

CHAIR  
Wm. T. Robinson III  
wrobinson@fbtlaw.com

Robert N. Weiner, Board of Governors Liaison

Michael A. Bedke

Donald R. Dunner

Thomas A. Forbes

H. Russell Frisby, Jr.

Rosemary E. Giuliano

Martin E. Lybecker

Richard M. Macias

Laura A. Miller

Janice F. Mulligan

Pauline A. Schneider

ABA DAY IN WASHINGTON  
PLANNING COMMITTEELaurel G. Bellows, Chair  
lbellowspc.com

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR

Thomas M. Susman  
(202) 662-1765  
susmant@staff.abanet.org

DEPUTY DIRECTOR

Denise A. Cardman  
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

R. Larson Frisby  
frisbyr@staff.abanet.orgLillian B. Gaskin  
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

Ann Carmichael  
carmicha@staff.abanet.orgKristi Gaines  
gainesk@staff.abanet.orgKirra L. Jarratt  
jarrattk@staff.abanet.orgE. Bruce Nicholson  
nicholsonb@staff.abanet.orgLEGISLATIVE COUNSEL/DIRECTOR  
GRASSROOTS OPERATIONSJulie M. Strandlie  
jstrandlie@staff.abanet.orgLEGISLATIVE COUNSEL/  
DIRECTOR OF STATE LEGISLATIONKenneth J. Goldsmith  
goldsmithk@staff.abanet.orgINTELLECTUAL PROPERTY  
LAW CONSULTANTHayden Gregory  
gregoryh@staff.abanet.org

LEGISLATIVE COORDINATOR

Jared D. Hess  
hessj@staff.abanet.org

July 16, 2010

Kenneth R. Feinberg  
Feinberg Rozen, LLP  
1455 Pennsylvania Avenue, NW  
Suite 390  
Washington, DC 20004-1008

Dear Ken:

Thank you for taking the time to meet with me and several of my American Bar Association colleagues last week. We appreciate the opportunity to respond to your request for some preliminary reactions to your Gulf Coast Claims Facility Draft Protocol. The ABA is honored to be included in this important project, and we are very pleased to provide this informal input.

After receiving your draft Protocol, we shared it with key volunteer leaders within several ABA entities housing the most expertise on the issues involved, including the ABA Sections of Administrative Law & Regulatory Practice, Dispute Resolution, Litigation, and Tort Trial and Insurance Practice, as well as the ABA Special Committee on Disaster Response and Preparedness. Due to the time limitations for responding to your request, we have not attempted to develop new ABA policy on the issues involved. Instead, we asked our volunteer leaders to immediately review the draft Protocol in their capacities as expert attorney practitioners and then provide us with any suggested changes to that document, as well as with any conceptual comments or questions that they may have. These comments, of necessity, are offered informally for your consideration as you finalize your draft Protocol. We specifically are not advocating any policy positions and caution that these submissions have not been approved by the ABA House of Delegates or Board of Governors, or by any ABA Section or other entity. Thus the submissions do not purport to represent the official positions or policies of the ABA or any entity of the Association.

I have attached as "Appendix A" a document that contains suggested redlined edits to the draft Protocol prepared by the volunteer leaders of the ABA entities noted above. Also attached, as "Appendix B," are the conceptual comments and other more substantive suggestions prepared by these and other ABA members for you to consider. Please review both "Appendix A" and "Appendix B," as many of our attorneys only provided comments and others only provided suggested redline edits.

July 16, 2010  
Page 2

I reemphasize that the attached redlined edits to the draft Protocol—and the other conceptual comments and substantive suggestions—reflect the reactions and views of the individual ABA volunteer leaders only.

Since we met, the ABA has also actively participated with Gulf States bar leaders in discussions about providing effective pro bono assistance to those individuals and small businesses injured by the oil discharge. We expect to continue to work with lawyers in those states and with both your Facility and state and local governmental entities to be of assistance as needed.

Thank you for including us in this important process. We look forward to working with you on the Protocol and other means of assisting the victims of the gulf oil discharge in the coming weeks.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

Attachments

## APPENDIX A

PROPOSED EDITS PREPARED BY INDIVIDUAL ATTORNEYS FROM THE ABA SECTIONS OF LITIGATION,  
DISPUTE RESOLUTION, AND ADMINISTRATIVE LAW & REGULATORY PRACTICE  
(7/16/10)

(NOTE: THESE EDITS HAVE NOT BEEN APPROVED BY THE ABA HOUSE OF DELEGATES, THE ABA BOARD OF GOVERNORS, OR ANY ABA SECTION COUNCIL, AND ACCORDINGLY, SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE ASSOCIATION OR ANY ABA SECTION OR ENTITY)

Deleted: Draft Nine ¶  
July 9, 2010¶  
6:20 p.m.¶

### Gulf Coast Claims Facility Draft Protocol

#### I. PURPOSE

This Protocol sets forth the procedure for the submission and resolution by the Gulf Coast Claims Facility (“GCCF”)<sup>1</sup> of claims by Individuals and Businesses (“Claimant”) for costs and damages incurred as a result of the oil discharges due to the Deepwater Horizon incident on April 20, 2010 (the “Spill”). All open Individual and Business claims that have been filed with the BP Claims Process as of 2010, will be transferred to the GCCF. The GCCF is administered by Kenneth R. Feinberg (the “Claims Administrator”), a neutral fund administrator responsible for all decisions relating to the administration and processing of claims by the GCCF. The Effective Date of this Protocol is [August 1, 2010].

Deleted: “

Deleted: “

#### II. ELIGIBILITY

##### A. Removal and Clean Up Costs

##### 1. Who may make a claim?

A claim for the costs of cleanup (“Removal”) of oil or related environmental discharges **REASON** **FOR CHANGE:** *Damages or injuries may be caused by or attributable to collateral actions or omissions of BP, e.g. damage or injury resulting from the oil company’s use of chemical dispersants.* due to the Spill and the costs to prevent, minimize, or mitigate the substantial threat of oil pollution due to the Spill may be made by any Claimant. The Removal actions taken must have been approved by the Federal On-Scene Coordinator and be consistent with the National Contingency Plan (“NCP”).

Formatted: Comment Text, Left, Indent: First line: 0 pt

Deleted: removal

Deleted: after a discharge

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Calibri, 11 pt, Italic

Formatted: Font: Calibri, 11 pt

Deleted: has occurred

Deleted: when there is a substantial threat of a discharge of oil

Deleted: Individual or Business

Deleted: ¶

<sup>1</sup> On April 28, 2010, the United States Coast Guard (“USCG”) designated BP Exploration & Production, Inc. (“BP”) as a Responsible Party under the Oil Pollution Act of 1990 (“OPA”) for oil discharges from the Deepwater Horizon facility. The GCCF fulfills BP’s obligations as a designated Responsible Party to establish a claims procedure; presentation of a claim to the GCCF satisfies a claimant’s obligation to present a claim to the responsible party before the claimant presents a claim to the Coast Guard for payment.

