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## Environmental Justice and the BP Deepwater Horizon Oil Spill

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# ENVIRONMENTAL JUSTICE AND THE BP *DEEPWATER HORIZON* OIL SPILL

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This Article analyzes the environmental justice implications of the BP *Deepwater Horizon* Oil Spill and proposes ways to better address these concerns currently and in the future. It explores the justice problems that have arisen with respect to the spill response, compensation, and employment and workers. The Article argues that these problems result from a mix of inadequate information, failure to incorporate environmental justice into planning, and statutory provisions that favor oil companies and limit protections for vulnerable populations. It proposes ways in which to address these causes in the context of this disaster and

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more broadly.

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## INTRODUCTION

In the aftermath of the BP *Deepwater Horizon* Oil Spill, a wide range of commentators has analyzed why the spill happened and how both offshore drilling regulation and disaster response could improve. The National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling's January 2011 report provides the most comprehensive account thus far, showing the systematic regulatory failures that caused the spill and proposing thoughtful reforms.<sup>1</sup> However, these analyses, to the extent that they address injustice, mostly focus on particular problems involving waste disposal, exposure to pollution, income loss, or the impacts of marsh destruction. They do not address the systematic differential impacts grounded in law that the spill had on low-income communities of color.<sup>2</sup>

This Article fills this important gap. It demonstrates the ways in which law structures justice problems across a range of different substantive issues arising from the spill. Consistently, the relevant

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<sup>1</sup> NATIONAL COMMISSION ON THE BP *DEEPWATER HORIZON* OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* (2011) [hereinafter NATIONAL COMMISSION REPORT], available at <http://www.gpoaccess.gov/deepwater/deepwater.pdf>.

<sup>2</sup> For a discussion of the broader social and ecological context in which the spill took place, see Daniel A. Farber, *The BP Blowout and the Social and Environmental Erosion of the Louisiana Coast* (Berkeley Pub. Law & Legal Theory, Research Paper No. 1740844, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1740844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740844). For a more in-depth discussion of cleanup worker safety issues, see Rebecca Bratspies et al., *From Ship to Shore: Reforming the National Contingency Plan to Improve Protections for Oil Spill Cleanup Workers* (Ctr. for Progressive Reform, Working Paper No. 1006, 2010), available at [http://www.progressivereform.org/articles/BP\\_OSHA\\_1006.pdf](http://www.progressivereform.org/articles/BP_OSHA_1006.pdf).

law and institutions provide exceptions for oil companies and inadequately protect vulnerable populations. Despite the Obama Administration's efforts to incorporate environmental justice concerns into agency decision-making, the cross-cutting nature of the spill response meant that these individual agency environmental justice initiatives often failed to translate into multi-agency action. Across all of these issues, information limitations often make the true extent of these problems unknowable. The demographic data is spotty in contexts most critical to evaluating environmental injustice. Moreover, it is hard to assess how problems in conveying important information translate into lack of access to resources.

This Article also proposes a road forward. It recommends numerous possibilities for reform to address current injustice and prevent future injustice. In so doing, it highlights which reforms are achievable and which ones are unlikely to overcome the powerful lobbying force of the oil industry. Across the board, better implementation of existing environmental justice mandates and more effective strategies around information seem more likely than major statutory reform. However, even in the legislative arena, victim-focused changes may be able to gain traction.

This analysis makes an important and innovative contribution to the scholarly literature in two respects. First, it demonstrates the systematic failure of our legal system to protect vulnerable populations in the aftermath of this spill as part of the broader systematic failures that caused this disaster. The National Commission's report argues that the blowout at the Macondo well was not simply a case of risk probabilities catching up to an unlucky BP; rather, the spill resulted from systematic regulatory failures and inadequate industry safety culture.<sup>3</sup> Likewise, the differential impacts on vulnerable populations in the aftermath of the spill were not an inevitable consequence of inequality in our society. Regulatory and human choices compounded to make low-income communities and communities of color more at risk of unequal impacts in the aftermath of the spill.

Second, the Article's examination of law's role in structuring unequal distribution of both "goods" and "bads" has broader implications for environmental justice analysis. It highlights the need to conceptualize environmental justice problems as much

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<sup>3</sup> See NATIONAL COMMISSION REPORT, *supra* note 1, at vii.

more than problematic structural racism bringing unfair devastating pollution into low-income communities of color. The response to the spill certainly has such stories, most prominently the disposal of the vast majority of oil spill waste in communities that are either majority people of color or whose proportion of people of color exceeds that of their county's proportion of people of color. But a focus only on manifestations of traditional environmental justice would miss a broader pattern of systematic unfairness. This Article reinforces the importance of weaving individual instances of unfair distribution of harms and resources into a broader mosaic of injustice.

Part I provides background on challenges to achieving environmental justice in order to contextualize the problems raised by the spill. Part II examines justice concerns arising from the spill response, with a particular focus on human health and waste disposal. Part III considers issues of unequal access to compensation, analyzing the Gulf Coast Claims Facility, governmental efforts, and litigation. Part IV discusses the inequalities surrounding employment and cleanup and oil rig workers with an emphasis on access to economic opportunities and safety. Part V proposes cross-cutting strategies to address inadequate information, incomplete implementation of the executive order on environmental justice, and statutory biases. The Article concludes with a broader analysis of the intertwined histories of oil and environmental injustice, and the possibilities for a better future.

## I. BARRIERS TO LEGAL PROTECTION OF ENVIRONMENTAL JUSTICE

The environmental justice movement, with its focus on the disproportionate distribution of environmental burdens and benefits, has long lagged behind both the civil rights and environmental movements that provide its component parts. To some extent, this lag results from neither movement treating environmental justice concerns as its core. However, the nature of these problems also makes them exceedingly difficult to address. They cross-cut substantive areas of law and legal structures, and interact with vexing, hard-to-solve social, political, economic, and cultural concerns.<sup>4</sup>

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<sup>4</sup> See, e.g., Sheila Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J.L. & URB. POL'Y 1 (2004); Michael D. Mattheisen, *The Effect of*

In the context of the oil industry specifically and energy industry more broadly, the ways in which law structures these companies makes them particularly hard to regulate effectively. Major oil companies are sprawling transnational behemoths which law regulates in a piecemeal fashion under the authority of many states and countries. No mechanisms exist to address them comprehensively at an international level, and corporate law limits the liability of the parts for one another. These structural concerns are compounded by the critical role that oil plays in the domestic and international economy and state sovereignty over natural resources. This Part explores these barriers to frame the paper's more specific analysis of environmental justice concerns in the context of the BP *Deepwater Horizon* Oil Spill.

### A. Substantive and Structural Intersectionality

What is environmental justice? Many hours have been devoted to debating this question, often with a focus on how broad the category of environmental justice should be. The core of environmental justice involves disproportionate environmental harm suffered by low-income communities of color. But over the years, those concerned with environmental justice have argued that these harms occur in a broader context that is part of the fairness problem. Most significantly, many have argued that environmental justice does not simply involve harms but also disproportionate access to environmental benefits, such as open space and parks and recreation. In addition, some have contended that the concentration of undesirable land uses—such as drug dealing or detention centers—in low-income communities of color are part of the environmental justice problem,<sup>5</sup> even when those activities have little direct environmental harm.

Under either a broad or most narrow definition of environmental justice, many types of law apply to the problem, each of which has a different core focus. As Hari Osofsky has

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Alexander v. Sandoval on *Federal Environmental Civil Rights (Environmental Justice) Policy*, 13 GEO. MASON U. C.R. L.J. 35 (2003).

<sup>5</sup> For analyses of the definition of environmental justice and the evolution of the movement, see Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 573 (2008); Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL'Y 265 (2006); Eileen Gauna & Sheila Foster, *Environmental Justice: Stakes, Stakeholders, Strategies*, 30 HUM. RTS. 2 (2003).



explored in her past scholarship, environmental justice problems generally lie at the intersection of environmental law, civil rights law, and tort law, each of which engages a different aspect of the problem. Environmental law typically focuses on violations of minimum standards applicable to everyone, which many severe environmental impacts will violate. Civil rights law engages the disproportionate character of the harm, with particular consideration of intentional discrimination against and disparate impacts on low-income communities of color. Tort law addresses the causation of harm in violation of a duty of care, and many environmental justice problems involve negligence (unreasonable conduct by the person or entity with the duty of care) or nuisance (substantial and unreasonable interference with use or enjoyment of land).<sup>6</sup>

In the context of offshore drilling and oil spills, a myriad of other laws apply that intersect with the justice problem. For example, the Department of Interior—through the Mineral Management Service at the time of the spill and the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) since the post-spill reorganization—and Coast Guard apply a regulatory apparatus to drilling. The National Commission's report makes clear that the way in which they implemented their authority pre-spill, together with an inadequate industry safety culture, increased the risks of a catastrophic blowout (and its environmental justice impacts) and of oil rig worker injury.<sup>7</sup> Similarly, as discussed in Part II, the National Contingency Plan used to respond to the spill, together with environmental law, helped to frame choices regarding waste disposal and health with significant fairness implications.<sup>8</sup> The Oil Pollution Act of 1990, among other laws, structures possibilities for compensation, the focus of Part III.<sup>9</sup> Laws regarding worker training and safety, paired with the National Contingency Plan and admiralty law, shaped the conditions of the workers and their capacity to gain compensation, which Part IV explores.<sup>10</sup> None of

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<sup>6</sup> See Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 *Stan. Envtl. L.J.* 71, 88–90 (2005).

<sup>7</sup> See NATIONAL COMMISSION REPORT, *supra* note 1, at 76–79.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Part III.

<sup>10</sup> See *infra* Part IV.

these laws has environmental justice as its primary focus, but all of them frame the disproportionate distribution of risks and benefits in the aftermath of the spill.

The difficulty of navigating substantive overlap to address justice problems is made worse by the structural fragmentation that accompanies these different legal regimes. Both offshore drilling and oil spill responses involve a myriad of federal, state, and local entities with specific responsibilities under the laws of these regimes. These entities often try to coordinate their efforts. The Department of Interior and Coast Guard work cooperatively in their dual roles regulating offshore drilling, and the National Contingency Plan (“NCP”) provides a framework for an array of key agencies to organize their efforts in response to spills. But after the *Deepwater Horizon* spill, the bifurcated and sometimes ambiguous divisions of authority also led to conflicts and actions outside of the formal post-disaster decision-making structure. States and localities at times used funds from BP to spread more boom—a physical barrier to the oil—when they disagreed with the federal government’s decision to distribute it elsewhere. Ad hoc subgroups of agencies made decisions about fishery closures and dispersant use outside of the formal structure.<sup>11</sup> Moreover, while the federal agencies involved all have explicit environmental justice obligations, as discussed in more depth in Part III, implementing those obligations becomes harder in the kind of multi-agency decision-making that took place in the aftermath of the spill.

### B. *Transnational Energy Production and Consumption*

These problems of both substantive and structural overlap are made more difficult by the institutional and legal structure of transnational energy production and consumption. This structure ties corporations to national governments, makes them hard to regulate effectively, and creates enormous pressure for greater energy independence. Together, these dynamics put pressure on the United States to exploit viable domestic sources of oil, a pressure that means that deepwater drilling and its justice implications will continue for the foreseeable future.

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<sup>11</sup> See Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077 (2011), for an in-depth analysis of these governance issues.

Due to the international law principle of state sovereignty over natural resources, corporations extracting oil around the world must do so with approval of national governments. Many of the countries with large oil supplies have governments with which the United States has uneasy relations and/or that face significant political instability.<sup>12</sup> This legal framework has resulted in significant environmental justice concerns associated with oil extraction around the world. Economically powerful corporations pair with governments wielding sovereign regulatory authority in ways that limit the capacity of vulnerable populations to protect their rights.<sup>13</sup> Especially in the poorer countries in which oil extraction takes place, but in the United States as well, these dynamics result in patterns of governmental underenforcement of environmental standards applicable to oil companies. Governments often profit directly from the oil companies' efforts; in the U.S. deepwater drilling context relevant to this article, the government receives royalties from leasing underwater land and drilling rights to oil companies.<sup>14</sup> Moreover, in countries with significant armed conflict or human rights violations, the relationship between the corporation and the government at times involves the corporation in that violence.<sup>15</sup>

The people who face the greatest environmental risks and harms as a result of this production do not receive its benefits. A voluminous scholarly literature provides narratives of massive environmental degradation intertwined with human suffering that accompanies oil and other extractive industries around the world,<sup>16</sup>

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<sup>12</sup> See Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331 (2004).

<sup>13</sup> See *id.*

<sup>14</sup> 43 U.S.C. § 1337 (2006) (authorizing the Secretary of the Interior to lease oil and gas rights to the highest responsible qualified bidder).

<sup>15</sup> See Dufresne, *supra* note 12, at 334–48; accord ECOLOGICAL RESISTANCE MOVEMENTS: THE GLOBAL EMERGENCE OF RADICAL AND POPULAR ENVIRONMENTALISM (Bron Raymond Taylor ed., 1995); MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (2001); Rebecca Hardin, *Concessionary Politics in the Western Congo Basin: History and Culture in Forest Use* (World Res. Inst. Env'tl. Governance in Afr. Working Papers, Working Paper No. 6, 2002), available at [http://pdf.wri.org/lea\\_wp6.pdf](http://pdf.wri.org/lea_wp6.pdf).

<sup>16</sup> Numerous books and articles have detailed the environmental and human toll of the energy production process. See, e.g., IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA (2001); Monti Aguirre, *The Chixoy Dam Destroyed Our Lives*, HUM. RTS. DIALOGUE, Spring 2004, at 20; Richard L. Ottinger, *Energy and Environmental Challenges for Developed and Developing Countries*, 9 PACE

as well as the unequal distribution of the burdens and benefits.<sup>17</sup> This Article adds to this literature by detailing the ways in which this unequal distribution is not simply a product of developing countries with unstable dictators. While the domestic U.S. version of environmental injustice stemming from the oil industry may be less extreme, the patterns of powerful corporations influencing the substance of law and enforcement in ways that put vulnerable populations at risk and the more limited avenues open to these impacted people are consistent with the rest of the world.

The treatment of governments and corporations under international law and its incorporation in domestic legal systems reinforces these difficulties. The international legal system is premised on sovereign and equal states making agreements with each other, whether through treaties or under customary international law. Nation-states are the primary subjects and objects of international law, while corporations, despite their transnational reach, have limited international legal personality.<sup>18</sup> While significant scholarship problematizes this structure and suggests ways in which informal dynamics change it,<sup>19</sup> the formal

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ENVTL. L. REV. 55, 62–70 (1991); Douglas John Steding, *Russian Floating Nuclear Reactors: Lacunae in Current International Environmental and Maritime Law and the Need for Proactive International Cooperation in the Development of Sustainable Energy Sources*, 13 PAC. RIM L. & POL'Y J. 711, 718–21 (2004); Andrea Wang, *China's Energy Policy and Competing International Environmental Pressures*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 271, 273–75 (2001).

<sup>17</sup> See Dufresne, *supra* note 12, at 348–63; Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 294–314 (2001); Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425 (2004).

<sup>18</sup> See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289–99 (5th ed. 1998); A.A. Fatouros, *Introduction: Looking for an International Legal Framework for Transnational Corporations*, in 20 UNITED NATIONS LIBR. ON TRANSNAT'L CORPS: TRANSN'L CORPS.: THE INT'L LEGAL FRAMEWORK 1, 17–18 (A.A. Fatouros ed., 1994).

<sup>19</sup> See THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS (Hilary Charlesworth et al. eds., 2005); Becky Mansfield, *Beyond Rescaling: Reintegrating the 'National' as a Dimension of Scalar Relations*, 29 PROGRESS IN HUM. GEOGRAPHY 458 (2005) (arguing for the importance of engaging the role of the national); Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 81, 107 (Thomas J. Biersteker & Cynthia Weber eds., 1996); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1318–19 (1996); Antonio F. Perez, Review Essay, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International*

legal system constitutes and regulates corporations primarily through national and subnational law.<sup>20</sup>

This national and subnational regulation of corporations becomes particularly problematic in situations like this one in which a mass of subcontracting relationships complicate questions of regulatory authority and liability. Another layer of multiscalar law interacts with the above-described regulatory regime due to the many corporations involved through subcontracting relationships in the drilling project. While BP, as the company with the oil and gas lease from the U.S. government,<sup>21</sup> is the legally responsible party for the spill, eleven other companies with ties to multiple countries (if one counts subsidiaries as distinct companies from their parents) had significant involvement in BP's drilling efforts at the Macondo well site.<sup>22</sup> Under the Outer Continental Shelves Land Act, Louisiana law incorporated as

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*Law*, 14 WIS. INT'L L.J. 463 (1996). For examples of different conceptual approaches to international law and the role of informal interactions in international lawmaking, see Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002); Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005). For an overview of several leading approaches, see FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (Oona A. Hathaway & Harold Hongju Koh eds., 2005).

<sup>20</sup> See 20 UNITED NATIONS LIBR. ON TRANSNAT'L CORPS: TRANSN'L CORPS.: THE INT'L LEGAL FRAMEWORK (A.A. Fatouros ed., 1994); 19 UNITED NATIONS LIBR. ON TRANSNAT'L CORPS: TRANSN'L CORPS. AND NAT'L L. (Seymour J. Rubin & Don Wallace, Jr. eds., 1994); Melvin Aron Eisenberg, *The Architecture of American Corporate Law: Facilitation and Regulation*, 2 BERKELEY BUS. L.J. 167 (2005).

<sup>21</sup> See BP, DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT 15 (Sept. 8, 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](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf) [hereinafter BP ACCIDENT INVESTIGATION REPORT].

<sup>22</sup> See Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, *supra* note 11, at 1084–86.

federal law governs these subcontracting relationships, but the entities themselves and the choices that they make present a complex geography of regulatory relationships.<sup>23</sup> For example, the *Deepwater Horizon* rig was registered under a Marshall Islands flag, giving the Marshall Islands partial regulatory authority under the United Nations Convention on the Law of the Sea.<sup>24</sup>

Together, these substantive and structural complexities create formidable barriers to justice. The following three Parts detail how these dynamics played out in the specific context of the BP *Deepwater Horizon* Oil Spill. They demonstrate the ways in which justice hinges on a myriad of particular decisions regarding many different laws and regulations and in which the types of problems articulated in this Part manifest through situational details.

## II. JUSTICE CONCERNS WITH THE SPILL RESPONSE

This Part analyzes environmental justice concerns regarding the spill response, with a focus on the disproportionate distribution of oil spill waste and of current and future public health risks associated with the BP *Deepwater Horizon* Oil Spill on low-income communities of color. The first Section examines the legal framework that governs the disposal of oil spill waste in municipal facilities, the environmental justice concerns raised by the distribution of such facilities, and the actual disproportionate dumping of oil spill waste in low-income communities of color. The second Section considers the inadequate access to health care, higher rates of exposure, and uncertain plans for long-term health surveillance that frame additional fairness concerns in the aftermath of the spill.

### A. Waste Disposal

By December 2011, the BP *Deepwater Horizon* Oil Spill had

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<sup>23</sup> See 43 U.S.C. § 1333(a)(2)(A) (2006); *Fruge ex rel. Fruge v. Parker Drilling Co.*, 337 F.3d 558, 560 (5th Cir. 2003). For applicable Louisiana law, see, e.g., LA. REV. STAT. ANN. § 9:4807 (2010); *Continental Cas. Co. v. Associated Pipe & Supply Co.*, 310 F. Supp. 1207 (E.D. La. 1970), *aff'd in part, modified in part, and vacated in part on other grounds*, 447 F.2d 1041 (5th Cir. 1971).

<sup>24</sup> See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 217; David Hammer, *Kenner Hearing: Marshall Islands-Flagged Rig in Gulf Oil Spill Was Reviewed in February*, *TIMES-PICAYUNE* (May 12, 2010, 4:27 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/kenner\\_hearing\\_marshall\\_island.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/kenner_hearing_marshall_island.html).

resulted in over 113,000 tons of solid waste and 1,408,000 barrels of liquid waste. The waste falls into five main categories: oily liquids (459,781 oil barrels), liquids (951,866 oil barrels), oily solids (96,842.80 tons), solid waste (13,961.90 tons), and recyclables (4,775.90 tons).<sup>25</sup> This immense amount of waste required facilities for disposal, oil recovery, and recycling. BP identified numerous facilities located throughout the Gulf Coast region to handle the volume of waste being generated as part of the cleanup effort, primarily located in Texas, Louisiana, Mississippi, Alabama, and Florida.<sup>26</sup> Additionally, the U.S. Environmental Protection Agency (EPA) and the U.S. Coast Guard approved waste management plans outlining how the waste would be managed in each state.<sup>27</sup> The plans took into account “applicable federal, state, and local regulations; planning for waste characterization; and BP’s proposed locations for waste management activities in order to consider the suitability of specific sites and the impacts on the surrounding communities.”<sup>28</sup>

Although BP and the governmental agencies explicitly included environmental justice concerns in their plans, leading environmental justice expert Robert Bullard raised concerns early on about the disproportionate siting of waste storage in low-income communities of color.<sup>29</sup> This Section examines the way in which law interacted with these environmental justice concerns. It begins by examining the applicability and operation of the Resource Conservation and Recovery Act (RCRA), the nation’s primary law governing the disposal of solid and hazardous waste in this context.<sup>30</sup> RCRA addresses the duties imposed on the EPA as the federal agency charged with regulating waste management.

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<sup>25</sup> *Weekly Waste Tracking Cumulative Report by Disposal Facility* BP (July 1, 2012), <http://usresponse.bp.com/external/content/document/2911/1488907/1/Waste-Oil-Recovery-and-Disposal-Summary-Report.pdf>.

<sup>26</sup> *Waste disposal and recoverable facilities (current and potential locations)*, BP (Mar. 7, 2011), <http://usresponse.bp.com/go/doc/2911/962795/Location-of-staging-areas-and-landfill-disposal-facilities>.

<sup>27</sup> *Waste Management on the Gulf Coast*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/bpspill/waste.html> (last updated Oct. 14, 2011).

<sup>28</sup> *Id.*

<sup>29</sup> Robert D. Bullard, *BP’s Waste Management Plan Raises Environmental Justice Concerns*, DISSIDENT VOICE, (July 29, 2010, 7:59 AM), <http://dissentvoice.org/2010/07/bp%E2%80%99s-waste-management-plan-raises-environmental-justice-concerns/>.

<sup>30</sup> *History of RCRA*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/epawaste/laws-regs/rcrahistory.htm> (last updated July 16, 2012).

It then examines the obligations stemming from Executive Order 12,898, which directs federal agencies to make environmental justice part of their mission.<sup>31</sup> While RCRA focuses on the broad waste regulations affecting human health and the environment, Executive Order 12,898 applies to specific EPA decisions that impact low-income communities and communities of color. By together addressing the impacts of waste management on humans and the environment, RCRA and Executive Order 12,898 play a pivotal role in establishing the legal framework surrounding the BP *Deepwater Horizon* Oil Spill waste management plans for Louisiana, Mississippi, Alabama and Florida.

1. *The Resource Conservation and Recovery Act (RCRA)*

For the last thirty-four years, RCRA has served as the nation's primary law governing the disposal of solid and hazardous waste.<sup>32</sup> RCRA aims to protect human health and the environment by ensuring proper management of wastes.<sup>33</sup> It directs the EPA to develop regulations governing the identification and management of hazardous and nonhazardous waste.<sup>34</sup>

RCRA incorporates two waste management programs to further its goal of protecting human health and the environment. The first program is the Solid Waste Program under RCRA Subtitle D.<sup>35</sup> This program "encourages states to develop comprehensive plans to manage nonhazardous industrial solid waste and municipal solid waste."<sup>36</sup> Subtitle D sets criteria for municipal solid waste landfills and other solid waste disposal facilities. The second important program under RCRA is the Hazardous Waste Program under Subtitle C.<sup>37</sup> This program "establishes a system for controlling hazardous waste from the time it is generated until its ultimate disposal."<sup>38</sup> Through Subtitle C and Subtitle D, RCRA seeks to protect human health and the environment by sequestering hazardous waste and regulating municipal and industrial waste facilities.

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31 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

32 *History of RCRA*, *supra* note 30.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*



Solid wastes are classified as “hazardous” or “nonhazardous” depending on their characteristics. RCRA defines hazardous wastes as those which pose a substantial or potential hazard to human health or the environment when improperly managed and divides them into two categories: listed wastes and characteristic wastes. Listed wastes are considered hazardous if they appear on one of the four hazardous waste lists established by EPA regulations.<sup>39</sup> Characteristic wastes have one or more of the following properties: ignitability, corrosive characteristics, reactivity, or toxicity.<sup>40</sup>

The Land Disposal Restrictions (LDR) program under 40 C.F.R. Part 268 typically governs hazardous solid waste disposal.<sup>41</sup> LDR mandates treatment standards specific to each type of hazardous waste. It requires that, rather than being diluted, hazardous waste be properly treated and then disposed of, not stored indefinitely.<sup>42</sup> In general, hazardous waste facilities incorporate strict land disposal restrictions, treatment requirements, and a zero discharge system.<sup>43</sup> The public health concerns surrounding hazardous wastes, coupled with the risk of leaching from landfills, legally prevents municipal solid waste landfills from accepting hazardous solid waste.

Nonhazardous wastes, on the other hand, are waste substances that are not ignitable, corrosive, reactive, or toxic. However, RCRA also provides strict regulatory requirements for these wastes to prevent environmental or public health problems. It limits nonhazardous solid waste disposal to approved industrial or municipal solid waste landfills. These landfills do not accept hazardous solid waste but can accept household waste, nonhazardous sludge, industrial solid waste, and construction and demolition debris.<sup>44</sup> The EPA enforces stringent design standards for municipal solid waste landfills to protect nearby groundwater

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<sup>39</sup> See 40 C.F.R. pt. 261 (2012).

<sup>40</sup> *Hazardous Waste Regulations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/epawaste/laws-regs/regs-haz.htm> (last updated July 16, 2012).

<sup>41</sup> U.S. ENVTL. PROT. AGENCY, INTRODUCTION TO LAND DISPOSAL RESTRICTIONS (2005), available at <http://www.epa.gov/wastes/inforesources/pubs/training/ldr05.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Landfills*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/nonhaz/municipal/landfill.htm> (last updated July 16, 2012).

and soil from leaching toxic waste in the landfill. These landfills must comply with the federal regulations in 40 C.F.R. Part 258, or equivalent state regulations.<sup>45</sup>

Although most hazardous waste is classified as a listed or characteristic hazardous waste, there are several exemptions under Subtitle C. For purposes of the BP *Deepwater Horizon* Oil Spill, the most significant exemption is oil and gas exploration and production (E&P) waste.<sup>46</sup> The E&P exemption is codified at 40 C.F.R. § 261.4(b)(5) and exempts wastes that have been generated from a material or process uniquely associated with the exploration, development, or production of crude oil and gas.<sup>47</sup> As a result, the oily solid waste generated by the BP *Deepwater Horizon* Oil Spill is categorically excluded from being labeled hazardous. The oily solid waste includes oil-soaked containment booms, oil-contaminated debris, oil-contaminated soils, tar balls, tar patties, and oil-contaminated vegetative debris.<sup>48</sup> These types of waste are officially categorized as E&P Type 16 waste: Crude Oil Spill Cleanup Waste.<sup>49</sup> This exemption allows oil and gas operators to choose a waste management and disposal option that is less stringent than what is typically required under RCRA Subtitle C.<sup>50</sup> The exemption therefore has a significant impact on the oil and gas industry because it reduces the overall cost associated with drilling.

