

# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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VOLUME 9

NUMBER 1

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## CORPORATE CRIMINAL CONSEQUENCES OF THE DEEPWATER HORIZON DISASTER

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### *I. Introduction*

On April 20, 2010, a drilling rig operated by BP, previously known as The British Petroleum Company, exploded off the coast of Louisiana in the Gulf of Mexico immediately killing 11 individuals.<sup>1</sup> The explosion caused an oil spill that lasted over four months and leaked tens of thousands of barrels of oil into the surrounding waters.<sup>2</sup> The overwhelming scope of the damages incurred has led some to call the incident the worst human-caused

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1. Information for Seaman's Manslaughter, Clean Water Act, Migratory Bird Treaty Act and Obstruction of Congress at 15, *United States v. BP Expl. and Prod. Inc.*, No. 12-292 (E.D. La. 2010).

2. *Id.* at 16.

environmental disaster in US history.<sup>3</sup> A few months after the incident, the United States Attorney for the Eastern District of Louisiana filed an information charging BP with 11 counts of seaman's manslaughter, one violation of the Migratory Bird Treaty Act, one violation of the Clean Water Act, and one count of obstruction of Congress.<sup>4</sup> In 2013, BP and the United States agreed on the terms of a plea deal in which BP pleaded guilty to each charge in the information.<sup>5</sup> This note is an examination of the United States District Court for the Eastern District of Louisiana's decision to accept that plea bargain.

## *II. Facts of the Case*

BP Exploration and Petroleum, Inc. ("BP") is a subsidiary of BP PLC, a global energy corporation headquartered in London, England<sup>6</sup>. In May, 2008, BP entered an agreement with the Minerals Management Service, a Department of the Interior agency, as lessor and operator of a well located in the Gulf of Mexico off Louisiana's coast ("Macondo Well"). BP contracted Transocean Ltd. ("Transocean") to supply labor and a drilling rig ("Deepwater Horizon") for the well.<sup>7</sup> BP, through Transocean, engaged in deep sea drilling seeking to reach oil and natural gas trapped below the seabed.<sup>8</sup> At all times during the drilling BP was responsible for compliance with Bureau of Ocean Energy Management, Regulation, and Enforcement's requirement to "ensure the protection of personnel, equipment, natural resources, and the environment."<sup>9</sup>

The drilling occurred through pumping a heavy, viscous liquid known in the industry as "mud" through long metal pipes called "risers" connecting Deepwater Horizon to a large structure called a "blowout preventer" placed on the seafloor.<sup>10</sup> Successful drilling required operators to carefully balance the pressure of gas attempting to escape fractures created in the earth by the drilling with the pressure pumping mud through the risers toward the

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3. Walton, Agnes, *The Biggest Environmental Disaster in US History Never Really Ended*, Vice, (Last accessed Feb 24, 2023), <https://www.vice.com/en/article/884z93/the-biggest-environmental-disaster-in-us-history-never-really-ended>.

4. Information at 18-24.

5. Guilty Plea Agreement at 15, *United States v. BP Expl. and Prod.*, No. 12-292 (E.D. La. 2013).

6. Information at 1.

7. *Id.* at 4.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 3.

seabed.<sup>11</sup> If the drilling operators failed to maintain this balance, a rush of oil and gas migrating to the well, known as a “kick,” posed a risk of catastrophic damage.

To avoid a kick, the well pressure was monitored by negative testing, a process in which the mud pressure acting on the reservoir was reduced below the reservoir’s pressure acting in the opposite direction toward Deepwater Horizon. In a successful test, cement in the blowout preventer serves as a barrier preventing gas and oil from escaping upward. Any increases in pressure indicated a risk of oil and gas escaping through the risers in a kick.<sup>12</sup> Internal protocol required “well site leaders” stationed at the Deepwater Horizon by BP for safety standards compliance to notify a team of engineers on stand-by off-shore of any increases in pressure for further evaluation.<sup>13</sup>

On April 20, 2010, negative testing revealed a pressure build up in one of the risers.<sup>14</sup> The site leaders did not notify the engineers of the increase.<sup>15</sup> The site leaders ignored the pressure readings on the initial pipe and instead tested a pipe which showed no pressure build up.<sup>16</sup> Based on the negative testing of the second riser, site leaders proceeded to replace heavier mud that had been pumped through the pipes with lighter seawater.<sup>17</sup> This lighter liquid was unable to hold down the reservoir, allowing oil and gas to escape. The ensuing kick caused multiple explosions and fires lasting two days.<sup>18</sup> Eleven individuals died in the destruction.<sup>19</sup> Additionally, oil began leaking into the ocean in large quantities.<sup>20</sup>

A task force (“Unified Command”) consisting of representatives from the US government, BP, and Transocean was immediately established to minimize the damage of the spill.<sup>21</sup> The task force was directly tasked with coordinating the response effort.<sup>22</sup> Four days after the incident, Unified Command publicly estimated that 10,000 barrels of oil per day (“BOPD”)

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11. *Id.*

12. *Id.* at 4.

