

# Recovering from the BP Oil Spill: NRDA and the Clean-up of the Gulf Coast

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On April 20, 2010, a fire aboard the Deepwater Horizon rig in the Gulf of Mexico resulted in the death of eleven crewmembers and the uncontrolled release of oil into the Gulf. Nearly five million barrels of oil were released before the spill was controlled in July 2010, making it the largest marine oil spill in American history.

# Sea Grant Response

- Lots of misinformation and confusion
- Initial concerns focused on individual damages and lost income
- Provided general legal information on the Oil Pollution Act and claims process
- Held public forums, developed factsheets on the processes,



# Oil Pollution Act 1990

- Prohibits discharge of oil into navigable waters and adjoining shorelines.
  - Must be “harmful to public health or welfare of the environment”
- Strict liability for damages and cleanup costs.
- Creates Oil Spill Liability Trust Fund to pay for clean-up costs while liability and/or costs are being determined.
  - Administered by Coast Guard

# Damages under OPA 90

- Private Party Damages, include
  - Damages to real or personal property
  - Loss to use of natural resources (subsistence use)
  - Lost profits or earning capacity
- Can include claims from state, local, and federal governments for damages to parklands, public beaches, government owned marinas, etc. which would be separate from Natural Resource Damages
- Natural Resources Damages







# NRDA for the Deepwater Horizon Spill



## The Basics of the Deepwater Horizon NRDA

# Natural Resources Damage Assessment (NRDA)

- Provisions within a handful of statutes permitting designated trustees to recover for damage to natural resources.
  - Oil Pollution Act, Clean Water Act, CERCLA, National Marine Sanctuary Act, Park System Resource Protection Act)
- First showed up as part of the environmental law blitz of the early 1970s





# NRDA under the OPA

- Trustees are designated to represent the public's interest in natural resources.
  - Federal trustees designated by the President
  - State trustees by governors.
- Trustees present claims and collect damages for natural resource damages.



# Deepwater Horizon Trustees

- Federal: NOAA, Dept. of Interior, Dept. of Defense
- State:
  - Alabama: AL Dept. of Conservation and Nat. Resources, Geological Survey of AL;
  - Mississippi: MS Dept. of Environmental Quality;
  - Florida: FL Dept. of Environmental Protection;
  - Louisiana: LA Dept. of Wildlife and Fisheries, Department of Natural Resources, Dept. of Environmental Quality, Louisiana Coastal Protection and Restoration Authority;
  - Texas: Texas Parks and Wildlife Dept., Commission on Environmental Quality, Texas General Land Office



# NRDA Trustee Responsibilities

- Assess natural resource damages for the natural resources under their trusteeship; and
- Develop and implement a plan for the “restoration, rehabilitation, replacement or acquisition of the equivalent of the natural resources under their trusteeship.”
- 33 U.S.C. § 2706(c).



# Three Stages of NRDA

- NRDA is broken into three stages:
  - Preassessment,
  - Restoration Planning, and
  - Restoration Implementation.
- Stage I: Preassessment is simply the determination of jurisdiction to pursue restoration and, if so, whether it is appropriate to do so.
- If this is determined in the positive, trustees release a Notice to Conduct Restoration Planning.



# Stage II: Restoration Planning

- Scientists collect as much data as possible on baseline (ie pre-injury) conditions and oil spill effects.





# Deepwater Horizon NRDA Data

- Scientists have collected 25,803 environmental samples:
  - 10,236 water samples; 3,060 sediment samples; 3,286 tissues samples; 1,840 tarball samples
- Documented oil on over 1,000 miles of shoreline
- Documented thousands of injured animals, including:
  - 2,263 visibly oiled dead birds; 2,079 visibly oiled live birds; 18 visibly oiled dead sea turtles; 456 visibly oiled live sea turtles.



# Restoration Planning

- Restoration Plan:
  - A set of restoration options designed to compensate the public for interim losses and return natural resources to baseline.
- Restoration options include:
  - Primary restoration – actions to directly restore the injured resources
  - Compensatory restoration – activities that provide services of the same type and quality, and of comparable value as those injured.



