

# The Deepwater Horizon Oil Spill:

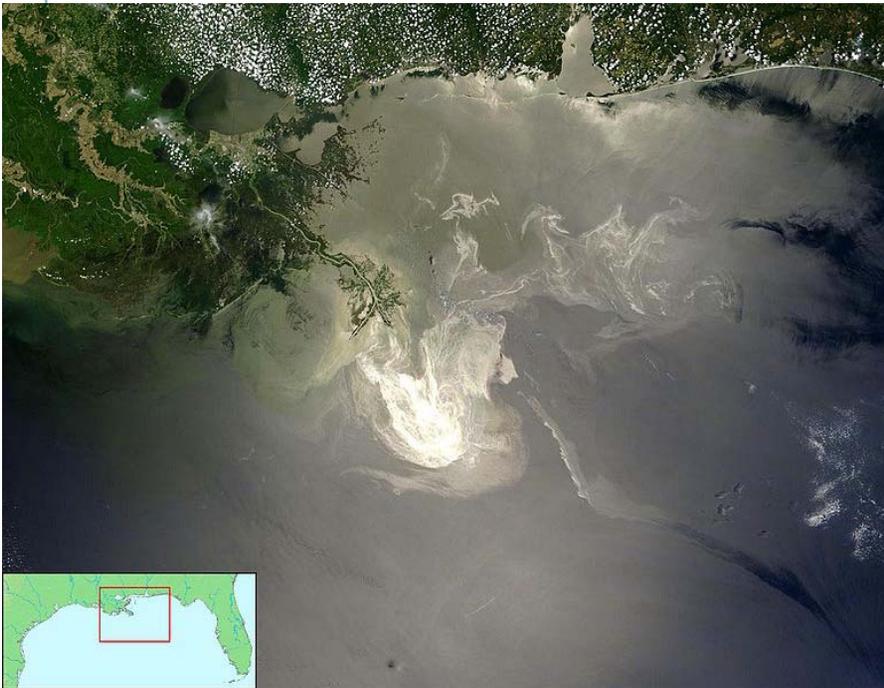
## Overview of Legal Issues & Damages Recovery



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# Impact of the Oil Spill



- At peak of the Spill, over 36% of Federal waters in the Gulf of Mexico were closed to commercial and recreational fishermen.
- Ocean Foundation utilized satellite data and estimates that 20% of juvenile bluefin tuna were kill in the gulf's most important spawning area.
- Samples of seafood have tested positive for Anthracene, a toxic hydrocarbon and by-product.



# Snapper and Red Fish Kills



# Impact of the Spill

- Thousands of fish and other wildlife were killed due to exposure to the Oil Spill.
- Even after the well was sealed, significant effects of the Spill continue to be seen.



As of February 2011, the rate of baby dolphins washing up on the shores of Alabama and Mississippi was 10 times the normal rate.



# Baby Dolphins in Gulf Coast



# Impact of the Oil Spill

The **U.S. Travel Association** estimated that the economic impact of the oil spill on tourism across the Gulf Coast over a three-year period could exceed approximately **\$23 billion**, in a region that supports over **400,000** travel industry jobs generating **\$34 billion** in revenue annually.



# Individuals and Businesses Harmed By The Spill: What Legal Remedies Exist?

- State law
- Federal Maritime Law
- The Oil Pollution Act of 1990 ("OPA") passed following the Exxon *Valdez* incident



# State Law Remedies

- OPA specifically does not preempt state law remedies. 33 U.S.C.A. § 2718.
- Florida, Alabama, Mississippi, Louisiana and Texas law may provide state law remedies to injured parties and allow recovery for economic losses incurred as a result of the spill.
  - See e.g. *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, (Fla. 2010) (allowing fishermen to recovery on both statutory and common law claims under Florida State law for polluting discharges into Florida waters.).
  - See e.g. La. R.S. 30:2451-2479 (Louisiana's Oil Spill Prevention and Response Act ("LOSPRA"))



