S. HRG. 111–874

EXXON VALDEZ TO DEEPWATER HORIZON: PROTECTING VICTIMS OF MAJOR OIL SPILLS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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EXXON VALDEZ TO DEEPWATER HORIZON: PROTECTING VICTIMS OF MAJOR OIL SPILLS

TUESDAY, JULY 27, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:40 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Amy Klobuchar, presiding.

Present: Senators Klobuchar, Franken, and Sessions.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. I call the hearing to order. Thank you, everyone, for being here. Good afternoon.

Tomorrow will mark 100 days from the time the BP oil spill began with the tragic explosion on the Deepwater Horizon. Eleven men lost their lives, and until recently, oil continued to spill into the Gulf of Mexico.

Unfortunately for our country and for the world, this is not the first oil spill that we have seen, and we have got a great panel of witnesses here today who are going to help tell us some of the lessons from the last massive oil spill in our country. That would be the Exxon Valdez disaster in 1989.

We will probably have to recess this hearing about 3 p.m., and in the meantime, to keep things going, Senator Sessions and I will offer our opening remarks, and we will turn to the witnesses for testimony. I know Senator Begich, who wants to be here, is presiding over the Senate, and we hope that he will join us at some point as well.

Now, today we are going to be hearing from a group of witnesses who are very familiar with the disaster that occurred in Alaska 21 years ago, and I am hopeful that we will learn from their experiences so we know how to better help the victims of this latest oil spill.

As we all know, on April 20th, tragedy struck in the Gulf of Mexico. An explosion aboard the Deepwater Horizon led to the largest oil spill in American history. Three months later, things are finally starting to turn a corner in the gulf. Officials are cautiously optimistic that the well has been plugged, and BP scientists believe that they may have a permanent fix when they put in the secondary well.

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That day cannot come soon enough. When the oil gusher in the gulf is permanently sealed, the first chapter of this environmental tragedy will finally come to a close. But it is only the first chapter.

Right now, the slick from the spill covers approximately 2,500 square miles. Oil has washed up on shores from Texas to Florida. The gulf region's beaches, marshes, and wildlife are imperiled. We have seen the pictures of the oil-soaked pelicans hobbling on the beaches, and we have watched as sea turtles and dolphins struggle to survive in water that has been polluted by oil. It is frustrating. It makes people very angry. It makes all of us very angry.

The livelihood of countless Americans are also in danger. Businesses that depend on commercial fishing, deepwater drilling, and tourism industries are all in jeopardy. And while the Gulf States closest to the spill will bear the brunt of the environmental harm, the fallout from this kind of environmental disaster goes well beyond the gulf. Ecosystems and economies across the country will suffer.

One example: Minnesota is the home of half a million ducks and the largest loon population in the continental United States. Every winter, those birds from Minnesota as well as 12.5 million other birds, 13 million birds make that long trek from the Midwestern States to the marshes along the gulf coast. The oil spill has spread to those marshes, and this year, when the migratory birds get to the gulf, there is a big risk that they will be ensnared by oil from the Deepwater Horizon spill. No one can just hold up a sign that says, "Hey, go to Texas instead." No one can put a big net up, and the birds do not really have the kind of instinct that would lead them to go somewhere else.

That is only one example of the many ways this oil spill is going to affect the health of entire ecosystems, even outside of the Gulf of Mexico.

History might be our best teacher. Twenty-one years ago, the Exxon Valdez oil tanker struck Bligh Reef in Prince William Sound, Alaska; 11 million gallons of oil spilled into the ocean. Despite a large-scale cleanup, there are still lingering effects on the environment. An estimated 80,000 liters of oil in the form of lumps of oil and tar are still said to pollute the coast of Alaska. The Exxon Valdez oil spill is ingrained in the memories of many Americans as one of the greatest environmental catastrophes of the 20th century. Exxon Valdez stands out in my mind not just as an environmental disaster, but also as a grave injustice.

A Minneapolis law firm, Faegre & Benson, represented 32,000 Alaskan fishermen, natives, and cities in their lawsuit against Exxon. An Anchorage jury awarded $287 million in actual damages and leveled $5 billion in punitive damages against Exxon. In 2008, after nearly 20 years of legal wrangling, the Supreme Court reduced the fine to around $500 million. They went from $5 billion to $500 million.

Exxon used every legal trick in the book to prevent the victims of the oil spill from getting compensation. After 20 years of court fights, 8,000 of the fishermen who sued Exxon died and were never paid. Other fishermen received less than they deserved, and they got their money 20 years too late.

While BP's executives sound outraged and contrite now, who is to say that will not change in 2 to 3 years. In the immediate aftermath of Exxon Valdez, Exxon's top executives were publicly repentant, but once they were behind the courtroom doors, they sang a very different tune.

As David Lebedoff, a Minneapolis attorney and author who wrote the book "Cleaning Up," one of the most definitive books on the post-Exxon Valdez litigation, as he put it, "A company's public relations goals just after a disaster are very different from its litigation needs 5 years later."

I think we have made some steps in the right direction. BP executives, after meeting with President Obama and after a lot of pressure from Congress, agreed to create a $20 billion spill response fund. That is something we did not have in Exxon. Kenneth Feinberg will administer the fund, and I believe that Mr. Feinberg will work hard to make sure that those funds are distributed quickly and fairly. But the fund is only a first step, not a silver-bullet solution.

I brought this panel together today to discuss how the lessons of Exxon Valdez can be applied to the tragedy in the gulf. How was Exxon able to keep the oil spill litigation gummed up in the courts for two decades? What compensation did victims in the Exxon Valdez tragedy get? And what challenges continue to plague their communities 21 years later? We need to have a clearer understanding of the financial, biological, sociological problems of the Alaskan communities, the ones they still face, in order to better understand the scope of the disaster in the gulf and to ensure that BP, not the taxpayers, are paying the bill for years to come.

Senator Sessions is now going to give his opening statement, and then we will hope to get the witness testimony in before the vote starts.

Thank you, Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you very much.

This is an important hearing, and it is not easy to deal with the losses of this kind of oil spill. I spent Saturday morning with Mr. Feinberg, meeting with local people who had suffered financial loss, perhaps not direct loss but very, very real loss to their financial ability to survive, and maybe it is not in normal terms a direct financial loss, but it is a very real financial loss. I do not envy the difficulties he has in deciding who gets paid and who does not, where you draw the line, and where you have got to, as a matter of equity, compensate people. He insists that he is prepared to pay far more than what these individuals would get if they were to go to court because for many of them they just would not meet the facial requirements, the elements of a lawsuit and would not be able to be compensated. That, as he acknowledges, remains to be seen, but that is his view.

So this is a challenge, and $20 billion is a lot of money to distribute. How you do that fairly and objectively so people do not rip off the fund is a challenge? And you have got to determine who is

in crisis now and needs the money immediately, which is a big problem that I believe is occurring on the gulf coast.

I do not believe this accident should have happened. I believe good, tight, tough management and oversight somehow or some way would never have allowed this disaster to occur. I am inclined to believe—and maybe as time goes by we will learn—that other rigs being operated more carefully with more control and more determination would have avoided this. So I am not at all defensive. I said within days of the disaster that, as far as I was concerned, BP was not too big to fail, that they were going to pay what they were obligated to pay, and if they cannot succeed, well, so be it. A lot of companies all over America fail every day as a result of actions that they take that get them in financial trouble, and nobody bails them out. So I do not think they need to be bailed out. I think they need to pay what they are lawfully required to pay. But being a person of the law, I think they can be encouraged to go beyond strict rules of law, but at some point every corporation is entitled to the protection of the law.

I think the Exxon Valdez situation is a good learning point. I do believe the Oil Pollution Act that arose out of that has proven in many ways to be helpful to us today. We have seen some things, I think, that need to be changed in it, but it is a lot better than not having it, I believe at this point. Those who in reaction to that spill passed the Oil Pollution Act I think did some good work, and there is nothing wrong with us in reaction to this circumstance figuring out how to improve the act.

We want to be sure that we do not eliminate 200,000 jobs and eliminate the economic benefit that we get from offshore oil and gas production through whatever it is that we decide to do about this. That worries me. A lot of people are not as attuned to it, I think, as I am. Having been involved in studying the economics of it for a number of years, it is a big, big deal for America.

So I think we need to see how we can proceed. Can we create a circumstance that puts great pressure on the responsible party? They have to be deeply financially committed to the safety of the rig. And maybe also we can create some pressure on the entire industry to support one another in ensuring that there is safety in oil drilling.

I was impressed that Exxon, Chevron, Conoco, and Shell have come together with building permanent response equipment the likes of which just now is being successful after 90 days. They are going to start now to spend $1 billion to develop a more effective capping procedure, which should have been done before, in my opinion. One of the great disappointments I have had about the oil industry is that though they have assured us repeatedly that they had everything under control, I have been disappointed they did not have this kind of equipment ready, because even though the chances for such a blowout were small, it was always possible. It would have been a few pennies in the scheme of the overall size of this industry to have had equipment sitting on the dock ready to respond within hours of this disaster.

So, Madam Chairman, thank you for hosting the hearing. I look forward to hearing our witnesses and wrestling effectively with

how to compensate victims and how to create a legal process that is fair and just.

Senator KLOBUCHAR. Well, thank you very much, Senator Sessions. Thank you for your words of willingness to look at this bill and make some improvements and changes to the existing law. I really appreciate that.

I think we will swear in our witnesses now. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. O'NEILL. I do.

Mr. BANTA. I do.

General MCINERNEY. I do.

Senator KLOBUCHAR. Thank you. So let me introduce all three witnesses at once.

First we have Brian O'Neill. He is a friend and colleague from Minnesota. He has extensive experience in oil spill litigation, and he has dedicated a large part of professional career—probably larger than he imagined when he first started doing this that it would last 20-some years—but a large part of his professional career fighting on behalf of the victims in the Exxon Valdez oil spill. He was the lead trial counsel for the 32,000 fishermen, natives, and cities in the Exxon Valdez litigation, and in 1994, the National Law Journal named him one of the Ten Best Lawyers in America for his work in Alaska. He graduated from the U.S. Military Academy at West Point and the University of Michigan Law School. He is a partner in the litigation group at Faegre & Benson, which is a law firm headquartered in Minneapolis, Minnesota.

I know Senator Franken is here, and I do not know if you want to add a few words for hometown lawyer who is appearing before our Committee.

Senator FRANKEN. Well, we are very proud. Thank you, Madam Chair, and we are very proud of you, Mr. O'Neill, for the work you did on the Exxon Valdez case and look forward to your testimony. We met this morning and a pretty harrowing story about what happened to the folks that you represented, how long this took, how such a high percentage of them died before seeing any money or restitution. And we just have an interest that the people who have been victimized in so many different ways by this oil spill in the gulf are not victimized twice, and I look forward to your testimony. Thank you for being here, as I thank all the witnesses.

Senator KLOBUCHAR. I also note that your son is there behind you. Is that right? So ready in case you need representation. All right. Good.

We will also hear from Joe Banta, who has flown all the way from Alaska. Senator Sessions, he took the red-eye—so I guess we should be nice to him—to be here with us. Joe grew up in Cordova in a commercial fishing family and was fishing in Prince William Sound by the age of 10. He was a herring fisherman before the Exxon Valdez oil spill and now is a project manager with the Prince William Sound Regional Citizens' Advisory Council, which focuses on oil spill prevention and response. Thank you for being here, Mr. Banta.

Finally, we will hear from Lieutenant General Thomas McInerney of the United States Air Force. He currently runs his own consulting firm, Government Reform Through Technology, GRTT, since retiring from the military. However, 21 years ago, he was in charge of the Alaskan Air Command and basically coordinated the Department of Defense's efforts on the oil spill cleanup during the time of the Exxon oil spill. He also graduated from West Point—wow, you are surrounded, Mr. Banta—and has a master's degree in international relations from George Washington University, and we are glad to hear his unique perspective today.

We will start with Mr. O'Neill.

STATEMENT OF BRIAN O'NEILL, PARTNER, FAEGRE & BENSON LLP, MINNEAPOLIS, MINNESOTA

Mr. O'NEILL. Thank you, Senator. I spent the last 21 years of my life working on a drunk-driving case, and I have some observations as a result of that endeavor.

In 1994, I did try for half a year the punitive damage case against Exxon, and leading up to that, we took testimony from over 1,000 people. We looked at 10 million documents, and since the trial, we have argued over 20 appeals and tried to distribute recoveries to fishermen and natives, and we have recovered about $1.3 billion during that period of time.

A fisherman is essentially a significant small business and may have as much as $1 million in capital invested in his business. But the capital is illiquid in that it is in the form of boats and fishing permits. And when a fisherman cannot fish, he cannot feed his family, he cannot make his boat payments; and if it is a fishery that has permits, it cannot make fishery permit payments. So if there is an oil spill, a fisherman has immediately a need for an infusion of cash to last through the year so he does not go into bankruptcy.

Now, at some time later, he also needs the opportunity for a full assessment as to what his damages are because oil spills are very unpredictable.

In the early 1970s, the citizens of Cordova objected to the Trans-Alaska Pipeline, and they did so because they predicted—and they predicted to Senate Committees—that if you allow the transport of oil through Prince William Sound, there would be a catastrophic spill, and it would destroy the fishery. And in 1989, that prediction came true, and the Valdez ran aground, and there was a massive amount of litigation that ensued.

The litigation with the Government was criminal and civil, and after 2 years into the litigation, both the State of Alaska and the Federal Government settled early. And when the settlement was approved, they explained to the district court judge in Anchorage that they were settling relatively inexpensively-$900 million for the civil damages to natural resources and $100 million in restitution under the criminal laws. They were settling rather cheaply because they needed the money immediately for remediation in the sound; and, two—and it was a stated reason—they did not feel that they could litigate against Exxon Corporation effectively over a number of years because of financial reasons and, again, the need for money.