Despite this E&P exemption, the EPA has stated that “the exemption does not mean these wastes could not present a hazard to human health or the environment if improperly managed.”<sup>51</sup> As noted above, the exemption only applies to wastes generated from the “exploration, development, or production of crude oil.”<sup>52</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Crude Oil and Natural Gas Waste*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/nonhaz/industrial/special/oil/> (last updated July 16, 2012).

<sup>47</sup> U.S. ENVTL. PROT. AGENCY, EXEMPTION OF OIL AND GAS EXPLORATION AND PRODUCTION WASTES FROM FEDERAL HAZARDOUS WASTES REGULATIONS 5–6 (2002), available at [www.epa.gov/osw/nonhaz/industrial/special/oil/oil-gas.pdf](http://www.epa.gov/osw/nonhaz/industrial/special/oil/oil-gas.pdf).

<sup>48</sup> BP, HOUMA INCIDENT COMMAND WASTE MANAGEMENT PLAN (2010), available at [http://www.epa.gov/bpspill/waste/r6\\_waste\\_plan\\_kmr20100615\\_1524.pdf](http://www.epa.gov/bpspill/waste/r6_waste_plan_kmr20100615_1524.pdf).

<sup>49</sup> *Id.*

<sup>50</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 47, at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 6.

Hence, wastes generated from the transportation of crude oil are not exempt from RCRA and can be treated as hazardous waste when disposed.<sup>53</sup> The EPA has acknowledged that if E&P wastes are not properly treated, they present risks to human health and the environment.<sup>54</sup> Specifically, when the EPA sampled oil and gas wastes, it found that “organic pollutants at level of potential concern . . . included the hydrocarbons benzene and phenanthrene. Inorganic constituents at levels of potential concern included lead, arsenic, barium, antimony, fluoride, and uranium.”<sup>55</sup>

As a result of the E&P exemption for RCRA Subtitle C, the oil-soaked containment booms, oil-contaminated debris, oil-contaminated soils, tar balls, tar patties, and oil-contaminated vegetative debris from the BP *Deepwater Horizon* Oil Spill were disposed of in Subtitle D municipal solid waste landfills in Gulf Coast communities.<sup>56</sup> Over 96,000 tons of this type of waste were generated in the six months following the oil spill and the Gulf Coast municipal landfills received the majority of it.<sup>57</sup> In August 2010, BP stated that “oily solids from spill response activities have been collected and characterized. To date, analytical results have confirmed these materials do not exhibit hazardous waste characteristics.”<sup>58</sup> However, BP also observed that, even without the analytical results, “federal and state regulations exempt most of these materials from the definition of hazardous waste due to the exploration and production exemption.”<sup>59</sup>

BP and the EPA worked cooperatively to ensure that the waste was stored safely in these municipal landfills and appear to

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<sup>53</sup> *Id.*

<sup>54</sup> Crude Oil and Natural Gas Waste: Regulatory Determination for Oil, Gas, and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446 (July 6, 1988).

<sup>55</sup> *Id.* at 25,448.

<sup>56</sup> HOUMA INCIDENT COMMAND WASTE MANAGEMENT PLAN, *supra* note 48, at 4.

<sup>57</sup> BP, WEEKLY WASTE TRACKING CUMULATIVE REPORT BY DISPOSAL FACILITY: REPORT FOR THE WEEK OF 12/19/2011 TO 12/31/2011 (2011), *available at*

[http://usresponse.bp.com/external/content/document/2911/1270763/1/Consolidated\\_Weekly\\_Report\\_123111\\_Disposal%20Facility.pdf](http://usresponse.bp.com/external/content/document/2911/1270763/1/Consolidated_Weekly_Report_123111_Disposal%20Facility.pdf).

<sup>58</sup> BP, WASTE SAMPLING: WASTE STREAM IDENTIFICATION AND CHARACTERIZATION 2 (2010), *available at* [http://www.epa.gov/bpspill/waste/bp\\_wastestreamid.pdf](http://www.epa.gov/bpspill/waste/bp_wastestreamid.pdf).

<sup>59</sup> *Id.*

have followed appropriate regulatory procedures.<sup>60</sup> However, perhaps in part due to the unequal distribution of landfills in the United States, people of color are disproportionately bearing the burden of these very large quantities of oily solid waste. While people of color make up just 26% of the coastal counties in Alabama, Florida, Mississippi, and Louisiana, Professor Robert Bullard found that 55.4% of the BP *Deepwater Horizon* Oil Spill waste was dumped in communities that are comprised predominantly of people of color. In addition, he noted that “[m]ore than 80 percent of the oil waste was disposed in communities where the percent people of color exceeded the percent in the county.”<sup>61</sup> Two landfills received close to half of the waste, both of which had more people of color living nearby than the percentages of people of color in the region as a whole:

(1) Springhill Landfill in Campelton, Florida: 24,247.4 tons dumped, while 76% of the residents living within a one-mile radius are people of color; and

(2) Allied Waste Colonial Landfill in Sorrento, Louisiana: 22,704.8 tons dumped, while 34.7% of the residents living within a one-mile radius are people of color.<sup>62</sup>

This disproportionate burden poses future risks for these communities. The E&P hazardous waste exemption has contributed to oil spill waste management plans that do not fully take into account the potential long-term effects of these very large quantities of oily solid waste on public health and the environment. The waste management plans for Louisiana, Mississippi, Alabama and Florida rely on the E&P hazardous waste exemption, and accordingly direct oily solid waste to municipal solid waste landfills.<sup>63</sup> Although sampling and analysis confirms that most of

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60 BP, MOBILE INCIDENT COMMAND CENTER SOLID WASTE MANAGEMENT PLAN (2010), available at [http://www.epa.gov/bpspill/waste/r4\\_waste\\_plan.pdf](http://www.epa.gov/bpspill/waste/r4_waste_plan.pdf).

61 Robert D. Bullard, *Targeted Environmental Justice Enforcement Needed in EPA Region 4*, DISSIDENT VOICE, (Nov. 29, 2010, 7:00 AM), <http://dissidentvoice.org/2010/11/targeted-environmental-justice-enforcement-needed-in-epa-region-4/>.

62 WEEKLY WASTE TRACKING CUMULATIVE REPORT, *supra* note 57; Robert D. Bullard, *BP's Waste Management Plan Raises Environmental Justice Concerns*, DISSIDENT VOICE (July 29, 2010, 7:59 AM), <http://dissidentvoice.org/2010/07/bp%E2%80%99s-waste-management-plan-raises-environmental-justice-concerns/> (racial composition statistics).

63 HOUMA INCIDENT COMMAND WASTE MANAGEMENT PLAN, *supra* note 48; MOBILE INCIDENT COMMAND CENTER SOLID WASTE MANAGEMENT PLAN, *supra* note 60.

the waste does not exhibit hazardous waste characteristics now,<sup>64</sup> the waste management plans do not contemplate the future risks associated with the disposing of 96,279 tons of oily solid waste in municipal solid waste landfills.<sup>65</sup> Moreover, even if the waste remains safe, it is unfair for this waste to be disproportionately stored close to where people of color live.

2. *Executive Order 12,898: "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations"*

Executive Orders are legally binding directives to federal administrative agencies. On February 11, 1994, President Clinton signed Executive Order 12,898 directing administrative agencies to make environmental justice part of their missions.<sup>66</sup> Executive Order 12,898 directs each administrative agency to "make environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>67</sup> As part of this order, President Clinton directed the implementation of an Interagency Working Group to provide guidance to federal agencies in their efforts to eliminate disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.<sup>68</sup> The Executive Order further directed the development of an agency-wide environmental justice strategy, and agencies were mandated to perform research, data collection, and analysis to ensure that their programs did not adversely affect minority and low-income populations.<sup>69</sup> In President Clinton's memorandum addressing Executive Order 12,898, he highlighted that the purpose of the Order was to "promote nondiscrimination in Federal programs substantially affecting human health and the environment, and to provide minority communities access to public information on, and an opportunity for public participation

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64 BP, WASTE SAMPLING, *supra* note 58, at 2.

65 WEEKLY WASTE TRACKING CUMULATIVE REPORT, *supra* note 57, at 1.

66 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

67 *Id.*

68 *Id.*

69 *Id.*

in, matters relating to human health and the environment.”<sup>70</sup>

Executive Order 12,898 directs the EPA to make environmental justice part of its mission. Additionally, the EPA’s Environmental Justice Strategy, adopted pursuant to Executive Order 12,898, acknowledged that “partnering with communities with minority low-income populations which may be suffering from disproportionately high and adverse human health or environmental effects should be a cornerstone of EPA’s pollution prevention efforts.”<sup>71</sup>

The Obama Administration is enforcing Executive Order 12,898 and making environmental justice an important part of its overall strategy to protect human health and the environment. The EPA’s current “Plan EJ 2014” has three main goals: (1) protect health in communities over-burdened by pollution, (2) empower communities to take action to improve their health and environment, and (3) establish partnerships with local, state, tribal, and federal organizations to achieve healthy and sustainable communities.<sup>72</sup> In July 2010, the EPA published *Interim Guidance on Considering Environmental Justice During Development of an Action*. When finalized, the guide will be used as a tool to help EPA officials consider environmental justice throughout the rulemaking process.<sup>73</sup>

One area of law that provides the EPA with broad discretion to consider environmental justice is the regulation of waste disposal under RCRA.<sup>74</sup> The EPA establishes the requirements applicable to the treatment, storage and disposal of waste “as may be necessary to protect human health and the environment.”<sup>75</sup> Therefore, in the context of waste management in the wake of the

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<sup>70</sup> EPA Insight Policy Paper: Executive Order #12898 on Environmental Justice, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/fedfac/documents/executive\\_order\\_12898.htm](http://www.epa.gov/fedfac/documents/executive_order_12898.htm) (last updated Nov. 9, 2011).

<sup>71</sup> U.S. ENVTL. PROT. AGENCY, THE ENVIRONMENTAL PROTECTION AGENCY’S ENVIRONMENTAL JUSTICE STRATEGY (1995), available at [http://www.epa.gov/compliance/ej/resources/policy/ej\\_strategy\\_1995.pdf](http://www.epa.gov/compliance/ej/resources/policy/ej_strategy_1995.pdf).

<sup>72</sup> Plan EJ 2014, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/ej/plan-ej/> (last updated June 19, 2012).

<sup>73</sup> U.S. ENVTL. PROT. AGENCY, INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING DEVELOPMENT OF AN ACTION (2010), available at [www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf](http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf).

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*

BP *Deepwater Horizon* Oil Spill, the EPA has the duty to consider the environmental justice impacts of its decisions.

Executive Order 12,898 directs the EPA to consider whether particular communities will be negatively impacted by the waste management plans adopted in response to the BP *Deepwater Horizon* Oil Spill. The EPA acknowledges that an essential element of environmental justice is fair treatment of all people. “Fair treatment means that no group of people should bear a disproportionate burden of environmental harms and risks.”<sup>76</sup> However, the small number of communities taking the majority of the oily solid waste shoulders a larger share of the burdens and risks associated with the Gulf oil spill cleanup effort.

The EPA also acknowledges that environmental justice requires the meaningful involvement of all people.<sup>77</sup> However, due to the emergency situation created by the Gulf oil spill, there was little opportunity to truly have “meaningful involvement” from communities that were impacted by the ultimate waste disposal plans. Although the EPA and BP sponsored community meetings in various sites throughout the region, the emergency situation created by the spill did not provide the public with an opportunity to influence the EPA or BP when making decisions about waste disposal facilities.<sup>78</sup> Most importantly, the emergency timeframe precluded decision-makers from making meaningful efforts to seek out and facilitate involvement with community members living near the landfills.

In its waste management plans, BP refers to making decisions about disposal facilities that take environmental justice concerns into account.<sup>79</sup> Specifically, BP’s Houma Waste Management Plan states that planning should include “analysis of socio-economic demographic data within close proximity to operations, evaluation of any potential impacts on sensitive populations, [and] evaluation of any pre-existing community concerns and regulatory

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<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.*

<sup>78</sup> *Community Outreach*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/BPSpill/community.html> (last updated Oct. 14, 2011) (relevant community meetings mostly took place after relevant waste disposal decisions had been made).

<sup>79</sup> HOUMA INCIDENT COMMAND WASTE MANAGEMENT PLAN, *supra* note 48, at 6.

enforcement history.”<sup>80</sup> Also, BP noted that it would demonstrate “a strong commitment to address environmental justice challenges and the disproportionate environmental burdens place on low income communities as required by applicable legal requirements.”<sup>81</sup>

However, the disproportionate burden on the towns of Campelton and Sorrento, which received close to half of the oil spill waste, raises questions about whether the governmental supervision adequately addressed environmental justice. As noted above, both landfills are located in areas that have a higher percentage of people of color than the region as a whole, and the area near Campelton’s landfill—which received the most waste—is over three-quarters people of color. This concern is reinforced by what took place when at least one community in Mississippi that was designated to receive waste attempted to opt out. Despite regulators disapproving of that opt out, the community was allowed to provide waste staging ground rather than storage after their efforts.<sup>82</sup> Low-income communities of color like Campelton may not have been aware or organized enough to raise similar concerns about the disproportionate burden they are assuming. Moreover, these concerns about communities having unequal capacity to resist in this context arise in a broader context of unequal siting of these kinds of waste disposal. The decision to place this waste in municipal land dumps exacerbates the environmental justice problem caused by the disproportionate siting of these types of disposal facilities in low-income communities and communities of color.<sup>83</sup>

In sum, both the EPA and BP are aware of environmental justice concerns and attempted to implement strategies to protect

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 11.

<sup>82</sup> See NATIONAL COMMISSION REPORT, *supra* note 1, at 170; see also *supra* notes 61–62 and accompanying text. The area around the landfill that tried to opt out, Pecan Grove Landfill, has a minority population of only 12.5% immediately surrounding the landfill. Bullard, *BP’s Waste Management Plan Raises Environmental Justice Concerns*, *supra* note 62.

<sup>83</sup> For an analysis of structural racism and the siting of industrial facilities, see Luke W. Cole, *Environmental Justice and Entrepreneurship: Pitfalls for the Unwary*, 31 W. NEW ENG. L. REV. 601 (2009). For a discussion of efforts to address dumping of toxic waste in low-income, communities of color, see Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENVTL. L.J. 9 (2007).



low-income communities and communities of color in applying RCRA to waste disposal in the aftermath of this spill. Nevertheless, some of the communities negatively impacted by the waste disposal of oily solid waste have high populations of low-income residents and people of color. While Executive Order 12,898 was not completely disregarded by the EPA, it was not given its full effect.

### B. Health

Gulf Coast residents experience the health impacts of the BP *Deepwater Horizon* Oil Spill through consumption of seafood, increased air pollution, and exposure to contaminants on beaches and in the water. In response to the BP *Deepwater Horizon* Oil Spill, the National Oceanic and Atmospheric (NOAA), the Food and Drug Administration (FDA), and the EPA launched a joint surveillance effort to test seafood, close waters contaminated with oil to fishing, and prevent contaminated seafood from reaching the market.<sup>84</sup> Seafood is tested for “taint,” petroleum odors, and unsafe levels of polycyclic aromatic hydrocarbons (PAHs), a type of potentially carcinogenic chemical that is found in oil.<sup>85</sup> According to the FDA, the chemical dispersants used to clean oil from the water are unlikely to contaminate seafood or harm human health, but seafood that has likely been exposed to dispersants is also being monitored.<sup>86</sup>

People living close to the Gulf Coast may have been exposed to particulate matter (PM) from the burning of oil by cleanup workers, or to low levels of chemicals from oil in the air.<sup>87</sup> Exposure to PM may exacerbate chronic conditions such as heart disease or asthma and chemicals in the air can cause irritation of the eyes, nose, throat, and skin.<sup>88</sup> Gulf Coast residents are also at risk of exposure to oil and dispersants on beaches or while swimming through direct skin contact.<sup>89</sup> Exposure may result in

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<sup>84</sup> *Overview of Testing Protocol to Re-open Harvest Waters that Were Closed in Response to the Deepwater Horizon Oil Spill*, U.S. FOOD & DRUG ADMIN. (July 15, 2010), <http://www.fda.gov/Food/ucm217598.htm>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *What to Expect from the Oil Spill and How to Protect Your Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://emergency.cdc.gov/gulfoilspill2010/what\\_to\\_expect.asp](http://emergency.cdc.gov/gulfoilspill2010/what_to_expect.asp) (last visited July 21, 2012).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

dermatitis, secondary skin infections, rashes, or other types of irritation.<sup>90</sup>

The BP *Deepwater Horizon* Oil Spill disaster may also cause or exacerbate mental and behavioral health problems.<sup>91</sup> Disasters lead to an increase in anxiety, post-traumatic stress, and other mental health disorders, and the prevalence and severity of mental illnesses are directly correlated to the severity of the disaster.<sup>92</sup> After Hurricane Katrina, a mental health study in New Orleans revealed a marked increase in anxiety and related mental health disorders; the BP *Deepwater Horizon* Oil Spill impacts many of the same communities that survived the hurricane, and studies since the spill indicate that some residents are struggling with a second wave of stress and trauma that could exacerbate existing mental health problems.<sup>93</sup> However, as discussed further in Part IV.B.1, the Gulf Coast Claims Facility specifically excludes compensation for mental health problems resulting from the spill.<sup>94</sup>

Studies of past oil spills also reveal resulting mental health problems. Psychological studies conducted a year after the *Exxon Valdez* Oil Spill in 1989 found higher rates of anxiety, depression, and post-traumatic stress disorder (PTSD) among people who were exposed to the spill, and Native Americans were found to be particularly vulnerable to depression after the spill.<sup>95</sup> According to the United States Department of Health and Human Services (HHS) and studies published in the *New England Journal of Medicine*, some mental health impacts of the BP *Deepwater Horizon* Oil Spill have already been observed.<sup>96</sup> For example, the

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<sup>90</sup> Gina M. Solomon & Sarah Janssen, Commentary, *Health Effects of the Gulf Oil Spill*, 304 J. AM. MED. ASS'N 1118 (2010).

<sup>91</sup> *Id.*

<sup>92</sup> Sandro Galea et al., *Exposure to Hurricane-Related Stressors and Mental Illness After Hurricane Katrina*, 64 ARCHIVES GEN. PSYCHIATRY 1427 (2007); Bernard D. Goldstein et al., Review Article, *The Gulf Oil Spill*, 364 NEW ENG. J. MED. 1334 (2011); Katherine Yun et al., Perspective, *Moving Mental Health into the Disaster-Preparedness Spotlight*, 363 NEW ENG. J. MED. 1193 (2010).

<sup>93</sup> *Id.*

<sup>94</sup> See *infra* note 152.

<sup>95</sup> Lawrence A. Palinkas et al., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, 150 AM. J. PSYCHIATRY 1517 (1993).

<sup>96</sup> See RAY MABUS, AMERICA'S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL 52 (2010), available at <http://www.restorethegulf.gov/sites/default/files/documents/pdf/gulf-recovery-sep-2010.pdf>; sources cited *supra* note 92.

National Domestic Violence Hotline received a 13% increase in calls from Gulf Coast states between April 2010 and June 2010, including a 21% increase in calls from Louisiana residents.<sup>97</sup>

The disproportionate health impacts of the BP *Deepwater Horizon* Oil Spill present a unique challenge when viewed in the legal landscape. Rather than providing for prevention of disproportionate impacts and care for those suffering long-term health impacts, the legal regime structuring oil spill response focuses primarily on cleanup and compensation, areas that are discussed in detail in Part IV. Applicable environmental law focuses on the protection and restoration of natural resources. Neither area sufficiently addresses environmental justice issues. While enforcement of existing law may help to address some health impacts of the BP *Deepwater Horizon* Oil Spill, new strategies are necessary to prevent disproportionate harm to low-income communities and communities of color. This Section explores existing legal strategies for preventing and addressing disproportionate health impacts caused by the BP *Deepwater Horizon* Oil Spill. Specifically, the Section analyzes the interaction between the National Contingency Plan, which coordinates oil spill response efforts, and the above-discussed Executive Order 12,898.

Passed in the aftermath of the *Exxon Valdez* Oil Spill, the Oil Pollution Act of 1990 (OPA) amended the Clean Water Act (CWA), authorizing the President to create a National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan or NCP) to coordinate the federal response to oil spills.<sup>98</sup> The NCP establishes criteria and procedures to ensure immediate federal response to any discharge “that results in a substantial threat to the public health or welfare of the United States.”<sup>99</sup> Under the NCP, duties are assigned to federal departments and agencies in coordination with the states.<sup>100</sup> Coast Guard strike teams are organized to coordinate response, a system of surveillance and notice is established to identify oil discharges,

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<sup>97</sup> *Id.*

<sup>98</sup> 33 U.S.C. § 1321(d) (2006 & Supp. VI 2012); *see also* CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41262, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 7 (2010), available at <http://www.fas.org/sgp/crs/misc/R41262.pdf>.

<sup>99</sup> 33 U.S.C. § 1321(d)(2)(I).

<sup>100</sup> *Id.* § 1321(d)(2)(A).

and oil removal techniques are identified.<sup>101</sup> Regulations of the NCP requiring oil spill response actions are binding and enforceable under the OPA and the CWA.<sup>102</sup> The President is authorized to revise or amend the NCP as needed.<sup>103</sup> Thus, the NCP has significant authority to address environmental harms by requiring specific response actions, and the President has the capacity to modify the NCP to require more effective response mechanisms or coordination as needed.

The NCP establishes a National Response System (NRS) consisting of multiple agencies and strategies.<sup>104</sup> The NRS is made up of a National Response Team (NRT) headed by the Coast Guard; Regional Response Teams (RRTs) comprised of regional representatives of each NRT member agency, local governments, and state governments; Area Committees (ACs) comprised of “qualified personnel from federal, state, and local agencies,” who develop Area Contingency Plans; and an On Scene Coordinator (OSC), generally a Coast Guard captain, who coordinates response activities and determines the level of cleanup required.<sup>105</sup> Area Committees must prepare and submit Area Contingency Plans (ACPs) to the President, detailing an adequate plan to remove oil and protect natural resources, fish, and wildlife.<sup>106</sup> Thus, the NCP constitutes a detailed, multi-agency coordinated response to oil spills with the authority to mandate specific actions on local and national levels.

Executive Order 12,898, described in depth in the preceding Section, is applicable to the National Contingency Plan via the various federal agencies involved in oil spill response. National Response Team member agencies include, among others, HHS, EPA, and NOAA, each of which is coordinating response activities related to health impacts of the BP *Deepwater Horizon* Oil Spill.<sup>107</sup>

Agency environmental justice strategies are relevant to the BP

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101 *Id.* § 1321(d)(2)(C)–(F).

102 HAGERTY & RAMSEUR, *supra* note 98, at 8.

103 33 U.S.C. § 1321(d)(3).

104 HAGERTY & RAMSEUR, *supra* note 98, at 8.

105 *Id.* at 8–9.

106 33 U.S.C. § 1321(j)(4).

107 *Member Agencies*, U.S. NAT'L RESPONSE TEAM, <http://nrt.org/production/NRT/NRTWeb.nsf/MADispForm?Openform> (last visited July 21, 2012).

*Deepwater Horizon* Oil Spill response efforts for several reasons. First, existing strategies may provide guidance to NRT member agencies and to the NRT as a whole for addressing environmental justice concerns related to increasing public participation in agency activities, health research and data collection, and identifying communities that rely on subsistence use of natural resources such as seafood. For example, HHS has identified strategies to improve health surveillance, identify environmental hazards that most impact communities of color and low-income communities, and educate communities about health risks through community-based outreach and training.<sup>108</sup> If these strategies have been well-implemented within HHS, and if they are well-tailored to the specific demands of oil spill response activities, they may serve as a model for responding to health impacts caused by the BP *Deepwater Horizon* Oil Spill.

Second, Executive Order 12,898's direction to federal agencies to "promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations" is particularly relevant in cases where such communities have experienced contamination of swimming water, beaches, and subsistence seafood.<sup>109</sup> For example, as discussed in detail below, EPA can file suit to enforce CWA prohibitions on unlawful pollution and other applicable environmental laws.<sup>110</sup>

Finally, Executive Order 12,898 is relevant to BP *Deepwater Horizon* Oil Spill agency response activities because it is binding on all federal agencies.<sup>111</sup> Therefore, each agency involved in response activities should consider whether such activities disproportionately impact low-income communities or communities of color.<sup>112</sup>

While each federal agency member of the NRT and the ACs is directed to address environmental justice implications of its activities, it is unclear how Executive Order 12,898 applies to the NRT or the ACs as bodies, because these entities also include state

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<sup>108</sup> DEP'T OF HEALTH & HUMAN SERVS., STRATEGIC ELEMENTS FOR ENVIRONMENTAL JUSTICE (1995), available at <http://www.epa.gov/compliance/ej/resources/publications/interagency/hhs-strategy-1995.pdf>.

<sup>109</sup> Exec. Order No. 12,898, § 1-103(a), 59 Fed. Reg. 7629, 7630 (Feb. 16, 1994).

<sup>110</sup> See *infra* III.D.2.

<sup>111</sup> See Exec. Order No. 12,898, § 6-604.

<sup>112</sup> See *id.* at § 1-101.

and local governments.<sup>113</sup> The NCP does not mention environmental justice, which could lead to a gap in analysis of disproportionate impacts in the context of NCP-mandated response activities.<sup>114</sup> Even though multiple NRT member agencies are coordinating to address health impacts, the NCP contains no specific provisions related to addressing or preventing disproportionate health impacts; rather, it addresses health concerns more broadly.<sup>115</sup> While the OPA gives the President authority to ensure immediate federal response to an oil spill substantially affecting the public health and to activate the NCP through multiple federal and state agencies, the OPA does not specify that the NCP focus on inequality in public health concerns arising from a spill.<sup>116</sup> Likewise, the OPA mandates that ACs prepare detailed plans for protection of fish and wildlife, but without an explicit environmental justice focus.<sup>117</sup>

This intersectionality raises the question of whether or not application of Executive Order 12,898 to individual agency actions is sufficient in the context of a multi-agency (and multi-government) coordinated response effort. Some agencies are clear about their consideration of environmental justice issues related to at least some response activities. For example, the EPA established a Cooperative Agreement grant program to provide funding and technical assistance to local organizations working on environmental justice issues resulting from the BP *Deepwater Horizon* Oil Spill.<sup>118</sup> On the other hand, as discussed in the preceding Section, the EPA did not give full effect to its environmental justice strategies in relationship to waste management decisions, which have disproportionately affected communities of color.<sup>119</sup> The NOAA Damage Assessment Remediation and Restoration Program, which works with natural resource trustees in Gulf Coast states to determine the extent of damage to fish and other natural resources, requires trustees to

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113 HAGERTY & RAMSEUR, *supra* note 98, at 8–9.

114 *See* 40 C.F.R. § 300 (2012).

115 *See id.*

116 *See* 33 U.S.C. § 1321(d)(2) (2006 & Supp. VI 2012).

117 *See id.* § 1321(d)(2)(M).

118 *Cooperative Agreements to Support Communities Affected by the BP Oil Spill*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/ej/grants/bp-spill-grants.html> (last updated May 24, 2012).

119 *See supra* Part II.A.

consider whether communities of color or low-income communities will be disproportionately impacted by its restoration activities.<sup>120</sup> While HHS has agency-wide environmental justice strategies that apply to all of its efforts, information about its application of those strategies to its BP *Deepwater Horizon* Oil Spill response is not publicly available.<sup>121</sup> Thus, the multi-agency structure of the response generally and with respect to health in particular poses environmental justice concerns.

