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Enforcement

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D. A CHALLENGE FOR CRIMINAL ENFORCERS: BP AND THE GULF OIL SPILL⁴⁷

By now everyone is familiar with the disastrous BP oil spill that fouled the waters and coasts of the Gulf of Mexico. The full extent of the damage has yet to be determined, but the decisions and events leading up to the blowout raise questions that pose significant challenges for regulators and enforcers. The following case study provides an opportunity to use what you have learned in this course to address those challenges. As you proceed, consider possible criminal charges that might be brought against the responsible corporate and individual parties, the range of possible sanctions against them, and the potential civil consequences of the spill.

⁴⁷I thank Christopher James for his significant research and editorial contributions to the BP narrative.

1. EXPLOSION ABOARD THE DEEPWATER HORIZON

At 9:50 pm on April 20, 2010, an explosion rocked BP's offshore oil rig, Deepwater Horizon, killing 11 workers, injuring 17, and unleashing what has become the largest accidental oil spill in world history. For nearly three months the well gushed up to 60,000 barrels per day into the Gulf of Mexico, compared with a total of 750,000 barrels the Exxon Valdez oil spill released into Prince William Sound off the coast of Alaska. The Deepwater Horizon rig was owned by Transocean Ltd. and leased by BP to drill its deepwater well, Macondo, off the Louisiana coast. Described as a "nightmare well" in internal BP emails, frequent drilling problems put the project well over budget and significantly behind schedule.

While BP Exploration and Production, Inc., a wholly owned subsidiary of BP, was the chief owner and operator of the Macondo oil well, operational responsibilities at the site were decentralized and—as is typical of many offshore drilling operations—allocated among multiple contractors and subcontractors. BP hired Transocean, which owned and operated the Deepwater Horizon rig, to drill the well starting in October 2009,⁴⁸ but the cement spacers—an integral part of any well-constructed offshore oil drilling operation—were provided by another contractor, Halliburton. This diffusion of authority and responsibility was exacerbated by a lack of clear standards and guidelines on the management of cost and safety concerns. BP largely ignored potential problems that Transocean and Halliburton raised during the drilling process, but neither Transocean nor Halliburton seemed sufficiently concerned to further press the issues with either BP or the regulators who had oversight responsibilities.⁴⁹ A presidential commission on the BP spill saw the decentralization of authority and lack of accountability as the chief cause of the spill. "The most significant failure at Macondo—and the clear root cause of the blowout—was a failure of industry management."⁵⁰

⁴⁸David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1421 (2011).

⁴⁹*Id.* at 1422.

⁵⁰NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE

During the last leg of drilling, BP made a number of decisions that seemed to put time and money above safety considerations, despite dangers revealed by BP's own internal tests and through warnings and recommendations from outside contractors. These decisions included: choosing to use a well design with few barriers to gas flow in lieu of a multi-barriered design; using 6 centralizers meant to center the pipe while guiding it into the well instead of the recommended 21; turning away a team brought on board to test the integrity of the cement bond in the well, even though internal tests predicted cement failure; defying industry best practice by only partially circulating drilling mud in the well; and neglecting to use a lockdown sleeve as a last resort to keep the seal at the well head from blowing out. Damning emails that later surfaced made it clear that BP engineers had recognized the risks, but as one of them responded, "who cares, it's done, end of story, will probably be fine."⁵¹

A partial explanation for BP's brazenness may be its reliance on the well's blowout preventer (BOP), which was owned by Transocean. A BOP is a standard safety measure intended, in part, to activate a "deadman" trigger that would clamp down and seal a gushing oil well in the event that a blowout occurs. In this case, however, fluid pressure reports received shortly before the explosion revealed a leak in the BOP hydraulics mechanism, which should have been equipped to seal the pipe in an emergency. BP internal investigations after the incident also raised concerns about maintenance, inspection, delayed testing, and even modifications made to the BOP at BP's behest. The failure of this last-resort safety measure was the capstone in a tragic comedy of errors that led to the spill.

