

National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling

UNLAWFUL DISCHARGES OF OIL: LEGAL AUTHORITIES FOR CIVIL AND CRIMINAL ENFORCEMENT AND DAMAGE RECOVERY

Staff Working Paper No. 14

Staff working papers are written by the staff of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling for the use of members of the Commission. They do not necessarily reflect the views of the Commission or any of its members. In addition, they may be based in part on confidential interviews with government and non-government personnel.

I. Introduction

The purpose of this staff working paper is to provide an overview of the sources and uses of penalties and other funds recovered as a result of unpermitted discharges of oil.¹ There are a number of provisions in federal environmental statutes that authorize the federal and/or state governments to seek fines and penalties for violations, recover clean up and removal costs, and secure funds to restore natural resources.

Relevant federal statutes include the Clean Water Act, Oil Pollution Act of 1990, Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act. This paper is intended to cover the primary federal enforcement and recovery authorities, but is not comprehensive. For example, it does not address criminal acts not covered under environmental and wildlife statutes, or state laws applicable to oil spills.

In June 2010, the Department of Justice (DOJ) announced that the United States would pursue all available civil remedies and consider appropriate criminal penalties to ensure that the responsible parties are held accountable for the Deepwater Horizon oil spill.² On December 15, 2010, the United States filed a civil complaint in the Eastern District of Louisiana naming, among others, BP, Anadarko, MOEX Offshore 2007, and Transocean as defendants. The complaint seeks: (1) to impose civil penalties on the defendants for alleged violations of the Clean Water Act and (2) “a declaration that the [d]efendants are responsible and strictly liable for unlimited removal costs and damages under the Oil Pollution Act of 1990.” The United States expressly reserved its right to amend the complaint “by, among other things, adding new claims and new defendants.”³

¹ Consistent with the Executive Order establishing the Commission, this staff working paper does not attempt to assign or apportion legal responsibility or liability among any of the parties involved in the blowout, explosion, fire, or oil spill.

² Press Conference, United States Attorney General Eric Holder, New Orleans, LA (June 1, 2010), <http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html>.

³ Complaint of the United States of America, United States v. BP Exploration & Production Inc., No. 10-cv-4536 (E.D. La., Dec. 15, 2010).

This staff working paper covers the following topics:

- 1) Clean Water Act civil and criminal enforcement mechanisms, including Supplemental Environmental Projects;
- 2) Sources and uses of the Oil Spill Liability Trust Fund established by the Oil Pollution Act;
- 3) Authority to recover removal, clean up, and natural resource damages costs;
- 4) Limitations on a responsible party's liability under the Oil Pollution Act; and
- 5) Authority for civil and criminal actions under federal wildlife statutes.

This paper's conclusion lists sources of funds that may be directed to support Gulf of Mexico restoration efforts.

II. Clean Water Act

The Clean Water Act authorizes the Environmental Protection Agency (EPA) and Coast Guard to assess administrative penalties. It also authorizes DOJ, on behalf of EPA and Coast Guard, to bring lawsuits seeking civil and criminal penalties.⁴

A. Civil Administrative Penalties

Section 311(b)(6) of the Clean Water Act authorizes EPA and the Coast Guard to assess administrative penalties (either Class I or Class II, depending on level of severity) for unpermitted discharges of oil. A Class I civil penalty may not exceed \$16,000 per violation, up to a maximum total penalty of \$37,500. A Class II civil penalty may not exceed \$16,000 "per day for each day during which the violation continues[.]" up to a maximum of \$177,500.⁵ In the case of the Deepwater Horizon spill, an administrative action to assess a Class II penalty, in lieu of a civil judicial action, would likely yield a substantially smaller penalty, because it would preclude the government from later filing suit pursuant to Section 311(b)(7) to recover a penalty for each barrel of oil released.⁶

