

INDUSTRY OVERBOARD: HOW THE DEEPWATER HORIZON OIL SPILL AFFECTED THE GULF COAST COMMERCIAL FISHING INDUSTRY AND STATUTORY RECOMMENDATIONS FOR FUTURE PROTECTION

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I.	Oil	463
II.	Oil Pollution and Its Hazardous Effects on Commercial Fishing Products	464
III.	Recent Oil Spills and Their Effects on the Commercial Fishing Industry	468
IV.	The Blowout at Deepwater Horizon	470
V.	The Oil Pollution Act.....	473
VI.	BP Gulf Coast Relief Fund.....	474
VII.	The Final Commission Report.....	475
VIII.	The National Safe Drilling Act.....	477
IX.	Conclusion	485

I. OIL

Around the world, oil has traditionally been considered the number one traded commodity, accounting for nearly half of all international sea-born trade.¹ While this statistic appears encouraging—as it assures us that our nation’s leading energy source will not disappear in the immediate future—it is also a major concern for many water-based economies. Due to such a vast amount of oil crossing the ocean, often traveling tens of thousands of miles, oil spills—and oil pollution—are an almost inevitable part of the oil trading industry.²

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1. GOTTHARD GAUCI, OIL POLLUTION AT SEA: CIVIL LIABILITY AND COMPENSATION FOR DAMAGE 2 (1997).

2. *Id.*

Pollution has several different meanings; it can be used to refer to the environmental damage resulting from a discharge, the existence of waste, or the waste itself.³ Pollution scientists generally use the word “pollution” to refer to the actual damaging effects of a substance.⁴ *Oil pollution* is then the action, and the resulting effects, of polluting with oil.⁵ While the number of oil spills has decreased over the past several decades, minor spills and leaks occur on a regular basis, and the threat of a catastrophic spill is still ever-present.⁶ As history points out, when such a catastrophic spill occurs, thousands of individuals and hundreds of businesses are negatively impacted.⁷ Therefore, Congress and national agencies must continue to develop legislation and regulations that adequately oversee the off-shore oil industry and at the same time provide heightened protection for water-based economies, such as the commercial fishing industry.

This Note will explore the effects of the Deepwater Horizon oil spill on the Gulf Coast commercial fishing industry. It will examine the laws Congress has employed to allow the fishing industry to recover from their economic losses. Parts II and III will examine how oil pollution damages and reduces the natural populations of fish, shrimp, and mollusks. Further, how such reductions in population resulting from previous oil spills have affected the long-term commercial fishing industry. Part IV will explore how the Deepwater Horizon oil spill affected the commercial fishing industry in the weeks and months immediately following the spill. Part V will survey federal legislation which seeks to provide financial assistance to individuals and businesses in the wake of a catastrophic oil spill. Part VI will address how current legislation fails to adequately protect the commercial fishing industry from such widespread disasters like the Deepwater Horizon oil spill as pointed out by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. Finally, part VII will present model legislation which is designed to further protect the commercial fishing industry.

II. OIL POLLUTION AND ITS HAZARDOUS EFFECTS ON COMMERCIAL FISHING PRODUCTS

In order to discuss how offshore drilling legislation must be adapted to further protect the commercial fishing industry, first, oil—as a toxic substance—

3. R.B. CLARK, *MARINE POLLUTION* 5 (3d ed. 1992).

4. *Id.* at 6.

5. *See id.*

6. *See GAUCI, supra* note 1, at 2.

7. *See generally* CLARK, *supra* note 3, at 49–52 (offering a general overview of the environmental and the resulting economic consequences of oil spills).

must be understood. The effects of oil on living organisms are extremely diverse. The extent of the oil's impact on an organism largely corresponds to the type and quantity of the oil discharged, the type of organism affected, the amount of oil the organism comes into contact with, the means through which the organism is exposed to the oil, and the age and health of the organism.⁸

Crude oil—the main type of oil discharged into the gulf following the Deepwater Horizon explosion—heavily resists mixing with water to an extent greater than most other types of oil, and as the oil remains undiluted for a longer period of time, it leads to more serious and long-term consequences.⁹ Some of the toxins within crude oil, such as benzene, last for only a few days before evaporating into the air above the water's surface.¹⁰ This helps mitigate some of the damaging effects of the oil, however, the fumes of the evaporation themselves are often poisonous to animals that breathe near the surface of the water.¹¹ Other toxins, the much heavier polycyclic aromatic hydrocarbons (PAHs), remain within the crude oil for longer periods of time because of their chemical structure.¹² This means that the dangerous effects of such PAHs are felt by the surrounding ecosystem for a more extended period of time.¹³

A water based organism largely comes into contact with oil in three ways: ingestion, absorption, and inhalation.¹⁴ Ingestion occurs when the oil is directly swallowed or indirectly consumed by predators higher up the food chain.¹⁵ Absorption is when the organism is directly exposed to the oil, such as oil coming into contact with the skin, fur, or other tissues of the organism.¹⁶ Finally, inhalation occurs when the organism breathes in the dangerous fumes released by the oil as it floats on the surface of the water and evaporates into the surrounding air.¹⁷

The effects of oil on fish, shrimp, and mollusks (typically called “shellfish” and which include such organisms as oysters and clams) are the primary concern to commercial fishermen and the aqua-cultural industry as these water-

8. See HOLLY K. OBER, EFFECTS OF OIL SPILLS ON MARINE AND COASTAL WILDLIFE 2–3 (2010), available at <http://edis.ifas.ufl.edu/uw330>.

9. U.S. FISH & WILDLIFE SERV., EFFECTS OF OIL SPILLS ON WILDLIFE AND HABITAT: ALASKA REGION 1 (2004), available at <http://alaska.fws.gov/media/unalaska/oil%20spill%20fact%20sheet.pdf>.

10. CHARLES WOHLFORTH, THE FATE OF NATURE: REDISCOVERING OUR ABILITY TO RESCUE THE EARTH 310 (2010).

11. OBER, *supra* note 8, at 1.

12. WOHLFORTH, *supra* note 10, at 310–11.

13. *See id.*

14. *See* OBER, *supra* note 8, at 1.

