

## **Crying over spilt oil: what the gulf spills in Bohia and the Mexican gulf remind companies about sustainability risks**

**By Colleen Theron<sup>1</sup>**

### **Introduction**

The past two years have witnessed two major spills of oil at opposite ends of the earth. Both spills were caused by western companies – BP PLC ('BP') and ConocoPhillips, companies that cannot be strangers to the increasing demand for proper governance and transparency, and particularly effective management of health and safety. In both disasters there has been a lack of proper safety checks of offshore operations. In such high risk operations it is difficult to see these oversights can be justified. What has been the real cost to the companies and the communities which they serve and how can issues like these be managed in a more effective way? Does it raise issues about environmental crime?

### **The BP disaster**

On 20 April, 2010 an explosion rocked the Deepwater Horizon oil rig in the Gulf of Mexico, killing 11 workers and triggering the worst environmental disaster in US history. The oil gushed out uncontrollably for three months. It was estimated by the time the well was capped in July 2010 that 4.9 million barrels of oil had spewed from it, coating migratory birds, destroying pristine marshes, sullyng beaches and inflicting incalculable damage to the ecosystem in the Gulf. Although the visible oil dispersed into the hot gulf streams, the extent of the environmental harm is unlikely to be known for years. The economic impacts have also not been calculated in total - the fisheries may not be safe, tourism has reopened but it is not clear when vacationers will return and although deepwater drilling permits have been reissued, the new regulations and liability limits could limit the number of companies involved, and the pace of drilling, thereby affecting jobs in the region.

The impact of the spill is not limited to BP. The rig owner Transocean Ltd, the well contractor Halliburton Co and Cameron International, maker of the well's failed blowout preventer are all in line to be sued by various parties for their role in the disaster.

### **The Bohai Bay disaster**

Since June 2011, the Penglai 19-13 field has leaked 3,200 barrels of oil and drilling fluids into the bay, where PetroChina Co. and China Petroleum & Chemical Corp have onshore refinery projects. The leaks at Penglai, which ConocoPhillips co- owns with the China National Offshore Oil Corporation Ltd (CNOOC), were China's worst since a pipeline blast at Xingang port in Liaoning

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province caused about 11, 000 barrels of oil to spill into the Yellow Sea in July last year.

A total of 5,500m<sup>2</sup> of the bay's surface has been contaminated, with around 870 square kms seriously polluted. ConocoPhillips was ordered to halt output on 2 September 2011 at Penglai.

Reports in the New York Times<sup>2</sup> state that the Chinese maritime authority is preparing to sue ConocoPhillips over the two oil spills. Whilst the Chinese authorities took a long time to react publicly, they could not ignore bloggers expressing outrage and some bad press from the People's Daily, the Communist Party's official newspaper that accused ConocoPhillips of 'delays, negligence, cover-ups and cheating'. CNOOC, which owns 51% stake in the operation might also be required to pay a fine. The symbolism of this is important. It is a message from the Chinese government signaling caution and concern over environmental issues, to companies operating in China.

## **Key Risks**

The cost of cleaning up the environmental damage is not limited to trying to repair the actual damage to the environment. BP and the other companies are faced with multiplying **lawsuits**. So far at least 300 federal law suits have been filed against BP and the other main companies. Although BP has set aside \$20 billion fund to pay oil spill claims and clean up this may not be enough to foot the entire bill. The Justice Department is likely to prosecute BP for criminal violations of the Clean Water Act and the Migratory Bird Treaty Act that will result in the largest fines ever imposed in the US for any form of corporate crime.<sup>3</sup> ConocoPhillips is the largest oil refiner in the US. It has been involved in environmental lawsuits in Louisiana, Washington State, Florida and Texas in the last ten years. To date the company has paid \$6.8 billion USD (4.3 billion yuan). This should be seen in the context of its profits, which in 2010 were over \$25 billion.<sup>4</sup>

It is not just the cost to the companies of clean up, but the reputational damage that it causes. BP's share price is 44% lower than it was prior to the oil spill and the company is now facing demands by shareholders to come up with a growth strategy. <sup>5</sup> CONOOC shares fell 1.3% to HK\$14.02 in Hong Kong trading.

