The Tines of Neptune’s Trident

Presented by Frank J. Gonynor, Gard (North America) Inc.
What happened in the USA because of the Macondo incident?
Is this a series of similar incidents, seemingly without end?

Concepts to Ponder?: ‘Risk homeostasis’ – Prof. Gerald Wilde, Queens University, ‘Target Risk 2’ (2001); ‘Normal Accidents’ (1999) – Prof. Charles Perrow, Yale University
Let us not forget…

Eleven persons killed, 18 injured, thousands affected, millions concerned.
The pursuit of hydrocarbons offshore will continue, and greater safety is imperative.

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**Fox News Polling: Support for Offshore Drilling Continues to Decline**

- **Support:**
  - April 10th: 70%
  - May 10th: 48%
  - June 10th: 44%

- **Oppose:**
  - April 10th: 22%

Thinking now about the energy situation, please tell me if you favor or oppose the following ways to reduce the country's dependence on foreign oil and make the United States more energy independent: Increasing offshore drilling in U.S. coastal areas.
Increased Support for More Offshore Drilling

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Most Now Oppose the Increased Use of Nuclear Power

The Tines of the Trident: Three Avenues of Response and Change

Executive – Regulations

Legislative - Statutes

Judicial – Legal Decisions
The Reaction of the Executive Branch

- Assistance during the formulation of a solution to the ongoing spillage.
- The National Commission on the BP Deepwater Horizon Oil Spill, a ‘blue ribbon’ panel of experts to examine what had happened and to make policy recommendations (Final report issued January, 2011).
- The USCG/BOEMRE Joint Investigation and its Final Report (September, 2011)
- The USCG Federal On-Scene Coordinator’s Report, evaluating oil spill response (September, 2011)
- The Incident Specific Preparedness Review for evaluation of the oil spill response (March, 2011)
- Report of the U.S. Chemical Safety and Hazard Investigation Board (‘CSB’).
Change of the Regulators

A Summary of Regulatory Changes Proposed

- Splitting and compartmentalization of functions into 3 new agencies.
- Endow all employees on the facility with ‘Stop Work’ authority.
- Determine who has ‘Ultimate Work Authority’.
- Employee participation in implementation of API Recommended Practice no. 75 *(issued in year 2004)*
- Ability for offshore workers to request BOMRE inspection.
- Third party audits of safety environmental management systems.
- Still to Come: Report of the CSB.
At hearings held in December, 2010, testimony taken from representatives from U.K., Norway, Australia, Mexico; CSB investigators have been dispatched to Brazil, Canada, and the U.K.

“Investigation findings to date indicate a need for companies and regulators to institute more rigorous accident prevention programs similar to those in use overseas.”

Possible recommendation of the adoption of the “Safety Case” concept. Australian, British and Norwegian regulators told the CSB they changed their safety system from a prescriptive approach, which is based on company’s following rules and requirements, to a risk-based system called a “safety case,” where companies assess risks and develop plans to take care of them

Possible proposal that past safety performance will be a factor in lease allocation decisions.
The Second ‘Tine’ – U.S. Congress

- In 2010, the House of Representatives held 33+ hearings, in 10 committees.
- The U.S. Senate conducted 30 hearings, in 8 committees.
- > 150 legislative proposals were introduced into Congress.
‘Sweeping Changes’?

Increase Liability Substantially

- Remove any limitation on liability for oil spill removal costs (for facilities currently $75 million).
- Raise limit on NRDA assessments to $750 million.
- Increase limit of liability to USD 10 billion
- Completely repeal U.S. Limitation of Liability Act for vessels.
- Recovery of punitive damages without tie to compensatory damage quantum.
- Expand scope of parties who can be liable for an oil spill.
- Increase Oil Spill Liability Trust Fund to $10 billion.
- Congress back from recess on Sept. 13th; adjourned Oct. 8th
Congressional Results?