13. *Id.*

14. Plea Agreement at 15.

15. *Id.*

16. Information at 5.

17. *Id.* at 6.

18. *Id.*

19. *Id.* at 7.

20. *Id.*

21. Information at 8.

22. *Id.*

were leaking from the well into the Gulf.<sup>23</sup> Two days later, the National Oceanic and Atmospheric Administration (“NOAA”) estimated 5,000 BOPD as the flow rate but cautioned the “methodologies used were ‘highly unreliable’” insofar as the actual number may have been “ten times” greater.<sup>24</sup>

David Rainey, BP’s Vice President of Exploration for Gulf of Mexico also working as Deputy Incident Commander at Unified Command, resolved to produce his own estimate.<sup>25</sup> Rainey discovered two methodologies for flow rate estimating on Wikipedia: the American Society for Testing and Materials (“ASTM”) method and the European “Bonn” method.<sup>26</sup> Rainey had no scientific background, and BP employed individuals specifically trained in the nuances of the relevant field, but Rainey proceeded to use the methods to produce his own figures.<sup>27</sup> The Bonn method yielded results in excess of 92,000 BOPD, while the ASTM method produced much lower figures conforming with the NOAA estimate. However, Rainey altered the ASTM method to arrive at predetermined figures by “reverse engineer[ing] results consistent with NOAA’s preliminary BOPD estimate.”<sup>28</sup> BP did not disclose this alteration but maintained the ASTM figures as the best estimate. BP’s internal efforts relied on estimates produced by a team of experts who calculated figures ranging from 14,000 to 146,000 BOPD.<sup>29</sup> One of BP’s expert engineers later contacted BP executives to express concern over the company publicly maintaining 5,000 BOPD as the best estimate.<sup>30</sup>

Rainey later prepared his findings in a report on Unified Command’s efforts to estimate the flow rate of oil leaking from the well.<sup>31</sup> In his report, Rainey failed to mention the Bonn method’s results, or any figures produced by the internal team of engineers. He also did not disclose that the ASTM method’s figures included in the report were a result of an inaccurate use of the method.<sup>32</sup> In response to concerns over flow rate estimates being inaccurately low, Unified Command established a new

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23. *Id.*

24. *Id.*

25. *Id.* at 9.

26. *Id.*

27. *Id.* at 10.

28. *Id.*

29. *Id.* at 11.

30. *Id.* at 12.

31. *Id.*

32. *Id.*

group of independent experts in a Flow Rate Technical Group (“FRTG”) to prepare a fresh batch of estimates.<sup>33</sup> The FRTG estimated a flow rate of 62,000 BOPD immediately after the explosion and 53,000 BOPD at the time their estimates were prepared.<sup>34</sup>

The House Subcommittee on Energy and Environment (“Subcommittee”) launched a formal investigation into the events surrounding the explosion and oil spill.<sup>35</sup> Rainey informed the Subcommittee that 5,000 BOPD was the most reliable estimate of the flow rate of leaking oil, and again omitted any mention of the Bonn method, internal estimates, or the “ASTM” method’s inaccuracy. Ten days later, the Subcommittee Chairman sent a letter to BP. In the letter, the Chairman accused BP of dishonesty regarding the flow rate and “stated that Congress was concerned that an ‘underestimation of the flow may be impeding the ability to solve the leak and handle management of the disaster.’”<sup>36</sup> The Subcommittee then issued fifteen questions to BP seeking more information about the flow rate.<sup>37</sup> Included were questions about the scientific basis for the methods BP relied on to produce the figures included in its reports and testimony, and a request for any other documents produced by BP that relate in any way to the flow rate inquiry.<sup>38</sup> In its answers to the subcommittee, BP relied on Rainey’s figures and again asserted 5,000 BOPD as the best estimate. While preparing its answers, BP continually received new estimates that exceeded 5,000 BOPD from both internal BP teams using new testing procedures and the FRTG.<sup>39</sup> None of this information was disclosed in BP’s prepared answers to the Subcommittee.<sup>40</sup>

Respondent superior allows a corporation to be convicted of crimes based on the actions of its agents.<sup>41</sup> A corporation should not receive any special treatment in its prosecution based on its status as a corporation. For the government to secure a conviction, it must prove that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as

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33. *Id.* at 13.

34. *Id.*

35. *Id.* at 14.

