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COMMENT

Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct

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I. INTRODUCTION

Like any business, the federal government has a strong interest in conducting business with trustworthy, responsible, and ethical corporate partners. The government relies on approved and qualified contractors to provide critical goods and services that allow the government to function smoothly and properly. Because some companies with whom the government contracts with might commit environmental crime or engage in environmental misconduct, the government is uniquely situated to regulate such business activities to protect themselves and the public from contracting with irresponsible and unethical entities who have engaged in such wrongdoing.

The government can protect itself from conducting business with criminal or irresponsible contractors through the process of suspension and debarment. Under this doctrine, government contractors who commit a criminal or civil offense, engage in corporate misconduct, or otherwise act irresponsibly in connection with a held government contract are prevented from obtaining

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future government contracts and nonprocurement transactions.[1] With this authority, suspension and debarment are necessary and powerful tools available to all federal agencies to ensure that the government continues doing business only with honest and responsible contractors.

To that end, suspension and debarment has, for the most part, been effective in protecting the government from irresponsible and unethical small partners or individuals. However, as this Comment argues, current practice as regulated under the Federal Acquisition Regulation (FAR) is largely ineffective and underutilized to adequately protect the government and public interest from large corporate partners engaging in environmentally irresponsible or unethical conduct. This Comment suggests that certain reforms to the FAR and a greater willingness to initiate suspension and debarment proceedings by federal agencies against large corporate entities who commit environmental crimes or misconduct will improve environmental compliance and properly hold contractors responsible for their environmental wrongdoings.

Part II of this Comment lays out the relevant historical and regulatory framework underlying the suspension and debarment regime, focusing on the procedural and substantive rules that are specified in the FAR. Part III of this Comment discusses suspension and debarment in the context of environmental crimes and misconduct, particularly emphasizing how corporate environmental behavior is treated under the FAR and how the EPA's suspension and debarment program has evolved over the years. Part IV of this Comment investigates British Petroleum, Inc. (BP) as a case study, analyzing its history of environmental noncompliance, utilizing Deepwater Horizon as a backdrop. The

1. Nonprocurement transactions are "any transaction [other than] procurement contract transactions," including but not limited to grants, cooperative agreements, scholarships, loans, subsidies, insurances, and contracts of assistance. *See* 2 C.F.R. § 180.970(a) (2010). Although nonprocurement transactions are covered under the Nonprocurement Common Rule (NCR), Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. 66,534 (Nov. 26, 2003) (to be codified at 5 C.F.R. pt. 970), this Comment focuses primarily on the effects of suspension and debarment on agency procurement actions.

Part goes on to discuss how a large company like BP has effectively evaded the arm of company-wide discretionary debarment and investigates the legal framework for such evasion. Finally, Part V of this Comment analyzes the flaws in the current debarment regime and offers proposals for reforming the system and ensuring compliance with the environmental statutes and the purposes of suspension and debarment as a whole.

II. BACKGROUND AND REGULATORY FRAMEWORK

A. Introduction to Suspension and Debarment Under the FAR

Suspension and debarment are actions that the federal government takes to prevent certain businesses and individuals from obtaining government contracts and nonprocurement transactions when that entity has committed a criminal or civil offense, engaged in corporate misconduct, or otherwise acted irresponsibly in connection with a held government contract.[2] The suspension and debarment process is a means for determining a contractor's present responsibility to do business with the government and for protecting the public interest—it is not intended to be used as a means of punishing participants or contractors. Rather, the process focuses on whether the respondent has demonstrated a lack of business integrity or business honesty, an inability to perform government contracts in a satisfactory manner, or whether some other factor has a serious and direct effect on their present responsibility. If a contractor is determined to no longer be presently responsible and is subsequently suspended or debarred, they are prohibited from

2. *See e.g.,* FAR 2.01 (2011) (defining "debarment" as an "action taken by a debarring official under [FAR] 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor that is excluded is 'debarred.'" "Suspension" is defined as "action taken by a suspending official under [FAR] 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor that is disqualified is 'suspended'." *See also* FAR 9.4.

receiving or being awarded new contracts, subcontracts, or nonprocurement grants for a specified period of time.[3]

B. Purpose and Policy Considerations

The two primary goals underlying the suspension and debarment regime are (1) to protect the government from business relations with dishonest, unethical, criminal, or otherwise irresponsible contractors or persons; and (2) to induce compliance with national socioeconomic programs.[4] The federal government protects the public interest by ensuring the integrity of federal programs by conducting business only with responsible persons. The government does not want to contract with companies or persons who have demonstrated a lack of business integrity or honesty and an inability to perform government contracts in a satisfactory manner, or who have engaged in such conduct as to have a serious and direct effect on their present responsibility.

It is easy to confuse the purposes and effects of the suspension and debarment process with agency enforcement mechanisms. A common misconception about suspension and debarment is that it is used to punish contractors for irresponsible or illicit conduct; after all, the effect of being barred from holding government contracts for a specified period of time has serious business implications. However, suspension and debarment is imposed only to protect the government and public interest from conducting business with unethical or irresponsible partners; it is strictly a business decision and is not meant to be punitive.[5] As explained by the D.C. Circuit Court of Appeals, "The security of the United States, and thus of the general public, depends upon the quality and reliability of items supplied by those contractors. . . . Debarment reduces the risk of harm to the

3. FAR 9.405(a).

4. *See generally* Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 CATH. U. L. REV. 363 (1995) (discussing government's effort to protect the public through the suspension and debarment process).

5. *See* FAR 9.402(b).

system by eliminating the source of the risk, that is, the unethical or incompetent contractor."[6]

C. Differences Between Suspension and Debarment

There are three chief differences between suspension and debarment: (1) the length of exclusion; (2) the standard of proof needed to make an official agency determination; and (3) the timing of the imposition of the proceeding. First, debarment imposes a much lengthier term of exclusion upon the contractor than suspension. Generally, a debarring official imposes debarment for a specified period that is "commensurate with the seriousness of the cause(s)" as a final determination that a person or company is not presently responsible, generally not to exceed three years.[7] However, although the FAR provides guidance of up to three years' exclusion,[8] it is not limited to three years, and longer periods of debarment may be imposed where circumstances warrant if the debarring official determines that an extension is necessary to protect the government's interest.[9] For example, one court found that an agency's decision to debar a contractor for fifteen years was reasonable.[10] So long as the debarring agency has a "reasonable basis" on which to fix the period of debarment, a reviewing court cannot substitute its judgment of an appropriate period for debarment.[11]

In contrast to debarment, suspension is imposed as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceeding when it is determined that immediate action is necessary to protect the government's

6. Caiola v. Carroll, 851 F.2d 395, 398-99 (D.C. Cir. 1988).

7. FAR 9.406-4(a)(1).

8. *Id.*

9. *Id.* at 9.406-4(b).

