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# Deepwater Horizon: A Decade of Legal Impacts

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The history of the U.S. oil industry is punctuated by key events that caused or accelerated the onset of major changes. In the arena of regulation, those events include the 1969 Santa Barbara spill that drove enactment of the core federal environmental statutes; the 1973 and 1979 supply shocks that drove active intervention in the pricing and distribution of crude and products; and the 1989 grounding of the *Exxon Valdez* that drove tanker technology advancements and the Oil Pollution Act of 1990 providing for recovery of economic losses and natural resource damages caused by spills.

To those dates we must add the explosion at the Deepwater Horizon mobile offshore drilling unit in the Gulf of Mexico on April 20, 2010. This week marks 10 years since that event—a decade that has witnessed significant legal changes. The legal impacts include an acceleration of the governmental division between commercial and enforcement agencies; enhanced regulation of and safety measures for the offshore drilling industry; new precedents on the extent of contractual indemnities and their interplay with federal penalties; and a mass claims resolution process that tested constitutional principles of causation and standing.

**The Incident: April 20, 2010**

On the evening of April 20, 2010, the crew of the semi-submersible drilling rig Deepwater Horizon was completing a temporary abandonment procedure on a well in about 5,000 feet of water, located approximately 50 miles off the Louisiana coast. A calamitous blowout triggered an explosion, a fire and ultimately the sinking of the vessel two days later. Eleven workers on the rig were killed in the explosion, and at least 17 others were seriously injured.

For 86 days, hydrocarbons flowed into the Gulf of Mexico at an estimated rate of between 50,000 to 70,000 barrels per day, reaching an expanse of shoreline. In the final tally, the disaster became one of the largest marine oil spills in history.

On July 15, BP Exploration and Production Inc., the operator of the Macondo well, successfully placed a temporary device called a capping stack on the damaged well to abate the flow of hydrocarbons. On Sept. 19, BP announced that operations to permanently plug the well were complete. It was later determined by a U.S. district court that there was a net discharge of 3.19 million barrels of oil into the environment.

**The Litigation**

Almost immediately after the incident, private parties and governmental entities began filing lawsuits, eventually totaling over 3,000 cases with more than 100,000 plaintiffs.

On Aug. 10, 2010, the Judicial Panel on Multidistrict Litigation consolidated pretrial proceedings in the U.S. District Court for the Eastern District of Louisiana for most federal cases. In addition, a group of Transocean companies, constituting the owner, operator and employer of the Deepwater Horizon rig and crew, filed an action under admiralty law to seek to limit their liability. The admiralty limitations action was consolidated with the other cases in the MDL proceedings, and other primary defendants, including BP and its cement contractor, Halliburton, were joined as parties.

The multiple lawsuits resulted in numerous settlements, penalties and costs paid by BP, totaling approximately $69 billion. This included a landmark $18.7 billion settlement with the federal and state governments to resolve all civil claims and environmental restoration costs, and a settlement with private plaintiffs that involved the establishment of a claims fund estimated to have resulted in the payout of over $12 billion for economic and property damage losses. Other defendants in the case, including but not limited to Transocean and Halliburton, also paid billions to settle their respective liabilities to governments, private plaintiffs and other defendants.

**Government Investigations**

On April 27, 2010, the U.S. Department of Homeland Security and the Department of the Interior formed a joint investigation team (JIT) consisting of representatives from the MMS (later from BOEMRE, as described below) and the U.S. Coast Guard (USCG). The JIT was charged with identifying the causes of the incident and making recommendations to reduce the likelihood of a similar event in the future. On May 22, 2010, President Barack Obama announced the creation of a national commission (presidential commission), to which he gave a similar charge. Numerous other governmental investigations were initiated, including those by the U.S. Congress, the Securities and Exchange Commission, and the U.S. Chemical Safety and Hazard Investigation Board.

On Jan. 11, 2011, the presidential commission released its report, concluding that the immediate causes of the incident were what it determined to be failures with respect to 1) cementing; 2) a negative pressure test; 3) temporary abandonment procedures; 4) kick detection; and 5) diversion and blowout preventer activation. The report identified root causes for the failures as overarching management deficiencies, including with respect to the training of key engineering and rig personnel, and insufficient regulatory oversight.

When the JIT released its full report Sept. 14, 2011, it reached similar conclusions as the presidential commission, finding that multiple causes and failures led to the incident. Both reports offered specific recommendations regarding changes to the regulatory regime and critiques of the industry's safety culture. The decade since the explosion has seen the following evidence of impacts in both industry and government.

**Regulatory, Legal and Industry Impacts**

- **Reorganization of administrative agencies**

  At the time of the Deepwater Horizon incident, the Minerals Management Service (MMS) had responsibility for three interrelated functions: 1) maximizing revenues from operations; 2) promoting resource development; and 3) enforcing safety regulations. Almost immediately after the incident, efforts were initiated to reorganize these functions in order to reduce the apparent conflicts and to assign each of the three functions to its own entity.

  On June 21, 2010, the MMS itself was renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (the BOEMRE). On Oct. 1, 2010, the BOEMRE division responsible for revenue collection was separated out and became the Office of Natural Resource Revenues (ONRR), located under the jurisdiction of the Department of the Interior's Office of Policy, Management and Budget. Then, on Oct. 1, 2011, BOEMRE was divided into the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE). BOEM is responsible for, among other things, leasing and environmental and economic studies and analyses, while BSEE is responsible for, among other things, permitting, offshore regulatory programs, training, environmental compliance, inspections, and oil spill response.