On the day of the explosion, 126 workers were aboard the Deepwater Horizon rig. Of those, 79 were Transocean employees, six worked directly for BP, and the remaining 41 were employed by other contractors.⁵² Nine of the eleven men who lost their lives when the rig

DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 92 (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

⁵¹Neil King, Jr. & Russell Gold, *BP Crew Focused on Costs: Congress*, WALL ST. J., June 15, 2010, at A1.

⁵²Ian Urbina, *Workers on Doomed Rig Voiced Concern About Safety*, N.Y.

exploded were employees of Transocean, the owner of the rig, and the other two employees who lost their lives were employed by M-I Swaco, an unrelated drilling company.⁵³ Coast Guard efforts to recover the dead were unavailing.

2. CHECKERED SAFETY HISTORY

The Gulf Oil Spill is not the first time BP has been in the line of fire for safety issues. In 2007, the company entered into two plea agreements with the Department of Justice to resolve criminal charges in two high-profile environmental incidents. The first, an explosion and fire at BP's Texas City oil refinery, claimed the lives of 15 workers and injured 170 others. The explosion resulted from the ignition of pressurized liquid and vapors released during an improper machine startup. The Department of Justice brought charges under the accident prevention and risk management provision of the Clean Air Act (CAA), and BP pled guilty to a felony under a CAA provision that penalizes "failing to have adequate written procedures for maintaining the ongoing mechanical integrity of process equipment . . . and for failing to inform contractors of the hazards related to their occupancy of temporary trailers in the vicinity of the refinery's Isomerization Unity."⁵⁴ The plea agreement included a \$50 million criminal fine—the largest ever under the Clean Air Act—and 3 years of probation. The terms of probation required BP to comply with agreements it had entered into with OSHA and the

TIMES, July 21, 2010, available at <http://www.nytimes.com/2010/07/22/us/22transocean.html>; Richard Pendlebury, *SPECIAL INVESTIGATION: Why Is BP Taking ALL The Blame?*, THE DAILY MAIL, June 18, 2010, <http://www.dailymail.co.uk/news/article-1287226/GULF-OIL-SPILL-Whys-BP-taking-blame.html>.

⁵³Joanna Sugden, *The Missing Men of Deepwater Horizon Oil Rig*, THE TIMES (Apr. 30, 2010), available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7112898.ece; Paul Rioux and Chris Kirkham, *Coast Guard Suspends Search for 11 Missing; No Oil Leaking From Underwater Wellhead*, THE TIMES-PICAYUNE, Apr. 24, 2010, at A1; Paul Rioux and Chris Kirkham, *Oil Rig Explosion Could Become One of Deadliest Industry Disasters in Gulf*, Apr. 29, 2010, available at http://www.nola.com/news/index.ssf/2010/04/oil_rig_explosion_could_become.html#incart_mrt.

⁵⁴Kirsten Korosec, *BP's Gulf Oil Spill: The Odds of Fines, Jail Time and the Death Penalty*, June 3, 2010, available at <http://www.bnet.com/blog/clean-energy/bps-gulf-oil-spill-the-odds-of-fines-jail-time-and-the-8220deathpenalty-8221/1879>.

Texas Commission on Environmental Quality, under which BP promised to make safety improvements at the refinery.

The second incident covered by the plea agreement occurred in 2006, when unchecked corrosion in an Alaskan pipeline caused a spill in Prudhoe Bay—the largest spill on Alaska’s north slope to date.⁵⁵ The investigation of the spill revealed that buildups of sediment had allowed acidic bacteria to proliferate and eventually eat through the pipe’s wall. Had BP followed proper procedures, it should have been able to recognize and manage the corrosion. Its negligent maintenance resulted in criminal charges under the Clean Water Act and BP pled guilty to a misdemeanor violation. The plea agreement included \$12 million in criminal fines, \$4 million in community service payments for environmental research, and \$4 million in criminal restitution to the state of Alaska, as well as 3 years of probation. The plea agreement acknowledged BP’s cleanup efforts following the spill.

