

## Do as I Say and Not as I Do: The United States' Immunity in Oil Spill Response Actions

*"I really don't know why it is that all of us are so committed to the sea, except I think it is because in addition to the fact that the sea changes and the light changes, and ships change, it is because we all came from the sea. And it is an interesting biological fact that all of us have, in our veins the exact same percentage of salt in our blood that exists in the ocean, and, therefore, we have salt in our blood, in our sweat, in our tears. We are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch it we are going back from whence we came."*<sup>1</sup>

### I. INTRODUCTION

Residents of the states bordering the Gulf of Mexico have more in common with their part of the sea than only salt content.<sup>2</sup> Affecting the well-being of Gulf residents, the *Deepwater Horizon* oil spill was the largest in United States history, and efforts to respond to the disaster were similar in scale.<sup>3</sup> Neither the United States government nor the responsible party was prepared to mitigate the risks present in deep-sea oil exploration.<sup>4</sup> The lack of preparation and size of the spill forced responders to consider and implement untested strategies.<sup>5</sup>

Private actors must consider the potential liability of their actions.<sup>6</sup> Government, shielded by sovereign immunity, does not need to utilize the same calculations.<sup>7</sup> This Note will suggest that government should waive its

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1. President John Fitzgerald Kennedy, Remarks in Newport, Rhode Island at a Dinner for America's Cup Crews (Sept. 14, 1962).

2. See Jennie Hobbs, *Surfrider Foundation Testing the Water Months After Spill*, PANAMA CITY NEWSHERALD, Jan. 25, 2011, <http://www.newsherald.com/articles/surfrider-90356-foundation-testing.html> (reporting chemicals associated with oil spill present in blood of Gulf resident).

3. See Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14.

4. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 84 (2011) [hereinafter DEEP WATER] (noting boilerplate procedures of industry and regulators prior to spill).

5. See *id.* at 144, 169 (observing knowledge of burning and dispersant strategies increased because of spill).

6. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 366 (2003) (maintaining goals of deterrence and compensation shape behavior of private actors).

7. See, e.g., Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1133, 1178-79 (1981) (arguing liability of governmental actors to force consideration of effects of actions); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216 (2001) (declaring sovereign immunity frustrates goals of compensation and deterrence); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New*

sovereign immunity during oil spill response actions in light of the controversies surrounding the Macondo Well blowout.<sup>8</sup> This Note argues that United States government response efforts were detrimental to the national welfare and, although a similarly situated private party would be liable for the citizens' injuries, the United States will not be held accountable.<sup>9</sup>

This Note will begin by outlining the initial events of the blowout.<sup>10</sup> Then it will present the government's contingency plan in case of an oil spill.<sup>11</sup> This Note will then compare the government's plan to the actual events that occurred.<sup>12</sup> Next, this Note will examine the decision to utilize dispersants to combat the oil spill.<sup>13</sup> The Note will continue to the successful containment of the spill.<sup>14</sup>

Next, this Note will outline the government's lawsuit to recover costs against British Petroleum and other parties.<sup>15</sup> An examination of the workings of the Oil Pollution Act and the doctrine of sovereign immunity will follow to highlight possible defense strategies of the defendants.<sup>16</sup> Additionally, this Note will outline the role of citizen suits in environmental regulation.<sup>17</sup> Finally, this Note will analyze the lack of remedies available to citizens when the government is the party responsible for pollution in oil spill responses, focusing on the government's lack of accountability following the *Deepwater Horizon* oil spill.<sup>18</sup> This Note argues that the government should waive its sovereign immunity in oil spill response actions.<sup>19</sup>

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*Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (declaring "systemic function" of damages in combating constitutional violations).

8. See *infra* Part III (analyzing underlying response decisions currently shielded by sovereign immunity).

9. See *infra* Part IV (arguing doctrine of sovereign immunity fails to serve best interest of citizens following oil spills).

10. See *infra* Part II.A (summarizing events from well blowout to government's lawsuit).

11. See *infra* Part II.B (indicating planned initial responses of government through National Contingency Plan).

12. See *infra* Part II.D (giving actual sequence of initial response efforts). The history of the well introduces the other defendants to the federal lawsuit. See *infra* Part II.C (providing history of ownership from government to lawsuit defendants).

13. See *infra* Part II.E (highlighting controversial use of Corexit dispersant as major response strategy).

14. See *infra* Part II.F (describing eventual success in stopping flow of oil).

15. See *infra* Part II.G (examining government suit, Oil Pollution Act, and doctrine of sovereign immunity).

16. See *infra* Part II.G (analyzing sovereign immunity through Comprehensive Environmental Response, Compensation, and Liability Act and Oil Pollution Act).

17. See *infra* Part II.H (introducing citizen suits).

18. See *infra* Part III (discussing remedies available to citizens).

19. See *infra* Part IV (concluding sovereign immunity inappropriate shield).

## II. HISTORY

### A. The Well Blows Out

On April 20, 2010, the Modular Offshore Drilling Unit *Deepwater Horizon* caught fire as the result of a blowout.<sup>20</sup> The rig exploded before sinking, killing eleven men.<sup>21</sup> The United States Coast Guard (USCG) immediately responded and began what would become a 152-day fight to contain and close a “spill of national significance” in the Gulf of Mexico.<sup>22</sup>

British Petroleum (BP) owned *Deepwater Horizon* and became the focus of the public’s anger shortly after the spill began.<sup>23</sup> The United States Government named BP a “responsible party” in the disaster.<sup>24</sup> The consensus among media reports was that BP would face both heavy civil penalties and

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20. *At Least 11 Missing After Blast on Oil Rig in Gulf*, CNN.COM (Apr. 21, 2010, 10:39 PM), <http://www.cnn.com/2010/US/04/21/oil.rig.explosion/index.html> (reporting initial fire). The *Deepwater Horizon* was about fifty miles off the coast of Louisiana when the incident occurred. *Id.* A general rule when drilling for oil is that the deeper the well, the more likely the well will encounter a high pressure reservoir. DEEP WATER, *supra* note 4, at 91. A blowout occurs when pressures without and within the well do not balance and oil and gas rush out of the well. *See id.* (describing characteristics of oil wells and oil drilling). Blowouts are iconic of oil drilling because most of the finds in the nineteenth and early twentieth centuries were low-pressure reservoirs near the surface gushing until the pressure dropped. Henry Fountain, *A Cheerier Oil Blowout*, N.Y. TIMES GREEN BLOG (May 11, 2010, 7:18 AM), <http://green.blogs.nytimes.com/2010/05/11/a-cheerier-oil-blowout/> (explaining blowouts in shallow wells).

21. *See At Least 11 Missing After Blast on Oil Rig in Gulf*, *supra* note 20 (recapping initial moments of *Deepwater Horizon* incident). The eleven men were missing and presumed dead. *See* DEEP WATER, *supra* note 4, at 131 (explaining Coast Guard suspended search April 23).

22. *See At Least 11 Missing After Blast on Oil Rig in Gulf*, *supra* note 20. The spill was declared a “spill of national significance” on April 29, 2010, nine days after the blowout. *See* Press Briefing, White House Office of the Press Sec’y, Press Briefing on the BP Oil Spill in the Gulf Coast (Apr. 29, 2010) [hereinafter BP Oil Spill Press Briefing], available at <http://www.whitehouse.gov/the-press-office/press-briefing-bp-oil-spill-gulf-coast>. Oil stopped flowing into the Gulf of Mexico on July 15, 2010. *See* DEEP WATER, *supra* note 4, at 164-65 (describing containment of oil leak). National Incident Commander Admiral Thad Allen declared the well effectively sealed on September 19, 2010 after relief wells had reached their destination. *See id.* at 169 (providing total leak time of 152 days).

23. *See* DEEP WATER, *supra* note 4, at 92 (outlining parties involved in drilling Mississippi Canyon Block 252). BP was the operator of the well, but the actual on-scene personnel were from Transocean. *Id.* (noting rig and crew provided by Transocean to BP). Transocean is a major contractor in the oil drilling industry, and this type of arrangement is normal. *Id.* (describing roles of BP and Transocean in drilling Block 252). As a result of BP’s actions in causing the spill and its perceived lack of commitment to the cleanup, some people boycotted BP, others protested BP, and some people resented BP. *See, e.g.*, Chris Joyner, *Anger About Oil Spill Turns to Protests*, USA TODAY, June 3, 2010, at B5 (outlining consumer responses to BP oil spill); Rebecca Mowbray, *Anger Rises over Failures*, NEW ORLEANS TIME-PICAYUNE, May 31, 2010, at A1 (describing Louisiana residents protesting BP); Steven Osunsami & Bradley Blackburn, *BP Oil Spill: Containment Cap Installed on Leak, As Anger Surges over Slow Claims Payouts*, ABCNEWS.COM (July 12, 2010), <http://abcnews.go.com/WN/bp-oil-spill-containment-cap-reaches-leak-anger/story?id=11145052> (noting public reaction as stemming from BP’s failure to pay claims in timely fashion).

