

BP GULF OF MEXICO OIL SPILL

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Synopsis: The blowout of BP’s Macondo well in the Gulf of Mexico on April 20, 2010, provided the first major test of the national oil spill containment and response apparatus put in place by the Oil Pollution Act of 1990. News media coverage of the blowout displayed a lack of awareness of the Act or the mechanisms it had put in place to respond to major oil spills. Many questions raised by the media are answered or explained by the statute and its regulations. This article discusses the Act’s provisions as they relate to the Macondo blowout, its effectiveness in dealing with the spill, and the prospects for amending the law.

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I. THE MACONDO BLOWOUT

The blowout of British Petroleum’s (BP) Macondo well in the deep water of the Gulf of Mexico was the largest accidental oil spill in the world, greater than both the Ixtoc blowout off the coast of Mexico and the Exxon Valdez spill in Alaska.¹ Eleven crew members of the Deepwater Horizon drilling rig were killed, others were injured, the livelihoods of thousands of fishermen were impacted, countless marine animals and organisms were destroyed, and marshes and beaches in Louisiana, Mississippi, Alabama, and Florida were fouled. The blowout dominated news coverage from April 20, 2010, until the blowout was

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1. Tom Zeller, Jr., *Estimates Suggest Spill Is Biggest in U.S. History*, N.Y. TIMES, May 27, 2010, available at <http://www.nytimes.com/2010/05/28/us/28flow.html> (Exxon Valdez spilled some 11 million gallons; Ixtoc some 140 million gallons); Joel K. Bourne, Jr., *The Deep Dilemma*, NAT’L GEOGRAPHIC, Oct. 2010, at 43.

finally capped on July 15, 2010. Hundreds of lawsuits have been filed.² There have been hearings before a joint investigatory panel of the Coast Guard and the Department of the Interior,³ an investigation by a commission appointed by President Obama,⁴ and extensive Congressional hearings.⁵

In the aftermath of the spill, resource damage assessment has begun, but will take time to complete. Some 185,000,000 gallons (4.4 million barrels) of oil were discharged,⁶ and, while clean-up efforts and natural processes appear to have removed much of the oil from the water surface, the effects on the Gulf of Mexico may last for decades. Media attention, once intense, is now focused elsewhere.⁷ The intensive media coverage raised many questions that were left unanswered before the media moved on to other issues. Among these are questions regarding who was in charge, delayed emergency response efforts, the laxity of federal oversight, the culpability of the companies involved,⁸ the impact of the oil on the ecosystem, the use of dispersants, and the ability of the environment to recover. Resolving the larger questions concerning resource damage will take years and involve disciplines outside the law. It is not the purpose of this article to resolve these issues or assess blame for the spill. Rather, the purpose of this article is more modest and limited: to address those questions that relate to the adequacy and effectiveness of the existing legal regime for responding to offshore oil spills.

2. Over 400 suits have been consolidated in the federal district court for New Orleans, presided over by Judge Barbier. *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, No. 2:10-MDL-02179-CJB-SS, 2010 WL 3269206 (E.D. La. Aug. 10, 2010).

3. Deepwater Horizon Joint Investigation (Sept. 11, 2010), <http://www.deepwaterinvestigation.com/go/site/3043/>. The due date for the report of the joint investigation panel was extended to March 27, 2011. Harry R. Weber, *Fed Panel Gets 60-Day Extension on Spill Report*, ASSOCIATED PRESS, Oct. 25, 2010, available at <http://www.ktiv.com/Global/story.asp?S=13386062>.

4. Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling (May 22, 2010), <http://www.oilspillcommission.gov> (last updated Feb. 18, 2011).

5. The House Committee on Energy and Commerce held ten days of hearings in May, June, and July of 2010, and the House passed a bill on July 30, 2010, H.R. 3534, that would impose restrictions on deepwater drilling. H.R. 3534, 111th Cong. (2010). See also Committee on Energy and Commerce, Hearings, <http://republicans.energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=7933> (last visited Jan. 28, 2010). A companion bill to the House bill was introduced in the Senate, S. 3663, but is unlikely to be enacted in the current session of Congress. Steven Mufson, *Concerns About the Big Spill Might Already Be Drying Up*, WASH. POST, Sept. 30, 2010, at AA01.

6. Current estimates include the official government estimate of 172,000,000 gallons, and an estimate by Columbia University of 185,000,000 gallons. Seth Borenstein, *Study Shows Latest Government Spill Estimate Right*, ASSOCIATED PRESS, Sept. 23, 2010, available at <http://abcnews.go.com/Technology/wireStory?id=11710745>. An earlier DOE estimate pegged the total amount of the spill at 206 million gallons. Joel Achenbach, *Oil Spill Dumped 4.9 Million Barrels into Gulf of Mexico, Latest Measure Shows*, WASH. POST, Aug. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html>.

7. Mufson, *supra* note 5.

8. Issues of culpability will be determined in other forums. Claims in the cases consolidated in federal court in New Orleans allege violations of state and federal law by BP, Transocean, Ltd. (owner of the Deepwater Horizon drilling rig), Halliburton Energy Services, Inc., and others. Typical of the actions is *Buras v. BP PLC*, which alleges negligence and wantonness in the operation of the drilling rig, negligence and defective design and manufacture of the rig and of the blowout preventer, and negligence in the cementing of the well. *Buras v. BP PLC*, No. 3:10-cv-00369-JJB-SCR (M.D. La. May 26, 2010).

II. THE OIL POLLUTION ACT OF 1990

The current regulatory framework for oil spill response to a large degree reflects reactions to earlier oil spill disasters. The Exxon Valdez spill in March of 1989 led to the enactment of the Oil Pollution Act of 1990 (OPA 90 or the Act).⁹ OPA 90 amended section 311 of the Clean Water Act, 33 U.S.C. §1321, which was enacted after the 1969 Santa Barbara blowout. The Port and Tanker Safety Act of 1978, which also amended section 311, was a reaction to the Argo Merchant tanker spill off Nantucket in 1976. OPA 90 was the capstone of a fifteen year legislative effort to “consolidate and rationalize the oil spill response mechanisms under various federal laws” that was pushed to completion in reaction to Exxon Valdez.¹⁰ OPA 90 provides a comprehensive legal framework that establishes federal management and control of oil spills, and federal control of containment, removal, recovery and clean-up efforts. It holds each “responsible party” liable for the costs of containment, clean-up, and damages sustained as a result of the spill. It creates a single, unified fund called the Oil Spill Liability Trust Fund to pay clean-up and removal costs of up to \$1 billion, and it creates stronger enforcement authorities, penalties, spill prevention countermeasures, and response mechanisms.¹¹ Answers to many of the questions raised by the media can be gleaned from OPA 90 and its implementing regulations.

A. *Who Is in Charge?*

Prior to the passage of OPA 90, it was unclear who among various federal, state, and local officials and private parties had primary responsibility for responding to a major oil spill. To remedy this, section 4201 of OPA 90 clearly requires that the federal government take control immediately in order to insure that containment, removal, and remediation measures are undertaken in a timely and orderly fashion.¹² Federal responsibility resides with the EPA for spills on land and with the Coast Guard for offshore incidents, such as the BP blowout. As the authorized federal agency, the Coast Guard was required to assume control of the spill response and to designate the party or parties responsible for the spill, and hence the party or parties liable for removal and clean-up costs.¹³

The Coast Guard assumed supervisory control of the response to the spill at the outset, but the fact that the Coast Guard was in charge was not consistently the perception of the media. The confusion relates in part to the fact that BP was the primary “responsible party” under OPA 90, and in that capacity shared responsibility for controlling the spill.¹⁴ The “responsible party” for an offshore

9. RUSSELL V. RANDLE, OIL POLLUTION DESKBOOK 3 (Envtl. L. Inst. eds., 1st ed. 1991). Much of OPA 90 is codified at 33 U.S.C. §§ 2701-2762 (2006), and certain provisions are codified elsewhere, including 33 U.S.C. § 1321 (2006).