Unfortunately, BP failed to live up to either of the agreements. Safety issues continued to plague BP’s Texas refinery after it entered into the 2007 agreement. Between June 2007 and February 2010, BP was cited for 760 “willful, egregious” OSHA safety violations, including 270⁵⁶ violations at its Texas City refinery that BP had promised to correct. During the same period, Sunoco and Conoco-Phillips were cited for committing 8 comparable violations, Citgo for committing 2, and Exxon for only 1. In October 2009, OSHA imposed a record \$87.4 million fine for the BP refinery violations,⁵⁷ and BP was in the process of contesting the fine when the explosion aboard the Deepwater Horizon triggered the Gulf spill.

But this is still not the end of the story. On April 6, 2010, the refinery’s Ultracracker unit, a hydrogen compressor that reduces emissions by trapping noxious chemicals for reuse in other parts of the

⁵⁵The spill released more than 200,000 gallons of oil into the bay.

⁵⁶BP History Fact Sheet, available at <http://www.osha.gov/dep/bp/bphistory.html>.

⁵⁷It was later discovered that a clerical error had resulted in the duplication of 29 “failure-to-abate” violations totaling \$6.1 million. BP agreed to pay a \$50.6 million fine for the continuing violations and, as of this writing, OSHA is seeking an additional \$30 million for the newly discovered violations. *Id.*, n.l.

refinery, malfunctioned. Instead of temporarily shutting down the plant in order to make repairs, BP rerouted the chemicals to the emergency flare device, which—at least in theory—burns most of the chemicals up before they are released into the air.⁵⁸ BP's report, which it filed with the state, revealed that over the course of 40 days, the plant had released 502,000 pounds of noxious chemicals into the environment, including 17,000 pounds of benzene, a highly carcinogenic compound.⁵⁹ In response, the Texas Attorney General filed an environmental enforcement suit seeking approximately \$600,000 in fines for violations of the Texas Clear Air Act, and a \$10 billion class-action suit was filed on behalf of over 2,000 workers exposed to the dangerous levels of carcinogens released during the incident.⁶⁰

Back in Alaska, several months after the Gulf Oil spill and eleven days before BP's probation for the Prudhoe Bay spill was due to expire, the probation officer assigned to BP's Alaskan operations filed a motion to revoke BP's probation on account of a 2009 Alaskan incident involving a leaking pipeline.⁶¹ After ignoring 165 days worth of low-temperature warning alarms for the pipeline, a long ice block that had developed inside the pipe caused it to rupture, discharging 13,000 gallons of oil and an indeterminate amount of oil-produced water mixture onto the North Slope

⁵⁸James C. McKinley, Jr., *With Neighbors Unaware, Toxic Spill at BP Plant*, N.Y. TIMES, Aug. 30, 2010, at A9, available at <http://www.nytimes.com/2010/08/30/us/30bprefinery.html>; Morgan Smith, *Beleaguered BP Texas City Refinery Faces Two Lawsuits*, THE TEXAS TRIBUNE, August 20, 2010, <http://www.texastribune.org/texas-energy/energy/beleBP-texas-city-refinery-faces-two-lawsuits/>.

⁵⁹McKinley, *supra* note 58; James C. McKinley Jr., *Class-action Suit Grows Over BP Refinery's Release of Chemicals in Texas City*, THE DALLAS MORNING NEWS, August 30, 2010, available at <http://www.dallasnews.com/news/state/headlines/20100830-Class-action-suit-grows-over-BP-8108.ece>.

⁶⁰McKinley, *supra* note 58; Smith, *supra* note 58. The EPA has also initiated an investigation into the incident. Jeffrey W. Johnson, *EPA Studies Toxic Air Release From BP Refinery*, Chemical & Engineering News: Government & Policy Concentrates, September 27, 2010, available at <http://pubs.acs.org/cen/government/88/8839govc1.html>.

⁶¹United States v. BP Exploration (Alaska) Inc., D. Alaska, No. 3:07-cr-00125, 11117110. As of this writing, the motion remains unresolved, and BP's probation has been indefinitely extended while the motion is pending.

Tundra. The spill violated the Clean Water Act, as the location of the spill is considered to be a “water of the United States.”

