No. _____

In The

Supreme Court of the United States

STATE OF LOUISIANA EX REL.
CHARLES J. BALLAY, DISTRICT ATTORNEY
FOR THE PARISH OF PLAQUEMINES, et al.,

Petitioners,

v.

BP EXPLORATION & PRODUCTION, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In keeping with its historic state police power to protect its wildlife, Louisiana enacted a wildlife protection statute (La. R.S. 56:40.1, *et seq*., "the Wildlife Statute"), empowering parish District Attorneys to impose penalties for the unlawful destruction of wildlife. When the Deepwater Horizon oil spill disaster caused the unprecedented destruction of wildlife, Louisiana District Attorneys from affected coastal parishes fulfilled their obligations under the Wildlife Statute by bringing suit to recover civil penalties from those responsible for the harm to Louisiana's fish, birds and game. The holdings below would bar Louisiana from exercising this traditional police power, even though imposing said penalties will in no way conflict with federal clean water regulation, which holds all oil spills unlawful.

The question presented is:

> In enacting the Clean Water Act, did Congress intend to strip the States of the ability to punish harm to their wildlife resulting from oil spills?

PARTIES TO THE PROCEEDINGS

Petitioners Charles J. Ballay, Esq., District Attorney for the Parish of Plaquemines, Leon A. Cannizzaro, Jr., District Attorney for the Parish of Orleans, John Phillip Haney, District Attorney for the Parishes of Iberia and St. Mary, Paul D. Connick, Jr., District Attorney for the Parish of Jefferson, Camille A. Morvant, II, District Attorney for the Parish of LaFourche, John F. Rowley, District Attorney for the Parish of St. Bernard, Harry J. Morel, Jr., District Attorney for the Parish of St. Charles, Walter P. Reed, District Attorney for the Parish of St. Tammany, Joseph L. Waitz, Jr., District Attorney for the Parish of Terrebonne, and Cecil Sanner, District Attorney for the Parish of Cameron were Plaintiffs and Appellants below.

Respondents BP Exploration & Production, Inc., BP Products North America, Inc., BP America, Inc., British Petroleum, P.L.C., Halliburton Energy Services, Inc., Transocean Offshore Deepwater Drilling, L.L.C., Transocean Holdings, L.L.C., Transocean Deepwater, Inc., Cameron International Corporation, Weatherford US LP, M-I LLC, Anadarko Petroleum Corporation, Anadarko E&P Company, LP, Moex Offshore 2007, L.L.C., and Moex USA Corporation, were Defendants and Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Louisiana, by and through the District Attorneys of coastal parishes, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 745 F.3d 157 and reproduced in the appendix hereto ("App.") at 1. The opinion of the District Court for the Eastern District of Louisiana is reported at 835 F. Supp. 2d 175 and reproduced in the appendix hereto at App. 34.

JURISDICTION

The judgment of the Fifth Circuit was entered on February 24, 2014. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

The Tenth Amendment to the Constitution provides that "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Louisiana Wildlife Statute, La. R.S. 56:40.1, *et seq*. empowers District Attorneys of the parish in which harm to Louisiana wildlife occurs to bring civil suit to recover civil penalties for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life unlawfully killed or injured.

The savings provisions of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2718(c), reserves to the States the power to impose additional liability and penalties for harm caused by oil spills.

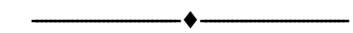
The savings provisions of the Clean Water Act (CWA) pertaining to oil spills, 33 U.S.C. § 1321(o)(1) and (3) preserve to the states the ability to impose additional damages for destruction to public property and to impose any laws not in conflict with the Clean Water Act's oil spill provisions.

INTRODUCTION

Penalizing harm to a state's wildlife is a long-recognized police power of states. So is penalizing harm from sea-to-shore oil spills. Nowhere in the Clean Water Act has Congress evinced any desire to curtail a state's power to punish the destruction of its

wildlife from oil spills. Louisiana's enforcement of its wildlife protection statute with respect to wildlife harmed as a result of an offshore oil spill in no way conflicts with the federal Clean Water Act. Rather than conduct the necessary conflict preemption analysis, the courts below improperly applied this Court's holding with respect to permitted discharges in *International Paper v. Ouellette,* 479 U.S. 481 (1987), to oil spills, even though the applicable statutes governing oil spills, as well as the policy considerations, are different from those at issue in *Ouellette*.

Consideration of the appropriate conflict preemption analysis, rather than misapplication of *Ouellette* beyond the permitted discharges at issue there, reveals that there is no conflict between allowing a state to exercise its traditional police power to penalize unlawful harm to wildlife resulting from an unlawful oil spill and the exercise of federal clean water regulation. In the Oil Pollution Act, Congress expressed a strong policy favoring state penalties for harm occasioned by oil spills, to be applied in addition to federal penalties. This Court should grant the Petition in order to ensure both fulfillment of Congressional intent and to protect vital interests of the States with respect to oil spills.



STATEMENT OF THE CASE

A. The Louisiana Wildlife Statute.

The Applicants are the District Attorneys of Louisiana coastal parishes whose shores and coastal waterways were inundated by oil from the Deepwater Horizon oil spill disaster. Their cause of action is based exclusively upon La. R.S. 56:40.1, *et seq*. ("the Wildlife Statute"), which levies civil penalties on parties responsible for unlawfully harming Louisiana wildlife. Louisiana's Wildlife Statute makes it unlawful to harm Louisiana wildlife through violation of state *or federal* regulation. La. R.S. 56:40.1 provides:

> A person who kills, catches, takes, possesses, or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life in violation of this Title, or a regulation adopted pursuant to this Title, or a federal statute or regulation governing fish and wildlife, or who, through the violation of any other state or federal law or regulation, kills or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life, is liable to the state for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life, unlawfully killed, caught, taken, possessed, or injured.

The Wildlife statute empowers District Attorneys of Louisiana parishes to bring suit on behalf of the State to collect penalties for the value of each fish, wild bird or other wildlife taken in violation of the statute. La. R.S. 56:40.4.

The Wildlife Statute exists solely for the protection of Louisiana's wildlife, and the only conduct it penalizes is the "unlawful" destruction of wildlife, however it is accomplished. Apart from prohibiting harm to Louisiana wildlife, the Wildlife Statute imposes no standards of conduct.

The Wildlife Statute sets forth no standard for drilling of oil wells or regulation of water pollution. Rather, the Wildlife Statute allows for recovery for destruction of wildlife by oil spill or water pollution only to the extent the oil spill or water pollution is in violation of an applicable state or federal law. Hence, in the instant case, the Wildlife Statute can be used to impose penalties for destruction of wildlife in Louisiana without imposing any standard of conduct with respect to oil spills different from that imposed by federal law. In this case, it is the violation of federal law that renders the killing of wildlife "unlawful" for the purposes of the Wildlife Statute.

B. The Deepwater Horizon Oil Spill Disaster.

On April 11, 2010, in the course of drilling BP's Macondo well roughly fifty miles from Louisiana on the Outer Continental Shelf, the Deepwater Horizon semi-submersible drilling vessel encountered a blowout and explosion which killed 11 individuals and led to the largest oil spill in U.S. history. Defendants BP EXPLORATION & PRODUCTION INC., BP, PLC, BP PRODUCTS NORTH AMERICA, INC., and BP AMERICA, INC., were the owners of the MMS

Mineral Lease G32306. Defendant BP EXPLORATION & PRODUCTION INC. was the operator of the Lease. Other defendants were the owner of the Deepwater Horizon vessel, Transocean, the company that did the cementing on the failed well, Halliburton, and sundry other defendants involved with the Deepwater Horizon vessel and its appurtenances. Petitioners have alleged that the oil spill was the result of violations of federal regulations and maritime law on the part of these defendants.

Oil from this spill entered into the waterways and estuaries of the State of Louisiana. As a result, a significant portion of Louisiana's wildlife was substantially harmed and/or killed within Louisiana's territorial boundaries. Petitioners, the District Attorneys of affected coastal parishes, brought the instant action under the Wildlife Statute on the grounds that, as a result of their unlawful conduct causing the explosion and uncontrolled Deepwater Horizon oil spill, defendants have killed or injured thousands of animals, including fish, wild birds, wild quadrupeds, and other wildlife and aquatic life in the waters and on the shores of Louisiana.

C. Proceedings Below.

In the aftermath of the Deepwater Horizon oil spill, the District Attorneys of Louisiana parishes whose waterways and shores were inundated with oil from the spill each filed suit in their respective Louisiana district state courts asserting solely claims for

penalties for harm to wildlife pursuant to the Wildlife Statute, La. R.S. 56:40.1, *et seq*. The District Attorneys who filed such suits were the District Attorneys of Plaquemines Parish, Orleans Parish, St. Bernard Parish, Jefferson Parish, Iberia Parish, St. Tammany Parish, Terrebone Parish, Lafourche Parish, Cameron Parish and St. Mary Parish. In each suit, the District Attorneys limited their claims for civil penalties to wildlife killed or injured within the territorial limits of the State of Louisiana.[1]

By Order of the United States Panel on Multidistrict Litigation, the sundry District Attorney Wildlife Statute suits were all consolidated in the matter of *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, in the Eastern District for the State of Louisiana.

After consolidation in the MDL, the defendants moved to dismiss the Wildlife Statute actions pursuant Fed. R. Civ. Pro. Rule 12(b)(6). The motion to dismiss was filed concurrently with motions to dismiss sundry other state and federal maritime claims filed by both State governments and private individuals. The trial

[1] Although some of the District Attorneys brought suit only against BP EXPLORATION & PRODUCTION INC., BP, PLC; BP PRODUCTS NORTH AMERICA, INC., and BP AMERICA, INC., BP EXPLORATION & PRODUCTION INC. (The BP Defendants), subsequent to consolidation, the court-appointed plaintiffs' steering committee filed a Local Government Entity Voluntary Master Complaint, Cross-Claim and Third Party Complaint (Doc. 1510), which urged Wildlife Statute claims against all the defendants in the consolidated actions.

court entered three separate, sequential orders on the sundry motions to dismiss. Each of these three orders related to different classes of claims which the district court had organized into pleading "bundles," but each of these orders incorporated by reference reasons set forth in the previously entered order with respect to the other "bundles" at issue. The first order pertinent to dismissal of the District Attorney claims (entered by the Court on August 26, 2011) related to private claims organized into "Bundle B1." 808 F. Supp. 2d 943 (E.D.La. 2011). The second order pertinent to these claims was entered on November 14, 2011, and addressed claims brought by the States of Louisiana and Alabama organized under "Bundle C." 2011 WL 5520295, E.D.La., 11/14/11.

In the "Bundle C" order, the District Court held that state government penalty claims brought exclusively under state laws providing for civil penalties for pollution damage incurred entirely within state borders were preempted by the Clean Water Act (CWA) under the United States Supreme Court's ruling in *International Paper v. Ouellette*, 479 U.S. 481 (1987). This Order referred to the earlier "Bundle B1 Order" in support of its findings. The third order pertinent to the dismissal of the District Attorneys' Wildlife Statute claims was entered on December 9, 2011 and entered final judgment dismissing the District Attorneys' lawsuits in their entirety. 835 F. Supp. 2d 175, E.D.La., December 09, 2011 (NO. MDL 2179).

The District Attorneys each individually filed timely notices of appeal with the United States Court of Appeals for the Fifth Circuit. On appeal, the District Attorneys urged that the trial court erred in dismissing their state law claims on the grounds of preemption under the Clean Water Act. After briefing and oral argument, the Fifth Circuit affirmed the trial court's ruling.

REASONS FOR GRANTING THE PETITION

I. Granting the Petition is necessary to protect well-recognized historic police powers of the States with respect to both wildlife protection and restitution for harm from sea-to-shore oil spills.

The Fifth Circuit failed to recognize that the Louisiana Wildlife Statute involves historic police powers of the State. This Court has long recognized that the States have a particular interest in the protection of wildlife, and that such activities are "peculiarly within" the States' police powers. *Lacoste v. Department of Conservation of State of Louisiana*, 263 U.S. 545, 550-551, 44 S. Ct. 186, 188-189 (1924); *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371, 391, 98 S. Ct. 1852, 1864 (1978).

In *Lacoste*, this Court upheld a state wildlife statute against a commerce clause challenge, holding:

> The legislation is a valid exertion of the police power of the state to conserve and

> protect wild life for the common benefit. . . . **Protection of the wild life of the state is *peculiarly* within the police power**, and the state has great latitude in determining what means are appropriate for its protection.

Lacoste, 44 S. Ct. at 188-189 (emphasis added).

The Wildlife Statute's sole purpose is the protection of Louisiana wildlife, a long-recognized area of state police power. The statute sets forth its purpose in the very first article: "To protect, conserve, and replenish the natural resources of the state. . . ." La. R.S. 56:1. The Wildlife State imposes no standard of conduct other than that one should not unlawfully harm Louisiana Wildlife. Federal law cannot preempt this well recognized area of state police power unless Congress has expressed the clear intent to do so. Congress has not. Quite the contrary, Congress has repeatedly recognized that, with respect to harm caused by oil spills, States maintain the authority to protect their natural resources by imposing penalties above and beyond those imposed by federal law. *See, e.g.,* 33 U.S.C. § 2718(c) and 33 U.S.C. § 1321(o), discussed *infra*.

This Court has also recognized that protecting against damage from sea-to-shore pollution from offshore oil spills is also within the historic police powers of the States. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S. Ct. 1990 (1973). In *Askew*, this Court noted the important interests that States have in protecting their shores, and in

particular their wildlife, from harm from offshore oil spills. This Court observed that oil spills have long-lasting impact on coastal wildlife and fisheries, protection of which has historically fallen within the purview of the States:

> The most serious consequences of oil pollution, however, may not be those which are immediately obvious. 'According to Dr. Erwin S. Iversen, a marine biologist: "The greatest problem may be the toxic effects on the intertidal animals that serve as food for the other more important fishes . . . . I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain." There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Galtsoff of the United States Fish and Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish. 'Large scale oil pollution, such as that which occurred when the 'Torrey Canyon' ran into the Seven Stones Reef, results in huge losses of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the

> damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing.

Askew, 411 U.S. at 334, n.5, 93 S. Ct. at 1596, n.5.

These impacts on marine life, birds, and ultimately commercial fishing interests, are precisely the interests that Louisiana's Wildlife Statute is intended to protect. Recognizing the importance of these matters to coastal states, this Court concluded, "sea-to-shore pollution – historically within the reach of the police power of the States – is not silently taken away from the States. . . ." *Id.,* 411 U.S. at 434, 93 S. Ct. at 1601.

The Fifth Circuit swept aside the well-recognized historic police powers implicated in this case by mischaracterizing the area sought to be regulated by the application of Louisiana's Wildlife Statute as that of "interstate pollution," an area traditionally occupied by federal law. This mischaracterization of interests sacrifices two long-recognized areas of state police power, wildlife protection and sea-to-shore pollution, in favor of an overly broad definition of the federal area of interstate pollution.

"Interstate pollution" as that term has been used by this Court, refers to discharges from a source in one state into waters shared by another state. *See, e.g., International Paper v. Ouellette*, 479 U.S. 481,

107 S. Ct. 805 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046 (1992). However, the term "interstate pollution" has *never* been used by this Court to refer to oil spills that originate offshore and migrate into state waters. In *Askew*, this Court characterized such pollution as "sea-to-shore pollution" and held that responding to damages from such was an area of traditional police power.

Louisiana's Wildlife Statute claims are not an exercise of police power over "interstate pollution." The Wildlife Statute sets no standards with respect to pollution, interstate or otherwise. Moreover, the pollution at issue here is not "interstate pollution," an area of federal regulation, but sea-to-shore oil pollution, an area in which this Court has recognized that states have traditionally exercised police power. The Fifth Circuit's ruling is an unprecedented expansion of federal regulation of "interstate pollution" into the field of sea-to-shore oil pollution, which this Court has found to be a question of vital, historic State interest.

Granting the Petition for Certiorari is necessary to clarify whether sea-to-shore oil pollution falls within the ambit of federal law or traditional police powers of the States. Additionally, assuming arguendo that sea-to-shore oil pollution does fall within the federal realm of "interstate pollution," this Court should grant certiorari to clarify whether federal occupation of that field trumps the States' historic police powers over wildlife protection when questions

of wildlife protection and interstate pollution overlap, as they inevitably will.

II. To prevent recurring federal intrusion into historic police powers, this Court should grant certiorari in order to conduct the proper conflict preemption analysis.

Having failed to recognize that historic police powers were at interest, the Fifth Circuit failed to conduct the required conflict preemption analysis. This Court has consistently held that, when dealing with historic police powers of the States, courts should employ a *strong* presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555 (2009); *Medtronic v. Lohr*, 518 U.S. 470 (1996). In *Lohr*, this Court stated:

> "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Lohr, 518 U.S., at 485, 116 S. Ct. 2240 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947)).

Since both protection of wildlife generally, as well protection of wildlife from harm caused by sea-to-shore oil pollution, have been held to be peculiarly

within the historic police powers of the States, the State of Louisiana's civil penalty claims for harm to Louisiana wildlife from the Deepwater Horizon spill cannot be preempted absent a clear and manifest intention of Congress. Congress has not expressed any intent to preempt the States' ability to impose penalties for damage to wildlife when such damage occurs as a result of an oil spill. To the contrary, Congress has repeatedly reserved to the States the ability to assert such claims.

There is no express preemption of penalties arising from oil spills in the CWA. Accordingly, preemption must be considered under conflict preemption principles. Although the Fifth Circuit stated that the State's claims were barred by conflict preemption, the lower court did not conduct the analysis necessary to reach such a conclusion. Under the requisite conflict preemption analysis, the Clean Water Act cannot be held to preempt claims for penalties under the Louisiana Wildlife Statute for harm to wildlife from an oil spill.

Conflict preemption only occurs when compliance with both the federal law and the state law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the purposes of the federal law. *Hillman v. Maretta*, 133 S. Ct. 1943 (2013). The lower courts did not even ask the questions of whether compliance with both Louisiana's Wildlife Statute and the Clean Water Act in the instant case was impossible, or whether allowing the state to proceed with its civil penalty claims for harm

to wildlife from an oil spill would frustrate the execution of the Clean Water Act.

The Wildlife Statute does not conflict with any regulation of the CWA. The Wildlife Statute prescribes no conduct whatsoever with respect to water pollution. Rather, the Wildlife Statute imposes penalties when violations of applicable state or federal law results in harm to wildlife. Liability under the Wildlife Statute does not even arise unless there is a violation of some other law, state or federal. In this case, liability for penalties under the Wildlife Statute arises because defendants have violated, inter alia, the Oil Pollution Act of 1990, the Clean Water Act, and/or federal maritime law by causing an unlawful oil spill. Imposing liability for harm to wildlife arising from such conduct in no way renders compliance with the CWA impossible or frustrates its purpose. In the case of oil spills, defendants can avoid liability under the Wildlife Statute simply by remaining in compliance with the CWA (which has zero tolerance for oil spills). Moreover, as is discussed, *infra*, Congress has recognized that imposition of additional state penalties for oil spills does not frustrate federal oil spill regulation, but rather *furthers* the deterrent purpose of federal law.

In support of its preemption ruling, the Fifth Circuit cites to a number of alleged conflicts that simply do not come into play when applying the Louisiana Wildlife Statute to impose penalties for harm from oil spills. For instance, the Fifth Circuit found:

> Allowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *Ouellette* . . . just as with entities operating in point-source states, if entities engaged in developing the OCS were subjected to a multiplicity of state laws in addition to federal regulations, they could be forced to adopt entirely different operational plans or in the worst case be deterred by the redundancy and lack of regulatory clarity from even pursuing their OCS plans. The reasons for avoiding redundant or conflicting legal regimes are equally potent whether the point source is located in a state or a federal enclave.

Allowing Louisiana to impose penalties for harm to its wildlife when a defendant violates federal law with respect to oil spills, as the Wildlife Statute provides, does not implicate such concerns. The Wildlife Statute does not impede "regulatory clarity." It does not require adoption of "different operational plans." It does not require adoption of any particular operational plan, apart from one that complies with applicable federal oil spill regulation. Rather, it merely imposes additional liability for destruction of Louisiana's wildlife when a defendant violates standards imposed under federal law. The conflicts cited by the Fifth Circuit as justification for stripping Louisiana of its police power to protect its wildlife are non-existent.

III. Granting of the Petition is necessary to answer whether *Ouellette*, which dealt with the CWA provisions regarding interstate permits, is applicable to oil spills.

The Fifth Circuit sidestepped the conflict preemption analysis required by this Court by simply finding that this Court's holding in *Ouellette* applies to oil spill claims. The lower court's reliance on *Ouellette* is misplaced. *Ouellette* involved the discharge of pollutants under permits issued pursuant to the CWA. It does not even address oil spills, which are *never* allowed under the CWA. *Ouellette* has never before been applied to oil spills, and with good reason.

In *Ouellette*, federal law was found to preempt the laws of all but the source state, because enforcement of the state standards at issue posed a significant likelihood of frustration of the complex consideration of conflicting interests in deciding appropriate discharge permits. The *Ouellette* court found that, although the CWA expressly preserves the rights of states to enact more stringent pollution permitting regulations, the needs of uniformity and furtherance of the goals of the CWA required that the source state's laws, rather than the laws of any other affected state, be the only state law applicable to claims arising from the permitted discharge. That concern does not arise here, because: 1) there is no permitted discharge as to which differing state standards could apply; and 2) there is no source state whose permitting process could be undermined by impacted states applying their own law.

In *Ouellette*, citizens of the state of Vermont sought to bring nuisance claims under Vermont law for damages arising out of a permitted discharge originating in the state of New York, the permitting (source) state. The *Ouellette* court found that the NPDES permits at issue, which allowed discharges from the source state facility, were only issued after careful deliberation of the conflicting interests involved in deciding the extent to which to limit lawful discharges of pollutants. The Court held that to allow other citizens of other states to bring actions under their own state's laws for discharges permitted by the source state posed significant risk of conflicting standards and could undermine the deliberative process by which the permits were granted.

The *Ouellette* court expressed the reason for its finding of preemption of claims brought under the laws of the source state:

> By establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA – elimination of water pollution – cannot be achieved immediately, and that it cannot be realized without incurring costs. The EPA Administrator issues permits according to established effluent standards and water quality standards, that in turn are based upon available technology, 33 U.S.C. § 1314, and competing public and industrial uses, § 1312(a). The Administrator must consider the impact of the discharges on the waterway, the types of effluents, and the schedule

> for compliance, each of which may vary widely among sources. If a State elects to impose its own standards, it also must consider the technological feasibility of more stringent controls. Given the nature of these complex decisions, it is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. See § 1342(b).

Ouellette, 479 U.S. at 494-495.

These concerns simply are not present in the instant case, because there is no such balancing of competing interests with respect to determining whether to permit oil spills. Rather, in 33 U.S.C. § 1321, Congress has provided that *all* discharges of oil in amounts determined to be harmful are unlawful.[2] No state can allow a permitting threshold

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[2] Notably, oil does not even fall within the definition of "pollutant" which may be regulated under an NPDES permit. "Pollutant" for purposes of CWA is defined as:

> Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

40 C.F.R. § 122.2.

Oil does not fit under any of these categories. It is not a waste product.

different than the federal threshold, so, with respect to oil spill regulation, the potential conflict at issue in *Ouellette* simply does not exist. Notably, it was these very same non-existent conflicts that the Fifth Circuit cited in support of its finding of preemption.

Moreover, the permitting provisions of the CWA discussed in *Ouellette* do not even apply to oil spills. In *Ouellette*, this Court addressed the partial savings provisions of Section 1342 of the CWA, which allow a source state to impose its own permitting regulations provided that they are as stringent as the federal regulation and meet with federal approval. *See Ouellette*, 479 U.S. at 489-490, discussing 33 U.S.C. § 1342(b). However, *Ouellette* did not even mention the savings clause of Section 1321(o) of the CWA which relates specifically to oil spills. Section 1321, which contains CWA savings provisions with respect to discharges of oil, *excludes* discharges under permits pursuant to 33 U.S.C. § 1342 from its scope. The *Ouellette* court's holding with respect to Section 1342 can have no bearing whatsoever on the preemption analysis under Section 1321, because Section 1342 is expressly excluded from the coverage of Section 1321. Additionally, while the savings clauses of Section 1342 make extensive reference to the "permitting state" (which the *Ouellette* holding refers to as a "source state"), Section 1321 does not even contain the term "permitting state."

No discharge of oil is permitted under the CWA.[3] Unlike Section 1342, discussed in *Ouellette*, which provides for permitted discharges of pollutants, Section 1321 *prohibits* discharge of oil into U.S. waters, and expressly reserves state's rights to impose penalties for such discharges. While there is great potential for conflict when a discharge of pollution is permitted by the regulations of one state, but barred by the regulations of a neighboring state into whose water the permitted discharge flows, there is no potential for such conflict with respect to oil spills, which are absolutely barred by the CWA. Here, there is absolutely no potential for conflicting or confusing standards with respect to discharges of oil, because the federal statute absolutely precludes any such discharges. Violation of *any* state law standard regarding oil spills is *a fortiori* a violation of the federal standard.

The Fifth Circuit argued that this Court's subsequent consideration of *Ouellette* in *Arkansas v. Oklahoma,* 503 U.S. 91, 112 S. Ct. 1046 (1992), somehow precludes limiting the *Ouellette* rationale to cases involving discharges under permits. In support of its

[3] The trial court incorrectly found that, because an NPDES permit was issued for BP's offshore operations, *Ouellette* applies. Section 1321 bans all discharges of oil, and expressly excludes wastes permitted under Section 1342 from its scope. That an NPDES permit was issued as to certain wastes has no bearing whatsoever on the applicability of the savings clause for discharges of oil, which by statutory definition, do not include pollutants permitted under Section 1342.

position, the Fifth Circuit cited to the following language from *Arkansas*:

> The Court held the Clean Water Act taken "as a whole, its purposes and its history" pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is "the law of the State in which the point source is located."

The Fifth Circuit not only took this language out of context, but also omitted the following sentence, which confirms that *Arkansas*, like *Ouellette*, was decided on principles applicable to permitted discharges, not oil spills. The very next sentence after that cited by the Fifth Circuit states:

> Moreover, in reviewing § 402(b) [33 U.S.C. § 1342] of the Act, the Court pointed out that when a new permit is being issued by the source State's permit-granting agency, the downstream State "does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters.

Arkansas, like *Ouellette*, dealt with permits issued under Section 1342, and has no application to oil spills, as to which Congress has created a completely different section of the CWA that does not

implicate the potentially varying standards presented by permitted discharges.

Unlike the permitting holdings in *Ouellette* and *Arkansas*, *Askew* specifically addressed oil spills and the savings provisions of Section 1321 of the CWA specific to oil spills. *Askew,* not *Ouellette,* is the case most on point. While *Ouellette* holds that regulation of interstate pollution is primarily a concern of the federal government, the *Askew* court recognized, specifically with respect to oil spills, that "sea-to-shore pollution – historically [is] within the reach of the police power of the States. . . ." 411 U.S. at 343.[4] This distinction is critical, as the *Ouellette* court based its holding that the matters covered by Section 1342 at issue in that case fell within areas historically subject to federal regulation. With respect to Section 1321 applicable to oil spills, the preemption analysis is entirely different, because Section 1321 deals with matters which this Court has found to be primarily within the scope of the States' historic powers.

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[4] The district court speculated that by sea-to-shore pollution, the *Askew* court was referring to spills originating in state waters. This speculation is refuted by the *Askew* court's reference to the 1967 Torrey Canyon oil spill as the prime example of sea-to-shore pollution. The Torrey Canyon spill was 7 miles from the nearest land, and nearly 15 miles from the English mainland coast affected by the spill. Oil from the spill washed ashore in Spain and France as well. Had such a spill occurred a similar distance from shore in the U.S., it would have been outside of state territorial waters.

IV. Granting the Petition is necessary to ensure fulfillment of Congressional intent as unequivocally set forth in statutes specifically directed to oil spills.

Any questions as to Congress's intent to preempt state claims for harm from oil spills are resolved not by reference to the inapposite holding in *Ouellette*, but by the savings clauses of OPA and CWA specific to oils spills, which were not even considered in *Ouellette*. Contrary to the Fifth Circuit's assertion, the Petitioners do not "rely" on these savings clauses to bring their claims. The Petitioners need not resort to savings clauses to preserve their claims, because there is no conflict between the state's Wildlife Statute claims and the CWA. Rather, the state points to these savings clauses as further support for the proposition that Congress had no intention to supplant state laws with respect to oil spills.

