



For The Defense

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Deepwater Horizon—Prospects for Criminal Prosecution

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The Casualty

On the night of April 20, 2010, there was a loss of well control during a temporary suspension operation at BP's Macando Well in the Gulf of Mexico, resulting in the release of a massive cloud of hydrocarbon gases around the Mobile Offshore Drilling Unit *Deepwater Horizon*. The crew's efforts to control or divert the flow of hydrocarbon gases were unsuccessful: at approximately 9:50 pm, the rig was rocked by the first of a rapid series of catastrophic explosions, and an intense fire broke out on the drill floor. Eleven crew members were killed by the explosions and fire. Shortly thereafter, the surviving crew members and other personnel aboard the rig abandoned ship and were recovered by a supply boat that was standing nearby.

The *Deepwater Horizon* sank on April 22, but oil continued to flow from the well until August 2010, when BP's static kill procedure finally succeeded in choking off the flow. This blowout was the largest accidental marine oil spill in U.S. history, and it caused extensive environmental and economic damages in the Gulf of Mexico and beyond.

Federal Enforcement Actions

The *Deepwater Horizon* casualty quickly gave rise to a number of administrative investigations that were charged with determining the cause(s) of the casualty and identifying potential corrective actions to reduce the risk of such casualties in the future. BP initiated an autonomous claims procedure for damage claims resulting from the oil spill, and hundreds of lawsuits were filed in federal and state courts, most of

which were subsequently consolidated into a multidistrict litigation (MDL) that is being managed by a district judge in the Eastern District of Louisiana. On June 1, 2010, Attorney General Eric Holder announced that the Department of Justice had initiated parallel civil and criminal investigations to determine whether federal enforcement actions were warranted. On December 15, 2010, the Admiralty Branch of the Civil Division filed a civil complaint in the *Deepwater Horizon* MDL against the lessee of the well, the operator of the rig and others, seeking removal costs and civil penalties, based upon the quantity of oil released, under the Clean Water Act. The government specifically reserved the right to amend its complaint at a later date to include additional defendants and/or causes of action.

With respect to criminal enforcement, the *Deepwater Horizon* Task Force, comprised of agents from numerous federal and state investigative agencies, has been collecting evidence for nearly a year concerning potential criminal violations of federal laws. Until recently, the *Deepwater Horizon* Task Force was headed by a senior prosecutor from the Environmental Crimes Section, and the criminal investigation was thus being supervised by the Assistant Attorney General for the Environment and Natural Resources Division. During March 2011, the Department of Justice announced that the leadership of the Task Force was being transferred to an Assistant U.S. Attorney, formerly with the U.S. Attorney's Office for the Eastern District of New York, and responsibility for supervision of the criminal investigation was shifted to the Assistant Attorney General for the Criminal Division.

This has created the unprecedented situation in which the oversight of the most significant pollution event of this generation is being handled by the Civil and Criminal Divisions of the Department of Justice, with the Environmental and Natural Resources Division apparently playing only an advisory role in both enforcement actions. Although the initial complaint filed by the Civil Division in the MDL does not contain any surprising causes of action, that complaint could well be amended to include civil fraud allegations or other causes of action not typically pursued in civil environmental enforcement actions. It remains to be seen what affect the Criminal Division's leadership will have on the nature and scope of any resulting criminal enforcement action.

Potential Criminal Charges

The timing of the filing of criminal charges in the *Deepwater Horizon* matter will be determined by several factors, very likely including the conclusion of the Joint U.S. Coast Guard and Bureau of Ocean Energy Management, Regulation and Enforcement casualty investigation, which is scheduled to issue its final report by the end of July 2011.

It is likely that the criminal investigation into this casualty will focus on potential criminal liability for the eleven deaths caused by the explosions and fire aboard the rig. The Seaman's Manslaughter Statute, which is a felony with a potential maximum sentence of ten years of imprisonment, provides for criminal liability based upon proof of simple negligence that results in a death aboard a vessel. The application of the manslaughter statute in this matter will present significant legal causation issues, as well as jurisdictional issues of first impression, given that the rig was approximately 50 miles offshore at the time of the casualty.

The criminal case also likely will include misdemeanor charges under the Clean Water Act predicated on proof of negligent conduct that caused the discharge of harmful quantities of oil into the Gulf of Mexico, which then migrated into the coastal waters of the United States. If the Alternative Fines Act is utilized, the potential criminal fine for a negligent Clean Water Act offense could be up to twice the pecuniary loss caused by the violation.

The oil spill resulted in the deaths of thousands of migratory birds, so it is also probable that the criminal prosecution will involve misdemeanor charges under the Migratory Bird Treaty Act, which is a strict liability statute. Criminal fines for violations of this statute too could be calculated under the Alternative Fines Act.

There are also indications that the Department of Justice is examining the potential for criminal fraud charges, potentially based on post-incident conduct that was intended to minimize the estimates of oil flowing from the well so as to reduce the potential penalty calculations under the Clean Water Act. The inclusion of criminal fraud charges would substantially alter the character of the criminal enforcement case, and could significantly expand the pool of potential targets of the criminal prosecution.

If the Department of Justice concludes that there is sufficient evidence to pursue charges under the Seaman's Manslaughter Statute or under one of the criminal fraud statutes, it would significantly diminish the potential for a negotiated resolution with any organizational and individual targets. When this circumstance is coupled with the extensive discovery record that has been and will continue to be generated by the administrative investigations and the on-going *Deepwater Horizon* MDL, it is likely that any criminal prosecution will result in a complex, protracted trial, which would involve substantial factual and legal challenges for the government.

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