10. Randle, *supra* note 9, at 3.

11. *Id.*

12. Oil Pollution Act, 33 U.S.C. § 1321(c)(2) (2006).

13. *Id.*

14. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-90R, DEEPWATER HORIZON OIL SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES, at 1 (Nov. 12, 2010) (“The U.S. Coast Guard’s National Pollution Funds Center (NPFCC) designated two BP subsidiaries - BP Exploration and Production and its guarantor, BP Corporation

facility includes “the lessee or permittee of the area in which the facility is located.”¹⁵ BP’s status as a “responsible party” was clear from the outset, and BP accepted that responsibility.¹⁶ In addition, on May 15, 2010, Secretary Napolitano and Secretary Salazar sent a letter to BP’s CEO, Tony Hayward, reiterating that as a responsible party, BP is accountable for the cleanup of the spill and all the economic loss caused by the spill.¹⁷ OPA 90 makes the responsible party not only responsible for “removal” costs, penalties, and damages, but also makes that party subject to orders of the Coast Guard to take remedial action to contain the spill and conduct removal operations.¹⁸ While the Coast Guard may not have among its personnel technicians skilled in the arts of deepwater drilling, the Coast Guard has authority under OPA 90 to requisition equipment and skilled personnel from private industry, including the responsible party, and put them to work in responding to the blowout.¹⁹ Consistent with OPA 90, BP remained on site throughout the duration of the spill, albeit its personnel were assisted by other personnel assigned by the Coast Guard, and BP carried out the Coast Guard’s directions in bringing the blowout under control.

The tension in the relationship between the government and BP was addressed in the reports of the President’s Commission.²⁰ The responsible party is, on the one hand, made liable for damages caused by the spill and is subject to civil and criminal penalties, and, at the same time, is often required to work under federal direction to bring the spill under control and conduct clean-up and remediation operations. That the responsible party is both an adversary and a partner may be confusing to the general public but is a direct result of the incongruent obligations imposed by OPA 90.

At the core of OPA 90’s approach to oil spill containment and response is the National Contingency Plan (NCP).²¹ The NCP establishes an organizational structure with national, regional, state, and local components, and integrates the responsibilities of sixteen federal agencies and state and local governments.²² The purpose of this structure is to create a “unified command system” that involves the responsible party “to achieve an effective and efficient response.”²³ The NCP pre-designates a National Response Team, Regional Response Teams,

North America, Inc. - and five other companies as “Responsible Parties” for *Deepwater Horizon* oil spill related claims.”).

15. 33 U.S.C. § 2702(a). An offshore facility is defined in 33 U.S.C. § 2701(32)(C).

16. If a designated party refuses to accept responsibility and is, after investigation, determined to be responsible for the spill, then additional penalties can be invoked for failure to accept responsibility, including liability for up to three times the cost of the federal response and clean up. Oil Pollution Act of 1990 § 4201, 33 U.S.C. § 2704(c)(2).

17. *Drilling Down on America’s Energy Future: Safety, Security, and Clean Energy, Hearings Before the Subcomm. on Energy and Env’t, H. Comm. on Energy and Commerce*, 111th Cong. 3 (2010) (Attachment A – Chronology of Deepwater Horizon Events) [hereinafter *Hearings*].

18. 33 U.S.C. § 2702.

19. *Id.* § 1321(c)(2)(B).

20. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *Decision Making Within the Unified Command* 10-16 (Staff Working Paper No. 2, Oct. 6, 2010), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Unified%20Command%20Working%20Paper.pdf> [hereinafter NAT’L COMM’N].

21. 33 U.S.C. § 1321(d); 40 C.F.R. pt. 300, subpt. D (2010).

22. 40 C.F.R. § 300.175(b) (2010).

23. *Id.* § 300.105(d).

an On-Scene Coordinator, a Unified Area Command, a National Incident Commander, and Area Committees.²⁴ The Unified Area Command includes a federal On-Scene Coordinator, a state On-Scene Coordinator, and the responsible party, and in the event of an oil spill, the federal On-Scene Coordinator takes charge of the Unified Area Command to orchestrate the appropriate response. If a spill is classified to be of “national significance,” then a National Incident Commander takes over. Area Committees develop area contingency plans, and Regional Response Teams develop plans for a regional response.²⁵

After an oil spill, the following sequence of events occurs under the NCP. First, the party discovering the spill notifies the National Response Center (NRC).²⁶ Second, the NRC informs the federal On-Scene Coordinator.²⁷ Third, the federal On-Scene Coordinator investigates the spill and coordinates and directs all containment and removal actions at the site.²⁸ Fourth, if the federal On-Scene Coordinator so elects, a responsible party may be directed to conduct containment and removal activity subject to oversight by the federal On-Scene Coordinator.²⁹

The Coast Guard’s initial response to the BP blowout was handled by its On-Scene Coordinator, Captain Joseph Paradis, who set up an Incident Command Post in Houma, Louisiana.³⁰ When the Unified Command was activated, Admiral Mary Landry became the On-Scene Coordinator, and a second Incident Command Post was opened at BP offices in Houston, Texas.³¹ On April 29, nine days into the event, the Coast Guard designated the incident a “Spill of National Significance,” created a National Incident Command (NIC), and named Admiral Thad Allen as National Incident Commander.³² On June 1, 2010, a third Incident Command Post was opened at Mobile, Alabama.³³

The media’s confusion over who was in charge seems largely generated by the fact that BP remained involved throughout the response efforts and shared offices with the Incident Command Posts. Nevertheless, government employees insist that the Coast Guard was actually in charge at all times.³⁴ Within the Unified Command Structure, “BP had decision makers in multiple locations,” and Coast Guard members and BP employees worked side by side.³⁵ BP controlled access to the wellhead, operated the remotely operated vehicles (ROVs) required for deepwater operations, and controlled the movement of vessels in the area above the wellhead.³⁶ BP also took the lead in containment

24. 33 U.S.C. § 1321(d)(2); 40 C.F.R. pt. 300, subpt. D (2010).

25. 40 C.F.R. § 300.120.

26. *Id.* § 300.300(b).

27. *Id.* § 300.300(d).

28. *Id.* § 300.305(b).

29. *Id.* § 300.305(d).

30. NAT’L COMM’N, *supra* note 20, at 4.

31. *Id.* (Initially assigned personnel were subsequently changed.).

32. *Id.* at 4-5.

33. *Id.* at 4.

34. *Id.* at 8.

35. NAT’L COMM’N, *supra* note 20, at 12.

36. *Id.*

efforts, including unsuccessful attempts to activate the blowout preventer using ROVs, failed efforts to stop the leak using a cofferdam, “top hat” and “junk shot,” and the finally successful containment dome emplaced on July 15, 2010.³⁷

Because the Coast Guard’s clean-up expertise is limited to water surface impacts, the Coast Guard relied on BP and experts recruited from other companies.³⁸ When early containment efforts proved unsuccessful, Deputy Secretary of the Interior David Hayes, Energy Secretary Steven Chu, and scientists from the National Laboratories and Geological Survey became involved.³⁹ Throughout, the Coast Guard asserts it maintained control through its On-Scene Coordinator and National Incident Commander.⁴⁰ BP remained onsite at the Macondo well, and under Coast Guard supervision and direction, capped the well on July 15, 2010, and completed on September 19, 2010, cementing of the bottom of the Macondo well using a relief well.⁴¹ BP’s exercise of responsibility, under Coast Guard supervision, for the efforts to bring the blowout under control is entirely consistent with OPA 90’s response and containment apparatus.

B. *Why Was the Government Slow to Respond?*

OPA 90 was intended to create a comprehensive oil spill response and containment network that would quickly and effectively respond to any type of oil spill.⁴² The Macondo blowout was the first major incident of national significance to test this network since OPA 90’s enactment, and the media complained that the government was slow to respond.

Media complaints that the government was slow to respond appear to be overstated. “Though some of the command structure was put in place very quickly, in other respects the mobilization of resources to combat the spill seemed to lag.”⁴³ The On-Scene Coordinator responded immediately. Coast Guard vessels were on scene on the day of the blowout to respond to the explosion and fire, and on the next day, April 21, 2010, the federal On-Scene Coordinator was designated and a Regional Response Team activated.⁴⁴ While it took ten days to elevate the spill to “national significance,” by mid-May “the Coast Guard was fighting a war against the oil. They built out the organizational structure for the response, and they moved resources into the area from all over the country.”⁴⁵ In commenting on the task of rescuing injured birds, Audubon Magazine, an institution not reticent in finding fault with the government, indicated that the Coast Guard was quick to respond, competent, and dedicated.⁴⁶

37. *Id.* at 13.

38. *Id.* at 14-15.