The Fifth Circuit recognized that under OPA, CWA, and even *Ouellette*, a State retains the right to impose stricter regulations, greater damages, and stiffer penalties than federal law if water pollution originates in the waters of that State. However, the Fifth Circuit reasoned that if an oil spill originated outside of a state, then the state could not impose any penalties apart from those allowed under federal law. This rationale ignores the plain language of the savings provisions of OPA and the CWA specific to oil spills (33 U.S.C. § 2718(c) and 33 U.S.C. § 1321(o), respectively). In these savings provisions specific to oil spills, and not addressed in *Ouellette*, Congress

preserved to States the right to impose additional penalties for oil spills regardless of whether the spills originated inside or outside of the state.

A. The savings provisions of OPA preserve Louisiana's right to apply its Wildlife Statute to oil spills originating outside of the state.

State laws, which impose penalties regarding oil spills, are expressly preserved under OPA. 33 U.S.C. § 2718(c). Section 2718 of OPA contains broad savings clauses that allow for the imposition of additional liability and penalties relating to oil spills. Section 2718(c), which applies specifically to penalties for violations of law relating to oil spills, expressly preserves the States' authority to impose penalties for harm occasioned by an oil spill, such as the civil penalties claims arising under the Wildlife Statute, providing:

> (c) Additional requirements and liabilities; **penalties**
>
> **Nothing in this Act**, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of Title 26, **shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof** –
>
> > (1) to impose additional liability or additional requirements; or

> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) **for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil**.

33 U.S.C. § 2718(c) (emphasis added).

This language preserves all state penalty provisions "relating to" oil spills in any way, not just those originating in the waters of that State.

The Fifth Circuit chose to ignore this statement of Congressional intent, finding that under *Ouellette*, Louisiana's claims were preempted, and, so the reasoning goes, the OPA savings clause cannot restore a cause of action that did not exist. To quote the Fifth Circuit, "With *Ouellette* as the controlling law, there are no savings remedies to 'save.'" This reasoning underlines the error of applying the holding regarding permitted discharges in *Ouellette* to discharges of oil.

In enacting the civil penalties savings clause of OPA Section 2718(c), Congress unequivocally expressed its intent to preserve the right of a State to exercise its historic police powers to protect the States' assets and resources from pollution by unlawful oil spills, without respect to where such spills originated. This Court has found that the savings clauses in Section 2718 were intended to allow additional remedies for oil spills to be recovered by the

States under state law. *U.S. v. Locke*, 529 U.S. 89, 105-106, 120 S. Ct. 1135, 1146 (2000), which held:

> The evident purpose of the saving clauses is to **preserve state laws which**, rather than imposing substantive regulation of a vessel's primary conduct, **establish liability rules and financial requirements relating to oil spills**. *See Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000) (words of a statute should be interpreted consistent with their neighbors to avoid giving unintended breadth to an Act of Congress).

(Emphasis added).

The Fifth Circuit's disregard for Congress's clear pronouncement of the preservation of state law providing for penalties for harm resulting from oil spills is inexplicable in light of the unquestionably applicable statutory provision in OPA. Rather than apply the broad savings provision of OPA to allow Wildlife Statute claims to go forward, the Fifth Circuit sidestepped the OPA analysis entirely, finding those claims preempted by the inapposite holding in *Ouellette*.

OPA was passed to provide a comprehensive scheme for addressing damage caused by oil spills. In 1990, Congress passed OPA – its most current enactment concerning the effects of an oil spill – "to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution." S. Rep. No. 101-94, at 9 (1990). In so doing, Congress

specifically noted that "[t]he body of law already established under section 311 [§1321] of the Clean Water Act is the foundation of [OPA]." *Id.* at 4. Hence, OPA was intended to expand upon and clarify the responsibility for oil spills as set forth in the CWA. Assuming *arguendo* that CWA preempted state penalties with respect to oil spills – it did not – in passing a comprehensive, "*single* Federal law" governing oil spills, Congress superseded any such preemption.

The progression of Congressional action is simple, and leads to but one conclusion as to whether OPA's savings clause applies. Congress enacted the CWA which contained certain regulations with respect to discharges of oil and other hazardous materials, and certain savings clauses with respect to state claims arising from such discharges. Then, after the Exxon Valdez oil spill, Congress determined it was necessary to provide more detailed and comprehensive legislation governing oil spills in "a single Federal law." Congress then considered CWA as the foundation for regulations regarding oil spills in enacting OPA, in which it provided for expanded regulations and savings provisions specifically with respect to oil spills. Hence, to the extent the OPA savings provisions are broader than those afforded under the CWA, the OPA provisions, which expanded upon CWA's provisions regarding oil spills, necessarily control.

Congress enacted OPA to "streamline federal law" and to "provide *quick and efficient cleanup of oil*

spills, compensate victims of such spills, and internalize the costs of spills with the petroleum industry." *Rice v. Harken Exploration Co.,* 250 F.3d 264, 266 (5th Cir. 2001) (citing Senate Report No. 101-94, *reprinted in* 1990 U.S.C.C.A.N., p. 772, 723) (emphasis supplied); *In the Matter of Settoon Towing LLC,* 2009 WL 4730971 (E.D.La. 2009). In view of the comprehensive scope and legislative history of the act, several courts have decided that OPA preempts or otherwise supplants preexisting federal law. *South Port Marine LLC v. Gulf Oil Limited Partnership,* 234 F.3d 58, 65 (1st Cir. 2000); *Settoon Towing, LLC, supra; Gabarick v. Laurin Maritime, Inc.,* 623 F. Supp. 2d 741, 750 (E.D.La. 2009); *Tanguis v. M/V Westchester,* 153 F. Supp. 2d 859, 867 (E.D.La. 2001).

In enacting OPA, Congress gave particular consideration to the issue of preemption, and expressed a marked intention *not* to preempt state law claims for oil spills:

> Preemption has been discussed by the members of the Committee more than any other single issue. S. 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fees, taxes, or penalties used to contribute to such funds. **The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed in S. 686.**

S. Rep. No. 101-94, *reprinted in* 1990 U.S.C.C.A.N., 739 (emphasis added).

Congress envisioned a system under which parties would have a choice whether to proceed under state or federal law. At the time OPA was enacted, twenty-four states already had oil spill and compensation laws on the books, and twelve states had oil spill funds. Seventeen of the states' laws had liability without specified limits. The oil companies lobbied hard for federal preemption, arguing that they could not afford reasonably-priced insurance coverage under such regimes and even suggesting that "they would not operate in an atmosphere of 'unlimited' risk." *Id.* at 728. Congress found their arguments "totally unfounded," noting that no oil shipping or producing companies were avoiding the seventeen states without liability limits. *Id.* In choosing to expose oil producers to state laws of potentially unlimited risk, Congress affirmed two "widely accepted" core principles: "a polluter should pay in full for the costs of oil pollution paid by that polluter; and, a victim should be fully compensated." *Id.*

OPA was "designed to provide basic protection for the environment and victims damaged by spills of oil." *Id.* at 728. A State "wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so." *Id.* On the other hand, a State which considered itself adequately protected by OPA could choose not to enact additional state law. "In any event," the Committee said, it chose "not to impose, arbitrarily, the constraints of the Federal regime on

the States while at the same time preempting their rights to their own laws." *Id.*

Notably, this history demonstrates that Congress did not, as the Fifth Circuit suggests, consider there to be any supposed preemptive effect on regulation of oil spills under this Court's decision in *Ouellette*. The Congressional record demonstrates that Congress considered the field of oil spill regulation *not* pre-empted in any way, and chose to *preserve* this status in enacting OPA.

Incredibly, in rejecting application of OPA's savings provision, the Fifth Circuit found that CWA was the more specific statute and hence it controlled. Unlike OPA, CWA is not limited to oil spills. It covers the discharge of a wide variety of pollutants into waterways, both permitted and un-permitted. Indeed, the savings provision of CWA Section 1321 covers discharge of oil "and other hazardous substances" occurring through any means, not just oil spills. OPA, on the other hand, relates only to oil spills, and was passed for the express purpose of providing a comprehensive *single* body of law with respect to oil spills. CWA, which broadly covers all nature of discharges of pollutants, cannot possibly be considered the more specific statute.

B. The Clean Water Act savings provision specific to oil spills preserves Louisiana's right to apply its Wildlife Statute to oil spills originating outside of the state.

The plain language of the CWA provisions covering oil spills confirms that Congress had no intention to curtail Louisiana's ability to impose additional penalties for harm caused by oil spills. As was discussed *supra*, oil spills are subject to a different savings provision of the CWA than permitted discharges into interstate waters at issue in *Ouellette*. In *Ouellette*, this Court did not consider the separate savings clause applicable to oil spills.

In holding that *Ouellette* bars the Louisiana District Attorneys' Wildlife Statute claims, the Fifth Circuit failed to consider the applicable savings clauses of the CWA with respect to oil spills. Section 1321(o) of the Clean Water Act, which is separate and distinct from the savings provision covering permitting of interstate discharges at issue in *Ouellette*, expressly preserves state law imposing liability for damages from discharges of oil.

Section 1321 bans the discharge of oil in amounts deemed to be harmful into any waters of the United States, including notably, areas subject to the Outer Continental Shelf Lands Act where the Deepwater Horizon spill occurred. The savings provision of Section 1321(o) broadly preserves all state laws imposing liability for damages caused by oil spills as

well as laws imposing standards not in conflict with the CWA. Section (o) provides:

> (o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected
>
> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.
>
> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.
>
> (3) **Nothing in this section shall be construed** as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or **to**

> **affect any State or local law not in conflict with this section**.

33 U.S.C. § 1321(o) (emphasis added).

Notably, only Section 1321(o)(2) contains the limiting language, "into any waters within such state . . . " Like the savings provisions of OPA, the other two clauses of Section 1321 place no such limitation on the source of the spill.

Disregarding both the strong presumption against preemption and the broad language of the savings provision, the Fifth Circuit focused solely on Section 1321(o)(2), and improperly interpreted that section narrowly so as only to save state claims for discharges where both the source and the impact of the oil spill were in state waters. Focusing on the phrase "into any waters within such state," the Fifth Circuit found that this saving clause only applies to situations in which the oil spill originated in state waters. However, the Fifth Circuit completely ignored the broad savings provisions of Sections (o)(1) and (o)(3), which do not include the "into any waters within such state" language. These two provisions, which operate independently of Section 1321(o)(2), preserve *all* state law causes of action for damage to public or private property (Section 1321(o)(1)), and all state laws "not in conflict with this section" (Section 1321(o)(3)), regardless of the place or origination of the oil spill.

Congress had a reason for including the "into waters of the state" language in only one of the three

savings provisions of Section 1321(o). Congress determined that when dealing with discharges into state waters, the States could require operational plans more stringent than the federal regulations. However, by excluding the "into any waters within the state" from the other two savings sections, Congress expressed a clear intent to allow states to impose damages and maintain their own laws (such as the Wildlife Statute), regardless of whether the oil spill originated in the state's waters, as long as the States did not impose requirements of conduct different from the federal regulations. Sections 1321(o)(1) and (o)(3) preserve Louisiana's historic police power to assess penalties for damage to wildlife when a defendant has violated federal law causing harm in the State, without respect to whether the spill originated in Louisiana waters.

The savings provisions of Section 1321(o) are extremely broad, and do not support the Fifth Circuit's narrow interpretation. In the savings provisions, Congress expressed the unequivocal intention *not* to interfere with the states' imposition of damages for oil spills, regardless of where they originate, or any other provisions not in conflict with the section.

V. The instant Petition presents the best vehicle for review of a recurring question of national importance.

The question of whether historic state police powers with respect to protection of wildlife from

oil spills are preempted by federal regulation of "interstate pollution" under the Clean Water Act is one of recurring national importance that has not been addressed by this Court. The Fifth Circuit's expansion of this Court's holding in *Ouellette* to oil spills is at odds with the holdings respecting historic state police power over sea-to-shore oil pollution in *Askew* and wildlife protection in *Lacoste*. This Petition presents a unique opportunity to resolve this conflict.

Because of the unique posture of the instant case, in which the question of preemption of state penalties for harm caused by oil spills is the *sole* issue to be addressed, this Petition allows for discreet review of this important issue. Since the lower courts addressed the preemption question in Rule 12 motion practice, there are no questions of fact to consider. Additionally, since the Petitioners' suit only asserted claims for civil penalties under the Wildlife Statute, there are no overlapping claims under federal law to consider.

The preemption question presented in this case is a recurring one of national importance. As the Fifth Circuit noted, in connection with the Deepwater Horizon oil spill, five States have asserted claims for penalties for violation of state regulations consistent with the Clean Water Act's requirements. Resolution of this key question is essential to the resolution of those States' pending claims.

Because the other pending State suits arising from the Deepwater Horizon disaster involve claims for damages under OPA as well as penalties under state law, this Court may never get the opportunity to consider the preemption issue in those cases. If the States are successful in their OPA claims, they may opt not to appeal the dismissal of their state law penalty claims. If they do appeal, then the preemption issue will likely be but one of many questions presented on appeal, many of which are embroiled with factual questions. Unlike those cases, the instant case affords the opportunity to address the question of preemption of state penalties for harm from oil spills without complications from other claims or divergent questions of fact.

The proliferation of offshore drilling makes this question likely to recur. As more offshore wells are drilled in ever deeper waters and at ever increasing well depths, the likelihood of offshore oil spills reaching state shores increases. Transport of oil offshore presents further chances for offshore oil spills to reach state shores. Every coastal state is affected by the preemption of oil spill penalty claims. States and the parties engaged in offshore drilling and transport of oil need to know whether, as Congress has stated, harm from offshore spills will be subject to state penalties. Until this Court weighs in, conflicts between the Fifth Circuit's ruling in this case and this Court's holdings in *Askew* and *Lacoste* leave the question open.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30012

IN RE: DEEPWATER HORIZON

Appeals from the United States District Court for the Eastern District of Louisiana

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(Filed Feb. 24, 2014)

Before JONES, BARKSDALE and SOUTHWICK, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Eleven Louisiana coastal parishes (the "Parishes") filed suits against BP and other defendants ("Appellees")[1] involved in the DEEPWATER HORIZON oil

[1] The Parishes filed suit against BP Exploration & Production, Inc.; BP Products North America, Inc.; BP America Production Company; and BP p.l.c. (collectively "BP"); Transocean Ltd.; Transocean Offshore; Transocean Deepwater; and Transocean Holdings (collectively "Transocean"); Halliburton Energy Services, Inc. and its related entities (collectively "Halliburton"); M-I, LLC; Cameron International Corp.; Weatherford U.S., L.P.; Anadarko Petroleum Corporation Co. and Anadarko E & P Company LP (collectively "Anadarko"); MOEX Offshore 2007 LLC and MOEX USA Corp. (collectively "MOEX"); Mitsui Oil Exploration Co., Ltd. ("MOECO").

(Continued on following page)

spill to recover penalties under The Louisiana Wildlife Protection Statute ("Wildlife Statute") for the pollution-related loss of aquatic life and wildlife. La. R.S. 56:40.1.[2] Suits filed originally in state court were removed to federal court, which denied the Parishes' motions to remand and then dismissed all of the Parishes' claims as preempted by federal law. Both decisions are challenged in the Parishes' appeal. We concur with the district court that the state law claims were removable pursuant to the jurisdictional provision of the Outer Continental Shelf Lands Act ("OCSLA"). We also affirm their dismissal as preempted by federal law.

BACKGROUND

The Macondo well, which was being drilled by the mobile offshore drilling rig DEEPWATER HORIZON, experienced a catastrophic blowout and explosion in April 2010 and caused hydrocarbon, mineral, and other contaminant pollution all along the shores

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On June 18, 2012, the district court entered a Consent Decree in MDL No. 2179 between the United States and MOEX defendants. Among other things, the Consent Decree provided for the payment of civil penalties to the State of Louisiana, conditioned on the State timely providing a Release to MOEX. The State timely provided the Release. Accordingly, the district court dismissed the Parishes' claims against MOEX.

[2] La. R.S. 56:40.1 *et seq.* authorizes civil penalties against any "person who . . . through the violation of any other state or federal law or regulation, kills or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life."

and estuaries of the Gulf Coast states, inflicting billions of dollars in property and environmental damage and spawning a litigation frenzy. Among the thousands of cases transferred for consolidated management by the Judicial Panel on Multidistrict Litigation to the Eastern District of Louisiana were the Parishes' lawsuits, some of which had been removed from state court. The district court handled cases filed by government entities, like the Parishes, in various groups according to their common issues. Considering first the remand motions filed by three of these Parishes, the court upheld its removal jurisdiction notwithstanding that the cases alleged only penalties accruing under state law for pollution damage that occurred in state waters or along the coastline.[3] The court predicated federal court jurisdiction on 43 U.S.C. § 1349(b)(1)(A). *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010* (*In re: Oil Spill*), 747 F. Supp. 2d 704, 708-09 (E.D. La. 2010). Next, considering various defendants' Motions to Dismiss the "B1" pleading bundle cases, filed for private or "non-governmental economic loss and property damages," the district court held that admiralty jurisdiction was present because the alleged tort occurred upon navigable waters and disrupted maritime commerce, and the operations of the

[3] At least three Parishes filed motions to remand (St. Bernard, Terrebonne, Plaquemines), and the court's pertinent order was issued on October 6, 2010. The docket sheets are somewhat ambiguous about which Parishes are included in the ruling and order, but all have appealed the refusal to remand.

DEEPWATER HORIZON, the vessel, bore a substantial relationship to maritime activity. *In re: Oil Spill,* 808 F. Supp. 2d 943, 951 (E.D. La. 2011). The district court also held that state law was preempted by maritime law. *Id.* at 953-55. In a subsequent order concerning the "C" pleading bundle cases, brought by the states of Alabama and Louisiana, the court drew from its decision concerning the "B1" pleading bundle to hold that the states' wildlife actions are preempted by federal law. *See In re: Oil Spill,* MDL No. 2179, 2011 WL 5520295, at *3, 8 (E.D. La. Nov. 14, 2011). Finally, when considering the Local Government Entity Master Complaint and certain other cases within pleading bundle "C," the district court held, *inter alia,* that because the Parishes only asserted state law claims, which the district court already deemed preempted, the cases failed to state claims upon which relief could be granted and must be dismissed. *In re: Oil Spill,* 835 F. Supp. 2d 175, 179-80 (E.D. La. 2011).

STANDARD OF REVIEW

"The district court's denial of the motion to remand, the propriety of removal under the various governing statutes, and the existence of subject-matter jurisdiction here are all interrelated questions of law subject to *de novo* review." *Oviedo v. Hallbauer,* 655 F.3d 419, 422 (5th Cir. 2011) (emphasis added). Further, "[w]e review the district court's grant of summary judgment on preemption grounds *de novo.*" *O'Hara v. Gen. Motors Corp.,* 508 F.3d 753, 757 (5th Cir. 2007).

DISCUSSION

I. Removal Jurisdiction

The Appellees principally rely on OCSLA's broad jurisdictional grant in petitioning for federal court removal jurisdiction.[4] Defendants may generally remove a case from state court if the federal court would have had original jurisdiction over it. 28 U.S.C. § 1441(a). The defendants bear the burden of establishing the basis for removal, and operative facts and pleadings are evaluated at the time of removal. *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 163, 118 S. Ct. 523, 529 (1997). The pertinent provision, OCSLA § 23(b)(1), states:

> . . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. . . .

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[4] Appellees' reliance on 28 U.S.C. § 1331 "arising under" jurisdiction is unpersuasive because no claim based on federal law appeared on the face of the Parishes' well-pled complaints. *McKnight v. Dresser, Inc.,* 676 F.3d 426, 430 (5th Cir. 2012). Further, we need not decide (a) whether the Parishes, whose recovery is "in the name of the State, and who will share proceeds of any statutory recovery with the State," are nonetheless "citizens" for diversity purposes; or (b) whether the fact that the State, if the real party in interest, is a plaintiff means that it cannot raise an Eleventh Amendment bar to removal.

The Fifth Circuit has interpreted this language as straightforward and broad. *See Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.,* 87 F.3d 150, 154 (5th Cir. 1996); *EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 569 (5th Cir. 1994) ("[A] broad reading of the jurisdictional grant of section 1349 is supported by the expansive substantive reach of the OCSLA."). Moreover, because jurisdiction is invested in the district courts by this statute, "[a] plaintiff does not need to expressly invoke OCSLA in order for it to apply." *Barker v. Hercules Offshore, Inc.,* 713 F.3d 208, 213 (5th Cir. 2013). Courts typically assess jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an "operation" "conducted on the outer Continental Shelf" that involved the exploration and production of minerals, and (2) the case "arises out of, or in connection with" the operation. *See, e.g., EP Operating Ltd. P'ship,* 26 F.3d at 568-69. As the district court noted, the fact that the oil spill occurred because of the Appellees' "operations" in exploring for and producing oil on the Outer Continental Shelf ("OCS") cannot be contested.

The Parishes do not concede, however, that, under the second half of the inquiry, their statutory wildlife claims arose out of or in connection with the oil production operation. Following the migration of contaminants from the well, the injury to wildlife and aquatic life was wholly situated in state territorial waters and on land. The statutory wildlife claims, they assert, have no effect on the "efficient exploitation of resources from the OCS," nor do they "threaten the

total recovery of federally-owned resources." *Id.* at 570. "Mere connection" to activities on the OCS, in other words, is insufficient to meet the jurisdictional test.

This argument, however, cannot be squared with applicable Fifth Circuit law or the facts before us. Even though one can hypothesize a "mere connection" between the cause of action and the OCS operation too remote to establish federal jurisdiction, this court deems § 1349 to require only a "but-for" connection. *See, e.g., Hufnagel v. Omega Serv. Indus., Inc.,* 182 F.3d 340, 350 (5th Cir. 1999) (applying the "but-for" test and finding § 1349 jurisdiction where a worker on a stationary drilling platform in the OCS was injured); *Tenn. Gas Pipeline,* 87 F.3d at 155 (using "but-for" test to find jurisdiction when a boat collided with a platform, even though the accident was argued to be a "navigational" error and the mineral operation in question did nothing to cause the accident); *Recar v. CNG Producing Co.,* 853 F.2d 367, 369 (5th Cir. 1988) (applying OCSLA to a personal injury suit when a platform worker was injured because a rope broke and caused him to fall to the deck of an adjacent transport vessel). The but-for test does not include a purposive element as the Parishes advocate. It is undeniable that "the oil and other contaminants would not have entered into the State of Louisiana's territorial waters 'but for' [Appellees'] drilling and exploration operation." *In re: Oil Spill,* 747 F. Supp. 2d at 708. This is not, in short, a challenging case for

asserting original federal jurisdiction, and therefore removal jurisdiction, under OCSLA.

Undeterred by this reasoning, the Parishes raise additional but flawed arguments. First, their attempt to intertwine the Section 1349 jurisdictional inquiry with OCSLA's choice of law provision, 43 U.S.C. § 1333, fails because the provisions and the issues they raise are distinct. *See, e.g., Dahlen v. Gulf Crews, Inc.,* 281 F.3d 487, 491-92 (5th Cir. 2002); *Recar,* 853 F.2d at 368-70. Federal courts may have jurisdiction to adjudicate a dispute under OCSLA, but they must then turn to the OCSLA choice of law provision to ascertain whether state, federal, or maritime law applies to a particular case. (Choice of law will be addressed in the next section of this opinion.) Any contrary implication in *Golden v. Omni Energy Servs. Corp.,* 242 Fed. App'x 965, 967 (5th Cir. 2007), is not precedential because the case was unpublished; we reference *Golden* here only because the Parishes erroneously relied on it.[5] Second, the Parishes contend that there is a situs requirement for OCSLA jurisdiction under the language of Section 1349. We disagree. Because federal jurisdiction exists for cases "arising out of, or in connection with" OCS operations, 43

[5] *Golden* has been criticized and is in any event factually distinguishable from this case, as the injury there originated in the land-based operation of the helicopter. *See, e.g.,* David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty & Maritime Law at the National Level & in the Fifth & Eleventh Circuits,* 33 Tul. Mar. L.J. 381, 464 (2009).

U.S.C. § 1349, the statute precludes an artificial limit based on situs and the Parishes' formulation conflicts with this court's but-for test. *See cases cited supra*. Third, the Parishes misapprehend 28 U.S.C. § 1441(b) in urging that diversity of citizenship is necessary to support the removal of an OCSLA claim. The version of Section 1441(b) in effect at the time of the district court's ruling required instead that a federal basis for original jurisdiction exist (OCSLA) and that no defendant be a citizen of the forum state.[6] Because both of those preconditions were met here, removal jurisdiction existed.

II. Choice of Law

The more difficult question in this appeal is whether the Wildlife Statute's penalties can be applied against the Appellees. The Parishes' arguments are easily summarized. Both briefs submitted by the

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[6] Section 1441(b) was amended effective only for actions commenced after January 6, 2012. The Parishes' claims commenced prior to that date. The language of Section 1441(b) applicable to the Parishes' claims provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b).

Parishes (authored on behalf of Orleans Parish, et al. and New Iberia Parish, et al.) acknowledge that the mobile offshore drilling unit DEEPWATER HORIZON is a vessel. *Demette v. Falcon Drilling Co.,* 280 F.3d 492, 498-99 (5th Cir. 2002), *overruled in part, on other grounds, by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,* 589 F.3d 778 (5th Cir. 2009) (en banc); *Offshore Co. v. Robison,* 266 F.2d 769, 776 (5th Cir. 1959). Both briefs assert that, for this reason, the OCSLA choice of law provisions cannot apply to their claims. ("Since, as the District Attorneys have consistently maintained, OCSLA situs is lacking, OCSLA cannot apply.") The Parishes thus foreswear any reliance on 43 U.S.C. § 1333(a)(2)(A), which borrows state law as surrogate federal law to regulate certain OCSLA activity.[7] As Orleans Parish puts it, "[i]t is not the adoption of state law as federal surrogate law that allows for penalties under Title 56, but the fact that the harm to wildlife made subject of the District Attorneys' suit occurred exclusively within Louisiana state waters, and Louisiana has the right to exercise its traditional police power . . . by pursuing penalty claims under Louisiana state law."[8]

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[7] Of course, the Parishes cannot prevent the application of OCSLA as a litigation choice any more than they could agree to a contract choice of law provision mandating admiralty law in these circumstances. *Alleman v. Omni Energy Servs. Corp.,* 580 F.3d 280, 283 n.2 (5th Cir. 2009) ("parties cannot choose to be governed by maritime law when OCSLA applies").

[8] The crux of the Parishes' argument is this analogy: "If someone commits murder on the navigable waters within the

(Continued on following page)

While they purport to abjure the application of federal law, however, the Parishes also rely on savings clauses in federal statutes that regulate water pollution (Clean Water Act ("CWA")), 33 U.S.C. § 1321(o),[9] and oil pollution (Oil Pollution Act ("OPA")), 33 U.S.C. § 2718(c), and preserve some state remedies. Of course, if the in-state location of wildlife injury alone suffices to support Louisiana's exercise of its police power, why resort to federal savings clauses?

The Parishes' inconsistent positions reveal a basic flaw. The question here is not whether federal law plays a role in remediating the effects of the Macondo well blowout, but how extensive the role is. The Parishes cannot prove Appellees' responsibility, or respective shares of responsibility, for wildlife injuries without alluding to the blowout's physical source, emissions from a well drilled in the OCS, or its human source, errors or omissions related to the DEEPWATER HORIZON'S production activity on the high seas above the OCS. The Parishes' pleadings

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State of Louisiana, admiralty law might apply to any civil claim arising from that death, but Louisiana would undoubtedly be able to prosecute the murder under Louisiana law." It is a bad analogy because it assumes the murder was committed in Louisiana waters, unlike the pollution that simply migrated into state waters. It is also an inapt basis for considering federal preemption, a subject that demands close textual analysis of case law and statutes.

[9] The district court referred to this provision by Section number of the Clean Water Act (§ 311), rather than by the U.S.C. number (§ 1321).

expressly allege, *inter alia,* that Appellees caused the Macondo well oil spill and violated federal regulations in so doing.