3. THE INVESTIGATION

In the months that followed the explosion aboard the Deepwater Horizon, the involved companies, regulatory agencies, and the House Committee on Energy and Commerce all launched investigations, scrambling to find a responsible party to answer for the catastrophe. The aftermath brought detailed scrutiny to the failed BOP onboard the Deepwater Horizon, as well as to the decisions made during the last leg of drilling, which other industry players condemned and referred to as “horribly negligent.”⁶²

Officials also pointed to regulatory failures at the Minerals Management Service (MMS), the federal agency that was responsible for overseeing BP’s offshore operations. In an industry where regulations seem to lag well behind technological advances, MMS seemed much too willing to allow the oil companies to dictate acceptable practices, and it was reported that employees from the regulated oil companies were treating MMS agency employees to sporting events, meals, and lavish gifts. The result? Leniency. MMS approved BP’s drilling plans when most other companies regarded them as unsafe, allowed for delayed testing of the destined-to-fail BOP, and approved an emergency response plan that cited a Japanese home-shopping website, and provided for the protection of “seals, sea otters, and walruses,” none of which inhabit the Gulf of Mexico.⁶³

Not surprisingly, BP CEO Tony Hayward became a magnet for a chorus of criticism. He was infamously chastised for repeatedly deflecting blame and for complaining about the disruptive effect of the incident, telling reporters, “I’d like my life back.” Though not personally involved with the Deepwater Horizon project, Hayward had removed several layers of safety assurance from the corporate structure to give more decision-

⁶²Carl Hoffman, *Investigative Report: How the BP Oil Rig Blowout Happened*, POPULAR MECHANICS, Sept. 2, 2010, at 2, available at <http://www.popularmechanics.com/science/energy/coal-oil-gas/how-the-bp-oil-rig-blowout-happened-2>.

⁶³Justin Pritchard et al., *BP’s Spill Response Plans Found Filled With Errors*, DETROIT FREE PRESS, June 10, 2010, at A15.

making power to lower-level managers and engineers who were more intimately involved in the operational details of the projects,⁶⁴ and he criticized the prior policy as inefficient and redundant. All of this despite BP's checkered safety history during his tenure as CEO.

At a hearing held by the House Committee on Energy and Commerce, which had initiated an investigation into the spill, Hayward was accused of fostering an atmosphere that put cost considerations above safety, and of encouraging BP employees to take risks in order to improve the bottom line. His only response was that he was not involved in the decision-making process and that those in the best position to make key decisions had the power to do so, though he did not identify who those people were. Hayward later agreed to step down as CEO effective October 1, some five months after the spill.

4. THE AFTERMATH

On July 15, 2010, the Macondo well was finally capped, but not until nearly 4.9 million barrels of oil had been released into the Gulf of Mexico. The extreme depth of the well and the high pressure it produced frustrated BP's early attempts to shut off the flow of oil. By the time the well was capped and oil had ceased to leak, a massive environmental toll had already been inflicted on the region. Although BP invested approximately \$4 billion of its own capital to spearhead the cleanup efforts, the rate of recovery did not keep pace with the rate of release and the oil spread quickly throughout the surrounding part of the Gulf. Some of the most telling evidence of the immediate environmental toll was a twenty-two mile long strand of crude oil that had blanketed the Gulf floor before the gushing was brought under control.⁶⁵

The impact from the spill on the Gulf coast, its inhabitants, and industries continues to be felt. Tens of thousands of marine species, eight national parks, thousands of miles of beaches, and human lives and livelihoods are still at risk. The fishing and tourism industries have been

⁶⁴In fact, BP policy is that any employee on board an oil rig can immediately stop operations at any time if he feels the conditions are unsafe.

⁶⁵See Richard Camilli et al., *Tracking Hydrocarbon Plume Transport and Biodegradation at Deepwater Horizon*, 330 SCIENCE 201, 201 (2010), cited in Uhlmann, *supra* note 48, at 1414-15.

hit the hardest, but the precise economic and environmental toll will be unknown for quite some time. In the meantime BP has vowed to pay off all legitimate claims through an independently administered \$20 billion trust fund designed to satisfy legitimate claims under the Oil Pollution Act as well as claims relating to state and local response costs, harm to natural resources, and economic hardship resulting from the spill.⁶⁶ Since participation in the trust by those affected by the spill is entirely voluntary, BP is likely to be named as a defendant in additional private lawsuits, which already number in the hundreds.⁶⁷

Regardless of how the lawsuits and BP's potential criminal liability play out, the spill will have environmental and economic consequences that will plague the Gulf Coast region for decades.