24. *See* BP Oil Spill Press Briefing, *supra* note 22. BP was a responsible party as the holder of right or use under the Outer Continental Shelf Lands Act. *See* 33 U.S.C. § 2701(32)(C) (2006) (defining responsible party through “offshore facility”).

possible criminal charges.<sup>25</sup> Relying on the Clean Water Act of 1973 (CWA) and the Oil Pollution Act of 1990 (OPA), the government filed a complaint on December 15, 2010 seeking compensation from BP as a “responsible party” for the cleanup.<sup>26</sup>

### B. *The National Contingency Plan*

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is a series of regulations outlining government responses to hazardous substance discharges.<sup>27</sup> The CWA, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the OPA impose duties upon the President who then delegates the duties and accompanying powers to various federal agencies through the National Response Team (NRT).<sup>28</sup> The NRT has representatives from a variety of federal agencies.<sup>29</sup>

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25. See Jennifer A. Dlouhy, *Disaster in the Gulf: Feds Seek Billions from BP, 8 Others*, HOUS. CHRON., Dec. 16, 2010, at A1 (outlining possible outcomes of government suit against BP); John Schwartz, *U.S. Sues Companies for Spill Damages*, N.Y. TIMES, Dec. 16, 2010, at A30 (explaining responses to and impact of lawsuit).

26. See Complaint at 3, *United States v. BP Exploration & Prod. Inc.*, No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010). The CWA codifies the government’s response to oil and hazardous substance spills. See 33 U.S.C. § 1321 (2006) (defining and establishing government response to water pollution). The OPA is a statutory framework designed specifically for oil spills. See 33 U.S.C. §§ 2701-2762 (outlining legal rights, duties, and liabilities in case of oil spill).

27. See The National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300 (2010). “The purpose of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.” *Id.* § 300.1. The OPA required revision of the NCP so the NCP would separate response actions for oil spills from responses for other substances. See *id.* pt. 300, app. E, § 1.1 (differentiating between oil spills and release of other pollutants). Appendix E applies to

discharges of oil into or upon the navigable waters of the United States and adjoining shorelines, the waters of the contiguous zone, or waters of the exclusive economic zone, or which may affect the natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

*Id.* § 1.3(a).

28. See 40 C.F.R. § 300.2 (designating authority and applicability). The President created the pyramidal command structure of the NCP and delegated the authority to revise the NCP and its components. See Exec. Order No. 12,580, 3 C.F.R. 193 (1987) (delegating Superfund powers to named federal agencies and establishing NCP). The President amended the original executive order by delegating the responsibility to report to Congress about oil pollution to persons like the Secretary of the Interior. Exec. Order No. 12,777, 3 C.F.R. 351 (1991) (amending earlier executive orders).

29. 40 C.F.R. pt. 300, app. E, § 3.1.1 (designating membership in NRT). Participating federal agencies include the USCG, the Environmental Protection Agency (EPA), the Federal Emergency Management Agency, the Department of Defense, the Department of Energy, the Department of Agriculture, the Department of Commerce (through the National Oceanic and Atmospheric Administration), the Department of Health and Human Services, the Department of the Interior, the Department of Justice, the Department of Labor, the Department of Transportation, the Department of State, the Nuclear Regulatory Commission, and the General Services Administration. *Id.* The chair of the NRT is a representative of the EPA and the vice chair is a representative of the USCG. *Id.* § 3.1.1(b). When a discharge of oil activates the NCP, the chair of the NRT flips to the agency providing the On-Scene Coordinator. *Id.*

The NRT is responsible for establishing procedures, evaluating responses, and coordinating the various subcomponents of the NCP.<sup>30</sup>

The NRT coordinates the preparation and planning of national incidents and coordinates the thirteen Regional Response Teams (RRTs).<sup>31</sup> The RRTs are in charge of preparing and planning regional responses to any discharge or release within their geographic boundaries.<sup>32</sup> The RRTs manage a Regional Contingency Plan and Area Contingency Plans (ACPs).<sup>33</sup> These ACPs outline, among other aspects, areas of special economic or environmental concern, local response resources, and the manner by which the ACP coordinates with other ACPs.<sup>34</sup>

The NCP creates a seamless top-to-bottom emergency chain of command that activates upon notification of a hazardous release to the National Response Center (NRC) with the On-Scene Coordinator (OSC) maintaining authority.<sup>35</sup> The OSC first assesses the magnitude of the release.<sup>36</sup> If the release is not threatening to the public health and welfare of the United States, then the responsible party may direct response efforts.<sup>37</sup> If the release does threaten the health and welfare of the United States, or the responsible party does not perform removal adequately, the OSC retains the authority to direct the release response.<sup>38</sup> In the event the USCG Commandant declares a “spill of national significance” in a coastal zone, the Commandant then names a National Incident Commander to direct all responses to combat the release.<sup>39</sup> The

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30. See *id.* § 3.1.1(d)-(i) (outlining various responsibilities and duties of NRT). The NRT can create its own bylaws and committees to further its objectives. *Id.* § 3.1.1(d). It can also establish methods of responding to discharges and recommend changes in the NCP to the Administrator of the EPA. *Id.* § 3.1.1(e).

31. *Id.* § 3.1.1(f) (authorizing oversight of RRTs by NRT).

32. *Id.* § 3.2(a) (describing RRTs). The standard federal regional boundaries are the boundaries of the RRTs. *Id.* § 3.2(b)(1).

33. 40 C.F.R. pt. 300, app. E, § 3.2(i) (2010) (explaining role of RRTs).

34. *Id.* § 1.5 (defining ACP). ACPs encompass the most basic response actions for a given area. See 33 U.S.C. § 1321(j)(4)(C) (2006) (outlining contents of ACPs); accord 40 C.F.R. pt. 300, app. E, § 4.1.3(c) (noting coordination with other committees).

35. 40 C.F.R. pt. 300, app. E, § 5.2(c) (giving guiding principles of NCP). Any person may make a report of a discharge. *Id.* § 5.1(a), (c). The person responsible for the facility or vessel from which the leak emanates must notify the NRC even if a federal officer received the initial report. *Id.* § 5.1(b) (“In any event such person . . . shall notify the NRC as soon as possible.”). Once notified, the OSC must notify the appropriate state agency of any state the discharge will affect. *Id.* § 5.1(d).

36. *Id.* § 5.2 (authorizing OSC to assess situation and direct response efforts). The OSC shall determine the size and type of discharge. *Id.* § 5.3.2(a)(2). The OSC’s determination dictates future actions. See *id.* § 5.3.2(a)(2)(A)-(C) (giving procedures based on size of discharge).

37. *Id.* § 5.2(d) (directing OSC to allow responsible party to direct response efforts).

38. *Id.* § 5.2(d) (granting OSC authority to respond to discharge if responsible party performs inadequately). The health and welfare of the United States includes, “but [is] not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States.” *Id.*

39. 40 C.F.R. pt. 300, app. E, § 5.3.5 (2010) (describing authority to declare spills of national significance). If the spill occurs in an inland zone, the EPA Administrator can declare a spill of national significance and assign a senior Agency official to assist OSC. *Id.* (granting authority to declare spill of national significance to separate authorities per spill location). A spill of national significance is

government must thoroughly document all response efforts to recover costs incurred using the Oil Spill Liability Trust Fund under the CWA.<sup>40</sup>

### C. History of the Macondo Well

In May 2008, BP Exploration & Production Company executed a lease agreement with the United States Minerals Management Service for “Block 252, Mississippi Canyon, OCS Official Protraction Diagram, NH 16-10.”<sup>41</sup> Over the course of the next eighteen months, BP became co-lessees with MOEX Offshore 2007, LLC and two companies utilizing the shared name Anadarko.<sup>42</sup> BP contracted with Transocean to drill the Macondo Well.<sup>43</sup>

Drilling began in October 2009 with the *Transocean Marianas*.<sup>44</sup> In March 2010, the *Transocean Marianas* was replaced at the Macondo Well by the Modular Offshore Drilling Unit *Deepwater Horizon*.<sup>45</sup> On April 20, 2010, the Macondo Well experienced a blowout containing oil and methane resulting in *Deepwater Horizon*'s explosion.<sup>46</sup> Recovery efforts rescued ninety-four crewmembers, but the USCG ceased searching for the remaining eleven crewmembers three days after the explosion.<sup>47</sup> The rig burned for two days before sinking on April 22.<sup>48</sup>

### D. The Spill

The Macondo Well began leaking at the same time the blowout occurred.<sup>49</sup>

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a spill which due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and cleanup the discharge.