- The actions taken were necessary to prevent, minimize, or mitigate the effects of the Spill, were approved by the Federal On-Scene coordinator and were consistent with the NCP.
- The costs incurred for Removal after the Spill or the costs incurred to prevent, minimize, or mitigate the threat of oil pollution from the Spill.
- The costs were reasonable.

Deleted: ational Contingency Plan.

Deleted: of removal incurred

Deleted: ¶

## B. Real or Personal Property

### 1. Who may make a claim?

A claim for damages due to physical injury to real or personal property may be made by any Claimant who owns, leases, or holds an exclusive possessory interest providing exclusive use of the property, but duplicate claims by an owner and a lessee for the same damage are not permitted. **[REASON FOR CHANGE: Many of the businesses most likely to be affected, e.g. restaurants and other hospitality industry venues located in the affected areas, are companies or business ventures that operate pursuant to some possessory interest other than a lease. Examples include restaurant or food & beverage management agreements, hotel operating agreements, and similar business arrangements whereby the property owner furnishes dominion and control over the subject property to the business venture in return for specified consideration (usually a percentage of gross or net profits from the business operated at the property). While this may sound like a typical landlord-tenant relationship, as a matter of law the management agreement or operator's agreement is not a lease. Lanqaage in the protocol should be modified to account for these kinds of claimants.]**

Deleted: an Individual or Business

Deleted: or

Deleted: duplication of

Deleted: will not be recognized.

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Formatted: Font: Calibri, 11 pt, Italic

Formatted: Font: Calibri, 11 pt

Formatted: Font: Calibri, 11 pt, Italic

### 2. Proof Required

- An ownership, leasehold or other exclusive possessory interest in the property.
- The property was physically damaged or destroyed.
- The cost of repair or replacement of the property.
- The value of the property both before and after damage.

Formatted: Indent: Left: 36 pt

Deleted: ¶  
¶

Deleted: or

## C. Lost Profits and Lost Earning Capacity

### 1. Who may make a claim?

A claim for Lost Profits or Lost Earning Capacity may be made by any Claimant. The Claimant need not be the owner of the injured property or natural resources to recover for lost profits or income so long as the Claimant can, by reasonable evidence consistent with this Protocol, demonstrate a direct causal connection between a Spill-related injury or damage and quantifiable loss incurred by the Claimant. **[REASON FOR CHANGE: Precautionary language limiting the scope of Claimants is advisable to reduce the risks of fraud and improper claims.]** Damages will be equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources that are used by the Claimant. **[NOTE: For what period of time? As stated, this may be construed as open-ended and indefinite.]**

Deleted: an Individual or Business

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Formatted: Font: Calibri, 11 pt, Italic

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

2. Proof Required

- Identification of injury, destruction, or loss to a specific property or natural resource (such as a beach, swimming area, or fishing ground) used by the Claimant.
- Claimant's lost earnings or profits were caused by the injury, destruction, or loss of a specific property or natural resource (such as lost income by a fisherman whose fishing grounds have been closed or lost profits by a hotel whose beach or swimming area has been oiled).
- Reduction of earnings or profits resulting from damage or loss of property or natural resources that are used by the Claimant.
- Amount of profits and earnings in comparable time periods. *[NOTE: For what period of time?]*
- Income received from alternative employment or business during the period when the loss was suffered.
- Efforts to reduce loss of profits and earnings.
- Savings to overhead and other normal expenses not incurred as a result of the Spill.

Deleted: ¶

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

D. Subsistence Use of Natural Resources

1. Who may make a claim?

A claim for Loss of Subsistence Use of Natural Resources may be made by any Claimant *[NOTE: Is there a real-world example of a business that uses the Gulf for subsistence purposes?]* who uses the natural resources which have been injured, destroyed, or lost, to obtain food, shelter, clothing, medicine, or other minimum necessities of life. Damages will be for loss of the natural resources used, for example, loss of fish or other wildlife used for food.

Deleted: an Individual or Business

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

2. Proof Required

*[NOTE: It may be problematic for the typical individual Claimant who relies on the Gulf for subsistence to produce this type of evidence]:*

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

- Identification of the specific natural resource for which compensation for loss of subsistence use is being claimed.
- Description of the actual subsistence use of each specific natural resource identified.
- Description of how and to what extent the subsistence use of the natural resource was affected by the injury to, destruction of, or loss of the specific natural resource.
- Description of effort made to mitigate the subsistence use loss.
- Description of each alternative source or means of subsistence available during the period of time for which loss of subsistence is claimed.

E. Physical Injury/Death

1. Who may make a claim?

A claim may be made by an injured Individual or the representative of a deceased Individual for physical injury to the body or death proximately caused by the Spill or the explosion and fire associated with the Deepwater Horizon incident.

## 2. Proof Required

- Medical records or death certificate demonstrating physical injury to the body or death.
- Cause of injury.
- Location where injury occurred.
- Evidence of total or partial disability, *if claimed*. ***[REASON FOR CHANGE: this revision is necessary to reduce the risk that existing language could be construed to eliminate claims for medical injuries that are not permanently disabling (whether total or partial).]***
- Expenditures for medical care not otherwise compensated.

Deleted: ¶

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Formatted: Font: Calibri, 11 pt, Italic

## F. Causation

The GCCF will only pay for harm or damage that is proximately caused by the Spill. A claim is not compensable if: (1) the Claimant's loss is a consequence of an injury to a third party proximately caused by the Spill (for example, the Claimant is a customer of or supplier to a business that has been injured); (2) the Claimant's loss is remote in time or place from the Spill; or (3) the Claimant's loss is the result of intervening events triggered by the Spill. The GCCF's causation determinations will be guided, as applicable, by OPA and other federal law, and the law of the state that would be applicable to a tort claim brought by the Claimant.

## III. FILING FOR COMPENSATION

### A. Claim Form

1. ***Claimants must complete the applicable Claim Form for either an Individual or Business.*** The Claimant ***must*** indicate on the Claim Form if the Claimant is applying for ***an Advanced*** Emergency Payment<sup>2</sup> or for payment of a Final Claim.

Deleted: will

Deleted: Claimants will complete a Claim Form for an Individual or Business.

2. ***A Claimant must,*** at a minimum, submit the documentation ***indicated*** on the Claim Form.

