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BP OIL SPILL SETTLEMENT IS LARGEST IN AMERICAN HISTORY, BUT IS IT REALLY AS GREAT AS IT SEEMS?

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On July 2, 2015, BP settled litigation from the now infamous 2010 Deepwater Horizon oil spill that killed 11 crewmembers and released 200 million gallons of crude oil into the Gulf of Mexico, which ultimately resulted in the deaths of thousands of marine animals and the loss of billions in economic damages.

[i] The settlement, the largest environmental settlement in American history, if approved, is between BP, the federal government, and the state and local governments of the five greatly affected states.[ii] It includes environmental fines under the Clean Water Act, along with payments to the five individual states for damages to natural resources and payments to local governments for lost tax revenue and other economic damages.[iii] Louisiana alone is slated to receive \$6.8 billion of the settlement, \$5 billion allocated to natural resource damages and \$1 billion to economic losses.[iv]

Many are saying that BP got off easy with this settlement, as BP could have been responsible for paying billions more in damages.[v] In court, BP argued that it had already been penalized enough with the \$42 billion it was already liable for in cleanup, individual claims, and criminal penalties, and it argued that any further financial burden would risk bankruptcy.[vi] However, the government argued that a high penalty would drive home the point that deep water drilling costs that assure safety should not be shirked in favor of increasing profits.[vii] In 2014, U.S. District Judge Carl Barbier found that BP was “grossly negligent” and 67% at fault for the spill.[viii] From this ruling alone, BP could have been liable for \$18 billion just under the Clean Water Act’s civil penalties, but last week’s settlement affirmed that BP need only pay \$5.5 billion in penalties under the Act.[ix] The case against BP was particularly strong, with Judge Barbier’s ruling and with the ample available evidence of its blatant failures to address known safety



(https://thenypost.files.wordpress.com/2014/10/bp-spill_.jpg)

concerns before the spill occurred.[x] Yet the case against BP was made even stronger last week after the Supreme Court rejected bids by BP and another petroleum company, Anadarko, to avoid paying the civil penalties under the Clean Water Act.[xi]

Even today, more criticism of the settlement is coming to light amidst reports that BP might avoid full payment on a large portion of the settlement. According to the U.S. Public Interest Research Group (U.S. PIRG), at least \$13.2 billion of the settlement might be eligible for BP to write off as a “normal business expense.”[xii] The U.S. tax code does not allow any entity to deduct a penalty paid for violating the law, but if the settlement does not specifically use the “penalty” language, then BP would have the opportunity to deduct those portions of the settlement.[xiii] In all, U.S. PIRG estimates that BP could have \$8.58 billion in tax deductions.[xiv] There is even talk that the remaining “non-taxable” \$5.5 billion portion of the settlement might be open to a loophole because 80% of the \$5.5 billion will go towards natural resource restoration, which BP might argue should not be treated as a penalty, as it is not purely punitive.[xv]

The settlement is still not final, as it requires the approval of Judge Barbier that will only come after a fairness hearing is held, which gives any who objects to the settlement a chance to be heard by the court.[xvi] However, due to lax disclosure requirements, it is likely that the public will never know for sure what happens with the settlement, as tax deduction claims on settlements are considered “confidential business information” by the IRS.[xvii] Interestingly enough, earlier this year, a bill called “The Truth in Settlements Act” was introduced in Congress that would require public disclosure of any settlement agreement involving federal agencies if the settlement exceeds \$1 million.[xviii]

[i] *Why BP Is Paying \$18.7 Billion*, The N.Y. Times (July 2, 2015), http://www.nytimes.com/interactive/2015/07/02/us/bp-oil-spill-settlement-background.html?_r=0.

[ii] Kevin McGill et al., *\$18.7B deal clears path for BP to close books on Gulf spill*, Kentucky.com (July 2, 2015), http://www.kentucky.com/2015/07/02/3927707_gulf-states-reach-187b-settlement.html?rh=1.

[iii] *BP to Settle Federal, State and Local Deepwater Horizon Claims for up to \$18.7 Billion With Payments to be Spread Over 18 Years*, BP (July 2, 2015), <http://www.bp.com/en/global/corporate/press/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html>.

[iv] Sophie Tatum, *Governors, DOJ cheer \$18 billion BP oil spill settlement*, CNN (July 2, 2015), <http://www.cnn.com/2015/07/02/politics/historic-settlement-reached-for-bp-oil-spill/>.

[v] Jared Keller, *The Muddening Silver Lining to BP's \$18.7 Billion Oil Spill Penalty*, Pacific Standard (July 6, 2015), <http://www.psmag.com/politics-and-law/how-come-bp-gets-to-treat-fines-like-business-expenses-but-i-cant-even-get-out-of-this-parking-ticket>.

[vi] Jennifer Larino, *Chat with law experts at noon Tuesday about BP oil spill settlement*, nola.com (July 6, 2015, 12:55 PM), http://www.nola.com/politics/index.ssf/2015/07/bp_oil_spill_settlement_ed_she.html.

[vii] *Id.*

[viii] Jonathan Stempel, *U.S. Judge upholds BP 'gross negligence' Gulf spill ruling*, Reuters (Nov. 13, 2014), <http://www.reuters.com/article/2014/11/14/us-bp-spill-idUSKCN0Y01320141114>.

[ix] Steven Mufson & Joel Achenbach, *Justice Department reaches \$18.7 billion agreement in principle with BP*, The Washington Post (July 3, 2015), https://www.washingtonpost.com/world/national-security/justice-department-reaches-187-billion-agreement-in-principle-with-bp/2015/07/02/6fe106fc-20bd-11e5-84d5-e37ce8ea61_story.html.

[x] *BP at fault for 21 of 35 factors in Gulf spill, panel finds*, NBCNews.com (Sept. 14, 2011, 7:47 PM), http://www.nbcnews.com/id/44514842/ns/us_news-environment/t/bp-fault-factors-gulf-spill-panel-finds/#.VZ2gSxPB6Gc.

[xi] Lawrence Hurley, *U.S. Supreme Court rejects BP, Anadarko over Deepwater Horizon spill penalties*, Reuters (June 29, 2015), <http://www.reuters.com/article/2015/06/29/us-usa-court-bp-idUSKCN0P91PA20150629>.

[xii] Zoe Schlanger, *How BP's \$18.7 Billion Gulf Spill Fine Could Be One Giant Tax Deduction*, Newsweek (July 2, 2015, 3:01 PM), <http://www.newsweek.com/how-bps-187-billion-gulf-spill-fine-could-be-one-giant-tax-deduction-349637>.

[xiii] *Id.*

[xiv] *Id.*

[xv] *Id.*

[xvi] Rick Jervis, *Gulf states reach \$18.7 billion settlement with BP over 2010 oil spill*, USA Today (July 2, 2015, 10:03 PM), <http://www.usatoday.com/story/money/business/2015/07/02/gulf-states-reach-187b-settlement-bp-over-oil-spill/29611451/>.

[xvii] *Id.*

[xviii] *Id.*

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