

The Legal Legacy: Investigations, Legislation, and Regulations

Roger Williams University School of Law April 13, 2011

Jonathan K. Waldron Blank Rome LLP

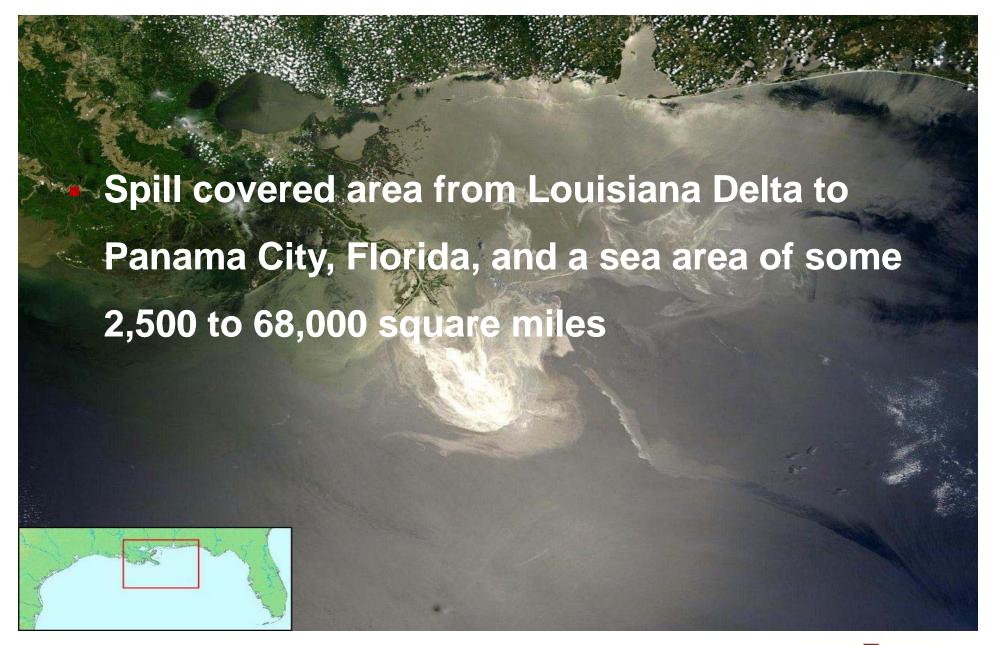












REACTION TO INCIDENT

- 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



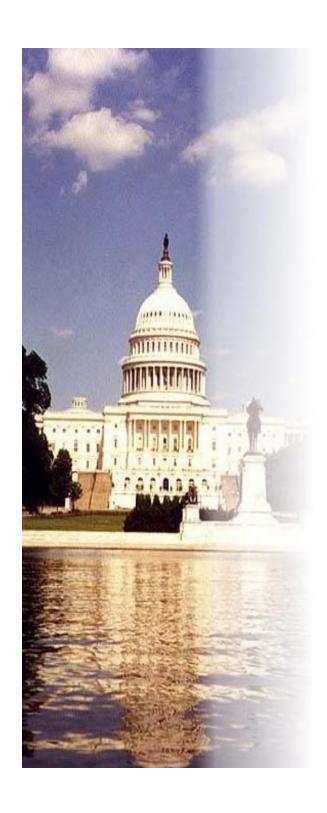
REACTION TO INCIDENT

- 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





- 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

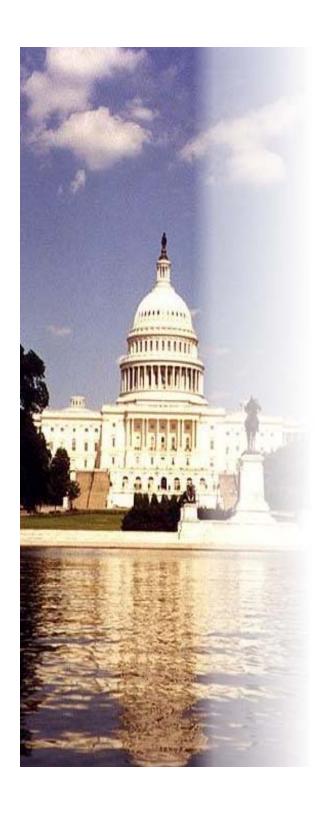


(continued...)

