

The Oil Pollution Act of 1990

A Study of the Effects of Legislation on the Deepwater Horizon Disaster

In Contrast to the Exxon Valdez Disaster

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The Exxon Valdez Disaster

On the night of March 24, 1989, the Exxon Valdez, a supertanker over nine hundred feet in length and charged with carrying crude oil from the end of the Trans-Alaskan Pipeline to the lower forty-eight states ran aground on Blight Reef in the Prince William Sound while carrying over a million barrels of crude oil. As a result, the reef tore a gash in the hull of the ship releasing eleven million gallons of crude oil into the Prince William Sound. As a result of this accident, environmental and economic impacts are still felt in the area and litigation is still making its way through our legal system over twenty years later.

Throughout testimony, it was learned that the ship's captain, Joseph Hazelwood, was a recovering alcoholic who had recently been released from a twenty-eight day alcohol treatment program while employed by Exxon. Captain Hazelwood had also dropped out of a mandatory follow-up program, as well as Alcoholics Anonymous meetings he was required to attend. Additional testimony showed that Captain Hazelwood regularly consumed alcohol at port bars, parking lots, apartments, airports, airplanes, restaurants, and on takers, all of which Exxon officials were reportedly aware of.

On the night of the spill, the Captain reportedly consumed five double-vodka drinks at a local port bar prior to setting sail at 9:12 p.m. As required by law, the

ship was led away from the port by a pilot licensed in the state of Alaska, who turned the control of the ship over to Captain Hazelwood at 11:20 p.m. Due to heavy ice conditions in the outbound travel lanes, the Captain requested, and was granted, permission to navigate the ship through the clearer inbound lanes. This travel plan required a move back towards the outbound lanes upon the ship's nearing of Busby light to avoid Blight Reef.

Approximately two minutes before this necessary maneuver back into the outbound lanes, Captain Hazelwood left the bridge and instructed the one remaining officer to begin the maneuver upon reaching Busby Light. The Captain reportedly needed to return to his bunk to complete paperwork, although it was against policy to leave only one officer on the bridge at any time. Furthermore, Captain Hazelwood was the only officer on the ship licensed to navigate these particular waters in the Prince William Sound. In addition, the Captain placed the ship on auto-pilot, which increased the ship's forward speed making the necessary maneuver at Busby's Light even more difficult.

For unknown reasons, the remaining officer on the bridge failed to make the necessary maneuver and the Exxon Valdez ran aground on Blight Reef, splitting open the hull of the tanker and spilling eleven million gallons of crude oil into Prince William Sound. A blood test on Captain Hazelwood conducted by the U.S. Coast Guard eleven hours after the spill showed that the Captain had a blood-

alcohol content of .061. Experts estimated that due to that content and the elapsed time, the Captain's blood-alcohol content would have been approximately .241 at the time of the spill, more than three times the legal driving limit in most states at the time.

As a result of the spill, Exxon spent nearly 2.1 billion dollars in clean-up expenses. They also plead guilty to criminal violations of the Clean Water Act, Refuse act of 1899, and the Migratory Bird Treaty Act of 1899. For these violations, they were ordered to pay 150 million dollars, a figure that was later reduced to 25 million dollars plus 100 million dollars in restitution. The company also came to voluntary settlements totaling 303 million dollars with fisherman, property owners, and other private parties.

All remaining compensatory damage claims against the company were joined together and subdivided into three classes; landowners, native Alaskans, and commercial fishermen. In addition, there were over thirty-two thousand claims against Exxon for punitive damages. While Exxon stipulated to its negligence in regards to the compensatory damage claims, the efforts seeking punitive damages are still working their way through the legal system, over twenty-three years later.

The Case, *Exxon Shipping Co. v. Baker*, was examined by the courts in three phases. The first phase dealt with recklessness on the part of both Exxon and

Hazelwood, thus opening the door for punitive damage claims. The second phase set the amount of compensatory damages for claimants who were either commercial fisherman or native Alaskans. The third and final phase of the case determined how the punitive damages would be split between Exxon and Captain Hazelwood.

In regards to phase 1, a trial court jury found that both Exxon and Captain Hazelwood were reckless, thus opening them up to punitive damages. The total compensatory damages calculated under phase 2 totaled 287 million dollars. Finally, in phase 3, the jury determined that Captain Hazelwood was responsible for five thousand dollars and Exxon was liable for 5 billion dollars in punitive damages, an amount that was twice remanded by the Court of Appeals before ultimately being set at 2.5 billion dollars.