*Id.* § 1.5 (2010). Interestingly, news reports at the time of the *Deepwater Horizon* spill stated that Secretary of Homeland Security Janet Napolitano declared the spill a spill of national significance and not Commandant of the USCG Admiral Thad Allen. See Campbell Robertson, *U.S. Intensifies Bid to Control Oil Spill in Gulf*, N.Y. TIMES, Apr. 30, 2010, at A1 (attributing spill of national significance declaration to Secretary Napolitano).

40. 40 C.F.R. pt. 300, app. E, § 5.7 (requiring administrative record to support recovery action).

41. See MINERALS MGMT. SERV., GULF OF MEX. OCS REGION, U.S. DEP'T OF THE INTERIOR, OIL AND GAS LEASE SALE 206 FINAL BID RECAP, at 42 (2008).

42. See Complaint at 9-10, *United States v. BP Exploration & Prod. Inc.*, No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010) (outlining various changes in ownership of Block 252). BP and MOEX entered into a joint operating agreement on the lease. *Id.* at 9. The Mineral Management Service ratified the interest assignment to the two Anadarko companies in February 2010. *Id.* at 10.

43. See *id.* at 12 (stating BP contracted with Transocean in 1998 to drill in federal waters).

44. U.S. Dep't of Interior, No. 00016597 MMS-NOLA-B2-00006-0002 (Feb. 5, 2010) (reporting suspension of drilling operations by *Transocean Marianas*).

45. U.S. Dep't of Interior, No. 00016597 MMS-NOLA-B2-00006-0001 (Apr. 21, 2010) (reporting abandonment of drilling operations by *Deepwater Horizon*).

46. See *At Least 11 Missing after Blast on Oil Rig in Gulf*, *supra* note 20 (giving first accounts of *Deepwater Horizon* explosion).

47. See DEEP WATER, *supra* note 4, at 131 (discussing USCG suspension of recovery efforts).

48. See *id.* at 130 (stating rig sank at 10:22 AM).

49. See *id.* at 131-32 (describing how oil and gas from well fueled fire, then continued leaking when rig

On April 21, Rear Admiral Mary Landry, USCG, was named the OSC pursuant to the NCP.<sup>50</sup> As the size of the spill and the inability of BP to combat it became apparent, Secretary Janet Napolitano of the Department of Homeland Security designated the Macondo spill a “spill of national significance” and named Admiral Thad Allen, USCG Commandant, as the National Incident Commander to coordinate the response to the spill on the national level.<sup>51</sup>

By the second day of the spill, the government and BP acknowledged that hydrocarbons were escaping at the seafloor and that BP's blowout preventer, a last resort safety device, had failed.<sup>52</sup> The initial estimate of oil flow into the Gulf was 1000 barrels of oil per day, but BP and the government continued to revise their estimates upwards until the estimate was about 60,000 barrels of oil per day.<sup>53</sup> As the size of the spill became apparent, offers and ideas to assist in

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sank).

50. See *id.* at 130 (naming command structure of spill response). Admiral Landry was not the first Federal OSC for the *Deepwater Horizon* spill response. See *id.* (giving timeline of command and control). The NCP stated that the initial On-Site Coordinator in coastal discharges should be the nearest Coast Guard Captain of the Port. 40 C.F.R. § 300.120(2)(b). The nearest port to *Deepwater Horizon* was Morgan City, Louisiana, and Joseph Paradis was the first Federal OSC. DEEP WATER, *supra* note 4, at 130.

51. See BP Oil Spill Press Briefing, *supra* note 22 (declaring “spill of national significance”); Press Release, Deepwater Horizon Incident Joint Info. Ctr., Coast Guard Commandant Admiral Thad Allen Designated National Incident Commander for Continued Response to BP Oil Spill (May 1, 2010), available at <http://www.restorethegulf.gov/release/2010/05/01/coast-guard-commandant-admiral-thad-allen-designated-national-incident-commander-> (discussing announcement of Admiral Allen as National Incident Commander). On June 1, Rear Admiral James A. Watson replaced Admiral Landry as OSC. See Press Briefing, Admiral Thad Allen, Deepwater Horizon Incident Joint Info. Ctr., Press Briefing by National Incident Commander (June 1, 2010), available at <http://www.restorethegulf.gov/release/2010/06/01/press-briefing-national-incident-commander-june-1-2010> (thanking Admiral Landry and noting her transition to Commander in New Orleans for hurricane season). On July 10, 2010, Admiral Paul Zukunft was named OSC. See Press Release, Deepwater Horizon Incident Joint Info. Ctr., Admiral Paul Zukunft to Assume Role of Federal On-Scene Coordinator (July 10, 2010), available at <http://www.restorethegulf.gov/release/2010/07/10/admiral-paul-zukunft-assume-role-federal-scene-coordinator>. On December 17, 2010, Captain Lincoln Stroh became the Federal OSC. See Press Release, Deepwater Horizon Incident Joint Info. Ctr., Federal Oil Spill Response Transitions to Regional Structure, Releases Scientific Report (Dec. 17, 2010), available at <http://www.restorethegulf.gov/release/2010/12/17/federal-oil-spill-response-transitions-regional-structure-releases-scientific-rep>.

52. See DEEP WATER, *supra* note 4, at 138 (detailing BP's continued attempts to close blowout preventer). A blowout preventer is a series of systems that acts as a gate to the well and as a way to shut the well down in case of an accident. See *id.* at 92 (describing blowout preventer as doorway for well). The Macondo Well blowout preventer had several redundant systems and means of activation. See *id.* at 93 (detailing specifications of blowout preventer). Responders were not able to activate the blowout preventer after the blowout on *Deepwater Horizon*. See *id.* at 132 (reporting response efforts moved beyond blowout preventer activation due to failure).

53. See *id.* at 132 (noting initial spill estimate of 1000 barrels per day on April 24). Within days, the official estimate climbed to about 5000 barrels. See *id.* at 133 (revising government estimate to roughly 5000 barrels with some reports estimating 10,000 barrels). In the beginning, private efforts to measure the rate of the spill ranged from 5000 barrels to 100,000 barrels per day. See *id.* at 146-47 (reporting range of estimates). On May 27, the federal estimate changed to a lower bound of 12,000 to 25,000 barrels per day with an undefined higher bound. See *id.* (reporting first government effort to measure spill flow rate). Eventually the government's official estimate became a time-dependent range between 53,000 and 62,000 barrels per day with a ten percent margin of error. See FLOWRATE TECHNICAL GRP., DEP'T OF INTERIOR, ASSESSMENT OF FLOW

combating the spill poured in from all over the globe.<sup>54</sup>

With the memory of the *Exxon Valdez* fresh in the minds of the responders, the OSC prioritized recovery efforts that would protect the Gulf Coast wetlands.<sup>55</sup> Workers placed millions of feet of boom around fragile shoreline habitats and burned off oil slicks thick enough to sustain a flame.<sup>56</sup> Unlike the *Exxon Valdez* spill, responders used dispersants as a major response strategy.<sup>57</sup>

### E. Dispersants

Oil breaks down naturally through wave action, heat, light, and microbial digestions.<sup>58</sup> Thick oil slicks break down more slowly than thin sheens, which break down more slowly than droplets.<sup>59</sup> Applying this science, the oil industry asserted that dispersing the oil might lead to more effective oil spill fighting.<sup>60</sup> Admiral Landry promptly authorized the use of dispersants to combat the oil spill and BP began spraying Corexit from both government and private airplanes.<sup>61</sup> Several companies developed dispersants that the EPA added to

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RATE ESTIMATES FOR THE *DEEPWATER HORIZON/MACONDO* WELL OIL SPILL 8 (2011) (narrating history of government estimates of spill size). In the end, the total amount of oil spilled was 4,900,000 barrels. *Id.* BP disputed the government estimates from the beginning, stating that no method for accurately measuring the oil flow rate exists. See Comment from BP to Oil Spill Commission Regarding Draft Staff Working Paper No. 3 (Oct. 21, 2010) (on file with *Suffolk University Law Review*) (outlining BP's objections to oil spill flow estimates); see also, DEEP WATER, *supra* note 4, at 147 (giving BP's disputation of flow rate measurement); Robert L. Cavnar, *BP Wins: EPA Will Agree to Cut Oil Spill Estimate*, HUFFINGTON POST (Feb. 2, 2011, 09:07 AM), [http://www.huffingtonpost.com/robert-l-cavnar/bp-wins-epa-will-agree-to\\_b\\_817327.html?utm\\_source=DailyBrief&utm\\_campaign=020211&utm\\_medium=email&utm\\_content=BlogEntry&utm\\_term=Daily+Brief](http://www.huffingtonpost.com/robert-l-cavnar/bp-wins-epa-will-agree-to_b_817327.html?utm_source=DailyBrief&utm_campaign=020211&utm_medium=email&utm_content=BlogEntry&utm_term=Daily+Brief) (reporting incorrectly EPA to revise oil spill size estimate downward); Jonathon Tilove, *BP Disputes Government Estimates of Volume of Gulf of Mexico Oil Spill*, NOLA.COM, (Dec. 3, 2010, 8:15 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/12/bp\\_disputes\\_government\\_estimat.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/12/bp_disputes_government_estimat.html) (explaining BP's stance regarding oil flow estimates).

