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BP spill costs to soar, say experts

By Ed Crooks in New York
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The Deepwater Horizon disaster is likely to end up costing BP much more than the \$40.9bn it has so far paid out and set aside, according to US legal experts who have worked on large pollution cases.

BP and the US authorities are expected to seek an eventual global settlement that rolls up into a single deal the company's liability for fines, damages and other penalties.

Calculations based on US legal opinions and precedents including the Exxon Valdez spill of 1989 suggest that this settlement could run into tens of billions of dollars.

The US Department of Justice is pursuing both civil and criminal investigations into the disaster and there will be a strong incentive on both sides to wrap all of those actions up into a single package.

Alfred Kuffler, a lawyer at Montgomery, McCracken, Walker & Rhoads, who has experience of pollution cases, says: "In terms of managing the risk, there is a lot to be said for capping the loss as best you can."

Daniel Jacobs, former DOJ attorney, now director of the sustainability management programme at American University, says there is a precedent in the agreement that BP reached in 2007 to settle penalties for the 2005 Texas City refinery explosion, pipeline spills in Alaska, and improper propane trading.

"The Texas City settlement was incorporated into one of the most remarkable package deals that I have ever seen," says Professor Jacobs. "Multiple violations under different statutes, civil and criminal penalties were all settled in one package. My suspicion is that there is talk behind the scenes to reach a similar global settlement for the gulf disaster."

David Pettit, a senior attorney at the Natural Resources Defense Council, an environmental group, guesses that in such a settlement BP "would be lucky to get out of it for less than \$100bn". Other estimates suggest that figure is excessive. But the outcome still looks likely to be significantly more than BP has so far paid out or provided for.

Costs of the spill already published by BP include the \$13.6bn spent already or expected to be spent in the future on responding to the disaster, and up to \$20bn for the Gulf Coast Claims Facility to compensate for financial losses. BP says the total pre-tax charge of \$40.9bn includes “estimated obligations for future costs that can be estimated reliably at this time”. It adds that the total bill is “subject to significant uncertainty”.

In particular, it has not included any estimate of natural resource damages claims, and other fines and penalties, except for an estimated \$3.5bn charge under the Clean Water Act. Legal experts expect the US authorities to push for penalties that are much higher.

BP’s estimate of \$3.5bn under the CWA, for example, is based on its argument that it was not guilty of gross negligence, giving a penalty of \$1,100 per barrel spilt. If gross negligence is found, that rises to \$4,300 per barrel. Government scientists have estimated that 4.9m barrels of oil came out of the well, but BP in its 2010 annual report said it had continued to use an estimate of 3.2m barrels as “its current best estimate”.

Gross negligence is hard to establish in court. But David Uhlmann, the former top environmental crimes prosecutor at the DOJ, now at the University of Michigan, argues: “The government will not let BP pay only \$1,100 per barrel spilled.”

He adds: “They may allow BP to pay based on the higher gross negligence figures without having to admit gross negligence, which is what matters most to BP.”

Natural resource damages and resulting fines are even harder to assess, with an initial report due in October and final conclusions next year.

But Gregory Evans, a Los Angeles-based lawyer specializing in environmental litigation, says natural resources damages “can swing wildly from the billions into the tens of billions of dollars.”

He adds: “These damages are large, and quite often eclipse even the clean-up cost of the incident.”

Even if a deal is reached with the US authorities, there will still be claims from businesses, individuals and other bodies who have suffered as a result of the spill.

BP hopes to recover some of the costs from other partner companies involved. It owns only 65 per cent of the Macondo well, while Anadarko Petroleum has 25 per cent and Mitsui Oil Exploration 10 per cent, and says those companies are liable for their shares of the spill costs. Its case will be stronger if it does not have to admit gross negligence. However, the other companies plan to resist that attempt. Even so, BP is still likely to accept that it is worth reaching an agreement to secure its future in the US, where it has 27 per cent of its oil and 32 per cent of its gas reserves.