

**SETTLING ENVIRONMENTAL DISASTERS: THREE JUDICIAL
FACTORS TO CONSIDER AND APPLICATION TO THE
MAYFLOWER, ARKANSAS OIL SPILL**

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INTRODUCTION

Environmental disasters are typically so complicated that the parties involved file multiple lawsuits.¹ Determining the relevant facts and applicable law often causes considerable confusion.² Should parties share damages, fines, or penalties? Did the disaster harm many different groups of people? Is a class action suit impractical? Should the parties choose a non-adjudicatory method? In addition to these questions, parties must decide what processes to use to remediate the disaster: arbitration, mediation, or settlement—which typically arises as a defendant’s guilty plea to the criminal charges associated with an environmental disaster.

This Note examines the non-adjudicatory solutions available in environmental disasters and the application of three common factors courts look to when deciding whether to accept a solution. These factors include: (1) the likelihood of plaintiff’s success at trial; (2) the degree of environmental cleanup and remediation that will result from the settlement or agreement; and (3) whether the non-adjudicatory method is more beneficial to the plaintiff. While no court has identified these three factors as an explicit test, several have conducted these examinations and applied these factors either implicitly or outside of the typical frameworks for considering settlements and plea agreements.

To demonstrate how courts apply this framework, this Note references two environmental disasters: the British Petroleum (“BP”) oil spill in the Gulf of Mexico in 2010 and the Love Canal disaster of the 1970s. For each of these cases, this Note discusses one of the important settlements or guilty pleas of each respective case. The BP Spill of 2010 involved a guilty plea agreement between the U.S. Department of Justice (“DOJ”) and BP.³ As a result of the settlement, the DOJ received a larger monetary sum than

1. ANN L. MACNAUGHTON & JAY G. MARTIN, ENVIRONMENTAL CONFLICT MANAGEMENT AND DISPUTE RESOLUTION 5–6 (Ann L. MacNaughton et al. eds., 2006).

2. *Id.*

3. See United States v. BP Exploration and Production Inc., No. 12-cr-00292, at 24 (E.D. La. Jan. 29, 2013), available at <http://www.justice.gov/criminal/vns/docs/2013/01/2013-01-30-bp-exploration-reasons-for-accepting-plea-agreement.pdf> (approving the settlement agreement).

litigation would have provided and expedited the environmental cleanup.⁴ The Love Canal disaster involved a settlement agreement between the United States, the State of New York, and the Hooker Chemical and Plastic Corporation⁵ that created a “phased approach for remediation” and cleanup of the site.⁶ With both the BP oil spill and Love Canal cases, the courts considered the three factors listed above when accepting guilty pleas or settlement agreements. By considering these three factors, courts approved agreements that involved a greater deal of environmental remediation and a better solution for the plaintiffs than would have been likely through litigation.

In Part III, this Note applies this three-factor framework to the Mayflower, Arkansas pipeline spill of 2013 to show what a court considers an acceptable settlement agreement.⁷ The Mayflower spill was relatively small: approximately 5,000 barrels (about 210,000 gallons; the same amount that spilled per day in the BP case).⁸ This spill was in a residential area and resulted in the evacuation of 21 homes.⁹ While small, this spill offers a valuable context for disasters that could occur with the construction of new pipelines such as the still controversial Keystone XL Pipeline,¹⁰ Enbridge’s pipeline expansions in the Midwest,¹¹ or the smaller Northeast Energy Direct pipeline in New Hampshire and Massachusetts.¹²

4. *Id.* at 10, 15.

5. *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067, 1067 (W.D.N.Y. 1982).

6. *Id.* at 1073.

7. *Exxon Sued Over Arkansas Oil Spill*, AL JAZEERA AMERICA (June 13, 2013, 10:18 PM), available at <http://www.aljazeera.com/news/americas/2013/06/2013613214825294345.html>.

8. U.S. DEP’T OF TRANSP., PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., OFFICE OF PIPELINE SAFETY, Corrective Action Order CPF No. 4-2013-5006H, at 2 (2013), available at http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/4%202013%205006H_Corrective%20Action%20Order_4%2002%2013.pdf [hereinafter Corrective Action Order CPF No. 4-2013-5006H (2013)]; see also *Exxon Sued Over Arkansas Oil Spill*, *supra* note 7; *ExxonMobil Faces Federal Lawsuit Over Arkansas Oil Spill*, L.A. TIMES (June 13, 2013), <http://articles.latimes.com/2013/jun/13/nation/la-na-mayflower-pipeline-20130614> (“The Justice Department and the state of Arkansas filed suit against the oil giant ExxonMobil over a March 29 pipeline rupture that spilled 210,000 gallons of oil into a residential neighborhood in . . . Mayflower.”).

9. *Exxon Sued Over Arkansas Oil Spill*, *supra* note 7; Corrective Action Order CPF No. 4-2013-5006H (2013), *supra* note 8, at 2.

10. Krishnadev Calamur, *Senate Fails to Override Obama’s Veto on Keystone XL Pipeline*, NPR (Mar. 4, 2015), <http://www.npr.org/blogs/thetwo-way/2015/03/04/390732040/senate-fails-in-bid-to-override-obamas-veto-on-keystone-xl-pipeline>.

11. Nia Williams, *Enbridge Hoping for Cross-Border Pipeline Presidential Permit by End-2015*, REUTERS (Feb. 20, 2015), <http://www.reuters.com/article/2015/02/20/enbridge-inc-pipeline-clipper-idUSL1N0VU18Z20150220>.

12. Bob Downing, *Kinder Morgan Identifies Shippers on New England Pipeline*, AKRON BEACON J. (Mar. 6, 2015), <http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/kinder-morgan-identifies-shippers-on-new-england-pipeline-1.572355>.

The DOJ, the State of Arkansas,¹³ and at least one private citizen,¹⁴ brought a civil suit against ExxonMobil for the rupture of the Mayflower, Arkansas pipeline. Although the investigation of the spill continues, the private citizens' civil suit alleges three counts against ExxonMobil.¹⁵ Based on these causes of action and the available information, a court is likely to accept a settlement agreement that has an adequate amount of environmental remediation and allows the plaintiffs to recover more in penalties than they would be likely to win in court. A settlement agreement is likely to benefit both parties and those of the general public whom the oil spill impacted. By applying this framework to a current environmental disaster, this Note highlights what a settlement agreement must include in order for a court to accept it. Furthermore, applying these factors to the Mayflower oil spill demonstrates what a settlement agreement should include for future pipeline ruptures.

