# PAYING THE PRICE FOR ENVIRONMENTAL DISASTER: AN INTERIM REPORT ON CRIMINAL AND CIVIL LIABILITY FOR THE BP OIL SPILL

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*It took twenty years to wind up the litigation arising from the Exxon Valdez oil spill. But less than five years after the BP Deepwater Horizon oil spill, BP has already paid out over $25 billion in clean-up, damages, and penalties. It has also agreed to a massive class action settlement, and faces potential civil penalties in the billions. This Article provides a roadmap to the litigation and explains how the legal system has been able to produce such rapid and generous results.*

## I. INTRODUCTION

The BP Oil Spill of 2010 was one of the largest in history, impacting a large area of the Gulf of Mexico and a huge swathe of the Gulf Coast. The legal system has responded on multiple fronts, giving rise to massive litigation.[1] In the four years since the spill, as detailed below, BP has already paid over $25 billion in cleanup, damages, and penalties.[2] It has agreed to a massive class action settlement that will undoubtedly involve

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1. For some particularly useful articles, see Samuel Issacharoff & D. Theodore Rave, *The BP Oil Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014); Russ Randle et al., *Oil Pollution Update*, 43 ENVTL. L. REP. 10309 (2013); David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413 (2011); W. Kip Viscusi & Richard J. Zeckhauser, *Deterring and Compensating Oil-Spill Catastrophes: The Need for Strict and Two-Tier Liability*, 64 VAND. L. REV. 1717 (2011). For a useful update on matters relating to the spill, see JONATHAN L. RAMSEUR & CURRY L. HAGERTY, CONG. RESEARCH SERV., R42942. *DEEPWATER HORIZON* OIL SPILL: RECENT ACTIVITIES AND ONGOING DEVELOPMENTS (2014), *available at* http://www.fas.org/sgp/crs/misc/R42942.pdf.

2. Paul M. Barrett, *How BP Got Screwed on Gulf Oil Spill Claims*, BLOOMBERG BUSINESSWEEK, June 27, 2013, http://www.businessweek.com/articles/2013-06-27/how-bp-got-screwed-on-gulf-oil-spill-claims.

billions more.[3] Government actions for civil penalties and future claims for ecosystem damage remain pending.[4]

Simply tracking the simultaneous developments on all these fronts is not easy, and no comprehensive report exists at this point. This Article is intended to fill that gap and to provide a basis for assessing the effectiveness of the legal system's response to this massive event. This Article begins with a brief description of the spill and its aftermath. It then examines the enormous legal liabilities created by the spill, mostly on the part of BP, to governmental entities (primarily the United States). It next turns to the on-going litigation efforts on behalf of private parties, and then concludes with some general observations about the legal system's ability to cope with the aftermath of mega-disasters, such as this oil spill.

## II. THE SPILL

It is well to begin with the spill itself; although the spill was front-page news for months, memories fade quickly, even after a dramatic event. On April 20, 2010, while drilling at the Macondo Prospect, about fifty-two miles southeast of Venice, Louisiana, an explosion on the Deepwater Horizon, caused by a blowout, killed eleven of 126 crewmen.[5] The gas rushed to the surface, ignited, and exploded.[6] Two days later, despite efforts to put out the blaze on the oilrig, the Deepwater Horizon sank in five thousand feet of water.[7] As later investigations showed, BP simply had not paid enough attention to safety before the accident, making multiple decisions that saved money at the expense of safety.[8]

Safety problems with other BP operations confirmed the organization's lack of a safety culture: "BP stressed production and efficiency over safety and failed to address systemic problems in its environmental compliance programs even after criminal (and civil) violations occurred

3. John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012, http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html.

4. On September 4, 2014, the District Court ruled that BP was guilty of gross negligence, opening the door to civil penalties of up to $17.6 billion. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2014 WL 4375933 (E.D. La. Sept. 4, 2014) [hereinafter *In re Deepwater Horizon* (Phase I)]. For an explanation of the range of possible penalties, see RAMSEUR & HAGERTY, *supra* note 1, at 5. The amount of oil spilled is still a matter of dispute and would affect the total fine.

5. *Deepwater Horizon Oil Rig Fire Leaves 11 Missing*, GUARDIAN, Apr. 21, 2010, http://www.guardian.co.uk/world/2010/apr/21/deepwater-horizon-oil-rig-fire.

