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Learning from Disasters: Twenty-One Years after the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?

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Twenty-one years ago, after the calamitous *Exxon Valdez* oil spill (EVOS) in Alaska's Prince William Sound, the pervasive systemic flaws—that, according to the State of Alaska Oil Spill Commission, had made a major calamity not just possible but probable¹—were largely cloaked behind the figure of a captain with a drinking problem. This time around, after suffering another horrific oil incident—this one almost 20 times larger than the *Exxon Valdez* spill²—the question for national energy law and policy is whether, this time around, we'll acknowledge and implement the hard systemic lessons largely avoided two decades ago. The Deepwater Horizon tragedy will be a doubly disastrous occasion if it does not produce systemic changes for the future, as the *Exxon Valdez* markedly failed to do. As White House Chief of Staff Rahm Emanuel said in another context, "You never want a serious crisis to go to waste."³

Author's Note: The author chaired the State of Alaska Oil Commission's legal task force after the 1989 wreck of the M.S. Exxon Valdez. The Commission's extensive reports and Appendices, issued in February 1990, are available online on the Alaska Resource Library and Information Service's website, www.arlis.org/vol2/a/EVOS_FAQs.pdf. The last-minute preparation of this analysis benefited from the help, gratefully acknowledged, of two research assistants, Brendan Boyle and Joseph Horton, both of the Boston College Law School Class of 2012. The views expressed here, other than those cited to the Commission and other sources, are the author's own and not those of the Commission nor of my research assistants.

1. See State of Alaska Oil Spill Commission's Reports and Appendices, February 1990, available at www.arlis.org/vol2/a/EVOS_FAQs.pdf [hereinafter EVOS Commission Report].
2. The *Exxon Valdez* spill is generally reported as releasing approximately 250,000 barrels, or 11,000,000 gallons, of crude oil. The April 2010, Deepwater Horizon blowout spill now appears to have released roughly five million barrels, at a rate varying between 50-60,000 barrels per day from April 20 until a top cap was applied on July 15, 2010.
3. See Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, available at http://online.wsj.com/article/NA_WSJ_

The Barack Obama Administration's Gulf of Mexico BP Deepwater Horizon Oil Spill and Offshore Drilling Commission, like the Alaska Commission to set up after the *Exxon Valdez* spill, will try to harvest conclusions about causation—"why did this calamity happen?"—and about necessary fundamental changes in how we manage the extraction and transport of oil for the future. Poised against this corrective agenda is the natural tendency of the industry and the communities that depend economically upon it to avert systemic changes that potentially will constrain ongoing economic activities. As in Alaska, within days of the Gulf of Mexico blowout, the industry and its supporters commenced defensive political and media initiatives to dilute public perceptions and impacts of the event.⁴ Meanwhile, legions of attorneys have been crowding into courts and agencies staking claims for billions of dollars in compensation and reparations, just as lawyers jammed flights into Alaska in 1989.

In both their similarities and differences, the Deepwater Horizon blowout spill and the *Exxon Valdez* experience are instructive. Many of the similarities are frustrating to longtime observers. Some of the differences are immensely heartening—in some but not all of the Obama Administration's words and actions, in potential corrective congressional legislation, and in belated proposals for wide adoption of a 1990 Alaska Commission recommendation for citizen watchdog councils.

- PUB:SB122721278056345271.html. Given the onrushing current event underlying this present analysis, many citations herein are given to press accounts, meanwhile noting that, over time, the factual record will be substantially deepened by historical vetting. See, e.g., PETER LEHNER, IN DEEP WATER (2010).
4. Given the current political landscape, it may well also suit the Administration's best interests in public polling to move public attention on to other issues. See Michael J. Evans, *Oil Spill Pictures and the Media Blackout*, BP OIL NEWS, June 9, 2010, <http://bpoilnews.com/oil-spill-pictures/oil-spill-pictures-bp-coverup-first-amendment/> (last visited Sept. 22, 2010). ("British Petroleum has thrown a media blackout over the Gulf Coast, with the apparent complicity of some in our federal and local governments.")

No oil spill, of course, like no coastal setting, is exactly like any other. The stony shores of coastal Alaska are very different from the reedy marshes and beaches of the Gulf Coast in ecology and climate.⁵ The *Exxon Valdez* oil spill soiled a coastal impact zone inhabited by no more than 30,000 people, with a sparse economy and only one state jurisdiction (and cost Exxon roughly \$5 billion).⁶ The Gulf of Mexico's affected coastal impact zone is home to nearly 14 million, with a complex, marine-oriented economy in five separate states, and the defendants' financial liability is likely to be commensurately larger.⁷

In terms of operational and institutional similarities between the EVOS and the Deepwater Horizon spill, many regrettably exist. They reflect conditions that were and are all too prevalent in the oil production system. Neither spill can be dismissed as an anomaly—as a supposed exception that proves a general rule of industry care and vigilance.

