

3-1-2012

## The Practice of Disaster Law

Clifford J. Villa

*University of New Mexico - School of Law*

Follow this and additional works at: [https://digitalrepository.unm.edu/law\\_facultyscholarship](https://digitalrepository.unm.edu/law_facultyscholarship)



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Clifford J. Villa, *The Practice of Disaster Law*, ABA Law Practice Today (2012).

Available at: [https://digitalrepository.unm.edu/law\\_facultyscholarship/325](https://digitalrepository.unm.edu/law_facultyscholarship/325)

This Article is brought to you for free and open access by the UNM School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sarahrk@unm.edu](mailto:sarahrk@unm.edu).



SMALL SCHOOL.  
BIG VALUE.

## The Practice of Disaster Law

By Clifford J. Villa

March 2012

---

*9/11...Katrina...the BP Oil Spill...Few of us probably want to say that our primary practice area is "Disaster Law," but the reality is that it is an increasingly potent area of focus for many law firms. Clifford Villa tells us that 2011 was an unprecedented year for disasters in the United States, and unfortunately, like death and taxes—it likely will continue to grow.*

---

In New York City, post-9/11, a pro bono attorney represents the widow of an undocumented worker killed in the collapse of the World Trade Centers, securing for her client a cash settlement from the federal 9/11 Victim Compensation Fund.<sup>1</sup> In Mississippi, post-Katrina, a big law firm represents a major insurance company denying coverage under a homeowner's policy, invoking an anti-concurrent causation clause to exclude damages based at least partly on floods.<sup>2</sup> In Alaska, 2011, lawyers for a pipeline company and the federal government arrive at an Incident Command Post to support round-the-clock efforts under Arctic winter conditions to fix an oil leak that has momentarily shut down the Trans-Alaska Pipeline.<sup>3</sup>

2011 was an unprecedented year for disasters in the United States<sup>4</sup> and it should be no surprise that there has been much attention lately within the ABA to the concept of "Disaster Law."<sup>5</sup> And yet, if you asked each of the lawyers above whether they engaged in the actual practice of Disaster Law, it seems unlikely that any would answer affirmatively. The lawyer representing the immigrant family who suffered a terrible loss on 9/11 might say she is practicing immigration law. The lawyer representing the insurance company in Mississippi might say he is practicing insurance defense. The lawyer for the

---

<sup>1</sup> OUT OF THE ASHES: 9/11 (2011), Marilyn J. Berger (producer) .

<sup>2</sup> See, e.g., Leonard v. Nationwide Mutual Insurance Co., 499 F.3d 419 (5<sup>th</sup> Cir. 2007).

<sup>3</sup> See [www.epa.gov/region10/alyeskaspill.html](http://www.epa.gov/region10/alyeskaspill.html) (last visited Jan. 6, 2012).

<sup>4</sup> In a typical year, the U.S. will experience three or four weather-related disasters causing damage over \$ 1 billion. In 2011, the United States suffered at least 12 such billion-dollar disasters, including fires in the Southwest, flooding in the Mid-West, tornadoes across the South, and Hurricane Irene on the East Coast. Justin Giles, "Erratic weather – public's left to wonder," SEATTLE TIMES (Dec. 25, 2011) at A10.

<sup>5</sup> Among other things, the ABA has established a Special Committee on Disaster Response and Preparedness and the ABA Tort Trial and Insurance Practice Section (TIPS) has established a Task Force on Disaster Preparedness and Response. For recent ABA publications on Disaster Law, see, e.g., Joe Regalia, "Disaster Law – An Emerging Area of Specialized Legal Study and Practice" (forthcoming Jan. 2012); G.M. Filisko, *What Did Katrina Teach Us?*, ABA JOURNAL at 33 (July 2011).

pipeline company might say he is acting as corporate counsel, while the EPA lawyer on the other side might say he is engaged in environmental enforcement.

So who are the people practicing Disaster Law today? *They are* - and legions of other lawyers across the country, which may even include *you*. You and they may not be practicing Disaster Law all the time; few, if any, lawyers would claim to make a full-time practice of Disaster Law. But the various legal engagements described above all fall within the broad scope of Disaster Law, which may encompass all legal authorities and implications of natural and man-made disasters. Because all lawyers and clients are susceptible to natural and man-made disasters (think of the earthquakes, fires, floods, tornados, hurricanes, winter storms, and terrorist threats we saw throughout 2011), a basic understanding of Disaster Law may help every lawyer serve his clients as well as his community and his family when the need arises. Recognizing this critical need, many law schools have recently added a course in Disaster Law to their curriculum.<sup>6</sup> However, for the vast majority of practicing attorneys who will never have opportunity for a full course in Disaster Law, this article provides a brief introduction to the subject, establishing a theoretical framework for approaching any disaster, and touching upon some of the major statutes and policies implicated in disasters.

