

Deepwater Horizon: The OPA Claims Process and the Gulf Coast Claims Facility



Russell S. Kent
Special Counsel for Litigation
Office of the Attorney General



The Oil Pollution Act (OPA) of 1990

33 U.S.C. §§ 2701 et seq.

- Passed in response to the 1989 Exxon Valdez disaster.
- Chapter 376, The Pollutant Discharge Prevention and Control Act, actually predated OPA.



Responsible Parties

- The Coast Guard has notified Transocean and BP of their potential liability under OPA. Coast Guard directed BP to establish a claims process.
- OPA defines who the Responsible Parties are; also allows actions for contribution against others. (33 U.S.C. § 2702)





Remedies

- Removal / response costs (33 U.S.C. § 2702(b)(1))
- Damages (33 U.S.C. § 2702(b)(2))
 - Natural resources (compare to Fla. Stat. § 376.121)
 - Real or personal property
 - Governmental revenues (net loss of taxes, etc.)
 - Increased cost of providing public services



Concerns with the GCCF

- **Interim Payments**
- *Protocol*: Emergency advance payments are only available until November 23, 2010. The only reference to Interim Payments is that they may be available after November 23rd under “appropriate circumstances.” There is no appeals process for EAP decisions.
- *OPA*: requires BP to provide interim payments for short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled. 33 U.S.C. § 2714(b)(2). Claims for interim or final payments must be made within 3 years of the damage. 33 U.S.C. § 2712(h)(2).



Concerns with the GCCF

- **Proximate Causation**
- *Protocol*: refers to “federal law” of proximate causation, implying that claimants must prove causation in more rigorous manner than required by OPA. Adds an element of foreseeability to analysis.
- *OPA*: strict liability statute; damages simply must “result from” the incident. 33 U.S.C. § 2702(a). Only mention of proximate cause is in the limitation of liability context.
- *Problem*: Protocol creates greater burden of proof and increases uncertainty. Also limits comparable revenue period to January 1, 2008 to April 20, 2010.



Concerns with the GCCF

- **Geographic Proximity**
- *Protocol*: states that a criteria for eligibility is the “geographic proximity” to the area where oil reached shore or remoteness in time or place from the spill. May also result in a claim being paid only in part.
- *OPA*: a claim is compensable if the damage “resulted from” the spill. Does not mention geographic proximity or remoteness as a limiting factor.
- *Problem*: the use of geographic proximity would adversely impact many claims from Florida, despite the fact that BP has paid these kinds of claims. Since we raised the issue two months ago, Mr. Feinberg has made several inconsistent statements.



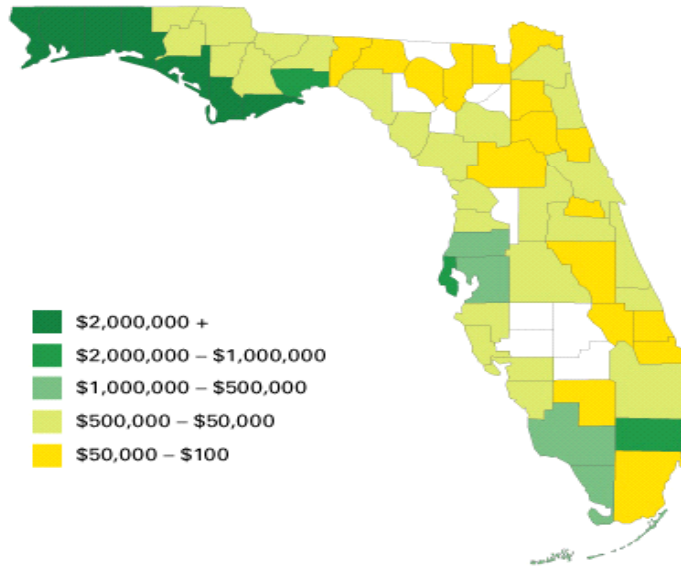
Concerns with the GCCF



Gulf of Mexico response: Florida

23 August 2010

Amounts Paid to Claimants by County



- \$2,000,000 +
- \$2,000,000 – \$1,000,000
- \$1,000,000 – \$500,000
- \$500,000 – \$50,000
- \$50,000 – \$100

\$81,000,000
paid to claimants in Florida to date

CLAIMS PAID BY COUNTY (in dollars)