10. *See* Coccia v. Def. Logistics Agency, Civ. A. No. 89-6544, 1992 WL 345106, at *5 (E.D. Pa. Nov. 12, 1992) (agreeing with plaintiff's attorney that "[A]lthough a debarment generally is imposed for three years, there is no maximum period. The Government thus is free to impose longer periods in egregious circumstances that present an unusual threat to the Government's business interests.").

11. *See* Shane Meat Co. v. U.S. Dep't of Def., 800 F.2d 334, 336-39 (3d Cir. 1986).

interest.[12] Generally, this temporary period of exclusion cannot exceed eighteen months, but if a legal proceeding has been initiated within that period, the suspension can last as long as such proceeding is ongoing, including any appeal.[13] For example, in *Frequency Electronics, Inc. v. U.S. Dep't of the Air Force*,[14] the Fourth Circuit upheld a suspension throughout the nearly five-year period of legal proceedings before an indictment was made.[15]

Second, the standard of proof required for an agency determination differs between suspension and debarment. A debarring official must conclude based on a *preponderance of the evidence* that the contractor has engaged in conduct that warrants debarment, whereas a suspending official, on the other hand, can impose a suspension "on the basis of *adequate evidence*, pending the completion of investigation or legal proceedings, when it has been determined that *immediate action* is necessary to protect the Government's interest."[16]

Third, debarment is imposed only after giving the respondent notice of the action and an opportunity to contest the proposed debarment (through a "notice of proposed debarment"). Suspension, in contrast, is usually imposed first by the suspending official, who promptly notifies the suspended person and provides the person an opportunity to contest the suspension and have it removed.[17]

D. Types of Debarment Actions: Discretionary and Statutory

There are two types of debarment proceedings available to a debarring official: (1) discretionary debarment and (2) statutory debarment. Under discretionary debarment, agencies may suspend or debar a contractor based on their discretion for any of a number of causes set out in the FAR. Such causes include, but

12. FAR 9.407-1(b)(1).
13. *Id.* at 9.407-4(a) to (b).
14. 151 F.3d 1029 (4th Cir. 1998).
15. *Id.* at 1035.
16. *See* FAR 9.406-3(d)(3) (debarment standard of proof) and FAR 9.407-1(b)(1) (suspension standard of proof).
17. *Id.*

are not limited to: (a) criminal and civil violations, such as the commission of fraud or a criminal offense related to obtaining or performing a government contract; (b) unsatisfactory performance of public contracts and transactions, such as the willful failure to perform in accordance with the terms of one of more public contracts, a history of unsatisfactory performance, or failure to perform one or more contracts; (c) certain labor and trade violations or commission of an unfair trade practice; or (d) acting in any other way that demonstrates a "lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor."[18]

Statutory debarment refers to the *automatic* or *mandatory* debarment of contractors for violations of certain federal statutes that include debarment provisions. In the environmental law context, both the Clean Water Act (CWA)[19] and Clean Air Act (CAA)[20] contain debarment provisions prohibiting federal agencies from entering into contracts with persons convicted of a criminal offense falling under the criminal penalty sections of the respective statutes.[21] The primary purpose of statutory debarment under the CWA and CAA is to undertake federal procurement activities in a manner that improves and enhances environmental quality by promoting effective enforcement of the Acts. The Acts both provide (nearly identically): "The prohibition [of contracting with contractors who have violated the respective criminal provisions] shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected."[22] In implementing and enforcing the CWA and CAA, EPA's objective is not merely to require that the facility stop the violation or remove contamination resulting from the violation, but also to require a demonstration that management has reacted

18. FAR 9.406-2(a).

19. Clean Water Act [CWA] §§ 101—607, 33 U.S.C. §§ 1251—1387 (2006).

20. Clean Air Act [CAA] §§ 101—618, 42 U.S.C. §§ 7401—7671 (2006).

21. *E.g.*, CWA § 508(a), 33 U.S.C. § 1368(a) ("No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials and services . . . ."); CAA § 306(a), 42 U.S.C. § 7606(a) ("No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services. . . .").

22. CWA § 508(a), 33 U.S.C. § 1368(a); CAA § 306(a), 42 U.S.C. § 7606(a).

responsibly to the event and will monitor and assure that violations are not likely to recur in the future.[23]

While environmentalists and proponents of a strong suspension and debarment regime might applaud the automatic and mandatory nature of statutory debarment on its face, this classification is misleading. A critical feature of statutory debarment is that it tends to be less severe than its discretionary debarment counterpart, despite its requirement for automatic or mandatory action. Unlike discretionary debarment, statutory debarment typically prohibits the government from granting contracts or subcontracts *only* to the specific facility where the accident or violation happened.[24] As discussed in greater detail in Part IV, *infra*, this means that large corporations owning and operating multiple facilities will not necessarily be debarred for civil violations or criminal convictions under the CWA and CAA, only that the specific *facility* where the violation occurred will be debarred. This could provide a legal loophole that allows large companies with multiple facilities that systematically violate CWA and CAA provisions to avoid the full impact of debarment since they will, as a company on the whole, be able to continue doing business with the government.

E. Determination of Present Responsibility under Discretionary Suspension and Debarment

In determining whether to suspend or propose to debar a contractor, the Suspension or Debarment Official (SDO) must determine whether a respondent is "presently responsible" and whether debarment is in the government's interest.[25] The criteria used in making that determination differs depending on whether the contractor is being considered for suspension or proposed for debarment. A debarring official must consider a

23. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 65 Fed. Reg. 19,618, 19,619 (Apr. 11, 2000).

24. *See, e.g.,* CWA § 508(a), 33 U.S.C. § 1368(a) (". . . [prohibited from entering into contracts] if such contract is to be performed at any *facility* at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.") (emphasis added); Clean Air Act § 306(a), 42 U.S.C. §7606(a) (same).

25. *See* FAR 9.406-1(a).

number of mitigating factors before mandating the debarment action, including whether the contractor: (1) had an internal control system and effective standards of conduct in place during the activity that is the cause of the debarment, or adopted such procedures prior to any government investigation of the activity; (2) brought the activity to the attention of the appropriate government agency in a timely or voluntary manner; (3) undertook a full investigation involving the circumstances surrounding the cause for debarment and, if so, allowed the debarring official to examine the results; (4) fully cooperated with government agencies, any court, or any administrative proceeding during the investigation; (5) paid all criminal, civil, and administrative liability related to their conduct; (6) took appropriate disciplinary action against the individuals responsible for the improper activity; (7) implemented or agreed to implement remedial measures; (8) instituted new or revised review and control procedures and ethics training programs; (9) had sufficient time to eliminate the circumstances within the organization which led to the cause for debarment; and (10) that the contractor's management recognized and understood the seriousness of the misconduct giving rise to the cause for debarment and had implemented programs to prevent recurrence.[26]

A suspending official, on the other hand, does not have the same restrictions and guidelines that a debarring official has under the FAR. Just because a cause for suspension may exist does not necessarily require that the contractor be suspended; in view of the seriousness of the contractor's acts or omissions, the suspending official may consider certain remedial measures or mitigating factors in deciding whether to suspend a contractor.[27] Nonetheless, it is important to note that "the existence or nonexistence of any remedial measures or mitigating factors is

26. *Id.* at 9.406-1(a)(1) to (10).