Our case was the civil case, and we did go to war with Exxon. And as everyone knows, we were at war with them for 21 years, and we estimate that they spent in defense of our case $400 million.

We learned some things. One of the things we learned was that part of the extraction of oil and the transportation of oil is going to be spills. Some spills are inevitable, and so you better have a system in place to deal with those hurt by the spill. It makes sound economics and it makes sound justice to have people hurt by an oil spill fully compensated and have the price of their hurt reflected in the price of oil at the pump.

We also learned that maritime law, old-fashioned maritime law, was ill-equipped to take care of victims of a spill, and OPA 90 tried to address that, and it made some steps forward. But somebody needs to take a look at OPA 90 so that we know who gets paid and for what they get paid, because both in the Valdez case and I think today, there is a great deal of uncertainty about what the proximate cause doctrines are with regard to oil spills.

A hotel with oil on its beach can recover. The hotel next door that has no oil on its beach, who knows? The hotel across the street, again, who knows? So fishers in part are protected, but they are not fully protected, and area businesses are—it is unclear.

Oil spills drastically impact the financial lives of fishermen, but they also destroy communities. An oil spill, unlike a natural disaster, results in a city like Cordova, Alaska, or a gulf city in higher suicide rates, depression, divorces, bankruptcies, people getting behind on their taxes. So as you look at this whole thing, people do have to be made whole financially, but remember, when you make them whole financially, you are helping to make their communities whole and in many cases helping to make their communities survive

That is my 5 minutes.

[The prepared statement of Mr. O'Neill follows:]

Senator KLOBUCHAR. Thank you. That was very helpful.

Mr. Banta.

STATEMENT OF JOE BANTA, PROJECT MANAGER, PRINCE WILLIAM SOUND REGIONAL CITIZENS' ADVISORY COUNCIL, ANCHORAGE, ALASKA

Mr. BANTA. Thank you, Madam Chair. I appreciate the opportunity to come before the Committee and provide you with information about the profound impact that the Exxon Valdez oil spill had on me, my family, and my hometown, a small rural fishing town in Prince William Sound.

I grew up in that town in a commercial fishing family. I began fishing at the age of 10. I was a third-generation fisherman. My Grandpa Bob came up to Alaska after World War I, drawn by the lure of a fishery.

In 1989, at the time of the spill, I was preparing for the herring fishery in Prince William Sound. Unfortunately, within a few weeks, I instead was doing wildlife rescue, a very tragic situation, sad and frustrating, and I will leave it at that.

The following year there were significant biological effects starting to show. Herring showed signs of stress, lesions from viral and

fungal infections. Within a few years, the fishery was closed entirely because the previously robust biomass of 150,000 tons of herring had been reduced by an order of magnitude down to 15,000 to 20,000 tons. The herring fisheries in the Sound have been closed for 15 of the 21 years since the spill. This was an immense impact biologically as well as financially. The herring that were the basic part of the food chain, sea birds, whales, seals, sea lions, other fish fed upon, was all quite almost literally gone.

There were also significant financial impacts from the loss of the herring fisheries that were multi-generational and multi-layered in effect from individuals up to entire communities. It rippled through all businesses like grocery stores, net mending, on up the chain. Those herring fisheries, again, are gone. My father's fishery is gone. My friends' fisheries are gone. Mine is gone. My permit, valued at $100,000, is now worth nothing. That income has evaporated from that fishery permanently. My sons, Wade, Tore, and Jonas, will no longer have the opportunity to participate in this unique Alaskan way of life, not unlike people that ranch or farm and make their living off the land.

So 21 years after the spill, here we are and there is no indication that this way of life is ever coming back. My family no longer fishes commercially in any way at all.

So the class action lawsuit ended in 1994, we have heard, before the herring fishery had entirely ended, though, so we were compensated only for the initial years of those financial losses, and not for the following past two decades. So the families and the fishermen have not been compensated for that loss with the end result being a significant uncompensated loss for each and every one of the people involved in the herring fishery.

Twenty-one years out, and the financial compensation, modest, that has been awarded from the lawsuit still has not had its final payments made. We are actually still waiting for final payments. A sociologist actually came up with a term he called "litigation stress" to define what goes on and the stresses that were added just by the litigation itself, not to mention the other stresses on up to suicide that we have dealt with.

In reality, this has only been compounded by the manner in which the Supreme Court intervened really at the end of the whole process and used this old maritime commercial law from the 1800s, essentially developed to deal with pirates to cut our jury award down to one-tenth the original what our peers had awarded us.

You have heard it before, and I am going to say it again. You should know that in the 21 years since the spill, a third of the 32,000 plaintiffs have passed away prior to the litigation's final settlement and payment. That is a third. So in this instance, justice delayed is truly justice denied.

Communities themselves lost money that had gone directly into the city's tax coffers from a raw fish tax gathered by the communities for herring processed in or near the area. I have been told that my hometown of Cordova lost approximately $20,000,000 over the last few years in raw fish tax revenue specifically into their coffers.

This year, in May, I was invited to travel to the gulf coast by folks down there, and I had the opportunity to meet with residents

and share lessons learned from the Exxon Valdez oil spill that my organization, the Prince William Sound Regional Citizens' Advisory Council, has developed. Our hearts sure go out to the people down there affected by that massive spill. We can definitely relate to that, unfortunately.

So these "Lessons Learned" documents that we brought down for folks down there, developed by my organization, I think are a valuable resource for them and for the Committee, and I will leave you these copies.

Thank you.

[The prepared statement of Mr. Banta appears as a submission for the record.]

Senator KLOBUCHAR. Well, thank you very much. I appreciate that, Mr. Banta. Also we can put those on the record if you would like to.

Mr. BANTA. Okay.

Senator KLOBUCHAR. All right. We will do that. Thank you.

Lieutenant General.

STATEMENT OF THOMAS G. MCINERNEY, LT. GEN. USAF (RET), CLIFTON, VIRGINIA

General MCINERNEY. Madam Chairman and members of the Senate Committee on the Judiciary, it is a privilege to appear before you today and testify about DOD lessons learned as the DOD coordinated during the Exxon Valdez oil spill from 24 March to 15 September 1989 in Prince William Sound while I was the commander of Alaskan Command. My comments of lessons learned hopefully will impact how we protect victims of current and future major oil spills.

The U.S. Government has reorganized significantly with the creation of the Department of Homeland Security and the creation of Northern Command within DOD. These changes are all positive with respect to my comments today.

A quick refresh for the Committee on the DOD assets provided may be useful. Our initial support was an improvised command-and-control system called OASIS that provided the on-scene Coast Guard coordinator, Vice Admiral Clyde Robbins, and the Exxon coordinator with the visual digital map display of the oil spill location, beaches, and other oil-covered areas, sensitive environment and wildlife areas. In addition, the U.S. Navy provided two amphibious ships for use as boatels to house the 11,000 workers who eventually worked in the area until Exxon could provide specially constructed barges to house them.

What we did not provide was manpower to clean up the beaches, which became a very contentious issue with Senators Stevens and Murkowski who felt the 6th ID should help. I was strongly opposed when President Bush made the final decision with support from Secretary of Defense Cheney to not use soldiers for the cleanup operations. Instead, Exxon hired local workers—the unemployment at that time was 8 percent in Alaska—which proved to be very successful and I believe a precedent for future cleanup operations. The military should not do what the private sector can do equally as well or better. I sense that this has not been the guidance in the gulf today.

I will now outline what I think were the most important lessons learned for the military support to protect victims to oil spill cleanup operations on this experience. DOD should be part of any initial task force established by DHS, States, local counties, and the oil company responsible. Rapid formation is critical to success. A joint force commander should be assigned to support the on-scene Coast Guard coordinator immediately. He and his staff should have the knowledge to provide systems and technology appropriate to support him such as imagery from satellites or unmanned aerial vehicles or manned aerial reconnaissance surveillance such as the U–2 with its unique spectral imagery.

These new technologies should be immediately deployed to give the national command authorities and all appropriate agencies involved the situational awareness that will enable swift identification of common cleanup objectives. I cannot emphasize this enough.

The dominant responsibility of the oil companies versus the U.S. Government was established for cleanup. I am troubled by the moratorium on continued drilling in the gulf as it runs counter to the guidance we used in Prince William Sound in keeping the tankers flowing out of Prince William Sound. Continued safe oil production operations are vital to our National security.

I mentioned earlier the OASIS command-and-control system was immediately established for cleanup operations. This was adapted from my joint command-and-control system and gave all players an excellent tool, such as the Secretary of Transportation Sam Skinner, Coast Guard Commandant Admiral Yost, near-real-time knowledge on how operations were going from their offices in Washington. Everybody knew where the primary slicks were, what beaches and sensitive areas were fouled with oil, how many ships and crews were working the beaches, et cetera.

This was of great value for all, especially the Exxon on-scene commander, along with his Coast Guard counterpart. However, once the Exxon lawyers discovered that Exxon was funding this near-real-time information, they terminated this valuable tool for fear that the U.S. Government would have too much information for later legal battles. We should not have let this happen, but this advanced command-and-control capability was not well understood at the time. There were too many other windmills to attack.

With reference to the current oil spill in the gulf and the relevancy of the Exxon Valdez experience, I would only say the laws and protocols were changed and are in force today which has enabled Secretary Napolitano and Admiral Allen to work very effectively with British Petroleum. I would suggest that we have not used all our latest imagery assets, such as UAVs like Global Hawk and U–2 aircraft. I would do a test immediately to demonstrate the value of continuous digital radar, infrared, and electro-optical displays that will show the coordinators the exact positioning of the oil slicks, location of the over 1,000 ships supporting them, fouled beaches and sensitive areas, et cetera. This real-time digital picture will be of immense value to protect the victims in future crises like this. I believe it should be considered for use by the DHS in all future disaster areas.

In summary, Madam Chairman, I believe many of the lessons learned from DOD's experience in the Exxon Valdez disaster have

been incorporated in the gulf today with the exception of near-real-time imagery for command and control from modern UAVs and the moratorium on oil production, which has been very deleterious to our National security.

Thank you.

[The prepared statement of General McInerney appears as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, and thank you to all three of you. I know Senator Begich is on his way, but I am going to get started with a few questions, and when he comes, we will have him speak and officially introduce you, Mr. Banta.

I wanted to talk just a minute about the Exxon Valdez litigation, Mr. O'Neill, and I know that the jury awarded the plaintiffs $287 million as well as $5 billion in punitives. That was in 1994. Fourteen years of appellate litigation followed. It was then reduced to $500 million. It is just hard for me to believe these 8,000—is this true that 8,000 fishermen actually died before they were able to even get their award?

Mr. O'NEILL. The statement is correct. Most of the fishermen at the time could have been anywhere from 18 years old to 70 years old, so just actuarially you lose an awful lot of people over 21 years. So these people did not get to see their justice, and their families sit there now knowing that they did not get to see their justice. And it hurts institutions—in this case, the court system—to have a process like that that goes on for 21 years. It is a nightmare for Cordovans. It is a nightmare for all the people in Alaska.

Senator KLOBUCHAR. So I take it you are glad that we were able to get at least $20 billion in the fund up front BP.

Mr. O'NEILL. I think the $20 billion that BP has agreed to administer is a huge, huge step forward. I have a couple of concerns about it, but that is real money, and it is a lot of real money. It takes care of the cap in OPA 90, and if it is run well, it will provide fishermen and other area business owners with immediate money so that you will not run into questions like bankruptcy. And if it is run well, in the end people will be fully compensated.

Senator KLOBUCHAR. Very good.

We have been joined by Senator Begich, and I am going to let you go. I know not all new Members of the Senate get that kind of deference, but only when you have a new Member of the Senate chairing the Committee do you get that. So I am going to have him speak for a little bit. Mr. Banta did a great job in his opening statement, Senator Begich, and he came on a red-eye to join us, so we are very impressed with that. And I know you wanted to say a few words about him and the subject, so thank you.

STATEMENT OF HON. MARK BEGICH, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator BEGICH. Madam Chair, thank you very much, and I know you know our votes have been delayed for about 15 minutes, so there is some more discussion on the floor. You have a Committee here. I have another Committee to go to. But I want to commend you for devoting your efforts to this important topic of protecting victims of oil spills.

As you know, Alaska has lived through the worst oil spill in our Nation's history until the Deepwater Horizon spill a few months ago. From the Easter weekend of 1989, when the supertanker ran aground on a well-marked reef, to the insulting Supreme Court decision last year, the Exxon Valdez disaster has been a nightmare for thousands of Alaskans. Eleven million gallons, enough oil to stretch from Cape Cod to North Carolina's Outer Banks, gushed into one of Alaska's most spectacular and sensitive areas. For months, night after night on the national news, the world was gripped by images of pristine shorelines awash in oil, birds and sea otters blackened to death.

Now, 21 years later, scars to Alaska's environment and Alaska's people remain. Thousands of Alaskans, sadly fewer and fewer each year, were only recently compensated for damage. Their livelihoods and ways of life are forever different.

As we assess the lessons learned two decades later, one truth rises above all others. We must be committed to paying the price of vigilance because the price of complacency is too high. That is why I commend your Committee's initiative today to ensure that the victims of the Deepwater Horizon do not suffer many of the same injustices experienced by Alaskans.

Madam Chair, you have an excellent witness in front of you, Joe Banta, who I know, as you said, already testified, to help guide you through your process. Joe grew up in an Alaskan fishing family, at the age of 10 began fishing the waters of Prince William Sound, which were affected by the Exxon Valdez. At the time of the spill, Joe was getting ready to fish the spring herring fishery. But when the Exxon Valdez ran aground, he joined the wildlife rescue crews to help care for the oiled birds and animals.

