The Oil Spill's Impact on Gulf Coast Oysters

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Oysters are an integral part of the Gulf of Mexico. They clump together to act as coral reefs that protect, shelter, and form vital nursery grounds for other aquatic species. They act as natural water purifiers, filtering anywhere from 25 to 50 gallons of water per day in the bays and estuaries where they dwell. Often referred to as the "backbone of marine life," oysters fall near the bottom of the food chain, providing nourishment for all types of sea life, including birds at low tide. Due to their proximity to shore, oyster shell reefs (living and dead) also help reduce shoreline and wetland erosion by forming natural ridges on the sea floor that minimize waves and tidal impact. And last, but certainly not least, oysters are a gastronomical delicacy whether done Rockefeller or Bienville style or just fresh, open, and on the half-shell. In the Gulf Coast region, this unique and valuable resource generates approximately $131 million in annual revenues.

Undoubtedly of critical importance to the Gulf's marine life, oysters are highly sensitive to the quality of their surroundings. Oysters feed by filtering nutrients out of seawater. Because they are immobile creatures, if the water around them is contaminated, oysters will collect these chemicals and pollutants, making them one of the most vulnerable species threatened by the BP oil spill disaster.

From April 20 through July 15, 2010, approximately five million barrels of oil gushed out of a deepwater oil drilling well in the Gulf of Mexico. The oil penetrated the water column and formed a thick oil slick that eventually reached the shores of the Gulf Coast, contaminating everything it encountered—including the world's last, largely intact network of oyster reefs. Because of the presence of oil in the water, state health departments closed the oyster seasons along the Gulf Coast, resulting in economic losses for oystermen and other businesses not only in the Gulf region, but across the United States.

Authors' Note: The authors are members of the firm's Gulf Coast Oil Spill Legal Team and represent oyster bed owners in litigation related to the Gulf oil spill. The authors wish to thank Emily Crawford, a third-year law student at the University of Alabama School of Law, for her contributions to this Article.

The Gulf region leads U.S. commercial oyster production, accounting for nearly 70% of total national catch.[1] Louisiana itself produces 40% of the oysters consumed in the United States, more than any other state.[2] As oyster habitats have disappeared and diminished along the East Coast, seafood processors in the Chesapeake Bay area have been purchasing oysters from Gulf Coast harvesters to meet East Coast demand.[3] Considered one of the last and best hopes for preservation, conservationists have been working for several years to preserve and expand the Gulf's oyster beds.[4]

It is not just the oil released over the 87-day life of the spill that is a concern—the solutions employed to dissipate and degrade the oil also have harmed and continue to threaten the immobile, delicate oyster. For example, in early July, more than 60% of the oysters in one of the most productive bays in Louisiana were reported dead as a result of the release of freshwater from the Mississippi River in an attempt to push oil out of Louisiana's coastal marshes.[5] Importantly, this freshwater release killed the oysters growing on the interior of the estuaries, an area protected from the oil and chemicals that were washing up on the intertidal oyster beds along the coast. In addition, there is much concern that oysters are being killed from the chemicals in the toxins used to disperse the oil.

The timing of the Deepwater Horizon disaster makes it even more damaging, as it coincided with the peak spawning season for oysters. Oysters reproduce by releasing eggs and sperm into the water. The eggs and sperm mix, and the fertilized eggs form hard-shelled larvae that eventually attach to a

1. Michael Hill, *Oil Spill Puts the Gulf Oyster Industry on Ice*, Financial Wire, June 22, 2010; David Muller, *Louisiana Officials Try to Allay Fears of Oil-Spoiled Seafood*, New Orleans CityBusiness, Apr. 30, 2010.
2. Jason Mark, *Disaster on the Half Shell*, The Progressive, August 2010; Melanie Patten, *Canadian Oyster Sales Booming After Gulf Spill*, The Hamilton Spectator, July 17, 2010.
3. Aislinn Maestas, *From the Gulf to the Bay, Oyster Industry Suffers,* Nat'l Wildlife Fed'n Media Center, July 21, 2010; Cory Nealon, *Oil Spill There a Disaster Here?*, Daily Press (Newport News, Va.), Aug. 6, 2010.
4. *See* Steve Gorman, *Spill Could Devastate U.S. Gulf Coast Oyster Reefs*, Reuters, May 8, 2010; Scott McMillan, *The Reef Makers*, Nature Conservancy, Summer 2010.
5. Jeffrey Ball, *Fresh Water Aimed at Oil Kills Oysters*, Wall St. J., July 20, 2010.

hard-surfaced bottom that becomes their home for life. The toxins in the oil and chemical dispersants can kill the larvae or cause oysters to close their shells, eventually suffocating them. According to researchers, oysters can remain closed for up to two weeks in colder weather with no adverse effects, but oysters remaining closed in the warm water temperatures of the Gulf may die within two days. Moreover, oysters are at their weakest after spawning season, making them even more vulnerable.

Although the well was capped on July 15, 2010, the Gulf Coast oil spill still remains a concern. While reports indicate that much of the oil has dissipated, an unknown amount remains below the surface, and its impact will likely linger. Scientists say that some of the oil has been consumed by bacteria, plankton, and other tiny creatures. These creatures will be eaten by small fish, crabs, and shrimp, which will in turn be eaten by bigger fish and marine mammals, ultimately jeopardizing the safety of sea life for human consumption. The threat of disease is also exacerbated, as some forms of harmful bacteria increase following oil spills. This is particularly true for *Vibrio parahaemolyticus* populations, bacteria that love heat and flourish in the summer. One species of *Vibrio*, called *vulnificus*, is carried by raw oysters and kills dozens of Americans each year.[6] According to scientists, it is possible that *Vibrio* growth could be spurred by the oil and other contaminants left behind from the spill.[7] Although federal agencies are conducting inspections on Gulf Coast seafood, the safety of consuming seafood from the Gulf remains a concern.