# Federal Maritime Law

- To state a claim under federal maritime law, an injured party may be forced to establish that he or she has a “proprietary interest” in property that is physically damaged by the tortious conduct in order to recover their purely economic losses. *See e.g. Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5<sup>th</sup> Cir. 1985) (*en banc*).
- This rationale has been used to deny maritime recovery to, *inter alia*,
  - Shipping interests, marina and boat operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen. *Louisiana ex rel. Guste v. M/V TESTBANK*, *supra*.
  - Operators of a mooring facility that did not sustain physical damage to their property. *Reserve Mooring Inc. v. American Commercial Barge Line, LLC*, 251 F.3d 1069 (5<sup>th</sup> Cir. 2001).
  - Convenience store owners. *In re Taira Lynn Marine Number 5, LLC*, 444 F.3d 371 (5<sup>th</sup> Cir. 2006).
- An exception to this “propriety interest” rule does allow recover for commercial oystermen, shrimpers, crabbers, and fishermen who make commercial use of impacted waters, and they are allowed to recover despite the putative lack of a “proprietary interest” because of their special interest in utilizing those waters for their livelihood. *See Louisiana ex rel. Guste v. M/V TESTBANK*, *supra*.



# The Oil Pollution Act (OPA) of 1990

33 U.S.C.A. §§ 2701 et seq.

- Passed in response to the 1989 Exxon Valdez disaster.
- Comprehensive federal statute that is a Congressional recognition that then-existing state and federal laws provided inadequate damages and clean-up remedies.
- Allows for recovery of a variety of damages:
  - Damage to natural resources (recoverable by the USA or State trustees);
  - Damage to real or personal property (recoverable by any claimant);
  - Damages for loss of subsistence use of natural resources (recoverable by any claimant);
  - Damages for lost taxes, royalties, rents fees, or net profits (recoverable by governmental authorities);
  - **Damages for loss of profits or earning capacity (recoverable by any claimant);**
  - Damages for net costs of public services during or after removal activities (recoverable a State or its political subdivisions);



# OPA: Introduction

- Two avenues for recovery under OPA:
  - (1) the Responsible Party (RP); and
  - (2) the Oil Spill Liability Trust Fund (OSLTF-U.S.C.G).
- Strict liability for RPs.
- RP is identified by the Coast Guard or the President.
- Damages generally capped at \$75 million per incident for a RP unless there was gross negligence or violation of federal regulations.



# OPA: Introduction

- Savings clause in OPA preserves certain state and maritime remedies;
- Prior to filing suit, an injured party must first file claim with the RP and give 90 days to respond.
- Third parties not named as an RP are not subject to OPA unless the RP establishes that they are the sole cause of the accident.



# OPA: Recoverable Damages

- OPA abolishes *Robins Dry Dock* economic loss rule where it is applicable. *Robins Dry Dock* is the 1927 US Supreme Court *case* that precludes recovery by those who suffered economic losses without any accompanying physical damage to their property (although some courts recognize exception for commercial fishermen). *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Union Oil Co. v. Oppen*, 501 F.2d 558 (C.A.9 1974).
- OPA dispensed with this rule for claims against the responsible party. 33 U.S.C. 2702(b)(2)(E)



# OPA: Responsible Parties

- Under OPA, the President or the Coast Guard can identify “responsible parties”
  - BP Exploration & Production, Inc. and Transocean, Holdings Incorporated have been designated as responsible parties by the Coast Guard.
  - Transocean disputes that it is responsible for any contamination other than that from the drilling platform itself, has not created a claims process, and has invoked its rights under the 1851 Limitation of Liability Act to limit its financial responsibility for the spill to \$27 million.



# OPA: Claims Process --- What Happens After A Claim Is Submitted?

- Once a claim is presented to the responsible party, the responsible party has the following options:
  - 1) It may deny all liability for the claim;
  - 2) Make a partial payment of the claim; or
  - 3) Pay the claim in full.
- If a claim is not fully satisfied within 90 days of its presentation to the responsible party, the claimant retains a variety of options.



