



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Student Scholarship

9-2017

The Deepwater Horizon Oil Spill: A Review of the Historic Civil and Criminal Liabilities, and Resulting Funding Streams, From America's Worst Environmental Catastrophe

Stephen L. Tatum

Henrik Strand

Follow this and additional works at: <https://scholarship.law.tamu.edu/student-scholarship>



Part of the [Environmental Law Commons](#)

THE *DEEPWATER HORIZON* OIL SPILL: A REVIEW OF THE HISTORIC CIVIL AND CRIMINAL LIABILITIES, AND RESULTING FUNDING STREAMS, FROM AMERICA’S WORST ENVIRONMENTAL CATASTROPHE

BY STEPHEN L. TATUM, JR. AND HENRIK STRAND

I.	Introduction	154
II.	The Primary Parties to the <i>Deepwater Horizon</i> Incident.....	158
	A. The Responsible Parties/Defendants	158
	B. The Plaintiffs	159
III.	Adjudication of the Major Civil Claims Arising from the <i>Deepwater Horizon</i> Incident	159
	A. Phase 1 of <i>In re Oil Spill</i> – The “Incident Phase”	161
	B. Phase 2 of <i>In re Oil Spill</i> – “Source Control” and “Quantification”....	163
	1. Source Control	163
	2. Quantification	163
IV.	Disposition of the Major Civil Claims.....	164
	A. BP’s Civil Settlement	164
	B. Transocean and MOEX Civil Settlements	167
	C. Anadarko’s Civil Penalty	168
V.	Criminal Charges Against BP and Transocean	168
VI.	The Major Funding Streams that Administer the Civil and Criminal Penalties from the <i>Deepwater Horizon</i> Incident	169
	A. Summary of Total Funds and Amounts Allocated to Texas	169
	B. National Fish and Wildlife Foundation (NFWF).....	170
	C. Natural Resource Damage Assessment (NRDA)	172
	D. The Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012—the RESTORE Act.....	174
VII.	Conclusion	178

I. INTRODUCTION

“ . . . the largest environmental catastrophe in the history of the United States.”¹

“ . . . the largest civil penalty ever paid by any defendant under any environmental statute, and the largest recovery of damages for injury to natural resources.”²

“ . . . the largest settlement with a single entity in the history of federal law enforcement.”³

“ . . . the largest criminal resolution in United States history.”⁴

Offshore exploration and production of oil and gas in deep water (as opposed to shallow water drilling near the coastline) is an extremely complex and risky endeavor. At the most basic level, the goal is the same as onshore drilling: create a secure pathway through subsurface rock formations to access trapped hydrocarbons and extract them to the surface. Offshore and onshore drillers also share the challenge of maintaining the “delicate balance” of competing pressures deep inside the well. If the pressures fall out of balance and well integrity is lost, there could 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,” also called a “blowout.”⁵

Yet, offshore drilling involves many complexities not found on land.⁶ For instance, an offshore drilling unit floats on the surface of the ocean miles from shore and thousands of feet above the hole it is drilling on the sea bed below, whereas inland drilling and production units sit directly on top of the well in physical contact with the land surrounding the hole. On land, hydrocarbons reach their collection point when they arrive at the well head, whereas offshore they must then travel thousands of feet up through a flexible riser that connects the well head to the rig on the surface. All of the underwater components that make deepwater drilling possible are subject to the intense pressures of ocean depths and the corrosive effects of seawater. For these reasons, deepwater drilling has been equated to working on the surface of the moon or performing heart surgery at the bottom of the ocean.⁷

If a blowout occurs on land, the uncontrolled flow of hydrocarbons will pool on the ground or flow in accordance with the local topography, and the point of discharge, usually the well head, can be directly accessed on land by response crews. In an underwa-

1 BOB CAVNAR, *DISASTER ON THE HORIZON*, at xiii (2010).

2 Memorandum in Support of Unopposed Motion by the United States for Entry of Consent Decree with BP at 2, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-4536, MDL No. 2179 (E.D. La. Mar. 22, 2016) [hereinafter *Memorandum in Support*].

3 *Id.*

4 Press Release, U.S. Dept. of Justice, BP Exploration and 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>.

5 Nat’l Comm’n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling 91* (2011) [hereinafter *Deepwater Report*].

6 *See id.* at 51–52 (discussing the special challenges of deepwater drilling generally).

7 Cavnar, *supra* note 1, at 33.

ter blowout, or even a surface discharge such as the *Exxon Valdez* spill, the escaping hydrocarbons are subject to tidal currents that can spread the oil and gas quickly across many square miles of ocean and eventually to shorelines, wreaking havoc on underwater and coastal wildlife and ecosystems along the way. This makes the response and cleanup exponentially more difficult than an inland spill and underscores the importance of preventing an underwater blowout in the first place.

On the night of April 20, 2010, about 50 miles off the coast of Louisiana on the Outer Continental Shelf, the mobile offshore drilling unit *Deepwater Horizon* was preparing to temporarily abandon the exploratory Macondo well it had been drilling for the BP Oil Company (BP) (formerly known as British Petroleum Company).⁸ At the time, BP was \$60 million over budget and 54 days behind schedule on the Macondo well, and every additional day the rig stayed on the well cost BP another \$1 million.⁹ BP was also under immense pressure to get the *Deepwater Horizon* to perform work on two other wells so as not to lose the 5,700 acre lease it spent over \$30 million to acquire from the United States two years earlier.¹⁰

Likewise, the Macondo well was under tremendous pressure, though of the geologic kind. Before the well could be abandoned, the crew of the *Deepwater Horizon* needed to perform various tests to ensure there were no leaks and the competing pressures in and around the well were in balance.¹¹ One such test, the “negative pressure test,”¹² was performed twice, but the results were misinterpreted, thereby preventing the crew from realizing that well integrity was in jeopardy.¹³ As a result, blowout-prevention measures (like re-casing the well with new cement, for example) were not taken.¹⁴ As the crew then proceeded with the next phase of well abandonment—removing the drilling mud—the pressurized hydrocarbons that had indeed breached the well casing rushed upward, pushing the mud out of the well head, past the blowout preventer, and into the riser that connected the well to the *Deepwater Horizon*.¹⁵ By the time the crew realized what was happening to the well, the blowout was well underway.¹⁶ Attempts to activate the blowout preventer failed, and when the oil and gas reached the rig and spewed out onto the drilling platform, the highly flammable fluids quickly found an ignition source, causing an explosion.¹⁷

8 *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010 (In re Oil Spill (Phase 1))*, 21 F. Supp. 3d 657, 666–67, 671 (E.D. La. 2014).

9 *Id.* at 675.

10 *Id.* at 671, 675.

11 Deepwater Report, *supra* note 5, at 105.

12 *Id.* The negative-pressure test “checks not only the integrity of the [well] casing, . . . but also the integrity of the bottomhole cement job.” *Id.* In a negative-pressure test, “the crew removes pressure from inside the well to see if fluids, such as hydrocarbons, leak in, past or through the bottomhole cement job. . . . If the casing and primary cement have been designed and installed properly, they will prevent hydrocarbons from intruding even when [the] pressure is removed.” *Id.*

13 *Id.* at 105–09.

14 *Id.* at 106.

15 *Id.* at 113.

16 *Id.* at 114.

17 *Id.*

The blast killed eleven of the crew instantly and damaged the riser, the rig, and its emergency systems so severely that the last lines of defense against an uncontrolled blowout were rendered ineffective—the rig was dead.¹⁸ Surviving crew members abandoned ship and then watched from a nearby vessel as the *Deepwater Horizon* burned continuously until it listed and sank below the surface two days later.¹⁹ As it sank, the riser connecting the rig to the well head buckled and ruptured, allowing the still-presurized flow of hydrocarbons to discharge into the ocean.²⁰

For 87 days, the oil discharged freely into the ocean until the well was finally capped on July 15, 2010.²¹ Until that time, the largest offshore drilling-related spill into American waters was the 1969 Union Oil Company blowout in the Santa Barbara Channel in California, where approximately 100,000 barrels of oil were spilled.²² The *Exxon Valdez* accident, the largest ocean-related spill, resulted in the discharge of about 260,000 barrels of oil along the shores of Alaska.²³ The *Deepwater Horizon* accident dwarfed them all, causing the release of 3.19 million barrels of oil into the ocean and onto the shores of all five Gulf Coast states, which in turn caused extensive and unprecedented damage to coastal ecosystems and economies.²⁴

Government's response began immediately. The Coast Guard assumed command of the response pursuant to a National Contingency Plan, setting up Incident Command Posts in Houma, Louisiana and in Houston, Texas, and deploying resources to begin fighting the fire and searching for survivors.²⁵ BP activated skimmer vessels to begin collecting oil from the surface and spreading chemical dispersants that break down oil so that it can dissolve and mix with the water.²⁶ Eventually, more than 45,000 responders from the Coast Guard, Louisiana National Guard, and several federal agencies were deployed to begin cleanup operations.²⁷

On May 19, 2010, the Secretary of the Interior dismantled the Minerals Management Service (MMS), the federal agency that managed the country's oil, natural gas, and other resources on the outer continental shelf, and reassigned its jurisdiction and duties to three other agencies.²⁸ A few days later, President Obama created the National Com-

18 *Id.* at 114–15.

19 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d 657, 667 (E.D. La. 2014).

20 *Id.*

21 *Id.*

22 Deepwater Report, *supra* note 5, at 28.

23 See NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Exxon Valdez Oil Spill*, <http://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill> (last visited Apr. 1, 2017).

