Statement of Kenneth M. Murchison

James E. and Betty M. Phillips Professor
Paul M. Hebert Law Center
Louisiana State University

on

S. 3305

before the

Senate Environment and Public Works Committee

June 9, 2010

I. Introduction

Chairman Boxer, Ranking Member Inhofe, members of the committee, thank you for inviting me to appear before you today. My name is Ken Murchison, and I am the James E. and Betty M. Phillips Professor at the Paul M. Hebert Law Center of Louisiana State University. The views I express today are my personal opinions; they do not necessarily represent the views of the law center, the university, or the state of Louisiana.

I have been a member of the faculty at the law center since 1977, and I have regularly taught environmental law since the early 1980s. I have been a visiting professor at the University of Richmond, the United States Military Academy, and the University of Alabama; I also spent a year as the Natural Resources Law Fellow at the law school at Lewis and Clark College. Before I entered the legal academy, I was first introduced to environmental law as a Judge Advocate in the United States Air Force; and I continued to work on environmental issues as a reserve Judge Advocate until I retired as a Colonel in 2001. I have written extensively on a variety of environmental law topics including the Clean Water Act.

The catastrophic consequences of the oil release that began on April 20 in the Gulf of Mexico have prompted all those interested in environmental protection to reconsider the legal regimes that govern deep-water oil operations. One of the most important of those regimes is the Oil Pollution Act of 1990, which was enacted following the Exxon Valdez oil spill in Alaska in 1989. Given the differing nature of the Alaska spill in 1989 and the continuing release in the Gulf of Mexico, it is appropriate for the Congress to reconsider whether existing law provides a satisfactory framework for the contemporary risks from offshore drilling activity. One important

aspect of the liability scheme of the Oil Pollution Act is a provision that limits liability for certain damages to $75 million. S. 3305 would raise that limit to $10 billion.

II. Brief Description of Oil Pollution Act Liability Provisions

Title I of the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701-20, establishes a liability scheme for oil spills. When oil is discharged from a vessel or facility into the navigable waters of the United States, adjacent shorelines, or the exclusive economic zone, each "responsible party" is liable for "removal costs" and "damages." OPA § 102(a), 33 U.S.C. § 2702(a). Removal costs are broadly defined to include actions that are "necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." OPA § 1001(30), 33 U.S.C. § 2701(30). The damages recoverable under the statute are:

- Injury to, destruction of, loss of, or loss of use of natural resources.
- Injury to, or economic losses from, destruction of property.
- Loss of subsistence use of natural resources.
- Net loss of taxes and other revenue from injury or loss of property.
- Loss of profits from damage to property or natural resources.
- Net costs of governments providing increased or additional public services.

The Fifth Circuit has ruled that this specific enumeration of damages precludes the award of punitive damages under the Oil Pollution Act. *South Port Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3d 58 (1st Cir. 2000).

Modeled on Section 311 of the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act, the Oil Pollution Act explicitly adopts the standard of liability of Section 311. OPA § 101(17), 33 U.S.C. § 2701(30). As with those statutes, liability under the Oil Pollution Act is strict and responsible parties can be jointly and severally liable subject to vary narrow defenses. OPA § 103, 33 U.S.C. § 2703.

The Oil Pollution Act differs from the Section 311 of the Clean Water Act and the Comprehensive Environmental Response, Liability, and Compensation Act because it imposes caps on some damages that can be recovered under the statute. For an offshore facility (other than a deepwater port), the liability limit is "the total of all removal costs plus $75,000, 000." OPA § 1004(a), 33 U.S.C. § 2704(a). However, the limit on liability for damages does not apply

- When the incident was "proximately caused by" the "gross negligence or willful misconduct of, " or "the violation of an Federal applicable safety, construction, or operation regulation" by the responsible party or
- When the responsible party fails to report the incident, to provide reasonable cooperation and assistance, or – without sufficient cause – to comply with a cleanup order.

