisms<sup>271</sup> but that no “injury” occurred. The happy outcome in the *Zoe* case leaves our firm wondering whether the courts might disapprove any and all attempts to attach economic value to larvae or phytoplankton in the ocean. In 2007, the U.S. Supreme Court did not even blink over the

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269. *See id.* at 677 (disagreeing with the testimony of the expert economist that valued each organism at six cents for total replacement costs of \$5,526,583 (0.06 x 92,109,720)).

270. *See id.* at 661.

271. *Compare:*

[T]here must have been—I speculate—tremendous damage to sheer numbers of those eggs and larvae. We should also bear in mind, however, that the numbers of eggs and larvae are always far in excess of what the system can support. The competition and struggle for existence is so intense that under normal, healthy circumstances, only one fish egg in millions wins the lottery ticket for becoming an adult. There is where a lot of the resiliency comes from. There may be enough survivors to let the Gulf recover quickly.

SAFINA, *supra* note 18, at 250-251, *with:*

Early on we got ships out there to get baseline data of things like plankton and Bluefin tuna larvae—as much as possible. When this disaster happened, just-spawned shrimp and crabs and fish were in the drifting plankton. The plankton, I think, could have been very seriously affected. Something like eighty to ninety percent of the economically important fish populations in the Gulf depend on the marshes and estuaries for part of their lives; they move back and forth. For them, this could not have come at a worse time. But it's next to impossible to document—so far—what's happened to them . . . We won't know for a while—we really won't know for decades—but it's likely it's had very serious impacts.

*Id.* at 283-84 (quoting Jane Lubchenco). This last comment—from a world-class biologist of considerable renown—makes us think twice about the wisdom of an Exxon-like reopener in our NRD settlement.

Environmental Protection Agency's (EPA) failure to ascribe any value at all to billions of fish (both juveniles and adults) lost in the course of utility use of cooling water.<sup>272</sup> Precedents such as *Zoe* and *Entergy*—that push living things to the precipice of worthless—are formidable tools for disarming the risks of NRD.

Despite these legal precedents, we do not expect the U.S. government to acquiesce meekly in these assertions of “worthlessness” or “causation not proven.” The U.S. government will attach plausible values to all things lost, including larvae. It will fight furiously, in a focused but comprehensive way, to link our spill to detrimental declines in natural resources. Predictably, two phases of proof will be unfurled to establish that an injury is compensable from a causation standpoint. The first, often termed general causation, requires proof that the toxic substance can cause an adverse effect—particularly the disease or injury in question. The government must then prove the specific injury was distinguishable from the background incidence of injury or disease and therefore could be causally attributed to exposure specifically from BP's oil. This is often termed specific causation. This distinction and the need to prove both is a central object in both NRD and all toxic torts and will be a great focus for defense—the Gulf of Mexico is full of other people's oil beside our own.<sup>273</sup>

We caution you also against expecting too much from the “finger-pointing” defenses suggested by the celebrated language in OPA (“result[ing] from”)<sup>274</sup> and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (no “double recovery,” no recovery for damages occurring “wholly before”).<sup>275</sup> There is a similar formulation in

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272. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); see also DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 224 (2010) (“In the EPA's Phase II rulemaking . . . literally billions of fish each year were simply ignored by the agency's economic analysis, treated as if their loss was meaningless because the question of their worth had been abandoned.”).

273. LEE & BRIDGEN, *supra* note 254, AT 201. See also Steve C. Gold, *How Genomic Information Should, and Should Not, Change Toxic Tort Causation*, 34 HARV. ENVTL. L. REV. 371 n.4 (2010) (finding that the plaintiff must prove both, but “court's ultimate focus” is proof that individual plaintiff's disease was caused by exposure) (internal citations omitted).

274. 33 U.S.C. § 2702(a) (2006).

275. Compare 42 U.S.C. § 9607(f) (2006), with 33 U.S.C. § 2706(d)(3) (OPA

the NRDA rules on the background presence of injury.<sup>276</sup> It is true that these legal fragments support a defense of “somebody else did it.” But the usual suspects that are mentioned, e.g. historic destruction of wetlands, Katrina, the infamous dead zone, fishing mismanagement, even climate change, can be distinguished without serious difficulty from oiling injuries.

On the important topic of quantification of environmental damage that the NRD rules require,<sup>277</sup> the industry has succeeded in limiting two of the best techniques that claimants have developed. One is the highly creative “body count” technique applied in *Zoe*,<sup>278</sup> where every creature killed would cost no less than six cents. The other is the highly popular contingent valuation technique where people are asked how much they would pay to protect a particular resource. This technique promised to inflate our liabilities to the point of the unbearable.<sup>279</sup> Courts have said that agencies can use the “contingent valuation technique”<sup>280</sup> but the industry continues to criticize this valuation method. We expect to keep the memory of *Zoe* alive and the threat of contingent valuation at bay.