### III. JUSTICE CONCERNS WITH COMPENSATION

One of the most pressing questions facing victims after the BP *Deepwater Horizon* Oil Spill revolves around the issue of how to make victims whole in the wake of damage suffered. This Part explores the environmental justice dimensions of efforts to provide compensation for victims of the BP *Deepwater Horizon* Oil Spill. It first describes the framework created by the Oil Pollution Act of 1990, and then explores environmental justice issues regarding the Gulf Coast Claims Facility, governmental distribution of funds, and litigation.

#### A. *Oil Pollution Act and Compensation*

In the wake of the *Exxon Valdez* disaster and the protracted litigation that followed, the OPA established liability guidelines for responsible parties in the event of an unlawful discharge of oil.<sup>122</sup> The OPA imposes liability on parties responsible for “a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil.”<sup>123</sup> Responsible parties include “the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under . . . the Outer Continental Shelf Lands Act . . . for the area in which the facility is located . . . .”<sup>124</sup> The source of the discharge, and as a result the responsible party, is to be designated by the President “where possible and appropriate,” pursuant to OPA § 2714.<sup>125</sup>

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<sup>120</sup> *DARRP: About Relevant Laws*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.darrp.noaa.gov/about/laws.html#12898> (last updated July 19, 2010).

<sup>121</sup> See DEP’T OF HEALTH & HUMAN SERVS., *supra* note 108.

<sup>122</sup> 33 U.S.C. §§ 2701–62 (2006 & Supp. IV 2010).

<sup>123</sup> *Id.* § 2702(a).

<sup>124</sup> *Id.* § 2701(32).

<sup>125</sup> *Id.* § 2714.

The OPA imposes affirmative duties on responsible parties. These parties are responsible for costs associated with removal of the oil, as well as specified damages caused by the unlawful discharge.<sup>126</sup> They must compensate for impairment of natural resources, damage to real and personal property, the incapacitation of subsistence resource users, lost tax revenues derived from damaged resources in their various forms, lost profits derived from said resources, and public services which suffer as a result of the discharge.<sup>127</sup> The conference report on the OPA states that “[t]he claimant need not be the owner of the damaged property or resources to recover for lost profits or income.”<sup>128</sup> States are able to impose liability provisions in addition to those provided for in the OPA in the case of discharge or removal within state limits.<sup>129</sup>

Responsible parties are required to begin advertising detailed claimant information within fifteen days of the incident, and must maintain these advertisements for at least thirty days.<sup>130</sup> Advertisements are to specify the availability of “interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled,” and that acceptance of these payments will not preclude the claimant from engaging in subsequent legal action to recover “damages not reflected in the paid or settled partial claim.”<sup>131</sup>

These short-term OPA payments are intended to be expedited in nature. “The responsible party shall establish a procedure for the payment or settlement of a claim for interim, short-term damages. Payment . . . representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected . . . .”<sup>132</sup> Under § 2710, indemnification agreements are allowed, but they do not transfer liability from the responsible party to any other party.<sup>133</sup> Regardless of indemnification, payment of “final damages . . . shall not foreclose a claimant’s right to recovery of all damages to

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126 *Id.* § 2702(b).

127 *Id.*

128 H.R. REP. NO. 101-653, at 4 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 779, 781.

129 33 U.S.C. § 2718.

130 *Id.* § 2714(b)(1).

131 *Id.* § 2714(b)(2).

132 *Id.* § 2705(a).

133 *Id.* § 2710.



which the claimant otherwise is entitled under this Act or under any other law.”<sup>134</sup>

The OPA serves to define the parameters of liability for responsible parties. If the discharge can be shown to be solely the result of an act of God, an act of war, or the act of “gross negligence or willful misconduct” by a party other than the initially designated entities, liability will either not be imposed, or will be imposed upon those responsible for negligence or misconduct.<sup>135</sup>

If unlawful discharge occurs at an “offshore facility” like the *Deepwater Horizon*, the responsible party is liable for all removal costs, and an additional \$75 million.<sup>136</sup> If discharge occurs onshore or in a deepwater port, the responsible party’s damages are capped at \$350 million.<sup>137</sup> These liability limits are to be adjusted for changes in the Consumer Price Index at least every three years, but remain at the aforementioned levels today.<sup>138</sup> OPA provisions also do not provide for the recovery of punitive damages.<sup>139</sup> Liability caps disperse only after a high burden of proof has been met. For instance, if the discharge was proximately caused by the “gross negligence or willful misconduct” of the responsible party, or if the responsible party violated “an applicable Federal safety, construction, or operating regulation,” liability caps would not apply.<sup>140</sup> The same would be true if the party failed to report the incident, to cooperate with authorities, or to comply with a lawful order.<sup>141</sup>

There is a three year limit on damage claims from the time “the injury and its connection with the discharge in question were reasonably discoverable . . . .”<sup>142</sup> Claims must first be brought to the responsible party, and if the responsible party denies the claim in full, or if the claim is not resolved within ninety days of

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134 *Id.* § 2715(b)(2).

135 *Id.* § 2702(d); *id.* § 2703.

136 *Id.* § 2704(a)(3) (2006 & Supp. IV).

137 *Id.* § 2704(a)(4).

138 *Id.* § 2704(d)(4).

139 See Kristin Choo, *The Price of Oil*, ABA J. (Aug. 1, 2010), [http://www.abajournal.com/magazine/article/the\\_price\\_of\\_oil/](http://www.abajournal.com/magazine/article/the_price_of_oil/).

140 33 U.S.C. § 2704(c)(1).

141 *Id.* § 2704(c)(2).

142 *Id.* § 2712(h)(2) (2006 & Supp. IV).

presentation, the claimant may commence legal action.<sup>143</sup> The OPA does not address whether partial payment that unsatisfactorily settles a claim prevents subsequent OPA-based litigation specific to that claim.

The OPA resolves many of the jurisdictional issues inherent after an unlawful discharge of oil. Actions arising under the OPA are to be heard in the U.S. district court for the district in which the discharge or injury occurs, or the district in which the defendant resides, is found, or has its primary place of business.<sup>144</sup> State trial courts may hear removal and damage claims.<sup>145</sup> These jurisdictional rules are subject to a three year statute of limitations on actions for damages and removal costs, a time period that commences when “the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care.”<sup>146</sup>

### B. Gulf Coast Claims Facility

After being designated a responsible party under the OPA, BP established the Gulf Coast Claims Facility (GCCF), administered independently by Ken Feinberg, to provide an administrative mechanism for quickly addressing claims arising from the spill, and pledged to establish a \$20 billion trust fund to satisfy claims adjudicated by the GCCF.<sup>147</sup> Because the GCCF is serving as a primary mechanism of compensation, this Section focuses on environmental justice concerns arising from it. The Section examines issues regarding the claims allowed, the emergency claims deadline, and the way in which BP provides funds for the GCCF.

#### 1. Allowed Claims

Although neither BP nor the federal government has indicated with certainty that the GCCF was intended to satisfy BP's compensation obligations under the OPA, the GCCF's descriptions

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<sup>143</sup> *Id.* § 2713(c).

<sup>144</sup> *Id.* § 2717(b).

<sup>145</sup> *Id.* § 2717.

<sup>146</sup> *Id.*

<sup>147</sup> See Jonathan Tilove, *Gulf of Mexico Oil Spill Escrow Figure of \$20 Billion Is Neither Floor Nor Ceiling for BP*, Times-Picayune (June 16, 2010, 8:08 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/gulf\\_of\\_mexico\\_oil\\_spill\\_escro.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/gulf_of_mexico_oil_spill_escro.html).

of itself suggest that the facility was established to address those obligations, at least in part. For example, the GCCF's "Protocol for Emergency Advance Payments" states that the U.S. Coast Guard "directed BP to maintain a single claims facility for all Responsible Parties to avoid confusion among potential claimants."<sup>148</sup> Therefore, the "GCCF (and the protocols under which it operates) are structured to be compliant with OPA."<sup>149</sup> The GCCF also utilizes OPA provisions in order to regulate fund policies, including whether or not a claim has been presented.<sup>150</sup> While BP has also authorized the GCCF to process personal injury claims outside the scope of the OPA, "submission of such claims [to the GCCF] shall be wholly voluntary."<sup>151</sup>

Private individuals and businesses may file claims seeking compensation for "direct damages resulting from the Spill,"<sup>152</sup> and for removal and cleanup costs "that result from actions [the individual or business] took to prevent, mitigate or clean up damages or anticipated damages."<sup>153</sup> Individuals and businesses may also file claims for damage to real or personal property, "measured by the cost of repair or replacement of the property and/or the difference in the value of the property before and after the damage."<sup>154</sup> In the case of property that is leased or rented to a third party, either the renter or the owner may file the claim, but each must inform the other that the claim has been filed.<sup>155</sup> There

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<sup>148</sup> *Protocol for Emergency Advance Payments*, GULF COAST CLAIMS FACILITY, [http://web.archive.org/web/20101123165056/http://gulfcoastclaimsfacility.com/p/roto\\_1](http://web.archive.org/web/20101123165056/http://gulfcoastclaimsfacility.com/p/roto_1) (accessed by searching for [http://www.gulfcoastclaimsfacility.com/proto\\_1](http://www.gulfcoastclaimsfacility.com/proto_1) in the Internet Archive index).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY § 7, <http://web.archive.org/web/20101123161456/http://gulfcoastclaimsfacility.com/faq> (accessed by searching for [www.gulfcoastclaimsfacility.com/faq](http://www.gulfcoastclaimsfacility.com/faq) in the Internet Archive index) (Compensation).

<sup>153</sup> *Id.* § 8 (Removal and Clean Up Costs).

<sup>154</sup> *Id.* § 9 (Damage to Real or Personal Property).

<sup>155</sup> *Id.* ("Any Individual or Business that owns or rents Real or Personal Property physically damaged or destroyed by the Spill may submit a claim to the GCCF for damages to the affected Real or Personal Property, or for economic losses resulting from the destruction of the affected property. If you are an owner of a property that you lease to someone else, you must notify the lessee that you are filing a claim. If you lease a property from someone else, you must notify the owner that you are filing a claim.") The FAQ also specifies that "the GCCF will

are two available claims for economic damages suffered from the Oil Spill: “Lost Profits and Earning Capacity” claims,<sup>156</sup> and “Loss of Subsistence Use of Natural Resources” claims.<sup>157</sup> Finally, individuals may file a claim for physical injuries or deaths that were “proximately caused by the Spill or the explosion and fire associated with the Deepwater Horizon incident, or by the cleanup of the Spill.”<sup>158</sup>

In order to facilitate GCCF claims, BP established Claim Centers and Community Outreach Centers throughout the region.<sup>159</sup> The federal government has established coordinating One Stop Career Centers (Comprehensive and Affiliate), Small Business Administration Offices, and Command Posts.<sup>160</sup> While a substantial number of the BP Claim Centers are in New Orleans and the surrounding areas, Centers stretch as far as Naples and Key West, Florida.<sup>161</sup> These Claim Centers were largely designed to help people process claims made on the \$20 billion fund discussed above.<sup>162</sup>

The available claims may affect different communities in a variety of ways. First, cleanup and oil removal costs must either be “approved by the Federal On-Scene Coordinator” or be “otherwise consistent with the National Contingency Plan.”<sup>163</sup> Differing levels of access to the FOSC or lack of knowledge about the National Contingency Plan may slow down individuals’ ability to access funds for cleanup and oil removal work already accomplished, especially if some communities did not receive as

not pay the same claim for damages or losses to Real or Personal Property to both an owner and a renter,” and that it will “generally” defer to the owner if both parties file. *Id.*

<sup>156</sup> *Id.* § 10 (Lost Profits and Earning Capacity).

<sup>157</sup> *Id.* § 11 (Loss of Subsistence Use of Natural Resources).

<sup>158</sup> *Id.* § 12 (Physical Injury or Death).

<sup>159</sup> A map of these centers is available at *Gulf Response Mapping Site*, ENVTL. RESPONSE MGMT. APPLICATION, <http://gomex.erma.noaa.gov/erma.html#x=-88.36381&y=28.73568&z=6&layers=11144+5723+2948> (last updated July 17, 2012).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Claims Site Offices*, GULF COAST CLAIMS FACILITY, <http://web.archive.org/web/20101123161519/http://gulfoastclaimsfacility.com/facility> (accessed by searching for <http://www.gulfoastclaimsfacility.com/facility> in the Internet Archive index).

<sup>163</sup> *Frequently Asked Questions*, *supra* note 152, § 8 (Removal and Clean Up Costs).

much information about the need for pre-approval. Second, although either the owner or the renter may file a claim for damage to real or personal property, the Frequently Asked Questions section notes that the owner will ordinarily receive the compensation unless the renter has a demonstrated contractual right to the damages.<sup>164</sup>

In addition, claims based on “Loss of Subsistence Use of Natural Resources” may be harder to obtain. The GCCF website notes that “[t]housands of identical claims for Loss of Subsistence Use of Natural Resources have been submitted to the GCCF with no documentation other than standard form letters signed by local officials stating that the claimant has experienced hardship in a ‘fill in the blank’ specified monthly amount as a result of the increase in seafood production costs after the Spill.”<sup>165</sup> According to the GCCF, “[t]hese claims are not sufficient for payment.”<sup>166</sup> Subsistence Use of Natural Resources claims are supposed to be for “damages to a claimant’s ability to rely, without purchase, on natural resources for food, shelter, or other minimum necessities of life,”<sup>167</sup> such as “a claimant who depends upon his or her ability to harvest fish that he or she depends upon for food may have a claim for the cost of replacing fish the claimant was unable to harvest because of the closure of fishing waters.”<sup>168</sup> Since the communities likely to need these types of subsistence claims may be primarily comprised of people of color, low-income people, and Indian Tribes, increased scrutiny related to these claims may make it harder for these groups to access much-needed subsistence income.

Finally, GCCF claims for personal injury or death are explicitly prohibited from including compensation for emotional or mental health injuries.<sup>169</sup> This prohibition may disproportionately

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<sup>164</sup> See *supra* note 157.

<sup>165</sup> *Claims for Loss of Subsistence Use of Natural Resources*, GULF COAST CLAIMS FACILITY, <http://web.archive.org/web/20101018000528/http://www.gulfcoastclaimsfacility.com/> (accessed by searching for [www.gulfcoastclaimsfacility.com](http://www.gulfcoastclaimsfacility.com) in the Internet Archive index).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Frequently Asked Questions*, *supra* note 152, § 12 (“An injury that relates to emotional or mental health is not a physical injury and is not an eligible claim.”).

affect communities of color and low-income people given the often greater barriers to their accessing emotional or mental health assistance outside of compensation by the GCCF.

## 2. *Emergency Advance Payments Deadline*

The OPA attempts to ensure implementation of procedures that make claimants whole as quickly as possible, and at no point in the Act are responsible parties given the right to preclude future litigation. Instead, the OPA takes affirmative steps to restrict transfer of liability.<sup>170</sup> The statute makes clear that liability is intended to remain with the responsible party in all but the most complete of claim settlements. However, the GCCF initially set a deadline for Emergency Advance Payments, designating that after the deadline, the only payments available will be accompanied by a waiver of liability. The GCCF has since addressed these concerns to some extent by allowing those who submit final payment forms to receive partial payments without a liability waiver and added quick payment and interim payment processes. However, the major difference early on between the options of those who submitted before and after the Emergency Advance Payment deadline raised environmental justice concerns.<sup>171</sup> In addition, at the time, discerning the overarching GCCF policy required synthesizing two separate answers on the GCCF's "Frequently Asked Questions" page.<sup>172</sup> Adding to the confusion, the Emergency Advance Payment and the Final Payment claims used the same form.<sup>173</sup> This Section explores these issues and the ways in which the initial GCCF procedures around emergency procedures violated the OPA.

The OPA requires that responsible parties establish a method of making interim short-term payments to individuals and

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<sup>170</sup> 33 U.S.C. § 2710 (2006) (stating that, while indemnification agreements are allowed, transfers of liability are not).

<sup>171</sup> See *Frequently Asked Questions*, *supra* note 152.

<sup>172</sup> Compare *id.* § 5.1 (Claims for Emergency Payment) (describing condition that Emergency Advance Payments must be submitted by November 23, 2010), with *id.* § 5.11 (describing condition that in order to obtain a Final Payment, claimant must sign a "Release and Waiver").

<sup>173</sup> See *Instructions—Gulf Coast Claims Facility Claim Form*, GULF COAST CLAIMS FACILITY 1–2, [http://web.archive.org/web/20101216021548/http://gulfoastclaimsfacility.com/Instructions\\_GCCF\\_ClaimForm.pdf](http://web.archive.org/web/20101216021548/http://gulfoastclaimsfacility.com/Instructions_GCCF_ClaimForm.pdf) (accessed by searching for [http://www.gulfoastclaimsfacility.com/Instructions\\_GCCF\\_ClaimForm.pdf](http://www.gulfoastclaimsfacility.com/Instructions_GCCF_ClaimForm.pdf) in the Internet Archive index).

businesses affected by the unlawful discharge of oil.<sup>174</sup> Under OPA § 2705, “[p]ayment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.”<sup>175</sup> Despite the language of OPA § 2705, the GCCF imposed a November 23, 2010 deadline for claimants to submit claims for Emergency Advance Payments.<sup>176</sup> After this deadline, these payments were no longer available, and the GCCF shifted to issuing Final Payments.<sup>177</sup> In the period preceding November 23, this deadline was alluded to on the GCCF’s “Frequently Asked Questions” website. In response to the question “Do I waive my legal rights by filing a claim?” the GCCF responds “no.”<sup>178</sup> “You do not waive or release any legal rights by filing a claim for Emergency Advance Payments with the GCCF. If you apply for Final Payment and the GCCF finds that you are eligible for Final Payment then you will be required to sign a Release to receive a Final Payment.”<sup>179</sup>

The GCCF went into a bit more detail in the eight pages of instructions provided for filing a claim form. “If you accept that determination, to receive a Final Payment you will have to sign a release waiving any rights you may have against BP to assert additional claims, to file an individual legal action, or to participate in other legal actions associated with the Spill.”<sup>180</sup> While this does further describe the repercussions of accepting a Final Payment, precise distinctions between the two forms of GCCF relief are susceptible to misunderstanding, as the deadline is not mentioned in conjunction with this information. Also, that Emergency Advance Payments and Final Payments used exactly the same form might contribute to claimant confusion.<sup>181</sup>

As a result, some individual claimants without the benefit of

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<sup>174</sup> 33 U.S.C. § 2705(a) (2006).

<sup>175</sup> *Id.*

<sup>176</sup> See *Frequently Asked Questions*, *supra* note 152, § 4 (How to File a Claim).

<sup>177</sup> See *id.*

<sup>178</sup> See *Frequently Asked Questions*, *supra* note 152, § 3 (Who May File a Claim).

<sup>179</sup> *Id.*

<sup>180</sup> See *Instructions—Gulf Coast Claims Facility Claim Form*, *supra* note 173, at 2.

<sup>181</sup> *Id.* at 1–2.

legal counsel might unknowingly have foregone their rights to future litigation in exchange for a payment received before the full scope of damages proximately caused by the oil spill is known. Such a payment would be necessarily incomplete, and the OPA restricts use of such payments as tools of liability limitation.<sup>182</sup> The GCCF has taken some steps that address this problem. By processing just a small fraction of the Final Payment claimants registered by October 2010, the GCCF prevented unintentional releases of liability.<sup>183</sup> Because of the important legal restrictions that accompany Final Payments, a delay in this aspect of the claims process was in keeping with the OPA.

The GCCF issued partial payments as Emergency Advance Payments to “Individuals and Businesses that are experiencing financial hardship resulting from damages incurred by the Spill.”<sup>184</sup> They appear to be the GCCF’s version of the “interim, short-term damages” required by OPA § 2705.<sup>185</sup> However, there are important distinctions between federal regulation and GCCF policy. According to the OPA, “[p]ayment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.”<sup>186</sup> Importantly, no deadline is mentioned in OPA § 2705, and the section instead precludes issuance of waivers of liability “for damages not reflected in the paid or settled partial claim.”<sup>187</sup> This language is indicative of the importance the OPA places on making claimants whole. While timetables are mentioned in the OPA, they almost exclusively restrict the actions of the responsible party, not the

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<sup>182</sup> 33 U.S.C. § 2715 (2006) (stipulating that payment of final damages “shall not foreclose a claimant’s right to recover all damages to which the claimant otherwise is entitled under this Act or under any other law”).

<sup>183</sup> See *GCCF Program Statistics—Overall Summary (as of October 27, 2010)*, GULF COAST CLAIMS FACILITY, [http://web.archive.org/web/20101028142924/http://gulfoastclaimsfacility.com/GCCF\\_Overall\\_Status\\_Report.pdf](http://web.archive.org/web/20101028142924/http://gulfoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf) (accessed by searching for [www.gulfoastclaimsfacility.com/GCCF\\_Overall\\_Status\\_Report.pdf](http://www.gulfoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf) in the Internet Archive index).

<sup>184</sup> See *Frequently Asked Questions*, *supra* note 152, § 5 (Claims for Emergency Advance Payment).

<sup>185</sup> 33 U.S.C. § 2705.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*



claimant.<sup>188</sup> The only restrictions on claimants provide for ample time to file claims of any kind against the responsible party. For example, regarding removal costs, “[n]o claim may be presented under this subchapter for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.”<sup>189</sup> Nowhere in the statute is it suggested that a deadline of mere months is appropriate.

The deadline for Emergency Advance Payment claim submissions was not widely reported in the national press. Unless the GCCF engaged in extensive local advertising, the deadline may have gone largely unnoticed among many residents of the Gulf Coast, which contains numerous communities of color where environmental justice concerns are of acute importance.<sup>190</sup> Some of these residents may have become aware of the deadline and its significance only after November 23, 2010. At that point, they would no longer be able to submit an Emergency Advance Payment Claim; instead, they would have faced the choice of either accepting a Final Payment and releasing BP of future liability or forgoing non-litigious reimbursement altogether. While the changes to allow more flexibility in Final Payment claims and add an Interim Payment option ameliorate these concerns significantly, the initial approach of the GCCF to Emergency Payments does not appear to have comported with the OPA or to have adequately protected the claims options for vulnerable populations.

### 3. Sources of GCCF Funds

Since the GCCF’s inception, the trust has been funded largely

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<sup>188</sup> See, e.g., 33 U.S.C. § 2714 (2006) (requiring that the responsible party begin advertising information about the unlawful discharge and the compensation fund no later than fifteen days after the designation is made, and continue advertising for at least thirty days).

<sup>189</sup> 33 U.S.C. § 2712(h)(1) (2006 & Supp. IV 2010).

<sup>190</sup> Residents of towns like Mossville, Louisiana, a predominately African-American community nestled in between the Gulf of Mexico and “Cancer Alley,” have filed human rights complaints with the Organization of American States as a result of widespread industrial pollution in the area. See Ike Srisikandarajah, *Human Rights in ‘Cancer Alley’*, PUB. RADIO INT’L (Apr. 26, 2010), <http://www.pri.org/science/environment/human-rights-in-cancer-alley1965.html>.

by BP's future earnings.<sup>191</sup> The popular and financial press has reported that GCCF funding hinges upon BP's Gulf of Mexico subsidiary remaining profitable.<sup>192</sup> BP did not sell assets to amass the \$20 billion pledged to the GCCF, but instead securitized future earnings.<sup>193</sup> The trust agreement provides that "the Grantor hereby agrees to grant, convey, and/or assign to the Trust first priority perfected security interests in production payments pertaining to the Grantor's U.S. oil and natural gas production."<sup>194</sup> As a result, BP holds a significant advantage in negotiating the terms of continued drilling in the Gulf.

As a sizeable corporation, BP could have funded even the multi-billion dollar GCCF trust in a number of ways. However, the company chose to offer royalties from production on its Thunder Horse, Atlantis, Mad Dog, Great White, Mars, Ursa, and Na Kika oil and gas assets, all located in the Gulf of Mexico, as collateral to the GCCF.<sup>195</sup> These fields, with the exception of Mars, are in 4000 feet of water or more.<sup>196</sup> Mars lies in almost 3000 feet of water.<sup>197</sup>

In effect, before October 12, 2010, when the Obama Administration announced the lifting of the moratorium on deepwater drilling in the Gulf of Mexico,<sup>198</sup> BP tied the success of the deepwater drilling moratorium to the reduction or failure of GCCF funding. As of late October 2010, the GCCF had handled claims from 87,080 claimants, and paid out a total of over \$1.5

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191 See Trust Agreement between BP Exploration & Production, Inc., John S. Martin, Jr., Kent D. Syverud, & Citigroup Trust-Delaware (Aug. 9, 2010), available at <http://motherjones.com/files/2010-8-9TrustAgreement.pdf> [hereinafter Deepwater Horizon Oil Spill Trust Agreement].

192 See Clifford Krauss and John M. Broder, *BP Says Limits on Drilling Imperil Spill Payouts*, N.Y. TIMES, Sept. 2, 2010, <http://www.nytimes.com/2010/09/03/business/03bp.html> (referring to the Gulf Coast Claims Facility).

193 See Deepwater Horizon Oil Spill Trust Agreement, *supra* note 191.

194 *Id.* at 4.

195 See Ian Walker, *BP Pledges Assets as Gulf Spill Collateral*, WALL ST. J., Oct. 1, 2010, <http://online.wsj.com/article/SB10001424052748703859204575525482920628758.html>.

196 See *Industry Projects*, NET RES. INT'L, <http://www.offshore-technology.com/projects/> (last visited Nov. 15, 2012) (separate link for each asset; Great White is discussed under the name "Perdido Regional Host Development").

197 *Id.*

198 See *Obama Administration Lifts Deepwater Drilling Moratorium*, FOX NEWS, Oct. 12, 2010, <http://www.foxnews.com/politics/2010/10/12/white-house-drilling-moratorium-lifted-soon>.

billion.<sup>199</sup> A sustained moratorium on deepwater oil and gas production in the Gulf of Mexico would have meant a substantial delay in issuance of GCCF payments, if not a complete undermining of the trust. BP, in effect, linked the legal rights of OPA claimants with the company's continued prosperity as a result of the very drilling that caused the BP *Deepwater Horizon* Oil Spill.

### C. Governmental Distribution of Funds

Federal, state, and local government also have been playing a significant role in compensating victims. The following Sections detail the federal and the state and local funding mechanisms and their environmental justice implications.

#### 1. Federal

Federal agencies incur oil spill-related costs in a variety of ways. They incur personnel costs when hiring temporary workers who engage in public health monitoring, monitoring the spread of oil, resource distribution, compensation administration, field programming, and other tasks.<sup>200</sup> Federal agencies also engage in direct and indirect compensatory activities, including “work, services, and materials procured under contract for purposes related to the Oil Spill,” and “agency activities to mitigate the impacts of the Oil Spill, [including] mobilization of resources to coordinate benefit issuance and the dissemination of public information.”<sup>201</sup> Finally, the large federal bureaucracy has attendant costs: “[t]ransportation costs,” “[t]ravel expenses and per diem, including a wide range of costs incurred while on travel” for federal employees, “[o]ffice supplies, equipment, and capital and/or maintenance costs for new or expanded field sites,” “materials, equipment, and supplies related to clean-up,” and “shipping costs and materials.”<sup>202</sup>

All of the money for these federal expenditures is provided for by the responsible party, and the Obama Administration has

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<sup>199</sup> See *GCCF Program Statistics—Overall Summary*, *supra* note 183.

