EXPLORING THE FRAMEWORK OF OIL LIABILITY LAW

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INTRODUCTION

Statistics indicate that thousands of oil spills are reported each year, which either pollute, or threaten to pollute, the waters of the United States.\textsuperscript{1} Emphasizing the devastating effects of oil on the marine environment, proponents of intensive oil spill legislation also note the crippling effect of oil spills on local fishing industries, tourism, and the “aesthetic beauty of the coastal areas.”\textsuperscript{2} In consideration of these concerns and consequences, the government’s interest in regulating oil spills is substantial and corresponds with a need to promote the vitality of the marine environment by protecting it from toxic substances. However legislative responses to the issue of oil discharge into the marine environment have been all but consistent in both the United States and abroad.

The history of oil spill legislation in the United States from 1899 until 1990 has reflected a transition from a compensation and liability scheme to an emphasis on clean up and prevention. With the enactment of the Oil Pollution Act, Congress purported to achieve a comprehensive oil liability scheme unlike previous legislation. However, the recent BP oil spill has shown that the current framework of oil spill liability as promulgated by OPA will not be effective in adequately covering the damages caused by the oil spill. Consequently further changes to oil spill liability law are needed. As Congress and the President consider proposals to address the problems exposed by the BP oil spill, they

\textsuperscript{1} Browne Lewis  \textit{It’s Been 4380 Days and Counting Since Exxon Valdez: Is It Time to Change The Oil Pollution Act of 1990?} 15 TUL. ENVTL. L.J. 97, 98 2001.
\textsuperscript{2} Id.
would be wise to consider the statutory schemes of other nations with a large offshore oil drilling industry and the international liability scheme for vessel-based oil spills.

PART 1: History of Federal Oil Spill Legislation in the United States Prior and Up Until the Oil Pollution Act of 1990

The history of federal oil spill legislation in the United States prior to 1970 may be characterized by a number of distinct limitations on the type of relief available to private and governmental claimants. While applicability of the Rivers and Harbours Appropriations Act of 1899 (Refuse Act) to governmental claimants mandated a criminal fine of $2,500 along with a civil cause of action to recover cleanup costs, commentators note that the “government was still required to show fault, as well as causation, making recovery for cleanup costs on the merits difficult.” Other limitations involving the assessment of liability for oil spills resonated within the 1966 amendments to the Oil Pollution Act of 1924. Although the Act provided civil and criminal penalties against dischargers of oil, the federal government faced major hurdles in establishing liability under the statute based on the Act’s definition of “discharge” as “willful or grossly negligent conduct.” In light of the limitations on governmental entities, commentators note that bringing an admiralty suit under common law nuisance theory “represented

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4 Id.
5 Id. at 166.
6 Id.
the government’s best chance to recover cleanup costs under the law existing at [the] time."7 Private claimants, on the other hand, found it much more difficult to recover under common law maritime actions.8 In addition to the substantial burden of establishing negligence under private nuisance claims, enactment of the Limited Liability Act of 1851 to oil spills not within the knowledge or privity of the vessel owner both limited damages to the value of the vessel and freight at the time of the injury and allowed private parties to only recover the amount “proportionate to its share of the total loss to all claimants” in the event that several claimants existed.9

In consideration of the limited scope of oil spill legislation prior to 1970, Congress enacted the Water Quality Improvement Act of 1970 (WQIA), which effectively eliminated recovery barriers generated under common law and the Limited Liability Act. The WQIA essentially “imposed a strict liability standard for all costs incurred by the federal government in the clean up of oil spills.”10 Two years later, Congress improved upon this legislation through the enactment of the Federal Water Pollution Control Act (FWPCA) of 1972. In addition to creating a remedy ensuring recovery of remediation costs by the government, the Act also established “specific federal mechanisms to clean up a spill.”11 The Act also required vessel owners and operators to provide proof of financial assurance of

7 Id. at 167.
8 See Id.
9 Id. at 167-68.
10 Id. at 168.
11 Id. at 169.
ability to meet cleanup costs in the amount of $100 per gross registered ton of the vessel, with a maximum liability of $14 million, regardless of vessel size.\footnote{33 U.S.C. § 1321(f)(1) (1982)}

To the extent that an owner or operator could establish that the discharge of oil was caused “solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party” liability for removal costs could be avoided under the Act.\footnote{Id.} Perhaps a more significant aspect of liability not included in the new legislation was the availability of claims for private parties. In fact, commentators note that the reliance by private parties on general maritime claims represented “a major weakness in the application of the FWPCA.”\footnote{Edgar Gold, Marine Pollution Liability After “Exxon Valdez”: The U.S. “All – Or-Nothing” Lottery?, 22 J. MAR. L. & COM., 423, 436 (1991).} A second noteworthy provision of the FWPCA applies to the federal government’s ability to recover costs beyond the scope of that authorized under the statute. Under the Act, non-discharging, non-sole cause third parties “whose actions may, in any way, have caused or contributed to the discharge of oil” may assume liability both up to and beyond the liability limits of the statute.\footnote{33 U.S.C. § 1321(h).} Although the Eastern District Court of Louisiana allowed for recovery of clean up costs under federal maritime law in excess of the statutory amount on the grounds that the actions of the third party defendants were “outside the scope of the FWPCA’s liabilities and benefits,”\footnote{United States v. Bear Marine Services, 509 F.Supp. 710, 718 (E.D. La. 1980).} the next year, the Supreme Court held in

