

**GULF COAST ESCROW FUND CLAIMS PROCEDURE ESTABLISHED FOR THE
DEEPWATER HORIZON OIL SPILL VERSUS
REMEDIES AVAILABLE UNDER CURRENT LAW**

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INTRODUCTION

On April 20, 2010 a blowout from the well site at which the *Deepwater Horizon* Mobile Offshore Drilling Unit (“MODU”) had been drilling led to an explosion resulting in the deaths of 11 crew members. The MODU was owned by Transocean, flagged in the Marshall Islands, and leased by BP for drilling operations in the Gulf of Mexico in Mississippi Canyon Block 252. The Coast Guard designated both BP and Transocean as Responsible Parties (“RPs”) under the Oil Pollution Act of 1990 (“OPA 90”) for claims purposes.

Immediately after the Coast Guard designated BP as an RP on April 28, 2010, BP agreed to take the lead in responding and paying claims under OPA 90 and begin advertising that it would pay. However, due mainly to criticism related to the quick payment of claims and issues related to the capability of the government to fully fund and pay claims under OPA 90, pressure was placed on BP to guarantee that funds would be available to pay claims to adequately compensate those parties suffering damages as a result of the spill.

This pressure resulted in the White House taking proactive action to broker an agreement between the U.S. Justice Department and BP that established a \$20 Billion Gulf Coast Escrow Fund (“GCEF”) to handle claims from the spill, and named Ken Feinberg the Fund Administrator.¹ Mr. Feinberg has released a proposed Draft Protocol for the Gulf Coast Claims Facility (“GCCF”) to explain the administration of claims against the GCCF. Mr. Feinberg has indicated that the GCCF will hopefully be operational sometime in the fall of this year.

The following is a discussion of the legal remedies available under the current legal regime to compensate injured parties as well as an analysis of the proposed GCCF and how it compares to the claims process currently available under OPA 90.

¹ See *The Gulf of Mexico Oil Spill: Ensuring a Financially Responsible Recovery Part II Before the Subcomm. on Fed. Fin. Mgmt. of the S. Comm. on Homeland Sec. and Gov’t Affairs*, 111th Cong. 1 (2010) (testimony of Kenneth R. Feinberg, Administrator, Gulf Coast Claims Facility).

CURRENT LEGAL OPTIONS TO PURSUE COMPENSATION FOR DAMAGES AND REMOVAL COSTS

Oil Pollution Act of 1990

Since 1990, the primary law governing recovery of removal costs and damages resulting from oil spills has been OPA 90,² which imposes strict, joint and several liability on the owner, demise charterer and operator of a vessel (RPs) from which oil is discharged into the waters of the United States.³ OPA 90 established an Oil Spill Liability Trust Fund (“OSLTF”), which is available to pay claims for removal costs and damages that are not paid by the RP.⁴ However, before accessing the OSLTF claimants must first submit their claims to the designated RP. OPA 90 allows interim damages claims for less than the full amount to which the claimant may ultimately be entitled.

When an RP denies a claim or fails to pay, the claimant must decide whether to commence an action against the RP in court, or initiate a claim against the OSLTF. Claims against the OSLTF will not be considered during the pendency of an action in court on the same claim.⁵ The requirement to make a claim first against the RP is considered satisfied when either the RP pays the claim, a settlement is reached with respect to the claim, the RP denies the claim, or the RP does not pay the claim within 90 days of submittal.⁶ The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the OSLTF to support the claim. Claimants may seek judicial review of the OSLTF’s denial of a claim. Claims for removal costs must be submitted within three years of the completion of all removal actions related to the incident. Damages claims must be submitted within three years of the date that the injury was reasonably discoverable with the exercise of due care. Types of damages that are recoverable under OPA 90 include real or personal property damage, loss of profits or earning capacity (*i.e.* economic damages), subsistence loss, and natural resources damage. Claims are deemed submitted on the date of receipt by the National Pollution Funds Center (“NPFC”).⁷

General Maritime Law and State Law

OPA 90 supplants the general maritime law of the United States only to the extent that the two are expressly or implicitly inconsistent.⁸ However, the general maritime law of the United States and the common law of certain states recognize a tort action for negligent infliction of damages caused by oil spills.⁹ Accordingly, a negligence claim under general maritime law

² Pub. L. No. 101-380, 104 Stat. 486 (1990) (codified primarily at 33 U.S.C. §§ 2701-61).

³ 33 U.S.C. §§ 2701-04.

⁴ The RP responsible for accepting and paying claims is identified through a Notice of Designation process per 33 U.S.C. § 2713(a) and 33 C.F.R. § 136.103(a).

⁵ 33 C.F.R. § 136.103(c)(2), (d).

⁶ *Id.*

⁷ *Id.* at § 136.101(a), (b).

