The following article was published in the Houston Chronicle on Thursday, March 27, 2014:

Barge firm faces long legal haul

Oil spill could bring years of litigation, stiff penalties

By Ryan Holeywell

Resolving legal issues that arise from Saturday’s fuel spill in Galveston Bay likely will require years of litigation and cost tens of millions of dollars.

“You usually don’t talk about environmental cleanups in the millions of dollars range. It’s in the tens of millions of dollars range,” said Noah Hall, who focuses on environmental and water law as an associate professor at Wayne State University in Detroit. “You dump something in the water, and boy is it hard to get back.”

Houston-based Kirby Corp., which owned and operated the barge that spilled 168,000 gallons of fuel after a collision Saturday, faces potential federal fines, cleanup costs and damage payments to residents and businesses.

Officials and legal experts stressed that the investigation into the incident continues and that no penalties or damages have been assessed.

On Tuesday, however, the government notified Kirby that under federal law, it is the responsible party for the spill, said Greg Beuerman, a spokesman for the group of responders that includes the U.S. Coast Guard, the Texas General Land Office and Texas Parks and Wildlife Department, among others.

The designation means Kirby is responsible for the cleanup and is subject to provisions of the Oil Pollution Act, a 1990 law passed in response to the Exxon Valdez oil tanker spill in Alaska.

Saturday’s spill resulted from the collision of the Kirby barge and the 585-foot bulk carrier Summer Wind, owned by Cleopatra Shipping Agency.

Although the investigation is ongoing, details of the collision aren’t likely to spare Kirby from federal penalties.

“Basically, the owner of the ship carrying the oil is responsible,” said Thomas Perrelli, a partner with the law firm Jenner & Block who previously oversaw the U.S. Justice Department’s litigation over the 2010 Gulf of Mexico oil spill.

If Kirby believes the Cleopatra Shipping vessel or other entities played a role in causing the spill, it will have to pursue litigation seeking reimbursement for a portion of any penalties or damages it pays.
“The legal regime is set up to make this really simple: you pay, and then you chase whoever you think caused it,” Perrelli said.

Matt Woodruff, Kirby’s director of government affairs, declined to speculate whether Kirby would sue other companies over the accident.

**Per-barrel penalties**

The Oil Pollution Act generally caps the cleanup costs a company can be assessed, with the caps varying among different types of vessels.

But if a court determines a spill resulted from gross negligence or violations of safety regulations, those caps don’t apply. “In the context of a major oil spill, that’s always something hanging over the head of the ships involved,” Perrelli said.

Kirby also could face penalties under the Clean Water Act. That penalty is $1,100 per barrel spilled — about $4.4 million based on the 4,000 barrels in the barge compartment that was breached. The penalty would be reduced for each barrel recovered in the cleanup process, but would increase to $4,300 per barrel if a court ruled the spill resulted from gross negligence.

Kirby Corp. has noted in federal financial filings that spills are a hazard of its business.

“Although statistically marine transportation is the safest means of transporting bulk commodities, accidents do occur, both involving company equipment and equipment owned by other marine carriers,” the company wrote in its annual report to the Securities and Exchange Commission, filed less than a month before the accident.

The Houston Chronicle reported on Monday that according to government records, the towboat Miss Susan, which was pushing the barge in Saturday’s collision, has been involved in 20 incidents reported to the Coast Guard in the past dozen years.

That total includes two other accidents that occurred when the towboat was pushing barges containing oil or asphalt.

Kirby has insurance covering up to $1 billion per occurrence for claims arising from collisions, personal injuries and environmental damage, according to its SEC filings.

**Who else has a claim**

Besides cleanup payments, federal law requires companies responsible for oil spills to establish funds to compensate individuals or businesses suffering spill-related property damage or economic losses.

Claimants can accept specified damage payments from the fund or pursue their own cases in court.
State and local governments also can file claims or pursue lawsuits.

Already, charter fishing businesses and others have filed a class-action lawsuit against Cleopatra Shipping Agency and Kirby Inland Marine, the Kirby Corp. subsidiary that owned the towboat Miss Susan.

Hall, the Wayne State professor, said the company could owe additional money to Texas under federal law as a penalty for damaging its natural resources.

“This gets a little subjective,” Hall said. “You figure out how many turtles you killed, how many miles of shoreline was polluted, and it gets paid to the state as the trustee of natural resources. It’s part of what the company owes society.”

The company also may face liability under the Migratory Bird Treaty Act because the spill was near routes used by migratory birds, said Marcilynn Burke, an associate professor at the University of Houston Law Center.

That law has been a powerful tool for the government in spill cases, and was applied extensively in the Exxon Valdez spill, said Burke, a former deputy director for programs and policy at the Bureau of Land Management.

“Accidents do happen,” she said. “The law is intended to make sure those responsible pay for the damages created by those accidents.”

ryan.holeywell@chron.com  twitter.com/RyanHoleywell