15. *Id.*

16. *Id.*

17. *Id.*

based organisms are the industry's primary "crop."¹⁸ While all three types of organisms are readily susceptible to harm or even death from contact with oil, the majority of damage sustained by the aqua-cultural industry is felt by those fishermen who primarily harvest mollusks.¹⁹

Mollusks are almost always too slow to escape the ever-spreading oil and many are subject to physical smothering by a layer of oil.²⁰ This direct exposure to the toxins within the oil (when the shell or body of the mollusk comes into physical contact with the oil) can also lead to altered or disfigured shell formation in developing mollusks.²¹ Even more damaging to both the organism and the industry is the fact that the sediment on the ocean floor often traps oil residue longer than the free flowing water above.²² Therefore, as mollusks live and feed within the sediment, these organisms are exposed to the harmful effects for longer periods of time than most other ocean species.²³ This leads to more sustained damage of the mollusk community and to the potential for decreased availability of healthy crops for harvesting.²⁴

Shrimp often suffer many of the same damaging effects as the mollusk community members.²⁵ Shrimp, like mollusks, are an important part of the aquatic food chain and when their tissue becomes contaminated through contact with oil, this contamination passes through the food chain.²⁶ Shrimp can be completely engulfed in oil and subject to smothering and poisoning from the toxins within the oil.²⁷

Fish are also subjected to direct exposure to oil discharged into their surrounding ecosystem. If not contained in a commercial pen, adult fish are better equipped than shrimp or mollusks to avoid much of the oil as fish are able to swim to clean water areas, although some exposure is still likely to occur.²⁸ Fish who do feed directly within oiled water make ingestion of oil extremely com-

18. See FISHERIES STATISTICS DIV., NAT'L MARINE FISHERIES SERV., STATISTICAL HIGHLIGHTS: FISHERIES OF THE UNITED STATES, 2010 (2010), available at <http://www.st.nmfs.noaa.gov/st1/fus/fus10/highlight2010.pdf> (stating the top five species for U.S. domestic landings includes: shrimp, scallops, and other fish species).

19. See CLARK, *supra* note 3, at 51.

20. See U.S. FISH & WILDLIFE SERV., *supra* note 9, at 2.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. See EARTH GAUGE, GULF OIL SPILL SERIES: EFFECTS ON INVERTEBRATES, available at www.earthgauge.net/wp-content/EG_Gulf_Invertebrates.pdf.

26. See JAMES PERRAN ROSS, UNIV. OF FL, AN INTRODUCTION TO MARINE SPILLS 5 (2010), available at <http://www.wec.ufl.edu/Introduction%20to%20Marine%20oil%20spills.pdf>.

27. U.S. FISH & WILDLIFE SERV., *supra* note 9, at 2.

28. CLARK, *supra* note 3, at 49–50.

mon.²⁹ Once exposed, adult fish often succumb to reduced growth capability and damage to vital body organs, especially the heart and gills.³⁰

For commercial fisherman, the largest risk to the fishing community—posed by oil—is the exposure of oil to fish eggs and larvae.³¹ As these adolescent forms are often found towards the surface of the water or within the sediment on the ocean floor,³² they are more likely than adult fish to come into direct contact with the oil.³³ Additionally, the eggs and larvae are more susceptible to the toxins found within oil, which are absorbed through the soft membrane walls.³⁴ Oil exposure to eggs and larvae can lead to delayed embryonic development, a drop in hatching rates, and overall severe development impairments.³⁵ A drop in development and hatching rates will have the potential for more long term effects on the commercial fishing industry as a drop in the number of young, healthy fish—along with the deaths of older fish and those more heavily affected by the spill—make it increasingly difficult for species to reproduce and repopulate.³⁶ Fortunately, one mitigating factor—which reduces the effects sustained from a catastrophic, long term oil spill on the aqua-cultural industry—is that many species of commercial fish and mollusks produce enormous quantities of eggs which may enable many affected populations to absorb large numbers of deaths and yet rebound to reasonable population numbers.³⁷

A physical threat to fish, shrimp, and mollusk crops is not the only potential issue many commercial fisherman face once an oil spill occurs.³⁸ The effect oil has on the appetite and mindset of potential consumers may also cause problems for the industry.³⁹ Commercial fishing products exposed to oil can retain an “oily” flavor, turning consumers off from the product.⁴⁰ A small amount of oil on just a few individual mollusks can alter the taste of the entire catch as the typical cooking process involves boiling the mollusks which then spreads the oil around to previously untainted individuals within the same pot.⁴¹

29. See U.S. FISH & WILDLIFE SERV., *supra* note 9.

30. *Id.*

31. CLARK, *supra* note 3, at 50.

32. *Id.*

33. U.S. FISH & WILDLIFE SERV., *supra* note 9.

34. CLARK, *supra* note 3, at 50.

35. OBER, *supra* note 8, at 2–3.

36. *See id.* at 5.

37. CLARK, *supra* note 3, at 51.

38. See Wendy Kaufman, *Gulf Seafood Industry Works to Wipe Oil Off Image*, NAT'L PUB. RADIO (Aug. 20, 2010), <http://www.npr.org/templates/story/story.php?storyId=129322243&ft=1&f=1001>.

39. *Id.*

40. CLARK, *supra* note 3, at 51–52.

41. *Id.* at 52.

Additionally, the purchase and consumption of commercial fishing products may wane for weeks or months after an oil spill based upon consumer's fears of eating contaminated, unsafe seafood.⁴² While the FDA conducts mandatory safety testing on all commercial fishing products,⁴³ governmental assurances may not be enough to restore confidence within the average consumer.⁴⁴ For example, in 1967, following the wake of the Torrey Canyon oil spill, the market price of fish in Paris dropped by half, even though no fish from the affected area were ever sold for consumption.⁴⁵ It likely takes a combination of both time and strong public relations campaigns in order to restore widespread consumer trust regarding the safety of the seafood market in order to bring commercial fishing producers to pre-spill levels of sales.⁴⁶

III. RECENT OIL SPILLS AND THEIR EFFECTS ON THE COMMERCIAL FISHING INDUSTRY

On January 28, 1969, a natural gas blowout occurred at a Union Oil Company oil platform located five-and-a-half miles from the Santa Barbara coastline.⁴⁷ Oil continuously flowed into the ocean from the damaged well-head for ten days.⁴⁸ Upon the capping of the well, smaller amounts of oil continued to leak out while gas leaked intermittently for several months.⁴⁹ By the time the well was capped, a total of 100,000 barrels of crude oil had escaped into the surrounding water and affected approximately 100 miles of Southern California coastline.⁵⁰ The extent of the spill caused commercial fishing in the area to be closed for over two months.⁵¹ Commercial fishermen sued Union Oil for damages and the court held that the company had a duty to conduct its drilling opera-

42. See Kaufman, *supra* note 38.

43. See *Seafood*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/Seafood/default.htm> (last visited Jan. 22, 2012) (stating that the "FDA operates a mandatory safety program for all fish and fishery products under the provisions of the Federal Food, Drug and Cosmetic . . . Act, the Public Health Service Act, and related regulations").

