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Wildlife Protection and Off-Shore Drilling: Can There Be a Balance Between the Two?

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WILDLIFE PROTECTION AND OFF-SHORE DRILLING: CAN THERE BE A BALANCE BETWEEN THE TWO?

*Tina M. Smith**

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INTRODUCTION

The Oil Spill in the Gulf of Mexico is the worst environmental disaster America has ever faced.¹ The millions of gallons of oil that have spilled into the Gulf of Mexico are more like an epidemic, one that we will be fighting for months and even years.²

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1. Long-Term Gulf Coast Restoration Support Plan, 75 Fed. Reg. 38,913 (July 6, 2010) [hereinafter Memo] (memorandum from President Barack Obama).

2. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT at 173 (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

Just over 21 years ago, on March 24, 1989, the largest oil spill in North America occurred when the Exxon *Valdez* oil tanker ran aground on Bligh Reef in Alaska and spilled 10.8 million gallons of crude oil into Prince William Sound.³ Today, we are faced with the BP⁴ *Deepwater Horizon*⁵ oil spill. The *Deepwater Horizon* spilled approximately 4.9 million barrels⁶ into an area that had already suffered significant hardship; it also contributed to the destruction of the area's unique beauty.⁷

On April 20, 2010, *Deepwater Horizon* (the oil rig that BP leased from Transocean Ltd.⁸ and situated on the Outer Continental Shelf (OCS)), exploded in the Gulf of Mexico.⁹ The drilling rig exploded while in the process of temporarily abandoning an exploratory well, known as the Macondo well.¹⁰ This explosion not only took eleven human lives, but also caused devastating consequences to the environment.¹¹ The Gulf of Mexico is the home and killing zone to a great number of species. As we stop and look at what our beautiful Gulf has become, we are perpetually frightened by the images of dead, oil covered animals, particularly the Brown Pelican. Every television news station, newspaper, and internet story has shown photographs of

3. Valdez Alaska, Exxon Valdez Oil Spill, <http://www.valdezalaska.org/history/oilSpill.html> (last visited June 3, 2010).

4. BP is one of the world's largest energy companies. See BP, <http://www.bp.com/sectiongenericarticle.do?categoryId=3&contentId=2006926> (last visited July 3, 2010).

5. Arnold & Itkin LLP, Deepwater Horizon Fleet Specifications, <http://transoceanlawsuits.com/involved-parties/transocean/deepwater-horizon/> (last visited March 3, 2011). The Deepwater Horizon is a Reading & Bates Falcon RBS8D design semi-submersible drilling unit capable of operating in harsh environments and water depths up to 8,000 ft.

6. Marine Mammal Commission, The Deep Water Horizon Spill and Marine Mammals (Jan. 17, 2011), http://www.mmc.gov/oil_spill/welcome.html.

7. Memo, *supra* note 1.

8. Transocean, the world's largest offshore drilling contractor, provides the most versatile fleet of mobile offshore drilling units to help clients find and develop oil and natural gas reserves. See, Transocean, <http://www.deepwater.com/fw/main/Our-Company-2.html> (last visited July 3, 2010).

9. Russell Gold, et al. *Leaking Oil Well Lacked Safeguard Device*, THE WALL STREET JOURNAL (2010), available at <http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html>.

10. REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT, (2010), <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf>.

11. CBS News: *Gulf Oil Spill by the Numbers*, May 25, 2010, http://www.cbsnews.com/stories/2010/04/30/national/main6447428.shtml?source=related_story.

the precious wildlife, and the effects that the BP oil spill has had on them.¹²

Several federal laws protect our environment and certain species. The most well known protection is from the Endangered Species Act of 1973 (ESA).¹³ Other sources of protection for the environment and species include, but are not limited to, the Marine Mammal Protection Act of 1972 (MMPA),¹⁴ the Migratory Bird Treaty Act of 1918 (MBTA),¹⁵ and the Oil Pollution Act of 1990 (OPA).¹⁶

As generation after generation try to enforce and teach that every life makes a difference in the way our ecosystem functions, we are faced with what course of action to take when human error plays a part in environmental disasters. In turn we have to rely on current laws of the federal government, or state and local governments, to hold the responsible parties liable for any harm incurred from disasters such as oil spills. Because of the detrimental impact of oil spills, the federal government should require that no corporation be allowed to bypass an environmental impact study when desiring to perform off shore drilling. Requiring an environmental review for all off-shore drilling would inform decision-makers and the public of the environmental effects of a proposed project and reasonable alternatives that would avoid or minimize adverse impacts.¹⁷ This would also allow the federal government to prepare for disasters such as the BP oil spill.¹⁸

This paper will analyze the current animal protection laws and off-shore drilling regulations to evaluate whether human error is considered when putting a price on our natural resources that have been destroyed from an oil spill. Part I discusses applicable provisions of the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act. Part II reviews the history of the

12. See generally CBS News: http://www.cbsnews.com/2300-201_162-10003552.html?tag=featuredPostArea; International Bird Rescue Research Center: <http://www.ibrrc.org/gulf-oil-spill-response-2010.html> (last visited Mar. 3, 2011).

13. The Endangered Species Act of 1973, 16 U.S.C. §§1531-1544 (2009), available at <http://www.nmfs.noaa.gov/pr/pdfs/laws/esa.pdf>.

14. The Marine Mammal Protection Act of 1972 as Amended (2007), 16 U.S.C. §§ 1361-1421, available at <http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf>.

15. The Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712, available at <http://epw.senate.gov/mbta.pdf>.

16. The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762, available at <http://epw.senate.gov/opa90.pdf>.

17. Jaclyn Lopez, *BP's Well Evaded Environmental Review: Categorical Exclusion Policy Remains Unchanged*, 37 *ECOLOGY L.Q.* 93, 94 (2010), available at <http://elq.typepad.com/currents/2010/currents37-10-lopez-2010-1102.pdf>.

18. *Id.*

Oil Pollution Act and how it was enacted by Congress in response to the Exxon Valdez oil spill, the unprecedented environmental disaster.¹⁹ Part III provides an account of the recent BP *Deepwater Horizon* oil spill and how oil spills affect wildlife. Part IV recommends steps that the government and private companies should take in order to preserve and protect our wildlife.

I. LAWS THAT PROTECT WILDLIFE

*"Once destroyed, biological capital cannot be recreated."*²⁰

Protection for animals in the United States did not come into play until the late 1800's.²¹ In 1866, New York resident Henry Bergh, drafted the first laws that considered the welfare of animals²² and founded the American Society for the Prevention of Cruelty to Animals (A.S.P.C.A.),²³ which was to enforce the enacted laws.²⁴ This created a ripple effect within states who responded by creating their own Societies for the Prevention of Cruelty to Animals (S.P.C.A.).²⁵ It was best stated by Judge Arnold in *Stevens v. State*, "[t]his statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners."²⁶

19. Barack H. Obama, President of the United States, President's Remarks on the Gulf Oil Spill, (May 27, 2010), the White House, available at <http://www.whitehouse.gov/the-press-office/remarks-president-gulf-oil-spill>. [hereinafter President's Remarks].

20. Donald Baur, Michael Gosliner & Nina Young, *The Law of Marine Mammal Conservation*, in OCEAN AND COASTAL LAW AND POLICY 477 & 510 n.1 (Donald C. Baur, Tim Eichenberg & Michael Sutton eds., 2008). Marine Mammals: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 92d Cong. 2 (Sept. 9, 1971) (statement of Rep. Dingell).

21. David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800's*, 1 Det. C.L. 1 (1993), available at http://www.animallaw.info/articles/arufavre_histcruelty1993.htm#N_20_.

22. See ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 14 (2009) (explaining that animal welfare typically focuses on the pain and suffering animals endure at human hands).

23. Favre, *supra* note 21. ASPCA's purpose is "[t]o provide effective means for the prevention of cruelty to animals throughout the United States, to enforce all laws which are now or may hereafter be enacted for the protection of animals and to secure, by lawful means, the arrest and conviction of all persons violating such laws." See also ASPCA, <http://www.aspc.org/about-us/> (last visited July 3, 2010).

24. *Id.*

25. *Id.*

26. *Id.* See also, *Stevens v. State*, 65 Miss. 329, 330 (Miss. 1887).

Whereas most laws treat animals as personal property, wildlife is treated as property that is under the absolute control of the government for the use and benefit of the people.²⁷ Two agencies of the United States that regulate the protection of wildlife are the U.S. Fish & Wildlife Service (FWS)²⁸ and the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NOAA Fisheries Service).²⁹ The FWS, under the direction of the Secretary of the Interior, is responsible for avian, terrestrial, and freshwater species.³⁰ The NOAA Fisheries Service, under the direction of the Secretary of Commerce, is responsible for marine and anadromous species.³¹ Exceptions include marine turtles, which are under the control of the NOAA Fisheries Service when they are in the ocean and under the control of the FWS when they are on their nesting beaches.³² The FWS and the NOAA Fisheries Service protect and regulate wildlife through numerous laws and treaties, including, but not limited to, the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act.³³ All three statutes make it unlawful for a person to take a listed animal without a permit.³⁴ The statutes also apply the term “take” to determine whether a person has

27. DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* 381 (2002).

28. The U.S. Fish and Wildlife Service (FWS), an agency within the U.S. Department of the Interior, is the premier government agency dedicated to the conservation, protection, and enhancement of fish, wildlife and plants, and their habitats. It is the only agency in the federal government whose primary responsibility is management of these important natural resources for the American public. See U.S. Fish & Wildlife Service, <http://www.fws.gov/fwsataglace.html> (last visited June 5, 2010).

29. The NOAA National Marine Fisheries Service is an agency of the National Oceanic and Atmospheric Administration (NOAA), within the Department of Commerce. The Fisheries Service is dedicated to protecting & conserving our nation’s living marine resources through scientific research, management, enforcement, & habitat conservation. See National Marine Fisheries Service, http://www.nmfs.noaa.gov/docs/080609_NOAAF_12045_Brochure_CMYK.pdf.

30. Wm. Robert Irvin & Michael J. Bean, *The Endangered Species Act and Marine Species*, in *OCEAN AND COASTAL LAW AND POLICY* 519, 521 (Donald C. Baur, Tim Eichenberg & Michael Sutton eds., 2008).

31. *Id.*

32. *Id.*

33. *Id.* at 483, 521.

