

# **BLOWOUT: The *Deepwater Horizon* Incident**

## **The Legal Legacy: Investigations, Legislation, and Regulations**

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# The Rig



A large offshore oil rig is engulfed in a massive fire, with thick black smoke billowing into the sky. The rig's structure is visible, including a large circular platform on the right. The sea is dark blue.

**11 men killed  
17 injured**

**22 17:20**

- **Spill covered area from Louisiana Delta to Panama City, Florida, and a sea area of some 2,500 to 68,000 square miles**



# REACTION TO INCIDENT

- Several official commissions/investigations were convened to investigate and report on incident
  - Presidential National Commission
    - Established May 21, 2010
    - Report released January 11, 2011
  - Deepwater Horizon Joint Coast Guard/Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) Investigation
    - Convened April 27, 2010
    - Final Report due July 27, 2011

# REACTION TO INCIDENT

*(continued...)*

- Coast Guard Incident Specific Preparedness Review (“ISPR”)
  - Convened June 14, 2010
  - Report released March 18, 2011
- Department of Justice Criminal Investigation
- Congressional hearings in both House and Senate
- A multitude of legislation proposed in 2010
- BP has spent over \$19 billion plus \$20 billion for the Gulf Coast Claims Facility

# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

- H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009 (the “CLEAR Act”)
- H.R. 3534 Passed by the House prior to the August 2010 recess
- S. 3663, the Clean Energy Jobs and Oil Spill Accountability Plan introduced by Senator Reid on July 28, 2010
- Opposition to unlimited liability language in S. 3663
- In response, Senate measures introduced intended to hold oil companies accountable without placing a burden on taxpayers and shutting smaller companies out from operating offshore





# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

## Key Provisions in the CLEAR Act (H. 3534)

- *Section 220: Manning and Buy and Build American Requirements:* Apply U.S. immigration laws offshore
- *Section 702: Repeal of and Adjustments to Limitation on Liability:* Retroactively repeal liability limits for offshore facilities (currently \$75 million damages and unlimited removal costs) and require review of liability limits every three years for vessels and onshore facilities
- *Section 703: Evidence of Financial Responsibility:* Increase financial responsibility requirements for offshore facilities and revision upward every three years unless President determines lower amounts
- *Section 704: Damages to Human Health:* Add “damages to human health” as compensable under OPA 90



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- *Section 708: OPA 90 Amendments and Clarifications:* Add “costs of federal enforcement activities” to the definition of removal costs under OPA 90
- *Section 709: Americanization of Offshore Operations in the Exclusive Economic Zone (“EEZ”):* Require vessels involved in offshore-related activities to be U.S. flagged (and thus U.S. crewed) and 75% U.S. owned effective July 1, 2011. Also applies to alternative energy projects, lightering operations, and freight carriage
- *Section 713: Double Hulls:* Accelerate double hull requirement for tankers offloading in lightering zones or deepwater ports
- *Section 714: Repeal of Response Plan Waiver:* Repeal the current waiver authority to operate without an approved oil spill response plan



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- *Section 717: Evaluation and Approval of Response Plans; Maximum Penalties:* Would require public notice and comment on response plans and increases the civil penalties available for oil spills (retroactive to *Deepwater Horizon*)
- *Section 719: Implementation of Oil Spill Prevention and Response Authorities:* Require agencies to develop and maintain capability to respond and the Coast Guard to act as a first responder
- *Section 724: Clarification of Memorandums of Understanding:* Require federal agencies to clarify the roles and jurisdictional responsibilities relating to the prevention of oil discharges



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- *Section 725: Build American Requirement for Offshore Facilities:* Require offshore facility (including a Mobile Offshore Drilling Unit) to be built in the United States unless meet waiver requirements for emergency/non-availability
- *Section 731: Extension of Liability to Persons Having Ownership Interests in Responsible Parties:* Extend definition of a Responsible Party to any person having more than a 25% ownership interest in a vessel or facility retroactive to January 1, 2010



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- Key Provisions in the Clean Energy Jobs and Oil Spill Accountability Act (S. 3663)
  - *Section 102: Removal of Limits of Liability for Offshore Facilities:* Eliminate the current \$75 million damages limitation cap
  - *Section 104: Oil and Hazardous Substance Response Planning:* Additional requirements for oil spill response plans (response to a loss of well control methods and equipment technologically feasible and prior assessment of potential impacts to ecologically-sensitive areas). Publish response plan in the *Federal Register* and provide comment period
  - *Section 502: Repeal of Limitation of Shipowners' Liability Act of 1851:* No longer limit liability of vessel owner for personal injury or death claims



