



Federal Civil and Criminal Penalties Possibly Applicable to Parties Responsible for the Gulf of Mexico Oil Spill

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Summary

Since the *Deepwater Horizon* oil spill began on April 20, 2010, Congress has given much attention to the compensatory liability provisions of the Oil Pollution Act and, to a lesser extent, those of the Jones Act and the Death on the High Seas Act. However, federal laws possibly relevant to the oil spill also impose civil and criminal money penalties, which may reach dollar amounts in connection with the Gulf spill greater than those for compensatory liability. This report summarizes selected federal civil and criminal penalty provisions that may be found violated in connection with the Gulf spill and related worker fatalities. It does not purport to be exhaustive. *CRS stresses that it has no knowledge of the facts surrounding the Gulf spill other than what has been publicly reported; hence the provisions listed here are only an informed guess as to those that ultimately may be found violated.*

At the outset, the penalty ceilings in the program statutes listed in this report may not be the applicable ones. As for *civil* penalty ceilings, the Federal Civil Penalties Inflation Adjustment Act requires federal agencies to adjust at least once every four years the maximum (and minimum, if any) dollar amount on civil penalties within their jurisdiction to reflect movement in the Consumer Price Index. As for *criminal* penalty ceilings, the Criminal Fine Improvements Act often applies. Under this statute, the maximum criminal fine a court may impose may be up to the greater of the amount specified in the law setting forth the offense or various alternative ceilings in the Criminal Fine Improvements Act.

For each statute listed, the report describes any civil administrative penalties, civil judicial penalties, and criminal penalties authorized by the statute that conceivably might be relevant to the Gulf spill. The program statutes covered are the Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, Oil Pollution Act, Outer Continental Shelf Lands Act, and Occupational Safety and Health Act. In addition, the report lists several provisions in the federal penal code that are often used in the prosecution of environmental crimes—involving aiding and abetting, conspiracy, false statements to the federal government, mail fraud, wire fraud, and obstruction of justice.

An addendum describes the civil complaint filed by the United States on December 15, 2010, against several parties allegedly responsible for the Gulf spill, and an insurance company.

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Introduction

Since the *Deepwater Horizon* oil spill began on April 20, 2010, Congress has given much attention to the *compensatory liability* provisions in the Oil Pollution Act.¹ These set out the liability of an oil spill's "responsible parties" for the costs inflicted on others by the oil spill—in particular, cleanup costs and economic damages (such as injury to natural resources, destruction of private property, and loss of profits or impairment of earning capacity). Congress has also addressed the compensatory liability provisions of the Jones Act² and the Death on the High Seas Act³ in connection with the deaths of 11 workers when the *Deepwater Horizon* platform exploded on April 20. To reiterate, the function of these liability provisions is to compensate those injured; that function determines the dollar amount of the liability.

Also discussed in relation to the *Deepwater Horizon* oil spill are federal statutory provisions of a very different nature. These provisions, the topic of this report, impose *civil and criminal penalties*. Their function is not to compensate, but rather, like all civil and criminal penalties, to punish and/or deter. On June 1, 2010, Attorney General Eric Holder announced that the U.S. Department of Justice had launched a civil and criminal investigation into the Gulf spill, including the deaths of the 11 workers on the *Deepwater Horizon* mobile offshore drilling unit. Observers have noted that civil and criminal penalties under federal law—leaving aside those under state law⁴—could be substantially greater than responsible party liability for cleanup costs and economic damages.⁵

This report summarizes selected federal civil and criminal penalty provisions that may be found violated in connection with the Gulf spill and related worker fatalities. It does not purport to be exhaustive. *CRS stresses that it has no knowledge of the facts surrounding the Gulf spill other than what has been publicly reported; hence the provisions listed here are only an informed guess as to those that ultimately may be found violated.*

That the federal laws listed herein extend to the Gulf spill seems clear, notwithstanding that the spill site is 50 miles off the coast of Louisiana, well beyond the territorial limits of the United States on the Outer Continental Shelf. Except for the Migratory Bird Treaty Act and Occupational Safety and Health Act, all the included laws expressly apply beyond the U.S. territorial sea, either out to the limit of the United States' Exclusive Economic Zone at 200 nautical miles offshore, or, as applied to persons subject to U.S. jurisdiction, anywhere on the high seas.⁶ As for the

¹ See *esp.*, Oil Pollution Act § 1002, 33 U.S.C. § 2702.