34. The Endangered Species Act, 16 U.S.C. § 1532. The Migratory Bird Treaty Act, 16 U.S.C. §703. The Marine Mammal Protection Act, 16 U.S.C. § 1362. A “person” is as, any private person or entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government. See The Endangered Species Act, 16 U.S.C. §1362(13) and The Marine Mammal Protection Act, 16 U.S.C. § 1362(10).

violated the act that protects that particular species.³⁵ The main difference between these statutes is that (1) the ESA provides for civil and criminal violations that are done “knowingly”; (2) the MMPA provides for civil and criminal violations, but with the “knowingly” provisions applying only to criminal violations; and (3) the MBTA provides for only criminal violations which allows for prosecution based on strict liability.³⁶

A. *The Endangered Species Act of 1973*

The history of protection for endangered species dates back to 1962 when the Department of the Interior established a Committee on Rare and Endangered Wildlife Species, and two years later, published a list of 63 species that were considered to be threatened with extinction.³⁷ Over the years, the protection for threatened or endangered species developed into what we currently know as the Endangered Species Act of 1973 (ESA).³⁸ The ESA was the first major piece of legislation in any legal system that sought to put teeth into the protection of endangered species domestically and internationally.³⁹ Congress found that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation” and that these species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”⁴⁰ In 1978, the U.S. Supreme Court found that “examination of the language, history, and structure of the [ESA] indicates, beyond doubt, that Congress intended endangered species to be afforded the highest of priorities.”⁴¹ The purpose of the ESA is to protect and re-

35. The Marine Mammal Protection Act, 16 U.S.C. § 1362(13). The Endangered Species Act, 16 U.S.C. § 1532(19).

36. Kristina Alexander, *The 2010 Oil Spill: Criminal Liability Under Wildlife Laws*, CRS Report For Congress R41308 (2010), available at <http://www.fas.org/sgp/crs/misc/R41308.pdf>.

37. GOBLE & FREYFOGLE, *supra* note 27, at 1164.

38. *Id.* at 1165-67.

39. ZYGMUNT J.B. PLATER, ROBERT H. ABRAMS, ROBERT L. GRAHAM, DAVID A. WIRTH & NOAH D. HALL, *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 428 (4th ed. 2010).

40. 16 U.S.C. § 1531(a)(1) and 16 U.S.C. § 1531(a)(3). Endangered Species Act of 1973, available at <http://www.fws.gov/endangered/esa-library/pdf/ESAa11.pdf>.

41. Irvin & Bean, *supra* note 30, at 521. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

cover imperiled species and the ecosystems upon which they depend.⁴² To prevent extinction, the Act provides three regulatory approaches: (1) Section 9 prohibits the importation and domestic sale of endangered species and their parts; (2) Section 7 forbids federal agencies from harming species; and (3) Section 9 also forbids the killing and taking of endangered species.⁴³ Section 7 and 9 are considered “roadblock” statutes where the legislative branch has put down a flat prohibition on environmentally damaging behavior.⁴⁴ Another important aspect of the ESA is Section 11(g)(4),⁴⁵ which is a citizen suit enforcement provision that allows citizens to take on the task of enforcing federal statutes.⁴⁶

The ESA is under the regulation of the U.S. Fish and Wildlife Service (FWS) and the NOAA Fisheries Service.⁴⁷ States are encouraged to develop and maintain conservation programs to protect threatened and endangered species; and the state laws and regulations are often more restrictive than the ESA in granting exceptions or permits.⁴⁸

Under the ESA, certain species of plants and animals (both vertebrate and invertebrate) are listed as either endangered or threatened according to assessments of the risk of their extinction.⁴⁹ To be protected under the ESA, a plant or animal must first be listed as either threatened or endangered.⁵⁰ As of July 5, 2010 there were 1,221 animals and 798 plants that were listed on the ESA as being threatened or endangered.⁵¹

Five factors are considered when listing a species, (1) damage to, or destruction of, a species’ habitat; (2) overutilization of the species for commercial, recreational, scientific, or educational purposes; (3)

42. U.S. Fish & Wildlife Services, *More Than 30 Years of Conserving Endangered Species* (Feb. 2009), http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

43. PLATER ET AL., *supra* note 39.

44. *Id.*

45. 16 U.S.C. § 1540(g)(4).

46. PLATER ET AL., *supra* note 39, at 245.

47. U.S. Fish & Wildlife Service Creation, Authority, and Functions (March 16, 1998), <http://www.fws.gov/policy/022fw1.html>. (NOAA, <http://www.nmfs.noaa.gov/aboutus.htm> (last visited July 5, 2010)).

48. U.S. Fish & Wildlife Service, *supra* note 42.

49. Eugene Buck, M. Lynne Corn & Pamela Baldwin, *The Endangered Species Act and “Sound Science”*, in *ENDANGERED SPECIES ACT UPDATE & IMPACT 1* (Evelyn T. Vaga ed., 2008).

50. Irvin & Bean, *supra* note 30.

51. U.S. Fish & Wildlife Service, *Listed Animals*, http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp (last visited July 5, 2010). *See also*, U.S. Fish & Wildlife Service, *Listed Plants*, http://ecos.fws.gov/tess_public/pub/listedPlants.jsp (last visited July 5, 2010).

disease or predation; (4) inadequacy of existing protection; and (5) other natural or manmade factors that affect the continued existence of the species.⁵²

Under the ESA it is unlawful for a person to “take” a listed animal without a permit.⁵³ Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”⁵⁴ To take may also include significant habitat destruction that actually kills or injures an endangered species.⁵⁵ A knowing violation of most provisions may be punished by a civil penalty of not more than \$25,000 or upon a criminal conviction not more than \$50,000, imprisonment of not more than one year, or both.⁵⁶ Endangered species are protected against “taking” within the United States, in its territorial sea, and upon the high seas.⁵⁷ Generally, threatened species are afforded the same protection as endangered species unless special regulations have been put into place.⁵⁸ The Endangered Species Act remains one of the nation’s strongest environmental laws.⁵⁹

B. *The Marine Mammal Protection Act of 1972*

On December 21, 1972, the Marine Mammal Protection Act (MMPA) became the first statute to identify marine ecosystem management as a priority for federal action.⁶⁰ The primary objective of the MMPA is “to maintain the health and stability of the marine ecosystem,” in theory, indicating that marine animals must be managed for their benefit and not for the benefit of commercial exploitation.⁶¹ The Act was established to prevent marine mammal species from declining beyond the point where they ceased to be significant functioning ele-

52. U.S. Fish & Wildlife Service, *supra* note 42.

53. *Id.* Harm is defined as “an act which actually kills or injures wildlife.” There are “incidental take permits” but they will not be discussed here.

54. *Id.*

55. Irvin & Bean, *supra* note 30, at 522.

56. 16 U.S.C. § 1540.

57. Irvin & Bean, *supra* note 30, at 522. (A “take” on the high seas is prohibited if done by persons subject to the jurisdiction of the United States).

58. *Id.* at 522-23.

59. *Id.* at 521.

60. Patrick Parenteau et al., *Legal Authorities for Ecosystem-Based Management in U.S. Coastal and Ocean Areas*, in OCEAN AND COASTAL LAW AND POLICY 597, 610 (Donald C. Baur et al. ed., 2008).

61. The Marine Mammal Protection Act of 1972 as Amended (2007), *supra* note 14, at 16 U.S.C. § 1361(6).

ments of the ecosystems of which they are a part.⁶² The Act was founded on a concern that certain species of marine mammals were in danger of extinction or depletion as a result of man's activities.⁶³ When enacting the MMPA, Congress put into effect a moratorium that allows permits to be issued for the incidental taking in the course of commercial fishing operations.⁶⁴ The Act expressly preempted all state law "relating to the taking of any species [. . .] of marine mammal."⁶⁵ Unlike the ESA, the Act lacks a citizen suit provision, thereby compromising its effectiveness. Enforcement of the MMPA is regulated by the Department of Commerce through the NOAA Fisheries Service, the Department of the Interior through the U.S. Fish and Wildlife Service, and the Department of Agriculture through the Animal and Plant Health Inspection Service (APHIS).⁶⁶

Under the MMPA it is unlawful "for any person subject to the jurisdiction of the United States [. . .] to take any marine mammal on the high seas" or "in waters or lands subject to the jurisdiction of the United States;" and it is also unlawful to possess, transport, purchase, sell, export, or import any marine mammal taken in violation of the Act.⁶⁷ A violation of the provisions will constitute a civil penalty of not more than \$10,000; upon a knowingly violation and conviction, the fine may be increased to not more than \$20,000, with imprisonment of not more than one year, or both.⁶⁸

"Take" is defined as "harass, hunt, capture, kill, or collect, or attempt to harass, hunt, capture, kill, or collect."⁶⁹ Protection is provided to any mammal which (A) is morphologically adapted to the marine environment, or (B) primarily inhabits the marine environment.⁷⁰ Two major groups of marine mammals are: (1) Cetaceans

62. *Id.*

63. *Comm. for Humane Legis. v. Richardson*, 540 F.2d. 1141, 1144 (D.C. Cir. 1976).

64. *Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 800 (D.C. Cir. 1988).

65. GOBLE & FREYFOGLE, *supra* note 27, at 897 (alternation in the original).

66. Creation, Authority, and Functions, Fish and Wildlife Service Manual, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/policy/022fw1.html> (last visited July 5, 2010); *see also*, *About National Marine Fisheries Service*, NOAA FISHERIES SERVICE, <http://www.nmfs.noaa.gov/aboutus.htm> (last visited July 5, 2010). (The NMFS protects whales, dolphins, porpoises, seals, and seal loins. The FWS protects walrus, manatees, otters, and polar bears. The APHIS is responsible for regulations managing marine mammals in captivity. The Marine Mammal Protection Act of 1972 As Amended, *supra* note 14).

67. GOBLE & FREYFOGLE, *supra* note 27, at 905; *see also* 16 U.S.C. § 1372(a)(1-4), (c) (alteration in the original).

68. 16 U.S.C. § 1375.

69. The Marine Mammal Protection Act of 1972 as Amended (2007), *supra* note 14.

70. Baur et al., *supra* note 20, at 483.

(whales, dolphins, and porpoises) and (2) Pinnipeds (seals, sea lions, and walruses).⁷¹ There are approximately 125 marine mammal species worldwide managed under the MMPA.⁷² Any species that is below its optimum sustainable population (OSP) is considered depleted under the Act.⁷³ Threatened and endangered marine mammals are also protected under the Endangered Species Act.⁷⁴

A 1971 report by the House Merchant Marine and Fisheries Committee underscored the need for the Marine Mammal Protection Act:

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interests; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interest of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.⁷⁵

Consequently, the Marine Mammal Protection Act would ensure that "future generations will be able to enjoy a world populated by all species of marine mammals."⁷⁶

71. Marine Mammals, NOAA FISHERIES: OFFICE OF PROTECTED RESOURCES, <http://www.nmfs.noaa.gov/pr/species/mammals/> (last visited June 24, 2010). (Cetaceans are relatively large, generally characterized by streamlined bodies that glide easily through the marine environment. Approximately 78 species of whales, dolphins, and porpoises are included in the Order Cetacea. The word pinnipedia translates from Latin as "feather or fin foot," referring to their often large fin-like flippers. All pinnipeds must come ashore to breed, give birth, and nurse their young. Seals, sea lions, and walruses are taxonomically related to other carnivores, including bears, dogs, raccoons, and weasels (including otters)). [hereinafter Marine Mammals].

