UPPING THE ANTE IN THE OIL INDUSTRY: WHY UNLIMITED LIABILITY FOR OIL COMPANIES WILL DEAL AMERICA A BAD BEAT

Comment

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I. INTRODUCTION

It is a crisp April evening on board an offshore rig in the Gulf of Mexico over forty miles from the nearest shore, and the night is dark and quiet. After a long day's work, a crewman finishes his shift and returns to his sleeping quarters. As he begins to wind down, an alarm sounds. The rig's engine begins to accelerate, and the noise it creates becomes so loud that it nearly drowns out the alarm. Seconds later, the lights and computer screen in the sleeping quarter explode, catapulting shards of glass across the room and shrouding the room in total darkness. The crewman feels his way towards the door. As he reaches the handle, a massive explosion sends the door flying from its hinges and hurls him against the wall, crushing the bones in his elbow and ankle. As the room begins to fill with carbon dioxide, another explosion rocks the rig. Unable to walk, the man crawls through the dark, dragging himself over the lifeless bodies of his colleagues. He pulls himself to his feet and, working from memory and his daily experiences on the facility, he carefully maneuvers his way around, taking special caution not to fall off the rig into the 5,000-foot-deep water below.

As he struggles to put on a life vest with a broken elbow, a raging inferno erupts from the derrick. Mud and gas rain down upon him and a voice on the overhead speakers repeatedly shouts, "This is not a drill!" The fire illuminates the pitch-black night, and he realizes that he is trapped on a burning island in the middle of the Gulf of Mexico. The air is thick with gasoline and oil. Other crewmembers scream out in pain and desperation. As he looks around the deck, he sees his colleagues covered in blood, coughing and vomiting because of the fumes. The hurried radio chatter cracks, "Mayday! Mayday!" and "Man overboard!" The blaze engulfs the entire derrick and launches its way onto the deck, where numerous combustible chemicals are stored. He finds the captain, who appears to be

in shock, and attempts to engage the emergency disconnect to stop the fire. It fails. Then, the backup generator fails. Without power there is no way to pump water to fight the fire. The only chance he has at survival is to get off the blazing rig. He sees two of the facility's lifeboats motoring away from the rig and he thinks to himself that this cannot really be happening; there are still survivors on board. Several more large explosions occur. The blasts are blinding and take his breath away. With only two other remaining survivors, it is impossible to launch the last lifeboat. As the fire engulfs more and more of the deck, he must make a decision: brave the ninety-foot drop into the dark waters below or burn to death. Another crew member jumps. The man thinks of his wife and daughter back home and says a prayer. Determined to see them again, he jumps off the Deepwater Horizon offshore drilling rig and falls for what seems like an eternity into the depths of the almighty Gulf. . . .[1]

In an "unprecedented response" to the Deepwater Horizon disaster, President Obama demanded immediate action.[2] At the peak of the cleanup effort, federal, state, and local agencies, along with an estimated 47,000 individuals, 7,000 vessels, and 120 aircraft, worked together to mitigate the effects of the spill.[3] The well continued to hemorrhage for three months and polluted the Gulf of Mexico with nearly 49 million barrels of oil.[4] In the days and months following the spill, tens of thousands of claims have emerged from parties demanding compensation for their injuries.[5] Members of the cleanup operation allege that the toxic dispersant used to sink the oil made them physically ill and "permanently altered" the Gulf's ecosystem.[6] Shortly after the disaster, the President ordered a moratorium, which halted offshore drilling in the Gulf and caused rig owners to lose money.[7] Coastal citizens who make their livings in the shrimping, oyster, and recreational and commercial fishing industries lost income while the waters were closed.[8] These industries will continue to suffer because many marine species will take time to recover and may not recover at all, as was

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1. *See generally* Interview by CBS "60 Minutes" with Mike Williams, Chief Elecs. Technician on Deepwater Horizon Offshore Drilling Rig (May 16, 2010) (chronicling the event from a crew member's perspective).

2. *See* U.S. ENVTL. PROT. AGENCY, AMERICA'S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL, 2 (2010).

3. *See id.*

4. *See id.*

5. *See* Press Release, BP Pledges Collateral for Gulf of Mexico Oil Spill Trust (Oct. 1, 2010), http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7065280.

6. Complaint, Parker v. NALCO Co., 2010 WL 2470724 (E.D. La. 2010) (No. 10-CV01749).

7. *See* Robert Gibbs, Press Briefing by Press Secretary Robert Gibbs (July 12, 2010), http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-7122010; *see also* John M. Broder, *U.S. Issues Revised Offshore Drilling Ban*, N.Y. TIMES (July 12, 2010), http://www.nytimes.com/2010/07/13/us/13commission.html.

8. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 1.

the case after the *Exxon Valdez* spill.[9] Tourism to the Gulf Coast region declined drastically, causing companies and small businesses to lose revenue and many vacationers to lose their deposits.[10] The spill also had significant negative impacts on the water column, fisheries, coastal and marine habitats, and a variety of the Gulf's native species.[11] These are only a few examples of the many individuals and industries that sustained significant harm as a result of the spill.

The Oil Pollution Act of 1990 provides the primary means for ensuring that injured parties are compensated and that the environment is restored after a tragic oil spill like Deepwater Horizon.[12] The upper limit of liability for companies who contribute to offshore disasters, established by the Oil Pollution Act, is the total of all removal costs plus $75 million.[13] To date, British Petroleum (BP) reports to have paid over $5 billion in the thousands of claims made against it since the Deepwater Horizon spill.[14] This amount clearly exceeds the damage cap, and while BP has waived the Oil Pollution Act's liability limits, future responsible parties may not be as able or as willing to do so.[15] The Deepwater Horizon disaster has revealed that the current statutory liability scheme is inadequate to redress the injuries sustained from such a large-scale drilling disaster. A mere fourteen days after the initial explosion at Deepwater Horizon, Senator Menendez introduced Senate Bill 3305, which became known as the "Big Oil Bailout Prevention Unlimited Liability Act of 2010," to address the Oil Pollution Act's deficiencies.[16] This bill proposes to eliminate the current liability limits for offshore facilities and adopt an unlimited liability scheme for the oil industry.[17] The Senate Committee on Environment and Public Works considered arguments supporting and rejecting unlimited liability.[18] The

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9. *See* U.S. ENVTL. PROT. AGENCY, THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY, 5 (1972) [hereinafter THE CHALLENGE OF THE ENVIRONMENT].

10. *See* Complaint, Jett v. BP, No. 10-CV00228, 2010 WL 2398871, 5-7 (S.D. Ala. 2010); U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 1.

11. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 27-29.

12. *See* Oil Pollution Act, 33 U.S.C. §§ 2701-2720 (2006).

13. § 2704(a)(1)-(4).

14. BP, CLAIMS AND GOVERNMENT PAYMENTS: GULF OF MEXICO OIL SPILL REPORT (Jan. 27, 2011), http://www.bp.com/sectiongenericarticle.do?categoryId=9034722&contentId=7064398.

15. *See* Statement, *In re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, 2010 WL 4151003 (E.D. La.Oct. 18, 2010) ("BP already has paid claims many times over the OPA limit and will live up to its public commitment to pay all legitimate claims made in connection with the *Deepwater Horizon* incident and the resulting oil spill. Accordingly, BP has chosen to waive the statutory limitation on liability under OPA . . . .").

16. *See* Big Oil Bailout Prevention Liability Act of 2010, S. 3305, 111th Cong. (2010); Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).

17. Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).

18. *See The Big Oil Bailout Prevention Liability Act of 2010: Hearing on S. 3305 Before the S. Comm. on Env't & Pub. Works*, 111th Cong. (2010) [hereinafter *Unlimited Liability Hearing*].

bill was ultimately approved by the committee and is currently awaiting consideration before the full Senate.[19]

This Comment primarily addresses whether unlimited liability in the oil industry is the appropriate remedy to counteract the deficient liability limits currently in place under the Oil Pollution Act. In order to provide a framework for understanding this topic, this Comment begins with a history of oil spill legislation in the United States. Accordingly, Part II traces the development of liability in connection with discharges of hazardous substances in United States waters. Part III describes the circumstances leading to the development of America's first comprehensive oil spill legislation and presents the specific provisions of that legislation which relate to compensation of injured parties. Because of the recent Deepwater Horizon spill, Congress must now determine how to adjust the oil industry's liability system to ensure environmental restoration and compensation for all injured parties, not only for this incident, but for all potential disasters of this magnitude in the future. Part IV addresses Senate Bill 3305, also referred to as the "Big Oil Bailout Prevention Unlimited Liability Act of 2010," and the circumstances leading to its proposal. Part V sets forth the arguments in the current debate regarding the limits on liability available to "responsible parties" in the event of an oil spill. Part VI concludes that Congress should reject the unlimited liability scheme proposed by Senate Bill 3305 because the prospective destruction that unrestrained liability in the oil industry would wage on the American oil industry, and ultimately on the United States' environment and economy, substantially outweighs the benefits of a system that ensures that the polluter pays. Specifically, Congress should adopt a liability scheme similar to that established by the Price-Anderson Act in the nuclear industry. This type of system would increase the current liability limits and encourage development in the oil industry, while guaranteeing that America's domestic oil producers stay in the game.

II. THE EVOLUTION OF EARLY OIL SPILL LEGISLATION IN THE UNITED STATES

America's transformation from an agricultural society to a highly industrialized world power triggered its utilization and reliance upon oil as a dominant energy source.[20] The increased demand necessitated the

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19. *See* Press Release, U.S. Senate Committee on Environment and Public Works, EPW Comm. Approves Measure to Ensure Responsible Parties Pay for Damage from Oil Spills (June 30, 2010), http://epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=89fe751e-802a-23ad-4428-d91473f5f74b.