DISCUSSION QUESTIONS

1. *Clean Water Act.* It is widely expected that the investigations will culminate in one or more criminal prosecutions. The most likely environmental charges against BP would be for violating the Clean Water Act.

- a. Do the facts support bringing criminal charges under the CWA against the company? If so, what are the most likely charges and what would the government need to prove to obtain a conviction?
- b. The MMS approved BP's drilling plan for the Deepwater Horizon. How would the agency's approval affect the government's case?

⁶⁶Press Release, Washington University in St. Louis School of Law, Dean Syverud Named Trustee of \$20 Billion BP Gulf Fund (August 2010), *available at* <http://www.law.wustl.edu/news/pages.aspx?id=8240>.

⁶⁷Uhlmann, *supra* note 48, at 1416; *see also* In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010) (consolidating dozens of lawsuits and noting the existence of over 200 similar suits). There are two types of claims available through the BP trust—"interim payments" and "final payments." Interim payments only cover losses that have already been suffered and are disbursed every three months. Final payments are intended to cover both present and future losses. In order to receive a final payment, the recipient must relinquish the right to sue BP. *Receiving Compensation for the BP Oil Spill*, Environmental Law Institute, March 2011, http://www.eli.org/pdf/ocean/gulf_of_mexico/receiving_compensation_long.pdf.

How do the allegations of leniency affect your evaluation of the relevance of the agency's approval to BP's potential liability?

- c. Could Tony Hayward be charged as a responsible corporate officer? Should the government consider charging any lower level corporate operatives? If so, who would the most likely candidates be? Should they be charged under the responsible corporate officer doctrine or under some other theory?
- d. Recall the discussion in Chapter 3 concerning prosecution of a corporation as an entity. What legal rules and policies are at play in the BP case? What factors and policies should a prosecutor consider when deciding whether or not to file criminal charges against BP as an entity? Is BP's earlier plea agreement with the Justice Department relevant to this determination? If so, is its earlier deferred prosecution agreement relevant as well? How do BP's subsequent citations for 760 "egregious, willful" OSHA violations affect your analysis? What about the difficulty of attaching liability to individuals? Do the circumstances here warrant prosecution of the corporation?

2. *Knowing Endangerment.*

- a. In Chapter 4 we considered the *Borowski* case. In *Borowski*, the court addressed what class of parties the knowing endangerment provision is intended to protect and when informed consent will be a defense. Under the reasoning in *Borowski*, could BP be held liable under the CWA's knowing endangerment provision for the deaths of its employees aboard the Deepwater Horizon? If the ensuing oil spill were to pose a continuing risk to the health, safety, and livelihoods of the Gulf coast's countless inhabitants on a long term basis, would that expose BP to liability for knowing endangerment?
- b. There are also allegations that BP's initial estimates of the extent of the spill delayed crucial company and governmental response efforts and resource allocation (BP initially reported that only 5,000 barrels of oil were being released per day, but the actual measurement turned out to be between 40,000 and 60,000 barrels per day); that the company held back underwater camera footage that would have alerted authorities that the magnitude of the spill

vastly exceeded BP's initial estimate; and that BP failed to provide proper protective equipment to volunteers and contractors cleaning up the oil. Are there potential knowing endangerment violations here?

3. *False Statements.*

- a. The CWA places a premium on truthfulness, as reflected in its recordkeeping, reporting, and monitoring requirements. It is a crime under the Act to knowingly make a false material statement in any application, record, or other document required to be filed or maintained under the Act, or to knowingly falsify, tamper with, or render inaccurate any monitoring device or method the Act requires to be maintained. Do the facts in the BP case support criminal charges for violating these requirements? What would the government have to prove to obtain a conviction?
- b. Recall that in Chapter 8, we considered liability under the general false statements statute, 18 U.S.C. § 1001. How if at all does the CWA false statements provision differ from its more general Title 18 counterpart? Would the facts in BP support charges under § 1001?

