

# From the Exxon Valdez to the BP Macondo

*What the Next Decade holds  
for the Gulf of Mexico*

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The Pillsbury logo is located in the bottom right corner of the slide. It consists of the word "pillsbury" in a lowercase, sans-serif font, with a small red dot above the letter 'i'. The logo is set against a white rectangular background.

# Tale of Two Gulfs – Gulf of Alaska

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- 1989 – Exxon Valdez



# Exxon Valdez – Gulf of Alaska



- ▶ The birth of Natural Resource Damage
- ▶ The birth of Eco-Risk Assessment
- ▶ Oil Pollution Act of 1990
- ▶ Ecosystem Services

# The Exxon Valdez Damage Assessment

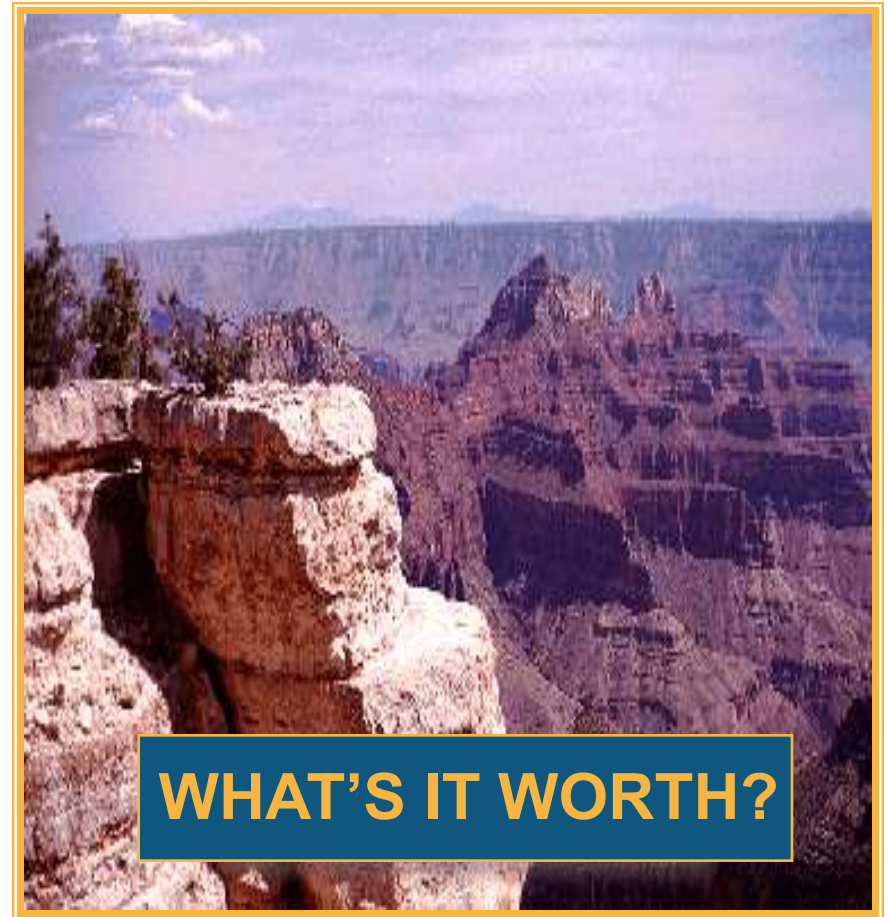
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- **Exxon contributed \$20 million to conduct the NRD for the spill**
  - a seat at the table as the assessment was being designed and implemented
    - The federal government reneged
  - “more than sufficient”
- **“Assessment War” ensued**
  - Federal and State governments spent \$120m
  - Exxon spent a reputed \$70m
- **Unexpected Benefit - Understanding**
  - Government Scientist – Consultants - Academics

# Contingent Valuation Methodology

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- **Passive Use Loss**
  - Option Value
  - Bequest Value
  - Existence Value
- **Nobel Panel on CVM**
- **Unique Resources**