<sup>200</sup> *Oil Spill Cost and Reimbursement Fact Sheet*, RESTORETHEGULF.GOV (July 12, 2011, 9:15 AM), <http://www.restorethegulf.gov/release/2011/07/12/oil-spill-cost-and-reimbursement-fact-sheet> (detailing various costs incurred by the Federal government).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

kept detailed records for agency appropriations, bills sent, and money received as part of BP's OPA obligations.<sup>203</sup> The Federal On-Scene Coordinator (FOSC) is responsible for assessing and identifying costs assumed by federal agencies attributable to the BP *Deepwater Horizon* Oil Spill, and operates under the auspices of the Coast Guard.<sup>204</sup> As of July 2011, the Obama Administration estimated that it had spent \$716.6 million in oil cleanup costs related to the BP *Deepwater Horizon* Oil Spill, for which it had sent twelve invoices to BP for reimbursement.<sup>205</sup> Since "[r]esponsible parties are financially liable for all costs associated with oil removal, including efforts to stop the leak at its source, reduce the spread of oil, protect the shoreline and mitigate damage to the public health or welfare,"<sup>206</sup> the federal government's current approach is to spend money and then "bill responsible parties regularly for costs."<sup>207</sup>

In addition to overseeing the oil spill response as detailed above, the Coast Guard is also responsible for administration of the Oil Spill Liability Trust Fund (OSLTF).<sup>208</sup> Created in 1986 and funded in conjunction with passage of the OPA, the OSLTF "is a billion-dollar fund established as a funding source to pay removal costs and damages resulting from oil spills . . . [and] is used for costs not directly paid by the polluter . . . ."<sup>209</sup> Of the two major OSLTF components, one is particularly relevant to the federal government's BP *Deepwater Horizon* Oil Spill cleanup and compensation regime: the Emergency Fund. The Emergency Fund "is available to pay for pollution removal activities, as well as the initiation of natural resource damage assessments."<sup>210</sup> These

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203 *Id.*

204 *Id.*

205 *Id.* The \$716.6 million number was obtained by adding the amounts shown for each of the twelve bills. The Administration has not released a thirteenth bill as of January 2012.

206 *Administration Sends Eighth Bill to BP*, RESTORETHEGULF.GOV (Nov. 19, 2010), <http://www.restorethegulf.gov/release/2010/11/19/administration-sends-eighth-bill-bp>.

207 *Id.*

208 *Oil Pollution Act of 1990*, NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, [www.uscg.mil/npfc/About\\_NPFC/opa.asp](http://www.uscg.mil/npfc/About_NPFC/opa.asp) (last updated July 11, 2012).

209 U.S. COAST GUARD, U.S. DEP'T OF HOMELAND SEC., NPFC PUB 16465.2, OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS 1 (2006), *available at* [http://www.uscg.mil/npfc/docs/PDFs/OSLTF\\_Funding\\_for\\_Oil\\_Spills.pdf](http://www.uscg.mil/npfc/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf).

210 *Oil Spill Cost and Reimbursement Fact Sheet*, *supra* note 200.

expenditures are authorized by the FOSC.<sup>211</sup> The Emergency Fund “is capitalized by an annual \$50 million apportionment from the OSLTF,” and provides a backup funding source for cleanup and compensation costs that may not be reimbursed by BP.<sup>212</sup>

There is some degree of overlap between federal responses and the state and private responses detailed below, especially in efforts to coordinate resources, compensation, and cleanup by the Obama Administration and by BP. Some of these overlaps are explicitly provided for, and the federal government assumes coordination responsibility. For example,

[i]f other Federal, state, local, or tribal agencies assist the FOSC with removal activities, they can sign an agreement . . . which provides funding of those removal activities out of the OSLTF. The [agreement] specifies which removal activities will be reimbursed, and establishes a dollar limit—or “ceiling.” The agencies subsequently obligate funds against that ceiling, and are reimbursed from the OSLTF Emergency Fund.<sup>213</sup>

The Emergency Fund also provides a backup reimbursement mechanism for claimants, because “[c]laimants (individuals, corporations, and government entities) can submit claims for uncompensated removal costs and OPA damages (listed above) caused by the oil spill to the [U.S. Coast Guard National Pollution Funds Center (“NPFC”)] if the [responsible party] does not satisfy their claims. NPFC adjudicates the claims and pays those with merit.”<sup>214</sup> While the chain of command appears clear from government information, news outlets and on-the-ground spectators have criticized the confusion surrounding who is in charge.<sup>215</sup> Some of the confusion stems from attempts to have those parties best suited to certain areas respond based on preexisting expertise in particular areas of oil spill management

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<sup>211</sup> *Id.*

<sup>212</sup> U.S. COAST GUARD, *supra* note 209, at 1–2 (discussing various parties and their ability to access the Emergency Fund).

<sup>213</sup> *Oil Spill Cost and Reimbursement Fact Sheet*, *supra* note 200. The agreement signed is called a “Pollution Removal Funding Authorization.” *Id.*

<sup>214</sup> U.S. COAST GUARD, *supra* note 209, at 2.

<sup>215</sup> See, e.g., Mark Sappenfeld, *The Gulf Spill Oil Muddle: When Oil Nears Shore, Confusion Begins*, CHRISTIAN SCI. MONITOR, June 6, 2010, <http://www.csmonitor.com/USA/2010/0606/The-Gulf-oil-spill-muddle-when-oil-nears-shore-confusion-begins> (noting that the “gap—the space between the logistical capabilities that BP brings to bear and the Coast Guard’s ability to oversee their deployment effectively—has been the single murkiest area of command and control during the cleanup.”).

and cleanup.<sup>216</sup>

Little information on the Obama Administration's Gulf Coast Response website details specific responses tailored to meet environmental justice concerns of compensation distribution, at least on the front page.<sup>217</sup> However, some federal response actions will have effects on environmental justice concerns beyond the issues described in the previous Sections. OSLTF funds represent an additional source of compensation for private organizations and individuals. Such organizations and individuals may be able to access the OSLTF Emergency Fund for claims not reimbursed by BP, subject to the limitations already noted. In the aftermath of the spill, though, the limited funding for the OSLTF Emergency Fund created concerns about whether there would be adequate funds for claims by communities made up of people of color and low-income people. The OPA provides funding for the OSLTF Emergency Fund at \$50 million dollars per year,<sup>218</sup> and has long been criticized as lacking enough funds to fulfill its mandate in the wake of a disaster the scale of the BP *Deepwater Horizon* Oil Spill.<sup>219</sup>

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<sup>216</sup> *Id.* (“The federal government has never contested BP’s management of the effort to kill or contain the well—BP alone has the tools and technical know-how. But the shoreline has been a gray area.”).

<sup>217</sup> For example, there is no section at the bottom of the government response website titled “environmental justice” or “communities of color” or any other moniker traditionally associated with environmental justice concerns. *See* RESTORETHEGULF.GOV, <http://www.restorethegulf.gov/> (last visited Nov. 15, 2012) (listing “Task Force,” “Assistance,” “Health & Safety,” “Fish & Wildlife,” “Environment” and “News” navigational categories at the bottom of every page; none of these categories have sub-categories that make explicit reference to traditional environmental justice communities, though some of the categories clearly reference relevant communities).

<sup>218</sup> U.S. COAST GUARD, *supra* note 209, at 1.

<sup>219</sup> For a selection of these criticisms, *see* Alfred Saunders, *The Real Oil Fund*, AM. CONSERVATIVE PARTY (June 23, 2010, 2:45 AM), [http://www.theamericanconservatives.org/cms/index.php?option=com\\_content&view=article&id=271:the-real-oil-fund&catid=977:blog&itemid=175](http://www.theamericanconservatives.org/cms/index.php?option=com_content&view=article&id=271:the-real-oil-fund&catid=977:blog&itemid=175):

“The purpose of the OSLTF is to help with oil spills. . . . The oil companies have been paying this tax for years in order to help with this kind of scenario. Presumably, the oil companies pass on the cost of the tax to the consumers[,] which means we have already paid for part of this cleanup. So where’s the money? In short, the federal government borrowed it from the OSLTF for other uses.”

*See also* Brian P. O’Neill, *An Oil Liability Primer*, NAT’L L.J. (June 14, 2010), LEXIS 1202462432272 (“The maximum payout from the OSLTF for the BP Gulf oil spill is \$1 billion. Claims are processed in the order received, and claims are paid out in the order approved. In other words, the OSLTF operates on a first-

## 2. State and Local Government

The federal government is not the only distributor of aid to victims of the BP *Deepwater Horizon* Oil Spill. In addition to the \$20 billion fund established for the GCCF and federal government resources detailed above, the OPA requires that BP reimburse state and local governments for their efforts to clean up spill harms.<sup>220</sup> BP has chosen to implement this payment system separately from the GCCF; while private parties apply to the GCCF, administered as above, state and local governments apply directly to BP.<sup>221</sup> According to BP, “Government claims” serviced by BP directly include “claims and funding requests for losses and/or expenses incurred by states, parishes, counties, Indian Tribes and other government entities and political subdivisions.”<sup>222</sup> There are certain types of OPA claims that are mainly or only available to these types of government entities: Natural Resources Damages, Loss of Government Revenue, and Increased Public Services.<sup>223</sup>

Under the rubric of “Natural Resource Damages,” designated federal, state, and local government entities may be reimbursed for costs for “[a]ssessing an area’s natural resource damages, [r]estoring the natural resources, and [c]ompensating the public for

come, first-served basis.”); Sima J. Gandhi, *The Big Oil Discount*, CTR. FOR AM. PROGRESS (May 13, 2010), [http://www.americanprogress.org/issues/2010/05/big\\_oil\\_discount.html](http://www.americanprogress.org/issues/2010/05/big_oil_discount.html):

“Even with [a proposed] higher cap [on per-incident liability], however, the OSLTF will likely run out of money. It earned about \$250 million from the 8-cent per barrel tax between October of last year and the end of April, but this tax expires in 2017 or when the OSLTF hits \$2.7 billion dollars (whichever comes first).”

<sup>220</sup> 33 U.S.C. § 2702(b) (2006).

<sup>221</sup> *Compensation*, BP, <http://www.bp.com/sectiongenericarticle800.do?categoryId=9036584&contentId=7067605> (last visited Nov. 15, 2012) (providing separate links for “Compensating individuals and local businesses,” and “Compensating governmental and other agencies”); *compare Government Claims*, BP, <http://www.bp.com/sectiongenericarticle.do?categoryId=9036595&contentId=7067576> (last visited Nov. 15, 2012) (“All government claims and funding requests will be handled by a specialized team and given high priority. BP has made advanced funds available to the States of Alabama, Florida, Louisiana and Mississippi, as well as several local parishes in Louisiana.”), *with Compensation, supra*, (redirecting “Compensating individuals and local businesses” to the main GCCF website instead of an internal BP webpage).

<sup>222</sup> *Government Claims*, *supra* note 221.

<sup>223</sup> U.S. Coast Guard, *Oil Spill Claims*, NAT’L POLLUTION FUNDS CTR., <http://www.uscg.mil/npfc/claims/> (last updated Aug. 7, 2012).

the lost use of the affected resources.”<sup>224</sup> Federal, state, and local governments may also file claims for loss of government revenues from the spill, and from increased public services they have had to pay out as a result of the spill.<sup>225</sup> Finally, governmental entities are eligible to file claims in a similar manner to those claims filed by private parties: they (along with “Clean-up contractors,” and any private party who helps to clean up) may file claims to recover removal costs for any costs incurred to “prevent, minimize, mitigate, or clean up an oil spill,” for compensation for property or boat damage, or for lost profits and earning capacity.<sup>226</sup>

In addition to receiving aid from BP, state and local governments, along with Indian Tribes and regional operations, are also engaged in the distribution of aid. These governments may be designated natural resource trustees tasked with compensating the public for loss of natural resources. They may also be distributing the funds obtained from GCCF funds to compensate or otherwise ameliorate harms felt by the spill. Finally, some states and localities have set up their own command centers to deal with regional or local issues specific to their areas.<sup>227</sup> These efforts may use state or local funds, or funds obtained from other sources (such as charities) to compensate victims for harms sustained as a result of the oil spill.<sup>228</sup>

States, tribes, and localities distributing compensation and cleanup funding in the wake of the BP *Deepwater Horizon* Oil Spill continue to face obstacles in meeting the needs of communities largely comprised of low-income people and people

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See, e.g., LA. OIL SPILL COORDINATOR’S OFFICE, <http://www.losco.state.la.us/> (last visited Nov. 15, 2012); LA. DEEPWATER HORIZON OIL SPILL NATURAL RES. DAMAGE ASSESSMENT, <http://losco-dwh.com/> (last visited Nov. 15, 2012).

<sup>228</sup> BP has established a specific site for each state that lists available resources and charitable organizations aiding with recovery efforts for particular localities. See, e.g., *Florida Gulf Response*, BP, <http://web.archive.org/web/20110711011955/http://www.floridagulfresponse.com/go/site/3059/> (accessed by searching for <http://www.floridagulfresponse.com/go/site/3059/> in the Internet Archive index); *Alabama Gulf Response*, BP, <http://web.archive.org/web/20110707102435/http://www.alabamagulfresponse.com/go/site/3051/> (accessed by searching for <http://www.alabamagulfresponse.com/go/site/3051/> in the Internet Archive index).



of color. Some of these issues will be similar to those faced by the federal government, but not all will apply in exactly the same fashion. First, it is less clear that states, localities, and tribes are subject to Executive Order 12,898, as the text of the order only specifies federal agencies. However, to the extent that state and local governments participate in reimbursement through the OSLTF, there may be oversight by federal agencies subject to the Order. Each state has set up an official BP *Deepwater Horizon* Oil Spill response webpage, though none mentions environmental justice explicitly.<sup>229</sup> Mississippi, however, has a “Community Engagement” section of its Department of Environmental Quality website that held an “Environmental Justice Summit” in February 2011, suggesting that more state-specific responses may be forthcoming.<sup>230</sup> The actual cleanup efforts, including efforts at monitoring and compensation, may also disproportionately help low-income people and people of color insofar as their communities are likely to be more affected by public health problems. Local governments may also be able to better assess the needs of vulnerable populations.

State and local government distribution of compensation to victims of the BP *Deepwater Horizon* Oil Spill will also depend on the money received from BP. For example, if a state or locality is a designated natural resource trustee, and is compensated for natural resources damage in order to compensate “the public for the lost use of the affected resources,”<sup>231</sup> private parties most affected by the loss of those resources may be able to petition the natural

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<sup>229</sup> See *Gulf of Mexico Oil Spill Information*, ALA. DEP’T OF ENVTL. MGMT., <http://adem.alabama.gov/moreInfo/oilspill.cnt> (last visited Nov. 15, 2012); *Deepwater Horizon Oil Spill Response & Restoration*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/deepwaterhorizon/default.htm> (last visited Nov. 15, 2012); LA. OIL SPILL COORDINATOR’S OFFICE, *supra* note 227; *2010 Oil Spill Incident Response and Information*, MISS. DEP’T OF MARINE RES., <http://www.dmr.ms.gov/2010-oil-spill-response-and-information> (last visited Nov. 15, 2012); *Oil Spills*, TEX. GEN. LAND OFFICE, <http://www.glo.texas.gov/what-we-do/caring-for-the-coast/oil-spills/index.html> (last visited Nov. 15, 2012).

<sup>230</sup> See *Office of Community Engagement*, MISS. DEP’T OF ENVTL. QUALITY, [http://www.deq.state.ms.us/mdeq.nsf/page/CE\\_Home?opendocument](http://www.deq.state.ms.us/mdeq.nsf/page/CE_Home?opendocument) (last visited Nov. 15, 2012); see also *Upcoming Community Engagement and Environmental Justice Summit 2011*, MDEQ ENVIRONMENTAL NEWS (Miss. Dep’t of Env’tl. Quality, Jackson, Miss.), September 2010, at 12, available at [http://www.deq.state.ms.us/mdeq.nsf/pdf/Main\\_Vol7Issue7MDEQNewsletter/\\$File/Vol.%207%20Issue%207.pdf?OpenElement](http://www.deq.state.ms.us/mdeq.nsf/pdf/Main_Vol7Issue7MDEQNewsletter/$File/Vol.%207%20Issue%207.pdf?OpenElement).

<sup>231</sup> NAT’L POLLUTION FUNDS CTR., *supra* note 223.

resource trustee for access to some of the money received. However, the OPA does not make clear whether natural resource trustees are required to make private payouts, or whether public works activity (such as building a park to replace a lost or damaged river in an affected community) would fulfill statutory obligations.

Third, state and locality payments and expenditures will have similar, but slightly different concerns with regard to OSLTF Emergency Fund crowd out. If the Emergency Fund limits are met only through federal and state expenditures, low-income people and people of color are dependent on decisions by those entities that take disproportionate harm and need into account in order to be funded. In addition, states with more advanced rubrics and responses for accessing and mobilizing to file for federal money may also be better able to reach communities of color and low-income populations.<sup>232</sup> This means that States and localities that fail to mobilize may not be able to aid these populations as effectively.

#### D. Litigation

When the GCCF, federal, state, and local resources described in previous Sections have been exhausted, or perhaps in lieu of seeking them, litigation provides a final compensation mechanism for victims of the BP *Deepwater Horizon* Oil Spill. This Section details both litigation by victims under tort and admiralty law and litigation by government and nongovernmental organizations under the OPA and environmental law.

##### 1. Private Litigation

Victims filed hundreds of actions in the aftermath of the spill: “[a]s of June 24, 2010, a total of 218 claims arising from the oil spill had already been filed in federal district courts in 10 different states: Alabama, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, South Carolina, Tennessee and Texas.”<sup>233</sup>

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<sup>232</sup> For example, BP’s local site for Alabama lists no local organizations it is working with; its Louisiana local site lists over forty. Compare BP, *Alabama Gulf Response*, *supra* note 228, with BP, *Louisiana Gulf Response*, *supra* note 228.

<sup>233</sup> Scott Summy, *Managing Claims Arising from the Gulf Coast Oil Spill: Multidistrict Litigation v. the \$20 Billion Fund*, BNA’S TOXICS L. REP., July 8, 2010, available at 2010 WL 2695523.

Most of these are tort cases filed individually or as class actions, though some are shareholder class actions or derivative suits.<sup>234</sup>

Seventy-seven of these cases were transferred by the United States Judicial Panel on Multidistrict Litigation (“MDL”) on August 10, 2010, to the Eastern District of Louisiana to be adjudicated together by Judge Carl J. Barbier as MDL No. 2179.<sup>235</sup> These seventy-seven cases are comprised mostly of the tort suits, but also include at least one Clean Water Act enforcement action, two wrongful death actions, and one personal injury action.<sup>236</sup> MDL No. 2179 is likely to be the default for transfer of new claims filed,<sup>237</sup> and at least some currently filed environmental suits were stayed in anticipation of being transferred to the MDL.<sup>238</sup> The Panel has indicated that it believes that more than 200 “tag-along” actions may eventually be part of MDL No. 2179.<sup>239</sup> It has also set deadlines for filing claims against Transocean, held monthly status conferences, dismissed RICO claims, and issued forty-eight Pretrial Orders governing pleadings, deposition protocol, and notification, among other things.<sup>240</sup> While the OPA limits BP’s liability for suits, it does not limit liability in the case of negligence claims under state law. Thus, almost all tort suits have alleged negligence by BP or one of the other companies involved in the spill.<sup>241</sup> On March 2, 2012, the parties announced a tentative settlement for MDL No. 2179, and Judge Barbier issued a series of orders adjourning a trial that

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<sup>234</sup> Melinda Arbuckle, *Case Chart*, BP LITIGATION, <http://sites.google.com/site/bplitigation/home/case-chart> (last visited July 22, 2012) (organizing litigation filed at that point for law students in Complex Litigation and noting the claims cited in each case).

<sup>235</sup> See *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* in the Gulf of Mex., on Apr. 20, 2010, 731 F.Supp.2d 1352 (J.P.M.L. 2010).

<sup>236</sup> *Id.* at 1353–54 (discussing the actions included in the MDL).

<sup>237</sup> See, e.g., Richard Fausset, *Three Environmental Groups Sue BP over Gulf Oil Spill*, L.A. TIMES, Oct. 21, 2010, <http://articles.latimes.com/2010/oct/21/nation/la-na-bp-lawsuit-20101021> (quoting environmental lawyers as assuming that their newly filed claims will be rolled into the “massive” MDL).

<sup>238</sup> See, e.g., *Defenders of Wildlife v. Minerals Mgmt. Serv.*, No. 10-0254-WS-C, 2010 WL 3522399 (S.D. Ala. Aug. 31, 2010).

<sup>239</sup> *In re Oil Spill*, 731 F.Supp.2d at 1353.

<sup>240</sup> See *MDL-2719 Oil Spill by the Oil Rig “Deepwater Horizon,”* E. DIST. LA., <http://www.laed.uscourts.gov/OilSpill/OilSpill.htm> (last updated Nov. 16, 2012) (providing updates on the progress of the MDL cases).

<sup>241</sup> 33 U.S.C. § 2718(c) (2006); Arbuckle, *supra* note 234 (noting the claims filed in each BP *Deepwater Horizon* Oil Spill case, almost all of which include a negligence claim).

had been scheduled to commence March 5, 2012, creating transition processes, and appointing interim class counsel.<sup>242</sup>

In addition to MDL No. 2179, two other sets of claims have been consolidated into MDL No. 2185. These claims involve, first, “securities plaintiffs [who] assert that they purchased BP securities at inflated prices based on defendants’ repeated assurances of BP’s safe operations; but then suffered losses following the Deepwater Horizon explosion/fire and subsequent oil spill.”<sup>243</sup> They also involve

ERISA plaintiffs [who] allege that defendants breached their fiduciary duties to participants and/or beneficiaries of one or more BP employee retirement plans with respect to those plans’ investments in those same securities, when defendants knew or should have known of serious and ongoing safety and maintenance problems at the company—problems that culminated in the Deepwater Horizon incident.<sup>244</sup>

MDL No. 2185 was transferred to Judge Keith P. Ellison in the Southern District of Texas for pretrial proceedings. On February 13, 2012, Judge Ellison granted in part and denied in part defendants’ motion to dismiss on the securities fraud claims. Judge Ellison also granted the defendants’ motion to dismiss as to one particular subclass of securities fraud plaintiffs who based their claims on BP statements about oil well safety. Judge Ellison previously dismissed the shareholder derivative lawsuit as more appropriately brought in England on September 15, 2011.<sup>245</sup>

It is difficult to predict how many lawsuits will end up being filed, and the total may be somewhat dependent on perceptions of the efficacy of the GCCF. The environmental justice implications of any particular lawsuit are also difficult to gauge. However, some potential implications are discernible. First, there are effects

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<sup>242</sup> MDL-2179, *supra* note 240; John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012, [http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?\\_r=2](http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=2).

<sup>243</sup> *In re BP Sec., Derivative & Employment Ret. Income Sec. Act Litig.*, 734 F.Supp.2d 1380, 1382 (J.P.M.L. 2010).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1383; *In re BP P.L.C. Sec. Litig.*, No. 4:10-md-2185, 2012 WL 432611 (S.D. Tex. Feb. 13, 2012); *In re BP P.L.C. Sec. Litig.*, No. 4:10-md-2185, 2012 WL 468519 (S.D. Tex. Feb. 12, 2012); *see id.* at \*1 n.3 (explaining the different legal theories advanced by different plaintiff subclasses); *In re BP S’holder Derivative Litig.*, No. 4:10-cv-3447, 2011 WL 4345209 (S.D. Tex. Sept. 15, 2011).

predicated on success or failure of the litigation at issue. To the extent that plaintiffs who are low-income or persons of color win monetary settlements or at trial, this compensation may alleviate some harms incurred by the BP *Deepwater Horizon* Oil Spill. On the other hand, long delays and eventual losses may strain an already-burdened population.

Second, favorable lawsuits have the potential to change safety—or at least liability—standards for future BP operations in deepwater drilling.<sup>246</sup> For some types of lawsuits, this may be the main outcome with the potential to help low-income people or people of color. In the BP Securities Litigation, for example, plaintiffs argue that “BP and its executives misled the investing public concerning the company’s safety measures and commitment to conducting safe operations.”<sup>247</sup> These claims do not rely on harms felt by people necessarily residing in the Gulf Coast region, and shareholder litigation is predicated on owning stock in BP, which is not typically common in predominantly low-income communities or communities of color. Nevertheless, the securities action alleges “that BP and its executives misled the investing public concerning the company’s safety measures and failed to disclose that its safety procedures were inadequate and that it cut costs at the expense of safety.”<sup>248</sup> In order to prove its claims, discovery in the case will focus on BP’s “safety record over at least the past five years, and, in particular, the alleged duty of BP officials to recognize and disclose the likelihood that a calamity such as this might occur.”<sup>249</sup> These types of lawsuits, even if they do not provide direct compensation to communities comprised largely of low-income people and people of color, may nevertheless provide powerful information and incentive for BP to engage in safer future practices.

However, the immediate history suggests that protracted litigation has the potential to have emotional consequences for victims. While all environmental situations are different, one commentator on the *Exxon Valdez* Oil Spill has investigated the

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<sup>246</sup> *Defenders of Wildlife v. Minerals Mgmt. Serv.*, No. 10-0254-WS-C, 2010 WL 3522399, at \*1 (S.D. Ala. Aug. 31, 2010) (describing the ways in which Plaintiffs believe the safety process before the BP *Deepwater Horizon* Oil Spill failed).

<sup>247</sup> *In re BP P.L.C. Sec. Litig.*, 734 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

effects of protracted litigation on participants.<sup>250</sup> Noting that adversarial litigation tactics taken to extend the litigation and avoid huge payouts may have psychosocial implications for victims and may end up being a “secondary disaster” that harms victims even after the spill is over, J. Steven Picou cautions against viewing litigation itself as a solution without attendant costs.<sup>251</sup> Other academics have long questioned the ability of adversarial litigation to bring about either social change or closure for plaintiffs.<sup>252</sup> Concerns about these effects may have changed the litigation strategies of attorneys filing suit after the BP *Deepwater Horizon* Oil Spill; for example, a far larger number of the suits filed are individual rather than class actions. However, these concerns about the long-term repercussions of litigation caution against relying solely on litigation as a stopgap for problems with accessing compensation highlighted above.

## 2. *The Oil Pollution Act and Environmental Law*

The Obama Administration has brought suits against BP and some of the other responsible companies under the OPA and other environmental laws in the Eastern District of Louisiana.<sup>253</sup> In addition, at least three environmental groups have filed suit charging that BP “violat[ed] the act because it has discharged oil into the gulf, and failed to measure the oil’s plume and flow and to remove the oil.”<sup>254</sup> At least one group also sent EPA a notice of intent to pursue a claim against Lisa Jackson, Administrator of the EPA, for failure to perform nondiscretionary duties under the

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<sup>250</sup> J. Steven Picou, *When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 68 (2009) (showing negative impact).

<sup>251</sup> *Id.* at 86–88.

<sup>252</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (arguing against the ability of litigation to effect social change).

<sup>253</sup> Complaint, United States v. BP Exploration & Prod. Inc., No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010), available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/EnvironmentalLaw/USDOJBPComplaint.pdf>; *Department of Justice Intends to Sue Oil Companies in Gulf Spill*, JOPLIN GLOBE, Sept. 15, 2010, <http://www.joplinglobe.com/national/x422129506/Department-of-Justice-intends-to-sue-oil-companies-in-gulf-spill>.

<sup>254</sup> Steve Kellman, *Environmental Groups Sue BP Under Clean Water Act*, CIRCLE OF BLUE (June 7, 2010, 10:27 AM), <http://www.circleofblue.org/waternews/2010/world/north-america/environmental-groups-sue-bp-under-clean-water-act/>.

