



Marine Resources Committee Newsletter

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MESSAGE FROM THE CHAIRS

Chad McGuire and Robin Craig

Although it is only February, 2012 is already proving to be an eventful year for marine resources issues. On January 11, the U.S. Supreme Court decided *Pacific Operators Offshore, LLP v. Valladolid*, a lawsuit under the Outer Continental Shelf Lands Act for compensation in connection with an offshore oil platform worker's death at his employer's onshore facilities. The next week, the Obama administration both released its draft implementation plan for the National Oceans Strategy announced in July 2010 and suggested that the National Oceanic and Atmospheric Administration (NOAA) should be moved from the Department of Commerce to the Department of the Interior.

The Marine Resources Committee's New Year's resolution is to better communicate with our members. Members should have been receiving a series of committee list serve announcements regarding the recent events just described. We are also (finally!) working to get the committee's Web site up and functional, providing you with links to important information regarding marine resources.

This newsletter represents another facet of that communication, and Vice Chair Evelyn Nackman has done a superb job of assembling a series of articles on a wide variety of topics. My thanks as well to all of the contributors.

I hope that you enjoy this issue of the newsletter, which provides quite a diversity of perspectives, as well—the views of attorneys in both private and government practice, of law students, and of academics. This diversity of jobs and views is one aspect of the Marine Resources Committee that I have enjoyed most over the years, and I look forward to future newsletters that display the same variety.

Finally, as always, I invite all interested readers to become more involved in the committee. The committee leadership would welcome short articles on any of the most recent developments in marine resources law, whether domestic or international. In addition, I am always looking for suggestions for subject matter for our Web site—please send me your link suggestions (although keeping in mind that the ABA has certain limitations on what we can link to)!

With best wishes for the coming year,
Robin Craig
Co-Chair, Marine Resources Committee

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DEEPWATER HORIZON UPDATE: EARLY RESTORATION ON AN UNPRECEDENTED SCALE

**Jessica Brody, George Green, and
Emma Lewis**

On December 14, natural resource trustees for the Deepwater Horizon incident (“the Trustees”) published a Draft Phase I Early Restoration Plan and Environmental Assessment, proposing eight early restoration projects that BP Exploration & Protection Inc. (BP) would fund pursuant to the Early Restoration Framework Agreement, (the “Framework Agreement”), entered into on April 20, 2011. Early restoration on such a large scale has never been accomplished before, and it represents a significant step forward in restoration of the Gulf’s natural resources. This article briefly describes some of the benefits and challenges associated with early restoration, and provides an overview of the Framework Agreement as well as the eight projects the Trustees have proposed.

While the Oil Pollution Act (OPA), 33 U.S.C. § 2706, and its implementing regulations, 15 C.F.R. §§ 990 et seq., contain no specific provisions governing early restoration, the regulations outline the criteria for restoration planning generally. In short, restoration projects should

- contribute to making the environment and the public whole by restoring, rehabilitating, replacing, or acquiring the equivalent of natural resources or services injured, or compensating for interim losses;
- address specific injuries to natural resources or services;
- restore natural resources, habitats, or natural resource services of the same type, quality and of comparable value to compensate for identified resource and service losses;
- be consistent with the anticipated long-term restoration needs and an anticipated final restoration plan; and
- be feasible and cost-effective.

Early restoration benefits the environment and the public by accelerating recovery rather than waiting for the entire damage assessment to be completed. Because early restoration shortens the duration of an injury, or reduces interim losses, it can also yield cost savings for a responsible party.

Nonetheless, negotiating an early restoration agreement can pose risks and challenges for both sides. Beginning restoration discussions while assessment activities are ongoing also increases the demands on the parties, requiring not only resources to conduct the assessment but also to review and analyze initial injury data and develop projects to address potential injuries. In addition to personnel, early restoration requires significant cooperation among the parties.