## 2. *The Myth of Restoration Planning*

We will not rehash the deficiencies identified in the stacked-up contingency plans and the oil spill response plans.<sup>281</sup> These kinds of “get ready for something” plans are fanciful and hypothetical. Planning failed in the Exxon case.<sup>282</sup> Congress

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prohibition on “double recovery”).

276. 43 C.F.R. § 11.16(d) (2010) (establishing that “damages or assessment costs may only be recovered once, for the same discharge or release and natural resource”).

277. *Id.* § 11.70–.73 (describing Type B Procedures).

278. *See* Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 661 (1st Cir. 1980) (disapproving the *Zoe* technique).

279. Brian R. Binger, Robert Copple & Elizabeth Hoffman, *Contingent Valuation Methodology in the Natural Resource Damage Regulatory Process: Choice Theory and the Embedding Phenomenon*, 35 NAT. RES. J. 443 (1995).

280. *General Elec. Co. v. Dep’t of Commerce*, 128 F.3d 767, 772–74 (D.C. Cir. 1997).

281. *See* John Adams Hodge, *How Environmental Regulators Can Address Human Factors in Oil Spill Prevention Using Crew Resource Management*, 40 ENVTL. L. REP. 11048 (2010); Denis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail,”* 63 U. PITT. L. REV. 791 (2002).

282. Zygmunt J.B. Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 ENVTL. L. REP. 11041 (Nov. 2010).

fixed the failure in the 1990 OPA,<sup>283</sup> only to have the failure fail again in the context of the Deepwater Horizon.<sup>284</sup>

These failures are of no concern. The old military view, that no plan survives contact with the enemy, is widely subscribed to in the oil industry. So far as our firm is concerned, short of deliberate misstatements, BP may put anything it wishes in its plans—so long as the plans are solemn, dutiful and plausible.

Contingency plans are all about a “good story,” and good stories can stray into the realm of the hypothetical or fictional. No doubt some commission of the future will wag its finger at the BP planning efforts.<sup>285</sup> BP should second this motion; it should deplore its own efforts, flail its own lapses, pledge to try harder, regret the shortcomings that occurred and insist that company planning will drastically improve. These claims might be exaggerations but the soft law of corporate planning does not care.

Now the U.S. government does some planning too, and BP is free to take an entirely different view of *this* planning. Under OPA, for example, government trustees shall develop a “plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship.”<sup>286</sup> BP’s response plan is a paper exercise, while the government’s is a solemn contract. BP’s plan can be filed and forgotten, but the U.S. plan will be remembered and enforced to the letter of the law.

Thus, when it comes to the restoration plan to fix what went wrong, the law has a sharper vision. Due process rushes to aid industry. Trustees must trudge up the hill of NEPA compliance, public participation, cost-effectiveness and consideration of reasonable alternatives so long as they are not excessively protective<sup>287</sup> and so long as they embrace the do-

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283. See 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 197 (stating that “[p]eople have plan fatigue . . . they’ve been planned to death.”).

284. *Id.*

285. See *e.g. id.* at vii, ix (stating that “a series of identifiable mistakes . . . systematic failures in risk management that . . . place in doubt the safety culture of the entire industry . . . [N]either industry nor government adequately addressed these risks . . . shortcomings in the joint public-private response to an overwhelming spill and concluding that “[b]oth government and industry failed to anticipate and prevent this catastrophe, and failed again to be prepared to respond to it.”).

286. 33 U.S.C. § 2706(e)(1)(C) (2006) (emphasis added).

287. 43 C.F.R. § 11.82(b)(iii) (2010) (providing under CERCLA, alternatives “are

nothing alternative of “natural recovery.”<sup>288</sup> Restoration cannot happen without restoration objectives specific to the injury and a way of measuring success.<sup>289</sup> There are prohibitions on double recovery and restrictions on using “option” and “existence” values.<sup>290</sup> For the faint of heart who call this a “double standard,” it is. The great corporations of the world must be free to change and innovate. From our perspective, governments are most useful when they are chained, limited and hobbled by law.

One of the great achievements for industry in this context is the invention of a new category of wildlife—“doomed” resources. Government planners must consider the ability of the resources to recover.<sup>291</sup> If the resources cannot recover and there is no plan for rehabilitation or restoration that could aid the process, as in the case of one pod of killer whales following the Exxon spill,<sup>292</sup> the population will be “doomed” and forgotten. If there is no plan for recovery there will be no industry liability.

### 3. *Trustees*

Third parties—notably the “joint” trustees and “outside” scientists—will influence the outcome on NRD. BP must have strategies for dealing with these third parties. The U.S. government is stuck with the “coordination” duty under the OPA regulations,<sup>293</sup> and BP should be more than happy with

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limited to those actions” that restore natural resources or services “to no more than their baseline”).