20. *See* JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., OIL SPILLS IN U.S. COASTAL WATERS: BACKGROUND, GOVERNANCE, AND ISSUES FOR CONGRESS, 1 (2010) (explaining that oil supplies nearly 40% of United States' energy needs); CHRISTOPHER BEDDOR, WINNY CHEN, RUDY DELEON, SHIYONG PARK & DANIEL J. WEISS, CTR. FOR AM. PROGRESS, SECURING AMERICA'S FUTURE: ENHANCING OUR

transportation of increasingly large quantities of oil across the navigable waters of the United States.[21] These factors, combined with the relatively recent expansion in offshore drilling, make it nearly inevitable that the occasional oil spill will occur.[22] And they have, quite frequently. From 1973 to 1984, between 9,000 and 12,000 oil spills occurred in United States waters *each year*.[23] It is in response to these spills that America's oil spill legislation evolved.[24] In 1886, Congress passed the Rivers and Harbors Act, which, for the first time in United States history, gave the federal government the authority to regulate navigation on United States waters.[25] Sixty years later, Congress would expand federal regulatory authority with the enactment of the Federal Water Pollution Control Act of 1948.

A. The Federal Water Pollution Control Act of 1948

Building upon the Rivers and Harbors Act, the Federal Water Pollution Control Act of 1948 provided the foundation for modern oil spill legislation.[26] Through the act, Congress intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[27] This authorized the federal government to prepare comprehensive programs to reduce and eliminate pollution of interstate waters.[28] It also required the federal government to assist in creating treatment plans to prevent the discharge of wastes into interstate waters.[29] Under the 1956 amendments, also referred to as the Water Pollution Control Act, "where health was being endangered, the Federal government no longer had to receive the consent of all States involved."[30] These amendments clearly expanded the

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NATIONAL SECURITY BY REDUCING OIL DEPENDENCE AND ENVIRONMENTAL DAMAGE 4 (2009) ("Petroleum—the major product of crude oil—is currently the leading source of all energy supply in the United States at 39.8 percent, providing 96 percent of transportation fuel and 44 percent of industrial fuel.") [hereinafter CTR. FOR AM. PROGRESS].

21. *See* RAMSEUR, *supra* note 20, at 1.

22. *See id.*

23. Michael J. Jewell & J.B. Ruhl, *Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 475, 477 (1991).

24. *See, e.g.*, Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is It Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 101 (2001).

25. Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (2006) ("The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited . . . ."). The Court has interpreted "obstruction" broadly to include industrial deposits (discharge). *See* United States v. Republic Steel Corp., 362 U.S. 482, 485 (1960).

26. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1251 (2006).

27. § 1251(a).

28. DIGEST OF FED. RES. LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERV., FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) [hereinafter DIGEST], *available at* http://www.fws.gov/laws/lawsdigest/fwatrpo.html (last visited May 24, 2011).

29. *Id.*

30. THE CHALLENGE OF THE ENVIRONMENT, *supra* note 9, at 13.

federal government's authority to regulate water quality and ensured that the federal government could take immediate action when necessary.[31]

In 1966, the Clean Water Restoration Act amended the Federal Water Pollution Control Act to permit the Secretary of Interior to "conduct a comprehensive study of the effects of pollution, including sedimentation, in the estuaries and estuarine zones of the U.S. on fish and wildlife, sport and commercial fishing, recreation, water supply and power, and other specified uses."[32] More importantly, it contained a provision that specifically prohibited individuals from discharging oil into navigable United States waters, unless permitted by the Secretary of Interior.[33] The law did not require that the responsible party intend to make such a discharge in order to be liable; it required only that a discharge occur.[34] This represents the first time that water pollution legislation specifically prohibited the release of oil in United States waters.

B. Water Quality Improvement Act of 1970

In 1970, Congress enacted the Water Quality Improvement Act of 1970, which amended the prohibitions on oil discharge and permitted such action only when it complied with regulations issued by the President and as allowed by the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.[35] These revisions also required the President to develop regulations defining hazardous substances and authorized him to "publish a National Contingency Plan to provide for efficient and coordinated action to minimize damage from oil discharges, including containment, dispersal, and removal."[36] The Federal Water Pollution Control Act (FWPCA) Amendments of 1972 expanded the provisions relating to hazardous material discharges, defined the liability for such discharges, and established the federal government's role in cleaning up after them.[37] Under this amendment, citizens could file suit against polluters for violating the provisions of the Act, which "[e]videnc[ed] a firm commitment to the idea of citizen involvement in enforcement of the FWPCA."[38] The amendments further restricted discharge of pollutants by instituting a new permit program that prohibited any discharge not authorized by a discharge permit.[39] It "changed the thrust of enforcement

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31. *See id.*

32. Clean Water Restoration Act of 1966, Pub. L. No. 89-753; DIGEST, *supra* note 28.

33. *See* DIGEST, *supra* note 28. In 1970, the tasks of the Secretary of the Interior were subsequently transferred to the Environmental Protection Agency (EPA). *See id.*

34. *See* Clean Water Restoration Act of 1966, Pub. L. No. 89-753; DIGEST, *supra* note 28.

35. *See* DIGEST, *supra* note 28.

36. *Id.*

37. *See id.*

38. THE CHALLENGE OF THE ENVIRONMENT, *supra* note 9, at 17-18.

39. *See id.* at 16.

from water quality standards, regulating the amount of pollutants in a given body of water, to effluent limitations, regulating the amount of pollutants being discharged from particular point sources."[40] This shift to a focus on pollution prevention and mitigation of its deleterious effects became increasingly important as the risk of catastrophic spills increased.

C. The Clean Water Act of 1977

The Clean Water Act of 1977 established important amendments to the FWPCA that related to discharges of oil. Its purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[41] Through this legislation, Congress declared it United States policy that there "should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone. . . ."[42] It required the President to determine what quantities of oil and other hazardous substances would negatively impact public health and the environment and mandated that, upon knowledge of a discharge of oil or other hazardous substances, a person in charge of the discharging vessel or facility must immediately notify the appropriate government agency.[43] This made it possible for the federal government to assess criminal, civil, and administrative penalties for failure to provide immediate notification and for discharge in violation of the Act.[44] Unfortunately, these advances in the field of oil spill legislation lost momentum after the Clean Water Act's enactment and, with time, became substantially outdated.

D. The Need for Reform

While the evolution of legislation regulating oil discharges and liability demonstrated Congress's intent to ensure restoration and compensation in the event of an oil spill, the scheme available under the

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40. *Id.* at 13. It also established that the regulations under this Act must identify the "best available technology for preventing and reducing pollution." *Id.* at 14.

41. Clean Water Act, 33 U.S.C. § 1251 (2006).

42. 33 U.S.C. § 1321(b)(1) (2006). The other main purpose of the Act was to, through funding, encourage the states to build sewage treatment plants. *Id.*

43. § 1321(b)(4)-(5).

44. § 1321(b)(5)-(7). Failure to immediately notify the appropriate government agency upon knowledge of a discharge of oil or other hazardous substance is punishable by fines as set forth in Title 18, imprisonment for a duration of no longer than five years, or both. § 1321(b)(5). Civil penalties in the amount of up to $25,000 per day of violation may also be assessed. § 1321(b)(7). A discharge resulting from gross negligence or willful misconduct carries with it a civil penalty of no less than $100,000 and no more than $3,000 per barrel of oil or per unit of a hazardous substance. *Id.* Administrative penalties associated with discharges prohibited by this Act may either be assessed per violation, not to exceed $25,000 per violation, or per day for each day the violation continues, not to exceed $125,000. §1321(b)(6).

various acts failed to provide a streamlined process to accomplish that goal.[45] In addition, the existence of numerous state statutes, each containing their own unique provisions pertaining to oil spill liability, made determining what standard to follow even more complicated.[46] Congress began recognizing these deficiencies as early as 1975, when it directed the Attorney General to conduct a study and recommend legislation that would resolve the issues and provide a comprehensive system for oil spill liability.[47] Congress received the proposal but refused to adopt it.[48] It recognized that the current system was inadequate and comprehensive legislation was needed but could not reach an agreement on the exact terms.[49] Issues such as whether the federal law should preempt state laws in the field of oil spill liability, whether to require vessels to have double hulls as opposed to single, and whether to hold the cargo's owner as well as the ship's operator liable for damages plagued congressional debate and hampered any real progress.[50] This inability to hammer out the details left this area of the law largely unchanged until the *Exxon Valdez* oil spill in 1989.[51]

III. THE OIL POLLUTION ACT OF 1990

Although federal oil spill legislation had made substantial progress during the more than 100 years since its inception, it had evolved into a confusing patchwork of assorted acts and amendments.[52] No cohesive strategy existed for responding to and ensuring compensation for damages caused by a significant oil spill.[53] During that same time, the United States had substantially increased the amount of oil it imported from other countries in order to meet growing consumption and demand.[54] As more oil was transported across the seas, the piecemeal response and liability scheme that would be necessary in the event of a transportation accident remained largely untouched.[55] After years of arguing back and forth, unable to agree on the terms of a comprehensive oil spill strategy, it took

45. *See supra* Part II.
46. Lewis, *supra* note 24, at 107.
47. *Id.* at 107-08.
48. *Id.*
49. *Id.*
50. *See, e.g.*, RAMSEUR, *supra* note 20, at 8.
51. *See, e.g.*, *id.* at 9.
52. *See, e.g.*, Lewis, *supra* note 24, at 107.
53. *See id.*
54. *See* U.S. Energy Info. Admin., U.S. Dep't of Energy, *Annual U.S. Imports of Crude Oil* (July 29, 2010), *available at* http://www.eia.doe.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRIMUS1 &f=A.
55. *See supra* Part II.D.

the *Exxon Valdez* catastrophe of 1989 to prompt Congress to pass the Oil Pollution Act of 1990.[56]

A. Exxon Valdez—The Spill

On March 24, 1989, the *Exxon Valdez*, a 900-foot long supertanker, struck Bligh Reef in Prince William Sound in Alaska, spilling an estimated eleven million gallons of crude oil.[57] The spill stretched over 1,300 miles of coastline.[58] In its 2009 Annual Status Report, the Exxon Valdez Oil Spill (EVOS) Trustee Council stated that, twenty years after the spill, crude oil discharged by the *Exxon Valdez* still lingered in the Prince William Sound.[59] At the time the EVOS Trustee Council released this report, the *Exxon Valdez* spill was the largest oil spill in United States history.[60] The highly toxic nature of the heavy crude oil produced in this region of Alaska, along with the fact that it disperses slowly upon discharge, made cleanup efforts especially difficult.[61] Over 300 miles of shoreline were affected, and in some areas, the oil sank three and a half feet into the pebbly beaches.[62] The cleanup effort lasted for four years and cost Exxon nearly $2.1 billion.[63]

The costs to the environment, however, are much steeper, and complete recovery may take decades.[64] It only took five hours for eleven million gallons of crude oil to seep from the fractured *Exxon Valdez*.[65] The resulting slick devastated the Sound's delicate ecosystem.[66] When asked

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56. *See* Jewell & Ruhl, *supra* note 23, at 478-79; *supra* note 24 and accompanying text.

57. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 474-77 (2008).

58. Before the Deepwater Horizon oil spill in April of 2010, the *Exxon Valdez* oil spill was the most notorious spill in modern times. *See* United States v. Locke, 529 U.S. 89, 96 (2000). Although these two spills received widespread media attention, many other modern-day spills have occurred; for example, the barge *Bouchard B155* spill in Tampa Bay in 2005 and the *Eagle Otome* incident in Port Arthur, Texas. *See, e.g.*, Angel Gonzalez & Naureen Malik, *Collision Causes Crude Oil Spill*, WALL ST. J., Jan. 24, 2010, http://online.wsj.com/article/SB10001424052748704562504575021540843701582.html; SARAH MILTON & PETER LUTZ, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., OIL AND SEA TURTLES: BIOLOGY, PLANNING, AND RESPONSE 58 (Gary Shigenaka, 2003), http://www.fws.gov/contaminants/FWS_OSCP_05/fwscontingencyappendices/L-WildlifePlans/turtle.pdf.

59. EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, 2009 Status Report 2 (2009) [hereinafter EVOSTC REPORT].

60. *Id.* at 4. With regard to spill volume, the *Exxon Valdez* spill ranks thirty-fifth on the list of international tanker spills which have occurred since 1967. *See* International Tanker Owners Pollution Federation Limited, Historical Data, *available at* http://www.itopf.com/stats.html.

61. EVOSTC REPORT, *supra* note 59, at 4-5 (stating that the cleanup efforts constituted the "largest private project in Alaska since construction of the Trans-Alaska Pipeline").

62. *See Exxon Oil Spill: Exxon Valdez Oil Spill and Its Environmental and Maritime Implications Before the Committee on Commerce, Science, and Transportation*, 101st Cong. (1989) (statement of Admiral Yost).

63. Exxon Shipping Co. v. Baker, 554 U.S. 471, 478-79 (2008); EVOSTC REPORT, *supra* note 59, at 7.

64. *See* EVOSTC REPORT, *supra* note 59, at 30.

65. Lewis, *supra* note 24, at 99.

66. *See* EVOSTC REPORT, *supra* note 59, at 5-6.

how many animals died as a direct result of the spill, the EVOS Trustee Council answered:

> No one knows. The carcasses of more than 35,000 birds and 1,000 sea otters were found after the spill, but since most carcasses sink, this is considered to be a small fraction of the actual death toll. The best estimates 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.[67]

Sadly, the visible effects, such as death and oiled beaches, may prove insignificant compared to the dormant, long-term effects such as species mutation and extinction.[68] Many of the area's native species have yet to recover, including killer whales, sea otters, harlequin ducks, and the Pacific Herring.[69] The EVOS Trustee Council's 1998 report noted the "possibility that herring genetically damaged by exposure to *Exxon Valdez* oil would perpetuate abnormalities in the gene pool."[70] Now, twenty-one years after the spill, the herring population in this region has yet to recover.[71]

Consequently, the destruction of this population caused the downfall of the entire herring fishing industry.[72] Prior to the spill, the herring had been a vital resource for both the marine and human communities of the Prince William Sound.[73] The commercial fishing permits once valued at over $34 million are now worth nothing.[74] Because the industry's losses were not finite and continued to grow exponentially for years after the *Exxon Valdez* litigation ceased, the industry received no compensation and has sustained losses of over $166 million.[75] The losses suffered by the herring population and commercial fishing industry are illustrative of the plights faced by countless other species and industries as a result of the

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67. Exxon Valdez Oil Spill: FAQ's, Links and Unique Resources at ARLIS 1, 4 (2010), http://www.washingtonpost.com/wp-srv/special/oil-spill/docs/arlis-exxon-valdez.pdf (last visited Oct. 8, 2010).

68. *See* John Keeble, OUT OF THE CHANNEL: THE EXXON VALDEZ OIL SPILL IN PRINCE WILLIAM SOUND, 271 (1999).

69. EVOSTC REPORT, *supra* note 59, at 14-16.

70. Keeble, *supra* note 68, at 271.

71. EVOSTC REPORT, *supra* note 59, at 15-16.

72. *See Unlimited Liability Hearing*, *supra* note 18 (statement of RJ Kopchak, Fisherman and Member of Cordova District Fishermen United and Prince William Sound Science Center).

73. EVOSTC REPORT, *supra* note 59, at 16.

74. *See Unlimited Liability Hearing*, *supra* note 18 (statement of RJ Kopchak, Fisherman and Member of Cordova District Fishermen United and Prince William Sound Science Center).

75. *See id.* (statement of RJ Kopchak, Fisherman and Member of Cordova District Fishermen United and Prince William Sound Science Center).

spill.[76] In an attempt to restore the environmental and economic livelihood of the Sound, many injured parties sought redress in the legal system.[77]

B. *Exxon Valdez—Litigation*

Hundreds of private and public entities filed criminal and civil suits against Exxon and Alyeska Pipeline Service Co. for damages sustained from the *Exxon Valdez* spill.[78] Unfortunately for many of the injured parties, litigation stemming from the spill continued for approximately nineteen years after the initial incident.[79] The United States had charged Exxon with violating the Clean Water Act, the Refuse Act of 1899, the Migratory Bird Treaty Act, the Ports and Waterways Safety Act, and the Dangerous Cargo Act.[80] Exxon pleaded guilty to all but the Ports and Waterways Safety Act and the Dangerous Cargo Act and agreed to pay $150 million in fines, which was later reduced to a fractional $25 million with restitution of $100 million.[81] The United States and the State of Alaska filed a civil action against Exxon for environmental harms.[82] Exxon agreed to pay at least $900 million to assist in restoring natural resources.[83] Exxon also paid an additional $303 million in voluntary settlements with various private parties, namely fisherman and property owners.[84]

These agreements did not address all of the injured parties and their claims.[85] The court, in *Exxon Shipping Co. v. Baker*, consolidated the remaining civil cases against parties responsible for the spill.[86] In this suit, the parties seeking damages included commercial fishermen, landowners, and Native Alaskans.[87] Specifically, these groups sought compensatory and punitive damages.[88] The jury for the district court awarded compensatory damages in excess of $287 million and punitive damages in excess of $5

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76. *See* EVOSTC REPORT, *supra* note 59, at 2.

77. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 479 (2008) (stating that a total of 32,000 plaintiffs sought punitive damages in the Exxon Valdez litigation).

78. *See id.* at 478-79; *see also* Eyak Native Vill. v. Exxon Corp., 25 F.3d 773, 774, n.1 (9th Cir. 1994) ("'Exxon' refers to Exxon Corporation, Exxon Shipping Company, Exxon Transportation Company, and individual defendants who are current or former Exxon employees. 'Alyeska' refers to Alyeska Pipeline Service Company, the six oil companies which, in addition to Exxon, are its co-owners, and individual defendants employed by Alyeska.").

79. *See Baker*, 554 U.S. at 471.

80. *Id.* at 479.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.*

86. *Id.*

87. *Id.* The parties seeking damages were divided into two categories, those seeking compensatory damages and those seeking punitive damages. *See id.* The District Court of Alaska further divided the compensatory damage category into the following subcategories: Native Alaskans, commercial fishermen, and landowners. *Id.*

88. *Id.*

billion.[89] The Ninth Circuit Court of Appeals remanded the case twice for adjustment to the size of the punitive damages award and ultimately abated the award to $2.5 billion.[90] On appeal to the Supreme Court, Exxon argued that $2.5 billion in punitive damages was excessive and unjustified under the goal of punitive damages to deter reckless behavior.[91] The Court agreed, vacated the Court of Appeals' judgment, and remanded so that the Court could remit the punitive damages award.[92] Twenty years after the initial incident, the plaintiffs finally received their award of $507.5 million—nearly $2.5 billion less than the original verdict.[93] This amount was grossly inadequate to compensate the innocent victims of the *Exxon Valdez* disaster. While the *Exxon Valdez* spill caused irreparable harm to the environment and communities of the Prince William Sound, it has served an invaluable role as the catalyst for the reform of American oil spill legislation.[94]

C. The Oil Pollution Act

Pre-*Exxon Valdez* oil spill legislation was a "hodgepodge" of various acts and amendments regulating various aspects of United States waters.[95] The disaster reinforced the need for comprehensive legislation, and Congress sprung to action.[96] During congressional debate in 1989, Congress recognized that the various oil spill laws "provide varying and uneven liability standards and scope of coverage for cleanup costs and damages associated with activities covered by each individual law."[97] The laws did not impose enough liability on polluters to encourage them to take adequate measures to prevent spills.[98] Congress concluded that preventing oil spills was most important.[99] It was with these shortcomings in mind that Congress constructed the Oil Pollution Act of 1990.[100] On August 18, 1990, President George Bush signed into law the most comprehensive piece of American oil legislation to date.[101]

The overarching purpose of the Oil Pollution Act (OPA) "is to make the environment and public whole for injuries to natural resources and

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89. *Id.* at 480-81. The jury awarded $5 billion against Exxon and $5,000 against Hazelwood. *Id.*
90. *Id.* at 479.
91. *Id.* at 488-92.
92. *Id.* at 515.
93. *Id.*
94. *See* United States v. Locke, 529 U.S. 89, 101 (2000).
95. *See, e.g.*, Lewis, *supra* note 24, at 107.
96. *See id.* at 108.
97. Jewell & Ruhl, *supra* note 23, at 491.
98. *Id.* at 490.
99. *Id.* at 492.
100. *Id.* at 490-92.
101. *See, e.g.*, Statement by President George Bush upon Signing H.R. 1465, 26 WKLY. COMP. PRES. DOC. 1265 (Aug. 27, 1990).

services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident)."[102] To achieve this goal, it expands federal authority to respond to oil discharge situations.[103] Section 4201(a) of the Act requires, in accordance with the National Contingency Plan, that the President "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge . . . of oil."[104] This section sets forth standards and procedures for responding to "worst-case oil spill scenarios," such as the *Exxon Valdez*.[105] As one commentator expressed:

> The experience of the *Exxon Valdez* spill made it abundantly clear that the primary emphasis [in reforming legislation] should be placed upon preventing further spills, especially catastrophic ones, and that in the event of such an occurrence, nothing approaching the confused and slipshod response to it should ever be repeated.[106]

The President mirrored this sentiment at the signing of the OPA, declaring that the most important aspect of the OPA was that "the prevention, response, liability, and compensation components fit together into a compatible and workable system that strengthens the protection of our environment."[107] Never before had any single law given the federal government such wide latitude to prevent, respond to, and rectify the event of an oil spill.