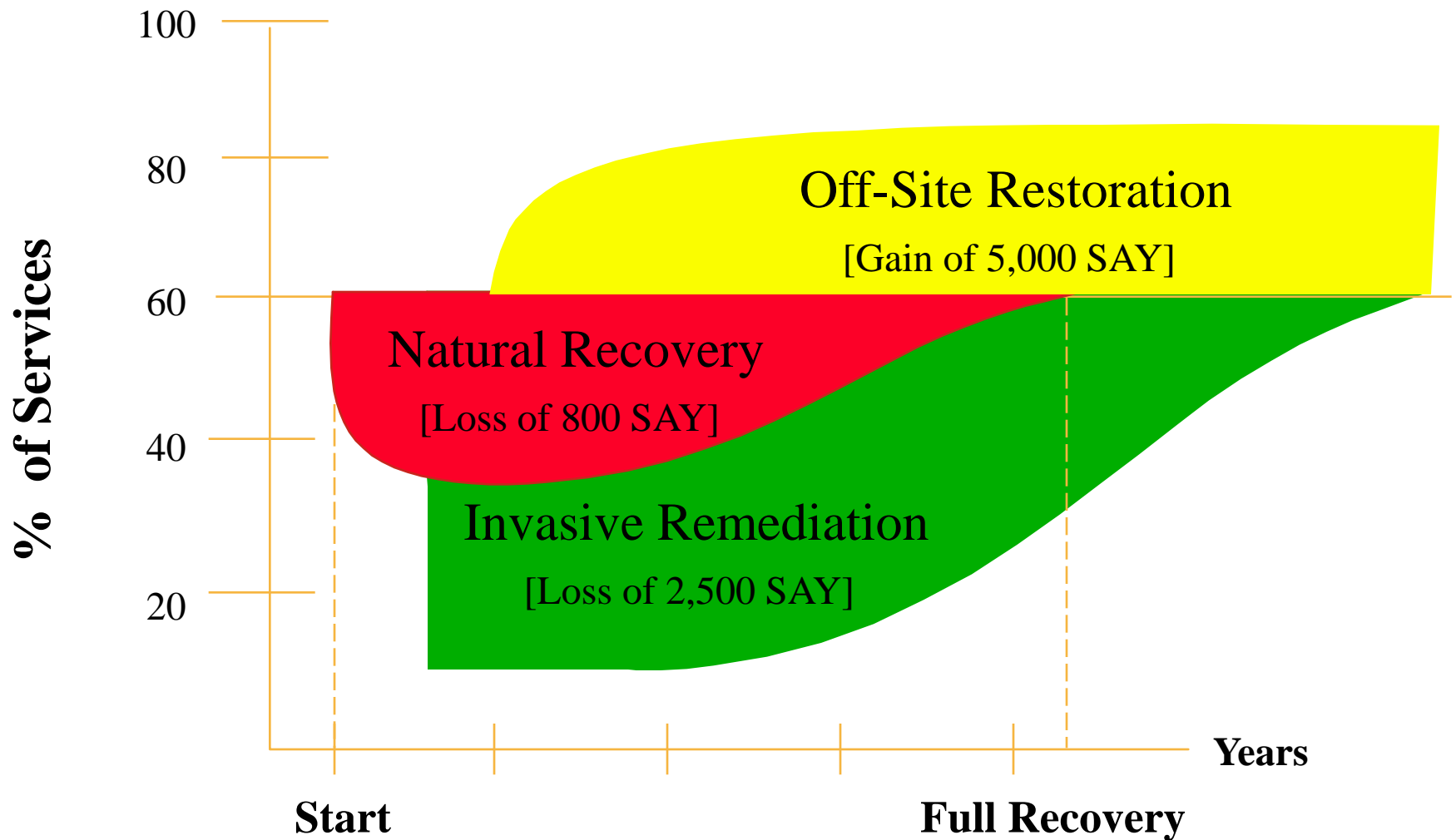


# 1994 – Oil Pollution Act Regulations

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- **Industry stakeholders formed “NRDA Roundtable”**
- **Lobbied CEQ/NOAA**
  - inclusion of Ecological Barter/HEA
- **Acceptance of Approaches**
  - incorporated in OPA regulations
  - Ecological Barter & Service Barter widely accepted by courts
  - considered reliable and scientifically supportable
  - dominant approaches for damage assessments
  - incorporated into the CERCLA NRD regulations

# Habitat Equivalency Analysis



# European Union Directive 2004/35/CE

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- **Ecological or Service Barter approaches new to EU**