The theoretical framework for approaching any disaster, in its simplest form, can be broken down into just three elements: preparedness, response, and recovery. These elements are often described as a “cycle” or “circle,”<sup>7</sup> recognizing that preparations now may help us survive and respond to a disaster later, which allows us to recover from the disaster in time, which (if we learn anything from the experience) should lead to better preparedness for the next disaster. During and following a major disaster, each of these three elements may occur simultaneously. However, for convenience, these three elements will be considered briefly below in turn.

## Preparedness

Preparedness for a disaster can take many forms, from locating the fire exits in a movie theater to funding a multi-billion dollar seismic retrofit of an urban freeway. Preparedness may be a matter of business prudence – backing up electronic files, for example – or it may be driven by concerns for your personal safety – reflected, for example, in the assembly of disaster kits for your home, car, and office. However, preparedness may also be a matter of law. Federal, state, and other statutes may specifically require the preparation of disaster response plans or contingency plans. For example, the Stafford Act<sup>8</sup> – which is the primary federal statute governing the federal involvement with disasters – specifically requires that states develop and maintain a disaster preparedness plan as a condition for

---

<sup>6</sup> Seattle University School of Law, for example, just offered its first course in Disaster Law in fall 2011. *See also* Regalia, *supra* note 6 (also noting Disaster Law courses at UC Berkeley and Loyola University New Orleans).

<sup>7</sup> *See, e.g.*, Daniel A. Farber *et al.*, *DISASTER LAW AND POLICY*, 2<sup>ND</sup> ED. (2010) at 3.

<sup>8</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 42 U.S.C. § 5121 *et. seq.*

receipt of federal disaster assistance.<sup>9</sup> Federal agencies are also required to maintain various plans. The U.S. Environmental Protection Agency, for example, is required<sup>10</sup> to maintain a National Contingency Plan for response to releases of oil and hazardous substances.<sup>11</sup> In some cases, the private sector is also specifically required to engage in contingency planning. For example, industrial facilities storing or managing certain chemicals above threshold quantities must prepare and maintain a Risk Management Plan,<sup>12</sup> as required by Clean Air Act Section 112(r).<sup>13</sup> Failure to maintain such a plan may result in the assessment of administrative fines, civil penalties, and even criminal prosecution.<sup>14</sup> Most importantly, failure to maintain preparedness may result in tragic deaths and other terrible losses from industrial accidents and other disasters that might have been prevented or mitigated through the exercise of thoughtful and deliberate planning.<sup>15</sup>

## Response

When disaster strikes, you want to know that there are professionals trained and equipped (i.e., *prepared*) to deal with the immediate aftermath. You want to know that the city can be evacuated, if necessary, in a safe and orderly manner before the hurricane makes landfall. You want to know that search and rescue operations after a major earthquake or tornado or flood can be initiated immediately and effectively. You want to know that the sprawling wildland fire can be extinguished without loss of life. You want to know that the oil gushing from the broken riser pipe a mile below the surface in the Gulf of Mexico can be contained before it causes catastrophic injuries to wildlife and livelihoods that depend on the bounty of the sea. You want all these things, but even as a lawyer, you might not appreciate the role of law in disaster response.

But you probably hear it on TV: “Following a request from Governor So-n-So, the President issued disaster declarations today for five counties affected by flooding in northern Wherever.” The legal basis for such declarations is, again, the federal Stafford Act, which authorizes the President to declare either an “emergency”<sup>16</sup> or a “major disaster”<sup>17</sup> in response to a request from a state governor.<sup>18</sup> The

---

<sup>9</sup> Stafford Act Sections 201(c), 401, 42 U.S.C. §§ 5131(c), 5170. Of course, state and local planning may also be required as a matter of state and local law. *See, e.g.*, RCW 38.52.030(3) (Washington State Emergency Management Division directed to “maintain a comprehensive, all-hazard emergency plan for the state”).

<sup>10</sup> *See* Clean Water Act Section 311(d), 33 U.S.C. § 1321(d).

<sup>11</sup> National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300.

<sup>12</sup> *See* regulations at 40 C.F.R. Part 68.

<sup>13</sup> 42 U.S.C. § 7412(r).

<sup>14</sup> *See generally* Clean Air Act Section 113, 42 U.S.C. § 7413.

<sup>15</sup> As one example of a preventable disaster, consider the BP Texas City refinery explosion in 2005, which killed 15 people, injured 180, and resulted in financial losses exceeding \$1.5 billion. Following a thorough investigation, the federal Chemical Safety Board concluded, “The Texas City disaster was caused by organizational and safety deficiencies at all levels of the BP Corporation.” Chemical Safety and Hazard Investigation Board, Final Investigation Report (Mar. 2007) at 18.

