



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 27 2011

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: EPA Office of Inspector General Evaluation Report, *EPA Should Clarify and Strengthen Its Waste Management Oversight Role With Respect to Oil Spills of National Significance* (Report No. 11-P-0706, September 26, 2011)

FROM: Mathy Stanislaus
Assistant Administrator *Mathy Stanislaus*

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to publicly respond to the Office of Inspector General (OIG) report, *EPA Should Clarify and Strengthen Its Waste Management Oversight Role With Respect to Oil Spills of National Significance*, Report No. 11-P-0706, September 26, 2011. While we continue to disagree with some of the language, assumptions and conclusions in the Report, as we describe in one particular instance below, the OIG has provided constructive recommendations. The Office of Solid Waste and Emergency Response (OSWER) concurs partly or fully with the recommendations. Our response to these recommendations and our proposed milestone schedule for implementing the identified corrective actions are also found below.

OIG FINAL Report Language

Final Report Language, Page 1, Chapter 1-Introduction, Background, Footnote 1. OIG's statement that "[t]he Office of Solid Waste and Emergency Response has indicated that there is an ongoing investigation into the number of barrels spilled" is not an accurate characterization of our previous comment to OIG's draft report. We stated in our previous comment that

the quantity of oil spilled is in dispute and is a litigable issue as part of the government's enforcement action filed in December 2010 against BP and other responsible parties. The quantity of oil spilled is also a key element for liability and is an express penalty factor under Section 311 of the [Clean Water Act].

The issue of the amount of oil released into the Gulf of Mexico as a result of the Deepwater Horizon Oil Spill is set for trial in the Eastern District of Louisiana (see page 2 of the attached "Case Management Order No. 3" (September 14, 2011) ("Source Control" Phase of trial). Thus, the issue is a matter before the court, not a matter subject to an ongoing investigation.

OSWER Response to OIG Report Recommendations:

OIG Recommendation 1.a.: *The OIG recommends that: From lessons learned in response to this Spill of National Significance, the Assistant Administrator for Solid Waste and Emergency Response work with other federal partners to determine whether the NCP and NRF should be updated to include processes for waste management oversight in response to nationally significant oil spills, including EPA's role as supporting agency in offshore spills.*

OSWER Response: EPA partly concurs with this recommendation. The National Contingency Plan (NCP) serves as the federal government's blueprint for responding to oil spills and hazardous substance releases. It is designed to be a broad and flexible plan that allows for regional and state-specific guidelines. The NCP discusses waste management specifications for Subpart D-Operational Response Phases for Oil Removal. 40 CFR 300.310 (c) of the NCP says that

oil and contaminated materials recovered in cleanup operations shall be disposed in accordance with the Regional Contingency Plan (RCP), the Area Contingency Plan (ACP) and any applicable laws, regulations or requirements. Regional Response Team and Area Committee guidelines may identify the disposal options available during an oil spill response and may describe what disposal requirements are mandatory or may not be waived by the On-Scene Coordinator.

The ACPs may identify a hierarchy of preferences for disposal alternatives, with recycling (reprocessing) being the most preferred, and other alternatives preferred based on priorities for health or the environment.

Therefore, EPA will not be modifying the NCP to address waste management oversight. However, EPA will develop waste management oversight procedures for ACPs for responses to Spills of National Significance (SONS) in accordance with the proposed corrective action for **Recommendation 1.b.**, below. EPA will also propose adding language to National Response Framework (NRF) Emergency Support Function (ESF) #10 annex that outlines EPA's waste management oversight capabilities as a support agency. However, a milestone date for the ESF #10 revision is dependent on the Federal Emergency Management Agency (FEMA) plan for completing updates to the NRF and its annexes under Presidential Policy Directive (PPD)-8. Under PPD-8, the Agency expects FEMA to set the deadline for all ESF coordinating agencies to update their ESF annexes sometime during the 2012 calendar year. EPA will submit draft revisions for ESF #10 to FEMA no later than December 2012. We would also note that our response to Recommendation 5 in OIG Report No. 11-P-0534, *Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill*, is not pertinent to our response to this recommendation. Our response to that recommendation addressed high-level official involvement, not waste management activities and again, changes would not be needed to the NCP to address those concerns either.

