

# BP faces criminal trial over oil spill

## Civil complaint by the US Department of Justice seen as first step towards prosecution

A CIVIL complaint brought last month by the US Department of Justice against the owners, insurers and operators of Deepwater Horizon has wider portents than appear at first glance, and a shelf life far longer than what some people might believe.

Regulatory experts see the civil lawsuit as a first step towards an eventual criminal trial of BP, as well as other individuals and entities against whom the US government might believe it has a prima facie case. This case could come in March or April, after the federal hearings currently under way are complete and evidence

gathered during them has been collated and is available for further use.

Defendants in the civil lawsuit comprise BP, Anadarko and MOEX, which held 65%, 25% and 10% respectively of the Macondo lease; distinct entities eventually identifiable as owner Transocean; and insurer Lloyd's Syndicate 1036.

In a minor but significant twist, the DOJ's civil lawsuit, which itself has been brought under the Federal Water Pollution Control Act, is asking the judge for a declaration that all defendants except Lloyd's be subjected to unlimited liability under the Oil Pollution Act 1990 for removal costs and damages.

While BP itself has already legally bound itself to unlimited liability, the fact that the government now wants the judge to declare seven other defendants as also subject to unlimited liability appears designed to allow

the DOJ to go after these entities in the unlikely event of a BP insolvency or collapse.

"It is like a man who wears a belt as well as suspenders," said maritime regulatory consultant Dennis Bryant. "One way or the other, the government wants to be sure it has someone in the frame for unlimited liability."

The main interest in this case, however, centres around the possibility of a criminal case, and the identities of those who might so be sued.

Blank Rome partner Jonathan Waldron said: "The civil lawsuit is only the first shoe. A criminal complaint is coming, but the DOJ will probably wait until the federal hearings are completed, which is scheduled to happen in February unless extended again. This way, the criminal lawsuit can draw upon all the facts gathered during this investigation."

Mr Bryant added: "The bar in the US these days is set so low for

criminal lawsuits that there is almost no doubt that one would be coming. However, the reason for the civil lawsuit appears much different than mere money."

Indeed, a civil lawsuit technically was not necessary, since BP already has set up a \$2bn escrow fund to pay Deepwater Horizon claims, and has paid hundreds of millions of dollars in

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bills sent to it by Washington. The Oil Spill Liability Trust Fund, the mechanism established by OPA 90 to cover claims for uncompensated costs and damages, is also processing claims.

"I understand the part of the suit seeking civil penalties, but not the part seeking costs and damages incurred by the federal government," said Mr Bryant.

"Government press releases have stated that it has been fully paid for all bills submitted and BP has promised to continue such payments. The government is not entitled to double recovery."

Separately, lawsuits brought by hundreds of individual plaintiffs alleging loss of business or other damages ensuing from Deepwater Horizon are progressing in Louisiana, before the same judge who now has the DOJ case.

On this backdrop, experts believe the DOJ's game plan in bringing a civil case is twofold:

getting access to evidence gathered during the discovery process in these cases, which is based on the assumption that all cases including the DOJ's would eventually be consolidated into one; and to put pressure on the non-BP defendants, as if to tell them that Washington reserves the right to come after them if the BP fount of cash dried up.

While a criminal lawsuit appears certain, so far there is no single "poster child" such as the allegedly inebriated — the charge was cleared at trial — Exxon Valdez master Joseph Hazelwood on whom to hang the Deepwater Horizon rap.

Instead, BP appears destined to play this role in the criminal trial as well. Certain defendants in the civil suit, such as Anadarko, MOEX and Lloyd's, might be excluded; while other yet to be determined parties would feature as criminal defendants. ■

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## Clearing the way for improved trade facilities

DREDGING is shaping up into one of the most critical challenges facing US ports in 2011.

American Association of Port Authorities chief executive Kurt Nagle told Lloyd's List that this issue has become even more urgent on the backdrop of the US Congress considering a ban on the legislative practice of "earmarks", which is how dredging typically has been funded since the 1990s.

Earmarks are funds directed to specific projects when a lawmaker quietly inserts language in legislation or Congressional committee reports, or other appropriations-related documents, that redirects a specific amount to a specific organisation or project, usually in his home state, without too much debate.

Earmarks are usually equated with "pork-barrel spending", although, as the dredging example itself shows, this analogy is not accurate in every situation.

As it is, US ports traditionally have complained of insufficient appropriations of federal dollars to maintain federal navigation channels at their authorised dimensions.

The US Army Corps of Engineers has sole responsibility for dredging all federal waterways. The money required for this work is collected from cargo owners in the shape of the Harbour Maintenance Tax, which has been in force since 1986.

"Nevertheless, the federal government spends only about half of the tax collected for its intended purpose — deep-draught navigation maintenance," Mr Nagle said.

Statistics bear him out. Since 1986, a \$5.6bn surplus has accumulated in the Harbour Maintenance Trust Fund while serious dredging needs have remained neglected.

AAPA communications director Aaron Ellis said that of the roughly

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Box handling at Boston: lobbyists are trying to ensure the funds collected under HMT are used to best effect. Bloomberg

\$1.3bn-\$1.6bn collected each year from the HMT, only half — about \$750m-\$800m — is appropriated to the USACE. The other half goes "to the ledger" — i.e. to buffer the trust fund.

The AAPA has lobbied, so far unsuccessfully, to ensure that 100% of the HMT collected each year be allocated to dredging, especially since the trust fund is already quite rich.

The Congressional push-back against earmarks — American politicians' way of showing recession-afflicted voters that they are serious about targeting wasteful spending and so-called pet projects — now poses a separate challenge in itself.

Mr Nagle said this intention actually runs the risk of undermining another element of

bipartisan agreement on Capitol Hill — a need to shore up America's infrastructure.

"We are very concerned that a broadly defined Congressional ban on earmarks could have significant impacts on appropriate federal investments critical to our nation's transportation system," he said.

"Under the existing structure of legislation, particularly regarding federal navigation channels, the federal investment has traditionally been provided through line-item project bills. As the dialogue proceeds, and the earmark debate is resolved, it is important not to lose sight of the need for appropriate investments in needed improvements to our nation's transportation infrastructure, including seaports

and the land- and waterside connections to them."

The AAPA also believes providing enough money for dredging goes to the root of the government's ethical commitment to America's ports and waterways.

"America's state and local public seaports are investing more than \$2bn in infrastructure improvements, and rely on a more than 200-year-old partnership with the federal government for the concomitant investments in connecting infrastructure, of which proper waterside access to all ports is a major element," Mr Nagle said. President Barack Obama's stated goal of doubling US exports in five years makes it even more important that the asset represented by ports not be allowed to wither away, he added.

**99.6%**  
amount of US overseas trade that moves through seaports

**15,000**  
number of jobs that are created for every \$1bn in goods exported

**13m**  
number of jobs supported by seaport activities

**\$3.8bn**  
value of goods that move in and out of US seaports each day

According to the AAPA, 99.6% of US overseas trade moves through seaports, and international trade accounts for more than a quarter of gross domestic product. Approximately 15,000 jobs are created for every \$1bn in goods exported, and seaport activities support more than 13m jobs. About \$3.8bn worth of goods move in and out of US seaports each day.

Mr Nagle said: "Projects to maintain these critical waterways at their authorised depths and widths would immediately provide transportation savings to benefit US businesses. With these savings, these sectors can enhance their global competitiveness and can create more jobs, for today and into the future." ■

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