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BP Disaster Victims Betrayed by One-Two Punch of ‘Hollowed Regulation and Hobbled Law,’ Says New CPR White Paper

Lax Regulation Contributed to Disaster; Constraints on Civil Justice System Hinder Victims’ Recovery

Washington, DC ---- While BP and its contractors appropriately bear the lion’s share of the blame for last year’s massive oil spill in the Gulf of Mexico, multiple failures of the regulatory system – some the result of lax enforcement and some of deliberate policy – helped make the spill possible, according to a new report issued today by the Center for Progressive Reform. In addition, the report contends, there is a less recognized problem: years of efforts to hobble the civil justice system will make it exceedingly difficult, if not impossible, for many of the spill’s victims or their survivors to recover fair damages in court.

The report, *The BP Catastrophe: When Hobbled Law and Hollow Regulation Leave Americans Unprotected*, notes that U.S. law relies on two complementary approaches to deter companies from taking the risks that led to the disaster in the Gulf: regulations establishing environmental and worker safety standards, and civil liability that serves both to discourage reckless corporate behavior and to compensate its victims. In the case of the BP spill, the authors write, lax regulation and enforcement made the spill possible, and outdated, overly corporate-friendly statutes could severely limit what victims can force BP to pay in damages. The report’s authors are CPR Member Scholars Alyson Flournoy (University of Florida Levin College of Law), Sidney Shapiro (Wake Forest University School of Law), William Andreen (University of Alabama School of Law), Thomas McGarity (University of Texas at Austin School of Law), and CPR Policy Analyst James Goodwin.

“The regulatory failure at work in the BP spill goes far beyond the cozy relationship between the Minerals Management Service (MMS) and industry,” says Shapiro. “In response to pressure from the oil industry and its allies in Washington, the laws and regulations themselves were crafted to make meaningful enforcement difficult, even impossible. And now that the damage is done, the survivors and economic victims of the spill are confronted with severe constraints on their ability to seek compensation in court for the harm done to them. The combined effect of hollowed regulation and hobbled law is that victims won’t be adequately compensated and the perpetrators will face neither the vigorous regulation nor punishing damage awards necessary to deter future disasters.”

To accompany the report, CPR also launched a new feature on its website as part of its ongoing CatastropheWatch project: [an interactive map](#) of the Gulf region demonstrating the harmful interplay between regulatory failures and civil justice constraints.

The authors of the report identify a series of regulatory failures and civil justice constraints, including:

- **Provisions in the relevant statute made adequate regulation all but impossible.** The Outer Continental Shelf Lands Act (OCSLA) provides the federal government with little authority to set forth adequate environmental standards for the oil and gas industry, it establishes timelines that turn the consideration of serious environmental hazards into mere paper-pushing exercises, and it provides for fines too feeble and bonding requirements too weak to deter bad behavior.
- **The MMS lacked the budget, staff expertise, and staff numbers to adequately regulate.** Even as deepwater drilling expanded in the last decade, bringing with it significantly more complex and difficult regulatory and enforcement problems, the MMS's budget and staffing remained essentially flat. The agency's misguided approach to supervising the industry was compounded by inadequate resources. In addition, the agency is a classic example of the dangers of a revolving door between industry and regulatory agencies.

In a previous report, [*Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence*](#), CPR Member Scholars detailed a series of specific regulatory decisions and policies that prevented regulators from forcing BP to better account for the potential risks. For example, the Fish and Wildlife Service and the MMS both essentially ignored low probability but catastrophic risks, and as a result did not force BP to develop sufficient safeguards to prevent the spill or adequate cleanup programs to mitigate the damage. (CPR's new [interactive map](#) of the oil spill illustrates the results.)

The new report also highlights the many ways that the deck has been stacked against spill victims seeking to recover damages in federal or state courts. The authors write that constraints on litigation deny victims a chance to be "made whole," but also spare BP and its contractors from having to pay the kinds of damages that would deter future bad behavior. According to the report, a number of federal and state laws have left some of the victims at a severe disadvantage, unable to recover anything approaching the full extent of the damages they have suffered in either state or federal courts. For example, the survivors of some of the workers killed on the Deepwater Horizon are restricted in their pursuit of damages because of the particular type of work their loved ones were doing on the deep sea oil rig, since different laws cover different types of workers. At the federal level, according to the report:

- **The Jones Act**, a 1920 statute covering "seamen" aboard the Deepwater Horizon, offers only partial compensation to victims' surviving families – allowing for economic losses, but not for the "loss of society," a common class of damages compensating families for the loss of love, affection, and companionship that results when their loved ones die. Some family members who were not dependent on the victims' wages could receive no compensation, apart from funeral expenses. The law may also be interpreted by the federal courts to bar punitive damages.
- **The Longshore and Harbor Workers' Compensation Act** covers "harbor workers" aboard the Deepwater Horizon, who worked side by side with "seamen." Their families will find litigation preempted by a federal workers' compensation system that uses a damages schedule that severely under-compensates disabled harbor workers or the survivors of harbor workers killed. Surviving family members are eligible only for economic losses, and up to \$3,000 in funeral expenses.
- **The Death on the High Seas Act (DOHSA)** allows surviving family members to bring a wrongful death suit for deaths arising from negligence or the unseaworthy condition of the vessel. It also bars recover for loss of society. In 2000, Congress expanded the statute to allow for loss of society damages for plane crash victims at sea, but lobbying by the cruise ship industry blocked efforts to extend that same provision to other circumstances. DOHSA also bars estates of killed

workers from seeking damages for pre-death pain and suffering, meaning that families of harbor workers will have no avenue to recover such damages, while families of seamen will be able to seek such damages under the Jones Act.

- The **Oil Pollution Act of 1990** (OPA) will likely restrict compensation for individuals and businesses along the coast for damage to natural resources and property. OPA establishes a process for settling claims out of court – for victims, trading some compensation in exchange for quicker resolution. OPA also establishes a \$75 million liability cap for damages, which would not apply if BP is deemed to have acted with gross negligence or in violation of federal safety regulations. Finally, OPA includes a complex “presentation” requirement that forces victims to gather evidence of damages, present it to BP, and then wait for an indeterminate period of time before filing suit – effectively allowing BP to decide when a plaintiff may sue.
- **Various state statutes** also restrict victims’ ability to recover damages. Louisiana law bars punitive damages, for example. In addition, Louisiana, Mississippi and Alabama law bars recovery of damages for pure economic loss, in the absence of personal injury or property damage, preventing commercial fishermen and the tourism industry from suing in state court. By contrast, Florida places comparatively few restrictions on victims’ ability to recover damages in state court.

“The victims of the BP spill deserve compensation,” Shapiro says. “But more than that, BP and its contractors – and for that matter, their competitors – need to know that if they cut corners with the stakes so high, they can expect their bottom line to suffer. Regulation should be strengthened to help prevent these disasters, and the civil justice system should be unshackled. Together the two systems can help avoid a recurrence of this tragedy.”

The authors call for a series of reforms, including modernization of DOHSA and the Jones Act, and revisions of OPA to eliminate the \$75 million liability cap, restore balance to the “presentation” requirement, and clarify that claimants can sue for punitive damages.

They also recommend changes to the Louisiana, Alabama, and Mississippi tort laws to recognize pure economic losses, and reforms to Louisiana law to allow for punitive damages in cases of gross negligence.

The report is available at http://www.progressivereform.org/articles/BP_Catastrophe_1101.pdf. The interactive map is at <http://www.progressivereform.org/maps/watch/cpr.html>.

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