OIG Recommendation 1.b.: *The OIG recommends that: From lessons learned in response to this Spill of National Significance that the Assistant Administrator for Solid Waste and Emergency Response work with other federal partners to complete guidance for waste management oversight in ACP's.*

OSWER Response: EPA concurs with this recommendation to work with other federal partners to complete guidance for waste management oversight in ACPs. EPA proposes to meet with the United States Coast Guard (USCG) before January 31, 2012 to discuss the development of guidance on this subject for use by the Regional Response Teams (RRTs) in updating their Regional and Area Contingency Plans. This meeting is necessary in order to reach agreement with the USCG on a schedule to work together to develop joint guidance for waste management oversight in ACPs. It is difficult to commit to a completion date at this time because the corrective action requires coordination among all 13 RRTs, each with multiple federal and state agency members. However, EPA will commit to producing a draft guidance document for field testing by January 2013.

OIG Recommendation 1.c.: *The OIG recommends that: From lessons learned in response to this Spill of National Significance that the Assistant Administrator for Solid Waste and Emergency Response develop a model waste management plan and a waste oversight framework that includes: i.) provisions for including all states and facilities involved in the response, ii.) definition of roles and responsibilities for all authorized responders, and iii.) an exit strategy for decommissioning waste management oversight activities.*

OSWER Response: EPA concurs with this recommendation to develop a model waste management plan that would provide the framework for the development of waste specific plans which would be applicable to coastal SONS per the OIG recommendation. The model plan would include provisions for including all states and facilities that would be involved in a response to coastal SONS and would identify the roles and responsibilities of all authorized responders. The development of an exit strategy for decommissioning waste management oversight will be addressed as part of EPA's response to **Recommendation 1.b.** The model waste management plan for a coastal SONS and any additional guidance developed by EPA (**Recommendation 1.b.**) that would modify or amend existing waste management oversight guidance for application to a coastal SONS would be posted to OSWER's "Waste Management for Homeland Security Incidents" at: <http://epa.gov/waste/homeland/>. Below are the milestones and schedule for completing these activities.

Milestones and Schedule for Completion:

- | | |
|--------------------------------------|----------------|
| 1. Send out draft WM plan for review | March 30, 2012 |
| 2. Prepare final WM plan | June 29, 2012 |

OIG Recommendation 3: *The OIG recommends that the Assistant Administrator for Solid Waste and Emergency Response update EPA's 2002 guidance on the E&P waste exemption to include circumstances under which E&P waste could be managed or disposed of differently, including during applicable oil spills. Incorporate into any lessons-learned review a discussion of EPA opinions and procedures for overseeing and handling waste from this spill, including those wastes subject to the E&P exemption.*

OSWER Response: EPA partly concurs with this recommendation. EPA continues to disagree with the first part of this recommendation to update the 2002 guidance on Exploration and Production (E&P) waste ("Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations"). This guidance serves a very specific purpose: to guide

regulators and the regulated community in determining which waste generated at oil and gas production operations are regulated as hazardous waste under RCRA. Developing procedures for managing and disposing of wastes from oil spills raises fundamentally different issues. Depending on the origin of the spill, the E&P exemption may not apply to oil spill wastes (for example, crude oil spilled from a tanker in transport would not be subject to the E&P exemption). Therefore the E&P guidance would not be an appropriate place to address these issues.

However, OSWER will prepare a memorandum to incorporate the lessons-learned from this spill discussing EPA's opinions and procedures for overseeing and handling waste, including waste subject to the E&P exemption during a spill of national significance. Below are the milestones and schedule for completing this recommendation.

Milestones and Schedule for Completion:

- | | |
|---|----------------|
| 1. Send out draft E&P memorandum for review | March 30, 2012 |
| 2. Prepare final E&P memorandum | June 29, 2012 |

OSWER welcomes the opportunity to continue working with the OIG to implement these recommendations and to strengthen its waste management oversight role with respect to Oil Spills of National Significance. If you have any questions, please contact Dana Tulis, in the Office of Emergency Management at (202) 564-8600.

