

# THE DEEPWATER HORIZON OIL SPILL LITIGATION: PROOF OF CONCEPT FOR THE MANUAL FOR COMPLEX LITIGATION AND THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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## ABSTRACT\*\*

*On April 20, 2010, the oil rig Deepwater Horizon exploded in the Gulf of Mexico, killing eleven people and injuring seventeen more. Efforts to stop the spill failed. For the next eighty-seven days, hundreds of millions of barrels of oil poured into the Gulf. This catastrophe not only changed the lives of the families of the dead and injured and the communities who experienced the economic and social disruption of the spill – it challenged the survival of the ecosystem of the ninth largest water body in the world. The oil spill extended fifty miles offshore from Louisiana in the Gulf of Mexico and spread over an area larger than the State of Idaho. The oil spill also triggered the onset of one of the most significant civil environmental enforcement actions in the history of our nation. This Article is written by counsel for the Department of Justice's civil enforcement case in response to the Deepwater Horizon disaster. After examining the litigation of the case from inception through settlement, this article explores the lessons learned from the litigation and the premise that this case demonstrates a proof of concept for the effectiveness of cooperative federalism, the Manual for Complex Litigation and the 2015 amendments to the Federal Rules of Civil Procedure.*

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## I. OVERVIEW

On April 20, 2010, the oil rig *Deepwater Horizon* in the Gulf of Mexico exploded and caught fire, resulting in the death of eleven individuals and injuries to seventeen more.<sup>1</sup> The *Deepwater Horizon* drilling rig was owned by Transocean Ltd., who contracted to drill for BP.<sup>2</sup> For eighty-seven days,

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1. See generally NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING REPORT TO THE PRESIDENT 3–19 (2011) [hereinafter REPORT TO THE PRESIDENT]. For information regarding the eleven men whose lives were cut short, see Steve Joynt, *Oil Spill Day 100: The 11 Men Who Died on the Deepwater Horizon*, ALABAMA.COM (July 28 2010, 5:00 AM), [http://blog.al.com/live/2010/07/oil\\_spill\\_day\\_100\\_the\\_11\\_men\\_w.html](http://blog.al.com/live/2010/07/oil_spill_day_100_the_11_men_w.html).

2. As used in this article, the term “BP” refers to the family of corporations involved in the exploration of the Macondo well and the response to the massive oil spill. As was discussed at length in the third trial held in the multidistrict litigation (MDL), the BP entities operate through a series of corporate entities that are closely intertwined and for purposes of this article are indistinguishable. See, e.g., Transcript of Trial at 1014:12–21, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 23, 2015). The details of the relationship between BP and Transocean are explained in the court’s ruling on the first phase of trial. See *In*

the nation watched in anguish as over three million barrels of oil poured into the Gulf<sup>3</sup> and numerous efforts to stop the spill failed.<sup>4</sup>

On June 15, 2010, President Barack Obama addressed the nation about the *Deepwater Horizon* disaster, saying: “We will fight this spill with everything we’ve got for as long as it takes. We will make BP pay for the damage their company has caused. And we will do whatever’s necessary to help the Gulf Coast and its people recover from this tragedy.”<sup>5</sup> Six years later, Attorney General Loretta Lynch announced a settlement that she described as the largest such settlement with a single defendant in the history of the Department of Justice.<sup>6</sup>

This article, prepared by the litigation counsel and the Assistant Attorney General who led the settlement discussions, reviews this civil enforcement case from its inception to settlement.<sup>7</sup> The litigation resulted in over 500 days of deposition, more than 100 expert reports, three trials, several appeals to the Fifth Circuit, multiple petitions to the Supreme Court, the management of terabytes of information, numerous case management orders, document management decisions, the application of the Manual for Complex Litigation, and the highly effective use of magistrate judges and special masters.

The article traces the key events in the oil spill and subsequent litigation as relevant to civil environmental enforcement in particular and as relevant to the litigation of any mass tort case in general. As this is the largest oil spill in the history of the United States, and one of the most extensive and far-reaching settlement agreements of its kind, it is worthy of study simply for the extraordinarily detailed environmental restoration that is both envisioned and funded. This case is also worth study as one of the best examples of a district court using the Manual for Complex Litigation

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*re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010 [hereinafter *In re* Oil Spill], 21 F. Supp. 3d 657, 668–69 (E.D. La. 2014).

3. See *In re* Oil Spill, 77 F. Supp. 3d 500, 525 ¶ 277 (E.D. La. 2014) (finding that 4 million barrels of oil were released into the Gulf but only considering 3.19 million barrels for civil penalties). By way of comparison, the *Exxon Valdez* spilled approximately 257,000 barrels. *In re* Oil Spill, 148 F. Supp. 3d 563, 569 ¶ 32 (E.D. La. 2015).

4. See *In re* Oil Spill, 77 F. Supp. 3d at 508–513 ¶¶ 68–196.

5. President Barack Obama, Remarks to the Nation on the BP Oil Spill (June 15, 2010), <https://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

6. U.S. Dep’t of Justice, Attorney General Lynch, *Federal Partners Announce Settlement with BP on Deepwater Horizon Oil Spill*, YOUTUBE, at 2:53–3:08 (Oct. 6, 2015), <https://www.youtube.com/watch?v=4jfDLNyIWis>.

7. The authors of this article witnessed or participated in many of the events and decisions described in this article, particularly those related to trial and litigation. Statements describing events that are not accompanied by references to specific sources are based upon the personal knowledge of the authors.

and the Federal Rules of Civil Procedure to manage litigation. This litigation served as proof of concept for two central themes of the Manual for Complex Litigation and the 2015 amendments to the Federal Rules of Civil Procedure: (a) the need for active judicial management and supervision and (b) the responsibility of all counsel to work toward the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>8</sup> The successful implementation of these principles demonstrates that successful enforcement is feasible even when the stakes are as high as they were after the nation’s largest oil spill.

## II. THE *DEEPWATER HORIZON* DISASTER

In 2008, BP leased, from the Department of the Interior, development rights for Mississippi Canyon Block 252 in the Gulf of Mexico.<sup>9</sup> The plan was to drill a well—to be named the Macondo well<sup>10</sup>—about 50 miles off the coast of Louisiana, where the ocean is a mile deep.<sup>11</sup> The oil was expected to be found two miles below the sea floor (three miles below the ocean’s surface).<sup>12</sup> BP entered into co-lessee agreements with Anadarko Petroleum Corporation and MOEX Offshore 2007 that designated BP as the “operator” of the Macondo well—a term with legal significance that will be discussed below.<sup>13</sup>

BP then contracted with various Transocean entities for operation of a mobile offshore drilling unit.<sup>14</sup> By February, 2010, Transocean’s *Deepwater Horizon* was drilling the deep-water Macondo well on the leased block.<sup>15</sup>

8. FED. R. CIV. P. 1.

9. *In re Oil Spill*, 21 F. Supp. 3d 657, 671 (E.D. La. 2014). The Outer Continental Shelf Lands Act establishes the framework for offshore drilling and extends the jurisdiction of the United States to the outer continental shelf regarding oil exploration and production. See 43 U.S.C. § 1332 (2012). The Department of the Interior promulgated regulations governing drilling activities, which were in effect at the time of the Deepwater Horizon incident. 30 C.F.R. pt. 250 (2016).

10. Macondo is the name of a fictional town in *One Hundred Years of Solitude* by Gabriel García Márquez.

11. *In re Oil Spill*, 21 F. Supp. 3d at 671 ¶ 45.

12. See *id.* at 673 ¶ 47.

13. See *In re Oil Spill*, 844 F. Supp. 2d 756, 747–48 (E.D. La. 2010).

14. *Id.* A mobile offshore drilling unit is exactly what its name implies – a vessel that can move from location to location and that when it arrives at the location of a well to be drilled, becomes a fully operational, and temporarily stationary, drilling platform. See 33 U.S.C. § 2701(18) (2012).

15. BP’s other contractors included Halliburton for the cement job and M-I Swaco as the drilling mud contractor. See *In re Oil Spill*, 21 F. Supp. 3d at 669 ¶¶ 26–30. Cameron had manufactured the Blowout Preventer. *Id.* at 669 ¶ 27. These companies were each defendants in private party cases; the United States did not sue any of them.

At the outset of the drilling, BP had identified a subsea blowout—i.e., an uncontrolled discharge of oil<sup>16</sup>—as one of the highest risks for the company associated with the Macondo well.<sup>17</sup> As described by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, the primary defense against a blowout is to apply pressure (in the form of a heavy fluid) to control hydrocarbons:

The principal challenge in deepwater drilling is to drill a path to the hydrocarbon-filled pay zone in a manner that simultaneously controls these enormous pressures [from the weight of the rocks above a pay zone] and avoids fracturing the geologic formation in which the reservoir is found. It is a delicate balance. The drillers must balance the reservoir pressure (pore pressure) pushing hydrocarbons into the well with counter-pressure from inside the wellbore. If too much counter-pressure is used, the formation can be fractured. But if too little counter-pressure is used, the result can be an uncontrolled intrusion of hydrocarbons into the well, and a discharge from the well itself as the oil and gas rush up and out of the well.<sup>18</sup>

There are many other safety measures used to prevent a blowout, but at the onset of drilling by the *Deepwater Horizon*, BP had identified the blowout preventer as the “last line of defense.”<sup>19</sup> This piece of equipment, which weighed 400 tons, comprised a series of valves intended to close the well and prevent the escape of oil, including in the event that the drilling team lost control of the well.<sup>20</sup>

Drilling at the Macondo well continued through April 20, 2010.<sup>21</sup> At that time, the drilling had reached final depth.<sup>22</sup> While the *Deepwater Horizon* was appropriate as a drilling rig, “BP, like most operators, would give the job of ‘completing’ the well to a smaller (and less costly) rig.”<sup>23</sup> As the National Commission stated, “To make way for the new rig, the *Deepwater Horizon* would have to remove its riser and blowout preventer from the

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16. REPORT TO THE PRESIDENT, *supra* note 1, at 90–91.

17. *In re Oil Spill*, 77 F. Supp. 3d 500, 517 ¶ 221 (E.D. La. 2014) (“As Dr. Tony Hayward, the Group CEO of BP p.l.c. at the time of the blowout, explained, BP had identified a subsea deepwater blowout as one of the highest risks for the company.”).

18. REPORT TO THE PRESIDENT, *supra* note 1, at 90–91.

19. *In re Oil Spill*, 77 F. Supp. 3d at 517 ¶ 221.

20. REPORT TO THE PRESIDENT, *supra* note 1, at 92–93.

21. *In re Oil Spill*, 21 F. Supp. 3d 657, 675 ¶¶ 73–74 (E.D. La. 2014).

22. *Id.*

23. REPORT TO THE PRESIDENT, *supra* note 1, at 103.

wellhead—and before it could do those things, the crew had to secure the well through a process called ‘temporary abandonment.’”<sup>24</sup>

To seal the well and complete the temporary abandonment, BP had to (1) cement the bottom of the well, (2) perform a test known as a negative pressure test to make sure the plug had sealed the well, (3) remove the drilling mud from the casing, and (4) set a second cement plug in place.<sup>25</sup> On the evening of April 20, 2010, BP had reviewed the results of the negative pressure test and concluded that it was safe to remove the drilling mud and set the second plug.<sup>26</sup> That conclusion, however, proved catastrophically careless. During the process of removing the drilling mud, there was an uncontrolled blowout of oil and gas from the well.<sup>27</sup>

The cause of the blowout was hotly disputed and the subject of the first trial, which will be discussed below. The complex technical questions addressed in that trial are beyond the scope of this article, but in a simplified summary, the court focused on the importance of the negative pressure test:

The negative pressure test, however, was a particularly critical part of the temporary abandonment operation. As previously explained, the negative pressure test is a safety-critical test. Its purpose was to determine whether the cement and casing had successfully isolated the well from the reservoir, so that the heavy drilling mud—which otherwise prevented hydrocarbons from flowing into the well—could be safely removed.<sup>28</sup>

The court then found that BP went forward with attempts to remove the drilling mud and install the second plug well despite “squirrely” results from the negative pressure test.<sup>29</sup>

In addition, the court found that BP engaged in a series of decisions that added risks to the cement job and the negative pressure test, including the decision to use fewer centralizers.<sup>30</sup> Similarly, BP decided not to per-

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24. *Id.*

25. *In re Oil Spill*, 21 F. Supp. 3d at 675–76 ¶ 75.

26. *Id.* at 676 ¶ 76.

27. *Id.* at 666–67 ¶¶ 2–7.

28. *Id.* at 738–39 ¶ 503.

29. *Id.* at 705–06 ¶¶ 266–77, 741 ¶ 511; REPORT TO THE PRESIDENT, *supra* note 1, at 106–14.

30. *In re Oil Spill*, 21 F. Supp. 3d at 740–41 ¶ 510. Centralizers are critical components in ensuring a good cement job. When a casing string hangs in the center of the wellbore, cement pumped down the casing will flow evenly back up the annulus, displacing any mud and debris that were previously in that space and leaving a clean column of cement. If the casing is not centered, the cement will flow preferentially up the path of least resistance—the larger spaces in the annulus—and slowly or not at all in the narrower annular space. That can leave behind channels of drilling mud that can severely compromise a primary cement job by

form a full “bottoms up” circulation.<sup>31</sup> Ideally, BP would have “pumped enough mud down the wellbore to bring mud originally at the bottom of the well all the way back up to the rig.”<sup>32</sup> The decision not to do this procedure increased the risk of cement channeling or contamination of the cement.<sup>33</sup> Other decisions also contributed to the risks of a poor cementing job and a blowout, including the decision “to pump a low volume of cement, which increased the risk that cement would not be placed appropriately”;<sup>34</sup> the decision to use a particular kind of cement without first checking its stability, which increased the risk of cement failure; the decision to pump the cement at a low rate in a synthetic oil based mud environment, which increased the risk of cement contamination; the decision not to perform a cement bond log following the cement job, which required BP to rely upon the “squirrely” negative pressure results;<sup>35</sup> and the decision to use an “unorthodox” spacer to separate the drilling mud from the seawater, which increased the risk that the openings in the blowout preventer would be clogged.<sup>36</sup> As the court stated:

While not all of these decisions may have contributed to the ultimate mode of failure, and perhaps not all were necessarily unreasonable decisions (at least when viewed in isolation), each of these decisions and their associated risks should have increased the caution surrounding the negative pressure test beyond the “high alert” status it already demanded.<sup>37</sup>

BP, however, did not increase its caution and accepted the results of the negative pressure test, causing a blowout and resulting explosions and fires.<sup>38</sup> This carelessness caused the death of eleven crewmen and seriously

creating paths and gaps through which pressurized hydrocarbons can flow. REPORT TO THE PRESIDENT, *supra* note 1, at 96.

31. *In re Oil Spill*, 21 F. Supp. 3d at 740 ¶ 510.

32. REPORT TO THE PRESIDENT, *supra* note 1, at 100.

33. *In re Oil Spill*, 21 F. Supp. 3d at 740 ¶ 510.

34. *Id.*

35. *Id.* A cement bond log tests the integrity of cement in the annular space around the casing and formation, and the location and severity of any channels through the cement. REPORT TO THE PRESIDENT, *supra* note 1, at 102.

36. *In re Oil Spill*, 21 F. Supp. 3d at 740–41 ¶ 510. The spacer is a liquid mixture that separates the heavy drilling mud from the seawater. Drilling crews routinely use water-based spacers, BP directed M-I Swaco mud engineers to create a spacer out of left-over materials on the rig that otherwise would have to have been disposed of as hazardous waste. REPORT TO THE PRESIDENT, *supra* note 1, at 106.

37. *In re Oil Spill*, 21 F. Supp. 3d at 741 ¶ 510.

38. *Id.* at 703 ¶ 251.

injured seventeen others.<sup>39</sup> Oil began flowing into the Gulf.<sup>40</sup> On April 22, 2010, the *Deepwater Horizon* sank to the ocean bottom, but the well, well equipment, and blowout preventer continued to discharge oil into the Gulf of Mexico until July 15, 2010.<sup>41</sup>

### III. THE AFTERMATH OF THE EXPLOSION

#### A. *The Organization of a Massive Response*

From the very moment it received word of the explosion, the Coast Guard was in action – rescuing individuals and taking control of the removal action.<sup>42</sup> The rescue operation alone was massive. As Admiral Allen stated, the Coast Guard engaged in “an extraordinary search and rescue case, where over 90 people were evacuated and three were critically injured and evacuated by Coast Guard helicopters.”<sup>43</sup> The initial rescues were followed by “three intensive days of searches of nearly 30 aircraft and vessel sorties, over 5,000 square miles searched.”<sup>44</sup> By April 22, 2010, the Coast Guard transitioned from solely a rescue and recovery operation to an oil spill response.

Oil spill response under the Clean Water Act and Oil Pollution Act is governed by the National Contingency Plan.<sup>45</sup> The National Contingency

39. *Id.* at 667 ¶ 3.

40. *Id.* at 667 ¶ 6.

41. *Id.* at 667 ¶¶ 5–7. Some of the plaintiffs asserted that the rig sank because six ships that came to the rig’s assistance used water hoses in an attempt to put out the fire aboard the rig. They claimed that as these six ships “continued to blast water onto the rig, its upper compartments began to fill, resulting in a shift in the center of gravity of the rig,” ultimately causing the rig to sink. *See In re Oil Spill*, No. 2179, 2011 WL 4829905, at \*1 (E.D. La. Oct. 12, 2011). The court rejected the claims, finding:

[A] reasonable person in Defendants’ situation would not foresee that spraying water from one vessel onto another vessel in apparent hopes of extinguishing a fire would cause oil to discharge continuously from the latter vessel’s drill pipe, which would *probably* result in the economic and property damages allegedly incurred by onshore Plaintiffs over fifty miles away.

*Id.* at \*6.

42. Transcript of Press Briefing by Coast Guard Commandant Thad Allen, and Assistant to the President for Homeland Security John Brennan on Ongoing Response to Oil Spill, MARINE LOG (May 1, 2010) [hereinafter Allen & Brennan Transcript], <http://www.marinelog.com/DOCS/NEWSMMIX/2010may00010.html>.

43. *Id.*

44. *Id.*

45. *See* 33 U.S.C. § 2712 (2012) (authorizing expenditure from the oil spill trust fund for costs that are “consistent with the National Contingency Plan”); 33 U.S.C. § 1321(c)(3) (2012) (“Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan . . .”). The National Contingency Plan is found at 40 C.F.R. pt. 300 (2016).

Plan organizes oil spill response using the Incident Command System, an expandable management structure designed to ensure that resources and personnel are used efficiently.<sup>46</sup>

Recognizing that the responsible party must perform the cleanup and that any cleanup must be closely supervised, the Incident Command System operates on the concept of “unified command.”<sup>47</sup> For offshore oil spills, such as the *Deepwater Horizon* spill, a member of the United States Coast Guard is appointed the Federal On-Scene Coordinator to run removal actions for off-shore oil spills.<sup>48</sup> The Federal On-Scene Coordinator approves and selects the response actions, which are then performed by the responsible party in coordination with representatives from other federal agencies, as well as state and local agencies.<sup>49</sup>

Because it was apparent early on that this spill represented a threat of massive geographical scope, the Coast Guard began implementing the most

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46. Transcript of Trial at 75:02–13, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 20, 2015). Because of the national scope of this disaster, efforts to coordinate the response were also governed by Homeland Security Presidential Directive 5. *In re Oil Spill*, 77 F. Supp. 3d 500, 507 ¶ 48 (E.D. La. 2014).

47. See Captain Laferriere Deposition at 259:01–05, 264:14–24, 265:01–06, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 5, 2015) [hereinafter Laferriere Deposition]; Transcript of Trial, *supra* note 46, at 125:04–125:06. The concept of unified command is also reflected in the fact that “parties rendering care, assistance, or advice consistent with the National Contingency Plan or as directed by the President (or his designee) are explicitly immunized from removal costs or damages that result from their actions or omissions.” *In re Oil Spill*, No. 2179, 2012 WL 5960192, at \*7 (E.D. La. Nov. 28, 2012) (citing 33 U.S.C. § 1321(c)(4)(A) (2012)). This derivative sovereign immunity is designed to encourage participation in cleanup efforts and compliance with directives of the Federal On-Scene Coordinator. *Id.* (quoting H.R. REP. NO. 101-653, at 45 (1990)). In the *Deepwater Horizon* litigation, the Court found that sovereign immunity protected the manufacturer of the dispersants from personal injury claims arising from exposure to the dispersants because this clause of the Clean Water Act preempted claims for personal injury under state or General Maritime law. *Id.* at \*21.

48. 33 U.S.C. § 1321(c) (2012) (“The President shall, in accordance with the National Contingency Plan . . . ensure effective and immediate removal of a discharge . . . .”); Exec. Order No. 12,777, 56 Fed. Reg. 54,757, 54,758 (Oct. 18, 1991) (“The functions vested in the President by Section 311(c) of FWPCA and Section 1011 of OPA, respecting an effective and immediate removal or arrangement for removal of a discharge and mitigation or prevention of a substantial threat of a discharge of oil or a hazardous substance, the direction and monitoring of all Federal, State and private actions, the removal and destruction of a vessel, the issuance of directions, consulting with affected trustees, and removal completion determinations, are delegated to the Administrator for the inland zone and to the Secretary of the Department in which the Coast Guard is operating for the coastal zone.”).

49. See 40 C.F.R. § 300.5 (2016) (“On-scene coordinator (OSC) means the federal official predesignated by EPA or the USCG to coordinate and direct responses under subpart D, or the government official designated by the lead agency to coordinate and direct removal actions under subpart E of the NCP.”).

complex application of the Incident Control System in American history.<sup>50</sup> For the first time, the United States declared a Spill of National Significance.<sup>51</sup> In other words, very early on, the Coast Guard recognized that this spill was one that “due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge.”<sup>52</sup> Having declared the spill one of national significance, the Coast Guard took the next logical step and created a National Incident Command, located in Washington, D.C.<sup>53</sup> The National Incident Command coordinated the “whole of government” response—taking responsibility for advising the President of the status of the response, coordinating with agencies not typically part of the Incident Command System, and addressing national political issues such as obtaining resources from outside of the Gulf Region.<sup>54</sup> Admiral Thad Allen retired from his post as Commandant of the Coast Guard and stepped in as the first National Incident Commander on May 1, 2010.<sup>55</sup>

Within the Incident Command System, the Unified Area Command—located in New Orleans, Louisiana (after a short period in Roberts, Louisiana)—was under the National Incident Command.<sup>56</sup> The Unified Area Command was headed by the Federal On-Scene Coordinator, who oversaw operational activities across the entire Gulf Region.<sup>57</sup> The Unified Area Command included the Coast Guard, BP as the responsible party, and the five affected states.<sup>58</sup>

Under the Unified Area Command there were five Incident Command Posts, one in each of the Gulf States, established to coordinate operations with local and regional elected officials, the two largest and most active of

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50. Transcript of Trial, *supra* note 46, at 77:6–8; UNITED STATES COAST GUARD, ON SCENE COORDINATOR REPORT: *Deepwater Horizon* Oil Spill 3 (2011) [hereinafter USCG REPORT] (“Because of the size and scope of the spill, the response organization required to combat it was unique in many respects.”); see also ROGER LAFERRIERE, FACTORS IN BUILDING AN INCIDENT COMMAND ORGANIZATION FOR THE LARGEST OIL SPILL IN U.S. HISTORY 1 (2011) (“In the words of a nationally recognized ICS expert, Mr. Charles Mills, President of Emergency Management Systems Incorporated, “This was the most complex incident managed with ICS in the history of its use.””).

51. *In re* Oil Spill, 148 F. Supp. 3d 563, 570 (E.D. La. 2015).

52. 40 C.F.R. § 300.5 (2016).

53. See USCG REPORT, *supra* note 50, at 6–9.

54. See *id.* at 3, 6–9.

55. Allen & Brennan Transcript, *supra* note 42.

56. See *In re* Oil Spill, 77 F. Supp. 3d 500, 507–08 ¶ 58 (E.D. La. 2014).

57. See USCG REPORT, *supra* note 50, at 6.

58. See Transcript of Trial, *supra* note 46, at 125:25–126:03; see also *In re* Oil Spill, 77 F. Supp. 3d at 507 ¶¶ 47, 53, 58.

which were in Houma, Louisiana and Mobile, Alabama.<sup>59</sup> The Incident Command Posts directed tactical efforts—addressing the particular mission of the post. Several of the posts were focused on fighting the spread of oil and preventing the oil from reaching the shoreline.<sup>60</sup> One of the Incident Command Posts had responsibility for stopping the flow of oil from the sea floor.<sup>61</sup>

Finally, under the Incident Command Posts, there were branches and staging areas established to coordinate the efficient and effective distribution and use of critical resources across regional boundaries.<sup>62</sup> For instance, in Louisiana, nine branches were set up, some of which were large enough to be incident command posts themselves.<sup>63</sup>

Within and as adjuncts to this Incident Command System, many federal agencies were involved in the response.<sup>64</sup> Given the unique scientific issues raised by trying to close a well that was a mile below the ocean's surface, many of the scientific agencies contributed their expertise.<sup>65</sup> Seven National Laboratories affiliated with the Department of Energy as well as the U.S. Geologic Survey within the Department of the Interior joined the response, as did numerous volunteers from the oil and gas industry and academia.<sup>66</sup> In all, more than ninety different organizations assisted in the response, including regulatory, academic, and military organizations, and other oil companies.<sup>67</sup>

The massive response also required thousands of responders. For instance, the Coast Guard deployed roughly fourteen percent of its personnel

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59. See USCG REPORT, *supra* note 50, at 3.

60. See Transcript of Trial, *supra* note 46, at 105:25–106:03.

61. *Id.*; see also USCG REPORT, *supra* note 50, at vii.

