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Criminal charges likely from Gulf oil spill, legal experts say

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WASHINGTON — Federal investigators are likely to file criminal charges against at least one of the companies involved in the Gulf of Mexico spill, raising the prospects of significantly higher penalties than a current \$75 million cap on civil liability, legal experts say.

The inquiry by the Homeland Security and Interior Departments into how the spill occurred is still in its early stages and authorities have not confirmed whether a criminal investigation has been launched.

But environmental law experts say it's just a matter of time until the Justice Department steps in - if it hasn't already - to initiate a criminal inquiry and take punitive action.

"There is no question there'll be an enforcement action," said David M. Uhlmann, who headed the Justice Department's environmental crimes section for seven years during the Clinton and Bush administrations. "And, it's very likely that there will be at least some criminal charges brought."

Such a likelihood has broad legal implications for BP and the two other companies involved — not the least of which is the amount of money any responsible party could be required to pay. The White House is asking Congress to lift the current \$75 million cap on liability under the Oil Pollution Act of 1990, but there's no cap on criminal penalties. In fact, prosecutors in such cases can seek twice the cost of environmental and economic damages resulting from the spill.

While Attorney General Eric Holder has confirmed that Justice Department lawyers are helping the agencies involved in the oil spill inquiry with legal questions, department officials have refused to detail what their role entails.

But Uhlmann and other experts said it's likely prosecutors are already poring over evidence from the spill because under the Clean Water and Air Acts and other federal laws aimed at protecting migratory birds, an accidental oil spill of this magnitude could at least result in misdemeanor negligence charges.

And under the migratory bird regulations, prosecutors have very broad discretion.

"If it happens, then you can charge it," said William Carter, a former federal prosecutor of 14 years who headed the environmental crimes section for the Los Angeles U.S. attorney's office. "There's no intent required."

He added that he agreed with Uhlmann, saying, "I would be shocked if there were no criminal charges filed in this case. There are so many things that went wrong out there."

In testimony on the Hill this week, all three companies involved in the spill — BP, Halliburton, and Transocean — denied culpability for the spill and have instead blamed each other.

BP did not respond to requests for comment.

Halliburton and Transocean declined to answer questions, saying it would be "inappropriate" to comment on any possible litigation or investigations.

"At the moment, Transocean is concentrating its efforts on assisting BP and federal and state agencies on the clean-up effort," the company said in a statement.

One of the numerous factors in determining whether to file criminal charges is the adequacy of civil damages, which would provide an additional reason for prosecutors to pursue a criminal case in connection with the Gulf spill, experts said.

Prosecutors also look at the history of violations, which could also persuade them to file charges. BP, for example, has already agreed to pay millions in criminal penalties for several major incidents, including for a fatal explosion at a Texas refinery in March 2005.

BP and several of its subsidiaries agreed to pay a total of \$373 million in fines for the Texas explosion, leaks of crude oil from pipelines in Alaska, and for fraud for conspiring to corner the market and manipulate the price of propane carried through Texas pipelines.

While the government will probably only bring criminal charges if there is some sort of negligence — "that's not a very high bar," Uhlmann said.

In 1999, the Ninth U.S. Circuit Court of Appeals upheld the misdemeanor conviction under the Clean Water Act of a supervisor at a rock quarry project that accidentally ruptured an oil pipeline, causing a spill.

For a felony, prosecutors have to demonstrate companies "knowingly" violated the regulations.

Tracy Hester, the director of the Environment, Energy and Natural Resources Center at the University of Houston, said prosecutors would be looking for "any possible concealment of the risks, a failure to respond to any known risks, and a failure to report a dangerous situation."

"Knowing is a slippery term," Hester said. "But knowing doesn't necessarily mean that you knew it was a violation of the law. You just have to be aware that what you were doing fell into what is regulated."

But Oliver Houck, a professor with Tulane University who specializes in environmental law, predicted that prosecutors are not going to want to pursue minor charges for such a catastrophic spill.

Meanwhile, the companies themselves have already started pointing fingers.

In testimony this week, BP pointed to questions about the blowout preventer — and made it clear that Transocean owned it.

Transocean, however, denied the blowout preventer caused the accident and hinted that the cementing and casing did not properly control the pressure.

Halliburton, the cementing sub-contractor, pointed to BP as the well owner.

"This has been a series of 'Oh my god' revelations, 'They did what?'" Houck said. "But those revelations are the grits and grease of standard civil claims."

"To get into criminal land, you would have to prove that they knew that the short cuts they were taking brought a high probability of serious risk," he said. "I don't think the government has that yet. That's what grand juries are for."

Houck added that some of the strongest environmental criminal cases have come out of civil cases, which means that prosecutors may not determine whether any of the companies have criminal liability for months, if not years.

"The beauty part of civil trials is the competing companies," he said. "As a prosecutor this is the most delightful scenario: All the defendants proving each others' guilt."

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