DIALOGUE

Recent Developments in Oil Pollution Act Litigation

Summary

Congress enacted OPA in 1990 following the *Exxon Valdez* oil spill, to strengthen the federal government's ability to prevent and respond to oil spills, to establish financial resources to aid response, and to raise standards for contingency planning. It is an area of law that is still evolving, particularly in the wake of the 2010 *Deepwater Horizon* spill and subsequent developments in Gulf of Mexico restoration and recovery. A number of recent cases have since dealt with issues related to the spill. On June 28, 2016, the Environmental Law Institute convened a panel of experts to discuss recent events in oil pollution law, including the resolution of *Deepwater Horizon* civil penalties and developments regarding natural resource damage assessments and liability. Below, we present a transcript of that discussion, which has been edited for clarity and readability.

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Russ Randle: One of the lessons that may be learned out of *Deepwater Horizon* cases stems from there being a relatively expedited resolution of these cases, which demonstrate what an able district judge and magistrate can accomplish if they set their minds to it.[1] It was roughly six years from the incident to the civil penalty settlement, and that is really a fine record for these officers of the judicial system. This case has been the focus of the oil industry and environmental community for quite a number of years, and there will be lessons learned in the natural resource damage (NRD) arena as we go forward. But there are, I think, some well-founded criticisms of the settlement. The judge I used to work for said a good settlement is one that leaves no one satisfied, so I think we've met that standard here. But the comments show that there are substantive concerns that perhaps too much of the settlement proceeds go to economic development and not enough to actual restoration of the Gulf.

So, with that, I'm going to turn it over to Steven and listen with great interest to the lessons learned out of the trial of the *Deepwater Horizon* case.

Steven O'Rourke: I'm supposed to talk about the settlement of the BP case.[2] Probably a lot of people know a fair bit about it. In 2010, the *Deepwater Horizon* drilling vessel, drilling a well called the "Macondo" well, lost control of the well and experienced a blowout. There was an explosion on the rig. Unfortunately, people died or were injured. Then, the rig burned for two days. It eventually sank and oil was released from the well for about three months, accumulating on the shoreline for more than one thousand miles and spreading across 43,000 square miles of the ocean.

So, we filed a case against BP and others—Transocean, the owner of the rig, and two other defendants who were investing partners. We only filed two claims. We filed a claim under the Clean Water Act (CWA)[3] for civil penalties. We did not file a claim under the Oil Pollution Act (OPA)[4] for NRD. Maybe you're thinking: this is supposed to be an OPA seminar; what's he doing talking about the CWA? Don't forget that when OPA was passed in 1990, it not only created what we think of as OPA today. It also amended the CWA. When the *Valdez* happened, the penalties available for civil penalties were just $25,000 per day. And that was a quick spill, but a huge volume of oil. So, when they passed OPA, they added a volume-based civil penalty in addition to a daily-based civil penalty. Anybody who was watching this spill saw the volume coming out. This obviously had the potential to be enormous, with potentially billions of dollars in civil penalties.

The NRD aspect of the case also looked at the volume of oil and considered penalties. The *Valdez* was a $900-million NRD settlement. The *Deepwater Horizon* was 20 years later with a much larger volume of released oil, so one could expect, even before the assessment, that it would

1. The Environmental Law Institute has a database of litigation on the *Deepwater Horizon* oil spill at http://www.eli.org/deepwater-horizon/deepwater-horizon-oil-spill-litigation-database, and detailed materials on the settlement and related processes at http://eli-ocean.org/gulf.
2. The consent decree is available on the U.S. Department of Justice (DOJ) website at https://www.justice.gov/enrd/deepwater-horizon.
3. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
4. 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001.

also be a billions-of-dollars claim. So, those are the two big claims that jumped out. We wanted to file with the CWA claim and get into the final case, but not file the NRD claim because the assessment had not been performed, and that's supposed to happen outside of court in an administrative process.

So, we jumped in with the CWA lawsuit and went through litigation. Just to give you a sense, we filed in 2010. Over the course of five years, we, the United States, produced about one hundred million documents. We had maybe 500 or 600 days of deposition. We had three trials. Collectively, that's about three months of trial time. We settled out some of the other defendants, MOEX and Transocean. When Transocean settled for a billion-dollar civil penalty, that was a pretty big deal. The biggest penalty ever awarded by a court prior to that was $12 million. MOEX was the first settler. They came out with $90 million. Transocean had $1 billion, and obviously we settled with BP later.

So, the stage that was set was five years of litigation. We rested our case on civil penalties. BP had too, and we were waiting for a ruling, and that's when we struck the settlement.

Figure 1 shows the terms of the settlement. Figure 2 depicts the terms in the form of a pie chart, for a different perspective. The first part of the settlement was a $5.5-billion civil penalty, and included all the payment terms over time. With that $5.5-billion civil penalty, we had asked for something higher and BP had asked for something lower in court. The maximum possible penalty was about $13 billion.

The next several lines on the chart represent the NRD settlement. I separated out two lines of $7.1 billion in due money and $1 billion of the early money. BP, the United States, and the states agreed to this framework, in which BP would pay for one billion dollars' worth of NRD restoration projects before we sued them. We called it the "Early Restoration" program. It was sort of a down payment on the anticipated damages, and that money had been being spent for several years. So, that money was kind of in the bag. And $7.1 billion on top of that amounts to $8.1 billion for restoration projects over time.