Analysis of federal law thus inevitably precedes the Parishes' simplistic *lex loci delicti* theory. Federal law covers the disaster in two ways. First, pursuant to OCSLA, "[a]ll law applicable to the outer Continental Shelf is federal law," and all cases "involving events occurring on the Shelf [are] governed by federal law. . . ." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 480-81, 101 S. Ct. 2870, 2876 (1981); *see* 43 U.S.C. § 1333(a)(1) ("The . . . laws . . . of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all . . . devices permanently or temporarily attached to the seabed . . . [for the purpose of resource exploitation].") Federal law governs injuries arising from activity on an OCSLA situs even if the injury occurs elsewhere. *See Alleman,* 580 F.3d at 286 (OCSLA applies to helicopter accident although victims fell into the sea after the helicopter crashed into an offshore platform). OCSLA allows the borrowing of state law as surrogate federal law only when state law is "not inconsistent with . . . other Federal laws and regulations. . . ." 43 U.S.C. § 1333(a)(2)(A). The borrowing provision does not apply here, however, either because, as the district court stated, the disaster is governed by maritime law or because the broader language of Section 1333(a)(1), which extends explicitly to devices temporarily

attached to the OCS (as Section 1333(a)(2)(A) does not), clearly controls.[10] In sum, even if the Parishes had not attempted to waive reliance on OCSLA, the federal law articulated by OCSLA displaces state law. Further, as the Supreme Court has ruled, Section 1333(a) "supersede[s] the normal choice-of-law rules that the forum would apply." *Gulf Offshore,* 453 U.S. at 482 n.8, 101 S. Ct. at 2877 n.8.

Alternatively, maritime law applies here because the DEEPWATER HORIZON is a vessel. A strong argument exists for the proposition that the disaster occurred while the vessel was engaged in the maritime activity of conducting offshore drilling operations, and the disaster had a significant effect on maritime commerce. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527 *passim,* 115 S. Ct. 1043 *passim* (1995) (maritime law applies to damages where drill barge flooded underwater tunnel and buildings on river bank); *Theriot v. Bay Drilling Corp.,* 783 F.2d 527, 538-39 (5th Cir. 1986).

OSCLA Section 1333(a)(1) and admiralty law constitute alternative, not overlapping, regimes of federal law. *See Rodrigue v. Aetna Cas. & Sur. Co.,* 395 U.S. 352, 361, 89 S. Ct. 1835, 1840 (1969); *Texaco*

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[10] This Court's "*PLT* test," which we have used to determine when state law may apply to an OCSLA activity, is a misfit for the present case. *See Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.,* 895 F.2d 1043, 1047 (5th Cir. 1990). *PLT* may suit cases under Section 1331(a)(2), but it is hard to square with Section 1333(a)(1), where state law has no role.

Exploration & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 772-73 (5th Cir. 2006). For present purposes, however, the exact dichotomy is irrelevant as either regime includes the federal statutes regulating water pollution and oil pollution, to which we now turn.

A. General Principles

The Federal Water Pollution Control Act (*aka* Clean Water Act, "CWA"), 33 U.S.C. § 1251-1376, and its implementing regulations comprehensively govern oil exploration and development on the OCS, including BP's conduct of the Macondo well operations pursuant to National Pollutant Discharge Elimination System ("NPDES") Permit No. GMG290000. *Gulf Restoration Network v. Salazar,* 683 F.3d 158, 164-66 (5th Cir. 2012). Under the regulations, states like Louisiana that might be affected by offshore pollutant discharges may offer comments before permits are issued, but they have no other express regulatory role. *Id.* at 165. Nevertheless, the Parishes assert the right to pursue state law penalties against the Appellees for pollution that migrated from nearly fifty miles offshore. We will examine their arguments in detail but first explain further the pertinent background law.

Put in starkest terms, had the blowout occurred in Texas state waters and caused pollution in Louisiana, the Parishes' Louisiana law claims would be squarely foreclosed. Federal preemption of interstate

water pollution claims has been a feature of United States law for over a hundred years. *See, e.g., Missouri v. Illinois,* 200 U.S. 496, 26 S. Ct. 268 (1906). Since 1987, the issue has been settled by the Supreme Court's decision in *International Paper Co. v. Ouellette,* 479 U.S. 481, 107 S. Ct. 805 (1987). In *Ouellette,* the Court resolved conflicting circuit court decisions on the question whether a state could enforce its laws against pollution that migrated into its environment from a neighboring state. *Compare Illinois v. City of Milwaukee,* 731 F.2d 403, 410-11 (7th Cir. 1984), *with Ouellette v. Int'l Paper Co.,* 776 F.2d 55, 55-56 (2d Cir. 1985). The Court explained that federal common law had, until 1971, governed "the use and misuse of interstate waters," and the Court reaffirmed the preemption of state law by federal common law articulated in *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 92 S. Ct. 1385 (1972). *Ouellette,* 479 U.S. at 487, 107 S. Ct. at 809. The Court described how the enactment of the federal CWA displaced federal common law with a complex scheme of cooperative federalism, delegating to states the authority to issue NPDES effluent discharge permits to point sources within their borders while retaining primary federal responsibility to eliminate water pollution. *Ouellette,* 479 U.S. at 488-91, 107 S. Ct. at 809-11. The Court then applied the standards of conflict preemption, concluding that the "CWA precludes a court from applying the law of an affected State against an out-of-state source." 479 U.S. at 494, 107 S. Ct. at 813. The Court stated:

> After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress."

479 U.S. at 493, 107 S. Ct. at 812 (citation omitted).

Among its reasons, the Court noted that factors such as the impact of discharges on a waterway, the types of effluents, and the schedule for compliance may vary widely among sources. Point source states may require stricter controls than the federal government. Complex policy, scientific, and technological decisions are required. Lawsuits based on affected states' common law of nuisance would upset this "balance of public and private interests." 479 U.S. at 494, 107 S. Ct. at 813. Such suits could "effectively override both the permit requirements and the policy choices made by the source State." 479 U.S. at 495, 107 S. Ct. at 813. The efficiency and predictability of the permit system would be undermined, to the disadvantage of private regulated entities. Chaotic confrontations among states could erupt over conflicting standards imposed on a single point source. In sum,

> It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

479 U.S. at 497, 107 S. Ct. at 814.

Notably, *Ouellette* also confronted and rejected the contention that two provisions of the CWA, which preserved a State's right to regulate its waters and an injured party's right to seek relief under "any statute or common law," authorized the nuisance suit under the affected state's law rather than that of the point source state. According to the Court, neither savings clause, carefully read, would stand for so broad a proposition. 479 U.S. at 492-93, 107 S. Ct. at 812. The citizen suit savings clause was preceded by the qualifier, "[n]othing in this section," while the states' authority was saved for regulation only of their own waters. *Id.*

Ouellette's interpretation of preemption under the CWA has not been superseded by any later Supreme Court decision nor, as we shall see, by statute. Indeed, its principles were affirmed by the Court in *Arkansas v. Oklahoma,* 503 U.S. 91, 100, 112 S. Ct. 1046, 1053-54 (1992).

Because the CWA was inadequate to provide complete remedies for the Valdez, Alaska oil spill catastrophe, Congress passed the Oil Pollution Act ("OPA") in 1990. 33 U.S.C. §§ 2701-62. Congress intended that the OPA would "build [ ] upon section 311 of the Clean Water Act [§ 1321] to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution." S. Rep. No. 101-94, at 9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730. The OPA prescribes a supplemental, comprehensive federal plan for handling oil spill responses, allocating responsibility among participants and prescribing

reimbursement for cleanup costs and injuries to third parties. The remedial efforts for the Macondo well blowout occurred under the auspices of both the CWA, 33 U.S.C. § 1321(b)(1) (the CWA applies to oil discharges in connection with activities above the OCS), and the OPA, 33 U.S.C. § 2701(32)(C) (extending the OPA to offshore facilities above the OCS).

Both the CWA and the OPA contain provisions that save state law causes of action, including penalty claims, under certain circumstances. The CWA clause involved in this case is 33 U.S.C. § 1321(o), which states in pertinent part:

> (o) Obligation for damages unaffected, local authority not preempted; existing Federal authority not modified or affected
>
> > (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator . . . or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance. . . .
> >
> > (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance *into any waters within such State,* or with respect to any removal activities related to such discharge.

> (3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

(Emphasis added).

The OPA's provision is differently worded:

Section 2718(a). Relationship to Other Law

> (a) Preservation of State authorities; Solid Waste Disposal Act
>
> Nothing in this Act . . . shall –
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –
>
> (A) the discharge of oil or other pollution by oil *within such State*; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law.
>
> . . . .
>
> (c) Additional requirements and liabilities; penalties

> Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or . . . any State or political subdivision thereof –
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> relating to the discharge . . . of oil.

33 U.S.C. § 2718(a), (c) (emphasis added).

B. Application of General Principles

The Parishes make two basic arguments. First, they assert that their historic police powers to deter oil pollution in their waters and protect their aquatic life and wildlife are preserved notwithstanding the application of federal law. Second, they assert that both above-cited federal savings clauses expressly protect their ability to levy Wildlife Statute fines. Each argument must be carefully considered.

1. Does *Ouellette* control?

The Parishes' first proposition depends on whether the states maintained historic police powers to apply their local law to interstate water pollution even if the pollution originated outside the state. The Supreme Court's discussion of the issue in *Milwaukee*

I contradicts the Parishes' position. 406 U.S. at 105-06, 92 S. Ct. at 1393-94. A federal common law of nuisance, not the competing laws of each affected jurisdiction, was applied to interstate water pollution cases from an early period. 406 U.S. at 106-07, 92 S. Ct. at 1394-95. This is not to say the states were deprived of rights and remedies in such cases, but only that they had to rely on the common body of federal law to do so. The claim by the states (and their localities) to apply their historic police power in these situations is therefore dubious.

Even assuming the Parishes have some residual police power to apply local law to this OCSLA-originated discharge, however, they must overcome federal preemption under the CWA. As the Supreme Court predicted in *Milwaukee I,* 406 U.S. at 107, 92 S. Ct. at 1395, Congress could and did supplant federal common law with an overarching regulatory framework to protect the nation's waters. To effectuate the full purposes of the regulations, *Ouellette* held that the states' ability to apply local law to out-of-state point sources of alleged water pollution was in conflict with the CWA. 479 U.S. at 494, 107 S. Ct. at 812-13.

The Parishes contend that *Ouellette* is distinguishable. First, it applies only to the CWA's permitting provision (33 U.S.C. § 1342), not to the oil discharge prohibition (33 U.S.C. § 1321(o)). Relatedly, the savings provisions that *Ouellette* found inapposite are different from the provisions the Parishes rely on. Second, since *Ouellette* considered only interstate

water pollution, the decision has no bearing on discharges from the OCS. We find these distinctions unpersuasive.

The Supreme Court's subsequent interpretation of *Ouellette* substantially undermines any cramped reading of the case. The Court reiterated *Ouellette*'s holding that "the Clean Water Act taken 'as a whole, its purposes and its history' pre-empted an action based on the law of the affected State and that the *only* state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'" *Arkansas,* 503 U.S. at 100, 112 S. Ct. at 1053 (citing *Ouellette,* 479 U.S. at 493, 487, 107 S. Ct. at 812, 809) (emphasis added). This statement is not limited to the specific provisions of the CWA at issue in *Ouellette*; in fact, *Arkansas* refers to "interstate discharge" irrespective of type or permit status. The Fourth Circuit confirmed *Ouellette*'s reach by applying it to an interstate pollution dispute arising under the Clean Air Act. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.,* 615 F.3d 291, 306-07 (4th Cir. 2010). That court concluded, "[t]here is no question that the law of the states where emissions sources are located . . . applies in an interstate nuisance suit. The Supreme Court's decision in *Ouellette* is explicit: a 'court must apply the law of the State in which the point source is located.'" *Id.* at 306 (citation omitted).

Hoping to confine *Ouellette* to NPDES permitting cases and the specific savings provisions the Court considered, the Parishes contend that the Court's goal in *Ouellette* was to prevent disruption of the

point-source effluent permitting system by redundant or conflicting state legal regimes. 33 U.S.C. § 1342. On the other hand, they contend, because the CWA essentially prohibits "discharges" of "oil or hazardous substances" into the nation's navigable waters and the waters of the OCS, 33 U.S.C. 1321(b), allowing all affected states to impose their laws on the illegal activity creates not conflict, but reinforcement of federal law.

The Court's opinion, however, resists such limitation. In the paragraph that introduces the Court's reasoning, *Ouellette* speaks plainly: "We hold that when a court considers a State-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the state in which the point source is located." 479 U.S. at 487, 107 S. Ct. at 809. There is no mincing about the precise preemptive provisions of the federal CWA. Later, the Court responds to the plaintiffs' allegations that the point source violated the terms of its NPDES permit by noting the availability of a citizen suit under the CWA in lieu of the law of the affected state. 479 U.S. at 498 n.18, 107 S. Ct. at 814 n.18. A permit violation constitutes a "discharge" prohibited by Section 1321(b). 33 U.S.C. § 1321(a)(definition of "discharge"), (b)(3). The Court's logic must extend to oil discharges, which are illegal under the same provision. With respect to oil pollution originating from the OCS, *Ouellette* offers an analogous answer: the affected parties can sue for the generous remedies, including for loss of wildlife, that the OPA offers. OPA, 33 U.S.C. § 2702(b)(2)(D).

A weaker argument against *Ouellette* urges that it quelled disputes over the application of competing state laws to interstate water pollution but has no impact on the overlay of state laws on a federally controlled point source. On the contrary, the federal responsibility for the OCS is clear. The Macondo well site was developed under a plethora of federal regulations, including an NPDES permit. *See generally Gulf Restoration Network,* 683 F.3d at 165-66. The federal government's interest is no different from that of point-source states, which aim to encourage economic development while preserving optimal environmental conditions for their citizens. Allowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *Ouellette*. That three Gulf coast states submitted amicus briefs in this appeal, and all five Gulf Coast states filed suits[11] to recover damages based on particular state laws testifies to the problem. Moreover, just as with entities operating in point-source states, if entities engaged in developing the OCS were subjected to a multiplicity of state laws in addition to federal regulations, they could be forced to adopt entirely different operational plans or in the worst case be deterred by the redundancy and lack of regulatory clarity from even pursuing their OCS plans. The reasons for avoiding redundant or

[11] The Local Government Entity Master Complaint alleges breach of tort duties under the laws of Florida, Alabama, Mississippi, Louisiana, and Texas.

conflicting legal regimes are equally potent whether the point source is located in a state or a federal enclave.

In sum, *Ouellette* forms a controlling backdrop for resolving claims caused by the blowout. Federal law, the law of the point source, exclusively applies to the claims generated by the oil spill in any affected state or locality.

2. Effect of Savings Clauses

With *Ouellette* as the controlling law, there are no state remedies to "save." The OPA applies as the law of the OCSLA point source and, along with the CWA penalties, furnishes a comprehensive remedial regime for affected states' governmental and private claims. Just because the Parishes are located in the most closely adjacent state, they fare no better than the "down-current" states of Texas, Mississippi, Alabama, and Florida. The CWA and the OPA "savings" clauses preserve but do not create state law claims. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 162, 40 S. Ct. 438, 441 (1920); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 224-25, 106 S. Ct. 2485, 2495 (1986) (Death on the High Seas Act savings clause only preserves state courts' jurisdiction to provide remedies for fatalities in state waters).[12]

[12] We reject the assertion in Alabama's amicus brief that "effects jurisdiction" or the "objective territorial principle," theories

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Nevertheless, for additional reasons, each savings clause is powerless to "save" the Parishes' claims under the Wildlife Statute. In general, the savings clauses must be read with particularity and, as *Ouellette* demonstrates, a savings clause does not disrupt the ordinary operation of conflict preemption. *See Ouellette,* 479 U.S. at 492-93, 107 S. Ct. at 812 (rejecting application of two savings provisions of the CWA); *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 869, 120 S. Ct. 1913, 1919 (2000).

a. CWA § 1321(o)

Most closely on point in the CWA is Section 1321(o)(2), which provides that, "[n]othing in this Section shall [preempt any state or local] requirement or liability with respect to the discharge of oil . . . into any waters within such state. . . ." The provision only saves state laws imposing liability or additional requirements with respect to the "discharge" of oil "into any waters within such State." The provision does not save a state's laws where the discharge did not occur "within" the state. The Parishes contend that the term "discharge" should be read to include "any means by which oil enters state waters." According to the statute, however, "discharge" "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping. . . ." 33 U.S.C.

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associated only with international law, apply to the federal preemption issues here.

§ 1321(a)(2). These gerunds connote active conduct or movement from a point source to a place within the state rather than the mere passive migration or floating of oil into state waters. Contrary to the Parishes' view, the word "emitting" does not change this analysis. "Emit" means to send out or release. *Webster's Third New International Dictionary* 742 (3d ed. 1986). The principle of *noscitur a sociis,* that words grouped in a list should be given related meaning, reinforces our interpretation because, taken in context with the other gerunds, "emitting" must take on an active cast. *See Third Nat'l Bank in Nashville v. Impac Ltd., Inc.,* 432 U.S. 312, 322-23, 97 S. Ct. 2307, 2313-14 (1977).[13]

The other subsections of Section 1321(o) afford no benefit to the Parishes. Section 1321(o)(1) expressly saves damage claims, not penalties under the Wildlife Statute. Section 1321(o)(3), a catch-all provision, saves state laws *not in conflict* with the section itself. To construe the catch-all harmoniously with Section 1321(o)(2), which is limited to discharges within state waters, and avoid rendering the companion provision superfluous, the catch-all must be similarly limited.

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[13] *Askew v. Am. Waterways Operators, Inc.,* 411 U.S. 325, 93 S. Ct. 1590 (1973), does not support the Parishes' interpretation of Section 1321 as preserving state law regulation of oil pollution that originated outside state waters. The spill in that case occurred adjacent to Florida's shore.

b. Section 2718(c)

The Parishes place the most emphasis on this savings clause from the OPA. The section states that "[n]othing in this Act [OPA] . . . shall in any way affect . . . the authority of the United States or any State [or locality] . . . to impose . . . any fine or penalty . . . " relating to an oil discharge. 33 U.S.C. § 2718(c). First, they assert, the OPA was enacted to supplement the older CWA apparatus for redressing the consequences of oil pollution. Second, the Parishes urge that the OPA, being specific with regard to oil pollution, controls over the more general requirements of the CWA, which applies to both illegal oil and hazardous substance discharges into navigable waters. Third, the exact language of Section 2718(c) differs critically from the CWA's Section 1321(o) because it lacks the narrowing reference to state waters. Finally, a construction of Section 2718(c) that limits its effect to discharges within state waters would allegedly render the OPA savings clause superfluous. Section 2718(c), from their standpoint, preserves "all state penalty provisions 'relating to' oil spills in any way, not just those originating in state waters." On balance, however, we conclude that the Parishes place more weight on this savings provision than it can bear.

To begin, the canon of construction that mandates application of a specific over a general statutory provision is not easily adapted to this statutory scheme. As all parties acknowledge, the CWA, the fountainhead of clean water regulation, contains the

provisions that prohibit oil discharges and set penalties for illegal discharges. 33 U.S.C. § 1321(b)(3), (6) ("Administrative penalties"), (7) ("Civil penalty actions"), (f) ("Liability for actual costs of removal"). These provisions led the district court to declare the CWA's savings provision more specific than those in the OPA. The Parishes, in contrast, characterize Section 2718(c) as plainly more specific both because it resides in the OPA and it preserves state penalty actions. We do not, however, perceive the applicability of these provisions to be an either/or proposition. Instead, each requires interpretation within a statutory framework in which the OPA was designed to complement, not compete with the CWA. That the OPA was enacted more recently than the CWA means little where there is no fundamental conflict with provisions of the CWA. The statutes, in other words, must be construed, as the district court noted, in *pari materia.*

Moving to the specific language of Section 2718(c), the provision more precisely states, "Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. § 183 *et seq.*), or § 9509 of Title 26, [shall affect] the authority of the United States or any State or political subdivision thereof. . . ." Statutory construction begins with the language of the statute, *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251, 130 S. Ct. 2149, 2156 (2010), and, in the absence of ambiguity, often ends there. Two features of this prefatory language are notable. The savings provision does not apply beyond the OPA itself and two other laws.

Further, Congress did not refer to the CWA. Courts are not at liberty to expand the language chosen by Congress, and the omission here is telling. Thus, while Section 2718(c) saves from the OPA's diminution the ability of the United States or state entities to impose requirements relating to oil discharges, it does not save those powers from the effects of the CWA or any other non-identified federal law. Consistent with this conclusion, the Supreme Court in *Ouellette* held that a savings clause commencing with "nothing in this section" is by its terms limited to preemption caused by that section alone. *See* 479 U.S. at 493, 107 S. Ct. at 812 (such a clause "does not purport to preclude pre-emption of state law by other provisions of the Act"); *see also United States v. Locke,* 529 U.S. 89, 106, 120 S. Ct. 1135, 1146-47 (Section 2718 does not extend to subjects addressed in other Titles of the OPA or other acts).

Other principles of statutory construction are relevant because of the prefatory language here. If Section 2718(c) were interpreted, as the Parishes contend, to "supersede" the CWA and *Ouellette* by allowing all affected states to layer their unique penalty and regulatory laws on top of those governing this OCSLA blowout, the result would be an implied repeal of CWA preemption. Implied repeals, however, are disfavored. *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442, 107 S. Ct. 2494, 2497 (1987); *Ysleta del Sur Pueblo v. Texas,* 36 F.3d 1325, 1335 (5th Cir. 1994). Apart from omitting reference to waters within the state, however, there is no indication

in Section 2718(c) or the OPA that Congress intended to repeal the point-source primacy ordained by the CWA. That the OPA in fact amended CWA Section 1321(o)(2) to add the phrase "or with respect to any removal activities related to such discharge" without also amending the immediately preceding phrase "into any waters within such State" signals Congressional intent not to modify this portion of the CWA. *See* OPA Sec. 4202, Pub. L. No. 101-380, 104 Stat. 484, 532 (codified as 33 U.S.C. § 1321(o)(2)). Courts cannot, without any textual warrant, expand the operation of Section 2718(c) to, in effect, modify the scope of preemption under the CWA.

It is also possible to understand why Section 2718(c) omits a reference to waters within the affected state. Simply, the provision saves remedies available to the United States as well as the states, rendering a geographic limitation to state waters meaningless. Viewed in light of Congress' presumed awareness of *Ouellette* when the OPA was passed, and Congress' failure to change the scope of CWA preemption despite its intent generally to broaden remedies against oil pollution, this omission cannot be controlling on the scope of this savings provision.

Nor does this construction deprive the savings provision of utility, as the Parishes assert. For any oil pollution whose point source is on the land or navigable waters within a state, Section 2718(c) authorizes the point source state and its political subdivisions to impose any additional liability, requirements, fines, and penalties. Preemption is limited to situations in

which the affected state is not the point source jurisdiction; affected states may still pursue relief based on the OPA and the CWA or the law of the point-source.[14]

Finally, we note that this interpretation does not diminish the incentives for compliance with the CWA or the OPA or the point source states' additional laws concerning oil pollution. The federal laws' extravagant penalties, fines, criminal liability, and damage exposure that may be imposed on entities associated with oil pollution, even in the absence of the layering of multiple affected states' laws, evidence a clear congressional policy of deterrence and retribution.[15]

CONCLUSION

For the reasons stated above, the district court had removal jurisdiction over the Parishes' Wildlife Statute claims. Further, it correctly concluded that the claims are preempted by the CWA as interpreted

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[14] The argument is also briefly made that the Parishes' Wildlife Statute claims are preserved by Section 2718(a)(1)(A), which allows any state or political subdivision thereof to impose additional liability or requirements with respect to "the discharge of oil or other pollution by oil within such State. . . ." The Parishes would limit "within such State" to modifying "pollution by oil." This does not wash grammatically; the geographic limitation applies to both means of pollution.

[15] From this discussion, it is clear that we reject a Tenth Amendment argument on behalf of the Parishes and need not reach Appellees' contention that the OPA's proscription of certain duplicative damages preempts the Wildlife Statute claims.

in *Ouellette*, and that Congress did not reject that interpretation explicitly or by negative implication in the CWA or when it passed the OPA. The judgment of the court dismissing the Parishes' claims is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010	*	**MDL No. 2179**
	*	**SECTION: J(1)**
This Document Applies to:	*	**JUDGE BARBIER**
Pleading Bundle "C," in part:	*	
Local Government Entity Master Complaint (Rec. Doc. 1510) and cases by local government entities and certain States of the United Mexican States (10-1757, 10-1758, 10-1759, 10-1760, 10-2087, 10-2731, 10-2996, 10-2997, 10-4185, 10-4239, 10-4240, 10-4241)	*	**MAG. JUDGE SHUSHAN**

ORDER AND REASONS

(Filed Dec. 9, 2011)

[As to the Local Government Entity Master Complaint and certain other cases within Pleading Bundle "C"]

Before the Court are multiple Motions to Dismiss the Local Government Entity Master Complaint and other individual actions falling within Pleading Bundle "C." (Rec. Docs. 1152, 1421, 1422, 1423, 1424,

1781, 1782, 1783, 1786, 2214, 2218, 2220, 2221, 2224, 2442, 2636, 2638, 2642, 2657).[1]

I. BACKGROUND AND PROCEDURAL HISTORY

This Multi-district Litigation ("MDL") consists of hundreds of consolidated cases, with thousands of claimants. These cases arise from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit ("MODU"), and the subsequent discharge of millions of gallons of oil into the Gulf of Mexico. Pretrial Order No. 11/Case Management Order No. 1 (Rec. Doc. 569) consolidated and organized claims into several "pleading bundles." As amended by Pretrial Order No. 33, Bundle "C" is defined as:

> **Public Damage Claims.** This pleading bundle will include claims brought by governmental entities for, inter alia, loss of resources, loss of tax revenue, property damages, response or restoration costs, and civil penalties.

(Rec. Doc. 1549). Actions were filed by District Attorneys for certain coastal parishes in the State of

[1] Opposition briefs appear at Record Documents 1820, 2110, 2138, 2139, 2161, and 3186. Reply briefs appear at 2738, 2741, 2742, 3554, 3555, 3558, 3563, 3579, 3580, 3582, and 3585. Sur-Reply and Supplemental Briefs appear at 3100, 3978, 3981, 3982, 3997, 3998, 3999, 4000, 4002, 4005.

Louisiana (Civ. A. Nos. 10-1757, 10-1758, 10-1759, 10-1760, 10-2087, 10-2731, 10-2996, 10-2997; hereinafter "Louisiana Parish DA Cases"), four cities in the State of Alabama (Civ. A. No. 10-4185; hereinafter "Alabama Cities Case"), and three States from the United Mexican States (Civ. A. Nos. 10-4239, 10-4240, 10-4241; hereinafter "Mexican State Cases"), all of which were consolidated with this MDL. Motions to Dismiss were filed in response to these actions (Rec. Docs. 1152, 1421, 1422, 1423, 1424, 1781, 1782, 1783, 1786).

After these individual actions were filed, the Plaintiffs' Steering Committee was granted leave to file a voluntary Local Government Entity Master Complaint (sometimes referred to as "Master Complaint," Rec. Doc. 1510; Pretrial Order No. 33, Rec. Doc. 1549). Local government entities could adopt the Master Complaint by filing a "Local Government Short Form Joinder" into member case 10-9999 (Pretrial Order No. 33, Rec. Doc. 1549).[2] Any answer, motion to dismiss, or other pleading filed in response

[2] The Local Government Entity Master Complaint also included an answer to and claim in the Transocean entities' Limitation Proceeding (Civ. A. No. 10-2771). By filing a Local Government Short Form Joinder, a plaintiff was deemed to have filed a claim in the Limitation Action as well as adopting the Master Complaint. (Pretrial Order No. 33, Rec. Doc. 1549 ¶ 3). Filing a Local Government Short Form Joinder does not waive any defenses, objections, motions, allegations, claims, etc., unique to a plaintiff or contained within a pre-existing petition or complaint. (Pretrial Order No. 33, Rec. Doc. 1549 ¶¶ 5, 8; Stip. Order of May 6, 2011, Rec. Doc. 2273 ¶ 4).

to the Master Complaint was deemed responsive to the common legal and factual issues contained in individual civil actions within Bundle C as well (Stipulated Order of May 6, 2011, Rec. Doc. 2273). Multiple Motions to Dismiss were filed with respect to the Local Government Entity Master Complaint (Rec. Docs. 2214, 2218, 2220, 2221, 2224, 2442, 2636, 2638, 2642, 2657).