54. See DEEP WATER, *supra* note 4, at 142-43 (describing proposals of foreign governments and private individuals). Many of the proposals were rejected as impracticable or untimely, but BP did famously purchase a design that actor Kevin Costner was promoting. *Id.* at 142 (explaining outcomes of various proposals).

55. See *id.* at 143 (rationalizing choice of responders to prioritize use of dispersants).

56. See *id.* at 151-54, 169 (detailing uses of booming, berming, and burning as response strategies).

57. See *id.* at 143-44 (detailing initial reliance on dispersants). Eventually BP sprayed at least 1.8 million gallons of dispersant. Mark Sappenfield, *New Gulf Oil Spill Mystery: How Much Dispersant Did BP Use?*, CHRISTIAN SCI. MONITOR, Aug. 1, 2010, <http://www.csmonitor.com/Environment/2010/0801/New-Gulf-oil-spill-mystery-How-much-dispersant-did-BP-use> (discussing controversy over amount of dispersant used). Responders planned to use dispersants as a major response strategy in the *Exxon Valdez* spill, but events frustrated this plan. See Elizabeth R. Millard, Note, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 344 & n.77 (1993) (describing responders' experiences with dispersants in *Exxon Valdez* spill).

58. See *The BP Oil Spill: Accounting for the Spilled Oil and Ensuring the Safety of Seafood from the Gulf: Hearing Before the Subcomm. on Energy and Env't*, 111th Cong. 47-48 (2010) (answer of Paul Anastas, Assistant Adm'r, Office of Research and Dev., Envtl. Prot. Agency) [hereinafter *Accounting for the Spilled Oil*] (describing process of oil breaking down).

59. See *id.* at 48 (clarifying how dispersing oil can allow oil to degrade at faster rates).

60. See *id.* (explaining dispersants increase oil degradation rates by fifty percent).

61. See DEEP WATER, *supra* note 4, at 143 (reporting planes full of dispersants readied before responders certain of oil spill). RRTs preauthorized the use of dispersants, but did not know about any long-term effects of

the NCP's Product Schedule.<sup>62</sup>

While many scientists supported the use of dispersants, others argued against dispersants because point-source pollution is easier to respond to than dispersed pollution.<sup>63</sup> *Deepwater Horizon*, however, was spewing crude oil almost a mile under the sea, and BP suggested applying dispersants close to the well in hopes that more direct application would ultimately lead to less dispersants being used.<sup>64</sup> The EPA and BP scientists worked to create compliance standards and ways to monitor the application of dispersants directly at the wellhead.<sup>65</sup> In a controversial decision, the government permitted BP to proceed with the plan.<sup>66</sup>

Concerns about the toxicity and unprecedented amounts of Corexit being released into the environment prompted the EPA to request that BP consider safer alternatives to Corexit or state why it could not find a less toxic dispersant to use.<sup>67</sup> BP responded that no other dispersant met the three criteria of toxicity, effectiveness, and availability.<sup>68</sup> The EPA then limited BP's use of dispersants to an established daily amount that BP could not exceed unless it received special approval from the OSC.<sup>69</sup>

BP continued to spray Corexit to disperse the oil.<sup>70</sup> Almost every day from May 28 to July 19, BP requested a waiver to exceed the set daily limit.<sup>71</sup> The

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the dispersants. *See id.* at 143-44 (noting potential troubles with dispersant use).

62. *See* ENVTL. PROT. AGENCY, NATIONAL CONTINGENCY PLAN PRODUCT SCHEDULE (2010) (detailing approved dispersants).

63. *See* Julia Whitty, *BP's Deep Secrets*, MOTHER JONES, Sept.-Oct. 2010 (describing point-source pollution preference).

64. *See* DEEP WATER, *supra* note 4, at 144 (explaining rationale for subsea application of dispersants).

65. *See id.* at 145 (giving background of creation of protocols).

66. *See* ENVTL. PROT. AGENCY, DISPERSANT MONITORING AND ASSESSMENT DIRECTIVE FOR SUBSURFACE DISPERSANT APPLICATION (2010), available at <http://www.epa.gov/bpspill/dispersants/subsurface-dispersant-directive-final.pdf> (detailing protocols BP required to follow for subsurface application).

67. *See* ENVTL. PROT. AGENCY, ADDENDUM TO DISPERSANT MONITORING AND ASSESSMENT DIRECTIVE FOR SUBSURFACE DISPERSANT APPLICATION (2010), available at <http://www.epa.gov/bpspill/dispersants/directive-addendum2.pdf> (requiring BP to investigate use of less toxic dispersants).

68. *See* Letter from Douglas J. Suttles, BP, to Rear Admiral Mary Landry, Commander, USCG & Samuel Coleman, Dir., Superfund Div., EPA (May 20, 2010), available at <http://www.epa.gov/bpspill/dispersants/5-21bp-response.pdf> (responding to criteria given by EPA).

69. *See* ENVTL. PROT. AGENCY, ADDENDUM 3 TO DISPERSANT MONITORING AND ASSESSMENT DIRECTIVE FOR SUBSURFACE DISPERSANT APPLICATION (2010), available at <http://www.epa.gov/bpspill/dispersants/directive-addendum3.pdf> (setting limits for use of dispersants).

70. *See* The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill (Deepwater Horizon Response External Affairs) May 28-July 19, 2010, available at <http://markey.house.gov/images/DISPERSANTDOCUMENTSMAY28-31.pdf>, <http://markey.house.gov/images/DISPERSANTDOCUMENTS JUNE1-7.pdf>, <http://markey.house.gov/images/DISPERSANTDOCUMENTS JUNE8-14.pdf>, <http://markey.house.gov/images/DISPERSANTDOCUMENTS JUNE15-21.pdf>, <http://markey.house.gov/images/DISPERSANTDOCUMENTS JUNE22-24.pdf>, <http://markey.house.gov/images/DISPERSANTDOCUMENTS JUNE25-29.pdf>, <http://markey.house.gov/images/reduced.DISPERSANTDOCUMENTS JULY1-7.pdf>, & <http://markey.house.gov/images/DISPERSANTDOCUMENTS JULY8-19.pdf>.

71. *See* Letter from Congressman Edward Markey, Chairman, Subcomm. on Energy and Env't, to Admiral Thad W. Allen, Nat'l Incident Commander, USCG (July 30, 2010) [hereinafter Letter from Congressman Markey], available at <http://markey.house.gov/docs/07-30-10ejmtocgdispersants.pdf> (noting continued use of dispersant).

OSC, Admiral James A. Watson, approved many of the waiver requests.<sup>72</sup> BP submitted some waiver requests that would have a retroactive effect.<sup>73</sup> The Coast Guard approved these requests as well.<sup>74</sup>

The official end of the dispersant spraying did not put to rest the controversy regarding the use of dispersants.<sup>75</sup> Gulf residents claimed that aircraft sprayed dispersants at night, and that spraying continued months after the well stopped spewing oil.<sup>76</sup> Reports of ill health and death from exposure to Corexit, oil, or a mixture of both did not stop as scientists continued to warn of the long-term health effects of the oil spill.<sup>77</sup> Whether the spraying of dispersants had achieved its original objective of preventing further damage to critical littoral and wetland species remained unclear as unexplained animal deaths mounted and researchers observed signs of the spill and its effects on birth cycles.<sup>78</sup>

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72. See *id.*

73. See *id.*

74. See *id.*

75. See DEEP WATER, *supra* note 4, at 170 (indicating residents' concerns over use of dispersants).

76. See *id.* (reporting Gulf residents' suspicions of unauthorized dispersant flights after well capped); see also Jerry Cope, *Undeclared: The Gulf Coast 6 Months After the Blowout*, HUFFINGTON POST (Oct. 20, 2010, 8:24 AM), [http://www.huffingtonpost.com/jerry-cope/undeclared-the-gulf-coast\\_b\\_766367.html](http://www.huffingtonpost.com/jerry-cope/undeclared-the-gulf-coast_b_766367.html) (arguing responders continued to spray dispersant).