² 46 U.S.C. § 30104.

³ 46 U.S.C. §§ 30301-30308.

⁴ Under the Outer Continental Shelf Lands Act, the civil and criminal laws of each "adjacent state," to the extent not inconsistent with federal law, are declared federal law for the portion of the Outer Continental Shelf between the seaward extensions of the state's boundaries, as far as the outer margin of the Outer Continental Shelf. OCSLA § 4(a)(2)(A); 43 U.S.C. § 1333(a)(2)(A). The Oil Pollution Act disclaims any preemption of state authority "to impose, or to determine the amount of, and fine or penalty (whether criminal or civil in nature) for any violation of law ... relating to the discharge ... of oil." OPA § 1018(c)(2); 33 U.S.C. § 2718(c)(2).

⁵ See John Schwartz, *With Criminal Charges, Costs to BP Could Soar*, NY Times, June 16, 2010 (online). For example, the maximum civil fine under the Clean Water Act for oil discharges resulting from gross negligence is \$4,300 per barrel (see text below). Multiplying this figure by the current estimate of the number of barrels being discharged daily in the Gulf, Mr. Schwartz asserts that responsible parties could be fined as much as \$280 million per day.

⁶ See Clean Water Act § 311(b)(3), 33 U.S.C. § 1321(b)(3); Endangered Species Act § 9(a)(1)(C), 16 U.S.C. § 1538(a)(1)(C); Marine Mammal Protection Act § 102(a)(1), 16 U.S.C. § 1372(a)(1); Oil Pollution Act § 1002(a), 33 U.S.C. § 2702(a).

Migratory Bird Treaty Act and Occupational Safety and Health Act, the Outer Continental Shelf Lands Act broadly declares that the laws 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” to explore for or produce resources.⁷ Thus, by one route or the other, the extraterritorial location of the *Deepwater Horizon* spill is not an obstacle to the imposition of civil and criminal penalties under the covered statutes.

At the outset, the reader should note that the penalty ceilings stated in the program statutes listed here may not be the applicable ones. As for *civil* penalty ceilings, Congress has enacted the Federal Civil Penalties Inflation Adjustment Act of 1990⁸ to ensure that inflation over a long period does not erode the deterrent force of a penalty ceiling. This act requires federal agencies to adjust at least once every four years the maximum (and minimum, if any) dollar amount on civil penalties within their jurisdiction to reflect movement in the Consumer Price Index. It applies whether the civil penalty is administratively or judicially imposed. (The Occupational Safety and Health Act, listed below, is expressly exempted.) Under one statute covered here, the Outer Continental Shelf Lands Act, this inflation-adjustment requirement also is imposed by the individual program statute.⁹ By whatever authority imposed, these inflation adjustments to the program-statute maximums are indicated in the following list by the phrase “(adjusted to [dollar amount]).”

As for ceilings on *criminal* penalties, the Criminal Fine Improvements Act¹⁰ (CFIA) often applies. This statute, enacted in 1984 and amended in 1987, reflected Congress’s sense that some fines in the U.S. Code were too low. The CFIA was intended to substantially increase them. Under this statute, the maximum criminal fine a court may impose may be up to the greater of the amount specified in the law setting forth the offense or various alternative ceilings in the CFIA. For organizations, the CFIA alternative ceilings are (1) the greater of twice any person’s gross gain from the offense or twice any non-defendant person’s gross loss; (2) for a felony or a misdemeanor resulting in death, \$500,000; (3) for a Class A misdemeanor not resulting in death, \$200,000; (4) for a Class B or C misdemeanor not resulting in death or for an “infraction,” \$10,000. For individuals, the penalty caps are half those for organizations. The indicated categories of offenses—Class A, B, and C misdemeanors, and infractions—are defined elsewhere in the U.S. Code based on the maximum term of imprisonment for the offense.¹¹

There are two circumstances when the CFIA does not, or may not, apply. First, the CFIA says that if a law setting forth an offense explicitly exempts the offense from the CFIA, then the defendant may not be fined more than the caps in that law.¹² None of the statutes discussed in this report

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U.S.C. § 2702(a); and Outer Continental Shelf Lands Act §§ 2(a), 3(1), 43 U.S.C. §§ 1331(a), 1332(1) respectively.