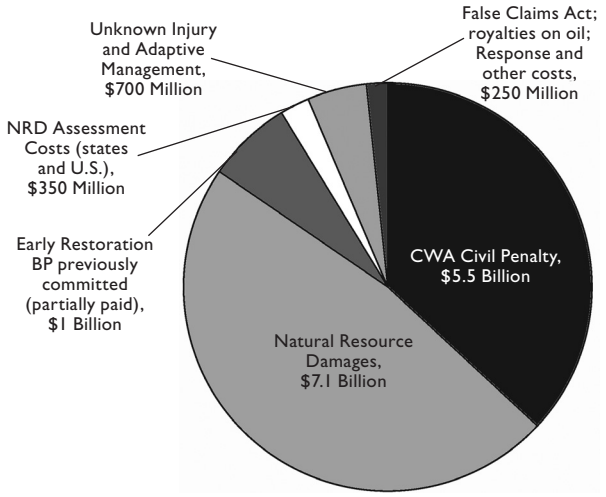
They paid $350 million in damage assessment costs to the state and federal governments. BP had previously paid quite a bit of assessment costs out of pocket. However, the assessment price turned out to be substantially higher than $350 million. So, what was left to be reimbursed was $350 million.

The line in Figure 1 for NRD for unknown injury and adaptive management was really in terms of taking a portion of the money and locking it away. We'll put it in a hypothetical lock box because that money can't be accessed for at least 10 years. It must be accessed by the 16th year. During that period, the state and federal trustees can hope to take out that money, up to $700 million; it's up to $700 million because of accruing interest. If the money is taken out sooner, it will be less. If we wait until the end of the period, it will be $700 million. The money was intended to be locked away to ensure that restoration projects get off the ground, but there's money left over to fix mistakes that were made and to adapt to changing circumstances or address injuries that were unknown at the time.

Figure 1
Federal & State Claims Resolved in Consent Decree

Claim	Amount
CWA Civil Penalty	$5.5 billion
Natural Resource Damage (NRD)	$7.1 billion
NRD: Early Restoration—BP previously committed (partially paid)	$1 billion
NRD: Assessment Costs (states and United States)	$350 million
NRD: Unknown Injury and Adaptive Management	Up to $700 million
False Claims Act and royalties on oil	$82.6 million
Response and other costs	$167.4 million
TOTAL	Up to $14.9 Billion

Figure 2
Consent Decree Payments
Summary of Payments



The last two lines in Figure 1 may be a lot of money but are relatively small in this case: royalties,[5] the False Claims Act,[6] and outstanding U.S. Coast Guard response costs.

That adds up to $14.9 billion.

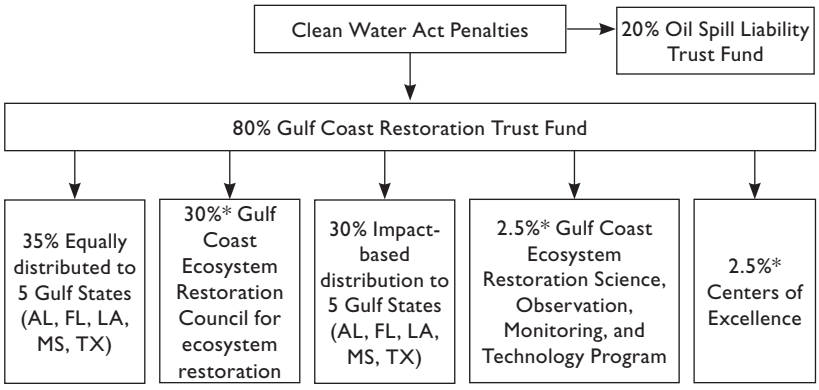
So, where does all that money go? Civil penalty money ordinarily under the CWA goes to the Oil Spill Liability Trust Fund, the OPA version of Superfund. But, for this case only, the U.S. Congress passed an act called the

5. Federal Oil and Gas Royalty Management Act, 30 U.S.C. §756.
6. 31 U.S.C. §§3729 et seq.

RESTORE Act[7] that said, okay, 20% will still go to the Oil Spill Liability Trust Fund, but 80% will go through the formula that's set forth in Figure 3.

Of the 80%, about one-third went to the states per capita, five states from Texas over to Florida; about one-third went to those states prorated on how oiled they got; and about one-third of it goes to an account to be dealt with by a council, the Gulf Coast Ecosystem Restoration Council, that's supposed to come up with a comprehensive plan on how to spend that money toward ecological restoration. Of the various pots shown in Figure 3, some can be used for certain economic incentives: because there was disruption of the economy, the RESTORE Act authorizes funding for economic projects.

Figure 3
Civil Penalty: Where Does the Money Go?
Allocation of Gulf Coast Restoration Fund



* Supplemented by interest generated by the Trust Fund (50% to the Gulf Coast Ecosystem Restoration Council, 25% to Science Program, 25% to Centers of Excellence)

For more information on the Restore Act visit: www.RestoreTheGulf.gov.

The NRD money, where does that go? Well, under OPA, it has to go to restore or replace the injured natural resources. And, in some cases, we could just put that money in the bank and let the trustees, state and federal, decide how to spend it over time. In this case, because of different states and different levels of oiling, it seemed like a better idea to figure that out beforehand. So, the consent decree adopts an allocation of the money, which was also adopted in the damage assessment and restoration plan under OPA, so they had to go hand-in-glove. We put the consent decree up for public comment with the plan because it's the same allocation of the damages across the states.

So, when deciding where the money should be spent and on what, the assessment was showing injuries to all sorts of categories out on the Gulf—from the ocean floor up to the water column, to the surface, to the air, to the shores, to the marshes. And the trustees eventually said, well, what we're really thinking about here is that this is an ecosystem injury. It's not just an injury to dolphins, say, but an ecosystem injury, and one option would be habitat-based, water quality-based, ecosystem-based restoration. That's alternative A.

Another option, alternative B, would be to focus more on individual species. Let's put a bunch of money on dolphins, for example. But the trustees decided—this is not a decision by the U.S. Department of Justice (DOJ)—that taking the habitat approach was the better approach, in part because by restoring the basis of the food chain, breeding grounds, and so on, and improving the water quality, if there's a species out there that was never found to be injured, well, it would be helped too. So, it's sort of more prophylactic.

