The Oil Spill Commission
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This statement provides an overview of the potential criminal and civil claims that the federal government and state and tribal natural resource trustees may assert against BP and other potential responsible parties for the Gulf oil spill. Drawing on my experience as Assistant Attorney General for Environment and Natural Resources with the prosecution and settlement of such claims against Exxon for the Exxon Valdez spill, I discuss some of the strategic issues that the government parties and the defendants face in dealing with such claims, the incentives for and potential structure of a global settlement, the legal and institutional challenges that the government parties face in assessing natural resource damages (NRD), and the need for an integrated approach and management structure for restoring the Gulf resources injured by the spill that is closely linked with other ongoing or future programs to protect and enhance those same resources.

Other than claims for removal costs and NRD, this statement does not address criminal or civil claims that states or tribes might assert or other claims for economic losses that governments, tribes or private parties may assert. The assertion of some of these other claims could further complicate the already difficult challenge of achieving a settlement of federal criminal and civil claims and federal, state, and tribal NRD claims in a way that will accommodate the basic interests of the various parties and advance restoration efforts without prolonged delay.

I. Potential Criminal and Civil Claims by the Federal Government and NRD Claims by Federal, State, and Tribal Trustees.

The federal government can assert criminal claims, claims for civil penalties, and NRD claims for injury to the natural resources of the Gulf and adjacent lands. The claims and the liabilities that they impose are cumulative. State and tribal natural resource trustee agencies can also assert NRD claims, which in many cases will concern the same natural resources as the federal NRD claims and overlap with them.

A. Criminal Violations

Depending on the facts, the Department of Justice could assert a variety of criminal violations against corporate and individual defendants.[1] These include the following:

Clean Water Act. 33 USC 1321(b)(3), prohibits the discharge of oil . . . in connection with activities under the Outer Continental Shelf Lands Act . . . which may affect natural resources belonging to . . . the United States . . . in such quantities as may be harmful . . . except . . . where permitted." Negligent violations can be prosecuted under 33 USC 1319(c)(1); persons convicted are subject to a fine of $25,000 per day or 1 year imprisonment or both. Knowing violations are

[1] Corporate defendants would not be subject to the imprisonment provisions of the criminal statutes discussed.

prosecutable under 33 USC 1319(c)(2); persons convicted are subject to a fine of $50,000/day or three years imprisonment or both. Under 33 USC 1319(c)(3), a defendant who "knows at [the time of a violation] that he thereby places another person in imminent danger of death or serious bodily injury . . ." is subject to a fine of $250,000 or 15 years imprisonment or both.[2]

Migratory Bird Treaty Act. 16 USC 703(a) makes it "unlawful at any time, by any means or in any manner, to . . . take [or] . . . kill . . . any migratory bird, any part, nest, or egg of any such bird . . ." This is a strict liability misdemeanor offense. The government need only show that the defendant committed an act that killed a migratory bird or its eggs. No negligence, knowledge, or purpose to kill a bird must be shown. Under 16 USC 707(a), persons convicted are subject to a fine of not more than $ 15,000, imprisonment for not more than six months, or both.

Rivers & Harbors Act. 33 USC 407 prohibits the discharge without a permit from the Corps of Engineers "from or out of any ship, barge . . . or from the shore, wharf manufacturing establishment or mill of any kind . . . any refuse matter of any kind or description." There may be some question whether an oil drilling rig falls within the statute, but the discharge of commercially valuable oil does. A mobile, semi-submersible offshore drilling unit such as the *Deepwater Horizon* would most likely be regarded as a "ship" for purposes of this provision. This is again a strict liability offense. 33 USC 411 provides that a person convicted is "guilty of a misdemeanor and subject to a fine of up to $ 25,000 per day and imprisonment for not less than thirty days nor more than one year, or by both such fine and imprisonment . . ."

Endangered Species Act. 16 USC 1538(a)(1) and 50 CFR Part 17 make it unlawful to knowingly "take" any species listed by the federal government as endangered or threatened without a permit; "take" includes killing or otherwise harming a member of such a species. 16 USC 1540(b)(2) subjects a person convicted to fines of up to $50,000 and imprisonment for up to one year.