27. *See id.* at 9.407-1(b)(2) ("A contractor has the burden of promptly presenting to the suspending official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists.").

not necessarily determinative of a contractor's present responsibility."[28]

F. Effects of Suspension and Debarment

When a contractor is suspended or proposed for debarment, it is immediately placed on the General Services Administration (GSA) Excluded Party List System (EPLS) (also known as the "GSA List").[29] The EPLS is essentially a "blacklist" of contractors compiled, maintained, and distributed by the GSA containing the names, addresses, and identity of parties debarred, suspended, or voluntarily excluded from federal contracting.[30] A contractor placed on the EPLS is excluded from receiving government contracts and subcontracts subject to federal approval, and agencies are not to solicit offers from, award contracts to, or consent to subcontracts with contractors on the GSA List unless the procuring agency's head or designee determines that there is a "compelling reason" for contracting with the excluded party.[31] Contracting officers cannot even evaluate the offers of contractors or include them in the competitive range for evaluation of other offerors.[32] Additionally, contractors are also excluded from conducting business with the Government as agents or representatives of other contractors when such entity has been debarred, suspended, or proposed for debarment.[33]

The consequences of being placed on the GSA List can be severe and quite expansive, regardless of whether the contractor is temporarily suspended or debarred for a longer term. After all, "[a] contractor withering away without the ability to compete does not value the artificial legal distinction between debarment

28. *Id.*

29. *See id.* at 2.101 (defining EPLS); *see also id.* at 9.404 (providing more information on EPLS and GSA).

30. *Id.* at 2.101; *see also id.* at 9.404. "Voluntary exclusion" refers to a contractor's settlement with the government whereby the contractor voluntarily chooses to exclude itself from participating in government contracting or subcontracting for a specified period or because of a Notice of Proposal to Debar. *See* 48 C.F.R. § 1509.406-3(a)(3)(vi).

31. FAR 9.405(a).

32. *Id.* at 9.405(d)(3).

33. *Id.* at 9.405(a).

and temporary debarment when the practical effects are identical."[34] The effect of a suspension or debarment is government-wide,[35] meaning, for instance, that if a company is debarred by the EPA for environmental misconduct, that same company cannot receive future contracts or subcontracts by other federal agencies, like the Department of Defense or Department of Labor, until that company has been removed from the GSA List entirely. Discretionary debarment decisions ordinarily apply to all divisions and other organizational units of a company, unless specifically limited by the terms of the decision.[36] This means that a discretionary debarment affects the entire company, and not just disparate business units or facilities. The agency has considerable discretion in deciding the scope for which suspension and debarment actions may apply. For instance, depending on the nature and extent of improper activity, exclusion from contracting can be imputed to: the contractor as an entity based on the fraudulent, criminal, or seriously improper conduct of its employees and officials (officers, directors, shareholders, partners, or other individuals associated with the organization); employees as individuals based on the conduct of the contractor; individuals based upon the misconduct of another individual; extension to affiliates; and participants in a joint venture.[37]

Additionally, there may be other collateral consequences felt by the debarred entity beyond the ability to contract with the government alone. First and foremost, there is the potentially devastating financial impact on contractors who depend on contracts with the government to remain viable but who are excluded from competing.[38] The ramifications of being found guilty of criminal environmental violations can also severely

34. Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 551 (2009).

35. FAR 9.401.

36. *Id.* at 9.406-1(b).

37. *Id.* at 9.406-5.

38. *See* Canni, *supra* note 34, at 551 ("This is especially so for small to medium-sized businesses focusing solely on government business that may lack the financial means to remain viable during the period of exclusion.").

injure the reputation of a business for years to come.[39] Other examples of non-federal effects include: ineligibility to contract with state/local governments;[40] denial or revocation of export licenses;[41] denial, suspension, or revocation of an organization's security clearance;[42] or a material financial impact to commercial sales because publicly held companies may need to disclose the potential financial impact of suspension or debarment in their public disclosures required by federal securities law (i.e., quarterly or annual reports).

III. SUSPENSION AND DEBARMENT IN THE CONTEXT OF ENVIRONMENTAL CRIME AND MISCONDUCT

Just like any other proper cause for suspension or debarment, a company or individual may be suspended or debarred by a federal agency for waste, fraud, abuse, poor performance, noncompliance, or other criminal behavior associated with environmental misconduct. The EPA's debarment program is governed by Executive Order 12,549, EPA's own nonprocurement debarment regulation, 40 CFR Part 32, and by the FAR, 49 CFR Part 9. EPA is unique in its role as steward of environmental protection in that it is one of only three federal government agencies to have a full-time debarment office devoted to determining the present responsibility of federal contractors and for issuing suspension and debarment

39. Carol Dinkins & Sean Lonnquist, *The Belt and Suspenders Approach: The Advantages of a Formalized Environmental Compliance Program*, 2009 UTAH L. REV. 1129, 1129 (2009).

40. Some states follow the ABA Model Procurement Code for State and Local Governments (2000), while others have directly written suspension and debarment provisions directly into their state statutes or regulations. *See, e.g.*, *Procurement Lobbying Guidelines,* N.Y. DEP'T OF STATE (2006), http://www.dos.ny.gov/procurement/lobby.htm; *see also Debarment Information,* N.Y. DEP'T OF LABOR, http://www.labor.ny.gov/workerprotection/publicwork/PWDebarmentInformation.shtm (last visited Nov. 30, 2011).

41. *See* 22 C.F.R. § 126.7(a)(5).

42. *See, e.g.,* DEP'T OF DEFENSE, INDUSTRIAL SECURITY REGULATION 5220.22-R, § C2.1.12.7, *available at* http://www.dtic.mil/whs/directives/corres/pdf/522022r.pdf (explaining that because "[d]ebarment and suspension actions . . . are considered pertinent from a security interest point of view," facilities listed on the GSA list "would normally be ineligible for a security clearance.").

decisions.[43] Other federal agencies with authority to suspend or debar, in contrast, have only part-time debarring officials who typically work for the agency's respective procurement office. Debarring officers who work for the very procurement offices responsible for arranging and securing federal contracts might face a potential conflict of interest when determining a proper cause of action concerning a contractor's actions. An agency that possesses its own Suspension and Debarment Office separate from its procurement office, like the EPA,[44] is theoretically able to remove itself from any such potential conflicts and focus its efforts strictly on the business decision of whether to suspend or debar a contractor.

