

**Alabama Appleseed Center  
For  
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July 28, 2010

Kenneth R. Feinberg, Esq.  
Claims Administrator  
Gulf Coast Claims Facility  
c/o Feinberg Rozen, LLP  
The Willard Office Building  
1455 Pennsylvania Ave., NW  
Suite 390  
Washington, DC 20004-1008

**Re: Gulf Coast Claims Facility Draft Protocol (Draft #9)**

Dear Mr. Feinberg:

The undersigned representatives of legal services providers and public interest law organizations in the states affected by the BP oil disaster write to comment on the Gulf Coast Claims Facility (GCCF) Draft Protocol (Draft #9). Each of these organizations has been involved in some form of disaster relief and recovery, either in connection with Katrina or the 9/11 attacks. Our collective experiences offer unique insight into the challenges facing the individuals, businesses, and locations damaged as a result of, or due to, the "Spill". We offer you our assistance, through these comments to the Draft Protocol and the attached Appleseed legal memorandum, in achieving a successful program for all Claimants harmed as a result of the Spill.

As detailed below, there are several structural and other problems with the Draft Protocol that require further review. The Protocol that will govern this process should be designed to assure the just, speedy, and inexpensive determination of every claim. It should permit informed decision-making by each Claimant at every stage of the process from determining whether to file a claim through assessing whether to accept the Final Decision and

execute the Release. Transparency is essential for other reasons as well, including managing expectations, reducing rejection rates, and promoting trust in the fairness of the process.

The Draft Protocol leaves many important questions unanswered, particularly in the fundamental areas of eligibility, causation, and damages calculation. Generic references to vast bodies of statutory and common law do not provide useful information to the average claimant, who may not have legal counsel. Claims Evaluators, who are responsible for determining eligibility and related causation issues, are presumably not making those decisions in their individual discretion, but will need to be given detailed guidelines to apply. Those guidelines should be published so that the Claimants may intelligently assess, when deciding whether to file a claim, their likelihood of qualifying for a compensable award. The methodology used by the GCCF to calculate awards also should be published so that each Claimant may assess the range of the potential award and be assured that similarly situated Claimants will receive comparable awards.

Every effort should be made to streamline the claims process. We recommend that you consider the Track A/Track B procedure that you used, to great effect, in the September 11th Victim Compensation Fund. Track A could be reserved for categories of similarly situated Claimants for whom causation might be presumed and damages could be calculated pursuant to a preset, published formula. If a Claimant prefers to make a more complex showing of individualized circumstances, s/he could elect to proceed on Track B.

The Release provision causes particular concern. As discussed below, we recommend: (a) eliminating the waiver of suit against responsible parties other than BP, and (b) amending the Release to allow claims for damages that were not known or foreseeable at the time a Final GCCF Decision on a prior claim was accepted. Absent these adjustments, Claimants would be well-advised to wait to file until the end of GCCF's three-year life in order to preserve their right to recover the totality of their losses. Another unintended consequence of the current draft process is that it may disadvantage the most financially distressed Claimants, who must come to GCCF early and before they may know the full extent of their losses.

These recommendations and others of a more specific nature are surveyed below. We believe that, if implemented, they will contribute to the success of this program, which is crucial to the wellbeing of those harmed as a result of the Spill.

\* \* \*

1. Purpose: This section should be extended to include a mission statement. The mission statement should: (a) reiterate BP's commitment that the \$20 billion contribution to the GCCF is not a cap on liability; (b) confirm the GCCF's commitment to fair and reasonable compensation for all damages incurred as a result of the Spill; (c) assure administration of the GCCF to secure the just, speedy, and inexpensive

determination of every claim; and (d) apply criteria that are consistent with, and no more restrictive than, the provisions of the Oil Pollution Act of 1990 (OPA), OPA regulations, and analogous law (see attached Appleaseed Comments on GCCF Draft Protocol No. 9).