I. CASE STUDY: THE BP OIL SPILL OF 2010

A. *Factual Background and History*

In 2008, BP purchased the rights to drill in the Mississippi Canyon Block 252, commonly known as the Macondo Well.¹⁶ Two years later, the BP oil spill occurred.¹⁷ Oil and natural gas traveled up through a pipe drilled two and a half miles into the ocean floor and spilled onto the deck of an offshore oil rig called the Deepwater Horizon.¹⁸ The rig caught fire and exploded, killing eleven people.¹⁹ Two days later, the entire Deepwater Horizon oil rig collapsed and sank.²⁰ When the rig sank, it cut the riser that

13. *Exxon Sued Over Arkansas Oil Spill*, *supra* note 7; Complaint at 1, United States v. ExxonMobil Pipeline Co., Civil Action No. 4:13-cv-00355 (E.D. Ark. 2013), available at <http://www.justice.gov/iso/opa/resources/8802013613125743925625.pdf>.

14. Complaint at 1, Duncan v. ExxonMobil, No. 4:13-cv-0400-BRW (Ark. filed June 10, 2013), available at <http://posting.arktimes.com/media/pdf/originalcomplaint.pdf>.

15. *Id.* at 4–6.

16. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT, 89 (2011) [hereinafter REPORT TO THE PRESIDENT].

17. *Id.* at 89–90.

18. *Id.* at 94; See also *Investigative Report: How the BP Oil Rig Blowout Happened*, POPULAR MECHANICS 2, 89 (Sept. 2, 2010), available at <http://www.popularmechanics.com/science/energy/coal-oil-gas/how-the-bp-oil-rig-blowout-happened> (providing more detail about the mechanics of the spill and explaining that the oil spill was the result of a poorly done negative pressure test of the well).

19. PETER LEHNER & BOB DEANS, IN DEEP WATER: THE ANATOMY OF A DISASTER, THE FATE OF THE GULF, AND ENDING OUR OIL ADDICTION viii (2010).

20. *Id.*

was leading from the bottom of the ocean to the rig itself.²¹ Crude oil and natural gas began spewing into the Gulf of Mexico at a rate of approximately 25,000 to 30,000 barrels of oil per day.²² After five months and many attempts at closing the well, BP was finally successful on September 19, 2013.²³ Despite BP's best efforts, the Deepwater Horizon disaster caused approximately 210 billion gallons of oil to spill into the Gulf of Mexico.²⁴ "The BP spill is by far the world's largest accidental release of oil into marine waters . . . [outstripping] the estimated 3.3 million barrels spilled into the Bay of Campeche by the Mexican rig Ixtoc I in 1979, previously believed to be the world's largest accidental release."²⁵

The negative effects of the spill were far reaching and led to both civil and criminal actions against BP.²⁶ The Gulf of Mexico also suffered serious environmental harm and the Gulf states suffered severe economic loss.²⁷ The spill devastated the sensitive Gulf-area wetlands, which are environmentally and economically important as a breeding ground for a variety of fish and wildlife, including 98% of the commercial fish and shellfish caught in the Gulf of Mexico.²⁸ BP's dispersant, though intended to break the oil into microscopic drops, actually created more harm than good when it sank the oil to the bottom of the ocean, and created dead zones in the Gulf.²⁹ The use of this dispersant may have allowed these oil droplets to travel farther throughout the Gulf of Mexico.³⁰ In addition to the harm relating to the wetlands of the Gulf, the spill also caused serious economic harm to tourism.³¹

21. *Id.*

22. Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 105 (2011).

23. LEHNER & DEANS, *supra* note 19, at x.

24. SCOTT SUMMY, *THE LEGAL CHALLENGES AND RAMIFICATIONS OF THE GULF OIL SPILL* 5 (Mary Ellen Fox et al. eds., 2010).

25. Campbell Robertson, *Gulf Spill is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 2, 2010, at A14, available at http://www.nytimes.com/2010/08/03/us/03spill.html?_r=2&fta=y&.

26. Emily Yehle & Lawrence Hurley, *BP to Pay \$4B to Resolve Criminal Claims*, GREENWIRE (Nov. 15, 2012), <http://www.eenews.net/stories/1059972598>.

27. J. BURTON LEBLANC, *NATURAL RESOURCES DAMAGES: A CHALLENGE FOR STATES AFFECTED BY THE GULF OIL SPILL* (2010), in *2010 GULF COAST OIL DISASTER: LITIGATION AND LIABILITY* 21, 22 (Mary Ellen Fox, et al. eds., 2010).

28. *Id.*; see also MELISSA GASKILL, *How Much Damage Did the Deepwater Horizon Spill Do to the Gulf of Mexico?*, SCIENTIFIC AM. (Apr. 19, 2011), <http://www.scientificamerican.com/article.cfm?id=how-much-damage-deepwater-horizon-gulf-mexico> (examining the economic and environmental impact of the BP oil spill one year after the accident).

29. LEBLANC, *supra* note 27, at 21–22.

30. *Id.*

31. *Id.*, see also OXFORD ECONOMICS, *The Impact of the BP Oil Spill on Visitor Spending in Louisiana*, TOURISM ECON. (Dec. 2010), <http://www.crt.state.la.us/tourism/research/Documents/2010-11/OilSpillTourismImpacts20101215.pdf> (exploring the spill's economic impact on tourism in Louisiana).

B. Application of the Three Factors

In addition to the civil claims brought by both private citizens³² and the U.S. government,³³ the DOJ also brought criminal charges against BP.³⁴ This case study will concentrate on the criminal claims. Specifically, BP pled guilty to:

Eleven counts of violations of 18 U.S.C. § 1115 (Misconduct or Neglect of Ship Officers), one count of a violation of 18 U.S.C. § 1505 (Obstruction of Congress), one misdemeanor count of a violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3) (Clean Water Act), and one misdemeanor count of a violation of 16 U.S.C. §§ 709 & 707(a) (Migratory Bird Treaty Act).³⁵

Judge Sarah Vance of the U.S. District Court for the Eastern District of Louisiana then accepted the plea agreement.³⁶

The three factors this Note examines are all present in the court's reasoning for accepting the plea agreement. In addition to the typical factors used for deciding to accept a plea agreement,³⁷ the court also considered the

32. See Gulf Coast Claims Facility, <http://www.gulfcoastclaimsfacility.com/> (last visited Oct. 10, 2013) (providing the official way for citizens to make civil claims against BP. The GCCF was closed in June 2012). See also Kenneth R. Feinberg, *Unconventional Responses to Unique Catastrophes*, 45 AKRON L. REV. 575, 575 (2012) (providing a criticism of mass tort funds in general and explaining that they should only be used in extraordinary situations); Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 819 (2011) (providing criticism of the Gulf Coast Claims Facility itself); Raymond L. Mariani, *The Mass Disaster Mediator: Can One Person Really Serve Two Masters?*, 19 No. 1 DISP. RESOL. MAG. 8, 8 (2011) (criticizing the administrator of the Gulf Coast Claims Facility, Kenneth R. Feinberg); BDO Consulting, *Independent Evaluation of the Gulf Coast Claims Facility: Report of Findings and Observations to the US DOJ* (2012), available at <http://www.justice.gov/opa/documents/gccf-rpt-find-obs.pdf> (providing a detailed independent evaluation of the Gulf Coast Claims Facility).