36. *Id.* at 15.

37. *Id.*

38. *Id.*

39. *Id.* at 16.

40. *Id.*

41. *Bringing Criminal Charges Against Corporations*, Dept of Justice (1999).

the responsible individuals, as potential criminal targets.”<sup>42</sup> The prosecutor should weigh all relevant factors when determining whether to file criminal charges against the corporation as an entity or its agents in their individual capacities.<sup>43</sup> Factors such as public harm inflicted, the pervasiveness of wrongdoing throughout the corporation, any history of similar conduct by the corporation, timely disclosure of wrongdoing, and the corporation’s remedial actions taken on its own among other considerations weigh in favor of the filing of criminal charges against the corporation.<sup>44</sup>

Federal prosecutors later filed an information in the Eastern District of Louisiana charging BP with eleven counts of seaman’s manslaughter under 18 U.S. Code § 1115, one violation of the Clean Water Act under 33 U.S. Code §§ 1319(c)(1)(A) and 1321(b)(3), one violation of the Migratory Bird Treaty Act under 16 U.S. Code §§ 703 and 707(a), and one count of obstruction of Congress under 18 U.S. Code § 1505. On November 15, 2012, before the case proceeded to the indictment stage, BP and the federal government agreed to enter a plea agreement under which BP pleaded guilty to all fourteen charged counts. Special consideration should be paid to the nature and seriousness of the offense, specifically including harm imposed to the public as a whole and the pervasiveness of wrongdoing throughout the corporation.

In all, the National Oceanic Atmospheric Administration estimates that 134 million gallons of oil were released from the well into the Gulf of Mexico over a span of 87 days affecting 1,300 miles of coastline across five states<sup>45</sup>. In addition to the eleven drill workers, thousands of animals perished in the aftermath, and thousands more endangered species were exposed to oil contamination in their habitats.<sup>46</sup> The financial damage imposed by the disaster is still difficult to pinpoint, but one study carried out by a team of university professors commissioned by the NAOO estimated the damage to natural resources alone to be \$17.2 billion.<sup>47</sup>

### *III. Law of the Case*

The plea agreement BP entered with the federal government pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is subject to

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42. *Id.* at 2.

43. *Id.* at 3.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

review by the court presiding over the case.<sup>48</sup> After reviewing the agreement, the court then determines whether to accept or reject it.<sup>49</sup> In its evaluation, “the Court must make an ‘individualized assessment of the plea agreement’ based on the facts and circumstances specific to the case.”<sup>50</sup> Factors the court may consider include but are not limited to “the exigencies of the plea bargaining system from the government’s point of view,’ including ‘limited resources and uncertainty of result.’”<sup>51</sup> The court may not consider policy grounds or prosecutorial discretion with respect to charging other individuals with crimes related to the incident, but it may reject an agreement for insufficiency of punishment.<sup>52</sup>

The court must also consider statutory requirements under 18 U.S.C. §§ 3553, 3563, and 3572, which pertain to the imposition of sentences and fines, and mandatory conditions of probation.<sup>53</sup> Under these statutes, the court is required to consider numerous factors in reaching its decision to accept or reject the agreement. Under 18 U.S.C. § 3553, when imposing a sentence, the court must consider “the nature and circumstances of the offense and the history and character of the defendant,” “the need for the sentence imposed to reflect the seriousness of the offense,” and “the kinds of sentencing available” among others.<sup>54</sup> Another statute, 18 U.S.C. § 3563 provides for conditions of probation.<sup>55</sup> The statute imposes mandatory conditions of fines, restitution, or community service for felonies such as the seaman’s manslaughter counts to which BP pleaded guilty. The statute also permits numerous discretionary options allowing for the construction of a more personalized set of conditions.<sup>56</sup> Under 18 U.S.C. § 3572, when deciding whether to impose a fine, the court must consider factors including “defendant’s income, earning capacity, and financial resources,” “the burden that the fine will impose upon the defendant,” and “any pecuniary loss inflicted as a result of the offense.”<sup>57</sup> In light of the totality of the circumstances and the factors considered, the court “must determine whether the proposed plea agreement is a ‘reasonable disposition’ given the

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48. *United States v. BP Expl. and Prods.*, No. 12-192 (E.D. La. 2013).

49. *Id.*

50. *Id.*

51. *Id.* at 2.

52. *Id.* at 1.

53. *Id.* at 2.

54. 18 U.S.C.A. § 3553 (West 2018).

55. 18 U.S.C.A. § 3563 (West 2008).