⁷ OCSLA § 4(a)(1); 43 U.S.C. § 1333(a)(1).

⁸ 28 U.S.C. § 2461 note.

⁹ OCSLA § 24(b)(1); 43 U.S.C. § 1350(b)(1).

¹⁰ 18 U.S.C. § 3571. This provision took its current form through amendments made by the Criminal Fine Improvements Act of 1987, P.L. 100-185, 101 Stat. 1280.

¹¹ Under 18 U.S.C. § 3559, a Class A misdemeanor is an offense for which the maximum term of imprisonment is one year or less but more than six months; a Class B misdemeanor, six months or less but more than 30 days; a Class C misdemeanor, 30 days or less but more than five days; and an “infraction,” five days or less (including when no imprisonment is authorized).

¹² 18 U.S.C. § 3571(e).

contains such a CFIA exemption. Second, a district court has held that CFIA penalty caps do not trump the lower penalty caps in the Endangered Species Act, enacted as they were *subsequent to* the 1984 and 1987 enactment of the CFIA.¹³ Though the Endangered Species Act does not explicitly exempt itself from the CFIA, the court argued convincingly that applying the CFIA cap to override the post-CFIA-amended lower cap would reduce the latter to a nullity, contrary to the rule of statutory construction that a statute should be read to give every word operative effect. At the same time, the court acknowledged that “other courts have summarily stated that [the CFIA] controls over other statutes that do not specifically exempt themselves.”¹⁴ It remains to be seen whether this one court’s view will win acceptance by other courts, as to the Endangered Species Act specifically or as to smaller-than-CFIA penalty caps enacted post-CFIA generally.

Program Statutes

Clean Water Act (CWA)

Civil administrative penalties

CWA section 311(b)(6)¹⁵ states that the owner, operator, or person¹⁶ in charge of a vessel, onshore facility, or offshore facility who (1) violates the section 311(b)(3) ban on discharging oil in harmful quantities¹⁷ or (2) fails to comply with the National Contingency Plan,¹⁸ may be assessed a Class I or Class II civil penalty by the Department of Homeland Security (DHS) or the Environmental Protection Agency (EPA). A Class I penalty may be up to \$10,000 (adjusted to \$16,000¹⁹) per violation, with a maximum penalty of \$25,000 (adjusted to \$37,500²⁰). A Class II penalty also may be up to \$10,000 (adjusted to \$16,000²¹) per day of violation, but with a maximum penalty of \$125,000 (adjusted to \$177,500²²).

In determining the amount of the administrative penalty, CWA section 311(b)(8)²³ states that DHS or EPA shall consider the seriousness of the violation, the economic benefit to the violator, the degree of culpability, past violations, etc.

¹³ *United States v. Eisenberg*, 496 F. Supp. 2d 578 (E.D. Pa. 2007).

¹⁴ *Id.* at 583 n.7.

¹⁵ 33 U.S.C. § 1321(b)(6).

¹⁶ The CWA defines “person” to include “an individual, corporation, partnership, [or] association....” 33 U.S.C. § 1362(5).

¹⁷ 33 U.S.C. § 1321(b)(3).

¹⁸ 40 C.F.R. part 300.

¹⁹ 40 C.F.R. § 19.4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 33 U.S.C. § 1321(b)(8).

Civil judicial penalties

CWA section 311(b)(7)²⁴ states the following civil penalties for the owner, operator, or person in charge of a vessel, onshore facility, or offshore facility:

- (A) for violating section 311(b)(3)'s ban on discharging oil into covered waters, up to \$25,000 (adjusted to \$37,500²⁵) per day of violation, or up to \$1,000 (adjusted to \$1,100²⁶) per barrel discharged;
- (B) for failing without sufficient cause to carry out a removal order by the President, up to \$25,000 (adjusted to \$37,500²⁷) per day of violation or up to three times the costs incurred by the Oil Spill Liability Trust Fund established under the Oil Pollution Act;²⁸
- (C) for failing to comply with the National Contingency Plan, up to \$25,000 (adjusted to \$37,500²⁹) per day of violation; and
- (D) for violating the aforementioned discharge ban as the result of gross negligence or willful misconduct, not less than \$100,000 (adjusted to \$140,000³⁰) for the violation, nor more than \$3,000 (adjusted to \$4,300³¹) per barrel discharged.³²

In determining the amount of the judicial penalty, CWA section 311(b)(8)³³ states that the court shall consider the same factors as mentioned above under "Civil administrative penalties."