33. Attorney General Eric Holder Announces Civil Lawsuit Against Nine Defendants for Deepwater Horizon Oil Spill, U.S. DEPT. OF JUSTICE (Dec. 15, 2010), <http://www.justice.gov/opa/pr/2010/December/10-ag-1442.html>.

34. Clifford Krauss & John Schwartz, *BP Will Plead Guilty and Pay Over \$4 Billion*, N.Y. TIMES (Nov. 15, 2012), http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?_r=0.

35. *BP Exploration and Production, Inc.*, No. 2:12-cr-00292, at 4–5.

36. *Id.* at 24.

37. *Id.* at 2 (“[T]he Court should analyze the proposed plea agreement in light of 18 U.S.C. §§ 3553; 3563; 3572, which govern the imposition of sentences . . . in federal criminal cases. Those statutory provisions require that all federal criminal sentences take into account a number of factors, including the nature and circumstances of the offense and the history and characteristics of the defendant; the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; the need to afford specific and general deterrence to criminal conduct; and the need to protect the public.”) (citing *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 727–28 (S.D. Tex. 2009); 18 U.S.C. 3553(a)), available at <http://www.justice.gov/criminal/vns/docs/2013/01/2013-01-30-bp-exploration-reasons-for-accepting-plea-agreement.pdf>.

likelihood of plaintiff's success at trial, the degree of environmental cleanup or remediation that will result from the plea agreement, and that the non-adjudicatory method is more advantageous to the plaintiff than litigation.

1. Likelihood of Plaintiff's Success at Trial

From the court's acceptance of the plea agreement, it is evident the court believed the government would succeed at trial against BP.³⁸ When examining the gravity of the wrongdoing, the court wrote, "[t]here is no question that BP has committed serious offenses."³⁹ The court then goes on to explain the serious impacts of BP's negligence: the death of eleven workers, serious environmental harm, and its obstruction of Congress.⁴⁰ The court's "matter-of-fact" tone when describing these wrongs shows the belief that the DOJ is likely to win at trial. The court also wrote, "the government's charges reasonably reflect the severity of the offensive conduct."⁴¹ By acknowledging that the claims against BP are "reasonable," the court is, in essence, agreeing with the charges. Indeed, the court wrote if the charges against BP were unreasonable, it would not accept the plea agreement.⁴²

Lastly, BP's acquiescence to the guilty plea is evidence that the DOJ would win in court. It is "unusual" that a corporation, like BP, would plead guilty to manslaughter.⁴³ If BP had a chance to win on these most serious counts (eleven counts of manslaughter), it makes the most sense that BP would not want to plead guilty here. Additionally, by agreeing to this guilty plea, BP is exposing itself to "not only substantial fines, but also collateral consequences in other litigation, as well as suspension or debarment from government contracts, including new leases for oil and gas exploration[;]" the consequences of this plea agreement go much farther than just these eleven charges.⁴⁴ By pleading guilty here, BP acknowledges the strength of

38. *BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 7, 9, 23.

39. *Id.* at 4.

40. *Id.* at 4–7; see also Press Release, United States Department of Justice, Former BP Engineer Convicted for Obstruction of Justice in Connection with the Deepwater Horizon Criminal Investigation (Dec. 8, 2013), available at <http://www.justice.gov/opa/pr/2013/December/13-crm-1329.html> ("Kurt Mix, a former engineer for BP, was convicted today of intentionally destroying evidence requested by federal criminal authorities investigating the April 2010, *Deepwater Horizon* disaster . . . [A] jury in New Orleans found that Kurt Mix purposefully obstructed the efforts of law enforcement during the investigation of the largest environmental disaster in U.S. history.").

41. *BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 6.

42. *Id.* at 3–4.

43. *Id.* at 6–7.

44. *Id.* at 7.

the DOJ's case. Although it is unclear exactly why BP agreed to the plea agreement, it seems that if BP thought the plea agreement was unreasonable, BP would not accept it.⁴⁵

The court acknowledges this Note's first factor both explicitly and implicitly. The court explicitly recognizes the plaintiff's likelihood of success at trial when it states the harm BP caused.⁴⁶ Implicitly, it recognizes this factor when considering the seriousness of the manslaughter charges and the far reaching impacts of a guilty plea.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Plea Agreement

One of the most unique aspects of the BP oil spill plea agreement is how the agreement allocates the penalties. Rather than going to the treasury, most of the fine "is targeted toward mitigating and repairing the damage done by the spill."⁴⁷

The plea agreement distributes funds to three organizations with the specific goal of remediation or oil spill research in the Gulf: the Gulf of Mexico Research Initiative, the National Academy of Sciences, and the National Fish and Wildlife Foundation.⁴⁸ "The \$100 million fine for violation of the Migratory Bird [T]reaty [A]ct is required by statute and the plea agreement to be used by the Director of the Interior to carry out wetlands conservation and restoration projects located in the Gulf Coast states."⁴⁹ The fine paid to the National Academy of Sciences was "for the purposes of oil spill prevention and response in the Gulf of Mexico."⁵⁰ BP also agreed to pay \$2.394 billion to the National Fish and Wildlife Foundation "to remedy harm and eliminate or reduce the risk of future harm to Gulf Coast natural resources"⁵¹ and "to create and restore barrier islands off the coast of Louisiana and/or . . . for the purpose of restoring the coastal habitat of the state."⁵² Lastly, BP promised to "continue to fulfill its commitment to fund the Gulf of Mexico Research Initiative."⁵³ BP created

45. David Shand, *BP Prepares to Fight Gulf Oil Spill Charges*, EXPRESS (Feb. 20, 2013), <http://www.express.co.uk/finance/city/378855/BP-prepares-to-fight-Gulf-oil-spill-charges> ("[BP has] always been open to settlements on reasonable terms, failing which we have always been prepared to defend our case at trial.")

46. *BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 4–7.

47. *Id.* at 13.

48. *Id.* at 13–14.

49. *Id.* at 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 16.

the Gulf of Mexico Research Initiative (“GoMRI”) on May 24, 2010 when it “committed \$500 million over a 10-year period to create a broad, independent research program to be conducted at research institutions primarily in the U.S. Gulf Coast States.”⁵⁴ GoMRI’s purpose is to “investigate the impacts of the oil, dispersed oil, and dispersant on the ecosystems of the Gulf of Mexico and affected coastal States.”⁵⁵

The second factor seems to play a very important role in the court’s reasoning for accepting the plea agreement.⁵⁶ It explained that, when evaluating the plea agreement, it “must make an ‘individualized assessment of the plea agreement’ based on the facts and circumstances specific to the case,” as Federal Rule of Criminal Procedure 11(c)(1)(C) requires.⁵⁷ In addition to this requirement, it gives a great deal of weight to the amount of environmental remediation to be done as a result of the plea agreement. The court recognizes this factor explicitly and explains its importance as a way to prevent similar disasters from occurring in the future.

