



Early Restoration in the Gulf of Mexico: When, Why and How?

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SEMINAR SUMMARY

Natural resource trustees are in the process of determining the extent of injuries caused to Gulf of Mexico ecosystems by the *Deepwater Horizon* oil spill. Required by the Oil Pollution Act of 1990, the natural resource damage assessment (NRDA) is designed to guide the assessment and quantification of impacts to natural resources, and the development and implementation of restoration efforts. The full extent of liability will be determined through a legal process that could take years, but on April 21, 2011, the natural resource trustees announced that BP had agreed to provide \$1 billion in funding for "early restoration" to address injuries on an accelerated timeline. Because early restoration is not a legally defined or structured process, many components of the process and agreement are novel. This seminar brought together experts to discuss what early restoration is, how it fits within the broader NRDA process, and the framework agreement and process.

Speakers

- **John C. Cruden**, President, Environmental Law Institute
- **Brian D. Israel**, Partner, Arnold & Porter LLP; Lead Outside Counsel for BP, *Deepwater Horizon* Natural Resource Damage Assessment
- **Dr. Johanna Polsenberg**, Federal Representative, Gulf Restoration Network

Moderator

- **Jordan Diamond**, Deputy Director, Ocean Program, Environmental Law Institute

[Mr. Cruden and Mr. Israel noted they were not speaking on behalf of current or former clients or affiliates, including the U.S. Department of Justice and BP, and that their comments should not be attributed to either. They also noted that their comments might be necessarily constrained due to confidential aspects of the early restoration agreement. Dr. Polsenberg noted that she was speaking only on behalf of the Gulf Restoration Network, not its affiliates or any other Gulf-based organizations.]

Mr. Cruden opened the seminar by setting the litigation and natural resource damage assessment (NRDA) process following the *Deepwater Horizon* oil spill in context. The spill affected all of the Gulf states, and the NRDA began virtually before the oil even stopped flowing. Mr. Cruden highlighted not only the environmental but also the economic consequences, including issues such as the lost public use of fisheries and beaches that is also a type of injury assessed through the NRDA process.

Mr. Cruden continued to describe the numerous restoration and recovery efforts that were initiated. There have been a number of reports and examinations detailing what happened, including the report by Secretary of the Navy Ray Mabus and the well-publicized series of hearings and reports from the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling. There also has been litigation. Thousands of lawsuits, filed across the country, have been now mostly consolidated into one multi-district litigation case heard by U.S. District Court Judge Barbier in New Orleans. The United States, Louisiana, and Alabama have each filed suits on behalf of the public against BP. To help compensate for individual economic damages, Ken Feinberg leads an administrative claims process.

Mr. Cruden discussed BP's potential liability under two statutes: the Clean Water Act and the Oil Pollution Act of 1990 (OPA). The Clean Water Act levies penalties for prohibited discharges, and the penalty amounts are being determined in court. OPA was enacted following the *Exxon Valdez* oil spill, and enables entities to recover all costs spent to clean up an oil spill and to restore injured natural resources. Notably, OPA provides for recovery of specified categories of economic damages: 1) the cost of restoring, replacing, or acquiring equivalent resources; 2) the diminution in value of injured resources pending restoration; and 3) the cost of conducting the assessment. Mr. Cruden noted how OPA and the resulting NRDA process differ from other environmental recovery processes, as the damages are not deposited in the U.S. Treasury and can only be used to restore or acquire equivalent resources.

Mr. Cruden described the current status of the *Deepwater Horizon* NRDA. A Trustee Council has been established with representatives chosen by the five governors of each Gulf state, the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration, and the U.S. Department of Defense. The Trustees have been meeting almost since the inception of the spill event, and must continue to meet to decide what will ultimately constitute the restoration plan. Determining what would have been but for the spill, and what steps should be taken to restore the Gulf to that state, is a highly scientific and complex endeavor. Mr. Cruden concluded his remarks by introducing the early restoration component of the Gulf NRDA. Almost exactly one year after the spill event, the Trustees and BP agreed to an [early restoration agreement](#). Early restoration is not required by statute, and to his knowledge has occurred in only one other case—the Fox River in Wisconsin—making the Gulf early restoration agreement a groundbreaking voluntary act, and a tribute to everyone involved, including BP.