The Alaska Commission noted multiple areas in the “mega-systems” of extracting and transporting oil in which the official players, both governmental and corporate, were enmeshed in a culture of complacency, collusion, and neglect. In applying its lessons 20 years later, systemic analyses of issues raised in the public and corporate management of these complex systems can be divided into two major sectors: *Prevention* covers issues of safe design, operation, and accident avoidance before the fact of an oil spill event. *Response* includes the technical quality, practical implementability, and readiness of spill response contingency plans and the command structure that will put them into effect.

I. Prevention System Failures

The preconditions for destructive discharges lie latent within the process of planning, permitting, construction, and operation, and in the design of precautionary safeguards. In Alaska, the oil spill commission noted that the entire system—from the drilling area on the North Slope, through the pipeline and Valdez tank farm storage areas, onto the single-hulled vessels and the transport route down to the refineries in Long Beach, California—had been developed with shortcuts and a primary focus on production rather than safety.⁸ The official state and local regulatory agencies often uncritically accepted industry data and assurances on the

design and safety of system elements, issued permits without required documentation, did not insist on strict compliance with corporate and federal rules, and on occasions when they attempted to assert regulatory vigilance were resisted, delayed, or overturned by the industry's greater resources and political momentum.⁹ The “revolving door” between industry and regulators produced what political scientists often describe as “agency capture.”¹⁰

The same complacency and inappropriate collusion is increasingly revealed in narrative details from the Gulf of Mexico oil production structure (with the added element of sex).¹¹ Regulators and regulatees played together in symbiotic relationships reflecting the fact that they considered themselves part of the same unitary community.¹² Deepwater drilling at unprecedented depths was undertaken with casual oversight, with lax requirements for drill plans and restricted company disclosure of geological data.¹³ Categorical exclusions from full environmental reviews were granted for deepwater drilling, and the potential for blowouts ignored as virtually impossible, ignoring data showing that blowout preventers are prone to failure.¹⁴ Monitoring and enforcement of regulations were haphazard. If violations were assessed, they were vigorously contested to burden and deter further enforcement.¹⁵

From what we have seen so far from the Gulf of Mexico, these preconditions for distress, as in Alaska, were not solely prevalent with one company. BP may have been particularly prone to corner-cutting in its dominance of the Alyeska management company and in the Gulf of Mexico,¹⁶ but the comfortable relationships with the U.S. Department of the Interior's Minerals Management Service (MMS) and its lax oversight were shared by all the deepwater drilling com-

5. Oiled sandy beaches may be easier to clean than cobbled stone beaches where the oil penetrates deeply. Marshes, however, are far more problematic. Warmer temperatures can break down oil faster. The winds and currents of the Gulf of Mexico are more complex than in the Gulf of Alaska.

6. The figure is a rough estimate based upon compensatory settlements of \$507.5 million, twice that amount in punitives after *Exxon Shipping v. Baker*, 128 S. Ct. 2605, 38 ELR 20149 (2008), \$30 million in interest, criminal fines of \$25 million, plus \$125 million in criminal restitution, \$900 million in a civil settlement with Alaska and the United States, and circa \$2.4 billion in remediation expenses. Some of these amounts appear to have been covered by insurance or offsets. The “reopener” clause was triggered in 2006 by Alaska's request for an additional \$92 million for ecological damages. See <http://www.arlis.org/docs/vol1/217276815.pdf>.

7. Steven G. Wilson & Thomas R. Fischetti, *Coastline Population Trends in the United States: 1960 to 2008*, in POPULATION ESTIMATES AND PROJECTIONS 2010, at 9 (U.S. Census Bureau, Population Estimates Program Ser. No. P25-1139 2010).

8. See *id.* at 34-36.

9. See *id.* at 34-59. When, at the commencement of the pipeline, the state of Alaska passed a protective statute establishing stricter standards for tanker safety and pollution avoidance, the industry's management consortium successfully attacked most of the law on preemption grounds. *Chevron U.S.A. Inc v. Hammond*, 726 F.2d 483, 501, 14 ELR 20305 (9th Cir. 1984) (district court had struck down most of the state statute; only a minor appealed part of the statute is upheld by the U.S. Court of Appeals for the Ninth Circuit).

10. See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975).

11. Charlie Savage, *Sex, Drug Use, and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 10, 2008, available at <http://www.nytimes.com/2008/09/11/washington/11royalty.html>.

12. See Jason DeParle, *Leading the Way Into Deep Water*, N.Y. TIMES, Aug. 8, 2010, at A1, A12-13. (“Obviously we are all oil industry,” said Larry Williams, the [MMS] district manager. “We're all from the same part of the country. Almost all our inspectors have worked for oil companies. . . . They grew up in the same towns.”)

13. See Randy Loftis, *Risks of Deep-Water Drilling Get Brush-Off*, ANCHORAGE DAILY NEWS, July 1, 2010, available at <http://adn.com/2010/07/01/1349546/depper-oil-wells-in-gulf-pose.html>.

14. David Barstow et al., *Regulators Failed to Address Risks in Oil Rig Fail-Safe Device*, N.Y. TIMES, June 20, 2010, available at <http://www.nytimes.com/2010/06/21/us/21blowout.html>.