II. THE LOCAL GOVERNMENT ENTITY MASTER COMPLAINT

The Local Government Entity Master Complaint named the following Defendants: BP Exploration & Production, Inc. and its related entities (collectively, "BP"), Transocean Offshore Deepwater Drilling, Inc. and its related entities (collectively, "Transocean"), Halliburton Energy Services, Inc. and its related entities (collectively, "Halliburton;"), M-I, LLC ("M-I"), Cameron International Corp. ("Cameron"), Weatherford U.S., L.P. ("Weatherford"), Anadarko Petroleum Corporation Co. and Anadarko E&P Company LP (collectively, "Anadarko"), MOEX Offshore 2007 LLC and MOEX USA Corp. (collectively, "MOEX"), and Mitsui Oil Exploration Co., Ltd. ("MOECO"). The Master Complaint asserts the following claims under general maritime law: negligence (asserted against all Defendants), gross negligence and willful misconduct (asserted against BP, Transocean, Halliburton, M-I, and Cameron), and products liability (asserted against Cameron, Halliburton, and Weatherford). Claims under the Oil

Pollution Act ("OPA"), 33 U.S.C. § 2701, *et seq.,* are asserted against BP, Transocean, Anadarko, and MOEX. Under state law, the Master Complaint asserts certain common-law and statutory claims: public nuisance and nuisance (asserted against BP, Transocean, Halliburton, M-I, Cameron, and Weatherford), trespass (same), fraudulent concealment or suppression of material facts (asserted against BP, Halliburton, and Transocean), the Florida Pollutant Discharge Prevention and Control Act, Fla. Stat. § 376.011, *et seq*. (asserted by Florida plaintiffs against BP and Transocean), the Louisiana Oil Spill Prevention and Response Act ("LOSPRA"), La. R.S. 30:2451, *et seq*. (asserted by Louisiana plaintiffs against all Defendants), penalties under La. R.S. 56:40.1, *et seq*. (same), and the Texas Oil Spill Prevention and Response Act of 1991, Tex. Nat. Res. Code Ann. § 40.001, *et seq*. (asserted by Texas plaintiffs against all Defendants). Punitive damages are sought under general maritime law. Finally, the Master Complaint requests a declaratory judgment that "any settlement provisions that purport, directly or indirectly, to release or to affect the calculation of punitive damages without a judicial determination of fairness, adequacy, and reasonableness are ineffective as contrary to law, equity and public policy."

The Court has previously issued rulings in this MDL on the Motions to Dismiss the complaints by the States of Alabama and Louisiana ("Order on the States' Actions," Rec. Doc. 4578) and the Motions to Dismiss the B1 Master Complaint ("B1 Order," Rec.

Doc. 3830). Those rulings resolve all of the issues raised by the instant Motions to Dismiss with respect to the Local Government Master Complaint. Accordingly, the Court finds as follows:

1. All claims pled under state law, including penalties under state law, are dismissed. (*See* Order on the States' Actions, Rec. Doc. 4578 at 6-17; B1 Order, Rec. Doc. 3830 at 8-18; *see also* note 5, *infra*).

2. General maritime law claims that do not allege physical damage to a proprietary interest are dismissed under the *Robins Dry Dock* rule.[3] (*See* B1 Order, Rec. Doc. 3830 at 19-25). Otherwise, and subject to the paragraphs below, the Master Complaint plausibly states claims for negligence and products liability under general maritime law. Most claims asserted under OPA do not require physical damage to a proprietary interest. (*See* B1 Order, Rec. Doc. 3830 at 20-21; *see also* 33 U.S.C. § 2702(b)(2)).

3. OPA does not displace general maritime law claims asserted against parties who are not "Responsible Parties" under OPA. Accordingly, the Master Complaint plausibly alleges general maritime law claims directly against non-Responsible Parties. OPA does displace general maritime law claims against Responsible Parties, but only with

[3] The Bundle C Master Complaint alleges that at least some of the Local Government Entities have suffered physical damage to a proprietary interest from the oil spill. (Rec. Doc. 1510 ¶¶ 115, 513, 585).

regard to procedure, as described below. (*See* B1 Order, Rec. Doc. 3830 18-26).

4. As to claims asserted against an OPA Responsible Party, the Local Government Entities are subject to OPA's presentment procedure, 33 U.S.C. § 2713. (*See* Order on States' Actions, Rec. Doc. 4578 at 17-21). The Master Complaint alleges that some of the Local Government Entities have complied with this procedure (Rec. Doc. 1510 ¶ 668).[4] Those who have not complied with the presentment requirement are subject to dismissal without prejudice, allowing them to exhaust the presentment of their claims before returning to Court. (*See* B1 Order, Rec. Doc. 3830 at 30).

5. There is no presentment requirement for general maritime law claims asserted against non-Responsible Parties (*See* B1 Order, Rec. Doc. 3830 at 31 n.15).

6. Punitive damages are available under general maritime law. Those Local Government Entities that have valid general maritime law claims against non-Responsible Parties may be entitled to punitive damages under general maritime law. Those Local Government Entities that have valid general maritime law claims against Responsible Parties and complied with OPA's presentment

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[4] "To the extent required by law, and/or by consent or stipulation by BP, Plaintiffs have satisfied, or will have satisfied, all of the administrative requirements of 33 U.S.C. §§ 2713(a) and (b), as to each and all defendants, by the submission of their claims to the Gulf Coast Claims Facility (the "GCCF") and/or BP and/or its agents or designees." (Rec. Doc. 1510 ¶ 668).

procedure may be entitled to punitive damages under general maritime law. (*See* B1 Order, Rec. Doc. 3830 at 26-27).

7. The negligence claims asserted against Anadarko and MOEX are dismissed. (*See* B1 Order, Rec. Doc. 3830 at 27-29). The Bundle C Master Complaint plausibly alleges OPA claims against these entities. (*See* B1 Order, Rec. Doc. 3830 at 35, 29 n.12).

8. The Court does not define at this time the precise contours of OPA causation. (*See* B1 Order, Rec. Doc. 3830 at 32-33).

9. The claim for declaratory relief is dismissed. (*See* B1 Order, Rec. Doc. 3830 at 34-35).

10. Dril-Quip, Inc. was not named in the Bundle C Master Complaint, but was tendered to the Local Government entities via Transocean's Rule 14(c) Third Party-Complaint (Rec. Doc. 1320 ¶¶ XIX, XLVII). Transocean demanded judgment in favor of the Plaintiffs, which required Dril-Quip to defend against "the plaintiff's claim as well as the third-party defendant's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff." Fed. R. Civ. P. 14(c)(2). Dril-Quip filed a Motion to Dismiss "all claims in Bundle C." (Rec. Doc. 2442 at 1). Dril-Quip, Inc. remains a 14(c) Defendant with respect to the claims saved by this Order; Dril-Quip's arguments particular to it that have not been addressed are preserved. (*See* B1 Order, Rec. Doc. 3830 at 33-34; Amended B3 Order, Rec. Doc. 4209 at 23).

Accordingly,

IT IS ORDERED that, with respect to the Local Government Entity Master Complaint, the Motions to Dismiss (Rec. Docs. 2214, 2218, 2220, 2221, 2224, 2442, 2636, 2638, 2642, 2657) are **GRANTED IN PART** and **DENIED IN PART,** as set forth above.

III. THE LOUISIANA PARISH DA CASES

As mentioned, multiple actions were filed by District Attorneys for certain coastal parishes in Louisiana, which were consolidated with the MDL. The Louisiana Parish DA Cases ***only*** assert claims under Louisiana Revised Statute 56:40.1 against the BP entities:

> A person who kills, catches, takes, possesses, or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life in violation of this Title, or a regulation adopted pursuant to this Title, or a federal statute or regulation governing fish and wildlife, or who, through the violation of any other state or federal law or regulation, kills or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life, is liable to the state for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life, unlawfully killed, caught, taken, possessed, or injured.

La. R.S. 56:40.1; *see also* LOSPRA, La. R.S. 30:2491(B) ("Notwithstanding any other provision of this law, nothing herein shall be construed to preclude the

Department of Wildlife and Fisheries from bringing a civil suit to recover penalties for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life unlawfully killed, caught, taken, possessed, or injured pursuant to R.S. 56:40.1 et seq.").

BP filed a Motion to Dismiss the Louisiana Parish DA Cases (Rec. Doc. 1786). Further, and as mentioned above, the Motions to Dismiss the Local Government Entity Master Complaint were also deemed responsive to the common legal and factual issues contained in the Louisiana Parish DA cases. For reasons explained in the Order on the States' Actions, claims under La. R.S. 56:40.1, *et seq.,* are preempted.[5] Because the Louisiana Parish DA Cases

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[5] The Order on the States' Actions held that penalties asserted by the States under their respective pollution laws were preempted in this instance by the Clean Water Act, largely due to the Supreme Court's interpretation of the Clean Water Act in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). (Rec. Doc. 4578 at 9-17). This reasoning is equally applicable to penalties asserted under La. R.S. 56:40.1. In addition to these reasons, it also bears mention that the amounts sought under La. R.S. 56:40.1 appear potentially duplicative of natural resources damage under OPA, *see* 33 U.S.C. §§ 2702(b)(2)(A), 2706, which are sought in this MDL.

OPA provides that "[t]here shall be no double recovery under this Act for natural resource damages. . . ." 33 U.S.C. § 2706(d)(3); *see also* 15 C.F.R. § 990.22. Under OPA, "natural resources" include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the

(Continued on following page)

resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government." 33 U.S.C. § 2701(20). Damages are defined as "(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (B) the diminution in value of those natural resources pending restoration; plus (C) the reasonable cost of assessing those damages." 33 U.S.C. § 2706(d). OPA's corresponding regulations, the Natural Resource Damage Assessment, or "NRDA," provide "a range of assessment procedures for evaluating injuries to natural resources and services, and a means for selecting restoration actions from a reasonable range of alternatives." 15 C.F.R. § 990.10.

Thus, while it is acknowledged that La. R.S. 56:40.1 is framed as a "penalty," *see* La. R.S. 56:40.7, 30:2491(B), the fact that La. R.S. 56:40.1 is based on the "value" of each animal injured or killed arguably resembles a compensatory claim, which would impermissibly overlap with recovery under OPA, *see* La. R.S. 56:40.3 ("Whenever the department determines that a violation of R.S. 56:40.1 has occurred . . . it shall demand ***restitution*** from him for the ***value of such wildlife or aquatic life,*** the value of which has been determined in accordance with R.S. 56:40.2. . . ." (emphasis added)). Furthermore, "per animal" valuation appears to be inconsistent with NRDA's methods of estimating this damage. *See, e.g.,* Melissa Trosclair Daigle, *The Value of a Pelican: An Overview of the Natural Resource Damage Assessment under Federal and Louisiana Law,* 16 Ocean & Coastal L.J. 253, 266-267 (2011) ("Because the NRDA process will often result in a monetary value being put on the restoration of affected resources, the public will often think that each affected individual organism is counted. However, the value of the damage is established by looking at the affected ecosystem – or in this case, ecosystems – as a whole. ***This is a more manageable process than putting a value on each animal lost, as the state is not required to keep a freezer full of dead organisms to prove impact.*** This process is especially helpful in situations like the Deepwater Horizon spill,

(Continued on following page)

assert no other causes of actions, these member cases fail to state any claims upon which relief can be granted.

Accordingly,

IT IS ORDERED that, with respect to the Louisiana Parish DA Cases, the Motions to Dismiss (Rec. Docs. 1786, 2214, 2218, 2220, 2221, 2224, 2442, 2636, 2638, 2642, 2657) are **GRANTED.**

IT IS FURTHER ORDERED that claims asserted under La. R.S. 56:40.1 are **DISMISSED WITH PREJUDICE.** Because La. R.S. 56:40.1 is the only cause of action asserted in the Louisiana Parish DA Cases, those cases (Civ. A. Nos. 10-1757, 10-1758, 10-1759, 10-1760, 10-2087, 10-2731, 10-2996, 10-2997) are also **DISMISSED.**

However, to the extent they have not already done so, the Plaintiffs in the Louisiana Parish DA Cases are not prejudiced from seeking removal costs and/or damages under OPA (subject to OPA's presentment requirement) and general maritime law by filing a Local Government Entity Short Form or filing an individual complaint.

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where the true death toll of organisms cannot be known." (emphasis added)).

IV. THE MEXICAN STATE CASES

The Mexican States of Tamaulipas, Quintana Roo, and Veracruz (collectively, "the Mexican States"), each brought substantially similar actions (Civ. A. Nos. 10-4239, 10-4240, 10-4241), which were consolidated with this MDL. Claims are asserted under OPA, in addition to claims of negligence, gross negligence, negligence per se, private nuisance, and public nuisance. The actions name as defendants BP, Transocean, Halliburton, Anadarko, and Cameron. Defendants moved to dismiss these actions. (Rec. Docs. 1422, 1423, 1424, 1784, 1786, 2636).[6]

As to the Mexican States' OPA claims, foreign claimants[7] may recover under OPA only in select situations:

> (a) Required showing by foreign claimants
>
> (1) In general
>
> In addition to satisfying the other requirements of this Act, to recover

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[6] The Motions appearing at Record Documents 1422, 1423, 1424, 1784, and 1786 specifically addressed the Mexican State cases. Cameron moved to dismiss the Local Government Complaint (Rec. Doc. 2636), which does not purport to include Mexican States. However, consistent with the Court's Order of May 6, 2011 (Rec. Doc. 2273), the Court construes Cameron's motion as moving to dismiss the Mexican States as well.

[7] "Foreign claimant" is defined as "(1) a person residing in a foreign country; (2) the government of a foreign country; and (3) an agency or political subdivision of a foreign country." 33 U.S.C. § 2707(c).

> removal costs or damages resulting from an incident a foreign claimant shall demonstrate that –
>
> > (A) the claimant has not been otherwise compensated for the removal costs or damages; and
> >
> > (B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

33 U.S.C. § 2707(a)(1). The Mexican States do not contend that "the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants." Instead, the Mexican States urge that four documents demonstrate that "recovery is authorized by a treaty or executive agreement." However, the Court finds that none of these authorize their recovery under OPA.

The first treaty on which the Mexican States rely, the Agreement of Cooperation Regarding Pollution of the Marine Environment by Discharges of Hydrocarbons and Other Hazardous Substances, U.S.-Mex., July 24, 1980, 32 U.S.T. 5899, does not purport to

deal with the recovery of removal costs or damages. Rather, that treaty constitutes an agreement to establish a joint contingency plan for oil spills. *See id.,* Art. I. The resulting joint contingency plan, called the MEXUS Plan, is similarly silent with respect to the recovery of removal costs or damages.[8] According to Section 105 of the MEXUS Plan, its only purpose is to "provide standard operational procedures, in accordance with the 1980 Agreement, to coordinate bilateral responses to pollution incidents. . . ." The MEXUS Plan's Annex for the Gulf of Mexico Region also says nothing about the recovery of removal costs or damages; its stated purpose is "to augment the MEXUS Plan with regional details."

The second treaty relied upon by the Mexican States, the Cartagena Convention, also does not authorize the recovery under OPA. *See* Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11,085. Like the MEXUS Plan, the Cartagena Convention focuses on the prevention, reduction, and control of pollution. *Id.* Art. 4.[9] While Article 14 of the

[8] The Joint Contingency Plan Between the United Mexican States and The United States of America Regarding Pollution of the Marine Environment By Discharges of Hydrocarbons or Other Hazardous Substances, U.S.-Mex., Feb. 25, 2000, *available at* http://www.epa.gov/region6/6 sf/pdffiles/mexusplan.pdf.

[9] Similarly, the Oil Spill Protocol to the Cartagena Convention focuses on responding to oil spills, not liability.

Cartagena Convention, entitled "Liability and Compensation," does state that "[t]he Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area," it does not authorize the Mexican States' recovery under OPA. Rather, Article 14 leaves that subject for some other law to address.

Third, the Mexican States' reference to the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, is unhelpful because the United States has not ratified that treaty, its predecessors, or its attendant protocols.

Finally, the Treaty on Maritime Boundaries between the United States of America and the United Mexican States, U.S.-Mex., May 4, 1978, 17 I.L.M. 1073 (1978), does not authorize the recovery of removal costs or damages under OPA. Article 3 of that treaty states that its purpose is to establish the location of maritime boundaries between the United States of America and the United Mexican States.

Because the Mexican States have failed to demonstrate that "recovery is authorized by a treaty or executive agreement between the United States and the claimant's country," the Mexican States' claims under OPA are dismissed. The Court does not reach the parties' arguments regarding presentment under OPA.

Turning to the remaining claims, the complaints fail to plead any specific statutes on which the negligence per se claims are based; therefore, those claims are dismissed. Because substantive maritime law applies to this case (*see* B1 Order, Rec. Doc. 3830 at 8), the nuisance claims are also dismissed. (*See* Order on the States' Actions, Rec. Doc. 4578 at 25). The negligence and gross negligence claims asserted against Anadarko are dismissed. (*See* B1 Order, Rec. Doc. 3830 at 27-29). The Mexican States' negligence and gross negligence claims asserted against Defendants other than Anadarko are preserved, but only to the extent there has been a physical injury to a proprietary interest. (*See* B1 Order, Rec. Doc. 3830 at 19-25).

Accordingly,

IT IS ORDERED that, as to the Mexican State Cases, the Motions to Dismiss (Rec. Docs. 1786, 1422, 1423, 1424, 1784, 2636) are **GRANTED IN PART** and **DENIED IN PART,** as set forth above.

V. THE ALABAMA CITIES CASE

Three cities and one town in Alabama – Greenville, Evergreen, Georgiana, and McKenzie ("the Alabama Cities") – filed a single action that was consolidated with this MDL. (Civ. A. No. 10-4185). Named as defendants are BP, Transocean, Anadarko, MOEX, Mitsui & Co., Halliburton, Cameron, and M-I. The Alabama Cities seek recovery under OPA and also assert claims of negligence, gross negligence, and

negligence per se. Defendants moved to dismiss these actions. (Rec. Docs. 1152, 1786, 1421, 2214, 2218, 2220, 2224, 2636, 2642, 2657).

The Complaint does not allege presentment in accordance with 33 U.S.C. § 2713. The Local Government Short Forms filed by the Alabama Cities similarly do not reflect presentment. (*See* Civ. A. 10-9999, Rec. Docs. 2, 3, 4, 5). Consequently, the claims under OPA, which are asserted against all Defendants (Complaint ¶ 61), are dismissed without prejudice. Although the Court does not require the Plaintiffs to present claims to each party that may be liable under OPA, claims must be presented to the party that has been formally designated as the Responsible Party and established a claims procedure in accordance with 33 U.S.C. § 2714(b); i.e., BP. (*See* Order on States' Actions, Rec. Doc. 4578 at 17-21; B1 Order, Rec. Doc. 3830 at 30).

As to the remaining claims, the complaint does not allege physical damage to a proprietary interest; rather, the Alabama Cities claim only economic losses. The Court also takes notice of the fact that the Alabama Cities are not located directly on the coast, but are some distance inland. Thus, the remaining negligence claims are precluded by the *Robins Dry Dock* rule. (*See* B1 Order, Rec. Doc. 3830 at 19-25).

Accordingly,

IT IS ORDERED that, as to the Alabama Cities Case, the Motions to Dismiss (Rec. Docs. 1152, 1786, 1421, 2214, 2218, 2220, 2224, 2636, 2642, 2657) are

GRANTED. The claims of the Alabama Cities are **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED.

New Orleans, Louisiana, this 9th day of December, 2011.

/s/ Carl Barbier
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010	*	**MDL No. 2179**
	*	**SECTION: J(1)**
	*	**JUDGE BARBIER**
This Document Applies to:	*	**MAG. JUDGE SHUSHAN**
Actions by the States of Alabama and Louisiana, Part of Pleading Bundle "C"	*	
10-4182, *Alabama v. BP P.L.C., et al.* 10-4183, *Alabama v. Transocean, Ltd., et al.* 10-3059, *Louisiana v. Triton Asset Leasing GmBH, et al.* 11-516, *Louisiana v. BP Exploration. & Prod., Inc., et al.*	*	

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ORDER AND REASONS

(Filed Nov. 14, 2011)

[As to the Motions to Dismiss the Complaints of the States of Alabama and Louisiana, Part of Pleading Bundle "C"]

Before the Court are multiple Defendants' Motions to Dismiss[1] under Federal Rules 12(b)(1), 12(b)(6),

[1] (Rec. Docs. 2630, 2631, 2637, 2638, 2639, 2642, 2644, 2645, 2646, 2647, 2649, 2651, 2653, 2655, 2656). Some Motions

(Continued on following page)

and 12(c), respecting the First Amended Complaints of the States of Alabama and Louisiana, as well as the corresponding Oppositions,[2] Replies,[3] Supplemental Briefs,[4] and Post-Argument Briefs.[5]

I. BACKGROUND AND PROCEDURAL HISTORY

This Multi-district Litigation ("MDL") consists of hundreds of consolidated cases, with thousands of claimants, pending before this Court. These cases arise from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit ("MODU"), and the subsequent discharge of millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later. The consolidated cases include claims for the deaths of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages.

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also sought to dismiss the Local Government Entity Master Complaint or all claims in Bundle C. At present, however, the Court only considers the Motions against Alabama and Louisiana. Arguments respecting Local Government Entities are preserved.

[2] (Rec. Docs. 3203, 3213).

[3] (Rec. Docs. 3554, 3555, 3556, 3557, 3561, 3562, 3580, 3581, 3582, 3583, 3584).

[4] (Rec. Docs. 3978, 3979, 3981, 3982, 3991, 3992, 4000, 4001, 4002, 4003, 4005).

[5] (Rec. Docs. 4106, 4107, 4115).

By and through their respective Attorneys General, the States of Alabama and Louisiana (sometimes referred to collectively as "the States") initiated individual actions that were consolidated with this MDL (Case Nos. 10-4182, 10-4183, 10-3059, 11-516), and subsequently filed Amended Complaints.[6] (Rec. Docs. 1872, 2031). The States allege that the oil spill caused a variety of past, present, and future damages, including damage to natural resources and property, economic losses (including lost revenues, such as taxes), costs associated with responding to the oil spill and performing removal actions, costs associated with providing increased or additional public services, and the long-term reputation damage or "stigma" associated with the oil spill.

Named as Defendants are BP Exploration & Production, Inc. and its related entities (collectively, "BP"), Transocean Ltd. and its related entities (collectively, "Transocean"), Halliburton Energy Services, Inc. and its related entities (collectively, "Halliburton;"), M-I, LLC ("M-I"), Cameron International Corp. ("Cameron"), Weatherford U.S., L.P. ("Weatherford"), Anadarko Petroleum Corporation Co. and Anadarko E&P Company LP (collectively, "Anadarko"), MOEX

[6] Pretrial Order No. 11/Case Management Order No.1 consolidated and organized claims filed in this MDL into several "pleading bundles." (Rec. Doc. 569). These actions form a portion of pleading bundle "C," "Public Damage Claims," which includes "claims brought by governmental entities for, inter alia, loss of resources, loss of tax revenues, property damages, response or restoration costs, and civil penalties." (Rec. Doc. 1549).

Offshore 2007 LLC and MOEX USA Corp. (collectively, "MOEX"), and Mitsui Oil Exploration Co., Ltd. ("MOECO").

Seeking compensatory and punitive damages, Alabama's Amended Complaint asserts claims under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701, *et seq.,* general maritime law (negligence and products liability), and Alabama law (negligence, products liability, public and private nuisance, trespass, and fraudulent concealment). Alabama also seeks civil penalties against all Defendants for violations of the Alabama Water Pollution Control Act ("AWPCA"), Ala. Code §§ 22-22-1 to -14, the Alabama Air Pollution Control Act ("AAPCA"), Ala. Code §§ 22-28-1 to -23, the Alabama Hazardous Wastes Management Act ("AHWMA"), Ala. Code §§ 22-30-1 to -24, and the Alabama Solid Waste Disposal Act ("ASWDA"), Ala. Code §§ 22-27-1 to -18.[7] Finally, Alabama requests a declaratory judgment that BP,

[7] Alabama claims there are forty-three separate and distinct coastal waters of the State, and the introduction of pollutants into each of those waters constitutes a separate violation under the AWPCA. Each day pollution remains in those waters constitutes a new violation of the AWPCA. Accordingly, Alabama seeks civil penalties of $25,000 per day, per contaminated body of water, under the AWPCA. Alabama also claims compensatory and punitive damages under the AWPCA. Under the AAPCA, Alabama seeks penalties of $25,000 per day. Under the AHWMA, Alabama claims that the chemical dispersants used to remediate the oil spill violated that Act, and seeks penalties of $50,000 per day. Under the ASWDA, Alabama seeks civil penalties of $200 per day.

Transocean, Anadarko, MOEX, and MOECO are held jointly and severally liable to it for OPA removal costs.

Louisiana asserts OPA and general maritime law claims that are similar to Alabama's. Under Louisiana law, the State asserts claims of negligence, products liability, trespass, nuisance,[8] *garde,*[9] unjust enrichment, ultra hazardous activity, fraudulent concealment and negligent misrepresentation, and for violations of the Louisiana Oil Spill Prevention and Response Act ("LOSPRA"), La. R.S. 30:2451 *et seq*. Louisiana also seeks civil penalties for violations of the Louisiana Environmental Quality Act/Water Control Law, La. R.S. 30:2025(E), 30:2076.[10] Finally, Louisiana requests a declaratory judgment that BP, Transocean, Anadarko, MOEX, and MOECO are jointly and severally liable to it

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[8] Louisiana pleads trespass and nuisance under both state law and general maritime law.

[9] "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications." La. Civ. Code art. 2317.

[10] Louisiana seeks civil penalties "of not more than $32,500 for each day of violation ($50,000 for each day of violation of a compliance order issued by the [La. Dept. of Environmental Quality]), and for an additional penalty of not more than $1,000,000 for each day of violation." (Rec. Doc. 2031 ¶ 188). In addition to penalties, Louisiana also seeks response action costs, attorney fees, and litigation costs under the Environmental Quality Act.

under OPA for damages and removal costs, and that BP, Anadarko, MOEX, Transocean, Cameron, and Halliburton are similarly liable for damages and response costs under LOSPRA.

II. PARTIES' ARGUMENTS

Most Defendants argue that the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.,*[11] and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.,* preempt all claims under state law. Defendants further assert that OPA displaces general maritime law claims,[12] thus the States' only cause of action is against "Responsible Parties" as defined by OPA. Defendants conclude that because the States have not complied with OPA's "presentment" procedure, all OPA claims should be dismissed as well.

Defendant Cameron employs a different choice-of-law analysis. Cameron argues that maritime law does not apply and OCSLA adopts the law of the adjacent state, Louisiana, to the extent it is not inconsistent with federal law. Continuing, Cameron argues that to the extent Louisiana law would allow recovery against parties other than OPA Responsible

[11] The CWA is also known as the Federal Water Pollution Control Act ("FWPCA"). *See* 33 U.S.C. § 1251 historical and statutory note, short title.

[12] Arguing in the alternative, Defendants allege that non-OPA claims for purely economic losses are barred under general maritime law.

Parties, it is inconsistent with federal law and preempted by OCSLA.

The States contend that general maritime law claims (including punitive damages under maritime law) are not preempted, because this case falls within the Court's admiralty jurisdiction and OPA expressly preserved maritime law. The States urge that OCSLA's provision adopting adjacent-state law does not apply, and thus the laws of all states are available. They contend that state law is applicable here, because OPA preserved state law and state law supplements (and thus is not preempted by) maritime law. The States also urge that they are not subject to OPA's presentment requirement, but, in any respect, they have sufficiently alleged presentment.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(c) is subject to the same standard as a motion under Rule12(b)(6). *In Re: Great Lakes Dredge & Dock Co.,* 624 F.3d 201, 209-210 (5th Cir. 2010). Thus,

> To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). To be plausible, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. In deciding

> whether the complaint states a valid claim for relief, we accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff. [*Doe v.*] *MySpace,* 528 F.3d [413,] 418 [5th Cir. 2008]. [The Court does] not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir.2007)); *see also Iqbal,* 129 S. Ct. at 1940 ("While legal conclusions can provide the complaint's framework, they must be supported by factual allegations.").

Id. at 210 (some citations omitted).

IV. DISCUSSION

With some exceptions discussed below, the issues raised by the Motions to Dismiss are identical to those previously addressed in the Court's Order and Reasons respecting the Motions to Dismiss the "B1" Master Complaint ("B1 Order"). (Rec. Doc. 3830, ___ F. Supp. 2d ___, 2011WL 3805746 (E.D. La. August 26, 2011)). Thus, the Court finds its conclusions in the B1 Order resolve many of the arguments presented here.

