

**EMERGING FROM THE MIRE: USING PUBLIC SHAMING
AFTER AN OIL SPILL TO YIELD INFORMED DECISIONS
AND ALTER BEHAVIOR**

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INTRODUCTION

Every year, there are about 14,000 oil spills within the United States alone.¹ There are approximately “25 spills per day into navigable waters and an estimated 75 spills on land.”² Yet few Americans could name more than one or two of the largest oil spills and, for the most part, are oblivious to the rest. The actual number of oil spill incidents is astounding, and the fact that the overwhelming majority of these spills are allowed to go unnoticed by the nation is especially alarming. The shroud of secrecy drawn by oil corporations, and the public’s lack of access to accurate information,³ ensures that people will remain complacent in their attitudes regarding oil activities, and as such, will not advocate for changes in our energy production and transport.

When the public does become aware of an oil spill, powerful energy corporations remain free to tout their philanthropy as they clean up the spill and spread misinformation about the extent of the damage.⁴ With the current approach, the ultimate impact of a spill and potentially its very existence remain unknown to the general population. Although under the Oil Pollution Act oil companies must pay fines and face other sanctions after a spill,⁵ as part of their retribution, they should also be required to provide full disclosure to the public about the spill, using information gathered from independent researchers, not their own hires. As courts continue the trend of treating corporations like individuals,⁶ enhanced and unique punishments for largely avoidable environmental catastrophes become imperative.

Borrowing a proven method of remediation from criminal law, this deterrent should take the form of public shaming, through a requirement to accurately publicize oil spills. This will have a direct and meaningful impact on corporations that heretofore would have relied on secrecy and misdirection to mitigate their responsibility. The ultimate goals of public

1. *Response to Oil Spills*, ENVTL. PROT. AGENCY (Nov. 8, 2014), <http://archive.epa.gov/emergencies/content/learning/web/html/response.html>.

2. MERV FINGAS, *THE BASICS OF OIL SPILL CLEANUP* 3 (Jennifer Charles ed., 2d ed. 2001).

3. Jeremy W. Peters, *Efforts to Limit the Flow of Spill News*, N.Y. TIMES (June 9, 2010), http://www.nytimes.com/2010/06/10/us/10access.html?ref=global-home&_r=0.

4. See, e.g., *BP Apology Campaign Begins Airing*, CNN (June 3, 2010, 10:05 AM), <http://www.cnn.com/2010/US/06/02/oil.spill.bp.apology/> (discussing BP’s attempts to improve its “tarnished” image with its promotional video following the 2010 Gulf oil spill).

5. 33 U.S.C. § 1321(f)(1) (2012); *id.* § 1321(b)(7)(D).

6. See *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that corporations should not be granted First Amendment free speech protection, because corporations are not people); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014) (holding that “closely held” corporations are “people” within the meaning of the Religious Freedom Restoration Act).

shaming are deterrence, public awareness, and accurate publicity of oil spill disasters.⁷ Public shaming provisions would have the effect of making oil companies and their practices more transparent, as well as permitting the public to make more informed decisions, and courts to levy fines and sanctions that accurately reflect a spill's real damages. The result of public shaming and the tandem education of the populace may ultimately tip society toward less damaging forms of energy, such as solar, electric, and wind. So long as oil companies keep the public in the dark, the status quo will continue. To better address oil pollution in our country, Congress should include public shaming and independent monitoring during a spill in the Oil Pollution Act.

This Note proceeds in two parts. The first section discusses three oil spill incidents. The first, the *Exxon Valdez*, set the stage for modern oil pollution control and legislation. The Deepwater Horizon spill chronicles the outcomes of a modern large-scale oceanic spill. The third spill, a largely unknown pipeline spill in Tioga, North Dakota, illustrates the practice of corporate secrecy and the need for public awareness after a spill.

This Note's second section explores a method of punishment for oil polluters that both sanctions the violators and engages the public, thereby encouraging people to use their voices and consumer power in response to a spill. This section argues that the Oil Pollution Act must require public shaming of oil companies to bring greater public attention to spills. The shaming will take unique forms, and the information used to shame the companies responsible for the incidents will originate from third-party observers, rather than from within the companies themselves. This Note urges Congress to incorporate public shaming into the Oil Pollution Act in order to increase public awareness of oil spills and the environmental dangers they cause.

I. AN OVERVIEW OF OIL SPILLS IN THE UNITED STATES

A. Although a Large Oil Spill May Garner Public Awareness, Many Aspects of the Spill Will Remain Unknown

1. The *Exxon Valdez* Oil Spill Disaster

At 12:04 A.M. on March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef, became lodged, and started fanning oil into Alaskan waters.⁸ This

7. Darlene R. Wong, *Stigma: A More Effective Alternative to Fines in Deterring Corporate Misconduct*, 3 CAL. CRIM. L. REV. 3 (2000).

8. ART DAVIDSON, *IN THE WAKE OF THE EXXON VALDEZ* 18–19 (Linda Gunnarson ed. 1990).

spill would become one of the largest oil spills in American history.⁹ To date, the spill remains one of the most well-known oil disasters.¹⁰ The 10.8 million gallons of crude oil gushing into the Prince William Sound has continued to negatively affect Alaska's coastal areas.¹¹ The economic and environmental losses resulting from this spill were enormous.¹² Studies show that the environment in Alaska's Prince William Sound region has not recovered from the spill, the "habitats injured by the spill have not fully recovered, and some are not recovering at all."¹³ Despite the unambiguous level of devastation, the court battles rage on, with Exxon fighting to limit their cost for damages.¹⁴ The "take-home message from this quarter-of-a-century long spill debacle is that no one should expect environmentally responsible behavior by government or the oil industry"¹⁵

Although this oil spill "was one of the most publicized and studied environmental tragedies in history," there are still questions surrounding the catastrophe.¹⁶ In the end, blame for the spill largely fell onto the shoulders of the inebriated ship captain; however, there were notable "safety failures that led to the spill."¹⁷ Problems far more insidious were at work long before the *Valdez* crashed into the Bligh Reef.¹⁸ The Alyeska Pipeline Service Company, which owns the Trans-Alaska Pipeline and regularly ships sizeable oil tankers through Alaskan waters, moved into the Alaskan

9. Alan Neuhauser, *Oil Spills Aplenty Since Exxon Valdez*, U.S. NEWS (Mar. 25, 2014, 9:58 PM), <http://www.usnews.com/news/blogs/data-mine/2014/03/25/us-racks-up-dozens-of-oil-spills-in-25-years-since-exxon-valdez>.

10. See, e.g., James Gerken, *Remembering the Exxon Valdez Oil Spill, 25 Years Later*, HUFFINGTON POST (Mar. 24, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/03/24/exxon-valdez-oil-spill-photos_n_5020845.html (reporting on the oil spill's long-term effects and demonstrating that people continue to remember the oil spill 25 years later).

11. *Id.*

12. See *Questions and Answers About the Spill*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, <http://www.evostc.state.ak.us/index.cfm?FA=facts.QA> (last visited Mar. 24, 2016) (listing numbers of animals killed outright by the spill); see also *Economic Impacts of the Spill*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, <http://www.evostc.state.ak.us/index.cfm?FA=facts.econ> (last visited Mar. 24, 2016) (discussing the economic toll on the Alaskan people).

13. Rick Steiner, *Compass: Exxon Valdez Spill Is Long Past, but Not the Oil-or the Legal Case*, ALASKA DISPATCH NEWS (Sept. 16, 2013), <http://www.adn.com/article/20130916/compass-exxon-valdez-spill-long-past-not-oil-or-legal-case>.

14. See *id.* (presenting information regarding the extensive court battles waged by Exxon in an attempt to stall cleanup efforts and limit their costs).

15. *Id.*

16. *Oil Spill Facts*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, <http://www.evostc.state.ak.us/index.cfm?FA=facts.home> (last visited Mar. 24, 2016).

17. Scott Michels & Aaron Ernst, *Exxon Valdez: In the Wake of Disaster*, RETROREPORT, (Dec. 9, 2013, 5:00 AM), <http://www.retroreport.org/video/exxon-valdez-in-the-wake-of-disaster/>.

18. See DAVIDSON, *supra* note 8, at 5 (discussing the lack of safety precautions and procedures in place before the *Exxon Valdez* crash).

wilderness with one clear goal: to make money.¹⁹ Apparently, safety was not on their minds as the “*Valdez* run constituted 13 percent of the nation’s total tanker traffic but accounted for 52 percent of its accidents.”²⁰ Some argue that behind closed doors, officials made decisions that ensured proper support would not be available to contain a spill.²¹ In fact, shortly before the *Exxon Valdez* spill, Alyeska employees confirmed that the company was laying off oil response teams, and that Alyeska was not making proper repairs to equipment—all in order to cut costs.²²

Because Alyeska disbanded the oil spill response team earlier, “Alyeska had no trained spill response team in place and ready to act.”²³ Success in an oil spill scenario depends on speed and exactness—neither of which Alyeska or Exxon exemplified in the hours after the *Valdez* struck the reef.²⁴ Alyeska’s on-site staff did not have equipment prepared for a spill, and so, in the first critical hours after the spill, oil gushed out of the ship and spread “three miles long and two miles wide . . .” unabated.²⁵ Notably, in December 1976, “[t]he Coast Guard ‘strongly recommended’ that the industry position appropriate cleanup gear in Prince William Sound. Alyeska did not comply with the recommendation.”²⁶ As time ebbed on, the oil slick spread over the ocean surface. Oil moves rapidly in water, “usually reach[ing] its maximum area within one day,” and will follow ocean currents and wind direction.²⁷ Therefore, when Alyeska barges finally arrived fourteen hours later with booms and skimmers, the spill had already spread to a likely unmanageable size.²⁸ As emergency personnel haphazardly put booms into place, the oil choked rescuers and continued to give off a gas that turned the air blue.²⁹

Public attention soon shifted away from Alyeska’s shortcomings, if the public had ever been aware of Alyeska’s mishandling of the spill to start. Attention shifted to the clear culprit—Exxon—which in turn placed the

19. *Id.* at 4.

20. *Id.* at 7.

21. Greg Palast, *25 Years After Exxon Valdez, BP Was the Hidden Culprit*, TRUTHDIG (Mar. 23, 2014), http://www.truthdig.com/report/item/25_years_after_exxon_valdez_the_hidden_culprit_was_bp_20140323.

22. DAVIDSON, *supra* note 8, at 7.

23. *Id.* at 22.

24. *Id.* at 23–25.

25. *Id.* at 24.

26. *Id.* at 86.

27. FINGAS, *supra* note 2, at 50.

28. DAVIDSON, *supra* note 8, at 28–29 (arguing that the Alyeska response team sent booms and skimmers far too late to manage the spill which had likely spread significantly within the first day).

29. *See id.* at 28–29 (describing the scene when a barge with booms and skimmers finally arrived at the downed ship).

blame on their purportedly inebriated ship captain.³⁰ The failure of Exxon was equally the failure of Alyeska, but once the media found the captain was controlling an oil tanker while inebriated, the public was never given the story beyond that failure.³¹ Alyeska claimed they could recover “at least 100,000 barrels of oil in seventy-two hours, [yet] Alyeska actually recovered barely 3,000 barrels within that time span.”³² Because Exxon relied on Alyeska for oil spill support and cleanup, there ostensibly was no plan in place once Alyeska eliminated the cleanup crew.³³ Cutting costs took precedence over protecting the environment from a spill; Alyeska saw to it that all possible contingency plans were eliminated from the budget.³⁴ The Prince William Sound oil spill did not happen because of unexpected circumstances, but was instead brought about by a steady stream of Alyeska’s poor management decisions.³⁵ Alyeska certainly did not want their shortcomings reaching the ears of consumers, and quietly disappeared from view shortly after Exxon began taking the blame.³⁶ Today, the public largely remains uninformed about the truth behind the Exxon spill. Unfortunately, this spill was not the last this country would see—it no longer ranks as either one of the largest in the nation or one of the top 50 internationally.³⁷

Furthermore, there was significant confusion regarding the actual amount of oil spilled from the tanker.³⁸ The original figures determined that between about 10.8 million gallons and 38 million gallons pumped out of the oil tanker into the ocean.³⁹ The low-end range of 11 million gallons is roughly enough oil to fill seventeen Olympic-sized swimming pools.⁴⁰ However, despite this wide range, the media began reporting that the *Valdez* had spilled only 10.8 million gallons. Exxon did not publicly state how much oil the

30. *See id.* at 49 (discussing how public blame was never put on the right groups; Alyeska never faced public scrutiny as Exxon did, and even Exxon found a scapegoat of their own).