⁴ In addition to the federal government's authority to bring enforcement actions, the Clean Water Act has a citizen suit provision. Specifically, the Clean Water Act provides for citizen enforcement of violations of "an effluent standard or limitation" or "an order issued by the Administrator or a State with respect to such a standard or limitation . . ." 33 U.S.C. § 1365(a)(1). Under the Act, a "citizen" is an individual, corporation, partnership, association, state, municipality, commission, political subdivision of a state, or interstate body "having an interest which is or may be adversely affected." *Id.* § 1365(g). Citizens do not have authority to bring suit under Section 311(unpermitted oil discharges) but may bring suit under Section 301 (general unpermitted discharges). *Id.* § 1356(f). Daily penalties are the same under both Sections, but Section 311 has additional penalty provisions based upon the number of barrels of oil released. *See* 33 U.S.C. § 1321(b)(7). At least 60 days before citizens can file suit, notice must be given to EPA, the state in which alleged violations occur, and the alleged violator. A citizen may not file suit if, after the 60 day notice period, EPA or the state at issue has already commenced a similar action. 33 U.S.C. § 1365(b). EPA may intervene in any citizen suit as a matter of right. *Id.* § 1365(c)(2). If the United States is not party to a citizen suit, it must be given 45 days to review any consent judgment before it may be entered. *Id.* at 1365(c)(3). Citizens may not sue for wholly past violations. To date, several citizen suits have been filed as a result of the Deepwater Horizon oil spill.

⁵ 33 U.S.C. § 1321(b)(6)(B); 40 C.F.R. § 19.4.

⁶ 33 U.S.C. § 1321(b)(6)(E).

B. Civil Judicial Actions

1. Penalties

Section 311(b)(7) of the Clean Water Act provides for civil penalties for unpermitted discharges of oil of up to \$37,500 per day of violation or up to \$1,100 per barrel of oil discharged.⁷ If the unlawful discharge is “the result of gross negligence or willful misconduct” of the owner, operator, or any person in charge of a vessel or offshore facility, the penalty is not less than \$140,000, and not more than \$4,300 per barrel of oil discharged.⁸ EPA has interpreted these provisions to mean that “the government may elect whether per day or volumetric penalties may apply according to how it pleads its case, or plead both approaches in the alternative.”⁹ The following factors must be considered when courts determine the amount of a civil judicial penalty (or when EPA or Coast Guard determines the amount of an administrative penalty):

the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.¹⁰

Given the severity of the Deepwater Horizon spill, the civil judicial penalties may be extremely high. News sources have estimated that the maximum civil penalty could be between \$4.5 billion and \$21 billion.¹¹ Penalties collected by the United States for civil violations of Section 311 of the Clean Water Act must be deposited into the Oil Spill Liability Trust Fund (described in Part III below).¹²

⁷ 33 U.S.C. § 1321(b)(7)(A); 40 C.F.R. § 19.4.

⁸ 33 U.S.C. § 1321(b)(7)(D); 40 C.F.R. § 19.4.

⁹ EPA Office of Enforcement and Compliance Assurance, CIVIL PENALTY POLICY FOR SECTION 311(b)(3) AND SECTION 311(j) OF THE CLEAN WATER ACT 2 (Aug. 1998), <http://epa.gov/compliance/resources/policies/civil/cwa/311pen.pdf>.

¹⁰ 33 U.S.C. § 1321(b)(8).

¹¹ Joel Achenbach and David Fahrenthold, *Oil spill dumped 4.9 million barrels into Gulf of Mexico, latest measure shows*, WASH. POST (Aug. 3, 2010) (civil penalty range is between \$4.5 billion and \$18 billion, based on an estimated 4.1 million barrels discharged into Gulf waters); Jonathan Tilove, *BP disputes government estimates of volume of Gulf of Mexico oil spill*, TIMES-PICAYUNE (Dec. 3, 2010) (civil penalties could be as high as \$21 billion, based on estimate of 4.9 million barrels of oil discharged from the Macondo well). These ranges are based on the civil penalty per barrel amount (for both negligent and grossly negligent discharges) multiplied by the estimated total number of barrels of oil released. According to the current official government estimate, the Macondo well released approximately 4.9 million barrels of oil over the course of the spill (± 10 percent), over 800,000 barrels of which were captured at the wellhead using the top hat and other devices. Deepwater Horizon MC252 Gulf Incident Oil Budget (Aug. 1, 2010), <http://www.noaanews.noaa.gov/stories2010/PDFs/DeepwaterHorizonOil-Budget20100801.pdf>). BP has not released its own estimate for the total amount of oil discharged from the Macondo well, but it disputes the government’s figures on the grounds that, among other things, they fail to take into account “significant flow impediments” and “rely on incomplete or inaccurate information, rest in large part on assumptions that have not been validated, and are subject to far greater uncertainties than have been acknowledged.” BP, BP’S PRELIMINARY RESPONSE TO THE FLOW RATE AND VOLUME ESTIMATES CONTAINED IN STAFF WORKING PAPER No. 3 (Oct. 21, 2010).

