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Paul Stanton Kibel  
*Golden Gate University School of Law, pkibel@ggu.edu*

Angela Haren Kelley

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PRICING PELICANS AND PETROL:
AN INTRODUCTION TO THE ISSUE

PAUL STANTON KIBEL* & ANGELA HAREN KELLEY**

The notion of “pricing” takes on a particular and peculiar meaning in the offshore natural resources context. This is because offshore natural resources, such as petroleum reserves, wild fisheries, marine mammals, and seabirds, are not owned in the traditional private property sense. Instead, such resources are held in trust by federal and state governments, who then establish the terms upon which private interests may access, exploit, or otherwise use them. These terms of access can include licensing/permitting fees, lease payments, royalties, subsidies, tax exemptions, insurance requirements, decommission costs, and liability for damages to the ocean environment. It is from the government’s formulation of these terms of access that the pricing of offshore natural resources emerges.

As one example, consider the question of how to monetarily quantify damage to wild fisheries, marine mammals, and seabirds that occurs when hazardous substances are released into offshore waters, as was the case with the 2010 British Petroleum (BP) disaster in the Gulf of Mexico. As National Public Radio (NPR) reported in a July 2010 segment titled Tallying Up the Pelican Bill, “[C]oming up with precise economic value for wildlife has stymied economists and scientists for decades. There’s no market for most of these animals. No catalog for endangered species. No eBay or Craigslist for migratory birds.”

Because there are not private purchasers of ocean wildlife like

* Associate Professor, Golden Gate University (GGU) School of Law; Co-Director, GGU Center on Urban Environmental Law; Faculty Editor, GGU Environmental Law Journal.

seabirds, and therefore no corresponding marketplace to set the prices for damages to such wildlife, legislators, regulators, and courts have developed alternative methodologies to quantify natural resource damages, including contingent valuation methodology, restoration or replacement costs, use value methodology, and habitat equivalency analysis (HEA). As Professor Itzchak Cornfield posed the question in his article, Of Dead Pelicans, Turtles, and Marshes: Natural Resource Damages in the Wake of the BP Deepwater Horizon Spill:

...[H]ow much is, for example, Louisiana’s state bird, the Brown Pelican, worth? What are people across the United States willing to pay, in dollars and cents, for the survival of that bird species? $5.00? $100.00? $1,000.00? or possibly $1,000,000.00?

In recent years, federal agencies have increasingly looked to restoration/replacement costs and HEA as the basis for quantifying natural resource damages. As NPR’s June 2010 Tallying Up the Pelican Bill report explained:

Instead of telling a company what they have to pay for dead animals, they [the federal agencies] just tell them they are required to restore the population of the animal. 47 dead pelicans? The company has to pay for enough habitat or conservation programs to bring back 47 pelicans. And that could be cheap or very, very expensive. Helm [Roger Helm of the United States Fish and Wildlife Service] has an elegant answer to the question of what a pelican is worth: the price of a pelican is exactly one pelican.

As another example of pricing in the offshore natural resources context, consider how the federal tax code applies to offshore oil drilling. Presently, the federal tax code includes exemptions and breaks to the oil industry, including write-offs for offshore drilling expenses that are worth billions of dollars annually. The New York Times wrote in its May 2011 editorial, The Return of “Drill, Baby, Drill”:

Senator Max Baucus, a Montana Democrat, is drafting a bill that seeks

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3 Id. at 318-319.
4 Tallying Up the Pelican Bill, supra note 1.
to repeal $4 billion in annual taxpayer subsidies to the oil industry and
use the proceeds to develop more efficient cars and alternative fuel
sources. Mr. Obama has twice tried, without success, to get rid of
those subsidies, and the House [of Representatives] voted in March
[2011] to preserve them in the current budget.

The tax breaks, fast write-offs for drilling expenses, generous
depletion allowances, and the like may have been useful years ago but
are wholly unnecessary when oil prices and industry profits are
reaching new highs.6

The federal government’s taxation policies for offshore oil drilling
operations are part of the terms of access that establish the pricing for
these petroleum reserves.

These conceptions of natural resource pricing factor into the choices
made regarding energy sector activities taking place off our coasts,
including oil drilling and renewable wave and energy projects. In this
dition of the Golden Gate University Environmental Law Journal,
Offshore Energy Projects: New Priorities in the Wake of the BP Gulf
Disaster, we examine the legal and policy climate in the aftermath of the
2010 BP disaster. In this climate, the costs of continued oil drilling off
our coasts are being considered in a more honest light, as are the
economic and environmental implications of replacing such oil drilling
with offshore renewable energy sources, such as wave and wind.

In the first article, Rebecca Bratspies, Professor at CUNY School of
Law in New York, explores the statutory and regulatory framework that
led to the BP disaster, in Regulatory Wake Up Call: Lesson’s from BP’s
Deepwater Horizon Disaster. To identify systemic failures that
contributed to the disaster, Bratspies examines both BP’s culpability as
an individual entity and the broader regulatory context that the company
acted within. Bratspies takes an in-depth look at the Outer Continental
Shelf Lands Act permitting process, and the National Environmental
Policy Act environmental analysis that is supposed to be required by that
process, and suggests that the known flaws in these systems should have
made the BP disaster predictable – and preventable. Through this
analysis, the article suggests important lessons for developing better
regulation going forward, both for offshore drilling and environmental
assessment more generally.