24 *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010 (*In re Oil Spill* (Phase 2)), 77 F. Supp. 3d 500, 522, 525 (E.D. La. 2015) (finding for the purposes of the case a release of 3.19 million barrels but suggesting the number could have been as high as 4.19 million barrels); see Campbell Robertson et al., *BP to Pay \$18.7 Billion for Deepwater Horizon Oil Spill*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html>.

25 Deepwater Report, *supra* note 5, at 130–31.

26 *Id.* at 132–33.

27 *Id.* at 133.

28 BUREAU OF OCEAN ENERGY MGMT., *The Reorganization of the Former MMS*, <https://www.boem.gov/reorganization/> (last visited Apr. 1, 2017). The three agencies that the

mission on the BP Deepwater Horizon Oil Spill and Offshore Drilling and tasked it with determining the cause of the explosion and oil spill, figuring out ways to improve oil spill response, and producing recommendations for safety reforms for offshore drilling.²⁹ In late May, the Obama administration suspended all deepwater oil and gas drilling (but not the continued production of existing wells) in the Gulf of Mexico and the Pacific Ocean for six months.³⁰ In July, a few days after the well was finally sealed, the President issued an executive order establishing a National Ocean Council and a national policy to, among other things, “ensure the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources.”³¹ Numerous new laws and regulations followed, dramatically changing the regulatory framework governing offshore exploration while reshaping the liability structure for future spills.³²

The lawsuits began almost immediately. Since the explosion, thousands of cases involving hundreds of thousands of named claimants have been filed in federal and state courts.³³ The claims have included wrongful death and personal injury both from the explosion and the response, as well as damage to property or natural resources, and economic losses.³⁴

On December 15, 2010, the United States government filed a complaint in the Eastern District of Louisiana against BP for civil penalties under the Clean Water Act (CWA)³⁵ and the Oil Pollution Act of 1990 (OPA).³⁶ Similar lawsuits by the five Gulf States—Florida, Alabama, Mississippi, Louisiana, and Texas—as well as numerous local governments, soon followed.³⁷ In 2014, the government brought criminal charges against BP, Transocean, and Anadarko in federal court, alleging fourteen counts of criminal behavior.³⁸

Today, the major civil claims against the parties responsible for the *Deepwater Horizon* accident have been resolved through settlements, and the criminal charges have been disposed of through plea agreements. The cases in which these claims and charges were adjudicated, and the resulting settlements, are very complex. This article provides a

MMS was divided into are (1) BOEM, (2) the Bureau of Safety and Environmental Enforcement (BSEE), and (3) the Office of Natural Resources Revenue. *Id.*

29 Deepwater Report, *supra* note 5, at vi. Included amongst the many recommendations the Commission offered was the need for government oversight and regulation that can keep pace with the “remarkable technological innovation and productivity” of the oil and gas industry. *Id.* at 57.

30 *Id.* at 152.

31 Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 19, 2010).

32 See Amber L. MacIver, *Offshore Oil and Gas: Chartering a New Course in 2012*, 43 TEX. ENVTL. L.J. 159, 159–60 (2013).

33 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d 657, 667 (E.D. La. 2014).

34 *Id.*

35 33 U.S.C. §§ 1251 et seq. (CWA).

36 33 U.S.C. §§ 2701 et seq. (OPA); Consent Decree Among Defendant BP Exploration & Production Inc. (“BPXP”), the United States of America, and the States of Alabama, Florida, Louisiana, Mississippi, and Texas at 1, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-4536, MDL No. 2179 (E.D. La. Apr. 4, 2016), <https://www.justice.gov/entrd/file/838066/download> [hereinafter Consent Decree].

37 *Id.* at 1–4.

38 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 668.

concise review of the major parties involved in the accident, the cases and settlements that produced the historic penalties and fines, and the major funding streams through which those penalties and fines are administered.

II. THE PRIMARY PARTIES TO THE DEEPWATER HORIZON INCIDENT

A. THE RESPONSIBLE PARTIES/DEFENDANTS

BP paid about \$34 million to the United States in 2008 for the 5,760-acre lease on which the Macondo well was drilled.³⁹ At the time of the spill, BP co-leased the tract with Anadarko, another oil and gas exploration-and-production company.⁴⁰ The Macondo well itself was co-owned by three oil and gas companies: BP (65%), Anadarko (25%), and MOEX Offshore 2007, LLC (10%).⁴¹ Still, BP was the operator and primary leaseholder of the well.⁴² Under MMS regulations, this meant BP was “the person the lessee(s) designates as having control or management of operations on the leased areas or a portion thereof.”⁴³

Transocean⁴⁴ owned the *Deepwater Horizon* rig and employed its crew.⁴⁵ BP hired Transocean “to implement BP’s drilling plan for the Macondo well.”⁴⁶ Under this arrangement, BP acted as supervisor, “determin[ing] and direct[ing] all aspects of how the well would be drilled, . . . the cementing process, and how and when temporary abandonment would take place.”⁴⁷

Halliburton Energy Services, Inc. provided cementing services and mudlogging services for BP on the Macondo well.⁴⁸ While Halliburton made recommendations to BP on the design and execution of the Macondo well’s cementing operations, it was ulti-

39 *Id.*; see also Deepwater Report, *supra* note 5, at 89 (stating the price for the lease).

40 *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 844 F. Supp. 2d 746, 747 (E.D. La. 2012), *rev’d in part*, 21 F. Supp. 3d 657 (E.D. La. 2014).

41 *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010 (*In re Oil Spill* (Anadarko Penalties)), 148 F. Supp. 3d 563, 567 (E.D. La. 2015).

42 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 671. Multiple wholly-owned subsidiaries of BP P.L.C. were involved in the Deepwater Horizon oil spill, including BP Exploration & Production, Inc. and BP America Production Company. See *id.* at 668–69 (listing the “BP Entities” defendants in the Phase 1 civil trial). For simplicity, this article will refer to BP entities collectively as “BP.”

43 *Id.* (citing 30 C.F.R. § 250.105 as it existed on April 20, 2010).

44 *Id.* As with BP, many subsidiaries of Transocean played a role in the accident. See *id.* at 669 (listing the “Transocean Entities” defendants of the Phase 1 civil trial). For simplicity, this article will refer to all Transocean entities collectively as “Transocean.”

45 *Id.*

46 Information for Clean Water Act Violation at 2, *United States v. Transocean Deepwater Inc.*, No. 2:13-cr-00001-JTM-SS (E.D. La. Jan. 3, 2013), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2013/01/18/2013-01-03-transocean-information.pdf>.

47 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 746.

48 *Id.* at 669.

mately BP that decided whether the design was appropriate and should be used.⁴⁹ It was then Halliburton's responsibility to test the cement.⁵⁰

Several other entities involved in the drilling of the Macondo well were either not parties to the civil and criminal proceedings or were subsequently removed. This included the manufacturer of the well's blowout preventer, the provider of goods and services related to drilling fluids, and several subsea oilfield services companies.⁵¹

B. THE PLAINTIFFS

The United States, represented by the Department of Justice, brought criminal charges against BP and Transocean.⁵² It also sued BP, Transocean, Anadarko, MOEX, and several smaller companies for civil penalties under the CWA and OPA.⁵³

The five Gulf States—Texas, Louisiana, Mississippi, Alabama, and Florida—all brought actions under their respective state environmental laws seeking civil penalties against BP and other responsible parties.⁵⁴ Each of these cases was transferred to and consolidated as multidistrict litigation in the Eastern District of Louisiana.⁵⁵ Texas brought its claims under the state's Oil Spill Prevention and Response Act and the Texas Water Code, in addition to claims under the OPA and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁵⁶ Specifically, Texas sought cost recovery and damages for injury to natural resources, lost tax and state park revenues, and other economic damages.

Lastly, a multitude of private individuals, businesses, and other entities across the Gulf filed claims against BP, Transocean and others, which claims also became part of the multidistrict litigation in the Louisiana federal court.⁵⁷

III. ADJUDICATION OF THE MAJOR CIVIL CLAIMS ARISING FROM THE DEEPWATER HORIZON INCIDENT

To date, thousands of complaints have been filed in federal and state courts around the nation as a result of the spill.⁵⁸ Most of the federal cases were transferred to the Eastern District of Louisiana as multidistrict litigation.⁵⁹ That court "adopted a phased

49 *Id.* at 694.

50 *Id.*

51 *Id.* at 669.

52 *Id.*

53 *In re Oil Spill (Anadarko Penalties)*, 148 F. Supp. 3d 563, 566 (E.D. La. 2015).

54 Consent Decree, *supra* note 36, at 1–4 (describing in detail each of the states' claims).

55 *Id.*

56 *Id.* at 2–3; *see also* 42 U.S.C. §§ 9601 et seq. (2012) (CERCLA); TEX. NAT. RES. CODE ANN. §§ 40.001–.008 (West 2015) (Oil Spill Prevention and Response Act); TEX. WATER CODE ANN. §§ 26.001–.003 (West 2015) (relating to water quality control).

57 *In re Oil Spill (Phase 1)*, 21 F. Supp.3d at 669.