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\footnote{Id.}
\footnote{33 U.S.C. § 1321(h).}
\footnote{United States v. Bear Marine Services, 509 F.Supp. 710, 718 (E.D. La. 1980).}
City of Milwaukee v. Illinois that the FWCPA precluded recovery under common law actions for removal of oil pollution.\(^\text{17}\)

On the issue of federal preemption of state causes of action, the Supreme Court further recognized in International Paper v. Ouellette the presumption that Congress intended to pre-empt such actions except those “preserved by the [FWPCA].”\(^\text{18}\) Despite the limitation on utilizing state causes of action under the Act, the FWCPA explicitly authorizes states to impose “any requirement or liability with respect to the discharge of oil or hazardous substances into any waters within such State.”\(^\text{19}\) Although the Clean Water Act of 1977 included noteworthy changes to the FWPCA in the form of increased liability limits, commentators criticize the 1977 amendments for an inherent “fail[ure] to establish effective preventive and immediate response mechanisms which would prevent spills altogether or provide for a prompt response.”\(^\text{20}\)

Soon after the enactment of the CWA amendments came the 1980s, an era of legislative turmoil and disagreement regarding the future of oil spill legislation. While there was general agreement about the need for comprehensive oil spill legislation, Congress was unable to agree on the type of provisions that should be included in such legislation.\(^\text{21}\) The Exxon Valdez oil spill during March of 1989, however, served as the motivating factor in Congress’s enactment of a comprehensive oil spill law. The Oil Pollution Act of

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\(^{20}\) Lewis, supra note 1, at 104.
\(^{21}\) Id. at 107-08.
1990 (OPA) expanded on the liability schemes of former oil legislation and addressed particular issues regarding “prevention, removal, and civil penalty programs.”\(^{22}\) In addition to designating liability to responsible parties, the Act also “provide[d] a fund to be used as compensation for catastrophic losses and for claims which are not compensated by dischargers.”\(^{23}\) Coupled with a significant focus on prevention unlike previous oil legislation, OPA further demonstrated its comprehensiveness through specific provisions related to (1) its applicability, (2) liable parties, (3) limits of liability, (4) certain defenses to liability, and (5) recoverable damages.\(^{24}\)

Under OPA, any discharge, or threat of discharge, of oil onto adjoining shorelines, into water within the exclusive zone of the United States, or into navigable waters of the United States is punishable under the Act.\(^{25}\) Although the language appears clear on its face, much of the litigation surrounding the applicability of OPA has focused on the definition of “navigable waters.”\(^{26}\) While OPA generally defines navigable waters as “the waters of the United States”\(^{27}\) recent court decisions have provided a narrower interpretation of the term requiring some connection “direct or indirect, to United States coastal or inland waterways.”\(^{28}\) OPA assigns liability to persons and organizations who are

\(^{22}\) Id. at 109.
\(^{23}\) Id. at 109-10.
\(^{24}\) Id. at 110.
\(^{26}\) Lewis, supra note 1, at 111.
\(^{27}\) 33 U.S.C. § 2701(21).
responsible parties in the discharge of oil.\textsuperscript{29} Responsible parties include owners and operators of vessels, onshore facilities, offshore facilities, and pipelines and licensees of deepwater ports.\textsuperscript{30} Thus, Congress’s formulation of a broad definition of responsible parties both realizes the potential for crushing liability on individual parties and ensures accountability by the greatest number of responsible parties.

Despite the broad range of liable parties listed under the Act, Congress manifested a fair and even-handed approach in the consideration and assessment of liability by placing specific limitations on the extent of responsibility for oil spills. The liability scheme enacted by OPA limits the liability of vessels based on the “type and size of vessel or facility involved in the spill.”\textsuperscript{31} OPA limits liability for a tank vessel to the greater of $1200 per gross ton or $10,000,000 (if vessel is greater than 3,000 gross tons) or $2,000,000 (if vessel is 3,000 tons or less).\textsuperscript{32} Similarly, offshore facilities other than deepwater ports have a maximum liability of removal costs plus $75,000,000 while onshore facilities and deepwater ports are limited to $350,000,000.\textsuperscript{33} However despite such explicit limitations on liability incorporated in the Act, gross negligence, violation of other federal regulations, knowledge of oil spill discharges and subsequent failure to report, along with failure to cooperate with removal

\textsuperscript{29} Id. at 112.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 121.
\textsuperscript{32} Id. at 122.
\textsuperscript{33} Id.
activities may preclude limitations on liability.\textsuperscript{34} In conjunction with significant limitations on the liability of vessel owners and operators, OPA also limits the type of defenses that may be raised to pollution claims. Like the FWPCA, OPA authorizes limited defenses to liability if discharges are the result of an act of God solely, an act of war, an act or omission of a third party, or “a combination of those things.”\textsuperscript{35}