  While the breakup of MMS had a political effect in demonstrating that action had been taken in response to the incident, the processes under which the now-separate agencies functioned did not change in many material respects. For example, offshore leasing policies under BOEM were carried out in much the same way as they had under MMS. Revenue collection by ONRR remained essentially unchanged by the reorganization, particularly since the function had always been maintained as a separate independent group within MMS. BSEE and BOEM continued to share a headquarters, and employees of the agencies worked collaboratively as they had prior to the separation.

- **Mandates for increased safety and oversight**

In the years following the incident through 2016, BSEE published several final rules that increased oversight, training and reporting requirements for offshore operators, including the Drilling Safety Rule, the Safety and Environmental Management Systems (SEMS) I & II rules, and the Blowout Preventer and Well Control Rule (WCR). The overall regulatory approach changed from being primarily prescriptive in nature to being goal-oriented. The changes were wide-reaching across all aspects of the industry, including well design, workplace safety, equipment specifications and maintenance, and corporate accountability.

In July 2019, the agency made changes to the WCR in response to concerns raised by industry and other stakeholders that certain of the rule's provisions imposed undue burdens on industry without significantly enhancing safety or environmental protection, and that the rules did not adequately account for technological advances or limitations. The revised rule made changes to regulations relating to reporting obligations, drilling margins, real time monitoring, and various equipment and systems requirements. In addition to being responsive to the private sector concerns, the 2019 changes to the WCR reflected the Trump administration's overall objective of encouraging energy exploration and production and reducing regulatory burdens.

In its executive summary for the final revised WCR, BSEE stated that none of the changes ignore or contradict the recommendations that were made by the governmental bodies that studied the Deepwater Horizon incident. Certain environmental groups and workplace safety advocates have disputed the agency's conclusion, particularly as drilling moves further offshore into deeper waters where the risks are greater and different challenges are presented.

While there appears to be a consensus that safety conditions offshore have improved under BSEE, reports by the Government Accountability Office in 2016 and 2017 criticized the agency's inability to fulfil its mandate due to understaffing and poor leadership. These criticisms are similar to those that were lodged against the old MMS.

What is clear is that reported injuries have steadily declined since 2007, and loss of well control events have also decreased. This may be partially attributable to the more active and collaborative role taken by industry. Shortly after the event, the Center for Offshore Safety was created; the center is an industry-led organization that helps operators and contractors set and meet safety objectives, including through the collection and publication of performance data from its members. Deepwater operators in the Gulf of Mexico also formed a consortium able to rapidly respond to any well containment event, using lessons learned from the Deepwater Horizon incident. These organizations share technical and operational knowledge among companies to help prevent another catastrophic event, while ensuring that industry can quickly mobilize to mitigate impacts if something goes wrong.

- **Causation and standing**

When BP entered into a settlement with a plaintiffs steering committee April 18, 2012, to resolve thousands of private claims for economic and property damages, the agreement established a claims process overseen by a special master. However, the evidence that class members with business economic loss claims needed to present in order to qualify for payment under the settlement was subject to interpretation, and BP strongly disagreed with the special master's reading.

After multiple appeals, the courts rejected BP's argument that proof of causation, or of traceability to the spill, was required before business economic loss claimants could recover under the settlement agreement. The courts ultimately found that certification of the settlement class and approval of the agreement's claims process framework did not violate federal law or standing requirements under Article III of the U.S. Constitution. In effect, the parties were entitled to agree to a mechanism for determining causation, and such an agreement was not defective under federal law even though it relaxed typical causation standards. This became a milestone decision in class action jurisprudence, demonstrating the length to which important legal tenets can be stretched in a class settlement context.

- **Gross negligence definitions**

Among the findings made by the district court was the proper definition to apply to the term "gross negligence" contained in the Clean Water Act. The district court found that the discharge of oil was a result of BP's gross negligence and "willful misconduct." In doing so, the court engaged in a long discussion about the appropriate definitions of those two terms, since they are not defined by the Clean Water Act or the Oil Pollution Act.

Ultimately, the court found that gross negligence is "an extreme departure from the care required under the circumstances or a failure to exercise even slight care," and that willful misconduct is "an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences."

Importantly, the court rejected the argument that the company, or "managerial agents" of the company, needed to ratify the reckless behavior of employees in order for the company to be found grossly negligent. Instead, the court concluded that a corporation is "vicariously liable under the CWA's enhanced penalty provision for the gross negligence and/or willful misconduct of its employees." However, the district found that contractual indemnities that purport to indemnify parties for liabilities caused by that party's own gross negligence are enforceable, except with respect to punitive damages or civil penalties. Part of the justification for allowing contractual indemnities to survive was the commercial nature of the arrangement and the division of risks and rewards among the parties to the agreement.

In the wake of this decision, some offshore agreements for the Gulf of Mexico have sought to define the specific personnel or job titles within an organization whose conduct can be imputed to the company, for purposes of private indemnities excluding the operator's gross negligence or willful misconduct. While

these contractual provisions will not necessarily protect operators from future Clean Water Act liabilities, they may help clarify contractual indemnity obligations between contractors or partners that involve allegations of the gross negligence or willful misconduct of particular employees.

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Ten years on, the lasting impacts of the Deepwater Horizon incident are still reverberating across the Gulf of Mexico states and industry and government more broadly. Just as was true for prior key events, industry and government made adjustments and instituted policies to regain public trust and improve safety. All companies across industries have learned lessons from the ways in which BP communicated with the public and regulators and facilitated the mass claims resolution procedures associated with this event.

On the anniversary of the Macondo incident, the industry and the regulators find themselves in another period of uncertainty and flux, brought on in large part by the COVID-19 pandemic transportation restrictions and by high crude production levels worldwide. As bankruptcy filings accelerate and market volatility continues, 2020 may mark another grave milestone in industry history. To the extent that the decade after Deepwater Horizon can be looked to as a guide, innovations and collaboration will be in order once again for the sector to maintain its resilience.

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