Clean Water Act (CWA).<sup>255</sup>

The CWA imposes civil penalties for illegal discharges of pollutants and criminalizes certain conduct as well.<sup>256</sup> Section 311 of the CWA explicitly provides that environmental officials may prohibit any discharge of oil that “may be harmful to the public health or welfare or environment of the United States . . . .”<sup>257</sup> The EPA has promulgated what is known as the “sheen test,” which provides that any oil spill that causes “a film or sheen upon or discoloration of the surface of the water or adjoining shorelines” constitutes a harmful quantity of oil that is prohibited by the CWA.<sup>258</sup> The CWA criminally punishes negligent violations, and is subject to a punishment “by a fine of not less than \$2500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.”<sup>259</sup> Higher penalties are available for knowing violations of the act, and of knowing endangerment under the CWA.<sup>260</sup> Enforcement actions under the CWA may be prosecuted by either the federal government<sup>261</sup> or by private parties through the CWA citizen suit provision.<sup>262</sup>

In addition to the CWA, the federal government uses three other major statutes to protect species from harm:<sup>263</sup> the Migratory Bird Treaty Act (MBTA),<sup>264</sup> the Endangered Species Act (ESA),<sup>265</sup> and the Marine Mammal Protection Act (MMPA).<sup>266</sup>

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<sup>255</sup> 60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary Duties Under the Clean Water Act from Marianne Engelman Lado & Hannah Chang, Counsel, Earthjustice, to Lisa Jackson, Administrator, U.S. Env'tl. Prot. Agency (Oct. 13, 2010), *available at* [http://www.earthjustice.org/sites/default/files/files/dispersant\\_notice\\_0.pdf](http://www.earthjustice.org/sites/default/files/files/dispersant_notice_0.pdf).

<sup>256</sup> 33 U.S.C. § 1319 (2006).

<sup>257</sup> 33 U.S.C. § 1321(b)(4) (2006 & Supp. VI).

<sup>258</sup> *See Chevron U.S.A., Inc. v. Yost*, 919 F.2d 27, 29–30 (5th Cir. 1990) (upholding the “sheen test”).

<sup>259</sup> 33 U.S.C. § 1319(c)(1).

<sup>260</sup> 33 U.S.C. § 1319(c)(2)–(3).

<sup>261</sup> 33 U.S.C. § 1319(b).

<sup>262</sup> 33 U.S.C. § 1365(a) (2006) (“[A]ny citizen may commence a civil action on his[her] own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.”).

<sup>263</sup> KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41308, THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS 1 (2010), *available at* <http://www.fas.org/sgp/crs/misc/R41308.pdf>.

<sup>264</sup> 16 U.S.C. §§ 703–12 (2006).

<sup>265</sup> 16 U.S.C. §§ 1531–44 (2006).

These statutes “apply to the oil spill from a well located approximately 50 miles off the coast of Louisiana” through the jurisdictional reach established in the Outer Continental Shelf Lands Act.<sup>267</sup>

The MBTA “makes it unlawful ‘by any means or in any manner’ to take, kill, or attempt to take or kill ‘any migratory bird, any part, nest, or egg of any such bird.’”<sup>268</sup> It also operates under a regime of strict liability, which means that “instead of having to show that defendants knew they were committing a particular act, the prosecution only has to show that an act happened. Under strict liability, actors are liable for a violation regardless of what they knew or what they meant to do. It is the easiest standard under which to prosecute.”<sup>269</sup> Additionally, while “the original purpose of the MBTA was to protect birds from hunting, it has long been used to prosecute any sort of taking of birds, including when they die from contamination.”<sup>270</sup> Prosecution under such statutes could result in fines being levied against BP, which could range from \$15,000 per act (the statutory fine allowed under the MBTA) to perhaps “twice the pecuniary losses incurred by anyone as a result of the spill” (if a court applied the Alternative Fines Act, which imposes harsher penalties).<sup>271</sup>

The ESA and MMPA prohibit actions that harass or kill either listed species (in the case of the ESA, which means species that are listed as either threatened or endangered) or marine mammals (in the case of the MMPA).<sup>272</sup> Unlike the MBTA, criminal prosecutions under both the ESA and the MMPA have a mens rea requirement for prosecution, which means that “[b]oth require proof that a defendant knew it was committing the act of causing an oil spill.”<sup>273</sup> Civil prosecutions under the ESA have the same intent requirement.<sup>274</sup> Under the MMPA, however, a civil prosecution “has no such requirement. Civil violations occur if a person ‘violates any provision of this subchapter or of any permit

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266 16 U.S.C. §§ 1361–1423h (2006).

267 ALEXANDER, *supra* note 263, at 1–2.

268 *Id.* at 1.

269 *Id.* at 4–5.

270 *Id.* at 5.

271 *Id.* at 8–9 (discussing the range of available penalties under the MBTA).

272 *Id.* at 1.

273 *Id.* at 9.

274 *Id.* at 3.



or regulation issued thereunder.”<sup>275</sup> Successful claims under either the MMPA or ESA generally result in the imposition of fines, which can reach \$11,000 per violation under the MMPA<sup>276</sup> and up to \$50,000 total under the ESA.<sup>277</sup> The Obama Administration has indicated that it is pursuing claims under the ESA, the MMPA, and the MBTA.

Enforcement actions under the statutes cited above all provide potential avenues for increased fines and payments by BP, which would provide avenues for claimants to have access to more funds that are potentially not capped by the \$20 billion GCCF. They would also provide avenues for money that does not rely on future profits from offshore drilling by BP, which is the current source of funding for the GCCF.<sup>278</sup> While the statutes themselves do not specify where all money from them should go, the Oil Spill Pollution Fund notes that “fines and civil penalties under OPA, the Federal Water Pollution Control Act, the Deepwater Port Act, and the Trans-Alaska Pipeline Authorization Act” are used as a source of funding for the OSLTF. The OSLTF has typically received between \$4 and \$7 million per year from these types of penalty deposits, but penalties in the wake of the BP *Deepwater Horizon* Oil Spill could vastly dwarf these amounts.<sup>279</sup> As of yet, the Obama Administration has not stated specifically what it would do with money collected from these types of enforcement actions, though the Senate recently passed a bill requiring money from CWA fines to be spent on projects to restore the Gulf Coast environment and economy. The Obama Administration chose to pursue these CWA actions through MDL No. 2179, but is not part of the proposed class settlement discussed previously.<sup>280</sup>

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<sup>275</sup> *Id.* at 4 (quoting 16 U.S.C. § 1375(a)(1) (2006)).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 8.

<sup>278</sup> Trust Agreement between BP Exploration & Production, Inc., *supra* note 191; Jim Efstathiou, Jr., *BP Spill Fund to be Backed by Future Drilling Revenue*, BLOOMBERG (Aug. 11, 2010, 6:10 PM), <http://www.bloomberg.com/news/2010-08-11/bp-spill-victims-fund-will-be-backed-by-future-revenue-from-oil-drilling.html>.

<sup>279</sup> *The Oil Spill Liability Trust Fund*, NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, [http://www.uscg.mil/npfc/About\\_NPFC/osltf.asp](http://www.uscg.mil/npfc/About_NPFC/osltf.asp) (last updated Feb. 22, 2012).

<sup>280</sup> See Schwartz, *supra* note 242:

“The agreement does not include the biggest plaintiff in the BP case: the federal government. Nor does it include the state and local governments along the coast, which are also suing. The federal

#### IV. JUSTICE CONCERNS WITH EMPLOYMENT AND WORKERS

The BP *Deepwater Horizon* Oil Spill significantly affected employment in the Gulf Coast region. This Part focuses on those employment impacts and on the safety, training, and compensation issues facing the most vulnerable workers in the context of the spill: cleanup workers and oil rig workers.

##### *A. Employment Loss and Opportunities*

The BP *Deepwater Horizon* Oil Spill occurred in an area already suffering from several layers of historical harms, including a heavy reliance on the oil industry and the resulting environmental damage, the aftermath of Hurricane Katrina and its effects on the area's population and economy, and the recession. These factors combined to significantly impact the makeup of the work force following the oil spill. Job seekers rushed to the Gulf Coast region seeking employment in the cleanup efforts: emergency personnel with specialized training offered specific skills and knowledge relating to disaster relief, oil rig workers and other Gulf Coast residents who lost their jobs as a result of the spill looked to replace lost wages and hasten the area's recovery, and the nation's unemployed responded to the promise of temporary work. This Section examines the economic state of the region prior to the spill and its positive and negative impacts on industries and employment.

##### *1. Impact of Hurricane Katrina on Gulf Employment*

The Gulf Coast was still recovering from the destruction caused by Hurricane Katrina when the BP *Deepwater Horizon* Oil Spill occurred. Changes in employment in the Gulf Coast region after Hurricane Katrina are important because this information may help predict future changes in employment in the Gulf Coast region in the aftermath of the BP *Deepwater Horizon* Oil Spill and because the region that suffered the most damage after Hurricane Katrina is now poised to bear the brunt of the damage from the oil

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government stands to recover billions of dollars in environmental fines, but the extent to which the Justice Department is involved in negotiations with BP is unclear.”

See also Bruce Alpert, *Senate Passes \$109 Billion Transportation Bill, Including BP Fines Provision*, TIMES-PICAYUNE (Mar. 14, 2012), [http://www.nola.com/politics/index.ssf/2012/03/senate\\_passes\\_109\\_billion\\_tran.html](http://www.nola.com/politics/index.ssf/2012/03/senate_passes_109_billion_tran.html).

spill. With both the hurricane and the oil spill, vulnerable populations in this area face two separate environmental justice events which threaten to become cumulative in their effect.

In August of 2005, Hurricane Katrina inflicted serious damage in the Gulf Coast areas of Alabama, Mississippi, and Louisiana. According to the Bureau of Labor Statistics (BLS), around 1.5 million people aged sixteen and older evacuated as a direct result of the flooding and property damage accompanying the storm.<sup>281</sup> The demographic composition of the evacuees represented the affected area's population fairly well.<sup>282</sup> However, only an estimated 73% of evacuees returned to the county where they lived prior the hurricane.<sup>283</sup> Twenty-three percent of evacuees from Louisiana, 11% of evacuees from Mississippi, and 5% of evacuees from Alabama had not returned to their states of origin by late 2006.<sup>284</sup> The varying levels of return to the region led to changes in the demographic composition of the area now hit hardest by the oil spill. The BLS found white and Asian populations most likely to return, each with more than 80% returning to the same county they inhabited before the hurricane.<sup>285</sup> Only 72.2% of Hispanic populations and a mere 53.8% of black populations returned.<sup>286</sup> In August 2010 Nielson News reported that New Orleans had become "older, wealthier and less diverse" since Hurricane Katrina because "[a]cross New Orleans, the storm decimated downscale, African-American-dominated sectors. The eastern part of the city in low-lying areas took the brunt of the flooding, and members of these segments were least able to return to New Orleans."<sup>287</sup> Renters with fewer ties to the area and less incentive to return and rebuild inhabited many of the low-income areas affected by the storm.<sup>288</sup> As a

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281 Jeffrey A. Groen & Anne E. Polivka, *Hurricane Katrina Evacuees: Who They Are, Where They Are, and How They Are Faring*, 131 MONTHLY LAB. REV. 32, (2008), <http://www.bls.gov/opub/mlr/2008/03/art3full.pdf>.

282 *Id.*

283 *Id.* at 38.

284 *Id.* at 40.

285 *Id.* at 44.

286 *Id.*

287 *Five Years After Katrina, New Orleans is Older, Wealthier and Less Diverse*, NIELSEN WIRE (Aug. 24, 2010), <http://blog.nielsen.com/nielsenwire/consumer/five-years-after-katrina-new-orleans-is-older-wealthier-and-less-diverse/>.

288 *Id.*

result, some of the most vulnerable populations in the Gulf Coast area relocated prior to the BP *Deepwater Horizon* Oil Spill.

The evacuees that did return to the counties they inhabited before Hurricane Katrina faced a poor job market. Affected areas had a 12.1% unemployment rate between October 2005 and October 2006 compared to the national unemployment rate of 4.7% during the same time period.<sup>289</sup> Unemployment continued to increase; in 2009 the national unemployment rate was 9.3%,<sup>290</sup> and some Gulf Coast region states faced higher unemployment rates: Alabama (11.2%), Florida (10.4%), Louisiana (7.1%), Mississippi (9.2%), and Texas (7.5%).<sup>291</sup>

## 2. Industries Benefiting from the BP *Deepwater Horizon* Oil Spill

The massive cleanup efforts in the Gulf created new employment opportunities in the hospitality and restaurant businesses.<sup>292</sup> The influx of out-of-state cleanup workers proved beneficial to other industries as well, such as movie theaters, clothing stores, grocery stores, and laundry services.<sup>293</sup> Businesses manufacturing oil cleanup materials and equipment also benefitted from the spill.<sup>294</sup> Gulf Coast companies like Granite Environment in Florida (manufacturing booms for oil containment) and Clean Beach Technologies in Texas (selling a Beach Restoration System™ for removal of tar from beach sand) received increased business as a result of the spill.<sup>295</sup> The demand for cleanup materials surpassed local availability, and businesses like

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289 Groen & Polivka, *supra* note 281, at 45.

290 BUREAU OF LABOR STATISTICS, CONSUMER POPULATION SURVEY, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE, 2009 ANNUAL AVERAGES 1 (2010), available at <ftp://ftp.bls.gov/pub/special.requests/lf/aa2009/pdf/cpsaat3.pdf>.

291 BUREAU OF LABOR STATISTICS, LOCAL AREA UNEMPLOYMENT STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY SEX, RACE, HISPANIC OR LATINO ETHNICITY, MARITAL STATUS, AND DETAILED AGE, 2009 ANNUAL AVERAGES 1, 17, 32, 42, 72 (2010), available at <http://www.bls.gov/lau/table14full09.pdf>.

292 Dawn Kawamoto, *BP Oil Spill Creates a Wave of New Jobs, Takes Others Under*, DAILYFINANCE (June 1, 2010, 6:00 AM), <http://www.dailyfinance.com/story/oil-spill-jobs/19495921/>.

293 L.B. Woodgate, *Gulf Oil Spill Cleanup Jobs and Employment Opportunities*, HELIUM (July 28, 2010), <http://www.helium.com/items/1905237-gulf-oil-spill-cleanup-jobs-and-employment-opportunities>.

294 Kawamoto, *supra* note 292.

295 Woodgate, *supra* note 293.

California-based Oceans Therapy Solutions Corporation, which builds centrifuges to remove oil from water, also experienced increased sales.<sup>296</sup> Oceanographers, marine specialists, and chemists had increased opportunities assisting BP and the EPA in the Gulf region.<sup>297</sup> Jobs in civil construction, risk management, and communications were also available.<sup>298</sup>

However, these benefits likely were not distributed equally. An NAACP investigation found that minority “[c]ommunity members and business owners [of color] have been locked out of access to contracts for cleanup and other opportunities related to addressing this disaster.”<sup>299</sup> According to the Federal Procurement Data System, on July 9th, 2010, a total of \$53 million had been awarded in federal contracts.<sup>300</sup> Approximately 4.8% of those contract resources, representing \$2.2 million, were awarded to small businesses the Federal Procurement Data System labeled as disadvantaged.<sup>301</sup> Businesses owned by women received 4.2% of federal contracts.<sup>302</sup> Eighteen of the 212 vendors with contracts were minority-owned, and only two of these vendors were owned by African Americans.<sup>303</sup> This led NAACP President Benjamin Jealous to articulate concern that “contractors of color are not receiving equal consideration for opportunities to participate in mitigation efforts.”<sup>304</sup>

### 3. Industries Negatively Impacted by the BP Deepwater Horizon Oil Spill

Gulf Coast businesses like hotels and restaurants saw a mixed impact as a result of the oil spill. Some businesses, like those

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> NAACP, BP OIL DRILLING DISASTER—NAACP INVESTIGATION 7, [http://naacp.3cdn.net/9a056d54b418ffef9a\\_ylm6bee32.pdf](http://naacp.3cdn.net/9a056d54b418ffef9a_ylm6bee32.pdf); see also Brenton Mock, *Minorities See Little Green in BP Oil Spill Jobs*, THE ROOT (July 13, 2010, 6:59 AM), <http://www.theroot.com/views/minorities-see-little-green-bp-oil-spill-jobs> (explaining that minorities did not receive much of the business opportunity).

<sup>300</sup> Mock, *supra* note 299.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Letter from Benjamin Todd Jealous, President & CEO, NAACP, to Tony Hayward, CEO, British Petroleum (July 10, 2010), available at [http://www.imdiversity.com/Villages/Careers/special/naacp\\_bp\\_spill\\_0710.asp](http://www.imdiversity.com/Villages/Careers/special/naacp_bp_spill_0710.asp).

servicing tourism, lost business, while others saw an increase in patronage due to the influx of workers and regulators responding to the spill.<sup>305</sup> Restaurants serving Gulf Coast seafood and seafood processing businesses suffered as a result of fishing closures and public concerns about oil contamination.<sup>306</sup> Beachfront property rental owners, recreational fishing outfitters and guides, and boat operators also saw decreased sales.<sup>307</sup> Small businesses are especially vulnerable to the changes resulting from the oil spill, and the Gulf Coast fishing industry has suffered significantly even though all closed fishing areas eventually reopened as of April 19, 2011.<sup>308</sup> The oil industry itself, and the workers it employs, were impacted by the negative publicity and inability to continue drilling.

Some sources suggest that impacts on the Gulf Coast fishing industry have a disproportionate effect on African-American and Southeast Asian populations.<sup>309</sup> Plaquemines Parish, a predominantly African-American area, has historically been the focal point of the Gulf Coast oyster fishing industry.<sup>310</sup> Many oyster fishermen lost their boats and their homes to Hurricane Katrina,<sup>311</sup> and by the time the *Deepwater Horizon* oil began to reach the oyster beds, there were between fifty and seventy-five African-American fishermen in the area.<sup>312</sup> When unable to work because of closed fishing areas between May 1 and May 15,<sup>313</sup> fishermen claimed up to \$5000 per month from BP. This claim, however, is significantly less than the \$10,000 to \$40,000 a month they made when fishing.<sup>314</sup> Few of the African-American oyster fishermen have diplomas beyond high school, and some do not

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305 Kawamoto, *supra* note 292.

306 Arbuckle, *supra* note 234.

307 *Id.*

308 *Deepwater Horizon/BP Oil Spill: Closure Information*, NOAA FISHERIES SERV., <http://sero.nmfs.noaa.gov/ClosureInformation.htm> (last updated Apr. 3, 2012).

309 Julie Weiss, *The Gulf Oil Spill: An Environmental Justice Disaster*, TEACHING TOLERANCE (Sept. 27, 2010), <http://www.tolerance.org/blog/gulf-oil-spill-environmental-justice-disaster>.

310 Brentin Mock, *Black Gulf Fishers Face a Murky Future*, THE ROOT (May 25, 2010, 11:54 PM), <http://www.theroot.com/views/invisible-fishermen-oil-spill>.

311 *Id.*

312 *Id.*

313 *Id.*

314 *Id.*

know how to read.<sup>315</sup> Oyster fishing is a way of life that is taught and continued within families, but that sort of education offers few opportunities outside of the industry.<sup>316</sup>

Vietnamese shrimp and crab fishermen around Biloxi, Mississippi, also felt impacts of the BP *Deepwater Horizon* Oil Spill.<sup>317</sup> Of the approximately 7500 individuals of Vietnamese descent in the area, approximately 2000 individuals were employed in jobs impacted by the spill.<sup>318</sup> Initially, BP only advertised compensation programs in English, and the language barrier may have prevented some eligible individuals from applying for aid.<sup>319</sup> BP eventually printed literature in more than one language and some translators were made available.<sup>320</sup> According to Kaitlin Truong of Asian Americans for Change, however, the Vietnamese fishing population still harbored concerns because “[t]hey were left out during Katrina, and they’re afraid [they’re] going to be left out again.”<sup>321</sup>

To counteract some of these negative impacts on the fishing industry, the BP Vessels of Opportunity program hired Gulf Coast fishermen and their boats to work on the oil spill cleanup.<sup>322</sup> The program targeted those unable to work as a result of the spill to provide temporary employment until the areas are re-opened to fishing.<sup>323</sup> According to [RestoreTheGulf.gov](http://RestoreTheGulf.gov), a total of 29,705 personnel had responded as of August 28, 2010.<sup>324</sup> This statistic includes the crews of the 5059 boats and sixty-four aircraft involved in cleanup efforts, but reports of the number of boats in

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Rick Jervis, *Gulf of Mexico’s Vietnamese Fishing Community Hit Hard*, USA TODAY (July 8, 2010, 9:48 PM), [http://www.usatoday.com/news/nation/2010-07-08-BP-claims-side\\_N.htm](http://www.usatoday.com/news/nation/2010-07-08-BP-claims-side_N.htm).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Fact Sheet on BP Vessels of Opportunity Program*, BP (July 7, 2010), [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/factsheet\\_bp\\_vessels\\_of\\_opportunity\\_program.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/factsheet_bp_vessels_of_opportunity_program.pdf).

<sup>323</sup> *Vessels of Opportunity Update*, BP (Aug. 16, 2010), [http://bp.concerts.com/gom/vesselsofopportunityupdate\\_160810.htm](http://bp.concerts.com/gom/vesselsofopportunityupdate_160810.htm).

<sup>324</sup> *Operations and Ongoing Response*, RESTORETHEGULF.GOV (Aug. 28, 2010), <http://www.restorethegulf.gov/release/2010/08/28/operations-and-ongoing-response-august-28-2010>.

the Vessels of Opportunity program vary, with some sources estimating around 3000 participating vessels.<sup>325</sup> BP reports on its website that the Vessels of Opportunity participants engaged in work like “supporting skimming, tending and maintaining boom, collecting sheen and light oil in shallower waters, finding and removing tar balls from the water, and transportation of supplies, personnel and wildlife.”<sup>326</sup> The program’s need for vessels did not match interest, and those working in the program longest were often cut in order to allow new community members to take part.<sup>327</sup>

All workers, including those hired through the Vessels of Opportunity program, were first hired by a BP contractor, as discussed in more depth in the following Section, and attended training sessions as required by the Occupational Safety and Health Administration (OSHA).<sup>328</sup> In addition to worker training, all boats in the program passed a dockside examination by the U.S. Coast Guard.<sup>329</sup> The Vessels of Opportunity program provides access to translators who speak Spanish, Vietnamese, and Khmer.<sup>330</sup> During training, program participants received compensation at a rate of twenty-five dollars per hour for either eight or twelve hour days.<sup>331</sup> Crews on vessels were compensated according to length of vessel rather than number of workers, and payment ranged from \$1200 per twenty-four hours for boats less than thirty feet to \$3000 per twenty-four hours for boats larger than sixty-five feet long.<sup>332</sup> The owner of the vessel received all payments and was subsequently responsible for distributing payment to the crew.<sup>333</sup> Boats were also being used by the state of Louisiana and by BP-contracted Oil Spill Response Organizations.<sup>334</sup>

Vessels of Opportunity programs in Alabama, Florida, and

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325 *Id.*; *Fact Sheet on BP Vessels of Opportunity Program*, *supra* note 322.

326 *Fact Sheet on BP Vessels of Opportunity Program*, *supra* note 322.

327 *Vessels of Opportunity Update*, *supra* note 323.

328 *Current Training Requirements for the Gulf Oil Spill*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR (July 21, 2010), <http://www.osha.gov/oilspills/training.html>.

329 *Fact Sheet on BP Vessels of Opportunity Program*, *supra* note 322.

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*



Mississippi officially ended on September 15, 2010, but the program was still active in Louisiana for some time thereafter.<sup>335</sup> BP has spent more than \$500 million on the program, which functioned with the expectation that fisherman would return to their regular jobs after being dismissed.<sup>336</sup> However, although the government re-opened eighty percent of Gulf Coast fishing areas by early fall, only twenty percent of the number of shrimp fishing boats working the area in 2009 had returned to work as of September 15.<sup>337</sup> The publicity surrounding the oil spill drove down the price of Gulf Coast seafood due to safety concerns, and fishing is consequently no longer profitable for some in the area.<sup>338</sup> The Food and Drug Administration (FDA) is in charge of safety programs for fish and related products, and according to the agency's website, "[a]lthough crude oil has the potential to taint seafood with flavors and odors caused by exposure to hydrocarbon chemicals, the public should not be concerned about the safety of seafood in stores at this time."<sup>339</sup> The FDA also stated that "[f]ish and shellfish harvested from areas reopened or unaffected by the closures are considered safe to eat."<sup>340</sup> Seafood contaminated with oil is not a primary health concern because the taste of oil is detectable at levels of contamination lower than levels that pose a health concern.<sup>341</sup>

Dispersants found in seafood products may pose a more significant risk than oil contamination.<sup>342</sup> For this reason, the areas

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335 Mark R. Kent, *BP Ends Vessels of Opportunity Program*, PRESS-REGISTER (Mobile, Ala.) (Sept. 15, 2010, 6:16 PM), [http://blog.al.com/live/2010/09/bp\\_shelves\\_vessels\\_of\\_opportun.html](http://blog.al.com/live/2010/09/bp_shelves_vessels_of_opportun.html); see *Alarming Trend: Fewer Commercial Fishermen Can Afford to Fish*, LA. SEAFOOD NEWS (Sept. 15, 2010), <http://www.louisianaseafoodnews.com/2010/09/15/alarming-trend-fewer-commercial-fishermen-can-afford-to-fish>.

336 Kent, *supra* note 335.

337 *Alarming Trend: Fewer Commercial Fishermen Can Afford to Fish*, *supra* note 335.

338 *Id.*

339 *Gulf of Mexico Spill Update*, U.S. FOOD & DRUG ADMIN. (Sept. 2, 2011), <http://web.archive.org/web/20100905063035/http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/Seafood/ucm210970> (accessed by searching for <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/Seafood/ucm210970> in the Internet Archive index).

340 *Id.*

341 *Id.*

342 *Questions and Answers on Dispersants*, U.S. ENVTL. PROT. AGENCY, [www.epa.gov/bpspill/dispersants-qanda.html](http://www.epa.gov/bpspill/dispersants-qanda.html) (last updated Oct. 15, 2011).

sprayed with dispersants were closed to fishing.<sup>343</sup> Dispersants were last applied to the waters of the Gulf Coast on July 19, 2010, and are specifically formulated to disperse and break down more quickly than oil.<sup>344</sup> While this rapid breakdown is good news for the fishing community, the viability of the fishing industry rests on the willingness of the public to purchase Gulf Coast seafood. According to NOAA Fisheries' Office of Science and Technology, only 58.5 million pounds of shrimp came out of the Gulf Coast in the first nine months of 2010 compared to an average from 2007 to 2009 of 86 million pounds for the same period.<sup>345</sup>

The long-term impact on the Gulf Coast fishing industry is complicated to assess. On February 1, 2011, NOAA re-opened more than 4000 square miles to fishing after extensive testing prompted by the discovery of tar balls in nets intended to catch Royal Red Shrimp.<sup>346</sup> On April 19, 2011 the 1041 square mile area surrounding the Macondo well, which was the last area to remain closed, was re-opened to all types of fishing.<sup>347</sup> Some sources suggest that the absence of fishing pressure during last summer's extensive fishing closures may have increased populations of some seafood species such as white shrimp.<sup>348</sup> Gulf Coast fishermen enjoyed a five-day white shrimp fishing season in April of 2011 because of the overabundance of the species.<sup>349</sup> However, the resilience and abundance of seafood species is only one part of the equation. Despite assurances from the FDA that Gulf Coast seafood is safe for consumption,<sup>350</sup> there is not yet

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<sup>343</sup> *Overview of Testing Protocol to Re-open Harvest Waters that Were Closed in Response to the Deepwater Horizon Oil Spill*, *supra* note 84.