Formatted: Indent: Left: 36 pt, Hanging: 18 pt

### B. Presentment of a Final Claim

1. A Claimant asserting a claim under OPA must first present the claim to the GCCF for consideration and potential resolution (33 U.S.C. §§ 2702, 2713). A Claimant asserting a non-OPA claim, such as a claim for death or physical injury, may submit ***the*** claim to the GCCF for consideration and potential resolution.

Deleted: s

Deleted: shall

Deleted: requested

Deleted: also

Deleted: a

2. For purposes of the presentment requirements under OPA, the ***claim is*** presented when ***the*** Claim Form ***submitted to GCCF*** is ***determined to be*** sufficiently complete for consideration.

Deleted: GCCF shall deem a

Deleted: a

3. The Claimant will be notified in writing, ***by mail and/or internet***, when the claim has been ***determined*** sufficiently complete for consideration.

Deleted: is

Deleted: and the Claim Form

Deleted: deemed

<sup>2</sup> An ***Advanced*** Emergency Payment is an "interim" payment under OPA.

4. The Claimant will be notified if the claim is inadequate, and given [xx] days to resubmit a modified claim. Instructions will be provided to the Claimant as to how to adjust the claim to make it comply with the GCCF standards.

C. Process for Filing a Claim

A Claim Form may be obtained and submitted to the GCCF in any one of the following ways:

1. Via the Internet – Claimants may submit a claim online by visiting the GCCF website: [www.gulfcoastclaimsfacility.com](http://www.gulfcoastclaimsfacility.com). Claimants will be instructed to follow simple steps for completing a claim. Once completed, the claim automatically will be submitted to the GCCF Database. A confirmation email will be sent to the Claimant and a Claim Number will be generated. The Claim Number will be the claim identifier throughout the process. The Claim Form and Instructions will be available in English, Spanish and Vietnamese. The Claim Form must be signed by the Claimant. [NOTE: IF THE CLAIM FORM IS AUTOMATICALLY SUBMITTED ELECTRONICALLY ONLINE, HOW DOES THE CLAIMANT SIGN? IF THE SIGNATURE IS PRESUMED BY SUBMISSION OF THE FORM, THE LAST SENTENCE SHOULD BE REVISED TO REFLECT THAT THE CLAIMANT WILL BE ASKED TO ACKNOWLEDGE THAT SUBMISSION OF THE FORM ELECTRONICALLY CONSTITUTES THE CLAIMANT’S SIGNATURE.]

Deleted: automatically

Formatted: Font: Italic

2. By Visiting a GCCF Claims Site Office – Claimants may visit one of the 33 Claims Site Offices established to assist Claimants with the claims submission process to (1) seek advice as to whether or not to file a claim or to (2) submit a claim in person. Claimants either may walk in to one of the Claims Site Offices or make an appointment by calling the toll-free telephone number listed below. The locations of the Claims Site Offices are posted on the GCCF website, [www.gulfcoastclaimsfacility.com](http://www.gulfcoastclaimsfacility.com), and listed at the end of this Protocol. If a visitor requires an interpreter, the Claims Evaluator will make arrangements to provide these services either via conference call or a scheduled return trip to the Claims Site Office. A Claims Evaluator will assist the Claimant in completing the Claim Form. The Claims Evaluator will print a copy of the Claim Form, the claimant will sign the Claim Form and the claim will be automatically submitted to the GCCF Database. A confirmation of the claim submission and Claim Identification Number will be provided by the Claims Evaluator. The Claim Form must be signed by the Claimant.

Deleted: either

Deleted: may

Deleted: line

3. Via U.S. Postal Service – Claimants may call the toll free telephone number listed below to request that a Claim Form be mailed via U.S. Postal Service. The Claims Operator will ask the caller to provide basic information which the Claims Operator will enter into the on-line system. The system will automatically generate a unique, pre-populated and bar-coded Claim Form which will include the identifying information provided by the caller. The Claim Form will contain a Claim Identification Number which will be the Claim identifier through the course of the process. The coded Claim Form will be mailed via U.S. Postal Service to the Claimant. The Claim Form must be signed by the Claimant. The Claimant may return the completed form via:

Deleted: , dedicated

Deleted: line

- U.S. Postal Service, via CERTIFIED MAIL: [REASON FOR CHANGE: For a few dollars, this could help to reduce significantly the number of fraudulent claims.]  
Gulf Coast Claims Facility

Formatted: Font: Italic

P. O. Box XXX  
XXXXXXXXXX, XX XXXXX

- Overnight Mail:  
Gulf Coast Claims Facility  
XXXXXXXXXX, XX XXXXX
- Fax:  
XXX-XXX-XXXX
- Email:  
XXXXXXXXXX@XXXXXXXXXX.XXX
- The toll-free telephone lines are as follows:
  - Toll Free Number: XXX-XXX-XXXX
  - Multilingual Telephone Line: XXX-XXX-XXXX
  - TTY Telephone Line: XXX-XXX-XXXX

All submitted Claim Forms, regardless of the method of submission, automatically will be forwarded to the Central Processing Database and integrated into a comprehensive GCCF Database.

Deleted: automatically

#### D. Appointment with a Claims Evaluator

Once a claim has been submitted, the claim will be assigned to a Claims Evaluator. The Claims Evaluator will review the claim for completeness and eligibility and may contact the Claimant to request additional supporting documentation if necessary or if the Claims Evaluator has any questions about the information submitted with the Claim Form. The Claimant may request an appointment with a Claims Evaluator at the nearest Claims Site Office to answer or clarify issues regarding the claim. Information regarding the nearest Claims Site Office and the scheduling of appointments with a Claims Evaluator will be accessible online at <http://www.> and available by telephone at (XXX) XXX-XXXX. ***[REASON FOR CHANGE: Information regarding the accessibility of the Claims Site Offices and the scheduling of appointments should be readily available to all Claimants, especially individuals, to facilitate the process and reduce errors].*** Examples of information and documentation that support a claim are attached as Exhibit A.

Deleted: the appropriate

Deleted: The Claimant may request an appointment with a Claims Evaluator at the nearest Claims Site Office to answer or clarify issues regarding the claim.

