The Oil Spill Liability Framework

Environmental Law Institute, Washington DC

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Seminar Summary

As the Gulf of Mexico spill grew, stakeholders and interested parties raised questions about the governing federal, state, and tort liability framework for oil spills. The panel summarized the legal framework for oil spill liability and highlighted potential future issues. Speakers from academia, government, private practice, and industry discussed the primary liability provisions in effect today, to help the audience understand aspects such as the types of damages covered and the factors that influence liability, and how and why the framework has and continues to evolve.

Speakers

- Zygmunt J. B. Plater, *Professor, Boston College; former chairman, State of Alaska Oil Spill Commission Legal Task Force*
- Lois J. Schiffer, *General Counsel, National Oceanic and Atmospheric Administration*
- John P. Wagner, *Senior Attorney, American Petroleum Institute*
- Russell V. Randle, *Partner, Patton Boggs LLP; author, Oil Pollution Deskbook*

Moderators

- Jordan Diamond, *Assistant Director, Ocean Program, Environmental Law Institute*
- Jim Walpole, *Chair, DC Bar, Ocean and Marine Resources Committee*

Mr. Zygmunt J. B. Plater provided an overview of the Exxon-Valdez oil spill that occurred on March 24, 1989, and the legislative and regulatory ramifications of the incident. He discussed the complexity of the Prince William Sound ecosystem and the effects of the spill, including the major subsurface damage caused and the severe impacts on public health. He also described the difficulties of responding. Although responders had 28 hours to deal with the spill before the tide came in, the only boat that could have put the boom in place was undergoing repairs in Seattle. Furthermore, there was no spill response action in place to guide actions and. Alyeska, the consortium of pipeline companies which at the time was dominated by BP, had systematically cut back on a number of safety and legal compliance provisions. Furthermore, although EPA had signed off on them, no studies had been completed on dispersants, coagulants, or high volume separators.

Mr. Plater noted the preconditions to the Exxon-Valdez spill, citing a system embedded with complacency, collusion, and neglect, which resulted in a series of cost-cutting measures such as layoffs of highly-skilled loading crews. He stated that a spill was inevitable. For example, the Exxon-Valdez was designed for a crew of 36, but was being run by a crew of 15 or 16. Mr. Plater noted that although the captain of the Exxon-Valdez was intoxicated, he was not the sole cause of the spill – a series of decisions, which had been approved by the US Coast Guard and EPA, contributed to make the spill inevitable. For more information on the Exxon-Valdez oil spill, Mr. Plater recommended *Sound Truth and Corporate Myth$*, a book by Dr. Riki Ott.

After discussing the Exxon-Valdez incident, Mr. Plater provided an overview of the liability and remedy issues that could relate to the Deepwater Horizon blowout in the Gulf of Mexico.

In terms of statutory liability, the responsible parties may be found liable under:

- Criminal statues (e.g. for manslaughter) and/or pollution penal violations (such as under the Clean Water Act);
- Jones Act, Death on the High Seas Act (DOHSA), and/or Occupational Safety and Health Act (OSHA);
- Oil Pollution Act of 1990 (OPA 90);
- Other state and federal statutory actions;
- Shareholder derivative suits;
- Re-opener Clause precedent from the Exxon-Valdez oil spill; and/or
- Possible new legislation or regulations.

Non-statutory liability may be found under:

- Public trust doctrine;
- Parens patriae;
- Maritime tort law (with the Exxon-Valdez as precedent);
- State common law actions such as public nuisance;
- Class action punitive damages (which *Exxon v. Baker* set at 1:1);
- Equitable remedies (such as restoration); and/or
- Possibly contract law (the Prince William Sound Regional Citizens' Advisory Council initially contractually settled).

Ms. Lois J. Schiffer discussed how NOAA has responded to the Deepwater Horizon blowout. First, NOAA has served as a conduit for scientific information, including conducting trajectory predictions, oversight and shoreline observations, and identifications of highly sensitive areas. Second, the agency is working with the Department of the Interior and possibly the US Air Force as fellow trustees, and with the affected states (sometimes with Texas, sometimes without), to produce joint NRDAs. The goal is to restore the impacted marine resources, which includes a long list of potentially affected species. Third, NOAA represents the Department of Commerce's interests in spill response decision-making in the regional response team.

Ms. Schiffer detailed NOAA's roles in NRDAs and restoration. Oil spills can cause a variety of impacts on natural resources, from the direct oiling of species to diminishment of ecosystem services. NOAA has closed fisheries in the Gulf of Mexico and developed a process to adjust the closure area on a daily basis. She explained that at the outset, the agency mobilized lawyers, economists, and scientists to begin

coordinating the different parties and collect a variety of data. They need to understand the complex ecosystems, the services they provide, and the injuries caused by the type and amount of oil spilled. Ms. Schiffer noted the difficulty of assessing how much damage has been suffered: to do so, the agency must both determine baselines for the ecosystem and determine how to repair, restore, or replace resources. Both are complicated tasks.