62. See USCG REPORT, *supra* note 50, at 3. One of the most critical resources turned out to be boom, which was used to protect shoreline, encircle oil for burning, and many other purposes. Early in the response there simply was not enough boom to meet all the needs and significant disputes arose among various authorities regarding the deployment of boom. See Transcript of Trial, *supra* note 46, at 126:1–17.

63. *Id.* at 77:15–21.

64. Iris Cross Deposition, 102:16–103:02, 106:16–25, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. June 26, 2014) [hereinafter Cross Deposition].

65. See Jane Lubchenco Deposition, 46:02–46:25, 47:04–47, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. July 10, 2014).

66. Cross Deposition, *supra* note 64, at 102:16–103:02, 106:16–25; Transcript of Trial, *supra* note 46, at 90:18–22. Chevron, Exxon, and Shell each loaned expertise and equipment and Chevron leased space to BP America Inc. for the response for a single dollar. See Letter from Roger Tucker, Jr., Manager, GOM Shorebases and Marine Transportation, Chevron, to BP America, Inc., *In re Oil Spill*, No. 10-MDL-2179, (E.D. La. May 26, 2010), Trial Exhibit 230370; Transcript of Trial at 1552:02–22, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 27, 2015); Cross Deposition, *supra* note 64, at 95:16–25, 98:13–20.

67. Cross Deposition, *supra* note 64, at 95:16–25.

to respond to the spill at the peak.<sup>68</sup> More than 19,000 people from BP staff, contractors, government, industry, and volunteers were working on the response in September 2010.<sup>69</sup>

The incident also required unprecedented response actions. In response to the disaster, recreational and commercial fishing grounds were closed.<sup>70</sup> At the peak of the closures, commercial and recreational fishing was prevented in an area that amounted to 88,552 square miles—roughly fifteen percent of Gulf waters and thirty percent of the Federal Gulf waters traditionally open to fishing.<sup>71</sup> In addition, on July 12, 2010, Secretary of the Interior Ken Salazar imposed a moratorium on deep water drilling.<sup>72</sup>

In response to the disaster, on May 19, 2010, the Secretary of the Interior undertook a reorganization of the Minerals Management Service, which prior to the disaster had been responsible for overseeing oil and gas

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68. Transcript of Trial, *supra* note 46, at 96:09–16.

69. USCG REPORT, *supra* note 50, at 200; Cross Deposition, *supra* note 64, 92:23–25; Email from May T. Chau to John Fink et al. (Sept. 16, 2010, 19:33:56), *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 16, 2010), Trial Exhibit 12023.

70. See Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill, 75 Fed. Reg. 24,822 (May 6, 2010); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Amendment to Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill, 75 Fed. Reg. 26,679 (May 12, 2010); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closures in the Southeast Region Due to the Deepwater Horizon Oil Spill; Amendment 2, 75 Fed. Reg. 27,217 (May 14, 2010); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closures in the Southeast Region Due to the Deepwater Horizon MC252 Oil Spill; Publication of Coordinates, 75 Fed. Reg. 50,934 (Aug. 18, 2010); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon MC252 Oil Spill; Amendment 3, 75 Fed. Reg. 74,648 (Dec. 1, 2010). The closures were completely lifted by February 24, 2014. See Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Highly Migratory Species; Withdrawal of Emergency Regulations Related to the Deepwater Horizon MC252 Oil Spill, 79 Fed. Reg. 10,028 (Feb. 24, 2014).

71. BP Parties' Answer to Plaintiffs' Amended Class Action Complaint for Private Economic Losses and Property Damages at 179, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. May 7, 2012), Rec. Doc. 6453; Diane Austin, Expert Report: Sociocultural Effects of the Deepwater Horizon Disaster in the U.S. Gulf of Mexico at 28, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 15, 2014), Trial Exhibit 13112.

72. Memorandum from the Sec'y of the Interior on Suspension of Outer Continental Shelf Drilling of New Deepwater Wells to the MMS Dir., *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. May 28, 2010), Trial Exhibit 12155. The moratorium was lifted on October 12, 2010. Press Release, U.S. Dep't of the Interior, Salazar: Deepwater Drilling May Resume for Operators Who Clear Higher Bar for Safety, Environmental Protection (Oct. 12, 2010), <https://www.doi.gov/news/pressreleases/Salazar-Deepwater-Drilling-May-Resume-for-Operators-Who-Clear-Higher-Bar-for-Safety-Environmental-Protection>.

development on the Outer Continental Shelf.<sup>73</sup> Eventually, the responsibilities of the former Minerals Management Service were divided among the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement.<sup>74</sup>

### B. *Stopping the Flow of Oil*

As the other Incident Command Posts worked on minimizing the effects of the oil already in the environment, personnel at the Houston Incident Command Post struggled mightily to stop the flow of oil from the Macondo well.<sup>75</sup> In multiple daily calls, prominent scientists, the Secretaries of Energy and the Interior, and engineers from across the oil industry consulted regarding the efforts' current status and devised new approaches to this unprecedented problem.<sup>76</sup>

At first, the effort was focused on activating the "seven separate closing devices on the" blowout preventer in the hope that the well could be closed with the valves already in place.<sup>77</sup> Using remotely operated subsea vehicles, the Unified Command tried to activate the valves to close the well.<sup>78</sup>

When it became clear that the Unified Command could not use the blowout preventer to stop the flow of oil, several other methods of capturing the oil were attempted—each of which failed. First, there was the coffer dam—a large metal box that was intended to contain the flow of oil and allow it to be piped to a vessel on the surface—which failed because hydrates formed within the box and prevented its proper placement.<sup>79</sup> The next highly public attempt was a "top kill"—an attempt to stop the flow of oil by quickly pumping heavy drilling mud at high pressure to overwhelm the upward flow of oil and drive the oil back into the reservoir.<sup>80</sup> Included with

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73. See Sec'y of the Interior, Secretarial Order No. 3302 (June 18, 2010); Press Release, U.S. Dep't of the Interior, Salazar Swears-In Michael R. Bromwich to Lead Bureau of Ocean Energy Management, Regulation and Enforcement (June 21, 2016), <https://www.doi.gov/news/pressreleases/Salazar-Swears-In-Michael-R-Bromwich-to-Lead-Bureau-of-Ocean-Energy-Management-Regulation-and-Enforcement-Secretarial-Order-Begins-Reorganization-of-Former-MMS>.

74. See Bureau of Ocean Energy Mgmt., *The Reorganization of the Former MMS*, ABOUT BOEM, <http://www.boem.gov/Reorganization/> (last visited Dec. 24, 2016).

75. *In re Oil Spill*, 77 F. Supp. 3d 500, 507–08 ¶54 (E.D. La. 2014).

76. *Id.* at 507–08 ¶¶ 54–66.

77. See USCG REPORT, *supra* note 50, at 22.

78. *In re Oil Spill*, 77 F. Supp. 3d at 508 ¶¶ 69–70.

79. *In re Oil Spill*, 77 F. Supp. 3d at 504 ¶ 20, 510 ¶ 104. Shortly thereafter, the responders installed a tube inside the pipe that had connected the well to the *Deepwater Horizon* (known as the riser) which began collecting some oil, but was unable to stop the majority of the oil from reaching the ocean. *Id.* at 506 ¶ 39, 511 ¶¶ 108, 110, 116.

80. See USCG REPORT, *supra* note 50, at 23.

this effort was a “junk shot” that sent literal junk—pieces of rubber tires, golf balls, and similar materials—down the well to block the flow of oil.<sup>81</sup> By May 29, 2010, it was clear these three efforts had failed.<sup>82</sup> A partial solution was then implemented: installing a “Top Hat” on the blowout preventer to capture a portion of the hydrocarbon flow and direct it to surface vessels for collection of oil and flaring of gas.<sup>83</sup>

Ultimately, the Unified Command decided to install a capping stack—essentially a small blowout preventer—on top of the failed blow out preventer.<sup>84</sup> This took some time to design and build, but by July 10, 2010 the responders were installing the capping stack.<sup>85</sup> Careful tests were conducted to ensure that closing the well using the capping stack would not cause so much pressure in the reservoir so as to crack the reservoir and cause an uncontrollable subsurface blowout from many sites.<sup>86</sup> On July 15, 2010, the capping stack was used to close all flow from the well.<sup>87</sup> Much more monitoring was conducted and on August 3, 2010, the Unified Command decided it was safe to leave the capping stack in place until a more permanent closure could be achieved.<sup>88</sup> Finally, after three million barrels of oil had reached the ocean and its shores, oil was no longer flowing into the sea.<sup>89</sup>

Throughout these months of efforts focused on the top of the well, parallel work was done planning and drilling the longer-term solution known as a relief well.<sup>90</sup> The relief well would be drilled to intercept the Macondo well and seal it shut permanently from the bottom.<sup>91</sup> On September 19, 2010, the relief well intercepted the original well and cement was set in place.<sup>92</sup> At that time, Admiral Allen announced:

After months of extensive operations planning and execution under the direction and authority of the U.S. government science and engineering teams, BP has successfully completed the relief well by

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81. *Id.*

82. *Id.* at 22–23.

83. *In re Oil Spill*, 77 F. Supp. 3d at 512 ¶¶ 138–39.

84. *Id.* at 513 ¶ 151.

85. *Id.* at 514 ¶¶ 168–69.

86. *Id.* at 514 ¶¶ 172–81.

87. *Id.* at 514–15 ¶¶ 182–201.

88. Transcript of Trial at 1528:09–32:07, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 8, 2013); Stephen H. Hickman et al., *Scientific Basis for Safely Shutting in the Macondo Well After the April 20, 2010 Deepwater Horizon Blowout*, 109 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 20268, 20271 (2012).

89. *Id.* at 516 ¶ 204.

90. *Id.* at 508–09 ¶ 71.

91. *Id.* at 508–09 ¶¶ 70–72.

92. USCG REPORT, *supra* note 50, at 23; *In re Oil Spill*, 77 F. Supp. 3d at 516 ¶¶ 210–12.

intersecting and cementing the well nearly 18,000 feet below the surface. With this development . . . we can finally announce that the Macondo 252 well is effectively dead.<sup>93</sup>

### C. *Cleaning Up the Oil that Escaped*

Given the broad reach of the oil, it is impossible in this Article to adequately describe the massive cleanup operations. It is important, however, to get a sense of the breadth and scope of these efforts. Among the various efforts was the unprecedented application of dispersants. Airplanes flew over the plume every day that weather permitted, dropping dispersants over the oil in order to break up the oil slicks before they reached the shoreline, where cleanup and removal of the oil was more difficult. The Unified Command applied 43,884 barrels of dispersant—an amount so large that if it were accidentally discharged it would constitute one of the largest chemical spills in American waters.<sup>94</sup>

The Unified Command also used *in situ* burns—gathering the oil using floating containment boom and burning the oil on the surface of the water—to prevent the oil from reaching shore. Again, the size of the spill led to an unprecedented number of burns. In all, the Unified Command conducted 411 separate *in situ* burns that involved eleven million gallons of oil.<sup>95</sup> Put differently, in the course of the response, the Unified Command burned more oil than the Exxon Valdez spilled.<sup>96</sup>

In addition to dispersants and *in situ* burns, the responders used every available skimmer and every foot of boom to contain and collect as much of the oil from the surface before it reached shore. In all 835 skimming vessels and well over a million feet of boom were used to contain and collect about five percent of the oil released during the spill.<sup>97</sup>

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93. *Allen: Macondo Well is Dead*, MARINE LOG (Sept. 19, 2010), <http://www.marinelog.com/DOCS/NEWSMMIX/2010sep00191.html> (quoting Admiral Thad Allen); REPORT TO THE PRESIDENT, *supra* note 1, at 169.

94. The Federal Interagency Solutions Group, Oil Budget Calculator Deepwater Horizon at 24–27, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 2010), Trial Exhibit 9182.

95. Thad Allen, National Incident Commander's Report: MC252 Deepwater Horizon at 5, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 2010), Trial Exhibit 9100.

96. Laferriere Deposition, *supra* note 47, at 209:22–210:04.

97. USCG REPORT, *supra* note 50, at 215 (providing number of skimmers and feet of boom); Thad Allen, National Incident Commander's Report at 5, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 1, 2010), Trial Exhibit 9100 (“We procured boom from all domestic manufacturers, and mobilized all East and Gulf Coast offshore skimming vessels. As a result of demand, we procured nearly all nationally produced snare, containment, and fire boom, and engaged every domestic boom supplier to boost manufacture from a few thousand feet per week.”).

Despite these herculean efforts to prevent the oil from reaching the shore, ultimately, over 1,000 miles of shoreline were oiled to one degree or another.<sup>98</sup> “Once oil reached the shore, the labor-intensive process of shoreline cleanup began.”<sup>99</sup> Shoreline cleanup involves a balancing to ensure that the method chosen to clean up the oil does not cause more harm than good.<sup>100</sup> Thus, every site that was oiled needed to be identified and evaluated before a cleanup method could be chosen. Often, cleanup involved the manual removal of oil, oiled sediment, and debris on hot beaches in hazardous protection gear.<sup>101</sup>

There were many other onshore and offshore response actions, including wildlife rehabilitation, skimming oil, installing and maintaining boom, providing safety measures and medical treatment, and of course the administration and planning required to coordinate all of these actions.<sup>102</sup> The response continued for years—as late as January 2015 the Coast Guard and BP were still maintaining command posts to respond to ongoing reports of oiling from the Macondo well.<sup>103</sup>

#### IV. FEDERAL STATUTES CONTROLLING OIL SPILL RESPONSE, COMPENSATION, LIABILITY, AND FEDERAL ENFORCEMENT<sup>104</sup>

Even before the response actions ended, an onslaught of investigations and litigation began. To understand these investigations and litigation, it is important to review the governing statutes and requirements. Because the Macondo Well was fifty miles off-shore, it was subject to the Outer Continental Shelf Lands Act.<sup>105</sup> This act establishes the federal regulatory framework for offshore drilling and extends the jurisdiction of the United States to the subsoil and seabed on the outer continental shelf for the purpose of controlling the exploitation of natural resources.<sup>106</sup> The Bureau of Ocean Energy Management within the Department of the Interior regulates the operations of the ocean block lessees, such as the lease controlled by BP.<sup>107</sup>

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98. Transcript of Trial, *supra* note 66, at 1775:22–25.

99. USCG REPORT, *supra* note 50, at vii.

100. Transcript of Trial, *supra* note 46, at 83:06–83:15.

101. USCG REPORT, *supra* note 50, at 65–69.

102. *See generally id.* at vi–xiv.

103. Transcript of Trial, *supra* note 46, at 135:18–136:11.

104. There are of course other federal statutes that could apply, but this article focuses on the statutes that came most into play in the MDL.

105. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356a (2012).

106. *Id.* § 1332.

107. *See* Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64,432, 64,434 tbl. A (Oct. 18, 2011) (“BOEM will be responsible for issuing the permits and notices and overseeing the activities under the approved permits . . .”).

The Bureau has promulgated regulations that govern offshore drilling. Some of the regulations include general prohibitions on polluting activities.<sup>108</sup>

In addition, the Oil Pollution Act establishes a federal framework to address oil spill liability and compensation. This Act provides that “each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident.”<sup>109</sup> A “responsible party” in the case of a vessel is “any person owning [or] operating . . . the vessel” and in the case of an offshore facility, “the lessee or permittee of the area in which the [offshore] facility is located or the holder of a right of use and easement.”<sup>110</sup> Additionally, in the case of a discharge from a facility on the Outer Continental Shelf, the United States may recover all removal costs from “the owner or operator of such facility or vessel.”<sup>111</sup>

Under the Oil Pollution Act, responsible parties are jointly and severally liable for all removal costs and damages resulting from the spill, and the United States may commence an action for the recovery of removal costs at any time after it incurs such costs.<sup>112</sup> Removal costs are “costs of removal that are incurred after a discharge of oil has occurred or . . . the costs to prevent, minimize, or mitigate oil pollution from such an incident.”<sup>113</sup>

The Oil Pollution Act specifies six categories of recoverable damages. The first category, natural resource damages, includes “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage.”<sup>114</sup> Other damages categories include economic loss from destruction of real or personal property; loss of subsistence use of natural resources; net loss of taxes, royalties, and fees recoverable by the United States or a State; and loss of profits or earning capacity.<sup>115</sup>

108. See, e.g., 30 C.F.R. § 250.107 (2015) (Operator must protect the environment by “[p]erforming all operations in a safe and workmanlike manner; and [m]aintaining all equipment and work areas in a safe condition”); 30 C.F.R. § 250.300(a) (2015) (“[L]essee shall not create conditions that will pose unreasonable risk to public health, life, property, aquatic life, wildlife, recreation, navigation, commercial fishing or other uses of the ocean.”).

109. 33 U.S.C. § 2702(a) (2012).

110. *Id.* § 2701(32)(A)–(C).

111. *Id.* § 2704(c)(3).

112. *Id.* §§ 2704(a)(3), 2717(f)(2). Financial guarantors who provide evidence of financial responsibility for a responsible party are liable for costs and damages up to the amounts of their guarantees. *Id.* § 2716(f).

113. *Id.* § 2701(31).

114. *Id.* § 2702(b)(2).

115. *Id.* § 2702(b)(2)(B)–(E).

The Act limits the amount of damages that responsible parties must pay.<sup>116</sup> The limits vary according to vessel or facility type.<sup>117</sup> The limitation that applies to the co-lessees provides that responsible parties for a spill from an offshore facility are liable for all removal costs plus \$75 million.<sup>118</sup> No damages cap applies, however:

[I]f the incident was proximately caused by (A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party.<sup>119</sup>

The third key statute in play is the Clean Water Act, which provides authority to the federal government to require a responsible party to fund or perform cleanup actions.<sup>120</sup> Section 311(b) of this Act prohibits:

The discharge of oil . . . into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone [or] in connection with activities under the Outer Continental Shelf Lands Act . . . in such quantities as may be harmful.<sup>121</sup>

The Clean Water Act establishes strict liability for a civil penalty against “[a]ny person who is the owner, operator, or person in charge of any vessel . . . or offshore facility from which oil or a hazardous substance is discharged.”<sup>122</sup> A “vessel” is “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”<sup>123</sup> An “offshore facility” is “any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of

116. *Id.* § 2704.

117. *Id.* § 2704(a).

118. *Id.* § 2704(a)(3).

119. *Id.* § 2704(c)(1). On October 18, 2010, BP submitted a statement to the court waiving “the statutory limitation on liability under OPA” without agreeing that it had committed gross negligence. Statement of BP Exploration & Production Inc. re Applicability of Limit of Liability Under Oil Pollution Act of 1990 at 1–2, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 18, 2010), Rec. Doc. 559.

120. 33 U.S.C. § 1321(c) (2012).

121. *Id.* § 1321(b)(3). EPA has promulgated regulations that define harmful quantities as those discharges of oil that cause “a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.” 40 C.F.R. § 110.3(b) (2015).

122. 33 U.S.C. § 1321(b)(7)(A).

123. *Id.* § 1321(a)(3).

any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel.”<sup>124</sup>

Under the Clean Water Act, civil penalties have a maximum amount of \$1,100 per barrel of oil discharged.<sup>125</sup> If the discharge of oil was “the result of gross negligence or willful misconduct of [any person who is the owner, operator, or person in charge of any vessel or offshore facility],” the penalty rises to a maximum of \$4,300<sup>126</sup> per barrel of oil discharged.<sup>127</sup>

The penalty amounts—\$1,100 per barrel, or, in the event of gross negligence, \$4,300 per barrel—are statutory maximums that courts rarely award. The Clean Water Act specifies eight penalty factors that the court shall consider in determining the penalty amount, including the seriousness of the violation, the economic impact of the penalty on the violator, and other factors discussed below.<sup>128</sup>

## V. INITIAL SAFETY INVESTIGATION

While the removal actions were continuing, the Executive branch also worked diligently to address looming questions. If the *Deepwater Horizon* disaster could happen, what’s to stop it from happening again? Even after the oil is stopped, how does one restore the damage done? Several steps were taken.

A month after the explosion, the President issued an executive order establishing a “National Commission on the BP Deepwater Horizon Oil Spill,” with seven members selected by the President.<sup>129</sup> The Co-Chair Members were Senator Bob Graham and former EPA Administrator William Reilly.<sup>130</sup> The Commission had no subpoena authority but still hired experts and conducted six public hearings.<sup>131</sup> On January 11, 2011, the

124. *Id.* § 1321(a)(11).

125. *Id.* § 1321(b)(7)(A).

126. The amounts identified in this above are the statutory penalty amounts adjusted for inflation. Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, *amended by* Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701; 40 C.F.R. § 19.4 (2015).

127. 33 U.S.C. § 1321(b)(7)(D).

128. *Id.* § 1321(b)(8); *see infra* Section IX.G.4.

129. Exec. Order No. 13,543, 75 Fed. Reg. 29,397 (May 21, 2010).

130. REPORT TO THE PRESIDENT, *supra* note 1, at 356. Another member was Dr. Don Boesch, who eventually testified in the civil trial. *Id.* at 357; Transcript of Trial, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Jan. 21, 2015).

131. *See* Exec. Order No. 13,543, § 4, 75 Fed. Reg. 29,397 (May 21, 2010) (providing for hearings but giving no authority for issuance of subpoenas). Each of the Commission’s hearings was announced as a “public meeting” in the Federal Register. *See, e.g.*, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 75 Fed. Reg. 47,584 (Aug. 6, 2010). Details regarding each of the six public hearings can be found at the archived site for the National Commission on the BP Deepwater Horizon Oil Spill and

Commission had issued its final report.<sup>132</sup> This report presented the Commission's conclusions regarding the causes of the blowout, gave a detailed chronology of the disaster and response, and made recommendations regarding future regulatory reform.<sup>133</sup> It was a superb product produced in a timely fashion.

Additionally, the Coast Guard is charged with investigating marine casualties,<sup>134</sup> just as the National Transportation Safety Board investigates the causes of airline crashes to prevent future accidents.<sup>135</sup> These investigations include subpoena power<sup>136</sup> and result in a report that is not admissible in litigation.<sup>137</sup> Because the *Deepwater Horizon* engaged in maritime functions and drilling activities, the Coast Guard's safety investigation for this disaster was performed jointly with the Department of the Interior.<sup>138</sup> This Joint Investigation Team conducted seven public hearings and heard testimony from more than eighty witnesses.<sup>139</sup> In September 2011, the Department of the Interior issued its portion of the report.<sup>140</sup> In response to the

Offshore Drilling, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Meeting 1: July 12-13, 2010 (New Orleans, LA)*, MEETINGS, <https://cybercemetery.unt.edu/archive/oilspill/20121210183605/http://www.oilspillcommission.gov/meeting-1/meeting-details> (last visited Jan. 19, 2016).

132. REPORT TO THE PRESIDENT, *supra* note 1, at 365.

133. See generally *id.* Despite a finding that the Commission's report was a public record under Federal Rule of Evidence 803(8), the court overseeing the ensuing multi-district litigation excluded the report from evidence because of the risk that the large amount of "internal hearsay" would cause mini-trials and delay in the resolution of the first phase of the trial. See *In re Oil Spill*, No. 10-MDL-2179, 2012 WL 425164, at \*1-\*2 (E.D. La. Feb. 9, 2012).

134. See 46 U.S.C. §§ 6301-6308 (2010).

135. See generally National Transportation Safety Board, *History of the National Transportation Safety Board*, ABOUT, <http://www.nts.gov/about/history/Pages/default.aspx> (last visited Dec. 26, 2016).

136. 46 U.S.C. § 6304 (2010).

137. *Id.* § 6308; see also *Newill v. Campbell Transp. Co., Inc.*, No. 2:12-CV-1344, 2015 WL 222438, at \*2 (W.D. Pa. Jan. 14, 2015) ("When § 6308 is 'read together' with the implementing regulations, the court reasoned, it 'is clear that the scope of the statutory protection is limited to the Coast Guard's investigative report, and anything included within that report, in order to avoid having the Coast Guard's investigative report and its conclusions influence the litigation process.'" (quoting *Guest v. Carnival Corp.*, 917 F. Supp. 2d 1242, 1244-45 (S.D. Fla. 2012))).

138. U.S. Dep't of the Interior & U.S. Dep't of Homeland Sec., Joint Department of the Interior and Department of Homeland Security Statement of Principles and Convening Order Regarding Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 21-22 April 2010 (2010), [https://www.dhs.gov/xlibrary/assets/deepwater\\_horizon\\_investigation.pdf](https://www.dhs.gov/xlibrary/assets/deepwater_horizon_investigation.pdf).

139. BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, U.S. DEP'T OF THE INTERIOR, REPORT REGARDING THE CAUSES OF THE APRIL 20, 2010 MACONDO WELL BLOWOUT 11 (2011), [http://docs.lib.noaa.gov/noaa\\_documents/DWH\\_IR/reports/dwhfinal.pdf](http://docs.lib.noaa.gov/noaa_documents/DWH_IR/reports/dwhfinal.pdf).

140. See generally *id.*

findings in the report, the Department made significant reforms to its regulations governing well design and workplace safety.<sup>141</sup>

There were several other safety investigations. One was conducted by the U.S. Chemical Safety Board, an independent agency established under the Clean Air Act to investigate the root cause of chemical accidents.<sup>142</sup> Additionally, at the request of the Secretary of the Interior, the National Academies of Sciences and the National Research Council prepared a report on the lessons learned from the *Deepwater Horizon* for future offshore drilling.<sup>143</sup>

## VI. THE GULF COAST ECOSYSTEM RESTORATION PLAN AND THE RESTORE ACT

On June 15, 2010, the President called on Ray Mabus, then Secretary of the Navy and formerly the Governor of the State of Mississippi, to “develop a long-term Gulf Coast Restoration Plan as soon as possible.”<sup>144</sup> The resulting report recommended the “immediate establishment of a new Gulf Coast Ecosystem Restoration Task Force.”<sup>145</sup>

By October 5, 2010, the President acted on that recommendation and established the Task Force to develop “a Gulf Coast ecosystem restoration agenda, including goals for ecosystem restoration.”<sup>146</sup> The task force, led by the Administrator of the Environmental Protection Agency, Lisa Jackson, was comprised of senior officials from the Departments of Defense, Justice, the Interior, Agriculture, and Commerce, and the Environmental Protection Agency, as well as several offices in the Executive Office of the Presi-

141. See, e.g., Oil and Gas and Sulphur Operations on the Outer Continental Shelf – Increased Safety Measures for Energy Development on the Outer Continental Shelf, 77 Fed. Reg. 50,856, 50,856 (Aug. 22, 2012) (“This Final Rule implements certain safety measures recommended in the report entitled, ‘Increased Safety Measures for Energy Development on the Outer Continental Shelf.’”). In the end, the Coast Guard did not issue a final report of its investigation.