¹² 26 U.S.C. § 9509(b)(8); 33 U.S.C. § 1321(s).

2. Supplemental Environmental Projects

A civil judicial penalty may be reduced if the defendant agrees to fund or perform a Supplemental Environmental Project (SEP) or similar initiative. SEPs are defined as “environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.”¹³ EPA includes SEPs in environmental enforcement settlements to induce defendants to voluntarily improve environmental quality after violations occur.¹⁴

According to EPA, “the primary purpose of [SEPs] is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this [p]olicy.”¹⁵ EPA’s SEP policy encourages use of SEPs in communities where environmental justice may be an issue. Thus, SEPs offer an opportunity for environmental improvement beyond compliance and are intended to benefit communities where violations occur.¹⁶

SEPs must be consistent with the provisions of the underlying environmental statutes, advance the objectives of the statutes that are the basis of the enforcement action, have a nexus to the violations, and be explained in detail in an environmental enforcement settlement.¹⁷ EPA may not manage or control SEP funds or “retain authority to manage or administer the SEP.”¹⁸ In addition, federal agencies may not authorize SEPs for statutory duties or particular activities for which Congress has otherwise made funds available.¹⁹ Finally, a defendant may not use a SEP to comply with obligations otherwise required by law.²⁰

If a defendant agrees to conduct a SEP, EPA may reduce the civil penalty that the defendant would otherwise be obligated to pay. EPA uses a combination of quantitative and qualitative factors to determine the mitigation percentage and final settlement amount.²¹

C. Criminal Penalties (Fines and/or Imprisonment)

1. Criminal Penalty Authority

Section 309(c) of the Clean Water Act authorizes criminal prosecution for unpermitted oil discharges. Those subject to criminal prosecution include individuals, corporations,

¹³ EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 4 (Apr. 10, 1998),

<http://www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>.

¹⁴ EPA, BEYOND COMPLIANCE: SUPPLEMENTAL ENVIRONMENTAL PROJECTS 3-4 (Jan. 2001),

<http://www.epa.gov/Compliance/resources/publications/civil/programs/sebrochure.pdf>.

¹⁵ EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 1 (Apr. 10, 1998).

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 6.

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.* at 12-17.

associations, states, municipalities, and responsible corporate officers.²² Depending on the level of intent, the following types of violators may be fined, imprisoned, or both:

- A person who *negligently* violates the oil discharge provisions of Clean Water Act Section 311 for the first time may be punished by a fine of between \$2,500 and \$25,000 per day of violation, imprisonment for up to a year, or both. For subsequent convictions, penalties increase up to a maximum of \$50,000 per day of violation, two years of imprisonment, or both.²³
- A person who *knowingly* violates Section 311 for the first time is punishable by a fine ranging from \$5,000 to \$50,000 per day of violation, imprisonment for up to three years, or both. For subsequent convictions, the maximum penalty is \$100,000 per day of violation, imprisonment for six years, or both.²⁴
- A person who *knowingly* violates Section 311 and who “knows at the time that he thereby places another person in imminent danger of death or serious bodily injury” (i.e. knowing endangerment) shall be subject to a fine of not more than \$250,000, imprisonment for up to 15 years, or both.²⁵ If the “person” is an organization, it shall be subject to a fine of not more than \$1,000,000. After a first conviction, the maximum punishment for a subsequent conviction is “doubled with respect to both fine and imprisonment.”²⁶

Fines collected by the United States for criminal violations of Section 311 of the Clean Water Act must be paid into the Oil Spill Liability Trust Fund (described in Part III below).²⁷

2. Criminal Sentences and Fines: Other Factors

When imposing a criminal sentence, courts must consider factors that include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment, promote respect for the law, assure adequate deterrence, and protect the public from future crimes of the defendant; and the need to provide restitution to any victims of the offense.²⁸

In assessing a criminal fine, courts must consider, among other things, the defendant’s income, earning capacity, and financial resources; the burden a fine will impose on the defendant; any monetary loss inflicted on others as a result of the offense; whether restitution is ordered and the amount of such restitution; whether the defendant can pass on the expense of the fine to consumers or other persons; and, if the defendant is an organization, the size of the organization and any measures taken to discipline any agent responsible for the offense.²⁹

²² 33 U.S.C. §§ 1319(c)(6), 1362(5).

²³ 33 U.S.C. § 1319(c)(1).