39. *Id.*

40. *Id.* at 13.

41. David A. Fahrenthold & Steven Mufson, *After Months of Trying, BP’s Macondo Oil Well Finally Dead*, WASH. POST, Sept. 18, 2010, available at <http://bp.concerts.com/gom/johnwright092110.htm>.

42. S. REP. NO. 101-94, at 3, 10 (1989).

43. NAT’L COMM’N, *supra* note 20, at 5.

44. *Hearings*, *supra* note 17, at 1.

45. NAT’L COMM’N, *supra* note 20, at 6.

46. Ted Williams, *Black Bayou*, AUDUBON MAG., Sept./Oct. 2010, at 62.

An explanation for the lag in mobilizing a national effort lies in the gross understating of the magnitude of the spill in its very earliest stages. BP reported initially that the spill was a mere 1,000 barrels per day, then increased that estimate to 5,000 barrels per day.⁴⁷ Experts with Columbia's Lamont-Doherty Earth Observatory reported that as early as May they were able, using reliable techniques, to estimate from video of the blowout a flow rate of 40,000 to 60,000 barrels per day, ten times greater than what BP was stating.⁴⁸ This was the rate ultimately determined by the official federal estimate.⁴⁹ BP's low ball initial estimates undoubtedly delayed the Coast Guard's elevating the spill to "national significance" and organizing the massive response required for such a large spill.⁵⁰

C. *Why Did It Take So Long to Stop the Spill?*

The reason it took so long to stop the spill is that there was no capability in place to do so, despite the existence of contingency plans for that very purpose. The NCP requires that each offshore drilling facility have in place, prior to drilling, a facility-specific oil spill response plan.⁵¹ That plan is supposed to be the principal tool for containing any spill. BP's response plan was wholly inadequate.

The NCP regulations adopted to implement OPA 90 require that:

[A]n offshore facility . . . that, because of its location, could reasonably expect to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or exclusive economic zone must prepare and submit a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.⁵²

The NCP regulation cross references a Department of the Interior (DOI) regulation, which sets forth detailed requirements for facility specific response plans for offshore oil rigs.⁵³ DOI's regulations in turn require that if you operate an oil rig seaward of the coastline, you must file with the Mineral Management Service (MMS)⁵⁴ for approval a spill response plan, and "[y]our spill-response plan must demonstrate that you can respond quickly and effectively whenever oil is discharged from your facility."⁵⁵ The general requirements for the response plan are:

(a) The response plan must provide for response to an oil spill from the facility. You must immediately carry out the provisions of the plan whenever there is a release of oil from the facility. You must also carry out the training, equipment

47. Lea Winerman, *Report: Government Underestimated, Underreported Oil Spill Size*, PBS.ORG NEWSHOUR, Oct. 6, 2010, available at <http://www.pbs.org/newshour/rundown/2010/10/report-federal-government-underestimated-underreported-oil-spill-size.html>.

48. Michael B. Shavelson, *Oil + Water*, COLUMBIA MAG., 2010, at 29, available at <http://magazine.columbia.edu/features/fall-2010/oil-water>.

49. See Borenstein, *supra* note 6; Achenbach, *supra* note 6.

50. NAT'L COMM'N, *supra* note 20, at 6-7, 10.

51. 33 U.S.C. § 1321(j)(5) (2006).

52. 40 C.F.R. § 300.211 (2010).

53. *Id.* § 300.211(b).

54. MMS has since been reorganized, with most of its functions assumed by the Bureau of Ocean Energy Management, Regulation and Enforcement.

55. 30 C.F.R. § 254.1(a).

testing, and periodic drills described in the plan, and these measures must be sufficient to ensure the safety of the facility and to mitigate or prevent a discharge or a substantial threat of a discharge;

(b) The plan must be consistent with the National Contingency Plan and the appropriate Area Contingency Plan(s);

(c) Nothing in this part relieves you from taking all appropriate actions necessary to immediately abate the source of a spill and remove any spills of oil.⁵⁶

The DOI regulations address equipment, maintenance of equipment, personnel, training of personnel, and periodic exercises to test the personnel and equipment.⁵⁷ The rig operator must identify the worst case spill, the natural and environmental resources threatened by a worst case spill, and detailed steps to contain a worst case spill. For example, the response plan must include:

A description of the response equipment that you will use to contain and recover the discharge to the maximum extent practicable. This description must include the types, location(s) and owner, quantity, and capabilities of the equipment. You also must include the effective daily recovery capacities, where applicable. You must calculate the effective daily recovery capacities using the methods described in § 254.44. For operations at a drilling or production facility, your scenario must show how you will cope with the initial spill volume upon arrival at the scene and then support operations for a blowout lasting 30 days.⁵⁸

The response plan is required to be tested periodically with drills and exercises, and is required to be formally reviewed and updated every two years.⁵⁹

Much was made in Congressional hearings of the fact that the Gulf of Mexico deepwater contingency plans of all of the major oil companies were boilerplate copied from plans designed for use in the Arctic, including references to walrus as potentially affected species.⁶⁰ However, that was not the only problem with the plans.⁶¹ While BP was required to identify a worst case spill from each specific rig and list the equipment and personnel that would be employed to contain such a spill, the response plan does not do that. Its focus is regional, and it is not specific for any particular rig or type of incident. BP's response plan claims that BP had the ability to respond to a blowout of 250,000 barrels per day, more than four times the reported maximum discharge from the

56. *Id.* § 254.5. If a rig operator has submitted a plan and is awaiting approval, he may operate the rig in advance of approval but only if he certifies in writing that he has:

[T]he capability to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such a discharge. The certification must show that [he has] ensured by contract, or other means approved by the Regional Supervisor, the availability of private personnel and equipment necessary to respond to the discharge. Verification from the organization(s) providing the personnel and equipment must accompany the certification.

Id. § 254.2(b).

57. *Id.* § 254.4.

58. *Id.* § 254.26(d)(1).

59. *Id.* §§ 254.30, 254.42.

60. *Drilling Down on America's Energy, Hearings Before the Subcomm. on Energy and Env't, H. Comm. on Energy and Commerce*, 111th Cong. 11-12 (June 15, 2010) (statement of Rep. Henry Waxman, Chairman, H. Comm. on Energy and Commerce), available at <http://democrats.energycommerce.house.gov/documents/20100615/Waxman.Statement.ee.06.15.2010.pdf>.

61. BP's Response Plan, approved in 2000, is posted on the Department of Interior's website. See BP Gulf of Mexico Regional Oil Spill Response Plan (Dec. 1, 2000), http://www.boemre.gov/DeepwaterHorizon/BP_Regional_OSRP_Redactedv2.pdf [hereinafter *BP Plan*].

Macondo blowout.⁶² Yet nowhere does the plan specifically describe how it would handle such a spill. The plan refers generally to equipment available to BP,⁶³ and appends a list of equipment located in the region, but does not describe how specific equipment would be employed to meet a worst case spill from the Deepwater Horizon. BP's response plan claims to have contracts with Marine Spill Response Corporation and National Response Corporation (NRC) for spill response equipment, and that contractors would organize spill removal,⁶⁴ but details on specific types of spills are lacking. The plan states:

NRC has oil spill response equipment located throughout the Gulf Coast area. Much of the equipment is in road-ready condition and available to be transported on short notice to the nearest predetermined staging areas(s). The "road-ready condition" ensures the shortest possible response times for transporting equipment to the staging areas. Major equipment locations for NRC can be found in Figure 14-1.⁶⁵

While listed equipment includes skimmers, remotely operated submersibles of the type used to eventually cap the blowout are not mentioned. In responding to the Macondo blowout, it quickly became apparent that BP was not prepared to contain such a large blowout in deep water. The equipment and personnel required for containment had to be assembled after the fact, and were drawn from locations spread around the world.⁶⁶

BP's board chairman was questioned by the Presidential Commission about the inadequacy of its contingency plan. The following exchange was reported by Associated Press:

Graham[]: "Why was there a gap between what BP said it would do and what it could actually deliver in a spill?"

Suttles: "It's hard for me to go back in time and understand what people were thinking at the time." He said no one anticipated a well that would flow for weeks on end at "significant rates." Now, however, the company has systems that have been developed since the April 20 blowout that could be applied to other deep-water wells.

Graham: "Do you think that now your company can live up to the permit representations that it made as to its ability to respond?"