Alternative C was to do what I mentioned, which is put the money in the bank and decide later. The trustees decided not to do that. So, the consent decree includes the allocation, as does the plan. Essentially, about $4 billion of it goes to coastal Louisiana habitat restoration with those marshes being where fish go to spawn, and birds go to feed, and so on.

That is my summary of the settlements. I just wanted to point out that what I was describing was the consent decree in the *United States v. BP* case, and the states are involved in that settlement under the NRD component. But there are other settlements out there that are part of the big picture. First, at the same time we settled our case, the states settled their claims under OPA for lost taxes. Hotel operators had no guests. Hotel operators lost money, but the states lost money, too, by not getting to tax those guests. And the local governments, the parishes in Louisiana, the counties and the other states, they settled with BP. It was negotiated at the same time and they were conditioned on each other, our consent decree and their settlement. $5.9 billion is the total for the five states plus the local governmental entities. So, when you add them together, that's $20.8 billion that settled simultaneously.

Of course, there were criminal pleas. Transocean had a criminal plea and BP had a criminal plea for $4 billion, $2.4 billion of which was to be spent on environmental restoration: $1.2 billion in Louisiana for barrier islands and diversions, and $1.2 billion in the other four states for environmental restoration. Plus $350 million for the National Academy of Sciences for research on spill prevention, spill technology, and spill cleanup.

Then, of course, the private parties, businesses and people, have their own settlements. And those are the class actions—one for economic losses, economic damages under OPA; lost income; lost wages. The other was for personal injury for people who were injured or exposed during the response actions on the beaches and so on. So, that's the bigger picture of other settlements that are out there.

7. Resources and Ecosystems Sustainability, Tourist Opportunities and Revived Economies of the Gulf Coast States Act (RESTORE Act), Pub. L. No. 112-141, Div. A., Title I, Subtitle F, §§1601-1608, 126 Stat. 405 (July 6, 2012) (partially codified at 33 U.S.C. §1321(t) & note).

Leaving the topic of the settlements, there were a lot of legal issues in the rulings of Judge Carl J. Barbier, so I picked a couple of the OPA issues that he had ruled on. First I will mention the moratorium. In 2010, after the spill, the U.S. Department of the Interior (DOI) put a moratorium on drilling in the Gulf. It shut down the whole industry, so all of those people lost money and they wanted to recoup it. They couldn't get it back from DOI because we have sovereign immunity. So, they wanted it from BP, and BP said that the chain of causation is too tenuous. And the plaintiffs said no, if the moratorium is due to the spill, then OPA's causation language is "resulting from" the incident. But Judge Barbier disagreed. The moratorium was not due to the spill. It was due to DOI's fear of future unrelated spills. And so the chain of causation, he said, wasn't there and BP didn't have to pay those claims.

Second, on the summary judgment motion, he ruled that the joint and several liability under OPA is not subject to a divisibility defense. So, unlike a Superfund case, which would have a divisibility defense, Judge Barbier said it's not available in an OPA spill.

And finally, of interest, states of course have their own versions of the CWA and their own versions of OPA. The judge ruled that because the spill was 50 miles offshore, even though the oil floated to state territories, their state laws were preempted by the CWA and OPA. The Outer Continental Shelf Lands Act[8] sort of displaced them, preempting all state laws. So, the only thing the states had left was OPA.

Figure 4
Natural Resource Damage Settlement

NRDA research site, Louisiana

- Total settlement is $8.8 billion
  - Includes $1 billion in early NRDA restoration
    - Amounts not yet paid must be paid within 30 days
  - $700 million for unknown injuries and adaptive management
    - Accrued but unpaid interest starting in 2026
    - $232 million payable one year after the final NRD payment
- Payment will be made over 15 years
- First payment one year after consent decree finalized

Russ Randle: Cyn, I believe you're up next. We're looking forward to hearing your approach and the Gulf Restoration Network's approach in this very complex case.

Cyn Sarthou: All right. I just wanted to start with what the Gulf Restoration Network (GRN) has done. The GRN had followed the BP disaster from the day it started, including flyovers and monitoring all the processes. And so we were very interested in the settlement. Figure 4 shows the overview of the settlement. We do admit that it's an unprecedented settlement and that assessing damage on the scale of this disaster, actually, if it went to trial, would have been extremely difficult. So, I put those provisos on it.

Nonetheless, the GRN and many of its partners were very disappointed by the settlement. Just even looking at the natural resource damage section of it—$8.8 billion, which includes the adaptation and unknown damages section—it sounds like a lot. But actually, when you consider restoration—a single marsh restoration project in the state of Louisiana can cost $300 million, and a diversion of sediment will cost one billion dollars—$8.8 billion in NRD damage is not really very significant.

One of the problems for us really is that there is a reserve account, but the reserve account is not very big; $700 million sounds like a lot, but again it's not very big when it comes to the costs of restoration. And there is some concern by some of our legal partners that there is not sufficient restriction to ensure that we actually get $700 million because, as we all know, people are in short budgets these days and there is a tendency to prematurely pull money that should be left for 10 years. So, that is a concern for many of us.

I do apologize; I'm pretty cynical. I lived in the Gulf for 20 years and have done environmental work here. Although I generally trust the federal government, I do not generally trust the states.

So, with the allocation, as you will note and as was discussed, the largest sum mainly goes to Louisiana, which is not surprising because Louisiana has the biggest need. Right now, our master plan for wetlands restoration in general is going from $50 to $100 billion. It's expected that the 2017 plan will be $100 billion worth of need. And, luckily, the state of Louisiana is adamant about using all of these monies for restoration.

But where we found it really disappointing, and I actually voiced concern before the settlement was finalized, is the open ocean pot. The open ocean pot is relatively small when you look at the damage, the fact that the damage occurred in the open ocean, and that a lot of "restoration projects in the open ocean" are going to be extremely expensive partly because of the cost of vessels to get out there.