Perhaps the most compelling aspect of OPA’s comprehensiveness is the nature and variety of economic recovery allowed under the Act. In addition to a broadened definition of removal costs which the Act considers to include not only costs associated with the removal of oil after a discharge, but “costs to prevent, minimize, or mitigate oil pollution,”\textsuperscript{36} the Act also provides for (1) natural resource damages . . . (2) damages to real or personal property, including economic loss, recoverable by the owner or lessee of the property; (3) damages for loss of subsistence use of natural resources, regardless of ownership or management; (4) net losses of taxes, royalties, rents, fees or shares of net profits, due to damage to property or natural resources recoverable by a governmental entity; (5) damages for loss of profits, or impairment of earning capacity, due to damage to property or natural resources; and (6) damages for the net costs of increased public services caused by a discharge of oil.\textsuperscript{37} In consideration of the plethora of damages available to claimants under the Act, Congress established the Oil Spill Liability Trust Fund (OSLTF) provision under OPA. The fund, financed primarily

\textsuperscript{34} Id.  
\textsuperscript{35} Id. at 120.  
\textsuperscript{36} Id. at 113.  
\textsuperscript{37} Id. at 114-15.
through a tax on crude oil at U.S. refineries, provides an alternative source of economic relief for claimants unable to obtain adequate damages from responsible parties.  

In addition to the availability of damages under OPA, the savings clause provision of the Act have led courts to consider “how far the states can supplement OPA in particular, and admiralty law in general.”39 While incorporation of a savings clause explicitly sustains state authority to formulate and enforce instate legislation of oil pollution, courts have struggled in reconciling the extent of legislative freedom allowed to states under OPA with the need for federal preemption of conflicting state law. In Dostie Development, Inc. v. Arctic Peace Shipping Co., the United States District Court for the Middle District of Florida held that OPA did not preempt common law negligence claims under section 1018(a)(2) of the Act, which authorizes states to “impose liabilities in addition to those of the Act.”40 The next year, the Fourth Circuit noted the applicability of state actions solely to parties damaged by the spill.41 Rejecting an assertion by vessel owner National Shipping Company (NSC) that the savings clause provision of the Act “authorized [NSC] to add common law claims against a responsible third party to claims arising from OPA itself," the court placed


39 Id. at 143.
40 Id. at 144 (citing No. 95-808-CIV-J-MMP, 1996 WL 866119 (M.D. Fla. 1996)).
emphasis on the purpose of the savings clause as a provision meant to encourage environmental protection and assist victims of oil discharges.\textsuperscript{42}

In light of the numerous aspects of oil spill liability addressed by OPA, the history of oil spill legislation in the United States prior to the Act may be characterized as narrow and lacking any significant comprehensive value. Although the transition from a purely governmental recovery scheme\textsuperscript{43} to legislation establishing federal mechanisms to effectuate the clean up process\textsuperscript{44} represents a significant advance in the evolution of oil spill legislation prior to 1990, the enactment of OPA symbolized a fundamental shift in the legislative approach to oil spill liability by including, among other things, provisions for liability, removal, and prevention under a single comprehensive law.

Although significant changes have been made to oil spill legislation since the enactment of the Refuse Act in 1899, commentators have noted a number of consistencies between OPA and the inadequacies of previous oil spill legislation. Thus, the Act has received criticism in failing to provide uniformity and predictability under the liability and removal provisions by ”confus[ing] the interaction of federal and state law” through the Act’s non-preemption provision.\textsuperscript{45} As a result, states may implement liability standards outside the scope of the Act, making the current liability scheme very similar to the one that existed before OPA.\textsuperscript{46} Furthermore, the limited amount of governmental resources available to

\begin{flushright}
\textsuperscript{42} Id.
\textsuperscript{43} Fjermedal, supra note 3, at 165.
\textsuperscript{44} Id. at 169.
\textsuperscript{45} Id. at 174.
\textsuperscript{46} Lewis, supra note 1, at 127.
\end{flushright}
clean up oil spills prior to the enactment of OPA remain largely the same. While the inadequacies of funds available under pre-OPA legislation justified establishing the OPA fund, commentators note that the current financial resources available under the Act are “not sufficient to clean up an oil spill the size of the Exxon Valdez oil spill.”47 Despite a number of apparent weaknesses in the Act, Congress succeeded in creating a revamped oil pollution liability scheme by integrating several dissimilar federal oil spill statutes into one comprehensive law. Thus, the enactment of OPA represents a fundamental shift in the direction of oil spill legislation from a compensation-centered focus on liability to an emphasis on clean-up and prevention. While significant disagreement exists as to the level of comprehensiveness achieved by recent oil spill legislation, the history of oil spill regulations has evolved and progressed over time.

PART 2: Oil Spill Liability Internationally

INTRODUCTION

The United States is not the only country that has felt the effects of large, environmentally and economically devastating oil spills over the past few decades. The international nature of the oil industry, the expansion of off-shore drilling in South America and increased oil demand from developing nations have

47 Id. at 126.
forced policy makers across the globe to address many of the same problems associated with oil spill liability that the United States faces today. As the United States begins to possibly rethink its oil spill liability regime, the efforts of other countries, regions and the international community may provide important lessons.