58 *See, e.g., id.*

59 *Id.* at 667. Where multiple federal civil actions in different federal districts share common questions of fact, the United States Judicial Panel on Multidistrict Litigation has authority to transfer such cases to any one district and court "for coordinated or consolidated pretrial

trial proceeding that ultimately focused on two cases” that would be handled as one bench trial.⁶⁰

The first case, *Triton Asset Leasing GmbH, et al.*, was a limitation of liability action under U.S. maritime law.⁶¹ In that case, Transocean, as owner of the *Deepwater Horizon* vessel, sought to exercise its statutory right to limit its liability in a maritime claim—in this case for personal injury and/or death of its employees from the explosion of the vessel—to the value of the vessel and its pending freight.⁶² In the second case, *United States v. BP Exploration & Production Inc., et al.*, the United States sought two forms of relief against BP, Transocean, Anadarko, MOEX, and others: civil penalties under the CWA and a declaratory judgment of liability under the OPA.⁶³

These two cases were consolidated and styled as *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*. The fact-finding proceedings were separated into three phases. Phase 1, or the “Incident Phase,” involved the determination and allocation of fault for every stage of the accident, from the initial loss of well integrity to the mishandling of the negative pressure test, the failure of the blowout preventer, the explosion and sinking of the rig and, finally, the breach of the riser and discharge of oil.⁶⁴ Phase 1 also included a determination of whether any defendant engaged in misconduct beyond simple negligence, a crucial inquiry that would determine the maximum allowable penalty.⁶⁵

Phase 2 of *In re Oil Spill* concerned the aftermath of the explosion and spill, examining (1) “Source Control,” or the defendants’ conduct or omissions in stopping the release of oil, and (2) “Quantification,” or the amount (in barrels) of oil actually released from the well.⁶⁶ The Quantification segment together with the negligence determination in Phase 1 would determine the total amount of civil penalties levied under the CWA.⁶⁷

Phase 3 was the “Penalty Phase,” in which the Court would consider evidence from the parties regarding factors that could mitigate or exacerbate the penalty amount.⁶⁸

proceedings” if doing so “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a) (2012). In this case, all of the cases were consolidated into MDL No. 2179. A complete listing of all orders entered in MDL No. 2179 can be viewed online on the website for the United States District Court for the Eastern District of Louisiana, accessible at <http://www.laed.uscourts.gov/OilSpill/OilSpill.htm>.

60 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 667.

61 *Id.* at 668; see also 46 U.S.C. § 30505(a) (2012) (providing for a general limit of liability under the Limitation of Liability Act).

62 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 668. The Court ultimately held that Transocean was not entitled to limit its liability because “the negligence or unseaworthiness that caused the damage was within the ‘privity or knowledge’ of the owner.” *Id.* at 753 (quoting 46 U.S.C. § 30505).

63 *Id.*

64 *Id.* at 668, 730.

65 *Id.* at 730.

66 *Id.*

67 *Id.* at 668.

68 See, e.g., *In re Oil Spill* (Anadarko Penalties), 148 F. Supp. 3d 563, 565 (E.D. La. 2015).

A. PHASE 1 OF *IN RE OIL SPILL* – THE “INCIDENT PHASE”

No party to the Phase 1 trial disputed that a “harmful” amount of oil was released from the Macondo well in violation of section 311 of the CWA.⁶⁹ When section 311(b)(3) is violated, section 311(b)(7)(A) imposes a civil penalty upon “the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which” the discharge occurred.⁷⁰ As an initial matter of law via cross-motions for partial summary judgment, the court had to decide whether the discharge of oil emanated from the “vessel” owned by Transocean (the *Deepwater Horizon* and riser connecting it to the well) or the “offshore facility” owned by BP and Anadarko (the Macondo well). The answer to that question determined liability for CWA penalties.

Anadarko argued that the oil had entered the marine environment from the riser owned by Transocean, and thus not from any facility owned or operated by BP or Anadarko.⁷¹ Transocean meanwhile argued that the term “from” refers to the source of the discharge, in this case the Macondo well, “where the uncontrolled movement of oil began, not some conduit through which oil momentarily passed.”⁷² The court agreed with Transocean, concluding that the Macondo well was an “offshore facility” under the CWA “from which oil discharged.”⁷³ As such, BP was an “operator” and a “person in charge” of the offshore facility from which the discharge occurred and was therefore liable for penalties under the CWA, section 311(b)(7)(A), “even if it is later determined that the discharge was ‘from’ the vessel and not the offshore facility.”⁷⁴

That left the court to decide in Phase 1 whether the discharge was the result of gross negligence or willful misconduct.⁷⁵ This determination was pivotal. If the court found gross negligence or willful misconduct the CWA’s maximum penalty of \$1,000 per barrel for a simply negligent discharge could rise to \$4,300 per barrel.⁷⁶

69 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 731 n. 160. Section 311(b)(3), 33 U.S.C. § 1321(b)(3), prohibits the discharge of “harmful” quantities of oil into the navigable waters of the United States and adjoining shorelines, or in connection with federally authorized deepwater exploration activities. *See id.* A “harmful” discharge includes one that “[c]ause[s] a film or sheen upon 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.” *Id.* (quoting 40 C.F.R. § 110.3(b) (2014)).

70 33 U.S.C. § 1321(b)(7)(A) (2012).

71 *See In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 844 F. Supp. 2d 746, 757 (E.D. La. Feb. 2012) (ruling on cross motions for partial summary judgment regarding liability under the CWA and OPA), *rev’d in part*, 21 F. Supp. 3d 657 (E.D. La. 2014).

72 *Id.*

73 *See id.* at 761. The Fifth Circuit affirmed, and BP and Anadarko filed petitions for rehearing that were pending at the time the Phase 1 trial concluded. *See United States v. B.P. Expl. & Prod. Inc. (In re Deepwater Horizon)*, 753 F.3d 570, 576 (5th Cir. 2014).

74 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 746.

75 *Id.* at 732 (internal quotations omitted).

76 *Id.* The CWA provisions establishing maximum penalty amounts have corresponding federal regulations that increase those amounts to account for inflation. *See, e.g.*, 40 C.F.R. § 19.4 (2017). So, under the CWA, the maximum penalty for a negligent discharge is \$1,000 per barrel, which was increased to \$1,100 per barrel by the regulation. *Compare* 33 U.S.C. § 1321(b)(7)(A) (statutory maximum) *with* 40 C.F.R. § 19.4; 33 C.F.R. § 27.3 (fed-

Presented with a mountain of detailed evidence at trial on the various and interconnected causes of the spill, the court analyzed whether BP's conduct in the incident was "an extreme departure from the care required under the circumstances or a failure to exercise even slight care" (gross negligence and recklessness), or whether it acted intentionally with the knowledge that its conduct would "probably result in injury" or "in such a way as to allow an inference of a reckless disregard of the probable consequences" (willful misconduct).⁷⁷ Starting from the recognition of the inherent danger and risk involved with deepwater drilling, the court found that BP committed one act of gross negligence and willful misconduct when it misinterpreted the negative pressure test of the well.⁷⁸ The court also determined that BP had committed a series of merely negligent acts involving technical drilling decisions that, taken together, "evinced an extreme deviation from the standard of care and a conscious disregard of known risks" that rose to the level of gross negligence.⁷⁹ In the end, the court concluded the *Deepwater Horizon* oil spill was the result of BP's gross negligence and willful misconduct under the CWA.⁸⁰

Next, the court set about allocating the degree of fault under general maritime law to BP, Transocean, and Halliburton, each of which had "engaged in conduct that was negligent or worse and a legal cause of the blowout, explosion, and oil spill."⁸¹ Finding that BP's conduct was reckless, and that Transocean and Halliburton acted negligently, the court then concluded that the parties' comparative fault, expressed as a percentage of total liability, was as follows: BP – 67%; Transocean – 30%; and Halliburton – 3%.⁸² The court noted that Transocean's and Halliburton's respective shares of liability were significantly less than BP's because "BP had a hand in most of [their] failures."⁸³ The court even went so far as to say that the conduct of BP's employees was "egregious enough that exemplary or punitive damages would be appropriate," but declined to impose them, citing Fifth Circuit precedent.⁸⁴ Notably, the court declined to extend BP's and Transocean's respective maritime liability to the parent corporations of those two companies, thereby isolating the impact of the two companies' liability to their North American concerns.⁸⁵

Lastly, the court addressed the OPA claim. The OPA imposes strict liability on "responsible parties" for removal costs and damages resulting from the discharge of oil.⁸⁶

eral regulations). Likewise, the statutory maximum penalty for a discharge resulting from gross negligence or willful misconduct is \$3,000 per barrel, which federal regulations raised to \$4,000 or \$4,300 per barrel. Compare 33 U.S.C. § 1321(b)(7)(D) (statutory maximum for gross negligence or willful misconduct) with 40 C.F.R. § 19.4; 33 C.F.R. § 27.3 (increasing the maximum penalty to \$4,000 and \$4,300, respectively).

77 *In re Oil Spill* (Phase 1), 21 F. Supp. 3d at 732-33.

78 *Id.* at 738-42.

79 *Id.* at 742-43.

80 *Id.* at 732, 737.

81 *Id.* at 746.

82 *Id.* at 746-47.

83 *Id.* at 748-49.

84 *Id.* at 747.

85 *Id.* at 751.

86 33 U.S.C. § 2701(32) (2012) (defining "responsible parties" to include the owner or operator of a vessel, or the lessee or permittee of an area where an offshore facility is located); *id.* § 2702(a) (imposing strict liability).