²⁴ 33 U.S.C. § 1319(c)(2).

²⁵ 33 U.S.C. § 1319(c)(3).

²⁶ *Id.*

²⁷ 26 U.S.C. § 9509(b)(8); 33 U.S.C. § 1321(s).

²⁸ 18 U.S.C. § 3553(a).

²⁹ 18 U.S.C. § 3572(a).

Courts may order restitution in any criminal case where required or allowed by law and to the extent agreed to by the parties in a plea agreement.³⁰ Restitution may be paid to the government for use in restoring natural resources.³¹ Courts may not impose a fine or penalty to the extent it will impair the defendant's ability to pay restitution.³²

The Alternative Fines Act authorizes criminal fines for organizations up to the greatest of: (a) the amount specified by statute; (b) \$200,000 for a misdemeanor not resulting in death and \$500,000 for a felony; or (c) twice the gross gain or gross loss resulting from the offense.³³ If applied in the case of the Gulf spill, the final provision could allow for the imposition of immense criminal fines equaling twice the aggregate losses resulting from the spill.

U.S. Sentencing Guidelines allow courts to impose a community service payment as an additional component of a sentence in order to repair harms caused by a defendant's actions.³⁴ Such payments punish the defendant, deter similar future conduct, and benefit the public because the payment goes to remedy the impacts of the violation. Community service payments occur with some regularity in criminal environmental cases.³⁵

D. Exxon-Valdez Criminal Plea Agreement

In 1991, Exxon pled guilty to violations of the Clean Water Act, Migratory Bird Treaty Act, and Refuse Act, and agreed to a \$150 million criminal fine (later reduced to \$25 million in recognition of Exxon's cooperation in cleaning up the spill). Of the \$25 million, \$13 million went to the Crime Victims Fund and \$12 million went to the North American Wetlands Conservation Fund. Exxon also paid \$100 million in criminal restitution for restoration, which was split evenly between the federal government and Alaska.³⁶

III. Oil Spill Liability Trust Fund

Congress established the Oil Spill Liability Trust Fund (Trust Fund or Fund) as a funding source for removal costs and damages resulting from oil discharges.³⁷ The Fund is located within the U.S. Treasury and is managed by the National Pollution Funds Center, an independent unit within the Coast Guard.

³⁰ 18 U.S.C. § 3663a.

³¹ See, e.g., EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, SETTLEMENT, <http://www.evostc.state.ak.us/facts/settlement.cfm>.

³² 18 U.S.C. § 3572(b).

³³ 18 U.S.C. § 3571(c).

³⁴ U.S.S.G. § 8B1.3.

³⁵ See, e.g., Plea Agreement, *United States v. Overseas Shipholding Group, Inc.*, No. 06-cr-65 (E.D. Tex. Dec. 18, 2006) (the defendant pleaded guilty and agreed to a \$9.2 million community service payment in addition to a \$27.8 million fine).

³⁶ Plea Agreement, *United States v. Exxon Corp.*, No. A90-015 CR (D. Alaska, Apr. 24, 1991); see also Government's Memorandum in Support of Agreement and Consent Decree, *United States v. Exxon Corp.*, No. A91-082 CIV (D. Alaska, Oct. 8, 1991).

³⁷ U.S. COAST GUARD, OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS (Jan.2006), http://www.uscg.mil/npfc/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf.

A. Funding Sources

The Trust Fund receives funding from the following sources: transfers from pre-existing funds; a per barrel tax on petroleum produced in or imported to the United States; cost recovery from responsible parties; civil and criminal penalties collected under Section 311 of the Clean Water Act; penalties for violations of certain other statutes; and investment interest on the Fund's principal.³⁸

In October 2008, Congress raised the per barrel tax from \$0.05 to \$0.08 until January 1, 2017, and to \$0.09 from January 1, 2017 until December 31, 2017.³⁹ It also removed a provision that phased out the per barrel tax if the balance of the Fund reached \$2.7 billion.⁴⁰ With this provision removed, the balance of the Fund has the potential to be much larger. The per barrel tax is the largest source of income.⁴¹

The Fund has two components: (1) the Emergency Fund, which contains \$50 million that may be used for removal activities and initiation of natural resource damage assessments without further appropriation; and (2) the Principal Fund, which funds the remaining expenditures.⁴² Congress amended the Oil Pollution Act in June 2010 to allow the Coast Guard to obtain one or more advances from the Fund of up to \$100 million each to cover Deepwater Horizon removal costs.⁴³

B. Trust Fund Expenditures

Uses of the Trust Fund that are relevant here include:

- payment of removal costs incurred by federal and state governments;
- payment of costs of natural resource damage assessments as well as development and implementation of restoration plans;
- payment of claims by individual persons or governments for removal costs and damages;
- payment of costs of federal agencies to administer and enforce the Oil Pollution Act; and
- research and development.⁴⁴

Money from the Trust Fund is also appropriated by Congress to the Denali Commission (to repair or replace storage tanks in Alaska) and to the Prince William Sound Oil Spill Recovery Institute.