⁸ 33 U.S.C. § 2751(e)(1). For example, the First Circuit ruled that OPA 90 supersedes the general maritime law to the extent that the latter authorizes imposition of punitive damages for oil spills. *See South Port Marine, LLC v. Gulf Oil Ltd. P’ship*, 234 F.3d 58, 64-66 (1st Cir. 2000).

⁹ Claims involving federal maritime torts will be decided under federal admiralty law rather than state law. The test for general maritime law applicability is whether there is a significant connection to a traditional maritime activity. Some may argue in this case that the spill from a well on the OCS does not meet this test.

may be made and requires proof that: 1) the defendant owed a duty to the claimant to exercise due care; 2) the defendant breached that duty; 3) the claimant was injured; and 4) the defendant's breach caused the claimant's injury.¹⁰ Generally, defendants are not liable under the general maritime law for purely economic losses in the absence of physical injury to the claimant's person or property, even though such losses may be a foreseeable consequence of the spill.¹¹ Additionally, claims under the general maritime law are subject to the vessel owner's ability to limit its liability under the Limitation of Shipowner's Liability Act of 1851.¹²

Although OPA 90 provides a comprehensive scheme for oil pollution liability, it does not replace or preempt state laws on the subject.¹³ Texas, Louisiana, and Florida have specific strict liability oil spill regimes for removal costs and damages,¹⁴ Alabama regulates oil pollution damages and removal costs under a negligence regime,¹⁵ and Mississippi regulates oil pollution removal costs (but not damages) under a strict liability regime.¹⁶ With regard to state common law claims, as discussed earlier, oil spills offshore have generally been treated as federal maritime torts. To the extent, however, that damages occur from activities ashore, state negligence law would be controlling. In addition, in the absence of an established maritime rule, the general maritime law may incorporate federal common law or the law of the relevant state.

Historically, injured parties have primarily pursued claims against the RP and then the NPFC. This process is usually more streamlined and efficient than pursuing a lawsuit under federal or state law. In addition, most states do not have a pollution trust fund similar to the federal fund and, even in states where such a fund exists, it is typically insufficient to pay all the claims.

THE GULF COAST CLAIMS FACILITY COMPENSATION REGIME

Although the GCCF Draft Protocol pulls much of its language from the OPA 90 Claimant's Guide and other policy guidance,¹⁷ it differs in significant ways from the current claims regime. The GCCF will not replace the OPA 90 OSLTF regime. Instead, it replaces the initial claims procedure that a claimant would normally pursue against an RP—in this case BP—before resorting to OPA 90's OSLTF.¹⁸ In short, once fully implemented, the GCCF will replace the initial claims procedure requiring claims be submitted first to BP before an injured

¹⁰ See, e.g., *Lloyd's Leasing, Ltd. v. Conoco*, 868 F.2d 1447, 1449 (5th Cir. 1989).

¹¹ *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927). The Ninth Circuit has created an exception whereby commercial fishermen may recover damages for their share of the prospective catch resulting from an oil spill. *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974). At the same time, the Ninth Circuit continued to enforce the *Robins Dry Dock* rule for other business properties that had not been physically injured by the oil spill. *Id.* at 570.

¹² See *In re Alex C. Corp.*, 2003 AMC 256, 2003 U.S. Dist. LEXIS 1301 (D. Mass. Jan. 30, 2003).

¹³ See 33 U.S.C. § 2717(c).

¹⁴ See Tex. Nat. Res. Code Ann. § 40.001, *et seq.* (Texas "Oil Spill Prevention and Response Act of 1991"); La. Rev. Stat. Ann. §§ 30.2451-2496 (Louisiana "Oil Spill Prevention and Response Act"); FLA. STAT. ANN. §§ 376.011-376.17, 376.19-376.21 ("Florida Pollutant Discharge Prevention and Control Act").

¹⁵ See Ala. Code §§ 22-22-1 to 22-22-14 ("Alabama Water Pollution Control Act").

¹⁶ See Miss. Code Ann. §§ 49-17-1 to 49-17-43 (Mississippi "Air and Water Pollution Control Law").

¹⁷ National Pollution Funds Center, Claimant's Guide: A Compliance Guide for Submitting Claims Under the Oil Pollution Act of 1990 (Nov. 2009) [hereinafter *NPFC Claimant's Guide*] available at <http://www.uscg.mil/npfc/docs/PDFs/urg/Ch6/NPFCClaimantGuide.pdf>.