15. See DeParle, *supra* note 12 (“A number of agency actions have drawn fire . . . [the MMS agency] ignored warnings that crucial pieces of emergency equipment, blowout preventers, were prone to fail.”).

16. See Noaki Schwartz, *BP Had a Key Role in the Exxon Valdez Disaster*, ASSOC. PRESS, May 25, 2010, <http://abcnews.go.com/Business/wireStory?id=10734948> (last visited Sept. 22, 2010). In the Gulf, there are reports that BP had by far the largest number of regulatory violations. Pierre Thomas et al., *BP's Dismal Safety Record*, ABCNEWS.GO.COM, May 27, 2010, <http://abcnews.go.com/WN/bps-dismal-safety-record/story?id=10763042> (last visited Sept. 22, 2010).

panies. Especially in Louisiana, but to a lesser extent in the other Gulf states too, oil is king, and close accommodation with the oil industry at the state as well as federal level has been standard operating procedure.¹⁷

The Alaska Commission made 59 recommendations in the wake of the *Exxon Valdez*, at least one-half of which were in whole or part directly relevant to the nation's oil extraction and delivery systems beyond Alaska as well.¹⁸ (In the heavy industry lobbying that characterized the passage of the Oil Pollution Act (OPA) of 1990¹⁹ through Congress in response to the Alaska disaster, many of these recommendations were excluded or diluted, with the U.S. Coast Guard and the MMS joining the industry in downplaying the commission's report.²⁰

Beyond recommendations for a comprehensive prevention policy and general operational safety commitments,²¹ the Alaska Oil Spill Commission urged that governmental and corporate performance standards specifically require best available technology, a fundamentally rational suggestion that could have made a significant difference in the Gulf of Mexico, and that enhanced state and local regulatory involvement be encouraged rather than preempted.²² Recommendations at the federal level included calls for serious unannounced safety drills, mandatory corporate safety reporting, mandatory personnel levels, revised insurance antitrust exemptions, and an intensified vigilance role for the Coast Guard.²³ In terms of structural reform, one of the Alaska Commission's most significant recommendations, only partially integrated into the OPA, was for the creation of institutionalized citizen watchdog councils to break up the tendencies toward complacency, collusion, and neglect within the di-polar industry-regulatory agency management model that has characterized the field.²⁴

The emerging history of Gulf of Mexico deepwater drilling frustratingly reflects how beneficial it might have been for those Alaskan recommendations to have been implemented nationally in the wake of the *Exxon Valdez*.

II. Response System Failures

The two disasters, two decades apart, reveal distressingly similar systemic failures in response preparation and implementation. Contingency plans are the heart of response effectiveness, and in both cases, the official contingency plans were largely fiction. BP's Gulf of Mexico plan notoriously included consideration of walrus, not found south of Seattle, as well as minimizing the possibility of a blowout and wildly exaggerating the practicability of discharge capture and cleanup.²⁵ There was no demonstrated technology for capturing a large blowout or a blowout at mile depths, despite 30 years of knowledge of the threat since Ixtoc in 1979. The official Alaska plan had failed within 48 hours; a generic default Exxon corporate plan had to be brought in.²⁶ Twenty-one years later, the command structure in the Gulf of Mexico was uncertain, with state and federal representatives stepping on one another's toes and BP not under their control.²⁷

The Alaska Commission focused on the need for designing and implementing a decisive unified incident command, a call that the OPA's national contingency plan in practice essentially avoided. In addition to asserting the need for governmental command authority over industry equipment and personnel, the commission called for shifting oil spill containment and cleanup responsibilities to the U.S. Army Corps of Engineers if the Coast Guard proved incapable of asserting stronger command authority,²⁸ and criticized the U.S. Environmental Protection Agency's (EPA's) lack of regulatory energy in spill prevention and response.²⁹ EPA's continued failure to scrutinize and regulate dispersants has been a critical element in the shortcomings of national spill response.³⁰

Indeed, perhaps the most significant indicator of dysfunctional response mechanisms, despite dire warnings from the Alaska Commission 20 years previously, was the vigorous and indiscriminate propensity to use dispersants.

17. It has been difficult to criticize the oil industry. After Hurricane Katrina, it was apparent to most coastal scientists that a major contributor to inland flooding and the destruction of buffering coastal marshes was the 8,000 miles of oil industry canals cut through coastal marshes to serve drilling operations, but this fact was generally not mentioned.

18. EVOS Commission Report. The Recommendations are spelled out at length in pages 129-71 of the report.

19. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.

20. "The Oil Spill Commission report was not accepted by the Coast Guard or MMS. . . . The Coast Guard opposed the Commission before the Congress on many matters in 1990 during passage of OPA-90." E-mail from Chairman Walter Parker, oral history comment, Answers to 3 Questions, Aug. 4, 2010 [on file with author].