Criminal penalties

CWA section 309(c)(1)³⁴ states that any person who violates the section 311(b)(3) discharge ban:

- (A) negligently, may be fined \$2,500 to \$25,000 per day of violation, or imprisoned up to one year, or both. For second and later convictions, such person may be fined up to \$50,000 per day of violation, or imprisoned up to two years, or both.
- (B) knowingly, may be fined \$5,000 to \$50,000 per day of violation, or imprisoned up to three years, or both. For second and later convictions, such person may be fined up to \$100,000 per day of violation, or imprisoned up to six years, or both.

²⁴ 33 U.S.C. § 1321(b)(7).

²⁵ 40 C.F.R. § 19.4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 26 U.S.C. § 9509 (establishing the Oil Spill Liability Trust Fund).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See supra* note 5.

³³ 33 U.S.C. § 1321(b)(8).

³⁴ 33 U.S.C. § 1319(c)(1).

- (C) knowingly, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, may be fined up to \$250,000 or imprisoned up to 15 years, or both. For organizations, the fine may be up to \$1 million. For second and later convictions, the maximum fines and maximum terms of imprisonment double.

CWA section 309(c)(4)³⁵ states that any person who knowingly makes any false material statement, representation, or certification in a document filed or required to be maintained under the CWA shall be fined up to \$10,000,³⁶ or imprisoned up to two years, or both. For second and later convictions, such person may be fined up to \$20,000 per day of violation, or imprisoned up to four years, or both.

CWA section 309(c)(6)³⁷ defines “person” for purposes of section 309(c) to include, among other entities, “any responsible corporate officer.”

Endangered Species Act (ESA)

Civil administrative penalties

ESA section 11(a)³⁸ provides that any person³⁹ who knowingly violates certain provisions of the act or any permit or regulation thereunder may be assessed a civil penalty by the Secretary [of the Interior or Commerce as program responsibilities are vested pursuant to reorganization plan] of not more than \$25,000 (adjusted by the Secretary of Commerce to \$32,500⁴⁰) for each violation. The “certain provisions” just mentioned include a prohibition on the “take” by any person subject to U.S. jurisdiction of any species listed as endangered or threatened under the act—either within the territorial seas of the United States or on the high seas. The key term “take” is defined to mean, among other things, to “harm” or “kill.”⁴¹

Any person who otherwise violates the act or any permit or regulation thereunder may be assessed a civil penalty by the Secretary of not more than \$500 (adjusted by the Secretary of Commerce to \$650⁴²) for each violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary.

³⁵ 33 U.S.C. § 1319(c)(4).

³⁶ CWA section 309(c)(4) is silent as to whether this fine is per day of violation. The “per day of violation” phrase appears only in the following provision governing second and later convictions (see text).

³⁷ 33 U.S.C. § 1319(c)(6).

³⁸ 16 U.S.C. § 1540(a).

³⁹ Defined to include “an individual, corporation, partnership, trust, association, or any other private entity.” ESA § 3(13); 16 U.S.C. § 1532(13).

⁴⁰ 15 C.F.R. § 6.4(e)(13)(i). To date, the Secretary of the Interior has not made any inflation adjustment.

⁴¹ ESA § 3(19); 16 U.S.C. § 1532(19).

⁴² 15 C.F.R. § 6.4(e)(13)(iii). To date, the Secretary of the Interior has not made any inflation adjustment.

Criminal penalties⁴³

ESA section 11(b)⁴⁴ states that any person who knowingly violates the same “certain provisions” noted above, or permits or regulations thereunder, may be fined up to \$50,000 or imprisoned up to one year, or both.