- Member States' prior approaches similar to "Valdez Approach"
  - monetizing each injury
  - resulting in large damage assessments (financial compensation to public)
  - does not achieve ELD objective to preserve biodiversity

- **Environmental Liability Directive (ELD)**

- Environmental damage occurring after April 30, 2007
- Member States to apply ELD principles through domestic law
  - resource-to-resource and service-to-service equivalency approaches preferred
    - recognizes off-site & out-of-kind options
  - alternative valuation techniques
    - acceptable when preferred equivalency approaches not possible



# Mega Borg

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- **Open Ocean Spills do not result in significant injury**
- **Cost of Assessment Only**
- **Returned Unused Assessment Funds**
- **Not punitive**



# BP Macondo – Gulf of Mexico

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- A small fraction of the oil reached the shoreline
- Bacteria
- Heat
- Natural Resource Damages should not be proportional to Valdez spill

- 3+ million barrels vs. 11million gallons
- Historical levels of dispersant use
  - 1.84 million gallons



# Long Term Implications

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- **Assessment and Understanding of Potential impacts of Open Ocean Spill**
- **Deep Ocean Spill/Blow-out Response Capacity**
- **Increase liability limits**
- **Increase in OPA fund size**
- **More onerous permitting requirements**
- **24 hour data rooms**

# Marine Mammal Protection Act (MMP)

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- **Look to the Gulf of Alaska**

- seismic airguns
- ship noise
- high energy sonars
- explosives detonations

- **Similarities**

- Science
- Statute

- **Differences**

- Sound
- Density of Marine Mammals
- Subsistence

- **Regulatory Processes in the Two Gulf will converge**

# 1972 Marine Mammal Protection Act (MMPA) 16 U.S.C. § 1361 et seq.

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***Empowers government to seek administrative fines and criminal prosecution for the statutory taking of a marine mammal by***

- Any person or vessel subject to the jurisdiction of the United States on the high seas
- Any person or vessel taking any marine mammal in the water or on land under the jurisdiction of the United States



# MMPA Statutory Definitions (16 U.S.C. § 1362)

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## Take

“ to harass, hunt, capture, or kill, or attempt to hunt, capture, or kill and marine mammal”

## Two Levels of Harassment

- **Level A**: “has the potential to injure a marine mammal or marine mammal stock in the wild”
- **Level B**: “has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns”



# MMPA Permissions and Authorizations

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## *Incidental Takings*

### 50 C.F.R. § 216.106 Letter of Authorization (LOA)

- **Traditional notice and comment rulemaking**
- **ca. 8-18 month timeframe for approval**
- **Good for 5 years**

### 50 C.F.R. § 216.107 Incidental Harassment Authorization (IHA)

- **Expedited notice and comment period**
- **ca. 120 day timeframe for approval**
- **Available for Arctic waters only**
- **Good for 1 year**

## *No Takings at All*

### Letter of Concurrence (LOC)

- **Not specifically authorized in statute or regulations**
- **No notice and comment necessary**
- **Terms (duration, protective measures) negotiated between applicant and NMFS**
- **Preferred vehicle for obtaining agency support for G&G in the Gulf of Mexico – over 110 G&G LOCs approved by the Interior since Obama took office**

# Recent Legal Challenges in the Gulf of Mexico

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- **On Feb. 10, 2011, the NRDC and other environmental groups filed a Notice of Intent to Sue the Secretary of the Interior and the BOEM for issuing permits to authorizing oil and gas exploration activity in the Gulf of Mexico**
- **The Center for Biological Diversity had filed a nearly-identical Notice in May 2010**
- *It is unclear whether NRDC and other environmental groups have or will follow through on their threat to sue*
  - *evidence of a chilling effect in the NMFS*



# The Future

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- **Draft EIS this summer**
- **Final EIS available spring of 2012**
- **Final Rule 2012**
  - Ramp up procedures
  - Areal monitoring
  - Vessel based monitoring
- **Science will lead the way**
  - Marine Mammals effected by sound
  - How much and in What ways?
  - Greater or Fewer measure – Place your bet
- **The Gulf of Mexico will become more like the Gulf of Alaska**

*End of Presentation*

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