Ms. Schiffer stated that the main focus of NRDAs is restoration: assessing how to compensate the public for the decreased value of the resources and for lost uses. Primary restoration is returning the ecosystem to its baseline condition. Compensatory restoration is compensating for lost uses (such as lost fishing opportunities) between the time of the incident and recovery. Injuries are scaled to the restoration. Ms. Schiffer stressed that sound science is the key to successful restoration. Three important sets of regulations are (i) EPA's regulations on National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR 300); (ii) NOAA's regulations on NRDAs (15 CFR 990); and (iii) the Department of the Interior's regulations on NRDAs. An NRDA is a process – to evaluate injuries to or lost use of public natural resources and to determine the appropriate amount and type of restoration needed, with the goal is to make the public whole following the release of the oil. The costs of repairing, restoring, or replacing resources are recovered from the responsible party, as are the reasonable costs of assessing those damages and the lost uses caused. Ms. Schiffer noted that these will likely amount to much more than $75 million, which is the current damages cap.

Mr. John P. Wagner described the regulatory changes that were implemented after the Exxon-Valdez oil spill. The liability provisions in OPA 90 are based on an insurance model, and funded by a tax on crude and imported petroleum products. The Oil Spill Liability Trust Fund (OSLTF) accrues approximately $400-500 million per year, of which roughly $150 million annually is devoted to federal response efforts such as those undertaken by the US Coast Guard. In 2017 the tax will increase from $0.08/barrel to $0.09/barrel.

Mr. Wagner explained the oil spill liability limits for offshore facilities. There is no limit on liability for response costs. The responsible parties are then required to cover the first $75 million of damages, which among other things includes natural resources damages, lost uses, and lost public services. After the cap is exceeded, the OSLTF covers damages up to $1 billion per incident plus $500 million for NRDAs and related claims. However, if the spill was caused by gross negligence, willful misconduct, or violation of a federal safety, construction, or operating regulation, then the responsible parties are liable for all damages without limit. OPA 90 also operates completely separately from state liability, which is not capped. Finally, responsible parties may be criminally liable under a number of statutes, such as the Migratory Bird Act. Mr. Wagner noted that compared to others, oil spills are a highly criminalized area of the law.

Mr. Russell V. Randle explained the factors that differentiate the Deepwater Horizon blowout from other oil spills. They include the great depth – and corollary great pressure – at which the spill occurred. It is one of the largest spills in US history, and has resulted in one of the largest commercial fisheries losses. Furthermore, the US had significant leverage over the tanker market in the 1970s and 1980s due to the large quantity that went to the US. The same is not true of the offshore drilling market, so we may not have similar leverage to change the regulations.

Mr. Randle also discussed the legislative initiatives that may occur as a result of the Gulf of Mexico incident. Regarding *liability limits*, proposals may surface to increase the limits to account for inflation, or to raise them retroactively. (Mr. Randle noted that the *ex post facto* restriction on retroactive

legislation only applies to criminal statutes.) One policy argument is that retroactive raises are unfair to the companies; on the other hand, the public may feel it is unfair they have to deal with the current damages. Another potential policy issue associated with increasing limits is that insurers may not cover smaller companies, which could either drive them out of the market or stimulate the market for self-insurance. In terms of *taxes*, the per-barrel tax that is dedicated to the OSLTF may be raised. The *penalties* under Clean Water Act section 311(b)(7)(a) may be raised from the current $1000/barrel ($3000/barrel if due to gross negligence). There is an election of remedies clause associated with that penalty. Mr. Randle also addressed recent comments that the federal government should take over responsibility for *federal response* efforts. However, the US Coast Guard does not have sufficient vessel capacity to do so, and would ultimately need to contract for additional vessels because it isn't cost effective to expand fleet capacity for infrequent accidents. Finally, in light of the severity of this accident, there may be a *moratorium* on such deepwater drilling, potentially defined by depth, geography, or some combination of the two.

Mr. Randle concluded the presentations with a discussion of the expected litigation response to the Deepwater Horizon blowout. There are ongoing OSHA and criminal investigations. We will see civil enforcement, including strict liability; there is no real question over responsibility, but rather what credit they will get for response actions and the like. Parties may also seek debarment for one or all of the potentially responsible parties from government contracts. Local and state government claims for lost tax revenue may be brought under OPA 90, and private parties may seek damages under the statute. Private parties may also seek damages under state and tort law. Securities litigation may arise, for example due to the decrease in stock prices, and insurance disputes may be triggered. Finally, foreign claimants, such as Cuba and Mexico, may seek redress. It is not yet known how far the damage will spread internationally. Mr. Randle stressed that many lessons will be learned from the types and locations of the ensuing litigation, which do not represent an efficient system.

Question & Answer

Under the existing legal framework, is it possible for the federal government to temporarily requisition the expertise and equipment of private companies – other than BP – who are successfully operating at depths equal to or greater than 5000 feet, in order to try and contain the Deepwater Horizon spill?

Mr. Randle replied that the government certainly has the authority to contract (as does BP) if it believes it could productively use private expertise. The US Coast Guard does not have that ability. Regarding requisitions, the Defense Production Act of 1950 may provide the ability to do so. It's not just the equipment that is needed – it's the knowledge of how to operate in the geologically complex area.