Suttles: "I think what's been clear is that we have demonstrated that we can contain uncontrolled flow in this particular well What we need to do is see about how

62. *Drilling Down on America's Energy, Hearings Before the Subcomm. on Energy and Env't, H. Comm. on Energy and Commerce*, 111th Cong. 12-13 (June 15, 2010) (statement of Rep. Henry Waxman, Chairman, H. Comm. on Energy and Commerce).

63. *BP Plan*, *supra* note 61, § 4, at 3.

64. *Id.* § 14, at 1.

65. *Id.*

66. The conclusion of the Presidential Commission on containment is as follows:

The containment story thus contains two parallel threads. First, on April 20, the oil and gas industry was unprepared to respond to a deepwater blowout, and the federal government was similarly unprepared to provide meaningful supervision. Second, in a compressed timeframe, BP was able to design, build, and use new containment technologies, while the federal government was able to develop effective oversight capacity. Those impressive efforts, however, were made necessary by the failure to anticipate a subsea blowout in the first place.

NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *Stopping The Spill: The Five-Month Effort To Kill The Macondo Well 1* (Staff Working Paper No. 6, Nov. 22, 2010), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Containment%20Working%20Paper.pdf>.

adaptable is that current capability to all the situations across the Gulf of Mexico.”⁶⁷

The primary problem with BP’s contingency plan was that it did not address what specific technology would be needed or available to respond to a deepwater blowout. Instead, it repeatedly emphasized that such a spill was unlikely, and that if it were to occur, environmental damage would be minimal because the well was forty-eight miles from shore.⁶⁸ If the Macondo blowout revealed a weakness in the comprehensive response and containment system created by OPA 90, it was the weakness of not properly implementing the NCP contingency planning elements at the lowest levels, not weakness in the regulatory structure itself. BP’s response plan was simply inadequate. The regulations required that BP be prepared to contain a worst case spill, but BP failed to meet the requirements of the regulations. BP CEO Tony Hayward admitted that BP “did not have the tools you would want in your tool-kit” and “it was entirely fair criticism to say BP dropped the ball when it came to planning for a major oil leak.”⁶⁹ This has a familiar ring, as it was the same complaint voiced after the Exxon Valdez spill and one of the principal deficiencies that OPA 90 was designed to correct.⁷⁰

The Presidential Commission investigating the BP spill concluded that mistakes by three major companies were responsible for the blowout, and the contingency plans of all the major oil companies were inadequate.

Our investigative team concluded that three major companies were fully implicated in the catastrophe and our staff further reported that other companies had no effective containment preparations and laughable response plans that promised to look out for any polar bears or walruses that happened on to the scene. The poor state of containment and response plans and capability in the Gulf of Mexico is indisputable evidence of a widespread lack of serious preparation, of planning, of management.

67. Joel Achenbach, *Oil Spill Commission Questions BP’s Response Plan*, WASH. POST, Sept. 27, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092703107.html?sid=ST2010100603343>.

68. *BP Didn’t Plan for Major Oil Spill*, ASSOCIATED PRESS, Apr. 30, 2010, available at <http://www.cbsnews.com/stories/2010/04/30/national/main6449241.shtml>. The Presidential Committee concluded that provisions in OPA 90 for research into containment and response technology had been grossly underfunded, and private industry did very little research in this area. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *Response/Clean-Up Tech. Research & Dev. & The BP Deepwater Horizon Oil Spill* (Staff Working Paper No. 7, Nov. 22, 2010), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Response%20RD%20Working%20Paper.pdf>.

69. *Hearings*, *supra* note 17, at 5.

70. Randle, *supra* note 9, at 12. Congressman Chafee, a sponsor of the OPA 90 bill, asserted that contingency plans for Exxon Valdez “were not worth the paper they were written on.” 136 CONG. REC. S11537 (Aug. 2, 1990). To address this problem provisions were included in OPA 90 to require periodic review and updating of response plans and periodic inspection and testing of equipment and personnel. H.R. Rep. No. 101-241, at 30, 42 (1989).

71. Press Release, *Nat’l Comm’n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Opening Remarks by Co-Chairmen William K. Reilly and Senator Bob Graham from Dec. 2 Deliberative Meeting* (Dec. 2, 2010), available at <http://www.oilspillcommission.gov/page/opening-remarks-co-chairmen-william-k-reilly-and-senator-bob-graham-dec-2-deliberative-meeting>. The Commission on January 6, 2011, issued its key findings in advance of its final report, due January 11, 2011, which reiterate that “the Macondo blowout was the product of several individual missteps and oversights by BP, Halliburton, and Transocean, which government regulators lacked the authority, the necessary resources, and the technical expertise to

Nine “overarching” management decision failures by BP, Halliburton, and Transocean are identified as causing the blowout, with BP responsible for seven and implicated in two.⁷² Lax federal oversight by the Minerals Management Service at the time the plans were filed was also a major factor.⁷³ The report states that:

[E]fforts to expand regulatory oversight, tighten safety requirements, and provide funding to equip regulators with the resources, personnel, and training needed to be effective were either overtly resisted or not supported by industry, members of Congress, and several administrations. As a result, neither the regulations nor the regulators were asking the tough questions or requiring the demonstration of preparedness that could have avoided the Macondo disaster.⁷⁴

The MMS for years preceding the blowout had been in bed with the industry it was supposed to regulate, and failed to insure that response plans met the requirements of its regulations.⁷⁵

Problems with the Regional and Area Plans also surfaced during the efforts to contain the spill. While state participation is integrated into the NCP planning and command structure through these plans, in reality the state and local governments in some respects either refused to acknowledge the NCP plans or chose instead to seek federal relief outside the NCP structure. Governors of the Gulf States requested and received declarations of emergency disasters under the Stafford Act administered by the Federal Emergency Management Agency (FEMA).⁷⁶ The FEMA authority provides money to state agencies, which then are responsible for disbursement. This produced state and local actions that sometimes operated at cross purposes with the NCP-authorized activities and created further confusion concerning the adequacy of response efforts.

D. Is There a Cap on BP's Liability?

The media widely publicized OPA 90's \$75 million cap on liability for offshore spills and aired promises of politicians to amend the law to remove the cap. However, the media never closely examined how OPA 90's liability cap applied in this situation. In fact, under the facts of this case, there is no cap on BP's liability.

While section 1004(d) of OPA 90 contains a limit on liability of \$75 million for spills from offshore facilities, the cap applies on its face only to damages and

prevent.” Press Release, *Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Comm'n Releases Chapter on BP Well Blowout Investigation in Advance of Full Rep.* (Jan. 6, 2011), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Advance%20Chapter%20on%20BP%20Well%20Blowout%20Investigation%20Released.pdf>.

72. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 122-126 (Jan. 11, 2011).

73. *Id.* at 126-127. See also Ian Urbina, *Inspector General's Inquiry Faults Regulators*, N.Y. TIMES, May 24, 2010, available at <http://www.nytimes.com/2010/05/25/us/25mms.html>.

74. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *supra* note 72, at 126.

75. See Urbina, *supra* note 73.

76. 42 U.S.C. §§ 5121-5206 (2006); 44 C.F.R. §§ 206.1-206.440 (2010); NAT'L COMM'N, *supra* note 20, at 18-20.

not to removal costs.⁷⁷ Hence, all of the costs incurred by the federal government and by state and local governments to remove and clean up the oil are not subject to the cap.⁷⁸ BP is strictly liable for these removal costs.⁷⁹ In addition, OPA 90 does not preempt state law, so that private damage claims arising under state law are not subject to the \$75 million cap. Finally, OPA 90's cap on damages does not apply if there was gross negligence, willful misconduct, or a violation of a federal safety regulation pertaining to the construction or operation of the facility by the responsible party.⁸⁰ Press reports and evidence heard at congressional hearings have detailed a number of regulatory violations by BP management.⁸¹ These are highlighted in the Report of the Presidential Commission, as noted above. BP's drilling partner, Anadarko, has called BP's management reckless and grossly negligent, and other major oil companies have distanced themselves from BP.⁸² Given these facts, it is perhaps not surprising that BP informed the court in the consolidated district court proceedings that it was voluntarily waiving the \$75 million cap.⁸³

77. 33 U.S.C. § 2704(a)(3) (2006).

78. 33 U.S.C. § 2702(a). Removal costs include all costs incurred in response to a spill, including: [C]ontainment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

Id. §§ 2701(30), (31).