For more than 20 years, Joe has worked for the Prince William Sound Regional Citizens' Advisory Council, which was created in the aftermath of the spill to give citizens more of a voice in development decisions. The RCAC has become a model for other parts of the Nation, including the gulf, and I have to tell you, Madam Chair, there is—people wonder how these committees operate. I know Joe probably has told you, but they are very, very independent. They speak their mind. When they see the industry not doing what they need to be doing, they speak up.

You will find Joe is a leading expert in oil spill recovery. By that, I just do not mean the science of picking up spilled oil, but how to deal with the social, psychological, and economic impacts of a giant oil spill.

Madam Chair, thank you very much for the opportunity to say a few words, and thank you for having Joe here. Alaska is better off because of these commissions and how they work and the citizens that are engaged in them, not just for a short period of time but for a long period of time, proven by Joe's service.

Thank you, Madam Chair.

[The prepared statement of Senator Begich appears as a submission for the record.]

Senator KLOBUCHAR. Well, thank you very much, Senator Begich, and I think the characterization of Joe that you gave as someone who is independent and speaks his mind would also apply to you, Senator Begich. So thank you for being here. I was just asking Mr.

O'Neill about some of the issues coming out of the actual litigation with the delays in time for the fishermen, the 8,000 people, fishermen, who actually died without getting their damages when they were alive.

And then I know one other things you mentioned, Mr. O'Neill, was just your frustration with the Government settling so quickly after 2 years where they fully—Alaska and the United States saying that they did not have the money to pursue the litigation. So I wanted to ask you about that, what you think they could have done better, and how that applies to today's situation, as well as you also mentioned that the settlement with Exxon had a re-opener clause in it for future damages up to $100 million, but all this clause did, in your words, was create more litigation.

Is there a way to make sure clauses are ironclad and a way to ensure that future harms, like the later damage we found to herring and other fish that people did not expect, could be accounted for? That is a two-part question: first about the Government settling earlier, and then the re-opener clause.

Senator BEGICH. If I could interrupt, Madam Chair, if I can be excused, only because two amendments that are waiting for markup outside the floor are about RCACs and making sure they are——

Senator KLOBUCHAR. Well, we want you to do your job instead of just talking about it.

Senator BEGICH. Thank you very much

Senator KLOBUCHAR. Thank you.

Mr. O'NEILL. Inherent in an oil spill is the fact that once the oil is spilled, you really cannot clean it up. Exxon spent $2 billion to clean up 8 percent. You do not know where it is going to go. You do not know how long it is going to be there. And, last, you do not know what creatures or ecosystems it hurts. Salmon can swim through oil. Herring cannot swim through oil. And you do not find out about those things for 5, 6, 7, 10 years after the spill.

When Alaska and the Federal Government settled their trustee claims, their natural resource trustee claims, for about $1 billion and agreed to three minor misdemeanor pleas, no one knew what the extent of the harm was going to be. And they did it for cost reasons, and they did it because they wanted money as quickly as they could get it. But in the end, the citizens of Alaska and the citizens of the United States paid.

The inability to know what the impacts of a spill are inherent in oil spills. In the gulf, I know Mr. Feinberg hopes to tie up his fund payments in 3 or 4 years, but assuming he can do it logistically—which I doubt—in 3 or 4 years you are still not going to know what the full impact of the spill is.

In Alaska, when the Government did its deal in 1991, it included a re-opener provision, and the re-opener provision was limited to $100 million, the thought being if there was significant harm that we did not know was going to occur, we will re-open the whole proceeding up to $100 million, and we will see if we can settle it. Now, all that has done is result in litigation.

I do not think you can finally settle oil spill claims in year 3 or year 4 after the spill. So if you are going to set up a system, a compensation system, the compensation system needs to deal with the

fisher in the first year. But the compensation system needs to wait for 3 or 4 or 5 years until you get a good handle on what the extent of the damages are going to be. And they can be odd. Nobody had any idea that herring would be genetically decimated the way they were in Prince William Sound, but they were.

You know, the Mississippi Delta is one of the great treasures of the world, and the impact of a massive amount of oil on that delta is a crapshoot. And once you get it in there, you are not going to get it out. You cannot send out people with steam cleaners into the delta and have them clean it. So you need to wait 3, 4, 5, 6, 7 years until you feel you have a handle on what the damages are and then move the money to the State and Federal Governments.

Senator KLOBUCHAR. Okay. That was helpful.

I think I am going to turn it over to Senator Sessions here so he can get some questions in before the vote, as well as hopefully Senator Franken. Then I will come back.

Senator SESSIONS. Thank you, Madam Chairman.

Well, I think that is good advice, Mr. O'Neill, in a lot of ways. Mr. Feinberg said to the local people Saturday. He met with some fishermen early Saturday morning. He had meetings with real estate people, and he had meetings with local mayors and made some promises, admitted maybe he promised some things he has not been able to deliver as quick as he thought he could.

So this is not an easy matter. That is one of the things that came across to me clearly. How do you decide this? Some of these things may well take 2 to 3 years. He has decided that he will provide people up to 6 months of benefits now if they can show their loss so they do not have to come back every month, and it would reduce paperwork and allow him to focus on other claims. And at some point, he will seek to bring the whole matter to a conclusion by making an offer for a final settlement. The initial payments will not require a release of any kind. So whether that will work or not, I do not know, but I am certain it will not go as smoothly as a lot of people would like it to.

General McInerney, I appreciate your comments about the moratorium. I would offer for the record a letter from a group of energy experts from the National Academy of Engineering who were quoted as saying that they favored a moratorium, but who wrote a very strong letter saying they never opposed that. I do not know if the Interior Department has acknowledged that they misquoted them yet, but at any rate, there are complications of significance in this whole process, and we want to do it right.

With regard to the Supreme Court decision, Mr. O'Neill, the jury awarded $287 million in compensatory damages to some of the plaintiffs and some got $22 million by settlement. The total compensatory damages, as I understand, against Exxon was $507 million. Was there any dispute about that? Or was it a case-by-case dispute as to what the exact fund amounts were? Was it that or the claim for punitive damages that really carried this case so long?

Mr. O'NEILL. In the end, there was agreement that the amount of money that Exxon paid to claimants was $507 million. That is the answer to the first question.

Exxon appealed significant portions of the compensatory award, and those appeals were not resolved until 2001 or 2002. The litigation after 2002 dealt solely with the punitive damage award.

Senator SESSIONS. Now, the maritime law has different rules than normal civil procedure. I always was told if you got hurt on a ship, you claim that the ship was unseaworthy, and most anything was unseaworthy. But there seemed to be limits on the amount of damages that do not apply to injuries sustained on land. That is a long time—not just something that came up lately by the Supreme Court, but that part of it has been long established.

To what extent do maritime lawsuits limit or prohibit punitive damages? I understand it is more difficult to gain a judgment for punitive damages in a maritime case than in a non-maritime case.

Mr. O'NEILL. There have been fewer punitive damage judgments in maritime cases, but they are well established and they go back to about the creation of the Republic. I would guess from 1776 until the present day, there may have been 30 or 35 punitive damage awards in maritime cases.

However, they were well established, and the maritime law, at least with regard to punitive damages, was essentially the common law of the Republic. So up to the time of *Exxon* v. *Baker.*, which was the Supreme Court decision that limits punitive damages, they were established and there was no arbitrary limit on the size of the award.

Senator SESSIONS. Why has it been more difficult to gain punitive damages? What kind of proof burdens do you have in a maritime case? Why wouldn't you have more than 35—you probably have 35 a week on the land or 35 a day.

Mr. O'NEILL. I am not so sure that is true, Senator. The answer is I do not know, and I have not seen any writing on why it is. I do know that the law was well established that you were entitled to them if you could prove a reckless disregard for the rights of others, and I do know that the law was well established that there was no one-to-one limit. In fact, there is no one-to-one limit in any other area of the law with regard to punitive damages.

Senator FRANKEN. [presiding]. Senator Sessions, I am terribly sorry about this, but I got to go vote, and I was wondering, Could you go vote? But I know how you are going to vote, so you do not have to go vote.

[Laughter.]

Senator FRANKEN. Unless you want to continue. You are senior to me——

Senator SESSIONS. I am over my time, so that is correct.

Senator FRANKEN. Okay. Can I just ask a few, and then either——

Senator SESSIONS. Has the vote started?

Senator FRANKEN. I guess they have, yes, and we have——

Senator SESSIONS. Yes, I guess they have. Let me go vote, and thank you, Senator Franken.

Senator FRANKEN. Okay. Then Senator Klobuchar will be back, and if you want to come back, you can.

You were talking about the one-to-one punitive. Let me ask you about that decision. It was as 2008 decision by the Roberts Court. Am I correct?

Mr. O'NEILL. Yes, sir.

Senator FRANKEN. Okay. And that was decided suddenly—because Exxon was charged—I mean, ruled that they would have to pay $5 billion, right?

Mr. O'NEILL. That is correct.

Senator FRANKEN. And they changed it to $1 billion?

Mr. O'NEILL. The Supreme Court reduced the total amount to $500 million, which included—in addition, they had to pay $500 million in interest because we had been at it for so many years.

Senator FRANKEN. Oh, Okay. Now, would you say that the—what reasoning was there? Was this anything backed by the—was there a constitutional reason for this?

Mr. O'NEILL. There was no constitutional reason.

Senator FRANKEN. So this was an activist conservative decision on behalf of Exxon.

Mr. O'NEILL. If you look at the case, the *Exxon* v. *Baker* case, it is unique in American law. You know, you go all the way back to the Bible, and you find punitive damages in ratios of 3:1, and other Supreme Court cases have talked, well, maybe there is a constitutional limit and a ratio of 10:1. But you find no scholarly writing, you find no cases, you find nothing in the Constitution, you find nothing in the statutes of the Congress that would suggest that there would ever be a one-to-one limit.

So if you read the case *Exxon* v. *Baker*, you come to the conclusion that they pulled it out of their bottoms.

Senator FRANKEN. Pulled it out—Okay. I got you.

You know, I guess they said that it would help be predictive—it would help be predictive or something like that, right?

Mr. O'NEILL. That is correct.

Senator FRANKEN. But don't you want punitive damages to prevent things like this from happening again? Isn't that the whole point? And didn't we just see it happen?

Mr. O'NEILL. The point is for punishment and to deter other people from doing bad things.

Senator FRANKEN. Boy, I really have to go to vote, and what I am going to do is, I guess, we will stand in recess until after the vote. Okay?

Mr. O'NEILL. Yes, sir.

Senator FRANKEN. Okay, good.

[Recess at 3:33 p.m. to 3:43 p.m.]

Senator KLOBUCHAR. Thank you. We are going to open the hearing again, and thank you for waiting. We sort of voted in groups so we could maximize the time we were here.

I want to start with you, Mr. Banta, and Mr. O'Neill talked about how you did not find out about certain damages until later, that at first certain fish seemed like they were hurt by the oil, and then later fish were hurt by the oil. And, of course, that is going to shape how we look at how we do damages in this case and if we have to make changes to the law so we account for those kinds of things.

Could you talk about the experience in Alaska?

Mr. BANTA. Yes, thank you. I think that these effects that we saw were probably—scientists probably call it something like sublethal chronic effects, and those just do not come out. You see acute

things when a creature like a sea lion or something floats to the surface. But when the herring come back year after year and spawn at these beaches where oil still continues to leach out of sediments or substrates and things like that, then it really is a multi-year process, and the consideration of that I think is critical to actually determining what truly is biologically damaged.

Senator KLOBUCHAR. And your testimony also recounted the harms that the oil spill caused to lots of people's jobs that were dependent on fishing, a wide variety of support occupations like vessel electronics, boat repair, fish processing. How does a local economy that is organized almost entirely around one network of jobs recover from the spill?

Mr. BANTA. I think in that instance it just took time. I mean, it really did take Cordova probably 15 or more years to kind of come around economically. The impacts, of course, on herring have been discussed in great detail here, but the impacts were on salmon as well, which is probably the key fishery. And that was for several years, and prices were reduced, and incomes. So you have all these multi-year processes going on for all these different species and then herring never really coming back.

So I think you just have to dig a little deeper, my friends. They did mechanicking when they were not fishing. One worked on the garbage truck hauling waste. You find what you can. You do not travel, and you cut back. It is just the unfortunate reality. And the schools do not get as much money, and it just kind of percolates all the way through the community at every level, from services down to the individual families' budgets.

Senator KLOBUCHAR. Okay. I wanted to explore with Mr. O'Neill, as we look at the actual language of the current law, how we could better capture some of these damages. Let us go through what some of them are.

First of all, I remember you mentioning the hotel beach and how for certain maybe a hotel that had oil on its shores would be covered, but maybe not a hotel that lost the same amount of customers but did not have oil on its shore because it did not have a shore. So how could you change the law to account for that?

Mr. O'NEILL. The answer is I do not know, but let me state to you the full extent of the problem.

Under traditional maritime law, hotels could not recover at all, anyway. The only people that could recover were actually oil individuals, oil boats, or fishermen. You could do it—the ideas that have come to me, you could do it by zone. If I was the administrator of the $20 billion fund, I would do it by zone. I do not know how you write that into legislation. But it is who gets to recover and what do they get to recover, two questions: Fishermen, fish processors, fish tenderers, people who support the fishing business, people on the shoreline, maybe people in other zones. OPA 90 talks about people who suffered damage as a result of the oil spill. That is about as narrow as it gets. But that provides no guidance because what happens is the courts then decide who is not going to get it, and that is what they decide. The history of the courts in dealing with oil spills is quite simply meant to keep people from recovering. So you need to spell it out in the bill in much more precision than is in OPA 90.