Mr. Wagner reiterated that the primary authority for this would likely be the Defense Production Act of 1950. Secondarily, possibility may be that the incident has been declared a spill of national significance, which gives the US Coast Guard the authority to directly contract if it believed it to be necessary.

Mr. Plater mentioned that after the Exxon-Valdez oil spill the state of Alaska found it had the right to engage in *posse comitatus*.

Do other federal laws create unlimited liability for natural resources damages, such as in sanctuaries, national parks, or national refuges?

Mr. Randle mentioned that the Department of Justice has separate statutory authority to pursue recovery of such damages on behalf of federal landholders, although he is not sure if there is a limit to such recoveries. Mr. Plater added that there is no cap on what Trustees Councils can do under Superfund, the Clean Water Act, or OPA 90.

What are the conceptual categories of potentially responsible parties for the Deepwater Horizon blowout?

In addition to BP and Transocean, Mr. Plater cited discussion of the potential role as collateral defendants of other companies who contributed parts or services to the Deepwater drilling. Examples include Hyundai (who helped construct the subsurface equipment) and Cameron International (who helped handle the deep drilling equipment).

Mr. Randle emphasized that OPA 90 does not limit the number of responsible parties that the government can designate. He expects that at least on the product liability side, claimants will target everyone in the chain of commerce that helped build the rig or conduct the drilling.

It is possible to determine a general gross negligence liability number, to provide a basis for a specific fund that operators could contribute to that would both limit gross negligence liability and ensure that there is money immediately on hand in such situations? What are the legislative hurdles, and what would be the timetable for such a determination?

Mr. Randle stated that he does not think a gross negligence fund and cap is likely in the near term, especially in light of the type of NRDA that will be needed to get even a rough damages estimate for the Deepwater Horizon blowout.

Mr. Plater and Ms. Schiffer explained that under Superfund settlements and clearance letters are negotiated with EPA to achieve this sort of limitation, but that it's not a legislative process. Mr. Randle also highlighted that under Superfund there are specific statutory re-openers. It could be very difficult to get a complete signoff in the case of oil spills.

In 2000, a First Circuit decision stated that punitive damages under maritime law are displaced by OPA 90. Could you comment?

Mr. Plater commented that most of the people he speaks with think that the First Circuit decision was an outlier. The decision contradicts 2718 2751 *Exxon Shipping v. Baker* is also not a due process argument against punitive damages – the court made it very clear that it was a common law decision under maritime law, making it simple for Congress to change.

Regarding foreign claimants, what laws might apply if the spilled oil enters the Loop Current or otherwise harms other countries?

Mr. Randle noted that there is a provision in OPA 90 that addresses foreign claimants. Among other things, it requires reciprocity between the countries involved.

What are the roles played by the Regional Citizen Advisory Councils (RCACs) in Alaska, and the mechanisms for establishing similar entities in the Gulf of Mexico?

Mr. Plater explained that the establishment of RCACs was one of the primary remedial suggestions of the Alaska Oil Spill Commission Legal Task Force. The underlying theory is that industry pays the annual fees for such entities (for example, the Cook Inlet RCAC receives approximately $1 million annually, and the Prince William Sound RCAC is funded at approximately $2 million annually). The end goal is to ensure that it is the people who are harmed are the ones to internalize the decision-making. Mr. Plater state that prior to the establishment of RCACs, collusion between agency and industry kept those affected out of the process. The idea for RCACs originated with Doug Schneider, a marine scientist at the University of Alaska, and the Commission successfully recommended them for inclusion in OPA 90. Mr. Plater emphasized that the consciousness-raising of a community that stems from an RCAC would be wonderful in the Gulf of Mexico.

From a legal perspective, how do you determine an assessment of value of things like the deep ocean ecosystem, since we do not know what is there?

Ms. Schiffer stated that you first speak with the scientists, and then address the question of how to valuate the services that the ecosystem provides. There are some approaches to doing so. It is not an easy process, but it is a question that natural science and social science tackle together.

Is there potential additional liability associated with the use of dispersants? Is it possible to be liable for response actions?

Mr. Randle explained that there are specific provisions in both Superfund and OPA 90 that immunize responders if they are complying with the directions of the on-scene coordinator, absent gross negligence. This is carried from earlier statutes where you could even sink the vessel, if necessary, and still have significant legal protection.

Does case law interpret "incident" flexibly? Could each day count as an incident?

Mr. Randle provided the statutory definition of an incident under OPA 90 section 1001: "'incident' means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil." He stated that it is an elastic definition, although he is not aware of case law on the subject.

How would litigation be affected were one of the responsible parties to have contractually assumed responsibility from another?

Mr. Randle and Ms. Schiffer explained that if you have indemnification between the parties, the courts are asked to apply it. However, if the US or a State is enforcing OPA 90, the contract is of no moment – when facing the government a party cannot contract itself out of liability.

Are the monies in the Oil Spill Liability Trust Fund actually stored separately?

Mr. John Wagner noted that he assumes that the funds are carefully accounted for but are not physically stored separately.

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