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Italic

### IV. APPLICATION FOR EMERGENCY ADVANCE PAYMENT

#### A. Eligibility

Claimants with claims for damages pursuant to Section II of this Protocol who are experiencing immediate and ongoing financial hardship resulting from damages incurred due to the Spill may apply for an Emergency Advance Payment. ***[REASON FOR CHANGE: This language will help distinguish EAPs from FPs.]***

Formatted: Font: Bold, Italic

Formatted: Font: Italic

B. Evaluation of Emergency Advance Payment Application

1. ~~An expedited review process will be used to evaluate~~ Emergency Advance Payment applications, ~~Only the documentation listed in Section [X] of the Claim Form will be required to substantiate an Emergency Advance Payment application,~~
2. Each Emergency Advance Payment application will be evaluated preliminarily within ~~48~~ hours of receipt ~~by GCCF~~ of the completed ~~Claim Form~~ to determine whether an Emergency Advanced Payment is appropriate based on the information submitted by the Claimant. ~~[REASON FOR CHANGE: As a matter of practicality, 24 hours may not be realistic, especially when some requests are being transmitted by U.S. Mail.]~~
3. Upon a determination that the Claimant is eligible for an Emergency Advanced Payment, a payment will be authorized within ~~48 hours of the eligibility determination.~~

- Deleted: Evaluation of
- Deleted: will apply a less rigorous standard for required corroboration than evaluation of a claim for Final Payment
- Deleted: Documentation required will be outlined in the Claim Form
- Deleted: 24
- Deleted: form for Emergency Advance Payment
- Formatted: Font: Italic
- Formatted: Font: Bold, Italic
- Formatted: Font: Italic
- Deleted: 24

C. Period for Application for Emergency Advance Payment

1. Emergency Advance Payment applications may be submitted either on a monthly basis ~~or for up to~~ six months of losses, at the option of the Claimant.
2. Emergency Advance Payment applications may be submitted until 90 days after the date that the ~~Deep Horizon well is successfully capped, which date will be posted on the~~ GCCF website. After that date, ~~only~~ Final Claims will be accepted, processed, and ~~as appropriate,~~ paid.

- Deleted:
- Deleted: posts on its
- Deleted: that the well has been successfully closed
- Deleted: claims for

D. Request or Receipt of Emergency Advance Payment Does Not Waive Any Rights

Claimants requesting an Emergency Advance Payment or receiving an Emergency Advance Payment ~~are not required, and~~ will not be asked ~~to sign a release or waive rights to assert additional claims, to file an individual legal action, or to participate in other legal actions associated with the Spill.~~

- Deleted: Payment of a liquidated lump sum
- Deleted: continue to
- Deleted: However, Emergency Advance Payment applications will no longer be accepted.
- Deleted: or required
- Deleted: any
- Deleted: Any
- Deleted: the Final Payment of the claim

E. Credit Against Final Payment

~~The sum of all~~ Emergency Advance Payment made to a Claimant will be deducted from ~~any payment for a Final Claim due to the Claimant.~~

V. **REVIEW PROCEDURES**

A. Determination of Final Claims

1. The GCCF shall notify the Claimant when a claim is deemed sufficiently complete.
2. After a claim is deemed sufficiently complete, the GCCF shall determine within 90 days whether payment ~~is due~~ to the Claimant, ~~the claim is denied, or to~~ request that the Claimant agree to an extension of ~~time~~ for additional evaluation by the GCCF.
3. Determinations of all claims will be guided, as applicable, by OPA and other federal law, and pertinent state law.

- Deleted: to make
- Deleted: the initial 90 day period
- Deleted: , or deny the claim

B. Notification of GCCF Decision

The Claimant will be sent in writing the Final Decision regarding the claim, the amount of the determined compensation, and in the case of an eligible claim, a Release to be signed by the Claimant.

C. Acceptance of Final GCCF Decision

If the Claimant ~~accepts~~ the Final Decision, the Claimant ~~must~~ return a signed Release ~~to the GCCF~~. The Release will waive 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 National Pollution Funds Center.

Deleted: decides to

Deleted: shall

Deleted: to the GCCF

D. Appeals

1. If a Final Claim is denied or the Claimant does not agree with the monetary amount determined, the Claimant may appeal the Final Decision to the GCCF Appeals Board within 7 days of receipt of the Final Decision or the Claimant may pursue the claim as permitted under OPA (33 U.S.C. § 2013).
2. BP may appeal to the GCCF Appeals Board only if [the amount of the determination is over \$500,000] or if the Claims Administrator authorizes an appeal.
3. A Claimant, whose Final Claim is denied, or who does not agree with the monetary amount determined by the GCCF, and who elects to appeal such Final Claim or determination of the monetary amount may elect to proceed to mediation before there is a final determination of the appeal by the GCCF.
4. BP shall participate in any mediation in good faith, and such mediation shall not unduly delay the final decision by the GCCF.

E. Payment of Claims

Within 14 days of the receipt of the signed Release, the GCCF will issue payment to the Claimant.

F. Collateral Source Compensation

The amount of compensation will be reduced by ~~any~~ collateral source compensation that the Claimant has received due to the Spill.

Deleted: the

1. Payments that constitute collateral source compensation.

Collateral source compensation includes but is not limited to, insurance and payments by federal, state, or local governments related to the Spill.

2. Payments that do not constitute collateral source compensation.

Collateral source compensation does not include charitable donations and the value of services or in-kind charitable gifts such as provision of emergency housing, food, or clothing distributed to the Claimant.

## VI. REPORTING

The GCCF shall submit to BP periodic ~~[NOTE: Monthly? Quarterly? Annually?]~~ reports regarding claims determinations. The Claims Administrator may seek to consult with BP ~~as needed,~~

Formatted: Font: Italic

Formatted: Font: Bold, Italic

Formatted: Font: Italic

Deleted: from time to time

## VII. LIMITATIONS

~~All claims must~~ be submitted to the GCCF ~~within~~ three years ~~from the Effective Date of~~ this Protocol,

Deleted: No claim may

Deleted: more than

Deleted: after the date that

Deleted: becomes operative

## VIII. PRIVACY

Information submitted by a Claimant to the GCCF will be used only for purposes of processing the Claimant's claim for compensation under this Protocol. Other than as required by law, regulation or judicial ruling, ~~or to verify the validity of claims or payments made,~~ information submitted by a Claimant will not be disclosed to any person or entity who is not administering or processing claims for the GCCF, without the express permission of the Claimant. ~~[REASON FOR CHANGE; AS ORIGINALLY DRAFTED, THIS IS TOO BROAD. ALL INFORMATION SUBMITTED IN A CLAIM IS NOT PRIVILEGED. ALSO, UNDER VI., REPORTS WILL BE MADE TO BP AND UNDER IX., AN INDEPENDENT AUDITOR WILL PERFORM QUALITY CONTROL. ON ITS FACE, THE PROTOCOL CONTEMPLATES THAT INFORMATION AS TO THE AMOUNT OF CLAIM AND TYPE OF DAMAGE WILL BE DISCLOSED.]~~

Formatted: Font: Italic

Formatted: Font: Italic

## IX. QUALITY CONTROL AND PROCEDURES TO PREVENT AND DETECT FRAUD

### A. Review of claims

For the purpose of detecting and preventing the payment of fraudulent claims and for the purpose of accurate and appropriate payments to Claimants, the GCCF shall implement procedures to:

1. ~~Audit, v~~ verify and authenticate claims.
2. Analyze claim submissions to detect inconsistencies, irregularities, duplication, and multiple claimants.
3. Ensure the quality control of claims review procedures.