Marine Mammal Protection Act (MMPA)

Civil administrative penalties

MMPA section 105(a)(1)⁴⁵ declares that any person⁴⁶ who violates the act or its regulations may be assessed a civil penalty by the Secretary [of Commerce or the Interior, depending on the affected species] of up to \$10,000 (adjusted by the Secretary of Commerce to \$11,000⁴⁷) for each such violation. Each unlawful taking shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown.

Criminal penalties⁴⁸

MMPA section 105(b)⁴⁹ states that any person who knowingly violates any provision of this act or its regulations shall be fined up to \$20,000 for each violation, or imprisoned up to one year, or both.

Migratory Bird Treaty Act (MBTA)

MBTA section 6(a)⁵⁰ provides that any person,⁵¹ association, partnership, or corporation who violates the Migratory Bird Treaty or the MBTA, or regulations under the latter shall be guilty of a misdemeanor and be fined up to \$15,000 or imprisoned up to six months, or both.⁵²

The MBTA provision most likely to be found violated by the Gulf oil spill is MBTA section 2,⁵³ making it unlawful, by any means or in any manner, to, among other things, “take” or “kill” any migratory bird. A 2007 Department of Justice memorandum cites seven unpublished cases in which oil companies were convicted under the MBTA for the deaths of birds in oil sump pits or as

⁴³ The criminal provisions in the three wildlife protection statutes in this report—the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act—are covered in greater depth in CRS Report R41308, *The 2010 Oil Spill: Criminal Liability Under Wildlife Laws*, by (name redacted).

⁴⁴ 16 U.S.C. § 1540(b).

⁴⁵ 16 U.S.C. § 1375(a)(1).

⁴⁶ Defined to include “any private person or entity.” MMPA § 3(10); 16 U.S.C. § 1362(10).

⁴⁷ 15 C.F.R. § 6.4(e)(10). To date, the Secretary of the Interior has not made any inflation adjustment.

⁴⁸ See *supra* note 42.

⁴⁹ 16 U.S.C. § 1375(b).

⁵⁰ 16 U.S.C. § 707(a).

⁵¹ The MBTA does not define “person,” in contrast with most of the other statutes discussed herein. However, as indicated above, business entities are separately listed as covered by the act.

⁵² See *supra* note 42.

⁵³ 16 U.S.C. § 703.

the result of contaminated mine tailings or collection ponds, making clear that the statute can be violated without the hunting or other specific targeting of a migratory bird.⁵⁴

Oil Pollution Act (OPA)

OPA section 4303(a)⁵⁵ makes any person⁵⁶ who fails to comply with the act's financial responsibility requirements subject to an administratively assessed⁵⁷ civil penalty up to \$25,000 (adjusted to \$27,500⁵⁸) per day of violation. In determining the amount of the penalty, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior violation, etc. The agency may compromise, modify, or remit any civil penalty imposed under section 4303(a).

Outer Continental Shelf Lands Act (OCSLA)

Civil judicial penalties

OCSLA section 24(b)(1)⁵⁹ states that any person⁶⁰ who fails to comply with the OCSLA, or leases, permits, regulations, or orders issued thereunder, after notice of the failure and a reasonable period to correct the noncompliance shall be liable for a civil penalty of not more than \$20,000 (adjusted to \$35,000⁶¹) for each day of the continuance of such failure.

If a failure to comply constitutes or constituted a "threat of serious, irreparable, or immediate harm or damage to life ..., property, any mineral deposit, or the ... environment," a civil penalty may be imposed without allowing a corrective action period.

Criminal penalties

OCSLA section 24(b)(2)⁶² provides that any person who knowingly and willfully:

- (1) fails to comply with the OCSLA, or leases, permits, regulations, or orders issued thereunder;

⁵⁴ See CRS Report R41308, *The 2010 Oil Spill: Criminal Liability Under Wildlife Laws*, by (name redacted), at 5-6.

⁵⁵ 33 U.S.C. § 2716a.

⁵⁶ Defined to include "an individual, corporation, partnership, [or] association" 33 U.S.C. § 2701(27).

⁵⁷ Under Exec. Order No. 12777 (1991), 56 Fed. Reg. 54,757, 33 U.S.C. § 1321 note, the penalty-assessing authority granted by OPA section 4303(a) to the President has been delegated, for offshore facilities other than deepwater ports, to the Secretary of the Interior.

⁵⁸ 30 C.F.R. § 253.51.