2. Eligibility: The GCCF's stated Purpose is to pay "claims by Individuals and Businesses for costs and damages incurred as a result of the oil discharges due to the Deepwater Horizon incident on April 20, 2010." (Section 1: Purpose). Yet, the Eligibility and Causation sections work together to exclude Claimants whose "costs and damages [were] incurred as a result" of the Spill. Claimants are ineligible if their losses are: (1) "a consequence of an injury to a third party proximately caused by the Spill (for example, . . . a customer of or supplier to a business that has been injured);" (2) "remote in time or place to the Spill"; or (3) "the result of intervening events triggered by the Spill." These provisions may unfairly exclude, among others: (a) employees who lose their jobs or suffer reduction in income resulting from, or due to, the Spill's adverse impact on their employers' businesses; (b) individuals who manifest symptoms of illness several years after the well is capped, but within the GCCF's three-year life; and (c) compensation for severe emotional distress resulting from, or due to, the Spill as provided under applicable state law.

Section II.C of the Draft Protocol is entitled "Lost Profits and Lost Earning Capacity." The section should be revised to make plain that: (a) claims by employees who have lost wages or been laid off as a result, for example, of the Spill's adverse impact on their employers are compensable (e.g., a restaurant worker or hotel housekeeper who is laid off or reduced to part-time as a result of the Spill's adverse impact on tourism); and (b) claims by employees who lost wages as a consequence of a Spill-related physical injury that does not qualify as a total or partial disability (e.g., a broken arm sustained in a clean-up operation). The GCCF also should create an eligibility category for individuals who can establish severe emotional distress resulting from or due to the Spill, consistent with applicable State law. Accordingly, the section should be revised to include loss-of-income as a compensable category and to broaden eligibility beyond those who incurred damages "due to the injury, destruction, or loss of real property, personal property, or natural resources that are used by the Claimant." (Section II.C.1, emphasis added).

The Eligibility section (Section II.B.1) permits claims to "be made by an Individual or Business who owns or leases the property, but duplication of claims by owner and lessee will not be recognized." Non-duplicative claims arising out of the different interests of, and different losses sustained by, owners and lessees should be compensated by the GCCF. When duplicative claims are filed, however, the Draft Protocol is silent as to which claim will be given priority, what allocation methodology (if any) will be used, and who is responsible for making these decisions (e.g., Claims Evaluators? Claim Administrator? Court?). We suggest that the GCCF include in Final Claims decision letters an allocation of awards in cases of duplicative claims to avoid expensive court proceedings and permit informed decision-making.

The Draft Protocol's "remote in time or place from the Spill" limitation needs to be better defined in published criteria. Any harm resulting from, or due to, the Spill that is the subject of a claim filed during the GCCF's life should be eligible for compensation. Artificial time or geographical barriers should not be erected to preclude full compensation to individuals or businesses that incurred damages resulting from, or due to, the Spill.

The Draft Protocol provides: "The Claims Evaluator will review the claim for. . . eligibility." (Section III.D). There has been no disclosure of who the Claims Evaluators are or what their qualifications will be. Because the Claims Evaluators are responsible for making the eligibility decisions, which may incorporate complex causation questions, we recommend that they have legal training. We also recommend that the GCCF publish the eligibility guidelines that the Claims Evaluators will apply. This will give fair notice to the Claimants, manage expectations, and streamline the process.

3. Causation: The Causation section invites complex legal analyses that will bog down the process, require representation by counsel and expert regression analyses in too many cases, and exclude otherwise eligible Claimants. To simplify the process, we suggest that guidelines be formulated and published identifying appropriate recurring circumstances in which causation will be presumed.

Although the section represents that "[t]he GCCF's determinations will be guided" by applicable statutory and common law, it deviates from those authorities in material respects. The appended memorandum from Appleseed identifies provisions in the Draft Protocol that deviate from, restrict, or conflict with, OPA's provisions and regulations, which, in contrast to the Draft Protocol, apply broad causation principles. In addition, the Draft Protocol deviates from common law causation principles by excluding claims for damages that are "the result of intervening events triggered by the Spill." (Section II.F.3). In the common law, intervening events do not result from the tort, but rather are unforeseeable and independent of the tort. The common law also recognizes that damages may result from a combination of events, only one of which is the tort. Regression analyses are used in court cases to identify the causes and to apportion fault among them. The Draft Protocol should specifically address multiple causation cases and how they will be handled in the claims process.