# The Gulf Coast Claims Facility

- The GCCF was created by BP to administer the OPA-mandated claims process given its designation as a responsible party.
  - As noted by Judge Barbier, “Mr. Feinberg was appointed by BP, without input from opposing claimants or the Plaintiffs’ Steering Committee (“PSC”), and without an order from the Court,” and that Feinberg was not “a Presidential appointee...”



# The Gulf Coast Claims Facility

- The GCCF is headed by its administrator Kenneth Feinberg, and has access to a \$20 billion fund created by BP to pay for its damages and clean up liabilities arising out of the Spill.
- Kenneth Feinberg's firm compensated \$1.25m a month by BP to operate the GCCF.



# The GCCF: \$75 Million Cap Inapplicable

- BP has waived the \$75 million cap on OPA damages liability, and the GCCF is accepting claims for non-OPA damages (i.e. personal injury and death).



# The GCCF: Presentment Under OPA

Dear Judge Barbier:

At the October 15 status conference, the Court asked BP's counsel to confirm that presentment to the Gulf Coast Claims Facility (GCCF) constitutes presentment to BP as a designated Responsible Party under OPA 90. As we have stated previously, BP acknowledges that presentment to GCCF in accordance with the requirements of OPA 90 and GCCF procedures will be considered presentment under OPA 90, without any requirement that presentment be separately made to BP directly. The Court will recall this re-confirms what I said in open court in response to Your Honor's question on this subject at a hearing regarding oil sampling issues on July 27, 2010. For the Court's and the parties' convenience, I have enclosed an excerpt from that hearing.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Don K. Haycraft", with a long horizontal flourish extending to the right.

Don K. Haycraft

SOURCE: 10/22/10 Letter from Don K. Haycraft, counsel for BP, to Judge Barbier.



# The GCCF: Claims Overview

- Emergency Advanced Payment Claims
- Quick Pay Final Claims
  - Feinberg's new "squeeze play and pay" process of extracting releases from claimants
- Interim Payment Claims
- Full Review Final Claims
- Feinberg's new "Squeeze Play and Pay" process of xxxx claims.



# The GCCF: Emergency Claims

- Initially, businesses and individuals were allowed to submitted “Emergency Advanced Payment” claims.
- These claims were accepted November 23, 2010.
- GCCF has stated Claimants only had to submit minimal documentation to support these claims.
- Claims were to cover damages for the period from April 20, 2010 to October 1, 2010.
- GCCF now omits from its reports the number of claimants denied through the EAP process.
- As of April 4, 2011, 169,008 claimants were paid \$ 2,580,197,185.18 through the EAP Process.



# The GCCF: Emergency Claims-Denials Letters W/O Reason!

Prior GCCF Denials have stated, inter alia, that:

## **Dear Claimant:**

You submitted a claim to the Gulf Coast Claims Facility ("GCCF") for an Emergency Advance Payment for damages relating to the Deepwater Horizon Incident on April 20, 2010 (the "Spill"). After review of your claim, we have determined that your claim does not meet the criteria established for Emergency Advance Payments from the GCCF. Your claim was denied for the following reason(s):

In determining eligibility, the GCCF applies the same factors to every claim. The GCCF takes into account evidence of the connection between the asserted loss and the Spill, the nature of the claimant's job or business, and the extent to which the claimant's job or business is dependent upon injured property or natural resources. In weighing these factors, the GCCF has determined that you did not demonstrate that you lost profits or income as a direct result of the Spill. This decision is based on criteria that apply to all claimants seeking payments from the GCCF. This denial applies to your request for an Emergency Advance Payment and does not affect your right to submit a Final Claim for any damages or losses you sustained. However, in preparing any Final Claim, you should review the reasons set forth above for the denial of your claim for an Emergency Advance Payment. If you have any questions about the denial of your claim, contact the GCCF [contact info omitted]. For more efficient service, have this notice and Your GCCF Claimant Identification Number with you when you call.