288. 15 C.F.R. § 990.53(b)(2) (2010) (stating that under the OPA, “[t]rustees must consider a natural recovery alternative in which no human intervention would be taken to directly restore injured natural resources and services to baseline”).

289. *Id.* § 990.55(b)(2) (“When developing the Draft Restoration Plan, Trustees must establish restoration objectives that are specific to the injuries. These objectives should clearly specify the desired outcome, and the performance criteria by which successful restoration will be judged. . .”).

290. *Compare id.* § 990.22 (double recovery), with 40 CFR § 11.83(c)(iii) (second-best treatment of option and existence values).

291. 43 C.F.R. § 11.82(d)(7).

292. 2009 PERSONAL STORIES, *supra* note 9, at 203, 205 (quoting Craig Matkin, Marine Biologist and Homer Resident after seven animals were lost from the AB pod and eleven from the AT-1 transient group: “now we realize that this group of transients may not recover and they’re probably headed for extinction.”).

293. *See* 15 C.F.R. § 990.14 (2010) (describing the coordination duty of trustees: “[f]or joint assessments, trustees must designate one or more Lead Administrative Trustee(s) to act as coordinators); *see also* NATIONAL OCEANIC AND ATMOSPHERIC



this state of affairs. BP is on plausible legal grounds to encourage—and close—any number of side deals it chooses to make with individual state trustees. BP must work overtime to undercut the “coordination” promised by the OPA regulations. Latecomers may be fruitfully caught in our trap of “double recovery.” Our firm will certainly argue “double recovery” at every opportunity.

Will our strategy of rewarding defectors turn against BP if it agrees to pay for some hare-brained scheme that has no hope of helping a single fish or blade of grass in the Gulf of Mexico? This worst-case scenario already has occurred (some are calling it Jindal’s Folly), as Governor Bobby Jindal now petitions BP “to get his one hundred miles of sand berms built.”<sup>294</sup> Our firm’s legal position must be that BP cannot be expected to distinguish between valid and invalid demands coming from a legally sanctioned trustee. That is, if the federal government does not say “No” in a timely manner, BP has every right to consider this silence a “Yes” and to offset the costs against the collective NRD responsibilities of the joint trustees.

BP must fully understand that this policy of separate deals with individual trustees can lead to the collapse and undermining of any collective effort, which will have its greatest force on the topic of NRD. Frankly, we believe that “divide and conquer” is a least-cost alternative for BP. We recommend this strategy to help curtail both response costs and liability for NRD.<sup>295</sup>

There is a huge risk, however, in the pursuit of any “divide

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ADMINISTRATION, PREASSESSMENT PHASE: GUIDANCE DOCUMENT FOR NATURAL RESOURCE DAMAGE ASSESSMENT UNDER THE OIL POLLUTION ACT OF 1990, THE DAMAGE ASSESSMENT REMEDIATION AND RESTORATION PROGRAM APP. J-1 (1996), available at [http://www.darrp.noaa.gov/library/pdf/PPD\\_AP-J.PDF](http://www.darrp.noaa.gov/library/pdf/PPD_AP-J.PDF).

294. SAFINA, *supra* note 18, at 271.

BP has agreed to pay a hefty \$360 million for them. But the Environmental Protection Agency is urging the Army Corps of Engineers to turn down the state’s sand berm project, saying berms don’t do anything and can harm wildlife. Ostensibly they’re to stop oil from contaminating shores and marshlands. Using a May permit, the state spent tens of millions of dollars to build four miles of berms . . . I suspect that this desire for berms stems from a fear of hurricanes, not oil. Is my suspicion misplaced? Says Grand Isle’s mayor, “What is wrong with us dredging and building these islands back up?”

*Id.*

295. Compare SAFINA, *supra* note 18, at 278 (Admiral Allen speaks of “the social and political nullification” of the NCP), with *id.* at 201 (“Unified Command, my [expletive].”).

and conquer” strategy. Absent a U.S. sign-off, the federal government will simply say that these “side deals” are part of the “response costs,” not a part of NRD. That is a powerful argument—probably a successful one—so “divide and conquer” might succeed only if BP chooses to pay for it. We do not know now where courts might draw the line between “restoration” costs (for NRD purposes) and “removal” or “response” costs (for cleanup purposes) but we do not expect any favors for BP in the formulation of the U.S. legal strategy.