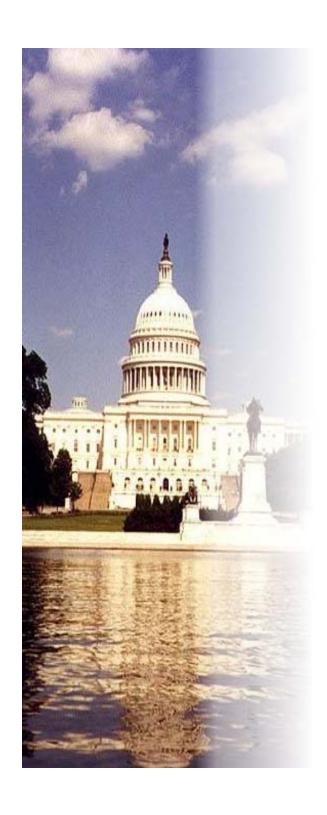
Key Provisions in the CLEAR Act (H. 3534)

- 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

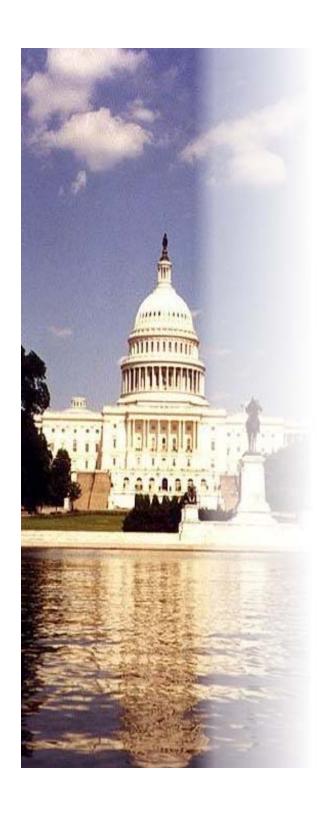




- Section 708: OPA 90 Amendments and Clarifications:
 Add "costs of federal enforcement activities" to the definition of removal costs under OPA 90
- Section 709: Americanization of Offshore Operations in the Exclusive Economic Zone ("EEZ"): Require vessels involved in offshore-related activities to 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



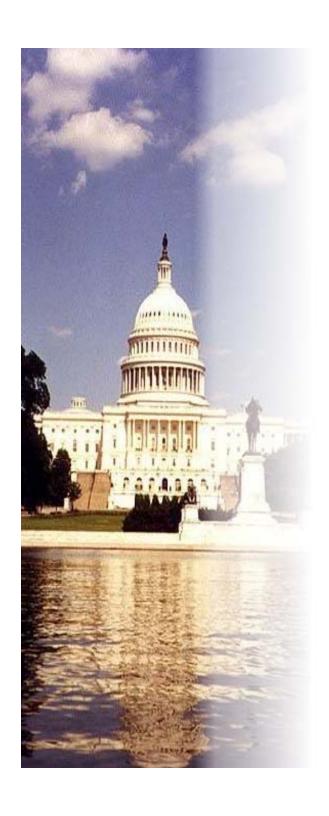
- Section 717: Evaluation and Approval of Response Plans; Maximum Penalties: Would require public notice and comment on response plans and increases the civil penalties available for oil spills (retroactive to Deepwater Horizon)
- Section 719: Implementation of Oil Spill Prevention and Response Authorities: 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