56. *Id.*

57. 18 U.S.C.A. § 3572 (West 1996).

available alternatives, the risks posed by those alternatives, and the limits in what the law allows.”<sup>58</sup>

#### *IV. The Plea Agreement*

Under the plea agreement, BP pleaded guilty to all fourteen counts charged in the information.<sup>59</sup> For each of the eleven counts of seaman’s manslaughter, BP was fined \$500,000 for a total of \$5.5 million.<sup>60</sup> These counts were subject to a statutory cap of the greater of \$500,000 or twice the gain or loss.<sup>61</sup> For the Clean Water Act violation, BP was fined \$1.15 billion.<sup>62</sup> This fine was levied under a statutory provision that allows for a court to fine an offender twice the pecuniary loss suffered by another party.<sup>63</sup> Another statute required the fines imposed under the Clean Water Act to be placed in a trust fund to be used for remediation.<sup>64</sup> This fund is managed by the United States Coast Guard’s National Pollution Funds Center and serves as a source of federal funding for oil spill cleanup efforts.<sup>65</sup> For the Migratory Bird Treaty Act violation, BP was fined \$100 million which went to the Wetlands Conservation Fund. The same statute allowing for the recovery of twice the pecuniary loss was applied to impose a fine exceeding the statutory cap of \$15,000.<sup>66</sup> Additionally, BP was placed on probation for a period of five years, and as a special condition of probation agreed to pay a total of \$2.4 billion in non-fine payments to various research and recovery projects.<sup>67</sup>

#### *V. Analysis of Agreement*

The court began its inquiry into the proposed agreement by fulfilling its statutory obligation to consider the seriousness of the offense and the history and characteristics of the defendant.<sup>68</sup> The court first acknowledged

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58. BP Expl. at 3.

59. Plea Agreement at 2.

60. *Id.*

61. 18 U.S.C.A. 1115 (West, current through P.L. 117-262).

62. Plea Agreement at 4.

63. 18 U.S.C.A. 3571 (West, P.L. 117-262).

64. 33 U.S.C.A. 1319(c)(1)(A) (West 2019).

65. *The Oil Spill Liability Trust Fund*, National Pollution Fund Center, (Last accessed Feb. 24, 2023), [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/about\\_npfc/osltf/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/about_npfc/osltf/).

66. 18 U.S.C.A. 3571.

67. Information at 20.

68. 18 U.S.C.A. § 3553



the catastrophic effect of the event: eleven deaths and substantial damage to the ecosystem.<sup>69</sup> The court also pointed out that the consequences of the situation came not only from countless acts of negligence in failing to respond to signs of danger and bypassing safety measures such as ignoring negative pressure testing readings and failing to contact the offsite team for assistance with the situation, but also from multiple acts of willful conduct in an effort to minimize the optics of the situation. Rainey, acting as an agent of BP, obstructed the Senate subcommittee inquiry and undermined the operations of the joint task force. This willful deceit by a BP executive multiplied the economic damage to the surrounding areas. The court additionally emphasized the scope of the damage stretched from Louisiana to Florida and “killed multiple migratory birds including brown pelicans, laughing gulls, and northern gannets, among others.”<sup>70</sup>

Next, the court looked at BP’s history with similar offenses. In 2009, a refinery in Texas City, Texas owned by BP Products North America, Inc. exploded killing fifteen people.<sup>71</sup> That BP entity pleaded guilty to a felony violation of the Clean Air Act “admit[ing] that it knowingly violated a requirement that it have written procedures to maintain the integrity of its process equipment and knowingly failed to warn contractors in the vicinity of the know hazards in its operations.”<sup>72</sup> The court also pointed out that in 2006, BP Exploration Alaska was convicted of a Clean Water Act violation for an oil spill in Prudhoe Bay, Alaska.<sup>73</sup> This was BP Exploration’s second conviction after previously pleading guilty to a violation of the Comprehensive Environmental Response, Compensation, and Liability Act in 2000 for failing to report dumping of toxic materials by a BP contractor along the North Slope of Alaska.<sup>74</sup> Additionally, the court noted, another BP entity pleaded guilty to charges related to price manipulation in 2007 and agreed to pay a total of \$300 million in penalties.<sup>75</sup>

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69. BP Expl. at 5.

70. *Id.*

71. *Accident Description: BP America Refinery Explosion*, (Last accessed Feb. 24, 2023), Chemical Safety and Hazard Investigation Board, <https://www.csb.gov/bp-america-refinery-explosion/>.

72. BP Expl. at 5.

73. *United States v. BP Expl.* (Alaska), No. A99-549-CV (D. Alaska).

74. *United States v. BP Expl.* (Alaska), No. 3.99-cr-001 (D. Alaska).