21. EVOS Commission Report, *supra* note 1, Recommendations 1-6.

22. EVOS Commission Report, *supra* note 1, Recommendations 13-18, 26-27. Congressional intent not to preempt state and local regulatory action would avoid the industry arguments that undercut Alaska's protective regulations in *Hammond*, 726 F.2d 483, *supra* note 9. The Commission also noted the particular utility of interstate compacts. EVOS Commission Report, *supra* note 1, Recommendation 18.

23. EVOS Commission Report, *supra* note 1, Recommendations 30-33.

24. EVOS Commission Report, *supra* note 1, Recommendations 3, 12, 26-27. See further discussion *infra* note 52 and accompanying text.

25. Reuters, *Walrus in Louisiana? Eyebrow-Raising Details of BP's Spill Response Plan*, May 27, 2010, <http://blogs.reuters.com/environment/2010/05/walrus-in-louisiana-eyebrow-raising-details-of-bps-spill-response-plan/> (last visited Sept. 22, 2010).

26. EVOS Commission Report, *supra* note 1, at 161; see also EVOS Commission Report, *supra* note 1, app. N, Day 2 and Day 3, available at <http://www.arlis.org/docs/vol1/B/26006063/26006063N.pdf>.

27. EVOS Commission Report, *supra* note 1, Recommendation 48 ("Incident Command System—A formal command structure known as the Incident Command System should be used to direct response to oil spills. . . ."), Recommendation 38 ("Government in charge—The spiller should not be in charge of response to a major spill. A spiller should be obligated to respond with all the resources it can summon, but government should command that response. . . ."). In contingency plans, industry equipment and funding are typically central. As the Alaska Commission noted, command must be governmental, yet when the U.S. Coast Guard command ordered BP to stop using dispersants, BP demurred. David A. Fahrenthold & Steven Mufson, *Documents Indicate Heavy Use of Dispersants in Gulf Oil Spill*, WASH. POST, Aug. 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/31/AR2010073102381.html>.

28. EVOS Commission Report, *supra* note 1, Recommendation 39.

29. EVOS Commission Report, *supra* note 1, Recommendation 40.

30. The necessity and shortcomings of EPA's scrutiny of dispersants are analyzed at length in Dr. Riki Ott's major compilation of post-EVOS accounting, SOUND TRUTHS AND CORPORATE MYTHS: THE LEGACY OF THE EXXON VALDEZ OIL SPILL (2005).

“Dispersant,” as the repercussions of Deepwater Horizon continue, is a previously-unfamiliar word that may well achieve the same kind of public notoriety as the once-unknown “chad.” Dispersants were targeted by the Alaska Commission as deeply problematic,³¹ but are strongly favored by industry for a variety of salient reasons. Dispersants are cheaper to the spiller than removal actions. Perhaps even more compelling, dispersants are “optically” preferable: they play a key role in the canonic “out-of-sight, out-of-mind” response strategy. If oil can be sunk beneath the surface and broken up into billions of small suspended droplets, it becomes invisible, lessens the images of fouled beaches and dying wildlife, and its existence can be doubted and denied.³² By discharging a torrent of dispersants a mile below the surface right at the blowout wellhead spew point, the objective is to prevent much of the oil from ever reaching visibility at the surface. If oil reaches beaches, dispersants can, to some extent, achieve surface cleaning. In Alaska, images of high-pressure spraying of dispersants on stony beaches were a major objective for Exxon in creating news video of successful post-spill cleanup.

But dispersants have serious destructive effects when released into the environment, and not just for wildlife. In Alaska, temporary workers hired to spray dispersants on Prince William Sound and on the beaches reported a litany of physical effects from exposure to backspray.³³ “We’re peeing blood,” the author was told. “If it’s doing this to us, what’s it doing to the places we’re spraying?!” In Alaska today, beaches that had been sprayed with dispersants reportedly demonstrate greater continued ecological damage than beaches that were never “cleaned.”³⁴ Down on the Gulf, there are not only reports of dolphins dying with hemorrhages around their blowholes and in their internal organs, but dispersant workers have also started to pass blood in their urine, and children and adults in coastal communities are reporting some of the same breathing illnesses and blood effects that were experienced in Alaska.³⁵

Dispersants in the water column not only kill marine mammals, fish, and other larger life forms, but may have even greater long-term ecosystem effects. The Deepwater Horizon blowout occurred at the Gulf of Mexico’s season of maximum larval production for fish, shellfish, and the myriad smaller life forms that support the fecundity of the Gulf. Dispersants make the oil miscible, hanging in subsurface curtain plumes of tiny droplets of heavy oil-cum-dispersant that can directly contaminate or be consumed by whatever it touches. “Clouds of larva, billions, even trillions

of them, are drifting in that water column,” a federal biologist told the author. “They move up and down according to temperature and light, and when they hit those plumes of suspended subsurface oil, it’s all over for them.”³⁶ The genetic damage to ecosystems in Alaska is still tangible. Herring populations and that major Alaska fishery have never recovered, and Prince William Sound’s primary pod of orca killer whales has not had a successful reproduction since the spill.³⁷ If the Alaska Commission’s recommendations had been heeded, it is likely that dispersants would play no part or a significantly reduced role in spill response, instead focusing national response on adoption of advanced skimmer oil-capture technology,³⁸ nontoxic coagulants that can operate in the subsurface water column as well as on the surface, high-volume separation and retrieval systems, and even short-term combustion approaches, in addition to greatly enhanced prevention. But it was not to be.

