

**BET THE PORT LITIGATION: *CLAIMS AND DAMAGES
CONSIDERATIONS FOR PORTS IN THE WAKE OF AN
ENVIRONMENTAL “CATASTROPHE”***



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SURFACE WATER AND SEDIMENT CONTAMINATION CAN RUIN YOUR WHOLE DAY

- Basic Environmental Law Framework
 - Remove and Remediate
 - Natural Resource Damages and Restoration
- Property Damages
- What's left? A lot!
- Expansive damages under OPA and the implications of the Gulf Spill/DWH
- Implications to other federal laws
- Common law, equity, and other interesting concepts



IMPLICATIONS OF AN OIL SPILL, CONTAMINATED SEDIMENTS, IMPAIRED WATERWAYS

- Hits the Port's central function and purpose
- Remediation Costs can be enormous
- Natural Resource Damages can be worse
- Ports may be Defendants AND Plaintiffs
 - Increased costs of maintenance dredging
 - Impacts to sediment disposal and CDFs
 - Increased costs of public services
 - Reduced traffic, fees, wharfage and dockage
 - Lost profits and business



RESPONSE COSTS/REMOVAL & REMEDIAL COSTS

- Strict Liability for Remediation
- Environmental Claims most frequently arise under federal/state statutes:
 - Non-Oil: CERCLA, RCRA
 - Clean Water Act and State law equivalents
 - State Superfund and equivalents
- Strict Liability Applies
- Joint & Several Liability Often Applies
 - Impacts of BNSF
 - Divisibility vs. Allocation
- Polluter Pays (loosely speaking)