4. Emergency Advance Payment: The Draft Protocol sunsets the Emergency Advance Payment provision "90 days after the date the GCCF posts on its website that the well has been successfully closed." This artificial limitation on Emergency Advanced Payment claims has no basis in the OPA. (See attached Appleseed Comments on GCCF Draft Protocol No. 9). In recognition of the fact that problems with the well may occur after the website posting or that Claimants may "experience[e] financial hardship resulting from damages due to the Spill" requiring an expedited response after the posting, we recommend that the Emergency Advance Payment program continue after the posting in appropriate circumstances. We recommend that the GCCF should publish: (a) criteria for Emergency Advance Payments; (b) the circumstances in which extensions

will be granted; and (c) procedures for an expedited renewal process to avoid monthly applications that consume GCCF resources and put Claimants, requiring emergency relief, at risk that their recovery will be disrupted.

5. Collateral Source Compensation: The Draft Protocol defines “collateral source compensation” to “include [] but is not limited to, insurance and payments by federal, state, or local governments related to the Spill.” (Section V.F.1). This provision shifts the burden to employers and the government to pay for damages caused by BP. If these collateral source payments are to be charged against the Claimants, then BP should at least reimburse affected employers who come into the GCCF for related unemployment/workers compensation insurance costs.

Exhibit A, Section C.1, of the Draft Protocol anticipates offsets for failure to mitigate damages. Yet, the main text of the Protocol does not specifically address this subject. If mitigation of damages is a component of the award formula, then that should be plainly stated, so that potential Claimants will have fair notice of this requirement, and the guidelines on mitigation and how it will be factored into the award calculus should be published.

6. Presentment of a Final Claim: The Draft Protocol does not append the Claim Form(s). Issues to be considered in drafting those Forms include: (a) the Claim Forms should be available in all languages spoken by the affected populations; (b) absence of a Social Security Number should not automatically disqualify a Claimant, and a link to the IRS website’s section on applying for Tax Identification Numbers should be included in the instructions; (c) a highlighted statement of which awards (or components of an award) will constitute taxable income and a link to the IRS website on the tax consequences of a GCCF award; and (d) a “plain English” Release provision with “plain English” warnings that the Final Award is conditioned on signing the Release, which (as it currently appears) protects not only BP, but all other responsible parties.

7. Determination of Final Claims: The GCCF determines whether, and how much, to pay the Claimant. The identification of the actual decision-maker(s) and their qualifications are not provided, but should be. We also recommend that the methodology that will be used to calculate the economic loss awards should be published.

8. Acceptance of Final GCCF Decision: Acceptance of the final award is conditioned on the Claimant’s waiver of rights, *inter alia*, “to participate in other legal actions associated with the Spill. . . .” The impact of this Release would preclude Claimants from suing parties, other than BP, for damages caused by the Spill, even though those parties have not contributed to the GCCF. We recommend that the Release be limited to contributors to the GCCF.

The Release would prevent a Claimant, who accepts a final award, from filing a subsequent claim for damages that were not known to the Claimant or foreseeable until after the

original claim has been accepted. For example, a claimant could receive an award for lost wages only to discover later that s/he has been injured as a consequence of working on the clean-up effort. Claimants may find it advisable to wait until the end of GCCF's three-year life to file in order to assure full recovery on the totality of their losses. The unintended consequence of this process is to disadvantage the most financially distressed Claimants, who must come to GCCF early and before they may know the full extent of their damages. It also tends to skew the filings toward the end of GCCF's life.

We therefore recommend: (a) eliminating the Release provision that waives suit against responsible parties other than BP; and (b) changing the Release so that it does not prevent claims to be filed, after a Final Decision, for damages that were not known or foreseeable when the Claimant accepted the Final Decision on the original claim. The Protocol should also state that, unless and until a Claimant accepts a Final GCCF Decision and executes a Release, that Claimant reserves the right to file claims under the OPA, in State court, or through other available avenues, so long as those claims are within the applicable statutes of limitations of the respective courts or tribunals.