Today, as EPA has belatedly hastened to test an array of dispersants, the Agency’s tentative conclusions about dispersant toxicity are cast into grave doubt by the Alaska experience. Those dispersants that have been tested appear in most cases to have been subjected only to short-term, high-dose acute toxicity tests of the dispersant alone, rather than doing the normal range of tests for toxicity, capabilities, and efficacy,³⁹ with insufficient testing of realistic dispersant-oil mixtures, and typically focusing only on short-term toxicity to humans, not on broad ecological toxicity effects.⁴⁰

III. Dissimilarities, Positive and Negative

Twenty-one years after the Alaska spill, some elements of the societal response to the Deepwater Horizon blowout spill are potentially quite different. The concept of natural

36. Personal Communication from federal biologist in Florida, June 2010.

37. Brandon Keim, *Unique Killer-Whale Pod Doomed by Exxon Valdez*, WIRED.COM, Mar. 24, 2009, <http://www.wired.com/wiredscience/2009/03/valdez-whales/> (last visited Sept. 22, 2010).

38. Some scientists have argued that it is preferable and less damaging to keep the oil on the water’s surface. If oil stays on the surface, rather than mixing deep in the water column, it is retrievable by the kind of effective surface technology currently used in Europe; if submerged by dispersants, it is not.

39. As EPA noted in its 1999 HPV Chemical Hazard Data Availability Study, “[t] here are six basic tests which have been internationally agreed to for screening high production volume (HPV) chemicals for toxicity. The tests agreed to under the Organization for Economic Cooperation and Development’s Screening Information Data Set (OECD/SIDS) program are: acute toxicity; chronic toxicity; developmental/reproductive toxicity; mutagenicity; ecotoxicity; and environmental fate.” EPA, HPV Chemical Hazard Data Availability Study, <http://www.epa.gov/hpv/pubs/general/hazchem.htm>. Testing that uses only acute toxicity parameters does not give reliable data on real-world toxicity.

40. In Alaska, research post-EVOS demonstrated that the mixture of crude oil and dispersant is more toxic than either the dispersant or crude oil by themselves. Robert A. Perkins et al., *Comparative Marine Toxicity Testing: A Cold-Water Species and Standard Warm-Water Test Species Exposed to Crude Oil and Dispersant*, 42 COLD REGIONS SCI. & TECH. 226 (2005). Low-dose exposures can be very dangerous. See NICHOLAS A. ASHFORD & CLAUDIA S. MILLER, CHEMICAL EXPOSURES: LOW LEVELS AND HIGH STAKES (1998). As to humans, “[e]ven moderate chronic exposure was . . . associated with a greater reported prevalence of chronic airway disease and symptoms of multiple chemical sensitivity.” ANNIE K. O’NEILL, SELF-REPORTED EXPOSURES AND HEALTH STATUS AMONG WORKERS FROM THE EXXON VALDEZ OIL SPILL CLEANUP (MPH thesis, 2001; http://tikioit.com/pdf/oneill_thesis.pdf). Cf. NATIONAL RESEARCH COUNCIL, COMMITTEE ON UNDERSTANDING OIL SPILL DISPERSANTS, OIL SPILL DISPERSANTS: EFFICACY AND EFFECTS (2005).

31. EVOS Commission Report, *supra* note 1, at 198-99.

32. Matthew Brown, *Underwater Oil Plumes Disputed by BP CEO Tony Hayward*, HUFFINGTON POST, May 10, 2010, http://www.huffingtonpost.com/2010/05/30/underwater-oil-plumes-dis_n_595015.html (last visited Sept. 22, 2010).

33. See Ott, *supra* note 30, at 20-71.

34. Personal Communication from Dr. Ott in Louisiana, Aug. 9, 2010.

35. *Id.* See Project Gulf Impact, From the Gulf Stream to the Bloodstream, <http://theintelhub.com/2010/09/05/from-the-gulf-stream-to-the-blood-stream/> (Sept. 5, 2010), (and video footage: <http://www.youtube.com/watch?v=6drasiXNFaw>) (volatile solvents profile analyses on airborne chemicals in the bodies of Gulf coastal residents—isoctane, hexane, methylpentanes, ethylbenzene, m.p.-xylene—apparently deriving from oil-dispersant effects).

resource damages was barely known in 1990,⁴¹ and the same for “ecosystem services,” the significant resource economics concept of accounting a shadow-priced cash value for the uncompensated economic values provided to human economies by, for example, marshlands’ water filtration and flood prevention that are normally taken for granted but can pose total impacts of hundreds of billions of dollars if lost.⁴² The existence today of solid economic arguments for ecosystem services means that the treatment of ecological damages has potentially evolved from charming aesthetic arguments to hard-cash realities.

