

BP's Settlement With DOJ: Lessons Learned Within the Congressional Investigations Arena

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On November 15, 2012, the U.S. Department of Justice announced that BP Exploration and Production Inc. (BP) has agreed to plead guilty to a 14-count criminal information and pay a record \$4 billion in criminal fines and penalties in connection with the 2010 *Deepwater Horizon* blowout and oil spill that killed 11 people and caused the largest environmental disaster in U.S. history. The charges against BP include manslaughter, environmental violations, and obstruction of Congress. The Department of Justice also unsealed indictments against Robert Kaluza and Donald Vidrine, two BP supervisors onboard the *Deepwater Horizon*, for manslaughter and environmental violations, and David Rainey, BP's former vice president of exploration for the Gulf of Mexico, for obstruction of Congress.

Media coverage has focused on the record fine and the manslaughter charges faced by BP, Kaluza and Vidrine. The focus for corporate executives, however, equally should be the obstruction of Congress charges, which stem from BP's response to Congress's investigation into the amount of oil flowing into the Gulf as a result of the *Deepwater Horizon* incident. Whereas the incident itself offers few lessons for corporations outside the oil field, BP's response to the congressional investigation of the incident offers lessons for all companies responding to congressional investigations in the future.

Background

The following facts are outlined as alleged in the criminal information against BP, the criminal indictments against BP executives and press releases issued by the Department of Justice.

On April 20, 2010, there was a blowout of natural gas, oil and mud at the *Deepwater Horizon*, a drilling rig leased by BP to drill at the Macondo well in the Gulf of Mexico. The blowout caused a series of explosions that killed 11 individuals onboard and caused a massive oil spill that lasted until the well was finally shut on July 15, 2010. On August 2, 2010, a group of independent and government experts announced that an estimated 4.9 million barrels of oil had been released during the spill.

BP's Flow-Rate Estimates

In response to the blowout, representatives from BP, Transocean Ltd. (the owner of the *Deepwater Horizon*) and the federal government formed Unified Command to coordinate the response to the oil spill. Rainey served on behalf of BP as Deputy Incident Commander at Unified Command. Rainey was BP's second highest-ranking representative at Unified Command.

On April 24, 2010, Unified Command issued a preliminary public estimate that 1,000 barrels of oil per day were flowing from the Macondo well. After a scientist at the National Oceanic and Atmospheric Administration (NOAA) prepared a written flow-rate estimate of 5,000 barrels of oil per day, Unified Command's public estimate quickly was revised to match that figure.

After learning of NOAA's preliminary flow-rate estimate of 5,000 barrels of oil per day, Rainey, who had no previous experience with oil spill estimation, performed Internet

research for information on how to perform such estimates. Rainey read about two generally accepted methods for estimating oil spill volumes based on observations of oil floating on the surface of a body of water and began performing daily estimates using these techniques. Rainey's calculations using one of the methods yielded flow-rate estimates as high as 92,000 barrels of oil per day. Rainey manipulated his calculations for the second method to achieve results consistent with NOAA's 5,000-barrels-per-day estimate.

At the same time, BP had teams of experts internally assess the flow rate for the Macondo well using sophisticated methodologies that focused on data from the seafloor. On April 22, 2010, BP engineers estimated that between 64,000 to 146,000 barrels of oil per day were spilling out from the Macondo well. On May 11, 2010, BP engineers calculated a range of 14,000 to 82,000 barrels of oil per day. Rainey was aware of the May 11, 2010, figures.

On May 13, 2010, a university professor with expertise in fluid mechanics measurement publicly estimated that oil was leaking from the Macondo well at a rate of 70,000 barrels per day, based on available video footage of the leak. Even though this number was roughly in line with the internal estimates of its engineers, BP dismissed the professor's figure and maintained that 5,000 barrels of oil per day was the "best" estimate.

In an email to BP executives on May 14, 2010, a BP engineer cautioned that the 5,000-barrels-per-day estimate could be inaccurate because internal models suggested flow rates of up to 100,000 barrels of oil per day. Rainey received a copy of the engineer's email and was directed by BP to prepare an internal memorandum to address the engineer's concerns.

In his memorandum, dated May 17, 2010, Rainey summarized the efforts undertaken by Unified Command to estimate flow rate, attempting to justify the 5,000-barrels-per-day figure. Rainey did not mention his own estimates that exceeded 5,000 barrels of oil per day and instead focused on his estimates using the second methodology. He failed to include documents relating to internal estimates by BP engineers. Rainey also falsely wrote that his own estimates of 5,000 to 6,000 barrels of oil per day played an important part in Unified Command's decision to raise its public estimate from 1,000 to 5,000 barrels of oil per day, even though he had not provided his estimates to Unified Command at the time it raised its estimate.

Congressional Inquiry

Shortly after the *Deepwater Horizon* incident, the House Subcommittee on Energy and the Environment (the Subcommittee) began an investigation of the blowout and oil spill. On May 4, 2010, Rainey briefed members and staff of the Subcommittee on BP's flow-rate estimates. He stated that 5,000 barrels of oil per day was the most accurate flow-rate estimate, noting that BP had calculated a hypothetical "worst case" scenario of 60,000 barrels of oil per day, but that this scenario assumed that the blowout preventer from the wellhead, which was still in place, had been removed. Rainey did not mention any information that contradicted the 5,000-barrels-per-day "best guess," including his own estimates or any other internal BP estimates.

On May 14, 2010, citing the 70,000-barrels-per-day figure provided by the university professor, the Subcommittee's Chairman sent a letter to BP accusing it of understating the amount of oil being spilled. The letter included a request for information about BP's method and scientific basis for its 5,000 barrels-per-day estimate, all documents created since the incident that related to BP's estimates and BP's current estimate of the flow rate.