A. Choice of Law; Penalties under State Law

Many of the choice-of-law issues are resolved by the B1 Order. First, the conclusions that the DEEPWATER HORIZON was a vessel under maritime

law and that this case falls within the Court's admiralty jurisdiction are equally applicable here. (Rec. Doc. 3830, at 4-8). The B1 Order also held that, while jurisdiction under OCSLA was present, OCSLA did not adopt the law of the adjacent state as surrogate federal law under 43 U.S.C. § 1333(a)(2)(A). (Rec. Doc. 3830 at 8-11[13]). That holding also applies here. Therefore, the Court rejects Cameron's argument that OCSLA adopts Louisiana law.

The B1 Order also held that claims of negligence and products liability under general maritime law were not preempted by OPA (including the availability of punitive damages), provided that the plaintiff alleged either physical injury to a proprietary interest or qualified for the commercial fisherman exception (*Id.* at 18-27). Thus, because the States have alleged physical injury to proprietary interests (*see, e.g.,* Rec. Docs. 1872 ¶ 92, 2031 ¶ 109) and the other elements pertinent to negligence and products liability claims, the States have stated causes of action under general maritime law. Consequently, punitive damages may

[13] The conclusion that the law of the adjacent state, Louisiana, could not be adopted under OCSLA was based on the second prong of the *PLT* test, which prohibits such adoption when maritime law applies to the issue. However, the Court also noted in the B1 Order that the language of 43 U.S.C. § 1333(a)(2)(A) refers to "artificial islands and fixed structures erected thereon," as distinguished from "temporarily attached" structures listed in Section 1333(a)(1), and thus Section 1333(a)(2)(A) did not appear to apply to a semi-submersible drilling rig/MODU like the DEEPWATER HORIZON.

also be available to the States where their claims arise under general maritime law. (Rec. Doc. 3830 at 26-27). OPA's presentment requirement is discussed separately, below.

The B1 Order also held that state-law claims were preempted by maritime law. As the States point out below, however, civil penalties were not at issue in the B1 Order and are unique to the States. In light of this, the Court revisits the issue of whether state law is preempted.

The B1 Order focused on several factors when it concluded that maritime law preempted state law. The Court noted that the casualty at issue occurred from a MODU that was floating on the "high seas" (the waters seaward of state territorial waters[14]) and connected by its drill pipe to the to the Outer Continental Shelf ("OCS"), which OCSLA declares to be an area of "exclusive federal jurisdiction." (Rec. Doc. 3830 at 12 (citing 43 U.S.C. § 1333(a)(1)). Because adequate and uniform remedies for the B1 claims are provided through legislation (OPA) and general maritime law, there were no substantive gaps for state law to fill. (*See id.* at 14 (discussing *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 99 (1996)). Thus, the B1 Order stated that it would contravene one of

[14] "The 'high seas' simply encompass 'all parts of the sea that are not included in the territorial sea or in the internal waters of a State.'" *Reynolds v. Ingalls Shipbuilding Div.,* 788 F.2d 264, 268 (5th Cir. 1986); *see also* 43 U.S.C. §§ 1312, 1332(2).

maritime law's fundamental purposes – "harmony and appropriate uniform rules relating to maritime matters" – if the Defendants to the B1 Master Complaint were subjected to the various laws of each of the affected Gulf Coast States into which oil passively flowed. (*Id.* at 12-13).[15] The Court also held that OPA's

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[15] At oral argument and in an post-argument briefing, the States point to cases where state law was upheld outside state waters. These cases are distinguishable for reasons that are discussed below. However, as to a broader point implicated by these cases, the Court notes that the B1 Order did not conclude that state law could never apply outside state waters; rather, that state law could not apply in this circumstance: "Thus, to the extent state law *could* apply to conduct outside state waters, *in this case* it must 'yield to the needs of a uniform federal maritime law.'" (Rec. Doc. 3830, at 13 (citation omitted; emphasis added)). The Court acknowledges that there are instances where state law applies outside state waters. However, the Court adds that, on the high seas federal interests (and federal law) typically predominate over state interests, particularly when substantive rights and remedies are available under federal law. This point was explained by the Fifth Circuit when it discussed the meaning of term "applicable" in OCSLA Section 1333(a)(2)(A) in a case involving an allision between a vessel and a fixed platform on the OCS:

> [OCSLA's] deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity – necessity to fill a significant void or gap.
>
> . . .
>
> The collision was a classic maritime case within the validly extended Admiralty jurisdiction in which both substantive rights and remedies were quite ample. There is no void, there are no gaps.
>
> . . .

(Continued on following page)

savings provision, 33 U.S.C. § 2718, did not preserve these claims. Finally, the B1 Order noted that this conclusion was "consistent with" the Supreme Court's conclusion in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). (Rec. Doc. 3830 at 16-17).

The States contend that this holding should not apply to their claims for civil penalties. They argue that the remedies under OPA and general maritime law do not vindicate their right and duty as separate sovereigns to protect their environments, citizens, and economies from pollution by punishing those

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> The United States has interests in its relations to other nations quite different from those among its own several states. Thus, while it does not offend the constitutional imperative for the uniformity of admiralty for the Louisiana Direct Action Statute to apply to maritime cases occurring on inland waters of Louisiana, quite different considerations enter in mandatorily applying that to some – but a very select class – cases on the Outer Continental Shelf. The class is select in the sense that it must somehow be physically-causally related to the structure ('artificial island') without which Louisiana law is as irrelevant as that of Pakistan.
>
> . . .
>
> Whether for off shore, unlike inland, maritime cases we would hold the Direct Action Statute inconsistent we need not here determine. Taking into account the National and International interests behind that element we do hold that for this maritime case the Direct Action Statute is not applicable.

Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Assoc., 417 F.2d 1030, 1036-40 (5th Cir. 1969).

whose pollution enters state territorial waters. Furthermore, the States argue that their penalties are only triggered when oil entered their territories, thus they do not attempt to regulate or penalize extra-territorial conduct; instead the conduct they seek to punish is allowing oil to enter state waters. Similarly, they assert that state penalties would not conflict with the "uniformity" principle sought by maritime law, since they are merely adding penalties to conduct that is unlawful under federal law. The States also claim that if their penalties are not available there would be no incentive for a discharger to prevent spills from entering state waters.

The Court acknowledges that it is questionable whether its reasons for holding that maritime law preempted the B1 claims would apply to the State's civil penalties, but it does not reach this issue. Rather, the States' asserted penalties focuses the Court's attention on the CWA and *Ouellette,* which interpreted the that Act. This is because Section 311(b) of the CWA provides for, *inter alia,* federal civil penalties when there is a "harmful" discharge of oil into or upon the navigable waters of the United States, the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act. 33 U.S.C. § 1321(b). By contrast, one of the primary concerns of OPA – the federal statute primarily at issue in the B1 Order – is providing compensatory relief for damages resulting from an oil spill. *See* 33 U.S.C. § 2702. Further, Section 311 of the CWA

contains its own savings clause for state law, which is discussed below.

In *Ouellette* the Supreme Court held, "when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." 479 U.S. 481, 487 (1987). In that case, Vermont landowners sued a New York paper mill under Vermont's common law of nuisance for pollution originating in New York waters but flowing into and affecting Vermont waters. *Id.* at 483-84. After noting that "the control of interstate pollution is primarily a matter of federal law," *id.* at 492, and discussing the regulatory framework imposed by the CWA's nation-wide permit system (the National Pollutant Discharge Elimination System or "NPDES"), *id.* at 487-491, the Court reasoned that Vermont law was preempted because, "[a]pplication of an affected State's law to an out-of-state source would . . . undermine the important goals of efficiency and predictability in the permit system." *Id.* at 496. Instead, plaintiffs in an "affected State" must sue under the laws of the "source State" or avail themselves of the other remedies provided by the CWA. *Id.* at 497-98 & n.18.

Here, the Court takes judicial notice of the fact that, much like the New York paper mill in *Ouellette,* an NPDES permit regulated BP's discharges on the

OCS.[16] Thus, this case involves "state-law claim[s] concerning interstate water pollution that is subject to the CWA," bringing it within *Ouellette*'s precedent. Nevertheless, the States attempt to distinguish *Ouellette* on the grounds that the discharge in that case was lawful in the source State, but not in the affected State; whereas here the discharge was universally unlawful. Thus, argue the States, *Ouellette*'s concern regarding creating conflicts with the CWA's regulatory scheme is not present.

The Court acknowledges that a discharge of oil that violates all potentially-applicable laws would not appear to implicate the CWA's regulatory scheme. However, fatal to the States' argument is the fact that the Vermont plaintiffs in *Ouellette* specifically alleged that the discharges violated the New York paper

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[16] *See* Notice of Final NPDES General Permit, Final NPDES General Permit for New and Existing Sources and New Dischargers in the Offshore Subcategory of the Oil and Gas Extraction Category for the Western Portion of the Outer Continental Shelf of the Gulf of Mexico (GMG290000), 72 Fed. Reg. 31,575 (June 7, 2007); BP's Bundle B1 Memo. in Supp. of Mot. to Dismiss, at 12-13 & Exs. 14 (NPDES No. GMG290000) & 15 (Notice of Intent dated Feb. 23, 2009) (Rec. Doc. 1440 at 26-27), *incorporated by reference and cited in* BP's Bundle C Memo. in Supp. of Mot. to Dismiss, at 2 n.4, 9 (Rec. Doc. 2644-1 at 18 n.4, 25) *and* BP's Bundle C Reply Br. at 6 (Rec. Doc. 3584 at 18). Neither State contests the fact that an NPDES permit governed Defendants' operations in the Gulf of Mexico, and in fact, Alabama expressly discussed this permit in its brief. *See* State of Ala.'s Bundle C Memo. in Opp. at 10 (Rec. Doc. 3203 at 18) ("the OCS General Permit at issue here explicitly banned the Defendants from spilling formation oil").

mill's NPDES permit. In other words, like the instant matter, the discharge in *Ouellette* was alleged to be universally unlawful:

> . . . If, ***as was also alleged in respondents' complaint, [the New York paper mill] is violating the terms of its permit,*** respondents may bring a citizen suit to compel compliance.

Id. at 498 n.18 (emphasis added); *see also Ouellette v. Int'l Paper Co.,* 602 F. Supp. 264, 266 (D. Vt. 1985) ("Count II alleges that defendant has violated its [NPDES] permit by discharging pollutants into Lake Champlain in excess of the amounts specified in the permit"). Notwithstanding this allegation,[17] the *Ouellette* Court concluded that the only available remedies were those provided under the source-State's law and the CWA.

Thus, even though the discharge was universally unlawful, *Ouellette*'s instruction is clear: only the law of the source State and federal law may apply.[18]

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[17] Because *Ouellette* was before the Court on a motion to dismiss under Rule 12(c), the Court was bound to accept the allegation as true. Although the defendant also moved to dismiss under Rule 56 (summary judgment), it appears the Court applied the Rule 12 standard.

[18] The only federal remedy *Ouellette* referred to was the CWA; OPA did not exist when *Ouellette* was decided and claims under general maritime law were not before the Court. However, remedies under both OPA and general maritime law are available for reasons explained in the B1 Order. (Rec. Doc. 3830 at 18-27).

Because the source of this discharge occurred within an exclusive federal jurisdiction, the OCS, the only available law is federal law. All States occupy the position of "affected States;" therefore the States' civil penalties are preempted.[19] The language of the CWA provides additional support for this conclusion. As mentioned, Section 311(b) of the CWA provides federal penalties for harmful discharges of oil, and Section 311(*o*)(2) contains a savings clause. The language of Section 311(*o*)(2) is consistent *Ouellette*'s holding:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the ***discharge of oil*** or hazardous substance ***into any waters within such State,*** or with respect to any removal activities related to such discharge.

33 U.S.C. § 1321(*o*)(2) (emphasis added). Prior to the *Ouellette* decision, it might have been debatable whether "discharge of oil . . . into any waters within such State" meant only the source of the discharge, or whether that term should be interpreted broadly to mean any State into which oil flowed. However, when Section 311(*o*)(2) is construed with *Ouellette,* the

[19] After revisiting *Ouellette,* it appears that the Court may have been inaccurate when the B1 Order stated that its conclusion was "consistent" with *Ouellette.* Rather, the issue of preemption of state law may have been compelled by *Ouellette*'s interpretation of the CWA, in addition to the reasons stated in the B1 Order. In any respect, the Court's conclusion in the B1 Order remains unchanged.

debate is resolved in favor of the narrower interpretation.[20]

The States argue that OPA's savings clause for state penalties, 33 U.S.C. § 2718(c), which does not include the CWA's qualifier, "into any waters within such State," preserves their penalties:

> Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof –
>
> > (1) to impose additional liability or additional requirements; or
> >
> > (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> relating to the discharge, or substantial threat of a discharge, of oil.

Assuming that the absence of "into any waters within such State" supports the States' interpretation, OPA's saving clause still cannot be considered in a vacuum. OPA Section 2718 must construed *in pari materia* with CWA Section 311(*o*)(2), because these statutes

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[20] Section 311's definition of "discharge" does not lead to a different conclusion. *See* 33 U.S.C. 1321(a) (" 'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping . . . ").

address common topics. *See* 82 C.J.S. § 476 (2011). If a conflict exists between OPA's savings clause and the CWA's, the CWA controls in this instance because it is the more-specific statute; i.e., the CWA contains penalties for discharges. *See* 82 C.J.S. § 482 (2011). Furthermore, although OPA amended Section 311(*o*)(2) to add the phrase ", or with respect to any removal activities related to such discharge," it left in place "into any waters within such State." *See* OPA § 4202, Pub. L. No. 101-380, 104 Stat. 484, 532 (codified as amended at 33 U.S.C. § 1321(*o*)(2)). Because Congress is presumed to be aware of *Ouellette*'s interpretation of the CWA when it passed OPA, the fact that OPA did not remove "into any waters within such State" leads to the construction that Congress did not intend to change *Ouellette*'s interpretation of the CWA. 82 C.J.S. § 512 (2011).

As to the States' argument that without state penalties, there is no incentive for a defendant to prevent its oil spill from entering state waters, the Court does not agree. The CWA and its corresponding regulations require owners or operators of vessels and facilities to submit a plan for responding to an oil spill. 33 U.S.C. § 1321(j)(5); 30 C.F.R. § 254.1, *et seq.* In the event of a spill, parties must immediately carry out the provisions of its response plan, as well as notify the National Response Center. 33 U.S.C. § 1321(c)(5); 30 C.F.R. §§ 254.5, 254.46. Failure to comply with the response plan or an order from the

federal removal authority triggers specific CWA penalties. 33 U.S.C. § 1321(b)(7)(B), (C).[21] These penalties are separate from those imposed by the CWA when there is a "harmful" discharge, which, given that they are based on either the days a discharge occurs or the volume of oil released, create another incentive to stop the source of a discharge (and thus limit the amount of oil that could potentially flow into state waters). 33 U.S.C. § 1321(b)(7)(A).[22] Failure to report a discharge, provide assistance when requested by a responsible official, or comply with a federal removal order will also revoke OPA's defenses and limit of liability. 33 U.S.C. §§ 2703(c), 2704(c). Also, one of the factors used to determine the amount of a CWA penalty is whether efforts to minimize or mitigate the effects of the discharge were successful. 33 U.S.C. § 1321(b)(8). Thus, while they may not specifically target state waters, federal laws provide substantial incentives for a discharger to promptly and efficiently stop the spread of oil and remediate its effects. It is also worth noting that amounts paid pursuant to CWA penalties are applied

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[21] Failure to comply with a removal order is penalized "in an amount up to $25,000 per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure." 33 U.S.C. § 1321(b)(7)(B). Failure to comply with a response plan results in a penalty of $25,000 per day of violation. 33 U.S.C. § 1321(b)(7)(C).

[22] Penalties are either $25,000 per day or $1,000 per barrel. 33 U.S.C. § 1321(b)(7)(A). The penalty is increased in the event of gross negligence or willful misconduct to $3,000 per barrel. 33 U.S.C. § 1321(b)(7)(D).

to the Oil Spill Liability Trust Fund, which, in turn, are used to pay for future oil spill response actions, fund natural resource damage assessment and restoration, and pay uncompensated removal costs and damages claims. 26 U.S.C. § 9509(b)(8), (c)(1)(C); 33 U.S.C. §§ 1321(s), 2712. Thus, CWA penalties indirectly benefit all States.[23]

Furthermore, although the Court does not decide at this time issues concerning liability or the extent of liability, it certainly appears that the States are eligible to recover all of their removal costs[24] under OPA. 33 U.S.C. § 2704(b), (c)(4) (providing that certain Responsible Parties are liable for all removal costs). If OPA's liability cap on damages does not

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[23] Although the Court does not base its conclusion on legislation not yet enacted, it is also worth noting that proposed legislation would direct 80% of CWA penalties paid in connection with this oil spill to the Gulf Coast States. *See, e.g.* Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2011, S. 1400, 112th Cong. §§ 3-4 (2011); *see also* H.R. 3096, 112th Cong. (2011).

[24] OPA defines "removal costs" as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. § 2701(31). "'[R]emove' or 'removal' means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 U.S.C § 2701(30).

apply,[25] then the States may recover all OPA damages as well, which includes damage to natural resources and property, lost revenues and profits, and the cost of providing additional public services. *See* 33 U.S.C. § 2702(b)(2). Furthermore, the States may be entitled to receive punitive damages under general maritime law, given the Court's holding above. Consequently, preemption of state penalties in this instance denies only the States' ability to receive an additional penal amount.

The Court is also unpersuaded by two cases cited at oral argument, upon which the States rely for the proposition that state regulations may apply outside state waters. The first case, *Pacific Merchant Shipping Association v. Goldstene,* involved a California statute that prohibited ships intending to enter a California port from using certain pollution-generating fuels within 24 miles of the California coast. 639 F.3d 1154 (9th Cir. 2011), *cert. pending and add'l briefing requested,* No. 10-1555, 2011 WL 4530049 (U.S. Oct. 4, 2011). Notably, that statute did not apply to ships merely passing within the 24-mile zone without stopping at a California port. *Id.* at 1175 ("Likewise, we further observe that the Vessel Fuel Rules generally apply to 'foreign and U.S. flag-commercial ships calling at California ports,' and,

[25] BP stated that it waives its limit of liability under OPA. (Rec. Doc. 559). As mentioned above, there are also circumstances that will void OPA's limitation of liability. *See* 33 U.S.C. § 2704(c).

among other things, contain an exemption for vessels merely passing through the region.").

The exemption for vessels not calling port makes *Goldstene* distinguishable from this matter. In effect, California's law regulates only those ships intending to immediately enter California waters (by virtue of their decision to port), who would otherwise bring with them pollution incidental to their operations. Although the California regulation appears to push the limits of state regulation, it is ultimately tied to activity occurring within California's territorial waters, where jurisprudence has consistently upheld States' interests in regulating pollution. *See, e.g., Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960). Here, however, the DEEPWATER HORIZON was operating off the coast of Louisiana without any apparent intent to enter state waters. Thus, the oil that entered state territories is not analogous to the pollution regulated by the California statute, given that the MODU did not intend to bring its pollution into state waters. Rather, the DEEPWATER HORIZON is analogous to those ships merely transiting California's 24-mile zone, which are exempt from regulation despite the fact that their pollution might passively enter California's territory.[26]

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[26] In an earlier case, the Ninth Circuit struck down a similar version of the statute which regulated vessel emissions (as opposed to fuel) within 24 miles of the California coast, holding that the regulation was preempted by the Clean Air Act. *See Pac. Merch. Shipping Assoc. v. Goldstene,* 517 F.3d 1108 (9th

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In the second case relied upon by the States, *Gillis v. Louisiana,* the Fifth Circuit upheld a Louisiana statute that regulated pilots outside Louisiana waters. 294 F.3d 755 (5th Cir. 2002). As explained by the *Gillis* court, however, since 1789 Congress has left the regulation of pilots to the States, and the Supreme Court has upheld such laws even when they involved areas outside state waters. *Id.* at 761-62. Also, and similar to the California statute, the pilotage regulation at issue in *Gillis* concerned ships that intended to enter (or were departing from) state waters which, again, is in contrast to the DEEPWATER HORIZON. Thus, *Gillis* is also distinguishable from this matter. *See also* note 15, *supra.*

As to the other cases cited by the States involving pollution originating within state waters, *e.g. Askew v. Am. Waterways Operators Inc.,* 411 U.S. 325 (1973), the Court remains unpersuaded for reasons stated above and in the B1 Order. Moreover, none of the cases cited by the States are as on-point as *Ouellette.*

Finally, the Court notes that the States' arguments might also implicate Due Process concerns, given that, under the States' theory, as many as five Gulf Coast States would be able to impose their penalties. This would seem excessive given that the

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Cir. 2008). That case appears more analogous to the instant matter, since the regulation involved an emission (which arguably is similar to a discharge) and did not discriminate between ships intending enter a California port and those merely passing within the 24-mile zone.

source of the discharge occurred in no State, and it is not alleged that the discharge was an intentional act. *See BMW v. Gore,* 517 U.S. 559, 574 & n.22 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. . . . [T]he basic protection against 'judgments without notice' afforded by the Due Process Clause, is implicated by civil penalties." (citations omitted)). By contrast, had the source of the discharge occurred within a State, the discharger would certainly be on notice that penalties under federal law and the source State's law would apply.

The Court is respectful of the States' desire to exercise their police powers and punish those who pollute their waters. However, for reasons stated above, the Court finds that the States' penalties asserted are preempted and must be dismissed. Furthermore, for reasons stated above and in the B1 Order, the Court also holds that the States' claims for compensatory and punitive damages asserted under state law are also preempted and must be dismissed. By this reasoning, Louisiana's request for a declaratory judgment under LOSPRA, must also dismissed.

B. Presentment under OPA

Defendants seek to dismiss all claims, arguing that the States have failed to sufficiently allege

compliance with OPA's "presentment" requirement. Defendants advance this argument under Fed. R. Civ. P. 12(b)(1), lack of subject matter jurisdiction, by contending that presentment is a jurisdictional prerequisite. Alternatively, Defendants assert that presentment is a mandatory condition precedent and move to dismiss under Fed. R. Civ. P. 12(b)(6).

As to whether presentment is a jurisdictional rule or a mandatory condition precedent, there is disagreement in decisions from this Court. *Compare Marathon Pipe Line Co. v. LaRoche Indus. Inc.,* 944 F. Supp. 476, 477 (E.D. La. 1996) (jurisdictional), *with Leboeuf v. Texaco,* 9 F. Supp. 2d 661, 665 (E.D. La. 1998) (mandatory condition precedent). The B1 Order previously concluded that OPA presentment is a mandatory condition precedent. (Rec. Doc. 3830 at 30-31) The Court does not sway from this holding and finds further support in the Supreme Court's recent discussion on this issue in another context. *See Henderson v. Shinseki,* ___ U.S. ___, 131 S. Ct. 1197, 1202-07 (2011). Accordingly, the 12(b)(1) Motions are denied; Defendants' arguments are considered under Rule 12(b)(6).

Relying on *United States v. M/V Cosco Busan,* 557 F. Supp. 2d 1058 (N.D. Cal. 2008), the States argue that when a State seeks removal costs, Sections 2713(b)(1)(C) and 2717(f)(2) (both quoted below) exempt it from having to first present its claim to the Responsible Party. The States further contend that when a State combines a claim for removal costs with a damages claim, both are exempt from presentment.

Defendants argue that *Cosco Busan* misinterpreted these statutes. After studying the matter, the Court respectfully disagrees with *Cosco Busan*'s interpretation.

OPA Section 2713 contains the presentment requirement and states, in pertinent part:

> (a) Presentation
>
> Except as provided in subsection (b) of this section, ***all claims for removal costs or damages shall be presented first to the responsible party*** or guarantor of the source designated under section 2714(a) of this title.
>
> (b) Presentation to Fund
>
> (1) In general
>
> Claims for removal costs or damages may be presented first to the Fund –
>
> . . .
>
> (C) by the Governor of a State for removal costs incurred by that State; or
>
> . . .
>
> (c) Election
>
> If a claim is presented in accordance with subsection (a) of this section and –
>
> (1) each person to whom the claim is presented denies all liability for the claim, or

> (2) the claim is not settled by any person by payment within 90 days after the date upon which
>
> > (A) the claim was presented, or
> >
> > (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later,
>
> the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

33 U.S.C. § 2713 (emphasis added). Section 2717(f)(2) establishes the statute of limitations for removal costs:

> (2) Removal Costs
>
> An action for recovery of removal costs referred to in section 2702(b)(1) of this title must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this subchapter for recovery of removal costs ***at any time*** after such costs have been incurred.

33 U.S.C. § 2717(f)(2) (emphasis added).

Cosco Busan interpreted the phrase "at any time" as exempting parties seeking removal costs under Section 2702(b)(1) from OPA's presentment procedure. *Id.* at 1060-61. In response to the defendants' argument that this interpretation would allow ***any*** claimant seeking removal costs to avoid presentment, the court replied:

> Contrary to Defendants' assertion, § 2717(f)(2) does not apply to "*any* claimant." Instead, § 2717(f)(2) only applies to "recovery of removal costs referred to in section 2702(b)(1)." Section 2702(b)(1), in turn, only applies to removal costs incurred by the United States, a State, an Indian tribe, or a person acting pursuant to the National Contingency Plan [FN 3]. ***Thus, §§ 2702(b)(1) and 2717(f)(2) permit only the United States, a State, or an Indian tribe to bring an action at any time to recover removal costs.*** All other claimants seeking damages or recovery costs must first present their claims to the responsible party, pursuant to § 2713.
>
> [FN 3.] The National Contingency Plan, codified at 33 U.S.C. § 1321(d), is a plan for removal of oil and hazardous substances prepared and published by the President. Neither party mentions the National Contingency Plan and the Court concludes that, at this time, it is not relevant to Defendants' Motion.

Id. at 1061 (citations omitted, second emphasis added).

However, Section 2702(b)(1) does not limit removal costs to just the United States, a State, or an Indian tribe:

> (b) Covered removal costs and damages
>
> (1) Removal costs
>
> The removal costs referred to in subsection (a) of this section are –
>
> (A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 1321 of this title, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; ***and***
>
> (B) any removal costs incurred by ***any person*** for acts taken by the person which are consistent with the National Contingency Plan.

33 U.S.C. § 2702(b) (emphasis added). "Any person" includes private parties. 33 U.S.C. § 2701(27). Thus, private parties may recover removal costs so long as their actions were "consistent with the National Contingency Plan" ("NCP").[27] If *Cosco Busan*'s conclusion

[27] The NCP is a set of federal regulations created by the CWA and provide, *inter alia,* "procedures for preparing for and responding to discharges of oil." 40 C.F.R. § 300.1. The CWA requires that all removal actions "shall, to the greatest extent possible, be in accordance with the [NCP]." 33 U.S.C. § 1321(d)(4). Consistent with this requirement, OPA Section 2702(b) states that the only private removal costs which are

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were correct that Section 2717(f)(2) trumps Section 2713's presentment requirement, then that conclusion would apply to private parties as well, which is exactly the concern expressed by the defendants in *Cosco Busan.*

Instead, this Court interprets "at any time" in Section 2717(f)(2) as clarifying the first sentence of that paragraph: "An action for recovery of removal costs referred to in section 2702(b)(1) of this title must be commenced within 3 years after completion of the removal action." In other words, to the extent one ***might*** interpret the first sentence of 2717(f)(2) as meaning that removal costs may only be sought after all removal actions are concluded, "at any time" makes clear that this is not the case: A claimant may periodically present removal costs as they are incurred.[28] Interpreting "at any time" in this manner gives appropriate meaning to that phrase within the context of Section 2717(f)(2) and Section 2713(a)'s statement that "all claims for removal costs or damages shall be presented first to the responsible party."

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recoverable are those that were consistent with the NCP's standards.

[28] This interpretation is also consistent with the second sentence of Section 2717(f)(2): "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages." This sentence envisions that a claimant will bring a series of claims over the course of conducting removal actions, rather than one lump claim at the end.