There is one conspicuous exception to our advice to work out separate deals with trustees. This exception applies to the Indian tribes. BP should not deal with them in any manner, shape or form. Our firm realizes that the tribes are formally incorporated into the structure of these NRD laws,<sup>296</sup> but we hope that none are sufficiently recognized to come against BP in the Gulf.<sup>297</sup> In previous litigation, our firm has confronted tribes and has found them to be skillful and resilient adversaries. They are not prone to the quick deals and ready buyoffs that make state and local governments so shamefully compliant. Some of the tribes actually see more in nature than the usual dollars, and they are slow to give it up. We are serious about this: we believe that other great corporations have been bankrupted by the environmental concerns of various tribes, and that the tribes should not be underestimated.<sup>298</sup> BP should know this especially, because one of the “country” lawyers who worked on the Coeur d’Alene case was the same fellow, Ray Givens, who caught BP earlier this year in a devious series of lease violations on an allotment owned by Alaska Natives.<sup>299</sup>

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296. 33 U.S.C. § 2706(a)(3) (2006) (NRD liability “to an Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe.”).

297. See 15 C.F.R. § 990.30 (2010) (defining “Indian tribe” as a tribe that is “recognized”). Compare JACOBSEN, *supra* note 111, at ch. 2 (“The Last Hunter-Gatherers in America”) with *id.* at ch. 8 (“The Last Days of Isle De Jean Charles”) (Biloxi-Chitimacha Indians; Pointe-au-Chien tribe).

298. See Clifford J. Villa, *Superfund v. Mega-Sites: The Coeur d’Alene River Basin Story*, 28 COLUM. J. ENVTL. L. 255 (2003).

299. See *Oenga v. United States*, 96 Fed. Cl. 479 (2010), *on reconsideration in part*, 97 Fed. Cl. 80 (2011) (Firestone, J.).

#### 4. *Dealing with the Science*

The science of the matter will significantly influence the extent of BP's liability and any wrong results will be financially painful to BP. Studies are likely gearing up to measure "harm" to the Gulf and its creatures, and these studies will probably be adverse to BP's interests. Fortunately, many great corporations—tobacco, chemical, and oil companies among them—have developed sophisticated strategies for managing the business risks brought on by scientific findings. BP need not be a passive recipient of science. Instead, it can actively influence the origins, development and content of these studies. Additionally, BP can take an active role in shaping public perceptions of the results. The leading playbook on the topic identifies useful corporate strategies to shape, hide, attack and package science.<sup>300</sup>

One of the major categories of behavior for influencing the content and reach of controversial science is described, uncharitably, as "harassing scientists" and the "art of bullying."<sup>301</sup> Our firm prefers to call this activity "employing legal tools to probe the content of careless science that could do damage to business enterprise." Once again, Exxon set the standard for this brilliantly nefarious practice. Exxon targeted Steve Picou, a sociologist from the University of South Alabama, who studied the social effects of the *Exxon Valdez* spill—surely a topic of interest to would-be litigants. Exxon subpoenaed Mr. Picou in an attempt to determine whether this research was objective and impartial. Picou explains:

Exxon wanted every original survey with names and addresses, plus every scrap of information that we had accumulated over four years of studying the social impacts of the spill. They claimed they wanted the information in order to check the statistical analysis we

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300. MCGARITY & WAGNER, *supra* note 137, at 61, 97, 128, 181. We are looking into who said this, why, and under what conditions: "[A] federal panel of about fifty experts recommends continued use of chemical dispersants, saying populations of the underwater animals likely to be killed have a better chance of rebounding quickly than birds and mammals on the shoreline." See SAFINA, *supra* note 18, at 114–15. We, of course, are of the opinion that BP is free of NRD liability for losses of underwater animals whose populations rebound quickly. They are already recovered. See generally Charles L. Franklin, *Dispersant Scrutiny Mirrors Larger Debate Over U.S. Chemical Control Policy*, 40 ENVTL. L. REP. 11142 (Nov. 2010).

301. MCGARITY & WAGNER, *supra* note 137, at 157.

had conducted and published in peer-reviewed journals, which showed irrefutably that the social impacts were extremely severe.

We had to provide copies of all our information, including travel requests, travel reimbursement, and food receipts. They even subpoenaed the faxes we had used to communicate with our colleagues for sharing information. It was absolutely ludicrous. Those nine months of probings totally stopped the project and completely disrupted the university's sociology department.<sup>302</sup>

Professor Picou added, "I made the decision that, if need be—if ultimately I was ordered to—I would go to jail rather than expose my respondents. Exxon was not getting our confidential data."<sup>303</sup> He did not go to jail. The court handed down a split decision but he learned a lesson about becoming involved in the lawsuits of oil companies.

The Picou incident was so inspiring that it is widely emulated, including a long and delicate political campaign to discredit Michael Mann, the creator of the so-called "hockey stick graph" on climate change.<sup>304</sup> This method has been adopted and approved of by law under the Data Access Act,<sup>305</sup> which obliges federally-funded scientists whose work is used to "inform or support" regulation to turn over their data and records under the Freedom of Information Act.<sup>306</sup> Mess with us, industry always has said, and we will mess with you.