⁵⁹ 43 U.S.C. § 1350(b)(1).

⁶⁰ Defined in OCSLA section 2(d), 43 U.S.C. § 1331(d), to include private and public corporations.

⁶¹ 30 C.F.R. § 250.1403. The Department of the Interior gives preeminence to the inflation-adjustment mandate in the OCSLA itself, rather than the more general one in the Federal Civil Penalties Inflation Adjustment Act. OCSLA § 24(b) instructs the Secretary of the Interior to make inflation adjustments in the above-described civil penalties at least every three years. The most recent adjustment is at 72 Fed. Reg. 8897 (2007).

⁶² 43 U.S.C. § 1350(b)(2).

- (2) makes any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under OCSLA;
- (3) falsifies or tampers with any monitoring device required by OCSLA to be maintained; or
- (4) reveals any data or information required to be kept confidential by OCSLA

shall be fined up to \$100,000, or imprisoned not more than 10 years, or both. Each day that a violation under clause (1) continues, or each day that a monitoring device remains inoperative or inaccurate because of activity under clause (3), shall constitute a separate violation.

Whenever a corporation or other entity is subject to prosecution under the above, any officer or agent of such corporation or entity who knowingly and willfully organized, or carried out the proscribed activity shall be subject to the same fines or imprisonment as indicated above.

Occupational Safety and Health Act (OSHA)

Civil administrative penalties⁶³

OSHA section 17(a)⁶⁴ states that any employer who willfully and repeatedly violates his duty to provide a place of employment free of recognized hazards, or occupational, safety, and health standards under this act, may be assessed a civil penalty up to \$70,000 for each violation, but not less than \$5,000 for each willful violation.

OSHA section 17(b)⁶⁵ says that any employer who has received a citation for a “serious violation” of the above requirements, *shall* be assessed a civil penalty up to \$7,000 for each violation. Under OSHA section 17(c),⁶⁶ a civil penalty with the same cap *may* be assessed if the violation is not serious. Section 17(k)⁶⁷ defines a “serious violation” to exist if there is a substantial probability that death or serious physical harm could result from a condition in a place of employment, unless the employer did not, or could not through reasonable diligence, know of the presence of the violation.

OSHA section 17(d)⁶⁸ provides that any employer who fails to correct a violation for which a citation has been issued within the period permitted may be assessed a civil penalty up to \$7,000 for each day such failure or violation continues.

⁶³ With regard to the civil penalty caps in the OSHA, recall that the Federal Civil Penalties Inflation Adjustment Act explicitly exempts this statute. In the current Congress, companion bills entitled the Protect America’s Workers Act (S. 1580, H.R. 2067) would significantly increase the OSHA civil penalty caps and direct the Occupational Safety and Health Administration to make inflation adjustments at least once every four years (just as the Federal Civil Penalties Inflation Adjustment Act does for other statutes).

⁶⁴ 29 U.S.C. § 666(a).

⁶⁵ 29 U.S.C. § 666(b).

⁶⁶ 29 U.S.C. § 666(c).

⁶⁷ 29 U.S.C. § 666(k).

⁶⁸ 29 U.S.C. § 666(d).

Criminal penalties

OSHA section 17(e)⁶⁹ says that an employer who willfully violates any standard, rule, order, or regulation, causing death to any employee shall be fined up to \$10,000 or imprisoned up to six months, or both. For second and later convictions, fines may be up to \$20,000 and imprisonment up to one year.

OSHA section 17(g)⁷⁰ provides that whoever knowingly makes any false statement in any application, record, report, plan, or other document filed or required to be maintained under this act shall be punished by a fine up to \$10,000, or imprisoned up to six months, or both.

Miscellaneous Provisions in Title 18

Several provisions in the federal penal code—Title 18 of the U.S. Code—that are not specifically environmental are often used in the prosecution of federal environmental crimes. It has been noted that proof of crimes under the environmental statutes may involve complex technical issues that, in most instances, are not present in Title 18 prosecutions, and that federal prosecutors are often more familiar with Title 18 offenses and hence more comfortable prosecuting them.⁷¹ Such federal provisions include (in paraphrased form):

Aiding and abetting, 18 U.S.C. § 2: Whoever aids or abets the commission of a federal crime is punishable as a principal. Similarly, whoever willfully causes an act to be done which if directly performed would be a federal crime, is punishable as a principal.