Furthermore, it would seem odd that Congress would choose to insert an exception to the presentment procedure in a Section concerning the statute of limitations, rather than directly in Section 2713. This point is highlighted by the fact that Congress ***did*** create a limited exception to the presentment requirement, and inserted it in Section 2713. Section 2713(b) provides select circumstances when a party may present its claim directly to the Oil Spill Liability Trust Fund, rather than first presenting the claim to the Responsible Party. State removal costs are one exception. 33 U.S.C. § 2713(b)(C). However, Section 2713(b) does not state that parties who might avail themselves of this exception are also free to sue a Responsible Party without first presenting their claim. Thus, the Court finds that the States must present their OPA claims to a Responsible Party before proceeding in Court.[29]

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[29] *See also United States v. Murphy Exploration & Prod. Co.,* 939 F. Supp. 489, 492 (E.D. La. 1996) ("[The defendant] also argues that the government's claim is barred because the OPA requires that all claims be presented first to the responsible party. [Defendant argues that] [b]ecause the Coast Guard sought and obtained compensation from the [Oil Spill Liability Trust Fund] before presenting a claim to the responsible party, the government has failed the statutory requirement imposed by 33 U.S.C. § 2713(a). . . . Here, the stipulated facts indicate that the Coast Guard presented its claims to [Defendant] and that [Defendant] denied liability and refused payment for more than 90 days after receiving the request for payment. Therefore, [Defendant]'s situation is distinguishable from the facts in *Boca Ciega* and finds no independent support in the statutory language.").

Turning to the issue of whether the States have sufficiently alleged presentment, the B1 Order discussed the practical problem of OPA presentment in the context of an MDL with 100,000 claimants:

> There are likely large numbers of B1 claimants who have completely bypassed the OPA claim presentation requirement, others who have attempted to present their claims but may not have complied with OPA, and others who have properly presented their claims but have been denied for various reasons. Claimants who have not complied with the presentment requirement are subject to dismissal without prejudice, allowing them to exhaust the presentment of their claims before returning to court. In the ordinary case, the Court would simply dismiss those claims without prejudice. However, as the Court has previously noted, this is no ordinary case. A judge handling an MDL often must employ special procedures and case management tools in order to have the MDL operate in an orderly and efficient manner. In this massive and complex MDL, the Court is faced with a significant practical problem. It would be impractical, time-consuming, and disruptive to the orderly conduct of this MDL and the current scheduling orders if the Court or the parties were required to sort through in excess of 100,000 individual B1 claims to determine which ones should be dismissed at the current time. Moreover, such a diversion at this time would be unproductive and would not advance towards the goal of

> allowing the parties and the Court to be ready for the limitation and liability trial scheduled to commence in February 2012. No matter how many of the individual B1 claims might be dismissed without prejudice, the trial scheduled for February would still go forward with essentially the same evidence.
>
> In summary on this issue, the Court finds that presentment is a mandatory condition-precedent with respect to Plaintiffs' OPA claims. The Court finds that Plaintiffs have sufficiently alleged presentment in their B1 Master Complaint, at least with respect to some of the Claimants. For the reasons stated above, the Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented.

(Rec. Doc. 3830 at 30-31 (footnotes omitted)).

With respect to the States, a different practical problem arises. Although there are only two States, their claims involve a much wider array of damages than private plaintiffs, and the extent of some of these damages are not yet known and are inherently difficult to calculate. For example, assessing damage to natural resources is complex enough that OPA created a specific set of federal regulations to guide assessments. 33 U.S.C. § 2706(e); 15 C.F.R. § 990. Assessments made in accordance with these regulations creates a presumption of validity. 33 U.S.C. § 2706(e)(2). Furthermore, the cost of assessment is

itself a recoverable damage under OPA, and OPA's three-year statute of limitations does not even begin to run for natural resources damages until completion of the assessment. 33 U.S.C. §§ 2706(d)(C); 2717(f)(1)(B).

Both States allege in their Complaints that they have satisfied OPA's presentment requirement. Alabama made a single allegation of compliance, while Louisiana set forth more detail. (Rec. Docs. 1872 ¶ 217, 2031 ¶¶ 143-152). Both States contend that they have presented multiple claims to BP, some of which were wholly or partially rejected. The States admit that some of their claims in the Amended Complaints are premature, given that the extent of damage is not yet known. However, the States assert that the need to preserve future claims in light of the Court's deadlines imposed to fulfill the MDL's goal of efficient resolution, as well as various statutory deadlines which may or may not apply, compelled the States to assert all claims, even those not yet entirely known.

As stated in the B1 Order, a judge handling an MDL often must employ special procedures and case management tools in order to have the MDL operate in an orderly and efficient manner. The Court is conscious of the burdens the MDL has placed on counsel for all parties. Although the States ultimately must present each claim to the Responsible Party in order to recover damages for that claim, the Court will not require the States to repeatedly amend their Complaints to specifically state the circumstances of

each presentment. Doing so would be a distraction to parties already under significant strains, and likely disruptive to this proceeding given the role the States play. Furthermore, given that presentment is not itself a cause of action, but a fact to be alleged to a cause of action, as well as the Court's finding that presentment is not a jurisdictional requirement, the Court is not convinced that OPA requires the parties to allege such specifics in their Complaints. Accordingly, the Court finds the States have sufficiently alleged presentment under OPA.

C. Other Claims Asserted under General Maritime Law

In addition to negligence and products liability, Louisiana also asserts trespass, public nuisance, and private nuisance under general maritime law.

As to the trespass claim, the Fifth Circuit has explained,

> While no rule of trespass exists in maritime law, federal courts may borrow from a variety of sources in establishing common law admiralty rules to govern maritime liability where deemed appropriate. It has held that in the absence of federal cases or an established federal admiralty rule on trespass, it would be more appropriate to apply general common law rather than state law which would "impair the uniformity and simplicity which is a basic principle of the federal admiralty law . . . " Applying this rationale, we

> hold that general common law and in particular the Restatement (Second) of Torts should control to determine the law of maritime trespass, in order to promote uniformity in general maritime law.

Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd., 959 F.2d 49, (5th Cir. 1992). The Restatement (Second) of Torts distinguishes between intentional trespass (e.g., a person purposefully entering another's land) and unintentional trespass (e.g., a person walking on a sidewalk near a store, slips, and falls against the store's window, breaking it). *See* Restatement (Second) of Torts § 165, 166 (1965). Louisiana's Complaint does not sufficiently allege that any Defendant intended to place oil its property. As to unintentional trespass, the Restatement provides that, except in instances involving ultra-hazardous activity, a defendant is liable only when his conduct is negligent, and only for the harm caused to the land, the possessor, or a thing or third person in whose security the possessor has a legally protected interest. *Id.* Offshore drilling activities are not considered ultra-hazardous. (*See* Rec. Doc. 3830 at 28 (citing *Ainsworth v. Shell Offshore, Inc.,* 829 F.2d 548, 550 (5th Cir. 1987)). Thus, the trespass claim is effectively absorbed into general maritime law negligence, as both require negligent conduct and both require physical injury to a proprietary interest or personal injury. Damages under trespass also appear to be no greater than those recoverable under general maritime law negligence. In light of *Marastro*'s instruction that a court "***may*** borrow from

a variety of sources in establishing common law admiralty rules to govern maritime liability ***where deemed appropriate,***" the Court finds it is not appropriate for it to borrow from common law in this instance, since the trespass claim is effectively the same as one for negligence. Accordingly, the claim for trespass under maritime law is dismissed.

As to the nuisance claims, courts have declined to recognized this tort in maritime cases. *See Louisiana, ex rel. Guste v. M/V Testbank,* 752 F. Supp. 1019, 1030-33 (5th Cir. 1985) (en banc); *Sekco Energy, Inc. v. M/V Margaret Chouest,* 820 F. Supp. 1008, 1013-14 (E.D. La. 1993). This Court similarly declines, given the other remedies available under OPA and general maritime law.

D. Other Issues Resolved by the B1 Order: Moratorium Damages, Anadarko & MOEX

The States allege economic losses resulting from the moratorium on deepwater drilling imposed after the oil spill. The B1 Order addressed this identical issue. Accordingly, the Court refrains from defining the precise contours of OPA causation – necessarily a factual analysis – at this time, and merely holds that the States have alleged sufficient facts to state a plausible claim for these damages. For similar reasons, the Court does not consider at this time Transocean's argument regarding "stigma" damages.

The B1 Order also dismissed all general maritime law negligence claims against Anadarko and MOEX, but did not dismiss OPA claims against those parties. Identical claims are asserted here. Accordingly, the States' general maritime law claims against Anadarko and MOEX are dismissed. The OPA claims against those parties are preserved.

V. SUMMARY

In summary, the Court finds as follows:

1. The States have stated claims for negligence and products liability under general maritime law.
2. Punitive damages are available to the States under general maritime law.
3. The States' claims under state law, including civil penalties and Louisiana's request for declaratory judgment under LOSPRA, are preempted. The state-law claims are dismissed.
4. Presentment under OPA is a mandatory condition precedent, not a jurisdictional requirement. The Motions to Dismiss under Rule 12(b)(1) are denied.
5. The States are subject to OPA's presentment requirement. The States have sufficiently alleged presentment.
6. Claims of nuisance and trespass asserted under general maritime law are dismissed.
7. General maritime law negligence claims against Anadarko and MOEX are dismissed.

Accordingly,

IT IS ORDERED that Defendants' Motions to Dismiss the Complaints of the States of Alabama and Louisiana (Rec. Docs. 2630, 2631, 2637, 2638, 2639, 2642, 2644, 2645, 2646, 2647, 2649, 2651, 2653, 2655, 2656) are **GRANTED IN PART** and **DENIED IN PART,** as set forth above.

New Orleans, Louisiana, this 14th day of November, 2011.

/s/ Carl J. Barbier
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010	* * * * * * * *	**MDL No. 2179** **SECTION: J** **JUDGE BARBIER** **MAGISTRATE JUDGE SHUSHAN**
Applies to: B1 Master Complaint		

* *

ORDER AND REASONS

(Filed Aug. 26, 2011)

[As to Motions to Dismiss the B1 Master Complaint]

This multi-district litigation ("MDL") consists of hundreds of consolidated cases, with thousands of claimants, pending before this Court. These cases arise from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit ("MODU"), which resulted in the release of millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later. The consolidated cases include claims for the death of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages.

In order to efficiently manage this complex MDL, the Court consolidated and organized the various

types of claims into several "pleading bundles." The "B1" pleading bundle includes all claims for private or "non-governmental economic loss and property damages." There are in excess of 100,000 individual claims encompassed within the B1 bundle.

In accordance with Pretrial Order No. 11 (Case Management Order No. 1), the Plaintiffs' Steering Committee ("PSC") filed a B1 Master Complaint (Rec. Doc. 879) and a First Amended Master Complaint (Rec. Doc. 1128) (collectively "B1 Master Complaint"). Before the Court are various Defendants' Motions to Dismiss the B1 Master Complaint (Rec. Docs. 1440, 1390, 1429, 1597, 1395, 1433, 1414, and 2107) and their Replies (Rec. Docs. 2312, 2188, 2298, 2216, 2191, 2212, 2217, and 2208), as well as Plaintiffs' Oppositions (Rec. Docs. 1803, 1804, 1808, 1821, and 2131).

I. PROCEDURAL HISTORY

In the B1 Master Complaint, the PSC identifies a number of categories of claimants seeking various types of economic damages, including Commercial Fishermen Plaintiffs, Processing and Distributing Plaintiffs, Recreational Business Plaintiffs, Commercial Business Plaintiffs, Recreation Plaintiffs, Plant and Dock Worker Plaintiffs, Vessel of Opportunity ("VoO") Plaintiffs, Real Property Plaintiffs, Real Property/ Tourism Plaintiffs, Banking/Retail Business Plaintiffs, Subsistence Plaintiffs, Moratorium Plaintiffs, and Dealer Claimants.

Plaintiffs named the following as Defendants in their B1 Master Complaint: BP Exploration & Production Inc., BP America Production Company and BP p.l.c. (collectively "BP"); Transocean Ltd., Transocean Offshore, Transocean Deepwater, Transocean Holdings (collectively "Transocean"); Halliburton; M-I; Cameron; Weatherford; Anadarko, Anadarko E&P (collectively "Anadarko"); MOEX Offshore, MOEX USA (collectively "MOEX"); and MOECO. All of the Defendants, with the exception of MOECO, have filed Motions to Dismiss. Additionally, Dril-Quip, which was not named as a Defendant in the Master Complaint, has filed a Motion to Dismiss (Rec. Doc. 2107) because of the procedural effect of the Rule 14(c) tender in Transocean's Third-Party Complaint.

Plaintiffs allege claims under general maritime law, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 et seq., and various state laws. Under general maritime law, Plaintiffs allege claims for negligence, gross negligence, and strict liability for manufacturing and/or design defect. Under various state laws, Plaintiffs allege claims for nuisance, trespass, and fraudulent concealment, and they also allege a claim for strict liability under the Florida Pollutant Discharge Prevention and Control Act, Fla. Stat. § 376.011 et seq. Additionally, Plaintiffs seek punitive damages under all claims and request declaratory relief regarding any settlement provisions that purport to affect the calculation of punitive damages.

II. LEGAL STANDARD ON MOTIONS TO DISMISS

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts "'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. A court "must . . . accept all factual allegations in the complaint as true" and "must draw all reasonable inferences in the plaintiff's favor." *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir. 2009). The Court is not, however, bound to accept as true legal conclusions couched as factual allegations. *Iqbal,* 129 S. Ct. at 1949-50.

III. PARTIES' ARGUMENTS AND DISCUSSION

The subject Motions to Dismiss go to the heart of Plaintiffs' claims in this case. Various Defendants advance somewhat different arguments as to why some or all of the B1 bundle claims should be dismissed. At bottom, however, all Defendants seek dismissal of all non-OPA claims for purely economic damages resulting from the oil spill.[1] Essentially,

[1] Additionally, Defendants move to dismiss all OPA claimants who have not complied with OPA's "presentment" requirement.

(Continued on following page)

Defendants move to dismiss all claims brought pursuant to either general maritime law or state law. All parties advance a number of arguments regarding the law that should apply to the Plaintiffs' claims for economic loss. The Defendants' Motions raise a number of issues involving choice of law, and especially the interplay among admiralty, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1301 *et seq.,* OPA, and various state laws.

A. Vessel status

Although it was unclear prior to oral argument, it is now apparent that only Defendant Cameron suggests that the DEEPWATER HORIZON MODU was not a vessel in navigation at the time of the casualty on April 20, 2010. Plaintiffs and all other Defendants agree that the DEEPWATER HORIZON MODU was at all material times a "vessel" as that term is defined and understood in general maritime law. Cameron argues that although the DEEPWATER HORIZON may have been a vessel during the times it was moved from one drilling location to another, at the time of the casualty it was stationary and physically attached to the seabed by means of 5,000 feet of drill pipe. Cameron relies on a line of cases beginning with *Rodrigue v. Aetna Casualty Co.,* 395 U.S. 352

They also question whether Plaintiffs can properly sue parties under OPA who have not been named as Responsible Parties, as well as whether VoO Claimants and Moratorium Claimants have stated viable OPA claims.

(1969), for the proposition that a drilling platform permanently or temporarily attached to the seabed of the Outer Continental Shelf is considered an "fixed structure" and not a vessel. Accordingly, argues Cameron, admiralty jurisdiction is absent and general maritime law does not apply. Cameron contends that no state law, other than that of Louisiana law used as surrogate federal law under OCSLA, governs Plaintiffs' claims.

The Court is not persuaded by Cameron's arguments. Under clearly established law, the DEEPWATER HORIZON was a vessel, not a fixed platform. Cameron's arguments run counter to longstanding case law which establishes conclusively that the Deepwater Horizon, a ***mobile*** offshore drilling unit, was a vessel.

In the seminal case of *Offshore Co. v. Robison,* the Fifth Circuit held that a "special purpose vessel, a floating drilling platform" could be considered a vessel. 266 F.2d 769, 779 (5th Cir. 1959). Specifically, the defendants in that case, who claimed that the floating platform should not be considered a vessel, argued that "[t]he evidence shows that Offshore 55 was a platform designed and used solely for the purpose of drilling oil wells in offshore waters – in this instance, the Gulf of Mexico. That the platform was not self-propelled and when moved from one well to another, two large tugs were used. Further, when an oil well was being drilled the platform was secured to the bed of the Gulf in an immobilized position with the platform itself raised forty to fifty feet above the water

level. . . ." *Id.* at 773 n.3. Nonetheless, the Fifth Circuit held that such a "floating drilling platform" can be a vessel, though secured to the seabed while drilling a well.

Cameron's argument is also foreclosed by more recent Fifth Circuit precedent in *Demette v. Falcon Drilling Co., Inc.,* 280 F.3d 492, 498 n.18 (5th Cir. 2002) ("This circuit has repeatedly held that special-purpose movable drilling rigs, including jack-up rigs, are vessels within the meaning of admiralty law."), *overruled in part, on other grounds by, Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,* 589 F.3d 778, 788 & n.8 (5th Cir. 2009) (en banc). In fact, in *Demette,* the Fifth Circuit expressly rejected the very same argument that Cameron makes in this case. *Id.* More recently, the Supreme Court held "a 'vessel' is any watercraft practically capable of maritime transportation." *Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 497 (2005). Noting that "a watercraft need not be in motion to qualify as a vessel . . . ," the Supreme Court explained that "[l]ooking to whether a watercraft is motionless or moving is the sort of 'snapshot' test that we [previously] rejected. . . . Just as a worker does not 'oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured,' neither does a watercraft pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident." *Id.* at 495-96 (internal citation omitted).

The B1 Master Complaint alleges that the DEEPWATER HORIZON was a dynamically-positioned semi-submersible deepwater drilling vessel. It employed a satellite global positioning device and complex thruster technology to stabilize itself. At all material times, the vessel was afloat upon the navigable waters of the Gulf of Mexico. Unlike the jack-up drilling rig in *Demette,* the DEEPWATER HORIZON had no legs or anchors connecting it to the seabed. Its only physical "attachment" to the wellhead was the 5,000 foot string of drill pipe. Again, this is no more of a connection than the casing that was being hammered into the seabed by the casing crew in *Demette.* 280 F.3d at 494-95. The DEEPWATER HORIZON was practically capable of maritime transportation, and thus is properly classified as a vessel. *See also Herb's Welding v. Gray,* 470 U.S. 414, 417 n.2 (1985) ("Offshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts." (citations omitted)); *Diamond Offshore Co. v. A & B Builders, Inc.,* 302 F.3d 531, 545 (5th Cir. 2002) ("because the *Ocean Concorde* is a semi-submersible drilling rig, which is undisputably a vessel. . . ."), *overruled in part, on other grounds by, Grand Isle Shipyard, Inc.,* 589 F.3d at 788 & n.8.

Cameron argues that its blowout preventer ("BOP") was physically attached to the wellhead, located on the seabed some 5,000 feet below the surface of the water, and that the oil spill occurred at the wellhead, not from the DEEPWATER HORIZON.

This does not persuade the Court to reach a different conclusion. The B1 Master Complaint alleges that both the BOP and the drill string were part of the vessel's gear or appurtenances. Maritime law "ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 535 (1995).

B. OCSLA jurisdiction

All parties agree that at the time of the spill, the DEEPWATER HORIZON was operating in the Gulf of Mexico approximately fifty miles offshore, above the Outer Continental Shelf, triggering OCSLA jurisdiction. Indeed, this Court has already held in this MDL that it has OCSLA jurisdiction pursuant to 43 U.S.C. § 1349 because "(1) the activities causing the injuries in question could be classified as an operation on the OCS involving exploration or production of minerals, and (2) because the case arises in connection with the operation." *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010,* 747 F. Supp. 2d 704 (E.D. La. 2010). In that previous decision, this Court did not address choice-of-law questions, explaining that "having determined that a decision that admiralty jurisdiction applies would not affect the Court's jurisdiction determination, a decision on whether state, admiralty, or other law applies does not need to be addressed at this time." *Id.* at 709.

C. Admiralty jurisdiction

The test for whether admiralty jurisdiction exists in tort cases was outlined by the Supreme Court in *Grubart, Inc v. Great Lakes Dredge & Dock Co.*:

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise of the incident shows a substantial relationship to traditional maritime activity.

513 U.S. 527, 534 (1995) (citations and internal quotations omitted).

The location test, which is satisfied when the tort occurs on navigable water, is readily satisfied here. The B1 Master Complaint alleges that the blowout, explosions, fire, and subsequent discharge of oil, occurred on or from the DEEPWATER HORIZON and its appurtenances, which was operating on waters overlying the Outer Continental Shelf; i.e., navigable waters. The connection test is also met. First, there is no question that the explosion and resulting spill

caused a disruption of maritime commerce, which exceeds the "potentially disruptive" threshold established in *Grubart*. Second, the operations of the DEEPWATER HORIZON bore a substantial relationship to traditional maritime activity. *See Theriot v. Bay Drilling Corp.,* 783 F.2d 527, 538-39 (5th Cir. 1986) ("oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce"). Further, injuries incurred on land (or in the seabed) are cognizable in admiralty under the Admiralty Extension Act, 46 U.S.C. § 30101.

This case falls within the Court's admiralty jurisdiction. With admiralty jurisdiction comes the "application of substantive admiralty law." *Grubart,* 513 U.S. at 545. "[W]here OCSLA and general maritime law both could apply, the case is to be governed by maritime law." *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.,* 87 F.3d 150, 154 (5th Cir. 1996).

D. Plaintiffs' state law claims

Plaintiffs designated their B1 Master Complaint as "an admiralty or maritime case" under Rule 9(h) of the Federal Rules of Civil Procedure. Although Plaintiffs acknowledge that admiralty jurisdiction applies to this case, they insist that substantive maritime law does not preempt their state-law claims because state law can "supplement" general maritime law, either where there is a substantive gap in maritime law or where there is no conflict with maritime law. Plaintiffs also argue that OPA contains a state-law

savings provision, which preserves these claims. However, Plaintiffs do ***not*** argue that state law applies as surrogate federal law through OCSLA, and, in fact, argue against this position.

Relative to OCSLA, some Defendants argue that the only state law that could apply to the B1 Plaintiffs' claims is Louisiana law, because OCSLA permits the application of only the adjacent state's law. On these grounds it is urged that the laws of all non-adjacent states must be dismissed.

The OCSLA provision that allows adjacent-state law to be adopted as surrogate federal law is § 1333(a)(2)(A):

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, ***and artificial islands and fixed structures erected thereon***, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added). It is argued that § 1333(a)(2)(A) does not apply, because the DEEPWATER HORIZON was not an "artificial island" or a "fixed structure." Based on the language

of § 1333(a)(2)(A), this argument has appeal. *See also Herb's Welding,* 470 U.S. at 417 n.2 (noting the distinctions between "fixed" and "floating" platforms). However, since 1990 the Fifth Circuit has employed the "*PLT* test" to determine whether state law may be adopted as surrogate state law under OCSLA:

> For state law to apply as surrogate federal law, three conditions must be met: "(1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structures permanently ***or temporarily attached*** thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law."

Grand Isle Shipyard, Inc., 598 F.3d at 783 (emphasis added) (quoting *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.,* 895 F.2d 1043, 1047 (5th Cir. 1990)). As the emphasized language indicates, the first prong of the *PLT* test ("situs prong") is not limited to artificial islands and fixed structures. Instead, the *PLT* test incorporates into § 1333(a)(2)(A) the locations referenced in § 1333(a)(1),[2] specifically "temporarily

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[2] Section 1333(a)(1) states:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and ***all installations and other devices permanently or temporarily attached to the seabed***, which may be erected thereon for the purpose of exploring for, developing, or producing

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attached" structures. *See Demette,* 280 F.3d at 496 ("[Section 1333(a)(1)] creates a 'situs' requirement for the application of other sections of the OCSLA, including sections 1333(a)(2) and 1333(b)."). This test has been applied to contract cases and tort cases. *See Grand Isle, supra* (contract); *Strong v. B.P. Exploration & Prod., Inc.,* 440 F.3d 665, 668 (5th Cir. 2006) (tort).[3]

Assuming the DEEPWATER HORIZON met the *PLT* test's situs prong,[4] the second prong of the *PLT*

> resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

43 U.S.C. § 1333(a)(1) (emphasis added).

[3] At least one commentator has argued that Congress intended that state law would only apply to "fixed" platforms, while "temporarily attached structures" (jack-up rigs, semi-submersible drilling rigs, etc.) would remain the province of federal law, particularly maritime law. *See* David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes,* 38 J. Mar. L & Com. 487, 534-35, 541-42 (2007).

[4] It is questionable whether the DEEPWATER HORIZON would satisfy *PLT*'s situs prong. The Fifth Circuit has explained that the situs prong consists of three locations: (1) the subsoil and seabed of the OCS; (2) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it has been ***erected on the seabed*** of the OCS, and (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS; (3) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it is not a

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test still precludes application of state law under OCSLA. As discussed, admiralty jurisdiction was invoked by this incident, *see supra* Section C. Therefore, general maritime law applies to the claims of the B1 Plaintiffs. Moreover, OPA applies of its own force, because that act governs, *inter alia,* private claims for property damage and economic loss resulting from a discharge of oil in navigable waters. *See* 33 U.S.C. § 2702(a), (b)(2)(B), (b)(2)(C), (b)(2)(E). Because OPA and/or general maritime law applies to the B1 Plaintiffs' claims,[5] state law may not be adopted as surrogate federal law under OCSLA § 1333(a)(3). *See Rodrigue v. Aetna Cas. & Sur. Co.,* 395 U.S. 352 (1969) ("for federal law to oust adopted state law federal law must first apply."). Consequently, adjacent-state law is not adopted under § 1333(a)(2)(A), nor does that Section preempt non-adjacent state law.

The focus turns, then, to the relationship between federal maritime law and state law. As mentioned, with the admiralty jurisdiction comes substantive maritime law. This means that general maritime law

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ship or vessel, and (c) its presence on the OCS is to transport resources from the OCS. *Demette,* 280 F.3d at 497. The first and third locations are not applicable. *See Diamond,* 302 F.3d at 544 n.13. Under the second location, a question arises whether the DEEPWATER HORIZON could be said to be "erected on the seabed of the OCS," given that it floated above the seabed. Regardless, the Court does not reach this issue since it finds that the second prong of the *PLT* test precludes the application of state law under OCSLA, as discussed in the main text.

[5] How OPA affects general maritime law is discussed later.

– an amalgam of traditional common law rules, modifications of those rules, and newly created rules – applies to this matter to the extent it is not displaced by federal statute. *E. River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 864 (1986). This framework, established by the Constitution,[6] intends that a consistent, uniform system will govern maritime commerce. *See The Lottawanna,* 88 U.S. 558, 575 (1874) ("It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.").[7]

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[6] Article III, § 2 extends the judicial power to "all cases of admiralty and maritime jurisdiction." Congress legislates in this area by virtue of the Interstate Commerce Clause and Necessary and Proper Clause. U.S. Const. Art. I, § 8. The Supremacy Clause, Article VI, ensures federal maritime law supercedes state law. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 4-1 to 4-2 (4th ed. 2004).

[7] *See also Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 157 (1920) ("The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal

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Admiralty does not entirely exclude state law, however, and States may "create rights and liabilities with respect to ***conduct within their borders***, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 375 n.42 (1959) (emphasis added; internal quotations and citations omitted).

But this case does not concern conduct within state borders (waters). This casualty occurred over the Outer Continental Shelf – an area of "exclusive federal jurisdiction" – on waters deemed to be the "high seas." 43 U.S.C. §§ 1332(2), 1333(a)(1)(A). The Admiralty Extension Act, though not itself a grant of exclusive jurisdiction, *see Askew, infra,* nevertheless ensures that damages incurred on land are cognizable in admiralty. *See Grubart,* 513 U.S. at 531. Citizens from multiple states have alleged damage, and multiple states' laws are asserted. While it is recognized that States have an interest to protect their citizens, property, and resources from oil pollution, to subject a discharger to the varying laws of each state into

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government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."); Schoenbaum, *supra* note 6, § 4-1 at 158 (stating that a desire for national uniformity drove the drafters to vest the federal courts with jurisdiction over admiralty cases). Although *Knickerbocker Ice* and its predecessor, *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1916), have certainly been limited by later decisions, they still retain "vitality." *See Askew v. Am. Waterways Operators, Inc.,* 411 U.S. 325, 344 (1973).

which its oil has flowed would contravene a fundamental purpose of maritime law: "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters." *Knickerbocker Ice Co., see supra* note 7. Thus, to the extent state law could apply to conduct outside state waters, in this case it must "yield to the needs of a uniform federal maritime law." *Romero,* 358 U.S. at 373. (citing *S. Pac. Co. v. Jensen,* 244 U.S. 205 (1916)).