Senator KLOBUCHAR. Okay. Now, some examples. You mentioned how much of a fisherman's assets are tied up in the worth of the boats and the entry permits—illiquid assets, in other words, and assets whose value can plummet after an oil spill. Did victims of the Exxon Valdez ever recover for those costs?

Mr. O'NEILL. No. The victims of the Valdez recovered for 1 year of fish price loss, for the most part 1 year of catch. They were unable to recover for their devaluation in the boat and the devaluation in the permit. And for these guys, the boat and the permit values are their asset base, and they are also their retirements. OPA 90 does not allow recovery for the permits or the boats.

Senator KLOBUCHAR. Yes. But with the $20 billion that is set aside—again, maybe this is not for you to ask, but for me to ask Mr. Feinberg. Will he be able to look at those kinds of losses just because it is a set amount of money that has been put out there?

Mr. O'NEILL. I think Mr. Feinberg, as I understand his charge, can do whatever he wants. I will say that we had a $100 million fund in Exxon that was supposed to help fishermen, and the administrator of that fund only paid out $37 million. There is an inclination on the part of people who run these funds to view that money as their own and to pay it out slowly or not pay it out at all. So there is some institutional concern about that.

Senator KLOBUCHAR. Given Mr. Feinberg's experience with the 9/11 victims, hopefully that will not happen in this case. But I think that is relevant to know what happened there.

Another example of a damage, you and Mr. Banta both mentioned that the herring population has not recovered in Alaska to the pre-spill levels. Salmon was impacted for a comparatively small number of years, but herring may never be the same. Was it possible for the litigation to recover those costs, the costs that—Mr. Banta is not going to be able to be a herring fishermen or his kids cannot.

Mr. O'NEILL. I think the herring fishery aspect of this is the biggest tragedy other than the impact on communities in the whole deal. It was not clear to us that the herring fishery was permanently impacted until 1996, 1997, 1998, and by then we had tried the case and a bunch of associated cases, and everything was up on appeal. And we never went back and revisited the herring fishery. To some extent, there was a view that the statute of limitations had run.

Senator KLOBUCHAR. Because that damage was found later?

Mr. O'NEILL. That is correct. But the incident was Good Friday of 1989.

Senator KLOBUCHAR. You also mentioned that under the Oil Pollution Act cities can recover only the net costs of the spill response, not the total of all diverted public service or lost taxes. Do you want to say more about the limits of our current compensation scheme on what State and local governments can recover?

Mr. O'NEILL. Yes, this is one that is very, very troublesome. A city who is besieged by an oil spill takes all of its employees and its buildings and such and diverts them from doing what they normally do for citizens to helping people with the spill, to cleaning up the spill, to housing oil workers, to providing police services to oil worker villages. So nobody in town gets the use of the library,

the use of the police, the use of the fire station because they are all diverted.

The cities ought to be paid for that. Under OPA 90, the cities can only be paid if they bring on extra people in addition to their regular staff. So their regular staff and their regular buildings are never reimbursed by the spiller or by a fund or by anybody, and that is wrong.

Senator KLOBUCHAR. In the book I mentioned earlier—and I think you know about that book; you are kind of the star of it, David Lebedoff's "Cleaning Up"—there is a quote that I want to read about the damage that is done to communities long after the oil has technically stopped flowing. It says, "One of the things that soon became clearer than ever before was the extent of suffering that the fishermen had endured because of the spill. The files were records of heartbreak. The years of lowered or absent income had wrought hundreds of tales of personal tragedy. Destitution, bankruptcy, drunkenness, and divorce were all too common. Some fishermen had suffered strokes. In one case, a multiple sclerosis condition had been badly aggravated by the stress of the spill resulting in permanent disability."

So my question is simple: Do you think the laws as they currently stand take into account these human costs?

Mr. O'NEILL. The human costs are a result of two things. First, they are a result of the fact that people cannot deal with manmade disasters the same way they deal with natural disasters. People can get through natural disasters some years after it, but with regard to a manmade disaster, they need their full measure of justice to move on. So one way to deal with this is quite simply to give them their full measure of justice and to allow them to get as whole as they can from money as quickly as they can after the spill.

The second aspect is litigation. Twenty-one years of litigation without an end in sight or, not that it is ending, without any justice received during those 21 years makes people—makes them very angry. So a combination of the impact on jobs and the impact of the justice system does not allow people to come to closure with an oil spill. And if you go into a bar in Cordova or Kenai or Kodiak or a coffee house or a book shop where people are sitting around having coffee, it is as if the spill happened yesterday.

Senator KLOBUCHAR. Is that also your experience, Mr. Banta?

Mr. BANTA. Oh, definitely. Even just talking about the gulf spill, people in Cordova do not want to hear it. It is so frustrating. But it just comes up. It is just kind of natural, unfortunately.

Senator KLOBUCHAR. And along the lines of what Mr. O'Neill was talking about, some of these damages that were not accounted for in the way the current law works, we talked about the herring population, we talked about the value of the license and the value of the boat and things that were illiquid assets. And then we also talked about tax revenue to the city, and your hometown of Cordova lost an estimated $20 million in raw fish tax revenues because of the lack of herring fisheries after the spill.

Did the oil spill affect the ability of the local government to deliver services? And do you feel that the costs for the local govern-

ment of just basically having all of its tax base eroded were adequately accounted for in the compensation?

Mr. BANTA. I think that we have seen specifically with those raw fish taxes that there was not any good mechanism to account for replacement of that revenue. I think that revenue has been lost forever to Cordova and any other communities that actually have herring processing from the sound, for instance, Valdez and probably Whittier.

I think that is pretty much all I can say about the tax issue, and your other question was about replacing income——

Senator KLOBUCHAR. I know that those were not included, the assets of the license and the boats.

Just one last question, and then I will turn it over to Senator Sessions. I know he has a few more questions.

In 2001 and subsequent years, researchers in Alaska dug over 12,000 pits—I really did not know this; they researched this—at dozens of beach sites that had been covered in oil back in 1989. The team found black oily liquid in over half of the holes dug in 2001 when they went back to look.

How long after the spill did the cleanup crews go away? And are your beaches back to normal?

Mr. BANTA. Well, I guess the reality is once that oil gets under some of the armor and the larger rocks that cover some of the beaches and gets down into the sediment, it is pretty much there. I think the cleanup ends at some point when it is determined that you have gotten out as much as you can get out, and that is made by the government and the responsible party. And, unfortunately, there are those beaches—you can go there today and find oiled beaches. The question is whether or not that does get mixed back into the environment. If an otter goes and digs for clams, that can loosen the substrate and release that oil. If there is a significant winter storm, something like that can happen again. Sea birds feeding for mussels, like the pigeon guillemot, that is still a threatened species, the harlequin duck, those kinds of things that feed like that maybe can still activate that oil. But it is out there in the environment, and that is just the reality that we are dealing with.

Senator KLOBUCHAR. Okay. Before I turn it over to Senator Sessions, Senator Sessions, you wanted this in the record, the primary recommendation in the May 27, 2010, report, "Increased Safety Measures for Energy Development on the Outer Continental Shelf," given by Secretary Salazar to the President misrepresents our position, but this is a recommendation. You want it on the record?

Senator SESSIONS. Please, yes.

Senator KLOBUCHAR. Okay. I will include it in the record.

[The recommendation appears as a submission for the record.]

Senator KLOBUCHAR. Senator Sessions.

Senator SESSIONS. Well, under the OPA, as I understand it, BP is the responsible party, and they have, as I understand it, they could seek compensation from anyone that they contracted with who failed in their duty to them to do the business. But essentially they are the ones that the Federal Government looks to to be the responsible party, that they have responsibility for total cleanup, no matter how much it costs, even to the extent the company economically fails. I would say for those who think it would be such

a disaster if they fail, I am sure somebody would buy their oil rigs and continue to operate them and buy their oil lands and produce from them. It is not going to end production. So they have that total responsibility.

Then they had a $75 million additional responsibility, which I assume is to go to compensate people who may have suffered losses outside of cleanup. And then there is a $1 billion or so trust fund that is available for compensation there.

So I have to acknowledge that based on that act, it looks like they are indeed willing to pay more than this act strictly requires them to pay. But is that your basic understanding of the framework of the act as far as what this responsible party is required to pay?

Mr. O'NEILL. I think that was a very careful reading of the act, Senator.

Senator SESSIONS. Thank you. Well, so that leaves us what we should do in the future. Now, I have supported legislation that would increase the compensation requirements beyond that act, in particular the $75 million limit, trying to tie it to the size of the producing company and their profits so that it would not completely prohibit a smaller company from being able to compete with some of the big oil companies. I just hate to create a situation so only the big four or five can drill in the gulf. But I find that difficult to word, actually.

Mr. O'NEILL. Well, I have a couple of observations on that, and I have thought about that. It seems to me that no matter who the producer is, the price of oil ought to reflect what the actual costs of its production are, and that includes a spill. And if the spill is by a smaller operator or a larger operator, economically neither one should get a step up on the other.

My second concern—and you also see this in the area of supertankers—is I would much prefer—as much as I dislike ExxonMobil, I would much prefer ExxonMobil to run its own supertankers rather than ship them out, to have small Liberian shipping companies run them. And that relates to the issue of these platforms. I feel safer having BP drill a platform than I do having a small Mom-and-Pop drilling operation run a platform. So I would be concerned about subsidizing the smaller operations. It just strikes me both economically and out of a sense of fairness that if you hurt people, you ought to pay for it.

Senator SESSIONS. Well, that is a pretty good analysis. Maybe you have about convinced me that our little plan was not so clever for several reasons, the points you made there.

I had originally thought that if you create a trust fund, much larger than a $1 billion trust fund, that might relieve the intensity of interest on the oil company not to have a spill. Is there a balance we could strike by raising the requirement on the oil companies and creating a trust fund that could perhaps keep the liability level at an amount that insurance at least could be obtained?

Mr. O'NEILL. I have thought about that, and I have an observation on that, too. The great thing about a trust fund is you know that if people are hurt, they will get paid. And, historically, that has been my interest in the whole thing.

But you are right, at the same time the creation of a trust fund may result in lax practices out in the oil patch in the long run or people cutting corners in the long run.

But that may be something you actually do a compromise on because when you do not pay people the full amount of their damages, it hurts American society. It hurts the Congress; it hurts the courts; it hurts American business; it hurts the legal profession.

So getting people compensated has always been No. 1 in my mind, but that is an interesting paradigm that you have created.

Senator SESSIONS. You know, I talked to a restaurant owner. They had done $430,000 in business last June. This June, this restaurant in Gulf Shores, they were down to $260,000. That would say to me somebody did this, I did not cause this, somebody was responsible for this. And I think they should be prepared to compensate me for the loss. And it is not right on the beach so no oil touched their restaurant, but the number of people who were coming to the beach dropped significantly.

General McInerney, one of the things that surprised me is after we have created this fabulous Homeland Security Department, this huge Department, virtually every county, I think, in America has a homeland security emergency response office under the State Government, but fundamentally funded by the Federal Government in large part. This was not activated in this system, so we had the Coast Guard, a military-type organization, that now has got to respond to an emergency, and we find that people from Port St. Joe to New Orleans, all over Louisiana, do not feel like they are getting personal attention. And, of course, the emergency management, when a hurricane hits, all these guys go up. All these entities are working. They have communications systems, everybody's cell phone and commitments. It just seemed to me odd that we could not utilize this structure, even to the point of asking people from Iowa or wherever who are maybe not busy in their emergency offices to come down——

Senator KLOBUCHAR. You have never been in Iowa, is that what you are saying?

Senator SESSIONS. Yes. They do not——

Senator KLOBUCHAR. Do not tell Senator Grassley.

Senator SESSIONS. They have a few floods, I guess, and snowstorms.

Senator KLOBUCHAR. They had some big floods.

Senator SESSIONS. It is odd. They say the Stafford Act has to be activated, and that makes the Federal Government liable, and they did not want to utilize this whole machinery because it could remove liability from BP and shift it to the Government, which I guess makes some sense. But isn't it true that we should be able to call on these personnel that are being trained and prepared to deal with all kinds of emergencies? They should be available to be utilized relatively easily without shifting the burden of financial payment to the Government, I would think. Do you have any thoughts about that?

General MCINERNEY. I have got a lot of thoughts on it, Senator, and I think you are spot on. You are getting on something. It is an archaic way of thinking, and the fact is we designed Homeland Security, we designed Northern Command to support when we

have any kind of incident, whether it is a natural disaster or man-made disaster, whatever you want. And so in the particular case you are talking about—and I am not that familiar with the Stafford Act, but it seems to me that Homeland Security and all those people that are out there that are designed for this are in a supporting role. They are supporting in this particular case BP. As I was supporting Exxon Valdez in Alaska, they were technically in charge in funding with the responsibility, and then they would go to different people. And I think that the law should be changed so when we have disasters like this that you can minimize the impact. And that is why, I think, when you look at the laws that you look at rewriting as a result of this, because, again, Homeland Security came after Exxon Valdez, but that does need to be changed. I think you are on to something.

In addition, I think that, for instance, we ought to have like a Global Hawk, an unmanned aerial vehicle that, when you have a natural disaster like this, it could be on alert and launched. You would go from Homeland Security to Northern Command, and they would launch the aircraft so the national command leadership get a visual picture of what is going on rather than relying on the television and other means, because we all know that it is the visuals that enable you to make decisions, see the gravity of a situation.

So I think we have to use this disaster as a tool to help rewrite our laws so that the assets we have as the U.S. Government can come and support it.