The EPA's debarment program began in 1982 as an attempt by the Office of Management and Budget (OMB) to respond to and correct Government-wide inadequacies in the management of federal contracts and assistance with regard to waste, fraud, abuse, and poor performance.[45] This "comprehensive Government-wide debarment and suspension system" developed by OMB applied to all federal contracts, assistance, loans and benefits extended by Executive-Branch agencies, including EPA.[46]

In addition to EPA's discretionary authority to debar,[47] it also has mandatory debarment authority under section 306 of the Clean Air Act[48] and section 508 of the Clean Water Act.[49] Substantially, the texts of the provisions are identical:

> No Federal agency may enter into any contract with any person who is convicted of any offense under [CAA § 113(c) or CWA § 309(c)] . . . for the procurement of goods, materials, and services

43. The other two federal agencies containing full-time debarment offices are the U.S. Air Force and U.S. Navy.

44. *See Suspension & Debarment Program*, EPA OFFICE OF GRANTS & DEBARMENT, http://www.epa.gov/ogd/sdd/debarment.htm (last updated Apr. 8, 2011).

45. *See A Brief History of EPA's Debarment Program,* EPA OFFICE OF GRANTS & DEBARMENT, http://www.epa.gov/ogd/sdd/history.htm (last updated Jan. 14, 2010).

46. *Id.*

47. *See supra* Part II.D.

48. CAA § 306, 42 U.S.C. § 7606.

49. CWA § 508, 42 U.S.C. § 1368.

> to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected.[50]

In line with these congressional mandates, it is the national policy of the federal government to

> . . . improve and enhance environmental quality. In furtherance of that policy, the [debarment] program [mandates] . . . [are] instituted to assure that each Federal agency empowered to enter into contracts for the procurement of goods, materials, or services and each Federal agency empowered to extend Federal assistance by way of grant, loan, or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act . . . and the . . . [Clean Water Act].[51]

Originally, the EPA divided its suspension and debarment program into three offices: the Office of Enforcement (statutory debarment); the Procurement and Contracts Management Division (procurement debarment); and the Grants Administration Division (assistance debarment).[52] In 1982, the discretionary procurement and assistance debarment authority was consolidated into the Grants Administration Division by the Office of Administration and Resource Management (OARM).[53] Then, in the early 1990s, the Agency further consolidated its debarment program into the Office of Grants and Debarment (OGD), located within the Office of Enforcement, where "all EPA discretionary and statutory debarment authority is delegated to the Assistant Administrator for OARM and [is] carried out by the

50. CAA § 306(a), 42 U.S.C. §7606(a); *see also* CWA § 508(a), 33 U.S.C. § 1368(a).

51. Exec. Order No. 11,738, 38 Fed. Reg. 25,161, 25,161 (Sept. 10, 1973).

52. *A Brief History of EPA's Debarment Program,* EPA OFFICE OF GRANTS & DEBARMENT, http://www.epa.gov/ogd/sdd/history.htm (last updated Jan. 14, 2011).

53. *Id.*

Office of Grants and Debarment (OGD)."[54] According to the EPA website:

> The Suspension and Debarment Division (SDD) [a division within the OGD] interacts with EPA program offices, the Office of the Inspector General, Department of Justice, and with federal, state and local agencies, to develop matters for consideration by the EPA Debarring Official. . . . The EPA Debarring Official is the Agency's national program manager. As such, the EPA Debarring Official establishes the Agency's debarment policy, and is the decision official for all suspension and debarment actions before the Agency.[55]

The separation of suspension and debarment decisions from procurement decisions and the merger of debarment roles into one office represent EPA's efforts to combine its vast contracting resources with its considerable enforcement clout.[56]

Besides the legislative and regulatory directives, EPA follows a number of guidance documents and internal memoranda to help base their suspension and debarment decisions connected with environmental conduct. Of particular note, EPA has a Voluntary Disclosure Program, the purpose of which is to "enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements."[57] By providing incentives for regulated entities to detect, promptly disclose, and expeditiously correct violations of federal environmental law, the Policy sets forth nine conditions, which if met by regulated entities, may allow them to become eligible for 100 percent mitigation of any gravity-based penalties that could otherwise be assessed.[58] Such conditions include: (1) systematic discovery of the violation through an Environmental Audit or a Compliance Management System; (2) voluntary

54. *Id.*

55. *Id.*

56. Memorandum from Jonathan S. Cole, Senior Attorney, EPA (on file with author).

57. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,618 (Apr. 11, 2000) (known as the "EPA Voluntary Disclosure Program").

58. *Id.*

discovery; (3) prompt disclosure; (4) discovery and disclosure independent of government or third party plaintiff; (5) correction and remediation; (6) prevent recurrence; (7) no repeat violations; (8) violations not resulting in serious actual harm to the environment or present an imminent and substantial endangerment to public health or the environment; and (9) cooperation with Agency investigation.[59]

With all these legislative, executive, and administrative mandates, EPA has a generally strong debarment program for ensuring that the Agency is only conducting business with presently responsible partners. As evinced by their Voluntary Disclosure Program, EPA is primarily concerned about "whether any mitigating factors or remedial measures show that the business risk of dealing with the individual has been eliminated to the extent that debarment is unnecessary."[60]

As an example of the reach of EPA's concerns, in *Burke v. EPA*, the D.C. District Court upheld a five-year debarment of a landfill operator by the EPA, concluding that EPA's five-year debarment was not arbitrary, capricious, or an abuse of discretion.[61] In that case, Paul Burke, the owner and sole shareholder of an Alabama landfill, negligently discharged excessive amounts of leachate, a liquid by-product produced in landfills, into a creek in violation of the CWA.[62] The negligent discharge of leachate resulted in the contamination of a direct drinking water source for residents of Birmingham, Alabama.[63] Concluding that Burke's criminal conviction provided cause for debarment and that Burke did not demonstrate sufficient mitigating factors or remedial measures showing that debarment was unnecessary, EPA found that a five-year, as opposed to a three-year, period of debarment was warranted under the circumstances.[64] Particularly, because the factual misconduct providing the basis for Burke's criminal conviction "show[ed] a serious lack of business responsibility," EPA did not act

59. *Id.* at 19,621-23.
60. Burke v. EPA, 127 F. Supp. 2d 235, 240 (D.D.C. 2001).
61. *Id.* at 242-43.
62. *Id.* at 236-37.
63. *Id.* at 237.
64. *Id.* at 242.

arbitrarily or capriciously in finding that a nexus existed between Burke's criminal conviction and his business integrity.[65] In making its determination, the EPA Debarring Official considered and evaluated relevant mitigating factors such as Burke's culpability, the seriousness of the misconduct, the time that had elapsed, appropriate remedial measures taken, court-imposed sanctions, character before and after the offense, and compliance with the consent order.[66] Ultimately, however, EPA found that "[o]nly when Mr. Burke was forced into a position of compliance by [Alabama Department of Environmental Management] did he begin to implement actions that should have been a part of the daily operation of [the landfill] . . . [and] Mr. Burke has not presented persuasive evidence of altered personal business conduct which demonstrates that he now does not pose a risk to the government."[67] Therefore, a five-year debarment was appropriate rather than the common three-year period. Even though debarment is generally imposed for a three-year period, a longer time frame is permitted when "extension is necessary to protect the Government's interest."[68]

The wide discretion given to EPA and high level of consideration it places on a contractor's mitigation and remediation practices were similarly demonstrated when EPA suspended IBM Corporation. On March 27, 2008, following an investigation, EPA found that IBM employees obtained protected source selection information from an EPA employee and used the information during its negotiations to improve its chance of winning a government contract. IBM officials knew this information was improperly acquired in violation of federal procurement procedures and the Federal Procurement Policy Integrity Act.[69] Here, the EPA Debarring Official determined that "immediate action was necessary to preclude an award of a federal contract to an offeror whose employees may have

65. *Burke*, 127 F. Supp. 2d at 240.

