



## **Just going through a phase? – A brief report on phases two and three of the DEEPWATER HORIZON trial**

With completion of the second segment of the trial, and commencement of the third, the final remaining issues of the DEEPWATER HORIZON litigation are nearing judgment in the federal district court in New Orleans.

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Phase Two of three now completed and a decision issued. In the ongoing litigation in the federal district court in New Orleans, on the sinking of the DEEPWATER HORIZON and the subsequent massive leakage from the Macondo well, the judge has issued his decision in the second phase of the tripartite trial (phase 1 – liability, phase 2 – determine amount spilled and clean-up response effects and phase 3 – determine amount of civil penalty).

In his decision<sup>1</sup> issued on 15 January 2015, Judge Barbier noted he was faced with a mountain of conflicting and credible evidence as to the amount of oil that flowed from the Macondo wellhead and the efficacy of the pollution response that was managed by defendant BP.

In the end, it seems that the judge assumed a middle position between the two polar opposites presented in court by BP and the US government finding that 4 million gallons of oil flowed from the well into the ocean. He furthermore found that the considerable clean-up campaign mounted by BP had recovered about 800,000 barrels of spilled petroleum, leaving a final figure of pollution to the environment of 3.14 million barrels. This figure was significantly less than the spill amount of 4.19 million barrels contended by the US government.

Based on Judge Barbier's earlier finding in phase 1 of the trial - that BP was in several respects *grossly negligent* in the drilling activities that led up to the well failure and its aftermath - the fine under the federal Clean Water Act could possibly be enhanced to a total maximum of USD 13.7 billion, which would dwarf the current record for a US marine pollution fine of USD 1 billion, paid by Transocean in 2013 as part of an agreed settlement with the US government - also in connection with the Macondo spill.

Set your phase(rs) on stun? Phase three has now begun! On 20 January 2015 the third phase of trial began. BP is contending that the potential maximum fine of USD 13.7 billion should not be assessed. Instead BP argue that a lower figure should be fixed by the court, taking into account BP's costly efforts to clean-up and mitigate spill impacts to the people and environment of the US Gulf. In short, BP's case is that due to its actions, the predicted collapse of the local ecosystem did not occur and much good to the local economy has been done by BP's continued economic activity, before, during, and after the incident. They argue that this should also be considered as a mitigating circumstance. Judge Barbier is to consider this as one factor in assessing the ultimate fine amount along with other factors, such as degree of culpability, prior fines history, and payment of other penalties already.<sup>2</sup>

During opening statements by the counsel for BP, when stating that the company had only set aside USD 2.3 billion for such a fine and that the value of the assets of the defendant that could be called upon to pay the fine had decreased markedly due to the drop in the price of petroleum, there was a query to counsel from the judge's bench, "I hate to interrupt," Judge Barbier said.<sup>3</sup> "Is there any reason that any penalties can't be structured to be paid over a number of years?"

Although this could be considered an off-hand remark, it could also signal that Judge Barbier, if the circumstances so suggest, is prepared to assess an ultimate fine of such a magnitude that several payments over a period of time might be called for. What the ultimate fine amount will be has yet to be determined and announced, but it may well become the highest figure ever assessed in a marine pollution incident in the US which would set yet another costly milestone in the history of marine pollution cases.

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1 [Judge Barbier's ruling of 15 January 2015](#) .

2 Under the Clean Water Act, at 33 U.S.C. sec. 1321(b)(8), there is given a set of eight criteria to utilize in determining a civil penalty, which are: (1) seriousness of the violation, (2) the degree of culpability, (3) any history of prior violations, (4) any other penalties for the same incident; (5) the nature, extent, and degree of success of any efforts the violator has done to minimize or mitigate the effects of the discharge, (6) the economic impact of the penalty on the violator, (7) the economic benefit to the violator, if any, resulting from the violation, and (8) any other matters as justice may require.

3 Source: Wall Street Journal, 20 January 2015.