# The GCCF: Emergency Advanced Payment --- Results?

- The State of Mississippi has taken issue with the GCCF's EAP program, noting that
    - Two-thirds of the claimants who filed for "emergency advance payments" from August 23, 2010 to November 23, 2010, were denied *any relief*. *Many of the one-third of "emergency" claimants who received* some compensation report that the compensation they received was far below the compensation to which they are entitled under OPA, and that the GCCF provided little or no explanation for the reduced payment.
- See 2/18/10 Briefing.*



# The GCCF: Final Claims

- On November 23, 2010, The GCCF issued protocol for Final Claims, as well as a Release and Covenant Not to Sue.
- Under the GCCF's protocol, Claimants may make a claim for a Final Payment.
- In order to obtain a final payment, "a claimant will be required to sign a release precluding the claimant from seeking further compensation from the GCCF, the Coast Guard, or in court from either BP or any other defendant companies allegedly responsible for the Oil Spill."  
*See 2/18/11 GCCF Final Protocol.*



# The GCCF: Final Claims

- For all final claims, both “Quick Payment” and “Full Review,” the GCCF requires claimants to sign a release that releases BP Exploration & Production and at least 123 other entities, the vast majority of which are not owned by BP.
- Commentators have noted that OPA does not authorize an RP to a “final” release from a claimant by any mechanism other than payment of the full amount ultimately owed.
- Commentators also note that the Coast Guard Regulations governing the OSLTF do not allow a broad release such as the one used by the GCCF.
- Under 33 C.F.R. 136.115, payment from the OSLTF “constitutes a release of the Fund for the claim,” and “precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the compensated claim.” (emphasis added).
  - The Coast Guard does not require the claimant to release the responsible party, or others, from any and all damages, known or unknown, and all theories of liability, but simply releases the claim for the amount compensated by the OSLTF.



# The GCCF: Final Claims --- Quick Payment Final Claims

- On November 23, 2010, The GCCF issued protocol for Final Claims as well as the Release and Covenant Not to Sue.
- Only open to individuals and businesses who received an EAP from the GCCF.
- Individuals receive \$5,000 and businesses receive \$25,000 without being required to provide additional documentation.
- These claims are processed within 14 days, rather than the 90 days or longer for Interim Claims.
- Claimants are required to sign the release noted above.



# The GCCF: Quick Payment Final Claims

- As of April 4, 2010, 501,209 total claims had been submitted to the GCCF.
- Of those 501,209 claims, 106,499 had submitted Quick Payment Claims.
- Of that 106,499, 102,314, or 96%, had received Quick Payments, totaling \$957,825,000.00
- By comparison, 98,056 had filed Full Review Final Claims, of which 6,933, or 7% had received payment totaling \$83,982,900.34
- Similarly, 68,536 claimants had filed Interim Claims, of which 4,554, or 6.6% had been paid a total of \$50,379,971.95.



# The GCCF: Interim Claims

- In a January interview with Bloomberg, Mr. Feinberg stated that the “Interim claims program has not been implemented yet.”
- Between November 23, 2010 and February 2011, no interim claims were paid.
- Protocol for Interim Claims was not finalized until February 18, 2010, nearly three months after GCCF terminated the EAP program.



# The GCCF: Interim Claims

- As of April 4, 2011, only 6.6% of the Interim Claims submitted to the GCCF had been paid.



# The GCCF: Eligibility Criteria --- Physical Proximity to the Oil Spill

- Neither physical proximity to the Oil Spill nor a particular type of work or business engaged in by the claimant is a prerequisite to eligibility for payment of a claim. But adequate documentation of damage attributable to the Oil Spill is required. *Physical proximity to the Oil Spill, and the nature of the business or work engaged in by the claimant, are important factors when it comes to the proof needed to document a claim that the damage was caused by the Oil Spill.* (emphasis added).
- See 2/18/11 Final Protocol.



# The GCCF: Eligibility Criteria --- Requirement that Oil Spill Caused Loss

- Claimants must submit evidence sufficient in the eyes of GCCF's accountants and attorneys that "link[s] the alleged damage to the Oil Spill --- as opposed to other factors such as a general downturn in the Gulf region economy or other financial uncertainty unrelated to the Oil Spill...."
- *Id.*



# The GCCF: Eligibility Criteria --- Other Key Provisions

- “The GCCF will evaluate each claim to determine whether a loss was caused by the Oil Spill. Each claim will stand on its own individual merits.”
  - Potential for inconsistent treatment of similarly situated individuals.