Mr. Israel began his presentation by outlining relevant dates in the NRDA process. On April 28, 2010, the Coast Guard identified BP as a responsible party for the *Deepwater Horizon* oil spill, a designation that BP accepted the following month. In June 2010, BP agreed to provide \$45 million to the NRDA pre-assessment process. Following the issuance of a formal notice of intent, BP accepted its invitation to begin the NRDA process in October 2010. To date, the parties have signed approximately 130 cooperative assessment plans, which detail how to conduct a particular mission or study. Mr. Israel noted the Gulf NRDA is the largest environmental assessment ever undertaken in this context; it is massive in scope, volume, and effort. Much study data is available online via BP.com/NRDA, including BP's [Gulf of Mexico NRDA: One Year Report](#).

Mr. Israel then discussed the early restoration agreement, signed by BP and the Trustees, in which BP committed to provide up to \$1 billion for early restoration projects in the Gulf. Part of the underlying rationale for the agreement is that, for better or for worse, NRDA's take a long time—for the simple reason that it takes a long time to complete the extensive assessment work and satisfy the statutory obligations for fairly and accurately estimating damages. Although there is nothing in OPA that provides for it, BP and the Trustees wanted to find a way to overcome this common criticism of the NRDA process, without prejudice to the trustees' ultimate calculation of damages.

Mr. Israel explained that the Trustees will select early restoration projects based on designated criteria. For example, selected projects must restore equivalent natural resources, address specific injuries associated with the incident, be cost effective, and be consistent with long-term restoration plans. All Trustees must agree to all projects, even if they do not affect all Trustees' resources. Mr. Israel highlighted that anyone, including BP, can submit project ideas; the Trustees are actively requesting proposals, and NOAA's webpage posts and maps the approximately 450 projects proposed to date. Once the parties agree upon projects, Mr. Israel noted that the Trustees will submit the projects to the public for review and comment in the form of a draft early restoration plan. Projects proposed to be funded by BP will be "clearly and prominently" indicated in a draft plan. Mr. Israel anticipates there will be multiple early restoration plans, as this is likely to be an iterative process.

Mr. Israel noted that, after public review, the Trustees and BP will enter into project stipulations that describe a project's restoration plan, responses to public comments, total credits, detailed cost, implementation, and all other details necessary for plan implementation. BP has moved \$1 billion from the \$20 billion trust fund that Feinberg is currently using to pay individual economic damages claims into a sub-account dedicated to early restoration. Once a project is selected, funds will be moved from the Early Restoration Subaccount to an account or accounts designated by the Trustees. The default assumption, which can be altered when necessary, is that 25% of project costs will be allocated at the outset; an additional 25% of project funds will be allocated after the project is put out for bid; and the remaining 50% will be paid after the bid is finally awarded.

Mr. Israel discussed how projects will result in "NRDA offsets." In short, BP will receive credits associated with each project against the ultimate NRDA claim. The credit must be quantified and articulated as part of each restoration project stipulation. Mr. Israel pointed out that offsets will not be measured in dollars spent, but in the natural resources or services provided, such as human use trips and discounted service acre-years for habitat productivity. They will be measured using the best available science, calculated to account for uncertainty, and clearly indicated in the draft early restoration plan disseminated for review and comment. Mr. Israel explained that, when the legal case is concluded (via settlement or judgment), offsets will be applied to whatever debit is determined by the court. If the resources and services provided by the projects are of same type and quality determined to have been injured, this crediting amounts to a mere subtraction exercise; scaling may be necessary to convert different types of injuries and credits.