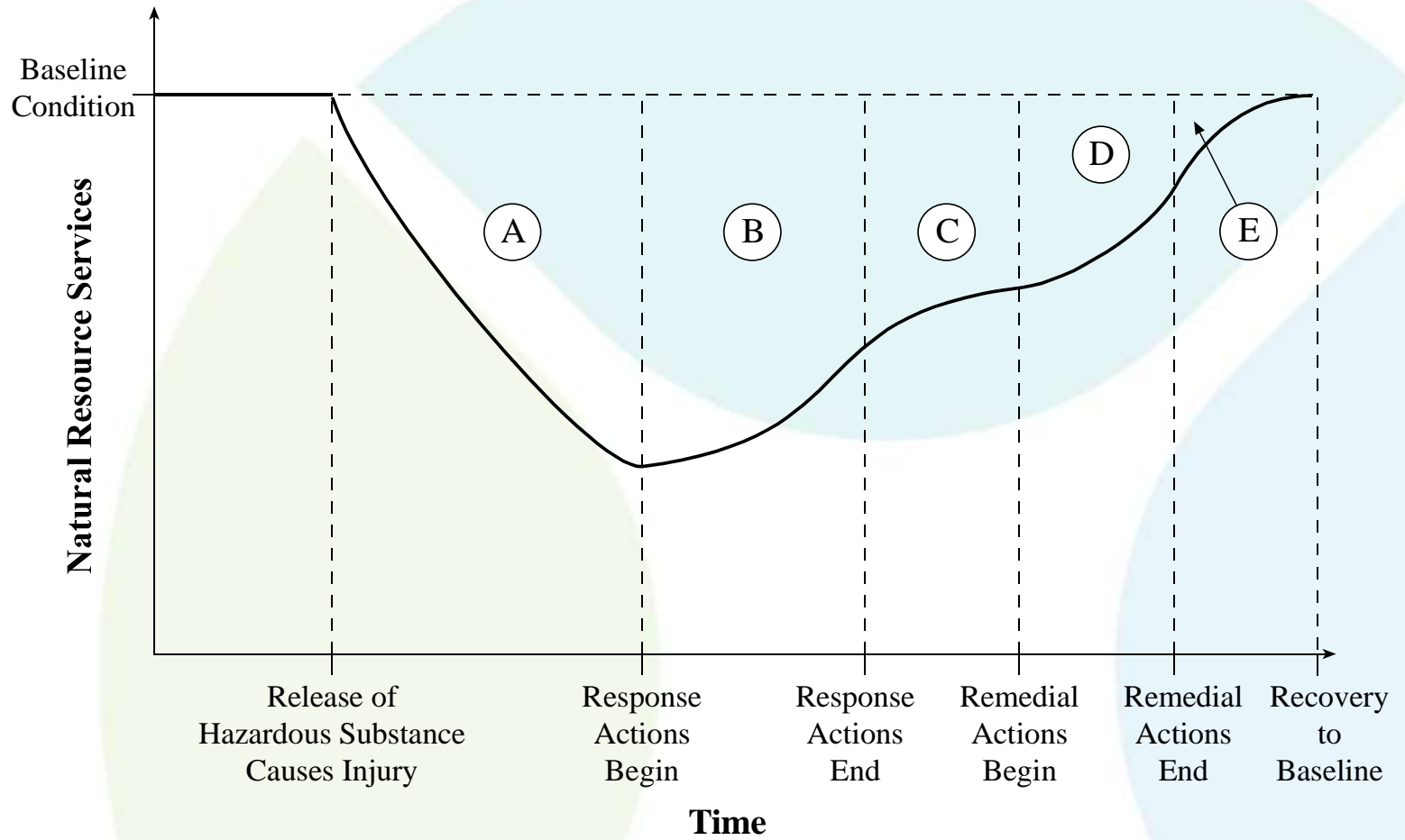


NATURAL RESOURCE DAMAGES: DIFFERENT THAN CLEANUP/REMEDIAL CLAIMS

- Cleanup/response is primary
- Risk based
- Human health & environment
- Superfund and other State/federal schemes
- More legal authority/case law
- More accepted for cleanup



RETURN TO BASELINE



NATURAL RESOURCE DAMAGES

- Trustees may seek to recover damages for the injury to the resource caused by the effects of contamination and the effects of the remedial actions taken at the site
- Damages include
 - Cost of restoration and/or replacement (actions taken with respect to the same resource or type of resource)
 - Acquisition of an equivalent resource (actions taken to replace the equivalent of the services to humans/environment provided by those resources)



NATURAL RESOURCE DAMAGES

- Include the costs of:
 - Assessing an area's natural resource damages,
 - Restoring the natural resources, and
 - Compensating the public for the lost use of the affected resources.
- Only available to federal, State and tribal trustees.



OIL POLLUTION ACT OF 1990

- Exxon Valdez
- Significant Gaps in Remedies and Response Capacity
- Hit PWS Community and Economy
- Congress Passes the Oil Pollution Act of 1990:
 - Covers oil spills in navigable waters
 - Strict liability applies
 - “Responsible Parties” are liable for all “Removal Costs” and “Damages”
 - Fund for cleanup and third party claims
 - Damages cap ... sometimes



COSTS & DAMAGES AVAILABLE UNDER OPA

- Response Costs
 - Natural Resources Damages
- AND**
- Property Damages
 - Lost Governmental Revenues
 - Costs of Additional Public Services
 - Lost Profits and Earning Capacity
 - Subsistence Use Damages



PROPERTY DAMAGES

- Injury to or economic loss resulting from destruction of real property (land or buildings) or other personal property.
- Does not include personal injury.
- Can be claimed by private or public entity that owns or leases property.



LOST GOVERNMENTAL REVENUES

- Net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or *natural resources*.
- Can be claimed by federal, state or local governmental entity.



COST OF ADDITIONAL PUBLIC SERVICES

- Net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil or directly attributable to response to the oil spill incident.
- Can be claimed by state or local governments.



LOST PROFITS AND EARNING CAPACITY

- Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of property or natural resources.
- Can be claimed by public or private entities.



SUBSISTENCE USE DAMAGES

- Damages for the loss of subsistence use of natural resources (fish, shellfish, etc.) depended on for subsistence use purposes.



PARADIGM SHIFT?

- After Valdez, many expected a crush of NRD
- NOAA and DOI continue to do work to assess damages to natural resources
 - Funding issues
 - Increased emphasis on States
- NOAA/DARPA: Obtained more than \$300 million for coastal restoration projects since 1990
- But, NRD did not materialize as “the next big thing”
- Groundwater cases and setbacks for Trustees



THE NEXT BIG THING



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Support vessels using their fire fighting gear to cool the rig



Support vessels using their fire fighting gear to cool the rig – note the list developing





Early morning Day 2 – Note the hole burned through the aluminum helideck



Day 2, morning – settling quite low in the water now – fuel and oil slick forming

