ALI-ABA Clean Water Act: Law and Regulation

Keynote Address of David M. Uhlmann (Prepared Remarks)

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Thank you for the kind introduction and thank you to the American Law Institute and the Environmental Law Institute for inviting me to participate in this Clean Water Act conference.

The Clean Water Act is one of our most successful environmental laws. We have made dramatic improvements in water quality in the United States since the Clean Water Act was enacted in 1972. Unfortunately, the Clean Water Act, like the rest of our environmental laws, is under siege despite its many successes in delivering on its promise of fishable and swimmable waters. As you will discuss later this morning, one of the biggest issues is the 2006 Supreme Court decision in *Rapanos v. United States*, which called into question the amount of protection that federal law provides the tributary system that flows into our nation's rivers and lakes. There also are enormous challenges for water pollution prevention from mountaintop removal mining, fracking, and non-point source pollution, so I am pleased you are addressing those topics as well.

Yet the greatest threat to the Clean Water Act and our environmental laws more generally is the degree to which environmental protection, like so many crucial issues in America today, has become polarized. In that regard, I wanted to note the passing this week of Russell Train, one of the giants of the American environmental movement. Russell Train led the Council on

Environmental Quality during the Nixon Administration and the Environmental Protection Agency during the Ford Administration–and is widely credited as the father of the National Environmental Policy Act. His record of accomplishment on behalf of the environment harkens back to a day when environmental protection was not a partisan issue. My hope for the future is that we might once more be true to Russell Train's legacy and find common ground in the need to provide a sustainable future and reestablish a bipartisan consensus on environmental issues.

Today, I have been asked to talk about the Gulf oil spill. Contrary to popular belief, the Gulf oil spill is not the largest oil spill in world history. That distinction belongs to Saddam Hussein and the Kuwait oil spill during the Persian Gulf War, which at 500 million gallons was more than 2 ½ times the Gulf oil spill. But the Gulf oil spill is the largest accidental spill in history. For comparison sake, the Gulf oil spill was 20 times larger than the Exxon Valdez oil spill, which at ten million gallons does not even make the top ten list of accidental oil spills.

There have been a number of significant developments regarding the Gulf oil spill. In December 2010, the Justice Department filed a civil complaint against BP, Transocean, Andarko, and MOEX, which is now scheduled for trial in January 2013. The Justice Department and BP agreed in April 2011 to a $1 billion initial natural resource damage payment to promote restoration efforts on the Gulf. In March 2012, BP and the plaintiff's steering committee agreed to a $7.8 billion settlement, which has been tentatively certified as a class action. If the class

action settlement is approved in November 2012, it will bring to nearly $30 billion the amount that BP has paid for cleanup costs, compensation to victims, and natural resource damage claims.

What is noteworthy to me, however, is the fact that the Justice Department has yet to bring criminal charges based on the Gulf oil spill. I wrote a New York Times op-ed in June 2010 and a Michigan Law Review article in April 2011 arguing that BP, Transocean, and Halliburton should be prosecuted under the Clean Water Act, the Seaman's Manslaughter Statute, and the Migratory Bird Treaty Act. Whether to bring criminal charges against BP, Transocean, and Halliburton for the Gulf oil spill is not a close call. It should have happened long ago, when there was still a sense of urgency and public outcry about the conduct that caused the spill.

The Clean Water Act and MBTA violations are the same charges that the Justice Department pursued successfully after the Exxon Valdez oil spill. The charges against Exxon were brought in February 1990, just 11 months after the spill, and were resolved within two years of the spill. The Gulf oil spill involves more complex factual issues than the Exxon Valdez spill, but there is nothing complicated or difficult about the Clean Water Act and MBTA charges. The Clean Water Act charges require only proof of negligence, which is defined as the failure to use reasonable care under the circumstances. The MBTA charges are strict liability offenses available whenever migratory birds are killed, although as a matter of prosecutorial discretion the Justice Department usually only charges MBTA violations when there is evidence of negligence.

BP all but admitted its negligence in the September 2010 "Bly Report" where it acknowledged its responsibility for the spill, while helpfully pointing out that Transocean and Halliburton were at fault as well. Every study completed to date, including the Presidential Commission report, the Coast Guard and Interior Department reports, the Chemical Safety Board report, and the National Academy of Sciences report has made findings that would support the conclusion that BP, Transocean, and Halliburton were at least negligent in the Gulf oil spill.