Under the OPA's liability scheme, if the drilling rig is being used as an "offshore facility" (i.e., it is being used for exploration, drilling, and producing as opposed to being in transit from one well to another), and the discharge occurs beneath the surface of the ocean, then the "responsible party" is the lessee of the area being drilled.⁸⁷ In its previous ruling on the cross-motions for summary judgment, the court had held that the *Deepwater Horizon* was being used as an "offshore facility" at the time of the discharge and therefore BP and Anadarko were the "responsible parties" for the subsurface discharge, not Transocean.⁸⁸ After trial, however, the court concluded that Transocean was liable for removal costs under a different OPA provision that makes the "owner or operator" of an "Outer Continental Shelf facility" liable to the government for all removal costs associated with the discharge of oil from the facility.⁸⁹

B. PHASE 2 OF *IN RE OIL SPILL* — "SOURCE CONTROL" AND "QUANTIFICATION"

1. SOURCE CONTROL

The Phase 2 trial commenced five months after the Phase 1 trial, but a year before the court issued its findings and conclusions from Phase 1.⁹⁰ It began with an examination of the response to the oil spill in the days, weeks, and months after the Macondo blowout and spill, referred to as the "Source Control" segment of the Phase 2 trial.⁹¹ On one side, a group of "Aligned Parties"—private plaintiffs, the States of Alabama and Louisiana, Transocean, and Halliburton—claimed that: (1) BP's response to the spill and its efforts to stop the discharge of oil were flawed to a degree that would warrant punitive damages; and (2) BP's source control conduct made it a superseding cause of the spill, thereby exculpating Transocean and Halliburton from the liability they were deemed to have under Phase 1.⁹²

BP disputed these claims with evidence that its source control plan complied with federal regulations and industry practice.⁹³ The court sided with BP, concluding that its post-blowout decisions and actions were not grossly negligent, and that punitive damages were not warranted.⁹⁴ The court reiterated, however, that these holdings would not affect any of the court's findings and conclusions from the Phase 1 trial.⁹⁵

2. QUANTIFICATION

In the Phase 1 trial, the court found that the discharge of oil in the *Deepwater Horizon* incident resulted from BP's gross negligence and willful misconduct, a holding that

87 *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, 844 F. Supp. 2d 746, 751 (E.D. La. 2012), *rev'd in part*, 21 F. Supp. 3d 657 (E.D. La. 2014).

88 *Id.* at 755–56.

89 *Id.* at 755; 33 U.S.C. § 2702(c)(3).

90 *In re Oil Spill* (Phase 2), 77 F. Supp. 3d 500, 503–04 (E.D. La. 2015) (presenting a timeline of the case).

91 *Id.* at 503.

92 *Id.* at 504, 516.

93 *See id.* at 520.

94 *Id.*

95 *Id.* at 525.

set the maximum civil penalty under the CWA at up to \$4,300 per barrel discharged.⁹⁶ That left the court to determine in the “Quantification” segment of the Phase 2 trial the total number of barrels that were discharged into the ocean from the Macondo well in order to set the total CWA penalty amount.

The net amount discharged would be determined by taking the number of barrels estimated to have left the underground reservoir and then subtracting the amount of oil collected during the spill response that had not “contact[ed] any ambient seawater” (i.e., that had not actually polluted the environment).⁹⁷ As the Court somewhat grumbled, “[t]here is no way to know with precision how much oil discharged into the Gulf of Mexico,” as “[t]here was no meter counting off each barrel of oil as it exited the well.”⁹⁸ This unfortunate reality begot troves of expert testimony that was “dense, highly technical, and conflicting.”⁹⁹

The parties to the Quantification segment of the Phase 2 trial, plaintiff United States and defendants BP and Anadarko,¹⁰⁰ agreed that 810,000 barrels of oil were collected during the spill before reaching the breach in the riser and spilling out into open water.¹⁰¹ But they disputed the amount of oil that left the reservoir. The United States claimed that five million barrels escaped the reservoir, which after subtracting the collected oil would result in a net discharge of 4.19 million barrels, thereby implying a maximum CWA penalty of just over \$18 billion.¹⁰² BP and Anadarko, on the other hand, argued that 3.26 million barrels had escaped, leading to a 2.45-million net discharge (implying a \$10.5-billion CWA penalty).¹⁰³

The Court found that four million barrels had left the reservoir, resulting in a net discharge of 3.19 million barrels.¹⁰⁴ Thus, after the Phase 1 and Phase 2 trials, BP faced just over a \$13.7-billion penalty for its role in the *Deepwater Horizon* tragedy.

IV. DISPOSITION OF THE MAJOR CIVIL CLAIMS

A. BP'S CIVIL SETTLEMENT

In October 2015, while BP's appeal of the Phase 1 holding was pending, the parties proposed a global Consent Decree that, upon court approval, would settle all civil claims brought by the United States and the five Gulf States against BP for the *Deepwater Horizon* spill.¹⁰⁵ Among other things, the joint filing laid out payment terms for both the

96 See *supra* note 76.

97 *In re Oil Spill* (Phase 2), 77 F. Supp. 3d at 522.

98 *Id.* at 523.

99 *Id.*

100 *Id.* at 522.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 525.

105 Press Release, Env't & Nat. Res. Div., U.S. Office of the Attorney Gen., U.S. & 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>.

civil penalties and natural resource damages, while also specifying injunctive relief and other terms of compliance.¹⁰⁶ The court signed and entered the Consent Decree on April 4, 2016, thereby certifying the historic settlement.¹⁰⁷

The first sum BP agreed to pay in the Decree was a \$5.5-billion civil penalty under the CWA, to be paid in fifteen annual installments from 2017 to 2031.¹⁰⁸ Twenty percent of that amount will go into the Oil Spill Liability Trust Fund, an existing fund managed by the U.S. Coast Guard that is used to address subsequent spills or environmental events related to oil discharges.¹⁰⁹ The remaining eighty percent (\$4.4 billion) will be deposited into a special fund in the federal Treasury that was established under the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (the RESTORE Act), to be used for ecosystem restoration and economic development projects along the coast in accordance with the provisions of the Act.¹¹⁰ The payments are made each year on April 4, the anniversary of the date the Consent Decree was entered.¹¹¹

Next, BP agreed to pay up to \$8.8 billion in natural resources damages (NRD) that will be used to return natural resources injured or lost as result of the spill to their pre-spill conditions.¹¹² This amount includes \$1 billion BP had already committed to the federal government and the Gulf States soon after the spill for early restoration projects.¹¹³ The Consent Decree required full payment within thirty days from the effec-

106 See Consent Decree, *supra* note 36, at 1829 (payment terms), 29–31 (Acceleration of Payments and Financial Assurance), 32–37 (Injunctive Relief), 37–42 (Stipulated Penalties).

107 *Id.* at 61. In reviewing any proposed consent decree, a court is to ascertain whether the decree is fair, adequate, and reasonable, *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977), and consistent with the objectives of the statute under which the action was brought. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J., concurring) (citation and internal quotations omitted).

108 Consent Decree, *supra* note 36, at 18–19.

109 See U.S. DEP'T OF JUSTICE, FACT SHEET: PROPOSED CONSENT DECREE WITH BP FOR THE DEEPWATER HORIZON/MACONDO WELL OIL SPILL, <https://www.justice.gov/enrd/file/780311/download> (explaining that eighty percent of the \$5.5-billion civil penalty was allocated under the RESTORE Act while that the remaining civil penalty would be paid to the Oil Spill Liability Trust Fund); 26 U.S.C. § 9509 (2012) (creating the Oil Spill Liability Trust Fund).

110 See Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, §§ 1602(a)–(b), 126 Stat. 405, 588 (2012) (codified as an amendment to 33 U.S.C. § 1321) [hereinafter RESTORE Act] (establishing the Gulf Coast Restoration Trust Fund). The RESTORE Act is a law Congress enacted specifically to administer certain civil and administrative penalties from the Deepwater Horizon spill. It was codified as an amendment to 33 U.S.C. § 1321. For a more detailed discussion of the RESTORE Act, see *infra* Section VI(d).

111 See Consent Decree, *supra* note 36, at 19.

112 *Id.* at 20–23. The number of \$8.8 billion was reached by adding the \$7.1 billion BP agreed to pay, the \$1 billion BP already committed to paying under a previous agreement, and the \$700 million (maximum) BP agreed to pay for unknown damages. “Natural Resource Damages” is defined in the Consent Decree on page 15 and is more fully discussed *infra* at Section IV.C.

113 See *id.* at 20; see also NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Early Restoration*, GULF SPILL RESTORATION, <http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/>

tive date of the Consent Decree of all outstanding balances remaining from that \$1 billion commitment for early restoration projects.¹¹⁴ When the Decree was entered, the NRD process of extensively and scientifically determining the extent of environmental damage process was still years away from completion.¹¹⁵

The remaining \$7.1 billion will be paid, like the CWA penalty, according to a fifteen-year schedule beginning in 2017.¹¹⁶ The natural resource damage payments are deposited into the “Deepwater Horizon Oil Spill NRD Fund,” managed by the Department of the Interior “for the joint benefit and use of the Trustees in accordance with the requirements” set forth in the Decree.¹¹⁷ In addition, BP agreed to pay up to \$700 million for damages to natural resources caused by the *Deepwater Horizon* spill that were unknown to the Trustees as of July 2, 2015, and for the adaptive management of any projects selected by the Trustees.¹¹⁸

In contrast to the CWA penalties, which are governed by the RESTORE Act, the NRD penalties must be spent in accordance with the provisions of the Decree itself. Specifically, the Decree states that the NRD penalty amounts must be used: (1) to “address injuries and/or losses to Natural Resources [defined in the Decree] resulting from the *Deepwater Horizon* Incident”; (2) for restoration of lost natural resources “as provided in one or more restoration plans adopted by the Trustees consistent with 15 C.F.R. Part 990”; (3) for monitoring, education, and other administrative activities related to the restoration plans; and (4) “for addressing unknown conditions and undertaking adaptive management.”¹¹⁹

Lastly, BP agreed to an additional \$600 million in payments attributable to assessment and removal costs under the OPA and penalties under the False Claims Act that includes amounts for royalties on the oil that was wasted in the spill.¹²⁰ In all, BP and the other parties to the Decree paid just under \$15 billion to federal and state govern-

(last visited Apr. 2, 2017) (explaining how the \$1 billion in early restoration funding has been used to date).