Alternative Fines Act. 18 USC 3571 provides for enhancements of fines otherwise provided for by specific statutes such as those described above. Subsection (a) provides for fines, in the case of a felony, of not more than $250,000; for a misdemeanor resulting in death, of not more than $250,000; and for a Class A misdemeanor that does not result in death, of not more than $100,000. Of greatest significance for the BP spill, subsection (d) provides:

> "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."

[2] Further, under 33 USC 1319(c)(4), a person knowingly making a false statement in connection with a violation is subject to a fine of $10,000 or two years imprisonment or both. Other provisions of federal law also provide for criminal penalties for violations of record keeping, reporting, and other requirements, as well as making false statements to federal officials.

The background of this provision's enactment indicates it was aimed at financial fraud, manipulation, and similar crimes. There is a question, that has not been litigated and squarely resolved by the courts, whether this provision applies to environmental violations, and whether "pecuniary loss" would, in the context of this statute, include removal and restoration costs and economic losses stemming from damage to natural resources. The provision was, however, invoked by the federal government in the Exxon Valdez settlement and was invoked as a basis for a settlement of environmental violations against BP arising out of the explosion at its Texas City refinery.[3] If the provision were held applicable, if removal, restoration, and other economic costs and losses stemming from injury to natural resources caused by the oil spill represent "pecuniary loss" within the statute, and if a court were to conclude that applying the provision would not "unduly complicate or prolong the sentencing process," the amount of fines imposed could increase dramatically.

B. Civil Penalties

Clean Water Act. Under 33 USC 1321(b)(7)(A), persons who discharge oil in violation of the Act are subject to a civil penalty of $25,000 per day or $1,100 per barrel; this is a strict liability provision. For violations resulting from "gross negligence or willful misconduct" a violator is subject to a civil penalty of not less than $100,000 per day of the violation and not more than $4,300 per barrel of oil. Prior to the 1991 amendment of this provision passed after the Exxon Valdez spill, it provided only for fines calculated on a per-day basis. The per-barrel penalties reflect adjustments for inflation as provided by later statute. Administrative penalties are also available under 33 USC 1321(b)(6), however such these are capped at $125,000 and are therefore unlikely to play a role in this matter. Given the magnitude of the BP spill, the civil penalties are potentially very large. .[4]

EPA authorizes civil judicial and administrative enforcement settlements under the laws that it administers, including the Clean Water Act, to include Supplemental Environmental Projects (SEPs), which must be approved by EPA with review by the Justice Department. SEPs are restoration projects conducted by the violator designed to improve resources affected by the environmental violation or that otherwise have an appropriate nexus to the violation. Civil penalties otherwise payable may be remitted in part by EPA in consideration of violators' funding of SEPs.

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[3] In *United States v. BP Products North America, Inc.*, a case arising from a deadly explosion at a BP refinery in Texas City, Texas BP pled guilty to a felony violation of the Clean Air Act. 610 F.Supp.2d 655 (S.D. Tex. 2009). The court approved the $50 million plea agreement expressly on the basis of the Alternative Fines Act. The complexity of calculating the aggregate gross loss to the victims of the Texas refinery explosion persuaded the court to base the fine on BP's gain in savings consequent to the violation. *Id.* at 707. The Ninth Circuit, in evaluating the appropriateness of the jury award from the civil litigation of the *Exxon Valdez* spill, relied upon the defendant's potential liability under the Alternative Fines Act as a reference point. *In re Exxon Valdez*, 270 F.3d 1215, 1245 (9th Cir. 2001). When the Supreme Court ultimately vacated this jury award, it was silent on this use of the Alternative Fines Act. *United States v. Baker*, 128 S. Ct. 2605 (2009).

[4] In addition to seeking civil penalties for a violation of 33 USC 1321(b)(3), the Federal government could assert a another Clean Water Act violation under 33 USC 1311(a): "Except in compliance with this section . . . the discharge of any pollutant . . . shall be unlawful." 33 USC 1319(d) allows the government to claim civil penalties of $25,000 per day of the violation. See generally United States v. Colonial Pipeline Co., 242 F. Supp. 2d 1365, 1379-72 (N.D. Ga. 2002) (allowing assessment of penalties resulting from an oil spill to proceed under both §1319 and §1321).