BP has many options for combating the science storm gathering in the Gulf. Our firm recommends immediately buying or shaping science and hiding valid science by infecting it with confidentiality clauses. The first tactic should cost no more than fifty million dollars and consists of acquiring the services of an entire academic department devoted to oceans and ocean life.<sup>307</sup> Tactic two is more expensive—perhaps

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302. 2009 PERSONAL STORIES, *supra* note 9, at 273–74 (Steve Picou, Sociologist, University of South Alabama).

303. *Id.* at 274.

304. MCGARITY & WAGNER 137, *supra* note , at 275–78.

305. Data Access Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998).

306. *Id.*

307. JACOBSEN, *supra* note 111, at 78 (stating that "[i]n addition to the Vessels of Opportunity program, BP launched what I think of as the Scientists of Opportunity program.").

costing \$500 million—and requires pledging this large sum for a ten-year research program managed by an expert panel, open to all comers, apparently with no strings attached. Such a program will certainly impress:

Rather, to its credit, I grudgingly admit, BP releases \$25 million of a pledged half billion dollars over ten years to support several universities' research into the effects of the blowout. To make recommendations on which institutions will receive funds, BP appoints an expert panel chaired by environmental microbiologist Rita Colwell, who formerly headed the National Science Foundation and is now a distinguished professor at Johns Hopkins University.<sup>308</sup>

BP would run few risks from employing this exercise. Any contract that goes out will contain the usual clauses on BP data “ownership,” reservations on “review of data” and “permission to publish.” These clauses will leave BP in complete control. It is our firm's experience that most university scientists, particularly in the biological sciences, could care less about these sorts of constraints. They want to get on with their work and avoid legal technicalities. Legal help from universities to faculties is desultory at best, which means that as a practical matter few scientists will question these limitations. Those that do can reject BP monies “on principle”—and be the poorer for it. In most cases these clauses will be ignored and forgotten, but we like them because they enable us to “pull the plug” on particularly obnoxious or dangerous researchers, such as a Steve Picou or a Michael Mann.

As soon as the flow of oil stops, BP must turn to a general strategy of “packaging science.” BP must speak glowingly of the recuperative powers of nature, underscore how concerns were greatly overstated, and explain how wildlife has learned to live with petroleum that always was extant in the natural environment. The U.S. government, understandably, will be anxious to express any “not-as-bad-as-we-feared” sentiments. Knowing this, BP must be ready to exploit any windows of opportunity that might occur.<sup>309</sup> Our firm is in the business of

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308. SAFINA, *supra* note 18, at 170.

309. See generally SAFINA, *supra* note 18, at 246–51 (reporting on the saga of “What Happened to the Oil?” and the White House misstatements on the topic); JACOBSEN, *supra* note 111, at 93 (Browner displaying “a sort of medieval understanding of

collecting every official government utterance that can be interpreted as downplaying, minimizing or “taking the optimistic view” on long-term environmental consequences. All of this is potentially serviceable as admissions to contradict the trustees’ eventual calculations of natural resource damages, which will not be compatible with BP’s downplaying, minimizing and optimism.

When the excitement subsides and the smoke settles, BP will retreat to Exxon’s strategy—repeated, insistent and varied denial of any long-term effects from the spill. Through extended focus on public relations, BP’s voice will continue to be heard as the others drop away.

##### 5. *Liability Under Wildlife Laws*

Finally, federal wildlife laws, particularly the Endangered Species Act (ESA), which is often extolled for its harshness, may play a role in BP’s liability. In the bigger picture, the shreds of life of which we speak do not really matter because the dollars are small and the legal risks quite tolerable. Nonetheless, many people think much of these symbolic laws, and they should be addressed with tender professional care.

We reiterate that BP had the fortuitous “foresight” to place its spill, and the dispersants that cheered it along, into completely unstudied and unknown “wilderness” regions of the deep Gulf:

[U]nlike past insults, this one spewed into the depths of the ocean, the bathypelagic zone (3,300–13,000 feet deep). Despite the cold, constant darkness and high pressure (over 150 atmospheres), scientists know that the region has abundant and diverse marine life. There are cold-water corals, fish, and worms that produce light like fireflies to compensate for the perpetual night. Bacteria, mussels, and tubeworms have adapted to life in an environment where oil, natural gas, and methane seep from cracks in the seafloor. Endangered sperm whales dive to this depth and beyond to feed on giant squid and other prey.<sup>310</sup>

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biology”); John Collins Rudolf, *Scientists Back Early Government Report on Gulf Spill*, N.Y. TIMES (Nov. 23, 2010), <http://www.nytimes.com/2010/11/24/science/earth/24spill.html> (agreeing that nature and technology had largely done their job).

310. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 174. We are reminded of

This BP Oil “disaster” will leave few footprints because it occurred mostly in parts unknown. We enclose for BP’s library a copy of the ten-years-in-the-making, first-ever global ocean Census of Marine Life.<sup>311</sup> This census combined the work of over 2000 scientists from eighty-two nations. It is filled with behind-the-scenes stories and breathtaking photographs. In this deep marine environment, this oil spill could render a species extinct before it is named or known. Philosophers will talk about this for years. But there will be no legal liability.

Of the many water classification schemes operative in the Gulf, two are of potential concern—“essential fish habitat” under the Magnuson-Stevens Act<sup>312</sup> and “critical habitat” under the ESA.<sup>313</sup> Preliminarily, it seems that BP successfully assailed “essential fish habitat.”<sup>314</sup>

Try as we might, we see nothing in this ominous classification scheme that forbids private parties from entering, damaging or destroying “essential fish habitat.”<sup>315</sup> “Critical habitat” has a richer legal history than does “essential fish habitat.”<sup>316</sup> With a number of subtle variations, “critical habitat” is a specified geography “essential to the conservation of the species” that “may require special management considerations or protection.”<sup>317</sup> The dreaded Section 7(a)(2) of the ESA states that each federal agency must insure that its action “is not likely to jeopardize” a listed

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the pioneers on the Oregon Trail who abandoned their broken-down pianos and dead horses in the “wilderness” where nobody could see them.

311. DARLENE TREW CRIST, GAIL SCOWCROFT & JAMES M. HARDING, JR., *WORLD OCEAN CENSUS: A GLOBAL SURVEY OF MARINE LIFE* (2009).

312. 16 U.S.C. § 1802(10) (2006).

313. *Id.* § 1532(5).

314. 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 178 (footnotes omitted).

315. See 16 U.S.C. § 1802(10) (defining “essential fish habitat” as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity”). The Councils are supposed to “minimize to the extent practicable adverse effects on such habitat caused by fishing . . . .” *Id.* § 1853(a)(7). So far as we know, BP wasn’t “fishing” on April 21, 2010, and the constraint is not enforceable against third parties. See JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW: CASES & MATERIALS* 481–84 (3d ed. 1999).

316. See Kieran F. Suckling & Martin Taylor, *Critical Habitat and Recovery*, in *THE ENDANGERED SPECIES ACT AT THIRTY* (Island Press 2006, Dale Goble, J. Michael Scott, and Frank W. Davis, eds.); see also Wyatt Golding, *Could It Have Mattered? Assessing the Policy and Implementation of Critical Habitat Designation Through the Lens of Deepwater Horizon* (2010) (for the LAW B565 U.S. Ocean and Coast Law advanced writing seminar, University of Washington School of Law).

317. 16 U.S.C. § 1532(5)(A)(i).

species “or result in the destruction or adverse modification” of critical habitat.<sup>318</sup>

Our firm’s brief conclusion is that BP’s oil has not yet entered “critical habitat” but that it is likely to do so in short order. Even were serious damage to be done, we do not believe that BP’s activity is constrained by the prohibition against “destruction or adverse modification.” Even if it were, we anticipate no circumstance that could rise to the hefty level of “destruction or adverse modification.” Mere oiling by BP is not the sort of annihilation these strict standards demand.<sup>319</sup>

The “take” provisions of the ESA, making it unlawful to “kill,” “harm,” “capture” or “wound” any endangered species, present bigger concerns for BP.<sup>320</sup> There is a civil penalty of “not more than \$25,000 for each violation”<sup>321</sup> and a misdemeanor criminal violation that can yield a fine of “not more than \$50,000 or imprisonment for not more than one year, or both.”<sup>322</sup> For BP’s purposes, this basically amounts to a body count—we do not want to hear that this sort of “take” is “only a misdemeanor” and “hard to prove.” In Exxon’s case, the United States surprised the company by picking up every carcass that could be found and throwing it in a freezer. The grand count for bird carcasses, as we recall, stopped somewhere around 135,000, though most were not endangered species.<sup>323</sup> Based on the Exxon experience, our firm advises BP to assume that each and every federal worker is out collecting bodies and putting them into freezers. You might consider a company collection effort of your own—out of respect for the deceased.

Though we cannot swear to the particulars, we invite BP to play the game of “body count.” We read the tales of many dead Kemp’s Ridley sea turtles,<sup>324</sup> large numbers of Bluefin tuna larvae, “hideously oiled gulls and pelicans,”<sup>325</sup> 500 tarred-and-

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318. *Id.* § 1536(a)(2).