31. *See id.* (depicting the press conferences held shortly after the spill and how Alyeska moved aside to allow Exxon to shoulder the blame).

32. *Id.* at 80.

33. *Id.* at 80–81 (explaining that Alyeska failed to have an emergency plan in place for oil spills and due to this failure, the *Exxon Valdez* spill was not contained in the first critical hours).

34. *Id.*

35. *See id.* at 86–87 (detailing the ways in which Alyeska failed to meet standards in order to minimize costs).

36. *See id.* at 87 (noting Alyeska’s shortcomings before and after the Exxon spill, and how Alyeska faded out of the media spotlight and the public’s attention after the spill).

37. Neuhauser, *supra* note 9.

38. *How Much Oil Really Spilled from the Exxon Valdez?*, ON THE MEDIA (June 18, 2010), <http://www.onthemedial.org/story/132811-how-much-oil-really-spilled-from-the-exxon-valdez/> (discussing that the eleven million gallon figure was a low-end estimate of the total amount of oil spilled) [hereinafter *How Much Oil Really Spilled*].

39. *Id.*

40. *Questions and Answers About the Spill*, *supra* note 12.

tanker had released, and in a clever move, Frank Larossi, the owner of Exxon Shipping, was quick to redirect attention by pinning the disaster on the ship's captain.⁴¹ The media switched gears to attacking the captain, and no one reported the high-end figures of the spill.⁴² Later, independent surveyors preparing for the eventual lawsuit against Exxon agreed that the actual amount of oil spilled was between 30 and 35 million gallons.⁴³ This information never made it to the public eye, and the federal government later created oil spill legislation to protect against future spills based upon the 10.8 million gallon estimate.⁴⁴

The lack of information provided after a spill affects more than public opinion; it plays a part in creating ineffectual legislation and court decisions. The only way to ensure that correct information reaches the public is to hire third-party investigators from the start, and to publish data from independent sources, rather than relying on corporate estimates, which are likely false.⁴⁵ The public, Congress, and courts must have access to accurate records to ensure that oil enterprises are held accountable for their actions. Ideally, with proper punishments in place oil companies will prevent oil spills before they happen. Deterrence in oil spill cases is key because once the oil is spilled, no amount of money will bring back the lost businesses that relied on an ecosystem untainted by oil.

a. The Oil Pollution Act of 1990 Attempted to Rectify Significant Shortcomings Observed During and After the *Exxon Valdez* Oil Spill

i. Backdrop of the Oil Pollution Act of 1990

After the *Exxon Valdez* spill, many voiced immense concerns regarding the outcome of the spill response and cleanup.⁴⁶ In congressional hearings, representatives said that:

41. *How Much Oil Really Spilled from the Exxon Valdez?*, *supra* note 38 (reporting that Frank Larossi insinuated that the captain had been drinking at the time of the accident).

42. *See id.* (explaining the events that led to the estimated size of the Exxon Valdez oil spill, and how that estimate never changed over time).

43. *Id.*

44. *Id.* (“And it’s extremely unfortunate, because we did write legislation at the federal level and at the State of Alaska to protect us from an Exxon Valdez-sized oil spill, which means that we are underprotected by three times.”).

45. *Id.* (concluding that oil companies likely misrepresent oil spill numbers, leading to disastrous results).

46. *E.g., Review of Current Laws for Recovering Damages Caused by Spills of Oil and Hazardous Substances: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Env’t of the H. Merch. Marine and Fisheries Comm.*, 101st Cong. 1-16 (1989) (statement of Rep. Gerry

[f]or the past two months, our Nation has watched in horror and anger as fish and waterfowl, and marine mammals have struggled to survive the worst oil pollution incident in our Nation's history. The American people, from the President on down, have made it clear that they want that oil spill cleaned up; that they want those natural resources restored; and they want the polluter to pay.⁴⁷

That sentiment extended to all oil spills, not just large-scale spills.⁴⁸ After the *Exxon Valdez* spill, it became clear that oil spills were an ongoing and significant threat to the health and welfare of the public, as well as the environment.⁴⁹ At the time of the *Valdez* crash, at least five separate federal statutes dealt with oil spill liability and compensation.⁵⁰ Congress recognized that this hodgepodge of statutes did not adequately address oil spill cleanup and liability, and a universally applicable statute was required.⁵¹

There was an overarching belief that the response to the Prince William Sound disaster was sluggish and deficient, resulting in extensive damages.⁵² Understanding the gravity of what had happened on the coast of Alaska, the public was deeply concerned and wanted to ensure that if a spill did happen again, the oil company responsible would be ready to react promptly, unlike in the *Exxon Valdez* disaster. Outraged by the devastation of the spill, the public sought not only a change in spill management, but also to send the message that this sort of disaster could never happen again.

ii. Provisions Under the Oil Pollution Act

The compensation plan in place prior to the passage of the Oil Pollution Act of 1990 (OPA) did not make the environment or affected people whole, and it needed an overhaul.⁵³ With the passage of OPA, Congress intended to

E. Studds, Chairman, Subcomm. on Fisheries and Wildlife Conservation and the Env't) [hereinafter *Review of Current Laws for Recovering Damages*]; S. REP. NO. 101-94, at 2 (1989).

47. *Review of Current Laws for Recovering Damages*, *supra* note 46, at 1.

48. *Id.*

49. S. REP. NO. 101-94, at 2.

50. *Id.* at 3.

51. *See id.* at 2-3 (calling for a set of corresponding laws at the international, national, and state level); *see also In re Settoon Towing LLC*, 722 F. Supp. 2d 706, 708-09 (E.D. La. 2009) (discussing the background and intention of the Oil Pollution Act of 1990); KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41396, THE 2010 OIL SPILL: NATURAL RESOURCES DAMAGE ASSESSMENT UNDER THE OIL POLLUTION ACT 1-2 (2010).

52. S. REP. NO. 101-94, at 2.

53. *Id.*

standardize oil spill liabilities.⁵⁴ To do this, Congress combined several individual statutes dealing with spill liability into one comprehensive act to streamline the litigation process.⁵⁵ With a focus on forcing the polluter to pay, and the desire to manage the shortcomings revealed during the *Exxon Valdez* crash, Congress passed OPA.⁵⁶

In keeping with the polluter-pays principle, the first section of OPA contains provisions establishing liability and determining appropriate compensation for oil spills.⁵⁷ Before a court decides subsequent fines, the party responsible “for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines . . . is liable for the removal costs.”⁵⁸ The Coast Guard determines the responsible party upon receiving information of an oil spill.⁵⁹

Additionally, the Act increases the liability limits that the Clean Water Act previously imposed on polluters.⁶⁰ Civil penalties are “up to \$25,000 per day of violation or an amount up to \$1,000 per barrel of oil,”⁶¹ and if gross negligence is found, the responsible party “shall be subject to a civil penalty of not less than \$100,000, and not more than \$3,000 per barrel of oil . . . discharged.”⁶² Notably, courts decide if an oil company will be

54. Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is It Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 125 (2001).

55. *Id.*; see also ADAM VANN & ROBERT MELTZ, CONG. RESEARCH SERV., R41972, THE 2010 DEEPWATER HORIZON OIL SPILL: NATURAL RESOURCE DAMAGE ASSESSMENT UNDER THE OIL POLLUTION ACT 1 (2013).

OPA amended the CWA and several other statutes imposing oil spill liability to create a unified oil spill liability regime, to expand the coverage of such statutes, increase liability, to strengthen federal response authority, and to establish a fund to ensure that claims are paid up to a stated amount.

Id.

56. *A Look at the 1990 Oil Pollution Act*, NAT'L PUB. RADIO (June 15, 2010), <http://www.npr.org/2010/06/15/127862906/a-look-at-the-1990-oil-pollution-act>.

57. 33 U.S.C. §§ 2701–2702 (2012).

58. *Id.* § 2702(a); see also *id.* § 2701(32) (defining a “responsible party”).

59. VANN & MELTZ, *supra* note 55.

60. Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 16 (1990).

61. 33 U.S.C. § 1321(b)(7)(A); see also ROBERT MELTZ, CONG. RESEARCH SERV., R41370, FEDERAL CIVIL AND CRIMINAL PENALTIES POSSIBLY APPLICABLE TO PARTIES RESPONSIBLE FOR THE GULF OF MEXICO OIL SPILL 3–4 (2010), <https://fas.org/sgp/crs/misc/R41370.pdf> (explaining that the penalties under OPA have increased as a result of inflation; for a violation of § 1321(b)(7)(A), penalties are adjusted from \$25,000 to \$37,500 and from \$1,000 to \$1,100 per barrel discharged).

62. 33 U.S.C. § 1321(b)(7)(D); see also VANN & MELTZ, *supra* note 55, at 4 (adding that for a finding of gross negligence the penalties rise from \$100,000 to \$140,000 and \$3,000 to \$4,300 per barrel discharged, as adjusted for inflation).

charged per day or per barrel spilled.⁶³ To determine the applicable financial penalties, the court

shall consider the seriousness of the . . . violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.⁶⁴

In addition to penalty information, OPA included other useful provisions, such as ongoing research to minimize future oil spills and education to increase awareness of the spill's environmental disruption.⁶⁵

Furthermore, the parties responsible for the degradation of natural resources must make those resources whole.⁶⁶ Natural resources in this country are protected under the public trust doctrine.⁶⁷ Drawing from the principles of this doctrine, when natural resources are damaged by oil pollution, "federal, state, foreign, and tribal governments may seek compensation for damage" under OPA.⁶⁸ This recovery process, known as Natural Resource Damage Assessment and Recovery (NRDA) is authorized under OPA,⁶⁹ and is also authorized by several other statutes depending on the type of contamination presented.⁷⁰ NRDA aims to restore natural resources; it does not directly aid individuals harmed by a spill, nor does it cover punitive damages.⁷¹ Instead, restoration fines are intended to recover the damaged natural resources to the status they were before the oil spill.⁷² The natural resources described under OPA broadly include:

63. VANN & MELTZ, *supra* note 55, at 4.

64. 33 U.S.C. § 1321(b)(8).

65. *Id.* at § 2761 (outlining the plan for ongoing research to curtail the disastrous effects of oil pollution and the means of reaching that end goal).

66. 15 C.F.R. § 990.10 (2015) ("The goal of the Oil Pollution Act of 1990 (OPA), . . . is to make the environment and public whole for injuries to natural resources and services . . .").

67. ALEXANDER, *supra* note 51, at 1.

68. *Id.*

69. 33 U.S.C. § 2702(b)(2)(A) (2012).

70. ALEXANDER, *supra* note 51, at 1.

71. *Id.*

72. *Id.*

land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the recourses of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.⁷³

Those tasked with analyzing the damages to those natural resources are called Trustees.⁷⁴ These Trustees include groups from federal, state, tribal, and foreign governments.⁷⁵ For example, the Trustees in the BP oil spill NRDA process include, to name only a few, the United States Fish and Wildlife Service, the Department of Environmental Quality for the State of Mississippi, and the Parks and Wildlife Department from the State of Texas.⁷⁶ These Trustees work together to create a viable restoration plan that addresses all of the damages to the affected natural resources.⁷⁷

Three phases are required to assess damages to resources prior to determining the responsible party's obligation.⁷⁸ First, in the Preassessment Phase, the Trustees determine whether restoration is necessary.⁷⁹ Second, in the Restoration Planning Phase, the Trustees assess the damages to the resources, analyze the type of restoration required, and consider how that restoration might take place.⁸⁰ Third, during the Restoration Implementation Phase, the Trustees create a restoration plan, and ensure that restoration is implemented.⁸¹ Each Trustee creates a plan that restores, rehabilitates, and replaces the natural resources within its trusteeship.⁸²

Damages are measured under 33 U.S.C. § 2706(d) in three separate ways. First, there is the "cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources."⁸³ The second deals with the "diminution in value of those natural resources pending restoration,"⁸⁴ and the third is the "reasonable cost of assessing those

73. 33 U.S.C. § 2701(20).

