

The New York Times

JANUARY 13, 2011

Halliburton's Legal Fate in Gulf Spill Still Uncertain

By LAWRENCE HURLEY
of Greenwire

The release Tuesday of the federal oil spill commission's report into the Deepwater Horizon disaster raises further questions about when Halliburton Co. will be added to the list of defendants in the federal government's civil complaint filed last month.

The Justice Department named nine defendants, including BP PLC and Transocean Ltd., when it filed its lawsuit in the Eastern District of Louisiana, but Halliburton, which played a major role in the Deepwater Horizon drilling operation, was conspicuous by its absence (Greenwire, Dec. 15, 2010).

The government is expected to announce criminal charges relating to the spill at some point, but so far, the focus has been on civil enforcement under such statutes as the Clean Water Act and the Oil Pollution Act. All the parties involved are also named as defendants in hundreds of private lawsuits filed by individuals and businesses affected by the spill.

The report from the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling found that Halliburton, along with BP and Transocean, were all guilty of "errors and misjudgments" in relation to the April 20 explosion and resulting spill (Greenwire, Jan 11).

A key example of Halliburton's role was highlighted in the report's fourth chapter, which focuses on the use of cement when

drilling the well, which BP subcontracted out to the firm.

One of the report's findings is that Halliburton had conducted tests in February 2010, two months before the disaster, that indicated the foam cement slurry used on the well was unstable.

The tests "should have prompted the company to reconsider its slurry design," the report says.

In highlighting "root causes" of the subsequent explosion and spill, the commission refers to "insufficient controls in place" at Halliburton that would have ensured that "test results were vetted rigorously."

"On the cement, they did the test, but they didn't communicate the result of that test," commission member Frances Beinecke, president of the Natural Resources Defense Council, said in an interview. "There were some real communication gaps, a lot of management errors, a lot of lack of information offshore and onshore, and among contractors."

Wyn Hornbuckle, a Justice Department spokesman, declined to comment on the government's plans in relation to Halliburton, noting that the release of the commission's report would not directly affect the government's investigation.

"The Justice Department's investigation is ongoing, and we continue to examine all relevant facts and evidence as to what caused the spill and all parties that may be responsible," he said.

At issue: liability under Oil Pollution Act

Lawyers familiar with the various lawsuits filed over the oil spill say Halliburton may have initially

been omitted from the government complaint because of uncertainty over whether it could be held liable under the Oil Pollution Act, which imposes stiff penalties for spills but only on parties defined as “owners or operators.” As a subcontractor, Halliburton could argue that its conduct is not covered by the law.

Brendan Cummings, senior counsel at the Center for Biological Diversity, which has filed its own lawsuit over the spill, conceded that government lawyers may be concerned on that point, but he thinks it is still possible that Halliburton could be deemed an “owner or operator” under the Oil Pollution Act.

“One could argue that their involvement in the cementing rises to that level, so it is not out of the question that the government would add them as a defendant under the existing claims,” Cummings added.

The Oil Pollution Act also imposes “joint and several liability” on those who are responsible for a spill, meaning no single entity foots the bill, which could work against Halliburton, noted Rena Steinzor, an environmental law professor at the University of Maryland School of Law.

Aside from the Oil Pollution Act and Clean Water Act, the government could look to other statutes with damages provisions, including the Migratory Bird Treaty Act, the Endangered Species Act and the Marine Mammal Protection Act, legal experts noted.

Under all three, the damages would be significantly less than what is available under the Oil Pollution Act.

Cummings suggested that Halliburton could also face common law claims “if the government chooses to enter that realm.”

Ultimately, Halliburton’s toughest fight could be with BP, several lawyers speculated.

The report’s clear statement that blame should be distributed among the three companies potentially bolsters BP’s legal position because, for example, it could make the argument that it was Halliburton’s gross negligence, not its own, that led to the explosion, Steinzor said.

That could lead to BP suing Halliburton and could also implicate the indemnification agreement between the two firms signed when Halliburton agreed to work on the well.

Patti Goldman, vice president for litigation at Earthjustice, speculated that all the companies involved in the litigation could end up at each other’s throats.

“I would expect more infighting among the various entities who are potentially liable,” Goldman said.

Halliburton declined to comment on what civil claims the government might file.

Reporter Katie Howell contributed.

Copyright 2011 E&E Publishing. All Rights Reserved.