77. See, e.g., M.C. Lyons et al., *The Influence of Water Temperature on Induced Liver EROD Activity in Atlantic Cod (Gadus Morhua) Exposed to Crude Oil and Oil Dispersants*, 74 ECOTOXICOLOGY & ENVTL. SAFETY 904-10 (2011) (explaining toxicity of oil and dispersant changes with water temperature); Bill Barrow, *BP Oil Spill's Health Effects Will Be Felt for Generations, Scientist Warns*, NEW ORLEANS TIMES-PICAYUNE, Feb. 5, 2011, at A1 (outlining health effects from oil and dispersants); Dahr Jamail & Erika Blumenfeld, *The Tragic State of the Gulf of Mexico: Sampling Reveals Oil and Dispersants on Mississippi Coast*, TRUTHOUT, Jan. 12, 2011, <http://archive.truthout.org/the-tragic-state-gulf-mexico-sampling-reveals-oil-and-dispersants-mississippi-coast66726> (showing oil and dispersants present along coast); Naomi King, *Oil-Spill Protesters Converge on Grand Isle*, HOUMA TODAY, Nov. 21, 2010, <http://www.houmatoday.com/article/2010-1121/ARTICLES/101129950> (detailing health concerns of Gulf residents); Steve Kolian, *Gulf Divers Experiencing Health Problems, Blood Contaminated with Petroleum Hydrocarbons*, LOWER MISS. RIVERKEEPER (Mar. 11, 2011, 1:19 PM), <http://lmrk.org/issues/bp-s-deep-water-drilling-disaster/gulf-divers-experiencing-health-problems-blood-contaminated-with-petroleum-hydrocarbons.html> (reporting divers experienced sickness from Corexit and oil); *Toxic Tide: Discovering the Health Effects of the Deepwater Disaster*, LIVING ON EARTH (Feb. 11, 2011), <http://www.loe.org/shows/segments.html?programID=11-P13-00006&segmentID=3> (discussing human health impacts of Gulf oil spill).

78. See, e.g., Susan Buchanan, *Private Seafood Tests Uncover Toxins Missed by Feds*, HUFFINGTON POST (Feb. 8, 2011, 9:23 PM), [http://www.huffingtonpost.com/susan-buchanan/private-seafood-tests-unc\\_b\\_820002.html](http://www.huffingtonpost.com/susan-buchanan/private-seafood-tests-unc_b_820002.html) (detailing incongruous results between private and governmental testing for toxins in seafood); Kathryn Gregory, *Gulf Spill Fallout Not Over, Journalist Says*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 18, 2011, at C2 (suggesting purpose of dispersant to sway public opinion in favor of BP); Richard A. Lovett, *Oil Spill's Toxic Trade-off*, NATURE NEWS (Nov. 10, 2010), <http://www.nature.com/news/2010/101110/full/news.2010.597.html> (explaining costs and benefits of dispersant strategy); News Release, Woods Hole Oceanographic Inst., *First Study of Dispersants in Gulf Spill Suggests a Prolonged Deepwater Fate* (Jan. 26, 2011), available at <http://www.whoi.edu/page.do?pid=7545&tid=282&cid=89188&ct=162> (discussing possible long-term presence of dispersant in water column).

### F. Containing the Spill

The blowout preventer's failure increased the size and duration of the spill.<sup>79</sup> At first, BP attempted to place an oil containment dome over the leak and pipe the leaking oil up to the surface.<sup>80</sup> This effort proved ineffective because hydrocarbon crystals formed on the dome.<sup>81</sup> BP next attempted to stop the leak through a top kill procedure by pumping drilling fluids into the broken riser pipe to stop the flow of oil and applying cement to seal the well.<sup>82</sup> This top kill procedure also failed.<sup>83</sup>

BP was able to siphon off some of the escaping crude using a cap containment system placed in early June.<sup>84</sup> Eventually, the government and BP decided that another attempt to cap the well from the existing source—rather than waiting for the relief wells—was feasible.<sup>85</sup> On July 15, oil effectively

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79. See DEEP WATER, *supra* note 4, at 273 (stating no response strategies existed beyond closing blowout preventer).

80. Ian Urbina et al., *On Defensive, BP Tests Ideas to Stem Leaks*, N.Y. TIMES, May, 4, 2010, at A1 (explaining use of dome to contain spill).

81. Campbell Robertson, *New Setback in Containing Gulf Oil Spill*, N.Y. TIMES, May 9, 2010, at A1 (reporting failure of containment dome).

82. See DEEP WATER, *supra* note 4, at 149 (explaining top kill procedure). A blowout occurs when the oil reservoir's pressure is higher than the environment to which drilling exposes it. See *id.* at 91. A top kill works in conjunction with a junk shot to equalize pressure, and both are accepted industry practice. *Id.* at 149. A top kill is an attempt to inject heavy drilling mud—a collection of heavy synthetic chemicals—into the well at a higher pressure than the pressure at which the oil escaped. See *id.* at 91, 149. A junk shot attempts to place objects, such as golf balls or pieces of tire rubber, into the blowout preventer with the hope that some of the objects lodge into place and decrease the flow of oil, thus decreasing pressure. See *id.* Once the responders firmly contained the leak, they could seal the leak by cementing the well. See Campbell Robertson et al., *Oil Hits Home, Spreading Arc of Frustration*, N.Y. TIMES, May 25, 2010, at A1 (reporting on possibility of cementing or replacing failed blowout preventer after well killed).

83. See DEEP WATER, *supra* note 4, at 150 (describing failure of top kill). Officials attempted the top kill procedure three times, but only succeeded in lowering the pressure, not fully negating it. See *id.* (detailing results of top kill procedure). BP explained that the most likely reason for the failure was that the rupture disks in the well casing collapsed inward, and the drilling fluids used to fight the pressure from the reservoir escaped into the surrounding rock. See *id.* at 158 (giving BP's view). Respondents determined that any future attempts to seal the well had to account for the possible fragile integrity of the well casing. *Id.* (stating conclusions regarding fragility of well casing). A total collapse of the well would cause hydrocarbons to leak through the bedrock and make the leak unmanageable. See *id.* (describing risks associated with well collapses).

84. See *id.* at 159 (explaining switch from kill strategies to containment strategies). BP began collecting oil from a "top hat" positioned above the blowout preventer which piped the oil to the *Discoverer Enterprise* at the surface. *Id.* Initially, this setup collected 15,000 barrels a day but did not gather all of the leaking crude. *Id.* A second ship, the *Q4000*, collected and burned up to 10,000 barrels of oil per day. *Id.* The 25,000 barrel a day capacity of both ships, however, proved insufficient to collect all the leaking oil. *Id.*

85. See *id.* at 162, 164 (describing placement of capping stack in early July). The capping stack was, in effect, another blowout preventer that responders could attach to the top of the existing blowout preventer. *Id.* at 162. BP had considered this capping stack early in its response, but the concerns over well integrity had caused responders to pursue other options first. *Id.* (explaining delay for deployment of capping stack). To install the capping stack, responders detached the top-hat siphoning device, ensured the top of the blowout preventer could accommodate the capping stack, and then installed the capping stack. See *id.* at 164 (detailing procedure to install capping stack). During the three days that the workers installed the equipment, oil flowed unimpeded into the Gulf. See Henry Fountain, *Ambitious Effort Begins to Contain All Spill Oil*, N.Y. TIMES, July 11, 2010, at A20 (noting new attempt temporarily increased flow of oil into Gulf).

stopped leaking into the Gulf of Mexico from the wellhead.<sup>86</sup> In August, a static kill procedure succeeded in capping the wellhead.<sup>87</sup> The first of two relief wells reached the Macondo Well on September 19, and BP and the government declared the well sealed.<sup>88</sup>

With the well no longer leaking, a review of the tragedy and its effects became the government's first priority.<sup>89</sup> The National Oceanic and Atmospheric Administration (NOAA) analyzed the Gulf fishing grounds and declared some parts open.<sup>90</sup> Concerns about the toxicity of fish from the Gulf depressed seafood prices despite Food and Drug Administration and NOAA assurances that the fish were safe to eat.<sup>91</sup>

### G. Post-Spill Cost Recovery

On December 15, 2010, the United States filed a complaint in the United States District Court for the Eastern District of Louisiana.<sup>92</sup> BP was among the

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86. DEEP WATER, *supra* note 4, at 165 (stating no oil flowed into Gulf on July 15). Responders worried that closing the new capping stack could force the oil into the surrounding bedrock with dire consequences, so they monitored the pressure readings on the new stack and prepared to open the stack to the Gulf to avert the more serious disaster of a total wellhead collapse. *See id.* at 165. In fact, responders were prepared to open the stack quite early over pressure concerns but risked a twenty-four hour test of well integrity. *See id.* at 166 (describing debates over keeping cap closed). The longer wait garnered favorable readings that confirmed the well had stabilized and the cap remained closed. *See id.* (explaining generation of mathematical model to account for readings).

