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INTRODUCTION: THE DEEPWATER HORIZON INCIDENT

*Charles H. Norchi**

On April 20, 2010 an explosion occurred on the BP *Deepwater Horizon* offshore drilling rig in the Gulf of Mexico, killing eleven crew members, seriously injured sixteen, and sinking the rig. By July 15, when the oil flow was arrested, the Macondo well had discharged 4.9 million barrels of oil into marine waters.¹ The continuing damage to the marine environment, the wider ecosystem, and to coastal human activity is still unknown. In this Symposium—*The Gulf of Mexico Oil Spill: Impacts, Responses, and Prevention*—the contributors appraise the regulatory and institutional pathologies that contributed to the incident, offer projections based on current practices and legal frameworks, propose alternative institutional and regulatory approaches, and recommend policies to achieve a preferred future for marine ecosystems and dependent human activity.

There are earlier oil spill incidents that, in retrospect, amounted to a trend. Alan Sielen writing in this volume describes the 1969 Santa Barbara oil platform spill, the 1979 Bay of Campeche blowout in the Gulf of Mexico, the 1989 Exxon Valdez in Prince William Sound of Alaska, and the 2002 wreck of the tanker Prestige off the Spanish coast. However *Deepwater Horizon* is different. It is one of those rare marine environmental events that has acquired the characterization of an “incident,” or a prism through which reactions at multiple levels can be assessed for acceptable risks and behavior, for systemic pathologies, policy preferences, and for alternatives in law, science, industry practice and policy. Through the incident prism, contributors to this symposium

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1. Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind*, *Scientists Say*, N.Y. TIMES, Aug. 3, 2010, <http://www.nytimes.com/2010/08/03/us/03spill.html?scp=1&sq=Gulf%20Spill%20Is%20the%20Largest%20of%20Its%20Kind,%20Scientists%20Say&st=cse>.

appraise natural resource damage assessment, collection and distribution; federal oversight of Outer Continental Shelf oil and gas activities; problems in spill response; the use of dispersants; renewable ocean energy resources; proposal for a department of the environment; and fisheries conditions in the Gulf of Mexico.

From the Symposium contributions, it is clear that the incident did not begin on April 20, 2010. The explosion was the culmination of a decision process that long predated that date and which now merits close parsing and appraisal. Future decision-makers and students of this event will want to know about the informational bases upon which prior decisions were made, the relevant legal prescriptions on the books at the time, the application of those prescriptions to behavior and events, procedures for handling substandard practices and behavior that lead up to the explosion, and the efficiency of regulatory agencies including any institutionalized practices for appraising internal processes and functions that could render decision-making in its entirety responsive and robust. Readers of this Symposium will find answers to those inquiries and be oriented to the events that culminated in the *Deepwater Horizon* incident and the context in which decisions were made. In turn, they will also find key aspects of the critical task of planning for, and hopefully averting, similar future incidents.

The full impact of the event remains unknown. In her article, *The Value of a Pelican: An Overview of the Natural Resource Damage Assessment Under Federal and Louisiana Law*, Melissa Trosclair Daigle, Legal Coordinator, Louisiana Sea Grant Law & Policy writes the numbers of dead fish and fowl, “do not capture the true impact of the *Deepwater Horizon* oil spill. It is impossible to get an accurate count of the birds, fish, insects, reptiles, and mammals that died and sank to the ocean floor or decomposed unseen in the marsh, or of the microscopic organisms that inhabit the range of ecosystems that were affected by the spill.”² Against this reality, she describes the Natural Resource Damage Assessment (NRDA) whose goal is “to make whole the natural resources and the public’s loss of the use of those resources that are damaged or destroyed by the discharge of oil.”³ Ms. Daigle examines the unique challenges the complicated *Deepwater Horizon* spill presents to the assessment and recovery process that is unfolding pursuant to federal and state law. The incident did not merely generate immediately discernable

2. Melissa Trosclair Daigle, *The Value of a Pelican: An Overview of the Natural Resource Damage Assessment Under Federal and Louisiana Law*, 16 OCEAN & COASTAL L.J. 253, 253-54 (2011).

3. *Id.* at 246.

affects, but also post-outcome uncertainties that complicate the goal of making the environment and the citizenry whole.