Attachment

cc: Barry Breen, OSWER
Lisa Feldt, OSWER
Suzanne Rudzinski, ORCR/OSWER
Sandra Connors, ORCR/OSWER
Lawrence Stanton, OEM/OSWER
Dana Tulis, OEM/OSWER
Cynthia Giles, OECA
Pam Mazakas, OECA
Elliott Gilberg, OECA
Scott Fulton, OGC
Mary Kay Lynch, OGC
Al Armendariz, Region 6
Sam Coleman, Region 6
John Blevins, Region 6
Carl Edlund, Region 6
Gwendolyn Keyes-Fleming, Region 4
Alan Farmer, Region 4
Dee Stewart, Region 4
Franklin Hill, Region 4
Carolyn Copper, OIG

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: OIL SPILL by the OIL RIG
DEEPWATER HORIZON in the
GULF OF MEXICO, on
APRIL 20, 2010

* MDL NO. 2179
* SECTION: J
* JUDGE BARBIER

This Document Applies to All Cases

* MAG. JUDGE SHUSHAN

PRETRIAL ORDER NO. 41

[CASE MANAGEMENT ORDER NO. 3]

In order to continue to organize and manage this complex litigation as efficiently as possible, upon consideration of the briefs filed by certain parties regarding this matter, and after consultations with Liaison Counsel, Coordinating Counsel for the States, and Coordinating Counsel for the Interests of the United States and consideration of the observations provided during those consultations, the Court adopts this Case Management Order No. 3 with respect to the scope and structure of the Trial of Liability, Limitation, Exoneration, and Fault Allocation ("Trial") that is scheduled to commence, as previously ordered in CMO No. 1 and CMO No. 2, on February 27, 2012.

I. TRIAL STRUCTURE

The Trial will address all allocation of fault issues that may properly be tried to the Bench without a jury, including the negligence, gross negligence, or other bases of liability of, and the proportion of liability allocable to, the various defendants, third parties, and non-parties with respect to the issues, including limitation of liability. The Trial will be conducted in at least three phases. Each phase will be comprised of the presentation of evidence and consideration of attendant legal questions pertaining to specific issues that will be the focus of that phase as described below. The focus of the phases of Trial will be as follows:

Phase One ["Incident" Phase] of the Trial will address issues arising out of the conduct of various parties, third parties, and non-parties allegedly relevant to the loss of well control at the Macondo Well, the ensuing fire and explosion on the MODU DEEPWATER HORIZON on April 20, 2010, and the sinking of the MODU DEEPWATER HORIZON on April 22, 2010, and the initiation of the release of oil from the Macondo Well or DEEPWATER HORIZON during those time periods (collectively, the "Incident"). Phase One will include issues asserted in or relevant to counterclaims, cross-claims third-party claims, and/or comparative fault defenses as appropriate.

Phase Two ["Source Control" Phase] of the Trial will address Source Control and Quantification of Discharge issues. "Source Control" issues shall consist of issues pertaining to the conduct of various parties, third parties, and non-parties regarding stopping the release of hydrocarbons stemming from the Incident from April 22, 2010 through approximately September 19, 2010. "Quantification of Discharge" issues shall consist of issues pertaining to the amount of oil actually released into the Gulf of Mexico as a result of the Incident from the time when these releases began until the Macondo Well was capped on approximately July 15, 2010 and then permanently cemented shut on approximately September 19, 2010. Phase Two will include issues asserted in or relevant to counterclaims, cross-claims, third party claims, and/or comparative fault defenses, as appropriate.

Phase Three ["Containment" Phase] of the Trial will address issues pertaining to the efforts by various parties, third parties, and non-parties aimed at containing oil discharged as a result of the Incident by, for example, controlled burning, application of dispersants, use of booms, skimming, etc. Phase Three of the trial will also address issues pertaining to the migration paths and end locations of oil released as a result of the Incident as carried by wind, currents, and other natural forces and as affected by efforts to contain or direct this

migration.

Phase Three will include issues asserted in or relevant to counterclaims, cross-claims, third party claims, and/or comparative fault defenses, as appropriate.