87. *See id.* at 166-67 (narrating events of static kill). The static kill procedure was the same as the top kill procedure except, now, the well was stabilized and success required lower pumping rates. *See id.* at 166. On August 2, 2010, the static kill began and responders cemented the well the following day. *See id.* at 167. Admiral Allen declared total success of the static kill on August 8. *Id.*

88. *See id.* at 169 (describing closing of well). Secretary of the Interior Ken Salazar had ordered the second relief well as a backup, and BP began drilling on May 17. *Id.* at 132. The oil industry considered relief wells the only effective method of sealing the well, but estimates pegged the time to completion at three months or longer. *See id.* (outlining viable options to seal well at beginning of spill).

89. *See id.* at 170 (noting shift in government and public focus once well sealed); *see also* Michael Cooper, *Coverage Turns, Cautiously, to Spill Impact*, N.Y. TIMES, Aug. 7, 2010, at A8 (noting shift in news coverage after successful static kill).

90. *See, e.g.*, Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA Re-opens More Than 3,000 Square Miles of Closed Gulf Fishing Area (Aug. 10, 2010), *available at* [http://www.noaanews.noaa.gov/stories2010/20100903\\_reopening.html](http://www.noaanews.noaa.gov/stories2010/20100903_reopening.html); Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA Reopens Nearly 8,000 Square Miles in the Gulf of Mexico to Fishing (Sept. 21, 2010), *available at* [http://www.noaanews.noaa.gov/stories2010/20100921\\_reopening.html](http://www.noaanews.noaa.gov/stories2010/20100921_reopening.html); Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA to Re-open One-third of Closed Gulf Fishing Area (July 22, 2010), *available at* <http://www.noaanews.noaa.gov/stories2010/20100722-reopening.html>.

91. *See* DEEP WATER, *supra* note 4, at 185-88 (noting concerns over safety of Gulf seafood and economic impact from injuries to Gulf "brand"); *see also* Press Release, Food & Drug Admin., NOAA and FDA Announce Chemical Test For Dispersant in Gulf Seafood (Oct. 29, 2010), *available at* <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2010/ucm231653.htm> (announcing new effort to monitor dispersant levels in food); Shaila Dewan, *Questions Linger as Shrimp Season Opens in Gulf*, N.Y. TIMES, Aug. 17, 2010, at A19 (describing issues with Gulf seafood brand in wake of BP oil spill); Dahr Jamail, *Is the Gulf of Mexico Safe?*, AL JAZEERA ENG. (Nov. 5, 2010, 1:31 PM), <http://english.aljazeera.net/indepth/features/2010/11/201011465847225269.html> (noting concerns regarding Gulf seafood).

92. *See* Complaint, United States v. BP Exploration & Prod. Inc., No. 2:10-cv-04536 (E.D. La. Dec. 15,

named defendants.<sup>93</sup> The United States sought civil penalties under the CWA, a declaratory judgment that all named defendants in the lawsuit are liable without limitation for removal costs and damages under the OPA, and injunctive and other relief as appropriate.<sup>94</sup>

Congress passed the OPA soon after the *Exxon Valdez* spill.<sup>95</sup> Congress intended to standardize the penalties on parties responsible for any future oil spills.<sup>96</sup> Under the OPA, responsible parties are liable for the removal costs incurred by the United States government or any Indian nation in the cleanup of an oil spill.<sup>97</sup> Responsible parties must also compensate private parties who clean up oil spills if the actions of the private party are “consistent with the National Contingency Plan.”<sup>98</sup> This statutory scheme and its language are similar to section 107 of CERCLA.<sup>99</sup>

Under both the OPA and CERCLA, in order to seek reimbursement from responsible parties, private parties’ response actions must be consistent with the NCP.<sup>100</sup> Unlike the OPA, however, CERCLA explicitly states that government removal or remedial actions must be consistent with the NCP.<sup>101</sup> Thus, while CERCLA may allow a party to defend against a government claim by proving that the government’s action was inconsistent with the NCP, it is not entirely clear whether this defense is available under the OPA.<sup>102</sup>

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2010). The United States also reserved the right to amend the complaint if it wished to pursue other actions against the defendants. *See id.* at 25.

93. *See id.* at 1.

94. *See id.* at 26 (requesting relief).

95. *See* Millard, *supra* note 57, at 340-49 (analyzing events leading up to passage of OPA). Comprehensive oil spill liability had been a topic of congressional interest for some years but the interest had not materialized into any legislation. *See id.* at 340 & n.54 (describing previous congressional attempts to legislate liability for oil spills). The House passed the bill that became the OPA on March 16, 1989, and the *Exxon Valdez* struck Bligh Reef on March 24, 1989. *See id.* (describing timing of events in 1989).

96. *See id.* at 338 (noting Congress’s desire for comprehensive oil spill compensation and liability).

97. *See* 33 U.S.C. § 2702(b)(1)(A) (2006) (detailing recoverable removal costs).

98. *Id.* § 2702(b)(1)(B) (implying responsible party liable if private plaintiff’s actions consistent with NCP).

99. *Compare* 33 U.S.C. § 2702(b)(1) (differentiating based on private or public status of plaintiff), *with* 42 U.S.C. § 9607(a)(4)(A)-(B) (2006) (distinguishing between public and private plaintiffs).

100. *See* 42 U.S.C. § 9607(a)(4)(B) (allowing recovery by private plaintiffs for recovery actions consistent with NCP).

101. *Compare* 42 U.S.C. § 9607(a)(4)(A) (stating government may only recover if actions were consistent with NCP), *with* 33 U.S.C. § 2702(b)(1)(A) (omitting requirement that government removal comply with NCP).

102. *Compare* 42 U.S.C. § 9607(a)(4)(A) (requiring government comply with NCP), *with* 33 U.S.C. § 2702(b)(1)(A) (declaring all government remedial costs recoverable from responsible party). The “arbitrary and capricious” standard for judicial review of an administrative decision does not allow a court to substitute its judgment for that of the applicable agency. *See* *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (outlining “arbitrary and capricious” standard).

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,

One cannot sue the king without his consent.<sup>103</sup> The mechanisms that allowed British subjects to seek redress against the Crown were not applicable to the democratic structure of the United States government.<sup>104</sup> The American judiciary concluded that an effective waiver required the national government to affirmatively waive its sovereign protection.<sup>105</sup>

The case law interprets CERCLA as an express waiver of sovereign immunity when the United States government or its instrumentalities are the owners, operators, or arrangers of the causes of a cost-recovery action.<sup>106</sup> The

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or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.*; accord *United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999) (utilizing arbitrary and capricious standard for review of agency decision under CERCLA). Arbitrary and capricious action inconsistent with the NCP has been a difficult burden for defendants to overcome, as indicated by the small number of successful challenges. See *Burlington*, 200 F.3d at 693-94 (holding failure to propose amendment resulted in arbitrary and capricious agency action); *Wash. State Dep't of Transp. v. Wash. Natural Gas Co., PacifiCorp*, 59 F.3d 793, 805 (9th Cir. 1995) (holding failure to follow procedures outlined in NCP resulted in arbitrary and capricious action)

103. See *United States v. Lee*, 106 U.S. 196, 205 (1882) (“The king was never suable of common right.”). The act of suing the sovereign is “inconsistent with the very idea of supreme executive power.” *Briggs v. Light Boats*, 93 Mass. (11 Allen) 157, 162 (1865). “The king can do no wrong” and thus a sovereign, being the embodiment of law, can never be in contravention of it. See David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 727 (1988) (quoting COKE, *INSTITUTES* 73 (2d Am. ed. 1836)). But see Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963) (urging interpretation of LUDWIK EHRLICH, *No. XII: Proceedings Against the Crown (1216-1377)*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 1, 42 (Vinogradoff ed., 1921), that “the king must not, was not allowed, not entitled, to do wrong.”). An alternative rationale was that it was illogical to have the King enforce a writ against himself. Jaffe, *supra*, at 3 (discussing FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 518 (2d ed. 1898)).

104. See Jaffe, *supra* note 103, at 19 (explaining differences in rights against government in English and American law). British subjects could seek redress for injuries through the petition of right against the sovereign directly or in suit against the Crown’s officers. *Id.* at 5-9. Obtaining recompense against the Crown was essentially a procedural issue, not a substantive one. *Id.* at 18. American independence and the foundation of a democratic republic made the distinction between the procedure and substance harder because of the lack of a clear sovereign. *Id.* at 20. Under the American system, the “people, who are [in Britain] called subjects, are the sovereign.” *Lee*, 106 U.S. at 208.

105. See *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (assuming congressional familiarity with judicial requirement of unequivocal waiver of sovereign immunity). This conclusion was not easily reached because, in *Chisholm v. Georgia*, the Supreme Court determined that a citizen could sue a state, making the doctrine of sovereign immunity inapplicable to the several states. 2 U.S. (2 Dall.) 419, 428 (1793) (“[A] State may be sued by a citizen of another State”). As a direct response to the Supreme Court’s holding in *Chisholm*, Congress proposed the Eleventh Amendment, disallowing suits against a state by any other state’s citizen in federal court. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (describing history of Eleventh Amendment). The Eleventh Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. From this beginning, the modern rule evolved that any waiver of the federal government’s immunity must be unequivocal, and a court facing ambiguous sovereign immunity waivers must resolve the waivers in favor of the sovereign. *U.S. Dep’t of Energy v. Ohio*, 503 U.S. at 615 (synthesizing modern rule).