Early Restoration Framework Agreement—Despite some challenges, the Trustees and BP committed to an early restoration framework agreement earlier this year whereby BP committed up to \$1 billion for early restoration projects to address injuries to natural resources caused by the MC252 incident. Funding for early restoration will come from the oil spill trust that BP established to pay individual, business and government, and natural resource damage claims. The Framework Agreement incorporated the project selection criteria noted above, with priority given to projects that are effective at restoring natural resources, provide the greatest benefits to wildlife, habitat, and human uses of such resources, and are ready to implement now or in the near future.

Public participation is also an important component of the early restoration process. The Trustees created a Web site (www.gulfspillrestoration.noaa.gov) to inform the public, solicit project ideas, and provide an opportunity for comment on the proposed projects. The Trustees are also holding public meetings across the Gulf region to facilitate public involvement.

In order to go forward with a project, the Framework Agreement specifies that the Trustees and BP must enter into a project stipulation, which will describe the benefits of the project, referred to as Natural Resource Damage Offsets, which are calculated using the best available science and apply the methodologies

described in the OPA regulations, *see* 15 C.F.R. part 990, or other methods upon which the parties agree. The Trustees have agreed to credit the NRD Offsets against their assessments of injury.

Early Restoration Projects—The Trustees have proposed the following eight early restoration projects:

- The Alabama Dune Restoration Cooperative Project will restore 55 acres of coastal sand dune habitat across the Bon Secour National Wildlife Refuge, the Bureau of Land Management Fort Morgan properties, the City of Gulf Shores, and the City of Orange Beach by planting native vegetation and installing sand fencing and signage. Benefits of the project include restoration of native vegetation and dune habitat, including endangered beach mouse habitat.
- The Alabama Marsh Island Restoration Project will protect 24 acres of existing salt marsh and create an additional 40 acres of salt marsh habitat at Marsh Island in Portersville Bay by constructing a permeable breakwater on the island and creating additional marsh habitat adjacent to the island. Benefits include erosion prevention and restoration of marsh habitat.
- The Florida Boat Ramp Enhancement Project will repair two existing public boat ramps and construct two new ramps in Escambia County. Benefits include improved public access to, and additional opportunities for, water and boating-related recreational activities.
- The Florida Pensacola Beach Dune Project will restore 20.4 acres of dune habitat near the western end of Santa Rosa Island in Escambia County, Florida, by planting a mix of native dune vegetation along 4.2 miles of beach. Benefits include protection of landward wildlife habitat and restoration of the dune profile and habitat.
- The Louisiana Lake Hermitage Marsh Project will create 104 acres of marsh within the Barataria Hydrologic Basin in Plaquemines Parish by pumping sediment from the Mississippi River and planting native vegetation. Benefits include the creation of brackish marsh habitat.
- The Louisiana Oyster Cultch Project will provide 850 acres of oyster cultch habitat on public oyster seed grounds in six locations in coastal Louisiana. In addition, improvements will be made to an existing oyster hatchery on Grand Isle. Benefits include the creation of oyster reef habitat and an increased rate of production of seed-sized and sack-sized oysters.
- The Mississippi Oyster Cultch Project will provide approximately 1430 acres of habitat and oyster cultch areas in Hancock, Harrison, and Jackson counties. Benefits include the creation and improvement of oyster reef habitat, enhancement of larval oyster attachment and growth, restoration of historical oyster cultch areas in Mississippi Sound, and prevention of coastal erosion and further habitat loss.
- The Mississippi Artificial Reefs Project will enhance and restore low profile man-made reefs in Mississippi's near shore waters to provide habitat for a variety of species. The project will create and enhance 67 existing inshore reefs over approximately 201 acres. Benefits include creation of habitat for the recruitment, survival, growth, and reproduction for young fish and other reef species.

As described further in the Trustees' Early Restoration Plan and Framework Agreement, these early restoration efforts represent an important step toward restoring the Gulf.

Jessica Brody, George Green, and Emma Lewis are associates at Arnold & Porter LLP. The authors wish to thank Brian Israel, partner at Arnold & Porter LLP, and Jean Martin, senior attorney at BP America, Inc., for their contributions to this article.