The other thing that's really disturbing is that of the open ocean pot, $150 million is allocated to administrative costs of all federal trustees across all of the pots. So, unlike many settlements, or what might have been more logical in our opinion, each of the pots will not pay for the trustees to participate in those processes. But instead, all of the money

8. 43 U.S.C. §§1331-1356(a).

needed to have all federal trustees participate in all of the different pots is going to come from the open ocean pot.

Although we call it the open ocean pot, we at GRN and our colleagues now call it the federal pot because it's really the only pot over which the federal government has any significant control. And I say this because—and I was really disappointed about it, too—it required unanimous approval of projects in each of the pots at the council level. What we found in early restoration was that it meant most of the money went to some pretty dicey projects, including a lodge and conference center in Alabama, which we actually recently won a lawsuit over, challenging that project for lack of environmental analysis on alternatives.

Another concern is the definition of open ocean. It only requires activity for resources primarily in the ocean, which may include coastal resources, and then, as I said, covers federal trustee administrative and preliminary planning activities for all restoration areas. It also seems to cover any projects that are going to happen on federal lands or, as I said, it includes, for example, recreational projects on the Gulf Island National Seashore and a ferry project in Pensacola that goes to federal property. Additionally, what's really, really strange is that some of our coastal colleagues are now arguing that open ocean monies can be used to fund coastal restoration through the natural resource damage assessment (NRDA). They argue that coastal habitats are important to many marine species and that since there is nothing you can really do to "restore" marine species, we should instead focus monies in the ocean pot on restoration of important coastal habitats. Their argument ignores very real needs in the marine environment that could be funded under NRDA.

So, that's a little bit of concern to us. As I said, the BP disaster happened in the open Gulf. There was a lot of damage in the open Gulf, including a lot of marine mammals that were impacted. There's now evidence that sperm whales have been significantly impacted, as have potentially Bryde's whales, which were not even known to be a resident of the Gulf before this spill. The other real concern for us is that there is so little baseline data on species in the Gulf that if this ever happens again, we're going to be in the same situation. So, it's a little troubling.

The next concern we have is the governance structure. The governance structure is really complicated. It has, of course, the trustee council, and then it has eight of what we call TIGs—Trustee Implementation Groups. Those implementation groups actually do most of the planning, and again all decisions must be made unanimously at each of those TIGs. The open ocean pot is the only pot that is all federal trustees and no state trustees. And what we have found at the state level is that anything that is not state-specific is being resisted by a lot of the states, so ecosystemwide restoration through this decisionmaking process is unlikely to occur.

There's one regionwide TIG, but it's not a huge amount of money. It will probably be the bulk of all multistate projects or cross-boundary projects. So, what you're probably going to find is a lot of isolated projects in Texas, in Louisiana, in Mississippi, in Alabama, and in Florida, which is not going to bring about, in the end, an ecosystemwide restoration. It's going to bring state-specific restoration.

The other thing we find extremely troubling about this—but I guess nobody really thought it was important—is that for the interested public, trying to follow this process will be a nightmare. This doesn't include the CWA fines in the whole RESTORE Act process, which is another public nightmare joined with this one, but it presumes that only people in Texas are going to care about Texas and they're not going to care about open ocean, regionwide, or what happens in Florida or Alabama, despite the fact that that is not true. There are a lot of groups that are trying to follow each one of the state restoration processes and the open ocean and regionwide restoration.

So, what's happening is that the public is going to have to choose what it thinks is most important to follow. For example, the GRN is having to choose two or three of these TIGs to follow because we know we cannot cover all of them, and yet all of the decisions will largely be made before it reaches the trustee council. So, there's not going to be much ability to influence what goes on in any of these TIGs and we're just going to have to sort of accept whatever comes up through the process, which doesn't seem very satisfying to the public since this is supposed to be public money intended to address NRD to public resources.

So, the TIGs are cumbersome. It's going to be extremely expensive as well. I mean, $150 million does not seem very large for us in terms of administrative costs when you think that federal agencies need to participate in nine TIGs and the restoration council, the NRDA council, for 15 years. So, the question is what's going to happen when costs are exceeded? When it exceeds that $150 million, will the feds just essentially back off and let the states take control? And, as I said, I think it silos the money in a way that will undermine comprehensive restoration.

I wanted to cover a little besides the BP disaster because contrary to common belief, we get spills all the time in the Gulf and nationally. It's pretty significant. Of course, OPA is based on the polluter-pays principle of liability and deterrence, and spills greater than 50 barrels require more-detailed reporting and monitoring and trigger greater investigative response by the Bureau of Safety and Environmental Enforcement. And OPA calls, unrealistically I'm afraid, for NRDAs for damage from all spills, especially over 50 barrels.

But the problem I think from our standpoint is that for most of the federal agencies, and especially the Coast Guard, there's a presumption that if a spill occurs in the open ocean, it dissipates. There's no impact; therefore, there's no need for an NRDA or response. Within the U.S. coastal oil spill data that we were able to find from 1990 to 2009, there are 1,750 spills with an annual average number of 88 for a significant volume, which are only spills over one thousand gallons. And the National Oceanic and

Atmospheric Administration (NOAA) pursued only 57 NRD settlements, which is 3.3% for those spills.

One of the problems is that it's in the open ocean, so how do you actually assess it? The cost of assessment is pretty significant, so unless it's on land or nearshore and hits shore, it's unlikely that any assessment will be done. The second thing is that scientists are not able to get out to a spill until after cleanup has been completed in most instances, and so it's unlikely that you're going to find damage. And in the deep ocean, what we find is that even if species are injured, it's unlikely they're going to make it to shore from deepwater spills, which are occurring more and more. Dying mammals generally fall to the bottom, so it's unlikely that you're going to find them.

