

***Deepwater Horizon* Litigation: Overview and Update**

Environmental Law Institute Webinar

November 13, 2013

In April 2010, the *Deepwater Horizon* oil rig exploded, leading to the death of eleven oil rig workers and harming habitats and ecosystems across the Gulf. Hundreds of lawsuits have been filed as a result of the disaster. Together, these lawsuits raise a wide variety of legal claims that involve different parties, different kinds of damages, and different timelines.

Presented immediately after Phase II of the BP civil trial, this ELI webinar provided an overview of the litigation landscape related to the disaster, and then delved into the status and implications of the ongoing trial in New Orleans. Expert panelists reviewed what occurred during the first two phases of the civil trial, its potential effects over both the short and long term, and what remains to be decided.

SEMINAR SUMMARY

MODERATOR:

- **John Cruden**, President, Environmental Law Institute

PANELISTS:

- **Blaine LeCesne**, Donna and John Fraiche Distinguished Professor of Law, Loyola University College of Law
- **Mark Schleifstein**, Environment Reporter, The Times-Picayune
- **Joel Waltzer**, Partner, Waltzer Wiygul & Garside Law Firm

Mr. Cruden opened the session by observing that the *Deepwater Horizon* oil disaster is likely one of the most examined environmental cases in U.S. history. After briefly outlining the content of the ensuing discussion, Mr. Cruden recapped the events following the April 20, 2010 blowout and described the different legal processes that were initiated in the wake of the spill.

Following Mr. Cruden's introduction, Mr. Schleifstein walked the audience through a timeline of major events in the legal proceedings surrounding the *Deepwater Horizon* incident, including the civil lawsuit filed against BP and its drilling contractors by the U.S. government in December 2010; the settlement of private property damage, economic loss, and medical claims in March 2012; and major civil and criminal settlements between the U.S. government and BP, MOEX, and Transocean. He additionally highlighted other private claims and federal government claims that have been filed over the past three years, and then provided an overview of the first two phases of the BP civil trial in New Orleans. Mr. Schleifstein closed by noting the major

unknowns that remain to be addressed, which include the final amount of penalties that will be levied under the Clean Water Act, as well as the total costs for restoration under the ongoing natural resource damage assessment process.

Next, Professor LeCesne focused his remarks on what he considers to be a central issue of this case—whether the rig explosion and subsequent oil release was the result of the defendants’ gross negligence. Professor LeCesne provided an overview and analysis of the case law governing this issue, emphasizing both the uncertainty of the question as well as the facts that might be used to either support or deny a finding of gross negligence in this case. He also discussed the issue of allocating fault among the major defendants, and highlighted the major questions the court will likely consider in determining the allocation.

Next Mr. Waltzer provided his remarks, which focused on several issues that have not received as much public attention. He gave some background on the Oil Pollution Act, and then went on to highlight two significant processes that have been unfolding since the disaster: the National Emergency Response System and the natural resource damage assessment (NRDA). He focused the remainder of his remarks on the *Deepwater Horizon* NRDA process.

SELECTED QUESTIONS AND ANSWERS

Mr. Waltzer indicated that the natural resource damage process is not currently part of the trial. Why is that the case, and when will it be added to the trial?

Mr. Waltzer responded that the NRDA process is not well-matched with the oil spill litigation because the scoping of injuries and identification of appropriate restoration projects takes a long time; it is a science-driven process. Further, there likely are latent injuries that may not become apparent for many years. Even though the NRDA process was initiated immediately after the spill, the full process could take up to five or ten years to complete.

There has been a lot written about fraud issues in the claims process. Has Mr. Schleifstein reported on any fraud issues, and if so, can you tell us what they are?

Mr. Schleifstein remarked that he and others have reported on a few fraud issues by individuals in the claims process. In addition, BP has taken issue with the way the rules of the economic damages settlement are being interpreted, because, a number of businesses are filing claims that may not have been directly related to the spill. The Fifth Circuit has decided that these rules must be reconsidered, and the claims administrators are in the process of drafting new rules.

Are there controls over state uses of restoration funds to ensure they are not used for things like rebuilding casinos rather than low-income homes?

Mr. Waltzer replied that controls exist. Mr. Schleifstein reminded the audience that 80% of all Clean Water Act civil penalties will be channeled through the RESTORE Act, which includes very specific rules about how the money will get divided up and spent by each Gulf Coast state.

Will the cases in the Multi-District Litigation eventually go back to the courts in which they originated, or will Judge Barbier decide everything?

Mr. LeCesne responded that Judge Barbier may not decide all of the cases that have been filed. These cases may take years to resolve and Judge Barbier may eventually return some of the cases back to the venues where they originated for a final decision.

Mr. Waltzer noted that Judge Barbier could decide to hold on to some broad categories of claims and conduct test trials before he sends them back. Mr. LeCesne agreed with Mr. Waltzer, noting that bellwether trials could play a large role in promoting settlements.

For additional information about these topics, visit ELL's website on *Deepwater Horizon* Recovery & Restoration at eli-ocean.org/gulf