<sup>16</sup> 42 U.S.C. §§ 501-503.

type of declaration (“emergency” or “major disaster”) has legal implications for the federal assistance available following the declaration, with major disaster declarations generally authorizing more and broader types of disaster relief than emergency declarations.

To carry out disaster responses most efficiently, the federal government has developed a National Response Framework, which identifies 15 “National Planning Scenarios” (e.g., Scenario 9: Major Earthquake; Scenario 10: Major Hurricane) and 15 “Emergency Support Functions” (ESFs). ESF 3, for example, provides for public works, including sanitation and debris removal, with the Corps of Engineers designated as the lead federal agency. ESF (Oil and Hazardous Materials Response) is assigned to the U.S. EPA. Following the many lessons learned from Hurricane Katrina, the National Response Framework was revised in 2009 to emphasize a “Readiness to Act.” Elements of this readiness include the use of advanced contracting, to ensure the availability of resources when needed, and the potential for “pre-positioning” of resources in anticipation of some disasters. For example, with Hurricane Irene bearing down on the Eastern Seaboard last August, FEMA pre-positioned 18 disaster response teams up and down the East Coast, the U.S. Coast Guard had 20 aircraft ready for deployment, and the National Guard had over 100,000 members ready to respond.<sup>19</sup> While Irene may have caused less damage than feared, it did result in billions of dollars in damages and at least 56 deaths; however, the number of lives saved through timely response is inestimable.<sup>20</sup>

Hurricane Irene resulted in 15 major disaster declarations, from Puerto Rico to Vermont.<sup>21</sup> However, not every kind of disaster response requires a disaster declaration under the Stafford Act. In 2010, for example, the massive BP Deepwater Horizon oil disaster in the Gulf of Mexico was governed primarily by the federal Oil Pollution Act (OPA).<sup>22</sup> OPA seeks to hold the “responsible party” liable for the entire costs of response plus damages from a spill of oil to waters of the U.S. Consistent with OPA, the response to the Deepwater Horizon oil disaster was funded and carried out largely by BP, with lead

---

<sup>17</sup> 42 U.S.C. §§ 401-427.

<sup>18</sup> Curiously, Stafford Act declarations must be made by state governors, even for Indian lands where a state has no jurisdiction. Recognizing this incongruity with tribal sovereignty, the Federal Emergency Management Agency (FEMA) has recently endorsed legislation proposing to amend the Stafford Act to allow tribes to seek federal declarations directly from the President, instead of indirectly through the Governor. See Press Release, FEMA Announces Support for Legislative Change to Allow Tribal Governments to Directly Apply for Federal Disaster Aid (Dec. 7, 2011).

<sup>19</sup> *Obama visits FEMA, readies response*, SEATTLE TIMES (Aug. 28, 2011) at A18.

<sup>20</sup> See Seth Borenstein and Samantha Gross, *Evacuations the right choice*, SEATTLE TIMES (Aug. 28, 2011) at A18 (quoting New Jersey Governor: “I want to make one thing really clear for folks who will say, ‘Well, there wasn’t abject destruction up and down the coastline, therefore we shouldn’t have left,’ ... those types of second-guessers won’t be tolerated. We saved lives.”).

<sup>21</sup> See FEMA website at [www.fema.gov/news/disasters](http://www.fema.gov/news/disasters) (last visited on Jan 2, 2012).

<sup>22</sup> 33 U.S.C. § 2701 *et seq.*

oversight by the Coast Guard. This led to some confusion in the media and public as to who was in charge of the operation.<sup>23</sup>

Among the people who should *not* be confused by a disaster response are the lawyers involved. BP certainly had corporate counsel providing internal advice on the liability scheme of OPA. The Coast Guard, the U.S. EPA, and other government agencies at all levels had advice of counsel as well, as did non-governmental organizations assisting with the response, and businesses and individuals affected by it.

The breath of legal issues arising in any disaster response may be surprising. Taking just the Deepwater Horizon disaster for example, a few of the questions that might be considered: On the beach under the Gulf Coast sun in the heat of July, can responders wear shorts and T-shirts consistent with requirements for Personal Protective Equipment? Can volunteers be allowed to assist with cleanup operations on their local beach? If so, under what conditions? Can media go up in Coast Guard helicopters? Can the U.S. pursue the oil slick if it crosses into international waters? Is the use of chemical dispersants authorized or banned in certain areas? Do the consultation requirements of the Endangered Species Act<sup>24</sup> or the National Historic Preservation Act<sup>25</sup> apply to this response? Can the government commandeer use of a fishing boat for the response? If so, is the owner entitled to compensation? Can fishermen seek immediate compensation for lost wages? If fishermen are hired to support the response effort, will property damages for any accidents be covered under their existing insurance policies? If one of the hired fishing crew is injured in this response effort, or causes some injury to others, what are the tort implications? Who is liable and under what standard?