EPA has developed requirements about when and what kinds of SEPs can be utilized to offset civil penalty settlement payments. EPA has determined that the required nexus between SEP and violation may be established by satisfying one three criteria:

> "a) the project is designed to reduce the likelihood that similar violations is satisfied will occur in the future; or
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> b) the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
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> c) the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.[5]"

Another requirement is that the proposed SEP not augment or supplement the appropriations of the EPA or any other federal agency. SEPs must be independent of activities for which the EPA has received appropriated funds or is required by law to perform. Examples of past SEPs resulting from oil spill violations under the Clean Water Act include the donation of spill response equipment to local emergency response crews and the purchase and permanent protection of resources in the affected area.[6]

Endangered Species Act. 16 USC 1538(a)(1) and 50 CFR Part 17 make it unlawful to knowingly "take" any species listed by the federal government as endangered or threatened without a permit. "Take" includes killing or harming any member of such a species. 16 USC 1540(a)(1) authorizes a penalty of up to $25,000 for each violation.

C. Removal Costs and Natural Resource Damages

The Oil Pollution Act (OPA), 33 USC 2702(a), imposes strict liability on "each responsible party" for removal costs and damages, including NRD, resulting from discharges of oil from a "vessel." 33 USC 2701(18) defines "vessel" to include a "mobile offshore drilling unit" such as the Deepwater Horizon. 33 USC 2701(32) defines a "responsible party" as "any person owning, operating, or demise chartering" such a vessel. BP would be liable, having demise chartered the Deepwater Horizon. Transocean would also be liable since it owned and operated the Deepwater Horizon with the assistance of personnel from BP, Anadarko, Halliburton, and M-I Swarco, who might, depending on the facts, thereby be liable as "operators."

"Removal costs" are defined under 33 USC 2702(b)(1) as any costs incurred by the United States, a State, or an Indian tribe consistent with the National Contingency Plan, the Clean Water Act, or the Intervention on the High Seas Act. "Removal costs" are defined under the Clean Water Act, 33 USC 1321(a)(25), as "the costs of removal of oil or a hazardous substance that are incurred after it is discharged . . ." 33 USC 1321(a)(8) further defines "removal" as "containment and removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public

[5] See Walker B. Smith, Importance of the Nexus Requirement in the Supplemental Environmental Projects Policy, EPA Memorandum, Oct. 31, 2002, *available at* http://www.epa.gov/compliance/resources/policies/civil/seps/sepnexus-mem.pdf.

[6] EPA maintains an online database of past SEPs at http://www.epa-echo.gov/echo/compliance_report_sep.html.

health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches . . .”

“Damages” are defined under 33 USC 2702(b)(2) to include NRD; damages for injury to or economic losses resulting from destruction of real or personal property; loss of subsistence use of natural resources; loss of government taxes, royalties, rents, fees, or net profit shares due to injury to real or personal property or natural resources; lost profits and earning capacity resulting from the same, by any claimant; and the net costs of providing increased or additional public services as a result of a discharge.

Damages Liability Cap: Under OPA, the amount of liability for discharges from offshore facilities is capped at “the total of all removal costs plus $75,000,000.” 33 USC 2704(a)(3). For the purposes of calculating the amount of liability, mobile offshore drilling units like the Deepwater Horizon are treated as offshore facilities. 33 USC 2704(b)(2). The cap does not apply if the discharge was “proximately caused by gross negligence or willful misconduct, or the violation of an applicable Federal safety, construction, or operating regulation . . .” 33 USC 2704(c)(1).

D. Natural Resource Damages

33 U.S.C. 2706(a) provides that the liability by a responsible party for NRD shall be to the federal government for natural resources belonging to, controlled by, or appertaining to the United States; to states for resources belonging to etc. a state or political subdivision thereof, and to Indian tribes for resources belonging to etc. them. Under 33 USC 2706(b), the federal and state governments designate trustees to present a claim for and to recover NRD. The President, by Executive Order and through the National Contingency Plan at 40 CFR 300.600, designated the following as among the trustees under OPA: the Secretary of Defense, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Energy, and “[f]or natural resources . . . not otherwise described . . . the head of the federal agency or agencies authorized to manage or control those resources.” OPA and the Executive Order leave entirely open what resources different trustees can claim for. In the context of the far-reaching BP spill, involving multiple states each with different resource management agencies and perhaps also tribes, the various federal, state, and any tribal NRD claims will all overlap to a considerable degree. Beyond precluding double recovery under 33 USC 2706(d)(3), OPA provides no mechanism for coordinating or directing the claims and NRD-related activities of different trustees.