66. *Id.* at 241.

67. *Id.*

68. *See* FAR 9.406-4(b).

69. IBM Corp., EPA Interim Agreement, EPA Case No. 08-0113-00 (Apr. 13, 2008), http://www.contractormisconduct.org/ass/contractors/32/cases/903/1179/ibm-suspension_agreement.pdf.

participated in illegal activities in receiving and using information about its competitors' bid and other information to increase its chance of winning the contract award."[70] However, the suspension was lifted one week later on April 3, 2008, because of IBM's prompt response to the suspension. Upon receiving the Notice of Suspension, IBM management officials and counsel initiated an immediate 'high priority' internal investigation into the allegations and promptly took steps to remediate and mitigate the situation. The remedial and mitigating actions taken by IBM included (1) publicly acknowledging the seriousness of the offense; (2) withdrawing its offer from further consideration in the subject procurement; (3) refunding attorney fees and costs to EPA; (4) pledging IBM's full commitment to conduct an examination of the company's federal compliance program and taking whatever corrective actions necessary; (4) placing responsible individuals on administrative leave; and (5) agreeing to cooperate fully with EPA and the U.S. Attorney's Office in bringing the matter to a prompt and appropriate conclusion.[71] Based on IBM's forthright representations and offers of remediation and mitigation made, EPA agreed to immediately terminate the suspension imposed on March 27, 2008 and remove IBM's name from the Excluded Parties List.[72]

IV. CASE STUDY: BP AS GOVERNMENT CONTRACTOR

British Petroleum, Inc. (BP) is one of the world's largest oil and gas companies. In addition to supplying fuel, heat, and energy to individual consumers around the globe, BP is also an enormous contractor with the United States government, whose contracts generate revenues in the billions of dollars annually. In fact, BP is the Pentagon's largest single supplier of fuel, providing nearly twelve percent of the total fuel purchased in fiscal year (FY) 2009, and having contracts worth at least $980 million in FY

70. *Id.*
71. *Id.*
72. *Id.*

2010.[73] In the Middle East, BP supplies eighty percent of the fuel used by the military in the war effort.[74] Additionally, BP operates 22,000 oil and gas wells across the United States, many located on federal lands or waters[75]. These wells produce thirty-nine percent of the company's total global revenue, about $16 billion.[76] As a government contractor, BP's actions as a business partner of the federal government fall under the scrutiny of debarment provisions in the FAR.

Despite this large presence in federal contracting, BP has a long history of incurring both criminal and civil fines and penalties—particularly due to environmental accidents, leaks, and threats to human health and safety. Prior to the April 20, 2010 Deepwater Horizon disaster that made national headline news for months, BP had five other major incidents in the past ten years, all tallying up major fines and other costs for BP.[77] In October 2000, BP received a felony conviction for illegally dumping hazardous waste down a well hole to cut costs; in a settlement, they agreed to a five-year probationary period.[78] In March 2005, an explosion at a BP Texas City oil refinery—the third largest refinery in the United States—claimed the lives of fifteen employees and injured 170 others; BP pleaded guilty to a felony and paid a $50 million fine in connection with their violations under the CAA.[79] In March 2006, an oil spill along

73. R. Jeffrey Smith, *BP Has Steady Sales at Defense Department Despite U.S. Scrutiny,* WASH. POST (July 5, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/ 07/04/AR2010070403632.html.

74. Jason Leopold, *Ex-EPA Officials: Why Isn't BP Under Criminal Investigation?*, TRUTH-OUT (May 28, 2010), http://www.truth-out.org/ex-epa-officials-why-isnt-bp-under-criminal-investigation59936.

75. Abraham Lustgarten, *EPA Officials Weigh Sanctions Against BP's U.S. Operations*, PROPUBLICA (May 21, 2010, 12:27 P.M.), http://www.propublica.org/ article/epa-officials-weighing-sanctions-against-bps-us-operations.

76. *Id.*

77. Leopold, *supra* note 74.

78. Lustgarden, *supra* note 75.

79. Leopold, *supra* note 74; *see also* Daniel Schorn, *The Explosion at Texas City*, CBS NEWS (Feb. 11, 2009, 5:49 PM), http://www.cbsnews.com/stories/ 2006/10/26/ 60minutes/main2126509.shtml; *see also* Ramit Plushnick-Masti, *BP Texas City Refinery Explosion: Company To Pay State $50 Million Over Air Pollution Violations*, HUFFINGTON POST (Nov. 3, 2011, 3:30 PM), http://www.huffingtonpost.com/2011/11/03/bp-texas-city-refinery-explosion_n_ 1074086.html.

Alaska's north coast resulted in more than 200,000 gallons of crude oil being spilled into Prudhoe Bay—the largest spill on Alaska's north coast ever.[80] The spill was caused by severely corroded pipelines for which BP failed to perform routine maintenance and upkeep. Again, BP pleaded guilty to negligent discharge of oil, a criminal misdemeanor under the CWA,[81] and paid $20 million in fines.[82] In 2004, BP entered into a Deferred Prosecution Agreement with the Securities and Exchange Commission (SEC) related to a price-fixing gas market scheme involving propane trading.[83] Counting as a conviction under debarment law, BP paid a $303 million fine.[84]

In the three instances where BP has had a felony or misdemeanor criminal conviction levied against it under the CAA or CWA, the responsible BP facility where the accident or violation occurred faced statutory debarment and the specific facility was automatically deemed ineligible to receive any future federally-funded contracts, but the company, as a whole, proceeded unhindered under a "business as usual" regime.[85] After each incident, BP vowed to make the remedial changes and solutions necessary to demonstrate their present responsibility.[86] However, it does not appear that BP has done so. For instance, despite BP's admission that their written procedures were inadequate to ensure its equipment's safety and that it had failed to inform employees of known fire and explosion risks at the Texas City refinery, BP did not fix the problems at the rebuilt Texas City refinery.[87] In fact, in October 2009, the Occupational

80. Leopold, *supra* note 74; *see also* Jason Leopold, *Prudhoe Bay, BP's Other Ticking Bomb*, CONSORTIUMNEWS.COM (June 16, 2010), http://www.consortiumnews.com/Print/2010/061610a.html.