But there was a presumption—and I will say that it's now been dispelled—that marine mammals and fish flee oil. So, if there's an oil spill, they will avoid the area. And what was found during the BP disaster, sadly, was that neither whales nor dolphins actually totally fled the area of oil. In fact, there were a lot of dolphins seen swimming through the oil with oil coming out of their blowholes. So, it's presumed that they were pretty badly damaged, but not that many individuals of that species were actually ever recovered. So, it's really a projection of how much damage was done.

This is a similar projection from all of these spills. The average number of spills greater than 50 barrels in the Gulf was in 2008 extremely high. It was over 30. But annually, it generally runs between five and 10 spills that are over 50 barrels. And yet, as I said, very little is done under OPA to determine liability.

Then, the most recent spill that was pretty significant was on May 12, 2016, on Shell's Brutus platform, or at least from that platform. There were 88,200 gallons of oil released. That oil drifted more than 50 miles. A lot of nonprofits that were flying over the area to try to monitor that spill did see marine mammals and other species swimming through the oil, but scientists were not able to get out there in a very timely manner and so it's unlikely that those species were recovered. They did skim up to 51,000 gallons of oily water, but that means that a lot of oil was left unrecovered. And May 18 was the day that a lot of the University of South Florida scientists got out there, but that was six days after the injury. What we heard was that the Coast Guard presumed there was no injury as no reports of injured wildlife occurred or were filed and the oil didn't reach land, which seems to be the biggest consideration in these situations.

So, will Shell face an NRDA? Probably not. It might be possible. The scientists are hoping it's possible, but it's doubtful. The cost of NRDA simply prevents trustees from identifying and seeking damages, which is sad. But what it means is that really the failure to impose liability is undermining what we feel is a deterrent value that was intended from OPA and the NRDAs. Responsible parties simply feel that they can get away with it and that there is no urgency to try to reduce what may be failing or the leaks that are occurring. And, as we said, NRDA does not account for areas like the Gulf, which have a heavy presence from the oil and gas industry. It simply doesn't account for or compensate for the cumulative impacts of the industry on our fish, on our wetlands.

In Louisiana, actually, the oil and gas industry is responsible for 30% to 60% of our coastal wetlands lost; and yet, both the state NRDA and the federal NRDA haven't helped us that much because it's a cumulative impact and not an individual impact of a single industry incident. So, that's my take.

Russ Randle: Thank you, Cyn. Let me ask you a question before we move on, as you mentioned a lack of deterrence value. If in fact damage assessments are not done, do you think it would be superior if we had essentially a schedule similar to the volume-based penalties, or simply a presumed payment for NRD? Would that answer some of these things? Because it's very costly to hire a vessel and move scientists and equipment out for an assessment. What's your thought on that?

Cyn Sarthou: I think for many of these spills, it would be true. I mean there've been some studies and presentations done recently at scientific conferences about this. Even an estimation of damage can be done through modeling, and that might be used to come up with what you were talking about, which is an assessment somewhat like the CWA assessments.

I do believe that it is necessary. I mean if you look at an incident, one many of you may not know about—the Taylor Energy incident—which is a continual release of oil since 2004, they have admitted recently that it will be a perpetual spill. There is no way to shut it off at this time; there's no basis right now for an assessment. They're not going out to assess it. They're presuming it's simply a sheen that may or may not be causing damage. But if we had some type of financial assessment for those types of releases for NRDA, at least it could help some of those agencies restore the species that are so heavily impacted by industry in the Gulf. So yeah, I think it would be very important.

Russ Randle: Thank you, Cyn. Karen, you're up.

Karen Mignone: So, we're going to take a little step back and go through the elements of NRD and then talk about one of the first cases where it was applied. OPA establishes what the natural resources are that get the funds, and the government determines that it's appropriate to quantify the damage to these resources as a part of cleaning up a spill or release as the terms are defined post-*Exxon Valdez*. And, in addition to response costs—sometimes there are response costs, sometimes there aren't—but those are the costs actually associated with cleaning up the spill. Then, there's the assessment of the NRD and the NRD costs.

The calculation requires a determination of the baseline condition pre-spill and what it will take to get back to that

baseline and what it costs to figure it all out. So, there's a lot of room in that language for argument, and I think we saw some of that down in the Gulf. We saw some of that up in Rhode Island in the spill I'll talk about. For most coastal or Great Lakes or tidal resources, the Coast Guard takes the lead in the investigation, but they are not the natural resource trustee, neither is the U.S. Environmental Protection Agency (EPA), but they work together.

Then, the trustees are usually NOAA, DOI, U.S. Fish & Wildlife Service, tribes, and states. And sometimes, as you've heard, it's difficult to get all the trustees to play nicely together. That's where, if you're working on this on behalf of a client, it's useful to have good relationships with either the Coast Guard or EPA, whoever is taking the lead, so that you can at least get some backing in persuading outliers to cooperate with the process. We've had some instances where there's serious disagreement among the trustees about what should be done and where the focus should be. That adds to the cost of assessment and also prolongs the process.

So, they are specifically targeted, as I said, to pay the cost, the assessment, and the development to implement the plan. And then there's the addition of compensatory restoration costs, which provide a compensation for natural resource services equivalent to those that were lost before restoration. That could include noneconomic damages, but they have to get assigned a dollar value. Again, there are models and there are exercises and there is a lot of room to argue. If you own a hotel, you don't get NRD. But part of the claim that the trustees can seek are damages based on lost opportunities, both for people to enjoy the resource where the hotel might be located and losses to the state from visitors. But all of that is part of what is obviously a complex calculation, and it all started with the *North Cape* in Rhode Island.