Now, why is it important, for instance, that you are able to see with the new technology that we have of infrared and radar where that oil flow is going? Because it enables you to position people so you can minimize the impact on the beach. You are talking about people on the beach, but how about the gas station owner or someone in 50 miles? Because, as you pointed out, the restaurant owner, the people just do not come, and so they should be compensated. So if we can minimize the impact on the beaches and in the fishing areas, then I think that is very important to minimize the victims in this particular case and continue the normal flow of business.

So I think it is very important. There are a number of things that you mentioned that I think you look at in totality that we should be doing.

Senator SESSIONS. Thank you, Madam Chairman. I would just say to Mr. Banta, we have an excellent biological environmental center called the Dauphin Island Sea Lab, and it does strike me that this is a long-term problem. I am told that the warm gulf waters are a little better than the cold Alaskan waters in that the microbes that can eat and deteriorate oil are more active in the warmer waters. But we think there is going to be some permanent long-term damage, and I guess you would agree that we should invest in the science to identify as soon as possible what those long-term environmental consequences are likely to be.

Mr. BANTA. Yes, Mr. Senator, I had the opportunity when I traveled to the gulf to go to the Dauphin Island Research Center and meet with some of the researchers there. That is just the kind of place that you would want to have doing research if you are looking at trying to do the best job on addressing impacts and effects

in looking at these long-term acute effects that really will need to be researched and tracked over many years.

Up in Alaska, we are obviously looking at generations, then a facility like that, we have some in Alaska that were put together, the Alaska Sea Life Center, the Oil Spill Recovery Institute, the Prince William Sound Science Center, that have been funded to deal with these kind of longer-term research questions, whether it is biological or technological.

Senator SESSIONS. Well, thank you. George Crozier, who runs that lab, was telling me that you never know about certain things. They use the dispersant underwater that seemed to have been very helpful. But compounds and products like benzene that would normally rise to the surface and dissipate in the air, he does not know now if they made it to the surface, and it is a more hazardous substance than basic oil, apparently, and it might still be in the water in concentrations that you do not know about. So I do think continual research analysis and prompt evaluation of the testing, which, you know, you hear that it takes 10 days to get a test result, you wonder: Can't we speed this up a little bit?

I am really proud of the people, proud of the Coast Guard. They are giving their best effort. A lot of errors have been made. The skimmers have proven that they can identify an oil glob out there and go and get it. We did not have enough skimmers. They were far too late arriving. A lot of things that did happen like that. But if this well stays capped, I am hopeful that our area of the gulf may be avoiding more serious spills, although it has taken some, and it does appear that the latest glob is heading toward Louisiana, and I hate it for them, where a lot of the estuaries exist.

Thank you all for your testimony. It has been very helpful.

Senator KLOBUCHAR. Well, thank you very much, Senator Sessions, and I truly appreciate your willingness to hear out these witnesses, and I think we all know, as you talked about some of the errors made in the reaction to the spill, I think we all know that we can also make errors here, and we want to make sure that whatever we do in response to the spill with looking at the liability statutes, there clearly improvements that need to be made, that we do the right thing and we take care of the people not only in the gulf but in this country. I just look at it from a fiscal standpoint. We do not want the taxpayers on the hook. I look at it from a fairness standpoint for people who are affected by this. And I think one of the things I will take away from this hearing and others is that, you know, some of these things we are going to have to—we will not know for sure the effect on dolphins off the coast or the effect on birds in Minnesota when they go down there, especially if some of the oil, as we know, is moving up into those marshes and things like that.

So I want to thank the witnesses. It has been really an actually informative hearing and positive hearing, and I thank my colleague Senator Sessions as well for his good questions, Senator Franken for coming, and I know that there are staff from some of the other Senators and people interested in this, so we will take all three of your lessons that you have given us to learn from Exxon Valdez and take them to heart and use them as we go forward in our work that we are doing in response to this horrific spill.

Thank you very much. We will keep the record open for 1 week—we try to have limits here—have the record open for 1 week for anyone that wants to put anything on the record, and with that, the hearing is adjourned. Thank you.

[Whereupon, at 4:15 p.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Statement by Joseph W. Banta
Senior Project Manager
Prince William Sound Regional Citizens' Advisory Council
to the
Senate Committee on the Judiciary
"Exxon Valdez to Deepwater Horizon: Protecting Victims of Major Oil Spills"
July 27, 2010

Good morning. My name is Joe Banta. Thank you for the invitation to appear before the Committee on the Judiciary today and for the opportunity to provide you with information about the profound impact that the *Exxon Valdez* Oil Spill had on my family and me and of my experiences following the spill. I believe that what my family and I have gone through is generally representative of the experiences of many of the local residents affected by the *Exxon Valdez* Oil Spill, although each of our stories is, of course, unique. I hope some of this information will be helpful to the Committee.

I grew up in a commercial fishing family who lived in Cordova, Alaska and I worked the waters of Prince William Sound with my father who was a commercial fisherman. I began fishing with him at the age of ten. My grandfather worked the waters of Prince William Sound starting shortly after World War I when he dug clams in Orca Inlet, and later was joined by his son, my dad.

The 1989 Exxon Valdez Oil Spill

In 1989 at the time of the *Exxon Valdez* Oil Spill, I was preparing for Prince William Sound's spring herring fishery. At the time of the spill my father was also involved in the Prince William Sound herring fisheries. Unfortunately, the herring fisheries were canceled after the immensity and spread of the spill became obvious. Soon after the spill, I took oil and hazardous material safety training and participated in wildlife rescue operations. That work was a sad and often futile effort – as many of the birds and otters that we encountered were so oiled that they were near death or dying by the time we could get close to them.

On top of that, the eagles from the area were quick to take advantage of the weak and dying oiled animals and we had to race to the oiled victims whether dead or alive. The unfortunate consequence was the oiling of the eagles as well. Then, the eagles tracked this oil back to their nests. So you can see the insidious manner in which the oil got spread through the food chain and the environment in ways that you wouldn't even think of. We were there to observe it first-hand and agonize over what it meant. We even encountered dead rockfish floating on the water's surface - deepwater bottom dwellers that don't live close to the surface at all. Observing this effect was especially disconcerting. What did it mean for our future fisheries, not just our livelihood, but our way of life?

Here we were at this critical re-awaking time for the Sound, the spring return of the herring for their massive shoreline spawning activities. In Prince William Sound, the

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spring herring spawning was a spectacle in and of itself, with seabirds, seals, sea lions, whales and many other species of fish joining in to target the schools of herring.

My hometown of Cordova is a remote, small community of approximately 2,500 people, where the only way in is by boat or plane. The herring fishery's impact on the livelihoods of local residents was significant. In 1989, at the time the spill, the herring resource had been slowly growing with the careful management of the Alaska Department of Fish and Game so that it had reached a record 150,000 tons of biomass.

Biological Effects

The following year, the herring showed signs of stress, with lesions attributed to viral and fungal infections appearing on a good portion of the populations. Within a few years the fisheries were closed because the previously robust 150,000 ton biomass was reduced by an order of magnitude down to 15,000 or 20,000 tons! The herring fishery in the Sound has been closed for 15 of the 21 years since the spill. While the herring numbers started to increase in 1997 and limited fisheries took place in 1997 and 1998, the increase ended in 1999. The fisheries have been closed since then and there have been no observations of any significant increase in the stocks of herring.

The loss of such a key species and large biomass in the ecosystem had an immense impact biologically as well as commercially. The food web lost one of its primary food producers. The herring that were a basic food source for seabirds, seals, sea lions, whales and many other species of fish were quite suddenly almost entirely gone. Scientists are still struggling to understand the consequences and the entire chain of events. The subject remains a major priority of the joint state and federal research and restoration process funded by criminal settlement funds after the spill. Some researchers have begun work to determine if the herring biomass has been affected genetically in a permanent manner. Just this year, scientists have identified lesions and parasites on two-year old herring.

Multigenerational Financial Losses

Financial impacts from the loss of the herring fisheries have been multi-generation and multi-layered – from individuals up to entire communities. For my family, what all this led to was a significant multi-generational financial impact. My *father's* herring fishery was gone and his salmon seining fishery was impacted. *My* fishery was gone. My sons have had no opportunity to participate in this unique Alaskan way of life – a way of life that created a direct link to the ocean in much the same way that farming or ranching creates a direct link and bond with the land. My herring permit from the state of Alaska went from being worth $100,000 to being worth nothing. My modest annual income from the fishery evaporated. Twenty-one years after the spill, there is no indication that this way of life is ever coming back. This income has been permanently lost. After three generations of participation in commercial fishing in Prince William Sound, my family no longer fishes commercially in any way.

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Compensation (or not)

The class action lawsuit took place in 1994 before the herring fisheries had been closed for a significant period and it addressed only the initial years of financial losses from that timeframe, not those that fishermen and their families have experienced for the past two decades. The final compensation from the lawsuit did not provide enough compensation for herring fishermen to buy into other fisheries, such as salmon seining or gillnetting. Unfortunately, the lawsuit did not foresee that the herring biomass was gone, potentially forever, and that the fisheries would still not be taking place 21 years later. The end result has been a significant uncompensated loss for herring fisherman such as myself.

It has been 21 years and the financial compensation from the lawsuit has still not been fully paid out. Long-term "litigation stress" itself has been a significant additional strain on fishermen as documented by socio-economic researcher Steve Picou who found that the –

> "adversarial litigation strategy utilized by Exxon became a secondary disaster that exacerbated and extended the chronic social and psychological impacts caused by the original oil spill."

And this stress has only been compounded by the way in which the Supreme Court intervened and used esoteric commercial law from the 1800's meant to deal with loss to pirates as a way to cut the jury award to a small fraction approximating one-tenth of the lower Court original award.

In the 21 years since the spill, a third of the 31,000 plaintiffs have passed away *prior* to the litigation's final settlement . . . a third! Many of the plaintiffs who are lucky enough to still be alive have lost faith in a legal system that did not fairly compensate them and denied them justice for so long.

Community Effects

Communities themselves lost money that had gone directly into the city's tax coffers from a raw fish tax gathered from herring processed in or near their communities. I have been told that my hometown of Cordova, where a significant portion of the herring was traditionally processed, has lost over $20 million in raw fish tax revenues because of the lack of herring fisheries over the years since the spill. This amount does not include losses accrued from fishermen spending herring fishing revenues for supplies, repairs and reinvestments.

Sociologist Dr. Steve Picou found Cordova to be "...the sociological 'ground zero' for EVOS social impacts, a commercial fishing community that has a limited occupational structure. Commercial fishing is the primary economic activity and a wide variety of support occupations (e.g., net mending, vessel electronics, boat repair, and fish processing) provide a network of jobs that organizes the occupational structure."

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To give this some perspective, Cordova, Alaska is only accessible by boat or airplane – there are no roads linking the community to other areas. It is a remote town surrounded by mountains, glaciers, and water, where people's lifestyles differ greatly from those on a road system. Fishing is one of the few ways people can earn a living to support their families. To people in Cordova and Prince William Sound fishing is part of their heritage, their identity - it gets into their blood - and to have that taken away was absolutely devastating to fishermen.

Besides fishing, the impact on the beauty and magnificence of this pristine environment was heartbreaking. I don't know how many of you have had the opportunity to enjoy the beauty of Alaska, but if you have, you would know what I mean. To have millions of gallons of oil spilled and spread over this remote environment was disastrous, both ecologically and financially and personally, as well.

Prince William Sound Regional Citizens' Advisory Council

In 1989, after working on the wildlife rescue process for a couple of weeks, we pretty much had done what we could with the oiled animals in our area. So, I went on to my other work with a small fishermen's association and also participated in the groundswell of citizen lobbying for legal and regulatory reform.

In 1990, I found employment in a newly formed citizens' organization, the Prince William Sound Regional Citizens' Advisory Council (PWSCAC), authorized by Congress in the Oil Pollution Act of 1990. This oversight panel was established to combat complacency and give local citizens a voice in the operation of the oil industry that had put local fisheries and livelihoods at risk. I've worked with the Council for over 20 years because the mission of the organization is so important and I never want to see anything like the EVOS happen in Alaska again. I have the opportunity to truly make a difference.

Since joining the Council, I have worked in a variety of positions in an effort to help the Council ensure that the best possible prevention and response capabilities, and the best scientific, technological, and socio-economic processes, are used to provide for the protection of the coastal natural resources that the people of the region depend upon for their food and livelihoods.

As a senior project manager, I manage the day-to-day operation and budget of several key PWSRCAC projects. I work with board members and volunteers on committees and project teams and represent the council in working groups and other forums focused more recently on scientific research. In the past, I also focused on the areas of spill prevention and response issues such as regulation development, contingency planning, oil spill drills and response, and response technology. One key project that I led resulted in the contractual use of fishermen and their fishing vessels by the oil industry response organization. I have worked extensively on projects involving oversight and understanding of the implementation of Oil Pollution Act of 1990 and of the state of Alaska's legal and regulatory framework for spill prevention and response.

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Socio-economic Impacts of the Exxon Valdez Oil Spill, Lessons Learned and Techniques for Coping with Technological Disasters

The socio-economic effects of the Exxon Valdez Oil Spill have been very well documented by researchers such as Dr. Steve Picou. Immediately following the spill he found a "general pattern of social disruption" for Cordova residents. Picou states:

> "For example in 1989, Cordova residents reported: 38 percent had family relations disrupted, 52 percent had changed their plans for the future, 68 percent reported work changes, and 96 percent stated that their community had changed. Furthermore, extremely high levels of spill-related psychological stress were observed. In 1989 and 1990, mean IES stress levels for commercial fishermen were moderate to severe, indicating clinical levels of impairment."

> "Four years after the EVOS, sociological research clearly documented that commercial fishermen and Alaska Natives were the two groups who were at high risk for chronic social and psychological impacts."