<sup>344</sup> *Questions and Answers on Dispersants*, *supra* note 342.

<sup>345</sup> *Shrimp Statistics*, OFFICE OF SCI. & TECH., NAT'L OCEANIC & ATMOSPHERIC ADMIN., (Sept. 2011), [http://www.st.nmfs.noaa.gov/st1/market\\_news/doc45.txt](http://www.st.nmfs.noaa.gov/st1/market_news/doc45.txt).

<sup>346</sup> *BP Oil Spill: NOAA Re-opens Federal Waters to Royal Red Shrimp Fishing*, NAT'L MARINE FISHERIES SERV. (Feb. 1, 2011), [http://sero.nmfs.noaa.gov/bulletins/pdfs/2011/FB11-010\\_Reopening\\_RoyalRed\\_020211.pdf](http://sero.nmfs.noaa.gov/bulletins/pdfs/2011/FB11-010_Reopening_RoyalRed_020211.pdf).

<sup>347</sup> *Entire Gulf of Mexico Reopened to Fishing a Year After BP Spill*, ENV'T NEWS SERV. (Apr. 19, 2011), <http://www.ens-newswire.com/ens/apr2011/2011-04-19-01.html>.

<sup>348</sup> *See Gulf Seafood Industry Sputters Back to Life, A Year After Oil Spill*, TIMES-PICAYUNE (Apr. 18, 2011, 11:15 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/04/gulf\\_seafood\\_industry\\_sputters.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/04/gulf_seafood_industry_sputters.html).

<sup>349</sup> *Id.*

<sup>350</sup> *See Gulf of Mexico Oil Spill Update*, *supra* note 339.

reliable data about whether the market for Gulf Coast seafood has recovered; some businesses claim that they are still having trouble with customers not trusting the safety of their seafood and that sales remain down.<sup>351</sup>

Beyond the broader compensation provisions described in the previous Part, there are a number of provisions focused on the economic effects of the spill. Under the OPA, the responsible party is liable for lost profits or earning capacity.<sup>352</sup> Compensation is administered through the OSLTF or the GCCF.<sup>353</sup> The requirements for eligibility for compensation under the OSLTF are: (1) the damage was a result of a spill that occurred on or after August 18, 1990; (2) the harms were caused by an oil spill; (3) the oil spill affected or substantially threatened to affect navigable waters of the United States; and (4) either the claim was presented to the party responsible for the oil spill, a responsible party has not been identified, the NPFC has solicited claims, or the claim falls under the listed exceptions for removal cost claims.<sup>354</sup> If all four requirements are satisfied, a claimant may submit a claim for damages or removal costs.<sup>355</sup>

Businesses and individuals filing claims for profit loss in vulnerable industries like fishing and small businesses where the long-term costs could not yet be accurately estimated were able to receive expedited payments from the OSLTF or GCCF to cover the loss of their first month's income.<sup>356</sup> Other claimants who were eligible for expedited payments include owners of coastal rental properties, restaurants, charter boat businesses, fishermen including shrimp and oyster harvesters, and seafood processing businesses.<sup>357</sup> Before the GCCF was formed, BP established an Immediate Action Claims Team to address these types of urgent

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<sup>351</sup> See Debbie Elliot, *BP's Oil Slick Set to Spill into Courtroom*, NAT'L PUB. RADIO (Feb. 16, 2012) <http://www.npr.org/2012/02/16/146938630/bps-oil-slick-set-to-spill-into-courtroom>.

<sup>352</sup> See 33 U.S.C. §§ 2701–62 (2006 & Supp. IV).

<sup>353</sup> See *supra* Part III.A–C.

<sup>354</sup> *OPA Claims Requirements*, NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, [http://www.uscg.mil/npfc/claims/general\\_claims\\_requirements.asp](http://www.uscg.mil/npfc/claims/general_claims_requirements.asp) (last updated Feb. 22, 2012).

<sup>355</sup> *Id.*

<sup>356</sup> See *supra* Part III.A.

<sup>357</sup> Press Release, BP, BP Takes Action to Fast-Track Claims for Gulf Coast Businesses (Aug. 3, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064163>.

loss of profits claims.<sup>358</sup> The company also expanded the types of claims covered to include tourist industries that operate near affected beaches.<sup>359</sup> Receipt of these payments does not preclude eligible claimants from filing more complete claims later on.<sup>360</sup>

Claims that did not fit within the categories eligible for expedited payments were referred to the GCCF for claiming lost profits or lost wages.<sup>361</sup> These deferred claimants included restaurants, tourist attractions, owners of property that are not located on oiled beaches, and seafood businesses outside of the Gulf that purchase Gulf Coast products.<sup>362</sup>

Both individuals and businesses can submit claims to the GCCF.<sup>363</sup> The GCCF defines lost wages as a “loss of or reduction in your ability to earn wages or income.”<sup>364</sup> Lost profits covers temporary and permanent decreases in a business’s capacity to make money.<sup>365</sup> According to the GCCF website, the GCCF fund is intended to compensate losses that are the result of “injury, destruction or loss of Real Property, Personal Property, or natural resources due to the Spill” and the claimant does not need to be “the owner of the damaged property or natural resources.”<sup>366</sup> In order to be eligible for funds, claimants must (1) “Identify the specific Real Property, Personal Property or natural resources injured, destroyed or lost due to the Spill” and (2) show loss of “earnings or profits as a result of the injury, destruction or loss of the specific property or natural resources.”<sup>367</sup>

Individuals who have received money from the fund and continue to lose income are not precluded from filing additional claims.<sup>368</sup> Individuals who lost their jobs because of the spill and have since accepted new employment at a lower pay rate can still file claims for the discrepancy in earnings.<sup>369</sup> The GCCF expands

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358 *Id.*

359 *Id.*

360 *See supra* Part III.A–C.

361 Press Release, BP, *supra* note 357.

362 *Id.*

363 *See Frequently Asked Questions, supra* note 152, § 10 (Lost Profits and Earning Capacity).

364 *Id.*

365 *See id.*

366 *Id.*

367 *Id.*

368 *See id.*

369 *See id.*

compensation to include damage to the physical buildings that house businesses and important tools of business like fishing boats.<sup>370</sup> While these harms are not direct wage or profit losses, they affect a claimant's ability to work and earn money. Expedited payments are available under the GCCF.<sup>371</sup> These expedited payments may be important for environmental justice because people who have not accumulated savings may have a greater need for expedited compensation in order to support themselves following a disaster.

Finally, BP established a \$100 million fund specifically to compensate oil rig workers who were out of work during the moratorium.<sup>372</sup> The Rig Worker Assistance Fund is administered by the Gulf Coast Restoration and Protection Foundation.<sup>373</sup> The money is distributed in the form of grants based on applications.<sup>374</sup> However, where rig workers have lost profits due to the moratorium, BP may be able to argue that the actions of the federal government are responsible for the losses.<sup>375</sup> "BP officials have insisted that they are not legally responsible for claims emanating from the moratorium, and described the \$100 million rig-worker fund as a good-will gesture."<sup>376</sup> If the moratorium was the direct cause of the lost wages rather than the oil spill, BP may not be liable for compensating oil rig workers.<sup>377</sup> Despite concerns about extensive layoffs under the deepwater drilling moratorium, oil rig workers did not suffer significant loss of employment because oil companies retained most of their skilled rig working employees to

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<sup>370</sup> *Frequently Asked Questions*, *supra* note 152, § 9 (Damage to Real or Personal Property).

<sup>371</sup> See 33 U.S.C. § 2705(a) (2006).

<sup>372</sup> Tilove, *supra* note 147.

<sup>373</sup> Press Release, BP, BP Fulfills Commitment to Assist Displaced Rig Workers, Establishes \$100 Million Fund Through Baton Rouge Foundation (July 30, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064072>.

<sup>374</sup> *Id.*

<sup>375</sup> Thomas Catan & Dionne Searcey, *Dispute Rages on BP Liability for Wages, as Obama Pushes*, WALL ST. J. (June 9, 2010), <http://online.wsj.com/article/SB10001424052748703627704575299153313210426.html>.

<sup>376</sup> Jonathan Tilove, *Moratorium Claim Situation Varies Depending on Whom You Talk To, and When*, TIMES-PICAYUNE (June 29, 2010, 10:22 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/moratorium\\_claim\\_situation\\_var.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/moratorium_claim_situation_var.html).

<sup>377</sup> Catan & Searcey, *supra* note 375.

perform deferred maintenance on oil rigs.<sup>378</sup>

#### 4. Long Term Gulf Coast Recovery Plan

Navy Secretary Ray Mabus issued a Long Term Recovery Plan outlining a proposed plan of action for recovery in the Gulf Coast area.<sup>379</sup> This plan has the potential to create new job opportunities in cleanup and restoration, but some raised concerns about the exclusion of minority groups from both the planning process and the proposed restoration.<sup>380</sup> Non-profit groups, like Bayou Interfaith Shared Community Organizing, in the areas hit hardest by the spill “believe this plan does not give those communities most vulnerable to disaster, be it an oil spill or a deadly hurricane, a voice in the decision-making process.”<sup>381</sup> These groups allege that the plan fails to address the specific and individualized needs of people and communities hit the hardest by the oil spill and its aftermath, including “African-American fishers in east Plaquemines Parish; the Pointe-Aux-Chien and Native American tribes further west; and Cajuns, Croatians, Vietnamese and Cambodians across the entire coast.”<sup>382</sup>

Those not happy with the plan indicated that the lack of diversity “means that the plan does not have a clear picture of the oil spill’s victims.”<sup>383</sup> For example, the Houma Nation, a tribe recognized by the state of Louisiana but not by the federal government, was neither allowed input nor given acknowledgment by the Long Term Recovery Plan.<sup>384</sup> While the certainty and scope of these concerns and allegations are uncertain, the fact that groups have raised these concerns at all warrants further examination of the development of the Long Term Recovery Plan.

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378 See INTER-AGENCY ECON. REPORT, ESTIMATING THE ECONOMIC EFFECTS OF THE DEEPWATER DRILLING MORATORIUM ON THE GULF COAST ECONOMY 6 (2010), available at [http://www.restorethegulf.gov/sites/default/files/imported\\_pdfs/external/content/document/2931/899311/1/Drilling\\_moratorium\\_official\\_report\\_0915.pdf](http://www.restorethegulf.gov/sites/default/files/imported_pdfs/external/content/document/2931/899311/1/Drilling_moratorium_official_report_0915.pdf).

379 MABUS, *supra* note 96.

380 Brenton Mock, *Oil Spill Recovery: Who Benefits?*, THE ROOT (Sept. 30, 2010, 1:35 PM), <http://www.theroot.com/views/post-oil-spill-recovery-who-benefits>.

381 *Id.*

382 *Id.*

383 *Id.*

384 *Id.*

### B. Cleanup Workers

According to a report from the National Institute for Occupational Safety and Health (NIOSH), an average of 46,271 people worked on various parts of the cleanup effort at its peak in the eleventh week of the spill.<sup>385</sup> As of the thirteenth week following the spill, that number was reduced to 29,390 cleanup workers.<sup>386</sup> In a September 30, 2010 statement, BP reported that “approximately 20,000 people from BP staff, contractors, governmental and industry employees and volunteers are at sites providing ongoing response.”<sup>387</sup> BP divided the areas in which workers perform response activities into four groups: offshore (those on boats near the leak), near shore (those on boats operating closer to shore performing activities like skimming or boom handling), beach (those doing land-based activities), and decontamination (those decontaminating response equipment and vessels).<sup>388</sup> A BP report on the monitoring of hazardous exposure identified the main methods to prevent harm to the response workers: engineering,<sup>389</sup> administrative controls, and personal protective equipment.

Assessing environmental justice in the context of cleanup workers is complex. On the one hand, this work is sought-after employment in a difficult economy. On the other hand, cleaning up oil spill waste is risky work, and the people needing to take such work may not have adequate options and protection. This Section explores these complexities by discussing the vulnerable populations involved in cleanup efforts, health and safety concerns, training, and housing.

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385 NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, NIOSH REPORT OF DEEPWATER HORIZON RESPONSE/UNIFIED AREA COMMAND ILLNESS AND INJURY DATA (APRIL 23 – JULY 27, 2010) (Aug. 13, 2010), *available at* <http://www.cdc.gov/niosh/topics/oilspillresponse/pdfs/NIOSHrot-BPIllnessAndInjuryDataApril23-july27-2010.pdf> [hereinafter NIOSH ILLNESS AND INJURY DATA].

386 *Id.*

387 *Personal Exposure Monitoring Results Summary*, BP (Sept. 30, 2010), [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads/pdfs/Health\\_Monitoring\\_Summary\\_Report\\_30\\_September\\_2010.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads/pdfs/Health_Monitoring_Summary_Report_30_September_2010.pdf).

388 *Id.*

389 *See id.*

### 1. *Vulnerable Populations Involved in Cleanup Efforts*

Three main categories of vulnerable populations were employed following the BP *Deepwater Horizon* Oil Spill: the previously unemployed, the homeless, and prisoners. The majority of the populations discussed here were involved in land-based beach cleanup. Finding reliable information on the precise demographics of the people performing beach cleanup was particularly difficult because of the insufficient collection and publication of data. A CNN article reported that BP was paying beach workers \$18 per hour, while supervisors made \$32 per hour.<sup>390</sup> Most employees were hired by contractors rather than by BP, and it is unclear whether the quoted wages include those workers. What follows is a discussion of the three previously identified groups: the unemployed, the homeless, and prisoners.

Many of the individuals BP hired to clean up the beaches in the Gulf Coast from Alabama, Mississippi, and Louisiana were already unemployed before the oil spill.<sup>391</sup> BP set up a program in partnership with state-run unemployment programs, and many of the individuals hired to participate in cleanup efforts filed for unemployment prior to the spill.<sup>392</sup> In fact “even before the cleanup worker program kicked off, Alabama workers could fill out an online job application for potential oil clean up jobs.”<sup>393</sup> Alabama began soliciting the unemployed to start cleanup training on May 12, 2010.<sup>394</sup> Approximately 4500 workers were recruited through these Gulf Coast unemployment programs.<sup>395</sup>

The full extent of previously unemployed individuals working as beach cleanup workers is unknown because beyond the June 8, 2010 CNN article, little information is available. Due to the high number of previously unemployed individuals in the region, however, it is likely that the previously unemployed filled many cleanup jobs. Some news and blog sources raised serious concerns over the education level of those entering into contracts to perform

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390 Catherine Clifford, *BP Hires the Unemployed for Cleanup*, CNN MONEY (June 8, 2010, 12:42 PM), [http://money.cnn.com/2010/06/08/smallbusiness/bp\\_hiring\\_unemployed/index.htm](http://money.cnn.com/2010/06/08/smallbusiness/bp_hiring_unemployed/index.htm).

391 *See id.*

392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.*



cleanup work.<sup>396</sup> Reports of individuals unable to read and write, requiring community members to read employment contracts to them, raise concerns about how many other illiterate workers entered into similar contracts without assistance.<sup>397</sup> The total number of cleanup workers is estimated in the tens of thousands, and it is not known how many of these workers were undereducated or previously unemployed.

The eligibility requirements for receipt of unemployment benefits are similar in all of the Gulf Coast states. All five states require that the claimant was employed for a percentage of their base period and meet certain minimum earnings during that time.<sup>398</sup> Depending on how long temporary oil spill cleanup jobs last and how much they pay, accepting a job performing cleanup work might make some previously unemployed workers ineligible for unemployment benefits. In Louisiana, an unemployment benefits claimant can be partially unemployed, so a part-time cleanup worker might still be able to claim unemployment while employed in an oil cleanup job.<sup>399</sup> Even within the unemployment benefits system, there is an unequal distribution of resources. The weekly maximum unemployment benefit varies by state. This means that workers in Mississippi and Alabama are at a disadvantage,<sup>400</sup> with a maximum weekly benefit payment of less than \$270, while unemployed workers in Texas can collect up

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<sup>396</sup> Eric Noll, *BP Oil Spill: Lafitte Bayou Fears What Incoming Oil Could Do to Community*, ABC NEWS (July 13, 2010, 2:53 PM), <http://blogs.abcnews.com/worldnewser/2010/07/bp-oil-spill-lafitte-bayou-fears-what-incoming-oil-could-do-to-community.html>.

<sup>397</sup> *Id.*

<sup>398</sup> *Unemployment Insurance Benefits Information*, TEX. WORKFORCE COMM'N., <http://www.twc.state.tx.us/ui/bnfts/claimant1.html#qualify> (last updated Oct. 24, 2012) [hereinafter TEX. WORKFORCE COMM'N.]; *Benefit Eligibility Requirements*, MISS. DEP'T OF EMP'T SEC., <http://www.mdes.ms.gov/Home/UnemploymentServices/BenefitEligibilityRequirements.html> (last visited Dec. 16, 2012) [hereinafter MISS. DEP'T OF EMP'T SEC.]; *Frequently Asked Questions from Claimants Concerning Benefits*, LA. WORKFORCE COMM'N., [http://www.laworks.net/FAQs/FAQ\\_UI\\_ClaimantBenefits.asp](http://www.laworks.net/FAQs/FAQ_UI_ClaimantBenefits.asp) (last updated Jan. 7, 2010) [hereinafter LA. WORKFORCE COMM'N.]; *Frequently Asked Questions—Filing a Claim*, FLA. DEP'T OF ECON. OPPORTUNITY, <http://www.floridajobs.org/frequently-asked-questions-directory/frequently-asked-questions/category/200e7f10-8a0e-4409-a9ff-84d011a3fae6> (last visited July 23, 2012); *Claim and Benefits FAQ*, ALA. DEP'T OF INDUS. RELATIONS, <http://dir.alabama.gov/uc/claims.aspx> (last visited Dec. 16, 2012) [hereinafter Ala. Dep't of Indus. Relations].

<sup>399</sup> LA. WORKFORCE COMM'N., *supra* note 398.

<sup>400</sup> MISS. DEP'T OF EMP'T SEC., *supra* note 398; ALA. DEP'T OF INDUS.

to \$426 per week.<sup>401</sup>

Disaster Unemployment Assistance is also available for individuals who have lost their jobs as a direct result of a federally-declared disaster and do not qualify to receive regular unemployment benefits.<sup>402</sup> However, claimants must apply for Disaster Unemployment Assistance within thirty days after the declaration of a major disaster.<sup>403</sup> The U.S. Commerce Secretary declared a fishery disaster at the end of May 2010, which means that the deadline to apply expired at the end of June 2010.<sup>404</sup> People who lost their jobs after June 2010 were therefore not eligible to receive Disaster Unemployment Assistance.

In addition to unemployed workers, homeless populations have been sources of labor for disaster cleanup.<sup>405</sup> These jobs are not always highly sought-after because they are temporary, often involve long hours, and are typically dangerous. In early 2010, crews that dealt with the cleanup after severe flooding in Tennessee drew heavily from area homeless shelters.<sup>406</sup> Employment agencies in Tennessee went so far as to seek workers in local shelters.<sup>407</sup>

The extent to which this type of recruitment happened in the Gulf was unclear, but in the aftermath of the oil spill, Gulf Coast homeless shelters received an influx of new residents looking for jobs working on cleanup.<sup>408</sup> However, due to area unemployment

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RELATIONS, *supra* note 398.

<sup>401</sup> TEX. WORKFORCE COMM'N., *supra* note 398.

<sup>402</sup> *Disaster Unemployment Assistance*, EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, <http://www.ows.doleta.gov/unemploy/disaster.asp> (last updated July 23, 2010).

<sup>403</sup> *Disaster Unemployment Assistance*, FLA. DEP'T OF ECON. OPPORTUNITY, <http://www.floridajobs.org/office-directory/division-of-workforce-services/unemployment-programs/disaster-unemployment-assistance> (last visited Dec. 16, 2012).

<sup>404</sup> *Fishery Disaster Declared in the Wake of Gulf of Mexico Oil Spill*, TIMES-PICAYUNE, May 24, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/fishery\\_disaster\\_declared\\_in\\_w.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/05/fishery_disaster_declared_in_w.html).

<sup>405</sup> Natalie Wendt, *Homeless Workers Want to Clean Up Oil Spill*, CHANGE.ORG (August 18, 2010, 6:30 AM), [http://homelessness.change.org/blog/view/homeless\\_workers\\_want\\_to\\_clean\\_up\\_oil\\_spill](http://homelessness.change.org/blog/view/homeless_workers_want_to_clean_up_oil_spill); *see also* David Helms, *Seeking Oil Spill Work, Homeless Fill Gulf Coast Shelters*, PRESS-REGISTER (Mobile, Ala.) (July 30, 2010, 8:07 AM), [http://blog.al.com/live/2010/07/seeking\\_oil\\_spill\\_work\\_homeles.html](http://blog.al.com/live/2010/07/seeking_oil_spill_work_homeles.html).

<sup>406</sup> Wendt, *supra* note 405.

<sup>407</sup> *Id.*

<sup>408</sup> Helms, *supra* note 405.

rates before the spill, the temporary suspension of much of the fishing industry, and the arrival of workers from around the country, there was heavy competition for cleanup jobs in the Gulf Coast.<sup>409</sup> Many of the other job seekers had more experience and specialized training and those reporting on the issue found that many of those filling the shelters were not being hired.<sup>410</sup> Instead, they were finding overcrowded homeless shelters.<sup>411</sup>

Some sources reported that BP was also using prison labor to clean the oiled beaches, although BP neither confirms nor denies these allegations.<sup>412</sup> Reports indicate that prisoners were not forced to participate in oil cleanup, but that they risked losing any “good time” earned towards early release and ultimately could spend more time in prison if they refused to take part.<sup>413</sup> According to reports, some inmates in the work release program did not receive pay for their labor while others made up to forty cents an hour.<sup>414</sup> If BP was using prison labor, they were benefitting from a cheap and reliable source of labor as well as receiving tax benefits.<sup>415</sup> Assuming prisoners were performing cleanup work, it is unclear the extent to which they received instruction regarding the dangers associated with handling oil or knew that they could opt out of the dangerous work. Area residents were reportedly upset at the prospect of a prison work force taking jobs away from locals whose livelihoods had suffered from the spill.<sup>416</sup>

Further, the participation of prisoners in the beach cleanup efforts may also contribute disproportionate representation of

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409 Wendt, *supra* note 405.

410 *Id.*

411 *Id.*

412 Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, THE NATION (July 21, 2010), <http://www.thenation.com/article/37828/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle>. The reporter based her assertion of the use of prison labor on reports from local residents and by travelling to the Lafourche Parish Work Release Center. At the work release center, Young reported that “[m]en were returning from a long day of shoveling oil-soaked sand into black trash bags in the sweltering heat. Wearing BP shirts, jeans and rubber boots (nothing identifying them as inmates), they arrived back at the jail in unmarked white vans, looking dog tired.” *Id.*

413 *Id.*

414 *Id.*

415 *Id.*

416 *Id.*

people of color in cleanup work. For example, in Grand Isle, Louisiana, a predominantly white area, African Americans were over-represented among cleanup workers to such an extent that NAACP president Ben Jealous sent a letter to the CEO of BP questioning why cleanup companies targeted African-American men to work such difficult and dangerous jobs.<sup>417</sup> According to the Louisiana Department of Public Safety and Corrections, in June 2011, 69.3% of the state adult correctional population was black and 94% was male, and drawing from such a population could potentially increase any racial disparity.<sup>418</sup> While reports of the use of prison labor are sparse, research turned up nothing to counter these reports. Those reporting on the use of prison labor write that official responses have indicated uncertainty but not denial.<sup>419</sup> The use of prison labor is another area in which information is lacking but necessary to assess environmental justice concerns.

## 2. Health and Safety Concerns Regarding Cleanup Workers

Cleanup workers faced the general health and safety risks associated with working with oil, health and safety risks specific to oil spill workers, and issues with the adequacy of training and housing. First, exposure to oil carries with it a host of risks. The primary danger to workers is the result of a mixture of hydrocarbons and designated light, medium, and heavy chemicals in the crude oil.<sup>420</sup> There are two main ways in which workers are exposed to the chemicals: breathing them in and direct skin contact.<sup>421</sup> The lighter chemicals generally evaporate within

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417 Letter from Benjamin Todd Jealous, President & CEO, NAACP, to Tony Hayward, CEO, British Petroleum, *supra* note 304. It should be noted that the claims made by Mr. Jealous were his own, and those claims have not been otherwise substantiated.

418 CORR. SERVS., LA. DEP'T OF PUBLIC SAFETY & CORR., DEMOGRAPHIC PROFILES OF THE ADULT CORRECTIONAL POPULATION (2011), available at <http://www.corrections.state.la.us/wp-content/uploads/stats/2a.pdf>.

419 Young, *supra* note 412.

420 See OIL SPILL CLEANUP INITIATIVE, NAT'L INST. OF ENVTL. HEALTH SCIS., SAFETY AND HEALTH AWARENESS FOR OIL SPILL CLEANUP WORKERS 35–36, 38–39 (2010), available at [http://www.osha.gov/Publications/Oil\\_Spill\\_Booklet\\_05.11\\_v4.pdf](http://www.osha.gov/Publications/Oil_Spill_Booklet_05.11_v4.pdf) (describing crude oil's evaporation and degradation and the various health hazards associated with exposure to different hydrocarbons and chemicals throughout these processes).

421 *Id.* at 40 (explaining the dermatitis hazard and the hazard of oily droplets/oily particles in the air during cleanup).

twenty-four to forty-eight hours of the spill, leaving behind the medium and heavy parts in the water.<sup>422</sup> This means that those exposed to fresher oil experience a much higher risk than those leading efforts on the shore because many of the hazardous components have evaporated by the time the oil reaches land.<sup>423</sup> Even after the oil has weathered and formed into tar balls, cleanup workers can suffer rashes as a result of contact.<sup>424</sup>

The lack of clear information regarding the long-term effects of oil exposure on human health complicates efforts to address potential concerns. An analysis of exposure of cleanup workers conducted by NIOSH in May of 1991 was unable to quantify the negative effects associated with oil exposure following the *Exxon Valdez* spill.<sup>425</sup> Part of the reason for the absence of proper analysis was a lack of information: “[a]n unsuccessful attempt was made to conduct a systematic, record-based review of health and injury data in the field. This was not pursued after the 1989 cleanup effort had ended.”<sup>426</sup> Though unable to encompass the whole scope of health and injury data, the report did manage to turn up some useful information. Upon examining workers compensation claims in Alaska, NIOSH found that there were a total of 1811 workers’ compensation claims in 1989 directly related to the spill.<sup>427</sup> The record attributed 800 worker injuries, or 44% of total reported injuries, to “strains/sprains, cuts/lacerations, or contusions;” 265 (14.6%) of reported injuries were attributed to bronchitis-type respiratory injuries; and forty-four injuries (2.4%) were attributed to dermatitis.<sup>428</sup> While this list is not exhaustive and may not fully encompass all of the injuries caused by exposure to oil, it provides some indication of the type of oil-induced injuries for which compensation was sought immediately following the *Exxon Valdez* oil spill. In addition to describing the types of injuries, the report also determined that some of the injuries and dangers came from workers choosing to take off parts

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422 *Id.*

423 *Id.*

424 *Id.* at 42–43.