This section will look at the oil spill liability statute of Norway, the International Convention on Civil Liability for Oil Pollution Damage (CLC), the Oil Pollution Compensation Fund (OIPC), the International Oil Pollution Compensation Supplementary Fund, and EC Directive 2005/35 EC. Like the United States, Norway has addressed the issues that arise from off-shore oil drilling since the discovery of the Ekofisk oil field in December 1969, providing a good example of a regulatory and liability regime that protects the environment while ensuring economic growth.48 The international community has responded to the multiple oil-spill incidents by creating a legal framework to reimburse those in signatory countries adversely affected by spills.49 Finally, recent oil spills off the coasts of Spain and France have led the European Union to pursue criminal action against those responsible for oil spills.50 These examples will hopefully provide the reader a basic understanding of how other countries and the international community have addressed the liability problems associated with oil spills.

spills and provide additional guidance to American policy-makers as they reevaluate the oil spill liability regime in the United States.

NORWAY

With the discovery of oil fields off the Norwegian coast in 1969, Norway’s policy makers began the process of creating a statutory regime to ensure that the oil industry benefited the Norway economy while also protecting the environment. Over the past forty years, Norway’s policy makers have created a strong regulatory framework that combines strong environmental regulations and an emission tax with an active and proactive oil industry. The partnership between the oil industry and Norway’s Ministry of Industry and Energy has put Norway’s offshore oil industry at “the international forefront regarding cost efficiency and environmentally friendly exploration and production operations.”

In addition to these preventive regulations, Norwegian policy makers have also created a system to deal with liability claims that would arise from an oil-spill.

Norway’s Petroleum Activities Act was originally passed in November 1996 and was recently amended in June 2009. Chapter 7 of the Petroleum Activities Act assigns liability for pollution damage. Section 7-2 defines the

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53 Id.
55 Id.
scope of the law, making pollution damage that “occurs in Norway or inside the outer limits of the Norwegian continental shelf or affects a Norwegian vessel, Norwegian hunting or catching equipment or Norwegian facility in adjacent sea areas” liable under the act.\textsuperscript{56} The act also applies to pollution damage “from facilities used in petroleum activities” defined under the Act “when the damage occurs in onshore or offshore territory belonging to a state which has acceded to the Nordic Convention on Environment Protection.”\textsuperscript{57}

Section 7-3 of the Act makes the licensee “liable for pollution damage without regard to fault.”\textsuperscript{58} This liability can be “reduced to the extent it is reasonable” if “an inevitable event of nature, act of war, exercise of public authority or similar force majeure event has contributed to a considerable degree to the damage.”\textsuperscript{59} Section 7-4 lists specific individuals who cannot be held liable for pollution damage and allows the licensee to recover its liability from the party that caused the pollution damage.\textsuperscript{60} In addition, Section 7-4 allows a victim of pollution damage to recover from the party that caused the spill only if the licensee “fails to pay within the time limit stipulated by the judgment.”\textsuperscript{61} Section 7-5 provides the licensee the opportunity to recover against the parties listed in Section 7-4 as exempt only in cases where the exempted party “acted willfully or by gross negligence” in causing the oil pollution.\textsuperscript{62} Section 7-6 makes those who

\begin{flushleft}\textsuperscript{56} Id. \\
\textsuperscript{57} Id. \\
\textsuperscript{58} Id. \\
\textsuperscript{59} Id. \\
\textsuperscript{60} Id. \\
\textsuperscript{61} Id. \\
\textsuperscript{62} Id.\end{flushleft}
conduct petroleum activities without a licensee and those who take part in those activities and knew or should have known that they were taking place without a license liable for pollution damage caused by their activities regardless of fault.\textsuperscript{63}

In the event of a pollution damage event, Section 7-7 sets out that “the operator…by public announcement, provide information regarding the party to whom claims for compensation for pollution damage shall be directed and of the period of limitation” and that the statute of limitations for claims is set by the Ministry of Industry and Energy.\textsuperscript{64} Section 7-8 sets the venue for legal claims as the courts in the “district where the effluence or discharge of petroleum has taken place or where damage has been caused.”\textsuperscript{65} However, the Ministry of Industry and Energy decides the venue if the damage was caused outside of any court district, its unclear in what court district the discharge or damage occurred, the discharge occurred in one court district but caused damage in another court district, or if the damage is caused in multiple court districts.\textsuperscript{66}

Chapter 8 of the Petroleum Activities Act provides special rules for the compensation of Norwegian fisherman. Section 8-3 makes the licensee liable, regardless of fault, to fishermen whom are affected by oil pollution for “the cost of reasonable measures to avert or limit such damage or such loss, including damage or loss as a result of such measures” including “damage and inconvenience due to pollution and waste.”\textsuperscript{67} Chapter 8 claims are made to a

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
special commission set up by the King of Norway, and the decision of the commission may be appealed. 68