1. Assessing and Compensating for Damages in Accordance with the Oil Pollution Act

The Oil Pollution Act provides that parties responsible for a vessel or facility that discharges oil or substantially threatens to discharge oil into navigable waters, shorelines, or the exclusive economic zone, will be liable for the costs of removal and damages that result from such an incident.[108] Responsible parties are divided into the following categories: (1) vessels, (2) onshore facilities, (3) offshore facilities, (4) deepwater ports, (5) pipelines, and (6) abandonment.[109] Any person that owns, operates, or charters a vessel is considered a responsible party under the OPA.[110] Any

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102. 15 C.F.R. § 990.10 (2011).

103. *See, e.g.*, RAMSEUR, *supra* note 20, at 3.

104. Oil and Hazardous Substance Liability Act, 33 U.S.C. § 1321(c) (2006); Oil Pollution Act, 33 U.S.C § 4201(a) (2006).

105. *See* § 4201(b).

106. Keeble, *supra* note 68, at 309.

107. Statement by President George Bush upon Signing H.R. 1465, 26 WKLY. COMP. PRES. DOC. 1265 (Aug. 27, 1990).

108. Oil Pollution Act, 33 U.S.C. § 2702(a) (2006).

109. *Id.* § 2701(32).

110. *Id.*

person who operates an onshore facility, any lessee or permittee of an area on which an offshore facility is located, and licensees of deepwater ports are all considered responsible parties under the OPA.[111]

Removal costs include all costs incurred by the individual states and the United States for those costs "which are consistent with the National Contingency Plan."[112] Damages covered by the OPA include, damages to natural resources, real and personal property, subsistence use, revenues, profits and earning capacity, and public services.[113] United States and state trustees can recover for "injury to, destruction of, loss of, or loss of use of, natural resources," which includes reasonable costs incurred in assessing the damage.[114] Claimants who own or lease property may recover for injury to real or personal property, including any economic losses that result from the destruction of such property.[115] Any claimant who uses natural resources for subsistence may recover for resources that have, as a result of oil discharge, been lost, destroyed, or injured, regardless of who owns or manages them.[116] Net loss of taxes, royalties, net-profit shares, rents, and fees may be recovered by the United States government, states, and political subdivisions thereof.[117] Profits and earning capacity may also be recovered to the extent that they are lost, destroyed, or injured.[118] The OPA even covers net costs for damages incurred for having to provide "increased or additional public services during or after removal activities," including protection from fire, health hazards, and safety caused by the discharge.[119]

2. *Restricting Liability*

In addition to setting forth the types of damages that responsible parties must compensate for, § 2704 of the OPA establishes specific caps on the total liability that those parties may incur.[120] These limits are divided into categories according to the type of facility or vessel that is responsible for the discharge of oil.[121] The maximum amounts include the total liability and any removal costs for a responsible party in any one incident.[122] Liability for tanker vessels is further divided based on the type

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111. *Id.*

112. § 2702(b)(1)(A)-(B). The Act does not, however, cover damages incurred due to discharges by public vessels, onshore facilities subject to the Trans-Alaska Pipeline Authorization Act, or permitted under federal, state, or local law. § 2702(c).

113. § 2702(b)(2)(A)-(F).

114. § 2702(b)(2)(A).

115. § 2702(b)(2)(B).

116. § 2702(b)(2)(C).

117. § 2702(b)(2)(D).

118. § 2702(b)(2)(E).

119. § 2702(b)(2)(F).

120. *See* 33 U.S.C. § 2704 (2006).

121. § 2704(a).

122. *Id.*

of vessel—single hull or double hull—and the weight of the vessel in gross tons.[123] The general rule for vessels is:

> (1) for a tank vessel the greater of—
> (A) with respect to a single-hull vessel, including a single-hull vessel fitted with double sides only or a double bottom only, $3,000 per gross ton;
> (B) with respect to a vessel other than a vessel referred to in subparagraph (A), $1,900 per gross ton; or
> (C)(i) with respect to a vessel greater than 3,000 gross tons that is—
> (I) a vessel described in subparagraph (A), $22,000,000 or
> (II) a vessel described in subparagraph (B), $16,000,000; or
> (ii) with respect to a vessel of 3,000 gross tons or less that is—
> (I) a vessel described in subparagraph (A), $6,000,000; or
> (II) a vessel described in subparagraph (B), $4,000,000;
> (2) for any other vessel, $950 per gross ton or $800,000, whichever is greater.[124]

Offshore facilities, excluding deepwater ports, are liable for the total of all removal costs plus $75 million.[125] The maximum amount required for onshore facilities and deepwater ports is $350 million.[126] The OPA also provides certain exceptions to these limits on liability, for example, in cases of willful misconduct or gross misconduct.[127] The President is required to adjust the limits "to reflect significant increases in the Consumer Price Index" at least every three years after July 11, 2006.[128] As required, the Coast Guard made the first mandated Consumer Price Index Adjustments on July 1, 2009, effective on February 5, 2010.[129] The purpose of the adjustments is to adjust for inflation and the calibrations are determined using a specific formula.[130] The adjustments were not intended to serve as a mechanism for raising liability limits to reflect changes in supply and demand or practices in the oil industry, or to amend the limits to fulfill the public's desire that responsible parties be held more accountable.[131] So,

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123. § 2704(a)(1)-(4).
124. § 2704(a)(1)-(2).
125. § 2704(a)(3).
126. § 2704(a)(4).
127. *See* § 2704(c).
128. § 2704(d)(4).
129. *See* 74 Fed. Reg. 31360 (July 1, 2009) (increasing the liability for single-hull oil cargo tank vessels greater than 3,000 tons from $3,000 per gross vessel or $22,000,000 to $3,200 per gross vessel or $23,496,000).
130. *See id.* at 31361.
131. *See id.* at 31362 ("[An] anonymous commenter suggested that the Coast Guard increase oil spill fines by 5,000 percent and hold oil company executives personally liable for oil spills. This comment is beyond the scope of this rulemaking. The primary purpose of this rulemaking is to implement the statutorily-mandated inflation increases to the OPA 90 limits of liability.").

although there is some statutory wiggle room, significant changes to the liability limits must be accomplished through an act of Congress.[132]

3. *The Federal Oil Spill Liability Trust Fund*

Envisioning scenarios where the statutorily defined liability limits would prove insufficient to restore injured parties and the environment after an oil spill catastrophe, the OPA created the Oil Spill Liability Trust Fund (Fund) to pick up where the liability limits left off.[133] The money available through the Fund is derived from an eight-cent per barrel tax on oil, which is ultimately paid by United States taxpayers.[134] The Fund pays for oil-spill related costs in a number of statutorily defined scenarios.[135] For example, the President may use it to pay for removal costs as he deems necessary, so long as such payment is consistent with the National Contingency Plan.[136] One example of such scenario occurs when the Fund is required to provide compensation for the portion of claims arising from a spill that exceeds the statutory liability limits.[137] Initially, the Fund could provide a maximum of $1 billion per incident, including a maximum of $500 million per incident for claims involving damage to natural resources.[138] In 2005, the Energy Policy Act increased the maximum amount in the Fund to $2.7 billion.[139] Just as the limitations on liability do not apply in certain situations, the Fund does not cover damages that result from the gross negligence or willful misconduct of the claimant.[140]

Although the $2.7 billion maximum on Fund distributions is an improvement on earlier amounts and may be adequate to compensate all injured parties in some situations, it is insufficient to compensate for damages resulting from larger and more devastating spills.[141] For example, had the OPA existed at the time of the *Exxon Valdez* incident, and had the captain not operated the ship in an intoxicated state, the § 2704(a)(3) limits on liability would have proved insufficient to compensate all injured parties.[142] By 2008, Exxon had paid in excess of $1 billion in settlements of federal and state claims for environmental damages and spent nearly $2.1

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132. *See id.*

133. John M. Woods, *Going on Twenty Years—The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 TUL. L. REV. 1323, 1324 (2009).

134. 26 U.S.C. § 4611(c)(2)(B) (Supp. 2010).

135. 26 U.S.C. § 9509 (Supp. 2011).

136. 33 U.S.C. § 2712(a)(1) (2006).

137. *See* 33 U.S.C. § 2712.

138. 26 U.S.C. § 9509 (Supp. 2011).

139. Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 194 (2005).

140. 33 U.S.C. § 2712(b).

141. *See* Patrick Nash, *The Adequacy of the Oil Pollution Act's Compensation Scheme in the Case of a Catastrophic Oil Spill*, 7 J. MIN. L. & POL'Y 105, 108 (1991).

142. *See* 33 U.S.C. § 2704(a)(3) (2006).

billion in cleanup efforts.[143] These numbers do not include the costs that coastal Alaskans have continued to incur as a result of the oil spilt more than twenty years ago.[144] These numbers far exceed all limitations provided by the OPA.[145] The costs were so high that Exxon's payments, combined with the additional money available through the Fund, would only have covered a small fraction of the damages for which Exxon was ultimately responsible.

Considering the hypothetical application of the OPA's liability limits to the *Exxon Valdez* spill, the Act was clearly inadequate to respond to a spill of great magnitude. Unfortunately, just as it took the *Exxon Valdez* disaster of 1989 to prompt America's first comprehensive oil spill law, it took the Deepwater Horizon disaster of 2010 to inspire Congress to consider adjusting the OPA's liability scheme.