425 See NAT’L INST. OF OCCUPATIONAL SAFETY & HEALTH, HEALTH HAZARD EVALUATION EXXON/VALDEZ ALASKA OIL SPILL (1991) [hereinafter EXXON/VALDEZ HHE], available at <http://www.cdc.gov/niosh/hhe/reports/pdfs/1989-0200-2111.pdf>.

426 *Id.* at 2.

427 *Id.* at 23.

428 *Id.*

of their protective equipment due to heat or discomfort.<sup>429</sup> The available records report that tests only found trace concentrations of dangerous chemicals.<sup>430</sup> Other reports directly counter this finding and determined that exposure to oil had significant health effects on *Exxon Valdez* cleanup workers.<sup>431</sup>

Beyond these NIOSH reports, OSHA itemized twenty different potential hazards to workers dealing with an oil spill, but acknowledged that the list was not exhaustive.<sup>432</sup> OSHA utilized requisite training as one of the primary methods to ensure the safety of cleanup workers, whether that training was administered by OSHA, BP, state agencies, or any number of contractors. In addition, BP and other agencies monitored worker exposure to certain chemicals and hazardous materials. Finally, a record was being kept of injuries and illnesses suffered by workers, though the accuracy and completeness of this record are unconfirmed.<sup>433</sup>

At the peak of cleanup efforts, BP employed up to 200 “industrial hygienists and technicians” to monitor worker exposure across three different work areas.<sup>434</sup> BP used varying methods for ensuring proper sampling of hazardous material. Some monitoring personnel used tools to measure the quality of the air and other materials encountered by workers.<sup>435</sup> Alternatively, monitoring personnel took samples directly from response workers, although these tests often required subsequent analysis to get results and therefore reduced the possibility of immediate action to avoid serious health consequences.<sup>436</sup>

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429 *Id.* at 24.

430 *Id.*

431 Drew Griffin, *Critics Call Valdez Cleanup a Warning for Gulf Workers*, CNN (July 8, 2010, 10:33 AM), <http://www.cnn.com/2010/US/07/07/oil.spill.valdez.workers/index.html> (reporting that 6722 of the 11,000 workers had gotten sick). In addition, the author indicates that Exxon has the medical records of ill or injured workers, but those records have been sealed to protect worker privacy. *Id.*

432 OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, TRAINING MARINE OIL SPILL RESPONSE WORKERS UNDER OSHA'S HAZARDOUS WASTE OPERATIONS AND EMERGENCY RESPONSE STANDARD (2001) [hereinafter OIL SPILL HAZWOPER], available at <http://www.osha.gov/Publications/3172/3172.html> (listing items such as drowning, slips, biohazardous debris, and fatigue).

433 *Personal Exposure Monitoring Results Summary*, BP, *supra* note 387.

434 *Id.*

435 *Id.*

436 *Id.*

When analyzing response workers' risk of exposure, BP primarily operated based on the guideline that any amount of hydrocarbons in the air over 100 parts per million constitutes excessive exposure.<sup>437</sup> OSHA notes, however, that "even if air sampling shows no detectable levels or very low levels of volatile organic compounds (VOCs), there still may be health effects present."<sup>438</sup> Further, despite a finding of dangerous levels by BP on only one occasion, reports have surfaced of vessel-based cleanup workers and former fishermen who became quite ill after performing work in the employ of BP.<sup>439</sup> There are also anecdotal reports of injuries sustained because workers were not allowed to wear proper safety equipment or were not outfitted with the proper safety equipment.<sup>440</sup>

BP's response and health mitigation efforts operated in tandem with the Unified Area Command (UAC),<sup>441</sup> though an examination of the UAC website does not make clear which entity is fully responsible for worker safety. According to BP, only one of the samples analyzed registered beyond the acceptable OSHA Personal Exposure Limit for response workers, and BP further asserts that this result was an isolated incident.<sup>442</sup> However, even if the company's statements are true, they do not necessarily reflect the extent of the injuries or dangers to cleanup workers. For example, OSHA had reported over 739 heat related illness incidents in cleanup workers.<sup>443</sup> OSHA also stated that it has implemented heat stress plans and work/rest requirements at the

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<sup>437</sup> *Id.*

<sup>438</sup> *Hazards Associated with Oil Cleanup Operations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, <http://www.osha.gov/oilspills/hazards.html#crude> (last visited Dec. 16, 2012).

<sup>439</sup> Nicole Santa Cruz & Julie Cart, *Oil Cleanup Workers Report Illness*, L.A. TIMES, May 26, 2010, <http://articles.latimes.com/2010/may/26/nation/la-na-oil-workers-sick-20100526>; *Personal Exposure Monitoring Results Summary*, BP, *supra* note 387.

<sup>440</sup> *See Former BP Cleanup Worker Exposes Staged Photo Ops, Toxic Working Conditions, and Covert Ops*, (Oct. 20, 2010), <http://www.youtube.com/watch?v=0DuPraOJaDg>. (accompanying video describing a scenario in which a worker was instructed not to wear a protective mask).

<sup>441</sup> *See generally Technical Reports and Studies*, BP, <http://www.bp.com/sectiongenericarticle800.do?categoryId=9040049&contentId=7067598> (last visited Dec. 16, 2012).

<sup>442</sup> *Personal Exposure Monitoring Results Summary*, BP, *supra* note 387.

<sup>443</sup> *Gulf Oil Response and Heat*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, <http://www.osha.gov/oilspills/heatstress.html> (last visited Dec. 16, 2012).

cleanup sites.<sup>444</sup> In addition, OSHA promulgated a number of other plans in order to properly protect workers based on the events of this and other spills.<sup>445</sup>

NIOSH compiled statistics on reported injuries suffered by cleanup workers based on data from OSHA and other sources.<sup>446</sup> As of July 27, 2010, NIOSH reported a total of 2130 injuries or illnesses related to spill cleanup.<sup>447</sup> Only ten of those injuries affected BP employees while 2050 were reported from contractors hired to do cleanup work.<sup>448</sup> NIOSH divided the recorded worker problems into two categories: injuries (accounting for 53.3% of incidents) and illnesses (accounting for 46.7% of incidents).<sup>449</sup> The majority of these incidents (68.1%) were reported in onshore workers.<sup>450</sup> Recorded illnesses included heat stress, multiple symptoms (e.g., nausea, vomiting, headache, and dizziness), gastrointestinal disturbances, dermatologic symptoms, general symptoms (e.g., fatigue), cardiovascular problems, and respiratory illness.<sup>451</sup> The majority of the illnesses appeared in the heat stress and multiple symptoms categories.<sup>452</sup> Oil and dispersants were only “explicitly mentioned as a contributing factor” in thirteen of the cases recorded by NIOSH, including six dermatologic, four injury (e.g., slipping on oil), and three vapor inhalation cases.<sup>453</sup> The total recorded illnesses catalogued in the report included only twelve cases that were severe enough to result in missed or

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<sup>444</sup> *Id.*

<sup>445</sup> See generally OSHA’s Efforts to Protect Workers, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, <http://www.osha.gov/oilspills/> (last visited July 23, 2012) (identifying rules such as those regulating the safety equipment that must be used).

<sup>446</sup> NIOSH ILLNESS AND INJURY DATA, *supra* note 385. While NIOSH has since produced other reports relating to the safety and injury of workers during the *Deepwater Horizon* spill cleanup, this report is the most recently published to provide specific numerical data on types of injuries suffered by workers. Compare *id.*, with BRADLEY S. KING & JOHN D. GIBBINS, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, HEALTH HAZARD EVALUATION OF DEEPWATER HORIZON RESPONSE WORKERS (2011), available at <http://www.cdc.gov/niosh/hhe/reports/pdfs/2010-0115-0129-3138.pdf>.

<sup>447</sup> *Id.* at 4.

<sup>448</sup> *Id.* Another fifty injuries came from federal, state, or local government employees, one volunteer, and nineteen unspecified. *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 8.

<sup>451</sup> *Id.* at 13.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 17.



restricted duty.<sup>454</sup>

Comparing current injury data with the total number of cleanup workers may lead to the conclusion that regulations are mitigating serious injury and illness. News reports of severe injury or illness not captured by the NIOSH report, however, make this conclusion less certain.<sup>455</sup> These conflicting records of injury and illness call into question the sufficiency of injury and illness reporting requirements.

A close examination of the reporting regulation itself demonstrates the scope of the problem. OSHA regulations exist requiring the reporting of worker injury and illness information from employers, but of the 2130 cases of injury or illness recorded by NIOSH in one report, only 281 of those cases were considered "OSHA-recordable cases."<sup>456</sup> This gap suggests that the regulations promulgated by OSHA do not sufficiently capture the full breadth of injuries occurring during the cleanup process. OSHA regulation requires reporting by employers, but does not contain any procedures for recording injuries occurring many years from the actual cleanup efforts.<sup>457</sup> Further, reliance on the NIOSH data does not assure the same level of accurate data compilation that may be possible through mandated reporting, as evidenced by the failed attempts by NIOSH to acquire *Exxon Valdez* data.<sup>458</sup>

In addition to the above reporting concerns, the worker population may benefit from improved monitoring and reporting of mental health issues. Studies found that following a disaster like the BP *Deepwater Horizon* Oil Spill, populations experience a rise in mental health problems.<sup>459</sup> In addition, the homeless population, a potential subset of cleanup workers, suffers from mental illness and substance abuse at a higher rate than the general population.<sup>460</sup>

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454 *Id.*

455 Compare Santa Cruz & Cart, *supra* note 439, with NIOSH INJURY AND ILLNESS DATA, *supra* note 385.

456 NIOSH INJURY AND ILLNESS REPORT, *supra* note 385, at 4.

457 See 29 C.F.R. § 1904.33 (2011) (requiring employers to maintain and update injury reports for a period of five years). Some evidence of illness and injury surrounding the *Exxon Valdez* spill did not turn up until years later, further necessitating a continuing record of injury and illness data. See Kim Murphy, *Exxon Spill's Cleanup Workers Share Years of Crippling Illness*, L.A. TIMES, Nov. 5, 2001, <http://articles.latimes.com/2001/nov/05/news/mn-372>.

458 EXXON/VALDEZ HHE, *supra* note 425; Griffin, *supra* note 431.

459 See, e.g., Palinkas et al., *supra* note 95.

460 AM. PSYCHOLOGICAL ASS'N, HELPING PEOPLE WITHOUT HOMES: REPORT

Mentally unstable members of the population engulfed in the hazards associated with the aftermath of oil spills and the cleanup effort may find themselves in a regulatory gap that no agency is currently equipped to handle. BP and regulators are engaged in a myriad of injury and illness mitigation efforts through monitoring of environmental conditions surrounding the spill,<sup>461</sup> but screening and treatment for mental illness or instability among workers is not discussed.<sup>462</sup>

Finally, despite the low numbers of serious injuries and illnesses reported thus far, it is too soon to be optimistic about the effects of oil exposure on oil cleanup workers. After the *Exxon Valdez* oil spill, injuries to cleanup workers often did not present until years after exposure.<sup>463</sup> This could be due in part to the relative lack of data available to NIOSH following the *Exxon Valdez* spill.<sup>464</sup> However, discrepancies in data availability cannot fully account for the reports of injuries and illness that are still being reported twenty years after the spill.<sup>465</sup>

### 3. Training of Cleanup Workers

OSHA regulates the training that maritime oil spill response workers receive, and it does so based on the Hazardous Waste Operations and Emergency Response standard (HAZWOPER).<sup>466</sup> HAZWOPER is a more general regulation intended to “protect workers involved in hazardous substance emergency response and cleanup operations.”<sup>467</sup> While the HAZWOPER regulation determines how those running the cleanup effort were required to

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OF THE APA PRESIDENTIAL TASK FORCE ON PSYCHOLOGY’S CONTRIBUTION TO END HOMELESSNESS 14–16 (2009), available at <http://www.apa.org/pubs/info/reports/end-homelessness.pdf>.

<sup>461</sup> See *Personal Exposure Monitoring Results Summary*, BP, *supra* note 387; OIL SPILL HAZWOPER, *supra* note 432.

<sup>462</sup> Research performed in the course of writing this article demonstrated no record of mental health monitoring or mitigation.

<sup>463</sup> Murphy, *supra* note 457.

<sup>464</sup> *Id.*

<sup>465</sup> See Santa Cruz & Cart, *supra* note 439 (discussing injuries reported by fishermen). Blogs have also reported a variety of injuries stemming from the spill, though it is not clear at this point if any of these reports can be substantiated. See, e.g., *Former BP Cleanup Worker Exposes Staged Photo Ops, Toxic Working Conditions, and Covert Ops*, *supra* note 440.

<sup>466</sup> 29 C.F.R. § 1910.120 (2011); see also OIL SPILL HAZWOPER, *supra* note 432.

<sup>467</sup> OIL SPILL HAZWOPER, *supra* note 432.

train employees, separate regulation actually outlines how a spill response is organized and managed, and it includes HAZWOPER training as a part of broader spill management.<sup>468</sup> Any individuals helping with the cleanup effort not covered under the OSHA HAZWOPER regulation (like volunteers) come under the regulatory coverage of state-level OSHA regulation or EPA HAZWOPER regulation.<sup>469</sup> OSHA does recognize states that have their own approved Occupational Safety and Health Plans, but none of the Gulf region states had such plans in place.<sup>470</sup> Therefore, any OSHA-related regulation pertaining to cleanup workers, their training, and management would have happened exclusively at the federal level in the states affected by the BP *Deepwater Horizon* Oil Spill.

Training for response workers during an oil spill is based on the assigned duties of the individual, and the specific training requirements are provided for in the Code of Federal Regulations.<sup>471</sup> OSHA requires three levels of training for various types of onshore cleanup, four levels of training for those working on marine vessels and with the Vessels of Opportunity program, and two levels for those supervising individuals fulfilling either role.<sup>472</sup> Over the course of cleanup efforts, OSHA warned about reports of trainers offering the HAZWOPER required trainings at significantly less than the forty hours required by regulation,<sup>473</sup> though it is not clear if OSHA took any legal action against offending companies. OSHA asserts plainly in its training tools that adherence to proper training guidelines is legally required to maintain compliance with OSHA regulation, and the training requirements are not simply guidelines to promote worker

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<sup>468</sup> See, e.g., 40 C.F.R. 300.150, 300.430 (2012); OIL SPILL HAZWOPER, *supra* note 432.

<sup>469</sup> OIL SPILL HAZWOPER, *supra* note 432. The EPA HAZWOPER standard is identical to the OSHA HAZWOPER standard, but EPA's HAZWOPER extends coverage to local and state government employees. *Id.*

<sup>470</sup> *Directory of States with Approved Occupational Safety and Health Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, <http://www.osha.gov/dcsp/osp/states.html> (last visited Dec. 16, 2012).

<sup>471</sup> OIL SPILL HAZWOPER, *supra* note 432. See generally 29 C.F.R. 1920.120 (providing the general regulations which must be applied to specific oil release incidents).

<sup>472</sup> *Current Training Requirements for the Gulf Oil Spill*, *supra* note 328.

<sup>473</sup> *Id.* (warning that "OSHA has received reports that some trainers are offering the 40-hour HAZWOPER training in significantly less than 40 hours, showing video presentations and offering only limited instruction").

safety.<sup>474</sup>

Louisiana also has some relevant safety regulations that apply to employers generally.<sup>475</sup> The penalty for a violation of Louisiana worker safety law is a fine “not exceeding five hundred dollars for each offense.”<sup>476</sup> No other Gulf Coast state has a general employee safety requirement analogous to Louisiana, and even if more states had such laws, it is not clear that those laws would be applicable or useful in the context of the BP *Deepwater Horizon* Oil Spill.

In addition to the above regulations addressing worker safety and training, OSHA promulgates rules requiring employers to record and report certain injuries or illnesses incurred by employees.<sup>477</sup> The reporting of injuries is an important step in passing laws and implementing regulations to protect workers.<sup>478</sup> In some respects the law appears to function properly, whereas in other instances problems with the law have arisen or a potential

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<sup>474</sup> OIL SPILL CLEANUP INITIATIVE, NATIONAL INST. OF ENVTL. HEALTH SCIS., *supra* note 420, at 7 (providing instructions for using the training tool provided by OSHA).

<sup>475</sup> LA. REV. STAT. ANN. § 23:13 (2010):

“Every employer shall furnish employment which shall be reasonably safe for the employees therein. They shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such employment and the place of employment safe in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees.”

<sup>476</sup> LA. REV. STAT. ANN. § 23:16 (2010).

<sup>477</sup> See 29 C.F.R. § 1904.0–44 (2011) (outlining general injury and illness reporting requirements for employers). OSHA requires reporting

“if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. You must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.”

29 C.F.R. § 1904.7 (2011).

<sup>478</sup> *Injury and Illness Prevention Programs Stakeholder Meeting: Meeting Summary Report*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEPT. OF LABOR (July 20, 2010), <http://www.osha.gov/dsg/topics/safetyhealth/07202010stakeholder-notes.html> (discussing the importance of information and data in the context of injury prevention).

lack of information with regard to the law poses a problem.

Regarding areas of training regulation that operated well, OSHA promulgated very specific training requirements to be met before individuals can be approved to work on the beaches, on the boats, or as a supervisor.<sup>479</sup> To the degree that regulations are in place specifying the type of training cleanup workers must receive, the law moved in the correct direction from past oil cleanup efforts. Agencies improved regulation since the *Exxon Valdez* spill,<sup>480</sup> and improvements to the HAZWOPER training regulation, when enforced, appear to provide the necessary information to cleanup workers. In its current state, however, the regulation does not mandate a demonstration of skill prior to completing the training; no measurable means exists to determine comprehension or skill following training.

The required training, when compared to reports of actual training taking place, raises concerns for worker safety and regulatory compliance.<sup>481</sup> BP contracted with other companies in order to administer training: PEC performed training for land-based cleanup, while Parsons and O'Brien performed training for vessel-based cleanup.<sup>482</sup> OSHA allowed BP to hire other companies to perform safety training, and OSHA subsequently publicized reports of inadequate training taking place.<sup>483</sup> A regulatory gap existed because no entity had scrutinized the companies tasked with worker training in order to ensure proper administration of training programs. Whether the oversight burden fell to BP or OSHA was unclear, but it is clear that under HAZWOPER, the proper training of these workers is important for their safety.<sup>484</sup> OSHA requested via their website and via a published training fact sheet that workers who did not receive proper training should report these problems.<sup>485</sup> To ask a potentially vulnerable cleanup worker to report the training they just received as inadequate, thus negating the training and further delaying the time when they can begin work, is inappropriate as a

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479 See *Current Training Requirements for the Gulf Oil Spill*, *supra* note 328.

480 Compare *Current Training Requirements for the Gulf Oil Spill*, *supra* note 328, with Murphy, *supra* note 457.

481 See *Current Training Requirements for the Gulf Oil Spill*, *supra* note 328.

482 *Id.*

483 *Id.*

484 *Id.*

485 *Id.*

primary means of obtaining information about inadequate training and simply not feasible. Though the HAZWOPER regulation does not expressly require monitoring procedures,<sup>486</sup> OSHA and BP are much better positioned than those seeking employment to evaluate the training procedures being administered.

Aside from the training oversight issues, a regulatory gap exists in how to deal with individuals not accustomed to standardized education;<sup>487</sup> some of the most vulnerable populations being hired for cleanup efforts received career-specific education as opposed to standardized education administered to the general population.<sup>488</sup> Reports that cleanup workers were signing contracts to work when they could not read or write raises serious concerns as to the sufficiency of a training program operated under an assumption of standardized education.<sup>489</sup> The current training regulations do not contemplate the training and employment of individuals without a basic level of education. The limited information available made it hard to assess the negative impacts of this regulatory gap on particular cleanup workers, but the danger of insufficient HAZWOPER training existed.

Some of the most vulnerable populations participating in oil cleanup, such as the previously unemployed, the homeless, and possibly prisoners,<sup>490</sup> are also more likely to be undereducated. It is unclear whether those receiving training were being tested to ensure that they fully comprehended all that was taught to them.

#### 4. *Housing of Cleanup Workers*

A substantial number of people employed in cleanup efforts live outside the Gulf Coast region, and even Gulf Coast residents may receive assignments to work a significant distance from their homes. This influx of non-resident cleanup workers created a demand for temporary housing for these employees. News sources

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<sup>486</sup> See 40 C.F.R. § 1910.120 (2011).

<sup>487</sup> See Mock, *Black Gulf Fishers Face a Murky Future*, *supra* note 310 (describing the education of oyster fishermen as being career-specific and passed down through families, with members typically not receiving a diploma beyond high school). Standardized education refers to the typical American style of education of grades one through twelve.

<sup>488</sup> *Id.*

<sup>489</sup> See Noll, *supra* note 396 (raising serious concerns about the education level of those entering into employment contracts).

<sup>490</sup> See *supra* Part III.B.1 (noting the vulnerable populations involved in cleanup efforts).

reported that in one particular area, five hundred workers were housed on barges located offshore because the area that needed cleaning was not easily accessible by land and there was no available housing nearby.<sup>491</sup> The barges were forty-foot-long corrugated steel boxes that read “Martin Quarters” on their sides.<sup>492</sup> B & J Martin, Inc., the manufacturer of these modular buildings, confirmed on its website that it was providing temporary housing structures to BP *Deepwater Horizon* Oil Spill respondents.<sup>493</sup>

B & J Martin, Inc., states that its modular buildings are U.S. Coast Guard-approved and meet the A-60 class construction requirements pursuant to American Bureau of Shipping standards, as well as being blast rated.<sup>494</sup> Beyond that assertion, the company makes no claims of certification or regulation. News reports indicate, however, that the barge quarters are in compliance with other Coast Guard regulations.<sup>495</sup> Further, while these facilities are an industry standard for many sea-going vessels and deepwater drilling operations, it is not clear whether their use is standard in spill cleanups.

On the barges, dubbed “flotels” by the press, workers were housed in steel boxes containing dormitory beds.<sup>496</sup> Each box housed twelve workers, there was a bathroom for every four workers, and, pursuant to Coast Guard regulations, each worker received thirty square feet (equivalent to an area of five feet by six feet) of space in the living quarters.<sup>497</sup> The article containing the above information only described use of these barges outside one particular port, but BP indicated that the use of such barges could

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<sup>491</sup> Ben Nuckols, ‘Flotels’ Await Oil Spill Cleanup Workers on Gulf, USA TODAY (June 3, 2010, 8:57 AM), [http://www.usatoday.com/travel/hotels/2010-06-03-flotels-gulf-oil-spill\\_N.htm](http://www.usatoday.com/travel/hotels/2010-06-03-flotels-gulf-oil-spill_N.htm).

<sup>492</sup> *Id.*

<sup>493</sup> News, B & J MARTIN, INC., <http://www.bjmartininc.com/#/?section=News> (last visited Dec. 16, 2012).

<sup>494</sup> See *id.*; see also 46 C.F.R. § 127.220 (2011) (describing the A-60 classification as one applying to general fire protection in shipping regulation, when the compartment containing the emergency source of electric power adjoins a space containing either the service generators or vital machinery for the ship’s operation).

<sup>495</sup> Nuckols, *supra* note 491 (indicating that the facilities comply with the Coast Guard regulation that each resident gets thirty square feet of space).

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

occur across the coast.<sup>498</sup> While *USA Today*, BP, and the contractors who use the barges state that the conditions are very livable, certain conditions, such as greater confinement, are inherent in living on a barge and do not occur in the same way in land-based housing.<sup>499</sup>

The “flotels” were not limited to land-based workers; there were reports that a group of fisherman went on strike to protest being moved from motels to the “flotels.”<sup>500</sup> One fisherman indicated that when he signed up to work, he was presented with an agreement that he would live in a motel or “somewhere they supplied us to live.”<sup>501</sup> The fishermen and workers complained that they were incapable of paying for their own housing but refused to move from their motels to the “flotels.” Other workers resolved to live in the “flotels” because they could not afford to give up their jobs. As one worker stated, “I’ll go to the Quarter boat and make the best of it. It’s their way or the highway.”<sup>502</sup>

Several laws exist which might apply to these floating barracks, but it appears that OSHA and the Coast Guard have decided that they are under Coast Guard jurisdiction. The manufacturer of the “flotels” references a set of applicable Coast Guard regulations, which reinforces this conclusion.<sup>503</sup> The Coast

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<sup>498</sup> *Id.*

<sup>499</sup> Flotels also have dangers not found in land-based housing. For example, on April 12, 2011, a flotel owned by Pemex sank. Everyone was evacuated safely. See Phaedra Friend Troy, *Pemex Evacuates Personnel as Jupiter Flotel Sinks in the Gulf of Mexico*, PENNENERGY (Apr. 13, 2011), [http://www.pennenergy.com/index/petroleum/display/8332281400/articles/pennenergy/petroleum/offshore/2011/04/pemex-evacuates\\_personnel.html?cmpid=EnlDailyPetroApril142011](http://www.pennenergy.com/index/petroleum/display/8332281400/articles/pennenergy/petroleum/offshore/2011/04/pemex-evacuates_personnel.html?cmpid=EnlDailyPetroApril142011).

<sup>500</sup> *Fishermen Strike in Protest of ‘Flotel’ Housing*, PROJECT NOLA (July 20, 2010, 11:15AM), <http://www.projectnola.com/the-news/news/44-wdsu/98292-fishermen-strike-in-protest-of-flotel-housing>.

<sup>501</sup> *Id.*

<sup>502</sup> *Floating Barges Will Be Home for Many Local Fisherman*, PROJECTNOLA.COM (July 21, 2011, 7:00 AM), <http://www.projectnola.com/the-news/news/42-fox-8/98360-floating-barges-will-be-home-for-many-local-fisherman>.

<sup>503</sup> B & J MARTIN, INC., *supra* note 493 (listing only compliance with Coast Guard regulation); see OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, COMPLIANCE DIRECTIVE NO. CPL 02-01-047, OSHA AUTHORITY OVER VESSELS AND FACILITIES ON OR ADJACENT TO U.S. NAVIGABLE WATERS AND THE OUTER CONTINENTAL SHELF (OCS) G-8 (2010) (emphasis added), available at [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-01-047.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-047.pdf) (“Consistent with longstanding policy, OSHA’s Temporary Labor Camp standard contained in 29 CFR 1910.142 does not apply to vessels (such as ships and barges). Any



Guard regulation cited by the manufacturer pertains specifically to the fire rating of deck coverings on various vessels.<sup>504</sup> This regulation does not apply to actual worker conditions, but addresses the structural soundness of the units for the purposes of providing housing on the water.

OSHA has its own regulation for the housing of workers hired for temporary purposes. Under 29 C.F.R. § 1910.142, OSHA has the power to regulate “Temporary Labor Camps,” but indicates that these regulations do not apply to vessels.<sup>505</sup> Those OSHA regulations state that “each room used for sleeping should contain at least 50 square feet of floor space for each occupant,” with at least seven feet of head space.<sup>506</sup> The toilet rooms require window access directly to the outside, as well as requiring toilet facilities access without passage through a sleeping area. In addition, no toilet should come within 100 feet of any sleeping room, dining room, lunch area, or kitchen.<sup>507</sup> The regulation pertaining to “Temporary Labor Camps” also includes many other detailed rules, but with regard to potential regulation of the “flotels” the above portions are the most relevant.<sup>508</sup>

Although the Coast Guard currently regulates the “flotels” due to their status as vessels, the temporary labor camp regulations might in some ways be a more appropriate fit.<sup>509</sup> Unlike workers living and working on navigable waters to which the Coast Guard housing regulations typically apply, many of these cleanup workers were instead living on navigable waters while working on

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hazards noted by [Compliance Safety and Health Officers] related to living spaces on fish processing vessels will be referred in writing to the U.S. Coast Guard.”).