OPA § 1004(c), 33 U.S.C. § 2704(c).

The Oil Pollution Act does not provide an exclusive basis for awarding damages for an oil spill. Section 1018, 33 U.S.C. § 2718, preserves the power of states and local governments to impose greater liability for "the discharge of oil or other pollution by oil within such State" or for "any removal activities in connection with such a discharge." In addition, Section 6001, 33

U.S.C. § 2751, provides that the Act does not affect admiralty and maritime law "[e]xcept as otherwise provided."

III. S. 3305

S. 3305 changes the limitation of liability for damages in Section 1004(a)(3) of the Oil Pollution Act, 33 U.S.C. § 2704(a)(3), by increasing the amount for which a responsible party can be held liable from $75 million to $10 billion. It also makes the new limit effective on April 15, 2010, a date that would make it applicable to the ongoing release of oil in the Gulf of Mexico. Increasing the damages for which a responsible party is liable should encourage responsible parties to exercise greater care in offshore drilling activities; eliminating the cap altogether would encourage even greater care. Increasing or eliminating the cap would also reduce or eliminate the unfairness of imposing the burden of the uncovered damages on innocent victims of an oil spill or on the general taxpayers.

The economic case for increasing or eliminating caps on liability is relatively straightforward. Immunizing an economic actor from bearing all the economic costs associated with its operations has the effect of under deterrence. That is, the actor will engage in conduct that would not be profitable if the actor bore the full economic costs or will forego safety or environmental controls that would be cheaper than paying the costs that the actor is avoiding. Given the possibilities of huge economic gains, the cap in the Oil Pollution Act probably does not induce drilling that would be unprofitable without the cap on liability; the drilling would almost certainly occur with or without the cap on liability for damages. The protection from

economic loss may, however, have the unconscious effect of discouraging some additional safety and environmental protections.

A cap as low as $75 million seems particularly inappropriate in the case of offshore oil facilities. The capital costs involved in those operations and the large potential for gain make the current cap a relatively minor aspect of the overall cost of operation even if the cap is adjusted to reflect changes in the consumer price index. (Section 1004(d)(4) of the Oil Pollution Act requires such revisions every three years, but I was away from my office while preparing these remarks and was unable to check to see whether the Department of the Interior had actually made those revisions for offshore facilities.)

The question of immunizing economic actors from full liability also has a moral dimension. If a disaster occurs, the amount of damages that individuals and property owners suffer does not decline because an actor is not required to pay the full costs associated with its economic activity. Instead, some persons suffering injury are not compensated at all or each person suffering injury recovers only a portion of the damage. In either event, individuals with no connection to the economic activity suffer injury and are forced to bear the cost of the loss. The cap is, in effect, a contingent tax on a group not directly involved with the economic activity. Alternatively, of course, the government could compensate those whose losses were not covered, but that approach would amount to taxpayers providing a subsidy to the economic activity that was shielded from complete liability.

A basic principle of justice suggests that it is fairer to make the party who experiences the economic gain of the activity bear the loss rather than the innocent bystander. This principle of fairness seems to be particularly applicable to the present spill in the Gulf of Mexico. Many

thousands of innocent property owners and business have suffered losses that threaten their livelihoods and financial well being. It is unjust to require them to subsidize an oil company that is still likely to reap huge profits from the oil field as the affected states and the people in them struggle economically and environmentally. Avoiding this injustice by governmental payments to individuals who have been harmed dilutes the unfairness by transferring the cost to all taxpayers, but it does not change the general proposition that persons not directly benefitting from the economic activity are being required to bear the cost of the damages rather than the economic actor.

At least two objections have been raised against the effort to eliminate the Oil Pollution Act's limit on liability for offshore facilities. On the one hand, some have expressed concern that eliminating the limits on liability will preclude smaller companies from drilling operations and lead to further domination of drilling activities by the small group of major oil companies. Others contend that the cap on damages under the Oil Pollution Act is a minor problem that should not be the focus of legislative response to the problems revealed by the Gulf catastrophe. Neither objection changes my view that S. 3305 is a desirable change to the Oil Pollution Act.