4. *Other Potential Statutory Bases for Environmental Criminal Liability.*

There are several other environmental criminal laws, mostly wildlife protection statutes, under which BP could face felony or misdemeanor liability. Possible statutory bases for criminal liability apart from the Clean Water Act include the Clean Air Act,⁶⁸ the Migratory Bird Treaty Act,⁶⁹ the Seaman's Manslaughter Statute,⁷⁰ the Marine Mammal

⁶⁸Clean Air Act § 113(c)(4), 42 U.S.C. § 7413(c)(4) (2006) (a rarely invoked provision of the Act makes it a misdemeanor to negligently release any hazardous air pollutant that places another person in imminent danger of death or serious bodily injury).

⁶⁹Migratory Bird Treaty Act § 2, 16 U.S.C. § 703(a) (2006) (prohibiting the unauthorized killing of migratory birds, such as those affected and coated by the oil spill); 16 U.S.C. § 707(a) (providing misdemeanor penalties for any violation of the Migratory Bird Treaty Act).

⁷⁰Seaman's Manslaughter Statute 18 U.S.C. § 1115 (2006) (a nineteenth century,

Protection Act,⁷¹ the Endangered Species Act,⁷² and the Outer Continental Shelf Lands Act.⁷³ With so many additional potential sources of liability beyond the obvious Clean Water Act violations, it would come as no surprise if the Justice Department were to file criminal charges against BP in connection with the spill.⁷⁴

5. *Sanctions.*

BP is amenable to a variety of sanctions, both judicial and administrative. The Department of Justice, EPA, and Delaware Attorney General are all potential players, and their discretion will largely determine the fate of the company. It is important to note that if BP were to be prosecuted and convicted, potential fines would not necessarily be limited to the statutory amounts prescribed under each individual statute (e.g. the Clean Water Act's \$50,000 per diem fine for felony violations and \$25,000 per diem fine for misdemeanors). Instead, organizational liability for a firm like BP could result in substantially higher fines under the Alternative Fines Act,⁷⁵ which authorizes a maximum fine of twice the

steamboat-era statute that provides for felony criminal liability for any vessel owner or operator "through whose . . . neglect . . . the life of any person is destroyed").

⁷¹Marine Mammal Protection Act § 102(a), 16 U.S.C. § 1372(a) (2006) (prohibiting any unauthorized taking of protected marine mammals in waters under United States jurisdiction); 16 U.S.C. § 1375(b) (providing misdemeanor penalties for any knowing violation of the Marine Mammal Protection Act).

⁷²Endangered Species Act § 9(a), 16 U.S.C. § 1538(a) (2006) (prohibiting the unauthorized taking of endangered species); 16 U.S.C. § 1540(b) (providing misdemeanor penalties for any knowing violation of the Endangered Species Act).

⁷³Outer Continental Shelf Lands Act § 24(c), 43 U.S.C. § 1350(c) (2006) (providing for felony penalties for knowing and willful violations of the Outer Continental Shelf Lands Act, which governed the drilling done at the site of the spill, and penalties for violating the terms of any lease, license, or permit issued under the Act).

⁷⁴See Uhlmann, *supra* note 48, at 1417 (collecting statutes and discussing the scope of BP's potential criminal liability).

⁷⁵18 U.S.C. § 3571 (2006) (under sentencing laws for federal crimes such as those found in the environmental statutes, the maximum fine for a corporate defendant is the greater of: (A) the specific amount set forth in the statute under which the defendant is convicted; (B) \$500,000 for each felony count or \$200,000 for each misdemeanor violation that does not result in death; or (C) twice the gain or loss that results from the offense).

loss associated with the offense. If the \$20 billion contributed by BP to the independent trust is any indication of the total loss, BP's criminal fine could easily become the largest criminal sanction in Department of Justice history.