74. ALEXANDER, *supra* note 51, at 2.

75. *Id.*

76. *Id.* at 3.

77. *Id.* at 4.

78. *See generally* 15 C.F.R. § 990.12 *et seq.* (2015) (setting out an overview of regulations under the Oil Pollution Act).

79. *Id.*

80. *Id.*; ALEXANDER, *supra* note 51, at 8.

81. 15 C.F.R. § 990.12; § 990.60.

82. 33 U.S.C. § 2706(e)(1)(C) (2012).

83. § 2706(d)(1)(A).

84. § 2706(d)(1)(B).

damages.”⁸⁵ NRDA damages are capped at \$75 million for offshore spills or \$350 million for spills at onshore facilities and deep water ports that cause pollution to navigable waters unless an exception applies.⁸⁶ Exceptions apply if the “incident was proximately caused by . . . gross negligence or willful misconduct of . . . the responsible party”⁸⁷

b. The Supreme Court Limited Damages Awarded After an Oil Spill in
Exxon Shipping Co. v. Baker

The case against Exxon Shipping Company was a complex maze of court battles and subsequent appeals. Exxon spent about \$2.1 billion to clean up the oil from the crashed tanker.⁸⁸ Exxon also pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.⁸⁹ In total, the resulting fines under those statutes were originally \$150 million, which courts reduced to \$25 million and \$100 million in restitution.⁹⁰ Exxon also paid \$900 million towards restoring the Alaskan environment, and they agreed to pay \$303 million to individuals for property damage and to business owners harmed by the spill.⁹¹

The punitive damages remained in contention, and parties continued to litigate this issue through 2008. OPA does not specifically outline punitive damage awards, and courts are able to use their discretion when awarding punitive damages.⁹² In 1994, the jury in the *Exxon Valdez* case awarded plaintiffs a little over \$5 billion in punitive damages.⁹³ The United States District Court for the District of Alaska held that the damages awarded were “justified by the facts of the case and [were] not grossly excessive so as to deprive Exxon of fair notice—its right to due process.”⁹⁴ In 2001, the federal appeals court determined that the \$5 billion in punitive damages was too high

85. *Id.*

86. § 2704(a)(3)–(4).

87. § 2704(c)(1).

88. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 479 (2008).

89. *Id.*

90. *Id.*

91. *Id.*

92. Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917, 928–29 (2011).

93. *In re the Exxon Valdez v. Exxon Mobile Corp.* 490 F.3d 1066, 1072 (9th Cir. 2006), *vacated by Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

94. *In re the Exxon Valdez*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002), *vacated by Sea Hawk Seafoods, Inc. v. Exxon Corp.*, No. 03-35166 (9th Cir. Aug. 18, 2003).

and remanded the case to the lower court.⁹⁵ After the remand, district court Judge Holland lowered that figure to \$4 billion urging that the amount was reasonable given the circumstances.⁹⁶ After a subsequent remand from the Ninth Circuit, Judge Holland increased the punitive damages award to \$4.5 billion.⁹⁷ Finally, the Ninth Circuit ordered a remittitur of \$2 billion, which reduced the final punitive damages to \$2.5 billion.⁹⁸ The Ninth Circuit opinion argued the \$4.5 billion figure was too high, and a \$2.5 billion damage award represented appropriate punishment for the reprehensible and reckless actions of Exxon.⁹⁹ Furthermore, the court argued that the lowered amount was reasonable and necessary to send a message to Exxon that their actions had been especially egregious.¹⁰⁰ Although this figure was a little over half what the jury awarded, Exxon fought this figure, and the case reached the United States Supreme Court.

The Supreme Court sent a rather different message with their ruling. The Court “capped the level of punitive damages available in such cases to the level of compensatory damages awarded.”¹⁰¹ That reduced the punitive damages against Exxon to \$507.5 million, which equaled the jury’s compensatory damages award.¹⁰² The Court reasoned that a 1:1 ratio between compensatory and punitive damages was reasonable and limited unpredictability in damage awards.¹⁰³ Courts typically award punitive damages to punish a defendant’s behavior, and to deter poor behavior in the future, rather than as a compensatory award to plaintiffs.¹⁰⁴ The Court, while recognizing the need to deter future oil spills, concluded that their decision was warranted in light of recent criticism regarding extremely high punitive awards and the unpredictability of retributory damages.¹⁰⁵ Although several courts agreed on a figure in the billions, the Court overturned those decisions and created a standard for all cases of this nature in the future.

95. *In re the Exxon Valdez v. Hazelwood*, 270 F.3d 1215, 1246–47 (9th Cir. 2001); Henry Weinstein & Kim Murphy, *Court Overturns \$5-Billion Judgment Against Exxon in '89 Alaska Oil Spill*, L.A. TIMES (Nov. 1, 2001) <http://articles.latimes.com/2001/nov/08/news/mn-1625>.

96. *Id.*

97. *In re the Exxon Valdez*, 490 F.3d at 1073.

98. *Id.* at 1095.

99. *Id.*

100. *See id.* (finding Exxon’s actions reprehensible, justifying the \$2.5 billion punitive damage award).

101. Garry A. Gabison, *Limited Solution to a Dangerous Problem: The Future of the Oil Pollution Act*, 18 OCEAN & COASTAL L.J. 223, 238 (2013); *see also* *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008) (“[T]he award here should be limited to an amount equal to compensatory damages.”).

102. *Exxon Shipping Co.*, 554 U.S. at 515.

103. *Id.*

104. *Id.* at 492.

105. *Id.* at 497, 499.

Damages of this sum are not enough to send a clear message to oil companies. They may even be so severely lacking as to create a disincentive to litigate smaller spills, which will not garner large compensatory damages.¹⁰⁶ The upshot of the Exxon litigation was that in the same year Exxon hit their all-time highest yearly profit—\$45.2 billion¹⁰⁷—the Court cut punitive damages, which should be used to make an example of truly despicable behavior, down to a miniscule figure compared to the original jury award. The lessened figure did not punish Exxon. Rather, in light of their yearly earnings, it merely created an inconvenience. The case started in 1989 when the tanker first hit the Alaskan reef. It took 19 years for a court to award the final punitive damages amount.

While the Court did not put an exact monetary cap on punitive damages, in essence, there is a ceiling on punitive damages because a cap exists for compensatory damages as outlined by Congress.¹⁰⁸ The Court limited punitive damages under OPA; as a result, society's legal voice concerning oil spill cases is limited. Additionally, while money damages are necessary, oil companies likely expect spills to occur. Spills remain a cost of doing business for these multi-billion dollar corporations,¹⁰⁹ and money damages, especially limited damages, do not send a firm enough message. What would speak volumes to oil companies would be the outraged voice of the public, vehemently opposing reliance on oil and urging for a change in society away from oil use. If oil companies do not feel society's outrage through punitive damages, the public must have some other recourse against oil companies and their ambivalence to accurately reporting oil spills quickly and efficiently. Public awareness through a public shaming model, based upon verified information, may once again give society a voice to motivate a change.

2. The Notorious Deepwater Horizon Oil Spill and Its Aftermath

During a still night on April 20, 2010, a bubble of methane gas from the Macondo well rocketed through the nearly 18,360 feet of pipeline below the

106. Gabison, *supra* note 101, at 238.

107. Chris Isidore, *Exxon Mobil Profit Is Just Short of Record*, CNN MONEY (Feb. 1, 2013, 9:39 AM), <http://money.cnn.com/2013/02/01/news/companies/exxon-mobil-profit/> (explaining that in 2008, Exxon Mobil hit not only their highest profit, but also the highest yearly profit for any company).

108. *See Exxon Shipping Co.*, 554 U.S. at 514 (explaining the monetary cap on criminal damages Congress set under the Clean Water Act).

109. *See* Isidore, *supra* note 107 (stating that in 2012, “[t]he No. 1 U.S. oil company posted full-year earnings of \$44.9 billion”).

ocean's surface up to the Deepwater Horizon rig.¹¹⁰ That methane “shot up the drill column, expanding quickly as it burst through several seals and barriers before exploding,” causing the failure of the British Petroleum (BP) Deepwater Horizon oil rig.¹¹¹ The methane gas cloud and hydrocarbons traveled through the “blowout preventers”—safety mechanisms designed to curtail such a blowout—and poured over the rig.¹¹² The hydrocarbons from the Macondo well ignited, and explosions rocketed the rig into total darkness.¹¹³ A slurry of oil and seawater gushed into the air and rained back down onto the rig and the ocean's surface.¹¹⁴ A raging fire soon ignited on the Deepwater Horizon rig, which turned into an uncontrollable inferno.¹¹⁵ The workers on the rig escaped any way they could.¹¹⁶ One worker threw himself off the ten-story rig into the blackened sea, and prayed he would land alive.¹¹⁷ Coast Guard rescuers never found 11 of the workers.¹¹⁸

The Deepwater Horizon burned for two days before collapsing.¹¹⁹ As the rig sank into the ocean, landing in the undersea Mississippi Canyon, the rig tore the piping that had pumped oil up from the Macondo well.¹²⁰ The destroyed pipe opened the way for a geyser of oil to spew directly from the undersea reserves up into the ocean.¹²¹ This geyser raged on for five months until September 19, 2010, when BP completely sealed off the Macondo well at the bottom of the ocean.¹²² According to several reports, over the course of 87 days, at least 200 million gallons (approximately 4.9 million barrels)

110. Naoki Schwartz & Harry Weber, *Bubble of Methane Triggered Rig Blast*, S. CAL. PUB. RADIO (May 8, 2010), <http://www.scpr.org/news/2010/05/08/14902/bubble-methane-triggered-rig-blast/>; PETER LEHNER & BOB DEANS, IN *DEEP WATER: THE ANATOMY OF A DISASTER; THE FATE OF THE GULF, AND ENDING OUR OIL ADDICTION* 36 (2010).

111. *Id.*

112. David Barstow *et al.*, *Deepwater Horizon's Final Hours*, N.Y. TIMES (Dec. 25, 2010), http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all&_r=0; Ben Bryant, *Deepwater Horizon and the Gulf Oil Spill—The Key Questions Answered*, GUARDIAN (Apr. 20, 2011), <http://www.theguardian.com/environment/2011/apr/20/deepwater-horizon-key-questions-answered>.

113. Bryant, *supra* note 112.

114. LEHNER & DEANS, *supra* note 110, at 1–2.

115. *Id.* at 2.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 3.