The trustees assess NRD and “develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.” 33 USC 2706(c). NRD are measured according to the “cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;” the “diminution in value of those natural resources pending restoration;” and the “reasonable cost of assessing those damages.” 33 USC 2706(d).

NRD recoveries must be spent exclusively to restore injured natural resources and for related activities. The trustees must retain NRD recoveries in a “revolving trust account, without further

appropriation, for use only to reimburse or pay costs incurred by the trustee . . . with respect to the damaged natural resources." 33 USC 2706(f). This arrangement was designed to ensure that NRD recoveries go to restore the injured resources. The provision authorizing trustee expenditures without further appropriation is a notable exception to the general requirements, under the Miscellaneous Receipts Act and Anti-Deficiency Act, that any recoveries on behalf of the United States must be deposited in the Treasury and may not be expended except pursuant to appropriation as well as authorization by Congress. The availability of significant funds outside of the normal appropriations process could have a major impact on the operations of trustee agencies, including the Army Corps of Engineers, which is under the authority of the Secretary of Defense, a designated OPA trustee, and has long played a prominent in the Mississippi Delta and Gulf region.

II. Exxon Valdez Settlement

The October 1991 settlement between the United States, Alaska, Exxon Corp., and Exxon Shipping, a wholly owned subsidiary of Exxon and owner and operator of the Exxon Valdez, settled all civil and criminal claims (including federal claims for civil penalties) and was approved by the federal district court in Anchorage in the form of a plea agreement (federal criminal charges) and a consent decree (civil claims).[7]

A. Criminal Plea Agreement

Exxon pled guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act.[8] A $150 million fine was assessed against Exxon; $125 million was forgiven in recognition of Exxon's cooperation in cleaning up the spill and paying certain private claims. Of the remaining $25 million, $12 million went to the North American Wetlands Conservation Fund; the North American Wetlands Conservation Act authorizes criminal penalties under the Migratory Bird Treaty Act to be paid into the Fund. 16 USC 4406(b).

The pleas agreement also provided $100 million in criminal restitution to be divided evenly between the federal and state governments. The federal government's $50 million went into the Natural Resource Damage Assessment and Restoration Fund. Alaska's $50 million was appropriated by the state legislature for a variety of conservation projects including a recreation and marine mammal rehabilitation center and habitat acquisitions.

B. Civil Settlement

The consent decree settling the federal and state civil claims provided for a total of $900 million in annual payments over 10 years. The monies have been disbursed as follows: $216 million in reimbursements for cleanup and damage assessments to the US and Exxon; $178 million for research, monitoring, and general restoration; $375 million for habitat acquisition; $45 million for program development and implementation; $177 million remained in a joint federal-state

[7] I had left the office some months before the final settlement was reached and judicially approved, but the basic contours were determined while I was still there.
[8] Exxon Shipping pled to all three violations; Exxon Corp. to one.

NRD trust fund account as of September 2008.[9] The civil settlement also included a "reopener window" that could be utilized at a later date to seek up to an additional $100 million to address unforeseen impacts from the spill. The United States and the State of Alaska exercised this option in 2006, filing a claim seeking $92 million to remove subsurface oil residues on shorelines. The claim is still pending and has not been resolved.

III. Issues and Challenges in Assessing NRD

The purpose of NRD assessment is to determine the character and extent of interim and ongoing injury pending and after completion of recovery. NRD recoveries are to be spent to achieve restoration of the injured resources to the condition that they would have been absent releases, to compensate the public for interim resource losses, and also for scientific studies, restoration planning, legal expenses, and other expenses incurred by trustees and government in connection with NRD assessment, recovery, and restoration activities.