Dr. Polsenberg began her presentation with praise for the early restoration agreement as generally good news. She noted, however, that public participation and transparency remain sources of concern for those working on the ground in the Gulf. Dr. Polsenberg explained the perception that, to date, the public meetings convened have been "listening sessions," rather than true two-way discussions. In addition, because this is a legal proceeding with a cloak of confidentiality, the public is somewhat unsure how projects are being evaluated. Overall, Dr. Polsenberg emphasized that community groups are concerned that early restoration decision-making is occurring without sincere consideration of public

input. In particular, she highlighted the reality that early restoration could end up constituting the bulk of, or indeed the only, projects undertaken in the Gulf with BP's money. Therefore it is of paramount importance that the process be inclusive and effective. As an example of unforeseeable long-term impacts, Dr. Polsenberg cited the collapse of Alaska's herring fishery that occurred a full four years after the *Exxon Valdez* spill.

Dr. Polsenberg then discussed the merits of currently proposed projects. She cautioned that no decisions have yet been made on the project proposals, so she cannot comment on the Trustees' project selection process. But the Gulf Restoration Network conducted a first review of roughly 240 project proposals submitted through July 2011, and determined that 60% of proposals would promote restoration, 30% might promote restoration, and 8% would be purely destructive. However, no one is being informed about which projects are actually under the Trustees' consideration.

Dr. Polsenberg lamented the lack of public input in the ongoing processes. She noted her approval of a phased approach to project approvals, so that the public will be able to monitor and evaluate success. This does not mitigate the fact that the current structure does not provide a process for formalized public input, does not provide a process for evaluating alternatives, and does not guarantee the Trustees will meaningfully incorporate public input. The public has no guarantee early restoration projects will be for the greatest good, for the greatest number, for the longest time, and occur as soon as possible.

Dr. Polsenberg reported that representative groups from across the Gulf have asked Trustees not only to let them provide input but also to be given feedback in return. The Trustees were open to the suggestion and requested the nongovernmental organizations to help ensure that as many groups as possible from across the Gulf were represented and able to take part in all discussions, either directly or via proxy, to make sure no viewpoints were inadvertently excluded. Accordingly, Gulf groups developed [guideline criteria](#) for evaluating projects. The Project Prioritization Guidelines include economic, ecosystem, implementation, monitoring, and community support and participation criteria. Gulf groups have discussed ranking the criteria. Dr. Polsenberg stressed how years of oil and gas development in the Gulf have led to habitat destruction, and how large projects with long-term impacts should be prioritized. She concluded by stating that, because the assessment has not yet been completed, the Trustees currently are free to pick potentially destructive projects or projects without the greatest long-term impact. It is therefore critical that the Trustees' decisions are guided by criteria made available to the public. Trustees represent the public good and therefore have a responsibility to make their selection process as transparent as possible to ensure the best restoration projects are employed with what is ultimately limited NRDA funding.

Concluding Thoughts

Mr. Cruden offered a final comment that, even though there is no legal history of early restoration, he thinks this is something the federal government should consider in many future NRD cases. This may well be a model for the future. Mr. Cruden agreed with the importance of the complexities Dr. Polsenberg identified, but noted that if early restoration can be advanced, it will be an advantage to both the ecosystem and companies, who would pay less for the period of lost resource use.

Mr. Israel followed up on Mr. Cruden's comment by expressing a hope that one year from now, everyone will be able to point to projects and feel they were successful. The intent of early restoration is to see good, cost-effective projects that address multiple services, have a nexus to injury, and are

implemented quickly. Mr. Israel emphasized that no one is naïve about the complexity of early restoration, but confronted with the alternative of a long wait time, the parties believed this was the better approach.

Dr. Polsenberg agreed early restoration would be a great model to have in place for the future. But as the process goes forward, she hopes to see evidence of how public comments are considered by the parties. Overall, the Gulf Restoration Network's biggest ask is greater transparency.

Question and Answer

What is the range of estimates of BP's total NRDA liability?

Mr. Cruden stated that estimates are very approximate. For reference, NRDA recovery for the *Exxon Valdez* oil spill was roughly \$900 million. In terms of what this case will ultimately be, no one yet knows. The parties are far from knowing the total harm component, because so much of the assessment involves groundbreaking science on the ocean floor. Mr. Cruden remarked, however, that neither BP nor the United States would have settled an early restoration agreement if they thought the total would be less than \$1 billion.

