HALL MAINES LUGRIN, P.C.

MEMORANDUM

To: Robert B. Parish, President, MLA
Patrick J.S. Griggs, CBE

Date: February 18, 2014

From: Clifton J. Hall, Hall Maines Lugrin, P.C.

Re: **U.S. Participation in Regional and Bilateral Agreements on Transboundary Oil Pollution from Offshore Activities, and U.S. Regulation of Offshore Energy Exploration and Production**

Issues:

1) Is the U.S. a party to the OSPAR Convention, the Barcelona Convention, or the Abijan Convention, and are U.S. Operators parties to OPOL?

- **Comments:** The United States is not a party to the 1992 OSPAR Convention, the Barcelona Convention, or the Abidjan Convention; nor is the U.S. an OPOL Designated State. The following U.S.-based oil companies have subsidiaries that are members of OPOL: Apache, ATP, Chevron, ConocoPhillips, EOG Resources, and Hess.

2) Is the U.S. a party to any other form of regional or bilateral agreements that address the issues of liability and compensation?

- No. **T**he United States is a party to the following agreements, none of which include substantive measures addressing liability or compensation:
  - The Canada – United States Joint Marine Pollution Contingency Plan ("JCP") of 2003.[1] Pursuant to the JCP,

[1] See http://www.dfo-mpo.gc.ca/Library/343409.pdf (last retrieved February 14, 2014).

for issues respecting limits of liability and compensation resulting from pollution incidents, parties are to apply their own laws to recovery of response costs they have assumed – see sections 801.1-4.

- The Joint Contingency Plan between the United Mexican States and the United States of America regarding Pollution of the Marine Environment by Discharges of Hydrocarbons or other Hazardous Substances (the "MEXUS Plan").[2] The MEXUS Plan has no provision for issues of liability or compensation.

- Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartegena Convention).[3] The Cartagena Convention provides that the Contracting Parties "shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area." It does not appear that a protocol for these issues has been reached, except as respects land-based pollution.[4]

- Other oil spill response agreements with Russia, Panama, and the British Virgin Islands, which do not deal with liability or compensation.[5]

- The International Convention on Oil Pollution Preparedness, Response and Co-operation (the "OPRC Convention");[6] ratified by the U.S. on March 27, 1992. This Convention recognizes "the serious threat posed to the marine environment by oil pollution incidents involving ships, offshore units, sea ports and oil handling facilities,"

---

[2] See http://www.rrt9.org/external/content/document/2763/540879/1/2000%20MEXUS%20Plan%20English.pdf (last retrieved February 14, 2014).

[3] See http://www.cep.unep.org/cartagena-convention/cartagena-convention.pdf (last retrieved February 14, 2014).

[4] See http://www.cep.unep.org/cartagena-convention (last retrieved February 14, 2014).

[5] See http://www.state.gov/e/oes/ocns/opa/marine/oil/ (last retrieved February 14, 2014).

[6] See http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE001109.txt (last retrieved August 21, 2013).

and further takes into account "the "polluter pays" principle as a general principle of international environmental law," but does not include substantive provisions relating to liability or compensation, and further provides that it should "not be interpreted as in any way prejudicing the rights of Parties to recover from third parties the costs of actions to deal with pollution or the threat of pollution under other applicable provisions and rules of national and international law."

- The Joint Marine Pollution Contingency Plan Atlantic Geographic Annex (CANUSLANT).[7] CANUSLANT in turn makes reference to the International Emergency Management Assistance Memorandum of Understanding (IEMAMOU), which is an agreement on mutual aid among the New England States (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut), the Atlantic Provinces (New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador) and Québec.[8] Neither CANUSLANT nor IEMAMOU includes provisions pertaining to liability or compensation, other than to workers engaged in cleanup activities.

- The Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic.[9] The U.S. is a party along with Canada, Denmark, Finland, Iceland, Norway, Russian Federation, and Sweden. This Agreement provides that it takes into account the "polluter pays" principle as a general principle to be applied (fifth paragraph of preamble), and further provides that its provisions "shall not be interpreted as in any way prejudicing the rights of Parties to recover from third parties the costs of dealing with pollution or the threat of pollution under other applicable rules of national and international law," and that "[s]pecial attention shall be paid to

[7] See http://www.uscg.mil/d1/response/jrt/documents/AGA_signed_29JUN2010(sm).pdf (last retrieved February 14, 2014).

[8] See http://www.iemg-gigu-web.org/mou-e.asp (last retrieved February 14, 2014).

[9] See http://www.state.gov/r/pa/prs/ps/2013/05/209406.htm (last retrieved February 14, 2014).

international instruments and national law on liability and compensation for oil pollution damage.