The conceptual basis for restoration is further elaborated in the NRD assessment regulations issued by NOAA under OPA. While compliance with these regulations is optional with trustees, under 33 U.S.C 2706 (c)(2), trustees that conduct NRD assessments pursuant to the regulations enjoy a rebuttable presumption in favor of their assessment in litigation against responsible parties; accordingly trustees generally follow the regulations. The NOAA regulations, 15 CFR 990.30, define "baseline" as "the condition of the natural resources and services that would have existed had the incident not occurred." The purpose of NRD assessment is to "evaluate the nature and extent of injuries resulting from an incident, and determine the restoration actions needed to bring injured natural resources and services back to baseline and make the environment and public whole for interim losses." Restoration consists of actions to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services. It includes "primary restoration," which is any action, including natural recovery, that returns injured natural resources and services to baseline; and "compensatory restoration," which is any action taken to compensate for interim losses of natural resources and services that occur from the date of the incident until recovery.

The theory is that trustees can determine a baseline and correlatively, the character and extent of injuries caused by discharges; that restoration measures can be selected and implemented to restore, sooner or later, injured resources to their baseline condition; that interim resource losses to the public pending full recovery can be determined; and that resource measures can be devised and implemented to provide additional resource benefits to the public as in kind compensation for interim losses. Actually applying these concepts and identifying baseline conditions (which require good pre-existing data), discharge effects, resource injuries, measures that will successfully restore resources to baseline, interim losses to the public, and additional resource measures to compensate for them therefore is an immensely challenging and difficult task in the case of a major spill such as Exxon Valdez, or the much bigger and geographically much more extensive BP spill. The difficulties include determining baselines; determining the extent of injury to dynamic biological populations; accounting for long term low level but potentially quite important effects; accounting for the effects of removal actions, including use of dispersants,

[9] See Exxon Valdez Oil Spill Trustee Council, 2009 Status Report. Available at http://www.evostc.state.ak.us/Universal/Documents/Publications/AnnualStatus/2009AnnualReport.pdf.

which defendants may claim have enhanced rather than reduced injuries; and the feasibility of devising and successfully implementing restoration measures that will restore the wide range of resources exposed to oil in a vast marine environment. While localized, acute effects can be determined and perhaps remedied, more diffuse, complex, and long lasting effects pose far greater difficulties, as attested by the reports of the Exxon Valdez Spill Trustee Council.[10]

Determining interim losses to the public from injured resources pending full restoration (assuming that goal can actually be achieved) present additional challenges. The basic approach is to use economic valuation methodologies to put a dollar price tag on such losses and spend the equivalent on enhanced resource services to the affected public (e.g. additional protected wildlife habitat that will benefit those who fish, hunt, observe, or otherwise value wildlife). Fairly good valuation methodologies exist for lost resource services – for example, the losses that recreational fishers suffer if favored fishing grounds are closed or degraded. But the NRD conception also includes interim "non-use" losses – the loss in economic welfare suffered by member who places an economic value on the existence of undamaged nature for its own sake. The basic methodology for measuring such losses in dollars consists of contingent valuation methodology (CVM) surveys of a sample of individual members of the public to elicit their willingness to pay to protect a resource similar to that injured, apart from any use that they might make of it. The design of CVM studies (including identification of the relevant public and the framing of the questions, whether respondents are asked to value a range of other resources at the same time, etc.) is controversial, and critics have attacked the validity of the entire enterprise, pointing out that survey respondents do not have to back up their stated valuations with actual money payments. In the context of the BP spill, it would be very difficult to devise a study that was not influenced and probably biased by the immense and highly adverse publicity generated. There is also an unresolved question whether a court would, consistent with the Federal Rules of Evidence, allow CVM study results to be presented to a jury.[11] Potential NRD liabilities for non-use values determined through CVM are thus highly uncertain but potentially immense, an important factor driving a global settlement in the Exxon Valdez case.

IV. Global Settlement of Governmental Claims for the BP Spill and Integrated Restoration and Enhancement of the Gulf Ecosystems

It would be in the long run interests of the federal, state, and any tribal parties and of the defendants to achieve a global settlement in order to resolve risk and avoid potentially immense litigation delay and expense. Most importantly, a global settlement could deliver restoration resources to the Gulf more rapidly.