Norway’s liability statute creates a claims system that is streamlined for those affected, while still providing for judicial recourse against those ultimately responsible for causing a spill. Since the licensee is liable regardless of fault to those affected by oil pollution and claims are made in one venue, the payment of claims is likely expedited, ensuring that those affected by a pollution event are compensated quickly and without extensive litigation. In the event of a spill, the licensee is the party that in most situations will bring suit against the party that caused the spill. This limits the amount of litigation that will arise out of a spill to the claims that the licensee will have against the parties at fault for the spill. The fewer number of parties involved in litigation coming out of a spill will make settlement more likely. Since settlement is likely, the licensee has less incentive to contest claims, as there is more certainty that he will be repaid for the claims paid out to those affected by the spill. Fewer contested claims could create an incentive for frivolous claims that would increase the cost of an oil spill, provide a windfall to those not affected by the spill, and decrease the amount of funds available to those actually affected by the spill. However, the benefits of an expedited claims process and less litigation outweigh the possibility of frivolous claims being compensated. As American policy-makers re-evaluate oil spill liability, they would be wise to take a look at Norway’s approach to this difficult problem.

68 Id.
INTERNATIONAL OIL SPILL LIABILITY CONVENTIONS

In response to the allision of the oil tanker Torrey Canyon with a reef near the Scilly Isles in 1967, the international community created legal instruments to address the liability issues that arise from oil spills from tanker accidents. This effort led to the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC) and the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 (FC). In 1992, both conventions were amended to address concerns that the liability limits in the original conventions were too low. In 2003, the International Oil Pollution Compensation Supplementary Fund was created. As of August 1, 2009, 121 countries were parties to the CLC, 104 were parties to the FC, and 24 states had agreed to the Supplementary Fund. The United States is not a party to any of these international conventions.

These conventions create a three-tier system in order to pay for claims arising out of oil spills. The first tier is the Civil Liability Convention (CLC), which allows recovery for property damage, economic loss, loss of profit from impairment of environment, reasonable reinstatement, and reasonable preventive measures for oil pollution damage in the territorial sea, contiguous

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70 Id.
71 Id.
73 www.iopcfund.org
74 www.iopcfund.org
zone, and exclusive economic zone of a contracting state and anywhere preventive measures were taken.\textsuperscript{75} The CLC imposes strict liability on the ship owner, but the ship-owner can be exonerated by statutory exception.\textsuperscript{76} Ship-owners’ liability is limited to $6.5 million so long as the spill was not caused by the ship-owner’s personal act or omission, intent to cause such damage, reckless action or action with knowledge that damage would occur.\textsuperscript{77} In addition, ship-owners of vessels carrying more than 2000 tons of oil must have insurance to cover their liability under the CLC.\textsuperscript{78} The courts of the state where the damage occurred and courts of the states that took reasonable preventive measures to stop damage from occurring can hear claims under the CLC.\textsuperscript{79}

The second tier is the Fund Convention (FC), creating an additional level of compensation that is often used when the costs are greater than the ability of the owner to pay.\textsuperscript{80} The Fund sets a $293 million limit for liability for claims from an oil spill incident.\textsuperscript{81} Countries that are parties to the Fund make payments to the Fund for each contract where 150,000 tons of oil are delivered to the country.\textsuperscript{82} The third tier is the 2003 Supplementary Fund.\textsuperscript{83} The Supplementary

\textsuperscript{75} “The International Regime for Compensation for Oil Pollution Damage” Explanatory Note prepared by Secretariat of the International Oil Pollution Compensation Funds, Dec 2005. Accessible at www.iopcfund.org/npdf/genE.pdf.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
Fund raises the available funds for compensation for an incident to $1.067 billion and is funded in the same way as the Fund Convention.\textsuperscript{84}

Though the Conventions have provided an effective means of recovery for spills since their ratification, the Prestige spill in 2003 exposed problems with the current system. On November 19, 2003, the oil tanker Prestige sank off the coast of Spain, spilling 64,000 tons of oil into the sea where it contaminated 3,000 kilometers of European coastline.\textsuperscript{85} The FC announced in June 2004 that claims from the Prestige spill would total 1.038 billion Euros, exceeding the 171.5 million Euro's available in the Compensation Fund.\textsuperscript{86} This shortfall led to claims being paid at a 15 percent pro rata rate.\textsuperscript{87} The tanker owner’s insurance company paid about $25 million in claims, but further action against the tanker owner was impossible because the tanker-owner company was sold by its parent company after the spill and liquidated without paying any additional compensation to those affected by the spill.\textsuperscript{88}

EU CRIMINAL LIABILITY

The Prestige spill showed that liability could be limited by corporations through the use of multiple subsidiary companies and that the Funds created to pay claims in the event of oil spills were not adequately funded to deal with a

\textsuperscript{84} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
massive oil spill event. The international community reacted by creating the Supplementary Fund, but the outrage across Europe led leaders across the continent to take collective action to address liability in the event of an oil spill affecting the European Union. This collective action led to a proposal from the EU Commission that set criminal sanctions for ship-source pollution. The European Parliament and the Council of the European Union adopted this proposal in September 2005. This Directive makes discharges of oil in the “internal waters, territorial sea, straits used for international navigation, the exclusive economic zone” of EU members and on “the high seas…as infringements if committed with intent, recklessly or by serious negligence.” Intentional discharges are punishable with a prison sentence of 5-10 years if the spill caused “significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.” If the spill is committed “with serious negligence” and causes the same harm, then the punishment is between two and five years in prison. Prosecution of these cases is up to the individual member states affected by a spill.