The Obama Administration can be credited with heartening and unprecedented responsive improvements, as well as distressing echoes of past political dysfunctions. The sophistication of the industry’s defensive informational campaign, however, is likely to be far greater than 21 years ago. In the *Exxon Valdez* setting, the federal executive maintained a low profile. President George H.W. Bush did not fly to Alaska, and he specifically abjured federal responsibility.⁴³ Exxon managed the response initiatives. No federal review commission was appointed. Only narrowly was the U.S. Department of Justice prevented from settling the criminal liability actions without major penalties.⁴⁴ Twenty-one years ago, however, the press and congressional politicians took virtually no critical notice of the lack of presidential attention.

In contrast, the Obama White House has produced a series of remarkable interventions. One innovation is the \$20 billion compensation fund to be administered by Kenneth Feinberg who managed the post-9-11 fund.⁴⁵ The need for rapid access to massive amounts of sustaining compensation payments was clear, but no obvious federal law existed to support creation of such a fund.⁴⁶ By jawboning BP

Chairman Carl-Henric Svanburg into a negotiated contract to post such a huge fund (with the help of 52 Democratic senators), President Obama created a legal animal that had never before existed, neither corporate nor governmental,⁴⁷ neither foreclosing recovery outside the fund⁴⁸ nor holding funded payments to single payouts, bypassing the technical requirements and burdens of litigation victims otherwise would dauntingly face.⁴⁹ The oiled communities of Alaska had requested a similar innovation and would have rejoiced at anything resembling the Obama-Svanburg fund, but no such thing ever approached reality. In addition, the Obama Administration persuaded BP to create a likewise unprecedented \$100 million foundation grant to offer interim support to unemployed oil workers, and a \$500 million Gulf of Mexico Research Initiative fund monitoring human health and environmental effects.⁵⁰ While lingering health effects still plague local coastal communities in Alaska, the latter fund possesses dramatic potential to change the medical and informational opacity experienced after the *Exxon Valdez* spill.

The Obama Administration has split up the MMS into three separate entities, including a Bureau of Ocean Energy Management Regulation, and Enforcement,⁵¹ and created a presidential oil spill commission (which remains a work in progress, and has expressly sought input from the experiences of the Alaska Commission). Following the recommendations of its Ocean Policy Task Force, which proposed the establishment of a national policy for the stewardship of the ocean, coasts, and Great Lakes, the Administration has initiated a National Ocean Council.⁵² The Administration’s attention to coastal risk management also expressly includes the Arctic,⁵³ where oil companies have sought to press ahead with offshore

41. Cf. National Oceanic and Atmospheric Administration (NOAA), Deepwater Horizon Oil Spill: Update of NOAA NRDA Activities, <http://www.darrp.noaa.gov/http://www.darrp.noaa.gov/> (June 2010).

42. See Robert Costanza & Herman E. Daly, *Natural Capital and Sustainable Development*, 6 CONSERV. BIO. 37-46 (Mar. 1992); Paul Hawken, *Natural Capitalism*, MOTHER JONES, Mar.-Apr. 1997, at 40. There is a strong body of law review scholarship on ecosystem services. See GRETCHEN DAILY, NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (G.C. Daily ed., 1997); J.B. Ruhl & James Salzman, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENVTL. L. 157 (2007); J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1 (2005); James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309 (2001).

43. See Fareed Zakaria, *Presidential Pony Show*, NEWSWEEK, June 13, 2010, available at <http://www.newsweek.com/2010/06/13/presidential-pony-show.html>. President Bush’s Transportation Secretary, Samuel Skinner, declared that direct federal government involvement would be “counterproductive,” <http://www.newsweek.com/2010/06/13/presidential-pony-show.html>.

44. Personal Communication from Dr. Rick Steiner, University of Alaska, who was instrumental in blowing that whistle, June 2, 2010, telephone conversation.

45. See Sheryl Gay Stolberg, *Administering Fund, a Master Mediator*, N.Y. TIMES, June 17, 2010, at A18, <http://www.nytimes.com/2010/06/17/us/17feinberg.html> (last visited Sept. 22, 2010).

46. Like others, the author hypothesized a mega-lien on BP assets, and Boston College Law School colleague Brian Quinn discovered a means to assess very large supplemental bonding requirements to cover late-arising environmental hazards. See U.S. Department of the Interior, Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases in the Outer Continental Shelf, Gulf of Mexico OCS Region, NTL No. 2000-G16, effective date: Sept. 7, 2000, <http://www.gomr.mms.gov/homepg/regulate/regs/ntls/ntl00-g16.html>; Leasing of Sulphur or Oil and Gas in the Outer Continental Shelf, 30 C.F.R. pt. 256, Subpart I (1997, amended 2001). Neither of these avenues, however, appeared to allow timely payment of victim compensation.