Picou further reported that "Commercial fishermen who had experienced 'income loss spirals' following EVOS manifested increased 'symptoms of depression, anxiety, and PTSD.'" These patterns continued to be documented in some form up to the present day through on-going survey methods. They were further exacerbated by the "litigation stress" I discussed earlier.

A significant resource developed by the council after the Exxon Valdez Oil Spill to help address socio-economic impacts and stresses is its "Coping with Technological Disaster Guidebook" and its companion "Peer Listener Training Program."[1] A team of council volunteers, staff and contractors worked together for over two years to develop this very detailed document that provides lessons learned by individuals, families, businesses and communities as a result of the impacts of the Exxon Valdez Oil Spill. Dr. Picou was the technical expert for the team. The lessons learned in the Guidebook are combined with advice on potential problems and how to deal with them. The Peer Listener Training Program component of the Guidebook is designed to directly address the socio-economic and mental health stresses of a technological disaster through community education, peer to peer counseling, and improved relations.

There is a marked difference between communities that suffer *natural* disasters and those who go through *technological* disasters. While communities usually work together to bounce back from a natural disaster, communities going through a disaster that has a responsible party have a harder time. Technological disasters and the associated stresses from them can create corrosive communities that lose their sense of connection and experience increases in divisiveness, alcohol and drug use, domestic violence and even suicide. Our Peer Listener Training Program is a tool that can help people listen to a peer

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[1] The PWSRCAC's "Coping with Technological Disasters Guidebook," its appendices, and the "Peer Listener Training Program" can be found at http://pwsrcac.info/community-impacts/.

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and begin to understand and deal with the stresses that are taking place as a result of a technological disaster.

As an example, the Guidebook says businesses can expect to lose employees to better paying jobs related to the cleanup, cities may need to hire people to deal strictly with spill-related issues, families may experience separations due to oil-related jobs and government offices may be swamped with requests for information. The Peer Listener Training Program was designed to help people deal with these very real stresses and strains.

Recently, in May of 2010, I traveled to the Gulf Coast region at the request of the Mississippi-Louisiana Sea Grant Consortium to meet with local residents and to share with them lessons learned from the *Exxon Valdez* Oil Spill. To see the major oil spill in the Gulf Coast has been very upsetting to us in Alaska having lived through a similar spill ourselves. Our hearts go out to the people down there affected by that massive oil spill. We can relate to their unfortunate losses and the uncertainty of not knowing what the future holds.

We have been able to work with Dr. Picou, the Mississippi-Louisiana Sea Grant Consortium and others to help make available the Peer Listener Training Program to those in the Gulf who may benefit from it. We have also made available copies of the "Coping With Technological Disasters Guidebook" to people in the Gulf region who have requested it. It is our genuine hope that some of the hard lessons learned by people in the Exxon Valdez oil spill region can be helpful to those who have been harmed from the impacts of the BP Deepwater Horizon Spill.

Ms. Chairman, I have brought a copy of a book entitled, "The Spill: Personal Stories from the *Exxon Valdez* Disaster" for the committee's hearing record if you would like. This book contains the remarkable recollections of 65 people closely involved in the spill in a variety of ways. For each, the spill was a transforming event. The hope of those of us who lived through the Exxon Valdez oil spill is that no one else would have to suffer through such an ordeal. It is very painful for us to bear witness to what is now being repeated in the Gulf of Mexico. We are hopeful that Congress will do for the Gulf what it did for the people, the marine life and resources of the waters of Prince William Sound as well as for the safe transport of oil through Alaska waters when it authorized the Prince William Sound Regional Citizens' Advisory Council. That action was the most effective step that Congress could have taken to help prevent another devastating oil spill such as the Exxon Valdez oil spill in those waters in the future.

In closing, thank you for the opportunity to tell some of my story, which is but one of thousands. As a victim of the Exxon Valdez Oil Spill, I have suffered not only significant financial losses, but the loss of a way of life. Unfortunately, many others have experienced considerable, and in some cases, more losses than my family and I did.

I have tried to use these experiences to help make a difference, working to ensure that such a spill will never impact Prince William Sound again through the work of the

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Prince William Sound Regional Citizens' Advisory Council. From that work and experience, we have developed a body of knowledge that we believe can help those in the Gulf living through the Gulf oil spill cope with and address effectively the unfortunate realities and stresses of the current oil spill and its aftermath, as well as any future spills or similar national disasters.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
"Exxon Valdez To Deepwater Horizon: Protecting Victims Of Major Oil Spills"
July 27, 2010

I thank Senator Klobuchar for chairing today's hearing on these important and timely issues. The oil spill in the Gulf of Mexico is a tragic reminder of the enormous consequences of irresponsible corporate behavior. The depth of this tragedy is made greater by the fact that it occurred at the hands of a company whose business involves exploiting for its own profit the natural resources that belong to all Americans. The companies responsible for the Deepwater Horizon oil rig owed far better stewardship of the environment to the American people. Now that the worst imaginable outcome has occurred, Americans all along the Gulf Coast will struggle with this disaster for many years to come, and it is appropriate for this Committee to turn its attention to these victims and their needs.

When a divided Supreme Court handed down its 2008 decision in *Exxon v. Baker*, the Judiciary Committee held a hearing to explore the consequences of that decision. At the time, I expressed my belief that the rule the Court invented in that case—arbitrarily capping punitive damages in maritime cases—might have been good for big oil, but did little in the way of providing an incentive for corporations to behave more responsibly or a mechanism for communities and individuals to hold them accountable. It comes as little surprise to me that as we learn more about what happened on the Deepwater Horizon, it appears that shortcuts and shortsighted decision-making played a role in causing this tragedy.

As a result of the Deepwater Horizon disaster, and the Exxon Valdez disaster before it, there are many victims. Americans in the affected areas have lost their livelihoods; they have seen their wetlands, fisheries, and beaches destroyed; and they have endured, and will endure, years of hard work to reclaim what they have lost. Some have lost their lives. Our laws must treat them fairly and provide accountability.

When the Deepwater Horizon exploded and sank, 11 men were killed. Yet perhaps nowhere are our Federal laws more unfair to victims of injury or death than in the maritime context. The Death on the High Seas Act, which is one of the few remedies for these families to seek justice, provides compensation only for pecuniary losses associated with a wrongful death. This involves a cold calculation of a victim's monetary worth to his or her family and nothing more. And if an individual killed has no dependents, they are entitled to very little, yet the loss to a parent or a sibling is no less tragic. The current Federal maritime law—unlike common law across the country—does not recognize the human losses associated with the death of a loved one: the suffering of a spouse who has lost his or her husband; a parent that has lost a child; or a child who will no longer have a mother or father to share the joys and accomplishments as they grow up. And in addition to the injustices to the victims, the current laws provide little incentive for corporate actors to put the safety of their employees or customers first. This is wrong and Congress should correct this situation immediately.

I was glad to have Senator Klobuchar, along with Senator Durbin, Senator Feingold, Senator Whitehouse, and Senator Schumer, join me in introducing the Survivor's Equality Act. This

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legislation would amend the Death on the High Seas Act to make clear that in a wrongful death maritime action, a victim's survivors could recover non-pecuniary losses such as the loss of companionship, comfort, and care. My legislation would bring Federal maritime tort law into the legal mainstream.

It is also important to remember that often, in the case of serious environmental catastrophes like the Deepwater Horizon spill, the companies that caused the disasters may be guilty of committing environmental crimes. These wrongdoers must be held accountable for their criminal acts, and they, rather than American taxpayers, should pay for the damage they have done. That is why I introduced the Environmental Crimes Enforcement Act, which aims to deter environmental crime, protect and compensate its victims, and encourage accountability among corporate actors.

This important legislation is set up to deter schemes by Big Oil and others that damage our environment and hurt hard-working Americans by increasing sentences for environmental crimes. All too often corporations treat fines and monetary penalties as merely a cost of doing business to be factored against profits. To deter criminal behavior by corporations, it is important to have laws resulting in prison time, and this bill would appropriately raise sentences for environmental crime to be comparable to sentences for other serious crimes. This bill also aims to help victims of environmental crime – the people who lose their livelihoods, their communities, and even their loved ones – reclaim their natural and economic resources by making restitution mandatory for criminal Clean Water Act violations.

But Congress must act quickly. The families of those who died on the Deepwater Horizon expect us to do the right thing. They cannot afford to wait. Similarly, accountability for environmental crimes and restitution for the victims of those crimes should not wait. Achieving justice for the victims of this disaster should not be a partisan issue, but I am concerned about the delays we have seen so far on the progress of both of these commonsense bills. I made a commitment to the families of the men who were killed on the Deepwater Horizon disaster that I would work to bring them—and all maritime victims in the future— the fairness and justice they deserve under the law. I urge Senators to join me moving quickly on these important bills.

Again I thank Senator Klobuchar for chairing today's hearing, and I thank our witnesses for their participation.

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TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY
BY
THOMAS G. MCINERNEY LT GEN USAF (RETIRED)
JULY 27, 2010

CHAIRMAN AND MEMBERS OF THE SENATE COMMITTEE JUDICIARY

IT IS A PRIVILEGE TO APPEAR BEFORE YOU TODAY AND

TESTIFY ABOUT DOD LESSONS LEARNED AS THE DOD COORDINATOR

DURING THE EXXON VALDEZ OIL SPILL FROM 24 MARCH TO 15 SEPTEMBER 1989

IN PRINCE WILIAM SOUND, ALASKA WHILE I WAS THE COMMANDER OF ALASKAN

COMMAND.

THE US GOVERNMENT HAS REORGANIZED SIGNIFICANTLY WITH THE CREATION

OF THE DEPARTMENT OF HOMELAND SECUTIY (DHS) AND THE CREATION OF

NOTHERN COMMAND (NORTHCOM) WITHIN DOD, AND THESE CHANGES ARE ALL

POSITIVE WITH RESPECT TO MY COMMENTS TODAY.

A QUICK REFRESH FOR THE COMMITTEE ON THE DOD ASSETS PROVIDED MAY BE

USEFUL. OUR INITIAL SUPPORT WAS AN IMPROVISED COMMAND AND CONTROL

SYSTEM CALLED OASIS (OIL AREA SURVEILANCE INFORMATION SYSTEM) THAT

PROVIDED THE ON SCENE COAST GUARD COORDINATOR, VICE ADMIRAL CLYDE

ROBBINS AND THE EXXON COORDINATOR WITH A VISUAL DIGITAL MAP

DISPLAY OF THE OIL SPILL LOCATION, BEACHES AND OTHER OIL COVERED

AREAS, SENSITIVE ENVIORNMENT AND WILDLIFE AREAS. IN ADDITION, THE

USN PROVIDED TWO AMPHIBOUS SHIPS, JUNEAU AND MCHENRY, FOR USE AS

BOATELS TO HOUSE THE 11,000 WORKERS WHO EVENTUALLY WORKED IN

THE AREA UNTIL EXXON COULD PROVIDE SPECIALLY CONSTRUCTED BARGES TO

HOUSE THEM.

WHAT WE DID NOT PROVIDE WAS MANPOWER TO CLEAN UP THE BEACHES WHICH BECAME A VERY CONTENTIOUS ISSUE WITH SENATORS STEVENS AND MURKOWSKI WHOM FELT THE 6TH INFANTRY DIVISION SHOULD HELP. I WAS STRONGLY OPPOSED AND PRESIDENT BUSH MADE THE FINAL DECISION WITH SUPPORT FROM SECRETARY OF DEFENSE CHENEY TO NOT USE SOLDIERS FOR THE CLEAN UP OPERATIONS. INSTEAD EXXON HIRED LOCAL WORKERS (THE UNEMPLOYMENT AT THAT TIME WAS 8% IN ALASKA) WHICH PROVED TO BE VERY SUCCESSFUL AND I BELIEVE A PRECENDANT FOR FUTURE CLEAN UP OPERATIONS. THE MILITARY SHOULD NOT DO WHAT THE PRIVATE SECTOR CAN DO EQUALLY AS WELL OR BETTER. I SENSE THAT THIS HAS NOT BEEN THE GUIDANCE IN THE GULF TODAY.

I WILL NOW OUTLINE WHAT I THINK WERE THE MOST IMPORTANT LESSONS LEARNED FOR MILITARY SUPPORT TO OIL CLEAN UP OPERATIONS BASED ON THIS EXPERIENCE:

1. DOD, NOW NORTHCOM, SHOULD BE PART OF ANY INITIAL TASK FORCE ESTABLISHED BY DHS, STATES, LOCAL COUNTIES AND THE OIL COMPANY RESPONSIBLE. RAPID FORMATION IS CRITICAL TO SUCCESS.

2. A JOINT FORCE COMMANDER SHOULD BE ASSIGNED TO SUPPORT THE ON SCENE COAST GUARD COORDINATOR IMMEDIATELY. HE AND HIS STAFF SHOULD HAVE THE KNOWLEDGE TO PROVIDE SYSTEMS AND TECHNOLOGY APPROPRIATE TO SUPPORT HIM SUCH AS IMAGERY FROM SATELLITES OR UNMANNED AERIAL VEHICLES (UAV'S), OR MANNED AERIAL RECONNAISSANCE

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AND SURVEILANCE SUCH AS THE U-2 WITH ITS UNIQUE SPECTRIAL IMAGERY. THESE NEW TECHNOLOGIES SHOULD BE IMMEDIATELY DEPLOYED TO GIVE THE NATIONAL COMMAND AUTHORITIES AND ALL APPROPRIATE AGENCIES INVOLVED THE SITUATIONAL AWARENESS (SA) THAT WILL ENABLE SWIFT IDENTIFICATION OF COMMON CLEAN UP OBJECTIVES. I CAN NOT EMPHASIZE THIS ENOUGH.