89 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
The EU Directive has been criticized on multiple fronts. The term “serious negligence” has led to outcry from the shipping industry. The Directive provides no definition of the term serious negligence, and it is unclear whether accident spills constitute serious negligence. In October 2005, Mr. Empaminondas Embiricos, chairman of the Greek Shipping Co-operation Committee, argued that the term serious negligence is “legally defective” because it is “imprecise, subjective and lacks clarity” and will be “most prejudicial to the accused in the climate of public sentiment commonly experienced after a pollution incident.” Mr. Embiricos has also argued that the courts will find serious negligence “when ordinary negligence has caused or contributed to serious consequences”, resulting in “criminal sanctions for pollution caused by ordinary negligence.”

In addition to the problems with serious negligence, the prosecution of seafarers raises both practical and fairness issues. The prosecution of seafarers could “discourage cooperation from seafarers in accident investigations” because seafarers will be scared that information they provide to the investigation will be used against them in a criminal trial. Also, a ship’s officers and company management make most of the important decisions that lead to a spill, while the rest of the crew follows the orders of their superiors.

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96 Id.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
would seem unfair to prosecute the entire crew for a spill when they had no control over many or all factors that led to the spill, and who likely were put in harms way during the events that led to the spill.\textsuperscript{103}

CONCLUSION

As policy makers begin to reevaluate liability for oil spills in the United States, they should consider the lessons from other countries experiences dealing with this issue. Congress would be wise to consider the Norway model, as it provides a system that quickly compensates those affected while also decreasing the amount of litigation arising from a spill. The Executive Branch should consider whether now is the right time for the United States to join the international conventions on oil spill liability, keeping in mind the shortcomings of this regime made apparent by the Prestige spill. Finally, while the United States currently assigns criminal penalties for certain violations of environmental laws, policy makers should be careful that any statute assigning criminal liability for oil-spills does not make the same mistakes as the European Union’s Directive.

PART 3: The Evolving Landscape of Oil Spill Liability Law

INTRODUCTION

\textsuperscript{103} Id.
The BP oil spill is now acknowledged as the largest offshore oil spill in U.S. history. Consequently, it is not surprising that while the BP oil spill has been successfully capped, issues relating to the legal liability for the damages caused by the oil spill will continue for the foreseeable future. Although numerous state and federal statutes are responsible for establishing the boundaries of legal liability for oil spills, critics have stipulated that these regulations are not sufficiently stringent enough to successfully mitigate the externalities of future oil spills. In order to combat certain deficiencies in the statutory schemes, some of these critics have suggested the necessity of changing the landscape regarding legal liability for oil spills. Congress has seemingly recognized the critical nature of these oil spill liability concerns as reflected in recently proposed legislation, which if accepted, would effectively address the key issues raised by critics of current oil spill liability. But in order to understand the potential impact of these proposals regarding oil spill liability law, it is essential to examine the scope of oil spill liability in its current state, which can be accomplished through the context of the BP oil spill.

THE CURRENT STATE OF OIL SPILL LIABILITY LAW

As was previously stipulated, the principle statute governing liability for oil spills is the Oil Pollution Act of 1990 [OPA]. Certain aspects of the OPA have simplified the tasks of identifying the responsible party for oil spills and assigning

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civil liability to those responsible for the damage caused by the oil spill. The OPA allocates liability to parties based upon the specific circumstance of the oil spill. In oil spills that take place in offshore facilities (like the BP oil spill), the responsible party is the holder of the drilling permit. Once the OPA has identified the responsible party for an oil spill, it imposes strict liability upon that party for the damages caused. In the context of the BP oil spill, because BP is the holder of the drilling permit, BP is the responsible party and therefore liable for the damages. The majority of controversy surrounding the OPA however is directly related to the liability limits established by the Act.

The liability cap for oil spills occurring in offshore facilities is $75 million. Although this figure represents an “increase over previous damages caps,” its deficiency in the wake of larger offshore oil spills is exemplified by the BP oil spill, where damages to private parties alone figure to be in the billions of dollars. Also worrisome is the fact that the liability cap applies not only to private-party actions but also to natural resource damages. Because the economic costs of the BP oil spill to natural resources will likely take years to fully appreciate, a liability cap on natural resource damages threatens to cause natural resource

105 Id.
106 Id.
107 Id.
109 Id. at 3-4. (Arguing that the $75 million figure precludes any liability stemming from state law governing liability for spills. “Victims can therefore sue in state court to recover damages).
110 Id. at 3.
organizations to accept monetary settlements from BP that will be vastly below the actual monetary damage caused.\textsuperscript{112}

In light of these legitimate concerns, the OPA articulates exceptions to the aforementioned liability limits, in which it eliminates the liability cap if it is established that the oil spill was caused by “gross negligence or willful misconduct or by violation of federal regulations.”\textsuperscript{113} However, it is still unclear whether any of these exceptions will apply to BP and although BP has acknowledged a degree of fault for the oil spill, that acknowledgment falls short of the necessary standard for any of the exceptions to apply.\textsuperscript{114} Finally, the OPA provides for an “Oil Spill Liability Trust Fund,” which “can make damages payments of up to $1 billion per incident.”\textsuperscript{115} Although this fund could help account for a portion of the financial damages that would otherwise be precluded by the liability cap, the $1 billion payout limit stipulated by this fund is significantly less than the expected damages of the BP oil spill.