II. ORDER OF PROCEEDINGS IN THE TRIAL

The order of trial in Phase One will be as follows:

First, the Plaintiffs' Steering Committee ("PSC") shall adduce factual and expert evidence in support of the plaintiffs' claims against all defendants.

Second, Transocean shall present factual and expert evidence on its exoneration, limitation, and liability defenses, as well as its counter- and cross-claims and third party claims against any third party 14(c) defendants.

Third, the third-party defendants shall present their factual and expert evidence in support of their defenses to plaintiffs' claims and any other defendants' counter- and cross-claims and third party claims against them, and in support of their counter- and cross-claims and third party claims against other defendants. The Court encourages third-party defendants to confer and reach agreement as to their sequence of presentation, failing which, the Court will enter an order regarding same.

Fourth, the PSC shall present the plaintiffs' rebuttal evidence.

The Court will enter orders at a later date regarding the sequence of proceedings for Phase Two and Phase Three of the Trial. The record will be held open between Phases of the Trial unless the Court determines it is appropriate to deem the record closed on the issues in a particular Phase because the record has been sufficiently developed to permit final rulings on those issues.

All parties shall present evidence relevant to a particular Phase during that Phase and should not expect they will be permitted to fill evidentiary gaps in one Phase by presentation of evidence in a subsequent Phase; provided, however, that there may be circumstances in which it is appropriate to present evidence in one phase that is relevant to another phase -- such as, but not limited to, where the evidence is relevant to more than one phase or where efficiency is best served by permitting evidence to be admitted in more than one phase.

III. FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court anticipates that it will direct the parties to submit proposed findings of fact and conclusions of law promptly after the conclusion of each Phase of the Trial and final proposed findings of fact and conclusions of law regarding all evidence and legal issues in the liability portion(s) of the Trial promptly after the conclusion of Phase Three of the Trial.

At the end of each Phase of the Trial and after consideration of the parties' submissions, the Court may decide to issue partial Findings of Fact and Conclusions of Law for that Phase if it deems the record adequately developed. If the Court does not find it appropriate to enter Findings of Fact and Conclusions of Law with respect to any issues tried until the conclusion of all Trial Phases, the Court may defer issuing its Findings of Fact and Conclusions of law until the conclusion of all phases of the liability and limitation trial.

IV. PRETRIAL PROCEEDINGS

Discovery and other pretrial proceedings for Phase One will continue to be conducted in accordance with the provisions of CMO No. 1 (Rec. Doc. 569), CMO No. 2 (Rec. Doc. 1506), and other applicable Pretrial Orders, as the provisions of those Orders may be applied or modified by future orders of the Court and in conferences conducted by the undersigned or by Magistrate Judge Shushan.

After consulting with Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel, the Court will enter additional Pretrial Orders regarding the scope and schedule for discovery and other pretrial proceedings with respect to Phase Two and Phase Three of the Trial. Subject to further consideration and specification, the Court anticipates that discovery and other pretrial proceedings for Phase Two of the Trial and possibly for Phase Three of the Trial will likely need to be conducted concurrently with pretrial proceedings for and the conduct of Phase One of the Trial, and that discovery and other pretrial proceedings for


Phase Three of the Trial will likely need to be conducted concurrently with pretrial proceedings for and the conduct of Phase Two of the trial.

The Trial will stand in recess between Phase One and Phase Two of the Trial and between Phase Two and Phase Three of the Trial. The Court will determine during Phase One of the Trial the length of the recess before commencement of Phase Two of the Trial, and will determine during Phase Two of the Trial the length of the recess before commencement of Phase Three of the Trial. The Court expects that discovery for Phases Two and Three of the Trial will be largely completed in advance of those Phases and therefore expects that the recesses will not be used primarily for discovery for Phases Two and Three.

V. SUPPLEMENTATION OF AND AMENDMENTS TO THIS ORDER

The provisions of this Order are provisional and may be supplemented or modified either *sua sponte* or on motion by any party as may become necessary.

New Orleans, Louisiana, this 14th day of September, 2011.


CARL J. BARBIER
UNITED STATES DISTRICT JUDGE