It could be argued that negligence, while it provides a basis for civil lawsuits, should not be the basis for criminal charges. It is true that we should not criminalize accidents. No one believes that BP, Transocean, or Halliburton wanted to cause the spill. However, both BP and Transocean put profits before safety; neither company had a management culture that made environmental protection and worker safety a priority. BP took risks in drilling the well; Transocean carried out BP's questionable directives and had an inoperable blowout preventer; and then there is Halliburton, which knowingly used faulty cement to seal the Macando well.

On these facts, a criminal case based on negligence is appropriate and is consistent with how the Justice Department has handled past oil spill cases. The Alternative Fines Act calls for maximum criminal penalties of up to twice the pecuniary losses associated with the spill, which could reach into the tens of billions of dollars. By comparison, the Exxon Valdez resulted in criminal fines of $150 million, and the largest criminal fine ever paid in the United States was the

$1.3 billion paid by Pfizer in 2009 for marketing fraud. Even if the actual fines are well short of the maximum penalty, multi-billion dollar criminal fines would be the largest ever imposed for a criminal case in the United States and would send a message that civil penalties alone cannot.

So why hasn't the Justice Department filed criminal charges 2½ years after the Gulf oil spill began? Part of the answer may lie in the Justice Department's decision in March 2011 to transfer the case from the Environmental Crimes Section to the Criminal Division of the Department. At the time, the Department justified its action by explaining that it wanted to create a task force to provide more resources and streamlined decision-making. But that begs the question why the Environmental Crimes Section was not selected to lead the task force.

Moving the case out of the Environmental Crimes Section meant that the largest environmental crimes office in the world–which led the Exxon prosecution and had three decades of experience prosecuting oil spill cases–would no longer have a leadership role in the biggest environmental disaster in U.S. history. In the 18 months since the transfer occurred, most of the Environmental Crimes Section prosecutors have been reassigned to other matters. The Criminal Division, which never has prosecuted an oil spill case nor any other environmental crime, is now exclusively in charge of the case. Its prosecutors still could and perhaps will bring criminal charges under the Clean Water Act. But their focus appears to be on other crimes.

In April, almost exactly two years after the Gulf oil spill began, the Justice Department announced the first criminal charges in the case. The defendant was Kurt Mix, a BP engineer accused of deleting text messages regarding the size of the spill. Mr. Mix claims that he was cooperating with the government and had provided investigators the information contained in the text messages, which could undermine the case against him. Regardless of the merits of the charges, it seemed curious that the Justice Department, after investigating for two years, would start its criminal case with charges against a low-level engineer. Now, five months later with no additional charges in sight, the Department's effort has morphed from curious to disconcerting.

News reports this summer suggested that the Justice Department is trying to determine whether to file charges against BP officials for misleading the public and the government about the size of the spill while the company was scrambling to control the runaway well. If BP officials lied about the size of the spill, it may be possible to bring false statement or obstruction of justice charges or even charges of lying to Congress. There also have been suggestions that BP officials deliberately understated the size of the spill in an unsuccessful effort to prop up BP's stock values, which had declined by more than a third in the aftermath of the spill. If those claims are true, the Justice Department could seek indictments on charges of securities fraud.

It is not surprising that Criminal Division prosecutors would focus on traditional criminal charges like false statements, obstruction of justice, and securities fraud, which the Criminal

Division prosecutes regularly. Nor is it wrong for prosecutors to investigate whether BP officials engaged in obstruction of justice or securities fraud. If there is sufficient evidence to prove that BP officials engaged in a cover-up or securities fraud, those individuals should be charged.

The focus of any criminal prosecution of the Gulf oil spill, however, should be on the spill itself and the tragic loss of life that occurred on the Deepwater Horizon. The negligence of BP, Transocean, and Halliburton caused 11 people to die, incalculable damage to sensitive ecosystems, and billions of dollars in economic losses to communities along the Gulf of Mexico. The lead charges against BP, Transocean, and Halliburton therefore should be criminal charges under the Clean Water Act, Seaman's Manslaughter Statute, and Migratory Bird Treaty Act. To proceed otherwise would devalue the environmental crimes and worker deaths that occurred.