72. *Id.*

73. Baur et al., *supra* note 20, at 485. (The OSP standard has considerable legal significance under the MMPA. In addition to serving as the conservation objective of the Act, it establishes a threshold for determining when certain activities are to be prohibited or restricted. According to 16 U.S.C. § 1362 (Marine Mammal Protection Act), the term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. The Marine Mammal Protection Act of 1972 As Amended, *supra* note 14).

74. Marine Mammals, *supra* note 71.

75. Baur et al., *supra* note 20, at 479.

76. *Id.*

C. *The Migratory Bird Treaty Act of 1918*

Among nature's most magnificent living resources is the migratory bird which "play[s] a significant ecological, economic, and cultural role in the U.S. and internationally."⁷⁷ Migratory birds embark twice a year between different countries, over different states, and covering landscapes from the ocean to the mountains in order to breed.⁷⁸ These birds link the countries, the people, and the ecosystems to each other in ways that are unimaginable to the general populous.⁷⁹ The Migratory Bird Treaty Act⁸⁰ (MBTA) is based on the 1916 treaty signed by the United States and Great Britain, on behalf of Canada, entitled the Convention for the Protection of Migratory Birds.⁸¹ Following the Canadian treaty (amended 1995), other treaties were signed with Mexico (1936, amended 1972 and 1999), Japan (1972), and Russia (1976).⁸²

Additionally, the Migratory Bird Treaty Reform Act of 2004 secures that the MBTA no longer applies to non-native species.⁸³ The framers of the MBTA stated that "the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen" create conditions that do not allow for the nesting of migratory birds.⁸⁴ Due to the Migratory Bird Treaty Reform Act of 2004, any birds that result from intentional human introduction are not protected by the MBTA.⁸⁵ Birds that are threatened or endangered are

77. Program Overview, Migratory Bird Program, U.S. FISH & WILDLIFE SERVICE, 1 (2008), available at http://www.fws.gov/migratorybirds/NewReportsPublications/FactSheets/MBM_Fact_Sheet.pdf (alternation in original).

78. *Migratory Birds: A Federal Trust Resource*, 1, <http://www.fws.gov/migratorybirds/AboutUS/mbstratplan/Introduction.pdf> (last visited Apr. 16, 2011).

79. *Id.*

80. Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712.

81. U.S. Fish & Wildlife Service, *Permits*, THE MIGRATORY BIRD PROGRAM, <http://www.fws.gov/migratorybirds/mbpermits.html> (last visited June 12, 2010).

82. *Id.*

83. Interim Management Guidance, Migratory Bird Treaty Act, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/20080/im_2008-050_migratory.html (last visited July 3, 2010).

84. PROTECTION OF MIGRATORY BIRDS, S. REP. NO. 27 (1917), *microformed on* CIS 65th Congress, 1st Session 17-S1553-27 (Cong. Info. Serv.).

85. *List of Protected Birds, Migratory Bird Management Information*, 2, http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/43603_QA_1013_rule.pdf (last visited Apr. 16, 2011).

also protected by the Endangered Species Act.⁸⁶ The protection of migratory birds is not limited to only the MBTA and the ESA.⁸⁷

Under the MBTA it is unlawful, “by any means or in any manner,”⁸⁸ to pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, nest, or egg or any such bird, unless authorized under a permit issued by the Secretary of the Interior.⁸⁹ Upon conviction of a violation, a person is guilty of a misdemeanor and may be fined not more than \$15,000, imprisoned not more than six months, or both and upon a knowing violation is guilty of a felony and may be fined not more than \$2,000, imprisoned not more than two years, or both.⁹⁰ To take is defined by regulations as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect,” or attempts to do such things.⁹¹

Over 800 birds within the United States are protected by the MBTA.⁹² In 1920, the Court affirmed the constitutionality of federal regulation of migratory birds when it was challenged as infringing on the state ownership doctrine.⁹³ The Court held that state ownership of birds could not be established since wild birds “are not in the possession of anyone.”⁹⁴ The Act is managed by the U.S. Fish & Wildlife Service under the direction of the U.S. Department of the Interior.⁹⁵ The mission of the Fish and Wildlife Service’s Migratory Bird Program is to conserve migratory bird populations and their habitats for future generations.⁹⁶

86. *Birds Protected by the Migratory Bird Treaty Act*, 1-2, <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/compare.pdf> (last visited Apr. 16, 2011).

87. *Id.* at 3-6; see also *A Guide to the Laws and Treaties of the United States Migratory Birds*, THE MIGRATORY BIRD PROGRAM, U.S. FISH & WILDLIFE SERVICE <http://www.fws.gov/migratorybirds/RegulationsPolicies/treatlaw.html> (last visited July 5, 2010).

88. 16 U.S.C. §703(a).

89. U.S. Fish & Wildlife Service, *Permits – Bald and Golden Eagle Protection Act Summaries*, THE MIGRATORY BIRD PROGRAM, <http://www.fws.gov/migratorybirds/mbpermits/ActSummaries.html> (last visited on Aug. 3, 2010).

90. 16 U.S.C. §707.

91. U.S. Fish & Wildlife Service, *supra* note 89.

92. *Id.*

93. DIANE OLSON BELANGER, *MANAGING AMERICAN WILDLIFE: A HISTORY OF THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES* 24 (1988); see also, *Missouri v. Holland*, 252 U.S. 416, 430-35 (1920).

94. *Id.*

95. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, <http://www.fws.gov/laws/lawsdigest/treaty.html> (last visited June 13, 2010).

96. THE MIGRATORY BIRD PROGRAM, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/migratorybirds/AboutUS.html> (last visited July 3, 2010).

II. CONSEQUENCES OF OUR NATION'S ENERGY NEEDS

*“Producing oil here in America is an essential part of our overall energy strategy.”*⁹⁷

“The United States uses about 700 million gallons of oil every day; and the world uses nearly 3 billion gallons each day.”⁹⁸ People use oil for many different purposes:

- to fuel our cars, trucks, and buses, and to heat our houses;
- to lubricate machinery large and small, such as bicycles or printing presses;
- to make the asphalt we use to pave our roads;
- to make plastics, such as the toys we play with and the portable radios or CD players we listen to; [and]
- to make medicines, ink, fertilizers, pesticides, paints, varnishes, and electricity.⁹⁹

The nation's increased desire for oil and natural gas resources dates back to the 1800's when the first onshore well was drilled in Pennsylvania.¹⁰⁰ As the desire mounted in 1896, the first offshore well was drilled off the coast of California but was erected at the end of a pier that was generally 300-500 feet long.¹⁰¹ It wasn't until 1947 that the first free-standing platform was drilled in open water.¹⁰² Oil production generated great revenues for the country.¹⁰³

A. Off-Shore Drilling Management and Regulations

In 1945, the seabed natural resources were proclaimed to be the property of the United States.¹⁰⁴ The Federal Government controls the seabed beyond the three-mile limit, in which the coastal states re-

97. President's Remarks, *supra* note 19.

98. *What's the Story on Oil Spills?*, OFFICE OF RESPONSE AND RESTORATION, NOAA'S NATIONAL OCEAN SERVICE, http://response.restoration.noaa.gov/topic_subtopic_entry.php?RECORD_KEY%28entry_subtopic_topic%29=entry_id,subtopic_id,topic_id&entry_id%28entry_subtopic_topic%29=184&subtopic_id%28entry_subtopic_topic%29=27&topic_id%28entry_subtopic_topic%29=3 (last visited July 7, 2010).

99. *Id.*

100. *Leasing Oil and Natural Gas Resources, Outer Continental Shelf, Mineral Management Service*, U.S. DEPARTMENT OF THE INTERIOR, 2, <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>.

101. *Id.* at 2-3.

102. *Id.* at 3.

103. *Id.* at 4.

104. *Id.* at 5. (President Truman declared that the United States had jurisdiction beyond 3 miles of the seabed natural resources of most coastal states. In 1950, the U.S. Supreme Court upheld this decision when the States of Louisiana and Texas sued the Federal Government claiming that the respected states were the sole owners of the offshore

tained control.¹⁰⁵ The portion of the government's control is known as the Outer Continental Shelf (OCS).¹⁰⁶ The division between the Federal Government and Coastal States took place in 1953 when Congress passed the Outer Continental Shelf Lands Act (OCSLA).¹⁰⁷ The OCSLA was not only passed to divide the seabed jurisdiction but also recognized a need to safely conduct oil and natural gas operations.¹⁰⁸ The OCS is regulated by the Minerals Management Service (MMS), a division of the U.S. Department of the Interior, which manages the nation's natural gas, oil, and other mineral resources on the outer continental shelf.¹⁰⁹ Not only is the OCS regulated by the OCSLA, it is also regulated by federal laws, including, but not limited to, the National Environmental Policy Act (NEPA), the Endangered Species Act, and the Marine Mammal Protection Act.¹¹⁰

On May 19, 2010, the Secretary of the Interior issued Secretarial Order No. 3299 which stressed the importance of restructuring the MMS by eliminating one core department and establishing three different departments to oversee effective enforcement, energy development, and revenue collection.¹¹¹ President Obama summed it up in his remarks on May 27, 2010 by saying: "For years, there has been a scandalously close relationship between oil companies and the agency that regulates them. That's why we've decided to separate the people who permit the drilling from those who regulate and ensure the safety of the drilling."¹¹²

On June 18, 2010, the Secretary issued another Secretarial Order, No. 3302, which would change the name of the agency from the MMS to The Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE).¹¹³ The purpose of the BOEMRE is to man-

seabed adjacent to their coasts. The U.S. Supreme Court granted the U.S. exclusive rights to the seabed from the shoreline out to 27 miles).

105. *Id.*

106. *Id.* at 1, 5.

107. *Id.* at 2, 5.

108. *Id.* at 5.

109. Water Challenges, U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov/whatwedo/water/> (last visited Aug. 2, 2010).