44. See Kaufman, *supra* note 38 (discussing the impacts that the Deepwater Horizon oil spill had on consumer perceptions regarding sea food).

45. CLARK, *supra* note, at 3, at 52.

46. Kaufman, *supra* note 38.

47. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., REPORT NO. HMRAD 92-11, OIL SPILL CASE HISTORIES 1967-1991: SUMMARIES OF SIGNIFICANT U.S. AND INTERNATIONAL SPILLS 162 (1992) [hereinafter SIGNIFICANT SPILLS].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (stating that the commercial fishing industry was closed in the affected area for a three month period from February until April).

tions in a reasonably prudent fashion in order to avoid harm to aquatic life.⁵² In upholding the denial of Union Oil's motion for summary judgment, the court held that Union Oil was subject to damages if plaintiffs could show "that the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized" if the spill had not hampered their commercial fishing operations.⁵³

On March, 24, 1989, the supertanker *Exxon Valdez* ran aground on the coast of Alaska in Prince William Sound.⁵⁴ Roughly 10.8 million gallons of crude oil entered the Sound and 1000 miles of coastline were affected.⁵⁵ Adding to the catastrophic effects of the spill was the fact that it occurred during the spring months—when numerous species of commercial fish were in the spawning process or young fish were just beginning to hatch.⁵⁶ Due to this, the population of herring remained decimated for the next several years.⁵⁷ The total herring population has not recovered to pre-spill populations, and a lasting impact on the herring population is attributed to the oil spill in that many fish that survived the spill suffered high rates of viral infections, which has further weakened the population's ability to rebound.⁵⁸ The pink salmon population also declined, with an estimated eleven percent of adult pink salmon failing to return to the Sound's Southwest District in 1991 and 1992.⁵⁹ Additionally, oil remaining on the surface of stones and gravel damaged and killed pink salmon embryos until at least 1993.⁶⁰ It is estimated that the spill caused over \$300 million in economic harm to the aqua-cultural industry and its partners.⁶¹ In a class action lawsuit—brought on behalf of the commercial fishermen and other businesses—the jury initially

52. Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).

53. *Id.*

54. ALASKA OIL SPILL COMM'N, SPILL: THE WRECK OF THE EXXON VALDEZ, IMPLICATIONS FOR SAFE TRANSPORTATION OF OIL iii (1990), available at http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/spill_wreck_ExxonValdez_1990.pdf.

55. *Id.*

56. ANGUS M. GUNN, UNNATURAL DISASTERS: CASE STUDIES OF HUMAN-INDUCED ENVIRONMENTAL CATASTROPHES 87 (Greenwood Press 2003).

57. See *Pacific Herring*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, http://www.evostc.state.ak.us/recovery/status_herring.cfm (last visited Jan 22, 2012) (detailing the challenges to recovering the hearing population after the *Exxon* oil spill).

58. *Id.*

59. *Pink Salmon*, EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, http://www.evostc.state.ak.us/recovery/status_pinksalmon.cfm (last visited Jan. 22, 2012).

60. *Exxon Valdez Facts*, OCEANA, <http://na.oceana.org/en/our-work/stop-ocean-pollution/oil-pollution/learn-act/exxon-valdez-facts> (last visited Jan. 22, 2012).

61. *Id.*

awarded the plaintiffs \$287 million dollars in compensatory damages and five billion dollars in punitive damages.⁶²

IV. THE BLOWOUT AT DEEPWATER HORIZON

On April 20, 2010, a fire broke out aboard the Deepwater Horizon—a floating, semi-submersible drilling unit—causing a series of explosions.⁶³ The explosions ultimately resulted in the sinking of the drilling unit and the detachment of the unit from the wellhead.⁶⁴ At the time of the explosion, the unit was drilling a well planned to be at a depth of 5600 meters.⁶⁵ Deepwater Horizon was owned by Transocean but had been leased to British Petroleum (BP) until 2013.⁶⁶ The mineral rights to the oil were purchased in 2008 and drilling began only two months prior to the explosion—in February 2010.⁶⁷ The Department of the Interior—the federal agency in charge of the nation’s natural resources—exempted the operation from obtaining a detailed environmental impact study (EIS) after it concluded that the chance of a catastrophic oil spill resulting from Deepwater Horizon drilling operations was highly unlikely.⁶⁸ These permits typically include information relating to any impact drilling activities would have on the environment and detail means to minimize such impacts.⁶⁹ Obtaining an EIS is required by the National Environmental Policy Act in order to receive a drilling permit.⁷⁰ It is not uncommon, however, for oil companies to receive an exemption from conducting an impact study.⁷¹ Additionally, BP was not required to file the traditional detailed blowout plan.⁷² These plans provide the Department of

62. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 480–81, 514 (2008) (punitive damages were later reduced by the Supreme Court to \$507.5 million).

63. PAUL ANDREWS, BP: WHERE DID IT ALL GO WRONG? 10–11 (2010).

64. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 130–32 (2011), available at <http://www.oilspillcommission.gov/final-report> [hereinafter NAT’L COMM’N REPORT].

65. ANDREWS, *supra* note 63, at 10.

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* 42 U.S.C. § 4332(C) (2006).

70. *See id.*

71. *See* Juliet Eilperin, *U.S. Exempted BP’s Gulf of Mexico Drilling From Environmental Impact Study*, WASH. POST, May 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/04/AR2010050404118.html> (discussing BP’s lobbying efforts to increase EIS exemptions for oil drilling in order to avoid unnecessary paperwork and delays).