79. *Id.* § 2702(a).

80. *Id.* § 2704(c).

81. See, e.g., *Hearings, supra* note 17; Jad Mouawad, *BP Has a History of Blasts and Oil Spills*, N.Y. TIMES, May 8, 2010, available at <http://www.nytimes.com/2010/05/09/business/09bp.html?pagewanted=all>; David Hammer & Dan Shea, *Safety Fluid Was Removed Before Oil Rig Exploded*, TIMES-PICAYUNE, May 6, 2010, available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/safety_fluid_was_removed_befor.html. "On the morning of April 20, the crew from Transocean (the owner of the rig), over the strong objections of their own drilling superintendent, was ordered by BP to take the heavy drilling mud out of the drill pipe and replace it with seawater. That was the triggering event . . ." Michael B. Shavelson, *Oil + Water*, COLUMBIA MAG., Fall 2010, at 27. In testimony before the joint Coast Guard/Bureau of Ocean Management investigatory panel, Halliburton engineer Jesse Gagliano stated that he had "recommended that BP use 21 centralizers to keep the casing properly positioned. But even though an additional 15 centralizers were flown to the rig, BP chose not to use them. The cementing job proceeded with six." And, "Transocean subsea superintendent William Stringfellow Jr., when asked about federal regulation governing [blowout preventer] maintenance, testified, 'I would say that it's probably out of compliance with the regulation.'" Juliet Eilperin & Mary Pat Flaherty, *Top Obama Adviser's Input on Drilling Plan Limited*, WASH. POST, Aug. 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/25/AR2010082507021.html>. A defective blowout preventer manufactured by Cameron International, and faulty well cementing performed by Halliburton Energy Services were other culprits identified as being responsible for the spill. Matthew Mosk, *BP Oil Spill: As Companies Point Fingers at Each Other, New Concerns About Blowout Preventer*, ABCNEWS.COM, May 12, 2010, <http://abcnews.go.com/Blotter/bp-oil-spill-companies-point-fingers-concerns-blowout/story?id=10627599>.

82. Joel Achenbach & David Hilzenrath, *From Series of Missteps to Calamity in the Gulf; Investigators Believe that BP Cut Corners*, WASH. POST, July 25, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/24/AR2010072402594.html>; John M. Broeder & Jad Mouawad, *Oil Execs. Break Ranks in Testimony*, N.Y. TIMES, June 16, 2010, at A20; Christopher Swann, *Anadarko Hopes Blame Is Pinned on BP*, N.Y. TIMES, June 22, 2010, available at <http://www.nytimes.com/2010/06/22/business/22views.html>.

83. *BP Waiving \$75 Million Cap for Some Oil Spill Claims*, WASH. POST, Oct. 18, 2010, available at http://blog.al.com/wire/2010/10/bp_waiving_75_million_cap_for.html.

E. Why Was BP's Permission Required for Private Clean-Up Efforts?

Media coverage expressed frustration with the need of private parties to obtain approval from BP or the Coast Guard to participate in clean-up efforts, and for the slow pace of approval. The private parties seeking to help were often local watermen whose livelihoods were at stake, and who had the knowledge and resources to help. The reason for BP approval, or Coast Guard sanction, of private clean-up efforts is that OPA 90 makes BP liable for all oil removal costs incurred by governmental entities, but not necessarily those of private entities. Private entities can be recruited and employed as part of the responsible party's contingency plan, and in that respect BP would not only pay for their costs, but would control what they do. To be part of the BP contingency response plan they would have to be approved in advance by BP, or recruited after the fact to participate in the plan by BP. Alternatively, private efforts can be incorporated into a federal, state, or local government clean up and removal effort, allowing the government to pay the private parties and thereafter be reimbursed by BP, but again the efforts would have to be under the control of a governmental entity, part of its official clean up response, and consistent with the NCP.⁸⁴ Absent sanction by a governmental entity or by BP, a private party assisting the clean up might seek to recover its costs from BP as damages, but the claim would have to be filed after the costs were incurred, and would be subject to challenge by BP.⁸⁵

Furthermore, many of the voluntary efforts could not be effectively utilized. For example, the U.S. Fish and Wildlife Service, working with its Louisiana counterpart and Audubon naturalists, had sufficient personnel to perform the demanding job of rescuing, cleaning, and releasing oiled birds, but could not use hundreds of untrained volunteers seeking to assist.⁸⁶ Local officials, unfamiliar with the Area Committees and Unified Command structure, demanded action not contemplated by the NCP response plan and complained when their demands were not met.⁸⁷ This ultimately led to efforts that were funded through FEMA grants outside the NCP structure that were counterproductive to the NCP-sanctioned activities, including the deployment of booms in inappropriate areas and the construction of berms.⁸⁸

F. To What Penalties Is BP Subject?

OPA 90 provides an array of civil and criminal penalties to which a responsible party is potentially subject. Administrative penalties that can be assessed by the Coast Guard include Class I civil penalties of \$10,000 per violation, and Class II civil penalties of \$25,000 per day up to a maximum of \$125,000.⁸⁹ Civil penalties that can be assessed by court action on a strict liability basis⁹⁰ include \$25,000 per day of violation, or \$1,000 per barrel of oil

84. Parties seeking reimbursement for removal expenses from the Oil Spill Liability Trust Fund must meet narrowly interpreted regulations showing that their efforts are consistent with the NCP. *Gatlin Oil Co. v. United States*, 169 F.3d 207, 210-11 (4th Cir. 1999).

85. *Id.*

86. Williams, *supra* note 46, at 63.

87. NAT'L COMM'N, *supra* note 20, at 19-20.

88. *Id.* at 20-22.

89. 33 U.S.C. § 1321(b)(6) (2006).

90. *City of Phila. v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

discharged, or on proof of gross negligence or willful misconduct, not less than \$100,000 and not more than \$3,000 per barrel of oil discharged.⁹¹ Criminal penalties can also be assessed against responsible organizations and individuals, including a fine of \$25,000 plus one year in prison for negligence, and a \$50,000 fine and up to three years in prison for a knowing violation. For a violation that amounts to knowing endangerment, a fine of up to \$250,000 for an individual and \$1,000,000 for an organization, and a prison term of not more than fifteen years are authorized.⁹² Each day of violation is considered a separate offense.

The Justice Department has initiated an investigation to determine whether to bring criminal charges in connection with the BP spill.⁹³ The criminal investigation is focusing on BP, Transocean, and Halliburton,⁹⁴ but the Department has not officially announced who it intends to charge or what criminal penalties it will seek. The report of the Deepwater Horizon Joint Investigation, which should detail what civil fines will be assessed against BP and others, was not available at the time this article was written. On December 16, 2010, the Justice Department filed a civil complaint against BP and eight other companies in the United States District Court in New Orleans, where it will undoubtedly be included among the consolidated cases pending before Judge Barbier.⁹⁵ In this action, the United States seeks to assess civil penalties and to recover damages under the Clean Water Act and OPA 90 for costs of the clean up and damages to natural resources. The complaint demands that civil penalties be assessed in an amount “of up to \$1,100 per barrel of oil that has been discharged or up to \$4,300 per barrel of oil that has been discharged, to the extent that the discharge of oil was the result of gross negligence or willful misconduct.”⁹⁶ Without stating an explicit amount of damages, the complaint asserts that damages exceed \$75 million, and that BP has waived the \$75 million liability cap under OPA 90.⁹⁷

Considering that oil was spewing into the Gulf at a rate of some 60,000 barrels per day from April 20 until July 15, 2010, the per barrel civil penalties and per day criminal violations amount to a huge liability. At 4.4 million barrels, which is the current estimate of the total size of the spill, the civil penalty of \$3,000 per barrel could exceed \$13.2 billion if a gross negligence standard is used. Furthermore, a corporation convicted of a criminal penalty could lose its right to bid on any contracts with the U.S. government,⁹⁸ and the Secretary of the Interior has authority under the Outer Continental Shelf Lands

91. 33 U.S.C. § 1321(b)(7).

92. 33 U.S.C. § 1319(c).

93. Jerry Markon, ‘BP Squad’ Assembles to Probe Oil Spill; Criminal Inquiry to Focus on Three Firms and Their Ties to Regulators, WASH. POST, July 28, 2010, at A1.