Given all the factual and legal complexities in determining and valuing injury to natural resources, including interim lost use and non-use values, full litigation of the NRD claims in Exxon Valdez or BP to final judgment, including massive discovery, endless motions, and appeals, could well take 20 years or more. Defendants could use litigation delay to wear down the plaintiffs and postpone the ultimate day of reckoning. A big factor in driving the Exxon

[10] See *id.*

[11] See generally Richard B. Stewart, Natural Resource Damages: A Legal, Economic and Policy Analysis. (1995) (Editor and principal author).

Valdez settlement was the federal criminal case. There is little or no discovery in criminal trials, which proceed on a fast track. Defendants, especially major corporations, want to avoid the publicity of a criminal trial, uncertainty in the amount of fines that could be levied in light of the Alternative Fines Act, and the potential use by plaintiffs of a conviction following trial in private civil claims including claims for punitive damages. Thus, defendants have strong incentives to settle criminal charges, but in doing so they also want to resolve all government liabilities against them, rather than settling one set of claims while remaining open to indefinite and highly uncertain liability under the others, especially NRD claims. Governments also have incentives to pursue a global settlement in the context of a criminal settlement in order to avoid long delays, very high costs, and large uncertainties regarding recoveries in NRD claims.

Compared with the criminal case, the civil penalty claims in Exxon Valdez were not big enough to drive the settlement. But they are certainly large enough in the case of the BP spill to help drive settlement if they could be determined without significant factual and legal controversy and delay. Government assertion of penalties for negligent discharge and possible defenses based on partial government responsibility for the size of the spill could, however, complicate and delay the resolution of civil penalties claims and thereby reduce their efficacy as a settlement driver.[12]

As regards the elements of a global settlement and the allocation of settlement monies: because of tax deductibility, insurance, public relations, and other considerations, defendants have strong incentives to maximize the amount paid and spent as NRD and minimize the amounts paid and disposed of as fines or civil penalties. Trustee agencies also have strong incentives to maximize the NRD portion of the total, because they can expend them without further appropriation and, in the case of federal agencies, congressional control. Because of its concerns to ensure punishment and deterrence, the Justice Department sought to ensure that a substantial portion of any settlement in Exxon Valdez took the form of criminal fines and civil penalties, which ordinarily must be paid into the Treasury. In the ultimate Exxon Valdez settlement, substantial fines as well as criminal restitution were ordered, but most of the monies were allocated to cover removal and restoration costs. The civil penalty claims were rolled into an umbrella civil settlement, all of which was effectively allocated to restoration, removal, and related expenses.

The BP spill involves five states and the federal government, each with multiple NRD trustees, plus possible tribal NRD claims. There will also be multiple defendants. Thus, resolving the government claims in the BP spill will be far more complicated and difficult than in the Exxon Valdez case, involving only two governments and one (effectively) defendant. A big challenge for the government lawyers will be to maintain a united front in pursuing defendants and resolving claims, reaching any global settlement, and spending the monies. A united approach is essential because the resource claims of the various trustees will overlap. A united front is also important from the viewpoint of the governments in order to prevent the defendants from pursuing a divide and conquer strategy. Of course the defendants face similar challenges.

[12] I am skeptical about the use of a reopener clause like that in Exxon Valdez, especially in the context of the BP spill, where the resources affected by the spill have been subjected to many other stresses. It is highly unlikely that new evidence will be discovered in the future that will reveal types and magnitudes of injury to the resources that can be unambiguously attributed to the spill. In exchange for a reopener, defendants will demand a reduction in monies otherwise paid up front. I believe that the governments would be better advised to forgo the reopener to negotiate more up-front restoration recoveries.