3. A Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

The non-adjudicatory method in this case was the plea agreement. The advantage to the plaintiff is the increased fine that BP paid.⁵⁸ “There is a significant risk that absent a plea agreement, the government would be unable to recover more than \$8.19 million dollars in fines from BP.”⁵⁹ This is drastically different from the \$4 billion fine in the settlement agreement.⁶⁰ This vast difference makes the plea agreement much more advantageous to the plaintiff. Even if litigation went as successfully as possible for the plaintiff, the fine would be “less than half a percent (0.205%) of the total negotiated criminal recovery of \$4 billion.”⁶¹ Additionally, there is also a risk that the government would win less than

54. *GoMRI History*, THE GULF OF MEXICO RESEARCH INITIATIVE, <http://gulfresearchinitiative.org/about-gomri/gri-history/> (last visited Nov. 10, 2013).

55. *Id.*

56. *See BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 4, 6, 13, 24 (acknowledging the severity of the environmental harm from the disaster and the importance of proper remediation).

57. *Id.* at 1 (citing FED. R. CRIM. P. 11(c)(1)(C)).

58. *Id.* at 15.

59. *Id.* at 7 (emphasis in original).

60. Shand, *supra* note 45 (“[BP has] always been open to settlements on reasonable terms, failing which we have always been prepared to defend our case at trial.” BP’s reasons for accepting the settlement are unknown, but BP wrote it would fight the settlement if the settlement agreement was unreasonable.)

61. *See BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 10 (acknowledging the vast difference in penalties when comparing the possible outcome of litigation to the settlement agreement).

\$8.19 million.⁶² “In order to recover fines of the magnitude [of the plea agreement], the government would have to prove the applicability of the Alternative Fines Act.”⁶³ This would be a large hurdle for the government because the court cannot apply the Alternative Fines Act when its application would “unduly complicate or prolong the sentencing process.”⁶⁴ By avoiding trial and using a plea agreement, the government was able to secure a much larger fine.

The court further examined this factor, but similar to the other two factors, no statute, rule, or common law requires the court to consider this factor. Rather, the court was able to accept a balanced plea agreement because it considered these three factors in its examination of the plea agreement. If the court had strictly used the statutorily mandated factors, the plea agreement would likely be less effective because the court would accept a much smaller fine.⁶⁵

No statute or case law mandates the court consider these three factors when accepting the plea agreement. Examining the plaintiff’s success at trial, environmental remediation, and the benefits to the plaintiff would not typically play a role in the court’s reasoning. In particular, the parties and victims should consider this plea agreement a success because of the amount of environmental remediation involved. The court intends the fine to remedy the environmental harm the oil spill caused. This is important because without the court’s consideration of environmental remediation, the plea would be much less effective, but the court would still accept it.

II. CASE STUDY: THE LOVE CANAL SETTLEMENT AGREEMENT

A. *Factual Background and History*

“The Love Canal site is roughly rectangular, 16-acre parcel of land located in the City of Niagara Falls, New York.”⁶⁶ The land was originally developed to create a canal that would be used to create electricity for industrial development in the surrounding area.⁶⁷ This plan, however, never came to fruition and instead, the Hooker Chemical and Plastics Corporation (“Hooker”) purchased the land in 1920.⁶⁸ Hooker and the Town of Niagara

62. *Id.* at 8–11.

63. *Id.* at 8.

64. *Id.* at 8 (citing 18 U.S.C. § 3571(d)).

65. 18 U.S.C. § 3553 (1987); 18 U.S.C. § 3563 (1987); 18 U.S.C. § 3572 (1987).

66. *Hooker*, 540 F. Supp. at 1004.

67. *Id.*

68. LOIS MARIE GIBBS, *LOVE CANAL AND THE BIRTH OF THE ENVIRONMENTAL HEALTH MOVEMENT* 21 (updated ed. 2011).

both intentionally and knowingly use the land as a municipal and toxic waste dump.⁶⁹ In 1953, the Niagara Falls Board of Education purchased the property for \$1.⁷⁰ The Niagara Falls Board of Education knew Hooker dumped toxic chemicals at the site.⁷¹ Consequently, Hooker required a clause in the deed to disclaim all liability to protect itself into the future.⁷² Ultimately, the town used the property for a school, parks and recreational areas, and private homes.⁷³

Between Hooker's sale of the property in 1953 and government intervention and clean up in 1978, a variety of problems arose related to the toxic chemicals buried beneath the site.⁷⁴ This included many problems with construction, complaints of strong odors, minor chemical burns when children picked up powdery materials they found, land collapses, and puddling of toxic materials.⁷⁵ Additionally, a myriad of health problems associated with the chemicals buried underneath the site began to appear and were reported.⁷⁶ These problems included:

Above-normal amounts of miscarriages . . . the birth-defect rate in the five preceding years [of the study] to be 56 percent; an increase in central nervous system disease including epilepsy, nervous breakdowns, suicide attempts, and hyperactivity in children; a greater chance of contracting urinary disorders . . . an increase in asthma and other respiratory problems.⁷⁷

Furthermore, a study of births in the Love Canal area "showed that out of the last 15 pregnancies . . . we have had only two normal births. The rest resulted in a miscarriage, and stillborn or birth-defected babies."⁷⁸ The Environmental Protection Agency ("EPA") and the State of New York eventually cleaned up the site and then sought damages from Hooker Chemical under the Comprehensive Environmental Response,

69. *Id.*; see also *Hooker*, 540 F. Supp. at 1007–17 (providing a detailed explanation of dumping practices, composition of waste materials, and details of specific toxins).

70. GIBBS, *supra* note 68, at 21.

71. *Hooker*, 540 F. Supp. at 1019–25 (providing a detailed explanation of the discussions between Hooker Chemical and the Town of Niagra).

72. GIBBS, *supra* note 68, at 21.

73. *Id.*

74. *Hooker*, 540 F. Supp. at 1028–40 (providing a detailed list and explanation of different events that occurred after the property was transferred to the town. Hooker was informed of some of these incidents, but Hooker did not know of most incidents).

75. *Id.*

76. GIBBS, *supra* note 68, at 23.

77. *Id.*

78. *Id.* at 23–24.