94. Jerry Markon, BP, 8 Other Companies Sued by Justice Department over Gulf Oil Spill, WASH. POST, Dec. 16, 2010, at A6.

95. *Id.*

96. United States v. BP Am. Exploration & Prod. Inc., No. 2:10-cv-04536-CJB-SS ¶ 75 (E.D. La. filed Dec. 15, 2010).

97. *Id.* ¶ 90.

98. 31 U.S.C. § 6101.11(a) (2006); *see also* Exec. Order No. 12,549, 30 Fed. Reg. 6370 (1986); Exec. Order No. 12,689, 54 Fed. Reg. 34131 (1989); 48 C.F.R. § 9.404 (2010).

Act to cancel BP's lease if he finds that BP has violated Outer Continental Shelf (OCS) regulations or the terms of its lease.⁹⁹

G. What Damages Will BP Have to Pay?

Damages that BP will have to pay, in addition to the previously mentioned civil and criminal penalties, include removal costs incurred by federal, state, and local governments, personal injury and property damage claims now pending in the consolidated law suits, and resource damage claims that will be assessed by federal and state governments as trustees for the damaged natural resources. The total cost to BP in penalties and damage claims will be very large. An article published in the New York Times estimated that total costs to BP, including civil and criminal penalties, could exceed \$60 billion.¹⁰⁰

Removal costs,¹⁰¹ while capped under the Clean Water Act at \$50,000,000,¹⁰² are not capped under OPA 90, which states:

Notwithstanding the limitations established under subsection (a) of this section and the defenses of section 2703 of this title, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.¹⁰³

BP will accordingly be responsible for all costs incurred to remove oil from the water and shorelines of the Gulf States.

Personal injury and economic damage claims are not preempted by OPA 90.¹⁰⁴ Such claims are proceeding under state and federal law in the consolidated federal court actions in New Orleans.¹⁰⁵ They include eleven

99. 43 U.S.C. §§ 1334(a)(2), (c) & (d) (2006) provide authority to cancel leases, subject in certain cases to the lessee's right to receive compensation for the value of the canceled lease. The Secretary's authority to suspend leases in order to protect natural resources was recognized in the aftermath of the Santa Barbara blowout, *Gulf Oil Corp. v. Morton*, 493 F.2d 141 (9th Cir. 1973), but the courts also held that if the suspension effectively canceled the lease, then compensation for a taking would be owed. *Sun Oil Co. v. United States*, 572 F.2d 786 (1978).

100. John Schwartz, *With Criminal Charges, Costs to BP Could Soar*, N.Y. TIMES, June 16, 2010, available at <http://www.nytimes.com/2010/06/17/us/17liability.html>.

101. OPA 90 broadly defines removal costs. Section 1001 states:

(30) 'remove' or 'removal' means containment and removal of oil or a hazardous substance from water and shore-lines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches; (31) 'removal costs' means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.

33 U.S.C. §§ 2701(30), (31).

102. *Id.* § 1321(f)(3).

103. *Id.* § 2704(c)(3).

104. *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973).

105. For the OCS, 42 U.S.C. § 1333 adopts the law of the adjacent state, including tort law, as surrogate federal law for area covered by Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1356(a)) to the extent that the state law is not inconsistent with other federal laws. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986). Courts have held that, under 43 U.S.C. § 1333(a)(2)(A), state law is applicable to fill gaps in federal law, and thus, where Longshoremen's and Harbor Workers' Compensation Act provides a comprehensive

wrongful death claims, numerous claims for personal injury suffered by rig workers and by persons engaged in clean-up efforts, and claims for damages to business interests, including claims by fishermen, persons engaged in tourist related businesses, and other businesses adversely impacted by the spill.¹⁰⁶ BP's liability in these actions will undoubtedly be substantial. In the Exxon Valdez spill, damage claims arising under state law constituted by far the largest liability faced by Exxon.¹⁰⁷

Resource damages are yet another area where BP faces substantial, unknown liability. Section 1006 of OPA 90 makes BP liable to the federal government, state governments, and Indian tribes for damage to natural resources "belonging to, managed by, controlled by, or appertaining to" such entities, which are specifically designated as trustees of such natural resources.¹⁰⁸ In addition, the measure of damages to natural resources is spelled out in the Act. Rather than leaving it up to a court to assign an economic or commodity value for each destroyed resource, OPA 90 requires that the measure of damages be based on: "(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."¹⁰⁹ The trustees are tasked with assessing natural resource damage, and developing plans for rehabilitation and restoration.¹¹⁰

OPA 90 also authorizes disbursements from the Oil Spill Liability Trust Fund, established under the Clean Water Act,¹¹¹ to pay up to \$1 billion for removal costs incurred in response to an oil spill.¹¹² The purpose of the Fund is to pay for NCP-authorized activities and removal costs so that there is no delay in undertaking essential actions to prevent, mitigate, or clean up oil spills. Through subrogation, the Fund is authorized to recover from responsible parties the amounts it pays out.¹¹³ The Fund is an essential response resource, particularly when the responsible party has not been determined, or when the responsible party does not cooperate. In this case, however, BP has acknowledged its status as a responsible party, has agreed to fund a \$20 billion claims fund, and has stated it is willing to pay reasonable and appropriate damage claims.¹¹⁴ Under these circumstances, the Oil Spill Liability Trust Fund may have a less critical role to play, but it still has a role. BP was billed some \$69 million on June 3, 2010, to reimburse the Fund for removal costs incurred as

scheme of rights and remedies, federal not state law applies. *Perron v. Bell Maintenance & Fabricators*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied* 507 U.S. 913 (1993).

106. *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, No. 2:10-MDL-02179-CJB-SS*, 2010 WL 3269206 (E.D. La. Aug. 10, 2010).

107. *In re: Exxon Valdez*, 472 F.3d 600, 619-20 (9th Cir. 2006).

108. 33 U.S.C. §§ 2706(a)-(b).

109. *Id.* § 2706(d)(1).

110. *Id.* § 2706(c).

111. 26 U.S.C. § 9509.

112. 33 U.S.C. § 2712.

113. *Id.* § 2715.

114. *Claims – Gulf of Mexico, BP*, <http://www.bp.com/sectiongenericarticle.do?categoryId=9034722&contentId=7064398> (last visited Jan. 28, 2010).

of that point in time.¹¹⁵ By November 12, 2010, removal costs totaled \$581 million, of which BP had repaid to the Fund \$518 million.¹¹⁶ In a report dated November 12, 2010, the Government Accountability Office (GAO) indicated that required payments from the Fund could exceed \$1 billion for the Macondo blowout, and recommended that Congress amend OPA 90 to allow disbursements from the Fund to exceed the \$1 billion limitation per incident, provided that recovery of disbursed monies from responsible parties can be assured.¹¹⁷

Resource damages, while substantial, will be less than the apocalyptic predictions made in the early days of the blowout. “Due to the nature of the oil and the monumental cleanup effort, visible damage was not as bad as the public imagines or the media have depicted.”¹¹⁸ Of the 4.4 million barrels discharged, the government estimated that BP had removed a quarter (either by recovering or burning the oil), another quarter had evaporated, and a third quarter had been dispersed in the water column. The last quarter remained as slicks on the surface or had washed up on shore.¹¹⁹ Of long-term concern to scientists is the oil dispersed in the water column, the result of BP’s widespread use of chemical dispersants. The deep waters of the Gulf show oxygen depleted zones and a significant reduction in plankton and copepods which scientists attribute to the spill.¹²⁰ By December 31, 2010, most beaches has been cleared of oil, but on shorelines in Louisiana oil residue and tar balls remained buried beneath sand and oyster shells.¹²¹

The National Oceanic and Atmospheric Administration (NOAA), which was delegated the federal government’s trusteeship duties under section 1006 of OPA 90, must perform the natural resource damage assessment. Once this has been completed, NOAA must develop a plan to restore or replace the damaged resources. BP will be expected to pay the costs of the environmental assessment and implementing the restoration plan.

Relatively early in the saga, President Obama persuaded BP to “voluntarily” establish an independent \$20 billion fund to pay damage claims to persons financially injured by the spill.¹²² The fund is being administered by Kenneth Feinberg, and persons whose claims are denied have a right of appeal to a three-person panel.¹²³ The President made clear that the \$20 billion is not a

115. *Hearings*, *supra* note 17, at 5.

116. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-90R, DEEPWATER HORIZON OIL SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES (2010).

117. *Id.*

118. Williams, *supra* note 46, at 63.

119. Joel K. Bourne, Jr., *The Deep Dilemma*, NAT’L GEOGRAPHIC, Oct. 2010, at 52.

120. *Id.* at 50-53.

121. Cain Burdeau, *Coasts Almost Cleared of Oil*, ASSOCIATED PRESS, Dec. 31, 2010, available at <http://www.theeagle.com/business/Coasts-almost-cleared-of-oil>.

122. Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion to Help Victims*, N.Y. TIMES, June 17, 2010, available at <http://query.nytimes.com/gst/fullpage.html?res=9503E5DE143FF934A25755C0A9669D8B63&sec=&spon=&pagewanted=2>.

123. As of February 12, 2011, Mr. Feinberg had paid 168,634 claims totaling \$3.4 billion. Steven Mufson, *BP Fund to Settle More than 2,000 Claims of Damage from Gulf Oil Spill*, WASH. POST, Feb. 12,

cap on liability.¹²⁴ BP also agreed to fund a separate \$100 million pool for oil industry workers laid off during the President's suspension of offshore drilling activities.¹²⁵

H. How Will the Macondo Blowout Affect Deepwater Oil Production?

In addition to protecting the environment, environmental laws serve a secondary purpose of reassuring the public that needed industrial activities can proceed in a safe and environmentally responsible manner. But if, notwithstanding the existence of the national comprehensive oil spill containment and response system erected by OPA 90, major spills can still occur and persist for several months before being brought under control, then one may question whether OPA 90 is adequate. Alternatively, as some environmentalists argue, one might conclude that deepwater oil production is simply too challenging to be allowed to continue because the Macondo blowout ran unabated for three months even with the national comprehensive oil spill containment and response system erected by OPA 90.

In reaction to the blowout, the President immediately ordered the Secretary of the Interior to report within thirty days regarding what measures under the Outer Continental Shelf Lands Act were required to protect public health and safety. The Secretary in a series of actions issued through the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE), suspended deepwater drilling in the Gulf of Mexico, first on May 28, 2010, then again on July 12, 2010.¹²⁶ During the suspension, the BOEMRE Director held a series of public meetings, gathered information from written submissions and from congressional hearings, and on October 1, 2010, he issued his Decision Memorandum for the Secretary, in which he recommended an early lifting of the suspension, subject to the adoption of new safety rules and containment strategies.¹²⁷ Accordingly, the Secretary lifted the moratorium on October 12, 2010, as the new and more stringent regulations were put in place.¹²⁸

2011, at A13, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/11/AR2011021106414.html?nav=emailpage>.

124. *Id.*

125. *Id.*

126. The BOEMRE Director issued his "Safety Report" on May 27, 2010, in response to the President's directive. Based on this report, the Secretary on May 28 suspended drilling activities in the Gulf of Mexico in water deeper than 500 feet. Decision Memorandum for the Secretary from the Director of the Bureau of Ocean Energy Management, Regulation, and Enforcement 1-2 (Oct. 1, 2010), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=64703>. The Secretary's action was immediately challenged by companies in the offshore industry, and on June 22, the U.S. District Court for Louisiana enjoined the suspension. *Id.* The BOEMRE Director continued to study the facts relating to the Macondo blowout and the industry's response to it, and on July 12, 2010, the Secretary issued a new suspension. *Id.* The new suspension was more precisely drafted, and was limited to drilling operations employing blowout preventers. The purpose of the new suspension was to allow time to put in place new safety measures, to develop improved containment response capability for blowouts, and to allow sufficient time for the industry to devote the resources required to contain and clean up the BP spill. *Id.*

127. Decision Memorandum for the Secretary from the Director of the Bureau of Ocean Energy Management, Regulation, and Enforcement 1-2 (Oct. 1, 2010).

Building upon the Safety Report, BOEMRE has prepared three sets of major safety-related standards: (1) Notice to Lessees No. 20 IO-05: Increased Safety Measures for Energy Development on the OCS (the Safety NTL) which was issued on June 8, 2010; (2) the Safety Interim Final Rule, which has

The new regulations tighten standards for well design, blowout preventers, safety certification, emergency response, and worker training.¹²⁹ Those in the industry claim that the spill is “a game changer,” and that it has made the industry far more alert to safety.¹³⁰ Stung by the revelations regarding their response plans, Exxon, Shell, ConocoPhillips, and Chevron have pledged to spend \$1 billion on a Gulf of Mexico response force.¹³¹ BOEMRE concluded that the experience of responding to the Macondo blowout has caused the industry to develop technologies and capabilities that it previously lacked:

It is clear that, due to the experience of gaining control over the Macondo well and a new commitment by industry focused on developing new equipment and systems for well containment, industry and government are better equipped and prepared today to contain an oil well blowout in deepwater than they were at the time of the Deepwater Horizon event or the July 12 suspension decision.¹³²

The Gulf holds some 19% of U.S. proven reserves.¹³³ Offshore oil leasing provided \$5.9 billion to the U.S. Treasury in 2009, \$5.6 billion of which came from the Gulf of Mexico.¹³⁴ Most of the promising prospects in the Gulf lie in deepwater. National policy reflected in the Outer Continental Shelf Lands Act encourages the production of oil from the continental shelf, provided it can be done safely and without unreasonable risk to the environment. Oil exploration and production will undoubtedly continue in the deepwater of the Gulf of Mexico, but it will proceed more carefully and deliberately.

At the same time, the Macondo blowout dramatically changed the political landscape for offshore leasing. In March, shortly before the Macondo blowout, the President had announced that his Administration was opening new areas off the U.S. coast for expanded oil and gas leasing, part of a political overture to obtain backing for comprehensive climate legislation. On December 2, 2010, the Administration canceled that initiative, marking “a sharp political shift . . . in the wake of the massive BP oil spill and the collapse of comprehensive climate

been completed and will be published in the next several days; and (3) the Workplace Safety Rule, which requires operators to develop SEMS programs, which has been completed and will be published in the next several days, with additional enhancements to be added in a supplemental rulemaking. With certain exceptions discussed below, these measures implement the enhanced safety standards recommended by the Safety Report. These new safety standards also address the central safety concerns raised by the *Deepwater Horizon* event.

Id. at 9.

128. Peter Baker, *White House Is Lifting Ban on Deepwater Drilling*, N.Y. TIMES, Oct. 12, 2010, available at <http://thecaucus.blogs.nytimes.com/2010/10/12/white-house-to-lift-ban-on-deep-water-drilling/>. See also Press Release, Dep’t of the Interior, Salazar: Deepwater Drilling May Resume for Operators Who Clear Higher Bar for Safety, Environmental Protection (Oct. 12, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Deepwater-Drilling-May-Resume-for-Operators-Who-Clear-Higher-Bar-for-Safety-Environmental-Protection.cfm>.

129. Decision Memorandum for the Secretary from the Director of the Bureau of Ocean Energy Management, Regulation, and Enforcement 1-2 (Oct. 1, 2010).

130. Steven Mufson, *Concerns About the Big Spill Might Already Be Drying Up*, WASH. POST, Sept. 30, 2010, at AA9.

131. *Id.*

132. *Id.* at 14.

133. *Id.*

134. Bourne, *supra* note 119, at 44.

legislation.”¹³⁵ While the Administration pledged to continue leasing in the deep water of the Gulf of Mexico, areas off the Mid-Atlantic coast were removed from the next five-year leasing plan, and areas in the western Gulf of Mexico and off the western coast of Alaska were subjected to a moratorium on drilling.¹³⁶

Thus, it would appear that the regulatory apparatus created by OPA 90 was insufficient to contain a major blowout caused by deepwater drilling operations. That this was the fault of a failure to abide by and enforce OPA 90’s regulations may well be lost on the general public, or deemed to be not important. In any event, to the extent that comprehensive environmental regulation is intended to inspire confidence that oil exploration and production can proceed responsibly in environmentally sensitive areas, OPA 90 has not succeeded.