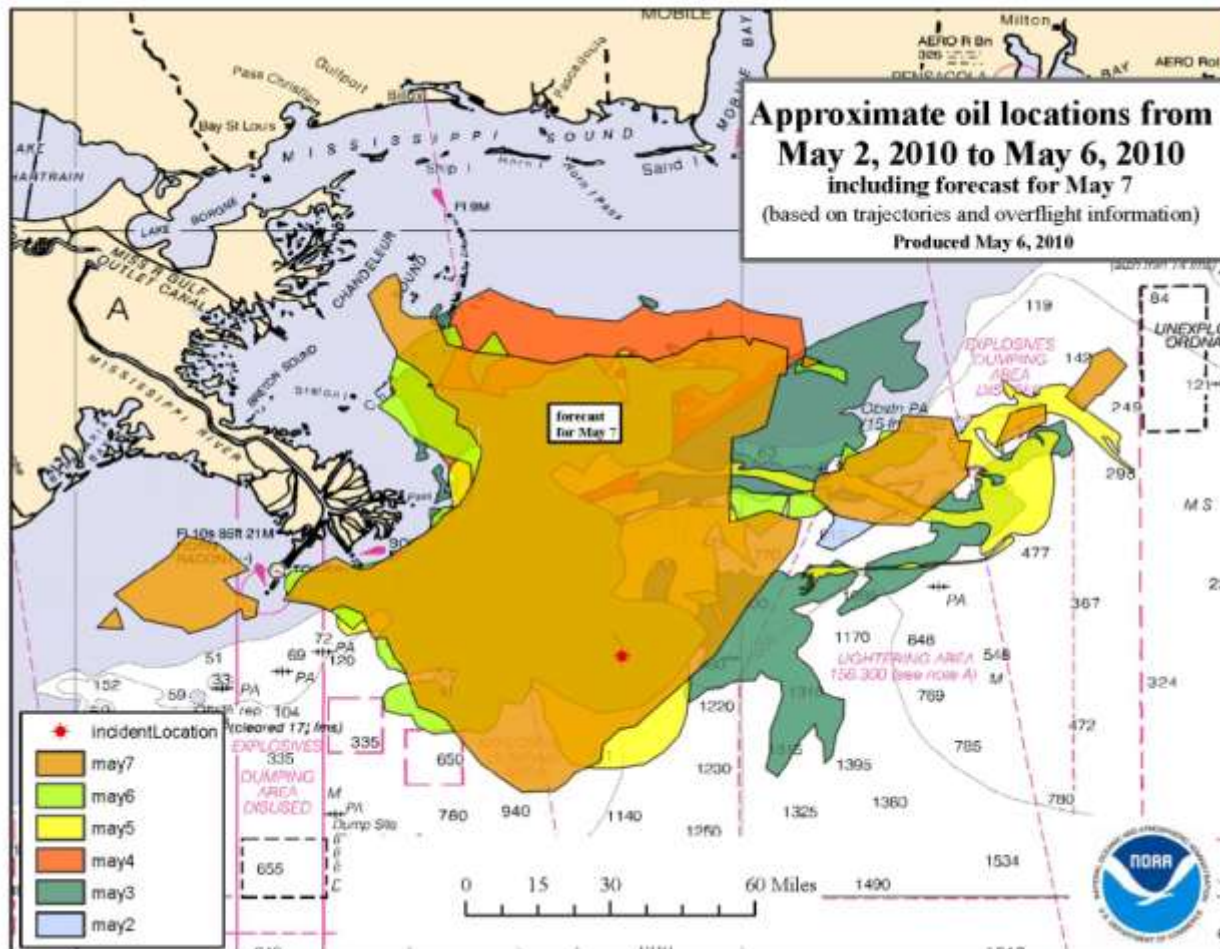












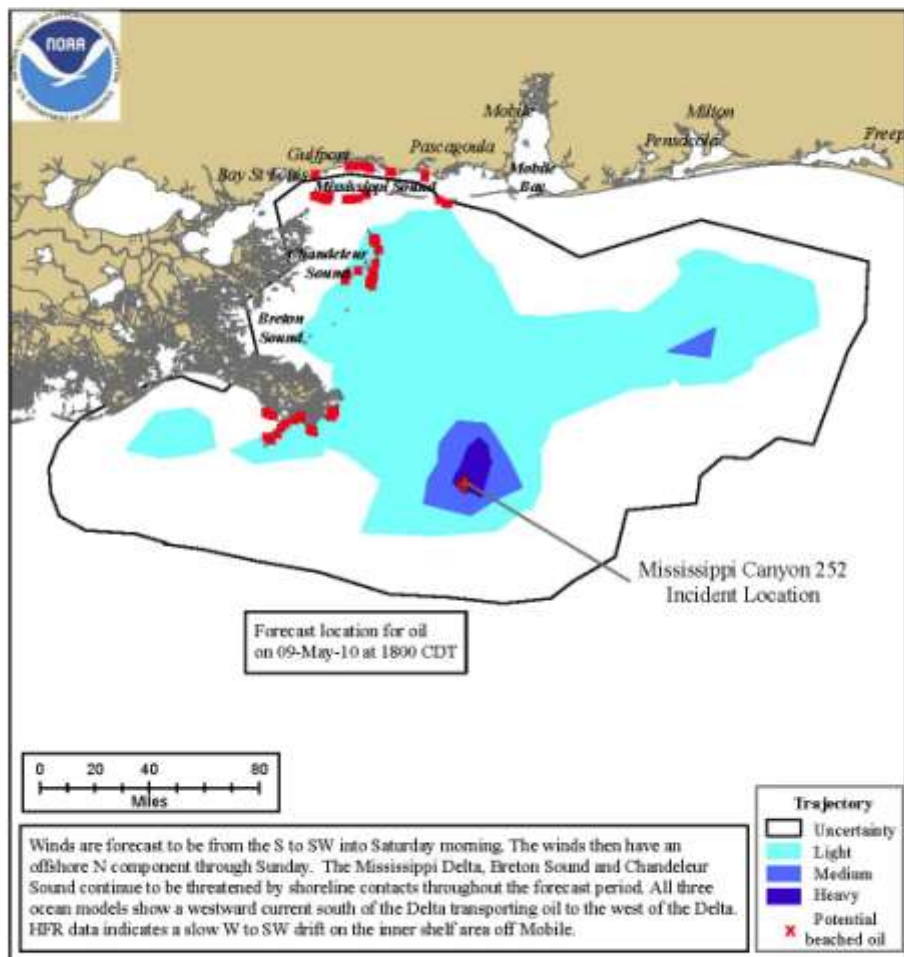
Trajectory Forecast Mississippi Canyon 252

NOAA/NOS/OR&R

Estimate for: 1800 CDT, Sunday, 5/09/10

Date Prepared: 2000 CDT, Thursday, 5/06/10

This forecast is based on the NWS spot forecast from Thursday, May 6 PM. Currents were obtained from the NOAA Gulf of Mexico, Texas A&M/TGLO, and NAVO/NRL models and HFR measurements. The model was initialized from satellite imagery analysis provided by NOAA/NESDIS obtained Thursday morning, and 3 Thursday overflights. The leading edge may contain turballs that are not readily observable from the imagery (hence not included in the model initialization).



