Oil Spills

Criminal Charges Said Likely in Gulf Spill; Corporate Penalties, Prison Terms Possible

In the wake of the ongoing Gulf of Mexico oil spill, BP Plc faces likely criminal charges by the federal government that have the potential to cripple the corporation financially and lead to jail time for top company officials, according to legal experts.

While criminal charges may not come until after the leak is stopped, experts said, federal prosecutors are already gathering evidence aimed at showing BP officials took, or failed to take, steps that led to the catastrophic spill.

Prosecutors have at their disposal an arsenal of environmental laws and other statutes—all with relatively low evidentiary standards—that put BP as a corporation at risk of paying huge fines and place individual company officials at risk of prison terms of up to 15 years.

Faced with these potential liabilities, BP officials are unlikely to fight criminal charges in court, environmental crimes experts said. Rather, the company would be more likely to follow the path taken by Exxon Corp. after the 1989 oil spill in Alaska and seek a global settlement with the government to resolve all federal criminal and civil violations.

Attorney General Eric Holder announced June 1 that the Justice Department is using “the full weight” of its investigative power to pursue criminal and civil investigations against BP for the oil spill that began April 20 (104 DEN A-8, 6/2/10).

Among the statutes Holder said the Justice Department can use to take legal action against BP are the Clean Water Act, the Oil Pollution Act of 1990, and several wildlife protection laws including the Migratory Bird Treaty Act and Endangered Species Act.

“In terms of pursuing criminal liability, the United States has a pretty nice range of federal laws at its disposal,” said Noah Hall, an environmental law professor at Wayne State University Law School in Detroit and former senior attorney with the National Wildlife Federation.

Holder did not indicate how soon federal charges might be brought, but legal experts doubted they were imminent.

“I think the government will want to keep the company’s attention focused on capping the well for now,” said Peter Henning, an environmental law and white collar crime expert also at Wayne State University Law School.

As asked to comment on possible criminal allegations, BP spokesman Toby Odone told BNA, “We wouldn’t comment or speculate on current or future litigation.”

Criminal Charges a Near Certainty, Experts Say. Along with a civil lawsuit to recover clean up costs, there is little doubt the government will ultimately file criminal charges against BP, experts said.

“The case against BP is a slam dunk,” said David Uhlmann, who headed the Justice Department’s Environmental Crimes Section during the administration of George W. Bush. “There isn’t any question they’re going to bring criminal charges against BP,” Uhlmann said in a recent interview with National Public Radio.

“Really the questions are not so much about whether they have a strong case . . . but rather just how serious will the charges be, just how many companies will be involved, and whether individuals will be charged,” added Uhlmann who now teaches environmental law at the University of Michigan Law School.

The pending investigation is likely to be wide-ranging and focused on the events that led up to the spill, experts said.

“What prosecutors and EPA investigators are doing right now is looking for physical evidence,” Ron Sarachan, who headed the Justice Department’s Environmental Crimes Section during the Clinton administration, told BNA in a recent interview. “They are subpoenaing relevant documents and making sure all relevant evidence is preserved by BP.”

“They will then use that evidence to conduct interviews with anyone who has relevant knowledge of the events, including decisionmakers within the company,” added Sarachan, who now chairs the corporate and government investigations and white collar defense group at Ballard Spahr in Philadelphia.

Low Threshold for Criminal Violations. The principal statute prosecutors will be examining for use against BP is the Clean Water Act which provides for both civil and criminal penalties, said Henning at Wayne State. Under Section 309 of the act, “the maximum fine is $25,000 a day and up to one year in prison for a conviction based on negligence which is misdemeanor,” he said. “For a conviction based on conduct shown to be done ‘knowingly,’ a felony, the act provides for a penalty of $50,000 a day and up to three years in prison.”
Proving negligence under the law is relatively easy, according to Sarachan. “Courts that have interpreted the negligence standard under the Clean Water Act have held you only need to show simple negligence, you don’t need to show gross negligence,” he explained. “You’re dealing with a very low standard for a criminal matter.”