142. See generally Chemical Safety Board, *History*, ABOUT THE CSB, <http://www.csb.gov/about-the-csb/history/> (last visited Dec. 26, 2016).

143. NAT'L ACAD. OF ENGINEERING & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *MACONDO WELL—Deepwater Horizon Blowout: Lessons for Improving Offshore Drilling Safety* ix (2012), [https://docs.lib.noaa.gov/noaa\\_documents/NOAA\\_related\\_docs/oil\\_spills/mocando-well\\_lessons\\_2011.pdf](https://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/mocando-well_lessons_2011.pdf).

144. Press Release, President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010), <https://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

145. RAY MABUS, SECRETARY OF THE NAVY, *AMERICA'S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL 1* (2010), <http://www.restorethegulf.gov/sites/default/files/documents/pdf/gulf-recovery-sep-2010.pdf>.

146. Exec. Order No. 13,554, 75 Fed. Reg. 62,313 (Oct. 8, 2010).

dent.<sup>147</sup> By December 2011, the Task Force issued its “Gulf of Mexico Regional Ecosystem Restoration Strategy,”<sup>148</sup> which set forth four ecosystem restoration goals: restore and conserve habitat, restore water quality, replenish and protect living marine and coastal resources, and enhance community resilience.<sup>149</sup> In achieving these goals, the report called for science-based adaptive management.<sup>150</sup> This report later provided valuable information for the natural resource assessment and restoration planning.

The second major recommendation of Secretary Mabus’ report was a proposal to Congress to dedicate Clean Water Act civil penalties collected for the *Deepwater Horizon* oil spill to the Gulf Coast.<sup>151</sup> Under the Act’s oil spill civil penalty provisions, the penalties are deposited in the Oil Spill Liability Trust Fund,<sup>152</sup> which is a fund available to support government responses to oil spills like the *Deepwater Horizon* disaster.<sup>153</sup> As will be discussed below, Congress acted on this recommendation.

The Executive branch was not alone in focusing its attention on the causes and cures for the disaster. Following the initial oil spill, there were numerous congressional hearings highlighted by highly-publicized testimony from the key companies involved. The 111th Congress held more than sixty hearings on a variety of oil-spill related topics, and members introduced more than 150 legislative proposals. In addition to two bills that provided funding for the response, investigations, and litigation, Congress ultimately passed one substantive bill directly related to the *Deepwater Horizon* disaster.<sup>154</sup>

That substantive act was the Resources and Ecosystems Sustainability, Tourist Opportunities and Revived Economies of the Gulf Coast States

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147. *Id.* § 2(a).

148. *See* GULF COAST ECOSYSTEM RESTORATION TASK FORCE, GULF OF MEXICO REGIONAL ECOSYSTEM RESTORATION STRATEGY 1 (2011), [https://archive.epa.gov/gulfcoasttaskforce/web/pdf/gulfcoastreport\\_full\\_12-04\\_508-1.pdf](https://archive.epa.gov/gulfcoasttaskforce/web/pdf/gulfcoastreport_full_12-04_508-1.pdf).

149. *Id.*

150. Notably, the damage assessment and restoration plan for the *Deepwater Horizon* incident, discussed *infra* n.187–06, 473–80 and associated text, also incorporated these four goals. *See* NAT’L OCEANIC & ATMOSPHERIC ADMIN., *Deepwater Horizon* Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement, § 1.5.3 (2016) [hereinafter NOAA ASSESSMENT], <http://www.gulf-spillrestoration.noaa.gov/restoration-planning/gulf-plan>.

151. MABUS, *supra* note 145, at 145.

152. 33 U.S.C. § 1321(s) (2012).

153. 33 U.S.C. § 2712 (2012).

154. JONATHAN L. RAMSEUR & CONG. RESEARCH SERV., *Deepwater Horizon* OIL SPILL: RECENT ACTIVITIES AND ONGOING DEVELOPMENTS 12–14 (2015), <https://archive.org/details/R42942DeepwaterHorizonOilSpillRecentActivitiesandOngoingDevelopments-crs>.

Act, or “RESTORE Act.”<sup>155</sup> As Secretary Mabus recommended, the RESTORE Act provides that the civil penalties collected for the *Deepwater Horizon* oil spill are to be returned to the injured area. Specifically, the Act requires that 80% of all civil and administrative penalties be placed in the Gulf Coast Restoration Trust Fund, established for environmental restoration, economic recovery projects, and tourism and seafood promotion in the five Gulf States directly affected by the spill.<sup>156</sup>

The RESTORE Act also created a new independent federal entity—the Gulf Coast Ecosystem Restoration Council—to administer aspects of the program,<sup>157</sup> and the President transferred to the Council the responsibilities that had previously rested with the Gulf Coast Ecosystem Restoration Task Force.<sup>158</sup> The funds are administered by a commission selected by the states and chaired by a Presidential appointee.<sup>159</sup> On March 1, 2016, the President rotated the Chair position from the Secretary of Commerce to the Secretary of Agriculture.<sup>160</sup>

Putting those elements together, the RESTORE process works as follows.<sup>161</sup> First, of the 80% of the total civil penalties that are deposited in the Trust Fund, 35% is distributed to the Gulf States *per capita*.<sup>162</sup> Second, 30% is to be spent by the Council, for ecosystem restoration, under a Comprehensive Plan.<sup>163</sup> Third, 30% is distributed to the Gulf States *pro rata* based on oil impacts, to be spent under State Expenditure Plans, which require approval of the Council.<sup>164</sup> Finally, 5%<sup>165</sup> goes to Centers of Excellence research grants,<sup>166</sup> and the Gulf Coast Ecosystem Restoration Science,

155. Pub. L. No. 112-141, §§ 1601–1608, 126 Stat. 405, 588–607 (Jul. 6, 2012) (partially codified at 33 U.S.C. § 1321(t) & note).

156. *Id.* § 1602(b).

157. 33 U.S.C. § 1321(t)(2) (2012).

158. Exec. Order No. 13,626, 77 Fed. Reg. 56,749 (Sept. 13, 2012).

159. 33 U.S.C. § 1321(t)(2)(C)(iv)–(v).

160. News Release, U.S. Dep’t of Agric., Obama Administration Announces New Chair of Restore Council and Reaffirms Commitment to Gulf Region (Mar. 1, 2016), <http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2016/03/0055.xml&printable=true&contentidonly=true>.

161. For a graphic depicting this allocation see Gulf Coast Ecosystem Restoration Council, *About the RESTORE Act*, HISTORY, <https://restorethegulf.gov/history/about-restore-act> (last visited Nov. 26, 2016).

162. 33 U.S.C. § 1321(t)(1)(A).

163. *Id.* § 1321(t)(2)(A) (30% to carry out the Comprehensive Plan), (t)(2)(B) (ecosystem restoration).

164. *Id.* § 1321(t)(3)(A) (30% pro rata), (t)(3)(B) (council to approve state expenditure plans).

165. Restore Act, §§ 1604(h), 1605(a).

166. *Id.* § 1605.

Observation, Monitoring and Technology Program within the Department of Commerce's National Oceanic and Atmospheric Administration.<sup>167</sup>

## VII. ASSESSING THE HARM TO THE ENVIRONMENT AND PLANNING FOR RESTORATION

### A. *Overview of the Effects of the Disaster*

There are several categories of effects that must be noted when placing the ultimate resolution of the litigation in context. First, "responding to an oil spill is an inherently dangerous" activity.<sup>168</sup> Response workers were subjected to incredibly stressful and dangerous conditions. Because direct exposure to oil can cause skin reactions, respiratory symptoms, and neurological effects, workers cleaning up the oiled beaches were required to work in protective clothing.<sup>169</sup> The cleanup, which was occurring during the hottest months of the year, resulted in numerous heat-related illnesses. For example, BP's data shows over 2,000 visits to the response area health clinics for heat-related conditions.<sup>170</sup> Other workers exhibited symptoms of illness arising from direct exposure to the oil.<sup>171</sup> Further, the physically dangerous conditions—working on boats on the ocean, for instance—resulted in broken limbs and other injuries including severed fingers and broken bones.<sup>172</sup> BP's own data shows there were at least 5,986 visits to the health clinics during the response. Eighteen response workers were hospitalized as a result of injury or illness related to the response.<sup>173</sup>

In addition to the immediate effects of the explosion and fire and the injuries and risks imposed on response workers, the release of more than three million barrels of oil into the Gulf of Mexico over eighty-seven days

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167. *Id.* § 1605(c)–(d).

168. Transcript of Trial, *supra* note 46, at 82:10–82:11.

169. Richard W. Clapp, Expert Report: Human Health Impact of Deepwater Horizon Explosion, Oil Spill, and Response at 1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 15, 2014), Trial Exhibit 13346.

170. See Richard W. Clapp, Expert Report: Human Health Impact of Deepwater Horizon Explosion, Oil Spill, and Response at 19, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 12, 2014), Trial Exhibit 13347.

171. See Clapp, *supra* note 169, at 6–10.

172. BP Recordable Injury and Illness Data at 4, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Dec. 3, 2010), Trial Exhibit 12020 (summarizing 5,986 injury and illness incidents by body part and geographic location); *id.* at 7, 25, 53, 64 (documenting severed or amputated fingers); *id.* at 4, 7, 9, 16, 22, 23, 24, 25, 26, 32, 35, 36, 37, 39, 40, 41, 46, 53, 56, 58, 61, 70 (documenting fractured or broken bones).

173. Clapp, *supra* note 170, at 3.

obviously had environmental effects.<sup>174</sup> The spill extended over more than 43,000 square miles, damaged and temporarily closed fisheries vital to the gulf economy, oiled hundreds of miles of beaches, coastal wetlands and marshes, and killed thousands of birds and other marine wildlife among other economic and natural resources injuries.<sup>175</sup> Oil was washed up onto more than 400 square miles of the sea floor and washed up onto more than 1,300 miles of shoreline from Texas to Florida.<sup>176</sup> Five states were directly affected by the oil spill: Texas, Louisiana, Mississippi, Alabama, and Florida.<sup>177</sup> From the very onset of this spill, the Coast Guard recognized that “[t]his event had the potential to affect every species in the gulf. We were fighting to save an ecosystem and a way of life that were at stake.”<sup>178</sup>

The economic and social consequences of the spill were also widespread. The spill occurred just as the affected region was beginning to recover from Hurricanes Katrina, Rita, Gustav, and Ike.<sup>179</sup> As a result of the fisheries closure, the spill itself, and the drilling moratorium discussed below, the spill disrupted livelihoods and patterns of daily living, exacerbated social and economic inequality in the region, challenged individual identity, fostered conflict and divisiveness, and disempowered local governments and charitable organizations.<sup>180</sup>

As Judge Carl J. Barbier, assigned to oversee the civil actions related to the spill, stated: “The seriousness of this violation cannot be overstated. The oil spill was extremely serious. It was gravely serious. It was a massive and severe tragedy.”<sup>181</sup>

### B. *The Natural Resources Damages Assessment and Restoration Program*

As other investigations and response actions were occurring, and as a complex civil action was brewing, outside of the judicial system a massive, multi-agency, multi-government regulatory administrative process was un-

174. *In re Oil Spill*, 77 F. Supp. 3d 500, 525 ¶ 277 (E.D. La. 2014); REPORT TO THE PRESIDENT, *supra* note 1, at 165 (describing July 15, 2010 as the “first time in 87 days no oil flowed into the Gulf of Mexico”).

175. *In re Oil Spill*, 148 F. Supp. 3d 563, 569–70 (E.D. La. 2015).

176. Press Release, U.S. Dep’t of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2015), <https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater>.

177. *Id.*

178. Summary of Interview of Adm. Mary Landry at 7, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 27, 2010), Trial Exhibit 7802.

179. Transcript of Trial, *supra* note 46, at 173:09–173:11.

180. *Id.* at 160:17–161:23. For a full discussion of these harms, see Austin, *supra* note 71.

181. *In re Oil Spill*, 148 F. Supp. 3d 563, 570 (E.D. La. 2015).

derway to prepare a natural resource damages assessment.<sup>182</sup> This undertaking was a significant effort of scientific inquiry, intended to identify what happened to the ecology of the affected area and to determine the best way to restore the lost natural resources.

### 1. A Very Short Primer on the Law Authorizing this Investigation

Under the Oil Pollution Act, the natural resource damage assessment process has the goal of restoring natural resources to the condition they would have been in had the oil spill not occurred.<sup>183</sup> This process involves assessing the type and extent of harm to natural resources, and the amount of money necessary to fund projects to replace or restore natural resources – and the services they provide.<sup>184</sup> The assessment process is a legal, scientific, engineering, and economic process with public input.<sup>185</sup>

The natural resource damages assessment is implemented by federal, state, and tribal natural resource “trustees,”<sup>186</sup> who are trustees in the usual sense of the word: the natural resources are the trust corpus, which is administered by the trustees for the beneficiaries: the people. Like any trustees, their job includes seeking compensation to the trust for any losses caused by third parties. “Trustee” agencies conduct the damages assessment, seek to recover damages from the responsible party, and then use the damages to restore, replace, or acquire the equivalent of the damaged natural resources.<sup>187</sup>

In general terms, the Oil Pollution Act provides that it is the duty of the trustees to develop a damage assessment and restoration plan (DARP).<sup>188</sup> Regulations specify various considerations for this document, but at its most simplistic, the document sets out: (1) the trustees’ findings as to injury to, destruction of, loss of, and loss of use of natural resources resulting from the oiling incident; and (2) selection of the proposed restoration actions from among the various reasonable alternatives that could com-

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182. The specific phrase “natural resource damages” does not appear in OPA (nor in the other analogous states that create similar claims); still, natural resource damages is a term, and NRD and NRDA are acronyms used by those who practice in the field.

183. 15 C.F.R. § 990.10 (2016).

184. 33 U.S.C. § 2706(d) (2016).

185. The National Oceanic and Atmospheric Administration (NOAA) has promulgated regulations establishing the process for assessing natural resource damages through complex scientific study. *See generally* 15 C.F.R. pt. 990. The process is documented in an Administrative Record and requires public participation. *See, e.g.*, 15 C.F.R. §§ 990.45, 990.14(d).

186. Trustees are selected by the President and the Governors of the relevant States. 33 U.S.C. § 2706(b).

187. 33 U.S.C. §§ 2706(c), (d), (f); 15 C.F.R. § 990.10.

188. *Id.* § 2706(c)(1)(C); 15 C.F.R. § 990.55(a).

pensate for such losses, or, if needed, monetary amounts for compensation.<sup>189</sup>

As far as legal claims, the Oil Pollution Act provides that the claim for natural resource damages shall be presented to the responsible party for settlement purposes,<sup>190</sup> but if no settlement is reached, a trustee may file a civil action to recover the damages as set forth in the damage assessment and restoration plan, as well as the “reasonable costs” of the assessment.<sup>191</sup>

## 2. Cooperation Among State and Federal Trustees in the Deepwater Horizon Incident

The *Deepwater Horizon* disaster demonstrates the political, scientific, and practical challenges of implementing the provisions of the Oil Pollution Act. For the *Deepwater Horizon* oil spill, beginning in 2010, five Gulf Coast States and four federal agencies—the National Oceanic and Atmospheric Administration, Department of the Interior, the Environmental Protection Agency, and the Department of Agriculture—formed a Trustee Council to carry out the administrative procedures associated with the damages assessment.<sup>192</sup>

The Oil Pollution Act’s natural resource damages provisions provide that both state and federal trustees share a joint trusteeship.<sup>193</sup> The imple-

189. 15 C.F.R. § 990.55(b)(1).

190. 33 U.S.C. § 2713(a) (2012); 15 C.F.R. § 990.62(a). Note that, while Judge Barbier ruled that “presentment” is a mandatory condition precedent to filing an OPA claim for damages, see *In re Oil Spill*, 808 F. Supp. 2d 943, 964 (E.D. La. 2011), the statute and regulations are not entirely clear – and there are no cases to illuminate the issue – that preparation of a DARP is too.

191. 33 U.S.C. § 2702(b)(2)(A) (2012). In this case, the presentment steps never happened because the case preliminarily settled *in globo* prior to completion of the damage assessment and restoration plan.

192. The Memorandum of Understanding was first signed in 2011 and amended in 2012. See Memorandum of Understanding Relating to the Natural Resource Damage Assessment and Restoration Resulting from the *Deepwater Horizon* Mobile Offshore Drilling Unit and the Subsea Macondo Well (Apr. 26, 2011); Amendment One to Memorandum of Understanding Relating to the NRDA and Restoration Resulting from the *Deepwater Horizon* Mobile Offshore Drilling Unit and the Subsea Macondo Well (Sept. 12, 2012). These agreements were superseded in 2016 by the post-settlement MOU. See *Deepwater Horizon* Trust Council, Trustee Council Memorandum of Understanding Relating to the Natural Resource Damage Assessment and Restoration Resulting from the *Deepwater Horizon* Mobile Offshore Drilling Unit and the Subsea Macondo Well (Mar. 22, 2016). For additional information regarding the natural resource damage assessment and restoration projects see the official website for the restoration, <http://www.gulfspillrestoration.noaa.gov>. The Environmental Protection Agency and the U.S. Department of Agriculture were made trustees for this natural resource damage assessment by Exec. Order No. 13,626, § 5, 77 Fed. Reg. 56,749, 56,751 (Sept. 10, 2012).

193. 33 U.S.C. § 2706.

menting regulations provide that trustees “should” act jointly to ensure full restoration without double recovery.<sup>194</sup> There is little case law discussing the impact of one trustee proceeding alone.<sup>195</sup> There are, however, many reasons that the state and federal agencies can choose to cooperate: efficiency, cost sharing, pooling of expertise, and fairness to the defendants. In an incident of this magnitude, however, it is clear that different states experienced different impacts from the oiling event; the states also have diverse ecosystems, and varying types of recreational uses of the natural resources. It is a testament to the principles of cooperative federalism that the federal government and the states worked together to successfully investigate the injuries to natural resources, and the alternatives to restore them.

From the very beginning of the spill, the Trustees mobilized teams of scientists to evaluate injuries, taking into account modeled and observed oil trajectories along the ocean surface, often while participating in the response.<sup>196</sup> The Trustees used field studies, laboratory studies, scientific literature, and model-based approaches to assess injuries.<sup>197</sup> These studies would assist in restoration planning and in preparing for ultimate litigation. On October 1, 2010, only sixteen days after the relief well was completed, the Trustees collectively issued their “Notice of Intent to Conduct Restoration Planning,”<sup>198</sup> under the regulations governing natural resource damage assessments.<sup>199</sup> From there, injury assessment and restoration planning continued, with the ultimate goal of publishing a damage assessment and restoration plan.

### *C. BP’s Role in the Deepwater Horizon Clean-up Effort and Funding*

The Oil Pollution Act also requires the responsible party to pay the reasonable costs of the assessment of the damages and ultimately to pay the damages awarded by a court.<sup>200</sup> Yet at the same time, the implementing regulations provide guidance for cooperative natural resource damages assessment with the responsible party,<sup>201</sup> and responsible parties sometimes

194. 15 C.F.R. § 990.14(a).

195. See *United States v. ASARCO, Inc.*, 471 F. Supp. 2d 1063, 1067–69 (D. Idaho 2005).

196. See NOAA ASSESSMENT, *supra* note 150, § 4.1.4.1.

197. *Id.* § 4.1.5.1.

198. Discharge of Oil from Deepwater Horizon/Macondo Well, Gulf of Mexico; Intent to Conduct Restoration Planning, 75 Fed. Reg. 60,800 (Oct. 1, 2010).

199. 15 C.F.R. § 990.41.

200. 33 U.S.C. § 2702(b)(2)(A) (2012).

201. 15 C.F.R. § 990.14(c).

find it to be in their interest to cooperate with the Trustees.<sup>202</sup> BP apparently saw it that way, and from the beginning of the spill response, provided funding for the assessment and for early projects.

BP funded three “emergency” restoration projects, as permitted under the implementing regulations.<sup>203</sup> This initial funding allowed the Trustees to implement emergency restoration to: (1) prevent additional injury to and restore submerged aquatic vegetation beds in Florida that had been destroyed by propeller scarring and other response vessel impacts; (2) provide alternative wetland habitat in Mississippi for waterfowl and shorebirds that might otherwise winter in oil-affected habitats; and (3) improve the nesting and hatching success of endangered sea turtles on the Texas coast.<sup>204</sup> BP and the Trustees entered into an “Emergency Restoration Implementation Agreement” for BP to fund those project.<sup>205</sup> The *Deepwater Horizon* spill became one of the few uses of the emergency restoration authorities to date.<sup>206</sup>

BP participated in the natural resource damages assessment in other ways as well. BP paid for early assessment work by the trustees, contributed to early restoration projects discussed below, and funded data collection and chemical analysis.<sup>207</sup> When BP did not fund particular investigations, the Trustees were authorized by the Oil Pollution Act to apply for funding from the Oil Spill Liability Trust Fund, and as necessary, the Trustees did just that.<sup>208</sup>

## VIII. THE DEPARTMENT OF JUSTICE ROLE

Before turning to the civil litigation and the lessons learned, one more player must be identified. The Department of Justice was involved from the first day of the disaster. The Attorney General visited the Gulf on

202. See John C. Cruden & Matthew R. Oakes, *The Past, Present, and Future of Natural Resource Damages Claims*, 28 GEO. ENVTL. L. REV. 291, 291 (2016); see also Brian D. Israel, *Natural Resource Damage Claims: Strategies for Responding to Increased Federal and State Enforcement*, ABA TRENDS, Sept.–Oct. 2006, at 4.

203. Emergency restoration is authorized under the Oil Pollution Act regulations. See 15 C.F.R. § 990.26.

204. NOAA ASSESSMENT, *supra* note 150, § 1.4.3.1.

205. See U.S. DEP’T OF THE INTERIOR, EMERGENCY RESTORATION IMPLEMENTATION AGREEMENT FOR THE MC-252 OIL SPILL (2011), <https://www.fws.gov/doiddata/dwh-ar-documents/987/DWH-AR0211929.pdf>.

206. See Nicholas J. Lund & Niki L. Pace, *Deepwater Horizon Natural Resource Damage Assessment: Where Does the Money Go?*, 16 OCEAN & COASTAL L.J. 327, 341 (2011).

207. NOAA ASSESSMENT, *supra* note 150, § 4.1.4.4. To see the work plans for the data collection, visit the official website. *NRDA Workplans*, <http://www.gulfspillrestoration.noaa.gov/oil-spill/gulf-spill-data/>.

208. 33 U.S.C. § 2712(a)(2) (2012).

numerous occasions while the spill continued, the United States Attorneys of the affected States designated counsel and assisted in cleanup activities, and senior litigation counsel were established and provided resources for both the civil and criminal investigations. Counsel were also assigned to work with and assist the natural resources trustees, as well as provide legal advice and assistance to Administration actions.

While the oil was still being released, senior officials of the Environment and Natural Resources Division and the Civil Division, using Coast Guard aircrafts, visited the oil site and then met with Coast Guard officials who were leading the recovery effort. Deputy Assistant Attorney General Cruden<sup>209</sup> brought in attorneys who had experience in the *Exxon Valdez* spill, gaining valuable context from their knowledge of the importance of early identification of evidentiary needs, evidence collection protocols, collecting oil samples, working with client agencies on sampling needs, and assuring that natural resource damage needs were considered at the very beginning of the action. By May 2010, the Department had assembled a litigation team led by Steve O'Rourke of the Environment and Natural Resources Division and Michael Underhill of the Civil Division—reflecting the cooperation of the Divisions within the Department. Members of this team were involved in the natural resource damages assessment, preparation for litigation, evidence preservation, and other pre-filing efforts long before the civil complaint was even filed.

The Department of Justice also participated in many of the negotiations that resulted in the establishment of the Gulf Coast Claims Facility. This Facility, headed by Kenneth Feinberg (who had previously been in charge of distributing funds to the victims of the September 11, 2001 attacks), was an independent claims facility.<sup>210</sup> After negotiations with the Obama Administration, including the Department of Justice, BP agreed to set aside twenty billion dollars to pay for private claims.<sup>211</sup> Between August 23, 2010

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209. On December 16, 2014, John C. Cruden was confirmed by the Senate as the Assistant Attorney General for the Environment and Natural Resources Division. See U.S. Dep't of Justice, *Environment and Natural Resources Division*, <https://www.justice.gov/enrd> (last visited Dec. 26, 2016).

210. See FREQUENTLY ASKED QUESTIONS, GULF COAST CLAIMS FACILITY 1 (2010), [http://www.restorethegulf.gov/sites/default/files/imported\\_pdfs/library/assets/gccf-faqs.pdf](http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-faqs.pdf) (describing the facility as an "independent claims facility" to be administered by Kenneth Feinberg); Scott Wilson & Joel Achenbach, *BP Agrees to \$20 Billion Fund for Gulf Oil Spill Claims*, WASH. POST (June 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061602614.html> ("The new fund will be administered by Kenneth Feinberg, the Washington lawyer who oversaw a similar fund for victims of the Sept. 11, 2001, terror attacks and who more recently was the Obama administration's special master for executive compensation at firms receiving federal bailout money.").

