

# Environmental Law NEWS

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## Editor's Note...

by William D. Wick

California has indeed gone green, taking recycling to a new level in making Jerry Brown Governor for the second time. One of the first environmental issues his administration will have to address is what to do about the Green Chemistry regulations that were supposed to have been finalized by January 1, but which remain in limbo. **Eric Newman** has been closely following the contentious development of the regulations, and provides illuminating background on this new frontier of California environmental law. New approaches to citizen enforcement are percolating as well, and **Jamee Patterson** explores the latest developments.

Last year's most notable environmental event, the BP oil spill in the Gulf of Mexico, isn't much in the news anymore, but **Jaclyn Lopez** reminds us that we shouldn't forget too quickly, because there are lessons to be learned. And the U.S. Supreme Court's 2009 decision on apportionment in hazardous site cases, *Burlington Northern v. United States*, continues to generate discussion. **Mark Zeppetello**, one of the lawyers involved in that case, provides an insider's view, and takes issue with some of the discussion in the Spring 2010 *Environmental Law News*.

Court of Appeal Justice **Ronald Robie**—who was working for the legislature 40 years ago when the California Environmental Quality Act became law—shares his recollections on the birth of CEQA, and **Lisabeth Rothman** surveys 40 years of CEQA litigation and concludes that little clarity has emerged on a variety of key questions.

Most of these articles were inspired by Yosemite presentations, but if you get inspired to assess a California environmental topic for *Environmental Law News*, let us know. Your audience will include the movers and shakers in the field. Contact me at [bwick@ww-envlaw.com](mailto:bwick@ww-envlaw.com).

## Message from the Chair...

by Marilee Hanson

Welcome to 2011, a year that should bring in a new era of environmental law in California. With the recent election in 2010 of Jerry Brown as Governor of California, we will embark on a fresh path of environmental protection, albeit with a backdrop of unprecedented fiscal challenges. Last year also marked the 20th anniversary of the Environmental Law Section and the 40th anniversary of the enactment of the California Environmental Quality Act.

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# What We Should Learn From the BP Spill

by Jaclyn Lopez\*

From April 20, 2010, to August 8, 2010, when BP's Macondo well was finally cemented and the flow officially stopped, approximately 205,800,000 gallons of crude oil poured into the Gulf of Mexico. Put into industry terms, that's about 4.9 million barrels of oil. That's enough oil to completely fill over 311 Olympic-sized swimming pools. Or, put another way, just imagine for a moment nothing but bubbling crude oil flowing over Horseshoe Falls, Niagara Falls' main cascade, for almost six whole minutes.

Compared to other oil spills in the western hemisphere, the BP spill has been one of the largest. When the Exxon Valdez tanker ran aground on Prince William Sound's Bligh Reef in Alaska in 1998, it spilled about 260,000 barrels, and Alaska is still feeling the effects to this day. The more locally felt Cosco Busan wreck in 2007 resulted in the loss of 58,000 gallons of refined oil into the San Francisco Bay, with a cleanup cost of over \$80 million. The BP oil spill is more than 3.5 thousand times the size of the Cosco Busan accident. There was, of course, the spill at Santa Barbara that released 80,000 barrels of oil in 1969, which was the impetus for all but shutting down the California coast to oil drilling.

The only other spill in the Americas that compares is the Ixtoc I disaster in Mexico, which spilled oil into the Gulf of Mexico for nearly nine months, totaling 3.5 million barrels. It too was the result of an exploratory well gone wild.

While the Gulf region is the most prolific in terms of domestic oil production, the Gulf and its sensitive coastal habitats are home to more than 15,000 species. About 25% of the nation's wetlands lie in the Mississippi River Delta, and one of the world's most important bird migration corridors, the Mississippi Flyway, supports approximately 1 billion birds, representing over 300 species. The Gulf and its surrounding habitat are also relied upon by about 40 different endangered and threatened species. All told, the oil spill impacted over 500 miles of Gulf coastline, and the timing of the spill could not have been worse. Imperiled species including the Atlantic bluefin tuna, Kemp's ridley sea turtle, loggerhead sea turtle, piping plover, and sperm whale were flocking to the Gulf to spawn, feed, and migrate when the spill began. As the spill mercilessly continued, these animals had nowhere else to go. As of November 2, 2010, wildlife officials have collected over 6,000 dead



birds, 600 dead sea turtles, and 100 dead mammals. And the collected carcasses make up only a small fraction of the total lost to the oil spill. Moreover, there are no estimates of fish, crustacean, and other small fauna mortalities, not to mention any quantification of the effects on mangroves and wetlands. Nor do these totals include the so-called 'rescued and released' wildlife, such as the more than 14,000 loggerhead sea turtle hatchlings that were transported and released away from the spill and their natal beaches. The effect of these extreme measures remains to be seen.