³⁸ 26 U.S.C. § 9509(a)-(b).

³⁹ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 405(a), (b), 122 Stat. 3765, 3860-61; compare 26 U.S.C. § 4611 (2007) with 26 U.S.C. § 4611 (2010).

⁴⁰ Compare 26 U.S.C. § 4611 (2007) with 26 U.S.C. § 4611 (2010).

⁴¹ NATIONAL POLLUTION FUND CENTER, OIL POLLUTION ACT (OPA) FREQUENTLY ASKED QUESTIONS, http://www.uscg.mil/npfc/About_NPFC/opa_faqs.asp#faq1.

⁴² U.S. COAST GUARD, OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS at 1.

⁴³ Act to Amend the Oil Pollution Act of 1990, Pub. L. No. 111-191, 124 Stat. 1278 (2010).

⁴⁴ 33 U.S.C. §§ 2712(a), 2761(f).

Sums expended by the Fund for response, removal, and recovery may be recovered from the responsible party. Recovered response and removal costs are not used to respond to the incident for which they were collected; rather, recovered funds go to the Principal Fund for use in future spills. When no responsible party is identified, the Trust Fund finances response, clean up, and claims. Expenditures are limited to \$1 billion per oil pollution incident. Natural resource damage claims and assessments are limited to \$500 million per incident.⁴⁵

IV. Removal Costs and Natural Resources Damages Authority

In addition to civil and criminal liability under the Clean Water Act, responsible parties are liable for two types of costs under the Oil Pollution Act of 1990: removal costs including (a) all removal costs incurred by the United States, a state, or an Indian tribe under provisions of the Clean Water Act, the Intervention on the High Seas Act, or state law; and (b) removal costs incurred by any person which are consistent with the National Contingency Plan;⁴⁶ and damages for injury to natural resources, injury to real or personal property, loss of subsistence use of natural resources, loss of revenues, profits, and earning capacity due to the destruction of real or personal property or natural resources, and costs of increased public services during or after removal.⁴⁷

Authority to recover damages for injuries to natural resources resulting from the spill is addressed in a separate staff working paper entitled Natural Resource Damage Assessment: Evolution, Current Practice, and Preliminary Findings Related to the Deepwater Horizon Oil Spill (No. 17). In brief, the Oil Pollution Act authorizes natural resource trustees—representing federal, state, Indian, or foreign governments—to recover “the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; the diminution in value of those natural resources pending restoration; plus the reasonable cost of assessing those damages.”⁴⁸ Natural resource damages are deposited in a revolving trust account “without further appropriation, for use only to reimburse or pay costs incurred by the trustee . . . with respect to the damaged natural resources.”⁴⁹

V. Limitation of Liability Under the Oil Pollution Act of 1990

Responsible parties are not liable for the costs of removal or damages if violations are caused solely by an act of God, act of war, or act or omission of a third party.⁵⁰ Based on the Deepwater Horizon’s status as a mobile offshore drilling unit, gross tonnage, and current response costs, the Oil Pollution Act limits the responsible party’s liability to all removal costs plus \$75 million.⁵¹ The limit would not apply if the incident was proximately caused by a

⁴⁵ 26 U.S.C. § 9509(c)(2).

⁴⁶ 33 U.S.C. § 2702(b)(1). The National Contingency Plan is a set of federal regulations prescribing the government’s response to spills and threatened spills of oil and other hazardous materials.

⁴⁷ *Id.* § 2702(b)(2).

⁴⁸ *Id.* § 2706(d).

⁴⁹ *Id.* § 2706(f).

⁵⁰ *Id.* § 2703(a).

