

After the Deepwater Horizon Response ...

# What Now?

Who could have predicted such an incident? As discussed in more detail below, the aftermath of this incident is raising more questions than answers now that the focus can turn from the response efforts to claims efforts and future improvements. According to reports as of this writing, BP has spent more than \$8 billion in the response and the Administration sent a sixth bill for another \$128 million to BP and the other Responsible Parties in early September 2010. BP paid the previous five bills totaling almost \$390 million. In addition, more than 42,000 claims have been filed against the new Gulf Coast Claims Facility since it opened in August 2010 and approximately \$80 million has been paid since the BP claims were transferred to the Facility. BP has made approximately 127,000 payments totaling about \$400 million prior to the transfer of the claims to the new Facility. Investigations are ongoing, it is unclear what legislation will ultimately be enacted, and the moratorium continues.

## Law Suits and Claims

The Multidistrict Litigation Panel (MDL)

has ruled that the suits pending against BP and others relating to the Deepwater Horizon oil spill will be consolidated for all pre-trial purposes before Judge Barbier of the U.S. District Court for the Eastern District of Louisiana. Judge Barbier has set the initial pre-trial conference for the MDL for September 16, 2010. The purpose of this conference is, in part, to establish case management orders for the proceeding. It is unclear how long these cases will take to resolve.

On August 23, 2010, the Gulf Coast Claims Facility (GCCF), administered by attorney, Kenneth R. Feinberg, trustee for the \$20 billion fund established by BP Exploration & Production Inc. (BP) to settle claims arising from the Deepwater Horizon casualty, opened for business for the receipt of claims. Claimants can file for Emergency Advance Payments (EAPs) between August 23 and November 23, 2010 in accordance with the GCCF Protocol for Emergency Advance Payments and for Final Payments until August 23, 2013.

Although claims for Final Payment can be submitted to the GCCF now, the EAP Protocol



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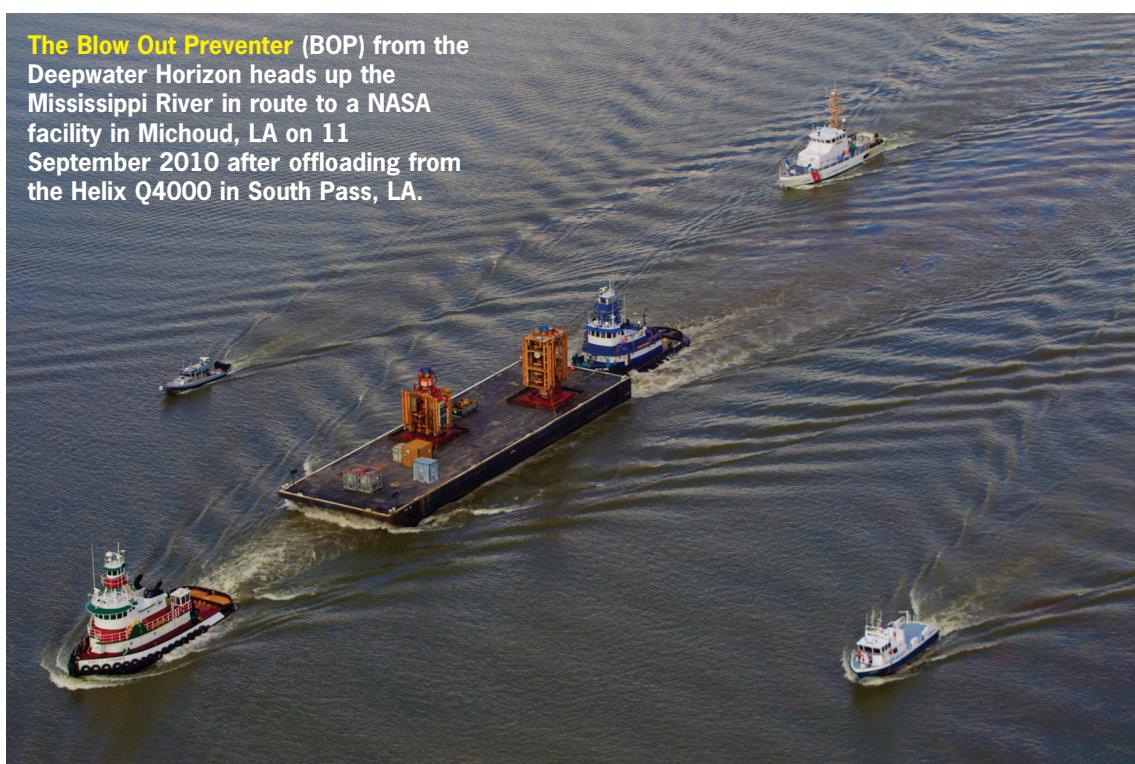
published on August 23, 2010 addresses only claims for EAPs and not Final Payments. A subsequent protocol will be published to address Final Payments at a later date. Any party suffering damages or seeking reimbursement for removal costs as a result of the Deepwater Horizon casualty should consider submitting a claim for an EAP as a bridge until the claimant's full damages or removal costs can be fully assessed. Obtaining an EAP from the GCCF will not jeopardize a claimant's right to pursue full compensation with the NPFC or against a responsible party through litigation if not satisfied with action taken by the GCCF.