- a. Under the Federal Sentencing Guidelines, a criminal purpose organization is one that is operated primarily for a criminal purpose or primarily by criminal means. If the court finds that a corporation is a criminal purpose organization, the guideline directs it to set the fine in an amount that will divest the company of all of its assets. Using the Guidelines to calculate the fines BP may face for violating the Clean Water Act, would BP qualify under the Sentencing Guidelines as a criminal purpose organization? Does the corporate death penalty seem a fitting punishment for BP?
- b. BP serves as the main supplier of oil to the US Government. It holds \$2.1 billion in contracts with the Pentagon, a number of leases to drill on government land, and drilling permits issued by regulatory agencies. What measures could the EPA take against BP? Would they serve as effective deterrents?
- c. If a corporation engages in activities that exceed those authorized by its corporate charter, a state—through either the legislature or Court of Chancery—can revoke the corporation's charter. Delaware—the state of incorporation for more than half of all US corporations, including BP America—permits revocation of a corporation's charter “for abuse, misuse or nonuse of its corporate powers, privileges or franchises.”⁷⁶ Courts, however, proceed with extreme caution before revoking a corporation's charter, looking for “a sustained course of fraud, immorality, or violations of statutory law.”⁷⁷ Can the state of Delaware revoke BP America's corporate charter because of the spill and/or BP's criminal enforcement history? Assuming *arguendo* that Delaware has the

⁷⁶Del. C. § 284(a).

⁷⁷*Young v. Nat'l Ass'n for Advancement of White People*, 109 A.2d 29, 31 (Del. Ch. 1954) (denying state's motion for preliminary injunction to suspend corporation's activities, which admittedly were beyond the powers granted under its charter).

power to revoke BP's charter, should the state take punitive action against the company?

BP America is simply part of a larger global corporation, BP PLC, based in the UK. What impact would revocation of its Delaware charter really have? What can be done to stop BP from simply reincorporating in another state? What remedies might be the most effective in controlling BP's US operations?

Before you try to answer these questions, consider the enormous economic consequences of the Gulf Oil Spill. New civil suits are filed against BP every day by those adversely affected by the spill, and to date BP has already spent billions on cleanup efforts on its own initiative and has promised even more to cover private losses. Would it be wise for Delaware authorities to revoke BP's charter—effectively cutting off its revenue generating abilities—when so much remains to be done in the Gulf?

- d. Although there is an ongoing federal criminal investigation of the spill, no criminal charges have yet been filed. But for purposes of exploring the potential legal implications of the spill, assume the following hypothetical scenario. Suppose that the government decides to file criminal charges against BP for crimes relating to the Gulf Oil Spill. Suppose further that BP agrees to plead guilty to some or all of the charges or is convicted at trial. In the event that either of these two outcomes were to come to pass, what would be an appropriate sentence? In our hypothetical scenario, should BP be required to serve a term of probation under the supervision of a court-appointed monitor?

Before answering these questions, recall the Con Ed Gramercy Park explosion, considered in Chapters 7 and 8. After years of denial, Con Ed pled guilty to covering up what it had falsely denied to the public and to regulatory authorities—i.e., that its steam pipes in the Gramercy Park manhole were insulated with material that contained asbestos and that the steam pipe explosion had spewed asbestos-laden debris into the air, contaminating the surrounding neighborhoods.

Con Ed was sentenced to three years' probation under the supervision of a court-appointed monitor who was granted

extraordinary access to Con Ed's records and programs relating to legal compliance issues "to keep the sword of Damocles hanging over the company." The sentencing judge found that extraordinary measures were necessary because of Con Ed's poor environmental compliance record and its culture of intimidation, both of which made it less likely that the company would implement meaningful reforms on its own to prevent recurrence of the conditions that led to the explosion and contributed to the ensuing cover-up.

BP's enforcement history was equally bleak. BP had previously been cited for various civil and criminal infractions, and reports indicate that rig workers aboard the Deepwater Horizon said that they feared retaliation if they reported their safety concerns.⁷⁸ If BP were to be convicted in connection with the Deepwater Horizon explosion and spill, are Con Ed's and BP's histories sufficiently similar to warrant comparable court-ordered monitoring of BP? Is it likely that without an external monitor, BP would independently adopt and implement effective internal reforms on its own?

⁷⁸Uhlmann, *supra* note 48, at 1421.