In *Shortcomings and Solutions: Reforming the Outer Continental Shelf Oil and Gas Framework in the Wake of the Deepwater Horizon Disaster*, Andrew Hartsig, Arctic Program Director for Ocean Conservancy, observes that, “the Deepwater Horizon disaster revealed systemic weaknesses in the administration of oil and gas activities on the Outer Continental Shelf (OCS). It also underscored the difficulty of stopping and responding to a major oil spill, even in the relatively accessible and temperate waters of the Gulf of Mexico These shortcomings affected the full spectrum of OCS activities, from planning for OCS oil and gas lease sales, to administering offshore exploration and development activities, to planning and implementing oil spill response efforts.”⁴ Systemic weaknesses contributed to ineffective decision-making. Mr. Hartsig describes the existing framework for federal oversight of OCS oil and gas activities, including oil spill preparation and response, and compliance with the National Environmental Policy Act (NEPA). He then recommends detailed policy and legislative solutions that address flaws in the framework following the National Commission’s recommendation of regulatory policies pertaining to the oversight of offshore drilling.

In *Deepwater Horizon Natural Resource Damage Assessment: Where does the Money Go?*, Nicholas J. Lund, Ocean and Coastal Law Fellow at the National Sea Grant Law Center at the University of Mississippi and Niki L. Pace, Research Counsel with the Mississippi-Alabama Sea Grant Legal program, continue the appraisal of the natural resource damages problem. Specifically, the authors treat the delicate issue of collection and distribution of restoration funds pursuant to the Oil Pollution Act of 1990. Via a review of prior experiences, they clarify some of the attendant controversies and uncertainties in a process whose goal is to ensure that the responsible party makes the environment “whole” again.

Russell V. Randle, a partner at Patton Boggs LLP, in *Spills of National Significance and State Nullification*, reveals certain deficiencies in the spill response and identifies factors at the core of the problem and means to adjust and correct them. He reviews responsible party issues, roles of state and federal government, information deficiencies in decision-making, and enhanced response to avert nullification. After

4. Andrew Hartsig, *Shortcomings and Solutions: Reforming the Outer Continental Shelf Oil and Gas Framework in the Wake of the Deepwater Horizon Disaster*, 16 OCEAN & COASTAL L.J. 269, 269-70 (2011).

canvassing particular experiences, Mr. Randle recommends specific changes to the National Contingency Plan (NCP), the federal regulation governing oil and hazardous substance response, which could resolve nullification and related problems. He underscores the lessons that can be applied to future spill response planning to avoid repeating the errors of the *Deepwater Horizon* experience.

In responding to a catastrophic oil spill, the treatment can render the patient worse. Catherine Kilduff and Jaclyn Lopez, staff attorneys at the Center for Biological Diversity, clarify this in their article, *Dispersants: The Lesser of Two Evils or a Cure Worse than the Disease*. Beginning with the decision to approve BP's use of subsea dispersant, they review the statutory framework for regulating dispersants, significant wildlife species and human impact, lessons from the *Deepwater Horizon* incident and the need for scientific investigation that could inform the application of existing laws and future policy adjustments.

Yet the lifestyle demanded by most human beings living in the developed spaces of our planet has determined that we live in a hydrocarbon present. But is there an alternative energy future? Todd J. Griset, an attorney with the firm Preti Flaherty, addresses this possibility in *Harnessing the Ocean's Power: Opportunities in Renewable Ocean Energy Resources*. He provides an "overview of the opportunities for the production of usable power from ocean energy resources other than oil and gas, as well as the legal regimes applicable to, and policy questions relating to that production."⁵ Mr. Griset makes the case that renewable energy resources derived from the oceans is not merely a projection, but that technologies to extract usable power are available now. He describes ocean wind, marine hydrokinetic technologies, ocean thermal energy conversion and legal regimes applicable to each. Rendering renewable energy resources from the seas economically feasible requires incentives that Mr. Griset describes. These renewable resources may be nearer to our energy present owing to the *Deepwater Horizon* incident.

The incident may also be a catalyst to reconsider the institutional framework for all environmental decision-making. Should such decision-making along with executive authority be located in a Department of the Environment? Alan B. Sielen, Senior Fellow for International Environmental Policy at the Center for Marine Biodiversity and Conservation, in the Scripps Institution of Oceanography, makes the affirmative case for a new federal Department of the Environment. He asserts the *Deepwater Horizon* spill was preventable and addresses the

5. Todd J. Griset, *Harnessing the Ocean's Power: Opportunities in Renewable Ocean Energy Resources*, 16 OCEAN & COASTAL L.J. 395, 396 (2011).

systemic industry and government failures at its roots. Mr. Sielen describes the problem of environmental decision-making dispersal across the government including conflicts among agencies. He describes how a Department of the Environment could resolve those problems and produce leadership that is now urgently required nationally and internationally.