122. *In re* Oil Spill by the Oil Rig “Deepwater Horizon”, 77 F. Supp. 3d 500, 516 (E.D. La. 2015); see also Margaret Cronin Fisk & Laurel Brubaker Calkins, *BP Gulf of Mexico Spill, From Disaster to Trial: Timeline*, BLOOMBERG (Feb. 24, 2013, 7:00 PM), <http://www.bloomberg.com/news/2013-02-25/bp-gulf-of-mexico-spill-from-disaster-to-trial-timeline.html> (explaining how BP sealed the Macondo well by pumping in cement from a relief well).

of crude oil flowed unabated from the Macondo well before the “bottom kill” mission was successful.¹²³

This disaster has left its mark in countless ways. The overall effects of such a catastrophe are not well understood, and ongoing studies reveal that the effects of the spill are far from over.¹²⁴ Findings conclude that because animals killed by the spill sank after they died, the number of deaths remains unknown. Reports indicate that an “unusually high number of bottlenose dolphins” have died over the past four years, and as many as 122 cetaceans were stranded or dead soon after the spill.¹²⁵ Between November 3, 2010 and April 13, 2010, another 936 cetaceans were reported stranded or dead.¹²⁶ From tests performed in 2011, researchers “concluded that nearly half the bottlenose dolphins tested . . . were in ‘guarded or worse’ condition, including 17 percent that were not expected to survive.”¹²⁷ However, BP contests claims that animals are dying because of the Deepwater Horizon disaster, and maintains that other issues are to blame.¹²⁸ Furthermore, BP claims that the Gulf is in a state of recovery.¹²⁹ Yet, no words do justice to the photographs of turtles perishing in a soup of brown oil in the Louisiana Bay or the pelicans attempting to fly with oil-doused wings.¹³⁰ We cannot begin to imagine what damages such a spill will have on deep-sea organisms, about which we know so little. The destruction caused by the *Exxon Valdez* spill is brought back to light through the BP disaster: researchers are “not surprised [by the damage]. In Prince William Sound, 25 years after the wreck of *Exxon Valdez*, there are still some species that have not fully recovered.”¹³¹

123. Mark Schleifstein, *BP Oil Spill: Scientists Struggling to Understand Effects Four Years Later*, NEW ORLEANS TIMES-PICAYUNE (Apr. 18, 2014), http://www.nola.com/environment/index.ssf/2014/04/bp_oil_spill_scientists_strugg.html; see, e.g., *RESTORE Act*, ENVTL. LAW INST., <http://eli-ocean.org/gulf/clean-water-act-restore/> (last visited Mar. 28, 2016); Kimberly Blair, *EPA Proposes Long-Awaited Dispersant Protections*, PENSACOLA NEWS J. (Jan. 16, 2015, 12:08 PM), <http://www.pnj.com/story/news/local/environment/2015/01/15/epa-proposes-long-awaited-dispersant-protections/21846543/>.

124. See *How Does the BP Oil Spill Impact Wildlife and Habitat?*, NAT'L WILDLIFE FED'N, <http://www.nwf.org/what-we-do/protect-habitat/gulf-restoration/oil-spill/effects-on-wildlife.aspx> (last visited Mar. 28, 2016) (noting the studies commissioned by Executive Order in 2010 and discussing how the BP spill could have long-term impacts to the coastal and oceanic environment).

125. Schleifstein, *supra* note 123.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See Christine Dell'Amore, *Gulf Oil Spill “Not Over”: Dolphins, Turtles Dying in Record Numbers*, NAT'L GEOGRAPHIC (Apr. 9, 2014), <http://news.nationalgeographic.com/news/2014/04/140408-gulf-oil-spill-animals-anniversary-science-deepwater-horizon-science/> (depicting some of the images taken of animals in the BP oil spill).

131. *Id.*

The lessons learned from *Exxon Valdez* did not prevent future spills, and history repeated itself in the BP Deepwater Horizon catastrophe.

From the start, BP worked hard to thwart negative public scrutiny from the oil spill. Initially, on April 23, BP insisted that there was no oil leaking from the Macondo well, and that the visible oil was from the collapsed rig.¹³² By April 24, the sheer size of the spill was so great that BP had to admit that the well was indeed causing the sheen of oil spreading out on the ocean's surface.¹³³ At the onset, BP estimated that approximately 1,000 barrels of oil were spilling into the Gulf per day.¹³⁴ Journalists attempted to document the scale of the spill and the blowout's impact; however, BP officials, aided by law enforcement, repeatedly rebuffed their entry—even to public access areas.¹³⁵ BP gave scientists and journalists limited information and restricted access to the rig site.¹³⁶ Representative Edward J. Markey, a Democrat from Massachusetts, commented that BP was unaccustomed to transparency or public scrutiny of its actions, and that it sought to limit access to its activities.¹³⁷

Because BP and the Coast Guard prohibited entry to the site, scientists and researchers resorted to alternative means to determine the actual spill rate.¹³⁸ Independent researcher Ian MacDonald “estimated that 9 million gallons had been spilled by April 28, a rate of . . . 30,000 barrels per day.”¹³⁹ SkyTruth, a nonprofit environmental analysis firm, also found results similar to MacDonald's.¹⁴⁰ When these corroborated results came to light, President Obama tasked the National Oceanic and Atmospheric Administration (NOAA) to determine a secondary spill rate. NOAA estimated a rate of 5,000 barrels per day, which the media declared the “maximum level of the spill rate,” although evidence suggested otherwise.¹⁴¹ BP, with help from the Coast Guard, stopped reporters and air traffic around the spill site, and blocked public view of the ordeal.¹⁴²

When BP finally released video feed of the underwater blowout, “Timothy Crone, a scientist at the Lamont-Doherty Earth Observatory, put

132. Tom Eley, *One Year Since the BP Oil Spill: Covering up a Catastrophe*, WORLD SOCIALIST, (Apr. 20, 2011), <http://www.wsws.org/en/articles/2011/04/bps1-a20.html>.

133. *Id.*

134. *Id.*

135. Peters, *supra* note 3.

136. *Id.*

137. *Id.*

138. Eley, *supra* note 132; Peters, *supra* note 3.

139. Eley, *supra* note 132.

140. *Id.*

141. *Id.*

142. *Id.*

the spill rate at 50,000 barrels . . . per day. University of California astrophysics professor Eugene Chaing put it in a range of 20,000 to 100,000 barrels daily.¹⁴³ Others estimated that the well spewed around 70,000 barrels per day—overall, every study corroborated that the 5,000 barrels-per-day estimate was wildly small. Final estimates by the Flow Rate Technical Group, hired by the Obama Administration, estimated that the rate “varied between 53,000 barrels and 62,000 barrels per day, an amount equivalent to the quantity of oil spilled in the 1989 *Exxon Valdez* disaster every week.”¹⁴⁴ The public may never know the true amount of oil that spewed out of the Macondo well.

BP’s key weapon against the visible oil was the dispersant Corexit. This dispersant, while touted as a lifesaver in the Gulf, is banned in Great Britain, and has been for the past ten years, because it is toxic to humans.¹⁴⁵ According to Dr. Susan Shaw, a marine toxicologist and prominent expert in oil spills, “Corexit is toxic. It is toxic to people. It is toxic to the environment. What it does is it breaks apart the oil” into little bubbles of oil which then sink back down into the ocean.¹⁴⁶ She and others caution that while both oil and Corexit are toxic, the two mixed together create a deadly combination.¹⁴⁷ Dispersants break down cellular walls of organisms, and oil is absorbed into cells and internal organs more readily, causing severe health concerns and, potentially, death.¹⁴⁸ In humans, Corexit causes a slew of maladies including headaches, dizziness, coughing, burning skin and throats, nausea, diarrhea, confusion, memory loss, and depression.¹⁴⁹

According to BP, the official amount of dispersant used above and below the water was around two million gallons.¹⁵⁰ However, concerns arose regarding this figure:

143. *Id.*

144. *Id.*

145. James Varty, *The Big Fix—BP Deepwater Horizon Oil Spill Cover Up*, YOUTUBE (Dec. 27, 2012), https://www.youtube.com/watch?v=_KgFBciS_X0&list=FLKOWRB_NUdI7hN69XyADVbA.

146. *Id.*

147. *Id.*; Julia Whitty, *The BP Cover-Up*, MOTHER JONES, (Sept./Oct. 2010), <http://www.motherjones.com/environment/2010/09/bp-ocean-cover-up> (“Oil is toxic to most life. . . . And Corexit is toxic to most life. But the most toxic of all is oil that’s been treated with Corexit.”)

148. Varty, *supra* note 145.

149. *Id.*; David Kirby, *Corexit: An Oil Spill Solution Worse than the Problem?*, TAKEPART (Apr. 22, 2013), <http://www.takepart.com/article/2013/04/17/corexit-deepwater-horizon-oil-spill>; see also Dahr Jamail, *BP Dispersants ‘Causing Sickness’*, AL JAZEERA AMERICA (Oct. 29, 2010), <http://www.aljazeera.com/indepth/features/2010/10/20101027132136220370.html>.

150. Whitty, *supra* note 147.

[T]his is from BP, a company that has proven itself to basically lie about every single thing regarding this oil spill from day one. They're all we have to rely on for this data. This is a very bad situation for us. I have actually talked with other independent scientists who looked at the amount of oil released and how much dispersants have had to be used in order to sink it, and I have heard some estimates as high as 40 million gallons.¹⁵¹

Further, the senior attorney for the Natural Resources Defense Council stated, “[w]hen you juxtapose their knowledge of this incident upon the oil companies constant and persistent assurances of safety to regulators, investigators and shareholders, you have all the elements to prove that their concealment of the information was criminal.”¹⁵²

Corexit aided in BP's mitigation of their damages. Typically, oil rises to the surface of a body of water, where it can be skimmed off and removed.¹⁵³ In the Deepwater Horizon situation, the oil was erupting from a single point source, which should have been relatively containable.¹⁵⁴ However, in this case, BP chose to add dispersants, which broke up the oil, causing it to sink back into the ocean.¹⁵⁵ Considering the implications of visible oil on the surface, BP's reasons for using the toxic chemical could be seen as self-serving. The Clean Water Act allows courts to fine owners or operators responsible for spills up to \$1,100 per barrel of spilled oil, and \$4,300 per barrel if a court finds that a company was grossly negligent.¹⁵⁶ Alternatively, a court may penalize the owner or operator for each day that oil spilled, ranging from \$37,500 to \$140,000 per day if a court finds that a company was grossly negligent.¹⁵⁷ Ultimately, courts have discretion to decide whether to fine responsible parties per barrel or per day. Therefore, as was seen in the *Exxon Valdez* spill, if a responsible party underreports the amount of spilled oil, the fines may be substantially lower than they would have been with accurate information. So too in the BP disaster. With the use of dispersants

151. FloridaOilSpillLaw.com, *Up to 40 Million Gallons of Dispersant Used in Gulf According to Independent Scientific Estimates*, YOUTUBE (Sept. 19, 2010), <https://www.youtube.com/watch?v=Ywk5NfxA9H0#t=17>.

152. Greg Palast, *BP Cover-Up 'They Knew'*, GREG PALAST (April 19, 2012), <http://www.gregpalast.com/bp-coverup-they-knew/>.

153. Whitty, *supra* note 147.

154. *Id.*

155. *Id.*

156. See *RESTORE Act*, *supra* note 123 (depicting the potential fines against BP for the Gulf oil spill); see also Clean Water Act, 33 U.S.C. § 1321(b)(7) (2012); MELTZ, *supra* note 61, at 4 (explaining the increased fines against owners and operators due to inflation).

157. *RESTORE Act*, *supra* note 123.

at the Macondo well site, much of the oil never rose to the surface, and therefore the actual amount of spilled oil is likely to remain a mystery.¹⁵⁸

The lack of readily available information regarding the BP spill keeps the public in the dark. From the beginning, lowering the “visual evidence” of the spill was BP’s priority, and that meant “blocking scientists and independent observers from the site of the blowout and destroying the corpses of animals found on beaches”¹⁵⁹ Because of the excessive use of Corexit, much of the oil remains under the water and hidden from the public. Years later, scientists from the University of California, Santa Barbara discovered oil at the bottom of the Gulf using similar methods employed after the *Exxon Valdez* spill.¹⁶⁰ Researchers have found as much as 620,000 barrels of oil covering the sea floor.¹⁶¹ The swath is approximately the size of Rhode Island.¹⁶² It would seem that the oil did not miraculously disappear, and much of it likely remains at the bottom of the ocean as BP intended. Unsurprisingly, BP vehemently rejected this data.¹⁶³ NOAA announced that about 26% of the oil released remains unaccounted for. However, this can be expected because “in an operation defined from the beginning . . . by confusion, misinformation and unanswered questions, there was skepticism in the Gulf over the precision of the estimate.”¹⁶⁴

The ongoing case against BP illustrates the necessity to make oil companies internalize the costs of oil spills. The legal battle against BP began on December 15, 2010, when the Justice Department filed suit against BP and eight other companies, asking the courts to hold the companies liable for the accident and cleanup costs.¹⁶⁵ By January 12, 2011, the National Oil Spill Commission found that “time- and money-saving decisions created an unreasonable amount of risk that triggered the Deepwater Horizon

158. Whitty, *supra* note 147.

159. Tom Eley, *One Year Since the BP Oil Spill: The Environmental Disaster Continues*, WORLD SOCIALIST (Apr. 23, 2011), <http://www.wsws.org/en/articles/2011/04/bps3-a23.html>.