# The GCCF: Eligibility Criteria --- Other Key Provisions

- “Claimants who were deemed ineligible for a GCCF Emergency Advance Payment are invited to resubmit a claim seeking a Final Payment or an Interim Payment, accompanied by documentation proving a connection to the Oil Spill.”
  - Critics have claimed that rejection letters for Emergency Advanced Payment claims were vague, and provided no guidance as to what the perceived deficiencies were, such that it is impossible to remedy these perceived problems in Interim or Final Payment Submissions.



# The GCCF: Eligibility Criteria --- Other Key Provisions

- Individuals who were injured or killed due to the Oil Spill are eligible to receive compensation from GCCF.
  - This takes the scope of the GCCF beyond OPA.
- Claims related to the moratorium on deepwater drilling, property damage claims for vessels used in the Vessels of Opportunity Program and claims by all Government entities are ineligible for compensation from the GCCF.



# The GCCF: Eligibility Criteria --- Other Key Provisions

- The GCCF has indicated that business claimants need to provide the following information to establish lost profits:
  - List of customers/suppliers within Gulf region
  - Evidence of cancelled orders/agreements/contracts as a result of the oil spill
  - Evidence of modified orders/agreement/contracts as a result of the oil spill
  - Historical evidence of consistently placed orders
  - Third party affidavits/letters
  - Third party invoices/receipts
  - Evidence of the traditional location of the affected business activity



# The GCCF: OPA & Proximate Cause

- The United States has specifically indicated that “OPA compels compensation to all individuals and business harmed “as a result” of the oil spill. 2/18/11 Brief of United States.



# The GCCF: OPA & Proximate Cause --- The State of Florida's Position

- As noted by the Attorney General for State of Florida, "While OPA requires the payment of all claims 'that result from' an oil spill, *see 33 U.S.C. § 2702*, the GCCF has attempted to implement additional, improper barriers to eligibility at various times, such as proximate cause or geographic proximity, but it is virtually impossible to tell if improper claims decisions are being (or have been) made based on these concepts without access to the claims data." *See 2/18/11 Brief of Pamela Jo Bondi, Attorney General, State of Florida.*



# The GCCF: OPA & Proximate Cause --- The State of Mississippi's Position

- As noted by the State of Mississippi, there is no “geographic proximity” requirement for recovering damages under OPA:

OPA does not require claimants to show geographic proximity to oil to be eligible to file for or receive compensation. Indeed, OPA envisions that claimants will be eligible for compensation for damages relating to the mere threat of a discharge of oil. Specifically, OPA states:

## § 2701. Definitions

For the purposes of this Act, the term –

....

(14) “incident” means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge *or substantial threat of discharge of oil* (*emphasis added*);

....

## § 2702. Elements of liability

### (a) In general

Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, *or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone* is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident. (*Emphasis added*).

Thus, under the express language of OPA, compensation may be due even when no actual discharge of oil has occurred.

See 2/18/11 Brief of the Attorney General of Mississippi.



# The GCCF: OPA & Proximate Cause --- The State of Alabama's Position

- The Attorney General of Alabama has taken issue with the GCCF's "direct causation" requirements.
  - We see three primary problems with the GCCF mandating proof of "direct causation" to achieve eligibility, rather than a simple "but-for" test.
    - "First, a direct causation requirement ignores the symbiotic relationship of Gulf Coast businesses with beach-related tourism...."
    - Second, OPA requires payment of damages that occurred "as a result of" the oil spill, regardless of whether the damage was "direct" or "indirect". If a business can document that it lost profits "as a result of" the oil spill, even if that business is one step removed from the beach/oil, it is entitled to be compensated under OPA...."
    - "Our third concern [is] The GCCF (and BP by proxy) possesses the sole discretion of choosing which damages were, or were not, 'directly' caused by the oil spill...."