III. LEGISLATIVE RESPONSE

The House Committee on Energy and Commerce held ten days of hearings in May, June, and July of 2010, and introduced a bill called the Blowout Prevention Act of 2010.¹³⁷ A companion bill to the House bill was introduced in the Senate,¹³⁸ and the Senate also held hearings. Both bills would repeal the liability limit for offshore spills, and would have made other changes to OPA 90. The House bill was referred to committee, and an entirely different bill emerged and was passed by the House on July 30, 2010.¹³⁹ The Senate bill was not reported out of committee, and the Senate took no action on its own bill or the House bill before the conclusion of the 2010 legislative session.¹⁴⁰

H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act passed by the House, covers an array of energy issues, in addition to sections that would amend OPA 90. Its OPA 90 changes are not insignificant. Section 702(a) would eliminate OPA 90’s \$75 million cap on liability for spills from offshore facilities, and would permit the President to increase other liability caps based on specific findings. The change would be retroactive for “any claim arising from an event occurring before [the] date of enactment, if the claim is brought within the limitations period applicable to the claim.”¹⁴¹ Section 704 of CLEAR would also add human health (including mental health) damages to OPA’s list of recoverable claims, retroactive in the same manner. Similarly, S. 3663 also would remove OPA 90’s liability cap and make other changes in the spill liability regime.

135. Juliet Eilperin & Steven Mufson, *Administration Reverses Offshore Drilling Policy in Eastern Gulf, Atlantic*, WASH. POST, Dec. 2, 2010, at 1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120106675.html>.

136. *Id.* at 16.

137. H.R. 5626, 111th Cong. (2010).

138. S. 3663, 111th Cong. (2010).

139. H.R. 3534, 111th Cong. (2010).

140. Mufson, *supra* note 130, at AA9.

141. Consolidated Land, Energy and Aquatic Resources Act, H.R. 3534, 111th Cong. § 702(b) (2010) (CLEAR). Much of the discussion of CLEAR in this section is based on an article authored by Svend Brandt-Erichsen and Adam Orford. Svend Brandt-Erichsen & Adam Orford, *House Enacts Amendments to Oil Pollution Act, Outer Continental Shelf Lands Act; Measure Awaits Senate Action*, MARTEN LAW (Aug. 2, 2010), available at <http://www.martenlaw.com/newsletter/20100802-house-enacts-amendments>.

To enhance spill prevention, CLEAR would require the Department of the Interior to impose additional safety equipment standards for blowout preventers, and would require independent third-party inspection and certification of blowout preventers. Section 205(a) would require DOI to set performance requirements for cementing and would require mandatory safety and environmental management systems for operations on the OCS. The bill would also impose safety standards and a buy-American standard for vessels operating in conjunction with oil exploration and production from the OCS.

Amendments designed to improve future spill response planning and execution are scattered throughout CLEAR. Offshore facilities would be required to develop response plans for worst-case discharges, which would be subject to governmental review and approval.¹⁴² Methods for responding to worst-case underwater blowouts would have to be studied and evaluated.¹⁴³ Memoranda of Understanding would have to be developed to clarify the responsibilities of the Environmental Protection Agency, Coast Guard, Department of the Interior, and other federal agencies in preventing and responding to spills. Coastal states would be eligible for grants to improve spill response planning.¹⁴⁴ New programs, such as the Offshore Technology Research and Risk Assessment Program and the National Oil and Gas Health and Safety Academy, would be developed to focus on prevention and response.

CLEAR also would create a “Gulf of Mexico Restoration Task Force” to include governors of the Gulf Coast States and federal agency heads, tasked with creating a “comprehensive, multi-jurisdictional plan for long-term restoration of the Gulf of Mexico,”¹⁴⁵ followed by annual reports to Congress. The National Oceanic and Atmospheric Administration would be required to establish a “comprehensive marine environmental monitoring and research program for the marine and coastal environment of the Gulf of Mexico,” to last at least ten years.¹⁴⁶ NOAA would monitor the fate of oil released during the Deepwater Horizon spill, and of the dispersants applied to break up the oil, as well as identify environmental impacts.

Section 205(a)(4) of CLEAR would authorize the cancellation of leases and permits if, after a hearing, it is concluded that a spill has occurred and “the threat of harm or damage will not disappear or decrease to an acceptable extent within 30 days.”¹⁴⁷ In direct response to the Deepwater Horizon accident, the CLEAR Act would preclude bidding on leases, easements, or rights-of-way by parties who had failed to meet their “obligations under [OPA] to provide compensation for covered removal costs and damages;” or had, in the previous seven years, committed “willful or repeated” Occupational Safety and Health Administration (OSHA) violations five times higher than industry average; had been convicted of a crime involving death or serious bodily injury; had more than ten fatalities at its facilities “as a result of violations of Federal or State health, safety, or

142. Consolidated Land, Energy and Aquatic Resources Act, H.R. 3534, 111th Cong. § 714 (2010).

143. *Id.* §§ 715, 718.

144. *Id.* § 605. The funds would come from the Ocean Resources Conservation and Assistance (ORCA) Fund, created by the act and funded by OCS revenues.

145. *Id.* § 501.

146. *Id.* § 502(a).

147. *Id.* § 205(a)(4).

environmental laws;¹⁴⁷ or had been fined more than \$10 million under the Clean Water Act or Clean Air Act.¹⁴⁸ Under these provisions of CLEAR, BP would be barred from further participation in OCS leasing.

Other provisions of CLEAR that affect offshore leasing, but not OPA 90, include provisions that codify the abolition of the Minerals Management Service and the placement of its functions in three separate bureaus,¹⁴⁹ amend the leasing provisions of the Outer Continental Shelf Lands Act to require consideration of other energy producing uses of the OCS,¹⁵⁰ and provide for changes in OCS royalties and the use of royalties.¹⁵¹

CLEAR did not pass the Senate in the last session of Congress. Moreover, the Congressional mid-term elections held in the fall of 2010 awarded control of the House of Representatives to the Republican Party and changed the political landscape in Washington, making it highly unlikely that CLEAR will be resurrected in the 2011 session of Congress.

Notwithstanding that CLEAR almost certainly will not be revisited, Congress would be amiss in allowing the opportunity presented by the Macondo blowout to go by without taking some form of action. In particular, two critical provisions should be adopted. First, the \$75 million cap on liability for offshore spills should be lifted. In fact, while OPA 90 strengthened and clarified previously existing oil spill response laws in most respects, it weakened prior law on this particular point. Prior to OPA 90, there was no liability limit for spills or blowouts resulting from oil and gas activities on the Outer Continental Shelf. The unlimited liability was the legacy of DOI regulation put in place after the Santa Barbara blowout, and the change in prior law effected by OPA 90 was lamented in the comments of Senator Lieberman and others.¹⁵² A second critical point is the limit in the Oil Pollution Fund of \$1 billion for any single incident, a limit that, as previously noted, the GAO has warned will likely be exceeded in the clean-up of the Macondo blowout. However, other provisions of CLEAR, such as those intended to remedy shortcomings in the Department of the Interior's regulatory oversight of offshore drilling, could be deemed unnecessary in light of the changes adopted by BOEMRE in October 2010. Some of CLEAR's provisions, such as those designed to punish BP and those requiring substantial new funding for rebuilding the Gulf states' shorelines, are certain to find little support in the changed political environment.

IV. CONCLUDING OBSERVATIONS

The Macondo blowout tested the mechanisms put in place by OPA 90 to deal with a major oil spill of national significance. The existing regulatory structure appears for the most part to have functioned as it was intended, but the effectiveness of containment efforts was disappointing. A national response to the spill was organized expeditiously, government control of the response and clean up was maintained, if not always appreciated by the public, the spill was

148. *Id.* § 206(b).

149. *Id.* §§ 101-109.

150. *Id.* § 206.

151. *Id.* §§ 301-321.

152. S. REP. NO. 101-94, at 26-27 (1989).

eventually brought under control, and efforts to provide compensation for economic loss and environmental damage are underway. But the spill ran out of control for over three months, and public confidence in the industry and its regulators was badly shaken.

In terms of containing a major spill, OPA 90's effectiveness is dependent on its contingency response plans, which in this case proved woefully inadequate. This is the legacy of years of lax oversight by the MMS, which the current Administration has undertaken to correct, and not due to deficiencies in the statute. While the BP spill highlighted some weaknesses in OPA 90, Congress' failure to adopt revisions to the law is not critical. OPA 90 remains a good and effective law. The failure to implement and enforce fully all of OPA 90's requirements, not deficiencies in the statute, has contributed to the loss of public confidence in the offshore oil and gas industry caused by the BP spill.