The ‘knowing’ standard that could lead to felony charges also is relatively easy for prosecutors to show, according to Roger Marzulla, former head of the Justice Department’s Environment and Natural Resources Division during the Reagan administration.

“It doesn’t require much,” he said. “It’s basically: did BP intend to drill an oil well in the Gulf that resulted in a discharge of oil into waters of the United States?”

Marzulla pointed out that the Clean Water Act also includes a so-called “endangerment” provision that could enable prosecutors to increase criminal penalties substantially. “The endangerment element is definitely present here where you already have 11 deaths and 17 injuries resulting from the oil rig collapse after the blow-out,” he said.

Under the provision, where there is knowing endangerment leading to a risk of death or serious bodily injury, a company can be fined up to $1 million and an individual can be fined up to $250,000 and be subject to a prison term of up to 15 years.

BP’s History Problematic. In deciding what level of charges to bring and how stiff a sentence to pursue, prosecutors also will look at BP’s prior history of criminal violations. Marzulla said, noting BP currently remains on probation under two plea agreements it signed with the government in 2007.

Under one agreement, between BP Products of North America and the Justice Department, BP pleaded guilty to a felony and paid a $50 million fine for not maintaining equipment at its refinery in Texas City, Texas, that led to an explosion and killed 15 people in March 2005 (United States v. BP Products North America Inc., S.D. Tex., No. 07-cr-434, plea approved 3/12/09; 47 DEN A-15, 3/13/09).

The second plea agreement, between BP Exploration Alaska and the Justice Department, covered an oil spill at BP’s oil pipeline at Prudhoe Bay, Alaska in 2006. BP pleaded guilty to a misdemeanor, paid a $12 million fine, paid $4 million in restitution to the state of Alaska, and made a $4 million payment to a nonprofit wildlife fund (United States v. BP Exploration (Alaska) Inc., D. Alaska, No. 3:07-cr-00125, 11/29/07; 230 DEN A-10, 11/30/07).

The fact that the previous criminal matters apparently involved different BP legal entities than the BP entity responsible for the Gulf oil spill will be of little concern to prosecutors, Sarachan said.

“In the 1989 Exxon oil spill the Justice Department prosecuted the parent company even though its subsidiary was the entity directly involved with the spill,” he said. The department relied on “a very aggressive theory of agency,” he explained, adding that he expected the department to do the same with respect to the current BP spill.

Given the size and devastating consequences of the Gulf spill, Sarachan said, the government might well decide to seek the maximum penalties available even if BP had no prior criminal history.

“Because of its huge scope, this BP spill could easily result in prosecutors taking the most aggressive enforcement response available,” Sarachan said.

Balanced on the other side of any charging or sentencing decisions by the prosecutors will be mitigating factors that may work in BP’s favor to reduce its potential criminal liability.

“Prosecutors will also consider BP’s extraordinary efforts to control the spill and clean up the discharge, along with its willingness to place $20 billion in escrow to pay damages,” Marzulla said, adding. “These are strong indications of its intention to ameliorate the effects of the spill.”

Individual Prosecutions Possible. Environmental crimes experts expressed mixed opinions on the likelihood that the government would seek to hold individuals criminally responsible for the spill, saying it depends on the outcome of the investigation.

“If there is evidence of gross negligence or wanton and willful behavior with respect to some of the steps that occurred before the spill, it could be used to pursue criminal charges against an individual,” Marzulla said.

Whether such evidence could allow prosecutors to reach into the upper ranks of BP’s corporate structure is unclear, but it is at least a possibility under current law.

“The policy of the Justice Department is to identify individuals who may be responsible,” noted Sarachan, “As a legal matter, the corporation can be held vicariously liable if there is a single employee who committed a crime in the course of their employment.”

“However, in cases involving accidents like this that may have been caused by a combination of different factors, it is often not possible to isolate a single individual and hold them responsible,” he added.

There is one legal doctrine available to prosecutors that could enable them to cite one or more higher level corporate officials for criminal violations, even though the officials may not have been directly involved with BP’s operations, Marzulla pointed out.