211. Wilson & Achenbach, *supra* note 210.

and the entry of the private party settlements discussed below,<sup>212</sup> the Gulf Coast Claims Facility accepted claims from businesses and individuals who were damaged by the *Deepwater Horizon* disaster.<sup>213</sup>

## IX. THE CIVIL LITIGATION

The civil litigation arising out of the *Deepwater Horizon* disaster is an example of true judicial economy in litigating this potentially unwieldy lawsuit. An examination of the pre-trial, trial, and settlement procedures demonstrate that active judicial involvement and cooperation on appropriate issues among even opposing counsel can achieve the goals of “just, speedy, and inexpensive” resolution of even the most significant and hotly disputed issues.<sup>214</sup>

### A. *The Federal Rules of Civil Procedure and the Manual for Complex Litigation*

Complex civil litigation in U.S. District Courts is typically managed under two guiding authorities: The Federal Rules of Civil Procedure and the Manual for Complex Litigation. The Federal Rules of Civil Procedure were amended after this litigation was concluded, but those amendments were presaged by many of Judge Barbier’s case management techniques. Accordingly, a short description of the 2015 amendments to the Rules is warranted.

In May 2010, just as the litigation from the disaster was beginning, the Civil Rules Committee held a civil litigation conference at Duke University School of Law.<sup>215</sup> At the conference, almost one hundred lawyers from various parts of the litigation world convened and discussed ways in which to improve civil litigation procedure, particularly in light of the steadily and dramatically increasing costs associated with discovery.<sup>216</sup>

For several years, the Rules Committee held meetings and received comments on various proposals to reduce discovery burdens and speed up the resolution of civil cases. The amendments that finally took effect on December 1, 2015, reflected numerous themes.<sup>217</sup> First, as signaled by the

212. The Deepwater Horizon Court Supervised Settlement Program (CSSP), began operation on June 4, 2012. Order at 1–2, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. July 2, 2013), Rec. Doc. 10564.

213. See GULF COAST CLAIMS FACILITY, *supra* note 210, at 19.

214. See FED. R. CIV. P. 1.

215. Duke Law News, *Federal Committee on Rules of Practice and Procedure Opens “Duke Rules Package” for Comment*, DUKE LAW (Aug. 22, 2013), <https://law.duke.edu/news/federal-committee-rules-practice-and-procedure-opens-duke-rules-package-comment/>.

216. *Id.*

217. *Id.*

amendment to Rule 1, the Committee made it clear that counsel have an obligation to use the Rules to secure the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>218</sup> Second, the Committee directed the courts to balance the burden of discovery requests and obligations against the size and needs of a particular case. The most direct expression of this obligation is found in the revisions to the definition of the scope of discovery to include that, which is both relevant to the claims and defenses and proportional to the needs of the case.<sup>219</sup> Third, the Committee integrated electronic discovery issues more firmly in the rules, setting forth specific topics for discussion among parties at the Rule 16 conference, permitting discovery requests to be served before the initial conference of the parties to encourage more productive discovery planning, setting specific standards for objections and responses to requests for production, and otherwise encouraging more detailed and productive cooperation among the parties.<sup>220</sup> Fourth, the Committee set forth a uniform standard for determining whether and which sanctions a court should apply in remedying a party’s failure to preserve evidence.<sup>221</sup> Justice Roberts summarized the intended effect of the rules in his annual report:

Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.

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The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules “should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—

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218. See FED. R. CIV. P. 1.

219. See FED. R. CIV. P. 26(b).

220. See, e.g., *id.* at 26(f), 34.

221. See *id.* at 37(e).

though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.<sup>222</sup>

Though it predated these amendments, the *Deepwater Horizon* litigation demonstrates that the changes contemplated by the Rules amendments will result in more efficient resolution of even the most complex cases.

### B. Formation of the Multi-District Litigation

Lawsuits arising out of the disaster began on April 21, 2010, the day after the explosion, while the rig was still burning.<sup>223</sup> Many of the plaintiffs raised admiralty law claims. They filed claims under the general maritime law – the admiralty equivalent to common law – which provides claims for compensatory damages for strict product liability for defective products,<sup>224</sup> punitive damages in the case of gross negligence,<sup>225</sup> and simple negligence.<sup>226</sup>

Shortly after, Transocean instituted a civil action in admiralty under the Limitation of Liability Act of 1851, seeking to limit its liability for common law or maritime claims.<sup>227</sup> The Limitation of Liability Act of 1851 provides that a vessel owner is liable only up to the value of the vessel and its cargo and is thus akin to limited liability for shareholders in a corporation.<sup>228</sup> The limitation evaporates if the vessel owner cannot prove a lack of “privity or knowledge” of the unseaworthy condition of the vessel.<sup>229</sup>

By May 2010, so many lawsuits and class actions were pending in different courts that certain plaintiffs, and BP itself, moved for consolidation in the Judicial Panel on Multidistrict Litigation.<sup>230</sup> The United States filed

222. CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–6 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

223. See, e.g., Complaint, *Roshto v. Transocean, Ltd.*, No. 2:10-CV-1156 (E.D. La. Apr. 21, 2010).

224. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

225. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

226. *In re Oil Spill*, 808 F. Supp. 2d 943, 943, 958 (E.D. La. 2011). Claims for purely economic losses unaccompanied by physical damage to a proprietary interest are generally precluded (with an exception for commercial fishermen). *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

227. See Complaint and Petition for Exoneration from or Limitation of Liability, *In re Triton Asset Leasing GmbH*, No. 10-2771 (S.D. Tex. May 13, 2010).

228. 46 U.S.C. § 30505 (2012).

229. *In re Oil Spill*, 21 F. Supp. 3d 657, 753 (E.D. La. 2014).

230. See Motion of Plaintiffs for Transfer of Actions to the Eastern District of Louisiana Pursuant to US 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, *In re Oil Spill*, No. 10-MDL-2179 (J.P.M.L. May 6, 2010), Rec. Doc. 1; BP Exploration and Production’s Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings

in support of consolidation and recommended the Eastern District of Louisiana.<sup>231</sup> On August 10, 2010, the Panel agreed, transferring seventy-seven actions that had been filed in (or removed to) seven different United States District Courts, to the Honorable Carl J. Barbier, Eastern District of Louisiana. The Panel noted that the Judge “had a distinguished career as an attorney and now as a jurist,” and that it had “every confidence that he is well prepared to handle a litigation of this magnitude.”<sup>232</sup>

### C. *Setting the Judicial Structure*

The day he was appointed, Judge Barbier issued Pretrial Order 1, consolidating the transferred cases and all “tag along” actions for pretrial purposes and beginning a multi-district litigation that would ultimately involve over one hundred thousand private party claimants.<sup>233</sup> The Judicial Panel on Multi-District Litigation spoke prophetically regarding the management task ahead of Judge Barbier:

Judge Barbier has at his disposal all the many assets of the Eastern District of Louisiana, which include magistrate judges and a clerk’s office accustomed to handling large MDLs. Judge Barbier may also choose to employ special masters and other case administration tools to facilitate certain aspects of the litigation. *See* Manual for Complex Litigation, Fourth §§ 11.52, 11.53 (2004).<sup>234</sup>

Judge Barbier did just as the Panel suggested. By June 4, 2010, Judge Barbier had selected U.S. Magistrate Judge Sally Shushan to act as Magis-

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Under 28 U.S.C. § 1407, *In re* Oil Spill, No. 10-MDL-2179 (J.P.M.L. May 20, 2010), Rec. Doc. 13.

231. *See* United States of America’s Statement of Interest and Response to Motion to Transfer, *In re* Oil Spill, No. 10-MDL-2179 (J.P.M.L. Jun. 16, 2010), Rec. Doc. 98. The state governments, however, were initially reluctant to join the multi-district litigation, preferring to litigate their claims in their own courts. *See, e.g.*, Motion to Remand to State Court by Plaintiff Louisiana State, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Aug. 24, 2010), Rec. Doc. 65. In the end, as described below, the States’ participation in the same litigation as the United States allowed a level of cooperation that greatly enhanced the recovery for the Gulf of Mexico.

232. *In re* Oil Spill, 731 F. Supp. 2d 1352, 1355 (J.P.M.L. 2010). A second MDL was set up in Houston for shareholder lawsuits under the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp. *In re* BP p.l.c. Securities Litigation, 734 F. Supp. 2d 1376 (J.P.M.L. 2010). Separately, the Securities and Exchange Commission itself sued BP for misrepresenting the rate of flow of oil from the well during the spill. *See* Complaint, SEC v. BP, p.l.c., No. 12-CV-2774 (E.D. La. Nov. 15, 2012), Rec. Doc. 1. That case was settled for \$525 million. Final Judgment as to Defendant BP p.l.c., No. 12-CV-2774 (E.D. La. Dec. 10, 2012), Rec. Doc. 5.

233. *In re* Oil Spill, 21 F. Supp. 3d 657, 667 (E.D. La. 2014).

234. *In re* Oil Spill, 731 F. Supp. 2d 1352, 1356 (E.D. La. 2010).

trate on the case.<sup>235</sup> As discussed below, Judge Shushan oversaw the discovery in the litigation and performed many other management tasks, including efforts to settle the case.<sup>236</sup> On September 24, 2010, the Court appointed Professor Francis E. McGovern as Special Master.<sup>237</sup> Later, Judge Barbier appointed additional special masters as the cases progressed and additional issues arose, chiefly related to reaching or implementing settlements (as cited below).

Not surprisingly, this multi-district litigation involved numerous attorneys representing various parties. For the private plaintiffs alone, there were more than ninety attorneys.<sup>238</sup> Judge Barbier followed the Manual for Complex Litigation in establishing coordinating counsel for three groups of parties: the private parties, the Defendants, and the federal government parties, and the private plaintiffs.<sup>239</sup> As the Manual contemplates, these coordinating counsel were central to the efficiency of the litigation.<sup>240</sup> They served as the counsel who coordinated discovery, made arrangements for payment of costs of depositions and trial exhibits, and provided a discrete group with which the Court could communicate on a regular basis.<sup>241</sup>

The court used a new case management tool for multi-party complex civil actions: the “pleading bundles.”<sup>242</sup> By Pretrial Order 11, the judge required all private plaintiffs to redo their complaints and file into one of the following bundle sets: (A) personal injury and death claims resulting directly from the events of April 20, 2010; (B) private individual and business economic loss claims; (C) claims by governmental entities; and (D) injunc-

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235. Transcript of Status Conference at 18:01–06, *Wetzel v. Transocean, Ltd.*, No. 10-cv-1222 (E.D. La. June 4, 2010), Rec. Doc. 108.

236. *Id.*

237. Order at 3, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 7, 2010), Rec. Doc. 492 (to coordinate communications across the Oil Spill Liability Trust Fund, Gulf Coast Claims Facility, and state and federal courts).

238. See Order and Reasons – Aggregate Common Benefit Fee and Cost Award at 1 n.1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 25, 2016), Rec. Doc. 21849 (stating that 93 attorneys were part of the application for award of attorneys’ fees to the plaintiffs).

239. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004); Pretrial Order No. 6, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Aug. 27, 2010), Rec. Doc. 110 (establishing Plaintiffs’ Steering Committee); Pretrial Order No. 10, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 19, 2010), Rec. Doc. 567 (establishing the Defendants’ Steering Committee); Pretrial Order No. 26, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 27, 2011), Rec. Doc. 1074 (establishing Coordinating Counsel for the government parties).

240. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

241. See Pretrial Order No. 8 at 3–4, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 8, 2010), Rec. Doc. 506 (setting forth responsibilities of Plaintiffs’ Steering Committee).

242. Pretrial Order No. 11 at 2–5, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 19, 2010), Rec. Doc. 569.

tive and regulatory claims.<sup>243</sup> The concept here was to allow for large classes of plaintiffs to join a “master” complaint with a short form.<sup>244</sup>

Judge Barbier’s use of pleadings bundles was new, but it was consistent with the Manual for Complex Litigation, which encourages prompt action to finalize the pleadings to allow for early resolution of legal issues.<sup>245</sup> By bundling the pleadings, the court made the efficient resolution of Rule 12 motions possible.<sup>246</sup> For example, in ruling on Rule 12 motions to dismiss pertaining to the B1 Master Complaint, the court concluded that the case was in the admiralty jurisdiction, all State laws were preempted, and punitive damages under the general maritime law were not displaced by the Oil Pollution Act.<sup>247</sup> All of these decisions simplified and narrowed the issues for trial by making it possible to consolidate the vast majority of liability issues in a single, phased trial.<sup>248</sup>

#### D. *The United States Enters the Litigation*

In 2010, the United States filed a complaint in the Eastern District of Louisiana and joined the multi-district litigation, with two claims for relief: (1) civil penalties under the Clean Water Act and (2) a declaratory judg-

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243. *Id.*

244. See Transcript of Status Conference at 14:45–14:49, 15:47–15:48, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sep. 16, 2010), Rec. Doc. 550. The State of Louisiana objected to Pretrial Orders 8 and 11 as usurping its sovereignty and sought a writ of mandamus allowing the state to operate outside of the plaintiffs’ steering committee without being part of the “common benefit” pool from which the plaintiffs’ attorneys would be paid. Petition for Writ of Mandamus or Prohibition at 5–8, 12–14, *In re State of Louisiana*, No. 11-30178 (5th Cir. Feb. 22, 2011), Rec. No. 00511391480. The Fifth Circuit denied the petition, finding that the pretrial orders fell squarely within the court’s “inherent authority and discretion to consolidate and manage complex litigation, particularly when serving as the transferee court in a multidistrict proceeding.” Order at 2, *In re State of Louisiana*, No. 11-30178 (5th Cir. Apr. 11, 2011), Rec. Doc. No. 00511442196.

245. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.31 (2004).

246. By the time of this publication, the court has been able to dismiss entire bundles on the merits or for lack of expedience. See, e.g., Pretrial Order No. 60, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 29, 2016), Rec. Doc. 16050.

247. See *In re Oil Spill*, 808 F. Supp. 2d 943 (E.D. La. 2011).

248. It is also worth noting that Judge Barbier made use of technology to simplify service of documents in the litigation, including amended pleadings and discovery. See Pretrial Order No. 12 at 1 ¶ 1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 26, 2010), Rec. Doc. 600 (“In order to facilitate case management, document retrieval, case organization and expeditious, efficient and economical communication by and amongst counsel, the parties will utilize the services of LexisNexis File & Serve . . . and its litigation system for providing electronic service, storage and delivery of court-filed and discovery related documents through a secure website.”).

ment of liability under the Oil Pollution Act.<sup>249</sup> The complaint also prayed for unspecified injunctive relief.<sup>250</sup> The complaint named the following defendants: (1) BP as lessee, owner, operator and person in charge of the well, and operator of the vessel; (2) Anadarko and MOEX as co-lessees of the ocean block, and co-owners of the well; and (3) Transocean as owner and operator of the drilling rig, and blowout preventer, and operator of the well.<sup>251</sup>

In the *Deepwater Horizon* multi-district litigation, there were essentially two categories of plaintiffs. The government group included the United States and the five Gulf coast states (Louisiana, Alabama, Texas, Mississippi, and Florida),<sup>252</sup> and several local governments.<sup>253</sup> The other plaintiff group included private litigants such as individuals and businesses.<sup>254</sup> As called for by the Manual for Complex Litigation,<sup>255</sup> the court appointed a Plaintiff's Steering Committee to represent all of the private litigants, as well as many of the local governments.<sup>256</sup> As for the sovereign governments, the court appointed "coordinating" counsel for the United States and the states.<sup>257</sup>

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249. Complaint of the United States of America, *United States v. BP Expl. & Prod. Inc.*, No. 10-4536 (E.D. La. Dec. 15, 2010), Rec. Doc. 1 (citing 33 U.S.C. § 1321(b) (2012); 33 U.S.C. § 2702(a) (2012)).

250. *Id.* at 26.

251. *Id.* at 5–13.

252. Alabama and Louisiana each filed complaints seeking damages. *See, e.g.*, Complaint for Declaratory Judgment at 1, *Louisiana v. Triton Asset Leasing GmBH*, No. 10-3059 (E.D. La. Sept. 14, 2010), Rec. Doc. 1; The State of Alabama's First Amended Complaint, *Alabama v. BP, p.l.c.*, No. 10-MDL-2179 (E.D. La. Apr. 5, 2011), Rec. Doc. 1872. About three years after the explosion, to avoid their claims being barred by the statute of limitations, *see* 33 U.S.C. § 2717(f) (2015), Texas, Mississippi and Florida filed suit as well. *See, e.g.*, Complaint at 1, *Texas v. BP Expl. & Prod.*, No. 13-315 (E.D. Tex. May 17, 2013), Rec. Doc. 1; Original Complaint at 1, *Mississippi v. BP Expl. and Prod. Inc.*, No. 13-158 (S.D. Miss. Apr. 18, 2013), Rec. Doc. 1; First Amended Complaint at 1, *Florida v. BP Expl. & Prod., Inc.*, No. 13-cv-123 (N.D. Fl. Apr. 20, 2013), Rec. Doc. 2.

253. Campbell Robertson et al., *BP to Pay \$18.7 Billion for Deepwater Horizon Oil Spill*, N.Y. TIMES (July 2, 2015), [http://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html?\\_r=0](http://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html?_r=0). Several cases were filed against the United States outside of MDL 2179, but such claims are beyond the scope of this article.

254. Pretrial Order No. 11, *supra* note 242, at 4.

255. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

256. Pretrial Order No. 9 at 1–3, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 8, 2010), Rec. Doc. 508.

257. Pretrial Order No. 26, *supra* note 239 (appointing Michael Underhill as coordinating counsel for the Federal Government Interests and Alabama's Attorney General as coordinating counsel for the state interests).

### E. Pretrial Proceedings: Scope and Scale

Not surprisingly, given the scope of the disaster and the response to it, pretrial activities in the MDL involved terabytes of data,<sup>258</sup> hundreds of hours of depositions, dozens of third party subpoenas, and numerous motions to compel. The sheer volume of work was complicated by the fact that the governments and private plaintiffs had to work together to present a unified case to the trial judge, despite having asserted claims under different laws.<sup>259</sup> There were some theories of the case presented where not all plaintiffs were in agreement. For example, the private plaintiffs argued that Halliburton was at fault for the cement job. Conversely, the United States emphasized BP's control over all operations, including the cementing work.<sup>260</sup>

Adding to the complexity, there were even times when the United States and BP were aligned on issues. For example, when Transocean sought to have BP indemnify it for any civil penalties that the court might award to the United States, BP and the United States both argued against Transocean's position, though for different reasons.<sup>261</sup>

Despite the breadth and complexity of the pretrial issues, even matters of this size can be resolved in a "just, speedy, and [relatively] inexpensive" manner when managed properly by the court and parties.<sup>262</sup> Just such a circumstance occurred in the *Deepwater Horizon* litigation. From the outset of the litigation, the court established an aggressive schedule intended to hold the trial on liability and limitation just shy of two years after the well was finally capped.<sup>263</sup> Accomplishment of this ambitious goal required adherence to a set of principles which foreshadowed the December 2015 amendments to the Federal Rules of Civil Procedure.

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258. One source estimates that a megabyte of computer storage can contain approximately 100 word processing pages. Michael R. Arkfeld, Arkfeld on Electronic Discovery and Evidence § 1.2(G) tbl.1 (2d ed. LawPartner Publ'g LLC 2010). A megabyte is a millionth of a terabyte—indicating that a terabyte can contain approximately 100 million word processing pages. *See id.* § 2.3(B).

259. *See* Pretrial Order No. 26, *supra* note 239.

260. Transcript of Opening Statements at 51–58, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Feb. 25, 2013).

261. *In re* Oil Spill, 841 F. Supp. 2d 988, 992 n.4 (E.D. La. 2012).

262. FED. R. CIV. P. 1.

263. *See* Pretrial Order No. 32 at 4, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Mar. 3, 2011), Rec. Doc. 1506 (setting trial on liability for July 16, 2012); REPORT TO THE PRESIDENT, *supra* note 1, at 167 (stating that static kill of the well was announced on August 8, 2010).

## 1. Emphasis on Cooperation and Professionalism

From the first pretrial order issued by the court, Judge Barbier demanded a standard of cooperation and professionalism from the attorneys:

It is not yet known how many attorneys will eventually join this litigation, but we can assume it will be a large number. As attorneys involved in a multi-district case, you will probably be laboring together for some time in the future with work progressively becoming more complicated and exacting. Some of you know each other and some are complete strangers. Undoubtedly each has a different style and personality. It is likely that during the course of this litigation your working relationship will occasionally be strained, communication derailed, and mutual trust questioned. The just and efficient resolution of this litigation will depend in large measure on the way you as attorneys comport yourselves and overcome the temptations and trepidations inherent in a case of this magnitude. The Manual for Complex Litigation recognizes that judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, the added demands and burdens of this type of litigation place a premium on professionalism and require counsel to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and the Court. The Court expects, indeed insists, that professionalism and courteous cooperation permeate this proceeding from now until this litigation is concluded.<sup>264</sup>

Toward the end of achieving that cooperation and efficient work, Magistrate Judge Sally J. Shushan held weekly status conferences to discuss the progress of discovery and other pretrial efforts. Throughout these hearings, Judge Shushan emphasized an esprit des corps among all counsel, and when the prediction rang true that counsels' working relationship occasionally became strained, the court addressed such issues directly.<sup>265</sup>

The emphasis on cooperation went to the heart of managing the burden of discovery on the parties and especially upon third parties. Throughout

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264. Pretrial Order No. 1 at 1-2 ¶ 1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 10, 2010).

265. See Transcript of Status Conference at 6:25-12:24, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 21, 2014); Transcript of Status Conference at 10:17-12:19, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Nov. 2, 2012), Rec. Doc. 7837 (Judge Shushan expressing appreciation for the United States' sharing a photograph of counsel in costume for Halloween).

discovery, the Magistrate Judge required the parties to coordinate in issuing subpoenas, discovery requests, and even exhibit lists.<sup>266</sup> When cooperation failed, the court did not hesitate to rule quickly and definitively. For instance, the court held twice-weekly calls with the United States and BP during the most intense document discovery, during which challenges to the parties' productions could be raised and addressed directly.<sup>267</sup>

## 2. Preservation of Evidence

Given the rapid onset of litigation after the explosion, preservation of evidence was at the forefront of the court's and parties' minds from the outset. One of the first complex evidentiary issues to arise was the intersection of the efforts to seal the well and the need to preserve evidence of the cause of the explosion. On August 20, 2010, the court held a status conference by telephone regarding plans to make changes to the well in order to facilitate the relief well construction.<sup>268</sup> Eventually, the blowout preventer was brought up from the sea floor and the court appointed a Special Master (a former Coast Guard Captain) to oversee the preservation and examination of the blowout preventer in preparation for trial.<sup>269</sup>

Preservation of evidence and the cost of the preservation were early issues for the United States as well. One of the earliest filings by the United States recognized the breadth of discovery and the potential burden imposed by preservation of evidence. Foreshadowing the recently imposed requirement to discuss "any issues about preserving discoverable evidence,"<sup>270</sup> even before filing its complaint, the United States negotiated an order addressing the preservation of electronically stored information. This negotiated order addressed issues that arise in nearly every litigation – such as whether to preserve back-up tapes – and also issues unique to a case involving the ongoing response to a major disaster – such as addressing data

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266. See, e.g., Transcript of Status Conference at 20:08–22:16, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Nov. 5, 2012), Rec. Doc. 7837 (discussing coordination of subpoenas on a number of third parties); Transcript of Status Conference at 25:05–31:17, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. May 6, 2011), Rec. Doc. 2324 (discussing coordination of responses to defendants' discovery requests to the States).

267. See, e.g., Transcript of Status Conference at 30:17–32:03, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. May 11, 2012), Rec. Doc. 6527 (discussing challenges to the United States' privilege logs and referencing a follow-up "BP-US conference").

268. Minute Entry, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 20, 2010), Rec. Doc. 53.

269. See, e.g., Order Regarding the Appointment of Captain Suzanne E. Englebert, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 13, 2011), Rec. Doc. 4013.

270. FED. R. CIV. P. 26(f)(2).

generated by employees deployed to the spill during their non-duty hours.<sup>271</sup>

The United States led the efforts to minimize the burden of preservation of evidence throughout the litigation. Because the response was ongoing, numerous issues arose regarding the preservation of physical items from the exploration of the well. Commanding the most attention, of course, was the preservation of the failed blow-out preventer. The United States worked with BP and the other parties to develop a protocol for raising the blow out preventer from the ocean floor, moving it to a base operated by the National Oceanic and Atmospheric Administration, maintaining the equipment over the next several years, and providing procedures for access and inspection by the various experts who testified.<sup>272</sup>

In addition, issues related to the preservation of various biological, plant, and environmental samples arose repeatedly. The United States also addressed these issues in a manner consistent with the Rule 26 mandate to meet and confer regarding preservation. To achieve judicial efficiency, to the extent practicable, the United States developed procedures for consultation that resolved many issues without court intervention. For instance, the United States negotiated Pretrial Order 30, which permitted it to dispose of samples if, after following a specified procedure, no other party objected.<sup>273</sup>

Where issues of spoliation did arise, the court used its own attention or that of Special Masters to identify the prejudice and remedy it. By focusing on curing the prejudice rather than imposing sanctions, the court embodied the spirit of the 2015 amendments to Federal Rule of Civil Procedure 37.<sup>274</sup> For example, in one incident, BP requested that Halliburton produce a series of modelling runs performed using a proprietary program. These runs, which were created by a retained expert witness after the closure of the well, were missing from the expert's computer when it was searched for

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271. See Pretrial Order No. 22 at ¶ 14.a., *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 4, 2011), Rec. Doc. 943 (relieving the United States of the obligation to preserve most backup tapes); *id.* ¶ 17 (identifying when information collected by individual employees was outside the possession, custody or control of the United States); see also Motion for Entry of Order on Preservation of Evidence, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Dec. 24, 2010), Rec. Doc. 911 (setting forth reasons for order and history of negotiations).