# Scale of Restoration Activities

- Trustees must next determine the scale of restoration activities
- 2 Approaches:
  - Service-to-service approach – provides natural resources and services of the same type and quality and of comparable value as those lost.
  - Valuation approach – as determined using dollars or units of resource service.



# Evaluating Restoration Options

- Options are evaluated on several factors:
  - Cost
  - Effectiveness
  - Likelihood of success
  - Extent to which the action will prevent future harm
  - Multi-resource benefits
  - Effects on public health and safety
- Public Review and Comment:
  - Once a draft Restoration Plan is developed, there is opportunity for public review and comment.



# Stage III – Restoration Implementation





# Restoration Implementation

- Trustees present the Final Restoration Plan to the responsible parties, collect the natural resource damages and begin carrying out restoration projects.
- The process can take years, even for a relatively minor incident.
  - For example, the NRDA conducted for a September 1998 spill in Lake Grand Ecaille, LA affecting 1,233 acres of wetland did not produce a Final Restoration Plan until November 2005 and did not settle until January 2006.



# Restoration Implementation

- Trustees present written demand to Responsible Parties (RPs), requiring either:
  - RPs implement Final Restoration Plan or
    - Subject to Trustee oversight
  - Advance the costs of restoration and implementation.
- Responsible parties have 90 days to respond.
- If no response, Trustees can file suit or present claim to the Oil Spill Liability Trust Fund.



# Restoration Funds

- Funds held in trust
  - Recovered funds are placed into a revolving trust account.
- Multiple Trustees can pool funds into a joint account with management plans.
- All earned interest must be used for restoration.
- Trustees may form a committee to oversee restoration coordination among Trustees, monitoring and oversight of restoration, and restoration evaluation.





# Potential Controversies Surrounding Recovery & Restoration

# Potential Uses & Limits of Restoration Funds

- Emergency Restoration Projects
- Connection between Injured Resources and Restoration Projects
- Legal Fees
- Disbursement of Funds





# Emergency Restoration Projects

- May be conducted during NRDA process so long as
  - emergency action is required “to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources.”
    - 33 U.S.C. § 2712(j)(2)
- The action must:
  - Not be undertaken by the lead response agency
  - Be feasible and likely to succeed
  - Delaying the action would result in increased damages to natural resources
  - The costs must not be unreasonable.



# Emergency Restoration Projects

- Very little accountability
- Trustees must only provide the public with notice of these actions “to the extent practicable,” and must provide the public with “notice of the justification for, the nature and extent of, and the results of” the emergency action “within a reasonable time after completion.”
  - 15 C.F.R. 990.26(e).
- Infrequently undertaken



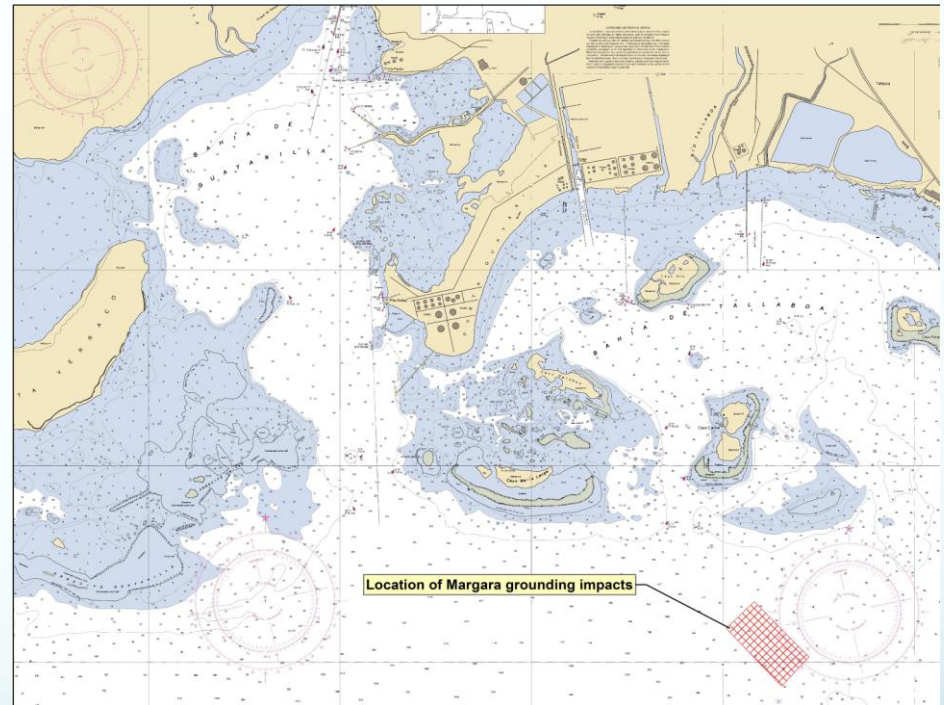
# Emergency Restoration Projects— T/V Margara

