

FINANCIAL TIMES

BP Faces Battle to Cap Legal Liabilities

By Michael Peel and Sylvia Pfeifer in London and Anna Fifield in Washington

Published: August 3 2010

BP is likely to be locked in legal battles over its liabilities from the [Gulf of Mexico oil spill](#) for many years. But the US government's most recent [estimate of the spill, at 4.9m barrels](#), has provided the first glimpse of the battleground over official penalties.

While the [\\$21bn \(€15.9bn, £13.2bn\) fine that could be levied under the Clean Water Act](#) is the most eye-catching, the justice department is investigating whether criminal or civil cases are warranted in relation to the spill.

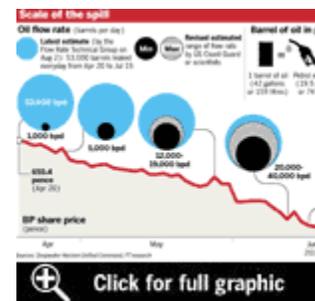
If so, BP could also face charges under the Oil Pollution Act of 1990, the Migratory Bird Treaty Act and Endangered Species Act, the Refuse Act and other "traditional" criminal statutes, says the justice department.

Making matters worse for BP, the new US oil drilling regulator said on Tuesday that he wanted to increase the penalties that his agency could levy on violators such as BP, and in a way that would allow him to take into account past transgressions.

"I do think that what a regulator such as I can do is take a company's safety record into account in imposing sanctions. That's something that can be done and frankly should be done," Michael Bromwich, who has been the director of the US Bureau of Ocean Energy Management for six weeks, told reporters.

The bureau, part of the interior department, was formerly known as the Minerals Management Service. It was renamed as part of a wide-ranging shake-up that involved Mr Bromwich being installed as its head and the agency being split into three.

During his review of the bureau, Mr Bromwich said he had concluded that the penalty structure – \$35,000 per day for a violation – was inadequate.



“My initial reaction to that was, ‘What if you have a massive bad act by someone but it only lasts one day? Is it really sensible to limit the fine that I can impose on this to \$35,000 a day?’ I don’t think it makes any sense at all.”

Mr Bromwich, a former inspector general of the justice department and federal prosecutor, said he was looking into what combination of rule-making and legislation was needed to strengthen the bureau’s clout.

“I think there is a real virtue to a penalty structure that deters – that deters the violator and that deters the rest of the industry because they see that the regulator means business,” he added.

Lawyers said that one of the biggest fights between BP and the authorities was likely to be over whether the company was guilty of [gross negligence](#) – a charge that would need to be proved if it were to be fined the maximum \$21bn under the Clean Water Act.

In the absence of gross negligence, which would probably require detailed evidence such as conversations and documentary records, the maximum penalty would be only a quarter of that.

Lawyers said BP and any other companies targeted by the authorities could also try to lessen the sting of the government action by seeking to discredit the official estimate of the size of the spill and by arguing that there were mitigating factors.

Gregory Evans, a California-based lawyer who acted in the bankruptcy of Asarco, the US copper producer, said his experience showed that government estimates of environmental liabilities could be “wildly exaggerated”.

“In the Asarco bankruptcy . . . the government claimed that environmental liabilities exceeded \$6bn,” he said. “In the end, the government agreed that \$1.8bn constituted full payment – 100 cents on the dollar – for all environmental claims.”

The companies could call independent experts to question the 4.9m-barrel leak estimate, which the government has already acknowledged has a margin of error of 10 per cent either way.

BP could also argue that it deserves some credit for containing 800,000 barrels of the 4.9m, as calculated by the government, although lawyers said this release was still technically a breach of the law. It is also likely to try to draw in other companies, such as business partners and contractors, to take at least some of the blame.

Richard Wiedman, an attorney with Eckert Seamans Cherin & Mellott in Pittsburgh, said that while it was “unusual for any penalty case to result in anything close to the calculated maximum”, this was not a typical case.

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