106. See, e.g., *FMC Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833, 842-46 (3d Cir. 1994) (holding United States liable under CERCLA as operator and arranger); *Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1119 (D. Nev. 2008) (finding United States liable under CERCLA as arranger); *Elf Atochem N. Am.*,

United States government retains its sovereign immunity in instances where it is acting in its regulatory capacity, such as conducting removal or remedial actions under CERCLA.<sup>107</sup> An even stronger preference for sovereign immunity exists under the OPA because the government is not required to comply with the NCP to recover costs.<sup>108</sup>

#### H. Citizen Suits

Citizen suits are a common feature of environmental legislation.<sup>109</sup> The CWA authorizes citizens to sue violators on behalf of the United States government.<sup>110</sup> These citizens act as “private attorneys general” to enforce environmental regulations.<sup>111</sup> Historically, private citizens could enforce criminal statutes as well as various other government regulations.<sup>112</sup>

A citizen’s CWA suit involves a notice period during which a citizen must notify the EPA Administrator, the state where the violation occurs, and the responsible party of the citizen’s intent to file suit.<sup>113</sup> Within that sixty-day period, the EPA may pursue the alleged violator or let the citizen pursue the charge.<sup>114</sup> The Supreme Court has held that any CWA violation must be allegedly ongoing for a citizen to bring suit.<sup>115</sup>

Citizens have sued the federal government under the CWA.<sup>116</sup> In most of

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Inc. v. United States, 868 F. Supp. 707, 712-13 (E.D. Pa. 1994) (finding United States liable as an owner under CERCLA). See generally Rebecca Heintz, Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263 (1994) (outlining sovereign immunity in the context of environmental litigation).

107. See *United States v. Am. Color & Chem. Corp.*, 858 F. Supp. 445, 450 (M.D. Pa. 1994) (stating government not liable under CERCLA acting in regulatory capacity); *United States v. Atlas Minerals and Chem., Inc.*, 797 F. Supp. 411, 419-20 (E.D. Pa. 1992) (same); *United States v. Skipper*, 781 F. Supp. 1106, 1111 (E.D.N.C. 1991) (same). But see *United States v. Iron Mountain Mines*, 881 F. Supp. 1432, 1442 (E.D. Cal. 1995) (holding CERCLA supersedes regulatory immunity granted by other statutes).

108. See 33 U.S.C. § 2702(b)(1)(A) (2006) (failing to qualify which removal actions United States can recover).

109. See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 56-58 (1989) (outlining citizen suit provisions in environmental legislation); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 1-4 (2003) (describing role of citizen suits in environmental litigation and legislation).

110. 33 U.S.C. § 1365 (allowing citizen suits).

111. See May, *supra* note 109, at 1 & n.1 (characterizing citizens in citizen suits as “private attorneys general”).

112. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 2 (1975) (explaining incentive structure of private law enforcement).

113. 33 U.S.C. § 1365(b) (requiring notice sixty days before bringing suit).

114. 33 U.S.C. § 1365(b)(1)(B) (2006) (forbidding commencement of citizen action if government action already begun).

115. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (limiting universe of CWA violations actionable by citizen suit).

116. See, e.g., *Roosevelt Campobello Int’l Park Comm’n v. U.S. Env’tl. Prot. Agency*, 711 F.2d 431, 441 (1st Cir. 1983) (ordering EPA to pay attorney’s fees to Conservation Law Foundation for successful citizen suit); *Nat’l Res. Def. Council v. U.S. Env’tl. Prot. Agency*, 437 F. Supp. 2d 1137, 1166 (C.D. Cal. 2006) (compelling EPA to promulgate guidelines as required); *Nw. Env’tl. Advocates v. U.S. Env’tl. Prot. Agency*, 268 F. Supp. 2d 1255, 1262 (D. Or. 2003) (mandating EPA to promulgate water quality standards as required).

these cases, the citizen sought to force the government to enforce its own regulations.<sup>117</sup> Suit against the United States as a source of pollution is also possible.<sup>118</sup> The events in the *Deepwater Horizon* spill suggest it is possible that a governmental response may be worse than the original pollution.<sup>119</sup> Congress has maintained the government's sovereign immunity for actions during response efforts to waterborne pollution.<sup>120</sup>

### III. ANALYSIS

The government must waive its immunity in order to be held liable for injuries it inflicts.<sup>121</sup> Normally, when there are no issues of immunity, such as suits between private parties, the principles of compensation and deterrence drive the underlying judgment.<sup>122</sup> The idea that the system will compensate the victim and discourage the injuring party from repeating its behavior does not apply to governmental action.<sup>123</sup> The government's power to control its own liability allows the government to make decisions based on a rationale different from that of a private party in the same position.<sup>124</sup>

The government charged BP as the responsible party for the *Deepwater Horizon* spill.<sup>125</sup> The government's filing a civil complaint against BP under the OPA did not leave BP many options to limit its own liability.<sup>126</sup> BP's best defense has been to challenge government estimates of the amount of oil spilled in order to lessen the penalty under the OPA.<sup>127</sup> This desperate defense to limit the amount BP will pay shows the contrast between the deterrence effects of environmental laws on private parties opposed to the effect of sovereign immunity on the government.<sup>128</sup> Fear of the penalties for creating or worsening spills during remedial or removal actions does not affect the government.<sup>129</sup>

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117. See *supra* note 116 and accompanying text (giving examples of government as defendant in citizen suits).

118. See 33 U.S.C. § 1323 (waiving sovereign immunity when federal facility acts as source of pollution)

119. See *supra* note 77 and accompanying text (raising possibility response actions worsened human health effects).

120. 33 U.S.C. § 1321(j)(8) (2006) (maintaining sovereign immunity in response actions).

121. See *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (requiring clear waiver of sovereign immunity for suit to proceed).

122. See Sharkey, *supra* note 6, at 366 (stating private actors driven by consideration of effect on others).

123. See Chemerinsky, *supra* note 7, at 1202 (opining sovereign immunity deprives citizens of equal protection of law).

124. See *supra* note 7 and accompanying text (arguing government should behave as private actor).

125. See BP Oil Spill Press Briefing, *supra* note 22 (implying BP admission of responsibility).

126. See *supra* note 102 and accompanying text (comparing defenses under CERCLA and OPA and finding OPA more strenuous). The government suing under the OPA, instead of the CWA, meant that BP could not even attempt to argue that government actions had been arbitrary and capricious. See *id.*

127. See *supra* note 53 (highlighting BP's refusal to accept official estimates of total spill).

128. See 33 U.S.C. § 2702(b)(1)(A) (2006) (imposing liability on responsible parties for costs incurred by United States).

129. See *id.* § 1321(j)(8) (maintaining sovereign immunity while not granting private parties same privilege).

The United States has maintained its sovereign immunity under the CWA for its actions when responding to any pollution incident.<sup>130</sup> If the federal government were to pollute the water in violation of the CWA, but does so while responding to a previous pollution incident, it would not be held liable for that pollution, yet it could be liable if it was the original polluter.<sup>131</sup> The rationale behind this preservation of immunity is to allow the government great leeway to effectively respond to spills in a timely manner.<sup>132</sup>

A private actor in the same situation would not have the latitude of the government in the choices it could make to respond to a pollution event.<sup>133</sup> The review of a private party's actions under the OPA would determine if the party acted within the NCP, instead of the applicable tort standard, and therefore the NCP could serve as a definition of reasonableness.<sup>134</sup> In the *Deepwater Horizon* spill, the government did not respond according to the NCP.<sup>135</sup> Thus, considering the reasonableness of these government actions provides insight into how effective sovereign immunity is when the government must handle oil spill emergencies.<sup>136</sup>

Three government actions are clearly controversial enough to warrant closer scrutiny for reasonableness. The first action is the government's decision to oversee BP's operations to fight the spill instead of directly taking charge of the spill-response efforts.<sup>137</sup> The second is the high emphasis placed on the aerial spraying of dispersants in excess of previous guidelines and sometimes in contravention of EPA permission.<sup>138</sup> The third decision that may or may not be controversial is the decision to inject dispersant directly at the wellhead and allow the oil into the entire water column.<sup>139</sup>

The government's decision to oversee BP's efforts to fight the spill, instead of becoming directly responsible for it, resulted in some accusations that BP was doing just enough to fight the spill rather than doing everything in its

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130. *Id.* Specifically, the section reads: "The United States Government is not liable for any damages arising from its actions or omissions relating to any response plan required by this section." *Id.*

131. *See id.* § 1323 (waiving sovereign immunity for federal actors under CWA).