Plaintiffs argue that state law is not preempted in this instance because state law can supplement maritime law. Plaintiffs rely heavily on *Yamaha Motor Corp. v. Calhoun,* which involved a young girl killed in a jet ski accident in state territorial waters, where there is no federal statute providing a remedy for wrongful death. 516 U.S. 199 (1996). The decedent's parents attempted to sue under the state wrongful death statute. The question in *Yamaha* was whether general maritime law's wrongful death action, often called the "*Moragne* action" (named for the case that created it, *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375(1970)), preempted state law.

The Court held that state law was not preempted. The *Yamaha* Court noted that before the *Moragne* action was created in 1970, courts permitted state wrongful death statutes to fill the substantive gap in the law. It also noted that the *Moragne* Court was focused on curing an anomaly that existed for seafarers (generally speaking, seamen and longshoremen): When killed outside territorial waters, seafarers could base a wrongful death claim on

unseaworthiness (because the Death on the High Seas Act ("DOHSA") incorporates unseaworthiness for seafarers), but not when killed within state waters (because DOHSA does not apply there; thus seafarers could only use state law, which was negligence-based). Although *Moragne* ended this anomaly, it specifically left in place the seafarer's ***pre-existing*** ability to bring a wrongful death action under state law. Thus, the *Moragne* action was "in many respects a gap-filling measure to ensure that seamen (and their survivors) would all be treated alike," irrespective of whether death occurred within or beyond state waters, and "showed no hostility to concurrent application of state wrongful death statutes." *Id.* at 214 (quotations omitted).[8] Accordingly, *Yamaha* does not support using state law to supplement maritime law in this case, since there is no substantive gap for state law to fill (as contrasted with the situation in state waters before the creation of the *Moragne* action); remedies are available under both OPA and general maritime law. Also significant is the *Yamaha* Court's observation that maritime law had long accommodated States' interests in regulating maritime affairs that occurred ***within their territorial waters.*** *Id.* at 215 n.13. Again, this casualty occurred beyond state waters, so *Yamaha* is also distinguishable for this reason.

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[8] The *Moragne* Court did not apply the *Moragne* action to nonseafarers. This was done by subsequent courts. *See Yamaha,* 515 U.S. at 210 n.7.

Louisiana v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (applying maritime law and rejecting state-law claims for nuisance by plaintiffs seeking to recover for economic losses sustained in connection with an oil spill from a vessel on the Mississippi River), and *Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd.,* 959 F.2d 49 (5th Cir. 1992) (using general common law rather than state law to supplement maritime law in order to promote uniformity of maritime law) provide further support for the conclusion that Plaintiffs' state-law claims are not viable.

Plaintiffs' contention that OPA's savings provisions preserves its state-law claims is also unavailing. These provisions state:

> (a) Preservation of State authorities; Solid Waste Disposal Act
>
> Nothing in this Act or the Act of March 3, 1851 shall –
>
> > (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –
> >
> > > (A) the discharge of oil or other pollution by oil within such State; or
> >
> > > (B) any removal activities in connection with such a discharge; or
> >
> > (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person

> under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.
>
> . . .
>
> (c) Additional requirements and liabilities; penalties
>
> Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof –
>
> > (1) to impose additional liability or additional requirements; or
> >
> > (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> relating to the discharge, or substantial threat of a discharge, of oil.

33 U.S.C. § 2718. These provisions evince Congress' intent to preserve the States' police power to govern pollution discharges within their territorial waters. The Court does not read as them giving States the power to govern out-of-state conduct affecting multiple states. "The usual function of a saving clause is to preserve something from immediate interference – not to create; and the rule is that expression by the Legislature of an erroneous opinion concerning the law does not alter it." *Knickerbocker Ice,* 253 U.S. at

162. In other words, although Congress has expressed its intent to not preempt state law, this intent does not delegate to the States a power that the Constitution vested in the federal government.[9]

This conclusion is consistent with the Supreme Court's rationale in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). There the Court addressed the question of "whether the [Clean Water] Act preempts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York." *Id.* at 483. The Clean Water Act ("CWA") contained two provisions relating to state-law remedies:

> Except as expressly provided . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

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[9] After oral arguments and the Motions were taken under advisement, the States' Coordinating Counsel raised what it considered a new argument: Prior to OPA's enactment, OCSLA previously contained a savings provision purporting to preserve the States' ability to enact pollution laws respecting oil spills on the Outer Continental Shelf, and this provision was essentially moved to OPA. Counsel contends that in light of this, OPA's savings provisions should be interpreted in line with the former OCSLA provision. The Court has considered this argument, but is not persuaded. Even if the OCSLA savings provision was not repealed, it, like the OPA savings provisions, cannot grant to the states a right that is not permitted by the framework established by Constitution.

> . . .
>
> Nothing in this section [Citizen Suits] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . .

Id. at 485 (quoting 33 U.S.C. §§ 1370, 1365(e)). Notwithstanding these provisions, the *Ouellette* Court determined that " . . . when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." *Id.* at 487. According to the Court, "[a]pplication of an affected State's law to an out-of-state source would . . . undermine the important goals of efficiency and predictability in the permit system." *Id.* at 496. The Court also noted that prohibiting an action under the affected State's laws did not leave the plaintiffs without a remedy, as they could avail themselves of either the source State's law or the CWA's citizen suit provision. *Id.* at 497-98 & n.18. Although this matter may not immediately concern a permitting process, similar goals exist in maritime law (uniformity), as discussed above. Thus, just as the Supreme Court limited the state-law claims preserved by the CWA savings clause, this Court finds it appropriate to limit state-law claims purportedly saved by OPA.

Plaintiffs' reliance on *Askew v. American Waterways Operators, Inc.* is unpersuasive despite that Court's observance that ship-to-shore pollution control

is "historically within the reach of the police power of the States," and "not silently taken away from the States by the Admiralty Extension Act." 411 U.S. 325, 337 (1973). *Askew* involved a challenge to the constitutionality of the Florida Oil Spill Prevention and Pollution Control Act, which governed state and private damages incurred as a result of an oil spill in the State's ***territorial*** waters. The Court also noted that previous decisions "gave broad 'recognition of the authority of the States to create rights and liabilities with respect to ***conduct within their borders***. . . .'" *Id.* at 340 (emphasis added). Thus, *Askew* does not suggest that state laws could apply to an out-of-state polluter. *Askew* is also distinguishable on the grounds that there was no overlap between the relevant federal and state statutes at issue, as there is with OPA. The federal statute in *Askew* addressed federal cleanup costs; the state statute addressed state and private damages. Thus, there was no available federal statutory remedy for the damages sought in *Askew.*

The Court's analysis is also not in tension with *United States v. Locke,* which held that OPA did not save Washington's tanker-design statutes. 529 U.S. 89 (2000). Plaintiffs emphasize the Supreme Court's point that "[p]lacement of the savings clauses in Title I of OPA suggests that Congress intended to preserve state laws of a scope similar to the matters contained in Title I of OPA. . . . The evident purpose of the savings clauses is to preserve state laws which, rather than imposing substantive regulation of a vessel's

primary conduct, establish liability rules and financial requirements relating to oil spills." *Id.* at 105. Plaintiffs use this point to advance the argument that if the statute at issue in *Locke* dealt with liability rather than tanker design, it would have been preserved under OPA. This is an overly broad interpretation. The Washington statute governed tankers operating in Washington state waters. Although the Supreme Court observed that the savings clause in OPA preserved state statutes relative to liability, it did not declare a rule so broad as to allow state liability statutes to apply to oil spills outside of state waters.

Plaintiffs also insist that under *Curd v. Mosaic Fertilizer, LLC,* 39 So. 3d 1216 (Fla. 2010), "any person" can recover for damages suffered as a result of pollution under the Florida Pollutant Discharge Prevention and Control Act ("FPDPCA"). *Curd* involved commercial fishermen who made claims for economic damages resulting from an oil spill caused by a vessel operating in Tampa Bay, i.e., Florida territorial waters. As with the cases above, this case is distinguishable from a discharge occurring over the Outer Continental Shelf.

Accordingly, Plaintiffs' state common-law claims for nuisance, trespass, and fraudulent concealment, as well as Plaintiffs' FPDPCA claims are dismissed. Because the Court finds that state law is inapplicable to this case, Plaintiffs' arguments regarding the economic-loss doctrines of various states are moot.

E. General maritime law claims

Defendants seek to dismiss all general maritime claims, contending that when Congress enacted OPA, it displaced pre-existing federal common law, including general maritime law, for claims covered by OPA. Defendants argue that OPA provides the sole remedy for private, non-governmental entities asserting economic loss and property damage claims. They urge that when Congress enacts a comprehensive statute on a subject previously controlled by federal common law, the federal statute controls and displaces the federal common law. Defendants further argue that under OPA, Plaintiffs are allowed to pursue their claims for economic damages solely against the designated "Responsible Party" and that OPA does not allow claims directly against non-Responsible Parties.

Prior to the enactment of OPA in 1990, a general maritime negligence cause of action was available to persons who suffered physical damage and resulting economic loss resulting from an oil spill. General maritime law also provided for recovery of punitive damages in the case of gross negligence, *Exxon Shipping Co. v. Baker,* 554 U.S. 471 (2008), and strict product liability for defective products, *E. River S.S. Corp.,* 476 U.S. 858 (1986). However, claims for purely economic losses unaccompanied by physical damage to a proprietary interest were precluded under *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927). The Fifth Circuit has continuously reaffirmed the straightforward application of the *Robins Dry Dock* rule, explaining that "although eloquently

criticized for its rigidity, the rule has persisted because it offers a bright-line application in an otherwise murky area." *Mathiesen v. M/V Obelix,* 817 F.2d 345, 346-47 (5th Cir. 1987) (citing *Louisiana v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985)); *see also Wiltz v. Bayer CropScience, Ltd.,* ___ F.3d ___, 2011 WL 2535552 (5th Cir. 2011); *Catalyst Old River Hydroelectric Ltd. v. Ingram Barge Co.,* 639 F.3d 207 (5th Cir. 2011) (both reaffirming the applicability of *Robins Dry Dock*).

One relevant exception to the *Robins Dry Dock* rule applies in the case of commercial fishermen. *See Louisiana v. M/V Testbank,* 524 F. Supp. 1170, 1173 (E.D. La. 1981) ("claims for [purely] economic loss [resulting from an oil spill and subsequent river closure] asserted by the commercial oystermen, shrimpers, crabbers, and fishermen raise unique considerations requiring separate attention . . . seamen have been recognized as favored in admiralty and their economic interests require the fullest possible legal protection."). A number of other courts have recognized that claims of commercial fishermen are sui generis because of their unique relationship to the seas and fisheries, treating these fishermen as akin to seamen under general maritime law. *See Yarmouth Sea Prods. Ltd. v. Scully,* 131 F.3d 389 (4th Cir. 1997); *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir. 1974).

Accordingly, long before the enactment of OPA, this was the state of general maritime law. Persons who suffered physical damage to their property as well as commercial fisherman had a cause of action under general maritime law to recover losses resulting

from unintentional maritime torts. In the case of gross negligence or malicious, intentional conduct, general maritime law provided a claim for punitive or exemplary damages. *Baker,* 554 U.S. 471. And, in the case of a defective product involved in a maritime casualty, maritime law imposed strict liability. *E. River S.S. Corp.,* 476 U.S. 858 (1986).

In the wake of the EXXON VALDEZ spill in 1989, there were large numbers of persons who suffered actual economic losses but were precluded from any recovery by virtue of the *Robins Dry Dock* rule. At that time, an oil spill caused by a vessel on navigable water was governed by a web of different laws, including general maritime law, the CWA, and the laws of states affected by the spill in question. Various efforts had been made in the past to enact comprehensive federal legislation dealing with pollution from oil spills. With impetus from the EXXON VALDEZ incident, Congress finally enacted OPA in 1990.

OPA is a comprehensive statute addressing responsibility for oil spills, including the cost of clean up, liability for civil penalties, as well as economic damages incurred by private parties and public entities. Indeed, the Senate Report provides that the Act "builds upon section 311 of the Clean Water Act to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution." S. Rep. 101-94 (1989). One significant part of OPA broadened the scope of private persons who are allowed to recover for economic losses resulting from an oil spill. OPA allows recovery for economic losses "resulting

from" or "due to" the oil spill, regardless of whether the claimant sustained physical damage to a proprietary interest. OPA allows recovery for "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, or natural resources, which shall be recoverable by ***any claimant***." 33 U.S.C. § 2702(b)(2)(E) (emphasis added). Furthermore, the House Report noted that "[t]he claimant need not be the owner of the damaged property or resources to recover for lost profits or income." H.R. Conf. Rep. 101-653, at 781 (1990).

Clearly, one major remedial purpose of OPA was to allow a broader class of claimants to recover for economic losses than allowed under general maritime law. Congress was apparently moved by the experience of the Alaskan claimants whose actual losses were not recoverable under existing law. Another obvious purpose of OPA was to set up a scheme by which a "Responsible Party" (typically the vessel or facility owner) was designated and made strictly liable (in most instances) for clean up costs and resulting economic damages. The intent is to encourage settlement and reduce the need for litigation. Claimants present their claims to the Responsible Party, who pays the claims and is then allowed to seek contribution from other allegedly liable parties. 33 U.S.C. §§ 2709, 2710, 2713. If the Responsible Party refuses or fails to pay a claim after ninety days, the claimant may either pursue its claim against the government-created Oil Spill Liability Trust Fund or

file suit in court. *Id.* § 2713. There was much debate in Congress about whether or not this new federal statute should completely preempt or displace other federal or state laws. Ultimately, the statute included two "saving" provisions, one relating to general maritime law[10] and the other to state laws (discussed above). The question arises in this case as to whether, or to what extent, OPA has displaced any claims previously existing under general maritime law, including claims for punitive damages.

Only a handful of courts have had the opportunity to address whether OPA displaces general maritime law. For example, the First Circuit in *South Port Marine, LLC v. Gulf Oil Limited Partnership,* 234 F.3d 58 (1st Cir. 2000), held that punitive damages were not available under OPA. The First Circuit began by noting that in enacting OPA "Congress established a comprehensive federal scheme for oil pollution liability" and "set[ ] forth a comprehensive list of recoverable damages." *Id.* at 64. "Absent from that list of recoverable damages is any mention of punitive damages." *Id.*

The First Circuit found that the Supreme Court decision of *Miles v. Apex Marine,* 498 U.S. 19 (1990),

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[10] "Except as otherwise provided in this Act, this Act does not affect – (1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 33 U.S.C. § 2751(e).

led to the conclusion that OPA did not allow for punitive damages. "The Court [in *Miles*] refused to allow recovery for loss of society when such damages were not provided in [Death on the High Seas Act], reasoning that 'in an area covered by statute, it would be no more appropriate to prescribe a different measure of damage than to prescribe a different statute of limitations, or a different class of beneficiaries.'" *Id.* at 65-66 (internal citations omitted). Likewise, the First Circuit determined that OPA's absence of an allowance for punitive damages was conclusive. In *Clausen v. M/V New Carissa,* the district court adopted the First Circuit's rationale and held that punitive damages were not allowable under OPA. 171 F. Supp. 2d 1127 (D. Or. 2001).

In *Gabarick v. Laurin Maritime* (*America*) *Inc.,* 623 F. Supp. 2d 741, 747 (E.D. La. 2009), the district court determined that OPA preempted maritime law claims for economic loss, using the four factors articulated in *United States v. Oswego Barge Corp.,* 664 F.2d 327 (2d Cir. 1981), to analyze whether OPA displaced general maritime law: "(1) legislative history; (2) the scope of legislation; (3) whether judge-made law would fill a gap left by Congress's silence or rewrite rules that Congress enacted; and (4) likeliness of Congress's intent to preempt 'long established and familiar principles of the common law or the general maritime law.'"

However, more recent Supreme Court precedents cause this Court to question the notion that long-standing federal common law can be displaced by a

statute that is silent on the issue. *See Exxon Shipping Co. v. Baker,* 554 U.S. 471 (2008) (holding that the CWA did not displace a general maritime remedy for punitive damages) and *Atlantic Sounding Co. v. Townsend,* ___ U.S. ___, 129 S. Ct. 2561 (2009) (holding that the Jones Act did not displace the availability of punitive damages for a seaman's maintenance and cure claim).

In *Baker,* the Court employed a three-part analysis to determine if a statute preempts or displaces federal common law. First, is there a clear indication that Congress intended to occupy the entire field? Second, does the statute speak directly to the question addressed by the common law? Third, will application of common law have a frustrating effect on the statutory remedial scheme? 554 U.S. at 489. The question presented in *Baker* was whether the CWA preempted or displaced general maritime punitive damages for economic loss. The Court first stated that it saw no clear indication of congressional intent to occupy the entire field of pollution remedies. Next, the Court noted that the CWA made no mention of punitive damages, and that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." Finally, the Court did not perceive that punitive damages for private harms would have any frustrating effect on the CWA remedial scheme. Accordingly, the Court concluded that the CWA did not preempt punitive damages under general maritime law.

In *Townsend,* the Supreme Court revisited its prior holding in *Miles v. Apex Marine,* 498 U.S. 19 (1990), on which the *South Port Marine* court hinged its analysis. The *Townsend* Court explained that *Miles* did not allow punitive damages for wrongful death claims because it was ***only*** as a result of federal legislation that a wrongful death cause of action existed. 129 S.Ct. at 2572-73. Accordingly, "to determine the remedies available under the common-law wrongful-death action, 'an admiralty court should look primarily to these legislative enactments for policy guidance.' It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA." *Id.* at 2572 (citing *Miles,* 498 U.S. at 27). The Court contrasted the situation in *Miles* with the question before it in *Townsend,* and it concluded that "both the maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* In other words, the Court limited the application of *Miles* when it concluded that punitive damages were available to the seaman asserting a cause of action for maintenance and cure.

The B1 Master Complaint alleges economic loss claims on behalf of various categories of claimants, many of whom have not alleged physical injury to their property or other proprietary interest. Pre-OPA, these claimants, with the exception of commercial fishermen, would not have had a viable cause of action and would be precluded from any recovery by

virtue of *Robins Dry Dock*. Accordingly, claims under general maritime law asserted by such claimants are not plausible and must be dismissed.

However, the Court finds that the B1 Master Complaint states a viable cause of action against the non-Responsible Parties under general maritime law on behalf of claimants who either allege physical damage to a proprietary interest and/or qualify for the commercial fishermen exception to *Robins Dry Dock*. In brief, these claims are saved and not displaced by OPA for the following reasons.

First, when reading OPA and its legislative history, it does not appear that Congress intended to occupy the entire field governing liability for oil spills, as it included two savings provisions – one that preserved the application of general maritime law and another that preserved a State's authority with respect to discharges of oil or pollution within the state. 33 U.S.C. §§ 2718, 2751.

Second, OPA does not directly address or speak to the liability of non-Responsible Parties to persons who suffer covered losses. Although OPA contains provisions regarding the Responsible Party's ability to seek contribution and indemnification, *Id.* §§ 2709, 2710, it is silent as to whether a claimant can seek redress directly from non-Responsible Parties. Prior to OPA's enactment, commercial fisherman and those who suffered physical damage had a general maritime law cause of action against these individuals.

Third, there is nothing to indicate that allowing a general maritime remedy against the non-Responsible Parties will somehow frustrate Congress' intent when it enacted OPA. Under OPA, a claimant is required to first present a claim to the Responsible Party. If the claim is not paid within ninety days, the claimant may file suit or file a claim against the Oil Spill Liability Trust Fund. A Responsible Party is strictly liable and damages are capped unless there is gross negligence or violation of a safety statute or regulation that proximately caused the discharge. To allow a general maritime claim against the Responsible Party would serve to frustrate and circumvent the remedial scheme in OPA.

Thus, claimants' maritime causes of action against a Responsible Party are displaced by OPA, such that all claims against a Responsible Party for damages covered by OPA must comply with OPA's presentment procedure. However, as to the non-Responsible Parties, there is nothing in OPA to indicate that Congress intended such parties to be immune from direct liability to persons who either suffered physical damage to a proprietary interest and/or qualify for the commercial fishermen exception. Therefore, general maritime law claims that existed before OPA may be brought directly against non-Responsible parties.

F. Claims for punitive damages

OPA is also silent as to the availability of punitive damages. Plaintiffs who could assert general maritime claims pre-OPA enactment may plausibly allege punitive damages under general maritime for several reasons. First, "[p]unitive damages have long been available at common law" and "the common-law tradition of punitive damages extends to maritime claims." *Townsend,* 129 S. Ct. at 2569. Congress has not occupied the entire field of oil spill liability in light of the OPA provision preserving admiralty and maritime law, "[e]xcept as otherwise provided." OPA does not mention punitive damages; thus, while punitive damages are not available under OPA, the Court does not read OPA's silence as meaning that punitive damages are precluded under general maritime law. Congress knows how to proscribe punitive damages when it intends to, as it did in the commercial aviation exception under the Death on the High Seas Act, 46 U.S.C. § 30307(b) ("punitive damages are not recoverable").

There is also nothing to indicate that allowing a claim for punitive damages in this context would frustrate the OPA liability scheme. As stated above, claims against the Responsible Party must comply with OPA's procedure, regardless of whether there is also cause of action against the Responsible Party under general maritime law. However, the behavior that would give rise to punitive damages under general maritime law – gross negligence – would also break OPA's limit of liability. *See* 33 U.S.C. § 2704(a). Thus,

the imposition of punitive damages under general maritime law would not circumvent OPA's limitation of liability.

Finally on this issue, the Court notes Justice Stevens' concurrence in *Baker* in which he wrote that the Trans-Alaska Pipeline Authorization Act ("TAPAA"), which provided "the liability regime governing certain types of Alaskan oil spills, imposing strict liability but also capping recovery," "did not restrict the availability of punitive damages." 554 U.S. at 518. Although the issue of whether TAPAA precluded an award of punitive damages was not squarely before the Court in *Baker,* Justice Stevens' concurrence adds further support for this Court's conclusion. OPA, like TAPAA, creates a liability regime governing oil spills, imposes strict liability on the Responsible Parties, includes liability limits, and is silent on the issue of punitive damages.

Thus, OPA does not displace general maritime law claims for those Plaintiffs who would have been able to bring such claims prior to OPA's enactment. These Plaintiffs assert plausible claims for punitive damages against Responsible and non-Responsible parties.

G. Negligence claims against Anadarko and MOEX

Anadarko and MOEX, the non-operating lessees for the Macondo well, have joined in the arguments

made by other Defendants.[11] However, these two Defendants advance additional, independent reasons supporting their Motions to Dismiss. In essence, Defendants argue that under the Joint Operating Agreement ("JOA") existing between BP and themselves, BP was the operating partner, responsible for the drilling of the Macondo well. Anadarko or MOEX had no personnel present aboard the DEEPWATER HORIZON and assert they had no right to control BP's conduct.

Ainsworth v. Shell Offshore, Inc. lays out the analysis for evaluating Plaintiffs' negligence claim against Anadarko and MOEX. 829 F.2d 548 (5th Cir. 1987). "[A] principal generally is not liable for the offenses an independent contractor commits in the course of performing its contractual duties." *Id.* at 549. There are two recognized exceptions to this general principle, in the case of an ultra-hazardous activity, or when the principal retains or exercises operational control. *Id.* at 550. Offshore drilling operations are not considered ultra-hazardous. *Id.* As to operational control, the Court in *Ainsworth* did not find that this exception was met even when the principal had a company man present on the platform. In this case, it is not alleged that either Anadarko or MOEX had anyone present on the DEEPWATER HORIZON. Under the JOA, BP was solely responsible

[11] Although minority interest lessees, Anadarko and MOEX contest their status as Responsible Parties. Neither has been formally named as a Responsible Party at this time.

for the drilling operations. Any access to information that Anadarko and MOEX may have had did not give rise to a duty to intercede in an independent contractor's operations – especially because Plaintiffs have not alleged in their Complaint that Non-Operating Defendants had access to any information not already available to BP and Transocean personnel either onshore or on the rig.

Plaintiffs attempt to avoid dismissal by suggesting that they do not argue for vicarious liability of the Non-Operating Defendants, but rather that Anadarko and MOEX were directly negligent. However, adding a "direct-duty" label to their claims does not add merit to them. *See Dupre v. Chevron U.S.A. Inc.,* 913 F. Supp. 473, 483 (E.D. La. 1996) (rejecting plaintiffs' attempt to disguise a vicarious liability claim as one of direct duty because doing so "would amount to an end-run around a large body of Fifth Circuit precedent finding no 'operational control' despite some knowledge of risk or involvement with safety issues and the presence of 'company men' on the contractor's rig"). Simply put, Plaintiffs have failed to allege a plausible general maritime negligence claim against the two Non-Operating Defendants. All general maritime negligence claims against Anadarko and MOEX must be dismissed.[12]

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[12] Because it is plausible that Anadarko and MOEX will be found to be Responsible Parties and thus liable under OPA, OPA claims are not dismissed.

H. Presentment under OPA.

Defendants also seek to dismiss all OPA claims because the B1 Master Complaint does not properly allege that the B1 Claimants have complied with the "presentment" requirements of OPA. Defendants argue that presentment to the Responsible Party is either a jurisdictional requirement or, alternatively, a mandatory condition precedent before filing suit.

The Court finds that the text of OPA clearly requires that OPA claimants must first "present" their OPA claim to the Responsible Party before filing suit. The "Claims Procedure" section of OPA reads:

> (a) Presentation
>
> Except as provided in subsection (b) of this section, ***all claims for*** removal costs or ***damages shall be presented first to the responsible party*** or guarantor of the source designated under section 2714(a) of this title. . . .
>
> (c) If a claim is presented in accordance with subsection (a) of this section and –
>
> (1) each person to whom the claim is presented denies all liability for the claim, or
>
> (2) the claim is not settled by any person by payment within 90 days after the date upon which

> (A) the claim was presented, or
>
> (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later,
>
> the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

33 U.S.C. § 2713 (emphasis added).

The text of the statute is clear. Congress intended presentment to be a mandatory condition precedent to filing suit. *See Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.,* 51 F.3d 235 (11th Cir. 1995) (presentment is a mandatory condition precedent to filing suit under OPA); *Gabarick v. Laurin Maritime* (*America*)*, Inc.,* 2009 WL 102549 (E.D. La. 2009) (noting that the purpose of the claim presentation procedure is to promote settlement and avoid litigation).

Defendants argue that the B1 Master Complaint does not sufficiently allege that claimants have presented their claims to BP as the Responsible Party. There are likely large numbers of B1 claimants who have completely bypassed the OPA claim presentation requirement, others who have attempted to present their claims but may not have complied with OPA, and others who have properly presented their claims

but have been denied for various reasons.[13] Claimants who have not complied with the presentment requirement are subject to dismissal without prejudice, allowing them to exhaust the presentment of their claims before returning to court. In the ordinary case, the Court would simply dismiss those claims without prejudice. However, as the Court has previously noted, this is no ordinary case. A judge handling an MDL often must employ special procedures and case management tools in order to have the MDL operate in an orderly and efficient manner.[14] In this massive and complex MDL, the Court is faced with a significant practical problem. It would be impractical, time-consuming, and disruptive to the orderly conduct of this MDL and the current scheduling orders if the Court or the parties were required to sort through in excess of 100,000 individual B1 claims to determine which ones should be dismissed at the current time. Moreover, such a diversion at this time would be unproductive and would not advance towards the goal of allowing the parties and the Court to be ready for the limitation and liability trial scheduled to

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[13] Counsel for BP acknowledged at oral argument that at least ***some*** of the B1 claimants have properly presented their claims.

[14] *See, e.g., In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010,* No. 10-md-2179, (Rec. Doc. 676) (E.D. La. Nov. 15, 2010) (Pretrial Order 15, continuing all pending and future motions); *see also* Fed. Judicial Ctr., *Manual for Complex Litigation, Fourth* §§ 10.1 (2004) (explaining that Fed. R. Civ. Proc. 16(c)(12) authorizes a judge to adopt special procedures for managing complex litigation).

commence in February 2012. No matter how many of the individual B1 claims might be dismissed without prejudice, the trial scheduled for February would still go forward with essentially the same evidence.

In summary on this issue, the Court finds that presentment is a mandatory condition-precedent with respect to Plaintiffs' OPA claims.[15] The Court finds that Plaintiffs have sufficiently alleged presentment in their B1 Master Complaint, at least with respect to some of the Claimants. For the reasons stated above, the Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented.[16]

I. Vessel of Opportunity and Moratorium claims

The parties disagree as to whether the Vessel of Opportunity ("VoO") and Moratorium Plaintiffs have stated plausible B1 claims. Plaintiffs argue that OPA may apply to some of the claims presented by VoO

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[15] Of course, there is no presentment requirement for Plaintiffs to pursue any general maritime law claims which survive the present Motions to Dismiss.