The *North Cape* was an oil barge carrying a couple million gallons of home heating oil, and the tugs caught fire while towing the *North Cape* in a storm. They cut the barge loose and abandoned ship. The barge hit shore and released about 828,000 gallons of oil onto Moonstone Beach.

Moonstone was pretty famous. It used to be Rhode Island's only nude beach, and then the piping plovers were protected and it became Rhode Island's nicest piping plover beach. But it also is a barrier beach to some pretty important coastal salt ponds.

So, as I said, this happened during a pretty bad storm. Because of the storm, there was a whole lot of churning. There wasn't a lot of oil slick visible. The oil got distributed throughout the entire water column and showed up as far away as Block Island and Buzzards Bay, but no dispersants were used because it was naturally dispersed. There was some release of oil into the ponds on the other side of Moonstone Beach, and those ponds are habitat for bay scallops. They're a pretty big resource or commercial product from Rhode Island, Montauk, and Cape Cod. The ponds also are home to other shellfish bivalves.

So, this was the first chance to use OPA's NRD provision, and there was a lot of uncertainty about how it should be done. Rhode Island Department of Environmental Management Marine Fisheries division and NOAA led the trustee efforts. They focused on both the physical damage to places like Moonstone and the ponds, and also the damage to commercial fish. The biggest commercial fishing fleet affected was the lobster industry. Rhode Island, up to that point, was landing somewhere between five and eight million pounds of lobsters per year. This spill killed millions of pounds of lobsters. There were some horrible pictures of piles of lobsters sitting on the beach waiting for destruction, and it killed them at all stages of development—from little baby lobsters to big guys. It takes a lobster seven to eight years to get to a commercial size. And basically it killed off the entire family.

So, four years after the spill, they began lobster restoration, and 150 Rhode Island and Massachusetts fishermen participated in the project. They notched 125 million female lobsters to restock Rhode Island and southeast Massachusetts coastal waters. And for a lot of the fishermen, this replaced their normal fishing. They worked for Ocean Technology Foundation. They had observers onboard and they did the restocking. Part of the NRD also included trying to restore shellfish species. They purchased eider and loon habitat up in Maine, which made people in Rhode Island curious, being in a separate state and all. Then, they purchased additional piping plover habitat.

So, what they did in getting lobstermen involved early on was pretty smart because it gave them something to do. Unfortunately, nobody thought about the long term, and it was years later that the lobstermen realized what the full extent of the damage was. By then, it was too late to make a claim. The other interesting thing about that for the lobstermen—I represented a group of them—is that some of them didn't keep really good records because there's that whole IRS thing. Not all of them, but it was hard to make a claim when you didn't have really accurate records. There was one lobsterman out of the entire fleet who had logged every single lobster he had ever caught, and even his case turned out as being speculative.

So, it was an interesting experiment. The total cost was $7.6 million. I think the total damage, had more time been spent in assessing the damages, would have been much higher. I think we've all learned a lot since the *North Cape* about taking your time to properly assess the extent of the damage and waiting before making a final decision. I hope we never have a spill as big as BP again, but that initial restoration fund and then taking the time to assess made a whole lot more sense than what happened with *North Cape*. But lesson learned.

Russ Randle: Karen, I'm shocked, absolutely shocked that people who fish for a living would not have the exact figures.

Karen Mignone: It was pretty interesting when they all came into my office and said, "You know, our catches are down." I said, "Well, I need to see your records." They all

looked at me like I had asked them for a lobe of their liver or something. It was amazing. And then there was one guy who kept records.

But the lobster industry in Rhode Island is almost gone. They went from averages of between six and eight million pounds per year pre-spill to two to five million. And it's really hard to judge whether that is just the spill or, my guess is, a lot of it is the rise in ocean temperature because the little buggers are mobile and I think they fled north because the catches in Maine had been up. So, maybe they are fleeing the oil, who knows? But anyway, the industry there is more abundant.

Russ Randle: A sober ending to that presentation, and underlining of the need to do good assessments.

We have an online question, which I'll open for the panel. But Steve, perhaps you'll start. What are the conditions under which the United States would revoke the corporate charter of the responsible party found to be grossly negligent? It seems that the low settlement number for the BP disaster was calibrated by the court and parties not for gross negligence, but to allow the continued existence of the company. Would you care to comment on any aspect of that?

Steven O'Rourke: Sure. I'll comment on the last part first, which was whether the penalty was designed not to recognize gross negligence. Under the CWA, strict liability is $1,100 per barrel maximum. So, for the size of this spill, as determined by the judge in phase 2, that is about $3.5 billion as the maximum. Since we settled for $5.5 billion, we're into the realm of worse than strict liability and into the realm of gross negligence or willful misconduct.

So, in the first trial, we had the burden of proof to prove gross negligence or willful misconduct, and the judge ruled that we had. So, then he set a maximum penalty of $13.7 billion. So, it had been strict liability at $3.5 billion, and with a gross negligence maximum of $13.7 billion, there's a number at the middle-ish of about 40% of the maximum, at $5.5 billion. So, I don't agree that we didn't recognize the gross negligence. If it hadn't been gross negligence, the most we ever could have gotten was $3.5 billion.

As to the question about debarment, there was a temporary suspension of BP. As it happens with the way the regulation is, EPA was the debarment authority in this case, and they temporarily suspended BP from all federal contracts, which would include getting new leases from DOI for new wells. BP came in and they negotiated the debarment agreement, including a bunch of mandatory requirements related to drilling safety practices, third-party auditing, process safety improvements with auditors and monitors, an ethics officer, and a few other things.

I might be conflating a criminal plea with the debarment agreement. But between them, they had quite a few mandatory requirements related to process safety improvements to avoid a spill like this, which is one of the reasons our consent decree didn't have an extensive injunctive program. It reminded everybody that those obligations were out there. It requires BP to publish a lot of that information on websites. That's the new requirement. But we were not starting from scratch, a blank page. So, in answer to the question—when does the government consider debarring a company?—the answer is "this case," because the debarment process was instituted, and two settlements were reached—one for the debarment agreement, and then one for the penalties.