- April 2006 grounding of the *T/V Margara* off Tallaboa, Puerto Rico
  - Injured over 8,400 square meters of coral-covered seafloor
  - Threatening the spill of 300,000 barrels of oil



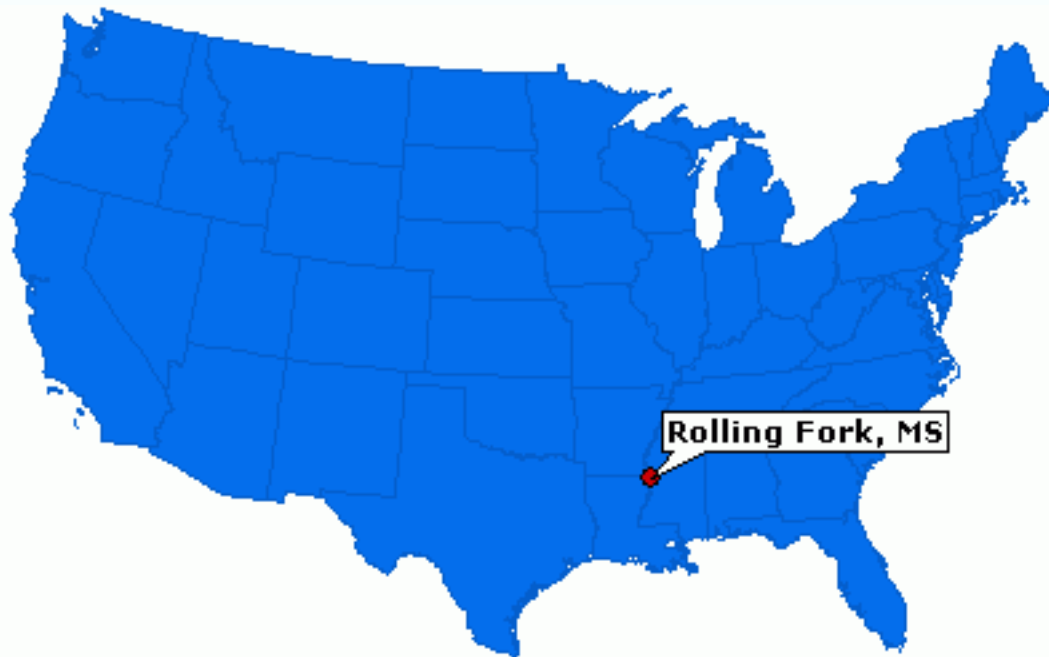
# T/V Margara

- Some species of coral were knocked loose and were at risk of imminent loss due to movement, burial, storms, etc.
- Trustees in PR decided to act quickly to reattach the coral fragments while they could.
- Public notified before the action via press release, and Trustees continually released information on progress and completion, including a post-hurricane check.



# Emergency Restoration Projects

- The first “emergency restoration” project for the Deepwater Horizon NRDA was announced in December 2010.
- Project is set to improve 2,500 acres of wetlands at the Howard Miller and Malmaison WMAs near Rolling Fork, MS.