[16] The Court does not decide today what constitutes "presentment." OPA requires a claimant to present his or her claim for a "sum certain" to the Responsible Party. How this requirement can be applied in the context of the BP oil spill is unclear. The long term effects on the environment and fisheries may not be known for many years.

claimants because OPA provides for liability on the part of Responsible Parties for damages that "***result from***" discharges of oil. At least some of the VoO claimants allege property damage to their vessels. Moratorium Plaintiffs argue that they have stated a viable OPA claim because there are some losses that would have been incurred regardless of the Moratorium and further because the Moratorium was a foreseeable response to the spill. Defendants counter that OPA does not apply to claims alleged by VoO Plaintiffs because their injuries occurred as a result of their participation in the VoO program, not as a result of the spill. Defendants also argue that Moratorium claims must be dismissed for failure to state an OPA claim because the imposition of the Moratorium was an intervening or superseding cause of damage that could not reasonably have been anticipated.

Few courts have had occasion to address the question of OPA causation. *See, e.g., Gatlin Oil Co. v. United States,* 169 F.3d 207 (4th Cir. 1999) (holding that a plaintiff could not recover for fire damage because the evidence did not show that the fire caused the discharge of oil into navigable waters); *In re Settoon Towing LLC,* 2009 WL 4730969 (E.D. La. Dec. 4, 2009) (explaining that it was potentially possible for an injured party to recover for damages incurred as the result of a shutdown of the Gulf Intracoastal Waterway in the wake of a spill). The parties acknowledge that these claims are fact specific and present a more attenuated causation analysis than

the other claims for economic loss, and they compare and contrast the instant Moratorium claims and VoO claims with the facts in the few cases that have been decided.

The Court reminds the parties that the issue before the Court on a Motion to Dismiss is simply whether Plaintiffs have stated a plausible claim for relief. A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. A court "must . . . accept all factual allegations in the complaint as true" and "must draw all reasonable inferences in the plaintiff's favor." *Lormand,* 565 F.3d at 232.

The Court notes that OPA does not expressly require "proximate cause," but rather only that the loss is "due to" or "resulting from" the oil spill. While the Court need not define the precise contours of OPA causation at this time, it is worth noting that during oral argument both counsel for BP and the PSC conceded that OPA causation may lie somewhere between traditional "proximate cause" and simple "but for" causation. *See CSX Transp., Inc. v. McBride,* 131 S. Ct. 2630, 2642-43 (2011) ("Congress, it is true, has written the words 'proximate cause' into a number of statutes. But when the legislative text uses less legalistic language, *e.g.,* 'caused by,' 'occasioned by,' 'in consequence of,' . . . and the legislative purpose is to loosen constraints on recovery, there is little reason

for courts to hark back to stock, judge-made proximate-cause formulations.").

The Court need not define causation under OPA – necessarily a highly factual analysis – at this stage of the pleadings. The Court is satisfied that the VoO and Moratorium Plaintiffs have alleged sufficient facts to state plausible claims in the B1 bundle.

J. Dril-Quip as 14(c) Defendant

Dril-Quip, which was not named as a Defendant in the Master Complaint, has filed a Motion to Dismiss (Rec. Doc. 2107) because of the procedural effect of the Rule 14(c) tender in Transocean's Third-Party Complaint. Although the Court has dismissed all state-law claims alleged by Plaintiffs in their B1 Master Complaint, Dril-Quip remains a 14(c) Defendant with respect to Plaintiffs' claims saved by this Order.

K. Claims for declaratory relief

Plaintiffs seek a declaratory judgment that "any settlement provisions [with Defendants] that purport, directly or indirectly, to release or to affect the calculation of punitive damages without a judicial determination of fairness, adequacy, and reasonableness are ineffective as contrary to law, equity, and public policy." (Rec. Doc. 1128 at 193.) Plaintiffs also seek a declaration that "the conduct of BP and its agents and representatives, including the Gulf Coast Claims Facility ("GCCF"), in obtaining releases and/or

assignments of claims against other parties, persons, or entities is not an obligation of BP under OPA." (*Id.* at 193-94.)

The Court finds Plaintiffs' claims for declaratory relief fatally problematic in at least two respects. First, Plaintiffs do not identify any cause of action entitling them to declaratory relief. Under the Declaratory Judgment Act, "a party's legal interest must relate to an actual 'claim arising under federal law that another asserts against him. . . .'" *Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods* (*HAVEN*), 915 F.2d 167, 171 (5th Cir. 1990). Accordingly, because "it is the underlying cause of action of the defendant against the plaintiff that is actually litigated in a declaratory judgment action, a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action." *Id.* Here, the Court agrees with BP that Plaintiffs have not identified a cause of action that would entitle them to their requested relief.

The second obvious flaw in Plaintiffs' request for declaratory relief is that nothing prohibits Defendants from settling claims for economic loss. While OPA does not specifically address the use of waivers and releases by Responsible Parties, the statute also does not clearly prohibit it. In fact, as the Court has recognized in this Order, one of the goals of OPA was to allow for speedy and efficient recovery by victims of an oil spill. The Court finds that Plaintiffs' declaratory relief claim fails on this ground as well.

L. OPA claims against Anadarko E&P

One of the Anadarko entities, Anadarko E&P, urges dismissal of Plaintiffs' OPA claim, arguing that Anadarko E&P did not hold a lease interest in the Macondo Prospect at the time of casualty. Plaintiffs allege Anadarko E&P held a 22.5% ownership interest in the lease of the Macondo Prospect at all relevant times, including at the time of the blowout and oil spill. The Court concludes Plaintiffs have stated a colorable OPA claim against Anadarko E&P and accordingly this claim survives Anadarko E&P's Motion to Dismiss.

M. Claims for attorneys' fees

Plaintiffs argue that attorneys' fees are available under general maritime law. Plaintiffs cite cases in which courts have allowed attorneys' fees for bad faith failure to pay maintenance and cure, claims that are not present in the B1 Master Complaint. The line of cases relied upon go back to *Vaughan v. Atkinson,* 369 U.S. 527 (1962), where a seaman was forced to hire a lawyer and go to court to recover benefits plainly owed under what the Court referred to as "laws that are centuries old." The default was willful and persistent, and since it was a maintenance and cure claim, there was no defense. Under these circumstances the Supreme Court allowed a claim for attorneys' fees. This rule has generally been limited to maintenance and cure cases.

Pursuant to the "American Rule" in the United States, the prevailing litigant is ordinarily not entitled to collect attorneys' fees from the losing party. *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240 (1975); *see also Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc.,* 747 F.2d 995, 1011 (5th Cir. 1984) ("The general rule in admiralty is that attorneys' fees are not recoverable by the prevailing party"). Generally, litigants must pay their own attorneys' fees absent statute or enforceable contract. Plaintiffs allege a claim for attorneys' fees under the so-called "bad-faith exception" to the "American Rule."

Plaintiffs misread the bad-faith exception, which is designed to cover situations in which the defendants have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Galveston County Navigation Dist. No. 1 v. Hopson Towing Co., Inc.,* 92 F.3d 353, 356 (5th Cir. 1996). In that case, the Fifth Circuit reversed an award of attorneys' fees in a maritime allision case because there was "no evidence that the defendants took this [legal] position maliciously or in bad faith, nor that they failed to comply with discovery requests, filed frivolous pleadings, or otherwise abused the litigation process." *Id.* at 359.

A more recent case from the Sixth Circuit discussed the older line of cases and the bad faith exception in some detail. In *Shimman v. International Union of Operating Engineers,* the Sixth Circuit held that a person who harms another in bad faith is nonetheless entitled to defend a lawsuit. 744 F.2d 1226,

1228-34 (6th Cir. 1984) (en banc). *Shimman* made clear that the focus of the inquiry is not the actions that precipitated the law suit, but rather the manner in which the litigation itself is carried out. That is, the rule is intended to penalize the litigant who brings to court a frivolous suit or defense, or abuses the process so as to create an injury separate from the underlying claim. The Fifth Circuit has adopted this same reasoning. In *Guidry v. International Union of Operating Engineers,* the Court rejected a claim for attorneys' fees because there was no evidence that the defendants in the case had either brought a frivolous defense or pursued the litigation in a vexatious manner. 882 F.2d 929 (5th Cir. 1989).

Even more to the point, the Fifth Circuit seems to have ratcheted up the standard for a bad faith attorneys' fee claim since *Guidry.* "A court should invoke its inherent power to award attorneys' fees only when it finds that 'fraud has been practiced upon it, or that the very temple of justice has been defiled.'" *Boland Marine v. Rihner,* 41 F.3d 997, 1005 (1995). In *Boland,* the Fifth Circuit held that a determination that the defendant instituted the proceedings, or required the proceedings to be instituted, without reasonable grounds is not the equivalent to a finding that fraud was perpetrated on the Court or that the "very temple of justice has been defiled which is required for a court to assess attorney's fees through its inherent powers." *Id.*

The Court concludes that plaintiffs' complaint does not allege a plausible claim for attorneys' fees

under either general maritime law or the bad faith exception, and this claim must be dismissed.[17]

IV. SUMMARY

In summary, the Court finds as follows:

1. The DEEPWATER HORIZON was at all material times a vessel in navigation.

2. Admiralty jurisdiction is present because the alleged tort occurred upon navigable waters of the Gulf of Mexico, disrupted maritime commerce, and the operations of the vessel bore a substantial relationship to traditional maritime activity. With admiralty jurisdiction comes the application of substantive maritime law.

3. OCSLA jurisdiction is also present because the casualty occurred in the context of exploration or production of mineral on the Outer Continental Shelf.

4. The law of the adjacent state is not adopted as surrogate federal law under OCSLA, 43 U.S.C. § 1333(a)(2)(A).

5. State law, both statutory and common, is preempted by maritime law, notwithstanding

[17] This ruling is not intended to preclude possible claims for attorneys' fees available by statute or federal rule, or some other non-statutory exception to the American Rule, such as common-fund fees, or situations where a party willfully violates a court order. *See Boland,* 41 F.3d at 1005.

OPA's savings provisions. All claims brought under state law are dismissed.

6. General maritime law claims that do not allege physical damage to a proprietary interest are dismissed under the *Robins Dry Dock* rule, unless the claim falls into the commercial fishermen exception. OPA claims for economic loss need not allege physical damage to a proprietary interest.

7. OPA does not displace general maritime law claims against non-Responsible parties. As to Responsible Parties, OPA does displace general maritime law claims against Responsible Parties, but only with regard to procedure (i.e., OPA's presentment requirement).

8. Presentment under OPA is a mandatory condition precedent to filing suit against a Responsible Party.

9. There is no presentment requirement for claims against non-Responsible Parties.

10. Claims for punitive damages are available for general maritime law claimants against Responsible Parties (provided OPA's presentment procedure is satisfied) and non-Responsible Parties.

11. All general maritime negligence claims against Anadarko and MOEX are dismissed, as Plaintiffs have failed to state a plausible claim against the Non-Operating lessees/ Defendants.

12. Plaintiffs have plausibly alleged OPA claims for VoO claimants and Moratorium claimants.

13. Dril-Quip remains a 14(c) Defendant.

14. Plaintiffs' claims for declaratory relief are dismissed.

15. Plaintiffs have plausibly alleged OPA claims against Anadarko E&P.

16. Plaintiffs' claims for attorneys' fees under general maritime law are dismissed.

Accordingly,

IT IS ORDERED that Defendants' Motions to Dismiss the B1 Master Complaint (Rec. Docs. 1440, 1390, 1429, 1597, 1395, 1433, 1414, and 2107) are hereby **GRANTED IN PART** and **DENIED IN PART**, as set forth above.

New Orleans, Louisiana, this 26th day of August, 2011.

/s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	OIL SPILL by the OIL RIG "DEEPWATER HORIZON" in the GULF OF MEXICO, on APRIL 20, 2010	: MDL NO. 2179 : SECTION: J : JUDGE BARBIER : MAG. JUDGE SHUSHAN

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THIS DOCUMENT RELATES TO 10-1757, 10-1758, 10-1760, AND 10-2087

ORDER

For the reasons set forth in this Court's Order in *In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010,* 10-MD-2179 (Rec. Doc. 470), (Reference: 10-cv-1759), the Court ORDERS that the following motions are hereby DENIED:

State of Louisiana's Motion to Remand, 10-CV-1757 (Rec. Doc. 9);

State of Louisiana's Motion to Remand, 10-CV-1758 (Rec. Doc. 7);

State of Louisiana's Motion to Remand, 10-CV-1156 (Rec. Doc. 309), (Reference: 10-CV-1760); and

State of Louisiana's Motion to Remand, 10-MD-2179 (Rec. Doc. 65), (Reference: 10-CV-2087).

New Orleans, Louisiana, this 6th day of October, 2010.

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	OIL SPILL by the OIL RIG "DEEPWATER HORIZON" in the GULF OF MEXICO, on APRIL 20, 2010	: MDL NO. 2179 : SECTION: J : JUDGE BARBIER : MAG. JUDGE SHUSHAN

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THIS DOCUMENT RELATES TO 10-1759.

ORDER

Before the Court is Plaintiff State of Louisiana's Motion to Remand, *In re: Deepwater Horizon,* 10-CV-1156 (Rec. Doc. 304) and Defendant BP's Memorandum in Opposition, *In re: Deepwater Horizon,* 10-CV-1156 (Rec. Doc. 401).

PROCEDURAL HISTORY
AND BACKGROUND FACTS

On May 17, 2010, the State of Louisiana filed suit against BP Exploration & Production Inc., BP PLC, BP Products North America, Inc., and BP America, Inc. (collectively "Defendants") in the 32nd Judicial District Court for the Parish of Terrebonne, State of Louisiana. In its complaint, Plaintiff alleged that Defendants have killed, caught, taken, possessed or injured fish, wild birds, wild quadruped, and other wildlife and aquatic life in violation of Louisiana State Law. Specifically, Plaintiff alleged that Defendants owned and operated a Minerals Management

Services Mineral Lease in the Gulf of Mexico. According to Plaintiff, Defendants failed to comply with applicable statutes and regulations governing the exploration and production of minerals or with the regulations governing the removal and remediation of the discharged contaminants. Plaintiff alleged that Defendants' failure to comply with applicable statutes resulted in an April 20, 2010 explosion aboard the Deepwater Horizon, a mobile offshore drilling rig, and the release of oil, other minerals, and contaminants into the Gulf of Mexico. Plaintiff further alleged that the oil spill was not timely contained and therefore, oil and other contaminants entered into the waters of the State of Louisiana – inflicting death and injury to Louisiana aquatic life and wildlife.

In its complaint, the State only asserted a cause of action under La. Rev. Stat. Ann. § 56:40.1 *et seq.* and specifically stated, "[n]otwithstanding any language in this petition to the contrary, plaintiff does not plead, and will never at any time in the future plead, any claim or cause of action arising under any federal law, and asserts no such claims or cause of action herein." Nevertheless, on June 17, 2010, Defendants removed this matter to the Eastern District of Louisiana, claiming that this court has original subject matter jurisdiction over the litigation pursuant to 43 U.S.C. § 1349(b)(1). Defendants also claim that this court has original subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff's claims arise under federal statutes, namely, the

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*.

Plaintiff has filed the current motion to remand, alleging that this matter was improperly removed. After reviewing the motion and the applicable law, this court finds as follows:

THE PARTIES' ARGUMENTS

Plaintiff argues that it did not allege any federal claims in its complaint and therefore, according to the well-pleaded complaint rule, removal is improper. Plaintiff also argues that no federal statute provides this court with jurisdiction in this matter. Further, Plaintiff argues that even if this court has jurisdiction, the Eleventh Amendment to the United States Constitution prevents removal. Alternatively, Plaintiff claims that this case involves general maritime law claims, and therefore, removal is not proper because the claims do not arise under the laws of the United States. Finally, Plaintiff argues that this court should sanction Defendants for improperly removing this matter to federal court.

Defendants argue that § 1349 of the Outer Continental Shelf Lands Act ("OCSLA") clearly supports this Court's original subject matter jurisdiction. Defendants further argue that Plaintiff's claims regarding the well-pleaded complaint rule, Eleventh Amendment immunity, and admiralty jurisdiction are frivolous. Therefore, Defendants urge this court to

deny Plaintiff's motion to remand and Plaintiff's request for sanctions.

DISCUSSION

Generally, a defendant may remove a civil action filed in state court if a federal court would have original jurisdiction over the action. *See* 28 U.S.C. § 1441. Once a motion to remand has been filed, the burden is on the defendant to prove, by a preponderance of the evidence, that federal jurisdiction exists. *De Aguilar v. Boeing Co.,* 47 F.3d 1404, 1412 (5th Cir. 1995). The jurisdictional facts supporting removal are examined as of the time of removal. *Gebbia v. Wal-Mart Stores, Inc.,* 233 F.3d 880, 883 (5th Cir. 2000). The removal statutes should be strictly construed in favor of remand. *Manguno v. Prudential Property and Cas. Ins. Co.,* 276 F.3d 720, 723 (5th Cir. 2002).

I. Well-Pleaded Complaint Rule

The well-pleaded complaint rule provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1987). The rule governs whether a claim arises under federal law so as to confer federal question jurisdiction under 28 U.S.C. § 1331 and is based on the theory that the plaintiff is "the master of her complaint." *Medina v. Ramsey Steel Co., Inc.,* 238 F.3d 674, 680 (5th Cir. 2001) (citing *Carpenter v. Wichita Falls Indep. Sch. Dist.,* 44 F.3d 362, 366 (5th

Cir. 1995)). As such, "[a] determination that a cause of action presents a federal question depends upon the allegations of the plaintiff's well-pleaded complaint." *Medina,* 238 F.3d at 680. Accordingly, under the well-pleaded complaint rule, when a plaintiff has a choice between federal and state law claims, she may proceed in state court "on the exclusive basis of state law, thus defeating the defendant's opportunity to remove." *Id.*

However, the well-pleaded complaint rule only applies to removal based on 28 U.S.C. § 1331 (statutory "arising under" cases). *Am. Nat'l Red Cross v. S.G.,* 505 U.S. 247, 258 (1992). Although in their notice of removal, Defendants claim that this Court has original subject matter jurisdiction under 28 U.S.C. § 1331, Defendants also assert that this Court has original jurisdiction under 43 U.S.C. § 1349. Therefore, although Plaintiff is correct in arguing that the well-pleaded complaint rule prevents Defendants from removing this matter on the basis of 28 U.S.C. § 1331, there is nothing preventing Defendants from removing this matter based on an assertion of jurisdiction under 43 U.S.C. § 1349. Therefore, if this Court finds that jurisdiction exists pursuant to 43 U.S.C. § 1349, Plaintiff is incorrect in arguing that the well-pleaded complaint rule serves as a bar to removal.

II. OCSLA Jurisdiction Pursuant to § 1349

Defendants assert that this Court has original jurisdiction under § 1349. Section 1349(b)(1) states:

> the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter.

43 U.S.C. § 1349(b)(1). The Fifth Circuit has held that the jurisdictional grant contained in § 1349(b)(1) is very broad. *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.,* 87 F.3d 150, 154 (5th Cir. 1996); *see also EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 569 (5th Cir. 1994) (stating that a "broad reading of the jurisdictional grant of section 1349 is supported by the expansive substantive reach of the OCSLA"). In deciding whether § 1349(b)(1) grants a court jurisdiction, courts routinely perform a two part analysis. *See, e.g., Recar v. CNG Producing Co.,* 853 F.2d 367, 369-70 (5th Cir. 1988); *Tenn. Gas Pipeline,* 87 F.3d at 154-55; *EP Operating Ltd. P'ship,* 26 F.3d at 568-69.

First, courts determine whether the activities that caused the injury can be classified as an "operation conducted on the outer Continental Shelf" and whether that "operation" involved the exploration or

production of minerals. 43 U.S.C. § 1349(b)(1). While the statute does not define "operation," the Fifth Circuit has broadly defined the term, stating that operation is "the doing of some physical act." *Tenn. Gas Pipeline,* 87 F.3d at 154. The Fifth Circuit has provided further guidance on the interpretation of the term by stating that "operation involves exploration, development, or the production of minerals on the OCS" and by clarifying that "[t]hese terms denote respectively the processes involved in searching for minerals on the OCS; preparing to extract them by, *inter alia,* drilling wells and constructing platforms; and removing the minerals and transferring them to shore." *Id.* Given this broad definition of operation, it is clear that Defendants' activities qualify as an operation. Defendants were exploring and producing minerals, namely oil, from the outer Continental Shelf. It is these activities that allegedly caused the April 20, 2010 explosion and the resulting oil spill. For these reasons, this Court finds that Defendants' activities should be classified as an "operation conducted on the outer Continental Shelf, which involved the exploration and production of minerals." Therefore, Defendants were conducting an operation as defined under § 1349.

Second, courts focus on whether the case and controversy "arises out of, or in connection with the operation." This phrase, which is "undeniably broad in scope," *EP Operating Ltd. P'ship,* 26 F.3d at 569, has been analyzed using a "but-for" test; i.e., but for the operation, would the case or controversy have

arisen. Here, Plaintiff argues that it was injured by Defendants' "illegal killing, catching, taking, possessing, or injuring of wildlife and aquatic life in Terrebonne Parish resulting from oil and/or other contaminants entering into the territorial waters of and onto land located in the State of Louisiana." 10-CV-1759 (Rec. Doc. 1-2). Plaintiff's theory of liability is based on Defendants' alleged negligent actions during the drilling and exploration operation. These facts clearly satisfy the "but-for" test because the oil and other contaminants would not have entered into the State of Louisiana's territorial waters "but for" Defendants' drilling and exploration operation. Accordingly, it is clear that original jurisdiction rests with this Court pursuant to § 1349(b)(1).[1]

[1] Plaintiff's arguments related to OCSLA § 1333 is not applicable to whether this Court has jurisdiction in this matter. "The Supreme Court and the Fifth Circuit have held that § 1333 creates a situs requirement for the application of other sections of the OCSLA." *Landry v. Island Operating Co. Inc.,* Civ. A. No. 09-1051, 2009 WL 3241560, *2-3 (W.D. La. Sept. 30, 2009) (citing *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 219 (1986); *Demette v. Falcon Drilling Co., Inc.,* 280 F.3d 492, 496 (5th Cir. 2002)). However, although the Fifth Circuit has discussed § 1333 and its situs requirement in relation to § 1349, *See Golden v. Omni Energy Services Corp.,* 242 Fed. Appx. 965, 967 (5th Cir. 2007), neither the Supreme Court nor the Fifth Circuit has held that the situs requirement has to be satisfied for jurisdiction to be proper under § 1349. As stated above, the Fifth Circuit generally focuses on the "operation" and the "but-for" test to determine if jurisdiction exists under § 1349.

III. Admiralty Jurisdiction

Plaintiff argues that even if § 1349(b)(1) gives this court original jurisdiction over this matter, maritime law requires this case to be remanded. Title 28 U.S.C. § 1441(b) states that "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the . . . laws of the United States shall be removable." "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). It is well settled that maritime law claims do not arise under the laws of the United States. It is therefore true that unless a defendant is not a citizen of the state in which the action was brought, § 1441(b) does not allow maritime law claims to be removed to federal court. This is true even if the court has both OCSLA and admiralty jurisdiction because the Fifth Circuit has not determined that finding that a court has OCSLA jurisdiction is synonymous with finding that a plaintiff's claim arises under the laws of the United States. *See Tenn. Gas Pipeline,* 87 F.3d at 156; *See also Walsh v. Seagull Energy Corporation,* 836 F. Supp. 411, 417-18 (S.D. Tex. 1993); *Rivas v. Energy Partners of Delaware,* No. Civ. A. 99-2742, 2000 WL 127290, *5 (E.D. La. Feb. 1, 2000) (stating "the Fifth Circuit has never held that where OCSLA and general maritime law overlap, the case is removable without regard to citizenship"); 28 U.S.C. § 1441(b). Nevertheless, Defendants in this matter are not

citizens of Louisiana (the state in which the action was brought). Therefore, because this court has original jurisdiction under § 1349(b)(1), it does not matter whether Plaintiff's claims do not arise under the laws of the United States. This matter is removable because "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The remainder of Plaintiff's arguments related to admiralty jurisdiction are premised on what law should apply. Despite Plaintiff's claims, nothing Plaintiff cites indicates that a discussion of these issues would have any bearing on whether this Court has jurisdiction over this matter. Further, having determined that a decision that admiralty jurisdiction applies would not affect the Court's jurisdiction determination, a decision on whether state, admiralty, or other law applies does not need to be addressed at this time.

IV. Eleventh Amendment Immunity

Notwithstanding that this Court has original jurisdiction under § 1349(b)(1), the State argues that the Eleventh Amendment precludes Defendants from removing this case to federal court. Plaintiff correctly argues that the scope of sovereign immunity is broader than the Eleventh Amendment's text and that courts should not be confined by the Amendment's definition of immunity. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 69 (1996) (stating courts should be cautioned against "blind reliance upon the

text of the Eleventh Amendment"); *Alden v. Maine,* 527 U.S. 706, 728-29 (1999) (stating the amendment merely confirmed, rather than established, the principle of sovereign immunity); *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 753 (2002) (stating the Eleventh Amendment is but one particular exemplification of sovereign immunity). However, Plaintiff's suggestion that sovereign immunity should not depend on whether the State appears as a plaintiff or a defendant is far reaching.

Although the Fifth Circuit has not directly addressed this issue, the court has indicated that it supports the notion that the Eleventh Amendment does not apply to the removal context when the State is a Plaintiff. *See Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.,* 625 F.2d 22, 24 n.6 (5th Cir. 1980) (stating in a footnote that the Eleventh Amendment is inapplicable where a state is a plaintiff); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.,* 536 F.3d 418, 431 n.12 (5th Cir. 2008) (stating, "consistent with Supreme Court precedent," a number of circuit courts have interpreted the Eleventh Amendment as applicable only when a state is a defendant). Further, many circuits follow this logic. *See, e.g., California ex rel. Lockyer v. Dynergy, Inc.,* 375 F.3d 831, 848 (9th Cir. 2004); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.,* 359 F.3d 1237, 1239 (10th Cir. 2004); *Regents of the Univ. of California v. Eli Lilly & Co.,* 119 F.3d 1559, 1564-65 (Fed. Cir. 1997). Nevertheless, Plaintiff asks this Court to

rely on *Moore v. Abbott Laboratories, Inc.,* 900 F. Supp. 26, 30 (S.D. Miss. 1995), a district court case in which the court found that by removing the litigation to federal court, the defendants involuntarily subjected the State of Mississippi to the jurisdiction of the court, and therefore, the removal violated the State's Eleventh Amendment Sovereign Immunity. *Id.*

This Court finds *Moore* to be unpersuasive for two reasons. First, as discussed above, the Fifth Circuit has clearly indicated that it does not support such a broad interpretation of the Eleventh Amendment. Second, *Moore* relied on a single district court case, *California v. Steelcase Inc.,* 792 F. Supp. 84 (C.D. Cal. 1992), in reaching its holding. In *Steelcase,* a Central District of California court held that "the immunity granted by the Eleventh Amendment is an immunity from being made an involuntary party to an action in federal court, [therefore] it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court." However, *Steelcase* has been expressly deemed unpersuasive by the Ninth Circuit. *California v. Dynergy, Inc.,* 375 F.3d 831, 848 (9th Cir. 2003)[2] (holding that a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction). For these reasons, this Court finds that *Moore* is

[2] The Ninth Circuit also expressly stated that *Moore* was unpersuasive. *Dynergy, Inc.,* 375 F.3d at 849, n.15.

unpersuasive and that the Eleventh Amendment is not a bar to removal in this matter.

CONCLUSION

Based on the foregoing discussion, this Court finds that it has original jurisdiction under 43 U.S.C. § 1349, and that neither the well-pleaded complaint rule, the Eleventh Amendment, nor admiralty jurisdiction serves as a bar to removal in this matter. Accordingly, IT IS ORDERED that Plaintiff's Motion to Remand, *In re: Deepwater Horizon,* 10-CV-1156 (Rec. Doc. 304) is hereby DENIED.

New Orleans, Louisiana, this 5th day of October, 2010.

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES
DISTRICT JUDGE