Conspiracy, 18 U.S.C. § 371: If two or more persons conspire to commit any offense against or to defraud the United States, and one or more persons acts to effect the object of the conspiracy, each person shall be fined under Title 18⁷² or imprisoned not more than five years, or both.

False statements, 18 U.S.C. § 1001: Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government, knowingly and willfully falsifies, conceals, or covers up a material fact, or makes any materially false statement or representation, or makes any false writing knowing it to contain any materially false statement, shall be fined under Title 18⁷³ or imprisoned not more than five years, or both.

Mail fraud, 18 U.S.C. § 1341: Whoever, having devised a scheme to defraud, mails any matter or thing in furtherance thereof, or receives any such matter or thing, shall be fined under Title 18⁷⁴ or imprisoned not more than 20 years, or both.

⁶⁹ 29 U.S.C. § 666(e).

⁷⁰ 29 U.S.C. § 666(g).

⁷¹ Joseph J. Lisa, *Honest Services Fraud: The Future of Prosecutions for Environmental Crimes?*, 56 Federal Lawyer 55, 56 (June, 2009).

⁷² The text reference to being fined “under Title 18” (as worded in the codified statute, “under this title”) is generally understood to be a reference to the Criminal Fine Improvements Act, 18 U.S.C. § 3571, discussed on page 2 of this report.

⁷³ *Id.*

⁷⁴ *Id.*

Wire fraud, 18 U.S.C. § 1343: Whoever, having devised a scheme to defraud, transmits by wire, radio or television communication in interstate commerce any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme, shall be fined under Title 18⁷⁵ or imprisoned not more than 20 years, or both.

Obstruction of justice, 18 U.S.C. § 1512: Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or misleads another person, intending to influence the testimony of a person in an official proceeding or hinder the communication to a law enforcement official or judge of information relating to the commission of a federal offense, shall be fined under Title 18⁷⁶ or imprisoned not more than 20 years, or both.

Addendum: The December 15, 2010, Complaint Filed by the Department of Justice

On December 15, 2010, the U.S. Department of Justice filed a civil complaint against multiple parties alleged to be responsible for the Gulf spill⁷⁷—the only suit it has filed thus far related to the Gulf spill. The case was filed in the federal district court for the Eastern District of Louisiana, the same court which the Judicial Panel on Multidistrict Litigation designated last summer as the proper venue for the hundreds of compensatory liability suits now pending.

As pertinent to this report—dealing only with penalties rather than compensatory recovery—the key paragraph in the complaint recites that:

Pursuant to [Clean Water Act § 311(b)(7), discussed above] and 40 C.F.R. § 19.4, Defendants BP, Anadarko Exploration, Anadarko Petroleum, MOEX, Triton, Transocean Holdings, Transocean Offshore, and Transocean Deepwater are each subject to a judicially assessed civil penalty of up to \$1,100 per barrel of oil that has been discharged or up to \$4,300 per barrel of oil that has been discharged, to the extent that the discharge of oil was the result of gross negligence or willful misconduct by such Defendant.

The complaint does not request a specific dollar amount of civil penalty, only that the court declare the defendants' liability to the United States "in an amount to be determined at trial." A second request for relief in the complaint addresses compensatory recovery under the Oil Pollution Act and is beyond the topic of this report.

In a paragraph reserving the right to amend the complaint, the document also signals that the Department of Justice may be investigating further liabilities of the defendants and/or additional parties—for penalties, damages, or other remedies. Specifically mentioned as possible sources of such liability are the Clean Water Act, Oil Pollution Act, Outer Continental Shelf Lands Act,

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The named defendants are BP Exploration & Production Inc., Anadarko Exploration and Production LP, Anadarko Petroleum Corp., Moex Offshore 2007 LLC, Triton Asset Leasing GMBH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc. An additional defendant, QBE Underwriting Ltd., Lloyd's Syndicate 1036, was named because it allegedly insured and/or provided a Certificate of Financial Responsibility and certain guarantees pertaining to liabilities of the other defendants.

Endangered Species Act, Marine Mammal Protection Act, National Marine Sanctuaries Act, and Park System Resource Protection Act.

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