Deleted: v

### B. Quality Control

1. The GCCF shall institute periodic quality control audits designed to evaluate the accuracy of submissions and the accuracy of payments.
2. The GCCF shall engage an independent outside accounting firm to perform an independent test of claims to ensure that the claims have been accurately processed.

C. False or Fraudulent Claims

Each Claimant will certify at the time of application, under penalty of perjury, that the information provided in the application is true and accurate to the best of Claimant's knowledge, that Claimant understands that false statements or claims made in connection with that application could result in fines, imprisonment, and/or any other remedy available by law to the Federal Government, and that Claimant understands that suspicious claims will be forwarded to Federal, state, and local law enforcement agencies for possible investigation and prosecution. The GCCF will refer all suspected false or fraudulent claims to appropriate law enforcement authorities.

D. Awards to Individuals Providing Information on Fraudulent Claims

1. Individuals having knowledge of fraudulent claims, or misconduct within the GCCF, are encouraged to voluntarily and anonymously provide that information to the GCCF at 1-800-XXX-XXXX.
2. At the discretion of the GCCF, if the information provided results in the disclosure of fraudulent conduct on behalf of a claimant or individual associated with the GCCF, then the Claims Administrator may, at his/her discretion, provide a financial award to the individual(s) who reported the false or fraudulent claim.

Deleted: sign a form

Deleted: stating that he or she certifies

Deleted: his or her

Deleted: and

Deleted: he or she

Deleted: may

Deleted: f

Deleted: shall

Deleted: evidence of

Formatted: Indent: Left: 0 pt

Formatted: Indent: Left: 0 pt, First line: 18 pt

Formatted: Indent: Left: 36 pt, Hanging: 18 pt

## **APPENDIX B**

COMMENTS PREPARED BY INDIVIDUAL ATTORNEYS FROM THE ABA SECTIONS OF LITIGATION, DISPUTE RESOLUTION, ADMINISTRATIVE LAW & REGULATORY PRACTICE AND TORT TRIAL AND INSURANCE PRACTICE AND THE SPECIAL COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS  
(7/16/10)

**(NOTE: THESE COMMENTS HAVE NOT BEEN APPROVED BY THE ABA HOUSE OF DELEGATES, THE ABA BOARD OF GOVERNORS, OR ANY ABA SECTION COUNCIL, AND ACCORDINGLY, SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE ASSOCIATION OR ANY ABA ENTITY)**

### **COMMENT I**

1. How far from the moment and the scene of the spill will claims be recognized? There is a bar on claims remote in time and place. That bar has merit as a starting point but needs to be explored. Economic effects have a way of rippling, being underestimated or having a considerable "tail." I recognize the importance of defining limits but the geographical and temporal emphasis in the Protocol seems both vague and potentially unfair.
2. The Protocol seems to assume that claimants will have past experience to serve as a measure of present claims. While this is wise in most cases, it seems to exclude those without records, i.e., persons of limited means. It also works against those who were just starting out this year and had made diligent preparations that were thwarted by the spill. This is something to which you may wish to give additional thought.
3. The use of the notion of "proximate cause" is a troubling one. The legal definitions are all over the lot both in the case of different states and in the case of each individual state. Maybe you can't do better but perhaps you could give more thought to this. There is too much unpredictability in this concept. Perhaps the Protocol needs to consider a way to build a working definition of the term (perhaps by a fairly elaborate string of hypotheticals), most particularly for the guidance of its decision-makers. Otherwise, I fear competing definitions and rulings will spring up.
4. I'm worried about the vigor of the effort to get the claims forms into the hands of the injured. As a Special Master, you reached out to the 9/11 victims. Similar though less personalized efforts need to be embedded as a part of the Protocol. The elderly, housebound, illiterate, and technologically backward, etc., are likely to have great difficulty getting the forms. The team needs to have a plan and make an effort to reach them.
5. What will assure that the local claims offices will not turn into "welfare" style offices that see their mission as keeping a lid on claims? Some sort of inspection, testing, review and monitoring is necessary so that the process is oriented toward helping claimants, especially those easily discouraged, etc.
6. What will the incentives be for claims evaluators? Will they be encouraged to be generous or not? Processes like this often turn into efforts to reduce expenditures so that evaluators can show what a "good" job they are doing. The 9/11 process avoided that mentality. Is something being done to avoid it here? The people harmed are being asked to waive serious legal claims and should be treated fairly.
7. I would like to see more details about the fraud process. I think it is critical to root out fraud if processes like this one are to gain credibility and stand as an effective precedent for the future. Yet, as per comment number 7 above, how should the fraud discovery

8. I do not see any effort to address the potential risk of toxic torts. What should be done about those who eat poisoned fish or shellfish? Suffer disease or injury because of exposure to contaminated water, beaches, wetland or farmlands? Is it safe to assume that there is no toxic tort risk? That there is no time lag or "tail" until the manifestation of injury? The recent 9/11 proceedings involving workers at ground zero suggest that such an assumption may be both unwise and naive.
9. Should the waivers being secured cover claims regarding punitive damages pegged to misconduct that may not yet be disclosed? If so, would the deeds of BP warrant exemplary punishment? Perhaps this should all go to the states and federal government, but that kills incentives for private litigation.
10. On the death of a claimant how should his or her claim be handled? Extinguished?
11. There seems to be no opportunity for the injured to give voice to their claims/grievances. Such an opportunity was critical to the success of the 9/11 fund. It is a part of human nature to desire a chance for voice (see the work of Tom Tyler and others). Hearings of some sort should be considered.

## COMMENT II

In general, from the perspective of the administrative procedure, the claims process seems quite sound and appropriate for a process that is designed to be expeditious and somewhat informal. That being said, I set out below some matters that warrant further consideration.