Known as the “Responsible Corporate Officer Doctrine,” this legal concept, developed in judicial case law, provides that anyone who had a responsible share in the criminal conduct can be held accountable for criminal violations, Marzulla said.

“It recognizes how you actually achieve the goals of deterrence and punishment under the environmental laws,” he said. “It’s not done by putting some poor schmuck in jail who may have worked on some part of the drilling rig. It’s done by going up the corporate ladder to find the individuals actually responsible for the decisions that led to the violations.”

For example, these decisions could include any executive determination to shortchange safety budgets or equipment that can be shown to have played a role in the spill, Marzulla said. “You want to get at the heart of the problem by going after the persons responsible for setting up a milieu that disregards environmental protections.”

Potential charges against BP under Title 18 of the U.S. criminal code include filing false statements with the government and obstruction of justice.

“Almost any false statement made orally or in writing could qualify,” Marzulla said, noting such statements are usually found in reports or forms filed with the government.
“You also often find evidence of a cover-up in situations like the BP spill,” Marzulla said. “Individuals can destroy records or change numbers on a report. These are the kinds of things that can lead to obstruction of justice charges.”

Violations of wildlife protection statutes—such as the Migratory Bird Treaty Act, Endangered Species Act and Marine Mammal Protection Act—are often sought because they are so-called strict liability statutes, which require no showing of negligence or intent, said Hall at Wayne State, the former National Wildlife Federation attorney.

“Under the Migratory Bird Treaty Act, for example, you only need to show birds are dead to prove a misde-meanor,” Hall said. However, he added, one of the downsides of using these statutes is that they provide for only modest fines.

**Fines Add Up Under Oil Pollution Law.** Another environmental law expected to play a major role in any government enforcement action is the Oil Pollution Act of 1990, enacted in the aftermath of the 1989 Exxon Valdez spill. While not technically a criminal statute, the law will serve as the primary means for the government to recover its cleanup costs and impose monetary fines on BP, experts said.

Also a strict liability statute, the Oil Pollution Act does not require any showing of fault or negligence on the part of BP. It mandates that BP take the lead, as the “responsible party,” for cleaning up the oil spill and requires BP to reimburse the government for any costs it incurs in dealing with the spill.

The act also provides for penalties of up to $1,100 per barrel of oil spilled into U.S. waters. In cases where there is evidence of gross negligence or willful misconduct, the penalty increases to $4,300 per barrel which, depending on how long the spill continues, could impose significant financial costs on BP, according to Hall, the environmental crimes and wildlife law expert.

“If you take the current estimates of 60,000 barrels per day and multiply that by, say, 100 days, you’re looking at a potential penalty with just the Oil Spill Act of around $25.8 billion,” Hall said, noting that number was likely on the conservative side and assumed the leak would be capped sometime in August.

The environmental group Center for Biological Diversity sued BP and Transocean Inc. in federal court June 18, using citizen suit provisions of the Clean Water Act to allege illegal discharges of more than 100 million gallons of oil and other pollutants into the Gulf. At the time, the center said that, assuming the spill lasts until Aug. 1, liabilities could eventually reach $10 billion (Center for Biological Diversity v. BP America, E.D. La., No. 2:10-cv-10768, 6/18/10; 117 DEN A-16, 6/21/10).

The penalty amount under the Oil Pollution Act would not include whatever penalties BP is required to pay for illegal discharges under Section 309 of the Clean Water Act, or payments it is ultimately required to pay in civil suits for damages, nor would it include the $20 billion escrow payment BP has already promised.

A private estimate by the Raymond James financial services firm currently places BP’s total financial liability for the spill at approximately $63 billion, based on a formula extrapolating from the payments made by Exxon for the Exxon Valdez spill.

“If you wrap together what BP will end up paying under the criminal statutes, civil penalties, natural resource damages, cleanup costs, and restitution, the government could probably wipe BP out financially,” Hall said. “So far, however, we haven’t seen any indication that it wants to do that,” he added.