Rainey was the primary source of flow-rate information for BP's response to the Subcommittee's request. During the preparation of BP's response, Rainey continued to receive information that the 5,000-barrels-per-day estimate was too low, but he withheld this information from other BP employees

and attorneys working on BP's response. On May 24, 2010, BP submitted its written response to the Subcommittee. Attached to its response were Rainey's May 17, 2010, flow-rate memorandum and its attachments.

On August 2, 2010, the Flow Rate Technical Group, comprised of independent and government experts, estimated the flow rate following the blowout to initially have been 62,000 barrels per day, slowing to 53,000 barrels per day by the time the well was shut on July 15, 2010.

Criminal Charges

The indictment against Rainey charges him with obstructing the Subcommittee's investigation, in violation of 18 U.S.C. § 1505, and making false statements to federal law enforcement officials during their investigation of the case a year later, in violation of 18 U.S.C. § 1001(a)(2). Rainey faces a maximum sentence of five years in prison on each count.

Of the \$1.256 billion in criminal fines to be paid by BP, \$500,000 is attributable to the obstruction of Congress count.

Lessons Learned for Responding to Congressional Investigations

The response of BP and its executives to the *Deepwater Horizon* inquiry exemplifies that failing to disclose requested information or responding in an inaccurate or inconsistent manner during a congressional investigation can result in exposure to potential criminal liability. Companies frequently become caught up in the high-profile aspects of a congressional investigation, ignoring the seemingly mundane tasks of producing documents and responding to written requests in the form of interrogatories. Indeed, it is understandable that a company may focus on the possibility that its CEO or high-level executives will be called to testify at a public hearing before Congress, particularly in light of the media attention that such hearings may receive. However, as the *Deepwater Horizon* case emphasizes, a company may face more serious exposure, including criminal liability, for failing to properly vet written responses provided at an early investigative stage when Congress is simply fact-gathering, with no decision yet made as to whether to hold a hearing or issue a public report. Accordingly, it is critical for a company to ensure that it does everything it can to produce information and submit written responses in as accurate a manner as possible.

Responding to Letter Request or Subpoenas Issued by a Congressional Committee

A congressional committee's first step in any investigation typically is to seek documents or information through letter requests. Noncompliance with a letter request likely will result in the issuance of a subpoena. All standing committees and subcommittees have subpoena power, which can be used to try to strong-arm companies into cooperating and providing responsive information if necessary. Companies are far better off trying to work with a congressional committee within the context of a letter request, as committee staff likely will be more amenable to narrowing the scope of the request as well as extending the time period to respond. In contrast, if a congressional committee is forced to go through the procedural hoops of issuing a subpoena, the possibility of negotiating the parameters of the same is less likely.

Once a letter request is received, consistent with responding to written requests or subpoenas from other governmental investigative entities, a company should (i) issue a document preservation directive to all relevant personnel so as to avoid the loss or spoliation of responsive materials; (ii) begin comprehensive and systematic collection efforts to identify all responsive materials and memorialize the same in a privileged and confidential memorandum to the file; and (iii) review the letter request to identify those requests that immediately can be complied with, those requests that may be overly

broad but can at least partially be complied with, and those requests which cannot be complied with in their current form, necessitating further discussions between committee staff and outside counsel to arrive at a workable disclosure strategy.

Further, in situations involving parallel civil or criminal proceedings, the production of documents should be coordinated so as to ensure that productions are consistent. The existence of parallel civil or criminal proceedings does not excuse a company from producing relevant documents. To the contrary, a witness can be convicted of contempt for failing to produce documents to Congress on the basis that a lawsuit involving the same matter was pending. It is not uncommon for Congress to investigate matters that are simultaneously the subject of a criminal investigation.

Particular Perils Posed by Written Responses

With respect to requests that entail written responses, companies should identify all relevant employees who should be involved in formulating the response. As illustrated by the *Deepwater Horizon* investigation, companies should not exclude lower-level employees in such responses if they are the primary gatekeepers of responsive information. Similarly, written responses should be reviewed by all of the key relevant employees so as to ensure the accuracy of the response. In this regard, companies must have sufficient controls in place to ensure that internal discrepancies between employees and documents are resolved before issuing a response to a congressional committee. Indeed, it is critical for a company to provide information that is properly vetted before going out the door – *i.e.*, information that is carefully combed for its accuracy, that is not internally controversial or subject to debate, and that is consistent with previous statements or, if providing new information, can be explained as to why the information differs from what has previously been provided. Similarly, all written responses should be checked against documents already produced. Because committee staff are responsible for conducting the investigation and making factual determinations, a company should assume that committee staff will independently seek to verify the responses provided to them.

If a company discovers that it has provided a written response that is inaccurate, could be viewed as misleading or is deficient in content, immediate steps should be taken to supplement or correct the record. One of the biggest mistakes a company can make during the course of a congressional investigation is to alienate or lose the trust of committee staff, who are tasked with conducting the investigation and providing regular updates to the committee chairman and other committee members regarding their findings and the cooperation they are receiving from the relevant parties. They often also are tasked with drafting a report or preparing the chairman and committee members for a hearing. If the committee staff has reached the conclusion that the company is not trustworthy, the company can certainly expect for committee members to have reached the same conclusion given that all information that they receive primarily is filtered through the committee staff.

Conclusion

Criminal sanctions for making false statements or obstructing Congress are real. While Congress itself may be limited in the direct sanctions it can impose on a company and generally needs to rely on the Department of Justice to initiate prosecutions on the basis of findings made by a congressional committee, the BP case clearly highlights the risks of engaging in conduct during the course of a congressional investigation that gives rise to criminal prosecution for obstruction of Congress.