Despite the liability limitations of the OPA, BP should also be liable for civil and criminal damages stemming from various Federal Wildlife statutes, which fall outside the scope of the OPA’s liability cap. The National Marine Sanctuaries Act, which is designed to protect designated marine sanctuaries, provides civil


\textsuperscript{113} Richardson, supra note 2, at 3.


\textsuperscript{115} Richardson, supra note 2, at 3.
penalties of $100,000 per day for violation of the provisions encompassing the act.\textsuperscript{116} It also enforces additional liability for “damages” to the sanctuaries and any subsequent replacement costs.\textsuperscript{117} Two sanctuaries potentially may be affected by the oil spill (Flower Garden Banks National Marine Sanctuary and Florida Keys National Marine Sanctuary) and in the event that damage to either of these sanctuaries is proven, BP would be fully liable.\textsuperscript{118} The Migratory Bird Treaty Act [MBTA] offers another viable route to assessing monetary liability upon BP for the oil spill.\textsuperscript{119} The MBTA assesses penal fines for killing migratory birds based upon a strict liability standard, in which the prosecution would only have to show that the defendant was responsible for the act.\textsuperscript{120} Given the apparent “massive numbers of bird deaths as a result of the oil spill,” and BP’s partial acknowledgement of fault, the MBTA should provide another means of collecting damages from BP.\textsuperscript{121}

By examining the full scope of oil spill liability law in the context of the BP oil spill however, a clear incongruity emerges between the monetary liability that BP would likely face and the monetary damages that the BP oil spill is likely to

\begin{itemize}
\item \textsuperscript{116} 16 U.S.C. 1431
\item \textsuperscript{117} Id.
\item \textsuperscript{119} 16 U.S.C. 703
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Kristina Alexander, \textit{The 2010 Oil Spill: Criminal Liability Under Wildlife Laws}, \textit{CONGRESSIONAL RESEARCH SERVICE}, June 28, 2010. P.9 Accessible at www.fas.org/sgp/crs/misc/R41308.pdf. (Arguing that although the Endangered Species Act and the Marine Mammal Protection act offer alternative routes to establishing BP’s criminal liability, it is unlikely that the government will pursue prosecution for either of these statutes since they are both “fault based”).
\end{itemize}
cause. There are two significant consequences of this incongruity: First, the actual damages stemming from the oil spill to private parties and natural resources will far exceed the monetary civil and criminal liability imposed upon BP, leaving the American government (and consequently American taxpayers) responsible for accounting for the difference. Perhaps the more far-reaching consequence of this incongruity is the realization that under the current principles of oil liability law, oil companies, like BP, are faced with a figure of economic liability, which has a relatively inconsequential effect upon their ultimate profit margin. As a result, these companies have a diminished interest in spending additional resources to improve upon safety regulations that are aimed at deterring future oil spills.

THE BP $20 BILLION CLAIMS FUND

It was likely in response to the above criticisms of current oil spill liability law that BP agreed to provide a $20 Billion claims fund, meant to satisfy claims stemming from the oil spill involving natural resource damages, OPA violations, and torts. The Claims fund also stipulates that “fines and penalties will be excluded from the fund and paid separately.” Thus, the implementation of this fund demonstrates the impracticality of the current state of oil spill liability law from an economic standpoint. In addition to greatly expanding upon previously established liability limits, BP’s claims fund confers additional benefits to potential

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123 Id.
oil spill victims. First, the claims fund will allow victims with lesser damages to group their lawsuits together into class actions that will likely secure a settlement, when any of those claims, alone, would have been economically infeasible to try. Furthermore the claims fund provides an economically efficient means of litigation by eliminating many costly attorneys fees and often avoiding litigation altogether.

Nevertheless, despite the apparent benefits of the BP claims fund, there is a significant drawback. A provision of the claims fund stipulates that “in order to receive the final settlement offer, the claimants must waive any right to bring further court proceedings against BP.” This provision raises a serious dilemma for potential claimants, as it is far too early to accurately calculate the full extent of damages arising from the oil spill. This includes harm to individuals and “biophysical damages,” both of which often “take years to develop,” and are the subjects of controversy regarding their translation into economic terms. Consequently, this provision threatens to take advantage of many claimants, who due to their financial situations, may be forced to take final settlements that are

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126 Id.
127 Id.
“substantially lower than” what would ultimately be regarded as “fair and reasonable.”