3. THE DOMINANT RESPONSIBILITY OF THE OIL COMPANY'S VERSUS THE USG WAS ESTABLISHED FOR CLEAN UP, I BELIEVE, AFTER THE EXXON VALDEZ DISASTER AND THEREFORE I FEEL IT IS PARAMONT THAT SOLDIERS NOT BE USED FOR THESE MANUAL OPERATIONS. I DO NOT OBJECT IF SPECIALLY EQUIPPED NAVY SHIPS ARE USED AS WE DID IN PRINCE WILLIAM SOUND OR IF THE NAVY HAS SPECIALLY EQUIPPED SKIMMERS TO ASSIST. I FEEL THAT THESE DISASTERS IMPACT THE LOCAL COMMUNITY SO SEVERLY THAT THE LOCAL POPULATION SHOULD BENEFIT FROM THE TEMPORARY JOB CREATION AND FOR PROTECTION OF THEIR LOCAL ENVIORNMENT. I AM TROUBLED BY THE MORATORIUM ON CONTINUED DRILLING IN THE GULF AS IT RUNS COUNTER TO THE GUIDANCE WE USED IN PRINCE WILLIAM SOUND (PWS) IN KEEPING THE TANKERS FLOWING OUT OF PWS. CONTINUED SAFE OIL PRODUCTION OPERATIONS ARE VITAL TO OUR NATIONAL SECURITY.

4. I MENTIONED EARLIER THE OASIS COMMAND SYSTEM THAT WAS IMMEDIATELY ESTABLISHED AS A COMMAND AND CONTROL SYSTEM FOR CLEAN UP OPERATIONS. THIS WAS ADAPTED FROM MY JOINT COMMAND AND CONTROL SYSTEM AND GAVE ALL PLAYERS AN EXCELLENT SA TOOL, TO INCLUDE

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SECRETARY OF TRANSPORTATION SAM SKINNER AND THE COAST GUARD COMMANDANT ADMIRAL YOST, NEAR REAL TIME KNOWLEDGE ON HOW THE OPERATIONS WERE GOING FROM THEIR OFFICES IN WASHINGTON. EVERYBODY KNEW WHERE THE PRIMARY SLICKS WERE, WHAT BEACHES AND SENSITIVE AREAS WERE FOULED WITH OIL, HOW MANY SHIPS AND CREWS WERE WORKING THE BEACHES ETC.

THIS WAS OF GREAT VALUE FOR ALL ESPECIALLY THE EXXON ON SCENE COORDINATOR, ALONG WITH HIS CG COMMANDER. HOWEVER, ONCE THE EXXON LAWYERS DISCOVERED THAT EXXON WAS FUNDING THIS NEAR REAL TIME INFORMATION, THEY TERMINATED THIS VALUABLE TOOL FOR FEAR THAT USG WOULD HAVE TOO MUCH INFO FOR LATER LEGAL BATTLES. WE SHOULD NOT HAVE NOT LET THIS HAPPEN BUT THIS ADVANCE COMMAND AND CONTROL CAPABILITY WAS NOT WELL UNDERSTOOD AT THE TIME AND THERE WERE TOO MANY OTHER WIND MILLS TO FIGHT.

WITH REFERENCE TO THE CURRENT OIL SPILL IN THE GULF AND THE RELEVENCY OF THE EXXON VALDEZ EXPERIENCE, I WOULD ONLY SAY THAT THE LAWS AND PROTOCOLS WERE CHANGED AND ARE IN FORCE TODAY WHICH HAS ENABLED SECRETARY NAPOLITANO AND ADMIRAL THAD ALLEN TO WORK VERY EFFECTIVELY WITH BP. THERE IS NO QUESTION THAT THIS OIL SPILL IS FAR MORE CHALENGING WITH RESPECT TO THE SOURCE FROM A SURGING WELL 5,000 FEET BELOW SEA LEVEL. AT THE SAME TIME THE GULF IS NOT NEARLY AS REMOTE AND SUPPORT ASSETS ARE FAR MORE READILY AVAILABLE TO SUPPORT THE OIL SPILL TASK FORCE. THIS IS AN IMPORTANT PLUS. I WOULD

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SUGGEST THAT WE HAVE NOT USED ALL OUR LATEST IMAGERY ASSETS SUCH AS UAV'S LIKE GLOBAL HAWK OR REAPERS AND U-2 AIRCRAFT. I WOULD DO A TEST IMMEDIATELY TO DEMONSTRATE THE VALUE OF CONTINUOUS DIGITAL RADAR (SAR), INFARED AND ELECTRO OPTICAL DISPLAYS THAT WILL SHOW THE COORDINATORS THE EXACT POSITIONING OF THE OIL SLICKS, LOCATION OF THE OVER 1,000 SHIPS SUPPORTING HIM, FOULED BEACHES AND SENSITIVE AREAS ETC. THIS REAL TIME DIGITAL PICTURE WILL BE OF IMMENSE VALUE I BELIEVE AND SHOULD BE CONSIDERED FOR USE BY DHS IN ALL FUTURE DISASTER AREAS. WE MUST DEVELOP THE PROCEDURES TO KEEP UP THE NATIONAL LEADERSHIP AND GOVERNORS' SITUATIONAL AWARENESS. TODAY WE GIVE OUR BATTLE FIELD COMMANDERS THIS CAPABILITY BUT NOT OUR LEADERSHIP IN CONUS. SATELLITES ARE HELPFUL BUT NOT CONTINUOUSLY REAL TIME.

IN SUMMARY, MADAME CHAIRMAN, I BELIEVE MOST OF THE LESSONS LEARNED FROM DOD'S EXPERIENCE IN THE EXXON VALDEZ DISASTER HAVE BEEN INCORPORATED IN THE GULF TODAY WITH THE EXCEPTION OF NEAR REAL TIME IMAGERY FOR COMMAND AND CONTROL FROM MODERN UAVS, AND THE MORATORIUM ON OIL PRODUCTION.

Hearing of the Senate Committee on the Judiciary:
"Exxon Valdez to Deepwater Horizon: Protecting Victims of Major Oil Spills"
Tuesday, July 27, 2010 at 2:30 p.m. in Room 226 of the Dirksen Senate Office Bldg.

Written Testimony of Brian B. O'Neill

For 21 years, my legal career has been focused on a single episode of drunk driving: In March 1989, the *Exxon Valdez* ran aground in Alaska's Prince William Sound.

As an attorney for 32,000 Alaskan fishermen, Natives, and cities, I tried the *Valdez* case against Exxon for five months in 1994. Along the way, my colleagues and I took testimony from more than 1,000 people, looked at 10 million pages of Exxon documents, argued 1,000 motions, and went through 20 appeals. I argued many of the appeals. After years of appeals, we distributed $1 billion to 32,000 claimants. I learned some things that might come in handy.

FISHERMEN

Fishermen run significant small businesses. Fishing boats cost from $60 thousand to well over a million dollars. In areas of the country where limited entry permits exist, those permits can cost from $5 thousand to $300 thousand. Boats and permits tie up significant capital often financed through bank loans. That capital also provides the fisherman's retirement fund.

An oil spill may prevent a fisherman from catching fish. The spill may hurt the exvessel price of fish as many buyers do not want fish from an oiled fishery. And a spill may drastically devalue boats and permits.

Because a fisher's capital is illiquid, an interruption in fishing can drive him into bankruptcy in a year. A fisherman needs immediate cash after his fishery is oiled, to live on and to make the payments on his boat and permit. Because the effects of oil on a fisher's business may be unknown for years, any final accounting may have to wait for years. The uncertainties created by a spill can destroy a commercial fishery.

LAW OF OIL SPILLS AT THE TIME OF THE *EXXON VALDEZ*

When the *Exxon Valdez* ran aground in 1989, the primary remedy against an owner or shipper was the maritime common law, which allowed a remedy for negligence. In addition, companies were responsible in punitive damages for the reckless acts of their managerial level employees. People with oiled property and fishermen, processors, and tendermen could recover. Others were barred from recovery of economic losses under a doctrine referred to as Robins Dry Dock after the Supreme Court case of the same name in 1927.[1] Owners and shippers could attempt to limit their liability to the salvage value of the wreck under the Limitation of Liability Act of 1851.[2] However, Congress passed a special statute for Alaskan oil in 1973 that provided for a $100 million fund and repealed the Limitation of Liability Act for Alaskan oil.[3]

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THE *EXXON VALDEZ* LITIGATION

In the early 70s, fishermen of Cordova, Alaska objected to the building of a pipeline across Alaska that had a supertanker terminal in Valdez. They argued to the Congress that a catastrophic spill was inevitable on the sea leg of the oil's journey through Prince William Sound to the lower 48 states. The Sound was one of the great fishing grounds in the world. A bitterly divided Congress authorized the pipeline. As predicted by the fishers of Cordova, on Good Friday, 1989, the Valdez ran aground, oiling Prince William Sound with the oil moving around the Kenai Peninsula to Kodiak, Cook Inlet and the Alaskan Peninsula.

In the *Valdez* case, Exxon set up a claims office right after the spill to pay fishermen part of their lost revenue. Fishermen initially were required to sign documents limiting their rights to future damages. After an outcry, that practice stopped. At the time, the full extent of their damages was not known. As time would tell, fishermen didn't fish for as many as three years after the *Valdez* spill. Their boats and fishing permits lost value. The price of fish from oiled areas plummeted. Prince William Sound's herring have never recovered and there hasn't been a herring fishery for over ten years. Alaskan Natives have seen their lands oiled and re-oiled over the years and to this day have oil on many of their beaches. In short, south-central Alaska was devastated.

Despite public outcry, the Coast Guard and Exxon declared victory and a cleanup over after two years. Exxon spent $2 billion dollars on the cleanup, picked up only 8 percent of the oil, and oil remains today.

Alaska and the federal government settled both criminal and natural resource claims with Exxon early on in the litigation. Exxon pled guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, and was fined $25 million plus restitution of $100 million. The damage claims were settled for a little over $900 million. Both settled early, as the governments stated in the approval process, because they couldn't afford the legal fight that full compensation would entail and needed immediate money for restoration. In hindsight, the damages were much worse than expected, as they will be for the gulf spill. Although the agreement with Exxon had a reopener clause in it for future damages for $100 million, all it did was create more litigation. In the end, full damages to the public lands were never recovered. This left state and federal governments to foot the bill.

After a five-month trial in Anchorage, Alaska, on September 16, 1994, a jury found Exxon liable to private plaintiffs for $287 million in compensatory damages and $5 billion in punitive damages. With other settlements, the amount of compensatory damages eventually recovered by private plaintiffs was $507 million. In the end, Exxon paid $500 million in interest payments.

The appeals courts found that fishermen, fish processors, and fish tenders, as well as those who had oiled property were entitled to recover. Many other claimants, including area businesses and boat builders, were unable to collect because of Robins Dry Dock. Fishermen were able to recover lost catch and the impacts on fish price but, for the most part, were unable to collect diminution in the value of their fish permits and boats. The appellate courts reduced the amount of punitive damages to $2.5 billion.[4]

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After 14 years of appellate litigation, the Supreme Court in *Baker v. Exxon*[5] affirmed the imposition of punitive damages but reduced the punitive award to $507 million, declaring for the first time in American law that there is a 1 to 1 limiting ratio for large punitive damage awards. At the same time, because of a split vote, the Supreme Court cast doubt on the imposition of punitive damages on vessel owners for the reckless acts of their managerial employees.

Many commentators view the decision as an unusually activist decision, this time in favor of big business.

We began to set up our claims processes in 1994. The design work on "who could collect for what" took two years, primarily because we attempted to achieve consensus on behalf of claimant groups and fairness. As we collected settlement money, and eventually $1 billion from Exxon, we disbursed it to claimants. It has taken us a number of years primarily because of Exxon's delaying tactics. Over the last 21 years we estimate that over 6,000 victims have died out of 32,000. We received our last $70 million payment from Exxon less than a year ago. We also have been impacted by IRS, state tax, and child support liens. Recently we have been slowed because of a need to deal with estates, bankruptcy estates, and divorces. We are about done.

As an aside, we started the litigation with 62 law firms. Most bailed out over the years due to expense. Most of the work over the last 21 years was done by 4 firms. My colleagues Dave Oesting, Matt Jamin, Gerry Nolting, Lynn Sarko and I have worked almost full time on this case since 1989.

LESSONS LEARNED FROM THE *EXXON VALDEZ* LITIGATION

The *Exxon Valdez* oil spill taught us that the extraction and transportation of oil will necessarily result in massive spills. Once oil is spilled, you cannot really clean it up. It goes in directions you never expect it to go. And a spiller will pressure the Coast Guard to declare victory and a cleanup over.

We also learned that the harm from a spill may be ongoing for years, and thus, the full extent of damage may be unknown five or ten years after the spill. For damage claimants, the unpredictable nature of an oil spill raises many questions. Will oil impact a fishery for a year or destroy the fishery? Will oil impact a specific species such as oysters or shrimp or will it impact the entire food chain? Will clean up activities and use of toxic dispersants cause more harm to natural resources? It also presents a need for immediate interim payments and a final accounting some years later.

Further, we learned that the traditional construct of maritime law is outdated and provides little relief to victims of the spill. Many fishermen were unable to recover the devaluation of their boats and fishing permits. Many area businesses were unable to recover at all. And Exxon used the inherent problems of proof regarding future damages to defeat many legitimate damage claims. Sadly, we also learned that a company as big as Exxon can bring the judicial system to a halt and delay payments to claimants until many of them are dead.

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As to the state and federal settlements, in hindsight, they were hasty. The novel reopener clause now proves to be nothing but a license for more litigation.