IV. RAISING THE STAKES: BIG OIL BAILOUT PREVENTION UNLIMITED LIABILITY ACT OF 2010

Times have changed considerably in the twenty years since Congress enacted the Oil Pollution Act. As President Obama remarked, "[t]he Oil Pollution Act was passed at a time when people didn't envision drilling four miles under the sea for oil."[146] Recent technological advances have enabled oil companies to build offshore drilling rigs further and further from shore.[147] Unfortunately, deepwater drilling poses unique risks, and failure at such great depths can prove extremely difficult to correct.[148] The consequences of a catastrophic failure are even greater in particularly sensitive environments such as the Gulf of Mexico.[149] The recent Deepwater Horizon disaster revealed that "the laws that have been in place have not been adequate for a crisis of this magnitude."[150] Congress must now determine whether it is more prudent to patch the OPA liability scheme as proposed by Senate Bill 3305 or to replace it altogether.

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143. Exxon Shipping Co. v. Baker, 554 U.S. 471, 474-80 (2008).

144. EVOSTC REPORT, *supra* note 59, at 4.

145. *See* 33 U.S.C. § 2704(a)(3).

146. *President Obama Meets with Congressional Leaders on the BP Spill and the Months Ahead*, THE WHITE HOUSE BLOG (June 10, 2010, 2:42 PM), http://www.whitehouse.gov/blog/2010/06/10/president-obama-meets-with-congressional-leaders-bp-spill-and-months-ahead.

147. *See* National Ocean Industries Association, *History of Offshore*, http://www.noia.org/website/article.asp?id=123 (last visited May 16, 2011).

148. *See* BP, DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT 1-192 (2010), http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf.

149. *See* RAMSEUR, *supra* note 20, at 5.

150. *See President Obama Meets with Congressional Leaders*, *supra* note 146.

1. Deep Trouble at Deepwater Horizon

On April 20, 2010, an explosion occurred on the Deepwater Horizon oil rig located just forty-one miles off the coast of Louisiana.[151] The rig, leased by BP, was operated by a 126-person crew in waters approximately 5,000 feet deep.[152] The facility no longer produced oil and was entering into its final stages of operation.[153] BP, with the help of Halliburton, was in the process of reinforcing the well with a cement casing.[154] BP's investigation team characterized the events leading to the explosion as follows:

> The accident . . . involved a well integrity failure, followed by a loss of hydrostatic control of the well. This was followed by a failure to control the flow from the well with the BOP equipment, which allowed the release and subsequent ignition of hydrocarbons. Ultimately, the BOP emergency functions failed to seal the well after the initial explosions.[155]

The explosion killed eleven crew members, and the well discharged oil continuously for three months until it was finally capped on July 15, 2010.[156] Over those three months, an estimated 4.9 million barrels of oil flooded into the Gulf of Mexico, only one million of which were ultimately recovered.[157] For months after the spill, the resulting oil slick caused tar balls and oil soaked marine life to wash up along the shores of Mississippi, Alabama, Florida, Texas, and Louisiana.[158] The Gulf of Mexico provides nearly one-third of all oil production and seafood harvesting in the United States.[159] The tourism, commercial, and recreational fishing industries, which "contribute tens of billions of dollars to the U.S. economy," were unable to operate and have yet to recover.[160] Countless American citizens living along the coast relied upon the health and productivity of the Gulf as

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151. U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 2.

152. Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, April 21, 2010, http://www.nytimes.com/2010/04/22/us/22rig.html. Transocean employees comprised the majority of the crew. *Id.*

153. *Id.*

154. *See* Ben Casselman & Russell Gold, *Legal Tactics Emerging at Oil Hearings*, Aug. 29, 2010, http://online.wsj.com/article/SB10001424052748703618504575459873056690954.html; Robertson, *supra* note 152.

155. DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT, *supra* note 148, at 9.

156. U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 2.

157. *Id.*

158. See Campbell Robertson, *Effects of Spill Spreads as Tar Balls are Found*, N.Y. TIMES, July 6, 2010, http://www.nytimes.com/2010/07/07/us/07spill.html.

159. *See, e.g.*, Nat'l Wildlife Fed'n, *How Does the BP Oil Spill Impact Wildlife and Habitat?*, http://www.nwf.org/Oil-Spill/Effects-on-Wildlife.aspx; BP P.L.C., GROUP RESULTS: FOURTH QUARTER AND FULL YEAR 2010 1, 3 (February 1, 2011), http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/B/bp_fourth_quarter_2010_results.pdf.

160. U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 1.

a source of employment and were left high and dry when the spill forced the government to close 88,522 square miles of federal waters.[161] Mitigating the deleterious effects of the spill required the hard work and cooperation of federal, state, and local governments, and nearly 50,000 individuals.[162] As was the case after the *Exxon Valdez* spill, the negative consequences of this disaster will continue to impact the economy, ecosystem, and citizens of the Gulf Coast region for years to come.[163]

As with any controversy surrounding a highly publicized disaster, unbiased, accurate information on precisely what went wrong and who was responsible is difficult to come by. One thing, however, is certain: the party or parties ultimately determined to be responsible for the Deepwater Horizon oil spill will have a lengthy list of hefty bills to pay.[164] On May 24, 2010, BP, the facility's lessee, reported that 23,000 claims had already been filed, 9,000 of which it had already paid.[165] In just four days, BP claimed to have spent nearly $760 million in responding to the incident.[166] That number increased rapidly, and as press secretary Robert Gibbs stated in a White House press briefing, "[o]bviously we've got a situation where . . . we could easily top $75 million in a short period of time."[167] This prediction was substantiated in a BP press statement, which reported that, as of October 1, 2010, it had paid over $806 million in response to 44,000 claims.[168] While the meter continued to run on the claims for damages associated with this disaster, quickly surpassing the amount that the responsible party or parties would be accountable for, members of Congress began looking for ways to ensure that the injured parties received just compensation.[169]

2. *Upping the Ante—The Big Oil Bailout Prevention Liability Act*

Taking the title of worst offshore oil spill in United States history, the Deepwater Horizon disaster promised to spawn another wave of litigation,

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161. *See id.* at 2.

162. *See supra* note 2 and accompanying text.

163. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 2, at 5.

164. *See* Press Release, Update on Gulf of Mexico Oil Spill Response (May 24, 2010), http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062283.

165. *Id.*

166. *Id.*

167. Robert Gibbs, Press Briefing by Press Secretary Robert Gibbs (May 4, 2010), http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-05-04.

168. Press Release, BP Pledges Collateral for Gulf of Mexico Oil Spill Trust, (Oct. 1, 2010), http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7065280.

169. *See, e.g.*, Acceptance of Offer on Liability and Expedited Claims at Mississippi Canyon 252 Act, S. 3461, 111th Cong. (2010); Big Oil Bailout Prevention Liability Act of 2010, S. 3305, 111th Cong. (2010).

much like that which resulted from the *Exxon Valdez* spill.[170] On May 4, 2010, New Jersey Senator Robert Menendez, on behalf of himself and Senators Nelson, Lautenberg, Cardin, Schumer, Whitehouse, and Sanders, introduced Senate Bill 3305 (S. 3305), titled Big Oil Bailout Prevention Liability Act of 2010 (Act).[171] The objective of S. 3305 was to amend the OPA to require oil polluters to pay for the entire cost of their spills.[172] The bill was read twice in the Senate and then referred to the Committee on Environment and Public Works (EPW), who made amendments and published the final Senate Report.[173] EPW passed the bill with the amendments on June 30, 2010, and, as of March 4, 2011, the bill continues to await consideration by the full Senate.[174] In its early stages, S. 3305 proposed to increase the limits on liability for offshore facilities from $75 million to $10 billion.[175] The Act and the amendments it proposed would apply retroactively, becoming effective on April 15, 2010, which would conveniently make the new provisions applicable to the claims for damages resulting from the April 20, 2010, Deepwater Horizon spill.[176] While upping the ante $25 million was enough for some members of Congress, others wanted to put oil companies all in.

3. Going All In—The Big Oil Bailout Prevention Unlimited Liability Act

As oil continued to seep from the well at Deepwater Horizon, many American citizens and members of Congress demanded that oil companies pay the entire amount of any damages they cause.[177] When reported on August 5, 2010, S. 3305 reflected those desires in numerous important changes.[178] First, the Act received a new title, the "Big Oil Bailout Prevention Unlimited Liability Act of 2010," and its purpose was modified to include not only amendment to the OPA, but also the FWPCA.[179] As the name denotes, the revised bill reflects the Senators' desire to eliminate altogether the statutory limits on liability for offshore drilling facilities by proposing that the language "and the liability of the responsible party under section 1002" replace the OPA's original language of "plus

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170. *See* Speaker Nancy Pelosi, *Ensuring Tools to Respond to the BP Oil Spill*, http://www.democraticleader.gov/floor?id=0376 (last visited March 4, 2011).

171. Big Oil Bailout Prevention Liability Act of 2010, S. 3305, 111th Cong. (2010).

172. *Id.*

173. *Id.*

174. *See supra* note 19 and accompanying text.

175. Big Oil Bailout Prevention Liability Act of 2010, S. 3305, 111th Cong. (2010).

176. *Id.*

177. *See e.g.*, *Unlimited Liability Hearing*, *supra* note 18 (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University); *Unlimited Liability Hearing*, *supra* note 18 (statement of Captain Mike Frenette, Venice Charter Fishing); *Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. Robert Menendez).

178. Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).

179. *Id.*

$75,000,000."[180] Second, the number of senators supporting the bill increased from seven to twenty-four, accounting for nearly one-quarter of the Senate.[181] The bill also amended the claims procedure set forth in the OPA.[182] The claims procedure initially permitted a claimant to commence court action against a responsible party or guarantor or to initiate a claim with the Fund once a claim had been presented and either of the two requirements had been met:

> (1) each person to whom the claim [was] presented denie[d] all liability for the claim, or (2) the claim [wa]s not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) . . . whichever is later.[183]

Finally, S. 3305 replaces "settled by any person by payment within 90 days" with "settled in whole by any person by payment within 30 days."[184] Instead of having to wait for the earlier of a settlement offer or the passing of ninety days, this bill would permit a claimant to commence court action within one month after presentation of a claim to the allegedly responsible parties.[185] In effect, this bill would impose unrestricted liability in the oil industry and encourage more rapid recovery—but only for offshore drilling facilities. Whether unlimited liability is the appropriate solution to the current controversy surrounding the OPA's deficiencies is up for debate.