47. The fund has been organized in the form of a trust under the laws of Delaware. See Deepwater Horizon Oil Spill Trust, <http://www.citizen.org/documents/2010-8-9TrustAgreement.pdf>. Some details of the fund’s trust design have raised worries from progressives. See Tyson Slocum, Concerns With the Deepwater Horizon Oil Spill Trust (Public Citizen, Aug. 12, 2010), <http://www.citizen.org/documents/BP-Trust-Public-Citizen-Concerns.pdf>.

48. Double recovery for the same harms would, of course, be forestalled, but at this date, it appears that a claimant could petition for fund recovery for one discrete class of harms suffered—for instance emergency claims from the emergency fund program—while preserving other legal avenues for other classes of harms, or claims against defendants other than BP. Harry Weber, *Gulf Claims Chief Feinberg Says No-Sue Rule Was His Idea, Not BP’s*, ASSOC. PRESS, Aug. 24, 2010, available at <http://abcnews.go.com/Business/wireStory?id=11456413>. This situation could be substantially modified, however, by contract terms imposed by the administrators of the fund. *Id.*

49. For more on the fund, see Frederic J. Frommer, *Feinberg Sells Compensation Fund to Spill Victims*, ASSOC. PRESS, July 19, 2010, available at http://seattletimes.nwsource.com/html/business/technology/2012394546_apusgulfspill.html.

50. See White House, Office of the Press Secretary, Claims and Escrow Fact Sheet, June 16, 2010, available at <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>.

51. Press Release, BOEMRE, Secretarial Order Begins Reorganization of Former MMS (June 21, 2010), available at <http://www.boemre.gov/ooc/press/2010/press0621.htm>.

52. Julie Pace, *Obama Launches New National Policy to Strengthen Management of Oceans*, ASSOC. PRESS, July 19, 2010, available at <http://www.washingtonexaminer.com/politics/ap/obama-launches-new-national-policy-to-strengthen-management-of-oceans-98771294.html>.

53. Jim Carlton, *Bill Includes Citizens Oil Panel for Gulf, Arctic Coasts*, WALL ST. J., Aug. 2, 2010, available at <http://online.wsj.com/article/SB10001424052748703292704575393492820269842.html>.

drilling, despite the extraordinary hazards of prevention and response in such a setting.

The Administration has also joined long-delayed congressional efforts to bring the Alaska innovation of industry-financed but independent citizen watchdog councils to national coastal application. Building upon a suggestion by Prof. Rick Steiner of the University of Alaska, the *Exxon Valdez* commission proposed that area sectors of the oil industry be required to fund independent watchdog citizen oversight councils with fact-finding powers to scrutinize the corporate-agency management of the oil extraction and transport system. In the congressional lobbying during the passage of the OPA, the concept was made into law in the form of regional citizen advisory councils (RCACs), but they were restricted to Alaska waters and denied the subpoena power the Alaska Commission had proposed.⁵⁴ Nevertheless, the Alaska RCACs have created a remarkable third force counterbalancing the di-polar industry-agency axis.⁵⁵ Council members represent commercial and recreational fishermen, local communities, and otherwise unrepresented groups who would themselves suffer the negative consequences of system breakdowns. The citizen councils' power to collect and disseminate sensitive relevant information, including receiving and communicating whistleblower leaks, has changed the topography of the oil extraction and transport system in Alaska. If one or more RCAC had been authorized for the Gulf of Mexico with subpoena power, it seems inconceivable to Alaskan observers, given their experience with RCACs, that the Deepwater Horizon well would have been permitted without full environmental review or a competent real-life contingency plan, never mind that it lacked worst-case analysis and had no blowout response plan. The Obama White House and congressional drafters are currently considering an RCAC provision for the Gulf and other coastal waters.⁵⁶ Integrating the RCAC form into the oil extraction and transportation megasystem is innovative in political theory terms as well as functionality. It institutionalizes a vigilant third perspective into the traditional di-polar industry-agency governance model, converting it into a multicentric pluralism.

IV. Will We Learn?

Inheriting a dysfunctional status quo, the Administration appears to have taken fundamentally rational but unprecedented steps to begin addressing systemic needs for reform. For undertaking this array of initiatives, President Obama

appears mainly to have opened up a harvest of criticism from both left and right, complaining that more should have been done. The possible omissions and commissions of the preceding Administration in cossetting the perilously risky deepwater regime seem to have gone virtually unnoticed.⁵⁷

"Optics" provide another fundamental difference between the EVOS setting and the BP blowout. While the *Exxon Valdez's* Capt. Joseph Hazelwood indisputably had a drinking problem and had had several drinks during the layover in Valdez,⁵⁸ the Alaska Commission attributed the spill to systemic shortcuts that meant that the ship's crew was understaffed and lacking in sufficient sleep, as well as other laxities not attributable to the captain.⁵⁹ It served the interests of all parties, however, to simplify the causation issue, narrowing it to the captain's consumption of several pre-embarkation vodkas.

No such reductionism is possible in the Deepwater Horizon calamity. The blowout was clearly caused by systemic failures, starting from the initiation of the well through the ultimate failures to perceive and correct imminent safety hazard conditions. The greater visibility of causative conditions means that responsive corrective actions in the 2010 setting are likely to address the kinds of systemic flaws that were obscured in the 1989 incident.