110. *Branch of Environmental Assessment (BEA), REGULATION AND ENFORCEMENT, BUREAU OF OCEAN ENERGY MANAGEMENT*, <http://www.boemre.gov/eppd/assessment/index.htm> (last visited Aug. 3, 2010).

111. Ken Salazar, *Order No. 3299*, THE SECRETARY OF THE INTERIOR, (May 19, 2010), available at <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>.

112. President's Remark, *supra* note 19.

113. The Secretary of the Interior, *Order No. 3302* (June 18, 2010), <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872>.

age the ocean energy and mineral resources on the Outer Continental Shelf along with Federal and American Indian mineral revenues to enhance public and trust benefits, promote responsible use, and realize fair value.¹¹⁴ The BOEMRE is now comprised of two major programs: Offshore Energy and Minerals Management (OEMM), and Minerals Revenue Management (MRM).¹¹⁵ The OCS lands are leased under the direction of the OEMM to corporations which explore, develop, and produce oil and natural gas.¹¹⁶

Under the OCSLA (1978), the Gulf of Mexico has an exemption unlike any other area.¹¹⁷ The Gulf of Mexico central and western areas are not required to submit a “development and production plan,” therefore, not triggering the requirement under the NEPA for an impact statement detailing the environmental consequences of development and production.¹¹⁸ The Gulf of Mexico was singled out for less environmental oversight than other parts of the nation’s offshore because the oil and gas industry in the Gulf was already mature and therefore the environmental risks were already better known.¹¹⁹ In 1981, the Department of the Interior promulgated final rules declaring exploration plans in the central and western Gulf of Mexico “categorically excluded” from NEPA review and also categorically excluded from NEPA review applications to drill wells.¹²⁰

Under NEPA regulations for proposed actions three review processes are established: (1) Environmental Impact Statement (EIS), (2) Environmental Assessment (EA), and (3) Categorical Exclusion (CE).¹²¹ An EIS is a detailed analysis of the potential environmental impacts of a proposed action (and alternatives) that may have a significant impact on the environment.¹²² An EA is a briefer analysis

114. Bureau of Ocean Energy Management, Regulation and Enforcement, Who is BOEMRE?, <http://www.boemre.gov/aboutBOEMRE/> (last visited Aug. 2, 2010).

115. *Id.*

116. Bureau of Ocean Energy Management, Regulation and Enforcement, Offshore Energy and Minerals Management (OEMM), <http://www.boemre.gov/offshore/> (last visited Aug. 3, 2010).

117. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President (Jan. 2011), available at <http://www.oilspillcommission.gov/final-report> (last visited on Feb. 3, 2011).

118. *Id.*

119. *Id.*

120. *Id.*

121. National Environmental Policy Act Implementing Procedures, 76 Fed. Reg. 214 (Jan. 3, 2011) (to be codified at 10 C.F.R. pt. 1021). Also available at http://nepa.energy.gov/documents/CXNOPR_01_03_11.pdf (last visited on Feb. 28, 2011).

122. *Id.*

conducted to determine whether a proposed action may have a significant impact on the environment and thus whether an EIS is required.¹²³ A CE is a class of actions that a federal agency has determined does not, absent extraordinary circumstances, individually or cumulatively have a significant impact on the human environment and therefore, neither an EA nor an EIS is required for a CE.¹²⁴ A CE was created to reduce the amount of unnecessary paperwork and delay associated with NEPA compliance.¹²⁵

NEPA requires “federal agencies to integrate environmental values into their decision making processes by considering the environmental impact of their proposed actions and reasonable alternatives to those actions.”¹²⁶ “In enacting NEPA, Congress recognized that many [f]ederal activities affect the environment in some way and mandated that before [f]ederal agencies make certain decisions, they must consider the effects of their actions on the quality of the human environment.”¹²⁷ NEPA requires the preparation of an Environmental Impact Statement prior to conducting any major federal action that could significantly affect the quality of the human environment.¹²⁸ Additionally, the public must be engaged before agencies can decide “whether and how they will proceed.”¹²⁹ “Complying with NEPA means agencies must complete NEPA environmental reviews of proposed major actions.”¹³⁰ On January 1, 2010, NEPA’s 40th Anniversary, President Obama proclaimed, “NEPA elevated the role of environmental considerations in proposed [f]ederal agency actions, and

123. *Id.*

124. *Id.*

125. Melissa Schwartz, *Categorical Exclusions for Gulf Offshore Activity to be Limited While Interior Reviews NEPA Process and Develops Revised Policy* (Aug. 16, 2010), <http://www.doi.gov/news/pressreleases/Categorical-Exclusions-for-Gulf-Offshore-Activity-to-be-Limited-While-Interior-Reviews-NEPA-Process-and-Develops-Revised-Policy.cfm>.

126. National Environmental Policy Act, Compliance and Enforcement, <http://www.epa.gov/compliance/nepa/> (last visited Aug. 5, 2010).

127. Christina Glunz and Kendra Barkoff, Press Release, *Council on Environmental Quality and Department of the Interior Announce Review of Minerals Management Service NEPA Procedures* (May 14, 2010), <http://www.doi.gov/news/pressreleases/Council-on-Environmental-Quality-and-Department-of-the-Interior-Announce-Review-of-Minerals-Management-Service-NEPA-Procedures.cfm> (last visited Dec. 28, 2010) (alteration in original).

128. U.S. Dept of the Interior Bureau of Land Management, National Environmental Policy Act of 1969 (NEPA), <http://www.blm.gov/wo/st/en/info/nepa.2.html> (last visited Feb. 28, 2011).

129. Glunz & Barkoff, *supra* note 127.

130. *Id.*

it remains the cornerstone of our Nation's modern environmental protections."¹³¹

In modern society, one does not stop to think about how the oil for automobiles or lights is acquired vis-à-vis drilling into the earth's core in search of crude oil.¹³² Only when a major environmental disaster occurs, do we contemplate how our natural resources, which include our land, seas, air, and our wildlife, which are our resources for the future, and our world's beauty, is being destroyed for our needs.

The ESA mandates that the Secretary of Interior or Commerce insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.¹³³ When operations on the OCS involve the presence of endangered or threatened animals, the ESA and MMPA can have an effect on the location, timing, and extent of oil and gas activities.¹³⁴ "Section 7 of the ESA mandates all Federal Agencies consult with the Secretary of Commerce (via NMFS), and/ or Interior (via USFWS), to insure that any 'agency action' is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of an endangered or threatened species' critical habitat."¹³⁵

B. *The Oil Pollution Act of 1990*

On March 24, 1989, an Exxon *Valdez* tanker carrying 53,094,510 gallons of crude oil ran aground at Bligh Reef in Alaska, rupturing eight of its eleven cargo tanks and eventually spewed 10.8 million gallons into Prince William Sound.¹³⁶ Within the first six hours of being grounded, the Exxon *Valdez* tanker spilled the bulk of the oil that ultimately affected over 1,100 miles of coastline in

131. Proclamation No. 8469, 75 Fed. Reg. 885 (Jan. 7, 2010). See <http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=GFSBBN/1/2/0&WAISaction=retrieve> (last visited Feb. 27, 2011) (alteration in original).

132. FUELING THE FUTURE: OIL 120 (Crystal McCage ed., 2007).

133. *Id.*

134. *Id.*

135. U.S. Department of the Interior, Branch of Environmental Assessment, Endangered Species Act, <http://www.boemre.gov/eppd/compliance/esa/index.htm> (last visited Aug. 3, 2010).

136. Final Report, Alaska Oil Spill Commission, Details about the Accident (Feb. 1990), available at <http://www.evostc.state.ak.us/facts/details.cfm> (last visited June 21, 2010). The Exxon Valdez Oil Spill Trustee Council was formed to oversee restoration of the injured ecosystem through the use of the \$900 million civil settlement. The Council consists of three state and three federal trustees.

Alaska.¹³⁷ This spill tested all aspects of whether Exxon, or Federal or State, governments were actually ready for an incident of this magnitude.¹³⁸ The slow response was evidenced by the fourteen (14) hours it took for the first full emergency crew to arrive at the scene and the additional twenty-one hours before oil contaminant equipment surrounded the tanker.¹³⁹ Clean-up procedures took place from April 1989 through September 1989 and again in 1990 and 1991, with a total of “more than 11,000 personnel, 1,400 vessels, and 85 aircrafts involved in the effort.”¹⁴⁰

There were loss to fisheries, livelihoods, and wildlife.¹⁴¹ Unfortunately, the grounding of the Exxon *Valdez* “occurred at the beginning of the bird migration season.”¹⁴² The images Americans saw on television and the descriptions they heard over the radio “were of heavily oiled shorelines, dead and dying wildlife and thousands of workers mobilized to clean beaches.”¹⁴³ Since most carcasses sink, the best estimate of the number of animals affected are: “250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, up to 22 killer whales, and billions of salmon and herring eggs.”¹⁴⁴ According to the Exxon Valdez Oil Spill Trustee Council 2010 Restoration Plan Update, most wildlife has since recovered or is in the process of recovering.¹⁴⁵

Due to the sufficient damage caused by the oil spill, the United States filed suit for criminal prosecution against Exxon for violating various environmental laws, including the Clean Water Act, the Refuse

137. NOAA's Office of Response and Restoration, *T/V Exxon Valdez* (Mar. 24, 1989), <http://www.incidentnews.gov/incident/6683> (last visited July 3, 2010). Incident News website provides publicly available information related to oil and hazardous material spills, both current and historical. It is developed and maintained by NOAA; Emergency Response Division (ERD). ERD was formerly known as HAZMAT.

138. Final Report, *supra* note 136.

139. JOSEPH KALO, RICHARD HILDRETH, ALISON RIESER & DONNA CHRISTIE, *COASTAL AND OCEAN LAW: CASES AND MATERIALS 775* (Thompson West 2007).

140. NOAA's Office of Response and Restoration, *supra* note 137.

141. Final Report, *supra* note 136.

142. NOAA's Office of Response and Restoration, *Other Special Interest News* (Mar. 24, 1989), <http://www.incidentnews.gov/entry/515610> (last visited July 3, 2010).

143. NOAA Ocean Service Education, *Prince William's Oily Mess: A Tale of Recovery*, http://oceanservice.noaa.gov/education/stories/oilymess/oily01_infamous.html (last visited July 7, 2010).

144. Exxon Valdez Oil Spill Trustee Council, Questions and Answers, <http://www.evostc.state.ak.us/facts/qanda.cfm> (last visited July 7, 2010).

145. Exxon Valdez Oil Spill Trustee Council, Exxon Valdez Oil Spill Restoration Plan (May 14, 2010), <http://www.evostc.state.ak.us/Universal/Documents/Publications/2010IRSUpdate.pdf>.