By leading with pollution crimes and manslaughter charges, the Justice Department would send a message that it is unacceptable for companies to put the environment and human life at risk. It also makes sense to lead with criminal charges under the Clean Water Act, Seaman's Manslaughter Statute, and Migratory Bird Treaty Act because those charges would be easier to prove. There is little question that BP, Transocean, and Halliburton were negligent. On the other hand, proving that BP officials lied about the size of the spill requires showing that they provided false information and did so knowing that it was untrue. Perhaps that occurred, but it is not clear that anyone knew the size of the spill during the efforts to control the runaway well.

In addition, multi-billion dollar fines are possible for the Clean Water Act violations, because the Alternative Fines Act authorizes fines up to twice the losses associated with the spill. False statement, obstruction of justice, and lying to Congress would not support anything more than multi-million dollar fines. For that reason alone, the Justice Department should be emphasizing the Clean Water Act violations and should not be delaying its criminal case for charges that will be more difficult to prove and will yield dramatically smaller criminal fines.

It is likely that the Justice Department will now wait until after the Presidential election to announce indictments or settlements. There is no Justice Department policy against pursuing criminal charges during a Presidential election; routine cases continue to be charged and settled regardless of the political calendar. But the Gulf oil spill is not a routine case; it is the largest case in the Department. If charging decisions are announced between now and the election, they will be seen as political even though the Justice Department is scrupulous about avoiding political influence in criminal cases. So it may be December or even January before we see major progress in the criminal prosecution of the Gulf oil spill, nearly three years after the spill.

The delay in the criminal case affects other aspects of the Gulf oil spill litigation as well. The Justice Department is now nearly two years into civil litigation over the spill and only has settled with MOEX, a subsidiary of Mitsui that had just a 10 percent interest in the Macondo well. The Justice Department has not reached a settlement with Anadarko, which held a 25

percent interest in the Macondo well, even though Anadarko agreed nearly a year ago to pay $4 billion to BP to settle its share of responsible party liability. Transocean recently indicated in SEC filings that it has held settlement talks with the Justice Department–and we can assume that the Justice Department and BP have continued to discuss both a civil penalty settlement and a resolution of natural resource damage claims. It is unlikely that any civil penalty settlements will occur with BP and Transocean, however, until the companies know about their criminal liability.

I expect that the Justice Department will eventually reach global settlements with the companies involved in the Gulf oil spill that will address criminal and civil penalties. When settlements occur, billions of dollars will be available for Gulf coast restoration efforts now that Congress has passed the RESTORE Act. The RESTORE Act allows 80 percent of fines collected because of the spill to be spent on Gulf coast restoration efforts. If there is a silver lining to the spill it probably is the fact that we are more acutely aware of the treasure that is the Gulf of Mexico and the damage that we have done to the Gulf long before the painful events of 2010. Now, for the first time, we will have funding available to begin serious restoration efforts on the Gulf of Mexico and the marshes and estuaries along its shores.

The Justice Department would have been in a better litigation and settlement posture, however, if it had moved more quickly in its criminal prosecution. Criminal cases are more compelling when there is a sense of public urgency, which is no longer present regarding the

Gulf oil spill. Criminal charges are easier to prove at trial when witness recollections are fresh. By waiting so long to bring criminal charges, the Justice Department has undermined the strength of its negotiating position, weakened its case if it goes to trial, and diminished the deterrent effect and the expression of commendation that are the primary goals of a criminal prosecution.

The criminal prosecution of the Gulf oil spill ultimately may prove to be a metaphor for our response to the spill more generally. It is hard to escape the conclusion that, while we have taken some positive steps, we could have done more. We changed how we regulate and enforce drilling permits. We took steps to ensure that victims of the spill were compensated. But in the wake of an unfathomable tragedy, we failed to heed the lessons of the spill. Congress passed no new laws to prevent future spills. We are back to drilling as usual. BP is once more turning huge profits. We have not moved closer to a future fueled by alternative energy. The Gulf of Mexico will never be the same, but the country is unchanged and unfazed. We have moved on.

We once were able to learn from our mistakes, in Santa Barbara and in Cleveland and on rivers and streams across America. As we commemorate the 40th anniversary of the Clean Water Act, let us hope that we will again find common ground in our obligation to leave the earth and the environment better than we found it. Our children and our grandchildren are counting on us.

Thank you very much.