272. See, e.g., Transcript of Status Conference at 98:05–124:03, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Apr. 15, 2011).

273. Pretrial Order No. 30, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Feb. 25, 2011), Rec. Doc. 1378.

274. See FED. R. CIV. P. 37(e)(1); Summary of the Rep. of the Judicial Conference Comm. on Rules of Prac. and Proc., Agenda E-19, at 15 (Sept. 2014) (emphasizing that the Rule was being amended to provide “broad trial court discretion to cure prejudice caused by the loss of” electronically stored information).

discovery purposes.<sup>275</sup> To replace the missing data, Judge Shushan assigned a special master, Captain Englebert, to take possession of the computer and supervise a forensic search for the files.<sup>276</sup> The court also directed the parties to cooperate in designing a protocol for the search and a method of replicating the files.<sup>277</sup> Judge Shushan supervised this process and inquired at each status conference regarding the progress until the issue was resolved.<sup>278</sup> As a result of the court's efforts, the prejudice alleged by BP was cured and any disruption of the litigation was averted.

### 3. Introducing Efficiencies into Document and Data Discovery

The court also introduced a number of procedures that significantly streamlined the document production. These procedures were drawn from or inspired by the Manual for Complex Litigation.<sup>279</sup> For instance, because determining the cause of the explosion and blowout required examination of the design of the well and blowout preventer, many parties sought discovery of information that is typically held as highly confidential business information. Similarly, discovery related to damages included information that contained health records and other personally identifying information. Further, because some parties were seeking to establish negligence by showing BP deviated from the general standard of care, BP sought discovery of the well designs and other information regarding its competitors' drilling activities.<sup>280</sup> All of this information was highly sensitive and if simplifying steps had not been taken, would have required page-by-page review of millions of pages of documents.

This problem was recognized in the Manual for Complex Litigation when it advised courts that, courts should consider an "umbrella" protective order when the volume of potentially relevant materials is large.<sup>281</sup> Such orders:

[P]rovide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected

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275. *In re Oil Spill*, No. 10-MDL-2179, 2012 WL 174645, at \*1 (E.D. La. Jan. 20, 2012).

276. *Id.*

277. *Id.* at \*2.

278. *See, e.g.*, Transcript of Status Conference at 24:22–25:01, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 16, 2012).

279. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 11.41–.49 (2004).

280. *See, e.g.*, United States' Status Report on Efforts to Respond to Discovery Served on It Before July 10, 2011 at Attachment 2, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 6, 2011), Rec. Doc. 3928 [hereinafter U.S. Status Report on Discovery] (identifying requests from BP for documents relating to various aspects of well design).

281. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004).

unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.<sup>282</sup>

Early on, Judge Barbier did what the Manual suggested and entered an umbrella protective order allowing the parties to exchange sensitive information under seal.<sup>283</sup> When the United States joined the litigation, a supplemental order was entered to address statutes that imposed unique obligations on the United States, such as the Privacy Act and statutes governing the locations of fishing grounds, oil deposits, and other sensitive information.<sup>284</sup>

While this procedure allowed the parties to produce a great deal of information rapidly, it did introduce challenges in an environmental enforcement action. Each of the statutes under which the United States brought suit were premised on the importance of public access to information and participation in enforcement. For instance, the Clean Water Act provides opportunities for parties to intervene in an enforcement action, and the regulations of the Department of Justice require public notice and comment on any settlements resolving claims under that statute.<sup>285</sup> The court addressed this dissonance directly at the time of trial when the parties were ordered to review all documents that were held as confidential under the pretrial orders and redact or otherwise remove the confidential information to allow the trial to proceed publicly.<sup>286</sup> Though reviewing the documents marked as exhibits was time-consuming—BP's exhibit list for the first

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282. *Id.*

283. *See* Pretrial Order No. 13, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Nov. 2, 2010), Rec. Doc. 641.

284. *See* Pretrial Order No. 36, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. May 16, 2011), Rec. Doc. 2376.

285. 33 U.S.C. § 1365(a) (2012); 28 C.F.R. § 50.7 (2016); *see also* 28 C.F.R. § 50.9 (“There is, moreover, a strong presumption against closing proceedings or portions thereof.”). One party, the Center for Biological Diversity, sued BP and Transocean under the citizen suit provisions of the Clean Water Act, alleging that the companies had violated the Act by discharging the oil into the ocean without a permit. *See* Center for Biological Diversity v. BP Am. Prod. Co., 704 F.3d 413, 418–19 (5th Cir. 2013). The Center later added claims pursuant to the Emergency Planning and Community Right to Know Act alleging that the companies failed to timely and accurately report the release of hazardous substances. *Id.* at 419. The court eventually dismissed these claims and the Fifth Circuit upheld the dismissal of all but the notification claims. *Id.* at 432.

286. *See, e.g.*, Transcript of Status Conference at 29:22–32:13, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Feb. 10, 2012), Rec. Doc. 5799.

trial was 268 pages long<sup>287</sup>—it was certainly less time consuming than reviewing all documents before their production.

Both the Manual for Complex Litigation and the court also recognized the issues that led the Advisory Committee for the Federal Rules of Evidence to propose Rule 502—the burdens imposed by page-by-page review for privilege.<sup>288</sup> The Manual advises courts to develop “procedures to accommodate claims of privilege or for protection of materials from discovery as trial preparation materials.”<sup>289</sup> Without such procedures, privilege claims can easily disrupt the discovery schedule.<sup>290</sup>

In the case at bar, the court took several steps to address privilege claims. First, the court entered an order implementing the provisions of Federal Rule of Evidence 502(d), *i.e.*, an order that permitted parties to claw back privileged documents that were inadvertently produced.<sup>291</sup> In addition, upon the parties’ agreement, that claw back order included the following provision:

Privilege log identification is not required for post-April 20, 2010 communications exchanged between the Producing Party and their counsel or among counsel for the Producing Party. In addition, neither communications between or among counsel for Plaintiffs nor communications between or among counsel for Defendants are required to be identified on the Producing Party’s privilege log.<sup>292</sup>

In doing so, the court eliminated the wasteful logging of documents that were very unlikely to raise a question in the parties’ minds, conserving the parties’ efforts to focus on more contentious assertions of privilege.<sup>293</sup>

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287. BP Phase One “Good Faith” Trial Exhibit List, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Nov. 14, 2011), Rec. Doc. 4585.

288. FED. R. EVID. 502, Adv. Comm. Note (stating that the new rule “responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive”).

289. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.43 (2004).

290. *Id.*

291. Pretrial Order No. 14 at 3–6 ¶¶ 6–10, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Nov. 3, 2010), Rec. Doc. 655; *see also* FED. R. EVID. 502(d).

292. Pretrial Order No. 14, *supra* note 291, at 2 ¶ 2.

293. While the Court’s procedures definitely introduced efficiency into this process, the parties still expended a great deal of effort addressing privilege issues. For instance, the United States and BP negotiated a procedure to address BP’s challenges to the assertion of the deliberative process privilege that ultimately reduced the number of claims to 119 documents and BP’s challenge to only 21 of those claims. Ultimately, each of the United States’ challenged deliberative process claims was upheld. *In re Oil Spill*, No. 10-MDL-2179, 2012 WL 2087219, at \*2 (E.D. La. Jun. 11, 2012). Another privilege dispute arose regarding BP’s assertion of attorney-client privilege over documents that the United States claimed were subject to waiver as a result of the crime-fraud doctrine. United States’ Motion to Compel

#### 4. The Actual Exchange of Data and Documents

Though the events at issue in this case took place over a relatively short period of time—most parties agreed to limit the majority of discovery to the period of 2005-2015<sup>294</sup>—the amount of documents and data exchanged in this case was massive. As the primary operator of the well and the entity participating in the response, BP was an obvious target of discovery. Perhaps also somewhat obviously, the United States was also a target of massive discovery because of its role in leasing the Macondo well to BP, responding to the spill, enforcing the law, and providing substantial scientific expertise regarding the Gulf of Mexico and oil drilling.

As expected by the Federal Rules of Civil Procedure,<sup>295</sup> the parties addressed the format of production early on in discovery.<sup>296</sup> Cooperation at the beginning of discovery streamlined the production and allowed all of the parties to use standard e-discovery document review platforms.

Despite the United States', and all the parties', efforts to reduce the burden of discovery, the exchange of data was still extensive. In the liability phase, alone, the United States was served with over 500 requests for admission, over 70 interrogatories, and more than 200 requests for productions of documents.<sup>297</sup> Ultimately, more than ten federal agencies produced over one hundred million pages.<sup>298</sup>

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Production of Previously Withheld Documents Pursuant to the Crime-Fraud Exception to the Attorney-Client Privilege, *In re Oil Spill*, No. 10-MDL-2179 (Jan. 30, 2013), Rec. Doc. 8417. The United States' motion was granted in part. See Order, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Apr. 4, 2013), Rec. Doc. 9115.

294. See, e.g., U.S. Status Report on Discovery, *supra* note 280, at 3, Attachment 4.

295. FED. R. CIV. P. 26(f), 34.

296. See Pretrial Order No. 16, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 8, 2010), Rec. Doc. 686.

297. U.S. Status Report Discovery, *supra* note 280, at Attachments 1–2.

298. Email from Cynthia Vide, Lead Project Manager, CACI, to Sarah Himmelhoch, Senior Litig. Counsel, U.S. Dep't of Justice, Env't & Nat. Res. Div. (Sept. 27, 2013, 4:44 EST) (identifying a total production of over 97 million pages). In Phases 1 and 2, the following federal agencies responded to discovery: Department of the Interior, Environmental Protection Agency, Department of Energy and seven National Laboratories, Department of Homeland Security and the U.S. Coast Guard, Department of Commerce and the National Oceanic and Atmospheric Administration, Department of the Navy, and the Army Corps of Engineers. In addition, the United States collected and produced documents from several independent volunteers who participated in the response. See U.S. Status Report on Discovery, *supra* note 280, at 4–23. In Phase 3, the United States provided additional documents from these same agencies and also collected documents from the Department of Health and Human Services, Customs and Border Protection, and the Department of Labor. See United States' Response to Defendants' First Set of Discovery Requests to the United States Relating to the Penalty Phase at 38, *In re Oil Spill*, No. 10-MDL-2179 (Apr. 25, 2014); Letter from Sarah Himmelhoch, Senior Litig. Counsel, U.S. Dep't of Justice, Env't & Nat. Res. Div. to Sally Shushan, U.S. Magistrate Judge (July 11, 2014).

The most successful effort to address the burden of discovery was undertaken in the third phase of discovery. The court was faced with a special challenge in this phase that related to, among other things, the seriousness of BP's and Anadarko's violations, including the nature and extent of environmental harm. At the same time, the United States was engaged in a substantial assessment of these environmental harms, which would likely result in a future claim for natural resource damages. BP sought to conduct significant discovery into the environmental impact of its spill, and the United States opposed such efforts in order to protect the integrity of the natural resource damages assessment. As the court recognized in the first penalty phase status conference:

[I]t seems to me that if I went along with BP's suggestion as to how we should approach and allow discovery on this, we'd in effect, be discovering and trying the [natural resources damages] case; and as we all know, that could be years away before a case is ready to be tried.<sup>299</sup>

The court, in the spirit of the judicial involvement contemplated by the Manual for Complex Litigation and 2015 amendments to the Federal Rules of Civil Procedure,<sup>300</sup> addressed this tension directly. First, the court invited and quickly disposed of numerous motions *in limine* defining the scope of the third trial, thereby providing clear guidance to the parties on the appropriate scope of discovery.<sup>301</sup> Second, the court directed the involvement of the Magistrate Judge in the planning of written discovery.<sup>302</sup> Judge Shushan directed the parties to exchange draft discovery,<sup>303</sup> after which the parties held an in person meet and confer. During that meeting, the parties addressed the scope of discovery and prepared a much narrower and more efficient exchange of documents and data for the final phase of the litigation.

This early exchange of discovery was remarkably similar to that contemplated by the amendments to Rule 26 that became effective on Decem-

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299. Transcript of Status Conference, *supra* note 265, at 66:14–19.

300. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10 (2004) (“Fair and efficient resolution of complex litigation requires at least that (1) the court exercise early and effective supervision (and, where necessary, control) . . . .”); ROBERTS, *supra* note 222, at 10 (“Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation.”)

301. See generally Transcript of Status Conference, *supra* note 265, at 13:20–85:08.

302. *Id.* at 12:25–13:05.

303. See, e.g., Email from Sarah Himmelhoch, Senior Litig. Counsel, U.S. Dep't of Justice, Env't & Nat. Res. Div. to Sally Shushan, U.S. Magistrate Judge (Apr. 4, 2014, 2:53 EST).

ber 15, 2015. As the drafters of the amendments recognized, early exchange of discovery requests “is designed to facilitate focused discussion” between the parties and “may produce changes in the requests.”<sup>304</sup> This expectation was proven correct by the discovery procedures implemented by the court in the third phase of the *Deepwater Horizon* discovery.

One last aspect of discovery related to documents and data is worth discussing. BP—the party held liable by the court for the violations—produced substantially less information than the United States. For instance, compared to the United States’ two million documents in Phase 3, BP produced roughly 258,000 documents.<sup>305</sup> Such statistics demonstrate that even with close supervision of the court, a large company with the right resources can demand disproportionate discovery in an effort to make civil environmental enforcement too burdensome for the governmental agencies. This case shows, however, that with focus by the government and the court on clear communication, well-defined standards for production, and the use of electronic tools, no company is beyond the reach of appropriate environmental enforcement.<sup>306</sup>

## 5. Depositions

Yet another challenge both in volume and complexity in the *Deepwater Horizon* civil litigation was depositions. Collectively, the parties conducted over five hundred days of fact depositions during discovery. These individuals who were deposed ranged from BP and Transocean employees who witnessed those first few horrifying moments of the explosion,<sup>307</sup> corporate representatives for third party contractors involved in the drilling,<sup>308</sup> to an

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304. FED. R. CIV. P. 26(d) advisory committee note to 2015 amendment.

305. Himmelhoch, *supra* note 298, at 41 tbl.3. This discovery imbalance proved more difficult but not insurmountable for the state governments. For instance, BP brought a motion to compel against the State of Louisiana, which resulted in an order providing for monetary sanctions and potential case terminating sanctions if the State missed specific discovery deadlines. *In re Oil Spill*, No. 10-MDL-2179, 2011 WL 5110046, at \*2 (E.D. La. Oct. 27, 2011). As evidenced by the fact that Louisiana is part of the global settlement, Louisiana was able to overcome this obstacle and get justice for its citizens.

306. See, e.g., Order Regarding the Protocol for Production of Documents from the U.S.’s Zantaz Archive, *In re Oil Spill*, No. 10-MD-2179 (E.D. La. Jan. 19, 2012), Rec. Doc. 5293.

307. See, e.g., Nick Watson Deposition, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jul. 14, 2011).

308. See, e.g., Ruben Schulkes Deposition, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 12, 2012).

expert witness on topics such as drilling safety, measuring the flow of oil, the impacts of the spill,<sup>309</sup> and more.

This challenge was recognized by the Manual for Complex Litigation, which states that depositions “are often overused and conducted inefficiently [therefore] [t]he judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible.”<sup>310</sup>

As with document discovery, Judge Barbier and Judge Shushan actively monitored the process of depositions and with the leadership of the main parties, including the United States, introduced significant efficiencies in the deposition procedure. The court:

- 1) Made it clear that each individual would only be subject to a single deposition (absent specific court order);<sup>311</sup>
- 2) Specified which counsel would question the witnesses;<sup>312</sup>
- 3) Limited speaking objections by providing very specific directions on how to object;<sup>313</sup>
- 4) Discouraged unnecessary attendance at deposition;<sup>314</sup>
- 5) Required the parties to agree on methods for telephonic attendance at deposition and internet based monitoring of depositions;<sup>315</sup>
- 6) Required completion of document production related to each witness before the deposition of that witness occurred;<sup>316</sup>
- 7) Specified how witnesses could assert the Fifth Amendment where necessary;<sup>317</sup>
- 8) Specified the presumptive locations of depositions;<sup>318</sup>
- 9) Provided direct oversight of depositions where necessary;<sup>319</sup>

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309. See, e.g., Alan Huffman Deposition, Vol. 1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 16, 2011).

310. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.45 (2004).

311. Pretrial Order No. 17 at 9, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 16, 2010), Rec. Doc. 740.

312. *Id.* at 3.

313. *Id.* at 7.

314. *Id.* at 2.

315. See *id.* at 8–9.

316. *Id.* at 10–11.

317. See Order Regarding Invocation of the Fifth Amendment, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. May 27, 2011), Rec. Doc. 2555.

318. Pretrial Order No. 17, *supra* note 311, at 4.

319. See Transcript of Status Conference at 23:23–25, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 11, 2011).

- 10) Established the distribution of time among the parties and the order of questioning for each deposition;<sup>320</sup>
- 11) Required coordination of subpoenas to third parties;<sup>321</sup> and
- 12) Required coordination of Rule 30(b)(6) depositions of the parties.<sup>322</sup>

Without these careful procedures, depositions of individuals already traumatized by the event itself could have become a chaotic mess of overlapping and competing interests. The safeguards and ground rules, however, minimized these challenges.<sup>323</sup>

The parties, too, invested in measures that maximized the usability of the depositions. The parties retained a single court reporting firm, which allowed the reporters to become familiar with the terms and issues in the case and improved the accuracy of transcripts. All depositions were videotaped and the court reporter provided iPads in the room for parties to follow the real-time transcription. In addition, the court reporter allowed remote access monitoring of the depositions, which allowed parties to coordinate with attorneys not present in the room during the breaks, thereby reducing the number of attorneys who had to be physically present at the deposition. Finally, the majority of the depositions were taken in a single building with spacious conference rooms that allowed parties not directly questioning the witnesses to sit at separate tables, reducing the number of lawyers at the table at any one time—and presumably reducing the stress of deposition on witnesses not used to the procedure.<sup>324</sup>

#### F. Summary Judgment Ruling

Judge Barbier recognized the principle enunciated by the Manual for Complex Litigation that “[m]otions practice can be a source of substantial

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320. See Order Regarding the Allocation of Time for Deposition of Richard Morrison, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 14, 2011), Rec. Doc. 4028.

321. Transcript of Status Conference at 64:21–69:22, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 4, 2011), Rec. Doc. 1556.

322. *Id.*

323. One of the interesting issues that arose involved the proposed deposition of Donald Vidrine, the BP well-site manager. In response to requests for information and his deposition, Mr. Vidrine asserted that he was unable to appear for deposition or respond to written questions because of a medical condition. As a result, his deposition was postponed once. When Transocean subpoenaed him for deposition at a later date, the Court ordered Mr. Vidrine to undergo an examination by a court appointed psychiatrist, a decision that Mr. Vidrine appealed to the Fifth Circuit. See *All Plaintiffs v. Transocean Offshore Deepwater Drilling, Inc.*, 505 Fed. Appx. 355 (5th Cir. 2013). Though the Fifth Circuit dismissed on jurisdictional grounds, Mr. Vidrine was successful in avoiding his deposition.

324. The description in this paragraph is based on the personal observations of Steve O'Rourke and Sarah Himmelhoch.

cost and delay.”<sup>325</sup> Accordingly, he imposed measures to control motions practice. For instance, he entered an order staying the response to all motions until the court issued a scheduling order.<sup>326</sup> In doing so, he allowed the parties to avoid filing motions for extensions or even responses to obviously deficient motions. Similarly, both Judge Barbier and Judge Shushan consistently imposed and enforced page limits and joint briefings.<sup>327</sup>

Most importantly for ensuring an efficient resolution of all the claims, Judge Barbier and Judge Shushan abided by the Manual’s advice that “[p]rompt rulings . . . will often help avoid unnecessary litigation activity.”<sup>328</sup> For instance, the summary judgment ruling discussed below was issued just thirty-two days after the completion of briefing and argument.<sup>329</sup> In all, the court disposed of many substantive motions before beginning trial.<sup>330</sup> This article will focus on those rulings most directly related to civil environmental enforcement.

One of the most significant pretrial rulings with respect to the United States’ claims resolved both substantive legal questions of import and also allowed an efficient trial of liability. Specifically, the United States moved for partial summary judgment, claiming that BP, the Anadarko entities, and the Transocean entities were strictly liable under the Clean Water Act and the Oil Pollution Act.<sup>331</sup> The Anadarko entities and Transocean entities cross-moved for summary judgment that they were not liable.<sup>332</sup> Resolution of these motions had procedural implications because Anadarko had made a demand for a jury trial.<sup>333</sup> If their liability for the United States’

325. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.31 (2004).

326. See Pretrial Order No. 15, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 5, 2010), Rec. Doc. 676.

327. See, e.g., Transcript of Trial at 2335:12–2336:23, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Feb. 2, 2015).

328. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.32 (2004).

329. *In re Oil Spill*, 844 F. Supp. 2d 746 (E.D. La. 2012) (deciding the summary judgment motions on February 22, 2012).

330. See Minute Entry, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 19, 2012), Rec. Doc. 5304 (stating that oral argument on the summary judgment motions was held that day). Judge Shushan also speedily addressed motions and encouraged oral argument in place of written briefs. *Id.* The lengths to which the court went to ensure motions were resolved quickly to avoid complicating the case is demonstrated by Judge Shushan’s remark that she did not “mind reading paper while I eat my [Thanksgiving] turkey.” Transcript of Status Conference at 28:17–29:12, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Nov. 18, 2011), Rec. Doc. 4787.

331. *In re Oil Spill*, 844 F. Supp. 2d at 748.

332. *Id.*

333. See *In re Oil Spill*, 98 F. Supp. 3d 872, 877 (E.D. La. 2015) (“When a claim is within admiralty jurisdiction and also within some other federal subject matter jurisdiction, the plaintiff may designate whether the claim is in admiralty or not . . . . One important consequence of the Rule 9(h) election is whether there is a right to a jury trial, as admiralty

claims was established in summary judgment, that would allow the court to try the remaining issues of liability for negligence alleged by the private parties and the penalty enhancement for gross negligence together without a jury.<sup>334</sup> Hence, the court acted quickly to resolve the substantive issue.

The Clean Water Act imposes liability on “[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged.”<sup>335</sup> Courts have routinely held that the Clean Water Act imposes strict liability.<sup>336</sup>

In its motion, the United States sought to hold Transocean, BP, and Anadarko liable as “owner[s]” under the Clean Water Act. Though there was a legal basis to hold the parties liable as operators as well, due to Anadarko’s role as an investing partner—which Anadarko labeled a “non-operating” partner—the U.S. did not allege that APC was either an “operator” or a “person in charge.”<sup>337</sup>

There was no question of fact that oil came from an under-ground reservoir, through the well, then through the blowout preventer, then into the water. There was no question that BP and Anadarko owned the well, while Transocean owned the blowout preventer.<sup>338</sup> Thus, liability devolved to a pure question of applying the law to those facts, which turned out to be surprisingly complicated: BP and Anadarko argued that the oil was discharged from the blowout preventer, not from the well (thus, they were not

cases are traditionally tried to the bench.”) (citing FED. R. CIV. P. 9(h)); *Luera v. M/V Alberta*, 635 F.3d 181, 188 (5th Cir. 2011). There was briefing about whether that jury demand was valid, but due to the entry of summary judgment, the substantive ruling was not required.

334. On appeal, Anadarko argued that its Seventh Amendment rights were violated by the court’s granting of summary judgment to the United States. The Fifth Circuit rejected that argument. *See In re Deepwater Horizon*, 772 F. 3d 350, 353 (5th Cir. 2014).

335. 33 U.S.C. § 1321(b)(7)(A) (2012). Such a discharge must involve “such quantities as may be harmful,” with harmful quantities having been administratively established to include any discharge that “cause[s] a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause[s] a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.” 40 C.F.R. § 110.3(b) (2015); *Chevron, U.S.A., Inc. v. Yost*, 919 F.2d 27, 30 (5th Cir. 1990).

336. *See, e.g., Santa Monica Baykeeper v. Intl. Metals Ekco, Ltd.*, 619 F. Supp. 2d 936, 940 (C.D. Cal. 2009); *Pub. Interest Research Grp. of NJ, Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1178 (D. N.J. 1993) (citing *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986); *United States v. Earth Sciences*, 599 F.2d 368, 374 (10th Cir. 1979)).

337. *See Plaintiff United States’ Memorandum of Law in Support of United States’ Second Motion for Partial Summary Judgment as to the Liability of BP Exploration & Production Inc., the Transocean Defendants, and the Anadarko Defendants at 1–2, 6–11, 22–26, In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Dec. 8, 2011), Rec. Doc. 4836-1.

338. *Id.* at 1–4.

liable);<sup>339</sup> Transocean argued that the oil was discharged from the well, not from the blowout preventer (BOP) (and thus, it was not liable);<sup>340</sup> and the United States argued that the oil came from the well and also from the BOP (and thus, all three were liable).<sup>341</sup> This was an issue of first impression.