V. THE DEBATE: WHETHER UNLIMITED LIABILITY IN THE OIL INDUSTRY IS APPROPRIATE

The Deepwater Horizon spill caused extensive damage to the ecosystem and economy of the Gulf Coast.[186] Six months after the spill, the disaster had already generated tens of thousands of claims that resulted in several hundred million dollars in payments from BP.[187] The statistics are alarming. Moreover, they do not account for the long-term effects that may surface in the future.[188] Congress must now determine how to adjust the oil industry's liability system to ensure environmental restoration and compensation for all injured parties, not only for this incident, but also for

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180. *Id.*

181. *Id.* (listing Senators Menendez, Nelson, Lautenberg, Cardin, Schumer, Whitehouse, Sanders, Brown, Gillibrand, Kaufman, Murray, Reed, Klobuchar, Feinsttein, Merkley, Stabenow, Feingold, Durbin, Shaheen, Casey, Leahy, Harkin, Franken and Mikulski as introducing the bill).

182. *Id.*

183. Oil Pollution Act, 33 U.S.C. § 2713(c) (2006).

184. Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).

185. *See id.*

186. *See supra* Part IV.A.

187. *See supra* note 171 and accompanying text.

188. *See* THE CHALLENGE OF THE ENVIRONMENT, *supra* note 9, at 5.

all potential disasters of similar magnitude.[189] As has been the case in past debates on oil spill legislation reform, even when most members of Congress agree that the current threshold is starkly inadequate, they fail to agree on how to resolve the issue.[190]

A. Arguments Advocating Unlimited Liability—Ensuring that the "Polluter Pays"

Proponents of S. 3305 and limitless liability for offshore polluters support the principle that the law should hold polluters accountable for the entirety of the damages they cause. Unlimited liability would ensure that all injured parties and the environment are fully restored and that the ultimate costs are not borne by innocent American citizens and businesses. In addition, eliminating the damage cap will encourage oil companies to take appropriate safety precautions, thus preventing the risk of future oil spills.

1. Eliminating Liability Restrictions Will Deter Risky Business Decisions and Promote Safety

Proponents of S. 3305 believe that increasing the damage cap will encourage the oil industry and potential responsible parties to conduct their offshore drilling activities more cautiously.[191] By the same reasoning, completely eliminating restrictions on liability would promote even greater care.[192] The current limits effectively immunize the polluter from assuming the economic costs of its operations and "ha[ve] the effect of under deterrence."[193] Because polluters are not held accountable for the full economic costs of their actions, the damage cap may have the effect of encouraging responsible parties to take actions that would not otherwise be profitable.[194] In some circumstances, the existence of liability limits may lead larger companies to disregard preventative safety measures that would be more costly than compensating for damages.[195] These types of consequences do little to further the OPA's most important aspects of

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189. *See supra* Part IV.

190. *Compare Unlimited Liability Hearing, supra* note 18 (statement of Sen. Robert Menendez), *with Unlimited Liability Hearing, supra* note 18 (statement of Sen. James Inhofe).

191. *Hearing of the Senate Environment and Public Works Committee: Big Oil Bailout Prevention Liability Act,* 111th Cong. (2010) (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University) [hereinafter *Initial Liability Hearing*].

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

preventing oil spill disasters and strengthening the protection of the environment.[196]

The current liability limits are so low that they fail to discourage the larger companies from taking shortcuts.[197] Depending on the size of the corners they cut, big industry players might quickly save up the $75 million to cover a spill in the unlikely event that one may occur. Even if this gambling does not entirely pay for the spill, for ExxonMobil, Royal Dutch Shell, BP, Chevron and Conoco Phillips, commonly referred to as the "Big Five,"[198] $75 million is just a drop in the bucket. For example, according to its quarterly results report, BP earned roughly $6.79 billion dollars in *profits* during the first three months of 2010.[199] That means that in only one quarter, BP made enough money to meet and far surpass the current liability limits established by the OPA.[200] As Captain Mike Frenette, a man who makes his living on the Gulf, asked, "should corporations that net billions of dollars annually be allowed to hi[de] behind a protective veil of a liability cap . . . while their actions devastate thousands of lives?"[201] Many members of Congress and Gulf Coast communities would answer no.

In response to arguments that removing the $75 million liability cap would affect mom-and-pop drillers disproportionately, unlimited liability supporters counter that Congress should not focus on the bill's effects on small versus large companies; instead, it should focus on the bill's effects on safe versus unsafe companies.[202] Unrestricted liability would only negatively affect the small, mom-and-pop drillers that fail to safely conduct their operations.[203] Large oil companies, capable of paying a substantial amount of money in the event of a catastrophic spill, are not the companies that America should be concerned about.[204] What America should really fear, in Menendez's view, are small, unsafe oil companies that take risky shortcuts.[205] He explained that "[i]f a $500 million company had been the operator and a spill causing $37 billion in costs and damages had taken place, . . . the residents of the Gulf and the American taxpayer would

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196. *See* Statement on Signing the Oil Pollution Act of 1990, 26 WKLY. COMP. PRES. DOC. 1265 (Aug. 17, 1990).

197. *Initial Liability Hearing*, *supra* note 195 (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University).

198. *See, e.g.*, David Ruth, *Baker Institute Study Shows 'Big Five' Oil Companies Limit Exploration Spending to Appease Investors: Second-tier Oil Companies' Increase in Exploration Positions Them Well* (Nov. 15, 2007), http://www.media.rice.edu/media/NewsBot.asp?MODE=VIEW&ID=10283.

199. BP P.L.C., GROUP RESULTS: FIRST QUARTER 2010, 1 (Apr. 27, 2010), http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/B/bp_first_quarter_2010_results.pdf.

200. *See id.*

201. *Unlimited Liability Hearing*, *supra* note 18 (statement of Captain Mike Frenette, Venice Charter Fishing).

202. *See id.* at 14.

203. *See id.*

204. *See id.* (statement of Sen. Robert Menendez).

205. *See id.*

be holding the bag for over $36 billion."[206] This result is not only economically unconscionable, but facially unjust.

2. *The "Polluter Pays" Principal: Shifting the Cost to American Citizens and Business is Unjust*

In addition to the economic consequences, limited liability also offends the "basic principle of justice."[207] A common theme of early water pollution laws, such as the Federal Water Pollution Control Act of 1948 and the Clean Water Act of 1977, was to ensure that polluters were held liable for the environmental and economic damage their discharges caused.[208] This "polluter pays" principal is common in the field of environmental law in the United States and beyond.[209] The idea is "a pretty basic free-market idea, an American idea, that if you take a risk, you should be the one to get the rewards, but also the one to incur the costs."[210] A liability scheme that does not hold polluters accountable for the full effects of their damages and ultimately shifts the cost to America's citizens and businesses is unjust. This system essentially requires the coastal community to "subsidize an oil company that is still likely to reap huge profits from the oil field as the affected states and the people in them struggle economically and environmentally."[211] There is absolutely no reason that American taxpayers should be forced to shoulder the costs for companies that have the ability to pay, especially considering the enormous profits some oil companies make.[212] For companies incapable of paying the entire cost to compensate injured parties and restore the environment in the event of a spill, it seems that at least some advocates of unlimited liability believe the industry is better off without them.[213]

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206. *Id.*

207. *Initial Liability Hearing, supra* note 195 (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University).

208. *See supra* Parts II.A & II.C.

209. *See* George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 646 (2010) ("The 'polluter pays' principle, whereby polluters are responsible for remedying the waste they generate, has been adopted by regulators in the United States, Europe, and Asia.").

210. *Unlimited Liability Hearing, supra* note 18 (statement of Sen. Amy Klobuchar).

211. *Initial Liability Hearing, supra* note 191 (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University).

212. *See supra* note 199 and accompanying text.

213. Patrice Hill, *Heavy Liability Could Sink Small Oil Drillers*, WASHINGTON TIMES (July 25, 2010), http://www.washingtontimes.com/news/2010/jul/25/heavy-liability-could-sink-small-oil-drillers/print/.

B. Arguments Rejecting an Unlimited Liability Scheme

Increasing or altogether doing away with the OPA's current limits on liability will ensure that responsible parties are held wholly responsible for compensating the victims of an oil spill and cleaning up and repairing the natural environment.[214] Unfortunately, an unlimited cap on damages may ultimately reward the larger companies by eliminating competition from small and medium sized oil companies.[215] In the event that large, domestic oil companies find themselves unable to self-insure, an unlimited liability scheme could force America to rely substantially on foreign oil and may ultimately bestow monopoly powers on national oil companies.[216] Dependence on foreign oil would compromise America's national security, jeopardize its economy, and increase the risk for catastrophic environmental destruction.[217]

1. Going All In Will Force American Oil Companies to Cash Out

In general, those who oppose unlimited liability, and S. 3305 specifically, do not claim that drilling safety reform is unwarranted or even unwelcomed; rather, they fear that the bill, as proposed, would go too far.[218] Some of the bill's most vehement challengers predict that unlimited liability for incidents such as the Deepwater Horizon spill would cause serious problems for America's domestic oil industry and the nation at large.[219] They believe that an increased cap or unrestricted liability would ultimately reward major oil companies, like BP, by causing insurance rates for Gulf oil production to rise to levels that only the Big Five would be able to afford.[220] One Senator has even gone so far as to propose to rename S. 3305 "the big oil Gulf monopoly bill" because it would make offshore drilling so expensive that national oil companies and major domestic oil companies would monopolize the Gulf's oil industry.[221]

The effects of such monopolies in the oil industry would be devastating and widespread. The obvious consequence is the demise of small, mom-and-pop operations.[222] Unlike larger companies, which make enough money to set some aside for potential accidents, otherwise known

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214. *See supra* Part V.A.

215. *See infra* Part V.B.1.

216. *See infra* Part V.B.1.

217. *See infra* Parts V.B.2.

218. *See, e.g.*, *Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. Lamar Alexander) ("I think almost everyone in the Senate believes there ought to be an increase in liability. But the question would be, should it be from the current model we now have?").

219. *Id.* at 3 (statement of Sen. James Inhofe).

220. *See* Hill, *supra* note 213.

221. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. Christopher "Kit" Bond).