Okaloosa.....	22,702,267	Liberty.....	87,45
Escambia	14,744,784	Indian River	85,396
Santa Rosa ..	11,349,842	Gadsden	78,381
Bay	8,040,787	Polk	72,085
Franklin	5,679,404	Calhoun	68,501
Walton.....	3,065,068	Jackson	62,270
Gulf	2,077,839	Volusia	60,681
Wakulla	1,679,336	Alachua	60,639
Pinellas	1,548,103	St. Johns.....	60,465
Broward	1,206,208	Charlotte	59,315
Pasco.....	978,610	Lake.....	58,167
Monroe	916,775	Marion	36,671
Collier.....	802,387	Miami-Dade.....	34,876
Hillsborough....	738,248	Clay	32,714
Leon	458,222	Jefferson.....	20,864
Duval.....	426,829	St. Lucie	18,498
Lee.....	409,756	Seminole	18,232
Levy.....	393,772	Martin	16,870
Hernando.....	367,390	Suwannee.....	10,593
Citrus.....	332,450	Baker.....	10,200
Orange	291,681	Nassau	9,604
Unknown	280,460	Putnam	9,433
Taylor	266,334	Madison.....	6,193
Manatee.....	197,786	Flagler.....	3,100
Washington	145,590	Columbia	1,538
Dixie.....	119,567	Okeechobee.....	1,392
Holmes.....	119,353	Osceola	1,071
Brevard	117,175	Hendry	964
Palm Beach.....	112,994		
Sarasota.....	101,804		

Sha



Concerns with the GCCF

- **Refiling**
- *Protocol*: states that all claims filed and pending with BP have been transferred to the GCCF, but the Press Release by the GCCF states that those claimants must refile their claim on the GCCF 18 page claim form.
- *Problem*: it is unclear whether refiling restarts OPA's 90 day processing clock. BP has already admitted delaying the resolution of thousands of claims in anticipation of the GCCF taking over.
- BP paid over \$81 million to Floridians. So far, the GCCF has received claims from 9,710 Florida businesses or residents and paid out \$4.3 million on 892 claims, less than \$5,000.00 per claim.



Concerns with the GCCF

- **Final Payments / Release**
- *Protocol*: No final protocol is available, however, the Emergency Protocol states that final claims may be made anytime, but the release language is not specified or discussed.
- *OPA*: release only “precludes the claimant from filing any subsequent action against any person to recover costs or damages **which are the subject of the compensated claim.**” 33 C.F.R. § 136.115(a).
- *Problem*: the release language is not disclosed or discussed. 620 Florida businesses or residents have already made final claims. Concern about releasing unknown claims or claims against other parties.



Concerns with the GCCF

- **Presentment**
- *Protocol*: “Whether or not a claim has been presented shall be governed by OPA and applicable law.” Does not state that submission of an Emergency Advance Payment claim satisfies the presentment obligation.
- *OPA*: a written request for a “sum certain” (33 U.S.C. 2701(2)) satisfies presentment requirement if it generally describes the nature and extent of the impact of the spill and associated damages. 33 C.F.R. §§ 136.105, 136.109. BP has 90 days from presentment during which to process and deny or pay claims, whether interim or final. 33 U.S.C. § 2713(d).



Presentation of Claims

- *Protocol* : filing a claim with the GCCF is “voluntary.”
- *OPA*: Presenting a claim to BP is a **condition precedent** to filing the claim with the OSLTF or going to court. *See, e.g., 33 U.S.C. § 2713(a); Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 240 (11th Cir. 1995).*
- *Problem*: The GCCF is the **only** existing process to present individual or business claims to BP. The only “voluntary” claims are personal injury or death claims, which are not compensable under OPA, but may be paid by the GCCF.
- BP has not waived the presentation requirement.
- The Oil Spill Liability Trust Fund is limited to \$1 billion per incident, with no more than \$500 million for natural resource damages. First come, first served.



Governmental Claims

- Governmental claims will continue to be processed by BP's adjusters but can be paid out of the \$20 billion fund. Obviously a concern about depleting the escrow fund with state and local government claims.
- So far, BP has paid out over \$10 million to counties that have made claims for roughly \$50 million. Cities and water management districts have also started making claims.
- Our office is available for advice on navigating this process. One issue involves the use of 2007-2010 as the comparable revenue period. On the lookout for other common issues.
- Governmental claims protocol should be available later this week. Witt Associates will act as the point of contact.



Conclusion

QUESTIONS?