9. Appeals: The seven-day period to file an appeal from a Final Decision should be extended to 60 days, and provision should be made for further extension upon good cause shown. This is necessary to assure that the right to an appeal is not compromised by a draconian limitations period. The procedures for an appeal should be published, including the right to a hearing, and the appellate panel should be identified. Moreover, there appears to be no legal authority, and none is cited, that gives BP standing to file an appeal contesting a Final Decision determined by GCCF, which is "fulfill[ing] BP's obligations as a designated Responsible Party to establish a claims procedure. . . ." (Draft Protocol, p. 1 n. 1).

10. Reporting: This section authorizes "[t]he Claims Administrator [to] seek to consult with BP from time to time." To highlight the essential independence of the Claims Administrator our strong recommendation is that this section should state that there shall be no such consultation at all. If such consultation is ever to take place it must be on a specific claim or claims, should be on notice to, and with the consent of, the relevant Claimant(s); the Claimant(s) should be allowed to appear and be heard in any such consultations, and all consultations should be transcribed. To do otherwise would negatively impact the fairness, and perception of fairness, which must govern these proceedings.

11. Required Information/Documentation for a Claim for Final Payment: Quite properly, these provisions recognize that proof may be submitted in any form "equivalent in probative nature" to the documentation identified in Exhibit A to the Draft Protocol. For example, Exhibit A, Section C.1, requires proof of job-search and job-hunting expenses for "Employee Claims." Proof of receipt of Unemployment Compensation or Temporary Assistance to Needy Families should constitute "proof

equivalent in probative nature” to expense records, because Claimants receiving those benefits would have been required to meet strict job search requirements in order to qualify for relief.

Claimants who do not have prior tax returns or Social Security Numbers may face collateral, unintended consequences by filing with GCCF. These Claimants, who may be among the most vulnerable, should be encouraged to come forward, and their employers should be encouraged to provide documentation necessary to complete a claim. To that end, we urge you, as Claims Administrator, to seek no-action letters from the Department of Homeland Security for immigrant claimants and from the Internal Revenue Service and State taxing authorities for claimants who owe fines/penalties/interest for prior tax years at issue in this process.

The GCCF should provide services to translate documents submitted in support of claims and other assistance to low income Claimants, who do not have the means to pay for the required documentation or its verification. All GCCF Claims Site Offices should: (a) be accessible to the disabled; (b) have on staff translators proficient in the primary languages used in the community where the Site Office is located; (c) have available an informed staff member who can guide the Claimant through the mechanics of the process, and (d) publish a flowchart/timeline to assist in understanding the requirements for filing, prosecuting, and appealing a claim. In addition, there should be a 24-hour, toll-free help line set up with informed personnel proficient in the primary languages spoken by the claimant population.

Section III.C.2 (1) of the Draft Protocol anticipates that Claimants may “seek advice as to whether or not to file a claim” from personnel at the GCCF Claims Site Offices. The decision about whether to file a claim, however, involves complex legal questions on matters pertaining to, *inter alia*, eligibility, causation, damage calculations, release and waiver, tax issues, etc. Advice on these legal issues can be competently offered only by a qualified attorney with no conflict of interest, *i.e.*, an attorney independent of BP and all other released parties. Accordingly, GCCF site office personnel should provide advice on the mechanics of the process and the operation of any published guidelines, but not on legal matters or whether to file a claim. We recommend that each Claims Site Office maintain a directory of local legal services offices and pro bono lawyer programs, and be directed to provide such information to all Claimants.

For these reasons, we request that you reconsider and revise the draft GCCS Protocol to strengthen and clarify your proposed process. We are grateful for this opportunity to

contribute to your leadership, and look forward to working with you and GCCS to make this the successful program to which you are so passionately committed.