72. *See* ANDREWS, *supra* note 63, at 10.

the Interior information on how the drilling operator would handle the occurrence of a blow out and a “worst case scenario” situation.⁷³

On April 25, 2010, federal officials estimated the leak from the wellhead as being up to 1000 barrels of crude oil a day; yet only 1143 barrels of oily water had been cleaned up by this date.⁷⁴ Because BP and its scientists, however, were only just beginning to receive images of the wellhead, these estimates were only preliminary.⁷⁵ On April 29, 2010, Louisiana Governor Bobby Jindal declared a state of emergency in Louisiana, as oil was beginning to be reported within commercial fishing areas.⁷⁶ The next day BP increased their estimation of the discharging crude oil to 5000 barrels per day.⁷⁷ Others considered these early estimates as being far too low.⁷⁸ As of August 2, 2010, estimates put the spill at 53,000 barrels of crude oil a day.⁷⁹

In 2008, the National Oceanic and Atmospheric Administration estimated that commercial fisherman harvested more than one billion pounds of fish and shellfish from the Gulf of Mexico⁸⁰ and that the aqua-cultural industry was worth approximately \$900 million in the Gulf Coast region.⁸¹ Within days of reported oil in commercial fishing territories, many fishing areas were opened for harvest-

73. U.S. DEP'T OF THE INTERIOR, NTL No. 2010-N06, NATIONAL NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS LEASES, OUTER CONTINENTAL SHELF (OCS) (2010), <http://gomr.boemre.gov/homepg/regulate/regs/ntls/2010NTLS/10-n06.pdf>.

74. *Update 8: Unified Command Continues to Respond to Deepwater Horizon*, RESTORETHEGULF.GOV (April 25, 2010, 7:51 AM), <http://www.restorethegulf.gov/release/2010/04/25/update-8-unified-command-continues-respond-deepwater-horizon>.

75. *See U.S. Scientific Teams Refine Estimates of Oil Flow From BPs Well Prior to Capping*, RESTORETHEGULF.GOV, (Aug. 20, 2010, 1:18 PM), <http://www.restorethegulf.gov/release/2010/08102/us-scientific-teams-refine-estimates-oil-flow-bps-well-prior-capping> [hereinafter *Refined Estimates*] (stating that scientists revised their estimates to “53,000 barrels of oil per day were leaking from BPs well” before the well was capped).

76. Press Release, Governor of LA, Governor Jindal Issues State Declaration of Emergency for Oil Leak, (April 29, 2010), *available at* <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=2137>.

77. Press Release, BP, BP Steps Up Shoreline Protection Plans on US Gulf Coast (Apr. 30, 2010), *available at* <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7061565>.

78. *See* Richard Harris, *Gulf Spill may Far Exceed Official Estimates*, NAT'L PUB. RADIO, May 14, 2010, <http://www.npr.org/templates/story/story.php?storyID=126809525> (reporting that scientists examining video of the gushing wellhead estimated that the well could be spilling 70,000 barrels a day instead BP's estimates of 5000 barrels a day).

79. *Refined Estimates*, *supra* note 75.

80. Press Release, Nat'l Oceanic and Atmospheric Admin., NOAA Opens 339 Square-Mile Fishing Area in Gulf of Mexico (June 7, 2010), *available at* http://www.noaanews.noaa.gov/stories2010/20100607_closure.html.

81. *General Facts About the Gulf of Mexico*, GULFBASE.ORG, <http://www.gulfbase.org/faacts.php> (last visited Jan. 25, 2012).

ing with hopes of mitigating some of the loss to the crop.⁸² The waves of the Gulf Coast waters and daily weather conditions continued to spread the oil into previously unaffected areas.⁸³

The first closure of a commercial fishing area occurred on May 2, 2010, with almost 7000 square-miles being deemed unsafe for fishing activities.⁸⁴ While this number seems staggering, in comparison to future closures, it was the smallest closure up until November 15, 2010.⁸⁵ On May 5, 2010, the total breadth of the area classified as “affected” or “uncertain” if affected by the spill was projected as over 135 miles by 100 miles.⁸⁶ The areas classified as “affected” or “uncertain” shifted on a daily basis due to water and air currents.⁸⁷

On May 24, 2010, federal officials declared the commercial fishing industry in the Gulf Coast region in a state of disaster.⁸⁸ The next day, the total area of closed commercial fishing grounds reached over 54,000 square-miles.⁸⁹ At its peak, on June 2, 2010, this total rose to over 88,500 square miles of fishing grounds or roughly thirty-six percent of the federal waters within the Gulf Coast region.⁹⁰ Early estimates of the commercial fishing industry put the loss at approximately \$2.5 billion.⁹¹ At the time of the spill, the total amount of oil discharged on a daily basis, the total area affected by the spill, and the damage sustained to the commercial fishing industry, were highly contested.⁹²

82. Press Release, LA Dep’t of Wildlife and Fisheries, Special Fish Season Opens in Zone 2 and Portion of Zone 1 (Apr. 28, 2010), <http://www.wlf.louisiana.gov/news/30650> (stating that, in consideration of the oil spill, shrimping zones near the gulf shorelines would be opened for harvest in hopes that “this special season should provide fishermen with added economic opportunity”).

83. *Trajectory Forecast Mississippi Canyon 252*, U.S. COAST GUARD (May 5, 2010 7:51 A.M.), http://cgvi.uscg.mil/media/main.php?g2_itemId=851760 (forecasting the path the spilled oil would take).

84. *Deepwater Horizon/BP Oil Spill: Size and Percent Coverage of Fishing Area Closures Due to BP Oil Spill*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERV., <http://sero.nmfs.noaa.gov/ClosureSizeandPercentCoverage.htm> (last updated Apr. 29, 2011).

85. *Id.* (at the height of the oil spill, 88,500 square miles or 36.6% of the Gulf was closed to fishing. By November 15, 2010 closures had dissipated to 1041 square miles, roughly 0.4% of the Gulf).

86. *See* U.S. COAST GUARD, *supra* note 83.

87. *Id.*

88. Press Release, Dep’t of Commerce, Commerce Secretary Gary Locke Announces Fishery Failure Determination in Gulf of Mexico (May 24, 2010), <http://www.commerce.gov/news/press-releases/2010/05/24/commerce-secretary-gary-locke-announces-fishery-failure-determination>.

89. *Deepwater Horizon/BP Oil Spill*, *supra* note 84.

90. *Id.*

91. ANDREWS, *supra* note 63, at 23.

92. *See id.* at 12.

