



Department of Justice

STATEMENT

OF

THOMAS J. PERRELLI
ASSOCIATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

HEARING ENTITLED

*"OUTER CONTINENTAL SHELF OIL AND GAS STRATEGY AND IMPLICATIONS OF
THE DEEPWATER HORIZON RIG EXPLOSION"*

PRESENTED ON

MAY 25, 2010

**TESTIMONY OF
THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE**

**BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE**

May 25, 2010

Chairman Bingaman, Ranking Member Murkowski, and members of the Committee, thank you for the opportunity to testify today about liability and financial responsibility issues related to offshore oil production. Before I begin, I would like to take a moment to express my condolences to the families of those who lost their lives and to those who were injured in the explosion and sinking of the Deepwater Horizon.

INTRODUCTION

The explosion and fire that took place aboard the Deepwater Horizon Mobile Offshore Drilling Unit on April 20th and the spill of oil into the Gulf of Mexico that followed have created a potentially unprecedented environmental disaster for the people and fragile ecosystems of the Gulf Coast. President Obama, the Department of Justice, and the entire Administration are committed to ensuring that those responsible for this tragic series of events are held fully accountable.

From the moment these events began to unfold, this matter has had the close attention of Attorney General Holder. While Administration efforts have focused on responding to the disaster and ensuring that the responsible parties stop the discharge, remove the oil, and pay for all costs and damages, the Department of Justice has been carefully monitoring events on the

ground and providing legal support to the agencies involved in the response efforts. To handle the multiple legal issues that a disaster of this magnitude raises, the Attorney General has assembled a team of attorneys from our Civil and Environment and Natural Resource Divisions who have experience with the legal issues that arise out of oil spills and other environmental disasters, as well as the United States Attorneys for the districts that are being, or are likely to be, affected by the spill. The United States Attorneys are on the frontline and have critically important knowledge of their communities and local matters. We at the Department of Justice are working to coordinate our efforts not only with the other federal agencies involved but also with the state Attorneys General for the affected states and with representatives from local communities.

My testimony today will focus on the Oil Pollution Act of 1990, or “OPA.” As you know, OPA was passed in the wake of the Exxon Valdez disaster to provide specific legal authority for dealing with the consequences of oil spills. OPA assigns responsibility and liability for cleaning up such spills. It also provides a liability scheme for payment of damages ranging from the immediate and ongoing economic harm that individuals and communities suffer to the potentially devastating and long-term harm done to precious natural resources.

Although OPA is the primary federal vehicle for addressing liability for response costs and damages resulting from oil spills, it is not the only legal vehicle for seeking compensation for incidents such as those now unfolding in the Gulf. It is important to remember that OPA expressly preserves state and other federal mechanisms for pursuing damages for injuries caused by such incidents and for assessing penalties for the underlying conduct that may cause such

disasters. There may be additional legal authorities available under both state and federal law, but the focus of my testimony today is OPA.

I assure you that this Administration will explore all legal avenues to make sure that those responsible for this disaster pay for *all* of the devastation that they have caused. Our mandate is to make sure that we recover every dime that the United States Government spends for the removal of the oil and the damages caused by this catastrophe. We will work tirelessly to carry out that mandate and to ensure that the American people do not pay for any of the costs and damages for which others are responsible.

THE OIL POLLUTION ACT OF 1990

OPA provides a strict-liability scheme for payment of removal costs and damages resulting from a discharge of oil from a vessel or facility into or upon the waters of the United States, including the area in which the Deepwater Horizon explosion, fire, and oil spill occurred. That means that those companies that are “responsible parties” under OPA are responsible for paying costs and damages under the statute, regardless of whether they are found to be at fault. Here, under OPA, the Coast Guard has designated the source of the spill and has thus far identified BP and Transocean as responsible parties under the statute.

OPA establishes certain limits on liability according to a formula that varies based on the size and nature of the vessel or facility that is the source of the spill. For discharges of oil from an offshore facility (other than a deepwater port), a responsible party is liable for *all removal costs*: There is no cap on such a responsible party’s liability for removal costs. OPA defines removal costs as the costs of removing spilled oil from water and shorelines or taking other

actions as may be necessary to minimize or mitigate damage to the public health or welfare, including wildlife and public and private property. The responsible party must pay in full for the removal costs incurred by the United States, a state, or an Indian tribe, or by a private party acting in accordance with the National Contingency Plan.