Russ Randle: Cyn, did you want to comment to any degree on the penalty level as opposed to the NRD recovery?

Cyn Sarthou: Well, the penalty level did venture into the realm of punitive, into the higher level. But as you will note from even the discussion of the potential amount, the potential amount could have been $13.9 billion. And $5.5 billion is not very close. It wouldn't even really be in the middle. So, it is what it is, and again it's unprecedented. But the damages related to BP are unprecedented as well.

I would like to note something, which is that when you have a major company, it's unlikely that permanent debarment is going to happen. The federal government actually sold several leases to BP during the disaster and its cleanup, so anybody who was watching the process knew that debarment was not going to be permanent. Because the oil industry, BP in particular, was proceeding with business as usual and the government was proceeding that way as well, we knew at some point that debarment was going to be lifted. Whether, in fact, the conditions put on them were sufficient is yet to be seen.

We're not always in favor of these people, and if you didn't know—I mean, I don't know how to say this, but there was just an explosion in Pascagoula related to an oil and gas well development in the Gulf. It's actually a BP Amoco facility. So, whether there's been any change as a result of this and how BP does business is yet to be seen.

Steven O'Rourke: I'll add one thing and maybe this is of interest, I don't know. As with the statutory maximum potential penalty—which, as I said, was $13.7 billion—of course, the court has to weigh the statutory factors about whether it should be that high or should be reduced. The United States actually said it shouldn't be the maximum. We said BP had done some things that they should get a discount for, including signing a criminal plea agreement for a $1.25-billion criminal fine, which is the largest criminal fine in history. And they also had done some claims-paying and response actions that were not required under the law, so that was over and above the requirements. So, there were a few items that we said to the judge we would recommend a discount for. So, that's out there.

Russ Randle: The statute actually lists in the CWA volumetric penalty a number of factors that the court is supposed to consider in calculating any such penalty.[9] What

9. CWA §311(b)(8), 33 U.S.C. §1321(b)(8).

were some of the factors that the government argued should have gone to support a larger penalty?

Steven O'Rourke: So, I would say we had three trials. The first was whether it's gross negligence, and that trial increased the maximum penalty number per barrel. The second trial was how many barrels: that set the maximum number in dollars. The third trial was the weighing of these statutory factors that you just talked about. I would say if you want to really just boil it down, it came down to the United States saying the first factor was the seriousness of the violation. It can't be overstated. Whereas, for BP, one of the factors was the efficacy of their response actions. And they dropped $14 billion on response to this case. So, those two were the main factors on a scale for the judge to weigh, I would say, other fines paid for the incident I just mentioned.

Actually one factor of interest was economic benefit. One of the factors was whether the defendant gained an economic edge from the violation. It should have been spending money for pollution control: it didn't. Shouldn't they have to disgorge that so they have a level playing field with their competitors? Well, here, the statutory maximum was $13.7 billion and the economic benefit was probably some millions. You know, tens of millions. And the question is: does that mean, because there's essentially no economic benefit, that the penalty comes down, or not? So, the judge actually ruled when ruling on Anadarko's[10] penalty that no, just because the economic benefit is low, it doesn't mean the penalty is low.

But I would say that was really the scale: seriousness versus the efficacy of response. We'll never know what the judge would have ordered—I'll mention the Anadarko ruling. We didn't settle with Anadarko. They went to trial and he issued a penalty against them for about $160 million. That's $50 per barrel. He did say that, almost gratuitously in the footnote, "I would have given BP a discount for response actions." But, on the other hand, he said the seriousness of this violation cannot be overstated. So, I think that was the balance there.

Russ Randle: What you're describing is far from a mechanical process.

Steven O'Rourke: This is an equitable balancing of factors, or a discretionary balancing of factors that would be reviewed under an abuse of discretion standard.

Russ Randle: It seems to me DOJ, to its credit, always takes comments on proposed consent decrees. What was the thrust of the comments saying that you all have not recovered enough?

Steven O'Rourke: Of the comments we got, I know Cyn just talked about that a little bit, but of the comments we got, thousands of comments, technically tens of thousands of comments, most of them did not say it wasn't enough. Most of the comments said good job, it was enough. Few of the comments said it's not enough. I would say many more of the comments were, as Cyn was talking about, about management of the trustee councils. And the concerns she raised were the concerns that came in from, well, it's not just from GRN, but from a bunch of other groups as well. So, the trustees thought about that and made the response to comments and decided to continue with that structure.

As for us being told it wasn't enough money, we found a lot of the comments to be fairly generic. There wasn't "you didn't give enough money because the species wasn't assessed properly." We got some very detailed comments on the injury assessment, but those comments were really talking about the science of the assessment—whether the beach bird models calculated enough birds, or what have you. They're not really talking about the total settlement amount.

Russ Randle: Karen, I'm going to send some of the questions now in your direction. Having been in perhaps the position of possibly trying an NRD claim for your lobstermen clients, how would you have gone about actually bringing such a claim?

Karen Mignone: Well, we did go into federal court in Rhode Island on the statute of limitations, which we're concerned about but not sure about. It didn't end well. There was a dispute about discovery of the damage, and that was our hope on the statute of limitations. But the courts determined that we should have known from the time the oil spill occurred.

Russ Randle: Okay. Cyn, one of the issues in terms of NRDA is that there's a presumption in favor of the assessment, but that's rebuttable under the statute. In your view, had the assessments advanced far enough that the United States could have brought a claim to recover with that presumption in place?