In response to a follow-up question citing an article in which BP estimated its liability at \$40 billion, Mr. Cruden noted he would be surprised if that estimate was limited to NRD; it more likely includes other costs as well, such as administrative claims and Clean Water Act penalties.

While the emphasis in the Deepwater Horizon NRDA process is on the identification of early restoration activities, the Exxon Valdez experience and other spills suggest long-term effects may not be apparent until many years after the spill. How are long-term effects being anticipated and incorporated in early restoration?

Mr. Israel commented that this is an important and challenging question for the Trustees to address. Mr. Cruden agreed and stated that even though the United States settled only two years after the *Exxon Valdez* spill event, money was set aside for unforeseen future impacts. In fact, there is still money in trust that has not been spent, as well as a reopener clause for things that were not known at the time. NRD judgments are very often predictive, but there are ways to protect for unforeseen circumstances.

Can the speakers comment on emergency restoration?

Mr. Israel described how emergency restoration allows the mobilization of funds for specific injuries that can be stopped with immediate action before the completion of the NRDA process. Unlike early restoration, OPA provides for emergency restoration by statute. Mr. Israel cited BP's separate emergency restoration agreement with the Trustees, under which several projects have been planned. Mr. Israel gave a specific example of one wetlands project in Mississippi to flood a flyway in order to attract migratory birds away from oiled wetland areas.

What happens if the damages assessment is less than \$1 billion?

Mr. Israel noted that the NRDA safeguard is that early restoration projects must have a nexus to damages, thus ensuring credits will not exceed debits. Mr. Cruden added that total NRDA damages coming in below \$1 billion was not one of his concerns in the agreement negotiating process. But as a

theoretical question, early restoration should never result in such an outcome because the individual projects should only address injuries suffered as a result of the incident.

What is the relationship between the NRDA funds and Clean Water Act penalties? Is there any connection envisioned between how funds are used?

Mr. Cruden described how Clean Water Act penalties are meant to deter and punish, whereas natural resources damages are designed to restore ecological conditions. Thus, although there are joint issues of fact and liability, these two recoveries have completely different objectives.

Dr. Polsenberg discussed the possibility that, if non-NRDA funds are made available for restoring Gulf resources (e.g., if Clean Water Act fines are legislatively directed to the Gulf), people should be careful to use those other funds to address long-term restoration of the Gulf ecosystem and Gulf livelihoods, instead of addressing the specific impacts of the *Deepwater Horizon* incident.

Pushing on the nexus between Clean Water Act penalties and NRDA: if Clean Water Act penalties or other monies fund projects in the Gulf, could BP claim credits towards NRDA under those projects?

Mr. Cruden described how the answer to this question will depend entirely on the structure of the potential statute that would supply funds to Gulf restoration. In terms of funds for actions such as removal and clean-up, there can be no double recovery from BP under NRDA.

How would Dr. Polsenberg, with her expertise on the Gulf, prioritize early restoration projects?

Dr. Polsenberg distinguished the *Deepwater Horizon* incident damages from the damages caused by decades of oil and gas development in the Gulf. Regarding the *Deepwater Horizon* incident, Dr. Polsenberg thought the deep ocean impacts to be the most important, and that continued monitoring and increased understanding of these impacts is necessary. In terms of long-term impacts, Dr. Polsenberg would focus on wetland and marsh habitat loss.

How can the public participate in early restoration?

Mr. Israel noted that, as there is no legal requirement for early restoration, there are no statutory requirements for public participation in the early restoration process. Nonetheless, the early restoration agreement envisions public comment periods prior to project stipulation, and the Trustees have websites that solicit project proposal ideas from the public.

Mr. Cruden underlined how National Environmental Policy Act (NEPA) processes are also occurring and offer opportunities for public participation. However, Mr. Cruden emphasized Dr. Polsenberg's prior point, that public involvement must be a dialogue rather than a monologue. But at the end of the day, the decision-making authority rests with the Trustees.

