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By Stefan Jovicic

News

Settlement in BP Deepwater Horizon oil spill

After 5 years of litigation over the 2010 Deepwater Horizon oil spill, the federal government and the Gulf states have agreed to a record-setting \$18.7 billion settlement with BP.¹ A judge must approve the settlement before it is final. If it is approved, the settlement “will be the largest environmental settlement” in U.S. history.²

The settlement includes:

- “A \$5.5 billion Clean Water Act penalty, 80% of which will go to restoration efforts in the affected states” pursuant to the RESTORE Act.³
- “\$8.1 billion in natural resource damages,” which will all go towards “gulf restoration and improvement projects as designated by the federal and state natural resource damage trustees.”⁴
- \$700 million to respond to “natural resource damages unknown at the time of the agreement.”⁵
- “\$5.9 billion to settle claims by state and local governments for economic damages they have suffered as a result of the spill.”⁶
- “\$600 million for other claims, including claims for reimbursement of natural resource damage assessment costs and other unreimbursed federal expenses” due to Deepwater Horizon activity.⁷

The settlement does not include:

- “At least \$8.5 billion in 2012 class action settlements of economic, medical and property damage claims with individual plaintiffs and businesses.”⁸
- “Claims from individuals and businesses that opted out of the 2012 settlement.”⁹
- “Private securities litigation pending in federal court in Houston.”¹⁰

¹ Department of Justice, *Fact Sheet on Agreement in Principle with BP*. Available at: <http://www.justice.gov/opa/file/625141/download>

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Kristen Hays, *Factbox: BP's \$18.7 billion oil spill deal by the numbers*, Reuters (July 2, 2015). Available at: <http://www.reuters.com/article/2015/07/02/us-bp-gulfmexico-settlement-numbers-fact-idUSKCN0PC22K20150702?mod=related&channelName=domesticNews>

⁹ *Id.*

The payments are to be made over a period of 15 to 18 years.¹¹ A large part of the payments could be tax-deductible for BP.¹² Of the total 18.7 billion, Louisiana will receive over \$6.8 billion.¹³ Mississippi will receive around \$2.2 billion, and Alabama will receive about \$2.3 billion.¹⁴ Some experts believe there would have been harsher penalties from the judge had there not been a settlement.¹⁵

Levee authority will continue appeal of wetlands damage lawsuit against oil and gas companies

The Southeast Louisiana Flood Protection Authority-East has voted 5-4 to continue its appeal of a federal court's dismissal of a lawsuit against more than 80 energy companies for damage to wetlands. In February 2015, the U.S. District Court for the Eastern District of Louisiana dismissed the levee authority's lawsuit for failure to state a claim under Rule 12(b)(6) because the authority did not prove its claims for negligence, strict liability, natural servitude of drain, or nuisance. Moreover, the Court found that the authority was not an intended third-party beneficiary of a government contract, and thus the authority did not prove its breach of contract claim either.

The authority argued that the dredging of canals and other actions by the energy companies in the "Buffer Zone" led to coastal erosion, which made south Louisiana more vulnerable to flooding and severe weather. The plaintiffs sought injunctive relief and damages.

The board members who voted against continuing the appeal have warned that continuing the appeal could result in an increased cost of litigation for the authority.

Sources: Mark Schleifstein, *Appeal of wetlands damage suit against energy companies will continue*, NOLA.com | The Times-Picayune (March 02, 2015). Available at: http://www.nola.com/environment/index.ssf/2015/03/continue_the_appeal_of_wetland.html#incart_river

Mark Schleifstein, *Federal judge dismisses levee authority's wetlands damage lawsuit against oil, gas companies*, NOLA.com | The Times-Picayune (February 13, 2015).