From this menu, the court selected Transocean's position.<sup>342</sup> The court reasoned that the oil was discharged from the well, that BP and the Anadarko entities owned the well, and that they were thus strictly liable.<sup>343</sup> Given the amount in controversy, it is not surprising that BP and Anadarko filed an interlocutory appeal. A three-judge panel of the Fifth Circuit affirmed, in a lengthy opinion adopting Judge Barbier's reasoning.<sup>344</sup> BP and APC sought *en banc* review, and filed a string of supplemental briefs. The same three-judge panel took the fairly unusual step of issuing its own "supplemental" opinion.<sup>345</sup> Subsequently, the Fifth Circuit denied *en banc* review by the narrow margin of seven opposed to six in favor, and five of the dissenting judges issued a written dissent.<sup>346</sup> The two defendants petitioned the Supreme Court for *certiorari*, which was denied.<sup>347</sup> Denial of *certiorari* is unsurprising given the procedural posture: this was an interlocutory appeal of partial summary judgment, in a matter in which the court

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339. See BP Exploration & Production Inc.'s Opposition to the United States' Second Motion for Partial Summary Judgment as to the Liability of BP Exploration & Production Inc., The Transocean Defendants, and The Anadarko Defendants at 15–17, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 9, 2012) Rec. Doc. 5124; Anadarko's Combined Memorandum of Law: (1) In Opposition to the Plaintiff United States' Second Motion for Partial Summary Judgment as to the Liability of BP Exploration and Production, Inc., the Transocean Defendants, and the Anadarko Defendants (Rec. Doc. 4836); and (2) In Support of Anadarko's Cross-Motion for Summary Judgment as to Anadarko's Non-Liability Under the CWA at 5–9, *In re Oil Spill*, 10-MDL-2179 (E.D. La. Jan. 9, 2012), Rec. Doc. 5113-2.

340. Transocean Defendants': (1) Opposition to United States' Second Motion For Partial Summary Judgment (Dkt. 4820); (2) Cross-Motion for Partial Summary Judgment that the Transocean Defendants Are Not Liable Under OPA or the Clean Water Act with Respect to the Underwater Discharge of Oil from the Macondo Well and (3) Combined Memorandum of Law at 9–13, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 9, 2013), Rec. Doc. 5103.

341. United States' Combined Memorandum Re: (1) Reply in Support of Second Motion of United States for Partial Summary Judgment as to Liability [4820] and (2) Opposition to Anadarko's Cross-Motion for Summary Judgment [5113], and (3) Opposition to Transocean's Cross-Motion for Summary Judgment [5103 at 2–10, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jan. 16, 2012), Rec. Doc. 5214.

342. *In re Oil Spill*, 844 F. Supp. 2d 746, 757–61 (E.D. La. 2012).

343. *Id.*

344. *In re Deepwater Horizon*, 753 F.3d 570 (5th Cir. 2014).

345. See *In re Deepwater Horizon*, 772 F.3d 350, 350 (5th Cir. 2014).

346. *In re Deepwater Horizon*, 775 F.3d 741 (5th Cir. 2015).

347. *BP Expl. & Prod., Inc. v. United States*, 135 S. Ct. 2893 (2015); *Anadarko Petroleum Corp. v. United States*, 135 S. Ct. 2891 (2015).

had already held several trials, issued Findings of Fact and Conclusions of law on Phase One, and scheduled the penalty phase trial. Final judgment in the matter was years away.

As to Transocean, the court reasoned that its blowout preventer was only a passive conduit for the oil and that Transocean was thus not liable as owner of the blowout preventer (leaving open the question of whether Transocean was liable as “operator” of the well itself).<sup>348</sup> The judge, in a separate ruling, later found Transocean liable as an operator.<sup>349</sup>

The United States appealed the denial of summary judgment as to Transocean’s liability. Before the appeal was even briefed, the United States and Transocean settled the Clean Water Act penalty claim,<sup>350</sup> and the United States dropped its appeal of the summary judgment ruling.

### G. Trial

Trial of the United States’ claims took place in three phases over three years, and two of the phases were tried jointly with the claims of private parties seeking punitive damages under the General Maritime Law.<sup>351</sup> Determining whether and how much of a penalty would be assessed upon BP and the other defendants was thus a multi-step analysis: (1) establishing liability; (2) determining whether there was gross negligence or willful misconduct; (3) determining how many barrels were discharged; and (4) determining a final penalty amount after applying the eight statutory penalty factors. As it turned out, in the case of *U.S. v. BP*, step (1) was handled on summary judgment, step (2) was the Phase One trial, step (3) was the Phase Two Trial, and step (4) was the Phase Three Trial. Once the Clean Water Act penalty was determined, absent the settlement, the parties would then have turned to determining the natural resource damages.

#### 1. Conduct of All Three Trials

Before turning to the substantive trial issues, it is important to recognize that Judge Barbier again demonstrated the effectiveness of the proce-

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348. *In re Oil Spill*, 844 F. Supp. 2d 746, 758 (E.D. La. 2012) (noting that Transocean is not liable because the equipment they owned was merely passive conduits through which oil flowed).

349. *In re Oil Spill*, 21 F. Supp. 3d 657, 756 (E.D. La. 2014).

350. Partial Consent Decree Between the Plaintiff United States of America and Defendants Triton Asset Leasing GmbH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc., *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Feb. 19, 2013), Rec. Doc. 8608 (requiring Transocean to pay \$1 billion as a civil penalty, along with extensive injunctive requirements related to drilling safety).

351. See Third Amended Pretrial Order No. 41, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 31, 2012), Rec. Doc. 7810.

dures recommended by the Manual for Complex Litigation in conducting each trial. The Manual for Complex Litigation gives specific direction on a number of aspects of trial, the wisdom of each was demonstrated by Judge Barbier's administration of the *Deepwater Horizon* trial. First, the Manual advises that a "trial schedule is essential to the orderly conduct of a trial" and recommends consideration of time limits on the trial or examination, as well as clear instructions regarding the start and end of each court day and on which days trial would be held.<sup>352</sup> Before each trial phase, the court discussed the question of when trial would occur, where parties would have space to work, and even designed a seating chart for the first two trials to ensure all parties had fair access in the courtroom.<sup>353</sup>

In the first phase of trial, the court did not impose specific time limits on witnesses or the total trial time. This decision is not surprising, given the number of parties and issues to be decided. In the later phases, however, the court imposed limits on the number of witnesses and trial time.<sup>354</sup> The experience of the lawyers involved was that such limits provided necessary focus to the trial presentations and reduced the gamesmanship involved in cross-examination.

Judge Barbier also embraced the use of an electronic courtroom, which significantly expedited the trial and provided ready access to the large number of lawyers and spectators in attendance. For the first phase of the trial, the use of an electronic courtroom also allowed the use of overflow courtrooms where non-essential attendees or spectators who could not find seats in the main courtroom could observe the proceedings. The parties' production of discovery in electronic form made the use of an electronic courtroom much easier because each party could use off-the-shelf software to call up, highlight, and display exhibits. In this bench trial, the use of electronic exhibits that could be enlarged and highlighted increased the speed at which relevant text could be called out and discussed by the witnesses.<sup>355</sup>

Judge Barbier and Judge Shushan also expedited the trial by handling the technical admission of exhibits through an out of court procedure. Prior to trial, counsel exchanged written exhibit lists and exchanged objections to the documents listed on opposing parties' lists. At trial, documents would be called up and used during testimony, but the parties and court would confirm formal admission of exhibits in a "marshalling" process. Specifi-

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352. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 12.12 (2004).

353. See, e.g., Transcript of Status Conference, *supra* note 265, at 85:23–92:18; see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 12.12 (2004).

354. See, e.g., Order Regarding Presentation of Evidence in Phase Two Trial, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Aug. 22, 2013), Rec. Doc. 11087.

355. The description in this paragraph is based on the personal observation of all the authors.

cally, at the end of each day, the parties would confer and agree upon the documents that had been used, those that had been objected to, and those that could be admitted. The next morning, the proffering party would then offer a list and copy of the exhibits to the court for admission. At the conclusion of each trial, the court held a final marshalling conference at which the parties resolved any lingering issues regarding the admission of evidence. Accordingly, valuable trial time was not consumed with detailed arguments over the admissibility of particular documents.<sup>356</sup>

Judge Barbier also took full advantage of the efficiencies that could be gained in a bench trial. For instance, witnesses who were scheduled to provide both direct and rebuttal testimony were required to testify only once. That simplified the scheduling of expert testimony offered by the plaintiffs – though it did lead to a little court room drama as the expert had to characterize the opposing parties' evidence in order to place his or her rebuttal testimony in context. Similarly, because Judge Barbier, as an experienced judge, was fully capable of distinguishing between demonstratives and exhibits, the use of demonstratives was more liberal and detailed than typical of a jury trial. Most expert witnesses presented their testimony using a series of PowerPoint; like slides that summarized the opinions being offered and cited to the source evidence. This allowed quicker presentation of the evidence while also providing the court with a handy outline for review later as it prepared its findings of fact.<sup>357</sup> The United States and the other plaintiffs made these slides and all of the trial exhibits available on a website after each day of trial.<sup>358</sup>

## 2. Phase One: Allocation of Fault and Determination of Gross Negligence and Willful Misconduct

The first phase of the trial addressed the events from April 20-22, 2010 and determined which of the various parties acted with negligence, gross negligence, willful misconduct, or were otherwise at fault, and allocated that

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356. The description in this paragraph is based on the personal observation of all the authors. The court also modified the procedures as additional efficiencies were identified. For instance, in the first phase, the parties did not separately number the pages of exhibits, which sometimes led to confusion as to the specific page being used. Similarly, the parties had not agreed upon a uniform numbering system for demonstrative exhibits in the first phase. For the second and third phases of trial, therefore, the parties and court agreed on a uniform number system for the pages of trial exhibits and demonstrative exhibits.

357. This paragraph is drawn from the personal experience of the lawyers present at trial, including Steve O'Rourke and Sarah Himmelhoch.

358. See Transcript of Trial at 23:12–17, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Feb. 23, 2013) (discussing the procedure for posting exhibits and other documents to [www.mdl2179trialdocs.com](http://www.mdl2179trialdocs.com)).

fault among the various parties.<sup>359</sup> This first phase of the trial was the longest, with twenty-nine trial days in 2013.<sup>360</sup> While the private party plaintiffs sought to establish liability for punitive damages under the General Maritime Law, the United States was trying the issue of whether the penalty enhancement due to “gross negligence or willful misconduct” applies to BP’s conduct.

The United States presented two theories. First, the United States presented witnesses who demonstrated the failure to properly interpret the negative pressure tests that occurred before the explosion in and of itself was gross negligence.<sup>361</sup> In an alternative theory, the United States presented evidence that the accumulation of poor decision-making by BP throughout the drilling of the well caused the explosion.<sup>362</sup> In sum, the United States provided expert witnesses who testified regarding the careless approach that BP brought to the well. As Donald Huffman, one of the United States’ experts testified, many of BP’s decisions were “totally unsafe and dangerous.”<sup>363</sup>

In its ruling on the first phase of trial, the court agreed with both theories. The 153-page decision, issued in 2014, found BP guilty of gross negligence and willful misconduct, meaning BP was subject to the higher penalties under the Clean Water Act.<sup>364</sup> The gross negligence finding against BP was a tremendous victory for the plaintiffs. In the author’s view, the court recognized the seriousness of the violation because of BP’s lack of due care and made it likely that the penalty would be in the billions of dollars.<sup>365</sup>

The Phase One ruling also resolved numerous other legal and factual issues related to the private parties. For example, the court found two other corporate defendants, Transocean and Halliburton, liable for ordinary negligence.<sup>366</sup> BP was apportioned sixty-seven percent of the blame for the oil spill.<sup>367</sup> Transocean was apportioned 30 percent of the blame and

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359. *In re Oil Spill*, 21 F. Supp. 3d 657, 668 (E.D. La. 2014) (noting that Phase One was known as the “Incident Phase”).

360. *In re Oil Spill*, 77 F Supp. 3d 500, 503 ¶ 4 (E.D. La 2015).

361. *See, e.g.*, Transcript of Trial, *supra* note 358, at 73:20–78:05 (outlining the United States’ evidence regarding the negative pressure test in its opening statement).

362. *See, e.g., id.* at 78:01–82:08.

363. Transcript of Trial at 670:05–15, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Feb. 27, 2013).

364. *In re Oil Spill*, 21 F. Supp. 3d at 757.

365. BP had appealed that finding, but in light of the settlement, the appeal was dismissed in 2016. Memorandum to All Parties re Dismissal of Appeal, *In re Deepwater Horizon*, No. 13-31374 (5th Cir. Jul. 7, 2016).

366. *In re Oil Spill*, 21 F. Supp. 3d at 756–57.

367. *Id.* at 747.

Haliburton was apportioned the remaining three percent of the blame.<sup>368</sup> The court also found that BP's conduct was so egregious that punitive damages under the General Maritime Law were appropriate; however, such damages could not be imposed due to the Fifth Circuit's legal requirement that the conduct must have involved certain high-level corporate officials to qualify.<sup>369</sup> All other defendants were dismissed.<sup>370</sup>

### 3. Trial Phase Two: Number of Barrels

The second phase of trial focused on the events from April 22, 2010 until the closure of the well and ultimately addressed two issues: were the defendants negligent with respect to the response actions, and what was the amount of oil discharged into the Gulf of Mexico?<sup>371</sup>

Judge Barbier divided the second phase trial into two segments. In the first segment, the private plaintiffs presented evidence regarding the defendants' conduct during the response actions. The United States did not participate in any significant way in this segment.<sup>372</sup> The private parties argued that BP and the other defendants had been negligent in their response to the oil spill after April 22, 2010.<sup>373</sup>

The second segment of the trial focused on a narrow but significant issue for the United States' claims—how many barrels of oil were discharged to the environment. As described above, the statutory maximum penalty under the Clean Water Act is determined in large part by the number of barrels of oil discharged (coupled, of course, with whether the conduct was grossly negligent).<sup>374</sup>

Because this spill was unprecedented and occurred a mile under the surface of the ocean through an uncontrolled hole with no monitor attached, the question of how many barrels were actually discharged was hotly contested. The United States offered the testimony of two senior scientists at the Department of Energy's National Laboratories, as well as several experts from the oil exploration industry.<sup>375</sup> BP and Anadarko countered

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368. *Id.*

369. *Id.* at 757.

370. *Id.* at 669.

371. *In re Oil Spill*, 77 F. Supp. 3d 500, 503 ¶ 5(E.D. La. 2015).

372. Participants in the Source Control segment were the "Aligned Parties" on one side – private plaintiffs, the States of Alabama and Louisiana, the Transocean entities, and Halliburton Energy Services, Inc. – and the BP entities on the other. *Id.* at 504 (Phase Two Findings of Fact). Meanwhile, the parties to the Quantification segment were the United States as plaintiff and BXP and Anadarko Petroleum Corporation as defendants. *Id.* at 522.

373. *Id.* at 516 ¶ 215 ("The Aligned Parties contend there were two major flaws relative to source control that delayed the successful capping of the well.")

374. See *supra* notes 124–27 and accompanying text.

375. *In re Oil Spill*, 77 F. Supp. 3d at 522.

with evidence from several experts of their own (such as geologists and professors of petroleum engineering).<sup>376</sup> The United States estimated that 4.19 million barrels of oil was discharged, but BP argued the actual amount was 2.45 million barrels of oil discharged.<sup>377</sup>

After reviewing the evidence from the two week trial, the court found that the issue was extremely complicated, but that his best estimate was that 3.19 million barrels had been discharged for purposes of calculating the maximum possible civil penalty under the CWA.<sup>378</sup>

The court also found that “arguably” a factfinder could conclude that BP acted with negligence in failing to close in the well for three months,<sup>379</sup> it could not be held liable for punitive damages for failures in its response actions;<sup>380</sup> the plaintiffs appealed that finding.

#### 4. Phase Three: Determining the Penalty Amount

Having issued findings on the first two phases of trial, the court had found all the facts necessary to determine the statutory maximum civil penalty—the number of barrels and the appropriate multiplier. All that was left with respect to the United States’ filed claims was to determine the correct penalty for BP and Anadarko within the statutory maximum.<sup>381</sup> The Clean Water Act sets forth eight factors for the court to consider in determining the specific penalty to be imposed on any particular violator:

376. *Id.*

377. *Id.*

378. *Id.* at 525.

379. *Id.* at 520.

380. *Id.*

381. In an interesting side note, the court was faced with an unusual legal question related to the per barrel maximum amount. Specifically, the Clean Water Act specifies a penalty of \$3,000 per barrel for gross negligence. Congress passed the Federal Civil Penalties Inflation Adjustment Act in 1990 to adjust civil penalties in many federal statutes for inflation by requiring the head of agencies to adjust civil penalties imposed by statutes under their jurisdiction for inflation at least every four years. Pub. L. 104–134, § 31001(s), 110 Stat. 1321 (codified at 28 U.S.C. § 2461 note, § 4). Both the Environmental Protection Agency and the Coast Guard have enforcement authority under the Clean Water Act. Paradoxically, at the time of the *Deepwater Horizon* spill, EPA had adjusted its civil penalties under the Clean Water Act to \$4,300 per barrel, while the Coast Guard had adjusted its penalties to \$4,000. Compare 40 C.F.R. § 19.4 (2010) with 33 C.F.R. § 27.3 (2010). BP argued that neither adjustment had authority to inflate the civil penalty. Rather, it argued that the Department of Justice was the only agency with authority to inflate the penalty. See *In re Oil Spill*, No. 10-MDL-2179, 2015 WL 729701, at \*2 (E.D. La. Feb. 19, 2015). By contrast, the United States argued that EPA’s penalty inflation applied because the Coast Guard had made errors in its calculations. *Id.* The court found that the United States’ interpretation was the better one and therefore that the statutory maximum penalty for BP would be calculated using \$4,300 per barrel. *Id.* at \*3.

- seriousness of the violation;
- economic benefit to the violator;
- 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>382</sup>

Almost every one of these eight factors raised interesting issues in the *Deep-water Horizon* litigation.

### a. The Seriousness of the Harm and Mitigation of the Harm

The United States emphasized the first of the eight statutory factors – the seriousness of the violation – by adducing evidence about human health harms, economic losses, environmental harm, and even impacts on society at large.<sup>383</sup> BP countered that it had spent billions of dollars conducting a large, comprehensive, and expensive response action that was in many (but not all) respects successful.<sup>384</sup> BP also highlighted how much it had paid to various private party claims.<sup>385</sup> Notably, these are two sides of the same coin: only in a serious spill would enormous response efforts and large claims payments be required. So the question arose: does a large response action merit reduction or increase in the penalty?

In a somewhat ironic twist, it was BP that demanded a public showing of the harm it had caused. The United States had argued that the spill was so obviously “serious” that neither side should waste the court’s time proving (or disproving) that fact.<sup>386</sup> BP, however, sought to prove that its response efforts mitigated the harms at issue.<sup>387</sup> Eventually, well over half of the live witnesses called by the United States related to showing “serious-

382. 33 U.S.C. § 1321(b)(8) (2012).

383. See Clean Water Act – Penalty Phase: United States’ Post-Trial Brief, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 27, 2015), Rec. Doc. 14341.

384. See Penalty Phase Post-Trial Brief of BP Exploration & Production Inc. at 1–2, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 27, 2015), Rec. Doc. 14344.

385. See *id.*

386. One motive for this motion was to preclude discovery into the on-going, extra-judicial natural resource damage assessment, the same concern discussed above. See *supra* Part VII.

387. BP Exploration & Production Inc.’s Memorandum in Opposition to the Motion of the United States to Limit Evidence about the “Seriousness” Factor at 2–8, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Mar. 6, 2014), Rec. Doc. 12463.

ness.” Moreover, the United States agreed that BP had performed an adequate response action—the first witness acknowledged that BP “did a pretty good job”<sup>388</sup>—but that any response action has dangers and risks and that no response action can completely eliminate the harm caused by the spill.<sup>389</sup>

When it ultimately ruled, the court found that the oil spill was “extremely serious,” “gravely serious,” and “a massive and severe tragedy.”<sup>390</sup> On the other hand, the court considered BP’s expenditures on response and compensation,<sup>391</sup> and noted that “BP promptly paid the Coast Guard’s invoices.”<sup>392</sup> More pointedly, the court stated that “had BPXP not settled with the Government, the court would be inclined to find that BPXP’s mitigation efforts warrants a significant reduction of its penalty.”<sup>393</sup> Because BP settled, no one but Judge Barbier knows exactly how much he would have reduced the penalty to account for BP’s “pretty good” response action.

### b. Ability to Pay and Economic Benefit

The remainder of the proof related to BP in the third phase of trial focused on BP’s argument that it had a limited ability to pay a civil penalty. BP focused on both plummeting oil prices and the liability that BP had already sustained from the oil spill to show that its American subsidiary—the named defendant and lease-holder—had such limited assets that any penalty over three billion dollars would exceed the entire value of the subsidiary.<sup>394</sup> The United States, however, demonstrated that the American subsidiary could access funding from London to pay any penalty imposed.<sup>395</sup> Through several witnesses, the United States offered evidence that BP operated its subsidiaries as an integrated company and that the American subsidiary had exactly as much money as the ultimate parent—BP

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388. Transcript of Trial, *supra* note 46, at 101:11–13.

389. *Id.* at 23:1–25.

390. *In re Oil Spill*, 148 F. Supp. 3d 563, 570 ¶ 42 (E.D. La. 2015). By the time of this ruling, BP had settled, so the opinion relates to the penalty for Anadarko. Nevertheless, certain findings relate equally to BP.

391. *E.g., id.* 572–73 ¶¶ 60–66, 574–75 ¶¶ 75–89.

392. *Id.* at 575 ¶ 86.

393. *Id.* at 528 n.111.

394. *See, e.g.,* R. Bruce Den Uyl, Expert Rebuttal Report, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 26, 2014), Trial Exhibit 13161. In a procedural twist, BP announced near the conclusion of the third trial that its selected economic expert had been diagnosed with a brain tumor and could not come to trial to testify in person. BP requested an extension of the trial to allow it to identify a new witness and prepare a new report. The court again focused on the fact that the trial was to the bench, not a jury, and that BP’s original expert witness had prepared three reports and had been deposed. Based on these facts, the Court rejected BP’s request. Transcript of Trial, *supra* note 327, at 2323:08–2329:03.

395. *See, e.g.,* Clean Water Act – Penalty Phase United States’ Post-Trial Brief, *supra* note 383, at 28–30.

plc—wanted it to have.<sup>396</sup> Ultimately, the court did not have to answer the interesting questions raised by this testimony, including the court’s own question as to whether it could order a penalty to be paid in installments over time.<sup>397</sup>

The other financial penalty factor—the “economic benefit” of the violation—was not the subject of proof at the third phase of trial. Fifth Circuit precedent required that the court make an estimate of the economic benefit resulting from the violation.<sup>398</sup> In ruling on Anadarko’s penalty, the court did just that; relying on testimony from the first phase of trial, Judge Barbier determined that the defendants accrued a benefit of approximately \$13.5 million.<sup>399</sup> Contrary to the defendants’ arguments, however, the court specifically held that “the fact that there is little or no economic benefit does not mean that no penalty may be imposed, nor does it necessarily warrant a reduced penalty.”<sup>400</sup> Rather, the United States argued that the lack of economic benefit shows just how flagrant the violations were—to save “little or no” money, the defendants wreaked havoc on the Gulf region.<sup>401</sup>

### c. Culpability

Virtually all of the trial time dedicated to Anadarko’s defenses was focused on its contention that it could not be considered culpable because the court allocated it no fault during the first phase of trial. Therefore, Anadarko argued that it should not be ordered to pay more than a nominal civil penalty.<sup>402</sup> Anadarko had been successful in several pretrial motions limiting evidence regarding its culpability and offered evidence during the third phase of trial that it was essentially a mere “investor” who could not and should not be subject to any penalty.<sup>403</sup> Despite its success in the pre-

396. *Id.*

397. Transcript of Trial, *supra* note 46, at 62:24–63:22.

398. *United States v. Citgo Petroleum Corp.*, 723 F.3d 547, 552–53 (5th Cir. 2013).

399. *In re Oil Spill*, 148 F. Supp. 3d 563, 571 ¶ 50 (E.D. La. 2015).

400. *Id.* at 581.

401. “For want of a nail the shoe was lost. For want of a shoe the horse was lost. For want of a horse the rider was lost. For want of a rider the message was lost. For want of a message the battle was lost. For want of a battle the kingdom was lost. And all for the want of a horseshoe nail.” James Baldwin, *Fifty Famous People*, THE BALDWIN PROJECT, <http://www.mainlesson.com/display.php?author=baldwin&book=people&story=nails> (last visited Dec. 27, 2016). As the United States argued in its final post-trial brief, “the Court should recognize that the entire disaster could have been prevented for a (proportionately) miniscule amount of money.” See *Clean Water Act – Penalty Phase United States’ Post-Trial Brief*, *supra* note 383, at 48.

402. *In re Oil Spill*, 148 F. Supp. 3d at 576 ¶ 98.

403. See, e.g., Transcript of Status Conference, *supra* note 265, at 30–43.

trial rulings, at the trial, the judge noted that Anadarko's argument was inconsistent with the statutory scheme:

It sounds like, frankly, this witness and the next witness, the next expert for Anadarko, seem to me to be making more of a policy argument, policy arguments as to why a non-operator shouldn't be subjected to penalties under the Clean Water Act. If that's the case, I think you're in the wrong venue. Maybe you need to go to Congress, because Congress has already decided that by enacting the Clean Water Act, Section 311, which says that there is strict liability if you are the owner or the operator of a facility from which oil is discharged into navigable waters, regardless of whether you're legally culpable in the sense of negligence.<sup>404</sup>

The court confirmed its views in its findings of fact and conclusions of law related to the civil penalty for Anadarko, imposing a civil penalty of \$159.5 million on the alleged "non-operator."<sup>405</sup> That penalty is, by itself, the largest Clean Water Act penalty judgment ever issued by a court after trial on the merits.

## X. GETTING TO THE FINAL SETTLEMENT OF THE CIVIL ENVIRONMENTAL ENFORCEMENT CLAIMS

Though the pretrial and trial procedures would be sufficient to prove the premise of this article—that the Manual for Complex Litigation and the Federal Rules of Civil Procedure are right to require active judicial involvement and professional cooperation by counsel—the ultimate resolution of many claims through various settlement processes go farther in proving these points.