How do habitats and species recover from the effects of oil, methane, and dispersants? The problem of capacity recovery is explored by Ashley McCrea-Strub and Daniel Pauly of the University of British Columbia in their article *Oil and Fisheries in the Gulf of Mexico*. They explain that “estimates of the quantity of oil, natural gas and associated methane and chemical dispersants released as a result of this calamity has been plagued by uncertainty.”⁶ Hence, it is difficult to project the long term impact on habitats and marine organisms. In the face of this difficulty, they offer an assessment of this uncertain future in a study that draws upon databases of spatially allocated fisheries data. Their work holds dire implications for commercial fisheries of the Gulf of Mexico.

Appraising the *Deepwater Horizon* incident unveils demands and claims in what has been famously called *The World Public Order of the Oceans*.⁷ This is a process in which nation-states and many other participants including corporations, navies, scientific organizations, NGOs, and individuals assert ocean demands and claims that generate outcomes embodied in regulations, court decisions and events, some of which are catastrophic. Even when the process unfolds within the jurisdiction of a coastal state, the impact is eventually global and it affects world public order. Thus, how a particular nation-state and its governmental agencies treat a critical ocean incident of national significance, is studied and appraised by decision-making elites elsewhere who also have national interests in the oceans and in the assets and resources that the seas might generate. This is especially relevant as new areas of continental shelf oil exploration open in the Arctic, Africa, Australia, Brazil and Russia.

Among the nation-states whose elites appraise incidents of national significance, such as *Deepwater Horizon*, are China and India, two governments that intensely demand hydrocarbon resources. These societies are at stage of economic development that will shape their decision calculus. Their scale of values, including acceptable ecosystem

6. Ashley McCrea-Strub & Daniel Pauly, *Oil and Fisheries in the Gulf of Mexico*, 16 OCEAN & COASTAL L.J. 473, 473 (2011).

7. MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (Yale Univ. Press 1975)

risks, will be different than ours. Their vast populations, their drive for industrial development across multiple sectors, their energy-dependent military expansions are overwhelming factors in decisions affecting oceans usage including hydrocarbon extraction and marine ecosystem protection. And the connectivity of our oceans renders our environmental fates co-dependent. It is in the global common interest that these newly empowered players, these rising hydrocarbon civilizations, learn the lessons of the *Deepwater Horizon* incident.

The *Deepwater Horizon* incident and the articles in this Symposium, also remind us of the scale of values of the mature hydrocarbon civilizations of the Americas and Europe. How is that scale to be balanced? What trade-offs are societies willing to accept? Is the value of environmental well-being which directly bears on human health, preferred over the value of wealth and its maximization derived from cheaper energy? Are individuals and households prepared to accept higher consumer product and fuel costs in return for greater environmental safeguards? Which commercial activity is to be favored—oil and gas exploration with its attendant risks, or fisheries and ecotourism? The skill required to access resources deep within the continental shelf is available to highly developed nation-states and corporations within those nation-states. That investment in skill, in turn, contributes to the wealth and power of the nation-state. The defense of the homeland and the projection of military power are dependent on energy resources, mostly hydrocarbon. Are nation-states willing to sacrifice diminished power for the well-being of the marine environment? Is a healthy environment also a component of power—what Joseph Nye has termed “soft power”?⁸ How will those choices be made and who will make them?

The *Deepwater Horizon* catastrophe generated a profoundly negative impact on the marine environment of the Gulf of Mexico including a range of coastal impacts bearing upon the human condition. It is a critical incident in the ocean and coastal law of the nation because it is shaping normative expectations at multiple social levels and with that, the decision-making calculus of political, legal, and corporate elites. Perhaps America is prepared for an adjustment in its scale of values, a post-*Deepwater Horizon* national self-scrutiny along with a clarification of broader goals and how to reach them. That is a latent theme of this Ocean and Coastal Law Journal Symposium. Our contributors to *The*

8. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* x (2004) (“Soft power . . . is the ability to get what you want through attraction rather than coercion or payments.”).

Gulf of Mexico Oil Spill: Impacts, Responses, and Prevention, have delivered more than scholarly appraisals of the *Deepwater Horizon* event. Through the prism of that incident, they have provided normative guidance for current and future decision-makers. And every concerned reader of this volume is a potential decision-maker who can contribute to a preferred marine ecosystem future in the common interest.