The next article also discusses the importance of regulatory
restructuring. Leila Monroe, Staff Attorney for the Natural Resources

6 Id.
Defense Council, examines proposed regulatory changes to prevent such disasters in the future, in Restructure and Reform: Post-BP Deepwater Horizon Proposals to Improve Oversight of Offshore Oil and Gas Activities. The article chronicles the troubled history of the Minerals Management Service under the Department of the Interior and discusses multiple reviews of the regulatory structure that allowed the BP disaster to occur. Monroe distills key recommendations to improving the Department of the Interior’s management and oversight of offshore oil and gas exploration and development activities.

In the third article, The Deepwater Horizon Oil Spill Trust and the Gulf Coast Claims Facility: The “Superfund” Myth and the Law of Unintended Consequences, Alfred R. Light, Professor of Law and Director of the Graduate Program in Environmental Sustainability at St. Thomas University School of Law in Florida, discusses the important issue of compensation to the victims of the BP disaster. Light explores and compares similarities between the Gulf Coast Claims Facility and the Superfund fund created by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address abandoned hazardous waste sites. Light identifies potential unintended and undesired consequences for the Gulf Coast Claims Facility by exploring the surrounding myths, with the hope that by doing so, some of the consequences experienced under CERCLA may be avoided.

In the fourth article, Rachael Salcido, Professor and Director of the Sustainable Development Institute at University of the Pacific, McGeorge School of Law, transitions the dialogue beyond petroleum and discusses the need to develop renewable sources of energy, in Siting Offshore Hydrokinetic Energy Projects: A Comparative Look at Wave Energy Regulation in the Pacific Northwest. The United States has the largest Exclusive Economic Zone of any nation, offering significant opportunity for non-petroleum energy generation. Hydrokinetic energy, derived from waves, tides, or currents, is a burgeoning industry. Salcido examines the approaches that the states of Oregon, California, and Washington have taken to address the need for additional renewable energy, while also undertaking a shift to comprehensive ocean management. While each state has taken a slightly different approach to folding wave energy into its alternative energy and marine management agendas, the progress made is encouraging for the development of a robust renewable ocean energy industry.

Building on the discussion of wave energy, co-authors Danielle Murray, Renewable Energy Program Manager in the Department of Energy for the City and County of San Francisco; Christopher Carr, Partner, Morrison & Foerster LLP; Jennifer Jeffery, Associate, Morrison
& Foerster LLP; and Alejandra Núñez-Luna, Associate, Morrison & Foerster LLP, discuss the complex and often competing local, state, and federal regimes currently in place to regulate wave energy, in *Riding the Wave: Confronting Jurisdictional and Regulatory Barriers to Ocean Energy Development*. Murray and her co-authors argue that regulatory procedures should be streamlined and comprehensive ocean power regulations should be enacted to enable the wave energy industry to succeed and become commercially viable. Using the City of San Francisco’s permitting application for its proposed Oceanside Wave Energy Project as a case study, the article highlights hurdles and illustrates the need for comprehensive regulatory reform that addresses both short- and long-term scenarios for the development of wave energy.

In the sixth article, authors Kenneth Kimmell, Commissioner of the Massachusetts Department of Environmental Protection, and Dawn Stolfi Stalenhoef, environmental attorney, discuss offshore wind energy as another promising renewable energy source, in *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*. Kimmell and Stolfi Stalenhoef present the experience of the Cape Wind Energy project, which, if completed, would be one of the largest offshore wind farms in the world and one of the most significant greenhouse gas reduction measures in our nation. Despite its obvious environmental benefits, the authors argue, the project was held captive by the permitting process for nearly a decade – in stark contrast to numerous offshore oil drilling projects – due to the imposition of disproportionally rigorous regulatory scrutiny, and the dogged political pressure applied by a few wealthy homeowners with ocean views in the direction of the proposed wind farm. The article examines federal and state court opinions, and relevant statutory authority, that ultimately resolved the jurisdictional disputes and led to the permitting of the Cape Wind Project. Kimmell and Stolfi Stalenhoef use the Cape Wind Project experience to highlight flaws in the federal permitting process for wind energy and offer recommendations forremedying those flaws.

This edition concludes with an examination of yet another source of offshore energy, liquefied natural gas (LNG). In *How States Can Affect Federal Deepwater Port LNG Licensing Decisions: A Case Study Involving the Deepwater Port Act and Coastal Zone Management Act*, Linda Krop, Chief Counsel of the Environmental Defense Center, and Professor, University of California, Santa Barbara, explores the general role of coastal states in permitting offshore LNG terminals and the specific role that California played in the licensing process for the proposed Carrillo Port LNG project. Krop explores the history and
authority of the Deepwater Port Act, and its relationship to other federal and state laws. In addition, Krop analyzes lessons learned from the Carrillo Port case study and highlights the importance of state involvement in LNG licensing decisions and public input and participation.

The articles in this Symposium Edition take a more exacting look at who will ultimately pay the price and reap the benefits of the offshore energy development decisions we make in the coming years.