6. Uhlmann, *supra* note 1, at 1422–23.

7. *BP Oil Spill Timeline*, GUARDIAN, July 22, 2010, http://www.guardian.co.uk/environment/2010/jun/29/bp-oil-spill-timeline-deepwater-horizon. For a detailed discussion of the events leading up to the spill, see NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 89–122 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf. In *In re Deepwater Horizon* (Phase I), the court determined that BP had been guilty of gross negligence. The court took into account a series of errors by BP, but focused most heavily on the misinterpretation of a "negative pressure test" by both the BP agent on the scene and a supervisor in Houston. *See id.* at *60–66.

8. Uhlmann, *supra* note 1, at 1440.

at BP facilities."[9] The massive flow of oil was finally stopped in mid-July.[10] In total, BP spent $14 billion on efforts to contain the spill and its spread, and, at its peak, almost fifty thousand people were employed in the response effort.[11]

The Gulf of Mexico is a unique ecosystem. Although the oil leak has long since ended, there are continued disputes over the environmental impacts of the spill. For example, it is unclear to what extent oil will continue to wash up on the Gulf Coast, whether species such as the dwarf seahorse can overcome the loss of so much of its habitat, and whether dispersants used during cleanup efforts may have unforeseen consequences on the environment.[12] Luckily, the environmental impacts of the spill seem to have been less than many observers had feared at the time.[13] Nonetheless, there are disturbing indications of long-term impacts on some coastal areas where oil may have persisted, and the subsequent effects on some marine animals.[14]

The spill resulted in criminal and civil penalties, as well as civil actions to recover damages for the spill's economic impact on fishermen and coastal residents.[15] Additional civil actions to recover for the spill's ecological impacts are still in the works.[16] We will first consider BP's liability to federal and state governments, and then turn to its liability to private parties.

## III. LIABILITY TO GOVERNMENTS

As a result of the extent of industry safety violations, the federal government brought criminal charges against BP and others.[17] BP agreed to plead guilty and pay $4 billion in fines for various criminal offenses, including eleven felony counts because of the deaths from the explosion, several misdemeanor counts under the Clean Water Act and the Migratory Bird Treaty Act, and a felony count for obstructing a congressional

9. *Id.* at 1439–40.

10. *Id.* at 1425. Excluding oil recovered at the wellhead, the government estimates that 4.1 million barrels of oil were spilled. RAMSUER & HAGERTY, *supra* note 1, at 1 n.2.

11. *Id.* at 6.

12. *See BP Oil Spill Timeline*, *supra* note 7.

13. Mark Schleifstein, *BP Oil Spill: Scientists Struggling to Understand Effects Four Years Later*, TIMES-PICAYUNE, Apr. 18, 2014, http://www.nola.com/environment/index.ssf/2014/04/bp_oil_spill_scientists_strugg.html.

14. *Id.*

15. The recent ruling in *In re Deepwater Horizon* (Phase I) would allow civil penalties of nearly $17 billion, though the ultimate amount will depend on the determination of exactly how much oil was spilled and on the district court's weighing of factors relating to harm and culpability.

16. As discussed *infra*, besides the amounts to be recovered in the future for ecosystem damages, funds for restoration of damaged coastal areas are also provided as part of the settlement of criminal charges against BP and would be funded in part by any civil penalties recovered by the federal government. *See infra* notes 21–25.

17. Steven Mufson, *BP Settles Criminal Charges for $4 Billion in Spill; Supervisors Indicted on Manslaughter*, WASH. POST, Nov. 15, 2013, http://www.washingtonpost.com/business/economy/bp-to-pay-billions-in-gulf-oil-spill-settlement/2012/11/15/ba0b783a-2f2e-11e2-9f50-0308e1e75445_story.html.

investigation.[18] Of the $4 billion, $1.2 billion was the criminal fine, nearly of all of it under the Clean Water Act.[19] The company also agreed to probation, which involved close government monitoring of BP's operations.[20] The remaining $2.8 billion was paid by BP to settle the criminal case.[21] The entire $4 billion was distributed as follows: $2.394 billion went to the National Fish and Wildlife Foundation to support restoration efforts in the Gulf states, $1.15 billion went to the Oil Spill Liability Trust Fund to help fund compensation for future spills, $350 million went to the National Academy of Sciences to fund oil spill research, $100 million to a wetland conservation fund, and $6 million to the U.S. Treasury.[22]