⁵¹ *Id.* § 2704(a).

responsible party's gross negligence, willful misconduct, or violation of applicable Federal safety, construction, or operation regulation.⁵²

BP "has chosen to waive the statutory limitation on liability under [the Oil Pollution Act]".⁵³ As of December 22, 2010, BP and the Gulf Coast Claims Facility (administrator of a \$20 billion escrow account funded by BP) had paid or approved for payment over \$4.3 billion for private claims, removal costs, and direct payments to governments.⁵⁴ Congress, the Administration and private citizens have questioned whether current Oil Pollution Act limits on liability are appropriate and whether they should be raised or removed entirely.

Even if BP had not waived the limitation on liability, however, it would still be responsible for paying amounts far greater than \$75 million because the limitation on liability also does not apply to civil and criminal penalties under federal and state law, oil spill removal costs under federal law, or claims for damages brought under state law.⁵⁵ For BP, these amounts outside the scope of the liability limitation include: removal costs (BP has paid over \$1 billion to date),⁵⁶ the potential billions of dollars in civil and criminal penalties identified in Section II, above; unlimited liability for damages in some states and potentially, civil and/or criminal penalties under state law. Thus, in the case of the BP spill and other spills, the liability cap would not represent the total amount a responsible party must in fact pay in connection with a spill.

VI. Selected Wildlife Statutes

The Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act authorize the government to bring both civil and criminal suits for actions that harm protected wildlife. Below is a brief description of each of these laws, which are potentially applicable to the Gulf spill.⁵⁷

⁵² *Id.* § 2704(c)(1).

⁵³ Statement of BP Exploration & Production Inc. Re Applicability of Limit of Liability Under Oil Pollution Act of 1990, In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 10-md-2179 (E.D. La. Oct. 18, 2010); *see also* The Role of BP in the Deepwater Horizon Explosion and Oil Spill: Hearing before the Subcomm. On Oversight and Investigations of the H. Comm. on Energy and Commerce, 111th Cong. (2010) (written testimony of Tony Hayward, CEO of BP) (BP has committed to paying "all necessary clean up costs and all legitimate claims for other losses and damages caused by the spill.")

⁵⁴ BP, CLAIMS AND GOVERNMENT PAYMENTS GULF OF MEXICO SPILL PUBLIC REPORT (Dec. 22, 2010), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Public_Report_12.22.10.pdf.

⁵⁵ *Id.* § 2718.

⁵⁶ BP, CLAIMS AND GOVERNMENT PAYMENTS GULF OF MEXICO SPILL PUBLIC REPORT (Feb. 10, 2011), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Public_Report_2-10-11.pdf.

⁵⁷ A Congressional Research Service report discussing criminal liability related to the spill under wildlife laws concluded that it would be difficult for the government to bring successful criminal prosecutions under the Endangered Species Act and the Marine Mammal Protection Act because of the *mens rea* requirements of those acts. By contrast, according to the report, it would be easier for the government to successfully bring criminal prosecutions under the misdemeanor provisions of the Migratory Bird Treaty Act, which imposes strict liability on defendants. CONGRESSIONAL RESEARCH SERVICE, THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS (June 28, 2010), available at: http://assets.opencrs.com/rpts/R41308_20100628.pdf. The Congressional Research Report does not discuss civil liability.

A. Endangered Species Act

Under the Endangered Species Act, it is illegal to “take” a species listed as endangered or threatened.⁵⁸ Persons who *knowingly* violate civil provisions of the Act may be subject to penalties ranging from \$13,200 to \$32,500 per offense.⁵⁹ Persons who *knowingly* violate criminal provisions of the Act may be fined up to \$50,000 and imprisoned for up to one year.⁶⁰ Anyone who otherwise violates the Act is subject to a civil penalty up to \$650 per offense.⁶¹

Penalties and fines collected for violations of the Act may be used to pay costs up to \$500,000 incurred by a person providing temporary care for fish, wildlife, or plants pending the outcome of a legal proceeding under the Act.⁶² Excess funds are deposited in the Cooperative Endangered Species Conservation Fund, which provides grants to states and territories for species and habitat conservation.⁶³

B. Marine Mammal Protection Act

Subject to exceptions, the Marine Mammal Protection Act makes it unlawful to take marine mammals.⁶⁴ Any person who *knowingly* violates the Act is subject to criminal prosecution and may be fined up to \$20,000, imprisoned for up to a year, or both for each violation.⁶⁵ Under the civil enforcement provisions, violations are punishable by a penalty of up to \$11,000 per violation.⁶⁶ Civil penalties under the Act could be substantial for this spill because of the broad statutory definitions of “take” and “harassment.”⁶⁷

Criminal fines for violations of the Act may be used by the U.S. Fish and Wildlife Service for protection and recovery of manatees, polar bears, sea otters, and walrus.⁶⁸ Civil penalties under the Act are paid to the U.S. Treasury.