Act, and the Migratory Bird Treaty Act.¹⁴⁶ Exxon Corporation pled guilty to one count of violating the Migratory Bird Treaty Act and Exxon Shipping pled guilty to one count each of violating the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.¹⁴⁷ Both corporations were jointly fined \$25 million and ordered to pay restitution of \$100 million.¹⁴⁸

In a civil proceeding, the United States and the State of Alaska sued Exxon for natural resource damages and reached a \$900 million settlement to be paid over a period of ten years.¹⁴⁹ The civil settlement included a “reopener” clause providing the United States and/or the State of Alaska the right to request additional monies, not to exceed \$100 million, for the purpose of restoring “one or more populations, habitats, or species which, as a result of the Oil Spill, have suffered a substantial loss or substantial decline.”¹⁵⁰ On August 31, 2006, the Government started the reopener process, requesting an additional \$92 million for the restoration of unanticipated injuries to natural resources.¹⁵¹ The Exxon *Valdez* spill became known as the nation’s biggest environmental disaster.¹⁵²

The magnitude of the Exxon *Valdez* oil spill revealed numerous weaknesses in the oil spill contingency planning and response readiness at the federal, state, and local levels.¹⁵³ In April 1989, the

146. Brad Marten, *Fighting the Last War: The Relevance (and Irrelevance) of the Exxon Valdez Spill to the Deepwater Horizon Spill* (May 5, 2010), <http://www.martenlaw.com/newsletter/20100505-deepwater-horizon-spill> (last visited June 24, 2010). Mr. Brad Marten was the Attorney who represented the State of Alaska in the case against Exxon for the Exxon Valdez oil spill in 1989.

147. *Id.*

148. *Id.*

149. Agreement and Consent Decree, *United States v. Exxon Corp. and Alaska v. Exxon Corp.*, Filed Oct. 9, 1991 in the United States District Court District of Alaska, http://www.evostc.state.ak.us/pdf/settlement/agreement_consent_decree093091.PDF. Natural Resources being defined as 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, the State, or both the United States and the State.

150. *Id.*

151. Exxon Valdez Oil Spill Trustee Council, *The Reopener*, <http://www.evostc.state.ak.us/facts/reopener.cfm> (last visited July 7, 2010). *See also*, http://www.evostc.state.ak.us/Files.cfm?doc=/Store/Event_Documents/SAK-DOL_FactSheet.pdf&. As required per the settlement agreement from the original oil spill, the Federal Government and the State of Alaska submitted the restoration plan to Exxon 90 days before submitting the demand. http://www.evostc.state.ak.us/Files.cfm?doc=/Store/Event_Documents/Comprehensive_Plan_1June2006FINAL.pdf&.

152. Final Report, *supra* note 136.

153. U.S. National Response Team (NRT), *Update of Implementation of Recommendations from the NRT Following the Exxon Valdez Oil Spill*, <http://www.epa.gov/>

President directed the National Response Team (NRT) to study the nation's overall capability to prevent and respond to oil spills of national significance and recommend improvements.¹⁵⁴ It was the findings of the NRT's study that influenced the development of the Oil Pollution Act (OPA).¹⁵⁵ In 1990 the OPA passed after the Exxon *Valdez* oil spill revealed that the Clean Water Act (CWA)¹⁵⁶ Section 311 posed legal inadequacies.¹⁵⁷ Limited to oil spills, the purpose of the OPA is to create a comprehensive federal scheme for recovery of clean-up costs, damages to natural resources, and makes the responsible party of the oil discharge liable for physical injuries, property damages, and direct and some indirect economic losses caused by an oil spill.¹⁵⁸ Also, the National Oil Spill Liability Trust Fund was established, "which is available to provide up to \$1 billion per spill incident."¹⁵⁹ The OPA "makes parties responsible for oil spills strictly liable for the damage caused."¹⁶⁰

The OPA added new vigor to the BOEMRE efforts offshore to keep any spills from occurring as a result of the OCS drilling and production activities.¹⁶¹ Namely, "The BOEMRE has three core objectives: safe offshore operations, environmental protection, and fair value for the lease rights conveyed."¹⁶² The BOEMRE accounts for almost every aspect of the OCS operations.¹⁶³ An Oil Spill Response Plan (OSRP) is required by owners or operators of oil handling, storage, or transportation facilities that are located seaward of the

osweroe1/docs/chem/evupdate.pdf (last visited Feb. 28, 2011). The National Response Team (NRT) consists of 16 federal agencies responsible for national planning and coordination of oil and hazardous substance emergency preparedness and response.

154. *Id.*

155. *Id.*

156. KALO ET AL., *supra* note 139, at 774. The Clean Water Act 33 U.S.C. §§ 1251-1387.

157. KALO ET AL., *supra* note 139, at 774.

158. KALO ET AL., *supra* note 139, at 781.

159. U.S. Environmental Protection Agency, Oil Pollution Act Overview, <http://www.epa.gov/oem/content/lawsregs/opaover.htm> (last visited June 22, 2010).

160. Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law*, Resources Magazine, Rev. June 2010, available at http://www.rff.org/RFF/Documents/RFF-BCK-Richardson-OilLiability_update.pdf.

161. Milo C. Mason, OCEAN AND COASTAL LAW AND POLICY 409, 418 (Donald C. Baur, Tim Eichenberg & Michael Sutton ed., American Bar Association, 2008). (This book uses the old name MMS, which has now been changed to BOEMRE).

162. Mason, *supra* note 161, at 412.

163. Mason, *supra* note 161, at 419. (The MMS is responsible for air emissions, effluent discharges, archeological resources, Endangered Species Act fauna and flora, Marine Mammal Protection Act mammals, shut down and emergency evacuation procedures, drilling fluid requirements, pollution control, blow-out preventers, production safety, production rates, safety training for personnel, and a myriad of other specific requirements. Note: MMS is now the BOEMRE).

coastline, including those located in both State and Federal offshore waters.¹⁶⁴ The OSRP should demonstrate that the particular corporation has planned for and is prepared to conduct an efficient, coordinated, and effective response to an oil spill.¹⁶⁵ These plans have been required since 1973, but the OPA requires a far more extensive plan for a worst-case discharge and also includes more types of facilities that are covered.¹⁶⁶

The OPA has established a \$75 million cap on the amount of additional liability, not including all costs for clean-up/removal, but also states that caps do not apply if gross negligence or willful misconduct is the proximate cause of the oil spill.¹⁶⁷ The cap applies to natural resource damages and economic damages to private parties.¹⁶⁸ The Exxon *Valdez* disaster brought the filing of criminal charges by the federal government, which allowed them to allege a violation under the MBTA and the Refuse Act.¹⁶⁹ Now with the OPA in place, civil penalties can now be applied by the federal government to *Deepwater Horizon* pursuant to the Clean Water Act.¹⁷⁰

III. THE GULF OIL SPILL

*The Deepwater Horizon blowout produced the largest accidental marine oil spill in U.S. history, an acute human and environmental tragedy.*¹⁷¹

On April 20, 2010, the *Deepwater Horizon*, built in 2001, a Mobile Offshore Drilling Unit (MODU) exploded.¹⁷² The *Deepwater Horizon* was located approximately 51 miles off the coast of

164. MMS Notice to Lessees No. 2006-G21 regarding Regional and Subregional Oil Spill Response Plans. <http://www.gomr.boemre.gov/homepg/regulate/regs/ntls/2006%20NTLs/06-g21.pdf> (last visited Feb. 28, 2011).

165. United States Department of the Interior Minerals Management Service Gulf of Mexico OCS Region, Notice to Lessees, NTL No. G21 (Oct. 26, 2006), <http://www.gomr.mms.gov/homepg/regulate/regs/ntls/2006%20NTLs/06-g21.pdf>.

166. U.S. National Response Team, *supra* note 153.

167. 33 U.S.C. § 2704 (a)(3), (c)(1) (1990).

168. Richardson, *supra* note 160.

169. Richardson, *supra* note 160. (Refuse Act – the dumping of “refuse” into the navigable waters of the United States).

170. Richardson, *supra* note 160.

171. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President at 173 (January 2011) available at <http://www.oilspillcommission.gov/>.

172. NOAA’s Office of Response and Restoration, *Deepwater Horizon* (Apr. 21, 2010), <http://www.incidentnews.gov/incident/8220> (last visited July 8, 2010). *See also*, Transocean Fleet Specifications http://www.incidentnews.gov/attachments/8220/526038/Deepwater_Horizon_specs.pdf.

Louisiana.¹⁷³ The explosion took place when crews were trying to close off the exploratory well until the need for future production arose.¹⁷⁴ A routine operation suddenly became disastrous when emergency valves failed to clamp the drilling pipe to stop the flow of oil in case of a blowout.¹⁷⁵ According to a congressional investigation, several factors contributed to the *Deepwater Horizon* disaster. The blowout preventer had a dead battery, was leaking hydraulic fluid, and was too weak to shut down the well in certain circumstances.¹⁷⁶ The liability for spill in the Gulf of Mexico falls on multiple companies. Transocean owned the *Deepwater Horizon* rig, Halliburton was the subcontractor, and British Petroleum was the leaseholder of the *Deepwater Horizon* rig.¹⁷⁷ Each corporation has pointed fingers and denied blame,¹⁷⁸ but the fact that our environment is paying the price of human error, is the blame of all parties involved.

On July 12, 2010, Day 84, BP installed a “capping stack” in hopes that this containment cap would temporarily stop the oil flow until the relief wells could be completed.¹⁷⁹ With approximately 4.9 million barrels of crude oil in the Gulf of Mexico, damage to our wildlife, to our coast lines, and to livelihoods one would have to ask, “Will this ever end?”¹⁸⁰ According to the National Commission’s Chief Counsel’s Report management failures, mechanical failings were not the ultimate source of the disaster.¹⁸¹ Some of the management failures that were observed by the Chief Counsel’s team were:

173. NOAA’s Office of Response and Restoration, *Deepwater Horizon* (Update Apr. 22, 2010), http://www.incidentnews.gov/attachments/8220/526081/NOAA_Update-Deepwater_Horizon_Incident.pdf.

174. John Cranford, *Oil, Water, Profit and Peril*. CQ Weekly Online 1388-1396 (June 7, 2010), available at <http://library.cqpress.com.famuproxy.fcla.edu/cqweekly/weeklyreport/111-000003677633>.