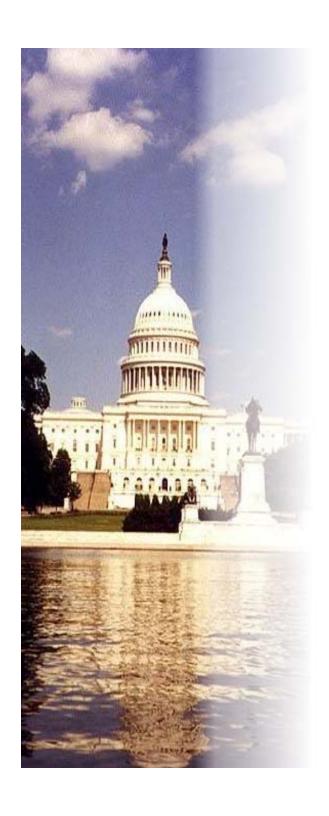
- Section 725: Build American Requirement for Offshore Facilities: Require offshore facility (including a Mobile Offshore Drilling Unit) to be built in the United States unless meet waiver requirements for emergency/non-availability
- Section 731: Extension of Liability to Persons
 Having Ownership Interests 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



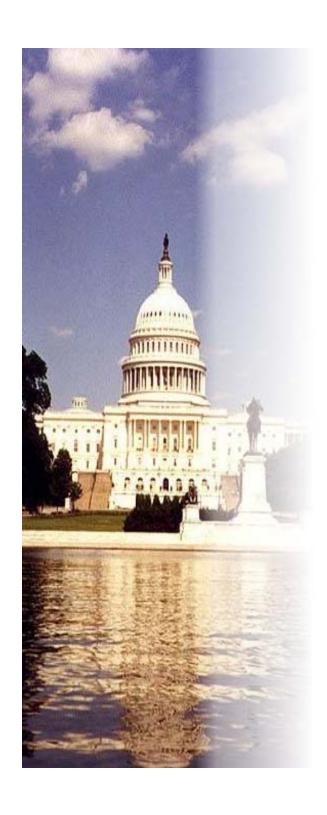
- Key Provisions in the Clean Energy Jobs and Oil Spill Accountability Act (S. 3663)
 - Section 102: Removal of Limits of Liability for Offshore Facilities: Eliminate the current \$75 million damages limitation cap
 - Section 104: Oil and Hazardous Substance Response
 Planning: Additional requirements 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



- 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



- 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



(continued...)

112th 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
- <u>Interim Rule on Increased Safety Measures (October 14, 2010)</u>: Implements May 27, 2010 Safety Measures Report to the President (*e.g.* drilling regulations, blowout preventers, well casing, and cementing)

BOEMRE ACTIONS

- 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





- 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



- 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?



(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 pursed in the vicinity of \$5.4 billion. For gross negligence the fine could be up to \$21 billion





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

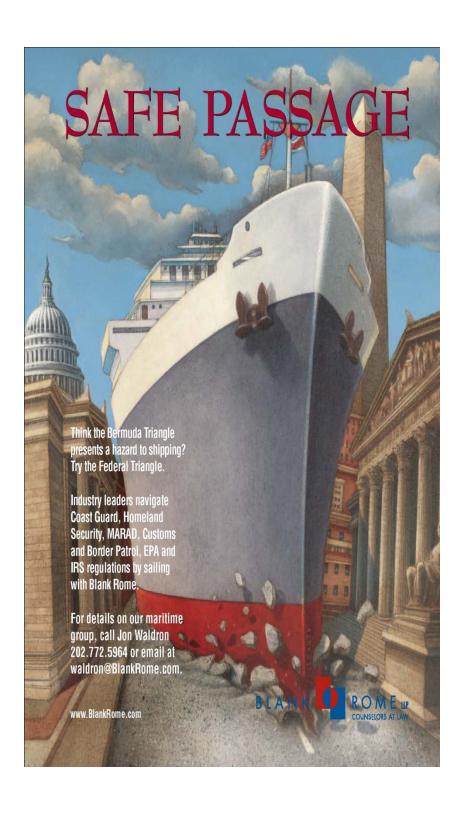




Prediction



- 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



QUESTIONS??

CONTACT:

Jonathan K. Waldron, Partner
Blank Rome LLP
202.772.5964
Waldron@BlankRome.com