V. THE OIL POLLUTION ACT

In the wake of the *Exxon Valdez* disaster, Congress passed the Oil Pollution Act of 1990.⁹³ The Act makes all parties responsible for the discharge of oil, or the substantial threat of discharge of oil, into the navigable waters of the United States, or its shorelines, liable for the removal costs and damages associated with the discharge.⁹⁴ Damages include “injury to, or economic losses resulting from the destruction of, real or personal property,”⁹⁵ as well as “loss of profits or impairment of earning capacity due to the injury.”⁹⁶ Cases interpreting the statute have not found a right to punitive damages against the responsible party.⁹⁷ Additionally, damages sustained from offshore facilities are capped at the cost of removal plus seventy-five million dollars.⁹⁸ To the United States commercial fishing industry, valued at over \$900 million dollars per year,⁹⁹ this cap would prove to be little or no real assistance, especially since the seventy-five million dollars would be distributed not only for damages, but also for cleanup and recovery costs.¹⁰⁰

Furthermore, the Oil Pollution Act incorporated the Oil Spill Liability Trust Fund, which had been established four years earlier by Congress as a means to assist in the liability and damages process.¹⁰¹ The largest source of revenue for the fund comes from a five-cent tax placed on each barrel of oil produced or imported into the United States.¹⁰² Any person or organization believing they have suffered damage from oil pollution can bring a claim for compensation.¹⁰³ No claim presented to the fund will be approved, however, if the claimant is also seeking recovery in court.¹⁰⁴

93. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701–2762 (2006)).

94. 33 U.S.C. § 2702(a).

95. *Id.* § 2702(a)(2)(D).

96. *Id.* § 2702(a)(2)(E).

97. *See, e.g.,* *South Port Marine v. Gulf Oil Ltd.*, 234 F.3d 58, 68 (1st Cir. 2000) (stating that the Oil Pollution Act should not be construed liberally to include punitive damages for plaintiffs, given that the Act expressly states strict liability caps and there is limited legislative history to support such an argument).

98. 33 U.S.C. § 2704(a)(3).

99. GULFBASE.ORG, *supra* note 81.

100. Oil Pollution Act, 33 U.S.C. § 2702(a)–(b) (2006).

101. *Id.* §§ 2701(11), 2712.

102. *The Oil Spill Liability Trust Fund (OSLTF)*, UNITED STATES COAST GUARD, http://www.uscg.mil/npfc/About_NPFC/osltf.asp (last modified Jan. 23, 2012).

103. Oil Pollution Act, 33 U.S.C. §§ 2701(4), 2713 (2006) (claims shall first be presented to the responsible party and may then be presented to the fund).

104. *Id.* § 2713(b)(2).

VI. BP GULF COAST RELIEF FUND

“On June 16, 2010, after meeting with President Obama, BP executives agreed to create a \$20 billion [Gulf Coast Relief Fund]”¹⁰⁵ to be administered by an agent independent of both the federal government and BP.¹⁰⁶ In order to produce revenue for the Fund, BP has been forced to sell approximately ten billion dollars’ worth of assets, delay payment of dividends to its shareholders, and cut spending.¹⁰⁷ The total twenty billion dollars will be paid in installments to the fund over the next coming years.¹⁰⁸

As of January 24, 2012, the Fund has received 1,045,728 claims from which 570,152 claimants filed for compensation and the Fund has approved and paid 224,729 claimants.¹⁰⁹ Of those already paid, 393,781 were for lost earnings or profits and 373 were for damage to real or personal property.¹¹⁰ Roughly sixty-four percent of claims brought by an individual have been for \$5000 or less, while fifty percent of the claims brought by businesses have been for amounts between \$10,000 and \$25,000.¹¹¹

The Fund also includes an emergency advance claim process to assist individuals and businesses that financially cannot wait for the standard claim processing procedure.¹¹² By January 24, 2012, the Fund had paid out nearly \$2.6 billion to over 169,000 emergency claimants.¹¹³

Individual members of the commercial fishing industry have accounted for almost four percent of individual claims paid with 11,502 claims paid, and the commercial fishing industry as a whole has accounted for roughly seventeen per-

105. ANDREWS, *supra* note 63, at 13.

106. See Jackie Calmes & Helene Cooper, *BP Chief to Express Contrition in Remarks to Panel*, N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/17/us/politics/17obama.html?pagewanted=all> (stating that “Kenneth R. Feinberg, the lawyer and mediator who ran the fund for victims of the Sep. 11 attacks” would be administering the twenty billion dollar fund).

107. Press Release, British Petroleum, *BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions* (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

108. *Id.* (stating BP planned to make \$5 billion in payments to the fund in 2010 and contribute \$1.25 billion to the fund every business quarter until \$20 billion has been paid into the fund).

109. *Overall Program Statistics*, GULF COAST CLAIMS FACILITY (Jan. 24, 2012), http://www.gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf (updated daily).

110. *Id.*

111. *Id.*

112. *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (Feb. 8, 2011), http://www.gulfcoastclaimsfacility.com/proto_4 (stating that any individual or business may make an emergency claim if they have “incurred costs, as a result of the Spill for the removal of oil or to prevent, minimize, or mitigate oil pollution”).

113. *Overall Program Statistics*, *supra* note 109.

cent of the total amount paid out to various businesses with claims totaling \$603,688,043.20.¹¹⁴ The total number of aqua-cultural business claims¹¹⁵ paid to compensate for lost earnings or profits accounts for just eighteen percent of all claims brought for lost earnings or profits (totaling 20,532 claims brought) and twenty-three percent of the total amount paid out within the category—totaling \$836,291,339.¹¹⁶

VII. THE FINAL COMMISSION REPORT

In their report to the President, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling noted several industry and government-wide problems which, when combined, ultimately failed to regulate offshore drilling and protect against the ever present threat of a catastrophic oil spill.¹¹⁷

First, the Commission reported that political pressures from within Washington, D.C. to deregulate the oil industry and the oil industry's lobbying efforts focused on the Mineral Management Service, the governmental agency authorized with much of the regulating authority, contributed to relaxed permitting, regulating, and inspection standards.¹¹⁸ These relaxed standards increased the chance of a spill due to poor oversight of the oil industry and the drilling process.¹¹⁹ The Gulf Coast region was especially deregulated; in some locations to the point that the minimal regulation left in place was effectively useless.¹²⁰ Usually this occurred due to a compromise between the regulating agencies and the oil industry to open up offshore drilling in the Gulf in return for closing drilling options in other parts of the United States.¹²¹ According to the Final Report, the

114. *Id.* (calculated from the *Individual Lost Earning or Profits Claims Paid By Industry* and *Business Lost Earnings or Profit Claims Paid By Industry* tables).