The spill has also had a tremendous effect on the local and national economy. During the spill, the National Oceanic and Atmospheric Administration was forced to close portions of the Gulf to commercial and recreational fishing. At one time, up to 36.6% of the Gulf's exclusive economic zone, which extends 200 nautical miles from shore, was closed to fishing. Parts of the Gulf remain closed to fishing to this day. This is significant because seafood caught in the Gulf represents about 40% of all seafood caught in the continental U.S. Furthermore, the fishing industry supports hundreds of thousands of jobs. All told, the government estimates that the spill will lead to a net loss of \$20 billion to the U.S. economy in 2010.

Given the devastating effects of the spill on the Gulf's biodiversity and economy, many Californians likely wonder whether the California coast is at risk for such a catastrophe. In addressing this issue, it is important to acknowledge some fundamental differences between California and the Gulf. First, the type of drilling that led to the BP disaster and the Ixtoc I spill, exploratory drilling, does not occur in federal waters off the coast of California. This type of drilling is particularly dangerous because of the tremendous pressure that is released once drilling begins. Additionally, California wells simply do not have the same intense pressure as those in the deepwater of the outer continental shelf in the Gulf of Mexico. Another consideration is the sheer volume of oil produced and number of rigs in the Gulf compared to California. Current production in the Gulf is about 1.3 million barrels a day, whereas in California it is about 61,000-67,000 barrels a day. There are 7,000 active leases and over 3,600 structures in the Gulf, compared to 49 leases and 23 oil and gas platforms off the coast of California. Finally, whereas oil and gas exploration and development is expected to end in the near future once and for all in California, the predicted undiscovered, technically recoverable oil in the Gulf of Mexico is 44.92 billion barrels, or more than half of all undiscovered oil in the U.S. outer continental shelf. Despite these differences, oil drilling activities are risky regardless of where they occur, and the threat of an oil spill in California is still very real. Therefore, it is important to learn from what went wrong in the Gulf to ensure

that a disaster like the BP spill never happens again.

Although we still do not know exactly what went wrong, we do know that some very important environmental safety nets were stripped bare by the Minerals Management Service, now called the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE"). Had the applicable environmental laws been complied with, BP and the government would have been better prepared to prevent and respond to such a disaster.

The Outer Continental Shelf Lands Act ("OCSLA") authorizes BOEMRE to conduct lease sales and approve oil and gas exploration and development plans. To do so, BOEMRE approves these activities in four stages: a 5-year program, lease sales, exploration plans, and development and production plans. At each stage of the process, BOEMRE is to comply with the National Environmental Policy Act ("NEPA"), which requires that federal agencies take a hard look at their actions, analyze the significant impacts on the human environment, and involve the public in the decision-making process. However, in the Gulf of Mexico, this process has been fraught with errors.

First, there were plain and obvious deficiencies with BOEMRE's NEPA analyses in the Gulf. For example, at the 2007-2012 programmatic level, BOEMRE's Environmental Impact Statement ("EIS") estimated that a large spill in the Gulf of Mexico would be about 5,300 barrels, and it based its analysis of environmental impacts on this amount. This may seem like a lot of oil, but as we have seen from the BP spill, this number is entirely too low. Furthermore, BOEMRE was on notice that a larger spill could occur, such as Ixtoc I, and should have relied on a higher estimate. Unfortunately for the Gulf, the programmatic EIS is the document to which all subsequent NEPA evaluations in the Gulf of Mexico were tiered, including the documents for BP's Macondo well. BOEMRE's estimate becomes even more ridiculous in light of BP's own exploration plan, which estimated its worst case scenario for a spill at 162,000 barrels a day.