### A. *Early Restoration Agreements*

One of the earliest partial settlements in the case was the agreement reached between the United States, the five Gulf States, and BP to address the ongoing damage the spill was doing to the natural resources found in the spill's path. In 2011, the United States joined with the federal trustees in negotiating an unprecedented "Framework Agreement," through which BP agreed to fund early restoration of natural resources — prior to the completion of the injury assessment and prior to the final Restoration Plan

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404. Transcript of Trial, *supra* note 327, at 2213:01–12.

405. *In re Oil Spill*, 148 F. Supp. 3d at 563. This decision was issued after the Consent Decree with BP was lodged, by which time, all other parties had settled.

for the entire incident—in amounts up to \$1 billion.<sup>406</sup> In exchange for funding the projects, BP would receive negotiated, stipulated offsets to be applied against the ultimate assessment of injury and damages under the Oil Pollution Act.<sup>407</sup> The Trustees selected the projects under that Act's restoration selection procedures, which include publishing a draft Restoration Plan, with an analysis of restoration alternatives (including “no action”), and accepting public comment.<sup>408</sup> By 2015, the Trustees had publicly announced final Records of Decision to implement over sixty-five projects, amounting to approximately \$877 million of the \$1 billion, and had agreed with BP on the stipulated NRD Offsets for each of those projects.<sup>409</sup>

### B. *Private Parties Settlement*

Another critical settlement that demonstrated the importance of active judicial involvement was the two class action settlements with BP: one for private parties' economic damages (e.g., lost income)<sup>410</sup> and a second for medical benefits for plaintiffs injured or potentially harmed during the response action.<sup>411</sup> These settlements—negotiated by private parties, not by the United States—were at least partially the result of two driving forces. First, the court had set a firm and fast trial date, and not surprisingly, the private settlement was completed just as the parties were making final preparations for the first trial.<sup>412</sup> Second, BP had the benefit of an interpleader-type action (in this case, the Admiralty Limitation filed by Transocean), which had the desirable effect of bringing plaintiffs to the table (due again to a deadline set by the court).<sup>413</sup> Because BP knew, roughly, the universe of claimants, it was in a better position to make an informed decision about settlement.

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406. See Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill at 1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Apr. 20, 2011), Rec. Doc. 2239-1.

407. *Id.* at 3.

408. See, e.g., 15 C.F.R. § 990.23 (1996).

409. See e.g., Notice of Filing of Stipulations (Phase IV) Under the Framework for Early Restoration Addressing Injuries Resulting from the Deepwater Horizon Oil Spill, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Sept. 24, 2015), Rec. Doc. 15378 (detailing different amounts of money attributed to each project).

410. See *In re Deepwater Horizon*, 739 F.3d 790, 803 (5th Cir. 2014); DEEPWATER HORIZON CLAIMS CENTER, <http://www.deepwaterhorizoneconomicsettlement.com> (last visited Dec. 27, 2016).

411. See DEEPWATER HORIZON MEDICAL BENEFITS CLAIMS ADMINISTRATOR, <https://deepwaterhorizonmedicalsettlement.com/en-us/home.aspx> (last visited Nov. 22, 2016).

412. See Third Amended Pretrial Order No. 41, *supra* note 351.

413. See *supra* note 227 and accompanying text.

The settlement established a claims process overseen by Special Master Patrick Juneau.<sup>414</sup> The resolution of these claims achieved an important goal of ensuring those individually and directly injured by the spill were compensated as early as possible. Such a result would have been impossible without the active judicial attention and firm trial date.

### C. *Criminal Plea*

Another settlement important to the resolution of the civil litigation was actually achieved outside the multidistrict litigation: the resolution of the criminal claims. Common sense dictates that a party facing both criminal and civil liability will hesitate to resolve the civil liability before having a sense of the criminal fines it may be facing.

But in this case, by December 2010, the Attorney General publicly announced that a criminal investigation into the causes and response to the oil spill had been opened.<sup>415</sup> The criminal prosecution was led by the Deepwater Horizon Task Force, including the Criminal Division and the Environment and Natural Resources Division of the Department of Justice, several U.S. Attorneys' Offices, and several federal investigatory agencies such as the Federal Bureau of Investigation and the Environmental Protection Agency.<sup>416</sup>

In November 2012, the Department of Justice announced the largest criminal resolution in American history: four billion dollars.<sup>417</sup> BP pled guilty to felony manslaughter charges for the eleven people killed in the explosion and fire, a felony charge for obstruction of Congress, and charges under the Clean Water Act and Migratory Bird Treaty Act.<sup>418</sup> While the

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414. The claims process ultimately spurred substantial collateral litigation over BP's complaint that it was paying more than expected under the settlement. *See, e.g., In re Deepwater Horizon*, 793 F.3d 479, 483 (5th Cir. 2015).

415. Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Announces Civil Lawsuit Against Nine Defendants for Deepwater Horizon Oil Spill (Dec. 15, 2010), <https://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-civil-lawsuit-against-nine-defendants-deepwater>.

416. On January 3, 2013 (on the eve of the Phase One trial in the civil action) the task force announced criminal plea agreement with Transocean for \$400 million. Press Release, U.S. Dep't of Justice, Transocean Agrees to Plead Guilty to Environmental Crime and Enter Civil Settlement to Resolve U.S. Clean Water Act Penalty Claims from Deepwater Horizon Incident (Jan. 3, 2013), <https://www.justice.gov/opa/pr/transocean-agrees-plead-guilty-environmental-crime-and-enter-civil-settlement-resolve-us>.

417. Press Release, U.S. Dep't of Justice, BP Exploration & Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), <https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>.

418. Guilty Plea Agreement at 1 ¶ 1, *United States v. BP Expl. & Prod., Inc.*, No. 12-292 (E.D. La. Nov. 15, 2012), Rec. Doc. 2.

criminal sanction included a significant fine to punish the crimes, it also included measures to repair the harm and change corporate behavior. First, the criminal resolution was specifically structured so that more than half of the monies would directly benefit the Gulf of Mexico region.<sup>419</sup> Approximately \$2.394 billion dollars was dedicated to acquiring, restoring, preserving, and conserving the marine and coastal environment, ecosystems, and bird and wildlife habitat in the Gulf of Mexico and bordering states.<sup>420</sup> Money would also be directed to barrier island restoration and river diversion off the Louisiana coast to further improve the coastal wetlands affected by the spill.<sup>421</sup> Second, the plea agreement required that BP hire certain subject matter experts to address BP's conduct of behavior.<sup>422</sup> BP had to agree to retain a process safety and risk management monitor and an independent auditor to oversee BP's process safety, risk management and drill equipment maintenance for its Gulf of Mexico operations.<sup>423</sup> Additionally, BP had to retain an ethics monitor to improve BP's code of conduct to ensure BP's future candor with the U.S. government.<sup>424</sup>

#### D. Settlements with Other Parties

Other settlements were also key to bringing an ultimate resolution to the United States' and the States' claims. First, on February 17, 2012, the United States announced it settled with MOEX for a \$70 million civil penalty and conservation projects in the Gulf of Mexico region that were estimated to cost at least \$20 million.<sup>425</sup> At the time, this penalty was the largest civil penalty under the Clean Water Act.<sup>426</sup> Less than a year later, Transocean agreed to plead guilty to criminal offenses and to settle its civil liability, paying \$1 billion in civil penalties and \$400 million in criminal fines.<sup>427</sup> This settlement then became the largest civil penalty ever imposed under the Clean Water Act.<sup>428</sup> These settlements were important in another way, as well, because they allowed the United States to focus on litiga-

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419. *Id.* at Exhibit B, 18 ¶ 37(a).

420. *Id.* at Exhibit B, 16 § 35.

421. *Id.* at Exhibit B, 18 ¶ 37(b).

422. *Id.* at Exhibit B, 9 ¶ 11(a).

423. *Id.* at Exhibit B, 1-2 ¶ 1(a), 8 ¶¶ 9-13.

424. *Id.* at Exhibit B, 2 ¶ 11(b). The civil Consent Decree reiterates that BP is in full compliance with the criminal remedial order.

425. Press Release, U.S. Dep't of Justice, Moex Offshore Agrees to \$90 Million Partial Settlement of Liability in Deepwater Horizon Spill (Feb. 17, 2012), <https://www.justice.gov/opa/pr/moex-offshore-agrees-90-million-partial-settlement-liability-deepwater-horizon-oil-spill>.

426. *Id.*

427. U.S. Dep't of Justice, *supra* note 416.

428. *Id.*

tion against the two largest defendants, BP and Anadarko, and made clear to BP the nature of any settlement that the United States would demand.

One other settlement helped pave the way for the settlement of the civil environmental claims. Specifically, Anadarko had asserted that BP was grossly negligent in causing the well to explode.<sup>429</sup> In an October 2011 settlement, Anadarko agreed to pay BP \$4 billion to resolve claims against each other arising out of the *Deepwater Horizon* incident.<sup>430</sup> By resolving the dispute with Anadarko, BP could estimate its total outstanding liabilities, facilitating the ultimate settlements with the United States and the States.

### E. *Debarment and Suspension*

Another investigation was launched by the U.S. Environmental Protection Agency's Office of Suspension and Debarment. This office is part of a government-wide program to prevent fraud, abuse, and other misconduct in government contracting.<sup>431</sup> Pursuant to regulation, a company may be suspended from contracting with the federal government for up to one year upon a showing that a company has engaged in criminal conduct or other misconduct.<sup>432</sup> Pursuant to these same regulations, for certain criminal convictions or civil judgments, a company can be "debarred"—excluded from government contracting—for a longer time, as appropriate to the conduct at issue.<sup>433</sup>

Before the *Deepwater Horizon* disaster, BP had often supplied the federal government with fuel through contracts.<sup>434</sup> At the time of the debarment and suspension investigation, BP held more than \$1.34 billion in federal contracts to supply fuel to various Department of Defense agencies.<sup>435</sup>

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429. See Press Release, BP Press Office, BP Announces Settlement with Anadarko Petroleum Company of Claims Related to Deepwater Horizon Accident (Oct. 17, 2011), <http://www.bp.com/en/global/corporate/press/press-releases/bp-announces-settlement-with-anadarko-petroleum-company-of-claims-related-to-deepwater-horizon-accident.html> ("Anadarko will no longer pursue its allegations of gross negligence with respect to BP.")

430. *Id.*

431. See EPA, *Suspension and Debarment Program*, GRANTS, <https://www.epa.gov/grants/suspension-and-debarment-program> (last visited Dec. 27, 2016).

432. See 2 C.F.R. § 180.125 (2016).

433. See, e.g., *id.* § 180.865.

434. See Complaint for Declaratory and Injunctive Relief at 8 ¶ 35, BP v. McCarthy, No. 13-cv-2349 (S.D. Tex. Aug. 12, 2013), Rec. Doc. 1.

435. *Id.*

EPA investigated BP and eventually issued a temporary suspension to BP, in light of its history of environmental violations.<sup>436</sup> BP sued EPA to lift the suspension.<sup>437</sup> By March 13, 2014, EPA and BP entered into an Administrative Agreement resolving the suspension and debarment issues.<sup>438</sup> In addition to incorporating the requirements of the criminal plea discussed below, “[t]he [a]dministrative agreement also requires actions related to maintenance or improvement of ethics and compliance programs and good corporate governance activities, such as: code-of-conduct training, the operation of an employee concerns hotline, and maintenance of risk-based compliance standards and procedures for BP Entities based in the United States.”<sup>439</sup> The Administrative Agreement further contains specific “provisions targeted to deep water drilling safety in the United States, including provisions related to contractor oversight and audits of safety and environmental management systems.”<sup>440</sup> As discussed below, this Administrative Agreement was incorporated into the Consent Decree resolving the United States’ claims against BP.

## F. *The Civil Settlement with BP*

### 1. Setting the Table

As discussed in this article, by early 2015, a number of actions had occurred. BP had settled its liability with private plaintiffs, entered a criminal plea, participated in three different civil trials, and was awaiting the judge’s verdict on a penalty. In addition, BP was engaged in costly discovery on the Gulf States’ claims for economic damages.<sup>441</sup> BP was aware that

436. Letter from Richard Pelletier, Suspension and Debarment Official, EPA, to Robert Dudley, CEO, BP plc, BP v. McCarthy, No. 13-cv-2349 (S.D. Tex. Nov. 28, 2012), Rec. Doc. 1-5.

437. See generally Complaint for Declaratory and Injunctive Relief, *supra* note 434, at ¶¶ 79–92.

438. Consent Decree Among Defendant BP Exploration & Production Inc., the United States of America, and the States of Alabama, Florida, Louisiana, Mississippi, and Texas at App. 4, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Apr. 4, 2016), Rec. Doc. 16093 [hereinafter Consent Decree].

439. *Id.* at 33 ¶ X.34.c.

440. *Id.*

441. The court had begun pretrial preparation for the State of Alabama’s claims. On July 16, 2014, the court set a trial date of September 16, 2015. See Order Regarding Alabama Damages Case, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. July 16, 2014), Rec. Doc. 13149. The State of Louisiana objected to the selection of Alabama as the first of the economic damages case and filed a Petition for a Writ of Mandamus, arguing that Louisiana had “consistently been denied the opportunity to prosecute any of its claims or to participate in critical aspects of its case” because the District Court elected to try the State of Alabama’s economic claims before the State of Louisiana’s claims. Louisiana complained that the court had disregarded “repeated requests from Louisiana that its economic loss trial proceed” and

once the States' claims were resolved, it still faced significant discovery and, ultimately, trial on natural resource damages.

Outside of court, the Trustee Council was in place, and BP had been paying hundreds of millions of dollars in "early" restoration projects. BP and the Trustees faced years of future natural resource damage assessment work (and associated costs) to be followed by either a settlement or the litigation of the largest natural resource damages case in history.

By April 30, 2015, both sides had rested and briefed all issues regarding the application of the penalty factors. Regardless of whether the maximum available penalty remained at \$13.7 billion or reverted to \$3.5 billion, the court was not likely to award the maximum penalty, after considering the eight factors set out at 33 U.S.C. § 1321(b)(8). Indeed, the United States had expressly conceded that the court should not award the maximum penalty, while BP vigorously argued that the penalty should be substantially lower than the maximum.<sup>442</sup> The United States faced a realistic predicted litigation outcome less than the maximum penalty. On June 10, 2015, the court issued an order indicating that the ruling on Phase Three was imminent.<sup>443</sup>

Meanwhile, the Department of Justice was preparing for the natural resources damage litigation. The Assistant Attorney General for the Environment and Natural Resources Division, John Cruden, led a meeting with the Trustee Council and explained to the trustees the extent of the litigation to date and the nature of the case that BP put on in the penalty trial which addressed, in part, environmental harm issues relevant to the planned natural resource damages trial. Thus, by June 2015, all of the parties—state, federal and BP—were facing more years of litigation, costly discovery, and delay in implementing the final remedy for the harm that the oil spill had caused and was causing.

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"the fact that the State of Alabama had previously stated it would prefer its trial take place in its home state." See Petition for Writ of Mandamus at 20–21, *In re Oil Spill*, No. 13-31317 (5th Cir. Dec. 31, 2013), Rec. No. 00512485381. The Fifth Circuit denied the request without an opinion. See Order, *In re Oil Spill*, No. 13-31317 (5th Cir. Jan. 13, 2014), Rec. Doc. 00512498419.

442. Compare Clean Water Act – Penalty Phase United States' Post-Trial Brief, *supra* note 383, at 1 (seeking a civil penalty "that approaches the statutory maximum"), with Penalty Phase Post-Trial Brief of BP Exploration & Production Inc., *supra* note 384, at 1 (seeking a civil penalty "at the low end of the statutory range").

443. See Order Canceling 6/18/15 Status Conference, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Jun. 10, 2015), Rec. Doc. 14705.

## 2. Reaching an Agreement in Principle

Demonstrating the importance of judicial involvement, the Court had appointed the former director of the Federal Bureau of Investigation, Louis Freeh, as a Special Master to review the class action settlement in 2013.<sup>444</sup> In April 2015, Special Master Louis Freeh began facilitating settlement discussions between the Assistant Attorney General Cruden and the Chief Executive Officer and Chief Financial Officer of BP plc. Though much of the specific discussion is still governed by a confidentiality order that was entered to allow expedited settlement discussions,<sup>445</sup> a general outline of the ensuing negotiations shows the importance of the two themes that served so well in the litigation: judicial involvement and professional cooperation.

After several different meetings, when the parties realized that settlement was a real possibility, settlement discussions started in earnest under the supervision of Magistrate Shushan, Special Master Freeh, and Special Master Juneau. The parties met from May to September in either New Orleans or Washington, D.C. The New Orleans meetings included senior representatives from the five Gulf States as well as the small federal negotiating team. Judge Shushan entered a series of confidentiality orders that restricted access and limited participants to a few.<sup>446</sup>

Ultimately, the parties focused on obtaining BP's binding financial commitment and involvement in future work to address the harm caused by the spill. Key issues in settlement discussions were the ultimate penalty, natural resource damages, the possibility of unknown conditions arising, injunctive relief, BP's future responsibility at the site, and payment of past government expenses. In addition, BP was also beginning negotiations with individual states and government entities concerning their economic claims.<sup>447</sup>

On July 2, 2015, the parties announced that they had reached an agreement in principle.<sup>448</sup> To protect the spirit of the settlement and minimize interference with the negotiation of the full settlement, Judge Shushan

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444. See Order, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Jul. 2, 2013), Rec. Doc. 10564.

445. Order Regarding Modification of Earlier Confidentiality Orders, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Oct. 5, 2015), Rec. Doc. 15434.

446. The description of the settlement discussions is based on the personal knowledge and observations of the authors.

447. The description of the settlement discussions is based on the personal knowledge and observations of the authors.

448. Press Release, U.S. Dep't of Justice, Statement by Attorney General Loretta E. Lynch on the Agreement in Principle with BP to Settle Civil Claims for the Deepwater Horizon Oil Spill (July 2, 2015), <https://www.justice.gov/opa/pr/statement-attorney-general-loretta-e-lynch-agreement-principle-bp-settle-civil-claims>.

worked with the parties to identify and limit by order exactly what information would be released about the agreement.<sup>449</sup> That information was conveyed to the press and to Congress. Attorney General Loretta E. Lynch stated the following:

Today, I am pleased to say that after productive discussions with BP over the previous several weeks, we have reached an agreement in principle that would justly and comprehensively address outstanding federal and state claims, including Clean Water Act civil penalties and natural resource damages. BP is also resolving significant economic claims with the impacted state and local governments. We will work diligently during the next several months to incorporate the agreement in principle into a consent decree, which would then undergo public comment before court approval. If approved by the court, this settlement would be the largest settlement with a single entity in American history; it would help repair the damage done to the Gulf economy, fisheries, wetlands and wildlife; and it would bring lasting benefits to the Gulf region for generations to come.<sup>450</sup>

### 3. Negotiating the Consent Decree

The agreement in principle was a major step forward, but it was non-binding. Four major tasks had to be completed before the settlement could become final: (1) BP, the United States, and the Gulf States had to agree to the complete terms of a consent decree; (2) the Trustees had to complete the damage assessment and restoration plan; (3) the Trustees had to comply with the requirements of the National Environmental Policy Act by creating an Environmental Impact Statement to analyze the environmental impact of the planned action;<sup>451</sup> and (4) BP had to settle as many of the economic claims of city, county or other local entities as possible.

The only way of completing these tasks was to divide and conquer. The Trustees, both state and federal, focused on completing their detailed assessment of the damages, restoration plan, and environmental impact study. The United States, led by Assistant Attorney General Cruden, and BP took the lead on negotiating the consent decree embodying the settlement of the penalty and natural resource damages claims. The States,

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449. Confidentiality Order, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Jul. 2, 2015), Rec. Doc. 14801.

450. U.S. Dep't of Justice, *supra* note 448.

451. *See* 42 U.S.C. §§ 4321–4370f (2012).

Judge Freeh, and Judge Shushan focused on drafting a consent decree resolving the States' economic damages claims.

Over the next few months, the parties worked together to convert the general statements in the agreements in principle into a full consent decree. In the end, the parties acted with breakneck speed, spurred on Judge Shushan and the Special Masters. These individuals set tight schedules, decided who would meet with whom and when, and provided logistical solutions to problems that arose. This judicial supervision was critical to resolving claims of six sovereigns related to the largest oil spill in American history.

Critical, too, was the tone set by the court and followed by counsel. Having committed to settlement, counsel worked over weekends, late at night, and agreed to disagree on things that were not critical to the settlement. Without this professional cooperation, which allowed for zealous protection of each client's interests but set aside petty bickering, gamesmanship, and tactical posturing, a settlement could not have been achieved in the six months between the onset of negotiations and lodging of the Consent Decree.

#### 4. Finalizing the Consent Decree

The final consent decree negotiations were conducted over several days in New Orleans. In a tightly scheduled set of meetings, the parties addressed the difficult remaining issues and set aside their differences to reach the landmark settlement. To ensure that the settlement was truly acceptable to all parties, Judge Shushan directed each state to obtain the signature of both its Attorney General and its Governor.<sup>452</sup> Because much work remained to be done on the natural resource damages assessment before the settlement could be made public, Judge Shushan collected the parties' signatures and held them essentially in escrow until all parties were ready to lodge the Consent Decree.

On October 5, 2015, the United States lodged the Consent Decree with the court.<sup>453</sup> Lodging is the formal act of submitting the proposed settlement to the court while giving the public an opportunity to review the settlement and provide comments, suggestions, or objections to the settlement. The settlement was announced by the United States in a press conference at which the Attorney General was accompanied by the Secretary of Commerce, Secretary of Agriculture, Administrator of the Environmental

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452. Judge Shushan issued this oral order in the presence of the authors at the final settlement meeting in New Orleans.

453. Notice of Lodging of Proposed Consent Decree Under the Clean Water Act and Oil Pollution Act, 80 Fed. Reg. 60,180 (Oct. 5, 2015).

Protection Agency, Deputy Secretary of the Interior, the Commandant of the Coast Guard, and the Assistant Attorney General for the Environment and Natural Resources Division.<sup>454</sup> The Department of Justice simultaneously also notified each of the Congressional representatives for the Gulf States about the settlement and answered any questions the representatives had regarding the settlement.<sup>455</sup>

On the same day that the United States lodged the Consent Decree, the Trustees published the final damage assessment, restoration plan, and environmental impact statement.<sup>456</sup> This publication was accompanied by the opening of an online library of the documents the Trustees considered in choosing the restoration activities for the affected area.<sup>457</sup>

## 5. The Public Comment Process

Consistent with Department of Justice policy,<sup>458</sup> the United States and the Gulf States' agreement to the Consent Decree was conditioned on a 60-day comment period and an opportunity for the sovereigns to determine whether the comments received during the public comment procedure "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate."<sup>459</sup> At the same time, under the natural resource damage regulations, the Trustees were required to hold a 45-day comment period regarding the draft damage assessment and restoration plan.<sup>460</sup> For ease of administration, the Trustees extended the comment period so that it would end on the same day as the public comment period on the Consent Decree.<sup>461</sup>

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454. U.S. Dep't of Justice, *supra* note 6.

455. *Id.*

456. Notice of Availability of a *Deepwater Horizon* Oil Spill; Draft Programmatic Damage Assessment and Restoration Plan (PDARP) and Draft Programmatic Environmental Impact Statement (PEIS), 80 Fed. Reg. 60,126 (Oct. 5, 2015).

457. NOAA ASSESSMENT, *supra* note 150. The Plan was finalized after an agreement in principle with BP was announced.

458. *See, e.g.*, 28 C.F.R. § 50.7 (2002).

459. *Id.* § 50.7(b); Notice of Lodging of Proposed Consent Decree Under the Clean Water Act and Oil Pollution Act, 80 Fed. Reg. 60,180, 60,181 (Oct. 5, 2015).

460. 15 C.F.R. § 990.23(c)(2)(ii)(C) (2016).

461. Notice of Availability of a *Deepwater Horizon* Oil Spill; Draft Programmatic Damage Assessment and Restoration Plan (PDARP) and Draft Programmatic Environmental Impact Statement (PEIS), 80 Fed. Reg. 60,126, 60,126 (Oct. 5, 2015) (providing that the Trustees would accept comments through December 4, 2015). Though Department of Justice policy only requires a thirty-day comment opportunity, the United States opted to provide twice that long for comments on the Consent Decree because of the expected public interest in the settlement.

Both the Department of Justice and the Trustees accepted public comments submitted by email, U.S. mail, or through an internet portal.<sup>462</sup> Additionally, the Trustees and the United States provided eight separate public meetings spread throughout each of the Gulf States and Washington, D.C.<sup>463</sup> In all, the United States received comments on the Consent Decree from over 34,000 commenters.<sup>464</sup> More than 99% of the comments were form letters on a single issue: concern about the issue of tax deductibility of payments due under the Decree.<sup>465</sup> Additionally, 96 commenters discussed their own personal descriptions of injury or private claims resulting from the spill, including physical injury or economic losses, 30 commenters expressed concern that the amounts in the settlement were not enough, 10 expressed their belief that the civil penalty was too low, 20 raised questions about criminal fines, and 35 asked for an extension to the comment period.<sup>466</sup> Approximately 20 other commenters thanked the Department for its work and expressed support for the Decree.<sup>467</sup> Finally, roughly 25 distinct, in-depth comments were received from a number of non-profit environmental groups, and other community groups.<sup>468</sup> While these groups supported the Decree restoration plan, they raised specific concerns, chiefly related to how the Trustee agencies would administer restoration going forward. The Department of Justice prepared a “Response to Comments” related to the Decree, addressing the comments expressly directed to the Department.<sup>469</sup>

The Trustees received approximately 6,370 submissions and provided a formal response to those comments in the final damage assessment and restoration plan.<sup>470</sup> Many of the comments to the Trustees related to “Governance” of the Trustees in the future, including costs of administration, organization of the agencies, and future options for public input, but few

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462. Notice of Lodging of Proposed Consent Decree Under the Clean Water Act and Oil Pollution Act, 80 Fed. Reg. 60,180, 60,181 (Oct. 5, 2015); Notice of Availability of a *Deepwater Horizon* Oil Spill; Draft Programmatic Damage Assessment and Restoration Plan (PDARP) and Draft Programmatic Environmental Impact Statement (PEIS), 80 Fed. Reg. 60,126, 60,127 (Oct. 5, 2015).