# Emergency Restoration Projects

- The idea is that newly flooded mudflats will provide habitat for migrating waterfowl and shorebirds that lost habitat on the coast.
- \$180,000
- Note that 23 individual ducks were found dead in the wake of the Deepwater Horizon Spill
  - Daily bag limit for ducks in MS is 6 per hunter



# Connection Between Injured Resource & Restoration Projects

- Restoration funds can only be used for the “restoration, rehabilitation, replacement, or acquisition of” the injured natural resources.
- The concern is that funds will be used improperly.
- “[T]he ultimate purpose of a [NRDA] should be to protect the public interest in a healthy functioning environment, and not to provide a windfall to the public treasury.”
  - *Puerto Rico v. SS Zoe Colocotroni*, 1<sup>st</sup> Cir. 1980



# Connection Between Injured Resource & Restoration Projects

- Similar “restore, replace or acquire the equivalent of” language in CERCLA.
- Trustees get *Chevron* deference.
- No hierarchy found between restoration, replacement or acquisition of the equivalent of the natural resources.
  - *Kennecott*, D.C. Cir. 1996.
- Trustees have latitude when deciding what the “equivalent” of a natural resource is, including acquiring “comparable lands for public parks or ... reforestation of a similar proximate site.”
  - *Puerto Rico v. SS Zoe Colocotroni*, 1<sup>st</sup> Cir. 1980.



# Connection Between Injured Resource & Restoration Projects

- Sometimes the connection isn't obvious.
- April 2000 Chalk Point Spill in Aquasco, MD leaked 140,000 gallons of oil into the Patuxent River.
  - 17 linear miles of shoreline affected
  - 600 Ruddy Ducks killed
  - 122 Diamondback Terrapins killed
  - 5,000 lbs of fish and shellfish



# Connection Between Injured Resource & Restoration Projects

- Trustees determined best restoration project to address loss of wintering Ruddy Ducks was habitat improvement to their breeding grounds in the midwest.
- Determined it was the best way to restore numbers, despite the fact that they couldn't be certain that the ducks would winter in off Maryland.



# Connection Between Injured Resource & Restoration Projects

- Deepwater Horizon NRDA money may similarly be used outside of the Gulf.
  - For example, Northern Gannets were the 3<sup>rd</sup> most injured species (637 birds) only nest in 38 established colonies in Atlantic Canada and the North Atlantic.
  - Common Loons (106 injured) nest only in northern North America.
  - Migrant shorebirds and passerines using the Mississippi Flyway
  - Wide-ranging Bottlenose Dolphin and Kemp's Ridley Turtles
- That said, majority of injured birds (esp. Laughing Gulls and Brown Pelican) nest in the Gulf.





# Recovery of Legal Costs

- Defined as:
  - “the costs of attorney actions performed for the purpose of assessment or developing a restoration plan” in accordance with the NRDA process
- Actions Must:
  1. comprise assessment or restoration planning activities,
  2. occur before litigation is filed, and
  3. be performed by an attorney working on behalf of a trustee agency



# Recovery of Legal Costs

- What about contingency fee arrangements with outside firms?
- In context of CERCLA, courts have suggested this violates the restrictions placed on NRD funds.
- OPA requires NRDA funds be spent on:
  - Damage assessment itself,
  - Development of restoration plan, and
  - Implementing activities to achieve “restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources.”



# Recovery of Legal Costs

- Contingency Fee criticisms include:
  - Breach of public trust doctrine
  - Violation of state fiduciary duties
- Caselaw suggests state law allowing contingency fee arrangements preempted by OPA/NRDA
  - *New Mexico v. Gen. Elec.*, (10<sup>th</sup> Cir. 2006) (in the context of CERCLA)



# Disbursement of Funds

- Deepwater Horizon = Multiple Jurisdictions and Trustees
  - Who gets what share of the funds?
- State posturing over severity of damages
- Interim Payments
- Alabama's Lawsuit
- Private Litigation



# Questions/Comments?

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