75. *Government’s Agreed Motion for Finding of Relatedness and Reassignment, Commodity Futures Trading Comm’n v. BP Prods. N. Am., Inc.*, 2007 WL 3407430 (N.D. Ill. Oct. 25, 2007) (1:06-cv-03503)

The court concludes that “[g]iven the severity of BP’s conduct in this case and its staggering consequences, as well as the criminal history of the BP corporate family, it is apparent ... that an acceptable sentence must impose severe fines and conduct remedies.”<sup>76</sup> Sufficient deterrence of future conduct will only be achieved by an order “several magnitudes more severe than any previously imposed on any BP company.”<sup>77</sup> The court held that the sentence outlined in the plea agreement is “reasonably calculated to accomplish these statutory objectives of sentencing.”<sup>78</sup>

According to the court, the charges reflected the seriousness of the offense: eleven counts of manslaughter for the eleven deaths caused by negligence onboard the Deepwater Horizon drill rig, Clean Water Act and Migratory Bird Treaty Act violations reflected the damage to the environment and wildlife, and the obstruction of Congress count reflects the willful thwarting of the Senate subcommittee’s inquiry. The convictions also carry collateral consequences for BP in civil litigation.<sup>79</sup> Finally, and most importantly in the court’s view, is that the amount of the fines and other payments are reasonable considering the risk of a trial, previous fines imposed, the focus on remedying damages, and other financial consequences BP is facing as a result of the Deepwater Horizon explosion and oil spill.<sup>80</sup>

In total, BP agreed to pay \$4 billion: \$1.256 billion in fines and \$2.744 billion in restitution payments. These amounts far exceeded the statutory maximums but are nonetheless valid pursuant to the Alternative Fines Act, which allows for an individual or entity to be fined twice the total pecuniary gain or loss from a violation.<sup>81</sup> But to successfully invoke this statute, the government would be forced to prove its applicability, otherwise fines would be statutorily capped at a total of \$8.19 million: \$500,000 for each manslaughter charge, \$25,000 per day of the Clean Water Act violation for \$2.175 million total, and \$15,000 for the Migratory Bird Act violation, and \$500,000 for the obstruction of Congress charge. The court expressed a lack of confidence in the government’s ability to establish the Alternative Fines Act’s applicability because of a provision precluding its application when it would “unduly complicate or prolong the sentencing process.”<sup>82</sup>

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76. BP Expl. at 6.

77. *Id.*

78. *Id.*

79. *Id.* at 7.

80. *Id.*

81. 18 U.S.C.A. § 3572 (West 1996).

82. *Id.*

If this provision is triggered, the court as a matter of law would be unable to proceed with fines under the Alternative Fines Act. The court reasoned that this obstacle would be burdensome for the government to overcome. As the court notes, reliance on this provision is not unprecedented, especially given the Supreme Court's ruling in *Southern Union Co. v. United States* extending the doctrine from *United States v. Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt" to cover statutory fines.<sup>83</sup>

In *Southern Union Co.*, a gas utility company was convicted of violating the Resource Conservation and Recovery Act for storing toxic materials without necessary permits.<sup>84</sup> The statutory maximum fine under the Act was \$50,000 per day of violation, and the indictment alleged a violation stretching a period of 762 days.<sup>85</sup> The probation office calculated a statutory maximum of \$38.1 million based on the entire duration of the alleged offense.<sup>86</sup> The gas utility company appealed arguing that this fact must have been decided by a jury under *Apprendi*.<sup>87</sup> The Court reversed and remanded holding that there is no difference between fines and imprisonment for purposes of *Apprendi*, thus a fine for a conviction of the Resource Conservation and Recovery Act larger than \$50,000 is unconstitutional under the Sixth amendment right to trial by jury unless the fine was imposed based on facts decided by a jury beyond a reasonable doubt.<sup>88</sup>

In a particularly relevant example found in *United States v. CITGO Petroleum Corp.*, an oil refiner was convicted of Clean Water Act violations related to operating an oil water separator without statutorily required emission control devices and Migratory Bird Act violations for the taking of migratory birds.<sup>89</sup> However, the court declined to permit the use of the Alternative Fines Act reasoning that under the recent decision in *Southern Union*, the court would essentially have to conduct an additional trial to ascertain the damages.<sup>90</sup> The court concluded that this constituted

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83. BP Expl. at 9.

84. *Southern Union Co. v. U.S.*, 567 U.S. 243 (2012).

85. 42 U.S.C. 6928(d).

86. *Southern Union Co.* at 352.

87. *Id.* at 347.

88. *Id.* at 348.

89. *United States v. CITGO Petr. Corp.*, 801 F.3d 477 (5th Cir. 2015).