Last, we learned that for whatever reason, the people who run claims funds treat fund money like it is their own, imposing rules so stringent that those injured have a hard time actually recovering money. The $100 million fund that Congress set up for Alaskan oil spills was designed to quickly and fairly pay claims but did little to solve the problems of fishermen, Natives, and damaged landowners. That fund only paid out about $37 million, even though the fund had $100 million to spend.

OPA '90

Congress passed the Oil Pollution Act of 1990 ("OPA '90")[6] in response to the *Exxon Valdez* oil spill, though the law did not apply retroactively. Under OPA '90, the states and the federal government are entitled to full recovery for their cleanup costs. Private claims and any other government claims, are artificially capped, for example at $75 million for the BP spill. However, there are exceptions, and if gross negligence or federal safety law violations are proved, there is no damages cap at all.

OPA '90 also preserves lawsuits under state law. In the BP spill, Texas, Mississippi, Alabama, and Florida either have no damages cap in their oil spill statutes or allow state law claims that are not subject to damages caps. So wise plaintiffs – states or fishermen – can avoid damage caps if they bring state law claims in Texas, Mississippi, Alabama, and Florida.[7] Louisiana's oil spill laws follow OPA '90 and cap damages at $75 million, but again, there are exceptions for gross negligence or violations of federal safety laws. However, it may very well be that Louisiana claimants are limited under the law to $75 million.[8]

OPA '90 tried to reform issues concerning the scope of recovery. In Section 1002 of OPA '90,[9] removal costs, natural resource damages and lost taxes are addressed. So are damages for property touched by oil. These sections provide little improvement from prior law. Economic damages for private plaintiffs are narrowly defined. For example, fishers can recover lost revenue but not the devaluation of their fishing permits or boats, substantial investments which can be worthless after a spill. Cities can recover only the "net costs" for spill response, a small fraction of diverted public services spent on an oil spill.

UNCERTAINTIES IN OPA '90

A plaintiff under OPA '90 may be in worse shape than before the passage of that Act. OPA' 90 has created many uncertainties that will serve to fuel and prolong litigation to the detriment of those impacted by the spill.

To begin, OPA '90's damages caps limit recovery for claimants. Prior to the spill there was no cap for a plaintiff who was able to prove mere negligence.

Second, for a plaintiff choosing a state law remedy, does the Limitation of Liability Act still apply?

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Third, does OPA '90 allow a cause of action for simple negligence under general maritime law? That negligence claim was successfully tried with no damages cap in the *Exxon Valdez* oil spill case. But there is an unresolved question as to whether maritime negligence is preempted by OPA 90.[10]

Fourth, does the Robins Dry Dock doctrine apply, limiting the scope of plaintiffs who can recover?[11]

Fifth, assuming that Robins Dry Dock does not apply, who can collect and what can they collect? What laws of proximate cause apply? Fishermen can recover lost profits but what about resort hotels? What about the hotel with the oiled beach? Yes, but what about the one two blocks down the beach with no oil? And how about the hotel across town with no beach?

Sixth, do punitive damages still exist under federal law?[12] And what about the imposition of punitive damages on a company for the reckless acts of its managerial agents? If punitive damages are available, is the amount of punitive damages limited to a 1 to 1 ratio?

OIL SPILL FUNDS AS PROXIES FOR LITIGATION

OPA '90 established the Oil Spill Liability Trust Fund ("OSLTF"),[13] which has essentially no track record and is another source of uncertainty. Claimants from the gulf spill must first present claims to BP, and if they don't get full payment, they can present their claim to the OSLTF. OPA '90 limits the maximum payout from the OSLTF for the BP Gulf oil spill to one billion dollars. Claims are processed in the order received, and claims are paid out in the order approved. In other words, the OSLTF operates on a first come, first served basis. Up to now, the major claimant and beneficiary of the Fund is the fund administrator, the Coast Guard, and not shrimpers and other claimants.

The basic problem with any fund is its size. As we can see, the one billion dollar OSLTF is not sufficient to deal with a major oil spill, especially if state and federal trustees can claim against the fund.

A second problem is the need of victims for immediate economic relief from the disaster and at the same time, the need for a sufficient period of time after the spill to assess the full extent of damages. Quick time bars subvert the fairness of the claims process by forcing premature settlements that do not capture the full extent of damages. This applies to both natural resource trustees and private claimants. An effective payment scheme must have at least two different kinds of payments: quick interim payments and a fair, final payment calculated after all the effects of the spill are known.

Third, damage assessments in oil spills are complex, and claims programs cannot be cookie cutter operations run by people with little experience in natural resources damages or fisheries. Claims adjusters and damage forms limit damages to the most obvious and are tied to often misleading historical data. For example, a claims adjuster may limit a fishermen's claim to the harvest levels and price of a prior poor season. Lawyers are needed to develop fully what are

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significant business claims. In the *Valdez* case, the claims program paid little of the ultimate recoveries.

Fourth, a claims administrator should not require releases; a claims administrator should not be acting as a defense attorney for the spiller. Even Exxon abandoned the practice of requiring releases. If claims monies move to a claimant, a receipt should be issued so that the spiller gets credit for the amount paid, but nothing more. As a matter of sound economics and simple justice, a victim ought to be able to take a payment for less than his full amount of damages and then move to the courts, if necessary, to be made as whole as money can make him whole. Claims payments should not be final settlements.

Fifth, claims administrators should not impose harsh rules that serve to prevent recovery for many of those legitimately harmed by the spill. As we saw with the $100 million fund that Congress set up for Trans-Alaska oil spills, nearly two-thirds of the money stayed in the fund due to crabbed claims rules. This problem is exacerbated when the fund is administered by institutions with ties to the oil industry.

It remains to be seen how Kenneth Feinberg will administer a claims facility and the new $20 billion escrow fund. Almost all we know about the administration of the $20 billion fund comes from the news. Mr. Feinberg has a track record of integrity and public service. However, all the claim funds he has administered were for defined populations of victims whose injuries resulted from a past and single event. An oil spill and its impacts are ongoing over a number of years. A recent ABA publication indicates he intends to be flexible as to the proof of a victim's claim. At the same time, he is using BP's claim adjusters and ESIS, which has direct ties to the insurance industry. Feinberg has announced that the $20 billion escrow will be available for cleanup costs, including BP's cleanup costs. If that's the case, the lion's share of the escrow would be used to reimburse BP for its cleanup costs – and not to pay claimants. The ongoing nature of a spill presents Mr. Feinberg with a unique challenge: as we sit here today, we have no idea how long the Gulf and its fishermen will be impacted. Mr. Feinberg, a lawyer, is encouraging claimants not to use a lawyer but at the same time to sign releases. His public pronouncements indicate he will attempt to roll up his operation in 3 years. How can fishermen without lawyers finally settle significant business claims? These are all problematic.

SOCIAL CONSEQUENCES

Oil spills have devastating impacts on people. Oil spills also tear the social fabric of communities. The obvious impact is the loss of tax revenues. But for fishing based communities the most serious impacts are in increased divorces, bankruptcies, alcoholism, tax liens, domestic abuse, stress-related disorders, depression and a loss of faith in American institutions like the Coast Guard, the courts, and corporate America.[14]

As people in the Gulf well know, when natural disasters hit, people are resilient. But people react differently to man-caused disasters. Hard feelings linger for years. You can go into a bar in rural Alaska and it is as if the *Valdez* spill happened last week. For many people, the *Valdez* spill destroyed a way of life. Family fishers left the business. Fishing communities are half the size they once were.

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For people to move on from man-caused disasters, they need their full measure of justice. Yet the citizens of Alaska certainly didn't get justice when the Supreme Court of the United States cut their damage award by a factor of ten. Petroleum companies play down the size of their spills and have the time and resources to chip away at damages sought by hard-working victims.

The media and public attention will move on after the spill is plugged, but these real human issues will persist for years. There is great uncertainty going forward. Justifiable anger rules the day in resource based communities.

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[1] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

[2] 46 U.S.C. App. § 183. The Limitation of Liability Act is now codified as amended at 46 U.S.C. § 30505. *See* Pub. L. 109-304, § 3, 120 Stat. 1513.

[3] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651.

[4] *In re* Exxon Valdez, 472 F.3d 600 (9th Cir. 2006); *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

[5] *Exxon v. Baker*, 128 S. Ct. 2605, 2634 (2008).

[6] 33 U.S.C. §§ 2701-2761.

[7] Tex. Nat. Res. Code § 40.256; Miss. Code Ann. § 49-17-1 *et seq.* (silent on whether the statute preempts other state law causes of action); Code of Ala. § 22-22-9; Fla. Stat. § 376.205.

[8] La R.S. 30:2479; La R.S. 30:2491.

[9] 33 U.S.C. § 2702(b).

[10] *National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1447 (E.D. Va. 1996) ("Because OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages.").

[11] *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 631 (1st Cir. 1994) ("Robins Dry Dock remains the rule in this circuit for federal claims, we simply hold that Rhode Island is free to chart a different course.").

[12] *South Port Marine, LLC v. Gulf Oil Ltd. Pshp.*, 234 F.3d 58, 66 (1st Cir. 2000) ("For the reasons set forth above, we agree with the district court that punitive damages were not available to plaintiff and affirm the court's ruling on that issue.").

[13] 26 U.S.C. § 9509.

[14] J. Steven Picou, Duane A. Gill, & Maurie J. Cohen, *The* Exxon Valdez *disaster: readings on a modern social problem* (J.S. Picou, D.A. Gill, and M.J. Cohen, eds., Dubuque, IA: Kendall/Hunt Publishing Co., 1999).

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The Primary Recommendation in the May 27, 2010 report, "INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF" Given by Secretary Salazar to The President Misrepresents our Position

The National Academy of Engineering recommended us as contributors and reviewers of the recent Department of Interior "30 Day Review" of the BP Oil Spill. We were chosen because of our extensive petroleum industry expertise, and independent perspectives. The report states:

"The recommendations contained in this report have been peer-reviewed by seven experts identified by the National Academy of Engineering. Those experts, who volunteered their time and expertise, are identified in Appendix 1. The Department also consulted with a wide range of experts from government, academia and industry."

The BP Macondo blow out was a tragedy for eleven families, and an environmental disaster of worldwide scale. We believe the blowout was caused by a complex and highly improbable chain of human errors coupled with several equipment failures and was preventable. The petroleum industry will learn from this; it can and will do better. We should not be satisfied until there are no deaths and no environmental impacts offshore - ever. However, we must understand that as with any human endeavor there will always be risks.

We broadly agree with the detailed recommendations in the report and compliment the Department of Interior for its efforts. However, we do not agree with the six month blanket moratorium on lfoating drilling. A moratorium was added after the final review and was never agreed to by the contributors.
The draft which we reviewed stated:

"Along with the specific recommendations outlined in the body of the report, Secretary Salazar recommends a 6-month moratorium on permits for new exploratory wells with a depth of 1,000 feet or greater. This will allow time for implementation of the measures outlined in this report, and the

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consideration of information and recommendations from the Presidential Commission as well as other investigations into the accident.

"In addition, Secretary Salazar recommends a temporary pause in all current drilling operations for a sufficient length of time to perform additional blowout preventer function and pressure testing and well barrier testing for the existing 33 permitted exploratory wells currently operating in deepwater in the Gulf of Mexico. These immediate testing requirements are described in Appendix 1."

We agree that the report and the history it describes agrees with this conclusion. Unfortunately after the review the conclusion was modified to read:

"The Secretary also recommends temporarily halting certain permitting and drilling activities. First, the Secretary recommends a six-month moratorium on permits for new wells being drilled using floating rigs. The moratorium would allow for implementation of the measures proposed in this report and for consideration of the findings from ongoing investigations, including the bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.

"The Secretary further recommends an immediate halt to drilling operations on the 33 permitted wells, not including the relief wells currently being drilled by BP, that are currently being drilled using floating rigs in the Gulf of Mexico. Drilling operations should cease as soon as safely practicable for a 6-month period."

We believe the moratorium as defined in the draft report addresses the issues evident in this case. We understand the need to undertake the limited moratorium and actions described in the draft report to assure the public that something tangible is being done. A blanket moratorium is not the answer. It will not measurably reduce risk further and it will have a lasting impact on the nation's economy which may be greater than that of the oil spill.

The report highlights the safety record of the industry in drilling over 50,000 wells on the US Outer Continental Shelf of which more than 2000 were in over 1000 feet of water and 700 were in greater than 5000 feet of water. We have been using subsea blowout preventers since the mid- 1960s. The

only other major pollution event from offshore drilling was 41 years ago. This was from a shallow water platform in Santa Barbara Channel drilled with a BOP on the surface of the platform.

The safety of offshore workers is much better than that of the average worker in the US, and the amount of oil spilled is significantly less than that of commercial shipping or petroleum tankers. The US offshore industry is vital to our energy needs. It provides 30% of our oil production, is the second largest source of revenue to the US Government ($6 Billion per year), and has a direct employment of 150,000 individuals. The report outlines several steps that can be taken immediately to further decrease risk as well as other steps that should be studied to determine if they can be implemented in a way that would decrease risk even more.

This tragedy had very specific causes. A blanket moratorium will have the indirect effect of harming thousands of workers and further impact state and local economies suffering from the spill. We would in effect be punishing a large swath of people who were and are acting responsibly and are providing a product the nation demands.

A blanket moratorium does not address the specific causes of this tragedy. We do not believe punishing the innocent is the right thing to do. We encourage the Secretary of the Interior to overcome emotion with logic and to define what he means by a "blanket moratorium" in such a way as to be consistent with the body of the report and the interests of the nation.

The foregoing represents our views as individuals and does not represent the views of the National Academy of Engineering or the National Research Council or any of its committees.

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