In addition to being responsible for all removal costs, a party responsible for a discharge of oil from an offshore facility is also liable for *damages* from the spill. With recognized exceptions, a responsible party's liability for damages for a discharge of oil from an offshore facility is limited to \$75,000,000 per incident. The liability cap does not apply if the discharge was caused by the gross negligence or willful misconduct of the responsible party or of any of its agents, employees, or contractors. Similarly, no liability cap applies if the spill resulted from the responsible party's – or its agent's, employee's, or contractor's – violation of an applicable Federal safety, construction, or operating regulation. Under such circumstances, a responsible party would be strictly liable for *all* damages covered by the statute. Recoverable damages cover, among other things, injuries to natural resources, loss of subsistence use of such resources, destruction of property, loss of tax revenue, loss of profits or earning capacity, and net increased costs for additional public services, including protection from fire, safety, or health hazards.

I note that BP has stated in Congressional testimony – including Lamar McKay's testimony before this Committee on May 11 – that it will not use the \$75 million cap to limit its payment of legitimate claims under OPA. We expect BP to uphold this commitment. Rest assured, however, that the United States Government is committed to making sure that all responsible parties are held fully accountable for all the costs and damages they have imposed on our people, our communities, and our precious resources.

In addition, under OPA, the Oil Spill Liability Trust Fund is available to pay compensation for removal costs and damages to the extent that a responsible party does not do so. The Fund is financed primarily by an 8 cent per barrel tax on oil collected from the oil industry. For any one oil-pollution incident, the Fund may pay up to \$1 billion or the balance of the Fund, whichever is less. Natural resource damage assessments and claims in connection with a single incident are limited to \$500 million of that \$1 billion. If the Fund pays compensation to a claimant, it becomes subrogated to all that claimant's rights to recover from the responsible party under OPA *or* from any party under any other law. That is, the Fund steps into the shoes of claimants that the Fund pays and assumes any rights of action that the claimants would otherwise have.

PROPOSED AMENDMENTS TO OIL POLLUTION ACT

As you know, the President recently sent up a legislative proposal designed to improve our ability to respond to oil spills. The proposal requested additional funding for many of the agencies that are responding to the present unprecedented oil spill.

Of more direct relevance to this hearing, the proposal would do two things: First, it would *raise* the potential cap on damages for responsible parties beyond the current limits. Second, it would increase the amount in the Oil Spill Liability Trust Fund by increasing the tax on industry through which the Fund is financed and would increase the amount the Fund could pay for cleanup and damages related to any given incident.

The Administration supports a significant increase in liability for offshore oil and gas developers whose actions pollute our oceans and coastlines and threaten our wildlife and other

natural resources. There are a number of factors to consider in increasing the liability caps. We must determine how to ensure that the liability rules provide the appropriate incentive for companies working in this field to fully account for the damages their actions may cause and to mitigate the risks of a catastrophic event. We must consider how best to ensure that the liability rules we adopt provide confidence that an individual or business harmed by an oil spill will be able to seek – and receive – fair compensation, and that the trustees charged with protecting our precious natural resources can secure adequate compensation for any harm done to those resources. In addition, we must consider the ways in which new liability rules may affect the structure of the offshore oil industry and the number of market participants. We must analyze how any change in the caps will interact with the current liability structure under OPA. Under that structure, the party responsible for a spill is liable for associated costs and damages up to a specified cap, if the cap applies, with liability for additional costs and damages spread across the oil industry as a whole through the Oil Spill Liability Trust Fund.

The Administration's proposal to increase the applicable liability caps would apply to any party found to be liable under OPA for any incident that occurred prior to enactment of the new liability caps. The Administration believes it is both fair and constitutional to enact legislation that would ensure that those who have caused environmental damage are held responsible for the damages they caused rather than imposing these costs on society more generally.

Our experiences over the last twenty years, and with the current disastrous chain of events, have convinced us that the old liability caps are simply inadequate to deal with the potentially catastrophic consequences of oil spills. We look forward to working with you to fix these caps.

CONCLUSION

The focus of everyone's efforts right now is – and should be – on ensuring that BP stops the discharge of oil and responds to the immediate aftermath of the spill.

The review of the facts regarding the Deepwater Horizon explosion, fire, and oil spill is still in its infancy. It would be premature to speculate as to the level of damages here or how much any responsible party will be liable to pay.

The Department strongly supports the Administration's legislative proposal and we look forward to working with you to see it adopted.