¹⁰ *Id.*

¹¹ *Id.*

¹² Zoe Schlanger, *How BP's \$18.7 Billion Gulf Spill Fine Could Be One Giant Tax Deduction*, Newsweek (July 2, 2015). Available at: <http://www.newsweek.com/how-bps-187-billion-gulf-spill-fine-could-be-one-giant-tax-deduction-349637>

¹³ Sophie Tatum, *Governors, DOJ cheer \$18 billion BP oil spill settlement*, CNN (July 2, 2015). Available at: <http://www.cnn.com/2015/07/02/politics/historic-settlement-reached-for-bp-oil-spill/>

¹⁴ *Id.*

¹⁵ Juan Carlos Rodriguez, *Without A Deal, BP Would Have Faced Harsher Penalties*, Law360 (July 2, 2015). Available at: <http://www.law360.com/articles/675372/without-a-deal-bp-would-have-faced-harsher-penalties>

Available at:

http://www.nola.com/environment/index.ssf/2015/02/federal_judge_dismisses_east_b.html

Louisiana could earn \$1.6 billion by selling carbon credits

According to a study done by Tierra Resources, Entergy, and the Climate Trust, Louisiana could earn anywhere from \$550 million to \$1.6 billion for coastal restoration in the next 50 years by selling carbon credits. Businesses and private landowners in Louisiana could sell the credits by setting up their own restoration projects, or by participating in publicly funded projects. The credits could be sold to businesses in California, where the nation's first mandatory cap and trade program is in place, or to businesses and individuals in the voluntary market. The money made from the credit sales would be available to go towards Louisiana's \$50 billion, 50-year coastal Master Plan.

Source: Mark Schleifstein, *Carbon credits could generate \$1.6 billion for Louisiana coastal restoration, study says*, NOLA.com | The Times-Picayune (March 5, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/03/carbon_credits_could_generate.html#incart_river

New study: ocean acidification will affect Louisiana's highly vulnerable oysters sooner than previously believed

According to a study in a peer-reviewed scientific journal, the oyster fisheries of Louisiana are "highly vulnerable to ocean acidification." Increased acidification is a problem because it can "compromise oysters' ability to create a hard shell." It may also "cause some organisms to die or reproduce less successfully." Ocean acidification is caused by increases in carbon dioxide. The new study said that ocean acidification would affect Louisiana's oyster crop sooner than the year 2100, which is what previous models suggested. Previous models did not consider algae blooms and local river runoffs that will add to the Gulf's acidification over time. The study also said that Louisiana oyster farmers' dependence on one species of oyster, rather than on multiple species, is risky. Looking at alternative oyster strains and species is one way that Louisiana oyster farmers could help "future-proof their communities against ocean acidification."

Source: Benjamin Alexander-Bloch, *Louisiana oysters are highly vulnerable to ocean acidification, new study says*, NOLA.com | The Times-Picayune (February 23, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/02/louisiana_oyster_fisheries_are.html#incart_river

Voluntary strategies alone are not enough to reduce nitrogen runoff flowing into the Gulf

According to a study in a peer-reviewed scientific journal, the voluntary plans to reduce the amount of nitrogen runoff flowing into the Gulf of Mexico's Dead Zone do not remove enough nutrients. The study showed that voluntary practices would reduce nitrogen pollution by about 30 percent. The EPA's goal is to reduce nitrogen pollution by 45 percent. The EPA's goal would shrink the Dead Zone to less than 1,930 square miles. The dead zone was 5,052 square miles in August 2014.

The study also found (and suggested) that combining the voluntary strategies with additional plans and techniques could help reduce the nitrogen runoff by 45 percent. The additional strategies include "restoring wetlands in marginal corn and soybean fields and within river and stream paths, as well as reconnecting rivers with their floodplains."

Source: Mark Schleifstein, *Voluntary plan to reduce fertilizers not enough to shrink Gulf's 'Dead Zone,' new study says*, NOLA.com | The Times-Picayune (February 3, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/02/voluntary_fertilizer_reduction.html

Governor Jindal signs bill for enforcement of turtle-excluder regulations

Governor Bobby Jindal has signed a bill that allows Louisiana Department of Wildlife and Fisheries agents to enforce Federal turtle-excluder device (TED) provisions. The bill repeals a 1987 Louisiana state law that banned DWF agents from enforcing TED provisions. The repeal will take effect on August 1st. The Louisiana House approved the repeal legislation in a 100-0 vote last month. The Louisiana Shrimp Task Force supports the repeal and thinks it will help with retailers and consumers who have boycotted Louisiana shrimp. In response to the repeal, the Monterey Bay Aquarium's Seafood Watch program has taken Louisiana shrimp off its list of seafood to "avoid." In 2013, the Seafood Watch program, which is influential amongst some environmentally conscious retailers and consumers, had put Louisiana shrimp on the "avoid" list because of the law banning enforcement of TED provisions.

