



By Elliott P. Laws

## In the Gulf, BP Faces a Tragedy

The explosion of the *Deepwater Horizon* drilling rig killed 11 workers. If that wasn't tragedy enough, the leaking well is estimated to be pouring between 20,000 and 40,000 barrels of crude oil into the Gulf of Mexico on a daily basis. Those figures translate into as much as 1.68 million gallons released every 24 hours. By comparison, the 1989 spill of the *Exxon Valdez* was approximately 11 million gallons, total.

This event, clearly the greatest environmental disaster in the United States since the Dust Bowl, has killed fish, sea mammals, and birds; caused a virtual halt to all seafood harvesting operations in a large swath of the Gulf of Mexico; and caused untold millions of dollars of damages to thousands of people who rely directly or indirectly on the gulf for a living.

As I am writing this, internal BP as well as multiple federal and congressional investigations are just getting up to speed. The Department of Justice recently announced that it was commencing both civil and criminal investigations into the explosion and the resultant leak. As these investigations unfold and engineers continue to try to stop the flow of oil, we were initially reminded by many that this was a freak accident that could not have been predicted. Yet in a 2000 plan for a proposed drilling rig to

be launched in the gulf by Shell, the Minerals Management Service wrote that while highly unlikely, such an event could happen — and predicted it in a manner that is eerily similar to what happened to the *Deepwater Horizon*. The MMS report forecasts that deep water spills would probably be larger than those in shallow water; that chemical dispersants would have a negative impact on birds and fish; that wetlands could be severely impacted; and that submerged oil would likely be a problem.

Anecdotal reports from survivors of the *Deepwater Horizon* and family members of the deceased workers allege that corners were cut and procedures, including safety, were sidestepped with increasing frequency. While this has not been established as fact it causes significant concerns — especially in light of BP's recent experiences.

I wrote a couple of years ago about the recommendations that resulted from another BP tragedy — the 2005 Texas City explosion where 15 refinery workers were killed. That column focused on the recommendations that were contained in the reports issued by both the Chemical and Safety Hazard Investigation Board and BP's own independent investigation chaired by former Secretary of State James Baker.

While criticizing BP's lack of commitment to process safety management, both reports called for an increased obligation of senior corporate management at and above the facility level and including the board of directors to ensure that the commitment is both implemented and strongly communicated to everyone who worked for the company. At the time I said of the recommendations, "I would not like to be a responsible corporate official who has not examined the company's EHS management system in light of these two

studies and has a major environmental accident to deal with. . . . Their focus is on safety, but that accountability will be equally expected after an environmental tragedy."

It seems to be some perverse joke by the gods of chance that BP itself is the company now facing the "environmental tragedy." But the warning should be heeded by all. This disaster is *not* an oil industry problem and its impacts will not be limited to worst-case scenario analyses. While some may ultimately believe that the results of the *Deepwater Horizon* will follow the old legal axiom that "hard cases make bad law," what this hard case will clearly result in is tough law.

After BP has stopped the leak and cleaned the oil; after the causes of the explosion are memorialized in reports and lawsuits and likely indictments; then we will see how this incident has truly changed the way industry will operate in this country. We will see what types of operational

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risks the government will now assume to be "reasonable," we will see what types of financial reserves must be held to insure against the unthinkable and the

unexpected, and we will see whether activities which carry some highly remote consequences are nonetheless so potentially catastrophic that they will not be allowed.

But in the meantime, all should remember the Texas City reports — because even more than before, "I would not like to be a responsible corporate official who has not examined the company's EHS management system in light of these two studies and has a major environmental accident to deal with."

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