Government claims against BP may be settled out of court, perhaps in a combined settlement that includes both NRDA and Clean Water Act penalties. Could such a settlement blur lines between them?

Mr. Cruden noted that although most environmental damages claims have settled, a trial is already scheduled currently for the U.S. case (although not the NRD claims). It is possible the case could result

in a full settlement, partial settlement, or a full jury trial. Regardless of outcome, NRD funds are allocated by statute only to specific uses, and that allocation is non-negotiable.

How might a consent decree read in this case?

Mr. Cruden noted that a decree would include lengthy DOJ memoranda to justify every cost and damage recovered in the settlement. In addition, DOJ would seek public comment on the judicial consent decree, as it does on all decrees, and submit those comments to the Court. Mr. Cruden emphasized that this process would be separate from the early restoration stipulation process.

Dr. Polsenberg clarified that the Clean Water Act specifies per barrel penalties for oil spills. In this case, there may be unprecedented fines levied. She analogized Clean Water Act penalties to a “ticket” to dissuade repeated wrongdoing, whereas NRDA is paying to fix what you did wrong. A question remains as to what happens under NRDA if restoration projects occur with other support before the NRDA is complete.

Given the rapidly eroding state of Gulf ecosystems, when is the optimal point for Trustees to measure the baseline? Having money now is better than having money later, but we will have a more complete picture of total damages later than we do now. How do we make these tradeoffs?

Mr. Cruden agreed that money now is better than money later, but it is a daunting tradeoff because there is currently insufficient information to fully understand the injuries suffered. This is a constant tradeoff in NRDA decision-making. He explained that, at the end of the day, it is part legal judgment and part scientific judgment—knowing when a party knows enough to file suit, even if the party does not know everything. Mr. Cruden also highlighted that a full NRDA was not completed before the *Exxon Valdez* spill settlement. One of the reasons the parties had enough confidence to complete an early restoration deal in this instance was that enough sampling and studies already have been completed to give a preliminary indication that damages would exceed \$1 billion.

Dr. Polsenberg expressed her wish that, moving forward, the Gulf will be viewed and treated comprehensively, with people working to prevent damages to the Gulf before they happen instead of responding to damages after they occur.

Mr. Israel agreed that NRDA involves difficult scientific questions that take a long time to calculate out, and noted that this is precisely why early restoration is warranted.

What is the relationship between early restoration and NEPA?

Mr. Israel explained that the early restoration agreement directly addresses the relationship between NEPA and early restoration, and includes provisions to ensure that standard NEPA processes will apply. Mr. Cruden added that certain early restoration activities could trigger additional state and federal permit processes, which may provide additional public participation opportunities.

What are the strategic advantages of keeping the early restoration process confidential?

Mr. Cruden emphasized that early restoration is occurring in the context of ongoing litigation. If this case proceeds to a judge or jury, publicly-provided information could be used in court. In addition, Mr.

Cruden highlighted that NRDA involves more public participation than most other environmental actions involving the U.S. Department of Justice.

Dr. Polsenberg praised BP for the responsibility it has taken to date, but recognized that the confidentiality surrounding the early restoration process likely is linked to BP's desire to avoid publically admitting liability in a way that could be used in the context of ongoing litigation.

Do you have any comments on the future of NRDA early restoration processes?

Mr. Cruden hopes the Gulf early restoration process will be successful and serve as a model for future NRDA actions, and possibly even that NRDA regulations will be amended to include early restoration.

Mr. Israel observed that it is difficult to know whether it will be appropriate to adopt the Gulf early restoration model in future cases. Here, the structure and scale are unique. Nonetheless, early restoration may potentially be applicable in future cases. Mr. Israel hopes early restoration results in a positive experience in the Gulf.

Dr. Polsenberg reiterated that representative groups in the Gulf strongly support early restoration funding, but that the process would be enhanced by more inclusion of public sector groups.

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