Compensation, and Liability Act (“CERCLA”),⁷⁹ and New York common law of public nuisance.⁸⁰

B. Application of the Three Factors

Although the court was not required to examine the three factors, the court considered them either implicitly or explicitly when determining if the court should accept the settlement agreement. In particular, this “settlement decree prescribes a phased approach for remediation” of the site.⁸¹ Although there were several different settlement agreements after Love Canal, this Note examines the settlement agreement involving the Hyde Park landfill site. “When [Hooker] ceased using Love Canal, it switched most of its waste disposal operations to Hyde Park. From 1953 to 1975 Hooker used the Hyde Park site to dispose of the toxic byproducts of its chemical manufacturing processes.”⁸²

1. Plaintiff’s Likelihood of Success at Trial

Although the court wrote “the most important factor is the court’s determination of the strength of the plaintiff’s case,”⁸³ compared to the other factors, the court actually discusses the plaintiff’s success at trial the least. Instead, the court continues its analysis and explains the “special policy considerations” that exist, in particular, “the court’s primary concern . . . to ensure that the settlement protects the public health and the environment to the greatest extent feasible.”⁸⁴

This contradictory language seems to indicate the court actually has two very important considerations: the likelihood of the plaintiff’s success at trial (the first factor), and the protection of the public interest and the environment (more related to the second factor). Although the court does not discuss the likelihood of plaintiff’s success at trial in great detail, it seems to rely on Hooker Chemicals’ and the government’s acceptance of the agreement to conclude this factor exists in the settlement agreement. “The settlement was . . . approved by counsel for all parties [and] by the

79. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a) (2002) (allowing the government to recover funds spent to remediate toxic waste sites).

80. *Hooker*, 540 F. Supp. at 997–99.

81. *Id.* at 1073.

82. Barry J. Tilling, *Painstaking Negotiation Leads to Landmark Court Order Approving Settlement in Hyde Park Hazardous Waste Cleanup Litigation*, 12 ENVTL. L. REP. 15013 (1982).

83. *Hooker*, 540 F. Supp. at 1072.

84. *Id.* at 1073.

state and federal agencies which are charged with the review of the various environmental protection statutes. This approval carries with it a strong presumption of validity.”⁸⁵

Although the court did not discuss the plaintiff’s likelihood of success at trial as much as it indicated, the court still likely considered this factor. The effort both parties put into the plea agreement seemed to indicate to the court that the plaintiffs would likely prove successful at trial. Instead of concentrating on the plaintiff’s likelihood of success at trial, the court concentrated its efforts on the importance of the public interest involved: environmental remediation.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Settlement Agreement

This factor is the most prominent reason for the court’s acceptance of the settlement agreement. In fact, the primary purpose of the settlement agreement is “a phased approach for remediation.”⁸⁶ The court stresses the importance of its role in protecting “public policy and the environment to the greatest extent feasible under currently existing technology.”⁸⁷

The court examines many details of the settlement agreement and whether or not the settlement agreement is ultimately motivated to protect the public health.⁸⁸ One particular detail that is worth repeating is that the government will supervise both phases of the process; first, “find out what is happening above and below the surface in the affected area,” and second, “the decree requires Hooker to provide a definite plan for remediation.”⁸⁹ Next, Hooker “will be required to execute [the definite plan], again under the supervision of the appropriate federal and state agencies and the court.”⁹⁰ The court mentions this supervision five more times throughout the court’s opinion.⁹¹ By emphasizing the required supervision, the court indicates that Hooker must conduct the remediation properly.

The court also looks to the amount of environmental cleanup and remediation when it addresses opponents’ concerns to the agreement. Opponents of the settlement were concerned that “Hooker’s compliance with the terms of the agreement will constitute a complete defense to any

85. *Id.* at 1080.

86. *Id.* at 1073.

87. *Id.*

88. *Id.* at 1073–79.

89. *Id.* at 1073–74.

90. *Id.* at 1074.

91. *Id.* at 1073–80.

future actions which the governmental parties might bring.”⁹² The court, however, argues that these concerns are unwarranted because several clauses in the settlement agreement stress the importance of environmental cleanup at other waste sites, such as the litigation surrounding what is commonly called Love Canal.⁹³ Section 11(d) of the settlement agreement states that the agreement does not “waive or release any cross-claims for contribution and/or apportionment of the Town of Niagara or the Town of Lewiston asserted against [defendant] in any pending or future legal action brought by a non-party to this action.”⁹⁴ The court is very clear that this settlement agreement is not necessarily the end of litigation, or environmental remediation duties, for Hooker in the Love Canal disaster: “this judgment will not, and indeed cannot, absolve Hooker from liability in actions brought by private individuals who are not parties to the settlement.”⁹⁵ Indeed, the court expects environmental remediation to continue as individuals and other private parties bring suit against Hooker.⁹⁶

The court takes environmental remediation very seriously in this settlement agreement. The court’s standard of review does not necessarily involve environmental remediation, merely “special policy considerations.”⁹⁷ In this case, these policy considerations are concentrated around environmental remediation. The court could have also reasonably accepted a settlement agreement that did not consider environmental remediation, but rather, included admittance of guilt and an appropriate fine. Environmental remediation was not required for this settlement agreement to be accepted. Indeed, even though unnecessary, the court’s consideration of environmental remediation led to the acceptance of a settlement agreement that helped to solve the problem created by the defendant.

3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

The court also considered this last factor when evaluating the settlement agreement from this part of the Love Canal disaster. Like the other two factors, the court was not required to consider it, but it ultimately did. This factor is important to consider for environmental disasters because

92. *Id.* at 1079.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1072.

it reflects the complicated nature of environmental disaster resolution. Oftentimes, litigation can be very risky for plaintiffs as the monetary and time commitments are both very significant. For example, the Exxon Valdez oil spill litigation was not completed until 20 years after the accident.⁹⁸ This long process involved many parties and many appeals; costing those involved a great deal of time and money.

In the *Hooker* case, the court wrote it was this “expenditure of considerable time, money and effort” that helped to justify the court’s acceptance of the settlement agreement.⁹⁹ The court knew both parties took the settlement agreement seriously.¹⁰⁰ By agreeing to a settlement, the plaintiffs saved considerable time and money that would have been necessary for adjudication.¹⁰¹ Furthermore, “there [was] no evidence in the . . . record to indicate that even after a favorable decision at the end of a protracted trial any remedy could be fashioned which would be more advantageous to the government or to the residents of the community.”¹⁰² The court reasoned that it should accept the settlement agreement because it was more advantageous to the plaintiffs. By taking into account these three factors, the court allowed a settlement agreement that focused on remediation and allowed both parties to begin the necessary cleanup process.

After discussing the importance of these three factors in past disputes, it is important to look at how to apply these three factors to a current environmental disaster: the Mayflower, Arkansas oil spill of 2013.

III. APPLICATION: THE MAYFLOWER, ARKANSAS OIL SPILL OF 2013

A. *Factual Background, History, and Relevance*

On March 29, 2013, a pipeline owned by ExxonMobil ruptured in Mayflower, Arkansas.¹⁰³ The Pegasus pipeline spilled about 5,000 barrels

98. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

99. *Hooker*, 540 F. Supp. at 1080.