*See 2/18/11 Brief of the State of Alabama*







# The GCCF: Calculation of Awards For Final and Interim Payments

- For Interim Claims, "The GCCF will base its calculation of awards for Interim Payments on actual documented losses incurred by a claimant during the period immediately following the Oil Spill on April 20, 2010 and the date the Interim Claim is filed."
- For Final Payments, the GCCF will base its calculation on two important factors:
  - 1) actual documented losses incurred by the claimant from the date the losses began since the Oil Spill on April, 2010 and,
  - 2) a recovery factor to value the risk of possible future losses as determined by the retained experts and other input received during the public comment period.



# The GCCF: Valuation of Claims

- For valuation of future losses, the GCCF utilizes 2010 figures.
- Future losses will only be paid for two years based on the two-week study of a marine biologist at Texas A&M who wrote a paper commissioned by Feinberg based on review of other Oil Spill literature and not empirical research.
- The GCCF's protocol states "The calculation of future losses will be based upon the actual losses incurred during the period immediately following the Oil Spill on April 20, 2010 through December 31, 2010."
- This means that year 1 of the loss has been shortened by 109 days to 256 days. Thus, Year 1 of the impact, as defined, captures only 70% of the first Fiscal Year's losses following the incident.



# The GCCF: Documentation Required to Establish Loss

- For businesses claiming lost profits:
  - (a) Provide federal income tax returns for 2008 and all subsequent years up to your most recently filed return. Include all W-2 forms, 1099 forms, and other attachments or schedules to each return. If any of your prior-year federal income tax returns are not available, provide a statement explaining why.
  - (b) For any prior year for which you cannot provide a federal tax return, and for the current year through the date you are claiming a loss, you still must establish your revenue and income history for the entire period with at least one of the following sources:
    - (i) Monthly and annual Profit and Loss statements.
    - (ii) Monthly sales and use tax returns.
    - (iii) For seafood harvesting businesses, a report, obtained from the applicable governmental agency, of the claimant's landings since January 1, 2008.
    - (iv) For new or start-up businesses, all available financial statements and business plans.
  - (c) In addition to federal tax returns, any business claimant seeking more than \$200,000 must submit monthly and annual profit and loss statements from 2008 to the present.



# The GCCF: Documentation Required to Establish Loss

- For individual claimants:
  - (a) Provide federal income tax returns for 2008 and all subsequent years up to your most recently filed return. Include all W-2 forms, 1099 forms, and other attachments or schedules to each return. If any of your prior year federal income tax returns are not available, provide a statement explaining why.
  - (b) For any prior year for which you cannot provide a federal tax return, and for the current year through the date you are claiming a loss, you must establish your earnings history for the entire period with at least one of the following sources:
    - (i) State tax returns, including all W-2 forms, 1099 forms, and other attachments or schedules to each return.
    - (ii) Paycheck stubs or other payroll records from all employment demonstrating all earnings from 1/1/08 up to the present.
    - (iii) A letter or other records from an employer that describe when you were working and your rate of pay and total earnings.



# The GCCF: Valuation of Claims

- The GCCF states that it will “use these actual documented 2010 losses to anticipate the gradual economic recovery expected to conclude within two to three years from the date of the Oil Spill.”
- The methodology utilized by the GCCF for projecting claimant’s losses will pay them 70% of their 2010 losses in 2011 and 30% of their 2010 losses in 2012. However, the initial value used by GCCF reduced the 2010 losses by 30% by focusing on the calendar year rather than the entire first year of the Spill’s impact. (April 20, 2010 to April 19, 2011).



# The GCCF: Valuation of Claims

- Calculation of future losses are also based upon actual losses for only the April 20, 2010-December 31, 2010 period. In essence, the GCCF's two years of future damages is actually 16 months of damages, less prior payments received by the claimant.
- Final payment factors and valuation are to be revisited every 4 months, so payment factors may decrease at the sole discretion of the GCCF and its retained experts.



# The GCCF: Valuation of Claims

- The GCCF will determine Final Payments for claimants with losses greater than \$500,000 on an individualized basis, so there is no guidance for such claimants.
- The protocol does not account for public perception of damages and future risks of re-oiling, all of which are “due to” the Oil Spill and compensable under OPA.