175. *Id.*

176. Ben Casselman & Jennifer Levitz, *Congress Homes in on Rig’s Blowout Preventer*, *The Wall Street Journal*, May 13, 2010, available at <http://online.wsj.com/article/SB10001424052748703339304575240323493707434.html?KEYWORDS=Congress+Homes+In+on+Rig%27s+Blowout+Preventer+Investigators+Find+%27Failsafe%27+Had> (last visited June 21, 2010).

177. *Oil Executives Shift Spill Blame in Senate*, MSNBC.COM, available at http://www.msnbc.msn.com/id/37079761/ns/us_news-gulf_oil_spill/ (last visited June 21, 2010). The Associated Press and Reuters contributed to this report.

178. *Id.*

179. BP Global, Press Release, Capping Stack Installed on MC252 Well, <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7063637> (last visited Aug. 3, 2010).

180. *100 Days of the BP Oil Spill: A Timeline*, TIME.COM, <http://www.time.com/time/interactive/0,31813,2006455,00.html?cnn=yes> (last visited Aug. 3, 2010).

181. NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, CHIEF COUNSEL’S REPORT, *Macondo: The Gulf Oil Disaster* (2011), available at

1. Ineffective leadership at critical times;
2. Ineffective communication and siloing of information;
3. Failure to provide timely procedures
4. Poor training and supervision on employees;
5. Ineffective management and oversight of contractors;
6. Inadequate use of technology; and
7. Failure to appropriately analyze and appreciate risk.¹⁸²

On September 19, 2010, the Macondo well was sealed by cement,¹⁸³ “[f]inally confirming that this well no longer presents a threat to the Gulf of Mexico.”¹⁸⁴

A. An Unprecedented Environmental Disaster

An oil spill that involved the response of 13 federal agencies, 5 states, residents, volunteers, contractors, expert consultants, non-governmental organizations, and industries demonstrates the unprecedented amount of oil released into the Gulf of Mexico.¹⁸⁵ The explosion and the subsequent spill of oil have created an unprecedented environmental disaster for the people and the fragile ecosystems of the Gulf Coast.¹⁸⁶ The *Deepwater Horizon* cut short the lives of crewmembers, and continues to claim the lives of thousands of animals.¹⁸⁷ According to the FWS reports, as of August 2, 2010, the following animal lives have been saved or taken: Birds: total collected: 4,914, dead: 3,271, released: 594; Sea Turtles: total collected: 843, dead: 503, released: 38, total number of hatchlings released 2,168; Mammals: total collected: 69, dead: 64, released: 1.¹⁸⁸ Steps are being

http://www.oilspillcommission.gov/sites/default/files/documents/C21462-408_CCR_for_web_0.pdf (last visited Mar. 23, 2011).

182. *Id.* at 225.

183. BP Confirms Successful Completion of Well Kill Operations in Gulf of Mexico, <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7065079> (last visited February 11, 2011).

184. *Id.* Tony Hayward, BP Group Chief Executive (alteration in original).

185. Marine Mammal Commission, *The Deepwater Horizon Oil Spill and Marine Mammals*, http://www.mmc.gov/oil_spill/welcome.html (last visited Feb. 15, 2011).

186. Report Regarding the Minerals Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development (Aug. 16, 2010), http://www.doi.gov/news/press_releases/loader.cfm?csModule=security/getfile&PageID=42036.

187. U.S. Fish & Wildlife Service, Bird Impact Data and Consolidated Wildlife Reports, <http://www.fws.gov/home/dhoilspill/collectionreports.html> (last visited July 11, 2010).

188. U.S. Fish & Wildlife Service, Deepwater Horizon Response Consolidated Fish and Wildlife Collection Report (2010), *available at* http://www.fws.gov/home/dhoilspill/pdfs/collection_07112010.pdf. This data shows wildlife collected in Alabama, Florida, Louisiana, Mississippi, Texas, and On-Water. The wildlife is grouped according to whether there are visible signs of oil or not. <http://app.restorethegulf.gov/go/doc/2931/841867/> (last visited

taken on a daily basis to try and save as many wildlife as possible, through the efforts of joint agencies.¹⁸⁹ As the numbers will reflect, this is the largest national response ever to an environmental disaster.¹⁹⁰ As of August 1, 2010 the administration has authorized the deployment of 17,500 National Guard troops, approximately 30,100 personnel are responding to protect the shoreline and wildlife, and more than 4,500 vessels are responding on site.¹⁹¹ Approximately 632 miles of Gulf Coast shoreline is currently oiled and approximately 57,539 square miles of Gulf of Mexico federal waters were closed to fishing in order to balance economic and public health concerns.¹⁹² The recovery process is being referred to as a “historic, all-hands-on-deck response, as the U.S. has leveraged assets and skills from Argentina, Belgium, Canada, China, Estonia, France, Germany, Greece, Ireland, Japan, Kenya, Mexico, Netherlands, Norway, Qatar, Russia, Spain, Sweden, Taiwan, Tunisia, United Arab Emirates, United Kingdom, the United Nations’ International Maritime Organization, the European Union’s Monitoring and Information Centre, and the European Maritime Safety Agency.”¹⁹³ The *Deepwater Horizon* oil spill has surpassed the *Exxon Valdez* as the largest oil spill in U.S. history.¹⁹⁴

As one article states, “First the Spill, Then the Lawsuits.”¹⁹⁵ On May 17, 2010, Defenders of Wildlife and the Southern Environmental Law Center filed suit against the MMS (N/K/A BOEMRE), United States Department of the Interior (DOI), and Ken Salazar, Secretary of

Aug. 4, 2010). Sea turtle nests have been relocated, and will continue to be relocated, by government agencies and Federal Express from beaches affected by the oil spill to beaches on Florida’s east coast.

189. U.S. Fish & Wildlife Service, State and Federal wildlife agencies, other partners, move to safeguard sea turtle nests; FedEx providing transportation to Florida’s Space Coast (July 9, 2010), available at <http://www.fws.gov/southeast/news/2010/r10-048.html> (last visited July 10, 2010).

190. Remarks by the President after meeting with Cabinet members to discuss the Deepwater Horizon oil spill on June 7, 2010, <http://www.whitehouse.gov/the-press-office/remarks-president-after-meeting-with-cabinet-members-discuss-deepwater-horizon-oil> (last visited Aug. 3, 2010).

191. RestoreTheGulf.com, Administration-Wide Response Summary to the Deepwater BP Oil Spill (July 6, 2010), <http://app.restorethegulf.gov/release/2010/07/06/administration-wide-response-summary-deepwater-bp-oil-spill> (last visited Aug. 2, 2010).

192. *Id.*

193. *Id.*

194. *Gulf Oil Spill is Worst in U.S. History, Estimates Suggest* (May 27, 2010), available at <http://www.cnn.com/2010/US/05/27/oil.spill.amount/index.html> (last visited June 21, 2010). CNN’s Richard Allen Greene, David Mattingly, & Courtney Yager and CNN Radio’s Lisa Desjardins contributed to this report.

195. John Swartz, *First the Spill, Then the Lawsuits*, (June 10, 2010), <http://www.nytimes.com/2010/06/11/us/11liability.html> (last visited Dec. 28, 2010).

the Interior.¹⁹⁶ The suit challenges the MMS's association in the Gulf oil disaster and continued lax oversight of oil drilling operation's including its failure to require a thorough examination of spill risks from exploratory drilling operations like the *Deepwater Horizon*.¹⁹⁷ Even though the 2004 MMS guidelines created an exclusion from environmental review, these guidelines made it clear that the exclusion did not apply to "untested deep water," yet the MMS granted *Deepwater Horizon* the exclusion even though it was in 5,000 feet of water.¹⁹⁸

On June 30, 2010, the Animal Legal Defense Fund, the Animal Welfare Institute, the Center for Biological Diversity, and the Turtle Island Restoration Network filed a federal suit against BP and the U.S. Coast Guard for burning critically endangered sea turtles, including the Kemp's ridley, during burn containment practices in violation of the Endangered Species Act.¹⁹⁹ Sea turtles, including the Kemp's ridley sea turtle, one of the rarest turtles on earth, were being caught during "controlled burns" when the oil was corralled then lit on fire making the turtles unable to escape and being burnt alive.²⁰⁰ On July 2, 2010, the sea turtles were granted a temporary reprieve.²⁰¹

One of the largest claims that the federal government could bring against BP and its partners is for natural resource damages.²⁰² For environmental damages, the federal government can access fines and punitive damages as stipulated in the CWA as being \$1,100 per barrel spilled, but raises that to \$4,300 per barrel for gross negligence.²⁰³ A BP spokesperson has confirmed that the company could be liable for up to \$4,300 per barrel.²⁰⁴ A more significant question is de-

196. Defenders of Wildlife, Gulf Oil Disaster, *Defenders v. Minerals Management Service; United States Department of the Interior; and Ken Salazar, Secretary of the Interior* (May 17, 2010), http://www.defenders.org/programs_and_policy/in_the_courts/legal_docket/gulf_oil_disaster.php (last visited June 24, 2010).

197. *Id.*

198. *Id.*

199. Animal Legal Defense Fund, Animal Legal Defense Fund Files Suite Against BP for Burning Endangered Sea Turtles Alive (June 30, 2010), <http://www.aldf.org/article.php?id=1391> (last visited July 9, 2010). The Animal Legal Defense Fund (ALDF) was founded in 1979 with the unique mission of protecting the lives and advancing interests of animals through the legal system.

200. *Id.*

201. Animal Legal Defense Fund, BP Agrees to Stop Burning Endangered Sea Turtles Alive (July 2, 2010), <http://www.aldf.org/article.php?id=1393>.