100. *Id.*

101. JAMES T. O'REILLY, *When and Why Should Settlement be Considered?*, in 2 TOXIC TORTS PRAC. GUIDE § 30:14 (2013) (“Among [the several factors to consider] are the continuing financial costs of litigation versus the finite costs of settlement . . . and the chances of success upon motion and at trial.”).

102. *Hooker*, 540 F. Supp. at 1080.

103. James Gerken, *Mayflower, Arkansas Oil Spill Leaves Crude Running Through Suburban Streets*, THE HUFFINGTON POST (Apr. 1, 2013, 11:26AM), http://www.huffingtonpost.com/2013/04/01/mayflower-arkansas-oil-spill_n_2992373.html.

of crude oil into a suburban area about forty kilometers from Little Rock.¹⁰⁴ This led to the evacuation of 21 homes, property damage, environmental harm, possible health effects, and questions about oil pipelines in the United States.¹⁰⁵ An original manufacturing defect caused the rupture.¹⁰⁶ “Microcracking might have occurred immediately following the pipe’s manufacturing, which led to further cracking and thinning of the pipeline during service, and ultimately causing the rupture.”¹⁰⁷ Furthermore, regulators from the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”) found the pipeline was about 70 years old and Exxon recently reversed the flow of the pipe.¹⁰⁸ This reverse in flow increased the capacity of the pipeline and as a result, increased the pressure of the oil flowing through it.¹⁰⁹ Although this increase in pressure did not exceed the maximum pressure the pipe could sustain, the combination of the microcracking and the increase in pressure likely led to the rupture.¹¹⁰

Although not nearly as severe as the BP oil spill or the incident at Love Canal, the Mayflower oil spill is an important case study for several reasons. First, its recentness provides an excellent opportunity to consider the factors applied in past settlement or plea agreements resulting from environmental disasters. This case study thus provides great opportunity to examine how an environmental disaster should or could be resolved. Second, pipeline ruptures have occurred in the past in the United States.¹¹¹ The Mayflower rupture was certainly not the first pipeline rupture in the United States,¹¹² which leads to the third reason this is a useful case study: the Keystone XL Pipeline.

104. *Exxon Sued Over Arkansas Oil Spill*, *supra* note 7; Corrective Action Order CPF No. 4-2013-5006H (2013), *supra* note 8, at 2 (“[ExxonMobil Pipeline Company] estimates that approximately 3500-5000 barrels of crude oil was released as a result of the Failure . . . Local police evacuated 21 homes.”).

105. Gerken, *supra* note 103.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. U.S. DEP’T. OF TRANSP. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., No. 20130151-17953, Accident Report – Hazardous Liquid Pipeline Systems (2013), *available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Press%20Release%20Files/Mobil_original_20130151_17953%20.pdf (outlining the details of the spill from the day of the rupture as Exxon Mobil reported them to PHMSA).

111. *See* NAT’L OCEANOGRAPHIC & ATMOSPHERIC ADMIN., OIL SPILL CASE HISTORIES: 1967 – 1991 SUMMARIES OF SIGNIFICANT U.S. AND INTERNATIONAL SPILLS 55, 78, 117 (1992), *available at* http://response.restoration.noaa.gov/sites/default/files/Oil_Spill_Case_Histories.pdf (providing the details of pipeline spills in Pennsylvania, New York, and Minnesota, respectively).

112. *Id.*

TransCanada proposed the Keystone XL Pipeline to the U.S. State Department in May 2012.¹¹³ The TransCanada Corporation proposed that a pipeline be built from the Canada-Montana border and connect to a pipeline in Steele City, Nebraska.¹¹⁴ The Keystone XL pipeline would connect oil extraction in Canada to refineries in Nebraska.¹¹⁵ This pipeline is very controversial; pitting many different groups against each other.¹¹⁶ By examining the possible outcomes, and determining what an adequate settlement or plea agreement would look like, we will be better able to understand how to deal with a spill that could result from the construction of the Keystone XL Pipeline. Particularly, by determining an appropriate settlement or plea agreement from the Mayflower oil spill, we may be better able to determine an adequate remedy for a future spill in a suburban neighborhood.

B. Application of the Factors to the Mayflower, Arkansas Oil Spill: What Kind of Settlement Agreement Would a Court Accept?

In June 2013, the DOJ, on behalf of the EPA, brought two claims against the ExxonMobil Pipeline Company and Mobil Pipe Line Company (“ExxonMobil”).¹¹⁷ In addition, the Arkansas Attorney General, on behalf of the Arkansas Department of Environmental Quality, brought four claims against the same parties.¹¹⁸

1. Likelihood of Plaintiff’s Success at Trial

Based on the facts of this situation, plaintiffs will likely succeed at trial because ExxonMobil’s use of the pipe was the major cause of the rupture. PHMSA determined, through an independent assessment, that the crack in the pipe, which caused the rupture, was an original manufacturing defect.¹¹⁹ Even though this may seem like the court should blame the manufacturer of

113. U.S. Dep’t of State, NEW KEYSTONE XL PIPELINE APPLICATION, <http://www.keystonepipeline-xl.state.gov/> (last visited Nov. 6, 2014).

114. *Id.*

115. *Id.*

116. *See generally* HUFFPOST: KEYSTONE PIPELINE, available at <http://www.huffingtonpost.com/news/keystone-pipeline> (providing a compilation of the Huffington Post’s articles and resources relating to the Keystone XL Pipeline).

117. Complaint, *ExxonMobil*, *supra* note 13, at 2.

118. *Id.* at 1.

119. Sam Eifling, *The Metallurgical Report on the Mayflower Pipeline Break Just Went Public*, ARK. TIMES (July 31, 2013), <http://www.arktimes.com/ArkansasBlog/archives/2013/07/31/the-metallurgical-report-on-the-mayflower-pipeline-break-just-went-public>.

the pipeline, “the actual use of the pipe” is an important contributing factor.¹²⁰ A court is likely to find ExxonMobil responsible for the pipeline rupture because ExxonMobil used the pipe for approximately 70 years, changed the flow, and increased the pressure of the pipe.¹²¹ Therefore, the plaintiffs will likely succeed at trial if a jury agrees and finds Exxon’s use was the primary cause of the rupture. However, success at trial does not necessarily mean a windfall for the United States or the State of Arkansas. The court will also have to examine the environmental cleanup or remediation that will result from the agreement.

2. Degree of Environmental Cleanup or Remediation that Will Result from the Settlement Agreement

Hopefully, any settlement agreement that the parties reach will include a degree of environmental remediation. Whether the parties will include environmental remediation is hard to predict at this point. However, based on the two previous case studies, there are several different paths the parties could follow. First, similar to the BP oil spill, the DOJ could decide that rather than put any settlement money in the general treasury, the settlement funds would be used strictly for cleanup in the Mayflower, Arkansas area. This could include granting the settlement funds to the EPA, the Arkansas Department of Environmental Quality, the U.S. Fish and Wildlife Service, or a local nonprofit or third-party organization dedicated to environmental cleanup.