115. *Id.* (including claims made by both the fishing industry and the seafood processing and distribution industry).

116. *Id.* (calculated from the *Business Lost Earning or Profit Claims Paid by Industry* table).

117. *See generally* NAT'L COMM'N REPORT, *supra* note 64 (describing inadequacies in government oversight and the need for industry cooperation to prevent future disasters).

118. *Id.* at 56.

119. *See id.* (stating that, in order to increase revenue from drilling, the oil and gas industry had moved "drilling further offshore and into much deeper waters[, which] came with a corresponding increase in the safety and environmental risks of such drilling. Those risks, however, were not matched by greater, more sophisticated regulatory oversight").

120. *See id.* at 56, 62 (explain how the government, in hopes of increasing domestic oil production, enacted a series of laws in the 1970s that exempted drilling leases located in certain areas in the Gulf from being subjected to environmental regulation required of oil leases located in other coastal waters of the United States).

121. *Id.* at 62.

Mineral Management Service was not sufficiently politically autonomous to withstand many of these pressures coming from Congress, the Executive Branch, and the oil industry.¹²²

Further complicating the Mineral Management Services' ability to properly oversee the industry were the conflicting roles played by the agency—on one hand regulating the industry while at the same time expanding the industry in order to increase revenues.¹²³

The lack of financial resources and trained personnel further crippled the agency's ability to inspect drilling facilities and sanction violators.¹²⁴ Inspectors were not properly certified to perform appropriate inspections, and the agency itself did not have the funds to properly maintain an educated staff with current knowledge on new, advancing energy technology used within the oil industry.¹²⁵ As the oil industry was allowed to expand without appropriate government oversight, inspectors became more and more overworked, and the quality of inspections each facility received diminished.¹²⁶ Many facilities were inspected by only one undereducated inspector even though agency officials knew that two person inspection teams were better able to “eliminate reliance on an [oil] operator representative for observations on safety tests, improve the thoroughness of the inspection, and reduce the ability of operators to successfully pressure an inspector not to issue [a citation].”¹²⁷ In the Gulf Coast alone, the number of inspectors totaled only fifty-five, while the number of off-shore facilities needing an inspection numbered over 3000, a ratio of one inspector for every fifty-four facilities.¹²⁸

The Commission cited several other industry and government-wide failures which lead to the resulting Gulf Coast spill, such as: a lack of full agency consideration of environmental concerns and their potential impacts,¹²⁹ failure to conduct proper testing on the quality of materials used in the drilling and cement-

122. *Id.* at 56–57.

123. *Id.* at 56.

124. *Id.* at 73–74 (stating that the Mineral Management Services (MMS) lacked resources necessary to effectively regulate the quickly expanding deepwater oil drilling industry. “Of particular concern, MMS was unable to maintain up-to-date technical drilling safety requirements, to keep up with industry’s rapidly evolving deepwater technology”).

125. *Id.* at 76–77 (quoting OUTER CONTINENTAL SHELF SAFETY OVERSIGHT BD., U.S. DEP’T OF THE INTERIOR, REPORT TO THE SECRETARY OF THE INTERIOR 11 (2010)).

126. *See id.* at 76–79.

127. *Id.* at 78.

128. *Id.*

129. *See id.* at 81 (describing the steps that the Mineral Management Services and Congress took to avoid environmental regulation related to deep sea oil drilling).

ing processes,¹³⁰ lack of investment and development in oil spill containment technology,¹³¹ and lack of industry-wide peer oversight.¹³²

The Report makes clear that it was not a single mistake or failure that ultimately caused the Gulf Coast spill, but rather numerous, diverse factors which all contributed to the resulting lack of regulation, the blowout of the well, the months-long continuous flow of oil, and the billions of dollars in damages sustained by the commercial fishing industry.¹³³ In order to further protect the commercial fishing industry and the healthy environment which it depends on, it appears that simply providing remedies for suffered losses and damages to the commercial fishing industry after a spill, as the Oil Pollution Act does,¹³⁴ will not solve the overall threat the offshore oil industry poses to the fishermen and the other businesses which rely upon them.¹³⁵ The commercial fishing industry not only requires the means of seeking redress once a spill occurs, but also the regulatory protection to decrease the chances of a damaging oil spill in the first place.

VIII. THE NATIONAL SAFE DRILLING ACT

The following is a model statute, comprised of both existing statutory language and proposed language. This model statute seeks to address several of the key concerns the National Commission pointed out as contributing to the Deepwater Horizon Oil Spill. Section 001 states a Congressional intent declaring the overall purpose of the National Safe Drill Act; it includes language encouraging a productive yet safe offshore drilling industry while at the same time seeking to protect the natural ecosystem and the commercial fishing industry. Section 002 creates the Independent Commission on Sustainable Offshore Oil Production. By creating an independent agency, the statute would help decrease the amount of political pressure felt by the Commission when carrying out its assigned tasks. Additionally, the Commission must strive to recommend policies that consider the effects upon the commercial fishing industry.

Section 003 lays out requirements which individuals must meet before they can be placed onto the Commission, such as coming from a diverse political party background and containing no financial ties to the oil industry. Section 003

130. *Id.* at 123.

131. *Id.* at 132.

132. *Id.* at 122.

133. *See id.*

134. Oil Pollution Act, 33 U.S.C. § 2702(a) (2006).

135. *See generally* NAT'L COMM'N REPORT, *supra* note 64 (detailing the how inadequacies in various government regulation, geared toward regulating off shore oil drilling, have failed to effectively regulate deep sea oil drilling and has also failed to provide protective environmental stop-gaps).

also restricts the reasons such Commissioners may be removed by the President—only for a showing of “good cause”—as this will help further insulate the Commission from political influence. Finally, vacancies on the Commission are staggered over the course of six years in order to make it more difficult for each new executive administration to completely influence the Commission’s actions and instead allow Commissioners to roll over from one administration to another.