81. *See* CWA § 309(c)(1)(A), 33 U.S.C. § 1319(c)(1)(A); *see also* CWA § 309(f), 33 U.S.C. 1319(f) (providing for responsible companies to compensate the government for the costs of cleanup and remediation for the negligent discharge of oil).

82. Leopold, *supra* note 74.

83. *Id.*

84. *Id.*

85. *See* Lustgarten, *supra* note 75.

86. *Id.*

87. *See* Pierre Thomas, *BP's Dismal Safety Record*, ABCNEWS.COM (May 27, 2010), http://abcnews.go.com/WN/bps-dismal-safety-record/story?id=10763042#.TtFCjmNFu30.

Safety and Health Administration (OSHA) fined the company $87 million for its failure to correct the safety problems at the rebuilt Texas City plant, representing the largest fine in OSHA history.[88] In addition, four years after the Prudhoe Bay oil spill, there are still "hundreds of miles of rotting pipe ready to break that needs [sic] to be replaced," according to Marc Kovac, a senior BP employee who worked on Alaska's North Slope for more than three decades.[89] In November 2009, a pipeline rupture at BP Alaska's Lisburne facility demonstrated BP's failure to learn from its past mistakes, in which a February 2001 pipeline ruptured under similar circumstances.[90] As another example, because of overtime benefits and a shortage of trained personnel, BP had a history of overworking employees by scheduling them for sixteen to eighteen hour work shifts.[91] This considerable time provides an "imminent safety risk" since working more than sixteen hours during a twenty-four hour time period can affect the mental capacity to make sound and timely decisions.[92] Yet, despite assurances by BP to EPA more than ten years ago that the company intended to come up with a plan to "fix" the sixteen to eighteen work shifts, sixteen-plus hour work shifts were routine at Prudhoe Bay in 2009.[93]

In evaluating present responsibility, a debarring official shall consider whether the contractor has implemented or agreed to implement remedial measures,[94] such as an ethics and compliance program. Debarring officials expect to see certain essential elements in an ethics and compliance program that demonstrate the company's corporate attitude to engage in responsible and ethical practices. Examples include: strong support of the program by senior management, demonstrating the company's commitment to high standards of business conduct; responsibility of line managers for the program who are

88. *Id.*

89. Leopold, *Prudhoe Bay, BP's Other Ticking Bomb*, *supra* note 80.

90. *Id.* (describing the improper placement of temperature pipe monitors on the inside of the facility rather than outside where it could provide a better measurement of temperature for both spills).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* FAR 9.406-1(a)(7).

accountable for the program's implementation; accountability to the board of directors; procedures for reporting and addressing violations; employee training regarding the ethics and compliance program; and a demonstrated employee commitment to comply with the standards of conduct.[95]

The company's history of continued violations and non-corrective corporate attitude demonstrates internal institutional problems— rather than isolated incidents—that seem to make BP, in its entirety, ripe for debarment. Until now, BP's executives and lawyers have fended off such company-wide debarment actions by promising that BP would "change its ways," but despite promises to remedy the problems, many still exist.[96] Aside from the $373 million in fines paid by BP over the past decade,[97] according to some employees speaking anonymously, BP follows an "operate to failure" attitude, meaning that, for example, BP Alaska avoids spending money on "upkeep" and instead runs the equipment until it breaks down.[98] This type of procedure typifies what happened in the November 2009 spill, when an employee performing a routine check discovered oil pouring out from a gash on the bottom of a twenty-five-year old pipeline at BP's facility.[99] In other words, an otherwise readily identifiable problem made during routine checks was systematically ignored for years until there was ultimate failure. In the case of the Texas City refinery explosion, BP blamed the disaster mostly on operator error and fired six employees; their internal investigation report concluded there was "no evidence of anyone consciously or intentionally taking actions or decisions that put others at risk."[100] However, the U.S. Chemical Safety Board, the federal agency that investigated the incident, found "[t]he problems that existed at BP Texas City were neither momentary nor superficial. They ran deep through that operation of a risk denial and a risk blindness that was not being addressed

95. *See id.* at 9.406-1(a).
96. Lustgarten, *supra* note 75.
97. *See* Thomas, *supra* note 87.
98. Leopold, *Prudhoe Bay, BP's Other Ticking Bomb*, *supra* note 80.
99. *Id.*
100. Schorn, *supra* note 79.

anywhere in the organization."[101] Over the more than eighteen months of investigations, the U.S. Chemical Safety Board "found problems at Texas City just about everywhere they looked: antiquated equipment, corroded pipes about to burst, and safety alarms that did not work."[102] The result, as discussed *infra* in Part V: BP paid a $50 million fine and the Texas City facility was statutorily debarred, but BP was allowed to continue to do business with the government.[103] Five years later, Deepwater Horizon occurred.

V. ANALYSIS AND PROPOSAL FOR REFORM

The example of BP sheds light on some of the flaws of the current debarment system. Despite BP's history of apparent noncompliance, accrual of fines and penalties associated with environmental misconduct, seeming lack of remediation and corrective action taken, and statutory debarment of individual BP facilities, the question remains: not why BP as an entire corporation—rather than just individual facilities or business units—has not already been debarred, but whether BP even *could* be discretionarily debarred. While the current debarment regulatory framework is indeed effective in protecting the government from conducting business with small government contractors,[104] the system is weak and largely ineffective in furthering the purposes of debarment when federal agencies contract with large corporations like BP. Quite simply, some companies are too big to ban, providing these companies with the ability to essentially circumvent the threat of company-wide debarment when faced with the choice of whether to conduct themselves properly or whether to follow "business as usual" methods. For some large companies who can afford the costs, it

101. *Id.*

102. *Id.*

103. *See* BP P.L.C. Texas Refinery Explosion – Guilty, *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=828 (last visited Oct. 1, 2011).

104. *See, e.g.*, Burke v. EPA, 127 F. Supp. 2d 238, 2390 (D.D.C. 2001) (representing an effective debarment process and result for a small government contractor who engaged in improper conduct demonstrating a lack of business integrity).

might be worth it to accept fines, penalties, and occasional facility debarment instead of changing their practices to come into compliance with environmental regulations.