In a decision handed down by the United States Supreme Court on June 25, 2008, two issues were remanded back to the lower courts, further lengthening judicial finality for all parties involved. The first issue was whether or not a corporation could be held liable for the reckless actions of an employee in a managerial capacity in regards to punitive damages. Secondly, the Supreme Court found that the award of 2.5 billion dollars in punitive damages was excessive and should fall more closely in line with the total amount of compensatory damages awarded, which was 507.5 million dollars.

The environmental impacts of this spill have also been staggering and are still being felt and seen today. Long-term effects to marine mammals such as Killer Whales could not even be immediately determined due to their bodies sinking upon death and their very slow reproduction rate. Reduced population and muted growth was also widely found in the population of Pink Salmon. Sea Otters and Pacific Herring are also experiencing reduced population numbers. Today, oil can also still be found below the surface of what appear to be clean beaches.

Today, (over) twenty years after the oil spill of the Exxon Valdez, Alaskans still wonder when the spill will be over. Usually, a major spill can be deemed “over” when all litigation has been settled, oil no longer persists in the environment, and negative effects are no longer detected. The Exxon Valdez spill does not meet any of these three criteria. (Rice)

The Oil Pollution Act of 1990

On August 18, 1990, the United States passed new legislation aimed at insuring a more leveled, organized, and efficient approach would be taken when handling the discharge or threat of discharge of oil on the navigable waters, adjoining shorelines, and the exclusive economic zone of the United States. This legislation is known as The Oil Pollution Act of 1990 and includes several

important changes over pre-existing law, namely the Clean Water Act and the Refuse Act of 1899, as well as pre-existing tort and maritime law. Recoverable damages in regards to national resources and eligible claimants were broadened, defenses available to the party were minimized, increased liability limits and penalties were enacted, and several preventative measures were put in place to prevent future spills.

Liability

Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident (33 U.S.C.A. §2702). These removal costs include all costs incurred by the United States, an affected State or Indian Tribe, or costs incurred by a person who performs clean-up related actions which are aligned with the National Contingency Plan.

Damages to natural resources are broadened to include damages for injury to, destruction of, loss of, or the loss of use of natural resources and include the reasonable costs associated with damage assessment. Damages to real or personal

property, whether owned or leased, may be awarded for injury to the property or economic loss resulting from the destruction of the property. Damages for loss of subsistence use of the damaged natural resource are now covered and include anyone who uses the damaged natural resource as a means for subsistence.

Damages the United States Government sustains in relation to revenues in conjunction with loss of taxes, royalties, rents, fees, or profits are recognized. And finally, the costs associated with increased public services necessary during removal and protective actions are now recoverable.

In cases of natural resource damages under section 2702(b)(2)(A) of this title, liability shall be to the United States Government for natural resources belonging to, managed by or controlled by, or appertaining to the United States, to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof; to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe, and in any case in which section 2707 of this title applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country (33 U.S.C.A. § 2706). These damages include the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources, the diminution of value of those natural resources pending restoration, and the reasonable cost of assessing those

damages. The funds for such damages will be controlled by the president of the United States, the Governor of an affected State, or a representative of an affected Indian tribe.

Defenses

Defenses are greatly limited under the Oil Pollution Act of 1990. There are only three circumstances in which a responsible party may avoid liability under the Act. They are strictly limited to an act of God, an act of war, or an act or omission of a third party in relation to all liabilities afforded under the Act. Additionally, partial defenses may be afforded based on gross negligence or willful misconduct on a particular claimant if the claimant fails to report the incident in a timely manner, fails to cooperate with removal activities when requested to do so by a responsible official, fails to comply with any other order issued under this Act or the Intervention on the High Seas Act.

Limits on Liability

The liability limits under the Oil Pollution Act of 1990 were set forth and significantly increased as outlined in 33 U.S.C.A. § 2704. Limits were also placed higher for vessels with a single hull. For example, a vessel with a single hull would be limited to three thousand dollars per gross ton, where the same size vessel with a double hull on both the sides and bottom would be limited to nineteen

hundred dollars per gross ton. Exceptions were also put in place to remove the limits due to gross negligence or willful misconduct on behalf of the responsible party, violations of any applicable Federal safety, construction, or operating regulation, failure to properly report an incident, or failure to reasonably cooperate and assist a responsible official in connection with removal activities.

Additional Enhancements

There were several other measures put in place deal with spill incidents under the Oil Pollution Act of 1990. Four notable ones were the creation of a fund to control finances associated with the clean-up, the creation of claims procedures, financial requirements of vessels navigating in covered waters, and jurisdictional and venue rules.