Initially, one might question the empirical premise that the cap on damages has allowed smaller companies to bid on projects on which they could not have bid if the cap had not been in place. Given the huge capital and operating costs involved in offshore drilling, intuition suggests that the cap on damages is a relatively small factor in the decision to bid on leases and to engage in exploratory drilling. Only the companies have the information that would support the premise that the damages cap is crucial, and they should be required to provide that information before the premise is accepted.

Even assuming that domination of drilling activity by major companies could increase because of the liability risks associated with unlimited damages, a damages cap is a particularly inappropriate means of responding to that market imperfection. As explained above, that approach amounts to a hidden tax on innocent victims of the drilling activity; and other fairer methods of spreading the risk are available. Obviously, smaller companies could establish contractual arrangements that would share the risks that were greater than they could bear individually. If those private arrangements are inadequate, the government could create mandatory pooling arrangements to which all participants in drilling activities contributed in proportion to their involvement in drilling activities. Such governmental approaches are preferable on both economic and moral grounds. If the industry as a whole has to bear risks, it will support stronger safety and environmental controls to minimize those risks. If losses do occur, they will be shared among those who benefit from the economic activity.

Others who oppose responding to the Gulf tragedy with an initial focus on the damages cap in the Oil Pollution Act argue that the cap is a minor aspect of the problems revealed by the Gulf release. In making this argument, they emphasize the several reasons that BP's liability for the Gulf spill will greatly exceed $75 million. First, the cap only applies to "damages," not "removal costs;" and – as noted above – the Oil Pollution Act broadly defines removal costs. Second, the Oil Pollution Act does not apply at all if the company was guilty of gross negligence of the violation of a safety, construction, or operating regulation. Third, the cap only applies to damages awarded under the Oil Pollution Act, not those imposed under state law or admiralty or maritime law.

These opponents of a statutory change in the liability cap for offshore facilities are correct that the $75 million limit is not an absolute cap on all liability for the release in the Gulf of Mexico. I believe, however, they underestimate the impact of the cap, and so I support the change proposed in S. 3305 or a complete abolition of the cap. Some victims of the release in the Gulf may avoid the cap after years of litigation regarding the definition of removal actions under the Oil Pollution Act, the applicability of the exceptions to the cap, and the reach of the savings clauses with respect to state law claims and admiralty claims. But I believe the basic idea of the Oil Pollution Act is the principle that federal law should provide a relatively prompt and certain remedy for damages to natural resources and property as well as the economic losses that individuals and governments experience as a result of oil spills.

The question of full recovery is particularly important with respect the current Gulf spill. Coastal lands and marshes have already been extensively damaged in Louisiana, and their recovery will take at least a generation. Even if individuals and property receive compensation for their direct losses, failure to restore those areas will eliminate the livelihoods – indeed, the entire way of life – for thousands of Louisiana citizens. Such a result would be equivalent to making a huge part of the state an economic and ecological dead zone. Louisiana is a small state, but it deserves fair treatment. Imagine the outcry if a similar fate threatened San Francisco Harbor, Martha's Vineyard, or the Chesapeake Bay. Reducing or eliminating the cap on damages will be a major step toward beginning the process of remediation and restoration.

IV. Additional Needed Reforms

For the reasons described above, I think I would be remiss if I did not emphasize that raising the cap on damages in the Oil Pollution Act is not a silver bullet that solves either the present crisis in the Gulf or prevents future disasters. After the Exxon Valdez spill, Congress made sweeping prospective changes regarding oil spills from tankers. The Gulf release has now demonstrated that the proper question for spills from offshore facilities is when they will occur rather than if they will occur. Thus, Congress should also consider additional reforms to reduce the risk from, and to mitigate the effects of, those spills. One might appropriate consider a variety of additional changes in the Oil Pollution Act and other federal statutes.