Respectfully submitted,

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Alabama Appleseed Center for Law &  
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**On Behalf of:**

**The Pro Bono Project (New Orleans)** – Rachel Piercey, Executive Director & Linton Carney, Chief Legal Officer

**Southeast Louisiana Legal Services** – Brian D. Lenard & Mark Moreau, Executive Directors

**New York Lawyers for the Public Interest** – Michael Rothenberg, Executive Director

**Mississippi Volunteer Lawyers Project** – A. La’Verne Edney, General Counsel

**Mississippi Center for Legal Services** – Sam H. Buchanan, Jr., Executive Director of Administration

**Mississippi Center for Justice** – Martha Bergmark, President/CEO and Beth Orlansky, Advocacy Director

**Louisiana Justice Institute** – Tracie L. Washington, Esq., Managing Co-Director

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**Florida Legal Services, Inc.** – Cindy Huddleston, Staff Attorney

**Capital Area Legal Services Corporation (Baton Rouge)** – James Wayne, Executive Director

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Kenneth R. Feinberg

- 9 -

**Alabama Appleseed Center for Law & Justice, Inc** – John A. Pickens, Executive Director & Craig H. Baab, Senior Fellow

**Acadiana Legal Service Corporation** – Joseph R. Oelkers, III, Executive Director

Encl.: Appleseed Legal Memorandum

# Appleseed



## COMMENTS ON GCCF DRAFT PROTOCOL # 9

NATIONAL APPLESEED,

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Section I – Section I should specify that the GCCF is acting in the place of the “responsible party” in receiving and adjusting claims pursuant to OPA § 1013, 33 U.S.C. § 2713, and that claims will be evaluated pursuant to the OPA. Because OPA § 1013(c) provides claimants who are dissatisfied with the result of their claim may then present their claim to the federal Oil Spill Liability Trust Fund or “commence an action in court,” Section I should make explicit that the GCCF will evaluate claims and make awards in light of the full panoply of rights and remedies that a claimant would have if it were forced to pursue remedies in those alternative fora. In that regard, please note that OPA specifically states that it does not preempt “State law, including common law.” OPA § 1018(a)(2).

### Section II.A –

1. Section II.A provides, as does OPA § 1002(b), that removal costs are recoverable but then states that the “actions taken must have been approved by the Federal On-Scene Coordinator [“FOSC”] and were consistent with the National Contingency Plan.” This language suggests a requirement of pre-approval by the FOSC. This requirement is inconsistent with the OPA, with the OPA regulations, and with analogous law. The statute requires simply that removal costs be “consistent with the National Contingency Plan.” OPA § 1002(b)(1)(B). The regulations for claims against the Fund provide that there should be a finding that “the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.” 33 C.F.R. §136.203(c) (emphasis added). The alternative

language means that pre-approval is not necessary. (We also suggest that the regulations are inconsistent with the statute, which provides only that the fact finder must find consistency, and does not give the FOSC a role in that determination.) Additionally, the requirement that response costs be incurred consistently with the National Contingency Plan is found in the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA," sometimes known as the "Superfund" statute), and there is a well-developed body of case law under that statute regarding this requirement. Generally, it is only required that there be "substantial compliance" with the NCP, not rigorous detailed line item compliance, e.g., *Central Maine Power Co. v. F.J. O'Connor Co.*, 838 F. Supp. 641 (D. Me. 1993), and the courts have specifically disclaimed any requirement of OSC or governmental pre-approval of response actions in order to recover costs, e.g., *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 262-63 (E.D.N.Y. 1986).

2. Section II.A.1 provides that persons who incur removal costs in response to a "substantial threat of a discharge" may recover those costs, but the term "substantial threat" (which is in the statutory definition of "removal costs") is not defined. Reference may be had to CERCLA, where "response costs" may be recovered for actions in response to a "release or threatened release." There is substantial case law under CERCLA holding that costs of studies and other prophylactic actions taken before actual contamination has reached the claimant's property are recoverable costs because they are in response to a threatened release.

#### Section II.B -

1. Section II.B states that a claim may be made "for damages due to physical injury to real or personal property." OPA § 1002(b)(2)(B) is broader, providing that damages may be recovered "for injury to, or economic losses resulting from" injury to real or personal property.

2. The section also states that "duplication of claims by [an] owner and lessee will not be recognized." The GCCF should recognize that owners and lessees may have different interests and different losses. For example, the lessee of real property may have "economic losses" arising out of the interference with his possession while the owner may have damages in the form of diminution of value to his reversionary interest. In that case, both would be entitled to recover under OPA § 1002(b)(2)(B).