## **The influence of the media**

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<sup>2</sup> NY times.com Edward Wong and Clifford Krauss, published August 25 2011

<sup>3</sup> Uhlman, David ' After the Sill is Gone: the Guls of Mexico, Environmental Crime and the Criminal Law' Michigan Law review 9 Vol 109:1413

<sup>4</sup>[http://www.wikinvest.com/stock/ConocoPhillips\\_\(COP\)/Data/Gross\\_Profit/2010](http://www.wikinvest.com/stock/ConocoPhillips_(COP)/Data/Gross_Profit/2010)

<sup>5</sup> Wall Street Journal, 7 September 2011

The intense media coverage of the BP oil spill figuratively brought the crisis into the living rooms of citizens across the globe for at least three months. This contributed to the outrage of the American's and other nationals at BP and others involved in the spill who perceived willingness to put profits before safety.

Although there were attempts to cover up the spill in China, environmental awareness is growing among citizens. Blogging and adverse press comment eventually brought news of the issue to light, however, it still took the State Oceanic Administration (SOA) a month after the incident first began to hold a press meeting. There is still criticism about the quality of information that has been released and also the corporate failure by the maritime environmental authorities to disclose information.<sup>6</sup> Perhaps a more telling issue has been the failure of ConocoPhillips to ensure proper disclosure of information. The media has reported that when ConocoPhillips was asked if it would similarly cover up an oil spill in the United States for a whole month, its answer was 'this incident happened in China'. Although the weak foundations of information disclosure by business and government in China will have to be strengthened, including the scope of environmental litigation to ensure that there is proper redress of any such similar issues in China, what seems more telling is the failure of companies, such as ConocoPhillips to understand that proactive disclosure, and greater transparency is essential to their own interests. One only has to see the impact on the value of BP's shares to see the effect of the Mexican gulf spill on its reputation.

### **Questions of environmental crime**

The BP oil spill has raised questions about the role of criminal enforcement under environmental laws, including whether ordinary negligence should result in criminal liability as well as the proper normative relationship between culpable conduct and environmental harm<sup>7</sup>.

Criminal prosecutions are meant to deter future spills of oil particularly as there is evidence that BP, Tranocian and Halliburton departed from industry standards in the drilling of the Macando well. However, the gulf spill raises questions on what constitutes environmental crime. Although the precedent for criminal prosecution in a major oil spill cases was set during the Bush administration when Exxon was prosecuted for the spill that marred Prince William Sound in 1989, bringing charges of 'knowing violations' will be more difficult than a charge of 'negligent violations' as none of the companies involved intended to discharge oil in the gulf.<sup>8</sup> A criminal prosecution is seen as a deterrent, however, it is more

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<sup>6</sup> [www.chinadialogue.net/article/show/sigleen/4418-transparency-test](http://www.chinadialogue.net/article/show/sigleen/4418-transparency-test) in the Bohia Sea

<sup>7</sup>Uhlman, D p1413

<sup>8</sup> Id

likely that BP will pursue a global settlement that resolves both criminal and civil penalties.

The legal situation with ConocoPhillips in China is entirely different to if the spill had happened in the US. Regulations in the US impose much harsher penalties. The 1990 Oil Pollution Act mandates that a compensation fund for spills be set up. There are ambiguities in Chinese law. There is no requirement in law at international or Chinese domestic level to set up a fund. The 1992 International Convention on Civil Liability for Oil Pollution Damage primarily covers spills from tankers, and doesn't include any regulation on offshore oil drilling. There are also legal gaps regarding liability of clean up of the marine environment. It is reported<sup>9</sup> that Chinese officials have completed a draft new policy, entitled 'State Compensation on Marine Ecological Damage' regarding compensation for oil spills. It strives to close loopholes in Chinese law by clarifying responsible parties and benefactors in the event of a spill.

In the European context the Environmental Liability Directive (2004/35/EC)<sup>10</sup> requires that environmental damage is reported and any further damage is mitigated. There is also the requirement to prevent and report imminent threats of environmental damage. For example, in the UK, the regulations implementing the Directive require that where there is an imminent threat of environmental damage or damage where there are reasonable grounds to believe will become environmental damage there is a requirement to:

- take all practicable steps to prevent damage immediately.
- notify the relevant enforcing authority if the threat is not removed.
- carry out measures specified in any notice issued by the enforcing authority

If similar provisions at international law level were in place, perhaps they would have played a role in mitigating further damage and certainly have required that the damage was reported in a timely manner. The issue would be what body at international level would enforce these kinds of provisions?