Desirable additional changes in the Oil Pollution Act include other provisions relating to compensation. With respect to compensation, the most obvious candidates are the other damage caps found in Section 1004, 33 U.S.C. § 2714; the economic and moral arguments applicable to the cap on offshore facilities also applies to these provisions. In addition, the savings provision for state law, OPA § 1018, 33 U.S. C. § 2718, should be amended to apply explicitly to all damage from oil pollution that occurs within the state; and Congress should consider expanding the availability of punitive damages under federal law, either by providing for them in the Oil Pollution Act or by expanding the narrow punitive damages allowed by the United States Supreme Court in *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605 (2008).

Not surprisingly, the provisions on prevention adopted by the Oil Pollution Act in response to the Exxon Valdez spill focused on improving tanker safety. A similar set of prevention requirements should be adopted for offshore facilities. At a minimum, further

environmental analysis (at least an environmental impact statement) should be required for all offshore wells now that we know what serious environmental harm is possible. Equally important, the statute should contain explicit requirements for stronger contingency plans for serious oil spills, so that initial containment of a future release will not be delayed for weeks. Congress should also give serious attention to a funding mechanism for ongoing research into remediation of oil pollution. By necessity, we are likely to learn a great deal about cleaning oil pollution from coastlines and marshes over the next twenty to thirty years. How much better it would be if we had begun that research in the 1990s.

Although I recognize that amendments to other statutes will often be beyond the jurisdiction of this committee, I would encourage committee members to support additional changes to other federal statutes when they are proposed to Congress. Chief of these reforms has to be radical changes in the Minerals Management Service. The nation has a right to expect that the regulatory agency governing oil development will protect the public interest in safety and environmental protection, and the Minerals Management Service has failed to provide that protection. Additional desirable statutory changes include amending the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1367, to make clear that citizen suits may be brought to redress oil spills and leaks and to eliminate the Outer Continental Shelf Lands Act provision that establishes a 30-day limit to complete the environmental review and act upon applications for permits to explore for undersea oil and gas reserves. *See* 43 U.S.C. § 1340. Finally, state like Louisiana that have assumed the risk (and now the reality) of environmental damages from offshore drilling operations should receive a fairer share of the royalties that those operations produce.

IV. Conclusion

This brief statement has tried to outline the liability provisions of the Oil Pollution Act and to describe the effect of S. 3305 and to describe the economic and moral arguments in favor of increasing or eliminating caps on liability. It also explains why I reject the two principal arguments against the proposed legislation. At the same time, I have tried to caution the committee against assuming that this legislation alone will solve or prevent the repetition of the current catastrophe in the Gulf of Mexico. Further revisions of the Oil Pollution Act as well as other statutes are also necessary, and I hope the Senate will pursue as many of them as possible.

My comments to this point reflect my views as a law professor whose career in environmental law is nearer to its end than its beginning. But I am also a citizen of Louisiana with deep roots in the state. I was born in Louisiana, and I have physically resided in the state for more than fifty of my sixty-three years. I think I am like most Louisianans in my reaction to the catastrophe unfolding in the Gulf of Mexico. We are dismayed by the horrific damages to one of the richest ecosystems in the world, but we are not primarily concerned with fixing blame and we are emphatically not looking for a handout. We are interested, however, in receiving fair compensation for the tremendous losses we have suffered, in seeing meaningful reforms that will lessen the likelihood of a similar disaster and provide an improved response when the next oil spill occurs, and in ensuring that we receive a fair share of the revenues generated by the environmental risks that we have taken on behalf of the nation. I support S. 3305 because it is a small step in the direction of fair compensation, but it must not be the total legislative response to disaster we have experienced.

Thank you for the opportunity to appear today. If you have any questions regarding any of the matters I have addressed, I will be happy to try to answer them.