So, how will those involved in the oyster industry recover the economic losses they have unquestionably suffered and will continue to suffer? Who can recover for damage inflicted on the Gulf's oyster beds?

The starting point for any analysis of the legal liabilities associated with the Gulf Coast oil spill is the Oil Pollution Act (OPA) of 1990.[8] The OPA allows for the recovery of a broad range of damages. The United States, individual states, Indian tribes, and foreign trustees may recover damages for injury to or destruction of natural resources, including the costs of assessing the damages—called "natural resource damages."[9] The owner or lessee of real or personal property can recover damages for injury to their property or economic losses from the destruction or injury of such property.[10] Any person can recover damages for the loss of profits or earning capacity due to the injury or destruction of real or personal property or natural resources (even if they are not the owner of the property or resource).[11]

In addition to the recovery available under the OPA, common-law claims and state statutes may provide some relief. State statutes may influence how common-law claims are decided, particularly with respect to the unique legal infrastructure for oyster bed ownership and harvesting that exists in the Gulf Coast states. While states typically own the seabed below the tide line, oysters present a unique property interest, in that many states have granted, by statute, private rights to them. Alabama, for instance, grants riparian rights and ownership over cultured oyster beds located up to 600 yards from the shore. This means the property owner adjacent to the oyster bed can bring common-law claims, such as nuisance, trespass, and negligence, against those responsible for the spill for damage to the cultured oyster beds.[12]

Gulf Coast states also grant oyster leases that permit leaseholders to harvest oysters from designated state-owned beds.[13] Although the state retains ownership of the water bottoms, the leaseholders can recover damages for injury to these state-created property interests. In other words, leaseholders can bring claims for nuisance, trespass, negligence, and other tort claims for any damage to the water bottoms on which their leases are located.[14]

States may also assert claims for damages to oyster beds. Specifically, if the beds are located in public waters, as many are, the state should be able to bring a natural resources damages (NRD) claim pursuant to the OPA.[15] States also should be able to bring claims for lost lease and tax revenue. In addition to leasing beds on which oysters thrive, many states also levy a tax on oysters harvested.[16] States and private parties should be able to simultaneously bring claims, as the damages sought by both are distinct.

With respect to the consolidation of the hundreds of oil spill cases into a Multi-District Litigation (MDL) in the Eastern District of Louisiana, the unique legal and factual status of oyster bed owners and lessees in the Gulf Coast states warrants a separate, distinct subclass in the oil spill litigation. As discussed above, oyster beds are governed by a unique statutory and property rights regime, unlike some other resources used by other types of claimants. Moreover, the different state laws that apply to oyster beds in the Gulf may warrant subdividing oyster bed classes even by state.[17] The oyster bed owners and lessees also have unique substantial interests and claims, in that they not only have present injury, but will also experience future injuries of unknown

6. Gardiner Harris, *U.S. Plans Raw Warm-Water Oyster Ban*, N.Y. Times, Nov. 12, 2009; Mark, *supra* note 2.
7. Joan Murphy, *Seafood Industry Clash on* Vibrio *Gulf Oysters Warning*, Food Chemical News, June 28, 2010; Paul Voosen, *Will Bacterial Plague Follow Crude Oil Spill Along Gulf Coast?*, Greenwire, June 17, 2010.
8. 33. U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001.
9. *Id.* §2702(b)(2).
10. *Id.*
11. *Id.*
12. *See* Ala. Code §9-12-22. Mississippi similarly confers property ownership over oyster beds in public waters. *See* Miss. Code Ann. §49-15-9.
13. *See* La. Rev. Stat. Ann. §56:423; Fla. Stat. Ann. §379:232; Tex. Parks and Wildlife Code Ann. §1.011; Ala. Code §9-12-24; Miss. Code Ann. §49-15-27.
14. *See* Avenal v. United States, 100 F.3d 933, 937 (Fed. Cir. 1996) (court acknowledged that owners of Louisiana State leases for water bottom lands used for oyster propagation had a recognized property interest in the water bottoms where their leases are located, including the "right to damages when the acts of another harm the oyster beds").
15. *See* 33 U.S.C. §2702(b)(2).
16. *See, e.g.,* Ala. Code §9-12-44 ($0.06 tax levied on each barrel of oysters harvested for resale).
17. *See* Manual for Complex Litigation, Fourth, §§22.72, 22.754; *see also* In re Telectronics Pacing System, Inc., 172 F.R.D. 271 (S.D. Ohio 1997) (in products liability class action where the laws of various states differed, the judge created subclasses for each of the major groups of state laws).

proportions for an uncertain period of time, as the extent of damage to the oyster beds is still undetermined.[18]

The oyster industry is important economically to the Gulf region and also deeply rooted in the culture and heritage of the region's residents and visitors. Seafood lovers are attracted to Gulf oysters because of their affordable price and, more importantly, because of their "clean, refreshingly briny taste" that is sweeter and has a softer texture than other oysters.[19] Because the flavor is strongly influenced by the water in which they grow, they are a unique and valuable resource that cannot be replaced or substituted. The Deepwater Horizon disaster will undoubtedly inflict long-term damage on this industry and culture for years to come, and may forever change and weaken the "backbone" of the Gulf's marine life.

18. *See* Manual for Complex Litigation, Fourth, §21.23; Ortiz v. Fibreboard Corp., 527 U.S. 815, 855 (1999) ("a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel").
19. *See* Hill, *supra* note 1.