Section 004 requires any Commission regulation or action to address a variety of concerns including both the health of the natural ecosystem and the commercial fishing industry. This stipulation ensures commercial fishing and environmental concerns are no longer able to be brushed aside during the regulatory process. Any new regulations must also encourage the use of the best available technology to ensure continuing safety and efficiency. Further, obtaining a waiver of a new Environmental Impact Statement requirement is much more difficult. Finally, the Commission is required to set up independent inspection teams consisting of six individuals—two of whom must come from the offshore oil industry—who must undergo no less than fifty hours of annual training on advances in offshore drilling technology and safety. These new inspection teams, as well as the continuing education, are paid for through a ten percent of one cent tax placed upon each new barrel of oil extracted. Hopefully these new changes will create a new level of protection for the commercial fishing industry while offering the offshore oil industry the flexibility and support to continue producing our nation’s much needed oil supply.

Section 001: Purposes

“The purposes of this chapter are: To declare a national¹³⁶ offshore oil and energy “policy which will encourage productive and¹³⁷ safe use of offshore oil reserves as an energy source; to help promote cooperation and open communication between the United States Federal Government and the oil industry; to encourage the oil industry to play a bigger role in safe oil production when conducting offshore oil activities; “to promote efforts which will prevent or eliminate damage to the environment and biosphere;¹³⁸ to minimize the negative effects of oil-based energy policies upon industries and businesses, including, but not limited to, the commercial fishing industry, that depend upon the water in which any oil activities are conducted in; “to enrich the understanding of the ecological systems and natural¹³⁹ water “resources important to the Nation; and to

136. 42 U.S.C. § 4321 (2006).

137. *Id.*

138. *Id.*

139. *Id.*

establish¹⁴⁰ an Independent Commission on Sustainable Offshore Oil Production.

Section 002: Creation of the Independent Commission on Sustainable Offshore Oil Production Commission

(a) “There is created in the Executive Office of the President¹⁴¹ an Independent Commission on Sustainable Offshore Oil Production (hereinafter referred to as the “Commission”).

(b) “Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to¹⁴² regulate and perform superior oversight of the offshore oil energy industry and oil energy production, as well as, address the impacts of the industry upon wildlife, natural resources, and industries which depend upon a healthy, natural environment; “to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote¹⁴³ safe and efficient offshore oil energy policies which protect the oil industry, other industries, businesses, or groups which rely on natural resources directly impacted by the oil energy policies and industry, including, but not limited to the commercial fishing industry, and overall environmental integrity.

Section 003: Commissioners

(a) Number of commissioners; appointment

The Commission “shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.”¹⁴⁴

(b) Upon enactment of this Act, each Commissioner shall serve a staggered term. The initial Commissioners, who shall make up the first Commission upon enactment of this Act, shall serve varied term limits, between one and six years, with each Commissioner serving a different term length in order to create lasting staggered terms.

(c) No more than a simple majority of the Commissioners shall be from the same political party.

(d) All Commissioners shall fulfill their term and shall be subject to removal only by the President upon a showing of good cause.

(e) Qualifications

140. *Id.*
141. 42 U.S.C. § 4342 (2006).
142. *Id.*
143. *Id.*
144. 47 U.S.C. § 154(a) (2006).

(1) “Each member of the Commission shall be a citizen of the United States.

(2)(A) No member of the Commission or person employed by the Commission shall—

(i) be financially interested in any company or other entity engaged¹⁴⁵ in the construction, leasing, drilling, or other activity, of any off-shore energy facility or vessel “which is subject to regulation by the Commission;”¹⁴⁶

(ii) be financially interested in any company or other entity which owns or operates any facility or vessel subject to regulation by the Commission,

(iii) “be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds, or other securities of any such company or other entity; or

(iv) be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this chapter; except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity which has a significant interest in¹⁴⁷ oil “manufacturing, or sales activities which are subject to regulation by the Commission.”¹⁴⁸

(B)(i) “The Commission shall have authority to waive, from time to time, the application of the prohibitions established in subparagraph (A) to persons employed by the Commission if the Commission determines that the financial interests of a person which are involved in a particular case are minimal, except that such waiver authority shall be subject to the provisions of”¹⁴⁹ any other applicable provision of this Chapter. “The waiver authority established in this subparagraph shall not apply with respect to members of the Commission.”¹⁵⁰

(ii) “In any case in which the Commission exercises the waiver authority established in this subparagraph, the Commission shall publish notice of such action in the Federal Register and shall furnish notice of such action to the appropriate committees of each House of the Congress. Each such notice shall include information regarding the identity of the person receiving

145. *Id.* § 154(b)(1)–(2) (A)(i).

146. *Id.* § 154(b)(2)(A)(i).

147. *Id.* § 154(b)(2)(A)(iii)–(iv).

148. *Id.* § 154(b)(2)(A)(iv).

149. 47 U.S.C. § 154(b)(2)(B)(i) (2006).

150. *Id.*

the waiver, the position held by such person, and the nature of the financial interests which are the subject of the waiver.”¹⁵¹

(f) Terms of office; vacancies

“Commissioners [sic] shall be appointed for terms of [six] years and until their successors are appointed and have been confirmed and taken the oath of office, . . . except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.”¹⁵²

(g)(1) “The Commission shall have authority, subject to the provisions of the civil-service laws and chapter 51 and subchapter III of chapter 53 of title 5, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions.”¹⁵³

(2) “Without regard to the civil-service laws, but subject to chapter 51 and subchapter III of chapter 53 of Title 5, each commissioner may appoint three professional assistants and a secretary, each of whom shall perform such duties as such commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to chapter 51 and subchapter III of chapter 53 of title 5, an[] administrative assistant who shall perform such duties as the chairman shall direct.”¹⁵⁴

Section 004: The Commission Authorities

“The Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the”¹⁵⁵ Independent Commission on Sustainable Offshore Oil Production “shall be interpreted and administered in accordance with the policies set forth in this chapter.”¹⁵⁶ Agencies of the Federal Government interpreting Commission policies shall—

(a) “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment”¹⁵⁷ and any industry or business, including but not limited to any industry or business associated with commercial fishing;

151. *Id.* § 154(b)(2)(B)(ii).

152. *Id.* § 154(c).

153. *Id.* § 154(f)(1) (citing 5 U.S.C. §§ 5101–5115, 5301–5392 (2006), outlining the qualifications for firing civil servants and determining pay scales).