C. Migratory Bird Treaty Act

The Migratory Bird Treaty Act makes it a criminal act “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird, [or] any part, nest, or eggs of

⁵⁸ 16 U.S.C. § 1538(a). Take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

⁵⁹ 16 U.S.C. § 1540(a); 15 C.F.R. § 6.4(e)(13).

⁶⁰ 16 U.S.C. § 1540(b).

⁶¹ *Id.* § 1540(a)(1); 15 C.F.R. § 6.4(e)(13).

⁶² 16 U.S.C. § 1540(d).

⁶³ *Id.* §§ 1535, 1540(d).

⁶⁴ *Id.* § 1372(a).

⁶⁵ *Id.* § 1375(b).

⁶⁶ *Id.* § 1375(a)(1); 15 C.F.R. § 6.4(e)(10).

⁶⁷ Take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). And “harassment” includes “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” *Id.* § 1362(18)(a). *See also* CONGRESSIONAL RESEARCH SERVICE, THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS at 4.

⁶⁸ 16 U.S.C. § 1375a.

any such bird”⁶⁹ Under the Act’s misdemeanor provisions, violators are strictly liable and may be fined up to \$15,000 and imprisoned for up to six months.⁷⁰ The Act also permits felony prosecutions,⁷¹ but a person cannot be convicted of a felony under the Act without intent to take a migratory bird, to sell or barter a taken migratory bird, or to place bait in order to take a migratory bird.

Criminal penalties under the Act have historically varied in severity.⁷² Although Exxon paid a fine following the Exxon Valdez spill in part based on violations of the Migratory Bird Treaty Act, it is not clear what portion of the fine was imposed pursuant to the Act because Exxon’s plea involved a number of violations of federal law.⁷³ The Act may be an effective tool for assessing criminal fines resulting from the spill.

Criminal fines are generally paid to the Crime Victims Fund.⁷⁴ Congress is authorized to direct fines and penalties received for violations of the Act to the North American Wetlands Conservation Fund for wetlands projects that benefit migratory birds and other wildlife.⁷⁵

VII. Conclusion

Some applicable federal legal authorities provide that recovered funds may be directed to the Gulf. Others may direct funds to unrelated environmental uses. Below is a list of how funds recovered under specific authorities may be used.

- Reimbursement of clean up and removal costs under the Oil Pollution Act are directed to the Oil Spill Liability Trust Fund;
- Natural Resource Damage recoveries obtained under the Oil Pollution Act are directed to the resources in the Gulf that were injured as a result of the spill;
- Civil penalties under the Clean Water Act are deposited into the Oil Spill Liability Trust Fund but are not specifically designated for restoration or other activities in the Gulf;
- A Clean Water Act civil settlement could include a Supplemental Environmental Project, which would likely aim to restore and enhance the Gulf and coastal areas;
- Criminal fines under the Clean Water Act are deposited into the Oil Spill Liability Trust Fund. A court could also order restitution and/or community service payments, both of which could be used in the Gulf;

⁶⁹ *Id.* § 703(a).

⁷⁰ *Id.* § 707(a); *see also, e.g.*, *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995) (holding that strict liability is the standard).

⁷¹ 16 U.S.C. § 707(b)-(c).

⁷² *See* CONGRESSIONAL RESEARCH SERVICE, *THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS* at 7-8.

⁷³ *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 479 (2008) (recounting Exxon’s settlement with the United States for criminal violations of the Clean Water Act, the Refuse Act of 1899, and the Migratory Bird Treaty Act); *see also* CONGRESSIONAL RESEARCH SERVICE, *THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS* at 7-8.

⁷⁴ 42 U.S.C. § 10601.

⁷⁵ 16 U.S.C. § 4406.

- Criminal fines under the Migratory Bird Treaty Act may be directed to the North American Wetlands Conservation Fund, which provides funds for wetlands conservation projects;
- Fines and penalties under the Endangered Species Act may go to the Cooperative Endangered Species Conservation Fund for species and habitat conservation; and
- Criminal fines under the Marine Mammal Protection Act may be used by the U.S. Fish and Wildlife Service for protection and recovery of manatees, polar bears, sea otters, and walruses.