114 See Consent Decree, *supra* note 36, at 22; see generally NAT’L OCEANIC & ATMOSPHERIC ADMIN., *Early Restoration Projects Atlas*, GULF SPILL RESTORATION, <http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/early-restoration-projects-atlas> (last visited Apr. 2, 2017).

115 See Memorandum in Support, *supra* note 2, at 11–12.

116 Consent Decree, *supra* note 36, at 21.

117 *Id.* at 22. The term “Trustees” is defined in the Decree to include any federal, state, or local officials designated by the President or a Gulf State Governor, or authorized under any applicable law, “to act as trustees on behalf of the public for Natural Resources in connection with the *Deepwater Horizon* incident.” *Id.* at 13–14, 17–18. In Texas, the Trustees include officials from the Texas Parks and Wildlife Department, the Texas General Land Office, and the Texas Commission on Environmental Quality. *Id.* at 18. The Decree describes the uses for which NRD funds should be applied, with reference to federal law that governs the NRD process. *Id.* at 22. The NRD process is more fully described *infra* at Section IV.C.

118 *Id.* at 23.

119 *Id.* at 22–24.

120 *Id.* at 24–27.

ments.¹²¹ But that amount does not represent the total amount of funds involved in the Decree settlement because the court's approval of the Decree was conditioned on the execution of a separate settlement agreement between BP and the Gulf States and local governments for economic damages and other claims arising from the spill.¹²² That settlement involved \$4.9 billion in total economic damages to the Gulf States and \$1 billion to local governments.¹²³ Taking those amounts into account, the Decree thus secured over \$20 billion in penalties from BP, thus making it "the largest settlement with a single entity in the history of federal law enforcement."¹²⁴

B. TRANSOCEAN AND MOEX CIVIL SETTLEMENTS

Before the third phase (the Penalty Phase) trial began, the United States settled its CWA claims with Transocean and MOEX through consent decrees.¹²⁵ Transocean agreed to pay a \$1-billion civil penalty.¹²⁶ Eighty percent of that penalty was dedicated to environmental and economic restoration activities along the Gulf Coast through the RESTORE Act, discussed below.¹²⁷ Transocean also agreed to subject itself to significant oversight of its drilling operations and to improve the safety of its operations as well as oil spill preparedness and response practices.¹²⁸

MOEX agreed to pay \$70 million in civil penalties as follows: \$45 million to the United States; \$6.75 million to Louisiana; \$5 million each to Alabama, Florida, and Mississippi; and \$3.25 million to Texas.¹²⁹ Those amounts shall be used to acquire Supplemental Environmental Project (SEP) properties in the coastal areas of Louisiana, Texas, Mississippi, and Florida that can be encumbered into perpetuity to protect habitats and natural resources.¹³⁰

121 U.S. DEP'T OF JUSTICE, FEDERAL AND STATE ACTION ON THE TRAGEDY AT THE *Deepwater Horizon*/Macondo Well 1, 1–2, <https://www.justice.gov/enrd/file/780461/download> (last visited Apr. 2, 2017) (The payment sums are broken down neatly in a document prepared by the Department of Justice and accessible on its website.).

122 Consent Decree, *supra* note 36, at 1, 51.

123 U.S. Dep't of Justice, *supra* note 121, at 2.

124 Memorandum in Support, *supra* note 2, at 2.

125 *In re Oil Spill (Anadarko Penalties)*, 148 F. Supp. 3d 563, 567 (E.D. La. 2015).

126 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. at 9, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-4536, MDL No. 2179 (E.D. La. Jan. 13, 2013), <https://www.justice.gov/iso/opa/resources/915201313122945254063.pdf> [hereinafter Transocean Consent Decree].

127 See discussion on the RESTORE Act *infra* Section VI.D.

128 Transocean Consent Decree, *supra* note 126, at 11–34.

129 Consent Decree Between the United States and MOEX Offshore 2007 LLC at 10, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-4536, MDL No. 2179 (E.D. La. June 18, 2012), https://www.epa.gov/sites/production/files/documents/moex-cd_0.pdf [hereinafter MOEX Consent Decree].

130 *Id.* at 12–13.

C. ANADARKO'S CIVIL PENALTY

After the court approved the BP, Transocean, and MOEX settlements, “only the CWA claim against Anadarko remain[ed] at issue.”¹³¹ The court had previously held that Anadarko was liable for CWA penalties because it was the part “owner” of an “offshore facility” (the Macondo well) from which a harmful quantity of oil had discharged.¹³² However, unlike BP, Anadarko had not been found negligent as a matter of law in connection with the blowout, explosion, or oil spill.¹³³ Thus, the maximum penalty that could be assessed against Anadarko was the unenhanced \$1,100 per barrel spilled, or \$3.5 billion.¹³⁴ Nevertheless, citing Anadarko’s lack of culpability and the fact that the company had already paid a \$4 billion settlement of compensatory claims, the court found Anadarko liable to the United States for CWA penalties in the amount of \$50 per barrel spilled, for in a total penalty of \$159.5 million.¹³⁵

V. CRIMINAL CHARGES AGAINST BP AND TRANSOCEAN

On November 15, 2012, the United States charged BP with fourteen counts of criminal behavior: eleven counts of seaman’s manslaughter, one count of violating the CWA, one count of violating the Migratory Bird Treaty Act, and one count of obstruction of Congress.¹³⁶ Less than two months later the Government charged Transocean with one count of violating the CWA.¹³⁷ Both BP and Transocean disposed of their respective criminal charges through similar plea agreements with the United States.¹³⁸

131 *In re Oil Spill* (Anadarko Penalties), 148 F. Supp. 3d 563, 567 (E.D. La. 2015).

132 *Id.* (quoting *In re Oil Spill* by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010, 844 F. Supp. 2d 746, 761 (E.D. La. 2012)).

133 *Id.*

134 *Id.* at 568.

135 *Id.* at 583.

136 Information for Seaman’s Manslaughter, Clean Water Act, Migratory Bird Treaty Act, and Obstruction of Congress at 18–24, *United States v. BP Exploration & Prod., Inc.*, No. 2:12-cr-00292-SSV-DEK (E.D. La. Nov. 15, 2012). The CWA charge was based on the allegation that BP negligently discharged and caused to be discharged oil that harmfully affected natural resources of the United States, in violation of 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3). *Id.* at 23. The allegation of a Migratory Bird Treaty Act violation was based on the deaths—caused by the spill—of multiple migratory birds of protected species. *Id.* at 24. The obstruction of Congress charge was based on BP’s alleged efforts to “influence, obstruct, and impede the due and proper exercise of the power of inquiry under which an inquiry and investigation was being had by” the House Subcommittee on Energy and Environment of the Committee on Energy and Commerce. *Id.*

137 Information for Clean Water Act Violation at 2–3, *United States v. Transocean Deepwater, Inc.*, No. 2:13-cr-00001-JTM-SS (E.D. La. Jan. 3, 2013), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2013/01/18/2013-01-03-transocean-information.pdf>. The CWA charge was based on the allegation that Transocean Deepwater Inc. negligently discharged and caused to be discharged oil that harmfully affected natural resources of the United States, in violation of 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3). *Id.*

138 BP’s plea agreement was accepted on January 29, 2013. U.S. DEP’T OF JUSTICE, *United States v. BP Exploration and Production, Inc.* Court Docket Number: 2:12-cr-00292-SSV-DEK,

BP pleaded guilty to all counts and agreed to pay \$4 billion in fines and penalties.¹³⁹ Of that total, \$1.256 billion are statutory criminal fines corresponding to each charge, including a \$1.15 billion fine for the CWA that is paid to the Oil Spill Liability Trust Fund, discussed above.¹⁴⁰ The remainder are criminal penalties dedicated to certain entities for environmental purposes—\$350 million to the National Academy of Sciences (NAS) for oil spill prevention and response in the Gulf, and \$2.394 billion in staggered payments over five years to the National Fish and Wildlife Foundation (NFWF) to address the spill's harmful impact on coastal natural resources.¹⁴¹ For its lone CWA charge, Transocean pleaded guilty and agreed to pay \$400 million in fines and penalties.¹⁴² Of that total, NAS and NFWF each received \$150 million.¹⁴³

All told, the United States' criminal cases against BP and Transocean for the *Deepwater Horizon* incident secured \$1.356 billion in fines for the federal government and just over \$3 billion in penalties for NAS and NFWF and their respective oil-spill-related environmental purposes. In addition, the plea agreements established specific parameters on how and for what the \$2.544 billion dedicated to NFWF can be spent, discussed in more detail below.

VI. THE MAJOR FUNDING STREAMS THAT ADMINISTER THE CIVIL AND CRIMINAL PENALTIES FROM THE *DEEPWATER HORIZON* INCIDENT.

A. SUMMARY OF TOTAL FUNDS AND AMOUNTS ALLOCATED TO TEXAS

The civil penalties and criminal fines resulting from the settlements and plea agreements described above will be administered through three main funding streams: the Natural Resource Damage Assessment (NRDA), the RESTORE Act, and the National Fish and Wildlife Foundation (NFWF) (criminal penalties). Table 1 breaks down the total amounts that will be administered through each funding stream. This includes

Pending Crim. Division Cases (June 12, 2015), <https://www.justice.gov/criminal-vns/case/bpexploration>; see also Guilty Plea Agreement, *United States v. BP Exploration & Prod., Inc.*, No. 2:12-cr-00292-SSV-DEK (E.D. La. Nov. 15, 2012), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2012/12/17/2012-11-15-BP-Guilty-Plea-Agreement.pdf>.

Transocean filed its Cooperation Guilty Plea Agreement on January 3, 2013. See Cooperation Guilty Plea Agreement, *United States v. Transocean Deepwater Inc.*, No. 2:13-cr-00001-JTM-SS (E.D. La. 2013).

