REFLECTIONS ON THE *DEEPWATER HORIZON* INCIDENT

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It is time for reflections and "lessons learned" following the announcement by the National Incident Commander, Admiral Thad Allen, on September 19, 2010, that well-kill operations on the MC252 well in the Gulf of Mexico were complete, permanently sealing the well. According to reports as of this writing, at the end of September, BP had spent more than $11.2 billion in the response, including the cost of the spill response, containment, relief well drilling, static kill and cementing, grants to the Gulf states, claims paid, and federal costs. In addition, as of October 28, more than $1.6 billion had been paid to claimants by the new Gulf Coast Claims Facility (GCCF) since it opened in August 2010. BP had made approximately 127,000 payments totaling about $400 million prior to the transfer of the claims to the new facility.

The Response

The Oil Pollution Act of 1990 (OPA 90) requires owners/operators of tank vessels, onshore facilities, and offshore facilities to submit response plans for responding to oil spills. Depending on the type of vessel or facility, the plans are to be submitted to the Coast Guard, Environmental Protection Agency (EPA), or the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE, formerly the Minerals Management Service). As part of these response plans, operators have to contract for adequate resources to respond to potential spills, up to and including a "worst case discharge." The Coast Guard, EPA, and BOEMRE, by implementing regulations, define how owners/operators should calculate their potential worst case discharge, and how owners/operators should determine the amount of equipment they should contract for in order to respond to their worst case discharge. Industry response resources in place today were primarily

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developed based on the standards set by the Coast Guard's tank vessel regulations.

History has shown that this regime has worked well for responding to vessel and onshore facility spills. Unfortunately, the BOEMRE regulations were much less prescriptive than the Coast Guard and EPA requirements and only contemplated a blowout for 30 days. In addition, it is now clear that industry was not really prepared to quickly stop the flow of oil. The spill, however, could have been much worse. Although an unprecedented amount of dispersants were applied and were effective, the potential impact on the environment and future use will be reviewed. Industry is now accelerating the engineering, construction, and deployment of equipment designed to improve capabilities to contain a potential future underwater blowout, and BOEMRE is finalizing new response plan standards to greatly enhance the nation's future capability to respond to a blowout in the future.

Investigations and Potential Penalty Action

The National Commission will soon complete its six-month investigation, which must be submitted to President Obama on January 12, 2011. Meanwhile, the joint Coast Guard and BOEMRE investigation has been delayed. It is not expected to be complete until after January 2011 at the earliest, when its conclusions and recommendations will be forwarded to Coast Guard Headquarters and BOEMRE for approval.

Given all of the information that has been released concerning the possible gross negligence or willful misconduct surrounding the investigations into the causes of the incident, the specter of the Department of Justice (DOJ) pursuing significant penalties, both civil and criminal, is real. DOJ continues its investigation and has not publicly released any information on its status. Civil penalties can be pursued up to a maximum of $4,300 per barrel of oil spilled, and Congress has proposed legislation that would increase this penalty provision to $7,500 per barrel of oil spilled retroactive to a date prior to the *Deepwater Horizon* incident. Under the Alternative Fines Act, despite particular criminal fine limits under other statutes, DOJ can pursue alternative criminal fines under this act up to twice the amount of pecuniary gain or loss by any person, which in this case could potentially amount to double the amount of all removal costs and damages stemming from the incident.

Claims

Putting aside the numerous lawsuits that have been filed, and that will likely take years to resolve despite the fact that the suits have been consolidated in a Multidistrict Litigation Panel (MDL) in the U.S. District Court for the Eastern District of Louisiana, a vast number of claims are being pursued against BP. All of these claims were transferred on August 23 to the GCCF, established by BP in coordination with the administration, pursuant to the establishment of a $20 billion fund to settle claims arising from the *Deepwater Horizon* incident. Claimants were allowed to file for emergency advance payments (EAPs) between August 23 and November 23, 2010, in accordance with the GCCF Protocol for EAPs and can file for final payments until August 23, 2013.

On October 29 it was announced that the GCCF would continue to accept claims for EAPs for the next three years without giving up rights to pursue an action against the National Pollution Fund Center (NPFC) or sue BP. With regard to claims for final payment, however, although they can be submitted to the GCCF now, the EAP Protocol published on August 23, 2010, addresses only claims for EAPs and not final payments. The GCCF will not consider claims for final payment until it publishes its subsequent protocol to address final payments. Once a claimant desires to move forward with a determination of a final payment from the GCCF, the claimant will be required to sign a release and waiver of rights for any future claims as a result of this oil spill as a condition to receiving payment, or be prepared to litigate the matter or pursue the claim against the NPFC. Either of these options can take years to resolve.

Spill Legislation

Congress was extremely busy with proposed spill legislation before it recessed in the summer. In this regard, the House passed H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009 (the CLEAR Act). Among other things, this bill would repeal limits of liability, increase the minimum level of financial responsibility for an offshore facility to $1.5 billion, authorize recovery for nonpecuniary damages and human health injuries, and substantially revise the oil spill response planning and safety regimes for vessels and facilities. Although the Senate failed to pass a bill, it consolidated proposed oil spill legislation into S. 3663, the Clean Energy Jobs and Oil Spill Accountability Plan, which was introduced by Senator Reid on July 28, 2010.

Whether the new Congress will focus and pass spill legislation remains to be seen. After the *Exxon Valdez* spill in 1989, it took Congress approximately 18 months to enact legislation. Hopefully, it will take Congress at least that long to implement legislation after the *Deepwater Horizon* incident to take the necessary time to reflect on the actions taken by industry and the administration to implement changes to the existing pollution and response regimes, and will avoid enacting legislation that overreacts to this incident. We will need the extra time to ensure that the decisions taken in crafting a new regime are indeed the right corrective measures under the circumstances. ◆

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