90. *Id.*

“unduly complicat[ing] or prolong[ing] the sentencing process,” so the Alternative Fines Act could not be applied.<sup>91</sup>

Similarly, in *United States v. Sanford Ltd.*, a deep-water fishing company was convicted of violating the Act to Prevent Pollution from Ships.<sup>92</sup> The trial court, relying on *Southern Union*, held that the Alternative Fines Act constitutionally requires amounts constituting “gross gains” or “gross losses” to be submitted to the jury for a finding using the reasonable doubt standard.<sup>93</sup> The court in *Sanford* did not reach a determination regarding whether the use of the Alternative Fines Act would be prohibitively cumbersome, but expressed reservations given the new Constitutional constraints and required the government to submit more information regarding the number of witnesses and type of information it planned to present at the sentencing stage so the resources required for the use of the Alternative Fines Act to the facts could become clearer.<sup>94</sup>

Of the aforementioned cases, only *Southern Union* is binding authority for the Eastern District of Louisiana, but these sister courts’ applications of the doctrine would likely serve as guidance for the district court presiding over any trial stemming from the charges. Thus, if the federal government were to take BP to trial for the fourteen offenses, fines imposed beyond the statutory maxima must be based on the jury’s factual determinations beyond a reasonable doubt. Specifically, the jury must have decided beyond a reasonable doubt that the amount “constituted a gross gain” and that the amount “was derived . . . from the charged offenses.”<sup>95</sup> Although the precise standard of causal nexus sufficient to show that a gross gain derives from the charged offense is largely undecided, in *U.S. v. BP Products Inc.*, the court ruled that “common-law principles of causation mandate that gain or loss be both factually and proximately caused by the defendant’s acts.”<sup>96</sup>

The unprecedented scope of this case poses a substantial challenge in fulfilling this requirement for a sum that would meet any measure of sufficiency. In addition to the court potentially declining at the outset to permit the application of the Alternative Fines Act because it would unduly complicate the sentencing process, meeting the required evidentiary standard of beyond a reasonable doubt to impose penalties totaling of \$4 billion would be a Herculean feat of prosecutorial work. As the court notes,

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91. *Id.*

92. *United States v. Sanford Ltd.*, 878 F. Supp. 2d. 137 (D.D.C. 2012).

93. *Id.* at 142.

94. *Id.* at 153.

95. *Id.*

96. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d (S.D. Tex. 2009).

there are potentially hundreds of thousands of victims of the Clear Water Act violation.<sup>97</sup> Every individual who has suffered harm due to BP's contamination of the water is encompassed within Alternative Fines Act's "gross losses" language but ascertaining the full scope of injury would be undoubtedly subject to extreme dispute. Further, future losses would be nearly impossible to calculate. In sum, if the court were to permit the Alternative Fines Act to be used at trial, the damages portion would likely surpass the length of the rest multiple times over. The court in *BP Products*, decided before the *Southern Union* decision, considered arguments over whether *Apprendi* would apply to fine calculation and while stating that "there appear to be cogent arguments that *Apprendi* would not apply," strongly indicated that if *Apprendi* did apply, the resulting burden would trigger the undue complication provision and preclude use of the Alternative Fines Act.<sup>98</sup>

Interestingly, BP was only charged with a singular count of the Migratory Bird Treaty Act, but each "taking" or killing of a migratory bird encompassed within the statute constitutes a separate unit of prosecution. Generally, violations of the Migratory Bird Treaty Act seem to be charged individually, but multiple charges of the same violation under the Migratory Bird Treaty Act were seen in *BP Products*.<sup>99</sup> Estimates of the number of birds killed by the disaster range from 600,000 to 800,000 including 102 different species, many of which are covered by the Act. Each violation by a corporation is a potential \$15,000 fine under 17 U.S.C. § 707(a). While the same obstacles of showing factual and proximate causation would be faced with charging individual statutory violations, and in all likelihood the fines would total an amount much lower than the amount imposed in the plea deal, at the time it could have proven a way to collect more than the \$8.19 million without the litigation risk of triggering the undue complication provision. However, in 2015, eight years after the decision in the present case, the Fifth Circuit Court of Appeals ruled that "taking migratory birds" requires "conduct intentionally directed at the birds, such as hunting and trapping, and not commercial activity that unintentionally and indirectly caused migratory bird deaths."<sup>100</sup> Thus, this approach would likely have been struck down on appeal.

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97. BP Expl. at 10.

98. BP Prods. at 690.

99. *Id.* at 660.

100. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

Next, the court considered the fines imposed in the plea in relation to previous criminal fines. The court pointed out that the total fine is more than three times greater than the second greatest fine ever imposed.<sup>101</sup> The case also dwarfs any other environmental related fines. The court drew particular attention to the Exxon Valdez criminal proceedings in which Exxon was fined \$150 million for an oil spill caused by an oil tanker crashing into a reef, but ended up paying \$125 million after \$25 million was forgiven in exchange for cooperation with the clean-up effort.<sup>102</sup> The court pointed out that BP's Clean Water Act fine in the present plea deal is forty-six times greater than the corresponding fine in *Exxon Valdez*, and the total amount of all fines is 160 times greater than that of *Exxon Valdez*.<sup>103</sup> The *Exxon Valdez* oil spill leaked 11 million gallons of oil into the water, while the Deepwater Horizon disaster leaked an estimated 121 million gallons, although some recent estimates reach as high as 210 million gallons.<sup>104</sup> The scope of the Exxon Valdez disaster stretched an estimated 1,300 miles of coastline and inflicted \$300 million in damages to 32,000 citizens.<sup>105</sup> By contrast, the Deepwater Horizon disaster affected an area estimated to be around 1,200 square miles, with an estimated economic impact of 22,000 jobs eliminated and \$8.7 billion in losses.<sup>106</sup> Additionally, BP Products only paid \$50 million in fines as a result of the Texas City disaster that killed 15 people.<sup>107</sup> In sum, the fine imposed under the plea agreement seems to be proportionate to the damage inflicted based on similar cases of which there are not many. The court acknowledged that BP could clearly afford to pay more based on its \$375 million in total revenue in 2011, but emphasized that the purposes of the fine is imposing punishment in light of previous fines and deterring future conduct.<sup>108</sup>

Next, the court considered where the fine payments will go. The court noted that while traditionally fines go to the US Treasury, statutory provisions allow the fines in this case to help defray cleanup costs from the

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101. BP Expl. at 12.

102. In Re. the Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004).

103. *Id.*

104. *The toxic reach of Deepwater Horizon's oil spill was much larger—and deadlier—than previous estimates, new study says*, Washington Post, (Last accessed Feb. 24, 2023), <https://www.washingtonpost.com/climate-environment/2020/02/12/toxic-reach-deepwater-horizons-oil-spill-was-much-larger-deadlier-than-previous-estimates-new-study-says/>.

105. In Re. the Exxon Valdez at 1078.

106. *Id.*

107. BP Expl. at 13.

108. *Id.*

disaster.<sup>109</sup> The Clean Water Act fine, \$1.15 billion, was directed to the Oil Spill Liability Trust Fund managed by the United States Coast Guard.<sup>110</sup> Under the RESTORE Act of 2012, at least 80% of the fine will go specifically to the gulf states most impacted by the disaster.<sup>111</sup> Next, the Migratory Bird Treaty Act fine of \$100 million is statutorily required to be directed to the Department of Interior for the purposes of ecological restoration projects intended to benefit the species affected by the spill. The North American Wetland Conservation Act permitted the Department of Interior to allocate funds obtained from fines of the Migratory Bird Treaty Act as grants for the purpose of protecting wetlands in the United States, Mexico, and Canada.<sup>112</sup> As for the non-criminal fines stipulated to as special conditions of probation, the \$2.394 billion was directed to the National Fish and Wildlife Association, which used the funds to carry out restoration projects.<sup>113</sup> An additional \$350 million was paid to the National Academy of Sciences to further scientific understanding of oil spills and their prevention. The court ended this part of its review of the argument by acknowledging that none of the fines or other payments can restore the 11 lost lives, but the payment to the National Academy of Sciences will at least help prevent future disasters.<sup>114</sup>

The court then transitioned to discussing the payments given other liabilities BP faces and payments they have made because of the disaster. Following the lead of the court in the criminal proceedings stemming from the Texas City disaster, the court considered BP's outstanding civil liabilities in light of the payments agreed to in the plea agreement.<sup>115</sup> The court says that BP has spent a total \$24.2 billion in costs related to the spill through the third quarter of 2012 including payments to individuals and businesses, impact assessment, and environmental restoration efforts.<sup>116</sup> While there is no statutory requirement to consider these concurrent civil liabilities and miscellaneous payments, and considering liabilities to individuals and businesses arguably conflates the goals of criminal versus

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109. *Id.*

110. *The Oil Spill Liability Trust Fund*, National Pollutions Fund Center, (Last accessed Feb. 24, 2023), [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/about\\_npfc/osltf/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/about_npfc/osltf/).

111. 40 CFR 1800.500.

112. 16 U.S.C.A. § 4401(a).

113. BP Expl. at 14.

114. *Id.* at 15.

115. BP Prods. at 695.

116. BP Expl. at 15.

civil liability, it seems appropriate in the present case to consider payments made toward ameliorating the wide-ranging effects of the disaster because these type of payments comprise the bulk of the agreement.