1. Provision II.F. The attempt to define certain claims as not meeting the "proximate cause" requirement may present problems. The Protocol states that no compensation is owed if *"the Claimant's loss is a consequence of an injury to a third party proximately caused by the Spill (for example, the Claimant is a customer of or supplier to a business that has been injured)."* This would seem to deny compensation to employees who lose their job when a restaurant closes because it cannot obtain sufficient seafood or suffers a loss in business. It might also preclude a claim by a restaurant who relied on particular suppliers for seafood and who can no longer obtain it from those suppliers. Is this your intent or is the first basis for preclusion in Section II.F perhaps too broadly worded?
2. Provision III.C.2. The provision indicates that representatives of the GCCF will be providing advice regarding whether to file a claim — *"Claimants may visit one of the 33 Claims Site Offices established to assist Claimants with the claims submission process to (1) seek advice as to whether or not to file a claim."* To reduce the risk that potential claimants will suffer harm from erroneous advice given by lower-level employees, advice that results in the claimant deciding not to file a claim should be documented and reviewed by a supervisor. If the supervisor concludes that the advice is erroneous (which would include an employee's failure to note that a particular statement of law is subject to reasonable dispute), the potential claimant could then be contacted and given proper advice.

While advice from government employees is ordinarily not a ground for estoppel absent extraordinary circumstances, it may not be clear that such a proposition applies in the context of this compensation program. Perhaps a provision should be added indicating that the advice given potential claimants shall not give rise to any claim of estoppel or damages. So that GCCF employees and potential claimants know that the decision to file a claim is for the potential Claimant, not the GCCF employee, to make, perhaps the Protocol should provide that "Ultimately, the decision to file a claim is that of the potential

Claimant, and a claim should be accepted even if the GCCF representative has advised the potential Claimant not to file a claim.”

3. Provision III.D. To the extent that the claims evaluator will rely on any document to deny a claim, the evaluator should be required to give the Claimant an opportunity to review the document and seek to rebut or otherwise address the issues raised by the document. For example, a Claimant should be aware of the basis for a claims evaluator’s conclusion that its action was “inconsistent with the National Contingency Plan” and be able to address that issue.
4. Provision V.D. This provision should require that any Final Decision should include or be accompanied by a notice indicating the Claimants appeal rights. This is typically a requirement of administrative adjudication systems, and is particularly important given that many Claimants will neither be represented by lawyers nor be familiar with administrative adjudication. In addition, the seven-day period to appeal seems to be very short.
5. Provision VI. Given the intense and legitimate public interest in the oil spill and the claims procedure, as well as the significant consequences of the spill for the general public, periodic reports describing the progress of the claims program and statistical information (such as the number of claims made and accepted) should be made available to the public. I am assuming that the Freedom of Information Act is not applicable to the GCCF.

Also, decisions on appeals from initial determinations should be made public. This will allow for public evaluation of the program, will inform Claimants with regard to the requirements for establishing a claim and their likelihood of success, and may ensure that claims evaluators are more likely to decide claims accurately.

In addition, again to enhance Claimants’ abilities to effectively present their claims and to assure that the public can make an informed evaluation of the program, it would be helpful if any guidance provided to claims evaluators with regard to how they could evaluate claims perhaps should be made available to the public (unless such publication would result in circumvention of efforts to identify false claims). Such guidance documents might also benefit from use of brief and informal notice and comment procedures before or around the time they take effect. OMB has urged agencies to adopt such an approach in its *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3438 (2007) (“Although this Bulletin does not require agencies to provide notice and an opportunity for public comment on all significant guidance documents before they are adopted, it is often beneficial for an agency to do so when they determine that it is practical”).

### **COMMENT III**

Some initial reactions. The Protocol tracks the OPA fairly well, except as noted below. How well it will work with non-OPA claims, both federal and state, is more problematic. Also, the Protocol seems to assume that OPA claims preempt similar claims under maritime and state law, which is patently not true for admiralty and maritime claims (the OPA itself preserves them) and probably not true for state-law claims. As a result, I think that the Release requirement is probably the most problematic, especially for unrepresented Claimants. Given the ability to submit claims by web site, I would think that the Fund would be concerned about ensuring that unrepresented Claimants understand EXACTLY what they’re getting into. Finally, the idea that the Fund operators are going to be making decisions that interpret both federal common law and state tort law makes me a little queasy, but I suppose that that’s inevitable in any system that is trying to simplify claim procedures.

Some specifics:

1. The description of the types of claims could stand a user-friendly rewrite. The section describing damages incurred from the oil spill sections, in particular, needs a verb.
2. The Protocol suggests that its procedures are required before claimants file OPA claims, which presumably is true, but also non-OPA federal, and even state tort, claims. I don't think that can be right.
3. The description of the Release is awfully broad and seems to require claimants to waive ALL other claims against BP, not just the problem submitted. At the very least, the Release should be deemed to NOT waive claims arising AFTER the original submission.
4. Seven days is an awfully short appeals period. Also, the appeals provisions don't specify what claimants can do with non-OPA claims. Finally, I assume that BP has agreed to the differential appeals rules; otherwise, there could be a due process challenge.
5. For removal and clean-up costs, approval by the Federal On-Scene Coordinator is not required under the OPA, but I suspect that a court would uphold that requirement in this context.
6. The OPA has a three-year discovery rule. Depending on how long it takes BP to shut down the well, and how long the migrating oil remains a proximate cause of damages, and how courts interpret "proximate cause" in this context, claims may well still be arising more than three years after the Protocol takes effect. I assume that BP's lawyers understand that the Protocol cannot cut off those potential future claims.

#### **COMMENT IV**

Comments on specific portions of the Protocol follow:

##### II.B. Lessee/Owner

Lessee should be required to notify owner of a claim.

##### III.A, EXHIBIT A. Claim Form.

The Protocol should attach a sample claim form and instructions that provides a format to ensure that the claimants, particularly smaller claimants, provide all identifying and statistical information necessary for processing. The form should include an opportunity to supply a narrative statement and to attach documentation. There should be forms in translation for persons with limited English proficiency, which is currently specified only for internet forms (III.C.1).

##### III.D. Appointment with claims evaluator.

Perhaps the section should be retitled "Assignment to and Determination by Claims Evaluator," since only the second sentence relates to the appointment.

A claimant requesting an appointment should be able to request a translator or evaluator fluent in his native language. (Language assistance is currently provided only at the time of filing a claim in person. III.C.2) The Protocol should state that accommodations will be made for claimants with

disabilities. The Protocol should consider specifying cities or other locations at which evaluators will be made available. The Protocol should allow claimants to be represented by counsel at appointments and should permit claimants to request joint appointments. GCCF should consider allowing smaller claimants to choose and book appointment times and locations online.