Faced with such enormous potential liabilities and because of the uncertainties of litigation, BP is not likely to fight criminal charges, experts said.

“BP will not go to trial in any criminal case. They will settle,” predicted Henning at Wayne State University Law School.

Marzulla said it is likely BP will attempt to resolve its criminal liability and its civil liability in a global settlement with the government.

“The effect would be to roll up all the civil violations and criminal violations and resolve them in a single settlement,” Marzulla said.

Since 1999, the Justice Department’s Environment and Natural Resources Division has had a written policy (ENRD Directive 99-20), known as the [Global Settlement Policy] which sets out requirements for a comprehensive settlement in cases involving civil and criminal violations of environmental laws.

Among other things, the policy requires separate handling and approval of the settlements of civil and criminal violations by the respective civil and criminal litigation sections of the Environment and Natural Resources Division. The policy also prohibits any bargaining by the defendant for leniency in the criminal case in return for agreements to settle civil violations.

**Consequences for Private Civil Suits.** A pending federal criminal prosecution against BP or criminal plea agreement is likely to have substantial ripple effects on the hundreds of private damage suits already filed against BP in the Gulf Coast states, according to attorneys handling the civil suits.

These effects could be both good and bad, said Scott Summy, a partner with Baron & Budd in Dallas, Tex., who is handling 12 multi-plaintiff private damage lawsuits against BP. “On the positive side, you have the power of the federal government that could in quick fashion obtain lots of evidence that could be used in a civil trial,” he said.

“To the extent that criminal allegations are supported by the evidence, that same evidence could be used to show gross negligence in a civil suit,” he continued. “That in turn would serve to remove the current liability cap of $75 million,” said Summy, noting the cap for consequential damages under the Oil Pollution Act does not apply where there is evidence of gross negligence (101 DEN B-1, 5/27/10).

On the negative side, Summy said, “There is the possibility that civil cases will be slowed down by BP not turning over documents or witnesses pleading the Fifth Amendment protection against self-incrimination.”

However, Summy said he did not anticipate such problems. “The witnesses we are deposing were on the rig and we don’t think the government is likely to be going after them for criminal charges,” he said. “The government, if it does pursue criminal allegations, will be more likely to go after higher ups in the company.”

**BP Could Lose Eligibility for Contracts.** A related risk for BP as a result of any pending criminal proceeding is that it could face suspension or debarment from its eligibility to compete for government contracts.
“It’s not a punishment but more a matter of protection for the federal government to make sure it is dealing with responsible contractors,” said Jessica Tillipman, a government procurement law professor and assistant dean at George Washington University Law School.

If BP is indicted, it faces immediate suspension from all future government contracts for a period of one year,” Tillipman told BNA. If BP is convicted, it will be barred from bidding on government contracts for a period of three years, she said.

However, under government procurement law, an indictment or conviction is not a prerequisite before an agency can strip a company of its contracting rights, Tillipman said. “It’s discretionary. If the government wants to do this, it can,” she said. “Often it can be a political calculation.”

Moreover, if one agency cuts off BP from government contracts, all other federal agencies will follow and bar BP from contracting, Tillipman said. States, too, often track actions by the federal government and could bar BP from their own contracts as well, she added.

Tillipman said that in the case of some large defense contractors such as Boeing or Lockheed Martin, suspension and debarment are often avoided, even when there is cause, because the company’s services may not be available from other sources.

“The interesting thing about BP is that it does not offer a unique service and the government can obtain oil or fuel from a variety of other sources,” Tillipman noted. As a result, she said, “The government could hold BP out as a villain and make an example of them.”

Any such action by the government could also have financial consequences for BP. In fiscal year 2010, BP held government contracts valued at $1.3 billion for aviation fuel and other oil products, according to [http://www.USASpending.gov](http://www.USASpending.gov) a government web site that tracks federal procurement spending. In the current fiscal year the value of BP’s government contracts is $837 million, according to the web site.

By Ralph Lindeman