132. *See id.* § 1321(j)(8) (asserting federal sovereign immunity for response actions); Chemerinsky, *supra* note 7 (stating some argue operation of government hindered if government liable for every injury).

133. *See* 33 U.S.C. § 1321(j)(8) (limiting grant of immunity in oil spill response actions).

134. *See* 33 U.S.C. § 2702(b)(1)(B) (2006) (requiring private party's actions be consistent with NCP); Cass, *supra* note 7, at 1140 (admitting no particular standard of conduct exists for governmental or quasi-governmental acts).

135. *See supra* notes 64, 66 (detailing the subsurface application of dispersant and decision to attempt application). *See generally* 40 C.F.R. pt. 300, app. E (2010) (failing to mention subsea application as possible response strategy).

136. *See* Chemerinsky, *supra* note 7, at 1214-15 (questioning effectiveness of sovereign immunity doctrine to incentivize proper government action).

137. *See supra* notes 66, 70, 80 and accompanying text (indicating BP separate entity from government in oil spill response).

138. *See* DEEP WATER, *supra* note 4, at 144 (showing early emphasis on aerial spraying of dispersants).

139. *See supra* note 66 (allowing subsea application of dispersant at wellhead).

power.<sup>140</sup> A few instances occurred in which some part of the overall command structure accused BP of less than thorough efforts.<sup>141</sup> Additionally, it became clear that, at times, BP was acting outside of its permitted actions and the NIC lacked either the power or the desire to draw hard lines.<sup>142</sup> The command structure thus may have allowed BP some liberties that may not have been available to a direct governmental command structure.<sup>143</sup>

These criticisms, however, do not point to the reasonableness of the decision to leave BP in charge.<sup>144</sup> Rather, BP was supposed to have the technology, preparation, and expertise to fight such an oil spill.<sup>145</sup> That BP was not so prepared does not detract from the reasonableness of the government's decision.<sup>146</sup>

Also deserving scrutiny is the decision to emphasize the aerial spraying of dispersants, particularly Corexit, in amounts never before used.<sup>147</sup> Aerial spraying had been used only slightly in the previous major American oil spill, and thus its environmental effects were relatively unknown.<sup>148</sup> The EPA had approved its use but the RCP had approved only a defined geographical area for spraying and had not restricted the amount.<sup>149</sup> The EPA then attempted to limit the amount that could be sprayed daily, but evidence shows that BP violated this limit several times without repercussions.<sup>150</sup> The detected presence of dispersants in seafood as well as Gulf residents raised legitimate concerns about the long-term health effects of the dispersant, for which no data was available.<sup>151</sup>

Dispersal had been an available strategy for oil spill responders, but always in the context of surface point-source pollution.<sup>152</sup> The *Deepwater Horizon* spill was point-source pollution at the wellhead, not at the surface.<sup>153</sup> The

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140. See Gregory, *supra* note 78 (questioning BP's motives); *supra* note 23 (noting reasons for anger of public against BP).

141. See Letter from Congressman Edward Markey, *supra* note 71 (requesting clarification of retroactive approval of BP spraying of dispersants).

142. See *supra* note 70 (revealing spraying in excess of standards without corrective action from NCP).

143. See DEEP WATER, *supra* note 4, at 170 (relaying Gulf residents' suspicions BP sometimes acted without government approval).

144. See Letter from Congressman Markey, *supra* note 71 (asking for clarification of BP's role in response efforts). BP was supposed to have a plan to respond to these types of emergencies. See DEEP WATER, *supra* note 4, at 132 (explaining oil companies required to be able to respond to spills).

145. See DEEP WATER, *supra* note 4, at 83 (noting BP's submission of impractical response plans).

146. See *id.* at 133 (demonstrating flaws in BP's response plan).

147. See *supra* note 61

148. See Millard, *supra* note 57, at 344-45 (recounting previous use of dispersants during *Exxon Valdez* spill).

149. See DEEP WATER, *supra* note 4, at 143 (explaining initial restrictions on dispersant use).

150. See Letter from Congressman Markey, *supra* note 71 (questioning implications of retroactive approval to exceed daily limits of dispersants usage).

151. See *supra* note 91 and accompanying text (presenting concerns over toxicity of Gulf seafood).

152. See Whitty, *supra* note 63 (describing dispersant strategy).

153. See *id.* (noting point source far below the surface).

original rationale of applying the dispersant did not exist.<sup>154</sup> Officials, however, stated that they chose between the option of the oil hitting the beach at the surface and affecting the Gulf wetlands or taking the chance with the dispersed oil.<sup>155</sup> The end result was spraying on an unprecedented scale but claiming it was a reasonable adaptation of the previous strategy to the conditions at hand.<sup>156</sup>

The decision to allow the injection of dispersant at the wellhead may have been unreasonable.<sup>157</sup> BP's request and the EPA's response indicate that nobody knew the potential effects of deepsea injection.<sup>158</sup> Nobody was sure that deep sea injection was even an effective strategy.<sup>159</sup> The EPA could not weigh the costs and benefits of a deep sea dispersal strategy because it had no data upon which to base the decision.<sup>160</sup> The government knew that dispersants were an effective strategy against surface pollution, but surface dispersant use does not result in as significant a toxic presence in the water column as subsea dispersant use.<sup>161</sup> Instead of the shallowest parts of the Gulf becoming the proving ground for the effectiveness of dispersants, the government decided to risk the possibility that dispersants were harmful throughout the entire water column.<sup>162</sup> This decision, made without any objective data, cannot be defended on any grounds other than the fact that no better alternatives were available.<sup>163</sup>

If the government's decision to inject dispersants at the wellhead was unreasonable, then sovereign immunity is a shield that should not protect the effects of that decision.<sup>164</sup> Reports have shown that Corexit is present both in the Gulf seafood supply and in Gulf residents.<sup>165</sup> Should Gulf residents suffer any harm, they will have no recourse against the government.<sup>166</sup>

Sovereign immunity allows the government wide latitude to respond to

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154. See *id.* (highlighting difference between spill and responders' preparations).

155. See DEEP WATER, *supra* note 4, at 143 (quoting one official's description of choice).

156. See *id.* at 145 (outlining reasons subsea application of dispersant viable alternative strategy).

157. See generally ENVTL. PROT. AGENCY, *supra* note 66 (creating decision framework to apply dispersants directly at wellhead).

158. See *id.* at 1 (requiring "proof of concept" prior to proceeding with full blown subsea injection).

159. *Id.* at 2 (stating deepsea application may proceed if proof of concept successful).

160. See *id.* (revealing EPA's lack of knowledge with regard to deepsea application of dispersants); DEEP WATER, *supra* note 4, at 144 (demonstrating responders lack of knowledge of subsea application).

161. See DEEP WATER, *supra* note 4, at 182 (indicating concern subsurface application of dispersants would increase presence of toxic compounds in water column).

162. See generally ENVTL. PROT. AGENCY, *supra* note 66 (allowing subsurface application of dispersants to move forward).

163. See *id.* (requesting testing data before moving forward with subsurface application).

164. See Chemerinsky, *supra* note 7, at 1214-15 (positing avoidance of paying damages only effective incentive to control government action).

165. See *supra* notes 77, 91 and accompanying text (indicating reports of presence of Corexit in Gulf residents and seafood supply).

166. See *supra* Part II.G-H (explaining lack of legal recourses for citizens against government actions during oil spill responses).

unexpected events and limits the costs to taxpayers.<sup>167</sup> The government's freedom of action also means that if the government makes the same mistakes that other private parties commit in the same situation, the government is not subject to the same review.<sup>168</sup> In the *Deepwater Horizon* spill, the decision to inject dispersants at the wellhead may not have been reasonable and no injured party will be allowed their day in court to contest it.<sup>169</sup>

#### IV. CONCLUSION

Sovereign immunity is not an undeniable social good because the government's ability to operate without fear of future costs may allow the government to take actions that injure citizens. The belief that government requires wide latitude to respond to environmental emergencies is not static, and citizens and legislators should revisit this belief and the corresponding statutes as circumstances demand. Man is acquiring the ability to do greater harm to the environment, other creatures, and himself every day but our ability to correct such harms is not commensurate. The *Deepwater Horizon* spill is a tragedy but let it not be a tragedy wasted by failing to implement the lessons we have learned.

*Mark M. Higgins*

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167. See Chemerinsky, *supra* note 7, at 1216-17 (exploring justifications for sovereign immunity, including limiting costs to taxpayers and enhancing separation of powers).

168. See *id.* at 1213 (arguing sovereign immunity allows government to act without accountability).

169. See *supra* Part II.G-H (revealing state of law for aggrieved citizens).