In additional to criminal penalties, Section 309 of the Clean Water Act provides for civil penalties to be assessed by the Environmental Protection Agency ("EPA") of up to $10,000 per day on the basis of "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."[23] Section 311(b)(7) of the Clean Water Act provides civil penalties of up to $25,000 per day—more significantly for BP, up to $1000 per barrel of oil, or $3000 if the spill was willfully negligent or due to gross misconduct.[24] A special statute called the RESTORE Act dedicates eighty percent of the civil fines in the BP case to restoration of the Gulf Coast.[25]

The culpability issue is obviously crucial, since it would raise the cap by a factor of three. A finding of willful negligence or gross misconduct would also influence the extent of the penalty within the cap.[26] At this point, the culpability issue remains unresolved. Aspects of the penalty case were tried in 2013, with a final trial on the scope of liability currently scheduled to begin in early 2015.[27] If the investigative reports discussed earlier are any guide, there is substantial evidence that could support a finding of culpability.

BP also faces civil liability to federal and state governments for damage to coastal ecosystems. Section 1006(d)(1) of the 1990 Oil Pollution Act ("OPA") provides that public entities can recover "(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the

18. *Id.*
19. Randle, *supra* note 1, at 10311.
20. *Id.*
21. *Id.*
22. RAMSEUR & HAGERTY, *supra* note 1, at 8.
23. 33 U.S.C. § 1319(g)(3) (2012).
24. *Id.* at § 1321(b)(7).
25. Randle, *supra* note 1, at 10312.
26. *Id.* at 10314.
27. Jennifer Larino, *BP Oil Spill Trial's Final Phase to Determine Fines Will Stretch into 2015*, TIMES-PICAYUNE, Mar. 21, 2014, http://www.nola.com/business/index.ssf/2014/03/bp_oil_spill_trials_final_phas.html.

damaged natural resources; (B) the diminution in value of those natural resources pending restoration; plus (C) the reasonable cost of assessing those damages."[28] These costs are to be assessed with respect to the restoration plans promulgated by federal or state trustees.[29] Section 1006(e) requires the President to issue damage assessment regulations; damage determinations pursuant to those regulations enjoy a rebuttable presumption of correctness.[30]

A natural resource may have value apart from its human uses, perhaps because of its beauty or uniqueness. A method known as contingent valuation has been used to assess this "nonuse value" through survey questions.[31] There is considerable controversy about the reliability of this methodology.[32] The National Oceanic and Atmospheric Administration developed rules under the OPA governing continent valuation, which were upheld in *General Electric Co. v. United States Dep't of Commerce*.[33] Thus, BP's damages may be based on evidence of the spill's effect on the intrinsic value of the ecosystem, not merely its economic benefits to humans.

The process for recovery of damages to natural resources is still at an early stage. BP agreed to pay an early restoration fee of $1 billion before the extent of the natural resources claim was determined.[34] The government will then request that BP take part in a "cooperative assessment" of the damage and the cost of restoration.[35] Somewhere down the road an effort to collect damages will follow.

## IV. LIABILITY TO PRIVATE PARTIES

In addition to its ecosystem impacts, the spill also had a widespread economic impact along the Gulf Coast, leading to a tsunami of damage claims by private parties. The framework for considering these claims was shaped by an earlier oil spill. In 1989, the Exxon Valdez oil tanker struck a reef near Alaska, resulting in an eleven million gallon spill, and damaging over a thousand miles of shoreline.[36] The resulting litigation lasted over twenty years, ending when the Supreme Court set the level of punitive damages at $500 million; by then, almost a fifth of the original

28. 33 U.S.C. § 2706(d)(1) (2012).
29. *Id.* at § 2706(c).
30. *Id.* at § 2706(e).
31. Viscusi & Zeckhauser, *supra* note 1, at 1757.
32. For critiques of contingent valuation, see CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 142–43 (1997); John M. Heyde, *Is Contingent Valuation Worth the Trouble?*, 62 U. CHI. L. REV. 331 (1995). For a discussion of improvements to the methodology, see Robert Sugden, *Anomalies and Stated Preference Techniques: A Framework for a Discussion of Coping Strategies*, 32 ENVTL. & RESOURCE ECON. 1 (2005) (introducing a symposium on the subject).
33. 128 F.3d 767 (D.C. Cir. 1997).
34. Randle, *supra* note 1, at 10313.
35. *Id.* at 10314.
36. Shannon L. Sole, Note, *BP's Compensation Fund: A Buoy for Both Claimants and BP*, 37 J. CORP. L. 245, 249 (2011).