222. Hill, *supra* note 213.

as "self-insuring," smaller companies must seek insurance through insurance providers.[223] Open-ended liability would make it "prohibitively expensive for them to get the insurance they need" and would ultimately force them out of the industry.[224] Loss of these small to medium-sized companies would also give rise to considerable job loss.[225] A recent study indicated that offshore drilling in the Gulf of Mexico provided nearly 400,000 jobs.[226] More than half of these jobs were from small to medium-sized firms.[227] This means that the United States could lose at least 200,000 jobs if these independent firms are forced out of the industry.[228] With the current unemployment rate hovering around 9%, the United States cannot stand to lose these independent oil companies.[229] Even more devastating would be the loss of the domestic oil industry to foreign oil companies.[230]

2. *Loss of Domestic Oil Producers Renders the United States Dependent on Foreign Oil*

During the hearing of the Senate Environment and Public Works Committee in consideration of S. 3305, Senator Inhofe discussed his apprehension with the President's moratorium on deep-water drilling.[231] President Obama enacted the moratorium after the Deepwater Horizon oil spill in an attempt to gain more information about how the incident happened before permitting any further deep-water drilling.[232] Senator Inhofe feared that it would harm the Gulf's economy, interfere with the United States' ability to produce its own oil, and ultimately render the United States dependent on foreign countries to meet the rising domestic demand for oil.[233] The moratorium has since been lifted, [234] but an unlimited damage cap could put the United States in the same vulnerable position. Some fear that if the OPA's damage cap is increased or eliminated altogether, "even the big five who would be self-insuring . . . would not be able to cover it."[235] This would make the United States

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223. *See* Joe Ortiz, *BP Oil Sparks Debate on Captive Insurers*, WALL ST. J. (June 9, 2010), *available at* http://blogs.wsj.com/source/2010/06/09/bp-oil-spill-sparks-debate-on-captive-insurers/.

224. Hill, *supra* note 213.

225. *See id.*

226. *Id.*

227. *See id.*

228. *See id.*

229. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE 1 (2011), http://www.bls.gov/news.release/pdf/empsit.pdf.

230. *See infra* Part V.B.2.

231. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. James Inhofe).

232. *See* Gibbs, *supra* note 7.

233. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. James Inhofe).

234. *See* Matthew Daly, *Offshore Drilling Ban: Obama to End Moratorium*, THE HUFFINGTON POST (Oct. 12, 2010), *available at* http://www.huffingtonpost.com/2010/10/12/offshore-drilling-ban-dec_n_759392.html.

235. *Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. James Inhofe).

"completely reliant upon China and Venezuela and the national oil companies, the only ones who could actually handle an unlimited cap."[236] Dependence on foreign oil will have devastating effects on the United States economy and exponentially increase the risks of oil spills and widespread environmental damage.[237]

i. Environmental Consequences

While offshore drilling exposes the United States to the inescapable risk that some accidental or careless oil discharges will occur, it does carry with it the benefit of reduced transportation of such an extremely hazardous resource.[238] Because the majority of the United States' imports come from companies overseas,[239] increased dependence on foreign countries would ultimately lead to an increased risk for widespread environmental damage. To sustain its current demand for and reliance upon oil in an economic climate suffering the loss of domestic oil production, America will have no other choice, short of a wide-scale decrease in consumption or a sweeping switch to alternative energy sources, but to import increasingly large quantities of oil from foreign countries.[240] This will inevitably heighten the risk of transportation disasters, which destroy coastal ecosystems, economies, and the lives of countless individuals.[241]

Vessels are responsible for the majority of all oil pollution incidents occurring in and around United States waters.[242] Not surprisingly, they are also responsible for discharging the highest quantities of oil and petroleum based products when an incident occurs.[243] For example, in 2008, tankships, tankbarges, and all other vessels accounted for the discharge of approximately 550,000 gallons of oil and petroleum products into navigable United States waters.[244] The remaining pollution in 2008, emitted from stationary sources such as facilities, pipelines, other nonvessels, and unknown sources, amounted to only 210,000 gallons.[245] These statistics

236. *Id.*

237. *See infra* Part V.B.2.

238. *See* RAMSEUR, *supra* note 20, at 1.

239. *See* U.S. Energy Info. Admin., U.S. Dep't of Energy, *Crude Oil and Total Petroleum Imports Top 15 Countries* (Jan. 28, 2011), http://www.eia.doe.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html.

240. *See* Mark D. Mutschink, *Facing the Future of Oil in U.S. Courts: A Recommendation for Changing the Bremen Doctrine on Enforceability of Forum Selection Clauses*, 63 SMU L. REV. 1343, 1346 (2010); U.S. Energy Info. Admin., U.S. Dep't of Energy, *Annual U.S. Imports of Crude Oil and Petroleum Products* (July 29, 2010), http://www.eia.doe.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mttimus1&f=a; *Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. James Inhofe).

241. *See* RAMSEUR, *supra* note 20, at 1.

242. U.S. Census Bureau, *Oil Spills in U.S. Water—Number and Volume: 2000-2008 "Table 359,"* 1, 1 (2008), http://www.census.gov/compendia/statab/2010/tables/10s0359.pdf.

243. *Id.*

244. *Id.*

245. *Id.*

indicate that transportation vessels pose a substantial threat to the environment.[246] Therefore, choosing a course of action that would necessitate the movement of more large vessels, containing increasingly heavy shipments of oil, will compromise the safety of America's coastal environments.

While S. 3305 adjusts liability for discharges by offshore drilling facilities, it does not modify liability limits for tanker spills.[247] The OPA assesses liability for discharges from vessels according to the size of the vessel measured in gross tons and whether it has a single or double hull.[248] This means that if S. 3305 becomes law and fears of monopoly and reliance on foreign oil are realized, America will be poorly situated to deal with the risk of catastrophic destruction that will necessarily accompany the increase in importation of oil. Liability should be commensurate with the potential for disaster; therefore, liability limits for tankers should be increased in tandem with an increase in liability for offshore drilling facilities. Failure to do this, especially considering the risks that importation via vessel poses, will exponentially increase America's risk for environmental destruction.

ii. Economic Consequences

In addition to the environmental hazards created by loss of domestic oil producers and inevitable dependence on foreign oil companies, the United States and the world at large would also suffer severe economic injuries.[249] The United States currently receives nearly half of its oil imports from Canada, Mexico, and Saudi Arabia—"friendly" foreign countries.[250] Unfortunately, American dependence on foreign oil comes at the same time that other high-consumption countries, such as Great Britain and Mexico, also face supply issues.[251] The combined effect of numerous oil dependent countries' loss of domestic supplies will give monopoly powers to the Organization of Petroleum Exporting Countries (OPEC), which already provides nearly half of the United States' oil supply.[252] Currently, members of OPEC include: Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela.[253] Giving OPEC a monopoly over the oil industry could prove ruinous, particularly in light of its established reputation for inflating prices

246. *See id.*
247. *See* Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010).
248. *See supra* Part III.C.2.
249. *See, e.g.*, CTR. FOR AM. PROGRESS, *supra* note 20, at 4.
250. *See id.* at 4-6.
251. *See id.* at 5.
252. *See id.*
253. ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, *Member Countries*, http://www.opec.org/opec_web/en/about_us/25.htm (last visited May 16, 2011).

and restricting supply.[254] For example, in 2008, OPEC refused to increase the amount of oil they exported to the United States.[255] This caused the price per barrel of oil to skyrocket and Americans were forced to pay nearly four dollars per gallon.[256] In the past, these types of "price shocks" have led to recessions and affected the growth of the United States' economy.[257]

Furthermore, dependence on unfriendly foreign countries would put the American economy at risk by jeopardizing national security.[258] The loss of domestic oil producers will force the United States to meet its demand by importing from national oil companies located in unstable regions, such as Venezuela, Russia, and the Middle East.[259] Many of these countries "harbor hostility toward the United States, and often use their energy reserves to pursue aggressive political agendas."[260] This is significant because, while the United States currently only controls 2% of the world's proved oil and gas reserves, national oil companies command 88% of the world's remaining oil reserves and comprise the majority of global production.[261] Not only is it not in America's best interest to do business with these countries, but contributing to their growth may also put their citizens at risk.[262] The revenue these countries receive is often hoarded by small groups of "ruling elites" who use the money as a way to guarantee their power and expand their oppressive regimes.[263] It is with these things in mind that Congress should determine the most appropriate course of action regarding S. 3305 and unlimited liability.

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254. *See* CTR. FOR AM. PROGRESS, *supra* note 20, at 5.

255. *See id.*

256. *See id.*

257. U.S. Energy Info. Admin., U.S. Dep't of Energy, *Energy Price Impacts on the U.S. Economy*, http://www.eia.doe.gov/oiaf/economy/energy_price.html (last updated Apr. 10, 2001).

258. *See* CTR. FOR AM. PROGRESS, *supra* note 20, at 1-16.

259. *See* Mutschink, *supra* note 240, at 1247-48; CTR. FOR AM. PROGRESS, *supra* note 20, at 6.

260. CTR. FOR AM. PROGRESS, *supra* note 20, at 6.

261. *See* Mutschink, *supra* note 240, at 1348; U.S. ENERGY INFO. ADMIN., U.S. Dep't of Energy, *Energy in Brief: Who are the Major Players Supplying the World Oil Market?* (Jan. 28, 2009), http://tonto.eia.doe.gov/energy_in_brief/world_oil_market.cfm; U.S. ENERGY INFO ADMIN., U.S. DEP'T OF ENERGY, *Notes and Sources for Table of World Proved Oil and Natural Gas Reserves, Most Recent Estimates* (Mar. 3, 2009) http://www.eia.doe.gov/emeu/international/Notes%20for%20Most%20Recent%20Estimates%20of%20Proved%20Oil%20and%20Natural%20Gas%20Reserves.html ("Proved reserves are estimated quantities that analysis of geologic and engineering data demonstrates with reasonable certainty are recoverable under existing economic and operating conditions.").

262. *See* CTR. FOR AM. PROGRESS, *supra* note 20, at 9.