- H.R. 5499/S.3473 = P.L. 111-191: authorized additional advances of the Oil Spill Liability Trust Fund, for the Deepwater Horizon incident only.
- H.R. 4899 = P.L. 111-212: provided $94 million for oil spill related programs, including research on impact of spill on fisheries, DOJ expenses.
- H.R. 3319 = P.L. 111-281: cargo owner liability for single hull vessels, tug escorts, human errors and oil spills, oil spill detection, oil fuel tank construction, regulations on oil transfer operations, Arctic oil spill prevention and response.
Then A Change of Congress – Then More Action?

- Congressional Election: 2 Nov 2010
- H.R. 2845 = P.L. 112-90, signed into law on 2 Jan 2012, dealt with oil spill pipeline safety.
- H.R. 3408 – create a Gulf Coast Restoration Fund, financed by 80% of Deepwater Horizon fines, penalties, settlements with the government (passed H.R. on 16 Feb 2012).
- Several others in Senate and House reported out.
National Commission – Gives Congress a Grade of “D”

Two years after the Deepwater Horizon explosion unleashed the worst oil spill in American history, Congress has failed to take meaningful action to prevent a similar disaster, according to a new report from members of a presidential panel.

The report cited significant progress by the Obama administration and the oil industry, giving them a B and a C+ grade, respectively, for their efforts to bolster safety, spill response and resources. Congress, however, got a D grade for its inability to "enact any legislation responding to the explosion and spill."

Report issued on 17 April 2012.
The Third Tine of the Trident: Court Actions

350 + Lawsuits

- Federal and state court actions, primarily in Louisiana, Florida, Texas, Alabama, and Mississippi
- Actions against the parties involved with the Deepwater Horizon, but also against others, such as versus manufacturer of the dispersant chemical used.
- Civil actions, but also criminal charges possible.

Consolidation to Federal Court in New Orleans

- Some said that litigation was the only means to delve into the root causes, gain just compensation for victims of the incident, and punish large corporations for wrongdoing.
- Has that yet occurred?
Key Rulings to Date

U.S. District Judge Carl Barbier

Current trial date: 14 Jan. 2013

• Claims for products liability as to dispersants can go forward.
• BP is not co-assured under Transocean’s insurance policies.
• BP must indemnify Transocean/Halliburton for 3rd party damages, even if caused by negligence, gross negligence or strict liability.
• No duty for BP to indemnify Transocean/Halliburton for punitive damages or civil penalties.
Key Rulings (cont.)

- BP and Anadarko liable for Clean Water Act penalties as offshore facility owners.
- $7 Billion Settlement: payments in the class actions to primarily fishermen and coastal property owners, with immediate ‘interim’ payments, including $600 million in attorney fees for class action counsel, and at least 25% contingency fees otherwise.
- Settlement does not resolve claims of the federal government, individual state governments, and claims by the class action plaintiffs versus Transocean and Halliburton (as part of settlement, BP assigned their claims versus those entities to the Plaintiffs).
Judicial Action – summary of current status

- Many points have been ruled upon, but many large and critical issues remain outstanding.
- A ‘fairness hearing’ in November to approve the class action settlement must be completed.
- The CWA civil penalties loom for the BP, Transocean, Anadarko: if gross negligence, then max. at $4300 per bbl, or $21.5 billion per company.
- Criminal charges have been filed in federal court against BP engineer Kurt Mix, for obstruction charges in deleting e-mails and text messages regarding flow rates from the leaking well. His case is set for trial 25 Feb 2013.
Deepwater Horizon: What changes have happened, or may occur, as a result?

Vectors of Change

- What branch of government – executive, legislative or judicial – will end up having the most impact with its actions?
- What influence will foreign regulatory and legal regimes have on U.S. decision makers?
- Will the offshore energy industry prove to be the prime architect of improvements and change?

A chain of incidents?

- Is there truly a ‘chain’ of incidents, and if so, can it be broken?
- Are ‘risk homeostasis’ and ‘normal accident’ concepts that have relevance?
- Can we learn and improve?
Thanks very much/ Mange takk

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