139 Guilty Plea Agreement at 1–4, *United States v. BP Exploration & Prod., Inc.*, No. 2:12-cr-00292-SSV-DEK (E.D. La. Nov. 15, 2012), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2012/12/17/2012-11-15-BP-Guilty-Plea-Agreement.pdf>.

140 *Id.* at 4–5.

141 Order at 16–17, *United States v. BP Exploration & Prod., Inc.*, No. 2:12-cr-00292-SSV-DEK (E.D. La. Jan. 29, 2013), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2013/02/05/2013-01-29-bp-exploration-order.pdf> [hereinafter BP Order].

142 Cooperation Guilty Plea Agreement at 1–4, *United States v. Transocean Deepwater Inc.*, No. 2:13-cr-00001-JTM-SS (E.D. La. Jan. 3, 2013), <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2013/01/18/2013-01-03-transocean-plea-agreement.pdf>.

143 Order at 1–2, *United States v. Transocean Deepwater Inc.*, No. 2:13-cr-00001-JTM-SS (E.D. La. 2013) [hereinafter Transocean Order].

amounts that are allocated to the Gulf Coast states (see Table 2) as well as amounts allocated for federal programs. The economic damages settlement that was tied to BP's global Consent Decree are not administered through any of the three funding streams, so those amounts are not included here.

TABLE 1

Funding Stream	Total Money Allotted
NRDA	Up to \$8.8 billion
RESTORE	\$5.33 billion
NFWF	\$2.544 billion
Total	\$16.67 billion

Table 2 breaks down the totals depicted in Table 1 as they are allocated to the Gulf Coast states under each funding stream. Note that the RESTORE Act totals reflect funds that have already been allocated to each state; the totals do not include an additional \$1.4 billion that has yet to be allocated in each state in amounts to be determined by the federal RESTORE Council in future rounds of funding under Bucket 2, described below.

TABLE 2
(DOLLARS, "M" = MILLION, "B" = BILLION):

	AL	FL	LA	MS	TX	U.S.	Total
NRDA ¹⁴⁴	296M	680M	5B	296M	238M	2.3B	8.8B
RESTORE ¹⁴⁵	752M	723M	1B	728M	547M	1.5B	5.3B
NFWF ¹⁴⁶	356M	356M	1.27B	356M	203M	N/A	2.54B
Total	1.4B	1.76B	7.27B	1.38B	988.5M	3.82B	16.67B

B. NATIONAL FISH AND WILDLIFE FOUNDATION (NFWF)

The National Fish and Wildlife Foundation is a congressionally-created nonprofit organization whose mission is to "further the conservation and management of the fish, wildlife, and plant resources of the United States . . . for present and future generations of Americans."¹⁴⁷ NFWF accomplishes its mission by fostering collaboration in the con-

144 Nat'l Oceanic & Atmospheric Admin., Plan for *Deepwater Horizon* Oil Spill Natural Resource Injury Restoration: An Overview 38, http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/Overview_04-07-16_final-508.pdf.

145 See discussion of RESTORE Act *infra* Section VI.D. RESTORE Act totals do not include \$1.4 billion that has yet to be allocated to each Gulf Coast state in amounts to be determined by the federal RESTORE Council in subsequent rounds of funding under Bucket 2.

146 Nat'l Fish & Wildlife Found., *Gulf Environmental Benefit Fund*, http://www.nfwf.org/gulf/Pages/home.aspx#.U-vYG_m-1EE (last visited Mar. 31, 2017).

147 16 U.S.C. § 3701(b)(2) (2000). The entirety of the act creating NFWF is codified under 16 U.S.C. §§ 3701–3710.

ervation community and awarding grants.¹⁴⁸ Because NFWF's sole purpose is ecosystem restoration, all of the money given to NFWF as part of the criminal penalties must be used exclusively for ecosystem restoration. As discussed above, the criminal penalties associated with the Macondo spill were established by two plea agreements—one with BP and one with Transocean—approved by a U.S. District Court in 2013.¹⁴⁹ In total, the two companies agreed to pay \$2.544 billion (BP: \$2.394 billion, Transocean: \$150 million) in staggered payments to NFWF.¹⁵⁰ This money is administered through a specially-created fund managed by NFWF called the Gulf Environmental Benefit Fund (GEBF).¹⁵¹ In the first four years, the GEBF has funded 99 projects worth over \$870 million.¹⁵²

NFWF expenditures of GEBF funds are governed by the criminal plea agreements.¹⁵³ Half of the penalties (\$1.272 billion) are to be divided up amongst the states of Alabama (28%), Mississippi (28%), Florida (28%), and Texas (16%) to mitigate the spill's damage to natural resources in each state.¹⁵⁴ The other half goes to Louisiana, where the majority of the oil washed up, "to create or restore barrier islands off the coast of Louisiana and/or to implement river diversion projects on the Mississippi and/or Atchafalaya Rivers."¹⁵⁵ In either case, the court directs NFWF to consult with state and federal resource managers that have statutory authority to coordinate with private entities on coastal environmental projects.¹⁵⁶ While NFWF consults with other agencies for input on potential projects, the NFWF Board of Directors makes the ultimate funding decisions.

In Texas, three natural resource agencies—the Texas Parks and Wildlife Department, the General Land Office, and the Texas Commission on Environmental Quality—sometimes referred to as the "trustee agencies," collaborate with NFWF to determine which projects to submit to the NFWF board for funding.¹⁵⁷ So far, Texas has been awarded \$82 million of its allotted \$203 million for 29 projects within the state, ranging from conservation through land acquisition to restoration of marshes, estuaries, and wildlife habitats.¹⁵⁸

By comparison, NFWF funding in Louisiana is more focused on restoration of barrier islands and the channels of the Mississippi and Atchafalaya rivers, leading to larger infrastructure projects rather than the smaller ecosystem restoration projects in the other Gulf States. Therefore, Louisiana has only funded 12 projects to date, worth a total of

148 See generally Nat'l Fish & Wildlife Found., <http://www.nfwf.org> (last visited Apr. 2, 2017).

149 See generally BP Order, *supra* note 141; Transocean Order, *supra* note 143.

150 BP Order, *supra* note 141, at 16; Transocean Order, *supra* note 143, at 1.

151 Nat'l Fish & Wildlife Found., *supra* note 146.

152 Nat'l Fish & Wildlife Found., *Gulf Environmental Benefit Fund Projects*, <http://www.nfwf.org/gulf/pages/gulf-projects.aspx> (listing the funded projects in each gulf state) (last visited Apr. 2, 2017).

153 See BP Order, *supra* note 141, at 17; Transocean Order, *supra* note 143, at 2.

154 BP Order, *supra* note 141, at 17; Transocean Order, *supra* note 143, at 2.

155 BP Order, *supra* note 141, at 18; Transocean Order, *supra* note 143, at 2.

156 BP Order, *supra* note 141, at 17–18; Transocean Order, *supra* note 143, at 2–3.

157 Nat'l Fish & Wildlife Found., *Gulf Environmental Benefit Fund in Texas*, <http://www.nfwf.org/gulf/Pages/GEBF-Texas.aspx> (last visited Apr. 2, 2017).

158 *Id.*

\$456 million.¹⁵⁹ Many of these projects are large, multi-phase infrastructure projects that over time will restore major portions of the Louisiana coast and protect inland areas against future storm surges.¹⁶⁰

Once all \$2.544 billion dollars has been deposited in the GEBF by 2018, NFWF will continue to work on projects on a yearly basis with all Gulf Coast states until their funding allocations are fully expended.¹⁶¹

C. NATURAL RESOURCE DAMAGE ASSESSMENT (NRDA)

The second major funding stream through which collected penalties from the *Deepwater Horizon* incident will be disbursed is the NRDA process. In general, the NRDA process is a legal process that federal agencies “use to evaluate the impacts of oil spills, hazardous waste sites, and ship groundings on natural resources both along the nation’s coast and throughout its interior.”¹⁶² The basic goal of the NRDA process is to “assess the extent of injury to a natural resource and determine appropriate ways of restoring and compensating for that injury.”¹⁶³ There are different methodologies, but this is generally accomplished by comparing the pre- and post-accident conditions of the affected environment and then monetizing the difference into a damage amount.¹⁶⁴ The body of law under which a responsible party is sued determines who conducts the assessment and how. For oil spill accident claims brought under the OPA, the National Oceanic and Atmospheric Administration (NOAA) conducts the NRDA.¹⁶⁵ Thus, NOAA conducted the NRDA for the *Deepwater Horizon* spill.

Generally, a NRDA conducted under the OPA assesses “damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage.”¹⁶⁶ The definition of natural resources under the OPA is broad, encompassing the “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States.”¹⁶⁷ While undergoing the assessment, NOAA must provide public notice, provide opportunities for public hearings, and respond to all meaningful comments on the assessment before implementation of restoration plans.¹⁶⁸ If the funds collected are in excess of the amount of funds needed for

159 Nat’l Fish & Wildlife Found., *Gulf Environmental Benefit Fund in Louisiana*, <http://www.nfwf.org/gulf/Pages/GEBF-Louisiana.aspx> (last visited Apr. 2, 2017).

160 See, e.g., *id.*; Nat’l Fish & Wildlife Found., *Mid-Barataria Sediment Diversion: Engineering and Design – Phase II*, <http://www.nfwf.org/gulf/Documents/la-mid-barataria-ii-16.pdf> (last visited Apr. 2, 2017).

161 Nat’l Fish & Wildlife Found., *supra* note 159.

162 NAT’L OCEANIC & ATMOSPHERIC ADMIN., *What is a Natural Resource Damage Assessment?*, <http://oceanservice.noaa.gov/facts/nrda.html> (last visited Apr. 2, 2017).