Second, the DOJ and ExxonMobil could follow the lead of the Love Canal settlement. This would require ExxonMobil to create a remediation plan that the government approves and then oversees. Based on the Love Canal case study, the government would be able to review any plan ExxonMobil provides.¹²² Although PHMSA has already requested a remedial work plan from ExxonMobil, this plan is not for environmental remediation; it is for repair of the pipeline to prevent future ruptures.¹²³ PHMSA extended the due date of this remedial plan until January 6, 2014.¹²⁴ PHMSA accepted ExxonMobil’s remediation plan¹²⁵ and approved

120. *Id.*

121. *Decades-old Defect Caused Exxon’s Arkansas Oil Spill: Regulator*, REUTERS (Aug. 1, 2013), <http://www.reuters.com/article/2013/08/01/us-usa-pipeline-exxon-idUSBRE97012S20130801>.

122. *Hooker*, 540 F. Supp. at 1076.

123. CORRECTIVE ACTION ORDER CPF NO. 4-2013-5006H (2013), *supra* note 8, at 4.

124. Letter from R. M. Seeley, Dir., Sw. Region, Pipeline & Hazardous Materials Safety Admin., to Gary W. Pruessing, President, ExxonMobil Pipeline Co. (Oct. 8, 2013), *available at* [http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_141CA30D9AD42AFB22CFF4D88E8F03789DB30000/filename/420135006H_Region_Grants_Time_Extension_10082013%20\(2\).pdf](http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_141CA30D9AD42AFB22CFF4D88E8F03789DB30000/filename/420135006H_Region_Grants_Time_Extension_10082013%20(2).pdf); Letter from Mark D. Weesner, Manager, Safety, Health, & Env’t Dep’t, ExxonMobil Pipeline Co., to Rodrick M. Seeley,

ExxonMobil's plan to restart the pipeline.¹²⁶ A plan that a court is likely to accept would need a significant amount of government oversight. As explained in the Love Canal case study, government oversight is important for the health, safety, and wellbeing of the environment, the residents of the area and those assigned to conduct necessary remediation.¹²⁷ Government supervision of remediation is important to ensure remediation is completed appropriately and ensures that chemical migration is kept to a minimum.¹²⁸

Third, ExxonMobil and the EPA could work together to create an adequate remediation plan. This would ensure both parties are satisfied with the goals and requirements of the plan. Additionally, it will give both parties more flexibility to deal with the situation as they see fit. If such a remediation plan is included in a settlement agreement, it is more likely to be accepted by the court and is likely to ensure adequate remediation of the site.

3. Non-adjudicatory Method is More Advantageous to the Plaintiff than Litigation

Based on the complaint and the relevant federal and state laws, the United States and the State of Arkansas are likely to secure civil penalties as a result of adjudication.¹²⁹ However, the important question to ask is: what will make a settlement agreement more beneficial to the plaintiffs than adjudication? In addition to the degree of remediation involved in a settlement agreement, the court's acceptance of the BP oil spill agreement relied heavily on the additional penalties the DOJ secured.¹³⁰ In order to determine how much the United States and the State of Arkansas stand to win from this case, several of the claims against ExxonMobil must be

Dir., Sw. Region, Pipeline & Hazardous Materials Safety Admin. (Mar. 28, 2014), available at http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_1CD3A957F1C04F27CA25A8D14F67DF1BBB141300/filename/ExxonMobil_North_Pegasus_Remedial_Work_Plan_03282014.pdf.

125. Letter from Mark D. Weesner, Manager, Safety, Health, & Env't Dep't, ExxonMobil Pipeline Co., to Rodrick M. Seeley, Dir., Sw. Region, Pipeline & Hazardous Materials Safety Admin. (Jan. 31, 2014), available at http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_99240D369DC4A85C92688DB2BD8B6E38F0101000/filename/Pegasus_RestartPlan_Southern_segment_redacted.pdf.

126. Letter from Rodrick M. Seeley, Dir., Sw. Region, Pipeline & Hazardous Materials Safety Admin., to Gary Pruessing, President, ExxonMobil Pipeline Co. (Mar. 31, 2014) available at http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_325C1FBC0A971C60C2DC5268CB2676A341960000/filename/420135006H_Approval_of_Restart_Plan_Southern_Segment_REV6_03312014.pdf.

127. *Hooker*, 540 F. Supp. at 1076.

128. *Id.* at 1078–79.

129. Complaint, United States v. ExxonMobil, at 1.

130. *BP Exploration and Production Inc.*, No. 2:12-cr-00292, at 10 (stressing the fact that without a guilty plea agreement, the U.S. would have secured significantly less through adjudication).

explored. This Note will determine this amount by examining each respective cause of action and the possible fines associated with it.

The first cause of action brought on behalf of the EPA was for “violations of CWA Section 311(b).”¹³¹ The civil damages pursuant to this claim are up to \$1,100 or up to \$4,300 per barrel spilled, depending on whether the court finds ExxonMobil was grossly negligent or not.¹³² With approximately 5,000 barrels of oil spilled, this claim could result in a civil penalty of either \$5.5 million or \$21.5 million. In addition to the federal government’s claim under the Clean Water Act, the State of Arkansas brought four claims that seek civil penalties from ExxonMobil.¹³³ This Note will discuss each of these claims and the civil penalties associated with them separately.

The State of Arkansas brought a claim under the Arkansas Hazardous Waste Management Act for the oil ExxonMobil cleaned up in Mayflower, Arkansas and then stored at a site off Highway 36 “in such a manner or place as to create or is likely to create a public nuisance or a public health hazard.”¹³⁴ The civil penalties associated with this claim are not to exceed \$25,000 per day per violation.¹³⁵ The complaint, however, does not outline the exact relief sought under this claim; it only requests the amounts referenced above. The complaint does not include a specific number of violations.¹³⁶ Assuming that the oil has been stored at the Highway 36 site for 45 days as of June 17, 2013, the civil penalties for the violation could be up to \$1.1 billion.¹³⁷

The State of Arkansas also seeks civil penalties under the Arkansas Water and Air Pollution Control Act.¹³⁸ These two causes of action are based on water and air pollution resulting from the oil spill.¹³⁹ Because of a lack of available information, the civil penalties for these two causes of action are much harder to calculate. Both claims include a civil penalty of \$10,000 per violation per day. But again, the complaint does not include the specific number of violations or number of days that the violations occurred over. This is likely because some of the violations are ongoing and may

131. Complaint, *United States v. ExxonMobil*, at 7.

132. *Id.*

133. *Id.* at 2.

134. *Id.* at 9.

135. *Id.* at 11.