Sources: Benjamin Alexander-Bloch, *Bobby Jindal signs bill allowing enforcement of turtle-excluder provisions*, NOLA.com | The Times-Picayune (July 1, 2015). Available at:

http://www.nola.com/environment/index.ssf/2015/07/bobby_jindal_signs_bill_allowing_enforcement_of_turtle_excluder_provisions.html#incart_river

Benjamin Alexander-Bloch, *Seafood Watch removes Louisiana shrimp from 'avoid' list*, NOLA.com | The Times-Picayune (July 2, 2015). Available at:

http://www.nola.com/environment/index.ssf/2015/07/seafood_watch_removes_louisian.html#incart_river

Texas Brine tries to shift some of the fault for the Bayou Corne Sinkhole in lawsuit against oil company

Texas Brine, the company that is being sued for creating the Bayou Corne sinkhole, is now suing Occidental Petroleum, an oil company that operated nearby, for contributing to the creation of the sinkhole. Texas Brine wants \$100 million from Occidental Petroleum to cover the damages that Texas Brine has already paid or will pay in the future. Texas Brine alleges that Occidental Petroleum was negligent because it “should have known” that “there was a high likelihood that the improper drilling and operation of an oil and gas well targeting the Big Hum oil reservoir would damage adjacent caverns in the Salt Dome.” Texas Brine has been litigating with the state of Louisiana and approximately 350 Bayou Corne residents since the sinkhole first appeared in 2012. In August 2014, a judge approved a \$48 million settlement with 269 of the residents.

Sources: Emily Lane, *Bayou Corne blame game: Texas Brine sues oil company for contributing to sinkhole damage*, NOLA.com | The Times-Picayune (July 9, 2015). Available at: http://www.nola.com/crime/baton-rouge/index.ssf/2015/07/bayou_corne_sinkhole_lawsuit.html

Decided Cases

EPA probably does not have to make stricter rules on nutrient pollution in Mississippi River

The U.S. Fifth Circuit Court of Appeals vacated and remanded a ruling that would have required the Environmental Protection Agency to determine whether it was necessary for it to issue more stringent rules to limit the flow of nutrient pollutants into the Mississippi River to reduce the size of the Gulf of Mexico’s Dead Zone. The Fifth Circuit ordered the U.S. District Court’s new review of the case to be “extremely limited” and “highly deferential” to the EPA’s reasons for not conducting a “necessity determination.” This order means it is very likely the EPA will not have to conduct a necessity determination, and thus it will not have to issue more stringent rules to stop nutrient pollution.

The suit was brought by a number of environmental groups (led by the Gulf Restoration Network) who were trying to get the EPA to make rules that would get states to require farmers and businesses to decrease the amount of nutrient pollutants flowing into the Mississippi River. In its ruling, the Fifth Circuit applied the “arbitrary and capricious” standard set out in the Administrative Procedure Act, a standard that is highly deferential to agencies when the agency refuses to initiate rulemaking. As a result, the U.S. District Court’s review is limited to determining whether the EPA has provided some reasonable explanation (grounded in statute) as to why it cannot or will not exercise its discretion to make a necessity

determination. If the agency has provided such an explanation (and the EPA probably has), the court must respect the agency's decision. The EPA believes that rulemaking at the state level would be the more effective and practical way of addressing issues of nutrient pollution rather than rulemaking at the federal level.