160. Tim McDonnell, *Tons of BP Oil Is Still on the Bottom of the Gulf of Mexico*, MOTHER JONES (Oct. 27, 2014, 2:01 PM), <http://www.motherjones.com/environment/2014/10/bp-deepwater-horizon-study-oil-ocean-floor>.

161. *Id.*

162. *BP Oil Spill Left Rhode Island-Sized ‘Bathtub Ring’ on Seafloor: Study*, NBC NEWS (Oct. 27, 2014, 3:44 PM), <http://www.nbcnews.com/science/environment/bp-oil-spill-left-rhode-island-sized-bathtub-ring-seafloor-n234961>.

163. *See id.* (presenting BP’s arguments against this research, which stated that large amounts of oil remain on the ocean floor surrounding the Macondo well).

164. LEHNER & DEANS, *supra* note 110, at 109.

165. *Gulf Oil Spill Timeline and the Ensuing Legal Cases Against BP*, ASSOCIATED PRESS (Jan. 15, 2013, 5:12 AM), http://www.huffingtonpost.com/2012/11/15/gulf-oil-spill-timeline_n_2139515.html [hereinafter *Gulf Oil Spill Timeline*].

explosion.”¹⁶⁶ On November 15, 2012, BP agreed to pay \$4.5 billion in a settlement and plead guilty to felony counts “related to the deaths of 11 workers and lying to Congress.”¹⁶⁷ The figure included \$1.256 billion in criminal fines, \$2.394 billion to the National Fish and Wildlife Foundation for cleanup efforts, and \$350 million to the National Academy of Sciences.¹⁶⁸ This fine is one of the largest levied against a corporation in American history.¹⁶⁹ Additionally, the court charged two BP employees with manslaughter and a BP executive with lying to authorities.¹⁷⁰ BP’s deceit included misrepresenting the amount of oil released from the Macondo well to Congress.¹⁷¹ As a result, BP agreed to pay an additional \$535 million in civil charges for the falsification of the flow rate at the wellhead.¹⁷²

The United States District Court for the Eastern District of Louisiana found that the conduct of BP was reckless, and 67% of the fault for the spill and subsequent damage rested with BP.¹⁷³ Additionally, Transocean was also found negligent and 30% at fault, and Halliburton’s negligent conduct garnered 3% of the fault.¹⁷⁴ Many argued the \$4.5 billion fine was minimal in comparison to the company’s yearly profits.¹⁷⁵ BP will pay these fines over the course of six years, which equates to \$750 million per year.¹⁷⁶ These fines were a pittance compared to BP’s annual profits, which were sky-high when oil prices were high—over \$25 billion in 2011, the year after the spill.¹⁷⁷ In

166. *Id.*

167. *Id.*

168. Clifford Krauss & John Schwartz, *BP Will Plead Guilty and Pay over \$4 Billion*, N.Y. TIMES (Nov. 15, 2012), http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?pagewanted=all&_r=0.

169. *Id.*

170. *Gulf Oil Spill Timeline and the Ensuing Legal Cases Against BP*, *supra* note 165.

171. Gaius Publius, *US Settles Criminal Charges Against BP for Gulf Spill – Is It Enough?*, AMERICABLOG (Nov. 20, 2012), <http://americablog.com/2012/11/bp-gulf-spill-deepwater-horizon-settlement.html>.

172. Krauss & Schwartz, *supra* note 168.

173. *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 21 F. Supp. 3d 657, 757 (E.D. La. 2014).

174. *Id.*

175. Tyson Slocum, *Public Citizen’s Take on BP Settlement*, CITIZEN VOX (Nov. 15, 2012), <http://www.citizenvox.org/2012/11/15/public-citizen-bp-settlement/>; Katie Greenshaw, *The \$4.5 Billion Criminal Fine for BP Oil Spill: Enough to Prevent Bad Corporate Behavior?*, CTR. FOR EFFECTIVE GOV’T (Nov. 16, 2012), <http://www.foreffectivegov.org/criminal-fine-for-bp-oil-spill>; Rakteem Katakey, *BP Profit Tumbles 91% Amid Oil Slump, Falling Short of Estimates*, BLOOMBERG (Feb. 2, 2016, 8:00 AM), <http://www.bloomberg.com/news/articles/2016-02-02/bp-profit-falls-91-missing-estimates-as-oil-slump-deepens> (showing BP’s annual profits for the past thirty years).

176. Kathy Finn & David Ingram, *BP Agrees to Record Criminal Penalties for U.S. Oil Spill*, REUTERS (Nov. 16, 2012, 4:09 AM), <http://www.reuters.com/article/us-bp-spill-idUSBRE8AE1AC20121116>.

177. Katakey, *supra* note 175.

contrast, BP spent “more than \$93 million on newspaper advertisements and TV spots in the weeks following the Deepwater Horizon oil spill, paying out three times as much money on ads as it did during the same time” in the year before the spill.¹⁷⁸

BP still faces additional civil fines under OPA and the Clean Water Act (CWA). The court broke this complex trial up into three separate parts.¹⁷⁹ Phase One, also known as the “Incident Phase,” determined fault for the failure of the Deepwater Horizon rig.¹⁸⁰ The court also held that BP will be “subject to enhanced civil penalties under the [CWA], as the discharge of oil was the result of [BP’s] gross negligence and . . . willful misconduct.”¹⁸¹ Because Judge Barbier found that BP’s actions were grossly negligent, BP faces fines up to \$4,300 per barrel of crude oil spilled in the blowout.¹⁸²

The court then broke Phase Two into the “Source Control” and “Quantification” segments.¹⁸³ The court ultimately ruled on how much oil entered the water and BP’s efforts to curtail the release of the oil.¹⁸⁴ Judge Barbier determined that “[t]here is no dispute that BP lied about the amount of oil that flowed from the well.”¹⁸⁵ While BP estimated that the flow rate was 5,000 barrels of oil per day (bopd), there “was little basis for this estimate and actual flow rates were significantly higher.”¹⁸⁶ BP’s own internal documents showed that the flow rates were higher than the figure they willingly released to the public.¹⁸⁷ In fact, BP hired experts to track the daily flow rate of the Macondo well.¹⁸⁸ These experts created daily internal flow rate estimates, which rose as high as 97,000 barrels of oil per day (or 4,074,000 gallons).¹⁸⁹ If that figure is accurate, then over the course of 87 days, the Macondo well could have released approximately 8,439,000 barrels of oil, which easily surpasses 300 billion gallons. BP’s top executives internally reported that the flow rate might be around 92,000 barrels per day;

178. Tennille Tracy, *BP Tripled Its Ad Budget After Oil Spill*, WALL STREET J. (Sept. 1, 2010, 11:57 PM), <http://www.wsj.com/articles/SB10001424052748703882304575465683723697708>.

179. *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 77 F. Supp. 3d 500, 503 (E.D. La. 2015).

180. *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 21 F. Supp. 3d 657, 668 (E.D. La. 2014).

181. *Id.* at 757.

182. MELTZ, *supra* note 61.

183. *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 77 F. Supp. 3d 500, 503 (E.D. La. 2015).

184. *Id.*

185. *Id.* at 518.

186. *Id.*

187. *Id.*

188. Brief for Plaintiffs-Appellees at 8, *Ludlow v. BP, P.L.C.*, 800 F.3d 674 (5th Cir. 2015) (No. 14-20420), 2014 WL 7249629, at *8.

189. *Id.*

however, BP maintained that the rate of 5,000 barrels per day was accurate.¹⁹⁰ Using this grossly misleading figure was a violation of 18 U.S.C. § 1505 for obstructing a Congressional proceeding.¹⁹¹ In the case against BP for this crime, the court determined that BP “had multiple internal documents with flow rate estimates that were significantly greater than 5,000 bopd that it did not share with the Unified Command.”¹⁹²

Although BP clearly reported inaccurate spill figures, in Phase Two the court found the well released 4 million barrels of oil; accounting for collected oil, the court concluded “for purposes of calculating the maximum possible civil penalty under the CWA that 3.19 million barrels of oil discharged into the Gulf of Mexico.”¹⁹³ Based on BP’s own data from April 22, 2010, computer-generated estimates ranged from “64,000 bopd, 93,000 bopd, 110,000 bopd and 138,000 bopd.”¹⁹⁴ These values yield between five and 12 million barrels spilled in total during the 87-day disaster, wildly more than the court-determined 3.19 million gallons. As such, the American public will never know the true extent of the Deepwater Horizon spill’s environmental and financial impact.

Finally, the last phase of the case will determine how much BP will pay in civil penalties based on this new finding. The court has discretion to fine BP up to \$13.7 billion for the CWA violations alone.¹⁹⁵ However, on July 2, 2015, the United States Justice Department announced a tentative settlement.¹⁹⁶ “If the proposed consent decree is approved after being submitted for public comment and then court-approval, BP will agree to pay \$18.7 billion in fines over the next 15 years to the U.S. federal government and the state governments of Alabama, Florida, Louisiana, Mississippi and Texas.”¹⁹⁷ While this sum appears to be a tremendous victory, upon further inspection it is a much lower fine than most were hoping for. This fine

190. *Id.* at 9.

191. *Id.*

192. *Id.* at 10 (quoting *United States v. BP Exploration and Production, Inc.*, No. 12–292, Rec. Doc. 2–1, Ex. A ¶ 5 (E.D.La. Nov. 15, 2012)).

193. *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 77 F. Supp. 3d 500, 525 (E.D. La. 2015).

194. Brief for Plaintiffs-Appellees, *supra* note 188, at 9.

195. *BP Agrees to Pay \$18.7 Billion for Gulf Oil Disaster*, ENVTL. NEWS SERV. (July 2, 2015, 6:18 PM), <http://ens-newswire.com/2015/07/02/bp-agrees-to-pay-18-7-billion-for-gulf-oil-disaster/> [hereinafter *BP Agrees to Pay*]; see also *BP Faces Up to \$13.7 Billion in Fines for Gulf Oil Spill*, AL JAZEERA AMERICA (Jan. 16, 2015, 7:00 PM), <http://america.aljazeera.com/articles/2015/1/16/bp-13-7-billion-fine.html> (explaining that because Judge Barbier found BP grossly negligent, the resulting Clean Water Act fines alone could total \$13.7 billion).

196. Antonia Juhasz, *BP ‘Got Off Cheaply’ with \$18.7 Billion Settlement*, ROLLING STONE (July 3, 2015), <http://www.rollingstone.com/politics/news/bp-got-off-cheaply-with-18-7-billion-settlement-20150703>.

197. *Id.*

combines not only CWA fines, but also NRDA fines and losses to state and local governments.¹⁹⁸ The settlement breaks down to \$5.5 billion in total CWA fines, \$7.1 billion in NRDA compensation, \$5.9 billion to state and local governments for economic damages, and finally \$600 million for other costs such as reimbursements.¹⁹⁹ Because the court has already found that BP was “gross[ly] negligent,” this outcome is a “bargain for BP.”²⁰⁰ The CWA fines alone should have ranged from \$13 to \$18 billion.²⁰¹ This significantly lower amount is a result of the Department of Justice agreeing that “BP will pay a civil Clean Water Act fine of only \$1,724 per barrel of crude spilled into the Gulf of Mexico. This falls far short of the \$4,300 per barrel maximum fine faced by BP for gross negligence and willful misconduct.”²⁰²

Although reports linked to the determination of the NRDA compensation have not been made public, the National Wildlife Federation estimated that the NRDA fine could have been as high as \$31 billion.²⁰³ The vice president of Oceana stated that “based on the amounts paid for a much smaller spill, the *Exxon Valdez* Oil Spill, [NRDA] damages could be in the \$30 billion range.”²⁰⁴ The \$7.1 billion NRDA fine pales in comparison to these estimates.