¹⁸ See Gulf Coast Claims Facility Draft Protocol, at 1 n.1 (July 9, 2010) [hereinafter *GCCF Draft Protocol*].

party may submit a claim against the OSLTF. In other words, the current BP claims offices will be closed, pending claims will be transferred to the GCCF, and the filing of a claim against the GCCF will meet the OPA 90 requirement that a claimant must first file a claim against the RP before pursuing a claim against the OSLTF. Accordingly, because the GCCF stands in place of the normal RP claims procedure, all of the other legal remedies provided under OPA 90 remain available. In theory, the GCCF is intended to expedite payments to claimants and be more transparent in order to encourage claimants to settle their claims against BP quickly through the GCCF rather than resorting to judicial remedies or filing a claim against the NPFC.

KEY COMPARISONS OF CLAIMS AGAINST THE GULF COAST CLAIMS FACILITY VERSUS CLAIMS AGAINST THE OIL SPILL LIABILITY TRUST FUND

Type of Claimants: The scope of claimants under the GCCF proposal is more restrictive than the OPA 90 regime. For example, the GCCF Draft Protocol “sets forth the procedure for the submission and resolution...of claims by individuals and businesses for costs and damages incurred as a result of the oil discharges.”¹⁹ By contrast, the OPA 90 claims procedure is open to individuals, corporations, partnerships, associations, federal or state governments, territories, foreign claimants, and RPs in limited circumstances.²⁰ This means that the GCCF will not be available to as many claimants as the OSLTF.

Types of Claims: Although for the most part the same types of claims may be made against the GCCF as under OPA 90, the GCCF permits claims for physical injury or death. It is unclear whether the GCCF will also permit claims for pain or suffering. OPA 90, on the other hand, does not provide for compensation for personal injury or death. Therefore, a claimant’s sole alternative to the GCCF for personal injury claims is litigation.

Time to Submit Claims: OPA 90 allows claims for damages “within three (3) years after the date on which the damage and its connection with the spill was reasonably discoverable,” and allows claims for removal costs “within three years after the date of completion of all removal actions for the incident.”²¹ However, the GCCF Draft Protocol states that “[n]o claim may be submitted to the GCCF more than three years *after the date that this Protocol becomes operative.*”²² This means that claimants may have less time to bring claims under the GCCF Draft Protocol, and this is critical because some of the damage caused by BP’s oil spill may not be “reasonably discoverable” for many years.

Claims for Removal Costs: Under OPA 90, a claimant may be compensated for removal costs if it can be demonstrated that the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident, that the removal costs were reasonable and incurred as a result of these actions, and that the actions taken were determined by the Federal On-Scene Coordinator (“FOSC”) to be consistent with the National Contingency Plan (“NCP”) or were directed by the FOOSC.²³ Except in exceptional circumstances, removal activities for which costs are being

¹⁹ See *Id.* at 1.

²⁰ See NPFC Claimants guide, *supra* note 17 at 3.,

²¹ *Id.* at 6.

²² GCCF Draft Protocol, *supra* note 18 at 8. (emphasis added).

²³ 33 C.F.R. § 136.203.

claimed must have been coordinated with the FOSC.²⁴ The GCCF requires a claimant to prove that the removal actions were approved by the Unified Command. Unless a particular removal action is included as approved within the daily Incident Action Plan approved by the FOSC, it is often difficult to obtain approval under OPA 90. It is unclear whether the standards will be any different under the GCCF as the standard for payment as written in the GCCF is a bit different.

Final Settlement of Claims: The GCCF Draft Protocol would require a claimant to sign a release that “waive[s] any rights the Claimant may have against BP to assert additional claims, to file an individual legal action, to participate in other legal actions associated with the spill, or to submit that claim for payment by the OSLTF.”²⁵ The regulations governing the OSLTF under OPA 90 state that acceptance of an offer of settlement “is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim.”²⁶ The regulations also state that, “acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim.”²⁷ However, the OPA 90 settlement provisions clarify that payment of a claim for interim damages “shall not foreclose a claimant’s right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.”²⁸ This means that once a claim is settled under OPA 90, no further actions may be brought on *that specific claim*, but OPA 90 contemplates claimants bringing additional claims as more damages are discovered or after interim payments have been made.

By contrast, the GCCF Draft Protocol requires a claimant to release BP from all future claims in order to receive settlement. Although under the GCCF a claimant may file for an “Emergency Advance Payment” for an interim payment similar to OPA 90, advance payments may only be made up to six months before a final settlement. These emergency payment requests are supposed to be evaluated and paid within 48 hours. In addition, applications for these payments will not be accepted more than 90 days after the well has been closed.

This final settlement requirement is one of the key differences between the new procedure and OPA 90. Mr. Feinberg has made it clear that one of the chief aims of the GCCF is to make any payment a final payment to forestall any potential future claims. To expedite claims processing, the GCCF will authorize a payment that may be speculative in forecasting future damages as long as the actual payment will permanently resolve a claim. In contrast, the OSLTF only pays for past, proven damages. In other words, if a claimant does not like the offer from the GCCF in order to permanently resolve a claim, the claimant can either sue BP or pursue a claim against the OSLTF after all damages can be calculated and proven.