202. *Id.*

203. Cranford, *supra* note 174.

204. Steve Hargreaves, *BP's fine could hit the billions*, CNNMoney.com, (July 20, 2010), http://money.cnn.com/2010/07/20/news/companies/bp_fines/index.htm?hpt=t2 (last visited Aug. 2, 2010).

termining the quantity of oil spilled.²⁰⁵ The range could be as high as 4.3 million barrels which would be a fine of over \$18 billion.²⁰⁶ The tragic truth is that the ultimate amount will be up to a judge and jury.²⁰⁷ Even though the OPA limits the economic liability to \$75 million per spill, BP has accepted responsibility for “legitimate” claims of economic losses that exceed the \$75 million cap.²⁰⁸ As of July 28, 2010, BP has paid \$256 million in claims.²⁰⁹

On December 15, 2010, the United States Government joined in on the lawsuits seeking unlimited penalties.²¹⁰ The defendants include BP and oil companies MOEX and Anadarko, which were partners in the Macondo well off Louisiana; Transocean and its partner, Triton Asset Leasing; and Transocean insurer QBE/ Lloyd’s.²¹¹ The federal government accuses the defendants of failing to take “necessary precautions” to prevent or control the *Deepwater Horizon* blowout.²¹² Per the U.S. complaint the cause of the *Deepwater Horizon* oil spill was the result of one or more of the following: acts, joint acts, omissions, fault, negligence, gross negligence, willful misconduct, and/or breach of federal safety and/or operating and/or construction regulations by the Defendants.²¹³ The Government is seeking civil penalties under the CWA and to declare eight of the defendants liable without limitations under the federal OPA.²¹⁴ Penalties would include all removal costs and damages caused by the oil spill, which includes damages to natural resources.²¹⁵ The head of the Justice Department’s civil division said the suit does not ask for a specific amount of damages “because it’s going to take years” to fully calculate the costs of the spill.²¹⁶ The company (BP) has estimated that the full cost of the

205. *Id.*

206. *Id.*

207. *Id.*

208. Cranford, *supra* note 174.

209. BP Global, Press Releases, Total Claims Payments Top \$256 Million (July 28, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064024> (last visited on Aug. 3, 2010).

210. CNN Wire Staff, U.S. joins Gulf oil spill lawsuits, seeks unlimited damages, CNN.com (Dec. 16, 2010), http://edition.cnn.com/2010/US/12/15/gulf.oil.lawsuits/index.html?hpt=T2§ion=money_topstories (last visited Dec. 28, 2010).

211. *Id.*

212. *Id.*

213. United States v. BP Exploration & Production, No. 10 Civil 04536 (E.D. La. Dec. 15, 2010). Available at <http://legaltimes.typepad.com/files/complaint-1.pdf>.

214. CNN Wire Staff, *supra* note 210.

215. *Id.*

216. *Id.*

spill may reach as high as \$40 billion.²¹⁷ As the federal government is being scrutinized for approving BP's oil spill response plan and for allowing them to use damaging oil dispersants to clean up the spill, the Sierra Club filed a motion to intervene in the Government's civil suit against BP.²¹⁸ This motion will allow them a seat at the table in any potential settlement, which will achieve their goal of ensuring that communities hurt by the disaster are fairly represented and compensated.²¹⁹ As with the Exxon *Valdez* in 1989, this is far from over and the local communities will be haunted by the damage caused for years to come.

B. *The Effects of Oil Spills on Wildlife*

The Louisiana coastline is a "very unique ecosystem" with its barrier islands and estuaries,²²⁰ and the BP oil spill couldn't have come at a worse time, as the migratory bird season had just started and breeding season was in effect.²²¹ The oil that was discharged from the *Deepwater Horizon* is classified as light crude oil, which is moderately volatile and has the potential to cause long-term contamination.²²² There are three primary ways that oil injures wildlife:

1. The oil gets on the fur and feathers and destroys the insulation value and birds and mammals then die of hypothermia (they get too cold),
2. They eat the oil, either while trying to clean the oil off their fur and feathers or while scavenging on dead animals, in which the oil is a poison that causes death, and
3. The oil impacts them in ways that does not lead to a quick death, such as damaging the liver or causing blindness.²²³

Factors that influence the severity of injuries from oil spills on wildlife include: (1) the amount of exposure to the oil, (2) the pathway that each animal is exposed, (3) the age, reproductive state, and health

217. *Id.*

218. Sierra Club, *Sierra Club Moves to Intervene in Justice Department Case Against BP* (Feb. 7, 2010), http://action.sierraclub.org/site/MessageViewer?em_id=196101.0 (last visited Feb. 15, 2011). Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States.

219. *Id.*

220. Gregory Bossart, Chief Veterinary Officer, Georgia Aquarium, Atlanta, Georgia. http://articles.cnn.com/2010-04-29/us/oil.spill.wildlife_1_oil-spill-oil-rig-explosion-director-of-bird-conservation?_s=PM:US.

221. *Id.*

222. U.S. Fish & Wildlife Service, *Effects of Oil on Wildlife and Habitat*, available at <http://www.fws.gov/home/dhoilspill/pdfs/DHJICFWSOilImpactsWildlifeFactSheet.pdf>.

223. Exxon Valdez Oil Spill Trustee Council, *supra* note 144.

of each animal, and (4) what chemicals are used to clean the spill.²²⁴ Wildlife can be affected in the form of behavioral, physical, and physiological injuries.²²⁵ The Exxon *Valdez* oil spill showed killer whales had such behavioral issues as reproductive injury, resulting in a particular pod of killer whales not being able to reproduce successfully since the oil spill. Consequently, the affected pod of killer whale is expected to become extinct as the last of the pod dies.²²⁶ Other findings after the Exxon *Valdez* oil spill were pulmonary emphysema and brain lesions.²²⁷ Some potential physical or physiological effects include irritation to the skin, chemical burns, short- and long-term respiratory effects, and stress from animals being captured.²²⁸

Oil's greatest impacts are on species that utilize the water surface, such as birds, and species that inhabit the shoreline.²²⁹ As oil accumulates on the fur and feathers, it will destroy the animal's insulation causing them to die of hypothermia.²³⁰ They can also lose their ability to fly and their buoyancy, causing them to drown.²³¹ Birds can also ingest the oil through cleaning or diving for food, which can cause lung, liver, and kidney damage and subsequent death.²³² Marine mammals are others that are most affected, as they must come to the surface to breath.²³³ Oil accumulation on the skin of marine mammals can make it difficult for them to breath and can cause difficulty moving in the water.²³⁴ Fish can be impacted by ingestion through their gills, by ingesting oiled preys, or by changes in the ecosystem that support the fish.²³⁵ Depending on what type of fish is being affected, the oil can have an impact on spawning success.²³⁶ Also affected by oil spills are scavengers who feed on carcasses of contaminated wildlife.²³⁷

224. Holly K. Ober, *Effects of Oil Spill on Marine and Coastal Wildlife* (2010), available at <http://www.wec.ufl.edu/Effects%20of%20oil%20spills%20on%20wildlife.pdf>.

225. Marine Mammal Commission, *supra* note 185.

226. *Id.*

227. *Id.*

228. *Id.*

229. U.S. Fish & Wildlife Service, *Effects of Oil Spill on Wildlife and Habitat* (2004), available at <http://alaska.fws.gov/media/unalaska/Oil%20Spill%20Fact%20Sheet.pdf>.

230. *Id.*

231. *Id.*

232. Gulf Oil Spill, NOAA, available at http://www.education.noaa.gov/Ocean_and_Coasts/Oil_Spill.html (last visited Feb. 15, 2011).

233. *Id.*

234. *Id.*

235. U.S. Fish & Wildlife Service, *supra* note 229.

236. *Id.*

237. *Id.*

An estimated 400 to 600 species are potentially at risk, with the oil beginning to reach the Louisiana coast at a peak period for migratory birds and other wildlife.²³⁸ The accidental or deliberate discharge of oil or chemicals into coastal or ocean waters may have complex environmental, economic, and legal implications.²³⁹ Fisheries, marine mammals, seabirds, and other forms of sea life may be destroyed or seriously damaged.²⁴⁰ Beaches may be fouled, the local fishing industry may collapse, and coastal businesses and their employees may be financially devastated by the economic losses associated with a loss of tourist trade and a collapsed fishing industry.²⁴¹ A serious environmental disaster such as an oil spill will have a lasting effect on everything and everyone that it touches. Everything from the economy to tourism can be affected as is evident in the state of Louisiana where, crabs, oysters, crayfish, shrimp, and assorted fish generate an average of \$2.85 billion a year in business.²⁴² Moreover, oil has the potential to be present in the environment for long periods of time after an oil spill.²⁴³ In a report by the National Parks Services, U.S. Department of Interior, oil from the Exxon *Valdez* spill is still present on some beaches twenty years after the spill.²⁴⁴

IV. RECOMMENDATIONS FOR MORE EFFECTIVE CONSIDERATION OF WILDLIFE

*"[W]hen you see birds flying around with oil all over their feathers and turtles dying, that doesn't just speak to the immediate economic consequences of this; this speaks to how we are caring for this incredible bounty that we have."*²⁴⁵

In 1970, the brown pelican, Louisiana's state bird, was listed on the endangered species list due to pesticide contamination, and was delisted in 1985 for Alabama, Georgia, Florida and northward along

238. Steve Ertel, Gulf Oil Spill Crisis Highlights Need For Safer, Cleaner Energy Sources, WWF, *available at* <http://www.worldwildlife.org/who/media/press/2010/WWFPressItem16126.html> (last visited Aug. 3, 2010).

239. KALO ET AL., *supra* note 139, at 774.

240. *Id.*

241. *Id.*

242. Ferguson, Ellyn. *For Gulf Wildlife, an Oil and Chemical Cocktail*. CQ WEEKLY Online 1320, 1320 (May 31, 2010), *available at* <http://library.cqpress.com.famuproxy.fcla.edu/cqweekly/weeklyreport111-000003675748> (last visited Aug. 2, 2010).

243. U.S. Fish & Wildlife Service, *supra* note 229.

244. 20 Years Later: Exxon Valdez Oil Spill, NATIONAL PARK SERVICE (2009), *available at* http://www.nps.gov/kefj/naturescience/upload/KEFJ_EVOS_1989-2009_qa.pdf.

245. President's Remarks, *supra* note 19, (alteration in original).

the Atlantic Coast.²⁴⁶ On November 11, 2009, the U.S. Department of the Interior announced, at a press conference in New Orleans, that the brown pelican “has made a remarkable recovery” and that “[w]e once again see healthy flocks of pelicans in the air over our shores.”²⁴⁷ Because of its history of recovery in the face of extreme peril the brown pelican has a special significance for the public.²⁴⁸ The fate of the brown pelican once again looks gloomy, as the BP oil spill has left many dead and many others in dire need of rehabilitation. Experts are uncertain as to whether enough brown pelicans will survive in order to remain off the endangered species list.²⁴⁹ The brown pelican is just one example of how an animal can go from being imperiled to thriving, and then possibly imperiled again due to the advancements of our nation.

After the Gulf oil spill, oil-covered pelicans became the image of how this disaster was affecting our wildlife. According to the Louisiana Department of Wildlife and Fisheries, of the approximately 5,000 oiled, injured, or impacted birds collected on the coast of Louisiana, roughly half were pelicans.²⁵⁰ “Before we even had a chance to celebrate them being taken off the endangered species list, we had the oil spill and they were one of the most impacted birds.”²⁵¹ As wildlife continues to be affected for years to come, changes need to be made that will take into consideration the effect on wildlife when such disasters happen.