3) Please identify the national regulations which are applied to offshore oil and gas exploration and exploitation operations by the authorities in your country?

- Requirements for financial responsibility for offshore oil and gas facilities are enforced by the U.S. BOEM pursuant to 30 CFR (Mineral Resources) Chapter V (BOEM) Part 553 (Oil Spill Financial Responsibility for Offshore Facilities).

- The financial responsibility requirements of 30 CFR Part 553 apply to any structure (including wells and associated pipelines), equipment, or device (other than a vessel) used for exploring for, drilling for, or producing oil or for transporting oil, including wells or parts thereof (including risers and well control equipment) drilled from mobile offshore drilling units (but not MODU's themselves) that is located seaward of the coastline or in any portion of a bay that is connected to the sea and depicted on government maps, and that has a worst case oil-spill discharge potential of more than 1,000 bbls of oil.[10]

- Covered facilities on the Outer Continental Shelf must demonstrate oil spill financial responsibility ("OSFR") based on the "worst case oil spill discharge volume," according to the following table:[11]

Worst case oil spill discharge volume	**Applicable amount of OSFR**
Over 1,000 bbls but not more than 35,000 bbls	$35,000,000
Over 35,000 but not more than 70,000 bbls	$70,000,000
Over 70,000 but not more than 105,000 bbls	$105,000,000
Over 105,000 bbls	$150,000,000

[10] 30 CFR § 553.3.

[11] 30 CFR § 553.13.

- An operator's OSFR can be demonstrated by self-insurance (proof of sufficient net worth), insurance, indemnity, or a surety bond.[12]

- The financial responsibility requirements imposed by 30 CFR Part 553 are similar in purpose and effect to those imposed under Article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1992 ("CLC"), one of the principal international conventions on pollution from tankers.

- 30 CFR Part 254 imposes oil-spill response plan requirements for facilities located seaward of the coast line. Under this part, the operator must submit a plan that among other things:

    - Designates a trained qualified individual with full authority to implement removal actions;

    - Designates a trained spill management team available on a 24-hour basis;

    - Describes a spill-response operating team that is trained and available on a 24-hour basis to deploy and operate spill-response equipment;

    - Designates a planned location for a spill-response operations center and provides for primary and alternate communications systems for coordinating spill-response operations;

    - Lists the types and characteristics of the oil handled, stored, or transported at the facility; provides procedures for the early detection of a spill; and

    - Identifies procedures the operator will follow in the event of a spill or a substantial threat of a spill.[13]

- The response-plan requirements of 30 CFR Part 254 would appear to comply with the requirements of Article 3, Section 2 of the OPRC Convention, which provides that the signatories will

[12] 30 CFR § 553.20-.41.

[13] 30 CFR § 254.23.

"require that *operators* of offshore units under its jurisdiction have oil pollution emergency plans," which are "approved in accordance with procedures established by the competent national authority."

- **Comments on OPA 90 and foreign claimants**:

  - **R**esidents of foreign countries, governments of foreign countries, and agencies and political subdivisions of foreign countries cannot recover removal costs or damages from a pollution incident under OPA 90 unless they can demonstrate that (1) they have not been otherwise compensated for the removal costs or damages; and (2) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants. See 33 U.S.C. Sec. 2707.

  - The Mexican States of Tamaulipas, Quintana Roo, and Veracruz brought OPA claims against BP, Transocean, Halliburton, Anadarko, and Cameron, in connection with the DEEPWATER HORIZON blowout and spill.[14] In response to the Defendants' position that the Mexican States did not meet the requirements for foreign claimants for OPA claims, those claimants asserted that the above-referenced MEXUS Plan, the Cartagena Protocol, the 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage (CLC), and the Treaty on Maritime Boundaries between the U.S. Mexico were treaties authorizing such claims or providing comparable remedies. The court rejected that argument, noting that none of the referenced agreements dealt with removal costs or damages (and noted that the U.S. had not ratified the CLC). The court therefore dismissed the Mexican States' claims under OPA 90.[15]

[14] *In re DEEPWATER HORIZON*, 835 F.Supp.2d 175 (E.D.La. 2011).
[15] 835 F.Supp.2d at 182.

- The "foreign-claimant" rule includes an exception allowing residents of Canada to make OPA claims in cases where a tanker that receives oil at the terminal of the Trans-Alaska Pipeline suffers a discharge or threat of discharge prior to delivery of the oil to a U.S. location.[16]

- Thus, while OPA 90 provides substantial protection for U.S. claimants, it is clearly limited in the international context by its exclusion of foreign claimants in the absence of international treaties or agreements.

[16] 33 USC § 2707(a)(2).