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- *Section 503: Assessment of Punitive Damages in Maritime Law: Overrule Exxon Shipping Co. v. Baker (i.e., 1-to-1 test) and allow unlimited punitive damages*
- *Section 504: Amendments to the Death on the High Seas Act: Amend the Death on the High Seas Act to enhance remedies for wrongful death to include non-pecuniary losses (loss of care, comfort, and companionship)*
- *Section 624: Oil Spill Evaluation Technology: New program and process for evaluation/validation of oil spill containment and removal technology*



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

- *Section 625: Coast Guard Inspections:* Mandate improvements in the frequency and comprehensiveness of Coast Guard inspections on U.S.- and foreign-flag tank vessels
- *Section 626: Certificate of Inspection Requirements:* Significant enhancement of standards to issue vessel a certificate of inspection
- *Section 630: Vessel Liability:* Would increase the limits of liabilities for all tank vessels



# CONGRESSIONAL ACTION FOLLOWING THE INCIDENT

*(continued...)*

## 112<sup>th</sup> Congress 2011

- Many bills with similar provisions introduced
- *H.R. 501; Implementing the Recommendations of the BP Oil Spill Commission Act of 2011 (Rep. Markey – MA):* Would implement many of the Commission recommendations and many of the CLEAR Act provisions passed by the House in 2010

# BOEMRE ACTIONS

- Increased Safety Measures for Energy Development on the OCS (NTL 2010-N05 – June 8, 2010): New safety policies following the incident
- Information Requirements for Offshore Plans (NTL 2010-N06 – June 18, 2010): Blowout scenarios, worst case discharge calculations and plans
- Interim Rule on Increased Safety Measures (October 14, 2010): Implements May 27, 2010 Safety Measures Report to the President (*e.g.* drilling regulations, blowout preventers, well casing, and cementing)

# BOEMRE ACTIONS

*(continued...)*

- Final Rule on Safety and Environmental Management Systems (October 15, 2010):  
Requires operators to integrate a comprehensive safety management system into OCS operations including third party auditors
- Adequate Spill Response and Well Containment Resources (NTL 2010-N10 – November 8, 2010):  
Operators must sign statement of compliance that company operating in compliance with all new requirements and BOEMRE reviewing response and containment capabilities
- Establishment of Ocean Energy Safety Advisory Committee: First meeting scheduled April 18, 2011
- BOEMRE approved eighth deepwater well April 1, 2011



# INVESTIGATIONS

- Presidential National Commission Findings
  - 380-page report includes an additional 60 pages of recommendations
  - Report concludes “systemic” problems across the industry
  - Indictment of the industry in its failure to prepare adequate plans to respond to a major incident
  - grossly inadequate federal oversight



# INVESTIGATIONS

*(continued...)*

- Joint BOEMRE/Coast Guard Investigation
  - Last hearings on blowout preventer held last week
  - Joint interim report regarding the investigation scheduled mid-April
  - Primary purpose is to investigate and determine the cause of the accident
  - Final report due no later than July 27, 2011.
  - Coast Guard report published by April 20 anniversary date?



# INVESTIGATIONS

*(continued...)*

- ISPR Report
  - Published without any notice
  - ISPR team composed of representatives from federal, state, local agencies and industry
  - Purpose is to assess Coast Guard preparedness process and initiate corrective actions
  - Recommends complete review of private sector oil spill response capability to respond to worst case offshore facility discharge
- DOJ Civil Penalties
  - DOJ has filed a complaint for damages and civil penalties in the Multi-District Litigation
  - On a per barrel basis, a civil penalty could be pursued in the vicinity of \$5.4 billion. For gross negligence the fine could be up to \$21 billion



# INVESTIGATIONS

*(continued...)*

- DOJ Criminal Investigation
  - Waiting for investigations to wrap up
  - Change in Task Force from Environmental Crimes Section to Criminal Division
  - Manslaughter Charges
  - Fraud Charges



# Prediction



- Republicans control the House
- Congress will wait until the joint BOEMRE and Coast Guard investigation is completed
- It took Congress 18 months after the *Exxon Valdez* incident to pass OPA 90
- Congress will consider actions taken by the Coast Guard and BOEMRE since the incident
- Legislation enacted will likely address the following items:
  - Limits of Liability
  - Limitation of Liability Act
  - Response and Containment planning standards
  - Response technology

# SAFE PASSAGE

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## QUESTIONS??

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