136. *Id.*

137. Roy Ockert, *Oil Companies Flaunt State Law In Aftermath of Mayflower Disaster*, ARKANSAS NEWS (June 17, 2013), <http://arkansasnews.com/sections/columns/news/roy-ockert/oil-companies-flaunt-state-law-aftermath-mayflower-disaster.html>.

138. Complaint, *United States v. ExxonMobil*, at 2.

139. *Id.* at 11–15.

continue through the on-going trial, which began in February 2014.¹⁴⁰ Based on nine separate violations and at least one hundred days of violations, the penalties for the water pollution could reach \$1 million.¹⁴¹ This could be even larger depending on when the court considers the cleanup complete.¹⁴² The civil penalties associated with the air pollution in the fifth cause of action are even harder to determine at this point because no assessment has been conducted at this time.

Lastly, the State of Arkansas is seeking civil penalties under the Oil Pollution Act (“OPA”).¹⁴³ “OPA provides that ‘each responsible party for a vessel or facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident.’”¹⁴⁴ This means that ExxonMobil is liable for the costs associated with the State of Arkansas’ cleanup efforts. These costs are estimated to be more than \$70.5 million.¹⁴⁵ Altogether, ExxonMobil could be ordered to pay civil penalties ranging from \$77 million to \$94 million. In addition to civil penalties, ExxonMobil has been ordered to pay \$2.6 million for violations of PHMSA regulations.¹⁴⁶

Ultimately, based on the previous case studies, the settlement agreement would likely have to exceed the penalties the United States and the State of Arkansas would be able to win through litigation. What this amount is, however, is hard to calculate based on the limited information available and the recent nature of the oil spill. As the parties and news organizations release more information and assessments of the situation, they will help paint a clearer picture as to an appropriate settlement amount.

A court is likely to use the three factors in the two previous case studies of the BP oil spill and Love Canal to consider a settlement agreement from

140. *State, Federal Lawsuit Against Exxon for Arkansas Oil Spill Gets Trial Date*, INSIDECLIMATE NEWS, (Nov. 1, 2013), <http://insideclimateneeds.org/print/28809>; Christina Huynh, *Panel Discusses Mayflower Oil Spill Effects*, WASH. TIMES, (Mar. 31, 2014), <http://www.washingtontimes.com/news/2014/mar/31/ark-panel-to-discuss-mayflower-oil-spill-effects/?page=all> (“Most of the areas contaminated by the oil leak have been cleaned, however some oil remains in Lake Conway’s Dawson Cove.”); *Exxon Mobil Seeks to Bar Release of Files in Arkansas Pipeline Case*, INS. J. (Jan. 2, 2015), <http://www.insurancejournal.com/news/southcentral/2015/01/02/351568.htm>.

141. See Steve Hargreaves, *Exxon Sued Over Arkansas Pipeline Spill*, CNN MONEY (June 13, 2013), <http://money.cnn.com/2013/06/13/news/companies/exxon-pipeline-lawsuit> (stating that violating state environmental laws can have a penalty of up to \$10,000 per violation per day).

142. *Id.*

143. Complaint, United States v. ExxonMobil, at 15.

144. *Id.*

145. *Arkansas Oil Spill Damages Exceed \$70M, Exxon Says*, INSURANCE JOURNAL, (Nov. 22, 2013), <http://www.insurancejournal.com/news/southcentral/2013/11/22/312089.htm>.

146. Anthea Mitchell, *Exxon Mobil Faces Oil Spill Penalty, But How Much?*, WALL ST. CHEAT SHEET (Nov. 10, 2013), <http://wallstcheatsheet.com/stocks/exxon-mobil-faces-oil-spill-penalty-but-how-much.html?a=viewall>.

the Mayflower, Arkansas oil spill. Although the parties are still compiling the relevant information, it will be important for the parties involved to begin assessing what kind of settlement agreement is possible. The United States and the State of Arkansas are likely to want as much environmental remediation and the largest civil penalties possible. ExxonMobil, on the other hand, is most likely interested in finding an affordable way to manage this disaster without damaging its public image. An acceptable settlement agreement will, not only balance the needs of both parties, but it will also include terms that will help the public impacted by this disaster.

An adequate settlement agreement would be beneficial to everyone involved in this case. Such a settlement agreement will allow remediation to begin in a timely fashion with adequate government supervision. Supervision will allow the government to ensure that remediation is completed properly and, similarly to the Love Canal case, will provide public access to this data.¹⁴⁷ Furthermore, an adequate settlement agreement may supply significant monetary fines to the United States government and the State of Arkansas. This could play two roles: punish ExxonMobil and further remediation efforts. Similar to the BP settlement, a large fine could punish ExxonMobil's behavior and provide funding for remediation.¹⁴⁸ Additionally, a settlement agreement could provide a timely solution to what could be a long term problem, if allowed to proceed to trial. By avoiding possible years of litigation, the parties will be able to solve the problem sooner, rather than later. Lastly, a settlement agreement may help to improve ExxonMobil's public image. BP's public relations campaign after the spill in the Gulf relied on apologetic ads,¹⁴⁹ many of which reflect BP's commitment to remediation efforts in the Gulf.¹⁵⁰ ExxonMobil may choose the same route in order to improve its own image. A settlement agreement between the United States, the State of Arkansas, and ExxonMobil may be a long way off. However, a settlement agreement that points the court in the direction of these three factors is not only likely to be accepted, but may also be one of the best ways to adequately clean up Mayflower, Arkansas.

147. *Hooker*, 540 F. Supp. at 1078.

148. *BP Exploration and Prod. Inc.*, No. 2:12-cr-00292, at 13–14.

149. Talia Buford, *BP's Traveling a Different Road to Redemption*, POLITICO (Sept. 10, 2013), <http://www.politico.com/story/2013/09/bp-oil-spill-96500.html>.

150. *Id.*

CONCLUSION

When deciding to accept a settlement agreement, courts will consider a standard set of factors. In the context of environmental disasters, courts consider the following additional factors: the likelihood of plaintiff's success at trial, the degree of environmental cleanup or remediation that will result from the agreement, and if the non-adjudicatory method is more advantageous to the plaintiff than litigation. Courts used these factors when accepting the agreements resulting from the BP oil spill and the Love Canal disaster. It is also likely the court will use these additional factors if a settlement agreement arises from the Mayflower, Arkansas oil spill because these factors lead to a more effective settlement agreement.

This Note argues that courts should explicitly recognize these factors in order to ensure that future settlements address the variety of needs that arise from an environmental disaster. Not only have these factors been used in the past, using them in the future ensures that timely environmental remediation, one of the most important aspects of resolving environmental disasters, will play an important role in future disasters. In the meantime, parties to a dispute can use these factors to write and approve adequate agreements and avoid litigation. Avoiding litigation with an adequate agreement can help save both time and money, and also improve cleanup efforts. The benefits of an adequate settlement agreement measurably affect the courts, the parties involved, and the public at large.