The veil of secrecy surrounding oil spills continued into the settlement phase of this case. The full details of the settlement are not publicly available.²⁰⁵ What the public sees is a tremendous sum of money going towards revitalizing the Gulf. They do not understand the vast shortcomings of this proposed settlement. The “figures in the agreement in principle, and in fact the confidentiality agreement itself, were all negotiated outside of the public eye.”²⁰⁶ Astoundingly, the NRDA fine is considered an “ordinary business expense,” which allows BP to take tax deductions for that fine.²⁰⁷ In a letter to Attorney General Loretta Lynch, Senator Bill Nelson of Florida

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Thomas St. Myer, *Senator Voices Concerns over BP Oil Spill Settlement*, PENSACOLA NEWS J. (Aug. 5, 2015, 4:47 PM), <http://www.pnj.com/story/news/local/pensacola/beaches/2015/08/05/senator-voices-concerns-bp-oil-spill-settlement/31181749/> (quoting letter from Senator Bill Nelson to Attorney General Loretta Lynch regarding the settlement outcome).

203. Juhasz, *supra* note 196.

204. Ryan Koronowski, *After Years of Litigation, BP Agrees to \$18.7 Billion in Claims and Penalties for Historic Oil Spill*, THINKPROGRESS (July 2, 2015, 11:11 AM), <http://thinkprogress.org/climate/2015/07/02/3676487/bp-spill-state-cwa-settlement/>.

205. St. Myer, *supra* note 202.

206. *Id.*

207. *Id.*

concluded that the public should have been informed of and involved in the settlement agreement, and because the full range of damages in the Gulf are not clearly understood, the settlement amount for future damages may not be enough.²⁰⁸

Even though this \$18.7 billion settlement may be the largest fine of its kind, it is a paltry amount and does not send a strong enough message. This settlement is a “disappointment to those who believe that the company should pay the full cost of the damages it caused. \$18.7 billion may sound like a lot of money, and it is, but it pales in comparison to what BP really owes.”²⁰⁹ Senator Nelson’s concerns fully articulate the need for oversight and complete clarity during and after an oil spill event.

B. Most Oil Spills Receive Less Notoriety, and the Public Remains Unaware

Although OPA applies to contamination of navigable waters of the United States, its shorelines, and its exclusive economic zone,²¹⁰ oil pollution negatively impacts onshore environments as well. The pollution caused by onshore oil spills is no less concerning, and perhaps is even more so, because OPA does not apply to these spills. Public shaming should apply to onshore spills just as it would to spills impacting navigable waters or shorelines. Although it would not be enforced through OPA, there should be analogous disincentives and punishment to combat inland oil spills. The Tesoro oil spill presents an example of a spill that went nearly unnoticed, and illustrates the need for expanded oversight and public awareness of all oil spills.

In Tioga, North Dakota, well out of public view, one of the largest onshore oil spills in the country’s history went nearly unnoticed.²¹¹ On September 29, 2013, while inspecting his wheat field, Steve Jensen found oil gushing from a Tesoro Corporation pipeline, which ran underneath his field.²¹² The Tesoro oil spill—named after the company that owns the pipeline—released approximately 20,600 barrels of crude oil into the

208. *Id.*

209. *BP Agrees to Pay \$18.7 Billion for Gulf Oil Disaster*, *supra* note 195.

210. VANN & MELTZ, *supra* note 55.

211. Emily Atkin, ‘It Will Never Be the Same’: North Dakota’s 840,000-Gallon Oil Spill One Year Later, THINKPROGRESS (Oct. 21, 2014, 3:02 PM), <http://thinkprogress.org/climate/2014/10/21/3582480/north-dakota-spill-one-year-later/>.

212. Todd Melby & Selam Gebrekidan, *In a Remote Field, North Dakota Oil Boom Suffers First Big Spill*, REUTERS (Oct. 10, 2013, 6:57 PM), <http://www.reuters.com/article/2013/10/10/us-tesoro-spill-northdakota-idUSBRE9990VL20131010>.

surrounding countryside.²¹³ The oil spread over an area of land approximately the size of seven football fields.²¹⁴

The Tesoro, BP, and *Exxon Valdez* spills all share common threads, but the Tesoro spill garnered far less drama and notoriety. Because the site of the Tesoro leak was remote and had few residents, the State of North Dakota did not see a reason to publicize the spill.²¹⁵ Complicating matters, “[s]tate and company officials kept [the leak] quiet for 11 days.”²¹⁶ Apparently, thwarting public awareness of oil spills in the state is not unusual. In a period of less than two years, the State reported approximately 300 spills, yet none of the reports were released to the public.²¹⁷

North Dakota, like many other states involved in oil production, does not have to report oil spills to the public under state laws.²¹⁸ This is especially troubling as North Dakota is the nation’s second largest oil producer, behind only Texas.²¹⁹ Oil producers in the state placed about “2,500 miles of new pipeline last year” and the state produces around a million barrels of oil per day.²²⁰ The director of the Dakota Resource Council, Don Morrison, stated that the public should be aware of the plethora of spills in the state because “people think [each spill is] an isolated incident that’s only happening to them.”²²¹ Lynn Helms, the director of the Department of Mineral Resources, which oversees the North Dakota Oil and Gas Division,²²² argues against reporting all oil spills, stating that the intention is “to find a balance so that ‘the public is aware of what’s happening but not overwhelmed by little incidents.’”²²³ The Oil and Gas Division “regulates the drilling and production of oil and gas in North Dakota.”²²⁴ There is every reason for a

213. James MacPherson, *ND Spills Went Unreported; State Testing Website*, ASSOCIATED PRESS (Oct. 25, 2013, 10:36 PM), <http://bigstory.ap.org/article/ap-newsbreak-100s-nd-oil-spills-not-publicized>.

214. *Id.*

215. Brian Klonoski, *Why Is Nobody Talking About the Tesoro Oil Spill in North Dakota?*, RYOT, <http://www.ryot.org/why-is-nobody-talking-about-the-tesoro-oil-spill-in-north-dakota/440253> (last visited Feb. 19, 2016).

216. MacPherson, *supra* note 213.

217. *Id.*

218. *North Dakota Recorded 300 Oil Spills in Two Years Without Notifying the Public*, GUARDIAN (Oct. 25, 2013, 1:59 PM), <http://www.theguardian.com/environment/2013/oct/25/north-dakota-oil-pipeline-spills-secrecy> [hereinafter *North Dakota Recorded 300 Oil Spills*].

219. *Id.*

220. *Id.*

221. *Id.*

222. DEP’T MIN. RESOURCES, <https://www.dmr.nd.gov/> (last visited Mar. 29, 2016).

223. *North Dakota Recorded 300 Oil Spills in Two Years Without Notifying the Public*, *supra* note 218.

224. DEP’T MIN. RESOURCES, *supra* note 222.

state heavily invested in oil to have an interest in limiting the reporting of oil spills.

A second similarity between the three aforementioned oil spills is an initial error in reports of the gallons spilled. Tesoro at first reported that 750 barrels spilled from the pipeline; however, a week later Tesoro revised that figure to 20,600 barrels.²²⁵ This error is especially surprising, considering that Tesoro should have noticed that 20,000 barrels were missing from the expected output of the oil field.²²⁶ Once again, the company that spilled the oil substantially underrepresented the size of the spill. Ultimately, in 2014, the head of the environmental section of the North Dakota Health Department said the spill would take two more years to clean up, in part because cleanup crews had found contamination as deep as 30 feet.²²⁷

*C. Oil Spills Will Continue to Be a Part of Regular Business Unless
Appropriate Punishments Are Implemented*

As shown by the recent Refugio Incident, unless a substantive change in the status quo is accomplished, oil spills will continue to occur. On May 19, 2015, in Santa Barbara County, a pipeline owned by Plains All American Pipeline ruptured; Plains initially estimated that the pipeline released roughly 101,000 gallons of crude oil, of which approximately 21,000 gallons reached the Pacific Ocean.²²⁸ Unsurprisingly, the original estimates increased, and Plains later reported that the rupture resulted in closer to 143,000 gallons of crude oil spilled, far more than their original estimate.²²⁹ Plains did not provide a new estimate for how much seepage reached the Pacific.²³⁰ Linda Krop with the Environmental Defense Center in Santa Barbara stated that:

A spill of this magnitude never would have happened if Plains and its predecessor had built in safer technologies such as an automatic

225. Klonoski, *supra* note 215.

226. *Id.* (quoting Steve Wereley, a professor of mechanical engineering at Purdue University and an expert on spill flows, who stated that Tesoro should have “notice[d] 20,000 barrels missing at the end”).

227. Nathan Bomey, *SeaWorld Attendance Down Despite Discounts*, USA TODAY (Aug. 6, 2015 12:36 PM), <http://www.usatoday.com/story/money/2015/08/06/seaworld-attendance-down-despite-discounts/31207051/>.

228. *Refugio State Beach Oil Spill: Pipeline Owner Among Top 5 Worst Safety Offenders*, ABC 7 (May 21, 2015), <http://abc7.com/news/refugio-oil-spill-pipeline-owner-among-top-5-worst-safety-offenders/734659/>.

229. Joseph Serna, *Refugio Oil Spill May Have Been Costlier, Bigger Than Projected*, L.A. TIMES (Aug. 5, 2015), <http://www.latimes.com/local/lanow/la-me-ln-refugio-oil-spill-projected-company-says-20150805-story.html>.

230. *Id.*

shutdown system. Not only did the operator not utilize this technology, which exists in all other oil pipelines in Santa Barbara County, but Plains also failed to report the spill in a timely manner, and failed to provide a quick response to the spill. As a result, the oil traveled a quarter mile to the Pacific Ocean, where it then spread 150 miles along the California coast, killing hundreds of marine mammals and seabirds and resulting in the closure of public beaches, State parks, and miles of fishing grounds.²³¹

Unfortunately, oil companies have continued to exhibit the same sort of poor behaviors since the *Exxon Valdez* spill. Ultimately, a change in the response to oil spills should force companies to alter their conduct.

Plains All American, a Texas-based company, has an appalling track record with “175 safety and maintenance infractions since 2006, according to federal records.”²³² A federal database tracking some 1,700 other pipeline operators shows that only four other companies have recorded more infractions than Plains All American.²³³ While Plains has a terrible track record with regards to incidents, their earnings do not reflect this trend. In 2014, Plains reported \$43 billion in revenue and \$878 million in profit.²³⁴

The previous incidents Plains recorded resulted in the release of over two million gallons of hazardous liquids over the course of more than a dozen spills in Canada and the United States since 2004.²³⁵ In 2011, Plains was responsible for “three major pipeline accidents in Alberta, including a 28,000-barrel spill . . . that polluted wetlands and the Peace River.”²³⁶ On May 14, 2014, Plains was responsible for another pipeline rupture that released approximately “19,000 gallons of crude onto the streets of Atwater Village in Los Angeles.”²³⁷

Although the pipelines owned by Plains are some of the most prodigious polluters, they are not alone. In 2014, there were 704 oil and gas pipeline

231. Email from Linda Krop, Chief Counsel, Environmental Defense Ctr. to author (Oct. 1, 2015, 7:15 PM) (on file with author).

232. Julie Cart, Jack Dolon & Doug Smith, *Santa Barbara Oil Spill: Pipeline Operator Has Long Record of Problems*, L.A. TIMES (May 20, 2015, 10:21 PM), <http://www.latimes.com/local/california/la-me-oilspill-pipeline-20150521-story.html>.