Sources: *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015)

Mark Schleifstein, *EPA likely won't have to adopt more stringent restrictions on nutrients in Mississippi River, appeals court rules*, NOLA.com | The Times-Picayune (April 7, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/04/epa_likely_wont_have_to_a_dopt.html

Federal court finds that MR-GO resulted in a Fifth Amendment "taking"

The United States Court of Federal Claims found that the Army Corps of Engineers' construction, expansion, operation, and failure to maintain the Mississippi River Gulf Outlet effected a "temporary taking" by increasing storm surge and flooding personal properties during Katrina and subsequent hurricanes. The plaintiffs in the case were St. Bernard Parish and property owners from St. Bernard Parish. It is unclear how much compensation the plaintiffs will receive. The Department of Justice is reviewing the ruling, and government officials have said they need 90 days to decide whether they will appeal. The Federal Claims Judge who issued the opinion, Susan Braden, has given the government until August 10, 2015, to inform the court of its decision. The Judge has urged the Department of Justice not to appeal.

Relying on the Supreme Court's 2012 decision in the *Arkansas Game & Fish* case, the claims court required the plaintiffs to prove: "(1) a protectable property interest under state law; (2) the character of the property and the owners' 'reasonable-investment backed expectations;' (3) foreseeability; (4) causation; and (5) substantiality." The court found that the plaintiffs proved all 5 points.

Sources: *St. Bernard Parish Gov't v. United States*, 2015 U.S. Claims LEXIS 526 (Fed. Cl. May 1, 2015)

Mark Schleifstein, *Corps' MR-GO 'took' value of properties in St. Bernard, Lower 9th Ward*, NOLA.com | The Times-Picayune (May 1, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/05/federal_judge_finds_army_corps.html#Ruling

Mark Schleifstein, *Corps of Engineers, feds have until Aug. 10 to decide on MR-GO takings appeal*, NOLA.com | The Times-Picayune (May 14, 2015).

Available at:

http://www.nola.com/environment/index.ssf/2015/05/us_given_until_aug_10_to_a_nnou.html

Pending Case: Oceana, Inc. v. Pritzker et al

Oceana has sued the Secretary of Commerce (Penny Pritzker), NOAA, and the NMFS (hereafter “agencies”). The suit was filed in the US District Court for the District of Columbia, and the docket number is 1:15cv555. Oceana alleges that the agencies violated the Administrative Procedure Act (APA), the Endangered Species Act, and NMFS regulations by issuing and relying on a “substantively and procedurally flawed biological opinion that fails to protect threatened and endangered sea turtles.”¹⁶ The agencies’ actions and general policy regarding sea turtles—which seem to allow shrimp fisheries to “incidentally take” a large number of turtles every year—are based on this allegedly flawed opinion. Oceana wants the judge to declare this opinion to be “arbitrary and capricious,” and thus in violation of the APA and the Endangered Species Act.¹⁷ Oceana also wants the opinion vacated, and they want NMFS to “reinitiate consultation” for a new biological opinion.¹⁸

The Specific Counts

First count: NMFS regulations require that the “Incidental Take Statement” in the biological opinion “set enforceable take limits that can trigger reinitiation of the formal consultation process” if these limits are exceeded.¹⁹ The biological opinion in question did not set “measurable and enforceable take limits.”²⁰ Instead, the opinion proposed to “monitor and limit takes by observing effort and compliance levels” from 2009 and by using a “hypothetical 88% TED effectiveness level as surrogates for actual take estimates.”²¹ The first count alleges that the agencies’ actions were arbitrary and capricious because the agencies did not give any sort of reason as to why they decided to use the 2009 level and the hypothetical 88% TED effectiveness level as surrogates.²² Moreover, the agencies did not explain how these surrogates serve “as an actual measure of sea turtle takes.”²³

Second count: The Endangered Species Act requires that “the terms and conditions of a biological opinion contain reporting requirements.”²⁴ NMFS regulations also require that the agency “monitor the impacts of the authorized incidental takes by reporting on the progress of the action and its impact on the

¹⁶ *Oceana, Inc. v. Pritzker et al*, No. 1:15cv555, US District Court for the District of Columbia, 2015, at 4

¹⁷ *Id.* at 42-43

¹⁸ *Id.*

¹⁹ *Id.* at 30.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 30-31.