33 U.S.C.A. § 2712 outlines the handling of all spill associated funds through a central fund under the control of the President of the United States. The fund can be used for removal costs consistent with the National Contingency Plan, payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions for assessing natural resource damages, removal costs resulting from a discharge or threat of discharge from a foreign offshore unit, claims payments for uncompensated removal costs, and the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary

for the implementation, administration, and enforcement of this Act. The general purpose of the fund is to streamline the financial aspects of spill clean-up and claims to a single fund under the strict oversight of the President of the United States.

33 U.S.C.A. § 2713 outlines the formal process for claims against the responsible party. It states that all claims for removal costs or damages shall be presented directly to the responsible party. This can be done once the President has properly notified claimants by a responsible party who may assert a claim, by the Governor of a State for removal costs incurred, or by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage.

33 U.S.C.A. § 2716 sets for the requirements any vessel over three hundred gross tons, any vessel using the waters of the exclusive economic zone to transship or lighter oil, or any tank vessel over 100 gross tons to carry all necessary documentation evidencing sufficient financial responsibility to meet the maximum amount of liability to which the responsible party could be subjected to, or in a case where more than one vessel is owned, financial responsibility to meet the maximum liability of the owner's ship with the greatest maximum liability. Penalties for not maintaining the necessary documentation can include the revocation of clearance to navigate controlled waters, denial of entry into

controlled waters, the detaining of the violating vessel, or the seizure of the violating vessel.

33 U.S.C.A. § 2717 laid out new jurisdictional and venue guidelines. This section provides that the United States district courts have exclusive original jurisdiction over all controversies arising under this Act. Venue is proper in any district where the discharge, injury, or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. It also grants State trial courts of competent jurisdiction the ability to consider claims under the Act or under State law, and stipulates their rulings be recognized, valid, and enforceable for all purposes of the Act.

Deepwater Horizon Disaster

On April 20, 2010, a Mobile Offshore Drilling Unit (MODU) named the Deepwater Horizon was operating over the Macondo/MC252 oil well approximately forty miles off of the Southern Louisiana coast when it exploded and sank. Due to the extreme depth of the water, it took several attempts over an eighty-seven day period to plug the leak. Over the course of the eighty-seven days, approximately 200 million gallons of Sweet Louisiana Crude Oil spilled into the Gulf of Mexico and spread as far east and west as the beaches in Florida and Texas and into inland water sanctuaries such as Lake Pontchartrain.

Impact of the Oil Pollution Act of 1990 on the Deepwater Horizon Disaster

The first notable impact that the OPA had on the Deepwater Horizon Disaster was BP's early acceptance of the "responsible party" designation. In the case of a vessel, any person owning, operating, or demise chartering the vessel is deemed a "responsible party," and also includes the owner of oil being transported in a tank vessel. Strict civil penalties established in the OPA called for BP to move quickly and accept the designation, which they can later legally challenge to recoup monies spent through the legal system should it be determined that they are not the responsible party, or if there is a third party who is culpable.

The second, but largest affect the OPA had on the Deepwater Horizon Disaster was the allowance of relief for parties who suffered a loss, but did not suffer damage to real or personal property. Previously, courts have followed *Robins Dry Dock & Repair Co. v. Flint* in which the court held that claims for purely economic losses unaccompanied by physical damage to a proprietary interest were precluded. This opened the door to a much larger number of victims than on previous oil spills. The first category of new claimants were those who used the affected areas for subsistence. The second allowed the Government of the United States, an affected State, or a political subdivision thereof to seek damages as a result of lost revenues, including loss of taxes, royalties, rents, fees, or net profits. Third, any claimant who suffered the loss of profits or an impairment of

earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources was entitled to damages. Finally, States were entitled to damages which arose from increased public services necessary within the scope of clean-up.

Finally, the claims process enacted through the OPA allowed for the expedited recovery of damages without the need for legal action. Because the responsible party was considered strictly liable under OPA, it was not necessary for each claimant to prove negligence and there was a defined process to file a claim. 33 U.S.C.A. § 2713 states that all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a). The responsible party then has ninety days upon presentation of the claim to settle with the claimant. If this does not occur, the claimant may then pursue legal action against the responsible party.

The Oil Pollution Act of 1990 has taken great strides in the handling of oil spills both on an environmental and economic level. As one can see, there are vast differences between the responses to the Exxon Valdez and Deepwater Horizon disasters and as it continues to evolve, it will continue to improve not only the response, but also the prevention of such environmental and economic tragedies.

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