thirty-two thousand plaintiffs had died during the course of the litigation.[37] As a result of Exxon Valdez, Congress passed the OPA in 1990,[38] which amended the Clean Water Act with new provisions for compensating victims.[39]

The OPA requires "responsible parties," such as BP, to establish an administrative compensation system in order to ensure speedy payment to claimants.[40] In order to promote speedy payment and discourage litigation, the statute requires that claimants first seek compensation from the administrative compensation system before they can go to court.[41] This provision was the basis for BP's administrative compensation system, which was shaped under considerable pressure from the Obama Administration.[42]

BP has agreed to set aside $20 billion in a trust fund (far over the statutory requirement) with an open-ended commitment should that amount prove insufficient.[43] In a year and a half of operation, the fund paid over $6 billion to two hundred and twenty-two thousand claimants.[44] It provided interim payments for past harm, including lost earnings and business profits, removal and cleanup costs, physical damage, and injury.[45] In return for signing a release, claimants with small claims could obtain $5000 (for individuals) or $25,000 (for businesses) as "Quick Payments."[46]

Final Payments were an option for larger claims, and they included a multiplier (called a recovery factor) to estimate future losses based on past losses; these payments also required a release for all liability, unlike the interim payments.[47] Initially, the multiplier was two for all claims except for the oyster industry, where it was four, but later the multiplier of four was extended to the rest of the shellfish industry.[48] The Gulf Coast Claims Facility ("GCCF") estimated business losses by comparing the claimant's revenue from the remainder of 2010 to either its projected revenue in the remainder of 2010 or its best eight months in 2008, 2009, or projected 2010, with an offset for avoided expenses after the spill.[49]

BP also faced massive civil litigation risks. Section 1002 of the OPA imposes liability on "each responsible party" for removal costs, damage

37. *Id.* at 249.
38. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended at 33 U.S.C. §§ 2701–2762 (2012)).
39. Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 513–14 (2000).
40. 33 U.S.C. § 2705 (2012).
41. *Id.* at § 2713(c).
42. Sole, *supra* note 36, at 246.
43. Issacharoff & Rave, *supra* note 1, at 398.
44. *Id.* at 400.
45. Sole, *supra* note 36, at 250.
46. *Id.* at 251.
47. *Id.*
48. Issacharoff & Rave, *supra* note 1, at 405.
49. *Id.* at 407.

to natural resources, damages "for injury to, or economic losses, resulting from destruction of, real or personal property," and lost profits "due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant."[50] The statute provides for unlimited liability if the spill is caused by gross negligence, willful misconduct, or a safety violation.[51]

Hundreds of cases seeking compensation for economic loss, involving thousands of individual claimants, plus class actions, were consolidated in front of a federal district judge in Louisiana.[52] The proceedings involved "scores of expert reports, hundreds of depositions, and more than 90 million pages of discovery documents."[53] BP changed its emphasis from the administrative fund—the GCCF—to litigation settlement.[54]

The settlement provided more generous methods for estimating future economic harm based on lost revenue immediately after the spill.[55] BP's willingness to agree to such generous terms was probably attributable to the greater degree of finality provided by class action settlements, which gave BP finality in terms of potential future claims.[56] Despite congressional hopes that the administrative mechanism would benefit all parties because of its lower transaction costs, the class action had some superior qualities that it could not replicate: "[t]he GCCF, for all its efforts to rapidly provide compensation to an astounding number of claimants in a streamlined, low-cost process, could not measure up to the class action settlement's ability to deliver finality—even at a greater cost—in a fair and equitable manner."[57]

The settlement provides that claimants in some particular industries and areas need only prove that they suffered an economic loss and certify (under pain of perjury) that BP caused the losses.[58] BP later had second thoughts about its settlement agreement and complained that it might have to make payments in cases where the claim form itself made it clear that a business would have closed for some obvious reason apart from the spill.[59] So far, the courts have rejected BP's argument that this aspect