163 U.S. ENVTL. PROT. AGENCY, *Natural Resource Damages: A Primer*, <http://www.epa.gov/superfund/natural-resource-damages-primer> (last visited Apr. 2, 2017).

164 See *id.* (explaining the scientific NRDA process).

165 Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762 (2012); 15 C.F.R. § 990 (2016); see also 40 C.F.R. § 300.600(b)(1) (explaining the Secretary of Commerce’s trusteeship).

166 33 U.S.C. § 2702(b)(2)(A).

167 *Id.* § 2701(20).

168 *Id.* § 2706(c)(5).

ecosystem restoration, the funds must be placed in the Oil Spill Liability Trust Fund.¹⁶⁹ In general, the OPA allows for damages for the cost of restoring, rehabilitating, or replacing through land acquisition of the damaged natural resources; diminution in value of natural resources pending restoration; and the cost of assessing the damages.¹⁷⁰

Once a NRDA is conducted under the OPA, the assessment is given a rebuttable presumption of correctness, thus transferring the burden of proof to the responsible party to disprove the assessment.¹⁷¹ NOAA then has options to conduct its assessment responsibilities, one of which is to sue to obtain compensation from the responsible parties.

Apart from the broad guidelines of the OPA, the specific program for restoration is guided by NOAA regulations. Under NOAA's final rule, the goal of the NRDA process is ecosystem restoration, defined as "any action (or alternative), or combination of actions (or alternatives) to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services."¹⁷² Under this rule, the assessment can be divided into three phases: (1) pre-assessment; (2) restoration planning; and (3) restoration implementation.¹⁷³

Under the pre-assessment phase, NOAA determines first whether an incident has occurred.¹⁷⁴ Then NOAA must determine if the spill was not excepted under federal, state, or local law, or was discharged from a public vessel.¹⁷⁵ Finally, NOAA must determine whether an "injury" has occurred to the natural environment.¹⁷⁶ If these three initial requirements are met, NOAA will then begin to undertake assessment and pursue either primary restoration (rehabilitating the actual site of the spill) or compensatory restoration (where NOAA restores other land to balance the ecosystem).¹⁷⁷

The second phase, the restoration planning phase, requires a more detailed determination of the injury determination than what occurs in the pre-assessment phase.¹⁷⁸ In this phase, NOAA must establish "pathways" connecting the source of the spill to the particular damages along the Gulf Coast.¹⁷⁹ After this determination, the NRDA process moves on to injury quantification, where NOAA "quantif[ies] the degree and spatial and temporal extent of . . . injuries relative to baseline."¹⁸⁰ The degree of injury is quantified

169 *Id.* § 2706(f).

170 *Id.* § 2706(d)(1).

171 *Id.* § 2706(e)(2).

172 15 C.F.R. § 990.30 (2016).

173 *Id.* § 990.12. For a detailed breakdown of the assessment programs NOAA has implemented, see Charles B. Anderson, *Damage to Natural Resources and the Costs of Restoration*, 72 TUL. L. REV. 417, 466–84 (1998).

174 15 C.F.R. § 990.41(a)(1). "Incident" in this context means "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters or adjoining shorelines or the Exclusive Economic Zone." *Id.* § 990.30.

175 *Id.* § 990.41(a)(2).

176 *Id.* § 990.41(a)(3). Here, "injury" is defined as "an observable or measurable adverse change in a natural resource or impairment of a natural resource service." *Id.* § 990.30.

177 *See id.* §§ 990.41(b), 990.42.

178 *See Anderson, supra* note 173, at 472.

179 15 C.F.R. § 990.51(d).

180 *Id.* § 990.52(a).

taking into account the spatial extent, the “morality percentage,” and the temporal extent of the injury.¹⁸¹

Finally, the restoration implementation phase closes the administrative record on the planning phase and begins the process of written demands to the responsible parties to pay for the NRDA assessment.¹⁸² The responsible parties have ninety days to respond by either paying the settlement or providing assurance that they will pay the assessed penalties.¹⁸³

For the *Deepwater Horizon* spill, BP agreed to a NRDA settlement of \$8.8 billion dollars to address natural resource injuries.¹⁸⁴ Texas only received \$231.651 million of this money since it was the least impacted of the states.¹⁸⁵ However, even though this money has been agreed to in the final consent decree, an Environmental Impact Statement (EIS) for the NRDA must still be prepared pursuant to the National Environmental Policy Act (NEPA).¹⁸⁶ Therefore, much of the NRDA activity has not yet reached the court.¹⁸⁷

D. THE RESOURCES AND ECOSYSTEMS SUSTAINABILITY, TOURIST OPPORTUNITIES, AND REVIVED ECONOMIES OF THE GULF COAST STATES ACT OF 2012—THE RESTORE ACT.

The RESTORE Act is a multifaceted and complex federal grant program that was enacted by Congress before civil liability for the *Deepwater Horizon* spill had been adjudicated but in anticipation of the massive penalties that would result.¹⁸⁸ It also represents a departure from the previous model used to administer civil penalties related to oil spill claims. Typically, civil penalties for oil spill claims adjudicated under the OPA are deposited into the Oil Spill Liability Trust Fund to be used on subsequent spill events—e.g., to pay for an immediate removal of a discharge or to prevent an imminent discharge.¹⁸⁹ With the RESTORE Act, Congress dedicated eighty percent of *all* administra-

181 See Anderson, *supra* note 173, at 473.

182 See 15 C.F.R. § 990.62.

183 *Id.*

184 Nat'l Oceanic & Atmospheric Admin., DEEPWATER HORIZON Oil Spill Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement 1-24 (2016), http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/2016/01/1-24-Front-Matter-and-Chapter-1-Introduction-and-Executive-Summary_508.pdf (explaining that BP agreed to pay \$8.1 billion for restoration plus up to an additional \$700 million to respond to damages unknown on the date of the agreement). This money also includes a \$1 billion dollar sum of “early restoration” that has already been used to work on ecosystem restoration immediately after the spill. *Id.*

185 See *Government Trustees Restoring the Gulf*, RESTORE the Tex. Coast (2014), <https://www.restorethetexascoast.org/government-trustees-restoring-the-gulf-nrda/>.

186 42 U.S.C. §§ 4321 et seq. (NEPA).

187 See generally *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, 844 F. Supp. 2d 746, 747 (E.D. La. 2012), *rev'd in part*, 21 F. Supp. 3d 657 (E.D. La. 2014) (not mentioning NRDA).

188 RESTORE Act, *supra* note 110, §§ 1601-1608, at 588-607.

189 See 33 U.S.C. § 2712(d)(1) (2012); see also 26 U.S.C. § 9509(a)-(c) (2012) (creating and governing the Oil Spill Liability Trust Fund). The Oil Spill Liability Trust Fund, established in the federal Treasury, is funded primarily by “amounts recovered under [OPA] for

tive and civil penalties—including OPA penalties and penalties assessed under the CWA—resulting from the *Deepwater Horizon* spill to a special fund created under the RESTORE Act called the Gulf Coast Restoration Trust Fund (RESTORE Fund), leaving the remainder for the Oil Spill Liability Trust Fund.¹⁹⁰

Monies from the RESTORE Fund are intended to fund ecosystem and economic restoration projects in the Gulf Coast region¹⁹¹ and are not subject to legislative appropriation at either the federal or state level.¹⁹² That is, a Gulf Coast state does not receive RESTORE funds as a grant into the state's revenue account for the general operation of state government. Rather, RESTORE funds must go to ecosystem restoration or economic development projects that benefit the Gulf Coast, and the responsibility for ensuring those purposes are carried out is expressly assigned to specific entities or public officials in the Gulf Coast states.¹⁹³ For instance, in Texas, certain duties are assigned to “the Office of the Governor or an appointee of the Office of the Governor,” whereas in Alabama, that authority is given to a council of state and local public officials.¹⁹⁴

Monies from the RESTORE Fund are allocated to the five Gulf Coast states according to a structure outlined in the Act that divides the money into five separate pots or “buckets,” as they are commonly called.¹⁹⁵ Each bucket governs a specified percentage of RESTORE Fund monies and provides how and for what purpose each portion should be spent.¹⁹⁶ No two buckets are alike. In sum, monies in the RESTORE Fund are distributed amongst the five buckets as follows: Bucket 1 (35%), Bucket 2 (30%), Bucket 3 (30%), Bucket 4 (2.5%), and Bucket 5 (2.5%).¹⁹⁷

damages to natural resources.” 26 U.S.C. § 9509(a), (b)(2). The OPA also requires certain amounts to be transferred into the Oil Spill Liability Trust Fund from monies collected under other bodies of law governing deepwater ports, offshore exploration, and pipelines. *Id.* § 9509(b)(4)-(8). Certain environmental taxes on petroleum are also deposited there. *Id.* § 9509(b)(1).

190 RESTORE Act, *supra* note 110, § 1602(a)-(b), at 588.

191 The “Gulf Coast region” is defined as a state's coastal management zone under 16 U.S.C. § 1453, or 25 miles from that zone. 33 U.S.C. § 1321(a)(33) (2012).

192 See Tex. Att'y Gen. Op. No. KP-0078 (2016), 2016 Tex. AG LEXIS 22 at 8 (addressing the proper way to administer the expenditure of federal funds allocated to Texas under the RESTORE Act).

193 33 U.S.C. § 1321(t).