#### Section II.C -

1. Lost profits and lost earning capacity are stated to be compensable when they are "due to the injury, destruction, or loss of real property, personal property, or natural resources" that are used by the claimant. Causation should not be so narrow - a person who suffered lost earning capacity due to bodily injury or sickness caused by the Spill should have a compensable claim under this section (as these persons' economic damages do not appear to be addressed under Section II.E).

2. We note that many of the suggested proof requirements in the Draft Protocol directly or very closely track requirements under the Code of Federal Regulations for claims made against the federal Fund. See, e.g., 33 C.F.R. § 136.215 (proof required to support a claim for damage to real or personal property – functionally identical) and § 136.221 (subsistence use of resources – nearly identical).

Interestingly, only the section on lost profits deviates significantly from the C.F.R. Compare 33 C.F.R. § 136.233. The CFR uses broader language to describe the compensable link between the injured property or natural resource and the economic injury (“as a consequence of”), and permits a claimant to prove their earnings via a rather broad set of document types. In this regard, the Draft Protocol is improperly more restrictive, as it proposes to link the injury to specific property or resources used by the Claimant, where the loss was directly caused by (and not “a consequence of”) the injury. Again, it makes little sense to make any element of eligibility or proof more restrictive in the context of the GCCF than would be the case if the claimant were forced to pursue a claim with the Oil Spill Liability Trust Fund, and the Protocol should be worded as broadly and non-restrictively as the CFR (if not more so).

We have placed the text of the CFR and the Draft Protocol side by side below for easy comparison:

33 CFR § 136.233	Protocol Section II.C.2
(a) That real or personal property or natural resources have been injured, destroyed, or lost.	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.
(b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.	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).
(c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.	Reduction of earnings or profits resulting from damage or loss of property or natural resources that are used by the Claimant.

<p>(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.</p>	<p>Amount of profits and earnings in comparable time periods.</p> <p>Income received from alternative employment or business during the period when the loss was suffered.</p> <p>Efforts to reduce loss of profits and earnings.</p> <p>Savings to overhead and other normal expenses not incurred as a result of the Spill.</p>
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Section II.E -

1. A physical injury claim appears to require proof (“Proof Required”) of total or partial disability, which suggests that the physical injury must be permanent. What if it was a broken arm and it healed?

2. This section of the Draft Protocol should also include severe emotional distress arising because of the Spill. This is generally a matter of state law, and different states have different proof requirements, with some requiring evidence of a physical manifestation of that severe emotional distress (e.g., loss of sleep or rashes) while others leave the question to juries.

2. This section of the Draft Protocol does not address economic losses arising out of physical injuries. We have addressed this question in Section II.C above, but it could be addressed here as well or alternatively.

Section II.F -

1. The “Causation” section of the Draft Protocol is inconsistent with the OPA and is also overly prescriptive. The Draft Protocol states that the GCCF will only pay for harm or damage that is “proximately caused” by the Spill and then attempts to set forth certain bright line limitations. Both the “proximate cause” requirement and the bright line limitations are inconsistent with the OPA, the regulations, and the OPA case law.

The OPA requires, variously, that the damages are “resulting from” damage to property, § 1002(b)(2)(B), or that the economic losses are “due to” the injury to, inter alia, natural resources. There is no statutory language supporting the proposed requirement of “proximate cause,” which has apparently been imported into the Draft Protocol from tort law.

The regulations also do not use the “proximate cause” concept. 33 C.F.R. § 136.231(a), for example, provides that a claimant may recover “loss of profits or impairment of earning capacity due to the injury” to natural resources, while § 136.233 (b) provides that the claimant should establish that her “income was reduced as a consequence of injury” to natural resources.