A. *Required Environmental Impact Studies*

Under current law, the BOEMRE has 30 days to review and approve or deny an exploration plan (EP) submitted by oil companies that wish to drill on the OCS.²⁵² This lack of time has been at the forefront of why the appropriate environmental review is continuously waived and why it is believed that the law was implemented to benefit

246. U.S. Department of the Interior News Release, November 11, 2009, *available at* http://www.doi.gov/archive/news/09_News_Releases/1111109.html (last visited June 7, 2010).

247. *Id.* (alteration in original).

248. John Rudolf & Leslie Kaufman, *Pelicans, Back From Brink of Extinction, Face Oil Threat*, N.Y. TIMES, June 4, 2010, *available at* <http://www.nytimes.com/2010/06/05/us/05pelican.html>.

249. *Id.*

250. Brown Pelicans Hit Hard by Oil During Summer, But Populations Still Intact, NATIONAL WILDLIFE FEDERATION, *available at* <http://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Wildlife/2011/01-11-11-Brown-Pelicans-Hit-Hard-by-Oil.aspx>.

251. *Id.* Quote by Greg Butcher, Director of Bird Conservation for the National Audubon Society.

252. President’s Remarks, *supra* note 19.

the industry, and not to protect the environment or the public.²⁵³ Consistent with federal regulations, an EP is deemed “submitted” once all supporting materials and documentation has been provided.²⁵⁴ Once a plan is deemed submitted, BOEMRE has 30 calendar days to analyze and evaluate it.²⁵⁵ This process could allow for longer than 30 days if documentation is missing. As the BOEMRE categorically exempted BP from a detailed environmental impact analysis, they themselves assessed the environmental impact of drilling in 2007 at the Deepwater Horizon site, saying that there would only be “sublethal” effects on fish and marine mammals, that “birds could become oiled,” and that it was unlikely that an accident would occur.”²⁵⁶ Even though neither BOEMRE nor BP anticipated an accident of the magnitude that has unfolded in the Gulf, it is evident that the lack of regulations with concerns for the environment is the number one culprit of this disaster.²⁵⁷

Under NEPA, all major federal actions that will significantly affect the quality of the human environment require an environmental impact statement (EIS).²⁵⁸ The fact that BP was categorically excluded from this requirement and eventually was the cause of an unprecedented environmental disaster goes to show that no entity or location should be exempted from the assessment of how their actions will affect the environment.

As we have seen throughout this paper, there are several laws protecting the environment and wildlife. Protection for the environment falls within two main acts: the NEPA and the OPA. The NEPA holds federal agencies to a higher standard by requiring them to consider the environment before any action can take place. The OPA is responsible for accessing liability for the pollution of oil. The act that is detrimental to the environment is the OCSLA, which allows for off-shore drilling, but also allows for categorical exemptions. This categorical exemption is the link to the Gulf oil spill. If BP were not exempted from providing an EIS, the disaster that claimed the lives of eleven crewmen and the lives of thousands of animals might not have happened. It is this exemption that needs to be excluded from any pro-

253. *Id.*

254. BOEMRE Calls for Public Comment to Inform Deepwater Environmental Assessment, BOEMRE, *available at* <http://www.boemre.gov/ooc/press/2011/press0128.htm> (last visited on Feb. 12, 2011).

255. *Id.*

256. Juliet Eilperin, U.S. Exempted BP's Gulf of Mexico Drilling From Environmental Impact Study, WASH. POST, May 5, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html> (last visited July 22, 2010).

257. *Id.*

258. Lopez, *supra* note 17.

cedure in order to secure the protection of our wildlife and environment.

Species are protected by the ESA, the MMPA, and the MBTA. Where oil spills are concerned, the ESA lacks any grounds to allow for prosecution due to the Act's requirement that a violation be "knowingly" for both civil and criminal charges. Under the MMPA, prosecutions for oil spills could happen but only for civil charges. As for criminal charges under the MMPA, the violation must be conducted "knowingly." The MBTA will be the best applied protection for animals that are affected by oil spills, due to that fact that it allows for prosecution based on strict liability. Under strict liability, actors are liable for a violation regardless of what they knew or what they meant to do.²⁵⁹ The BOEMRE, as with all Federal agencies, must consider the potential environmental impacts for every decision made.²⁶⁰

B. More Stringent Safety Protocols

To have a BOEMRE supervisor testify in a Senate committee hearing that the industry has standards for blowout preventers, but is unaware of anyone in the government checking to make sure the standards are being met, shows that current safety regulations are insufficient.²⁶¹ In the same hearing, the supervisor's testimony was summed up by his statement that the blowout preventers were "designed by industry standard, manufactured by the industry and installed by the industry, with no government witnessing or oversight of construction or installation."²⁶²

On May 21, 2010, President Obama issued an Executive Order creating the National Commission of the BP Deepwater Horizon Oil Spill and Offshore Drilling ("Commission").²⁶³ The President charged the Commission to determine the causes of the disaster, to improve the country's ability to respond to spills, and to recommend reforms to make offshore energy production safer.²⁶⁴ The Commission concluded

259. Alexander, *supra* note 36.

260. Environmental Stewardship, BUREAU OF OCEAN ENERGY MANAGEMENT, available at <http://www.boemre.gov/eppd/index.htm> (last visited Aug. 3, 2010).

261. Casselman & Levitz, *supra* note 176.

262. *Id.*

263. Exec. Order No. 13,543, 75 Fed. Reg. 29,397 (May 21, 2010), available at <http://www.federalregister.gov/articles/2010/05/26/2010-12805/national-commission-on-the-bp-deepwater-horizon-oil-spill-and-offshore-drilling>.

264. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President (January 2011). See also <http://www.oilspillcommission.gov/>.

that (1) the explosive loss of the Macondo well could have been prevented; (2) the immediate causes of the Macondo well blowout can be traced to a series of identifiable mistakes; (3) deepwater energy exploration and production involve risks for which neither industry nor government has been adequately prepared; (4) to assure human safety and environmental protection, regulatory oversight of leasing, energy exploration, and production require reforms; (5) because regulatory oversight alone will not be sufficient to ensure adequate safety, the oil and gas industry will need to take its own, unilateral steps to increase safety throughout the industry; (6) the technology, laws and regulations, and practices for containing, responding to, and cleaning up spills lag behind the real risks associated with deepwater drilling; and (7) scientific understanding of environmental conditions in sensitive environments in deep Gulf waters is inadequate, with the same being true of the human and natural impacts of oil spills.²⁶⁵

C. Steps in the Right Direction

On July 19, 2010, President Obama issued Executive Order No. 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes.²⁶⁶ The purpose of the order is to:

[Establish] a national policy to ensure the protection, maintenance, and restoration of the health of ocean, coastal, and Great Lakes ecosystems and resources, enhance the sustainability of ocean and coastal economies, preserve our maritime heritage, support sustainable uses and access, provide for adaptive management to enhance our understanding of and capacity to respond to climate change and ocean acidification, and coordinate with our national security and foreign policy interests.²⁶⁷

On July 30, 2010, the U.S. House of Representatives Committee on Energy and Commerce passed H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act.²⁶⁸ Key elements of the Act would amend the OPA to eliminate the \$75 million cap on liability for spills, and the OCSLA to emphasize that energy-related activities

265. *Id.*

266. Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010), available at <http://www.federalregister.gov/articles/2010/07/22/2010-18169/stewardship-of-the-ocean-our-coasts-and-the-great-lakes>.

267. *Id.* (alteration in original).

268. H.R. 3534, 111th Cong. (as passed by H. Comm. On Energy and Commerce, July 30, 2010), available at http://energycommerce.house.gov/index.php?option=com_content&view=article&id=2096:hr-3534-the-consolidated-land-energy-and-aquatic-resources-clear-act&catid=171:featured-legislation&Itemid=93.

be conducted in a matter that minimizes impacts to the marine, coastal, and human environments.²⁶⁹ A companion Senate bill, the Clean Energy Jobs and Oil Company Accountability Act of 2010 (S. 3663) would also remove OPA's liability cap and make other similar changes in the spill liability regime.²⁷⁰ World Wildlife Fund officials said that the catastrophic oil spill in the Gulf of Mexico, which could cripple the region's seafood industry and destroy the habitats of hundreds of bird and water species, underlines the need for the world to move strongly towards safer, cleaner energy sources of energy.²⁷¹

CONCLUSION

Wildlife and off-shore drilling do not complement each other. Therefore, a balance between the two will not be achieved as long as current laws and regulations are ignored and unchanged. Under the current regulations for off-shore drilling and protection of the environment, it is apparent that the laws that are in place are inefficient and must be changed. Efforts are underway to amend federal laws that will ensure the safety of our citizens and our environment, and will hold oil companies liable for their negligence.²⁷² The laws need to reflect the importance of, not only the people, but the wildlife and environment that often falls prey to daily activities. Laws and regulations are very quick to take human lives into consideration when imposing liability for negligent acts, but they often forget about the things that help balance the ecosystem.

To enhance protection of wildlife, the ESA and the MMPA need to be amended to allow changes to assign liability for such environmental disasters as oil spills. As oil spills are not a violation that can be held to the standard of "knowingly," it is a violation for lack of concern for the environment, especially when human error and money plays a role in why regulations are overlooked. The OPA and the OCSLA need to be amended as reflected in the U.S. House of Representatives Committee on Energy and Commerce H.R. 3534, the Consolidated Land,

269. Svend Brandt-Erichsen & Adam Orford, House Enacts Amendments to Oil Pollution Act, Outer Continental Shelf Lands Act; Measure Awaits Senate Action (Aug. 2, 2010), available at <http://www.martenlaw.com/newsletter/20100802-house-enacts-amendments>.

270. *Id.*

271. Steve Ertel, Gulf Oil Spill Crisis Highlights Need for Safer, Cleaner Energy Sources, WWF, available at <http://www.worldwildlife.org/who/media/press/2010/WWFPresitem16126.html> (last visited Feb. 3, 2011).

272. Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 22, 2010). H.R. 3534, 111th Cong. (as passed by H. Comm. On Energy and Commerce, July 30, 2010).

Energy, and Aquatic Resources (CLEAR) Act. The OPA oil spill liability cap of \$75 million should be eliminated to allow for oil companies to be liable for total damages, especially when negligence is at issue. If our government is going to allow off-shore drilling to continue, the following steps need to be implemented:

1. The Government must be accountable for all actions taken within its jurisdiction that will sufficiently impact the environment and species;
2. All companies must be held to high safety standards and regulations with Government oversight; and
3. All responsible parties must be held liable for the full and complete cost of restoring our environment to its fullest potential.