233. *Id.*

234. *Id.*

235. Steve Lopez, *Pipeline Firm Aims to Control Conversation on Santa Barbara Oil Spill*, L.A. TIMES (July 1, 2015, 3:30 AM), <http://www.latimes.com/local/california/la-me-0701-lopez-spill-20150701-column.html>.

236. Gregg Levine, *Pipeline Company in LA Oil Spill Has History of Violations*, AL JAZEERA AMERICA (May 16, 2014, 6:42 PM), <http://america.aljazeera.com/blogs/scrutineer/2014/5/16/pipeline-company-in-la-oil-spill-has-history-of-violations.html>.

237. *Id.*

incidents involving leaks, averaging about two spills per day in the United States in just this single year.²³⁸ These statistics are staggering, and the track record of Plains provides evidence that fines and penalties against the polluter are insufficient. Even more unsettling is that there are four other pipeline operators with track records worse than Plains All American. There is little solace in knowing that Plains will pay fines and proceed with business as usual—making an exorbitant profit from substandard practices.

II. PUBLIC SHAMING WILL MAKE REPORTS OF OIL SPILLS MORE TRANSPARENT

A. The Rationale Behind Public Shaming

Shaming provides a method whereby a company will face a unique form of accountability to those who consume their products, and society as a whole. Public shaming can be diverse and allows judges to be creative in the types of penalties they impose. Shaming is generally defined as “the process by which citizens publicly and self-consciously draw attention to the bad . . . actions of an offender, as a way of punishing him for having . . . engag[ed] in those actions.”²³⁹ The core idea behind public shaming is that “[b]y threatening a significant blow to the offenders’ reputations, shaming penalties create strong economic and psychological disincentives against crime.”²⁴⁰ For a variety of criminal offenses, shaming has taken several forms such as requiring offenders to wear signs announcing their wrongdoings, advertise their actions in newspaper ads, or post bumper stickers on their cars.²⁴¹ Some have argued that public shaming works especially well for businesses and companies, where the information can create a “ripple effect” that urges others to stop harming consumers and the environment.²⁴² Because companies are especially interested in avoiding negative publicity, they may work to avoid that punishment, therefore deterring negative behaviors.²⁴³

238. Renee Lewis, *Firm Behind California Oil Spill Has Shaky Safety Record*, AL JAZEERA AMERICA (May 20, 2015, 9:50 PM), <http://america.aljazeera.com/articles/2015/5/20/plains-all-american-has-history-of-oil-spills.html>.

239. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999).

240. *Id.*

241. *Id.* at 367.

242. *Shame on You: Do “Shaming” Punishments Work?*, LAWYERS.COM, <http://criminal.lawyers.com/criminal-law-basics/shame-on-you-do-shaming-punishments-work.html> (last visited Mar. 27, 2016) [hereinafter *Shame on You*].

243. *Id.*; see also David A. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1814–15 (2001) (“Not only does this moral disapproval have a chastening effect on actual offenders, since the

The success of shaming depends on the public. If the public universally views an action as outrageous, then shaming will have its intended effect. When society shares common values, “shaming can be a powerful corrective.”²⁴⁴ Additionally, to have an effect on a company’s reputation, courts must find the proper platform to inform the public.²⁴⁵ The punishment ought to “be crafted to convey not only what the offender did but also the fact that society finds such conduct morally repugnant.”²⁴⁶ Many people in society have common beliefs regarding which actions are repugnant, and will react similarly to damaging or upsetting deeds.²⁴⁷ This is likely the case with oil spills. If the public does view an act as reprehensible, the blow to a company’s reputation can be damaging to their image and costly to their bottom line.²⁴⁸

The only way to know if public shaming of a company works is to see a change in corporate behaviors.²⁴⁹ This may be difficult to monitor, especially over the short term.²⁵⁰ Although there is no obvious method to determine the effectiveness of public shaming, it seems logical that companies will work to avoid this punishment. Testing the method is worthwhile, and judges should feel free to use public shaming as punishment when sentencing corporations for bad behavior, especially since there is no downside for society. If the level of shaming is tough enough, the corporate offenders will likely be compelled to immediately institute meaningful changes in their overall practices so accidents do not happen, and will be more vigilant should an incident occur. If 14,000 oil spills per year are brought to light, public backlash will prevail.

B. Public Shaming Proves Useful in Cases Involving Individuals As Well As Corporations

Public shaming, while not commonly employed against corporations, is a useful method of deterrence and education in cases involving average citizens as well as corporations. Judges have imposed public shaming punishments in cases involving individuals, which were not only creative,

effect on their reputation can be devastating and costly, but the possibility of shaming can also discourage potential offenders from misbehaving in the first instance.”).

244. Skeel, *supra* note 243, at 1815.

245. Kahan & Posner, *supra* note 239, at 386.

246. *Id.*

247. Skeel, *supra* note 243, at 1815.

248. *Id.*

249. *Shame on You: Do “Shaming” Punishments Work?*, *supra* note 242.

250. *Id.*

but also acted as a useful tool.²⁵¹ For example, when a woman stole a gift card from a nine-year-old child, the judge ordered the woman to hold a sign in front of the courthouse for four and a half hours that said: “I stole from a 9-year-old on her birthday! Don’t steal or this could happen to you!”²⁵² Likely, this crime was contemptible enough to elicit the appropriate response from those who saw her sign that day. Realistically, this form of punishment might be useful against polluting corporations as well.

Shaming companies is not a novel theory. For example, in Cincinnati, a judge ordered a company that had polluted groundwater to issue a public apology in a newspaper.²⁵³ In another instance, a court ordered a polluting ferry operator in Massachusetts to publish an advertisement in the *Boston Herald* reading, “Our company has discharged human waste directly into coastal Massachusetts waters.”²⁵⁴ Readers seemed to be more impacted by that admission than by the fines the company paid.²⁵⁵ In North Carolina, a judge ordered General Wood Preserving Company to publish an advertisement apologizing for dumping hazardous waste from their plant.²⁵⁶ Recently, Walgreens chose to forego a plan to relocate their headquarters to Europe to avoid paying United States taxes.²⁵⁷ The tax evasion plan spread through the media, eliciting responses from television giants such as Jon Stewart to political figures including President Obama.²⁵⁸ Although Congress has not yet acted to prevent companies from pursuing such tactics, the potential consumer backlash in this case resulted in a halt of the Walgreens European move.

One of the most successful public shaming examples was the *Blackfish* documentary about the entertainment giant SeaWorld. Although the movie’s intent was likely education and not public shaming per se, the results have been the same, seeming to indicate that public awareness of a disreputable act and public shaming, at some point, become synonymous. The film educated the public about otherwise unknown facts regarding the depressing

251. See *Woman Ordered to Hold ‘Idiot’ Sign and 6 Other Cases of Court-Ordered Shaming*, HUFFINGTON POST (Jan. 13, 2013, 5:12 AM), http://www.huffingtonpost.com/2012/11/13/woman-ordered-to-hold-idiot-sign_n_2124146.html (presenting several instances where judges handed down a sentence which included public shaming) [hereinafter *Woman Ordered to Hold ‘Idiot’ Sign*].

252. *Id.*

253. Kahan & Posner, *supra* note 239, at 367.

254. Tovia Smith, *Companies “Named and Shamed” for Bad Behavior*, NAT’L PUB. RADIO (Mar. 7, 2010, 4:12 PM), <http://www.npr.org/templates/story/story.php?storyId=124357844>.

255. *Id.*

256. Kahan & Posner, *supra* note 239, at 385.

257. Sapana Maheshwari, *Walgreens Decides to Remain U.S. Company after Public Shaming*, BUZZFEED (Aug. 6, 2014, 3:48 PM), <http://www.buzzfeed.com/sapna/walgreens-abandons-relocation-scheme-to-avoid-us-taxes-after>.

258. *Id.*

existence of captive orca whales. The public was outraged by what they saw—and their outrage has made an impact. Attendance at parks dropped, stocks fell, and earnings slumped.²⁵⁹ SeaWorld has attempted to placate the public with little success.²⁶⁰ Upcoming movies such as John Green's *Paper Towns* and the *Finding Nemo* sequel, *Finding Dory*, which initially both included scenes at SeaWorld, have stricken those scenes completely from the films.²⁶¹ The concerned public also created a petition urging Southwest Airlines to drop their partnership with SeaWorld, one which had lasted since 1988.²⁶² One year after the film's release, and after the petition amassed more than 30,000 signatures, Southwest and SeaWorld ended their partnership.²⁶³ SeaWorld eventually capitulated to this backlash and announced that they would both stop hosting orca shows by 2019, and cease captive breeding of orca whales immediately.²⁶⁴ The outrage caused by the documentary has made a clear mark. Though once a beloved family vacation spot, a single documentary shattered SeaWorld's image forever.

In each of these circumstances, the public seemed to agree that the companies' behaviors were outrageous. Therefore, shaming had the desired effect of educating society and creating the intended communal outrage over the companies' actions. Furthermore, just in these examples, it is clear that in today's modern society, shaming is able to take on a life of its own. Whereas shaming used to be successful only in small communities,²⁶⁵ modern technology has allowed shaming to spread beyond the confines of a single subset of society. Twitter and Facebook spread information rapidly through an extremely vocal population. Shaming for acts of environmental

259. Al Lewis, *Will SeaWorld Tank After Expose in 'Blackfish'?*, MARKETWATCH (Nov. 7, 2013, 6:00 AM), <http://www.marketwatch.com/story/will-seaworld-tank-after-expose-in-blackfish-2013-11-07>.

260. *Id.*

261. Rebecca Ford, *SeaWorld Scene Cut From John Green's 'Paper Towns' Film*, HOLLYWOOD REPORTER (Jan. 16, 2015, 8:00 AM), <http://www.hollywoodreporter.com/news/seaworld-scene-cut-john-greens-763312>; *'Finding Dory' Ending Altered to Reflect Killer-Whale Revelations in 'Blackfish'*, HUFFINGTON POST (Aug. 12, 2013, 9:59 PM), http://www.huffingtonpost.com/2013/08/10/finding-dory-ending-altered-blackfish_n_3737119.html.

262. Lauren Raab, *Southwest, SeaWorld End Partnership a Year After 'Blackfish' Backlash*, L.A. TIMES (July 31, 2014, 3:00 PM), <http://www.latimes.com/business/la-fi-seaworld-southwest-airlines-20140731-story.html>.

263. *Id.*

264. Nathan Bomey, *SeaWorld to Phase Out Killer Whale Shows, Captivity*, USA TODAY (Mar. 17, 2016, 4:16 PM), <http://www.usatoday.com/story/money/2016/03/17/seaworld-orcas-killer-whales/81900498/>; Greg Allen, *SeaWorld Agrees to End Captive Breeding of Killer Whales*, NAT'L PUB. RADIO (Mar. 17, 2016, 5:59 AM), <http://www.npr.org/sections/thetwo-way/2016/03/17/470720804/seaworld-agrees-to-end-captive-breeding-of-killer-whales>.

265. Skeel, *supra* note 243, at 1811.

degradation, abuse, and crimes creates a profoundly negative public image and a stigma which corporations will likely work to avoid.²⁶⁶

C. The Oil Pollution Act of 1990 Must Be Adapted to Include Public Shaming

1. The Oil Pollution Act of 1990 Lacks Public Notification and Awareness Mechanisms

In enacting OPA, legislators agreed that all oil spills would harm the environment no matter how effective the response.²⁶⁷ The goal, therefore, was to prevent oil spills.²⁶⁸ Experience had allowed oil companies to view spills as an acceptable cost of doing business, and there was insufficient deterrence to “encourage greater industry efforts to prevent spills and develop effective techniques to contain them”—sound public policy must work against that motif.²⁶⁹ Although necessary and appropriate, incorporating financial payments as retribution for an oil spill creates a sentiment that the damage might be “paid away,” rather than impressing upon oil executives the public’s true feelings of condemnation for their actions.²⁷⁰ Although OPA increased liability and forced oil companies to partially internalize the costs of an oil spill, the notion that spills are just a cost of doing business endures. Furthermore, when courts reduce potential punitive damages against an oil company, as in the Exxon case, the sting of those fines is dramatically reduced, both in their retributive nature and their ability to send a clear message.