The court then pivoted to discussing the conduct deterrents included in the plea agreement. The period of probation imposed, five years, is the maximum permitted under the law for a corporation.<sup>117</sup> The plea also contains a plethora of specific conditions BP must adhere to throughout the probationary period. One significant condition is that BP must permit two government-approved safety monitors to evaluate BP's risk management procedures and practices in addition to an ethics monitor reviewing internal policy such as the company code of conduct and its enforcement.<sup>118</sup>

BP is further required to maintain a drilling operations center that monitors in real-time the pressures of the drilling pipes among other readings.<sup>119</sup> The Bureau of Safety and Environmental Enforcement must have access to this center's data.<sup>120</sup> BP must also "maintain a crisis management organization" and two centers with at least six crisis management personnel each.<sup>121</sup> Another condition is that BP must contract a third-party auditor to review its compliance with the probationary terms and report to the probation officer and Department of Justice.<sup>122</sup> Additionally, BP must adopt operational standards with enhanced safety. For example, BP must use two blind shear rams which improve the safety and effectiveness of the blowout preventer.<sup>123</sup> While some other conditions seem trivial, such as BP being required to create a public website containing "lessons learned from the Deepwater Horizon Incident," the bulk of the conduct requirements have strong logical ties to the conduct and damage.<sup>124</sup>

In the plea deal BP entered following the Texas City disaster, BP was not required to appoint an independent monitor.<sup>125</sup> The full extent of third-party involvement in the regulatory and protocol changes BP was forced to adopt appears to have been a single audit. Interestingly, that audit identified several issues that had not been corrected a year after the disaster and even

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117. *Id.* at 18.

118. *Id.*

119. Plea Agreement at 28.

120. *Id.*

121. *Id.* at 30.

122. *Id.* at 33.

123. *Id.*

124. *Id.* at 32.

125. BP Prods. at 709.



the audit itself was subject to criticism by the court regarding its lack of thoroughness.<sup>126</sup> Less than half of the refinery units at the facility were actually inspected for hazard analysis, and barely over half were inspected for safety training with the employees operating the units.<sup>127</sup> Comparatively, the terms stipulated to in the present deal are much more comprehensive and leave less room for obligations to be neglected.

Finally, the court considered victims' objections to the plea deal. The court said it received 29 statements in total. Victims making statements included families of the individuals who died in the explosion, one man who survived the explosion, and individuals whose property or livelihood was damaged by the fallout.<sup>128</sup> The primary concern expressed by victims appears to have been that no BP employees or executives were sentenced to jail time as a result of the incident.<sup>129</sup> However, in a criminal prosecution of a corporation, jail time is unavailable.<sup>130</sup> Some have even argued that corporate criminal law does not truly exist because incarceration is unavailable for corporations as a whole leaving fines and alternative measures such as forced implementation of safety protocol as the bulk of the government's punitive arsenal in these situations.<sup>131</sup> While the revocation of a corporate charter is possible, it is exceedingly rare.<sup>132</sup> Thus, the only way for persons to face jail time over the incident would be to charge them individually, which the federal prosecutions declined to do after weighing the factors of the case and deciding charging the corporation as a whole was the most appropriate course of action at the time. Two supervisors employed by BP to oversee safety procedures at the well were later indicted on charges of involuntary manslaughter, but the charges were dropped and one pleaded guilty to a misdemeanor count of the Clean Water Act while the other was acquitted at trial.

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126. *Id.* at 707.

127. *Id.* at 710.

128. BP Expl. at 22.

129. *Id.*

130. *Bringing Charges Against Corporations* at 3.

131. Diamantis, Mihailis, *But We Haven't Got Corporate Criminal Law*, 43 J. Corp. L. 992 (2022).

132. Mokhiber, Russell, *The Death Penalty for Corporations Comes of Age*, Corp Watch, (Last accessed Feb. 24, 2022), <https://www.corpwatch.org/article/death-penalty-corporations-comes-age>.

*VI. Conclusion*

From eleven individuals losing their lives, to billions of dollars of damage inflicted to the environment and local industries, the magnitude of the Deepwater Horizon disaster will be felt for decades to come. The plea deal BP entered with the federal government is easy to dismiss as unjust or insufficient given a cursory overview of the facts, but given the severe handicaps the prosecution would face at trial; the terms of the plea agreement likely represent the best balance of imposing a sizable punishment commensurate with the harm caused without risking a decimation of the terms as a result of causality concerns. The fairly strict non-economic terms of the plea additionally create reasonable hope that they will prevent future incidents through serving as adequate behavioral deterrents and correcting the lapses in safety protocol that contributed to the event.