this scale bar shows the meaning of the distribution terms at the current time

Next
Forecast:
May 7th PM

Trajectory Forecast

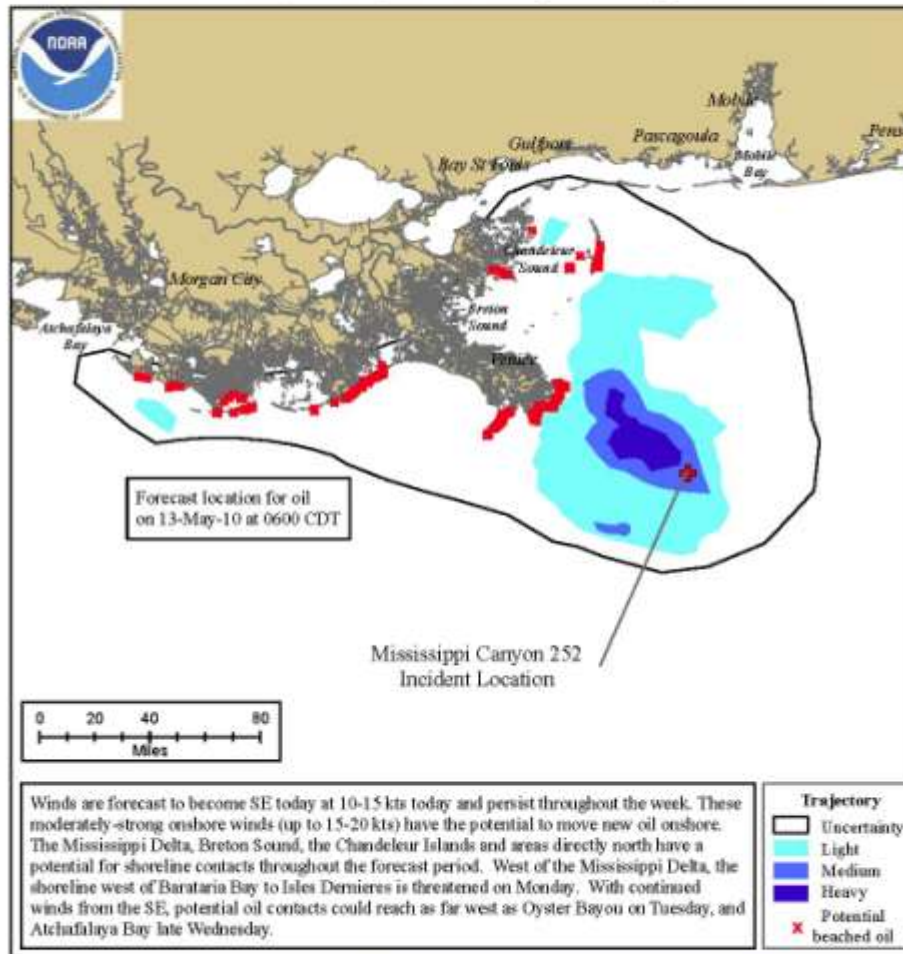
Mississippi Canyon 252

NOAA/NOS/OR&R

Estimate for: 0600 CDT, Thursday, 5/13/10

Date Prepared: 1300 CDT, Monday, 5/10/10

This forecast is based on the NWS spot forecast from Monday, May 10 AM. Currents were obtained from the NOAA Gulf of Mexico, West Florida Shelf/USF, Texas A&M/TGLO, and NAVO/NRL models and HFR measurements. The model was initialized from Monday morning satellite imagery and analysis provided by NOAA/NESDIS and overflight observations. The leading edge may contain turbidities that are not readily observable from the imagery (hence not included in the model initialization). Oil near bay inlets could be brought into that bay by local tidal currents.



this scale bar shows the meaning of the distribution terms at the current time

Next Forecast:
May 11th AM

THE IMPACT OF DEEPWATER HORIZON

- Hard to Overstate the Potential Impacts
- Economic Damages to Private Parties
- Public Entities' Lost Revenues and Increased Costs of Public Services
- Natural Resource Damages
 - Damages to the Marshes
 - Injuries to fish, birds and food chain
 - Losses of Human Uses and Cultural Impacts
- New Laws and Removal of Caps
- Long term impacts on drilling in the Gulf
- Legal Ramifications



“REMOTE” DAMAGES AVAILABLE

- OPA broadened the availability of damages by allowing for the recovery of economic damages by those **without a proprietary interest in damaged property** (i.e., “Profits and Earning Capacity” damages).
- This is a significant departure from federal maritime law, which required that persons who do not have a proprietary interest in physically damaged property have no cause of action for their economic losses.
(Robins Dry Dock)



CAUSATION AND THE SCOPE OF DAMAGES

- Traditional Property Damages
- Lost Profits Restaurants & Hospitality – where?
- Lack of Physical Proximity: Seafood Industry
- Governmental Losses of Revenues & Taxes
 - Across Every Sector – Tourism, Seafood, O&G
 - Offset by Response Inflows?
- Increased Costs of Social Services? Others?
- Moratorium and Economic Response Injuries?
- Line Drawing is very hard but the breadth of damages is staggering
- Causation & Remoteness ... Ports



OTHER AVAILABLE THEORIES OF RECOVERY/DAMAGES

- Public Trust
- State Oil Pollution Statutes
- CWA and other federal and State Penalties
- Negligence, Trespass and Private Nuisance
- Gross Negligence and Per Se Violations
- Strict Liability for Intentional Discharges
- Common Law Obstruction of Navigation
- Disgorgement Theories & Unjust Enrichment
- Public Nuisance: Imminent Danger to the Environment





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