OPA improved the disjointed legislation in place before its enactment. However, OPA is not without its flaws. Importantly, a provision requiring public notice and independent analysis is conspicuously lacking in OPA. OPA requires that oil spills be reported to the National Response Center, and potentially to the EPA as well, depending on the scope of the spill.²⁷¹ The only notice requirement in OPA for oil spills is that:

266. See Kahan & Posner, *supra* note 239, at 385–86 (explaining the success of public shaming in relation to environmental pollution, and the likely subsequent public outcry against the behaviors).

267. S. REP. NO. 101-94, at 2.

268. *Id.* at 3.

269. *Id.*

270. See *id.* (discussing how damages and clean-up costs from oil spills are an “accepted cost of doing business,” not an incentive toward “greater industry efforts to prevent spills”); see also Kahan & Posner, *supra* note 239, at 387 (“Shaming also removes any doubt that the political community means to condemn rather than price the offender’s conduct.”).

271. ENVTL. PROT. AGENCY, OIL DISCHARGE REPORTING REQUIREMENTS 1–2 (2006), <http://www2.epa.gov/sites/production/files/2014-06/documents/spccfactsheetspillreportingdec06-1.pdf>.

Any person in charge of a vessel or an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil . . . in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. The Federal agency shall immediately notify the appropriate State agency of any State which is, or may reasonably be expected to be, affected by the discharge of oil²⁷²

OPA does not require informing the public. It merely requires informing an appropriate federal agency. Therefore, if a state does not require public notification, no law will require it. Nor does OPA require independent monitoring during an oil spill. These issues go hand-in-hand. The public must receive third-party-verified information as soon as possible after an oil spill, rather than relying on the media. As was seen during the *Exxon Valdez* spill, news broadcasts may skew information—if the media even picks up the story. A reasonable update to OPA would be to require an independent third party to deliver legitimate information to the public, rather than relying on state legislation to impose that requirement. The public should be aware of the damages caused by oil companies to American land and water. Without that information, citizens may feel oil companies are doing a better job at curtailing pollution than they truly are. In addition, citizens will not change their own behaviors without clear, understandable, and overwhelming indications that oil pollution is having egregious impacts on their environment and welfare. Implementing public shaming would convey this information to the public, which would not only educate the populace, but also punish the defiling corporation.

The Clean Air Act (CAA) includes useful language, which Congress could incorporate into OPA. The CAA stipulates the creation of an independent entity, the Chemical Safety and Hazard Investigation Board, to investigate accidental spills or releases of dangerous materials.²⁷³ This investigatory board consists of five members who the President appoints with the prior advice and consent of the Senate.²⁷⁴ The members are appointed based upon “technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation.”²⁷⁵ These individuals investigate accidental chemical releases and “report to the public in writing

272. 33 U.S.C. § 1321(b)(5) (2012); *see also* § 1321(b)(3) (describing which oil discharges constitute “violations”).

273. 42 U.S.C. § 7412(r)(6).

274. *Id.* § 7412(r)(6)(B).

275. *Id.*

the facts, conditions, and circumstances and the cause or probable cause of any accidental release” which negatively affects people.²⁷⁶ The Board will also report to other governmental agencies on current safety protocols and effective methods to deter accidental chemical releases.²⁷⁷

An Oil Safety Board might be one option to improve current faulty and lacking OPA requirements. An investigatory board could oversee cleanup efforts and ensure the public receives accurate and immediate notification of reported spills. This board would be able to prevent inaccurate information from entering the media pool and the legitimacy to correct misinformation. Certainly, the board’s creation would be an improvement to current standards, which require no oversight of the kind seen in the CAA. It is important to clarify and expose the truth behind oil spills beyond what oil companies and the media choose to report. The company responsible for a spill should not be able to control what the media sees and hears regarding the spill. Third-party individuals overseeing the accidents would act as whistleblowers against incorrect information, and force oil companies to take further responsibility for the catastrophes they create. Perhaps with additional oversight, oil companies will choose to invest in safety and security systems, which may prevent oil spills before they happen. In addition, lifting the veil of secrecy which oil companies throw over spills might expose the truth behind the existing shortcomings that lead to these horrific disasters in the first place.

2. How Public Shaming Might Enter into Legislation, and How Courts Could Apply Public Shaming After an Oil Spill

The shaming of today should evolve beyond stitching a red “A” onto the lapel of a corporate manager’s Dormeuil suit. Today’s shaming must influence an entire society—by educating it as well as reflecting its morals. Congress should incorporate public shaming of oil companies into OPA to ensure that the public receives accurate information regarding oil spills, but also with an eye toward deterrence of future incidents. Courts have wide discretion when applying shaming punishments and shaming has taken on a variety of forms.²⁷⁸ All that is required is some creativity when determining the appropriate form of shaming to employ, based on the defendant and the

276. *Id.* § 7412(r)(6)(C)(i).

277. *Id.* § 7412(r)(6)(C)(ii).

278. *See* Kahan & Posner, *supra* note 239, at 384 (demonstrating that “shaming penalties assume a rich diversity of forms—from *stigmatizing publicly* (primarily media advertisements) to *literal stigmatization* (distinctive clothing or signs to be posted on the offenders’ property) . . .”).

circumstances.²⁷⁹ Posting a formal apology in a newspaper—such as an advertisement describing the spill—spreads information quickly and may have a “dramatic reputational effect.”²⁸⁰ However, that should not be the only mode used to spread information when an oil spill occurs. The mode used to disperse information ought to be the most accessible to the public. Spreading the information to the largest number of people may require several methods. Oil spills impact society as a whole, and all individuals who are affected should learn about the realities of a spill when it happens. The language of a spill announcement and ongoing follow-ups, should detail, in a straightforward and understandable form, the causes of the spill, and exact figures such as barrels spilled, and the resulting level of environmental degradation.²⁸¹ Third-party investigators will verify this information prior to its release, thereby assuring that oil companies do not have full control of the information circulated. Because fines and punishments for oil spills directly correlate to the actual number of barrels spilled, corporations must not have the opportunity to control and manipulate information. Especially as seen in the Deepwater Horizon spill, third-party researchers and investigators must have complete access to the spill area to verify measurements. Without these nonpartisan watchdogs, oil companies control the release of information, which is potentially incorrect and skewed.

One famous advertisement BP released shortly after the Deepwater Horizon spill deserves discussion.²⁸² BP expertly designed their advertisement, and carefully constructed it to paint a better picture of the cleanup efforts. The advertisement does not satisfy the task of shaming, or bring any consequences of the oil spill to light. The video conspicuously lacks any scenes of dead animals or oil-soaked beaches.²⁸³ Instead, the ad shows pristine white sand and clean seabirds in soapy baths.²⁸⁴ Next, the ad purports that although the disaster should never have happened, BP helped organize “the largest environmental response” seen in American history.²⁸⁵ Clearly, this statement and the scenes are intended to downplay the tragedy and shine a positive light on BP’s actions in the wake of the disaster. Not only does this not publicly shame BP, it astonishingly allows the wrongdoer to enhance its reputation by taking advantage of a catastrophe of its own

279. *Id.* at 386.

280. Skeel, *supra* note 243, at 1857.

281. Kahan & Posner, *supra* note 239, at 386.

282. *BP Apology Campaign Begins Airing*, *supra* note 4; *A Message From Tony Hayward*, BP, http://bp.concerts.com/gom/bp_response_tv_60_060310.htm, (last visited Feb. 20, 2016) (direct link to BP video referenced in *BP Apology Campaign Begins Airing*, *supra* note 4).

283. *A Message From Tony Hayward*, *supra* note 282.

284. *Id.*

285. *BP Apology Campaign Begins Airing*, *supra* note 4; *A Message From Tony Hayward*, *supra* note 282.

making. Reformed legislation should prohibit self-aggrandizing messages on behalf of the perpetrator in the wake of an environmental disaster.

The BP advertisement is an example of what to avoid during shaming sanctions. Any mode chosen to shame the defendant must accurately depict the damages of the spill. An oil company should not have the freedom to selectively show only the positive scenes from the spill. To be effective, the ad should contain accurate images of the destructive powers of an oil spill so the public can witness exactly what they have lost and the dangers to which they could potentially be subject—not only the already cleaned beaches and birds.

Courts must act as enforcers. Shareholders must not manage what the media reports or what the public sees. “When a corporate polluter is shamed by a court, we can easily see how the firm has offended a community standard.”²⁸⁶ A firm’s stockholders or directors are not the appropriate enforcers of the penalty.²⁸⁷ Their motivation may potentially be skewed as opposed to judges, who are a detached and impartial body, allowing for appropriate sanctioning.²⁸⁸ Because a stakeholder or manager in a company is likely to ultimately seek the company’s success, allowing them a role in enforcement will not ensure that shaming will have a successful outcome.²⁸⁹

To achieve effective public notification, some spill reports will focus locally, especially for small-scale pipe leaks. Spills of a higher gallon amount or spills that cover a wider area deserve a higher level of notoriety because they affect a larger percentage of the environment and population. A delicate balance must be struck. People may tune out the information regarding a spill if they become oversaturated by the information. But the populace should be aware of how oil companies impact our planet and our lives.

The shaming punishment should always elicit a feeling of disapproval of the company responsible for the oil spill.²⁹⁰ The damage itself, regardless of any shortcomings on a corporation’s part, should be enough to bring about public condemnation. Every oil spill impairs the environment and hurts our society as a whole. Furthermore, the defendant should pay for the costs associated with the shaming²⁹¹ in addition to the expenses for cleanup and punitive damages. An oil company should internalize as much of the cost associated with a spill as possible. Also critical, beyond the specific dollar

286. Skeel, *supra* note 243, at 1824.

287. *See id.* at 1825–26 (explaining the difference between courts and individuals enforcing shaming penalties).

288. *See id.* (illustrating the benefits of having the judicial system handle shaming penalties).

289. *Id.* at 1826 (“[P]rivate enforcers seem more likely to have problematic motives than judicial enforcers.”).

290. Kahan & Posner, *supra* note 239, at 385–86.

291. *Id.* at 386 (explaining that the defendant should pay for the costs associated with shaming such as newspaper announcements or formal apologies); Skeel, *supra* note 243, at 1826.

amount, are the unmeasurable costs to the corporation's brand and reputation; a corporation relies on consumers for its economic success. If handled properly, public shaming and third-party oversight would go beyond pulling at polluters' purse strings and impact companies where it arguably hurts more—their reputation and their control over an oil spill disaster once it takes place.

CONCLUSION

The number of oil spills in the country cannot continue to go unchecked and society must embrace creative methods to punish wrongdoers and halt the growing problem. No matter the fines levied against oil companies, oil spills damage American oceans, shores, and mainland. From a corporate standpoint, this form of pollution seems to have become just another cost of doing business and an acceptable part of a tremendously lucrative industry. Although fines against oil companies for their negligent actions are wise and necessary, society must begin to work towards a deterrent that makes the cost-cutting methods employed by oil corporations untenable. Courts can use public shaming to help satisfy that goal. Public shaming damages a corporation's reputation and social image, both of which are critical to continued public support.

Not only will public shaming expose the true damages of an oil spill to the public, and force oversight upon the dealings of the oil company after a spill, it might also legitimately stop companies from allowing spills to happen in the first place. An informed public, made aware of oil spills and educated with accurate data verified by trustworthy third parties via public shaming requirements, can demand that oil companies work to eliminate the high number of oil spills per year. Furthermore, if the public remains unsatisfied with the progress that oil companies make, perhaps society will eventually move away from oil towards cleaner fuel alternatives. Only with education of the public, a sense of environmental stewardship, and a concern for self-preservation can one expect to see change. Education in the form of public shaming can be a critical tool in attaining these goals.

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