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Phone + 1 646 783 7100 | Fax: + 1 646 783 7161 | customerservice@portfoliomedia.com

BP Spill Causes Spike in Enviro Litigation

By Jesse Greenspan

Law360, New York (July 09, 2010) – Environmental litigation has skyrocketed as massive quantities of oil continue to spew into the Gulf of Mexico and as the Obama administration ramps up its enforcement regime, with more lawsuits filed in the second quarter of 2010 than in any quarter in 2009.

A Law360 analysis found that 279 environmental cases were filed in federal court in the second quarter of 2010, compared to 161 in the first quarter – a rise of 73 percent. In fact, 110 federal environmental cases were lodged in May alone, a month that started a week-and-a-half after the Deepwater Horizon accident.

The 279 environmental cases filed in April, May and June represents a significant increase compared to any point in 2009, when 173 were filed in the fourth quarter, 197 were filed in the third quarter, 174 were filed in the second quarter and 165 were filed in the first quarter.

Overall litigation increased by 7 percent from the first quarter to the second quarter of 2010, the analysis found. Environmental cases made up 0.39 percent of all federal cases in April, May and June of this year and 0.24 percent of cases the previous three months, according to the analysis.

The Gulf spill was one obvious factor for the increase in litigation. For example, since the April 20 accident, property owners, fishermen, shrimpers, restaurants and other plaintiffs have lodged dozens of natural resources damages claims against Transocean Ltd., which owned the sunken Deepwater Horizon rig; BP PLC, which leased the rig; and certain contractors.

Meanwhile, environmental groups have taken aim at the Minerals Management Service for exempting oil companies drilling in the Gulf of Mexico from disclosing blowout and worst-case spill scenarios, and for its “categorical exclusion” exemption policy – which allowed many oil companies, including BP, to drill without an environmental impact statement.

“I think that MMS has been the mother of many lawsuits, and . . . the more you look the more you see lawsuits that need to happen because the agency was really acting in a lawless way,” said Pattie Goldman, vice president for litigation at the nonprofit environmental law firm Earthjustice.

Other environmental lawsuits to come out of the spill include one that accused the U.S. Department of the Interior of approving lease sales, seismic surveys and drilling operations without permits required by the Marine Mammal Protection Act and the Endangered Species Act; another that sought \$19 billion in damages from BP and Transocean for Clean Water Act violations; and a third that accused BP of using dispersants that were four times more toxic than the oil itself.

Still more cases are trying to nullify new exploration plans for the Gulf of Mexico.

“Obviously, there are a slew of BP-related actions,” said Wray Blattner, a partner in the environmental practice group at Thompson Hine LLP.

But the spill was not the only reason for the rise in litigation, according to Blattner.

“In my practice, I’m seeing a much more aggressive enforcement posture at the federal level, both in civil and criminal enforcement proceedings,” he said, adding that the Obama administration has shown “a definite change and emphasis on enforcement compared with the Bush administration.”

For example, there have been more asbestos management actions dealing with the demolition or renovation of buildings, Blattner said.

Changes in policy have generated industry challenges, including to certain U.S. Environmental Protection Agency actions trying to rein in greenhouse gas emissions, experts said.

One of those suits, brought by 13 Republican lawmakers and 17 companies in the first quarter of 2010, called the EPA’s endangerment finding an “unprecedented power grab,” and blamed the EPA for not considering evidence that global warming isn’t man-made but cyclical and not as extreme as the United Nations’ Intergovernmental Panel on Climate Change had reported.

In later suits, industry groups took issue with the EPA’s tailoring rule, which subjects large industrial facilities to Clean Air Act regulations, and with the EPA’s new national standards for cars and light-duty trucks.

“The environmental policy of the United States is designed to protect the environment for the future and the present, but it’s also supposed to avoid interference, as much as possible, with the efficiency of business and commerce and the freedom of people,” said Gregory Evans, an environmental litigation attorney with the Los Angeles-based Integer Law Corp.

At the other end of the spectrum, there has been an almost “exponential increase” in citizen suits, according to Pam Giblin, chair of Baker Botts LLP’s environmental department.

“Those have really been fast and furious,” Giblin said. “There’s definitely an uptick.”

As an example, she pointed to an environmental group out of the Boston area that has been suing facilities in the Houston area for alleged Clean Air Act violations.

As for the future, experts predicted that the number of new cases would remain high, even after BP oil spill suits stopped coming in.

“We still have lost and lots of work going on with clean air and coal plants,” Goldman, who added that water issues would likewise see a steady stream of litigation.

“In the West, it’s a water scarcity issue, and that’s only going to get more pronounced with population growth and climate change,” she said.