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# Gulf Coast Oil Spill: Does the Federal Government Share Responsibility?

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BP has correctly received most of the blame for the Deepwater Horizon oil spill. As the contractor of the rig, there is little question that BP is responsible for the accident. However, reports of federal regulatory exemptions and passed safety inspections should raise questions about the federal government's responsibility and the role of regulation.

**What Is the Federal Government's Responsibility?** As the owner of the waters where drilling takes place, the federal government bears ultimate responsibility for what happens on its property. Even though it leases the space to private investors, it is the government that is responsible for protecting public health, safety, and interests while allowing access to a needed resource through its regulatory authority.

Because the federal government exercises significant oversight, it shares some liability for what takes place under the lease. For example, the federal government sets safety guidelines for rig operations and conducts inspections to enforce its rules. Under this relationship, the lessee should reasonably be able to assume that federal guidelines will result in safe operations and that federal inspectors are competent in enforcing those rules. Regarding Deepwater Horizon, a question is whether the federal government fulfilled its regulatory obligations.

**Regulatory Exemptions and Passed Inspections.** There were potential lapses in regulatory enforcement that could yield some liability to the federal government. For example, the Department of Interior inspected the rig less than two weeks prior to the accident as part of a mandated monthly inspection regimen.[1] Federal regulators also gave the rig's emergency shutoff valve a pass 10 days prior to the accident. The so-called "blow-out preventer" is meant to be the fail-safe mechanism to ensure that major spills do not occur.[2]

There are also questions surrounding a National Environmental Policy Act (NEPA) exemption that BP attained. Major federal actions—including the sale of offshore drilling leases—generally require a detailed environmental impact analysis as part of the NEPA process before they are permitted. Unfortunately, NEPA has evolved into an onerous and costly process that slows progress on critical public and private activities. Complying with NEPA requirements can take years to fulfill, and the process is subject to litigation. This has led to NEPA exemptions for projects that are deemed to pose little environmental risk, which BP was granted.

The solution, though, is not to deny future NEPA waivers but to revamp the NEPA process altogether. As currently applied, NEPA is too wide-reaching and onerous, which results in the need to waive its provisions. In drilling alone, 28 percent of all drilling permit applicants received similar waivers

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between 2006 and 2008.[3] Federal projects are subject to NEPA as is anything that is potentially subject to federal oversight or requires a federal permit.

The problem in this case was that the environmental risk was miscalculated, and the federal government seems to have been unprepared to fulfill its responsibility to clean up the spill.

**Lobbyists, Royalties, and Government Intervention.** With its financial interests in energy production (royalty collection and taxes), the federal government is seeing its interests and those of its corporate partners becoming closely aligned. This is perhaps part of the problem of offshore drilling regulations.

There has been a movement in recent years toward more self-regulation in offshore drilling, which should continue. The problem is that the Mineral Management Service, which is responsible for overseeing offshore drilling, is also responsible for promoting energy production and collecting royalty fees from drilling activities. This presents an obvious conflict of interest, which the Obama Administration has recently recognized.

Moreover, the growing partnership between the federal government and the energy industry that it is supposed to regulate creates, at a minimum, the perception of impropriety. More worrisome, however, are the conflicts of interests that will emerge as government and industry grow closer together. Over time, this relationship will chip away at the government's ability to provide fair and efficient regulation.

**Smart Regulation, Not More Regulation.** Regardless of fault, something clearly went wrong in the Gulf. The involved parties did not uphold their responsibilities to ensure safe operations or to adequately prepare a response plan for a major spill. But this failure was likely not the result of insufficient regulatory quantity: Getting a lease to drill offshore is already an onerous regulatory process, and once drilling operations commence, the lessee is subjected to constant monitoring and inspection. It was more likely the case that the current regulatory regime confuses responsibilities, undermines incentives for market-based safety solutions, and creates conflicts of interests between the regulator and those being regulated.

As policymakers reevaluate the regulatory regime over offshore drilling, they should consider the following:

- *Do not ban offshore drilling.* While the accident in the Gulf should be understood and precautions should be put in place to prevent it from happening again, the nation should continue to move forward with offshore drilling. Without tapping its domestic resources, the U.S. will grow more dependent on the rest of the world. And forcing oil alternatives on the U.S. before they are economically viable will only punish America's citizens with higher energy prices and slower economic growth. There could also be unintended consequences, such as a greater use of tankers, which lead to more spills than offshore drilling.[4]
- *Hold lessee fully liable for drilling operations.* While the $75 million liability cap should be reassessed, such caps are sometimes necessary in the U.S., where unlimited tort liability can make doing business impossible.[5] The reassessment should be adequate to ensure that private actors are held financially liable for their actions but not so high as to be needlessly punitive. An accurate

1. The White House, Office of the Press Secretary, "Press Briefing on the BP Oil Spill in the Gulf Coast," April 29, 2010, at *http://www.whitehouse.gov/the-press-office/press-briefing-bp-oil-spill-gulf-coast* (May 6, 2010).
2. Michael D. Shear, Steven Mufson, and William Branigin, "Louisiana Governor Jindal Demands U.S. Government, BP Uphold Pledges to Avert Environmental Disaster," *The Washington Post*, April 30, 2010, at *http://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001044_pf.html* (May 6, 2010).
3. Government Accountability Office, *Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act*, GAO-09-872, September 2009, at *http://www.gao.gov/new.items/d09872.pdf* (May 11, 2010).
4. Robert Stewart, "Our Ocean Planet, Oceanography in the 21st Century," revised August 3, 2009, at *http://oceanworld.tamu.edu/resources/oceanography-book/oilspills.htm* (May 10, 2010).

liability assessment is a critical incentive, because it directly ties safety to long-term profitability.

- *Keep primary responsibility for safety with the lessee.* While a heavy regulatory burden may seem the best way to ensure safe operations, it can be counterproductive. If the government is responsible for ensuring safe operations, then the lessee can pay less attention to them. Combining liability with a responsibility for safety maintenance should minimize the likelihood of accidents by directly connecting profit motives to safe operations.
- *Limit federal intervention into the energy industry.* Instead of blurring the line between public and private activities—and thus responsibilities—the federal government should focus on providing a limited amount of strong, fair, and efficient regulatory guidance. At a minimum, those elements of the federal government responsible for promoting specific energy sources should not also be responsible for enforcing regulatory standards.
- *Review the NEPA process.* NEPA's pervasive application makes it highly burdensome and difficult to follow, which drives the need for waivers. As waivers become the norm, they become easier to attain even when perhaps they should be denied.

**Should the Federal Government Bear Some Responsibility?** Since details of the Gulf oil spill remain allusive, it is unclear what amount of liability should fall to the federal government. However, what is clear is that so long as the federal government takes on the responsibility of ensuring safe operations and responding to the cleanup, it should be responsible for competently carrying out that mission.

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5. In addition to the $75 million cap on damage liability, responsible parties are liable for all clean up costs. The $75 million cap is waived if the responsible party is found to be grossly negligent. Should damages exceed $75 million, the Oil Spill Liability Trust Fund can be tapped for up to $1 billion in related costs. The fund is paid for largely by an oil tax of $0.08 per barrel.