In the Exxon Valdez case, NRD plans were developed and monies spent by a Trustee Council composed of three federal and three Alaska state trustees. Under the federal-state Memorandum of Understanding establishing the Council, decisions must be unanimous. In the event of persistent disagreement, the only remedy is to apply to federal court to resolve the matter. I am very concerned that any such arrangement would not be workable or wise in the BP spill context, with so many different trustee authorities. Even if a trustee council were established and could manage to function under a decision rule of unanimity, there would be a real danger that the many trustees would effectively divide up the recoveries for separate expenditure that would only be loosely coordinated. One step towards a solution would be for the President to provide by Executive Order for appointment of a supervisory or head federal "Super Trustee" to exercise final review and decisional authority over federal decisions on restoration and NRD expenditures, and strongly encourage the states to do likewise. The arrangement could provide for joint federal-state appointment of a third Super Trustee to decide restoration priorities, plans and expenditures, along with the other two. Alternatively, Congress could establish such an arrangement by legislation.

It will also be important in the BP spill context to mesh NRD restoration plans, expenditures, and activities with other ongoing or proposed efforts to restore and enhance the Gulf and coastal ecosystems and natural resources, especially those linked with the Mississippi Delta. These resources have suffered massive long-term degradation from navigation and flood control works, dredge and fill projects, oil and gas development, residential and commercial development, pollution runoff, and other activities. While it will be possible to identify some local or otherwise targeted and acute damage to specific resources and target restoration activities on them, it will in many cases as a practical matter be impossible to separate the effects of the spill from the effects of other activities, past and continuing, that have and will continue to adversely affect the Gulf. In such cases, it would be counterproductive and indeed futile to try to target all NRD restoration efforts exclusively on seeking to undo the adverse effects of the spill on specified resources, and nothing beyond that. A more systemic approach is required. The Exxon Valdez settlement recognized this reality by providing that NRD recoveries could be spent to "enhance" affected resources, thereby finessing the impossible task, in many cases, of determining resource baselines and ensuring that restoration achieves a return to baseline condition – not more or less. The difficulties in establishing a baseline and targeting restoration to achieve it are much greater in the BP spill context because the resources affected – unlike those involved in the Exxon Valdez spill, had already been subject to many other stresses. Any arrangement for restoration in the context of the BP spill should aim to enhance a broad range of the services provided by the various resources affected in some way by the spill. The law is flexible enough to permit this approach, which would allow spill restoration activities to be closely coordinated or nested with other similar programs, including those aimed at restoration and protection of the critical Mississippi deltaic ecosystem. The President and/or Congress could provide a management structure to ensure that NRD restoration proceeds hand in hand with activities under such other programs, such as the LCA programs being undertaken pursuant to the 2007 Water Resource Development Act.

Moreover, there are ways in which some portions of a global BP spill settlement could be allocated directly for expenditure under such other programs. One means that could be

accomplished under existing law and practice would be for the settlement to provide for remission of civil penalties otherwise payable if funds were allocated to fund programs such as the LCA program, as a supplemental environmental project under EPA's SEP program. Although the amounts involved in the BP spill could potentially be far greater than those involved in past SEP projects, I see no reason in law or policy why this vehicle could not be used in the BP spill context, provided the activities funded presented a sufficient nexus to the consequences of the BP spill and the arrangements were subject to review and approval by EPA and the Justice Department in consultation with the NRD trustees and pursuant to whatever higher management and decision making structure may be established for restoration and related activities. This arrangement will also have the advantage EPA with authority over significant financial resources for restoration comparable to that of the federal trustee agencies

Another means to the same basic end is statutory. For example, S. 3767 would establish a Gulf Coast Ecosystem Restoration Fund that would receive 80% of any penalties, settlements, or fines collected in connection with the BP spill. The Fund would be administered by representatives from federal agencies and Gulf coastal states, chaired by a Presidential appointee. The bill currently provides that the Chair shall develop a proposed comprehensive plan for the purpose of long term conservation, flood protection, and restoration of biological integrity, productivity and ecosystem functions in the Gulf coast ecosystem, incorporating to the maximum extent practicable, any applicable plans previously developed by federal, state, and local agencies for the restoration of coastal wetlands and other areas of the Gulf coast ecosystem. This, of course, is only an example of a range of more integrated approaches that Congress might consider and authorize.

Whatever mechanism or mechanisms are used, it will be essential to develop an overall structure and management system for NRD restoration and similar efforts under related Gulf resource protection and enhancement programs to ensure, to the maximum extent feasible, that such efforts are harmoniously and effectively designed and executed for the lasting, long term benefit of the Gulf and the public.