### **The value of extended environmental/health and safety practices**

Although it would seem that there is increasing press coverage highlighting the need for companies to understand and manage their risks properly, the disasters highlight just how important effective environmental health and safety management is. It is essential to protect company value and to reduce risk.

Some of the other features of proper risk management in these areas are:

- ensuring compliance with regulation to mitigate risk, avoid fines, reduce fees and avoid legal action.
- maintaining the reputation of the business
- providing a moral compass internally for the business
- understanding and managing supply chain risks and issues

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<sup>9</sup> [www.china.org.cn/environment/2011-09/15/content-23419573](http://www.china.org.cn/environment/2011-09/15/content-23419573)

<sup>10</sup> [http://eur-](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2004&nu_doc=35)

[lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Directive&an\\_doc=2004&nu\\_doc=35](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2004&nu_doc=35)

- ensuring better reporting

### **What should companies be doing?**

Fundamentally companies must ensure that they understand the markets (including the legal landscapes) in which they operate. This includes mapping the sustainability risks that could arise and understanding the key regulations and best practice guidelines to their operations. Where a company operates on a global sphere the complexity of various rules, regulations and risks may be overlooked, particularly where the focus may be to maximize profit at any cost. To some extent the requirement in the UK Companies Act 2006 for companies to produce a business review that includes information on their impact on the environment may focus directors' minds on these issues. BP has covered the oil spill extensively in its 2010 annual report and accounts.<sup>11</sup>

Companies need to ensure that a traditional approach of 'find-it and fix-it mentality' puts the company at risk. The process of auditing operations should be more effective. This will require additional resource and competent workers to carry out audits and also the limits of audits.

A more strategic approach should be adopted to environmental, health and safety compliance to move it further up the product development cycle.

Proactive management is required to ensure that risks can be mitigated. Companies need to understand the tasks and controls that have to be put in place.

Proactive stakeholder engagement, including with staff is also viewed as a means of averting compliance issues. For example, the beverage company MolsonCoors<sup>12</sup> found that employees that felt engaged in the company are five times less likely than non-engaged employees to have a safety incident and seven times less likely to have a lost time incident. The average cost of a safety incident for an engaged employee was \$63, compared with an average \$393 for a non-engaged employee. Consequently through strengthening employee engagement the company saved \$1,721,760 in safety costs in 2002.

It ought to go without saying that contracts with sub contractors need to be carefully drawn up and that obligations are properly adhered to.

The strength of social media and the internet cannot be ignored. It was the outcries from bloggers and the media that added pressure to the Chinese authorities to decide on a legal strategy to deal with the Bohia spill. The pressure from the press exposing the failings of the companies and authorities to disclose

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[http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/downloads/pdf/BP\\_Annual\\_Report\\_and\\_Form\\_20F.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/BP_Annual_Report_and_Form_20F.pdf)

<sup>12</sup> <http://www.customer-insight.co.uk/article/867>

information had an impact. On July 12 the SOA ordered CPOC to halt operations, on the grounds that work to eliminate the risk of new spills had been too slow, and required that CPOC ensure information on the leak is promptly reported to SOA and made public'<sup>13</sup>

The legal ambiguities at all levels should also be clarified particularly in jurisdictions where the rule of environmental law may not be fully developed

## **Conclusion**

Greater commitment to environmental protection and safety is required by companies engaged in offshore operations, where their failure to do so can cause catastrophic harm. This requires a review of management systems and procedures. The international legal issues also need to be addressed. There is a need for better governance requirements, greater transparency and disclosure of accidents, particularly in China and an international framework of legislation that addresses compensatory issues, enforcement and ecological restitution. Issues about the type of environmental crime that is committed and the criminal nature of it should not overshadow the need for more effective regulation on offshore drilling.

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<sup>i</sup> See [www.chinadialogue.net/article/show/single/en/4418-transparency-test-in](http://www.chinadialogue.net/article/show/single/en/4418-transparency-test-in-the-Bohia-Sea) the Bohia-Sea

<sup>ii</sup> See [www.china.org.cn/environment/2011-09/15/content\\_23419573](http://www.china.org.cn/environment/2011-09/15/content_23419573)

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<sup>13</sup> See [www.chinadialogue.net/article/show/single/en/4418-Transparency-test-in](http://www.chinadialogue.net/article/show/single/en/4418-Transparency-test-in-the-Bohia-Sea) the Bohia Sea