154. 47 U.S.C. § 154(f)(2) (2006) (citing 5 U.S.C. §§ 5101–5115, 5301–5392 (2006)).

155. National Environmental Policy Act, 42 U.S.C. § 4332 (2006).

156. *Id.*

157. *Id.* § 4332(A).

(b) “identify and develop methods and procedures, in consultation with the Council on Environmental Quality”¹⁵⁸ and the National Marine Fisheries Service, “which will insure that presently unquantified environmental amenities and values”¹⁵⁹ shall “be given appropriate consideration in decisionmaking [sic] along with economic and technical considerations,”¹⁶⁰

(c) “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”¹⁶¹ or a navigable water, “a detailed statement by the responsible official on—

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,”¹⁶²

(4) the effects of the action upon any local population of fish, mammal, or other species which uses the area and may be affected by the proposed action,

(5) “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented,”¹⁶³ and

(6) any other potential adverse effects which the proposed action will have on water-dependent industries or businesses, including but not limited to, any industry directly involved with commercial fishing.

“Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental,”¹⁶⁴ fishing, or offshore oil energy “standards, shall be made available to the President, the Council on Environmental Quality,”¹⁶⁵ the National Marine Fisheries Service “and to the public . . . and shall accompany the proposal through the existing agency review processes;”¹⁶⁶

(d) Any detailed statement required under subparagraph (c), may not be waived unless by vote and approval by at least four of the Commissioners and

158. *Id.* § 4332(B).

159. *Id.*

160. *Id.*

161. National Environmental Policy Act, 42 U.S.C. § 4332(C) (2006).

162. *Id.* § 4332(C)(i)–(iii).

163. *Id.* § 4332(C)(v).

164. *Id.* § 4332(C).

165. *Id.*

166. *Id.*

upon a finding by the Commission that such a statement would be ineffective or unnecessary due to prior findings or reports. The Commission may not delegate this waiving authority.

(e)(1) “The Commission, for purposes of monitoring violations of any provision of this chapter (and of any regulation prescribed by the Commission under this chapter) relating to the¹⁶⁷ offshore oil industry, shall—

(2) Inspect each licensed facility or vessel on an annual basis, unless such vessel or facility is deemed to be in violation of this chapter, at which it shall be inspected at least twice a calendar year;

(3) Annually select two-thirds of all facilities or vessels subject to regulation under this Act to be subject to an unannounced inspection, each facility or vessel being subject to no less than one unannounced inspection every two years;

(A) Each Team shall—

(i) Consist of six individuals comprised of—

(I) Two full-time inspectors,

(II) Two part-time inspectors, and

(III) Two peer evaluators; each peer evaluator shall inspect three facilities or vessels in any given calendar year and may not act as a member of a Team for two consecutive years at a time;

(ii) undergo no less than fifty hours of annual training or education; such training shall consist of, but is not limited to, updates in industry safety, management, new environmental practices, and other subjects deemed appropriate by the Commission to provide inspectors with knowledge of current and advancing offshore oil industry technologies and practices.

(iii) A tax of one cent per barrel shall be placed upon each barrel of crude oil which reaches the surface of either the water or terrain, depending on where such drilling operation is occurring; one-tenth of such one percent shall be used to provide financial resources to the Commission to be used to provide for the on-going education of Commission and Team members on advancing oil energy technologies, including but not limited to, safer drilling techniques, industry equipment, and environment protection in drilling locations.

(iv) Nothing in this chapter shall be interpreted to interfere or preempt any part of, or claim brought under, the Oil Pollution Act or any other statutory or common law cause of action.

167. 47 U.S.C. § 154(f)(4)(B)(i) (2006).

(4) License teams of inspectors (hereinafter referred to as the “Team”), who shall carry out the facility or vessel inspections required by this Act;

(5) Oversee the exploration, leasing, licensing, construction, maintenance, and drilling of all future offshore drilling facilities or vessels;

(6) Oversee the technological modernization of all previous exploration, leasing, licensing, construction, maintenance, or drilling activities underway at the time of enactment of this Act;

(7) Promulgate regulations and rules using the best available technology to encourage safe, efficient, and cost-effective technologies and procedures which protect human and wildlife health and welfare; such rules and regulations shall take into consideration information from oil industry representatives, environmental organizations, and representatives from any interested industry or business, including, but not limited to any industry or business directly involved in the commercial fishing industry, which may be affected by any action taken by the Commission.

(f) Duties and powers

“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this”¹⁶⁸ Act, “as may be necessary in the execution of its functions.”¹⁶⁹

(g) Annual reports to Congress

“The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain—

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of”¹⁷⁰ any industry involved in the exploration, leasing, licensing, construction, maintaining or drilling for offshore oil;

(2) ”such information and data concerning the functioning of the Commission as will be of value to Congress in appraising the amount and character of the work and accomplishments of the Commission and the adequacy of its staff and equipment;

(3) an itemized statement of all funds expended during the preceding year by the Commission, of the sources of such funds, and of the authority in this chapter or elsewhere under which such expenditures were made;”¹⁷¹

168. Federal Telecommunications Act, 47 U.S.C. § 154(i) (2006).

169. *Id.*

170. *Id.* § 154(k)(1).

171. *Id.* § 154(k)(2)–(3).

(4) any reported impacts, which any industry, facility, or vessel regulated under this Act shall have had upon a native or artificial species of fish, mammal, or wildlife population;

(5) any significant reported impacts from oil or other pollution, which any industry, facility, or vessel regulated under this Act released, any affects from the release, and the nature of such affects, upon any industry or businesses, including, but not limited to any business involved in or effected by commercial fishing; and

(6) "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Office of Management and Budget."¹⁷²

IX. CONCLUSION

Even when the dangerous effects of oil on fish, shrimp, and mollusks are known, and after numerous past oil spills offered Congress the chance to further protect the industry, commercial fishermen and their livelihoods are still highly vulnerable to the ever present risk of a catastrophic oil spill. Hopefully, the model statute—outlined in this Note—remedies a few of the gaping holes within the current offshore oil regulation that allowed events such as the Deepwater Horizon oil spill to occur. With further oversight by the federal government, more cooperation by the oil industry, and full consideration of the needs of the commercial fishing industry—and the healthy ecosystem on which it depends—such catastrophic oil spills will become an occurrence of the past and America can have both safe and productive oil and commercial fishing industries.

172. *Id.* § 154(k)(4).