There are less promising dissimilarities as well, however. In the 20 years since the *Exxon Valdez*, the technology of media spin control has grown exponentially in sophistication, and the political setting has drifted farther from concern with science and fact as congressional polarization has increased. According to Alaska RCAC members reporting from the Gulf, BP has been far more successful than Exxon in removing dead and dying oiled wildlife from visibility on the coast, in managing medical reports on workers exposed to dispersants, and managing the press. BP is effectively supported by other companies and dependent coastal communities in asserting the exceptional status of the Deepwater Horizon blowout, the need to press on with deepwater drilling, and the reasonableness of risks being managed in the Gulf. The Obama Administration, perhaps eager to show progress in meeting the strident expectations of critics, has reportedly denied access to photographers seeking images of dead and dying wildlife,⁶⁰ has affirmed BP assertions that a

54. 33 U.S.C.S. §2732(d) (OPA §5002(d)) (1990).

55. What I call the old "di-polar" model of societal governance involves, on the one hand, the market dynamo that drives our economy generating invention, wealth, jobs, culture, as well as negative externalities like pollution—and on the other, government agencies holding the role and responsibility of counterbalancing the excesses of the marketplace economy. Adding a third leg shifts the governmental geometry toward a Jeffersonian multicentric pluralism, where previously marginalized affected interests are able to be actively involved in the governance process. The new triangulation created by the RCACs and other third-party empowerments helps to avoid public and individual values getting lost in the tangles of the traditionally insulated di-polar political-economic marketplace. I think I adapted this rubric from a phrase used by Prof. Lon Fuller in a slightly different context.

56. See Carlton, *supra* note 53.

57. The only direct linkage between the Dick Cheney-Bush policies of deregulatory encouragement and the Deepwater Horizon blowout derives from the secret Cheney energy policy advisory group, and originated from a United Kingdom report: Michael Tomasky, *Dick Cheney and the Oil Spill*, THE GUARDIAN, May 3, 2010, <http://www.guardian.co.uk/commentisfree/michaeltomasky/2010/may/03/usa-dickcheney> (last visited Sept. 22, 2010).

58. National Transportation Safety Board, *Factual Report-Toxicology*, Mar. 24, 1989. A blood sample was taken aboard the vessel from *Exxon Valdez* Captain Hazelwood. Later, laboratory testing showed a presence of ethanol percentage of .061, but no presence of drugs. Tests at another laboratory showed an ethanol percentage of .06 percent. EVOS Commission Report, *supra* note 1, app. N, at 48.

59. EVOS Commission Report, *supra* note 1, at 149-54. According to one explanation, he had left the bridge, not to sleep off alcohol, but to do work that should normally have been done by absent crew. See, e.g., EVOS Commission Report, *supra* note 1, app. N, at 16.

60. The reason given for restricted access, apparently, has been to prevent tainting of potential prosecutorial evidence. In Alaska, the federal government incinerated all collected oiled fauna as soon as a settlement with Exxon was

large majority of discharged oil has been recaptured, a claim vigorously disputed by observers,⁶¹ and has reopened areas to fishing that appear clean to the surface eye but contain plumes of subsurface oil.⁶² At a time when increased vigilance and skepticism would seem necessary, it is troubling to see federal officials downplaying continuing health, safety, and ecological conditions.

Vivid disasters create practical possibilities for systemic improvement, but only if systemic flaws are publicly perceived and systemic lessons learned. The *Exxon Valdez* oil spill in 1989 and the State of Alaska Oil Spill Commission Report of 1990 distilled some highly significant perceptions and recommendations for systemic improvements, but many did not translate into the federal OPA legislation passed in response to the public dismay at the Alaska calamity. Those that did tended to become suborned by the culture of complacency, collusion, and neglect that the Alaska Commission had identified as the precondition and cause of that disaster and the subsequent failures in cleanup and response. Now, the Deepwater Horizon blowout presents another opportunity to learn from disaster. Similarities and differences between the two crises reflect hopeful and less-hopeful indications that, this time around, hard lessons will be learned.

signed, to the frustration of ecologists seeking to research toxicity in wildlife and of litigants who wanted evidence on natural resource contamination in several settings.

61. Christine Dell'Amore, *New U.S. Gulf Oil Spill Report Called "Ludicrous," Much Gulf Oil Remains, Deeply Hidden and Under Beaches*, NAT'L GEOGRAPHIC NEWS, (Aug. 5, 2010), <http://news.nationalgeographic.com/news/2010/08/100805-gulf-oil-spill-cement-static-kill-bp-science-environment/> (last visited Sept. 22, 2010).
62. Fishermen in re-opened "cleaned" areas have been dragging up samples of thick oil concentrations from below the surface. Dahr Jamail & Erika Blumenfeld, *Despite "All Clear," Mississippi Sound Tests Positive for Oil*, Truthout Report (Aug. 29, 2010), <http://www.truth-out.org/mississippi-sound-tests-positive-oil62735> (last visited Sept. 30, 2010).