194 *Id.* § 1321(t)(1)(F)(i), (iv). Pursuant to this provision, Governor Perry appointed Commissioner Toby Baker of the Texas Commission on Environmental Quality to administer the RESTORE program in Texas. See RESTORE the Tex. Coast, Conserve, Restore, Renew: Framework for Implementing the RESTORE Act on the Texas Gulf Coast 3 (2015), <https://www.restorethetexascoast.org/wp-content/uploads/2014/08/Framework.pdf>. Governor Greg Abbott reappointed Commissioner Baker in that capacity in 2015. RESTORE the Tex. Coast, Planning State Expenditure Plan Grant: Texas Proposal app. A (2016), <https://www.restorethegulf.gov/sites/default/files/PSEP-TX-approval%20letter%20from%20the%20Chair-transmittal%20letter-and%20PSEP.pdf>.

195 33 U.S.C. § 1321(t)(1)-(3) (providing for the various “buckets”); RESTORE Act, *supra* note 112, §§ 1602-1605, at 588-606.

196 33 U.S.C. § 1321(t)(1)-(3).

197 See *id.*; see also RESTORE Act, *supra* note 110, §§ 1604-1605, at 603-06.

Bucket 1, or the “Direct Component,” allocates its thirty-five percent share of the RESTORE Fund to the Gulf Coast states in equal amounts (7% of RESTORE Fund each) for both economic and ecosystem restoration projects.¹⁹⁸ Eligible activities that can be funded under Bucket 1 include traditional restoration of ecosystems, fisheries, habitats, beaches, and wetlands, as well as workforce development, job creation, and infrastructure projects, among others.¹⁹⁹ The federal Treasury Department oversees the Bucket 1 funds and will not award any funds to a state until it determines the state has complied with the Act’s requirements.²⁰⁰ For their part, states must develop a multiyear implementation plan for the use of Bucket 1 funds and certify that the restoration projects the state wishes to fund under the plan are consistent with any applicable state grant or procurement rules.²⁰¹ Of all the RESTORE buckets, Bucket 1 offers states the most discretion in deciding how to use the funds.

Bucket 2, or the “Comprehensive Plan Component,” allocates thirty percent of the RESTORE Fund to the Gulf Coast Ecosystem Restoration Council (Council), an independent federal agency created under the Act made up of the governors of the five Gulf Coast states (or an appointee of the governor) and representatives from six federal agencies.²⁰² The Council is tasked with executing a Comprehensive Plan that will fund purely ecosystem restoration projects along the Gulf Coast.²⁰³ Projects are submitted to the Council for consideration by the Council members themselves, and then a vote is taken to decide which projects to fund.²⁰⁴ Unlike Bucket 1 funds, Bucket 2 funds may not be used to fund solely economic development projects.

On December 9, 2015, the Council approved the Initial Funded Priorities List of projects that it will fund across the Gulf using Bucket 2 funds.²⁰⁵ The list contains projects in ten key watersheds and estuaries across the Gulf totaling \$156.6 million in funding.²⁰⁶ Six of those projects are located in Texas in the Laguna Madre, Matagorda

198 33 U.S.C. § 1321(t)(1)(A); *see also* 31 C.F.R. § 34.103(a)(1) (2016) (federal Treasury regulations governing the administration of RESTORE Trust Funds).

199 33 U.S.C. § 1321(t)(1)(B)(i).

200 *Id.* § 1321(t)(1)(H).

201 *Id.* § 1321(t)(1)(E)(iii) –(iv).

202 *Id.* § 1321(t)(2)(A), (C). Commissioner Toby Baker of the Texas Commission on Environmental Quality was appointed by former Governor Rick Perry to represent Texas on the RESTORE Council, and Governor Greg Abbott reappointed him to that position in 2015. *See supra* note 195. The federal members of the RESTORE Council are the Secretary of the Interior, the Secretary of the Army, the Secretary of Commerce, the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the head of the Department in which the Coast Guard is operating (Department of Homeland Security). 33 U.S.C. § 1321(t)(2)(C).

203 33 U.S.C. § 1321(t)(2)(C)(vii)(II)(bb), (E).

204 *Id.* § 1321(t)(2)(C)(vi)(I).

205 Gulf Coast Ecosystem Restoration Council, GCERC *Funded Priorities List Factsheets*, RestoreTheGulf.gov, <https://restorethegulf.gov/gcerc-funded-priorities-list-factsheets> (last visited Apr. 2, 2017).

206 *See id.* (contains the full list of watershed and estuary projects); Gulf Coast Ecosystem Restoration Council, Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RESTORE Act) Initial Funded Priorities

Bay, and Galveston Bay areas, and include land conservation, wetland system restoration, beneficial use, and plugging of abandoned oil and gas wells.²⁰⁷

Bucket 3, the “Spill Impact Component,” is very similar to Bucket 1 in that it gives discretion to the states to decide which projects to fund, it can be used to fund projects with an economic development purpose, and states must submit a plan of proposed projects (a State Expenditure Plan) to the federal government for approval.²⁰⁸ However, Bucket 3 funds are administered by the RESTORE Council instead of Treasury.²⁰⁹ And Bucket 3 allocates its thirty percent share of the RESTORE Fund to the Gulf Coast states not in equal portions but rather pursuant to a formula established by the RESTORE Council that is based on the impact of the *Deepwater Horizon* spill on each state.²¹⁰

The Bucket 3 allocation formula takes into account three factors to determine each Gulf Coast state’s proportionate share of Bucket 3 funds: the miles of oiled shoreline a state experienced from the spill, the distance between the *Deepwater Horizon* at the time of the explosion and a state’s nearest point of oiled shoreline, and the average population of a state’s coastal counties.²¹¹ The formula was established as a federal rule promulgated by vote of the RESTORE Council.²¹² The final allocation of Bucket 3 funds pursuant to the rule is as follows: Alabama (20.40%), Florida (18.36%), Louisiana (34.59%), Mississippi (19.07%), and Texas (7.58%).²¹³

Buckets 4 and 5 of the RESTORE Act contain the smallest allocations of the RESTORE Fund. Bucket 4 allocates 2.5% of the Fund to establish a federal research program operated by NOAA.²¹⁴ Bucket 5 allocates the same percentage for the establishment in each state of Centers of Excellence—research programs operated by nongovernmental entities and consortia of public and private academic institutions that focus on science, technology, and monitoring in various disciplines such as coastal sustainability, wildlife and ecosystem restoration, and offshore energy development.²¹⁵ Pursuant to this provision, the State of Texas has established two Centers of Excellence, one

List 2 (2016), https://restorethegulf.gov/sites/default/files/FPL_forDec9Vote_Errata_04-07-2016.pdf [hereinafter Initial Funded Priorities List].

207 Initial Funded Priorities List, *supra* note 205, at 12–14, 23.

208 See 33 U.S.C. § 1321(t)(3)(B)(i)(I) (establishing eligible activities for Bucket 3 funding by reference to the Bucket 1 eligible activities); *id.* § 1321(t)(3)(B)(i) (requiring states to submit expenditure plans to the RESTORE Council for Bucket 3 funding).

209 *Id.* § 1321(t)(2)(C)(vi)(I)(bb) (providing that the Council must approve state plans for project funding submitted under Bucket 3).

210 *Id.* § 1321(t)(3)(A)(i)–(iii).

211 *Id.* § 1321(t)(3)(A)(ii).

212 *Id.*; see 40 C.F.R. 1800.100–.500 (2016) (the Spill Impact Formula Rule with explanations of each factor).

213 40 C.F.R. § 1800.500. The State of Texas did not vote in favor of the rule as promulgated in large part because it did not consider Harris County a coastal county for purposes of calculating the state’s average coastal county population.

214 RESTORE Act, *supra* note 110, § 1604(h), at 605.

215 *Id.* § 1605(c)–(d), at 605–06.

focused on offshore energy development and the other on the long-term economic and environmental health of the Texas coast.²¹⁶

VII. CONCLUSION

Out of the *Deepwater Horizon* tragedy, the Gulf Coast states now have an unprecedented opportunity to address and mitigate the damage from the spill and ensure the Gulf Coast's economic and environmental vitality for future generations. Over the next fifteen years, as the various settlement installments are paid, funds resulting from the spill will support economic and ecosystem restoration projects in key watersheds, bays, estuaries, and crucial centers of economic and tourist activity all along the Gulf Coast. This opportunity comes with a responsibility to maximize the benefit of all available funding to Gulf Coast ecosystems and communities. All three major funding streams are designed to facilitate that goal, and substantial governmental regulation and oversight is built into each to ensure the funds are expended for their intended purposes.

The various funding frameworks and processes are certainly not without faults. The Gulf Coast restoration effort in the wake of the *Deepwater Horizon* incident, however, is still in its infancy, so there will be ample opportunity for change and improvement in the process. The success of the effort will depend in large part on an engaged public, one that brings forward quality projects to fund and provides input whenever possible on how the process can be improved. To that end, all stakeholders must remain informed of available funding opportunities—when they begin, which funding stream applies, and for what purpose. Also, all stakeholders in the restoration process must be patient, for these programs reside in complex, federally-created bureaucratic structures that are designed to promote transparency and thoroughness, often times at the cost of efficiency.

Stephen L. Tatum, Jr., is Special Counsel to Commissioner Toby Baker of the Texas Commission on Environmental Quality (TCEQ). Henrik Strand is a J.D. candidate (2018) at the Texas A&M University School of Law and recent legal intern at the TCEQ. The opinions expressed herein are those of the authors, and not those of the TCEQ or any of its employees.

216 See *Subsea Systems Institute*, Univ. of Hous., <http://www.uh.edu/uh-energy/research/subsea-institute/index.php#aboutsubsea> (last visited Apr. 2, 2017) (Center of Excellence focusing on offshore energy development); Tex. OneGulf Ctr. of Excellence, <http://www.texasonegulf.org/> (last visited on Apr. 2, 2017) (Center of Excellence focusing on the long-term economic and environmental health of the Texas coast).