Rising US production may stimulate more OPA scrutiny, ELI forum told

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Federal requirements under the 1990 Oil Pollution Act (OPA), which came into question following the 2010 Macondo deepwater well blowout and crude oil spill, appear likely to get a fresh look as US onshore crude production climbs and producers scramble to get it to market, suggested some participants in a recent Environmental Law Institute seminar.

"OPA began as a response to the Exxon Valdez spill, and was focused on marine transportation initially," said Russell V. Randle, a Partner at Patton Boggs LLP's Washington, DC, office who moderated the discussion. "But there also have been major spills involving pipelines, rail transportation, and barge transportation in the time since.

"As a policy matter, we're seeing symptoms of a much broader issue: We have to move a lot more domestic oil than we originally thought," he continued. "Much of it is in places that are a significant distance from where it can be refined. That's causing us to make a lot of difficult transportation choices."

William D. Brighton, assistant environmental enforcement section chief at the US Department of Justice's Environment and Natural Resources Division, agreed as he expressed his personal views.

"There's a real change in oil production, with much of it taking place a long way from refineries," he said. "This is leading to more demand for long-distance transportation. Some of it is testing transportation in new ways, such as the mixture of tar sands into diluent which could create different problems if there are any releases."

Domestic OPA violations since the law's enactment have involved marine vessel collisions and groundings, pipeline ruptures, train derailments, truck accidents, offshore drilling rig accidents, and unintended onshore releases at production, storage, and refining facilities, Brighton said.

'A case to watch'

He said the July 25, 2010, rupture of Enbridge Energy Partners LP's crude oil pipeline was "a case to watch" since diluent that leaked made its way into a waterway. "If you were to ask industry whether pipelines, many of which are 40-50 years old, are capable of handling all this new production, it would cheerfully say 'yes,'" Brighton said. "Yet there still are incidents. Government doesn't do a much better job of anticipating where there will be problems."

OPA and the Clean Water Act provide a pretty powerful set of tools to address these issues, he continued. "They're
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But the Macondo spill was the single incident most responsible for stimulating demands for reform because it was so big, he maintained. “Issues in smaller incidents involving changes in the environment can be ignored in some cases, but not when something is this large,” he said. “There’s tension between the desire to move quickly and making sure strong science is the basic for action.”

Courts sometimes exercise wide discretion in OPA violation cases, according to William T. Hassler, a partner at Steptoe & Johnson LLP’s Washington office. In a 2013 case involving a more than 50,000 bbl wastewater discharge from a Citgo Petroleum Corp. refinery in 2006, the US government sought a $247 million ($3,000/bbl) civil fine that the trial judge reduced to $6 million ($111/bbl), he noted.

Both parties appealed to the Fifth US Circuit Court, which reversed the lower court’s decision. Its key penalty factor holdings under the federal Clean Water Act, Hassler said, included:

• No bar to action based on state enforcement action.
• Insufficiently detailed findings by the lower court on the economic benefit issue.

In the case involving the Mar. 29, 2013, spill of some 5,000 bbl from ExxonMobil Pipeline Co.’s line in Mayflower, Ark., he said the state and US Environmental Protection Agency sued within 3 months. “Under OPA, the federal government can be preempted if the state is moving quickly already,” he said. “That might have been a factor in Arkansas and the federal government working quickly together on this.”

OPA, CERCLA differences

Hassler said significant differences exist between federal enforcement powers under OPA and under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—more commonly known as Superfund—which became law 10 years earlier. “In my experience, the government has authority under CERCLA it doesn’t have under OPA,” he said. “Third-party landowners have to give access to companies for cleanup under CERCLA that doesn’t necessarily exist under OPA, for example.”

Randall B. Luthi, a former US Minerals Management Service director who now is the National Ocean Industries Association’s president, said OPA nevertheless laid a good foundation for responding to the Macondo well spill.

“I think we need to let the civil and criminal cases proceed before we can consider whether OPA needs to be changed,” he said. “A lot of good features already were in place: OPA set up staging areas to be used in case of spills. Industry moved quickly after the spill. Its actions may be why we haven’t seen a lot of wide-scale changes.”

Luthi said the initial Macondo response by the Marine Spill Response Corp., which was formed after the 1989 Exxon Valdez’ grounding in Alaska’s Prince William Sound, showed enhanced mechanical and boom recovery capabilities, proved in-situ burning was effective (but requires fire-resistant booms), advanced XPrize and other new skimming technologies, launched dispersant use studies, and employed remote sensing with Xband Radar and other infrared cameras.

“Probably the most frustrating part of all this is that when people saw all this oil coming out of the well, they wondered why the industry simply couldn’t put something over it,” he said. “We now have equipment which has been developed and which we can deploy in a matter of days instead of the 3 months it took in 2010.”

Luthi said that the RESTORE Act, which became law on July 6, 2012, changed where Macondo spill damage fines can be used, with 80% now going to states. “When it comes to natural resource damages, a lot of people are frustrated,” he observed. “Science takes a long time, and is usually done in connection with litigation. It takes a long time to get proper peer review.”

More comprehensive look

Cynthia Sarthou, the New Orleans-based Gulf Restoration Network’s executive director, said it was a good that a natural resources damage assessment (NRDA) came so quickly after the Macondo well accident and spill, but added that it quickly became apparent a comprehensive look was essential.

Her group felt a programmatic environmental impact statement would stimulate a high-level review of impacts that would help create a comprehensive restoration approach, she indicated. This would allow selections that would foster coordinated, and sometimes simultaneous, projects.

“One problem is that NRDA essentially is litigation, which means that a lot of agreements aren’t accessible to the public,” Sarthou said. “Most of what’s going on is taking place behind closed doors. Instead, we’ve seen a piecemeal funding of projects based on what states say they can prove as damages and negotiations with BP for offsets.”

“I think OPA created a good framework, but it didn’t contemplate an event of this size,” she said, adding, “This creates ecosystem questions that will be difficult to answer and take decades to assess. After the Exxon Valdez disaster, the herring population didn’t start to decline for 4-5 years. How do you address this through litigation?”

Offshore liability limits should be increased, Sarthou said. “Our concern is that there are small companies doing very dangerous things offshore and in the deepwater,” she said. “If they can’t pay the damages, they shouldn’t be out there.” But Luthi said unlimited liability would put many smaller, but essential, offshore service companies out of business.

“Is OPA still adequate? I’d say the jury is still out,” he said. “There may not necessarily be changes, but there certainly will be a lot of discussion.”