Cyn Sarthou: It's really hard to say. I have to admit that one of the biggest problems in the Gulf is that science has been so poorly funded that there's very little baseline data on a lot of species. I think we are seeing pretty significant impacts now. If the assessment had continued going, would it have been able to withstand BP's continuous assaults on science? I don't know. They continually said the science was poor, that there was no finding of injury. So, it was going to be a pretty ugly battle.

The other question that is of concern, and I'm sure was of concern to people trying to negotiate a settlement, was that any real assessment to find damage could have taken another 10 years, maybe more. So, that's why we felt that the $700 million in unknown and adaptive damages was so critical. We kind of wish it had been a little higher because assessing those impacts on marine species can

10. Oil Spill by the Oil Rig "Deepwater Horizon," 148 F. Supp. 3d 563, 45 ELR 20227 (E.D. La. 2015).

take decades. I mean, after the *Exxon Valdez*, it was presumed that killer whales were not significantly impacted, and yet it turns out that the resident population of killer whales in that area is now largely extinct and that only the migratory pod of killer whales had survived. But how long—20 or 30 years—it took to determine that. I do understand that whether in any reasonable period of time they could have done the science necessary is really pretty speculative. I mean, I don't know that we could have done the science.

Russ Randle: Okay. Steve.

Steven O'Rourke: Yes. I'd like to comment on what Cyn was just talking about, the "unknown conditions" money. So, the way we would normally settle an NRD case—well, let me step back. In a Superfund case, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[11] requires that as we settle the site, we must maintain a reopener for unknown conditions or for new information. CERCLA doesn't say that about an NRD case, but when we settled the Acushnet Harbor case,[12] Judge William G. Young in Boston said it had to be done anyway. So, we would often have a reopener like that.

Now in OPA, it doesn't say you need to have that reopener on response or damages. But we would often, as a matter of policy, attempt to negotiate for one. But what a reopener gets you is the right to watch and do another injury assessment 10 years, 20 years down the road—an example of what Cyn had been talking about—and sue again, and then prove the case, and then get your damages. In this case, we liquidated that into $700 million to be paid between 10 or 15 years out. We don't have to prove any of that. Now, if it wasn't enough, we struck a bad bargain. If it's more than enough, we struck too good of a bargain; but that's the term. We liquidated the unknown damages.

Russ Randle: It's common knowledge of course that the price of oil, which was quite high when the *Deepwater Horizon* disaster occurred and remained high until about two-and-a-half years ago, has collapsed and has now rebounded partly. Were those arguments about the collapse of the price advanced in the settlement discussions?

Steven O'Rourke: Well, they were certainly advanced in the third trial. One of the eight factors in the statute is the ability of the defendant to pay the penalty. We can't get $13 billion from an individual, right? So, the question was: can BP afford to pay the max or a percentage of the max? And that was the financial dispute. Accountants, financial analysts, and BP focused quite a bit on oil prices dropping from $100 per barrel to $50 per barrel, and that happened, quite frankly, almost on the eve of the trial. So, the expert reports had to get revised, and that was certainly a subject of dispute.

In the settlement, the way that plays out is in the financing structure. DOJ is not in the business of giving 15-year payment plans, right? Penalties are due upfront. If there's an ability-to-pay problem, sometimes people get a few years. And 15 years is really quite a long time, but of course it's $15 billion. It's the biggest settlement ever. And with the oil prices down, there had to be some accommodations or we just wouldn't get the money. Now, the payment structure, of course, has interest accruing and stipulated penalties if there's no payment; is guaranteed by the parent company in England; and has an acceleration (if there's an act of insolvency it becomes immediately payable).

Russ Randle: Well, BP appears to be one of the very few entities that would not have had to go directly into bankruptcy given the magnitude of this spill. But I don't represent them. They did commit enormous resources in order to do what other entities could have done. So, what would the United States have done had there been a bankruptcy here?

Steven O'Rourke: Well, the first question is what would the United States have done in the response action? Forget about the enforcement case. The Coast Guard had the Oil Spill Liability Trust Fund. At that time, it didn't have $14 billion in it. And that's what BP had spent on the response action. So, the question going forward is what happens if the next spill is with a less solvent company? I would be concerned about the response action.

Russ Randle: I'm assuming that BP did not ask for a jury trial on any of these matters.

Steven O'Rourke: Well, remember this was also a suit in the admiralty jurisdiction, which routinely doesn't have a jury trial. But there's another interesting ruling; the state of Alabama filed their claim for damages under OPA for lost taxes. The state asked for a jury, and BP moved to strike the jury. Judge Barbier said that despite the suit being in admiralty jurisdiction, this wasn't a general maritime law claim, it was a federal statutory OPA claim and that the jury right was there. So, that allowed Alabama to have a jury trial on their economic damages claim for lost taxes.[13]

Russ Randle: So, you had a ruling that the claim was in the nature of money damages that would have been available under the Seventh Amendment to the U.S. Constitution at the time the Amendment was adopted. And that was on the economic loss. Are you aware of actual case law on NRD that have a jury trial?

11. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
12. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1038, 19 ELR 21210 (D. Mass. 1989).
13. In re Oil Spill by the Oil Rig "Deepwater Horizon," No. 2:10-md-02179-CJB (E.D. La. Mar. 30, 2015).

Steven O'Rourke: Yes. When we talked about AVX,[14] in that case, the defendant asked for a jury trial. The United States moved to strike the jury trial demand. Judge Young denied that and held it would have a jury trial, but the case was eventually settled.

Russ Randle: Did they get to the point of actually requesting jury instructions and preparing them?

Steven O'Rourke: No. Those were never exchanged.

Russ Randle: I'm looking for authority for practitioners, in case somebody finds that there's any sort of published information on that.

Steven O'Rourke: That's the only one I know that was going to go to a jury trial for an NRD case.

Russ Randle: Okay. I want to thank each of our panelists for a very stimulating and very productive discussion. Thank you.

14. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1000, 19 ELR 21198 (D. Mass. 1989).