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WLF Seeks High Court Review of Controversial Clean Water Act Civil Penalty Case

“The Fifth Circuit’s unsupported and inconsistent view of when an entity can be held strictly liable for a ‘discharge of oil or hazardous substances’ under the CWA undermines the rule of law in ways that go well beyond the more than \$13 billion in civil penalties at stake in this case.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today asked the U.S. Supreme Court to review an appeals court decision that adopted a confusing test for determining hazardous-discharge liability under the Clean Water Act (CWA). In a brief filed in *BP Exploration & Production Inc. v. United States*, WLF argues the U.S. Court of Appeals for the Fifth Circuit erred in refusing to apply the rule of lenity to resolve a CWA textual ambiguity in favor of the defendants.

This liability dispute arises from the 2010 explosion on the *Deepwater Horizon* drilling vessel and the resulting oil spill in the Gulf of Mexico. BP Exploration (BP) owned the Macondo well beneath the seabed, and Transocean, one of the world’s largest offshore drilling contractors, owned and operated the *Deepwater Horizon* watercraft and all its appurtenances—including a blowout preventer and other safety mechanisms that were attached to the well. BP maintains that, for purposes of assessing liability under the CWA, oil was discharged into the Gulf only “from” Transocean’s *Deepwater Horizon* and its appurtenances, not directly from the Macondo well. Nonetheless, the Fifth Circuit determined that BP, not Transocean, was liable for the spill, but provided little statutory or legal justification for its odd conclusion in two separate opinions. The government seeks more than \$13 billion in civil penalties from BP—the largest in history.

In its brief urging review, WLF argues that the Fifth Circuit’s two internally inconsistent opinions finding BP liable implicitly acknowledge that the CWA’s “from-which-oil-is-discharged” provision is ambiguous. Such ambiguity in a harsh penal statute, WLF contends, invites application of the venerable rule of lenity, which requires that ambiguities in civil-penalty statutes should be resolved in favor of the defendant. Instead, the panel’s interpretation of the CWA essentially ignored the rule of lenity, leading the court to interpret the CWA expansively rather than narrowly.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews:

“The Fifth Circuit’s unsupported and inconsistent view of when an entity can be held strictly liable for a ‘discharge of oil or hazardous substances’ under the CWA undermines the rule of law in ways that go well beyond the more than \$13 billion in civil penalties at stake in this case. Only the Supreme Court can provide the clarity and regulatory certainty that faithful implementation of the CWA call for here. The Court should grant the Petition and reverse the decision below.”

WLF is a national, public-interest law firm and policy center that devotes a substantial portion of its resources to reining in governmental regulatory overreach.