²³ *Id.*

²⁴ *Id.* at 31.

species.”²⁵ If this monitoring shows that the number of incidental takes is greater than the number of incidental takes authorized, then a consultation must be reinitiated to “develop a new biological opinion.”²⁶ The second count alleges that the biological opinion in question did not require sufficient monitoring, and, in some cases, the opinion did not require any monitoring.²⁷ Without sufficient monitoring, the agency cannot know whether the limit has been exceeded. This alleged failure to require monitoring and reporting is arbitrary and capricious.

Third Count: The Biological opinion reached a conclusion that sea turtles are not put in jeopardy by the agencies’ actions and general policy. The third count alleges that the analysis done for this no-jeopardy conclusion was flawed, irrational, and arbitrary in a number of ways.²⁸ The 2008 population viability analysis (PVA) model that has been used in past opinions was not used in this opinion, and no explanation is given why the agencies departed from this model. The jeopardy analysis is also restricted to “the next several decades” and not to the next 100 years, which is what the “internationally accepted scientific guidance” suggests.²⁹ The jeopardy analysis also fails to adequately consider “takes from recreational and international fisheries,” fails to adequately estimate “the impact of the Deepwater Horizon spill,” fails to consider “the effects of climate change,” and fails to “analyze the extent and impact of takes on different age classes and recovery units.”³⁰

Fourth Count: The fourth count alleges that the abovementioned jeopardy analysis violates the APA and the Endangered Species Act because the analysis fails to adequately consider “aggregate and cumulative effects of agency actions.”³¹ The Endangered Species Act and the Consultation Handbook issued by NMFS require consideration of the aggregate effects of takes of sea turtles, “together with all other federally authorized fisheries, international fisheries, and the impact of all other activities.”³²

Fifth Count: The biological opinion relies on a definition of the terms “jeopardize the continued existence of” that has been judged to be unlawful in a previous case.³³ Alternatively, the biological opinion relies on the terms “jeopardize the continued existence of” without defining them.³⁴ Both scenarios render the agency decision arbitrary and capricious.³⁵

Sixth Count: The biological opinion fails to adequately “address the threat to sea turtle recovery posed by the shrimp fisheries.”³⁶ The opinion “fails to apply the

²⁵ *Id.* at 31

²⁶ *Id.* at 31-32.

²⁷ *Id.* at 32.

²⁸ *Id.* at 33.

²⁹ *Id.* at 34.

³⁰ *Id.* at 34-35.

³¹ *Id.* at 35.

³² *Id.* at 36.

³³ *Id.* at 37.

³⁴ *Id.* at 38.

³⁵ *Id.*

³⁶ *Id.* at 39.

appropriate standard to determine whether the shrimp fisheries jeopardize recovery.”³⁷ The appropriate standard considers whether the likelihood of recovery will be affected by the action.³⁸ The biological opinion simply says that the sea turtle population’s “potential for recovery remains in spite of the agency action.”³⁹ This standard is alleged to violate the APA and the Endangered Species Act.⁴⁰

Seventh Count: The law requires NMFS to evaluate the “effects of the [agency] action and cumulative effects on the listed species.”⁴¹ The “effects of the action” include the “direct and indirect effects of an action on the species that will be added to the *environmental baseline*.”⁴² This environmental baseline is not properly analyzed in the biological opinion. The opinion failed to describe the “impacts that fishing gear and the Deepwater Horizon oil spill have on habitats used by sea turtles.”⁴³ The opinion also failed to discuss any “new information about the impacts of the Atlantic pelagic longline fishery to the environmental baseline.”⁴⁴ It also failed to consider the “substantial impacts of climate change, high seas, and foreign activities.”⁴⁵ And all of these things should be considered when evaluating the environmental baseline.⁴⁶

Eighth Count: The Endangered Species Act requires consultations for the biological opinion to be based on “the best scientific and commercial data available.”⁴⁷ The eighth count alleges that the agencies, in their jeopardy analysis, failed to adequately consider the best available science on the “potential effects of climate change” and on the “substantial adverse effects of the Deepwater Horizon oil spill on local sea turtle populations.”⁴⁸

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 39-40.

⁴⁰ *Id.* at 40.

⁴¹ *Id.* at 40.

⁴² *Id.* [italics mine]

⁴³ *Id.* at 41.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 40-41.

⁴⁷ *Id.* at 42.

⁴⁸ *Id.*