<sup>504</sup> See *Domestic Structural Fire Protection Materials Regulations: Deck Coverings (A-60)*, U.S. COAST GUARD, [http://www.uscg.mil/hq/cg5/cg5214/domestic\\_sfp.asp](http://www.uscg.mil/hq/cg5/cg5214/domestic_sfp.asp) (last updated May 9, 2012) (citing 46 C.F.R. § 164.006 (2011)).

<sup>505</sup> 29 C.F.R. § 1910.142 (2011); OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), *supra* note 503.

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> Also included in the regulation are rules pertaining to the material floors must be made from, water supply, safety for cooking stations and kitchens, more detailed toilet information, sewage disposal, and refuse disposal. *Id.* Unfortunately, a lack of information pertaining to conditions on the barges and in the modular housing limits this Article’s ability to evaluate compliance with these provisions.

<sup>509</sup> *Id.*

land. OSHA's temporary labor camp regulations mandate more space and separation from toilets for housing compared to what is available in the "flotels" and required by the Coast Guard. First, the Coast Guard regulations require that the "flotels" provide only thirty square feet of living space per person, while OSHA requires fifty feet of living space per person.<sup>510</sup> Further, OSHA requires 100 feet of space between toilet rooms and sleeping quarters as well as access to toilet facilities without passing through sleeping quarters.<sup>511</sup> From a review of interior photos provided by B & J Manufacturers, it appears that restroom facilities are directly adjacent to individual bunks.<sup>512</sup> These differences raise serious concerns about the expectations of land-based workers suddenly forced to live on the "flotels," and the disparities in conditions required for people doing similar work based on whether they are housed on land or on "flotels."

Many individuals living in these "flotels" cannot afford their own hotels, a car to drive from the hotel to the work site, or to quit the job and go back to being unemployed.<sup>513</sup> Beyond the information available via the news media and the manufacturer of the "flotels," those tasked with regulating the health and safety of cleanup workers were silent on the use of this housing.<sup>514</sup> In addition to the previously stated OSHA compliance concerns, the agency and governmental silence on this housing situation left regulatory questions about specially equipping or training workers for living on the "flotels." Living on a barge presents unique problems and dangers not presented living on land, and the regulatory gap into which the "flotels" fall needed to be addressed more thoroughly by regulators.

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<sup>510</sup> See Nuckols, *supra* note 491.

<sup>511</sup> 29 C.F.R. § 1910.142 (2011); OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), *supra* note 503.

<sup>512</sup> *Martin Quarters, Gallery, B&J MARTIN, INC.*, <http://www.bjmartininc.com/#/?section=Martin%20Quarters&sub=0> (last visited Dec. 16, 2012).

<sup>513</sup> See *Floating Barges Will Be Home for Many Local Fisherman*, *supra* note 502.

<sup>514</sup> Research undertaken for this article showed no mention of the use of "flotels" for cleanup workers by the Coast Guard, OSHA, or any government agency.

### C. Oil Rig Workers

Oil rig workers faced environmental justice issues with regard to the BP *Deepwater Horizon* Oil Spill that preceded the explosions and continued in the spill's aftermath. BP indicated in its own reports that lapses in procedure and regulation put the safety of rig workers at risk on the *Deepwater Horizon*. This Section considers safety, regulatory, and compensation issues facing oil rig workers.

#### 1. Safety and Regulatory Issues for Rig Workers

The extensive subcontracting occurring on the rigs complicated worker safety. For example, BP leased the *Deepwater Horizon* rig from Transocean, and Transocean was also responsible for the initial drilling and operation of the well.<sup>515</sup> In addition, Haliburton oversaw the use of cement casing on the rig.<sup>516</sup>

The *Deepwater Horizon* rig workers faced an extremely difficult task, and BP documents indicate that improper actions were taken at the time of the accident that potentially reflected insufficient levels of training.<sup>517</sup> BP's own internal accident report suggests that the Transocean rig crew "was not sufficiently prepared to manage an escalating well control situation."<sup>518</sup> BP further indicates that Transocean's emergency policies and procedures for dealing with the situation were inadequate.<sup>519</sup> The fact that these policies and procedures appear inadequate and unclear indicates that a potential chain of command problem also may have contributed to the rig crew's failure to properly recognize and respond to warning signs as the well deteriorated. Further, the level of subcontracting on the *Deepwater Horizon* has thus far made it difficult to pinpoint a single player as being at fault.

In addition to these issues, the rig itself did not possess enough fail-safes and emergency controls to ensure worker safety. None of the protective systems could stop the flow of

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<sup>515</sup> BP ACCIDENT INVESTIGATION REPORT, *supra* note 21, at 17; *see also supra* note 23 and accompanying text.

<sup>516</sup> BP ACCIDENT INVESTIGATION REPORT, *supra* note 21, at 23.

<sup>517</sup> *Id.* at 44.

<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 99.

hydrocarbons, nor did systems effectively control potential ignition sources. BP's accident report suggests one cause of this protective gap was a "high level of reliance upon manual/human intervention in the activation of *Deepwater Horizon* safety systems, which included well control response."<sup>520</sup> A look into Transocean's maintenance records of the rig reveals an ineffective maintenance management system.<sup>521</sup> A prior incident at the well site on March 8, 2010, revealed that the crews were unprepared to deliver an effective emergency response, yet Transocean took no actions to correct the situation.<sup>522</sup> Transocean's maintenance records were also organized in such a way as to make it very difficult to track and ensure regulatory compliance.<sup>523</sup> The accident report made mention of inadequate testing procedures from Haliburton that made the development of correct risk assessment and safety precautions difficult.<sup>524</sup> Based on this information, it is clear that serious questions exist about the sufficiency of precautions to protect rig workers from a potential well fail.

When the rig exploded, the rig employees were thrust into a hostile environment. Unlike a simple leak or spill, the *Deepwater Horizon* failure resulted in a series of explosions beginning at 9:49 PM on April 20, as efforts to stabilize the rig were unsuccessful.<sup>525</sup> Of the 126 workers on board at the time, seventeen suffered serious injury and eleven lost their lives.<sup>526</sup> Not all of the 126 rig workers were BP employees; Transocean employed many, while the others were from contracted firms such as Haliburton, Anadarko, and M-I Swaco.<sup>527</sup>

Following the evacuation, BP kept some rig workers on boats or other rigs for fifteen hours or more.<sup>528</sup> When the company

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520 *Id.* at 139.

521 *Id.* at 48.

522 *Id.* at 107.

523 *Id.* at 167.

524 *Id.* at 67.

525 *Id.* at 29.

526 *Id.* at 9.

527 Joel Achenbach, *Oil Spill Hearings Focus on Who Was in Charge After the Blast*, WASH. POST, Oct. 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100501793.html> (identifying those companies as being present at the BP Hearings).

528 Joseph Shapiro, *Rig Survivors Felt Coerced to Sign Waivers*, NAT'L PUB. RADIO (May 6, 2010), <http://www.npr.org/templates/story/story.php?storyId=126565283>.

finally brought the workers to shore, BP immediately presented the rig workers with boilerplate waiver forms, in what some have speculated was an attempt to absolve their employer, Transocean, from liability.<sup>529</sup> Transocean claimed the forms were standard after such an event and that Coast Guard practices were responsible for causing the delays in bringing rig workers home.<sup>530</sup>

## 2. Compensation for Injured Rig Workers

Relief for injured oil workers is available under general federal maritime law, the Jones Act,<sup>531</sup> and for the family of those rig workers killed, the Death on the High Seas Act.<sup>532</sup> The Outer Continental Shelf Lands Act<sup>533</sup> provides the relevant structure for federal regulation affecting the safety standards for oil rig workers.

For oil rig workers injured on the *Deepwater Horizon*, compensation under maritime law is the simplest form of relief. Deep water drilling operations are subject to federal law through the jurisdictional provision of the Outer Continental Shelf Lands Act, which states that “the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the Outer Continental Shelf, or which involves rights to such minerals.”<sup>534</sup> Within federal courts, deep water oil rig workers are treated under maritime contract, with the Fifth Circuit holding that “even a contract for offshore drilling services that does not mention any vessel is maritime if its execution requires the use of vessels.”<sup>535</sup> Admiralty law provides a generalized liability in which the “employer’s responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment.”<sup>536</sup> Under general maritime

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<sup>529</sup> *Id.*

<sup>530</sup> Press Release, Transocean, Transocean Ltd. Issues Statement of Clarification (May 11, 2010), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle\\_pf&ID=1425590&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle_pf&ID=1425590&highlight=).

<sup>531</sup> 46 U.S.C. § 30104 (2006 & Supp. II).

<sup>532</sup> 46 U.S.C. § 30302 (2006).

<sup>533</sup> See 43 U.S.C. § 1333(a)(1) (2006).

<sup>534</sup> 43 U.S.C. § 1349(b)(1) (2006).

<sup>535</sup> *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500–01 (5th Cir. 2002).

<sup>536</sup> *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732 (1943).

law "the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."<sup>537</sup>

The most important statute potentially covering oil rig workers is the Merchant Marine Act of 1920, more commonly known as the Jones Act.<sup>538</sup> The statute states that "a seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer."<sup>539</sup> The Jones Act gives a seaman "the right to sue in an action at law for damages arising from the negligence of the owner or personnel of a 'vessel' aboard which the seaman is employed."<sup>540</sup> The Act "does not define the term 'seaman' and therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection."<sup>541</sup>

A worker making a claim under the Jones Act has a number of categories of damages from which to ensure relief. Courts have recognized that a plaintiff in a Jones Act suit "is entitled to recover damages for all his past, present and probable future harm attributable to the defendant's tortious conduct. Those damages include pain and suffering and mental anguish."<sup>542</sup> A Jones Act claim can also seek damages for loss of past wages and loss of future earning capacity,<sup>543</sup> both current and future medical expenses,<sup>544</sup> and interest "as compensation for the use of funds to which the claimant was rightfully entitled."<sup>545</sup>

For oil rig workers seeking compensation for injuries under the Jones Act, the first step is to determine just how they, as well as the rigs they work on, are classified under the law. In order to be

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537 *The Osceola*, 189 U.S. 158, 175 (1903).

538 46 U.S.C. § 30104 (2006 & Supp. II).

539 *Id.*

540 *Offshore Co. v. Robinson*, 266 F.2d 769, 771 (5th Cir. 1959).

541 *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995).

542 *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 317 (5th Cir. 1986).

543 *See, e.g., Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988).

544 *See, e.g., Saleeby v. Kingsway Tankers, Inc.*, 531 F. Supp. 879, 883 (S.D.N.Y. 1981).

545 *See, e.g., Courville v. Cardinal Wireline Specialists, Inc.*, 775 F. Supp. 929, 940 (W.D. La. 1991).

covered under the Jones Act, a worker must meet two distinct criteria.<sup>546</sup> First, the worker must be considered a “seaman” for the purpose of the statute. “Seaman” has been construed broadly in a number of federal decisions<sup>547</sup> and applies well to this context. Suit has already been filed by several *Deepwater Horizon* oil rig workers based on Jones Act claims.<sup>548</sup>

Second, in order to be covered as a Jones Act seaman, the *Deepwater Horizon* itself must also be classified as a vessel. Rigs sharing many of the characteristics of the *Deepwater Horizon* have been found by courts to be vessels for Jones Act classification, focusing on factors which designate “the purpose for which the craft is constructed and the business in which it is engaged.”<sup>549</sup> A “non-self-propelled barge which is moved from one drilling location to another by tugs . . . and is fitted with sleeping quarters and a galley,” was considered for vessel classification where the court found “there can be little question that the drilling barge known as Rig No. 4 is a vessel.”<sup>550</sup> The mobile nature of a rig such as the *Deepwater Horizon*, which is designed to establish drilling sites and move on to new prospects, makes it highly likely that it would be classified as a vessel under the Jones Act.

The Death on the High Seas Act also allows members of a deceased seaman’s family to bring suit.<sup>551</sup> The Death on the High Seas Act “limits the class of beneficiaries to the decedent’s ‘wife, husband, parent, child, or dependent relative,’ establishes a two-year period of limitations . . . and provides that contributory

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<sup>546</sup> 46 U.S.C. § 30104 (2006 & Supp. II).

<sup>547</sup> *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 346 (1991); *see, e.g.*, *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F. Supp. 909, 911–12 (E. D. La. 1963); *cf. Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479–80 (5th Cir. 1976) (while definition of “seaman” is expanded far beyond formally assigned maritime crews, steel worker who fell from bridge under repair by floating cranes is only connected to the vessel in a transitory capacity, and was not injured in the course of service of that vessel).

<sup>548</sup> Christopher Bauer, *Injured Deepwater Horizon Oil Rig Workers and Widow File Jones Act Personal Injury and Wrongful Death Lawsuit Against BP in Galveston*, LEXISNEXIS EMERGING ISSUES LAW COMMUNITY (May 6, 2010, 1:45 PM) [http://www.lexisnexis.com/Community/emergingissues/blogs/gulf\\_oil\\_spill/archive/2010/05/06/injured-deepwater-horizon-oil-rig-workers-and-widow-file-jones-act-personal-injury-and-wrongful-death-lawsuit-against-bp-in-galveston.aspx](http://www.lexisnexis.com/Community/emergingissues/blogs/gulf_oil_spill/archive/2010/05/06/injured-deepwater-horizon-oil-rig-workers-and-widow-file-jones-act-personal-injury-and-wrongful-death-lawsuit-against-bp-in-galveston.aspx).

<sup>549</sup> *Blanchard v. Engine & Gas Compressor Servs., Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978).

<sup>550</sup> *Guilbeau*, 215 F. Supp. at 910–11.

<sup>551</sup> 46 U.S.C. § 30302 (2006).

negligence will not bar recovery.”<sup>552</sup> An action under the Death on the High Seas Act does not require negligence, as the Act “gives a remedy for breach of the warranty of seaworthiness and . . . the libellant may recover thereunder without proof of negligence or culpability.”<sup>553</sup> This degree of freedom in structuring claims works to the benefit of the victims and ensures that they have a greater chance in receiving effective relief.

However, the narrow scope of the Death on the High Seas Act may make it ineffective as a comprehensive source of relief for those dependent on the deceased.<sup>554</sup> By limiting the payment of benefits to those fully dependent on the deceased, the statute constrains recovery to the benefit of the responsible party and at the expense of the victim. For some workers, the coverage under this act is extremely low. For example, the family of one deceased rig worker, who was single with no dependents, may end up claiming no more than \$1000 under the Death on the High Seas Act; his body was never found, so the lower funeral cost translated to an even lower payout.<sup>555</sup> The Senate is currently considering Senate Bill 3463, which would expand coverage to non-pecuniary damages and pre-death pain and suffering<sup>556</sup> and is a companion bill to the already-passed House Resolution 5503.<sup>557</sup> The pending legislation, however, does not address the limited set of people covered by the Act and did not make significant progress in the Senate after it was introduced.<sup>558</sup>

<sup>552</sup> Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620 (1978).

<sup>553</sup> Chermesino v. Vessel Judith Lee Rose, Inc., 211 F. Supp. 36, 39 (D. Mass. 1962).

<sup>554</sup> Cf. Lawson v. United States, 88 F. Supp. 706, 709 (S.D.N.Y. 1950) (allowing deceased bigamist’s second, illegitimate but bona fide, wife to recover under DOHSA).

<sup>555</sup> Stephanie Mencimer, *Will the Cruise Ship Industry Do BP’s Dirty Work?*, THE ATLANTIC (June 16, 2010, 8:30 AM), <http://www.theatlantic.com/national/archive/2010/06/will-the-cruise-ship-industry-do-bps-dirty-work/58188/>.

<sup>556</sup> Survivors Equality Act of 2010, S.3463, 111th Cong. (2010); Jim Walker, *Death on the High Seas Act Protects BP and Cruise Lines at the Grieving Family’s Expense*, CRUISE L. NEWS, June 16, 2010, <http://www.cruiselawnews.com/2010/06/articles/maritime-death/death-on-the-high-seas-act-protects-bp-and-cruise-lines-at-the-grieving-familys-expense/>.

<sup>557</sup> H.R. 5503, 111th Cong. (2010), available at <http://www.opencongress.org/bill/111-h5503/text>; Kim Geiger, *House OKs Bill to Allow Deepwater Horizon Victims’ Families to Sue*, L.A. TIMES, July 1, 2010, <http://articles.latimes.com/2010/jul/01/nation/la-na-high-seas-20100702>.

<sup>558</sup> See *Bill Summary & Status—111th Congress (2009-2010) S. 3463*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/>



The dangers facing rig workers were made greater by the lack of effective training, planning, and consistency of maintenance aboard the *Deepwater Horizon*. Regulations and safety procedures in place at the time of the accident, paired with the way in which they were operationalized, did not prevent worker injury. In the aftermath of the spill, the Jones Act and other compensation mechanisms provide some relief for the injured workers. However, the Death on the High Seas Act, unless amended significantly, provides only limited relief for the family of the rig workers that were killed.

## V. TOWARDS GREATER JUSTICE

The preceding Parts reveal an overwhelming mosaic of justice problems involving many different laws and regulatory entities. However, despite their substantive diversity, they have three common themes: (1) powerful oil interests have structured laws in ways that make deepwater drilling easier and provide insufficient protection for vulnerable populations; (2) although both the government and companies at times made efforts to be sensitive to environmental justice concerns, these concerns were incorporated incompletely; and (3) inadequate information collection often makes precise analysis of environmental justice hard. These themes provide the basis for the proposals of this Part for addressing environmental justice more effectively in this context.

### A. Statutory Reform

The statutes and regulations applicable to the BP *Deepwater Horizon* Oil Spill structured the environmental injustice in its aftermath in two primary ways. First, many of the laws applicable provide exceptions or flexibility that operated to create unfairness. Second, many of the provisions for compensating vulnerable populations have limitations that create risks of unfairness. Changing these laws would make a major difference in achieving environmental justice.

The first problem infused the regulatory process leading up to the spill, and the Obama Administration is reforming offshore drilling regulation to ensure more rigorous environmental review and oversight of projects. However, these reforms still miss other important gaps. Most significantly, so long as RCRA designates

oil spill waste for municipal solid waste landfills, an environmental justice problem will persist due to the unequal siting of these landfills. This spill exacerbated that base justice problem because of its size and, in so doing, suggests a possibility for reform.<sup>559</sup> Even if elimination of the exception is not politically feasible in the current political climate, limiting its applicability to smaller spills might help to address the overloading of municipal landfills that occurred in the aftermath of the BP *Deepwater Horizon* Oil Spill.

Moreover, in many instances, a tightening of regulatory oversight could make a difference. For example, the HAZWOPER training for cleanup workers is adequate when properly administered, but there were significant uncertainties regarding whether this was the case here.<sup>560</sup> Regulations could mandate post-training tests instead of leaving that testing up to the discretion of those providing the training to help make sure that those interacting with hazardous materials actually have the knowledge they need to be safe.

The second problem could be addressed through a variety of reforms to the laws and structures for compensation. Most fundamentally, the magnitude of this spill reinforced that the liability caps in the OPA are too low to provide adequate compensation for victims. In addition, the elimination of the GCCF's late November deadline for emergency payments or, at the very least, clearer advertisement of its significance would have helped ensure that it did not have a differential effect on those who are less educated, face language barriers, or have fewer resources to support representation. While the GCCF has taken steps to address these concerns, we should learn from this problem to set up such a fund differently in the first place in the future.<sup>561</sup>

More broadly, the spill highlighted the need to revisit categories for compensation. For example, the decision to exclude mental health problems from GCCF compensation made it even harder for poor people to get the services that they needed.<sup>562</sup> Additional funds or free services to help address the serious mental health implications of the spill, whether provided for through the

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559 See *supra* Part II.A.

560 See *supra* Part IV.B.

561 See *supra* Part III.B.

562 See *id.*

GCCF or elsewhere, are needed. Similarly, limiting compensation under the Death on the High Seas Act to dependents and constraining significantly the types of damages available even to that group means that many people significantly affected by the deaths of oil rig workers have limited mechanisms to be compensated for their losses.<sup>563</sup> Reforms under consideration to expand these mechanisms could support fairer and more compassionate treatment of those suffering the loss of loved ones in the aftermath of the spill.

### *B. Better Incorporation of Environmental Justice into Decision Making*

Even if the barriers facing the above reforms are too great to make such measures politically viable, many of the environmental justice problems in the aftermath of the spill could have been significantly ameliorated through a more rigorous and consistent application of existing environmental justice law and policy. The problems with the spill response in particular suggest that cross-cutting interactions create environmental justice danger zones. Even if individual agencies are implementing their environmental justice mandates, these mandates need to be integrated clearly into each step of oil spill regulation and disaster planning.

This integration needs to begin before any spills take place, with the regulation of offshore drilling and disaster planning. While the more rigorous environmental regulatory process that the Obama Administration is implementing certainly helps environmental justice by making everyone safer, that process needs to explore the differential risks faced by vulnerable populations and any specific measures needed to provide them with greater protection. Similarly, the more environmental justice is specifically addressed in each component of the National Contingency Plan process, the greater the likelihood that these concerns will be adequately addressed in an emergency that requires quick action. For example, assuming that the proposed reforms to the waste disposal exception do not take place, the plan can work to identify a demographically diverse set of disposal sites and make sure that a low-income community of color does not get designated to receive such a high percentage of the waste, as occurred in the aftermath of the BP *Deepwater Horizon* Oil Spill.

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<sup>563</sup> See *supra* Part IV.C.

Rigorous environmental justice monitoring needs to take place in the aftermath of the spill as well. Since these concerns can be lost in both the haste of emergency response and the complexity of many agencies interacting, a person designated to monitor environmental justice on the National Contingency Plan team could help to ensure their consistent consideration. That person could assess plans for their differential impacts and explore whether less unfair alternatives exist. If that person were both integrated at a high level into the planning process and in touch with an organized network of citizen groups representing vulnerable populations, environmental justice would be addressed much more rigorously in the response than it was in the aftermath of this spill.

The Obama Administration has an opportunity to create these reforms, without navigating the complexities of legislative change, during its current reexamination of the National Contingency Plan process. The National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling suggested a variety of ways in which that process could be more inclusive of state and local actors, but did not specifically address this environmental justice aspect of inclusivity. However, the need to create clearer pathways for these concerns to be addressed in the process is just as important for creating a fairer and more harmonious response in the future.

### *C. Creation of More Information Pathways*

Whichever scheme is adopted moving forward, efforts to address environmental justice require adequate information. Vulnerable populations need to know what their options are and how to access the resources available to them. Those concerned about advancing environmental justice need to know what differential effects are taking place and why. Both of these types of information were sometimes inadequate in the aftermath of the spill.

The government responders made significant efforts to create the first type of information flow. Claim centers existed to help people with their efforts to gain compensation. OSHA warned workers that training might be inadequate. To address language barriers, materials were distributed in multiple languages.<sup>564</sup>

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<sup>564</sup> See *supra* Part IV.A.

Even with these efforts, gaps still remained. For example, the representation of the GCCF emergency claims process may not have adequately conveyed the significance of that deadline or made sure that those with the least resources to meet it did so. The existence of reports of people receiving unequal distribution of compensation for similar losses (or even more compensation with less loss) suggests that individuals' ability to submit claims may have varied.<sup>565</sup> These concerns suggest the need to systematically review how information can be distributed most effectively to close these gaps.

With respect to the second type of information flow, more consistent collection of demographic information would help to reveal patterns and, as a result, places where intervention should occur. This information is important with respect to each aspect of the response, compensation, and protection of workers. For example, the disaggregation of health data (while respecting confidentiality) in the context of both the spill itself and of injured cleanup and oil rig workers can reveal whether more vulnerable populations were disproportionately impacted. The collection of clearer demographic data of cleanup workers and trainees would reveal potential patterns in who was employed and the adequacy of training. Opportunities for environmental justice assessment were often lost in the aftermath of the BP *Deepwater Horizon* Oil Spill because of inadequate data collection.<sup>566</sup> These specific issues occurred in a broader context where the government struggled to gain adequate information about the spill itself.

Addressing these informational concerns could also be part of the above-mentioned systematic review. Such a review should consider the categories of demographic data that would be most helpful for environmental justice assessment, the extent to which such information is being collected now, which types of collection are most feasible, and how to navigate privacy concerns. Reexamining information flow in both of these contexts would help to ensure that future environmental justice analysis can occur more efficiently and effectively.

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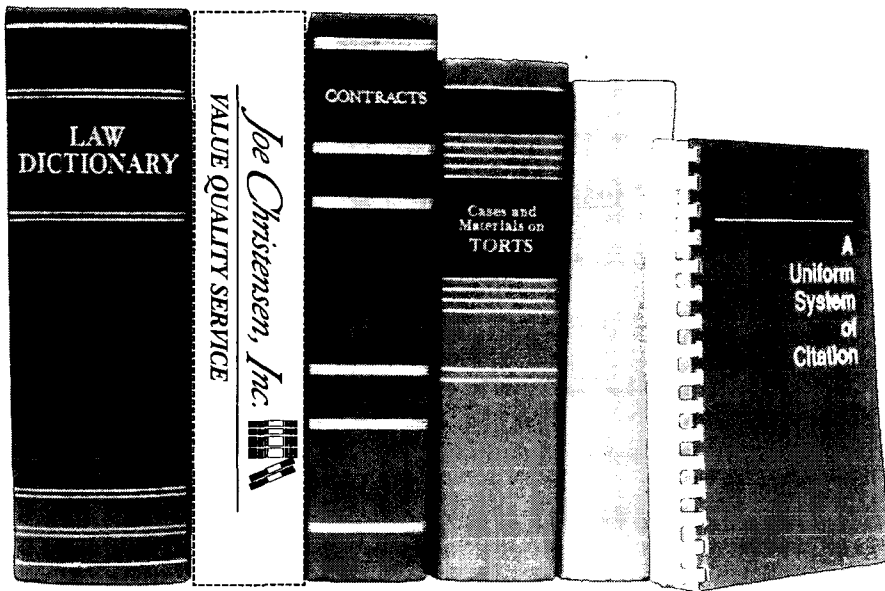
<sup>565</sup> See Kim Barker, 'Spillionaires' Are the New Rich After BP Oil Spill Payouts, WASH. POST, Apr. 13, 2011, [http://www.washingtonpost.com/national/spillionaires-are-the-new-rich-after-bp-oil-spill-payouts/2011/04/11/AFjaqsWD\\_story.html](http://www.washingtonpost.com/national/spillionaires-are-the-new-rich-after-bp-oil-spill-payouts/2011/04/11/AFjaqsWD_story.html).

<sup>566</sup> See *supra* Parts IV–V.

CONCLUDING REFLECTIONS ON THE FUTURE OF OIL AND  
ENVIRONMENTAL JUSTICE

While the full impact of the BP *Deepwater Horizon* Oil Spill will only become clearer over a period of years, the response to it highlighted equality problems embedded in laws and the way in which the government implements them. These are problems that we do not need to wait for more data to fix. They require legal reform and a systematic rethinking of how environmental justice is approached in the context of deepwater drilling and oil spills.

Moreover, the differential distribution of risks and benefits in this context reinforces the need for context-specific analyses of environmental justice concerns arising from complex environmental problems. When a wide range of entities interact through laws covering many substantive areas, equality concerns can be lost. Systematic examination of legal provisions for ways in which they create conditions of inequality, of plans for cross-cutting interaction to ensure that they incorporate environmental justice, and of information flows to ensure that vulnerable populations get resources and those assessing environmental justice can do so would make a difference. This type of examination needs to occur in the context of this spill and more broadly.



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