Another serious problem, and one specific to the Gulf of Mexico, is that in the Gulf, exploration plans and development plans are categorically excluded from full environmental review. That means that BOEMRE has determined that these activities are too minor to warrant review and have no possibility for significant environmental effects. BP's exploration plan was approved pursuant to this categorical exclusion. In fact, hundreds of these plans are approved each year in the Gulf pursuant to the same categorical exclusion. BOEMRE's continued reliance on this policy, in light of the spill, is nothing short of irresponsible. Rather than immediately abandoning this clearly errant policy, BOEMRE is cur-

rently reviewing how it uses categorical exclusions in outer continental shelf activities. To date, it has not committed to rescinding this policy.

Therefore, in lieu of environmental analysis in the Gulf, BOEMRE relies on the exploration plans and development plans prepared by the oil companies to glean environmental information. Even the briefest glimpse at these documents reveals that this procedure is wholly inadequate to comply with environmental laws and absolutely not protective of the environment. For example, BP's exploration plan informed BOEMRE that:

An accidental oil spill could cause impacts to wetlands, shore, and nesting birds, marine and pelagic birds, beaches, essential fish habitat, coastal wildlife refuges and wilderness areas. However, due to the distance from shore and the response capabilities that would be implemented, no significant adverse impacts are expected....

It is unlikely that an accidental surface or subsurface oil spill would occur...if such a spill were to occur in open waters...the effects would likely be sublethal and the extent of the damage would be reduced due to the capability of adult fish and shellfish to avoid a spill....

In the event of an accidental release, the water quality would be temporarily affected by the dissolved components and small droplets. Currents and microbial degradation would remove the oil from the water column or dilute the constituents to background levels.

The plan also claimed that BP had the ability to control a wild well. Clearly BP's exploration plan falls short of what is required to protect the environment.

In addition to BP's inability to plug the well, the company also encountered problems disposing of the oil. In-situ burns and dispersants were, and still are, the two main ways oil companies are authorized to dispose of spilled oil, including in California. The in-situ, or "controlled," burns conducted by BP and the Coast Guard were accomplished by using shrimp boats to corral oil by dragging fire resistant boom and lighting the enclosed oil on fire. The problem was that sea turtles, and other marine life, had the potential to get swept up and further inundated by the oil and then burned alive. In the Gulf, BP utilized this method to dispose of 10 million gallons of oil over 500 square miles. That was until veteran shrimp boat captain Michael Ellis drew attention to the burn boxes, and the Animal Welfare Group, the Center for Biological Diversity, and others sued the Coast Guard and BP to enjoin the practice. This

resulted in BP and the Coast Guard permitting wildlife rescuers aboard the boats and allowing them to rescue trapped animals. This is one of the few success stories from the tragedy.

Advocates were not quite as successful with regard to the use of dispersants. About 1.8 million gallons of dispersants were dumped in the Gulf of Mexico in an attempt to help dilute the oil. The dispersants used by BP, Corexit 9500A and 9527A, are banned in the U.K. because of their adverse effects on marine wildlife. These dispersants have never been tested at the volume or depths at which BP used them (almost as much dispersant was injected into the wellhead as was applied at the surface), and subsequent tests have confirmed that they killed up to 25% of all living organisms 500 feet below the surface. Of the 18 EPA-approved dispersants, 7 are less toxic than those used by BP. Of those 7, two are actually more effective than the Corexit dispersants on Louisiana crude oil. On May 26, 2010, EPA prohibited BP's use of the dispersants on surface waters; however, BP continued to pump the dispersants hundreds of feet below the surface.

The lessons to be learned from the BP spill are that: (1) drilling is risky, no matter how advanced the technology; (2) the public needs to be involved in the oversight of these activities, as is already authorized by Congress in OCSLA and NEPA; and (3) the federal government must comply with all environmental laws, as they are necessary for the protection of our environment. There is no doubt that had the government complied with relevant environmental laws, this tragedy would not have reached the epic scale it did. While the current and likely future extent of oil drilling off the California coast is minor relative to the Gulf, California should remain vigilant of BOEMRE's and the industry's compliance with environmental laws, and should continue to demand public participation in the management of oil drilling in California.

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\* Jaclyn Lopez is a staff attorney in the San Francisco office of the Center for Biological Diversity. As a result of the BP oil spill, the Center has brought a variety of strategic lawsuits to prevent further damage from the spill and prevent a future spill. Using federal laws like the National Environmental Policy Act, Endangered Species Act, and the Outer Continental Shelf Lands Act, she and the Center have had both immediate and far-reaching success in protecting endangered and threatened species in the Gulf of Mexico from oil drilling impacts.