463. Memorandum in Support of Unopposed Motion by the United States for Entry of Consent Decree with BP at 2, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Mar. 22, 2016), Rec. Doc. 16022-1.

464. *Id.* at 5–6.

465. *Id.* at 5.

466. *Id.*

467. *Id.*

468. *Id.*

469. Response to Comments on the Consent Decree, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Mar. 22, 2016), Rec. Doc. 16022-5.

470. All of the comments can be viewed and searched on the Trustees’ website, labeled “Online Comments Received.” NOAA ASSESSMENT, *supra* note 150.

expressed concern about the total amount of damages or the use of the ecosystem approach.<sup>471</sup>

After reviewing the public comments, the United States and each of the Gulf States concluded that they continued to believe that the settlement was sound and in the public interest. Accordingly, on March 22, 2016, the United States moved for approval of the Consent Decree,<sup>472</sup> and on April 4, 2016, Judge Barbier signed the Consent Decree and entered it in docket.<sup>473</sup>

## XI. THE CONSENT DECREE TERMS

While no settlement could undo all of the harm to lives, families, communities, and the environment caused by the spill, the Consent Decree with BP is nonetheless unprecedented. Combined with the separate-but-simultaneous settlement of the Gulf States' economic damages claims, the overall settlement requires BP to pay over \$20 billion,<sup>474</sup> which is the largest settlement with a single entity in the history of federal law enforcement.<sup>475</sup>

Following the court's approval of the settlement, the payments set out below are due over a 15-year period.<sup>476</sup> However, the payment schedule can be accelerated in case of corporate takeover or insolvency, and that is guaranteed by both the North American and UK parents of BPXP and other mechanisms to ensure compliance by BP.<sup>477</sup>

First, BP must pay a \$5.5 billion civil penalty, plus interest, to resolve the claim of the United States under the Clean Water Act.<sup>478</sup> That amount will be distributed by operation of the RESTORE Act,<sup>479</sup> so \$4.4 billion (80%) will be allocated to projects in the Gulf Coast region.

Second, to resolve the claim of the United States for injunctive relief under the Clean Water Act, BP must publicly report on its mandatory efforts to improve its drilling safety practices and other elements of its operations.<sup>480</sup> Many of these reporting requirements are incorporated from either the suspension and debarment settlement with the Environmental Protection Agency or the criminal plea agreement that BP entered.<sup>481</sup>

471. See Memorandum in Support, *supra* note 463, at 22–31.

472. *Id.* at 26.

473. Consent Decree, *supra* note 438, at 3.

474. Joint Motion for Dismissal, *In re* Oil Spill, No. 10-MDL-2179 (E.D. La. Oct. 5, 2015), Rec. Doc. 15435. The two settlements are related because they were negotiated simultaneously and conditioned upon each other. *Id.* at 9, 51.

475. U.S. Dep't of Justice, *supra* note 6.

476. *E.g.*, Consent Decree, *supra* note 438, at 19–20.

477. *Id.* at 29–30 ¶ 29–31, Appendices 8–9.

478. *Id.* at 18 ¶ 10.

479. *Id.* at 18–19.

480. *Id.* at 34 ¶ 38.

481. *Id.* at 34–35.

Third, BP must also pay up to \$8.8 billion for natural resource damages under the Oil Pollution Act,<sup>482</sup> which includes \$7.1 billion in payments over 15 years; \$1 billion that BP pledged under a prior agreement; and up to \$700 million for unknown conditions and adaptive management.<sup>483</sup> This money will be spent to restore natural resources injured or lost as a result of the spill.<sup>484</sup> Significantly, the Decree allocates these moneys by location and type.<sup>485</sup> First, the restoration plan is divided into seven geographic restoration “Areas” across the five Gulf States and also into “Region-wide” and “Open Ocean” areas.<sup>486</sup> Next, within these geographic areas, funds are sub-allocated to Restoration “Types” (such as fish, birds, and shoreline) that further the Restoration “Goals” of the Trustees (these are the rows).<sup>487</sup> Thus, the CD adopts the outcome of the NRD Trustees’ Damage Assessment and Restoration Plan.

Fourth, BP must pay \$600 million more for various claims: \$350 million for state and federal assessment costs under the Oil Pollution Act; \$167.4 million for removal and other costs paid by the Coast Guard-administered Oil Spill Liability Trust Fund; and \$82.6 million under the False Claims Act, which includes the amount that will be paid for royalties on the oil that was wasted.<sup>488</sup>

Finally, BP must pay up to \$4.9 billion to State and Local Governmental Entities for their damages under OPA (such as lost taxes).<sup>489</sup>

## XII. THE DAMAGES ASSESSMENT AND RESTORATION PLAN

Although not required by the consent decree, all state and federal trustees uniformly believed that the natural resource Damage Assessment and Restoration Plan should be completed simultaneously with a completed consent decree. Although BP will play no role in creating or implementing the restoration plan, the plan provides the necessary detail as to how the damages recovered through the settlement will be spent, and provides transparency to the public, guidance to decision makers, and a beginning to the restoration process.

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482. *Id.* at 20–22 ¶¶ 15–18.

483. *Id.* at 23 ¶ 21.

484. *Id.* at 22 ¶ 19.

485. *See id.* at App. 2 tbl.1.

486. *Id.*

487. *Id.*

488. *Id.* at 24–27 ¶¶ 22, 24.

489. Settlement Agreement Between the Gulf States and the BP Entities with Respect to Economic and Other Claims Arising from the Deepwater Horizon Incident at 6 ¶ 3.1, *In re Oil Spill*, No. 10-MDL-2179 (E.D. La. Oct. 5, 2015), Rec. Doc. 15435-2.

The injuries were staggering. The outcome of the injury assessment was set out as in the Damage Assessment and Restoration Plan. The creatures that lived in the water column that received over three million barrels of oil and all of the dispersants were significantly impacted: 2–5 trillion larval fish and 37–68 trillion invertebrates were killed.<sup>490</sup> Up to 23% of *Sargassum* in the Northern Gulf of Mexico – a sea grass that provides important habitat for breeding and other life cycles – was lost.<sup>491</sup> Around BP's wellhead, over 770 square miles of habitat were damaged, and over four square miles of reefs on the continental shelf edge were injured.<sup>492</sup> Nearer to shore, the Trustees estimate that between 4 and 8.3 billion subtidal oysters died or were never born as a result of the spill.<sup>493</sup>

The spill also damaged wetlands along the coast: hundreds of miles of above ground biomass died off, amphipods, periwinkles, and shrimp lost cover habitat, and flounder and red drum did not grow as large as they otherwise would have.<sup>494</sup> In addition, 51,600–84,500 individual birds were killed.<sup>495</sup> The Trustees estimated that between 4,900 and 7,600 large juvenile and adult sea turtles and between 55,000 and as many as 160,000 small juvenile sea turtles were killed by exposure to DWH oil.<sup>496</sup> Bottlenose dolphins in Bay Barataria suffered 35% excess mortality, 46% excess failed pregnancies, and 37% higher likelihood that animals would have adverse health effects.<sup>497</sup> Finally, the public lost approximately \$700 million worth of recreational opportunities (e.g., fishing).<sup>498</sup> The Trustees concluded:

The injuries caused by the DWH incident affected such a broad array of linked resources and services over such a large area that they cannot be adequately described at the level of a single species, a single habitat type, a single set of services, or even a single region. Rather, the effects of the DWH incident constitute an ecosystem-level injury.<sup>499</sup>

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490. NOAA ASSESSMENT, *supra* note 150, § 4.4.

491. *Id.* § 4.4.5; *see also* § 4.4.5.3.

492. *Id.* § 4.5.

493. *Id.* § 4.6.4.

494. *Id.* § 4.6.

495. *Id.* § 4.7.5.

496. *Id.* § 4.8.5.

497. *Id.* § 4.9.5.

498. *Id.* § 4.10.6.

499. *Id.* § 4.11.4.

Faced with such a large ecosystem-level injury, the Trustees also decided to focus the restoration on an ecosystem- or habitat-based approach.<sup>500</sup> They decided to

employ an *ecosystem approach* toward implementing the integrated restoration portfolio with the intent of *enhancing the connectivity and productivity of habitats and resources* . . . . [T]he key role of coastal habitats in the interconnected Gulf of Mexico ecosystem helps ensure that *multiple resources will benefit* from restoration and that reasonably inferred but *unquantified injuries are likely to be addressed* . . . . [E]mphasizing coastal habitat restoration . . . maximizes the likelihood of providing long-term benefits to all resources.<sup>501</sup>

The Damage Assessment and Restoration Plan also allocated the money across a set of goals that match up closely with the Goals set forth by the Gulf Coast Ecosystem Restoration Task Force (and Council):

- Restore and Conserve Habitat;
- Restore Water Quality;
- Replenish and protect living marine and coastal resources; and
- Provide and Enhance Recreational Opportunities.<sup>502</sup>

These goals were overlaid with a goal of Monitoring, Adaptive Management, and Administrative Oversight to Support Restoration Implementation.<sup>503</sup>

One other important aspect of the Damage Assessment and Restoration Plan is the environmental impact statement prepared under the requirements of the National Environmental Policy Act.<sup>504</sup> As contemplated under the natural resource damage assessment regulations, the Trustees integrated their environmental impact assessment with their overall planning.<sup>505</sup> Thus, the Trustees were required to consider other alternatives, including “no

500. *Id.* § 8.3.

501. *Id.* § 5.9.2 (emphasis added).

502. Compare GULF COAST ECOSYSTEM RESTORATION TASK FORCE, *supra* note 148, at 1, with NOAA ASSESSMENT, *supra* note 150, § 1.5.3. Note that the Task Force included a goal of enhancing community resilience, whereas the Trustees did not, replacing that general goal with the more specific reference to Recreational Opportunities. The differing goals can be explained by the differing governing laws. OPA’s NRD provisions arguably require that the Trustees’ DARP must restore the Natural Resources injured by the spill, 33 U.S.C. § 2702(b)(2)(A) and 2706(c) and (f), while the RESTORE Act’s requirements for spending the civil penalty amounts are broader, including coastal flood protections and conservation management. 33 U.S.C. § 1321(t)(1)(B) (2012).

503. See generally NOAA ASSESSMENT, *supra* note 150, § 5.1.

504. See 42 U.S.C. §§ 4321–4370m-12 (2012).

505. 15 C.F.R. § 990.23 (2016).

human intervention.”<sup>506</sup> Here, the Trustees also considered two vastly different programmatic approaches: (1) declining to select a programmatic restoration approach until further study was undertaken; and (2) directing the majority of the funds to specific species (such as oysters, dolphins, or birds) rather than to habitat and water quality improvements.<sup>507</sup>

### XIII. ANTICIPATED OUTCOMES FROM THE SETTLEMENTS

The settlements are expected to have significant compensatory impacts and yield and great benefits resulting from the federal enforcement efforts, in several categories: improvements in drilling safety and spill response as a result of penalties; injunctions; an influx of funding for research into drilling safety and spill response an environmental sciences; compensation for of the economic losses in the Gulf and improvements to the local economies; and direct restoration of the ecosystem.

#### A. *Penalties, Fines, and Injunctions*

Clean Water Act civil penalties are intended to punish the violator and to provide both general and specific deterrence.<sup>508</sup> The \$5.5 billion figure is a reasonable settlement that sufficiently punishes BP and sends a clear deterrent message to the entire industry.

As for injunctions, the United States, prior to the ultimate civil settlement, had already implemented two robust measures to improve both BP’s drilling practices and ethics. BP’s criminal plea agreement requires a safety monitor and an ethics monitor, safety and environmental audits, and strict drilling-specific requirements such as blowout preventer requirements and a real-time operations monitoring center.<sup>509</sup> As the judge who entered BP’s guilty plea and sentence, Judge Vance, stated, the purpose was to make sure that BP could not “return to business as usual while on probation.”<sup>510</sup> Separately, further monitoring and reporting requirements were imposed when BP entered into an administrative agreement with EPA to resolve potential suspension and debarment claims relating to the Macondo well spill and other prior BP conduct.<sup>511</sup>

506. See 15 C.F.R. § 990.53(b)(2).

507. NOAA ASSESSMENT, *supra* note 150, §1.5.4.

508. *In re Oil Spill*, 148 F. Supp. 3d 563, 576 (E.D. La. 2015); *Tull v. United States*, 481 U.S. 412, 422–23 (1987).

509. See Judgment at 1–7 ¶¶ 1–4, *United States v. BP Expl. & Prod.*, No. 12-cr-292 (E.D. La. Jan. 29, 2013), Rec. Doc. 66-3 [hereinafter BP Judgment]; Consent Decree at App. 6, *supra* note 438.

510. Reasons for Accepting Plea Agreement at 18, *United States v. BP Expl. & Prod.*, No. 12-cr-292 (E.D. La. Jan. 30, 2013), Rec. Doc. 65.

511. Consent Decree, *supra* note 438, at App. 4.

Under the Civil Decree, BP acknowledges compliance with the requirements of the prior two agreements, as well as their continuing force, and must also post on a publicly-available web site information about the company's ongoing performance under those agreements.<sup>512</sup> These postings should allow the public greater insight into BP's performance under these agreements.

Finally, the criminal fine of \$1.25 billion was the largest criminal fine in history, especially when the additional injunctive relief and restitution are taken into account.<sup>513</sup>

Taken together, the fines, penalties, and injunctive requirements provide powerful incentives for BP to closely monitor its operations in the future to ensure process safety to project workers and the environment. Moreover, the deterrent impact of those measures are likely to motivate the entire exploration and production industry to take great care in future operations.

## B. Science

The civil and criminal settlements also offer funding that must be used for specified research purpose.

On May 24, 2010, BP announced a commitment to fund the newly-created Gulf of Mexico Research Initiative, for ten years at a commitment of \$500 million.<sup>514</sup> This initiative funds research aimed at investigating the impacts of the spill on the ecosystems of the Gulf of Mexico and improving spill mitigation and remediation.<sup>515</sup> BP voluntarily set up the Initiative, but it later became a term of the criminal plea agreement that BP would continue to fund GOMRI.<sup>516</sup>

Another term of the plea agreement required BP to pay \$350 million to the National Academy of Sciences to fund research into oil spill prevention and response in the Gulf of Mexico.<sup>517</sup> The National Academy has set up a

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512. *Id.* at 32–37 ¶¶ 34–39, App. 4.

513. *See* U.S. Dep't of Justice, *supra* note 417.

514. Gulf of Mexico Research Initiative, *GoMRI History*, ABOUT, <http://gulfresearchinitiative.org/about-gomri/gri-history/> (last visited Dec. 27, 2016).

515. *Id.*

516. Guilty Plea Agreement, *supra* note 418, at Exhibit B, at 16.

517. *Id.* Transocean paid an additional \$150 million under its criminal plea. Judgment at 5, *United States v. Transocean Deepwater, Inc.*, No. 13-cr-1 (E.D. La. Feb. 14, 2013), Rec. Doc. 31 [hereinafter *Transocean Judgment*] (mandating that Transocean pay an additional \$150 million under its criminal plea).

thirty-year “Gulf Research Program,” whose plan is to fund research and development, education and training, and environmental monitoring.<sup>518</sup>

Finally, the civil settlements will provide funding under the RESTORE Act, which designates 2.5% of the civil penalties to the Gulf Coast Ecosystem Restoration Science, Observation, Monitoring and Technology Program within the Department of Commerce’s National Oceanic and Atmospheric Administration.<sup>519</sup> An additional 2.5% of the civil penalties is allocated to Centers of Excellence Research grants, which will each focus on science, technology, and monitoring related to Gulf restoration.<sup>520</sup>

### C. *Restoration of the Gulf Economies*

As laid out above, the RESTORE Act provides funding to the Gulf States (through a formula), some of which may be used for workforce development, job creation, and infrastructure projects benefiting the economy or to “improve” the economy of the Gulf Coast Region.<sup>521</sup>

Those state expenditures will supplement the financial compensation that is provided to individuals and businesses under class action settlement.

### D. *Restoration of the Environment*

The amount of damages recovered for natural resource injuries in this settlement is unprecedented; so is the Trustee Councils’ plan for restoring the Gulf’s ecosystem.<sup>522</sup> Moreover, the duly-appointed Trustees, acting as a coordinated state-federal Council, after years of scientific work, stated:

The Trustees believe that both the settlement and the programmatic plan are appropriate . . . [and] will make the public whole for the loss in natural resources and services suffered . . . . [T]he settlement provides a reasonable approach to achieving the goals of OPA to make the public and the environment whole, is a fair and reasonable result, and advances the public interest.<sup>523</sup>

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518. Nat’l Acad. of Sci., Engineering, Medicine, *About the Gulf Research Program*, ABOUT, <http://nationalacademies.org/gulf/about/index.html> (last visited Dec. 27, 2016).

519. RESTORE Act, Pub. L. No. 112-141, § 1604(h), 126 Stat. 405, 605 (Jul. 6, 2012) (partially codified at 33 U.S.C. § 1321(t) & note).

520. *Id.* § 1605; Gulf Coast Ecosystem Restoration Council, *supra* note 161.

521. 33 U.S.C. § 1321(t)(3)(B)(i) (2012).

522. See 15 C.F.R. § 990.25 (authorizing settlements where “the settlement is adequate in the judgment of the trustees to satisfy the goal of OPA and is fair, reasonable, and in the public interest, with particular consideration of the adequacy of the settlement to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services”).

523. NOAA ASSESSMENT, *supra* note 150, § 1.6.

The settlement even provides an allocation (up to \$700 million) for addressing unknown conditions and for adaptive management to be used 10 to 15 years after the settlement.<sup>524</sup> “Major pollution sites can be complex to study, and ecological conditions can change over time, with new information revealing unknown conditions.”<sup>525</sup> Often, large natural resource damages settlements will include a “re-opener” whereby the plaintiffs can re-open a settled case if unknown conditions come to light and can seek to prove the new conditions and additional damages.

In this case, the parties elected for a specific amount to be paid for unknown conditions rather than a re-opener. The approach in the Consent Decree to dealing with unknown injuries has advantages relative to settlements in which the parties provide for re-opening the settlement in the event unknown conditions arise. With a fixed payment, BP is obligated to pay the agreed amounts without the need for the governments to prove the existence of a spill-related injury unknown at settlement or any other requirement that might apply before the re-opener can be used. Additionally, BP must pay the amount even if there are no new, unanticipated injuries to natural resources. Proving damages beyond what will be covered by this settlement in such a massive, complex ecosystem – the Gulf of Mexico – would present a more problematic litigation challenge than one might normally face when employing a re-opener in less complex circumstances. The likely outcome – given the ecosystem-wide restoration that will be implemented with the stream of NRD payments – is that \$700 million will exceed any amount of NRD for “unknown conditions” that the Trustees could prove “result from” this incident in litigation 10 or 15 years from now.

Alongside the Damage Assessment and Restoration Plan, two other major sources of funding for ecological restoration arise from the settlements of this case.

First, under the criminal pleas with BP and Transocean and the judgment against Anadarko, over \$2.5 billion is directed as funding to the “Gulf Environmental Benefit Fund,” a newly created fund of the National Fish and Wildlife Foundation.<sup>526</sup> Of that total, \$1.272 billion will be used for

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524. Memorandum in Support, *supra* note 463, at 16–17.

525. *Id.* at 16. While some statutes require a re-opener, the Oil Pollution Act contains no such requirements. Compare 42 U.S.C. § 9622(f)(6)(A), with 33 U.S.C. §§ 2701–2762. Nonetheless, a re-opener is an appropriate matter for consideration in any major natural resource damages settlement. See, e.g., *In re Acushnet River & New Bedford Harbor: Proceeding re Alleged PCB Pollution*, 712 F. Supp. 1019, 1037–38 (D. Mass. 1989).

526. See BP Judgment, *supra* note 509, at Attachment 1 (“The terms of the order include the payment of . . . \$2.394 billion to the National Fish and Wildlife Foundation . . . .”); Transocean Judgment, *supra* note 517, at 5 (“In addition to the \$100 million fine paid to the United States Treasury, a non-fine monetary penalty payment of \$300 million is or-

barrier island and river diversion projects in Louisiana, while \$356 million goes for natural resource projects in each of the following states: Alabama, Florida, and Mississippi. The final \$203 million is for similar projects in Texas.<sup>527</sup>

Second, as discussed above, the RESTORE Act provides funding for ecological restoration. Specifically, the total civil penalties are \$6.6595 billion,<sup>528</sup> of which \$5.3276 billion (80% of the total) goes through the RESTORE Act formula. \$1.59828 billion (30% of the 80% of the total) is entirely directed towards ecosystem restoration.<sup>529</sup> 65% (\$3.46294 billion) is allocated to the States, and such sums may be – but are not required to be—spent on activities to improve the natural resources ecosystems of the Gulf.<sup>530</sup>

It can thus be anticipated that the future restoration projects, taken along with “early” restoration that has already been underway, will make the public whole for the losses to their natural resources caused by the incident.

#### XIV. TYING IT ALL TOGETHER: LESSONS FOR FUTURE CIVIL ENVIRONMENTAL ENFORCEMENT

The litigation arising out of the *Deepwater Horizon* disaster certainly expanded the substantive law of environmental enforcement in a way that will assist and inform future litigation. For instance, the ruling on the first phase of trial provided an unprecedented understanding of the legal standard for gross negligence under the Clean Water Act.

Similarly, the professional work of the Trustees in this case provided exceptional insight into how to balance individual state interests when addressing wide areas of environmental impact. The model set by this Trustee Council, which was made up of very senior and knowledgeable representatives, showed that creativity, persistence, and commitment can make cooperative federalism successful. While the path is never easy, the

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dered . . . \$150 million shall be paid to the National Fish and Wildlife Foundation, a nonprofit organization.”); Final Judgment as to Anadarko Entities, *In re Oil Spill*, No 10-MDL-2179 (E.D. La. Dec. 16, 2015), Doc. 15659; Nat’l Fish & Wildlife Found., *Gulf Environmental Benefit Fund*, <http://www.nfwf.org/gulf/Pages/home.aspx> (last visited Dec. 27, 2016).

527. Nat’l Fish & Wildlife Found., *Gulf Environmental Benefit Fund*, <http://www.nfwf.org/gulf/Pages/home.aspx> (last visited Dec. 27, 2016).

528. That is \$5.5 billion from BP, \$1.0 billion from Transocean, and \$159.5 billion from Anadarko.

529. 33 U.S.C. § 1321(t)(2)(A) (2012).

530. See 33 U.S.C. § 1321(t)(1)(B) (2012) (*per capita* component may be spent on natural resource restoration); *id.* § 1321(t)(3)(B)(i) (*pro rata* component may be spent on projects to improve the ecosystems).

*Deepwater Horizon* settlement shows that, with the right commitment, the needs of all affected communities can be addressed.

More broadly, however, this case is proof of the wisdom of two essential concepts embodied in the Manual for Complex and the Federal Rules of Civil Procedure. First, active judicial management throughout the litigation is essential. From the court's innovative use of pleading bundles, through the dedicated oversight of the special masters and U.S. Magistrate Judge, this litigation demonstrates what can be accomplished with the appropriate level of judicial involvement.

Doubters may argue that it is not possible for courts to dedicate a highly skilled Magistrate Judge and four special masters to every case. Their point is well taken. The *Deepwater Horizon* litigation, however, contains numerous examples of judicial involvement that do not require the extraordinary commitment necessary for a multi-district litigation that could still expedite and improve resolution of all civil environmental enforcement – perhaps even all civil litigation. Many of these examples are described above, but some of the most prominent examples of simple steps that courts could use to expedite civil litigation include: (1) using early pre-trial conferences, or even the Rule 16 conference, to set clear expectations regarding professional cooperation of counsel; (2) requiring the parties to not just discuss but resolve procedural issues such as the format of production, the preservation of information, scheduling and conduct of depositions, and exchange of exhibits before trial; (3) providing regularly scheduled status conferences (probably less frequently than occurred in the *Deepwater Horizon* litigation), at which the court can provide guidance on emerging discovery issues before they become full-blown disputes; and (4) strictly controlling motions practice with clear page limits, limits on extraneous briefing (such as sur-rebuttal briefs), and prompt rulings – even from the bench where appropriate.

As to the second theme, professional cooperation of counsel, it is hard to imagine a case more sensitive for both the plaintiffs and defendants. People's lives and livelihoods were significantly affected by the litigation itself and the events giving rise to the litigation. Yet, under the court's strong encouragement, all counsel took seriously their obligation to contribute to the just, speedy, and inexpensive resolution of all of the claims. Parties with vastly different views of the events and fault in the litigation could still agree on procedural issues – from when and how to produce documents to who went first in questioning witnesses. Doubters may argue that it is improbable to expect all efforts to cooperatively resolve all such issues. They are no doubt correct. But in the *Deepwater Horizon* litigation, as it should be in all civil environmental enforcement, the parties always met and

conferred on disputes, and if an agreement could not be reached, at least the dispute could be narrowed and clarified for the court.

In short, the procedures adopted by the court and counsel in the *Deepwater Horizon* case should be studied and adapted in future civil litigation. In this way, governments from small to large can continue to ensure that even the worst violators with the deepest pockets can be brought to justice within a reasonable time.