To illustrate, the top 100 government contractors (as measured by total amount of federal dollars awarded through government contracts) have paid more than $25 billion in penalties for fraud, bribery, falsifying records and other violations over the past fifteen years, but only four of them have been suspended at any point during that time from government contracting on a company-wide basis, and none have been debarred.[105] These companies are Boeing, GTSI, IBM, L-3 Communications, and Agility (formerly PWC Logistics, not a Top 100 contractor).[106] These are primarily defense contractors and providers of technological goods and services, companies not regularly involved in types of services giving rise to environmental violations (like oil and gas companies). Additionally, there has not been one company among the Top 100 federal government contractors since 1995 that has been suspended or debarred on a company-wide basis for an *environmental* violation.[107]

The statistics involving the largest oil, gas, and natural resources companies with regard to misconduct, on the other hand, are particularly telling. BP, for example, was ranked sixty-fifth in total federal contract award dollars in FY2010 ($1,033.3

105. *See Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org (last visited Nov. 13, 2011).

106. For descriptions of these companies, *see* Boeing Comp., *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=13&ranking=2 (last visited Nov. 13, 2011); GTSI Corp., *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=28 (last visited Nov. 13, 2011); IBM Corp., *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=32 (last visited Nov. 13, 2011); L-3 Communications, *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=37 (last visited Nov. 13, 2011); Agility (formerly PWC Logistics), *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=62 (last visited Nov. 13, 2011).

107. *See generally Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/ (last visited Nov. 30, 2011).

million) but has the highest number of instances of misconduct since 1995 (fifty-seven instances, tied with Lockheed Martin and Exxon Mobil) and paid the fourth highest amount of dollars in the forms of fines and penalties ($2,653.2 million "misconduct dollars") since 1995.[108] Exxon Mobil, ranked 124th in total federal contract dollars ($232.3 million) in FY2010, is tied with BP and Lockheed Martin for the highest number of instances of misconduct (57) since 1995, and paid the fifth highest amount of misconduct dollars ($2,513.5 million) since 1995.[109] Chevron Texaco ranked 132nd in total federal contract dollars ($93.1 million) in FY2010 but likewise has a disproportionate share of instances of misconduct and payment of fines and penalties due to these violations—eighth in instances of misconduct (35) since 1995 and twenty-second in misconduct dollars paid ($508.5 million) since 1995.[110] Clearly, these major oil and gas companies are paying exceedingly large fines and penalties in response to a high number of instances of misconduct, disproportionately more than what their total pool of federal contract dollars would indicate. And yet, none of these major companies have ever been suspended or debarred on a company-wide basis, a perplexing result given the FAR's mandate to debar contractors for the "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[111]

So why are large government contractors like BP, Exxon Mobil, and Chevron Texaco consistently paying millions of dollars in fines and penalties related to environmental violations but not being debarred? It is true that large corporations are often better

108. *See* BP P.L.C., *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=61&ranking=65 (last visited Nov. 13, 2011).

109. *See* Exxon Mobil, *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=23 (last visited Nov. 13, 2011).

110. *See* Chrevon Texaco Corp., *Fed. Contractor Misconduct Database*, POGO.ORG, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=140 (last visited Nov. 13, 2011).

111. FAR 9.406-2(a)(5) (setting forth causes for debarment); *id.* at 9.407-2(a)(9) (setting forth causes for suspension).

able to identify and correct misconduct than smaller companies, which may account for the low rate of suspensions and debarments for the largest contractors when you consider agencies' focus on remediation, mitigation, and correction of misconduct.[112] Likewise, at small companies, the person responsible for the misconduct might be the company leader, critical to making or providing what the government needs, which might warrant debarment for a small company but not necessarily large companies.[113]

However, discerning the real answer involves a much more thorough investigation. As mentioned previously, the company might simply be too big and involved in the government process to logistically be suspended or debarred by the contracting agency. It is not necessarily because the agency failed to diligently and enthusiastically pursue administrative options like suspension and debarment but, rather, because of the greater defects of the system as a whole. For example, a provision in the FAR provides that if "compelling reasons" related to national security or urgency exist to dictate the need to use the particular contractor or subcontractor in question, debarment may be avoided.[114] Given that BP supplies eighty percent of the fuel to the military stationed in the Middle East,[115] these circumstances might prove to be "compelling reasons" to not debar BP as a government contractor. This gives the contracting agency an incredible amount of discretion, perhaps too much. EPA routinely and discretionarily suspends and debars smaller companies and individual facilities that have CWA or CAA violations pursuant to their authority under section 508 of the CWA and section 306 of the CAA. BP's case is different because of the Defense Department's extreme reliance on BP's services.[116]

Furthermore, the government might be wary of interrupting oil and gas production that could affect energy prices or taking

112. *See* Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. TIMES (Dec. 17, 2010), *available at* http://www.nytimes.com/2010/12/18/us/politics/18contractor.html.

113. *See id.*

114. FAR 9.405-1(b).

115. *See* Leopold, *supra* note 74.

116. *Id.*

action that could threaten the jobs of thousands of BP employees, not to mention that the cost of replacing BP as a contractor might be too high to justify the debarment of such a large entity. Thus, the Department of Defense would not debar BP because of its strong ties and reliance on BP, just as EPA would not debar BP on a company-wide basis for other "compelling" policy reasons. In addition, the Department of Justice's pending litigation of Deepwater Horizon might have a residual effect on an agency's decision whether to debar BP. One of the penalty factors set forth in section 311(b)(8) of the CWA includes the economic impact of the penalty on the violator, i.e., the financial ability to pay a penalty.[117] If BP were debarred by the EPA for environmental misconduct-related reasons or by another agency for other reasons, BP would argue during Deepwater Horizon settlement discussions that debarment will impact their future earnings and thus their ability to pay. Even though debarment decisions should not be based on ongoing litigation but rather on agency-specific internal decision making procedures, the result nevertheless may be that the agency might be influenced by the effect a debarment might have on the pending litigation.[118] It seems, therefore, that BP and other large corporate entities with whom the government frequently contracts have found a loophole in the debarment regime.

Despite this problem, there is an answer. The FAR allows for the continuation of *current* contracts, providing that: "[n]otwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or

117. CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8) ("In determining the amount of a civil penalty . . . the Administrator, Secretary, or the court . . . shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, *the economic impact of the penalty on the violator*, and any other matters as justice may require.") (emphasis added).

118. *See, e.g.,* U.S. Dep't of Justice, Memorandum from Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), http://www.justice.gov/dag/cftf/corporate_guidelines.htm ("Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts.").

subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise."[119] In other words, a suspension or debarment is intended to only have *future* effect on the ability to contract. While it may, indeed, be logistically more difficult for an agency to find a new contractor to replace a newly suspended or debarred contractor, there should in theory be no effect upon the currently-existing contract. This should provide time for the agency to solicit bids and award a new contract to interested and qualified contractors with strong track records of compliance and business integrity who will comply with the ethical and legal demands that the FAR places on them. Reforms to the FAR should be made to account for situations where a current contract is set to expire (and before a new contract can be awarded to a presently responsible contractor) in order to allow an agency head to be able to extend the life of the current contract until the new one can begin.