The District Court in the recent case of *Dunham–Price Group, LLC v. Citgo Petroleum Corp.* rejected defense arguments that the claimant needed to prove that his injuries were “directly ‘due to’ property damage,” and that the plaintiff’s claim was not compensable because its injury resulted from “closure of the ... Ship Channel [and was] not attributable to a physical injury to property or natural resources.” No. 2:07–CV–1019, 2010 WL 1285446, at \*2 (W.D. La. Mar. 31, 2010) (emphasis added). The court held that it was for the trier of fact to determine whether plaintiff’s “economic losses are due to Citgo’s oil spill.” *Id.*

Reliance on the statutory language — “resulting from” or “due to” — instead of engrafting common law tort concepts like proximate cause or foreseeability onto a Protocol designed in the first instance to implement OPA, is especially required when one realizes that in the OPA Congress legislatively overruled the then–governing federal maritime tort law limitations that were based on proximate cause and that maritime tort law’s limitations upon economic damages. Under federal maritime tort law applicable in the Gulf States, as it existed at the time the OPA was passed, virtually no one other than persons with physical damage to property that they owned and, perhaps, commercial fishermen had any claim for damages at all. E.g., *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34 (11th Cir. 1982).

OPA compels a case–by–case consideration of whether the claimant’s damages are “due to” or “resulting from” damage to natural resources, without the overlay of the former tort law.

2. The Draft Protocol states that a claim is not compensable 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 is not a good statement of the law. For example, the supplier of bait to an affected fisherman or bait shop clearly has a valid claim.

3. The Draft Protocol states that a claim is not compensable if “the Claimant’s loss is remote in time or place from the Spill.” Remoteness in time may suggest a statute of limitations concept, but a “discovery rule” statute of limitations is already provided for in OPA § 1017(f)(1)(A). And remoteness in distance may not be a proper test either. Certainly a seafood processing facility in Houston or Shreveport may, or may not, have a valid claim.

4. The Draft Protocol states that a claim is not compensable if “the Claimant’s loss is the result of intervening events triggered by the Spill.” This is not a correct

statement of tort law. The “intervening cause” tort doctrine upon which this limitation in the Draft Protocol is apparently based cuts off claims only when the intervening event is independent of the tort. Events triggered by the Spill may cause damages that are “due to” or “resulting from” the Spill.

Section IV -

1. Claimants approved to receive Emergency Advance Payments on a monthly basis under Section IV.C.1 should have the option to re-apply via an expedited process to prevent them from going through a time-consuming application process every month.

2. The limitation that no Emergency Advanced Payment claims will be processed more than 90 days after the well is closed has no basis in OPA §1005. There may be persons who continue to be affected on an emergency basis who are not in a position to present a claim for final damages, including future losses, and they should not be turned away. Since any such payments are credited against any ultimate final claim, there is no legal reason to reject the presentation of such claims.

Section V.C -

1. The release requirement is too broad for several reasons. First, it does not account for a later arising injury that was not known at the time of the claim application. So long as such separate injuries are within the statute of limitations they should be permitted.

2. The release also runs too broadly. While a release of BP (and its partners in the well, such as Anadarko, given BP’s contribution rights under § 1009) and the Fund may be appropriate when a Final OPA claim is paid, requiring a release of other parties who caused other damages is improper.

Section V.D -

1. A Claimant needs to have longer than 7 days to appeal (especially when the GCCF gives itself 14 days to issue payment upon receipt of the Release). The OPA itself and the OPA regulations do not provide any limit other than the statute of limitations for presenting a denied claim or inadequate award to the Fund.

2. Since the GCCF is acting in BP’s stead, BP should have no right to appeal what are legally its own decisions.

Section VI - Why would a Claims Administrator consult with BP? Such a provision will impact the perception of the Claims Administrator being a neutral party.

Section VII - It should be made clear that claimants may still submit claims under the OPA or in state court or through other avenues after the GCCF has closed, so long as

those claims are within the applicable statutes of limitations of the respective courts or tribunals.

Proof Required Generally (Sections II.B1, II.C2, II.D2, II.E2, and Exhibit A) -

1. It is implied in several instances that claimants have a duty to mitigate damages. If claimant's mitigation efforts (or lack thereof) will affect their claim determination, their duty to mitigate should be made clear up front.

2. Several items of proof required are clearly outside the ability of individuals to obtain without legal or accountant assistance. This may discourage less sophisticated claimants from applying for aid, unless costs related to those professionals are also compensated.

3. The proof descriptions generally need to be more specific and clear - using examples would be helpful.

Miscellaneous - If the protocol is going to be made available to potential claimants, it might be helpful to include a flowchart / timeline to visually lay out the claims process.

Respectfully submitted,



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