Fund Cap: GCCF does not contain the same damages cap that OPA 90 does. The GCCF funding level is currently set at \$20 billion, and will be replenished as often as necessary as long as BP remains viable as a business entity.²⁹ By comparison, the OSLTF limits expenditures to

²⁴ 33 C.F.R. § 136.203, 205.

²⁵ GCCF Draft Protocol, *supra* note 18, at 7.

²⁶ 33 C.F.R. § 136.115(a).

²⁷ *Id.*

²⁸ 33 U.S.C. § 2715(b)(2).

²⁹ See *The Gulf of Mexico Oil Spill: Ensuring a Financially Responsible Recovery Part II Before the Subcomm. on Fed. Fin. Mgmt. of the S. Comm. on Homeland Sec. and Gov’t Affairs*, 111th Cong. 1 (2010) (testimony of Kenneth

\$1 billion per incident unless Congress intervenes to remove this limitation.³⁰ This means that the claims provisions in the GCCF Draft Protocol may be available for payment to more claimants because it has a larger pool of money.

Appeal Procedure: The GCCF Draft Protocol also appears to give claimants an extra administrative appeal procedure than they would have under OPA 90.³¹ The language in the GCCF Draft Protocol states, “the Claimant may appeal the Final Decision to the GCCF Appeal Board...*or* the Claimant may pursue the claim as permitted under OPA 90 (33 U.S.C. § 2013).” However, the appeal to the GCCF Appeal Board must occur within seven days, giving a claimant a short time to file an appeal.³² OPA 90, on the other hand, grants a claimant 60 days to file for reconsideration of their claim.³³

Processing Time: It appears that the time required to process any final payment will be an appealing feature of the GCCF as compared to the OSLTF process. Under the GCCF, once a claim is complete, claimants can expect GCCF to take 90 days to determine whether to pay, and then take an additional 14 days to actually pay after the receipt of a signed release.³⁴ Based on our experience with regard to claims against the NPFC, claimants who decide to pursue their claims further under OPA 90 can expect a lengthy process, in some cases years, to review and ultimately approve a claim and another 30 days for payment once the claim is approved.³⁵ If this does not satisfy the claim, a claimant’s only remaining option is lengthy and expensive litigation which generally has even greater downsides than pursuing administrative remedies as discussed in this article.

Claims for Lost Profits: The GCCF appears to include a requirement that a claimant must demonstrate that the claim for economic loss from damage, loss of property, or resources relates only to those goods “that are used by the claimant.” It is unclear whether this language is more limiting than OPA 90 which only requires that a claimant demonstrate that the loss of profits was “a result of the incident.”³⁶

CONCLUSION

The proposed GCCF provides claimants with significant incentives to avoid time consuming litigation or lengthy processing under the OSLTF for complicated claims involving, in particular, loss of profit claims, which will require proof of previous profits to calculate the losses due to the *Deepwater Horizon* oil spill. Both its monetary size, and its guaranty of replenishment (assuming BP remains viable), would appear to provide a viable option for claimants to pursue, once it is fully implemented and operational. Settlements under the GCCF should be relatively quick and efficient as compared to other options. In addition, if a claimant is

R. Feinberg, Administrator, Gulf Coast Claims Facility); Roger Parloff, *BP Settlements: A Gamble for Gulf Coast Victims*, *Fortune*, July 12, 2010, *available at*

http://money.cnn.com/2010/07/12/news/companies/feinberg_BP_claims.fortune/index.htm.

³⁰ See 26 U.S.C. § 9509(c)(2).

³¹ See GCCF Draft Protocol, *supra* note 18, at 7 (allowing appeal of Final Claim decision to GCCF Appeals Board).

³² *Id.* (emphasis added).

³³ 33 C.F.R. § 136.115.

³⁴ See Gulf GCCF Draft Protocol, *supra* note 18, at 6-7.

³⁵ See NPFC Claimants guide, *supra* note 17, at 6.

³⁶ 33 C.F.R. § 136.231.

willing to receive payments based on a estimation of future damages rather than waiting to fully assess actual damages, the GCCF may well provide the best forum for a claimant to be compensated. In essence, the compressed time period for processing of claims under the GCCF will pressure claimants to decide to accept relief under this new regime in order to obtain compensation quickly, rather than risk the unavailability of relief in the future or the possibility of greater compensation even though ultimate payment would likely be delayed for an extended period of time.

Settlement under the GCCF Draft Protocol, however, requires claimants to give up all rights to bring future claims, including claims against the OSLTF. In other words, claimants who accept a quick, up front payment from the GCCF may short themselves significantly from future recovery. This strategy favors BP in the long run, but with families out of work, the immediate need for relief may force claimants to file their claims under the GCCF regime, even if they believe they are owed significantly more.