Despite these logistical hurdles, debarment of a large multinational corporation like BP on a company-wide basis could be a very real possibility, which would be a certain method for the government to ensure that they no longer conduct business with a corporation that has so irresponsibly behaved in connection with their federal contracts, or at least until the company is able to adequately demonstrate its business integrity and commitment towards environmental ethics. Even before the Deepwater Horizon explosion, EPA debarring officials were considering discretionary debarment of the entire company regarding its unresolved debarment cases in Alaska and Texas.[120] At present, the EPA Suspension and Debarment Office has "temporarily suspended" any further discussion with BP on debarment matters until the completion of an investigation into the Deepwater Horizon can be concluded.[121] Should EPA ultimately decide to

119. FAR 9.405-1(a).

120. *See* Lustgarten, *supra* note 75.

121. *Id.* (". . . the EPA suspended negotiations with the petroleum giant over whether it would be barred from federal contracts because of the environmental crimes it committed before the spill in the Gulf of Mexico. Officials said they are putting the talks on hold until they learn more about the British company's responsibility for the plume of oil that is spreading across the Gulf.")

debar BP, the effects on the company would be sweeping: "Even a temporary expulsion from the U.S. could be devastating for BP's business."[122] A discretionary debarment would cancel not only the company's future contracts to sell fuel to the military, but prohibit BP from leasing or renewing drilling leases on federal land as well as cancel other contracts BP holds with other agencies, resulting in losses worth billions of dollars.[123] In the end, the question is not whether BP *could* be debarred as a government contractor but, rather, *will they*? Rep. Bart Stupak (D-Mich.) said it best: "the U.S. government needs to look at all possible options when it comes to showing BP, or any corporate bad actor, that a continued culture of cost cutting and increased risk taking will absolutely not be tolerated."[124]

If the federal government is actually serious about conducting business with presently responsible corporate partners to protect the public interest—and not just with a smattering of smaller contractors—reforms need to be made to the regulatory framework and agencies need to begin following the rhetoric they preach. To demonstrate the government's stated policies with its contradictory actions, the Department of Justice's internal guidance on prosecuting business organizations states:

> In evaluating the severity of collateral consequences, various factors . . . such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the *scope of the misconduct in a case is widespread and sustained* within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation

122. *Id.*
123. *Id.*
124. Smith, *supra* note 73.

> were engaged in or aware of the wrongdoing and the *conduct at issue was accepted as a way of doing business for an extended period*, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.125

Yet, BP and others like them know that the current system treats these large contractors as "special" and that although they may have to pay millions of dollars in administrative and criminal fines and penalties in connection with their environmental misconduct, the system would never allow them to be debarred or suspended on a company-wide basis—a far more catastrophic result to their business than the payment of fines and penalties. It is not until federal agencies begin to actually follow through on their congressional and executive mandates and debar companies, even the largest ones, for their continuous and systematic civil and criminal misconduct that the true goals of the debarment regime can be accomplished.

How might these reforms be realistically made? First, statutory debarment provisions like in the CWA and CAA need to be strengthened to allow for the automatic or mandatory debarment of contractors on a company-wide basis and not just applicable to individual facilities where the violation occurred. Continuation of the current practice allows deep pocket companies like BP to continue conducting themselves in an environmentally irresponsible way without ever having to seriously face the threat of company-wide debarment, a far greater deterrent than fines and penalties. Of course, fairness and economic concerns dictate that company-wide statutory debarments cannot and should not be designated for every violation of a statutory debarment provision. However, the inclusion of language in the FAR, or even in the CWA and CAA, giving the agency head the ability to debar contractors on a company-wide basis based on the egregiousness of the violation or

125. U.S. Dep't of Justice, Memorandum from Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), http://www.justice.gov/dag/cftf/corporate_guidelines.htm (emphasis added).

continued history of noncompliance would be effective in giving actual teeth to debarment.

Second, while agencies must be able to have some discretion and flexibility as to their ability to grant exceptions for "compelling reasons,"[126] they cannot rely on it so heavily so as to effectively provide an escape route for large companies like BP. Agencies must lead by example and demonstrate that government contractor misconduct will not go unnoticed in terms of willingness to actually debar entire companies. To that end, diversifying the entities that agencies contract with will enable the government to not rely so heavily on the services of the big companies. By doing that, the government will have appropriate alternatives available should a business partner engage in irresponsible or illicit behavior, while simultaneously spreading the wealth with small businesses struggling to survive in a shaky economy. How many more Deepwater Horizon oil spills must result before agencies are willing to follow their congressional mandates?

Finally, because debarment is not always a logistical possibility, other remedial options besides traditional "business as usual" fines and penalties might, at the least, work towards accomplishing the goals of environmental protection. Instead, because the FAR is an all-encompassing regulation and does not deal exclusively with environmental crimes or misconduct, EPA Guidance recommending Supplemental Environmental Projects (SEPs) in lieu of or in addition to fines or penalties paid to the Treasury might be a solution.[127] Although SEPs are meant to be

126. FAR 9.405-1(b).

127. Generally, a SEP is an action undertaken by an alleged violator to engage in an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid. Usually, SEPs are made as part of an enforcement settlement, which carries certain legal requirements: "There must be a relationship between the underlying violation and the human health or environmental benefits that will result from the SEP; [a] SEP must improve, protect, or reduce risks to public health or the environment, although in some cases a SEP may, as a secondary matter, also provide the violator with certain benefits; the SEP must be undertaken in settlement of an enforcement action as a project that the violator is not otherwise legally required to perform." *See Supplemental Environmental Projects*, EPA, http://www.epa.gov/oecaerth/civil/seps/ (last updated June 6, 2011).

"undertaken in settlement of an enforcement action,"[128] this does not mean that a SEP requirement could not be added to the FAR to ensure as optimal a result as possible. Adding such additional environmental compliance tools to the arsenal of federal agencies would be effective in demonstrating the government's real commitment to environmental enforcement and compliance, and, in the event that an irresponsible contractor cannot be debarred, at least the contractor would be engaging in otherwise ethical and beneficial behavior aimed at the betterment of society and attainment of the goals of the respective environmental statutes.

VI. CONCLUSION

Suspension and debarment is a critical tool available to the government to protect itself from conducting business with irresponsible and unethical business partners. Although not intended to be punitive in nature, the realistic effects of suspension and debarment on government contractors can provide a needed deterrent effect to ensure that contractors engage in ethical and presently responsible behavior. Regarding the suspension or debarment of small companies or individuals, the current system is effective at protecting the government and public interest. However, because of regulatory and practical flaws in statutory and discretionary debarment, large corporations with long histories of environmental noncompliance, violations, convictions, and irresponsible behavior like BP are beating the system. Because of the government's overreliance on large contractors, it is unable to adequately protect itself from irresponsible business partners when those companies engage in environmental crimes and misconduct and they are able to avoid the harsher effects of company-wide debarment. Regulatory reform to the FAR and changes in agency contracting practice is needed to accomplish the sensible goals of suspension and debarment.

128. *Id.*