GCCF should consider whether it should use video of any face-to-face meetings for auditing purposes. It should specify if the claimant can record the proceedings or indicate whether a record can be made available for the appeal to the GCCF Appeals Board ("internal appeal"). Particularly with regard to large cases, the Protocol should state whether the examiner can authorize BP to examine the claimant or witnesses.

#### IV.D. Non-waiver

The Protocol should clarify that a claimant may pursue alternative remedies until the claimant accepts a final decision (V.C), whether or not an emergency advance is sought.

#### V.B-C. Notification and Acceptance of Final Decision

If the final decision is subject to an internal appeal by the BP, it would appear that the claimant should not be asked to sign a release.

The first clause is limited to additional claims "against BP," the second clause refers to "individual legal actions" without any qualification, and the third clause refers to "other legal actions associated with the spill." Reference to "that claim" in final clause suggests that claimants may file "other claims" with NPFC. The Protocol should make clear whether the release extends in any respect to claims against parties other than BP or to prior or subsequent claims against BP not related to the spill. The Protocol should consider whether or not to have a choice of law clause for issues that may arise regarding the scope and effect of the release.

#### V.D. Appeals

The section should consider stating a standard for the claims administrator to authorize an internal appeal and the applicable standard of review. The section should consider stating a deadline for determination of the appeal.

#### IV.E Payment

This section should clarify whether any payment or partial payment is made where BP exercises an internal appeal.

#### VIII.E Privacy

In the case of large claimants and affiliates of BP (including major suppliers, government entities, and institutional customers), GCCF should reconsider the privacy policy in favor of public disclosure. This would ensure that BP did not unduly favor affiliates, government entities and business partners to the detriment of unrelated small claimants. In the case of smaller claimants, GCCF should consider qualifying the assurance of privacy to permit public disclosure of detailed statistical information that does not identify claimants, including the type and location of the claim, the award, whether the claimant appeared before an examiner, whether the claimant appeared through counsel, and the dates of filing and decision. This would provide increased accountability for BP and assure smaller claimants that the fund was being equitably distributed.

In all cases, the privacy policy should be given consideration regarding whether to modify it to permit BP to make voluntary disclosures to law enforcement officials in cases of suspected fraud or as a defense to duplicative claims in other fora.

## IX.B.2 Quality control.

GCCF should consider public disclosure, as limited above, as an additional means of assuring consistency and quality control.

## IX.C False Claims

The phrase "remedies available to the Federal government" may inadvertently imply the exclusion of BP's civil remedies for fraud. As noted above, perhaps the privacy policy should be modified to allow voluntary notification to law enforcement of suspected fraud.

### **COMMENT V**

1. There is no requirement set forth in the Protocol or Exhibit calling for evidence of the claimant's U.S. citizenship or legal residency. If this is an eligibility requirement, it should be clearly stated.
2. The \$500,000 cutoff for an automatic appeal right seems to be very high, both for individuals and small businesses. I would advocate for a much lower appeal right, at least for certain categories of claims.
3. Item B of Exhibit A should be expanded to include pertinent documentation for personal property, per Item B of the Protocol. The documentation identified in Item B of Exhibit A is pertinent to real property. Examples of additional items would be invoices/bills of sale; vehicle and vessel registration documentation, etc.
4. Item B of Exhibit A (first bullet point) ignores the implications of succession issues, particularly in Louisiana. It would be unfortunate if the tragic experience of dealing with successions after Hurricanes Katrina and Rita is repeated with this Claims Process. There should be some capacity for claimants to provide evidence of entitlement other than title or deed.
5. There doesn't seem to be a provision for the claimant to designate a representative and for the Claims Administrator to communicate concerning the claim with the designated representative. Again, in the case of many potential claimants who are elderly, disabled and/or of limited English proficiency, this would seem to be fundamental for fairness and due process.
6. Advocates who dealt with FEMA claims issues after the Gulf Coast Hurricanes (e.g., legal services providers) will have important insights and should be consulted.

### **COMMENT VI**

My limited comments concern the hearing and appeal process. However, I think the very general outline of the process seems reasonable in order to accomplish the intended goal of the claims process.

This Draft Protocol is similar to the process used by the 9/11 compensation commission for victims who were injured or killed. The one difference that I see is in section V. (Review procedures), subpart D (Appeals). In the 9/11 process, an appeal was heard by a single hearing officer who prepared a recommended decision to you as special master. In the Gulf Coast process, an appeal will be to an Appeals Board to hear from claimants who do not accept the Final Claim Award or a denial of a claim. Who are the members of the board, qualifications, etc? Also who will appoint the board members? I assume it will be you, but will BP or the federal/state governments have input into the board composition? Will one board be able to

handle the presumed high volume of claims? It may be necessary to have several boards. The draft Protocol does not indicate if the decisions of the board will be final or recommended decisions. Will the board be able to change the final award amount on their own or will it take approval by the Administrator?

In the great scheme of things, these are minor issues that I am sure will be worked out. I thought the 9/11 process operated quite efficiently. I think that this draft process will also work, hopefully, well. But the Gulf Coast problem is a much bigger problem and will cover a much larger number of claimants.

## **COMMENT VII**

### **GENERAL OBSERVATIONS:**

Between EAPs and FPs: It appears the exigent nature of the Gulf oil spill disaster might justify the utilization of a standard for recovering an Emergency Advance Payment ("EAP") that is less stringent than the standard applied for recovering a Final Payment ("FP"). Providing short-term relief and stabilization to affected populations is a legitimate purpose of this administrative process. However, having two different standards could cause confusion and open the door to litigation.

For example, what happens when a claimant initially satisfies the relaxed and abbreviated EAP standard, but upon more thorough review by the administering agency is found to not possess any legitimate qualifying claim? When the Gulf Coast Claim Facility ("GCCF") has the time to fully examine each claim and applies the higher standard of review, can it determine and take action on a finding that the claimant acted fraudulently or otherwise was not properly qualified to receive any funding (EAP or FP)? Is the GCCF authorized to demand a refund of previously tendered EAPs, or pursue legal action to recover those payments?

Likely Protests from Individual Claimants: Additionally, how will the administrative process as designed handle protests from applicants who are granted EAPs but denied FPs? From the layman's perspective, the obvious (although not necessarily logical) answer would be: "*I should not have to meet a higher standard for the Final Payment; either I am entitled to the money or I am not.*"

The administrative process as designed requires greater proof for FPs (for example, to demonstrate future losses). The average individual claimant likely will not have the documentation necessary, *i.e.*, accounting statements, expert opinions, *etc.*, to satisfy the requirements for obtaining an FP. If that is the case, a 90-day window for payments after the well is capped<sup>[1][1]</sup> is probably not going to be sufficient. On the other hand, keeping the EAP system in place too long could expose the process to abuse, fraud and charges of unjustified government largess. Are you considering requiring something like a post-90-days transition period wherein claimants are required demonstrate an effort to mitigate damages via attempting to obtain alternative employment, reducing overhead costs, *etc.*, as a prerequisite for filing claims after 90 days but within some greater time frame?