263. *Id.*

VI. CONGRESS SHOULD REJECT UNLIMITED LIABILITY AND REPLACE THE OIL POLLUTION ACT'S LIABILITY SCHEME WITH A TAILORED VERSION OF THE PRICE-ANDERSON MODEL

At the time of the OPA's enactment, very little was known about the potential risks posed by offshore drilling.[264] When President George H.W. Bush signed the OPA into law in 1990, he proclaimed that, "it should be noted that exploration for gas [thirty-eight miles] offshore carries little environmental risk."[265] In its hasty response to the *Exxon Valdez* spill, Congress failed to step back and look at the big picture. As a result, it passed a bill that was too narrowly tailored to the most common types of accidents at that time: discharges from tanker vessels. In this same manner, S. 3305's sponsors seek to amend the OPA in an impulsive response to the recent Deepwater Horizon tragedy. In doing so, they fail to consider the long-term economic and environmental consequences of their proposed amendments. To avoid repeating the mistakes of OPA's founders, Congress must consider the long-term consequences of unlimited liability before crafting a solution to the current controversy.

Ideally, oil companies should be liable for every penny worth of damage they cause because it is unjust and unacceptable to require innocent American businesses and citizens to bear the brunt of the cost in the event of another catastrophic spill. An unlimited liability system would guarantee that the environment is restored and that all parties are compensated for the injuries they sustain.[266] Unfortunately, this type of system would also cause the deterioration of America's domestic oil industry and increase dependence on foreign oil.[267] This would negatively impact the United States economy and increase the potential for environmental devastation.[268] If unlimited liability will put America at the mercy of national oil companies driven by unstable, unfriendly countries, it cannot be supported.

Fortunately, there is an alternative. The liability scheme established by the Price-Anderson Act would increase liability while ensuring that domestic oil companies are not driven out of the industry.[269] The Price-Anderson Act, as mentioned in the hearings considering S. 3305,[270] provides a solid foundation for a liability scheme equipped to respond to an accident and promote development in today's oil industry. It was enacted "to protect the public and to encourage the development of the atomic

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264. *See, e.g.*, Statement on Signing the Oil Pollution Act of 1990, 26 WKLY. COMP. PRES. DOC. 1265, 1266 (Aug. 18, 1990).

265. *Id.*

266. *See supra* Parts V.A.

267. *See supra* Part V.B.1.

268. *See supra* Parts V.B.2.

269. *See infra* note 274.

270. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. Lamar Alexander).

energy industry . . . ."[271] It accomplished this by establishing a two-tiered system of insurance protection.[272] The system works by providing "omnibus" coverage—a type of coverage used in a number of industries, including the auto industry.[273] Omnibus coverage expands the protection available for an insured licensee or contractor by indemnifying the entire industry.[274] Primary financial protection under this Act is achieved by the requirement that each facility obtain $375 million in private insurance for liability coverage.[275] In the event that the damage from a single incident exceeds the $375 million available from the particular facility, the coverage is supplemented by prorating up to $111.9 million from each facility throughout the entire nuclear industry.[276] This industry, consisting of 104 reactors, would provide supplemental coverage of approximately $12.6 billion.[277]

The Price-Anderson model essentially spreads the responsibility for any accident throughout the entire industry.[278] The shared liability keeps each facility interested in what occurs at other facilities and provides an incentive to "cooperate with best practices, to share technology and information, and to assist each other" in the case of an accident.[279] A major shortcoming of the OPA's current limits is that they are too low to deter oil companies from taking shortcuts that lead to greater risk for oil spills.[280] The Price-Anderson model would deter risky business decisions by keeping the companies invested in what occurs at other facilities. This, in turn, would promote safety by giving companies an incentive to not cut corners. This model would have the added effect of encouraging technological developments throughout the industry—a benefit that might have prevented the incident at Deepwater Horizon.

At the time of the Price-Anderson Act's consideration, insurance companies in the nuclear industry were growing increasingly concerned about the possibility of a nuclear accident and the "risk of potentially vast liability in the event" that such an accident occurred.[281] Neither the private

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271. 42 U.S.C. § 2012(i) (2006).

272. *See* 42 U.S.C. § 2210.

273. *See, e.g.*, Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co., 215 Ill.2d 121, 128-29 (2005).

274. AMERICAN NUCLEAR SOCIETY, THE PRICE-ANDERSON ACT: BACKGROUND INFORMATION 2 (2005), http://www.ans.org/pi/ps/docs/ps54-bi.pdf.

275. UNITED STATES NUCLEAR REGULATORY COMMISSION, FACT SHEET ON NUCLEAR INSURANCE AND DISASTER RELIEF FUNDS (August 2010), http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/funds-fs.html.

276. *Id.*

277. *Id.*

278. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. Lamar Alexander).

279. *See id.*

280. *See Initial Liability Hearing*, *supra* note 191 (statement of Kenneth M. Murchison, Professor at Paul M. Hebert Law Center of Louisiana State University).

281. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 64 (1978).

insurance companies nor the nuclear industry as a whole had the present ability to absorb the risk that the potential liability demanded.[282] Similar concerns have permeated the oil industry as a result of the Deepwater Horizon spill.[283] Many who oppose unlimited liability do so because they fear that the smaller, independent oil firms will not be able to obtain insurance and will therefore be forced out of the oil industry.[284] By increasing the liability and establishing a shared liability system, the Price-Anderson model avoids the negative consequences that an unlimited liability scheme would have on these smaller scale operations. Although this model does not currently differentiate between the amounts of liability insurance required by facilities of different sizes, it could be adjusted to require different primary protection insurance based on the size of the operation, the amount of risk the company takes, and its track record for safety. Some minor modifications of the Price-Anderson Model would address concerns for smaller firms' ability to afford insurance while ensuring that the American people are adequately compensated for oil spill damages. First, like the present model for the nuclear industry, all companies, regardless of size, would have to maintain the primary liability coverage of a set amount. Then, rather than adopt the Price-Anderson distribution methods for the supplemental amount over the primary coverage, all companies in the industry would be required to pay an additional amount of supplemental coverage based on their size, risk, and performance history. Securing domestic oil production would circumvent the many risks that open-ended liability poses to America's environment and economy.

In addition, this model would further the goals established by early oil spill legislation. The overarching purpose of the OPA is to "make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident)."[285] The two-tier, shared liability system furthers this purpose by increasing the amounts currently required by the OPA, and guaranteeing that the environment is restored and that injured parties are compensated for their damages. Furthermore, by promoting communication and the furtherance of safety technology, the Price-Anderson model will aid in prevention, thus furthering the objective of early oil spill legislation such as the Federal Water Pollution Control Act, Water Quality Improvement Act, and even the OPA.[286]

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282. *See id.*
283. *See supra* Part V.B.
284. *See supra* Part V.B.
285. *See* 15 C.F.R. § 990.10 (2011).
286. *See supra* Parts II.A, II.C, & III.C.

Finally, the Price-Anderson model has proven successful. The nuclear energy industry adopted the model in 1957.[287] Since then, it has undergone several revisions and amendments but continues to effectively serve the same purpose it did at the time of enactment—"to protect the public and to encourage the development of the atomic energy industry . . . ."[288] In 1979, the Three Mile Island accident tested the Price-Anderson Act's ability to respond to a nuclear incident.[289] The Act successfully provided compensation to cover the living expenses of the families that had been forced to evacuate.[290] The funds were used to reimburse more than 600 families and individuals for their lost wages and, eventually, to settle later litigation stemming from the incident.[291] All of these payments were covered by the primary insurance coverage, and the supplemental funds that would have been provided by the entire nuclear industry were not needed.[292] The Price-Anderson Act has shown that it is able to respond to a large-scale disaster and provide the appropriate relief. Thus, Congress need not reinvent the wheel; it should use the Price-Anderson model as the foundation for a liability scheme equipped to deal with the unique contingencies of today's oil industry.

VII. CONCLUSION

In light of the recent Deepwater Horizon disaster, the inadequacies of the OPA's current liability limits are clear. American citizens and members of Congress agree that measures must be taken to ensure that the OPA's liability scheme is equipped to compensate injured parties and restore the environment in the event of another catastrophic spill.[293] In constructing a permanent amendment to the OPA, Congress's ultimate decision should be logical and not purely emotional.[294] Because Senate Bill 3305's sponsors responded rashly to the Deepwater Horizon tragedy and failed to consider the long-term consequences of their proposed amendments, Congress should reject their proposal to eliminate the damage cap created by the Oil Pollution Act of 1990. While unlimited liability would ensure compensation and restoration in the event of another oil spill, it would force small domestic companies out of the industry and provide monopoly

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287. AMERICAN NUCLEAR SOCIETY, THE PRICE-ANDERSON ACT: BACKGROUND INFORMATION 1 (2005), http://www.ans.org/pi/ps/docs/ps54-bi.pdf.

288. *See* 42 U.S.C. § 2012(i) (2006).

289. United States Nuclear Regulatory Commission, *Fact Sheet on Nuclear Insurance and Disaster Relief Funds* (Aug. 2010), http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/funds-fs.html.

290. *Id.*

291. *Id.*

292. AMERICAN NUCLEAR SOCIETY, THE PRICE-ANDERSON ACT: BACKGROUND INFORMATION 3 (2005), http://www.ans.org/pi/ps/docs/ps54-bi.pdf.

293. *See supra* note 190 and accompanying text.

294. *See Unlimited Liability Hearing*, *supra* note 18 (statement of Sen. James Inhofe).

powers to the "Big Five" and national oil companies.[295] In the event that the Big Five could no longer self-insure, unlimited liability would leave America severely dependent on foreign oil.[296] The economic and environmental consequences of such an action clearly outweigh the benefits it seeks to provide.[297]

Congress should adopt a tailored version of the liability scheme established by the Price-Anderson Act. The Price-Anderson model is a recognized success in the nuclear industry and has withstood the demands of a large-scale nuclear accident—the Three Mile Island accident. By increasing the liability limits currently available under the OPA, this two-tiered liability system will guarantee that the environment is restored and that injured parties are compensated for the damages they sustain. The model will also further the goals of early oil spill legislation by promoting safety measures that will contribute to the prevention of future oil spills. By rejecting unlimited liability and adopting a system that has proven itself capable of responding to large-scale energy disasters, Congress can ensure that the "polluter pays," and that America maintains its place in the game.

295. *See supra* Part V.
296. *See supra* Part V.B.2.i.
297. *See supra* Parts V.B.2.i.-ii.