If a claimant, however, is either not satisfied with the EAP payment offered by the GCCF or desires to pursue a Final Payment now, it does not appear that GCCF will be ready to act on a claim for Final Payment until the Final Protocol is issued. Once a claimant desires to move forward with a determination of a Final Payment from the GCCF, the claimant should be prepared 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. Claimants should consider conferring with legal counsel to ensure they understand all options available to them.

## Investigations

The joint Coast Guard and Bureau

**The Blow Out Preventer (BOP) from the Deepwater Horizon heads up the Mississippi River in route to a NASA facility in Michoud, LA on 11 September 2010 after offloading from the Helix Q4000 in South Pass, LA.**



of Ocean Energy and Management (BOEM) investigation continues to develop conclusions and recommendations as they relate to the Deepwater Horizon explosion and loss of life on April 20, 2010. The facts collected at this hearing, along with the lead investigators' conclusions and recommendations will be forwarded to Coast Guard Headquarters and BOEM for approval. The Blow-Out Preventer was just raised and it is only now that the government has an opportunity to review this evidence and the investigation has recently been extended to at least November 2010. It is unlikely that anything will be finalized until 2011.

Meanwhile, the Department of Justice (DOJ) continues its investigation and has not publicly released any information on its status. However, the stakes are high, as the specter of a possible finding of gross negligence looms in this case and DOJ could pursue substantial criminal and civil fines. For example, on a per barrel basis, a civil penalty could be pursued in the vicinity of \$5.4 billion. If there is gross negligence the fine could be up to \$21 billion.

In addition, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, consisting of a bipartisan presidential commission, established by Executive Order by Barack Obama on May 21, 2010 is continuing its work to provide recommendations on how the United States can prevent and mitigate the impact of any future spills that result from offshore drilling.

### Spill Legislation

In response to the Deepwater Horizon incident, numerous hearings have been held with a focus on the economic and environmental effects of the spill, as well as the impact of the oil rig explosion on offshore oil and gas development policy. When Congress broke for the summer recess, the House had passed H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009 (the CLEAR Act). This bill incorporated key provisions from a bill introduced by Congressman Oberstar that would, among other things, repeal limits of liability, increase the minimum level of financial responsibility for an offshore facility to \$1.5 billion, authorize recovery for non-pecuniary damages and human health injuries, require all vessels engaged in OCS activities to operate under the U.S.-flag and be

75% U.S.-owned (and a Mobile Offshore Drilling Unit (MODU) would also have to be built in the United States), and substantially revise the oil spill response planning and safety regimes for vessels, facilities, and MODUs.

The Senate, on the other hand, failed to pass a bill, but consolidated proposed oil spill legislation in S. 3663, the Clean Energy Jobs and Oil Spill Accountability Plan, which was introduced by Senator Reid on July 28, 2010.

It became clear, before the Senate on August 6 went on summer recess, that there was opposition, both on the Democrat as well as the Republican side of the aisle. Senator Begich (D-AL) and Senator Landrieu (D-LA), both critics of the unlimited liability language in S. 3663, introduced separate measures shortly after S. 3663 was introduced intended to hold oil companies accountable, without placing a burden on taxpayers and shutting smaller companies out from operating offshore. In addition, the Republicans have their own legislation in play, S. 3643, the Oil Spill Response Improvement Act of 2010, introduced by Senator McConnell (R-KY) on July 22, 2010.

Given the pressures involved with re-elections and other priorities, it is unclear whether the Senate can pass spill legislation this fall and then work with the House to finalize and enact spill legislation before the end of the year. If not this year, then most certainly it will be a major issue in 2011.

### Moratorium

One of the key impacts of the spill incident is the six-month moratorium the Obama administration imposed on new deepwater drilling permits in May 2010 following the April 20 blowout. Although a federal judge in New Orleans blocked the ban after a number of energy companies filed suit challenging it, on July 12, 2010 the Interior Department replaced it with a revised one with additional justifications. The revised ban is still being targeted by industry to overturn it. Given the substantial economic implications, the moratorium is not only having directly on the offshore oil and gas operations, but also indirectly on the industries supporting these offshore activities.

### Conclusions

The implications of the Deepwater Horizon are staggering. The oil impacts were substantial and the resulting claims, including for eco-

nomic damages, huge. Many companies are simply considering whether it is worth conducting such operations in U.S. waters given all the uncertainties.

Claims and lawsuits will continue for an extended period of time. We await the results of the investigations and Congressional action in determining actions that will be taken against BP and possibly other Responsible Parties and the potential for a completely revised offshore liability, prevention, and response regime.

In the interim, stakeholders should continue to let Congress and the American public understand the importance of their interests, and the potential implications, to assist in resolving these outstanding issues.