319. *Butte Env’tl. Council v. U.S. Army Corps of Eng’rs*, 607 F.3d 570, 583 (9th Cir. 2010).

320. *See* 16 U.S.C § 1532(19); *see generally id.* § 1538(a)(1)(B).

321. *Id.* § 1540(a)(1). The “adjustments” upwards are ignored for the moment.

322. *Id.*

323. 2009 PERSONAL STORIES, *supra* note 9, at 121.

324. *See* SAFINA, *supra* note 18, at 284–85 (describing that Kemp’s Ridley sea turtles were “hammered”).

325. *Id.* at 104.



feathered birds, “350 dead or moribund loggerhead turtles,”<sup>326</sup> birds sodden in goo, a hundred dolphins in distress, the whole fauna of the sargassum weed “completely wiped out,”<sup>327</sup> 460 dead or injured sea turtles, fins of larval fish encased in oil, one struggling dolphin, plankton seriously affected and eighty oiled but still living birds.<sup>328</sup> Not to mention the 500 sea turtles, sixty dolphins and 2000 birds recovered dead.<sup>329</sup> Each oiled carcass might mean “ten to one hundred undetected deaths.”<sup>330</sup>

After we do the Body Counting, there remains only the math: 250 Bodies = 250 misdemeanors = 250 years in jail = \$12,500,000; or 750 Bodies = 750 misdemeanors = 750 years in jail = \$37,500,000. Environmentalists will argue that 250 different BP officers should serve the 250 misdemeanors. The federal government will insist that any final settlement should reflect some figure for the lost pelicans and turtles. Our firm will demand that any amount assessed should be offset elsewhere in the ledger sheet—probably in the category of response costs. BP may offer a letter of contrition, perhaps a pledge of remorse, which should be more than enough to close the deal.

Among the species discussed above, BP perhaps ought to be most concerned with the impact on Bluefin tuna. This is because the United States has displayed a disposition to fight for the Bluefin, and because the primary spawning grounds of the western population of Atlantic Bluefin tuna is in the Gulf of Mexico,<sup>331</sup> with peak spawning season occurring between April and June.<sup>332</sup> The Bluefin is loved and pursued around the world, and its numbers are plummeting. It is being severely negatively impacted by the Deepwater Horizon spill but fortunately for BP, it is not yet ESA-listed.<sup>333</sup>

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326. *Id.* at 151.

327. *Id.* at 167.

328. *Id.* at 98,124,157,167,172,190,193,284, 298–99.

329. *Id.* at 222.

330. See SAFINA, *supra* note 18, at 222.

331. Steven L. H. Teo et al., *Oceanographic preferences of Atlantic bluefin tuna, Thunnus thynnus, on their Gulf of Mexico breeding grounds*, 152 MARINE BIOLOGY 1105, 1106 (2007).

332. *Id.*

333. *Petition to List the Atlantic Bluefin Tuna (Thunnus thynnus) as Endangered under the United States Endangered Species Act*, CENTER FOR BIOLOGICAL DIVERSITY 2 (May 24, 2010), [available at](#)

Nevertheless, there are compelling reasons to be concerned about the long-term impacts of the Deepwater Horizon on the tuna. Because spawning occurs at the surface, adults entering their spawning grounds were likely coated with oil. This potentially impairs locomotion and causes skin lesions.<sup>334</sup> Spawning is a metabolically-intensive time for tuna that increases the rate at which they need to pass oxygen over their gills. As such, “their gills are much more likely to capture tiny droplets of oil suspended in the water column, the result of dispersants used to break up the oil spill . . . .”<sup>335</sup> Moreover, even individuals that did not enter the spill zone might eat contaminated prey.<sup>336</sup> What we expect, ultimately, is that the United States’ serious concerns<sup>337</sup> over the long term health over the Bluefin tuna population will carry over to the NRD process and we will see a United States “best effort” to secure restoration monies for the Bluefin tuna.

We have many defenses to supposed liability for species loss in the Gulf. We will say that the damage happened “wholly before” the oil spill and it was due to other causes. But we recognize that the decline of the Bluefin tuna and other species needs a scapegoat and BP is a nominee. In this instance, perhaps, a strictly legal response may not be the best policy. We are exploring a variety of charitable opportunities that would allow BP to demonstrate conspicuous support for the species restoration without compromising its larger legal necessities.<sup>338</sup> We will keep you posted and will seek your advice on these sensitive matters.

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[http://www.biologicaldiversity.org/species/fish/Atlantic\\_bluefin\\_tuna/pdfs/BluefinTunaPetition-5-24-2010.pdf](http://www.biologicaldiversity.org/species/fish/Atlantic_bluefin_tuna/pdfs/BluefinTunaPetition-5-24-2010.pdf).