Defining the Requirements for Evidence to Substantiate a Claim: Section II (Eligibility) and Exhibit A contain numerous bullet points of required proof to substantiate an EAP or FP claim. However, no clear definition exists as to what standard of acceptance or "admissibility" will apply for those elements of proof. Must documents be originals? Are attesting affidavits required, above and beyond the attestation required by the claim process itself? If there is an evidentiary threshold (whether administrative or judicial), or other minimum requirement that must be

established as to demonstrating need (rather than just establishing identity and presence), it should be defined or referenced.

## SPECIFIC OBSERVATIONS:

### Section II (Eligibility)

#### A. Removal and Clean Up Costs

1. Who may make a claim?
2. Proof Required

These sections state that actions taken must have been approved by the Federal On-Scene Coordinator ("FOSC") and be consistent with the National Contingency Plan ("NCP"). For some individual claimants, it may not be easy to locate the nearest FOSC or to review and ensure compliance with the NCP before taking action. Should there be exceptions carved out for emergency situations? Or for instances when the claimant can demonstrate that despite not obtaining prior approval in strict compliance with the administratively-dictated process, his or her actions would have been or are of the type that are regularly approved by the FOSC?

An analogy in the insurance context is a policy that requires the insured to report a claim within a certain period of time from when the claim arises. Numerous state courts have held that the insurer cannot deny a claim based on the insured's failure to timely report the claim unless the insurer can prove that it was prejudiced by the delay. Should the same approach apply with respect to claims for clean-up costs? Unless the GCCF can demonstrate the claimant's failure to obtain approval for his or her clean-up efforts prejudiced the GCCF, BP, or the environment, should GCCF deny the claim?

#### B. Real or Personal Property

1. Who may make a claim?

The Protocol defines the scope of eligible claimants under this section as "an Individual or Business who owns or leases the property, but duplication of claims by owner and lessee will not be recognized." You might want to consider whether this scope of eligibility is unduly narrow.

Many of the businesses most likely to be affected, *e.g.*, restaurants and other hospitality industry venues located in the affected areas, are companies or business ventures that operate pursuant to some possessory interest other than a lease. Examples include restaurant or food & beverage management agreements, hotel operating agreements, and similar business arrangements whereby the property owner furnishes dominion and control over the subject property to the business venture in return for specified consideration (usually a percentage of gross or net profits from the business operated at the property). While this may sound like a typical landlord-tenant relationship, as a matter of law the management agreement or operator's agreement is not a lease. Should the Language in the Protocol be modified to account for these kinds of claimants?

#### D. Subsistence Use of Natural Resources

This category of claims will be difficult to administer. Any business that generates profits from or otherwise relies upon the use of natural resources should be able to recover under a lost profit or earning capacity claim. However, the individual claimants who arguably lost their ability to live off the land are likely to be unfamiliar and not conversant with administrative procedures. I don't see how such claimants would be able to prove their damages under the framework of this administrative process.

More important, how will the GCCF substantiate such claims? For example, how would individual claimants prove that they were catching fish to feed their family? Testimonials? Pictures? People who eschew conventional lifestyles and do not purchase food from grocery stores may not have access to video or pictures of them and their family fishing for survival. They certainly will not have any receipts for the natural resources they obtained from the land. If the GCCF is going to take people at their word on these claims, is it going to open the door to fraudulent claims that would be almost impossible to disprove? These questions are difficult to answer.

#### E. Physical Injury/Death

##### 2. Proof Required

It is unclear whether all or just some of the listed proof is required. Assuming that all bullet point elements are required, it would appear that the GCCF is eliminating claims for any injuries that do not result in total or partial disability.

For example, someone could slip on a tar ball, suffer a bodily injury, spend thousands of dollars on medical treatment and extensive time going through intensive physical therapy, and ultimately recover. However, that victim would not be entitled to recover for injury because he or she is not considered totally or partially disabled.

#### **Comment VIII**

Section II, B. 1: Who may make a claim? It says duplication of claims by owner and lessee will not be recognized. Neither recognized? Second one not recognized? One over the other or neither one? Sec. III C.1. Process for filing a claim via the internet. It says the Claim form must be signed by the Claimant. How does one do that if filing online?

#### **Comment IX**

You might consider having Ombudspersons serve during the evaluation process. Ombuds can assist the applicant in identifying documentation that they will need to support their claim. They should have language skills to speak to the applicant directly. In the dispute resolution world, the Ombuds is a neutral who assists the parties.

#### **Comment X**

You may want to give more consideration within the Protocol to the emergency needs of persons put out of business and who barely have enough money to put food on the family table, much less the employees who were laid off. People who are without funds would have trouble paying accountants the money necessary to review their books and records and then compile all the claims materials required for the claims process. You might want to consider having more detail on this in the Protocol and building more flexibility for up-front emergency claims.

Consideration might also be given to providing more help up front to people who need time to put together their claims for business disruption (destruction), lost profits, deteriorating equipment, etc. This area of up-front interim claims and interim payments needs particular work to help the innocent victims of the disaster.

#### **Comment XI**

##### 1. Remedies and legal assistance

For persons of limited means the GCCF will likely be a quick and efficient mechanism for relief and a pro bono lawyer can often be invaluable to help an individual perfect a claim. Toward that

end, we encourage the GCCF to include links on its website and information in its print material and through its claims site offices on how low income claimants may access pro bono programs. The ABA will be delighted to work with Gulf State Bars and legal services offices to provide this information. In addition, for those who do not qualify for pro bono assistance, links to credible lawyer referral programs should be provided.

2. Other benefits and remedies

For some individuals and small and large businesses, there may be other remedies, in addition to the BP fund, that the claimant may want to consider, and he, she or it may benefit from legal counsel in making this decision. Will the GCCF, as a matter of routine, provide information to claimants about other sources of benefits and payments, such as SBA loans or food stamps, including the option of bringing action in a state court? Will the GCCF make available information on lawyer referral programs so persons who can afford legal help have access to reputable referral mechanisms?

3. Exacerbating circumstances

While a hurricane or other disaster is not an intervening event triggered by the oil spill, these events may compound or worsen the original oil-spill related damages. Will claimants be able to seek compensation for damages arising from these subsequent events, including additional removal or clean up costs as well as loss of business that can be shown to relate back to the oil spill?