50. 33 U.S.C. § 2702(b)(2) (2012).
51. *Id.* at § 2704(c).
52. Issacharoff & Rave, *supra* note 1, at 400.
53. *Id.* at 401.
54. *Id.* at 401–02.
55. *Id.* at 404–12.
56. *Id.* at 426–27.
57. *Id.* at 431. As of March 31, 2014, the settlement had resulted in payments of $4 billion. *See* RAMSEUR & HAGERTY, *supra* note 1, at 8. For suggestions about when such compensation systems should be used in the future, see Linda S. Mullenix, *Designing a Compensatory Fund: In Search of First Principles*, 3 STAN. J. COMPLEX LITIG. (forthcoming 2015), *available at* http://ssrn.com/abstract=2466301.
58. Campbell Robertson & John Schwartz, *How a Gulf Settlement that BP Once Hailed Became Its Target*, N.Y. TIMES, Apr. 26, 2014, http://www.nytimes.com/2014/04/27/us/how-a-gulf-settlement-that-bp-once-hailed-became-its-target.html.
59. *Id.*

of the settlement cannot be enforced because those claimants lacked standing to sue.[60]

## V. CONCLUSION

The full story of post-spill liability has yet to play out. The government's civil penalty action is still in process,[61] and recovery for harm to natural resources remains in the future. We also do not yet know the full extent of BP's monetary liability under the class action settlement.[62] Nevertheless, even at this stage, some conclusions can be drawn.

First, with the assistance of strong pressure from the White House on BP,[63] the system has actually worked, despite the magnitude of loss and the very large number of claimants. Within four years of the spill, billions have already been paid out to claimants, and a comprehensive settlement of the remaining private claims has been established.[64]

Second, distinctions between categories of liability have become blurred. In theory, penalties and civil damages have very different purposes, but, in the BP context, the difference has been largely erased. Criminal fines and civil penalties will be used in large part for restorative measures, rather than simply going to the federal treasury, thereby serving a compensatory function as well as a punitive one.[65] Another example of boundary blurring involves the distinction between tort litigation in the courts and administrative compensation systems. Litigation has resulted in a settlement that in operational terms looks little different than the administrative compensation system established under the statute.[66] Thus, tidy analytical categories have not fared well when faced with issues on the scale of the BP spill.

Third, despite what one might have expected from such large-scale litigation, events have moved remarkably quickly. Faced with such large potential liability, stonewalling by the defendant, BP, on multiple fronts would not have been surprising. BP clearly has had strong incentives to move the process along quickly, entering a guilty plea in the criminal case and agreeing to a generous class action settlement. BP's public image and its political standing are valuable company assets that would be

60. *In re* Deepwater Horizon, 744 F.3d 370 (5th Cir. 2014), *reh'g denied,* 753 F.3d 509 (5th Cir. 2014). For a critical appraisal of BP's argument, see Daniel A. Farber, *Standing, Settlement, and Mass Torts*, LEGAL PLANET (June 24, 2014), http://legal-planet.org/2014/06/24/standing-settlement-and-mass-torts/.

61. The district court ruling in *In re Deepwater Horizon* (Phase I), finding that BP was guilty of gross negligence, will surely be appealed, and other aspects of the civil penalty determination remain to be made.

62. Katherine Sayre, *U.S. Supreme Court Refuses, for Now, to Stop BP Oil Spill Payments*, TIMES-PICAYUNE, June 9, 2014, http://www.nola.com/business/index.ssf/2014/06/supreme_court_refuses_to_stop.html.

63. Issacharoff & Rave, *supra* note 1, at 298.

64. *See supra* text accompanying notes 18–22, 54–57.

65. *See supra* Part III.

66. Issacharoff & Rave, *supra* note 1, at 402.

damaged by any effort at stonewalling. Moreover, its investors may have been more concerned about having greater certainty regarding the company's liabilities than about even relatively large current payments.[67]

It is still too early for a final accounting of liability for the BP spill. Still, the contrast with the twenty-year litigation process following the Exxon Valdez spill has been heartening. This may be partly a tribute to the improvements made by the OPA. It may also be due to differences in corporate strategy and political pressures. We can only hope that the end result will come as close as possible to full compensation for victims and restoration of damaged ecosystems.

Preferred Citation: Daniel A. Farber, *Paying the Price for Environmental Disaster: An Interim Report on Criminal and Civil Liability for the BP Oil Spill*, 2014 U. ILL. L. REV. SLIP OPINIONS 9, http://www.illinoislawreview.org/wp-content/uploads/2014/10/Farber.pdf.

67. Additional relevant factors may have included the threat of being debarred from federal contracts and the possibility of being locked out of further offshore drilling. The EPA debarred BP from new federal contracts in 2012 as a result of the spill. The EPA later terminated its debarment in 2014. *US Legal Proceedings*, BP, http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings/US-legal-proceedings.html (last visited Sept. 23, 2014).