334. *Fact Sheet: Spawning Bluefin Tuna & the Deepwater Horizon Spill*, TAG-A-GIANT FOUNDATION 2, [www.tagagiant.org/media/GOMspill\\_factsheet.pdf](http://www.tagagiant.org/media/GOMspill_factsheet.pdf) (last visited Dec. 15, 2010).

335. Mark Schleifstein, *Bluefin tuna particularly vulnerable to Gulf of Mexico oil leak*, NOLA.COM (May 13, 2010), [http://nola.com/news/gulf-oil-spill/index.ssf/2010/05/bluefin\\_tuna\\_particularly\\_vuln.html](http://nola.com/news/gulf-oil-spill/index.ssf/2010/05/bluefin_tuna_particularly_vuln.html).

336. TAG-A-GIANT FOUNDATION, *supra* note 334, at 2.

337. U.S. Fish and Wildlife Service, *Announcement of Tentative U.S. Negotiating Positions for Agenda Items and Species Proposals Submitted by Foreign Governments and the Cites Secretariat*, FWS.GOV, 67–68, [http://www.fws.gov/international/pdf/CoP15notice4-CLEAN\\_WEB\\_tentative\\_U.S.\\_positions\\_final.pdf](http://www.fws.gov/international/pdf/CoP15notice4-CLEAN_WEB_tentative_U.S._positions_final.pdf) (last visited Dec. 13, 2010).

338. *See, e.g.*, JOHN HOFMEISTER, WHY WE HATE THE OIL COMPANIES: STRAIGHT TALK FROM AN ENERGY INSIDER (2010) (by the former President of Shell Oil Co.).

#### IV. CONCLUSION

BP's liability for the largest spill in the history of the oil industry is significant and vast if any evidence shows corner cutting, measured safety risks and deviation from industry standards. If such evidence does exist, however, the industrial culture and systemic problems of managing risk within the government oversight system will divert some blame away from BP. In effect, we believe that many of the events leading up to the disaster are due to the company's reliance on industry norms and failings of the larger system.<sup>339</sup> Still, in some ways, BP has been convicted in the eyes of the public and the public expects the government to hold BP financially accountable. If used strategically, the robust, post-*Exxon Valdez* landscape of environmental law is capable of punishing corporate environmental criminals through a complex formula of criminal and civil fines, civil penalties, response costs and natural resource damages. This formula represents a worst case, and is emblematic of an archaic, aggressive and punitive prosecution strategy against companies accused of environmental crimes.

The government's criminal enforcement choices and BP's defensive moves will shape the future of liability for environmental crimes. As your counsel, we will use a collection of legal precedents and tactical advice to expand upon BP's current defenses to erode environmental statutes and render some traditional tort law obsolete. We will help BP displace a potential DOJ criminal suit with a "deferred prosecution agreement" and vague promises to mitigate damages in the Gulf Coast through a private compensation scheme.

In addition to criminal fines, civil penalties are likely to land at one billion dollars. This penalty estimate is merely a jumping-off point for government negotiations, and will be weighed against BP's considerable success in minimizing and mitigating the effects of the discharge. BP undoubtedly has the upper hand in these negotiations as it is within the interest of the US government that harsh civil penalties take a backseat to the broader policies of economic progress and security. Determining civil damages will be a long, drawn-out and costly affair, but damages can be controlled by a favorable forum of

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339. See 2011 NATIONAL COMMISSION REPORT, *supra* note 9, at 217.

BP's choice. A portion of the estimated civil damages of thirty to forty billion dollars in liability should be dedicated to the creation of an "independent" compensation scheme that will sufficiently expedite and minimize claimants' recovery. In the process, BP will successfully accomplish a wholesale transformation of US tort law and corrode common law protections that aid claimants in the right to recovery.

In the 1990s' post-*Exxon Valdez* legal system, Congress thrust responsible parties into a role of primary responsibility for the cleanup. Through our efforts, response costs will be kept within reason by a huge, disciplined, ambitious and well-defined "takeover" of the critical leadership functions and human resource management. Taking ownership of the response puts BP in the driver's seat; it provides access and influence over decision-making and information collection and it establishes critical relationships with the Gulf States and federal government. Success in the NRD phase relies on these relationships, as the NRD process is as much a negotiation as anything else. Success also requires anticipation and planning during the cleanup and careful "management" of the ongoing science. The science and economics that go into modern damage assessments are complex and full of surprises, especially in the area of contingent valuations. We must immediately make it clear to the trustees that these novel methodologies will not stand up in court.

Successful use of legal precedents, tactical defenses and the creation of a novel compensation system will minimize BP's accountability and damages for the Gulf Oil Spill, and in the process, undermine the liability scheme designed to punish and deter future corporate environmental crimes.

Respectfully,

Bendini, Lambert & Locke