## Recovery

At some point in the disaster cycle, response efforts will ramp down and the recovery phase will take center stage. This may be the time when people ordinarily think of lawyers, the time when disaster victims begin filing claims for coverage under their homeowner's insurance, the time when individuals and businesses begin seeking assistance under the Stafford Act,<sup>26</sup> the time when various compensation funds might be set up,<sup>27</sup> the time when lawsuits begin to fly.<sup>28</sup> But the recovery phase does not just

---

<sup>23</sup> For an excellent and thorough discussion of the Oil Pollution Act and the BP oil disaster, see John Wyeth Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L. J. 57 (2011).

<sup>24</sup> Endangered Species Act Section 7, 16 U.S.C. § 1536(a)(2).

<sup>25</sup> National Historic Preservation Act Section 106, 16 U.S.C. § 470f.

<sup>26</sup> See, e.g., Stafford Act Section 408: Federal Assistance to Individuals and Households. 42 U.S.C. § 5174.

<sup>27</sup> See *supra* note 2 (discussing 9/11 Victim Compensation Fund, established by Congress 11 days after 9/11 via Pub. L. No. 107-42 (2001)). See also Gulf Coast Claims Facility, [www.gulfcoastclaimsfacility.com](http://www.gulfcoastclaimsfacility.com), established by BP to provide compensation for losses caused by the Deepwater Horizon disaster.

<sup>28</sup> See, e.g., MDL-2179 Oil Spill by the Oil Rig "Deepwater Horizon" (multidistrict litigation consolidated in E.D. La.)

begin and end with claims for compensation. Recovery may actually begin at the same time as the response, at least if visionary leaders can see beyond the immediate wreckage and imagine rebuilding a community more resilient and sustainable than the one that came before it. To deliver on such a vision, local leaders - both public and private - may need to make tough, and unpopular, decisions. This might include, for example, a moratorium on reconstruction until thoughtful redevelopment plans can be developed and considered.<sup>29</sup> It might include a decision not to rebuild public housing in a low-lying part of town, even if it is part of an established community. Or it might include a decision to relocate a commercial business, even if it affects local employment and the county tax base.

To help make such tough decisions, clients will likely need confident and competent legal advice. This, in turn, assumes the availability of legal advisors – including government attorneys, corporate counsel, solo practitioners, law firm lawyers, and pro bono volunteers – able to fully comprehend and explain the recovery process. One short-cut to understanding the recovery process was published recently by FEMA, the “National Disaster Recovery Framework”,<sup>30</sup> which applies whether a disaster is subject to a Stafford Act declaration or other legal authority. Like the National Response Framework “Emergency Support Functions,” the National Disaster Recovery Framework (NDRF) organizes recovery operations into designated “Recovery Support Functions” (RSFs), with designated coordinating agencies. The Housing RSF, for example, will be coordinated by HUD. All efforts under the NDRF will be guided by nine “core principles” for recovery. These include emphasis on local leadership; attention to the special needs of children, the elderly, and people with Limited English Proficiency; and recognition of the psychological and emotional dimensions of recovery. Given this broader view of recovery, the potential role of lawyers in the practice of Disaster Law extends well beyond the realm of trial lawyers litigating over disaster compensation, and into the sweep of legal counsel in almost every other legal discipline.

## Conclusion

In sum, the practitioners of Disaster Law may include *you*, whether you recognize it or not. From Animal Law to Elder Law, Environmental Law to Immigration Law, Insurance Law to Toxic Torts to Workers’ Comp., lawyers approach the practice of Disaster Law from many perspectives. But to be the most effective counselor and advocate for a client when approaching issues of Disaster Law, a good lawyer may want to maintain a broader perspective, to understand how one particular concern relates to the full disaster cycle of Preparedness – Response – Recovery. As we help our clients survive the immediate aftermath of a disaster and put their lives back together, wouldn’t it be better if we could help them reduce the impacts of the disaster yet to come?

---

<sup>29</sup> See, e.g., Farber, *supra* note 8 at 365 (moratorium on reconstruction issued by Mayor of Kobe, Japan, after city devastated by earthquake in 1995).

<sup>30</sup> FEMA, National Disaster Recovery Framework (Sept. 2011), available online at [www.fema.gov/pdf/recoveryframework/ndrf.pdf](http://www.fema.gov/pdf/recoveryframework/ndrf.pdf).

# Law Practice TODAY

THE MONTHLY WEBZINE OF THE ABA LAW PRACTICE MANAGEMENT SECTION

*Clifford J. Villa is an Adjunct Professor, Seattle University School of Law; Assistant Regional Counsel, U.S. EPA Region 10. Mr. Villa teaches Disaster Law and environmental courses at Seattle University School of Law. He also serves as on-call legal counsel for the EPA Region 10 Emergency Management Program. Views expressed in this article are those of the author alone and not necessarily official views of either the EPA or the United States.*