Whether the claims fund represents merely a quick fix or a first step in reforming oil spill liability law remains to be seen. It is worth noting however that this fund does not represent a liability limit and even BP officials have acknowledged that payouts for damages could approach $40 Billion. Consequently, the BP Claims Fund does not purport to set a new standard of liability but rather only to acknowledge that the existing liability limits are no longer sufficient in the wake of the BP oil spill.

CHANGING THE LANDSCAPE OF OIL SPILL LIABILITY LAW

Given the underlying concerns of the BP Claims Fund, a current issue of considerable controversy revolves around whether the liability cap of the OPA should be eliminated. This controversy has burrowed its way into Congress in the form of a proposed legislative measure. The “Big Oil Bailout Prevention Unlimited Liability Act of 2010,” proposes an amendment the OPA to remove any liability limits from the Act. This proposed bill however is likely to face criticism on the grounds that it unduly prejudices oil companies and would “result in uninsurable

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130 Id.
risks that would make [offshore] drilling too risky.” As a consequence, the United States may need to use alternative sources of acquiring crude oil, such as the world oil market, which would inevitably raise the cost of oil for both the government as a whole and the American consumer as an individual. Despite the legitimacy of this argument, studies have shown that even in the event of “a permanent ban on U.S. deepwater and ultra-deepwater drilling” (which would result in the analogous consequence of companies no longer engaging in U.S. offshore drilling), the consequential effect on prices to the United States consumer would be dulled by “the large international oil market.”

While the imposition of unlimited liability for offshore oil spills may induce oil companies like BP to expend more resources towards deterring future oil spills, there are more direct means of accomplishing this goal. Tighter U.S. regulation of oil companies would be effective in creating a more reliable standard of safety regulations for offshore drilling operations. Recently proposed legislation in the House of Representatives has explicitly addressed the need for enhanced safety measures on offshore oil drilling. The “Offshore Safety and Response Improvement Act,” advocates for the creation of preventative

135 Id.
safety measures to be taken in order to prevent future offshore oil spills.\footnote{136} Furthermore, the “Oil Spill Response and Assistance Act” authorizes the Secretary of Energy to order for the development of technology, which could be used to cap an oil spill in the event of a significant discharge of oil from an offshore facility. \footnote{137} Thus the enforcement of these two legislative acts would help to prevent future offshore oil spills and in the event that they occur, limit their damage significantly.

Legislative measures advocating for enhanced government safety regulations to offshore oil drilling are likely to face criticism on the grounds that such safety measures would become a financial burden to oil companies and consequently to U.S. oil consumers. \footnote{138} It is estimated that “higher safety standards could raise the costs of U.S. deepwater and ultra deepwater drilling by 10-20 percent….\[and\] the market will shift some \[of\] these costs forward to consumers in the form of higher prices.” \footnote{139} These concerns, however, are nullified by further studies, which have concluded that the increase in costs of offshore drilling as a consequence of increased safety measures would have a minimal effect on domestic and foreign oil prices. \footnote{140}

Despite the probable efficacy of enhanced safety measures, they will only have a limited degree of effectiveness if the United States fails to strictly enforce these regulations. While even large civil fines may be relatively inconsequential

\footnote{137} Oil Spill Response and Assistance Act. H.R. 5356, 111th Cong. (2010).
\footnote{138} Brown, supra note 32, at 11.
\footnote{139} \textit{Id.}
\footnote{140} \textit{Id.}
to the financial viability of an international oil company, “several studies…have demonstrated a negative stock price effect….[for] the announcement of civil” fines. 141 The dark shadow that these civil fines cast over a firm’s reputation may also “give lenders and insurers pause about risking more capital on that particular firm.” 142 However, if the intended effect of civil fines is to detrimentally impact an oil company’s reputation, it may be worthwhile for the United States to consider imposing criminal sanctions for violations of these safety measures. In addition to imposing monetary fines upon oil companies and detrimentally affecting their potential future profitability, “putting a criminal label on behavior is a signal of moral outrage in the community—perhaps having additional negative reputational impacts on those who have been labeled as criminally liable.” 143 Criminal penalties for violations of safety regulations could also include the “future debarment [of oil companies] from government contracts,” and moratoriums on offshore drilling as a means of supplementing monetary fines. 144 Such penalties would have more direct impacts on the long-term economic viability of oil companies and would go a long way to helping secure their cooperation with government imposed safety regulations.

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141 Cohen, supra note 30, at 4.
142 Id.
143 Id.
144 Id.
CONCLUSION

When viewed in the context of the BP oil spill, it is clear that the current framework of oil spill liability law is no longer an effective means of providing compensation for damages caused by large offshore oil spills. While the $20 Billion Claims Fund is a step in the right direction, it should only be viewed as a first step in the reformation of oil spill liability law. Currently proposed legislation to amend the OPA by removing the liability cap and enforcing stricter safety regulations would be a logical next step in the reformation process. Furthermore, harsher criminal and civil sanctions for violations of federal statutes would provide a further impetus for oil companies to comply with safety regulations, which will ultimately help deter potential future oil spills. Finally, policy-makers should consider the experience of other nations and the efforts of the international community as they evaluate these proposals to reform oil spill liability law for the 21st century.