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THE FORUM

Deepwater Horizon: Updating the OPA

The history of oil pollution legislation has tracked closely with oil spill disasters, from the Santa Barbara blowout in 1969, which led to the National Environmental Policy Act, to the *Exxon Valdez* in 1989, which resulted in the enactment of the Oil Pollution Act of 1990. This year's *Deepwater Horizon* disaster may well be unprecedented in terms of its scope and nature, and because industry and regulators were not prepared for such a massive spill at a depth of over 5,000 feet, this incident may similarly spur the development of new legislation.

Recent discussions on this front have focused on the OPA's \$75 million per-incident cap on economic damages and the Oil Spill Liability Trust Fund's \$1 billion cap for all restoration costs, damages, and lost use claims. The cap is not an absolute

limit — it may be lifted in cases of “gross negligence, willful misconduct or violation of a federal safety, construction or operating regulation” and it does not apply to remedies available under state or nonstatutory (for example, tort) law.

Taken together, one of the immediate questions facing legislators today is whether the available suite of statutory and nonstatutory remedies is adequate to make the public whole following this year's ecological, economic, and social disaster — and to help prevent spills from occurring, which is perhaps the more important point. What can and should be done to reform the system? Given how long it took to identify and assess the damages caused by the *Exxon Valdez* incident, how long will it be before we have the information necessary to do so?



Rebecca M. Bratspies
Professor
CUNY SCHOOL OF LAW

*“The Deepwater
Horizon disaster
marks the failure of
deregulation.”*



Kathryn Mengerink
Director, Ocean Program
ENVIRONMENTAL LAW INSTITUTE

*“Mandate baseline
ecosystem
assessments in
advance of oil and
gas activities.”*



Zygmunt J. B. Plater
Professor
BOSTON COLLEGE LAW SCHOOL

*“Will laxity and
collusion now come
to an end?”*



Russell V. Randle
Vice Chairman
ABA COMMITTEE ON SUPERFUND
AND NATURAL RESOURCES DAMAGES
LITIGATION

*“The disaster
provides lessons
on contingency
planning.”*

Contingency Planning — Lessons Learned

RUSSELL V. RANDLE

The *Deepwater Horizon* explosion, fire, sinking, and well blowout demonstrated the failure of BP's contingency plans for a worst-case accident. Congressional hearings in June strongly suggested that some of the other plans currently in place in the Gulf of Mexico would not work any better. These plans use much the same language as BP's, and contain similar errors, errors showing use of an Alaskan template without adequate updates of personnel or adaptation to local flora and fauna. The government's repeated approval of these plans suggest that regulators were not just asleep but comatose.

Five early lessons can help guide future steps to avoid similar disasters:

Prevention. Although a faster, more robust response would have prevented or slowed some environmental damage, once the blowout preventer failed no one had the technology to contain this mile-deep pressurized discharge. Responders have to deal with the oil when it reaches the surface, subject to wind, tides, and waves. The limits on such spill response place a high premium on prevention; we should expect much more detailed regulatory review of blowout preventers and offshore drilling procedures.

Paper vs. practice. The *Deepwater Horizon* had regular fire drills, drills which probably saved some lives. Sadly, there do not appear to have been any full-scale tests of BP and governmental contingency plans for a worst-case discharge. Though such a full-scale test would have been costly and time consuming, lasting several days, failure to test

these plans adequately has already cost much more. There is a military adage, "You can expect what you inspect." We should not be surprised that untested plans worked badly.

When Congress passed the Oil Pollution Act in 1990, it revised the Clean Water Act to provide that offshore facility contingency plans must provide for "training, testing, and periodic unannounced drills," among other steps. We should expect — and insist — that Congress and the administration demand periodic full-scale testing of these plans, not just at the facility (e.g., fire drills), but testing the full mobilization of resources, including vessels, onshore facilities, containment equipment, and emergency personnel, called for in the plan, with steps taken to address identified deficiencies — both private and governmental — as soon as practical.

Say what you mean, mean what you say — every day. Static contingency plans for a worst-case oil spill cannot work properly. This is especially true for a worst-case spill on the high seas, whether from a drilling rig or a tanker. The availability of vessels, people, and containment equipment like booms will change, sometimes rapidly, depending on the season, other spills, and other demands for these vessels and personnel. Key contacts routinely change. The steps to be taken may vary depending on hurricane risks, fish and waterfowl migration, and availability of governmental resources such as the National Guard.

Consequently, plans need to be checked and updated often if they are to work well. EPA rules already require oil spill contingency plans to be certified by a professional engineer, in part because improper certification may subject the engineer to professional discipline. Requiring a similar certification from key facility management for mandatory updates may help assure realistic, workable plans. False certification is an easily provable felony.

See for yourself. BP badly underestimated the discharge volume and thus the needed response. The error was compounded by regulators' initial reliance on BP estimates. Regulators need to make an early independent factual assessment to help assure an adequate response. The absence of this independent capability slowed deployment of enough surface vessels to contain the produced oil and hurt regulators' credibility with the public.

Build Government Response Capability. It is painfully clear that the federal government lacks the capacity to address a submerged spill, particularly one at this depth, but needs this capability if deepwater drilling is to continue. Fixing this problem means acquisition of manned and robotic submarines, more surface vessels and containment equipment, and addition of highly trained personnel into the Coast Guard to operate this new equipment. Fixing this problem also means adequate funding for the Coast Guard to train with the equipment, maintain it and modernize it over time — something past administrations have done poorly for a long time.

If applied, these lessons can improve prevention, increase government spill response resources, and force contingency plans to be regularly tested against reality and improved. Though more costly than the prior regime, there is nothing cheap about the cleanup and environmental damage that failure to heed these lessons has already caused.

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