

MONTGOMERY, McCracken, Walker & Rhoads, LLP

ATTORNEYS AT LAW

ALFRED J. KUFFLER
ADMITTED IN
PENNSYLVANIA & NEW YORK

123 SOUTH BROAD STREET
AVENUE OF THE ARTS
PHILADELPHIA, PA 19109-1029
215-772-1500
FAX 215-772-7620

DIRECT DIAL
215-772-7454
akuffler@mmwr.com

MEMORANDUM

FROM: ALFRED J. KUFFLER, ESQUIRE
RE: DEEPWATER HORIZON LEGISLATIVE PROPOSALS
DATE: MAY 20, 2010

Over the last forty-five years each major pollution incident including the Torrey Canyon in 1967, the Union Oil blowout in Santa Barbara Channel in 1971, the Exxon Valdez in 1989, the Erika in 1999, the Prestige, and now the Deepwater Horizon, exposed weaknesses in both the regulatory and compensation programs as they existed at the time of these spills. These revelations led first to private compensation agreements followed by increased regulation and expanded compensation regimes.

The aftermath of the Deepwater Horizon spill is proving to be no different from its predecessors..

Congressional hearings are certainly exposing deficiencies in the enforcement of existing regulatory programs and will in all likelihood produce both increased oversight and tighter regulatory requirements. Likewise, the sheer scale of the losses being incurred, quite apart from the politics of the moment, is causing Congress to review the current compensation requirements as channeled through the Oil Pollution Act of 1990.

Among the proposals already pending is that of the Obama Administration which was sent to the House of Representatives on May 12, 2010. The proposal, while technically to be

included in the fiscal year 2011 budget, in fact includes amendments to OPA-90, and other statutes.

As to liability limits, for vessels of all kinds the Administration proposes that the current provisions applicable to offshore facilities imposing on the “responsible party” liability for all “removal costs “plus an amount for “damages” to be determined by Congress. There are also amendments to several other statutes dealing with loss of income arising out of the Deepwater Horizon as well as subsidies for unemployment compensation related to this spill. Ultimately the RP under OPA-90 would be responsible for these amounts and, most importantly, such sums would fall outside the limits discussed above.

Nothing is said about adjustments to certificates of financial responsibility for vessels which currently are based on the Act’s tonnage limitations.

However, of considerable interest is the retroactive applicability of the proposal. The Administration would apply the amendments not only to the Deepwater Horizon spill, but also all incidents occurring before the effective date of the amendments to OPA-90. The proposed legislation states as follows:

Effective Date. This section shall take effect immediately upon enactment and shall apply to all responsible parties under the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.) including any party determined to be liable under the Oil Pollution Act for any incident that occurred prior to the enactment of this section. (emphasis added)

This latter provision means that the new limits will apply to any open OPA incidents which took place prior to the enactment of this legislation. Needless to say, such a provision has disturbing implications for RPs who have in the past estimated their exposure based on current OPA-90 limits and arranged their insurances and other programs for protection of the their financial position accordingly.

The immediate question arises as to the validity of any such enactment. While such an analysis requires detailed legal research it can be said as a general matter that Congress can decree legislation involving civil matters applies retroactive.

In fact, CERCLA (the Comprehensive Environmental Response Liability and Cleanup Act) on which the liability provisions of OPA-90 are patterned may provide guidance. There the courts upheld CERCLA's application to polluting activities which took place long before CERCLA became law on the basis that Congress was addressing the ongoing consequences of prior conduct, and not the legality of the conduct itself. It appears that the draftsmen of the Administration's proposed legislation are trying to fit their handiwork into the foregoing pattern. While much further study would be required before a view can be taken on the validity of the proposal, suffice to say there appears to be legal support for the Administration's position on this issue.

Please feel free to contact us concerning these issues.