Governmental Intervention Counseling Government Entities in the BP Oil Spill Disaster

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Situation Status Map

Nearshore Surface Oil Forecast Deepwater Horizon MC252

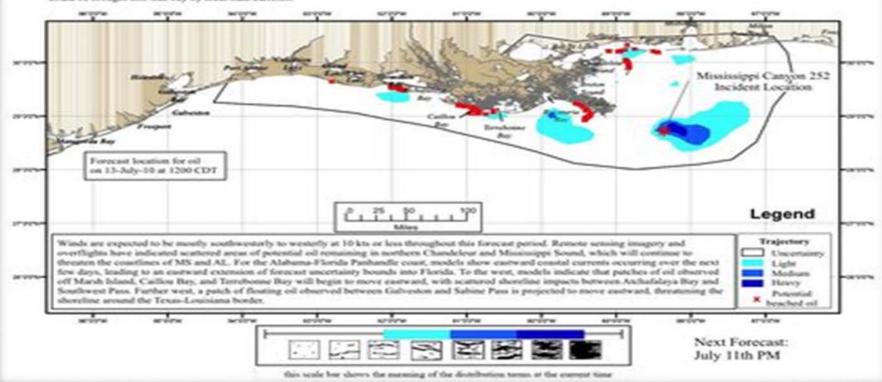
NOAA/NOS/OR&R

Nearshore

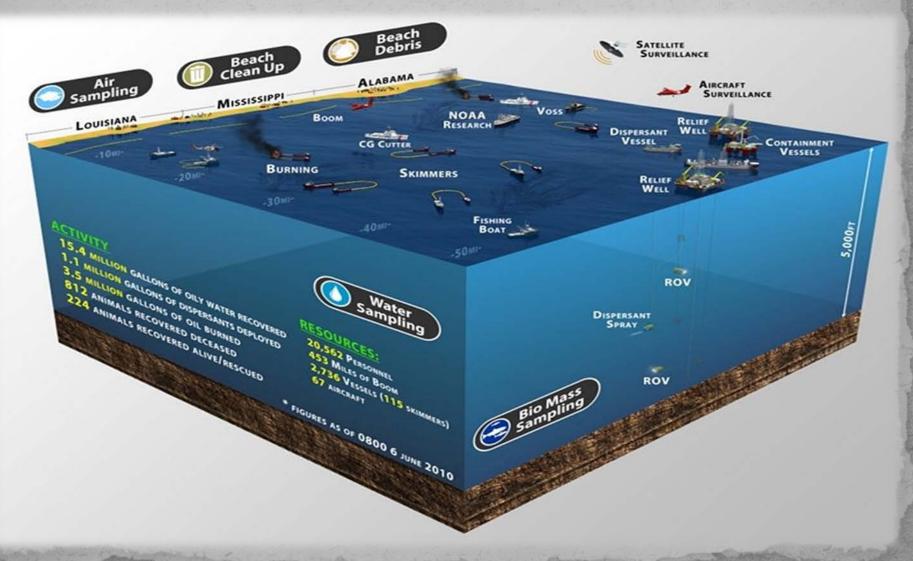
Estimate for: 1200 CDT, Tuesday, 7/13/10 Date Prepared: 2100 CDT, Saturday, 7/10/10



This forecast is based on the NWS spot forecast from Saturday, July 10 PM. Currents were obtained from several models (NOAA Gulf of Mexico, West Florida Shelf USF, TGLO EAMIL, NAVONE), and HFR measurements. The model was initialized from Saturday satellite imagery analysis (NOAA-NESDES) and Saturday overflights. The leading edge may contain tarbuils that are not readily observable from the imagery (honce not included in the model initialization). Oil near buy inlets could be brought into that buy by local tidal currents.



The Response



The Impacted Counties <u>Alabama</u>



Oil In Alabama





The Impacted Counties Florida

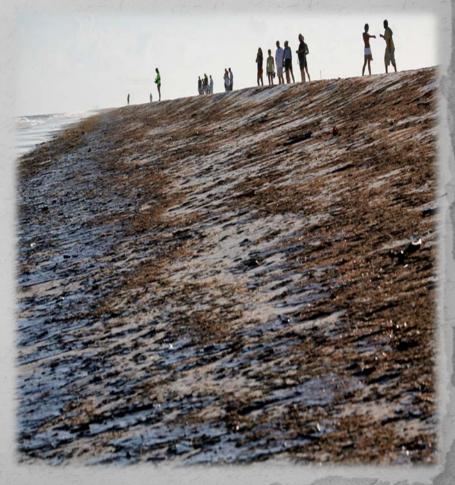


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Oil in Florida

"It looked like tobacco spit and smelled foreign, and it pooled yesterday in footprints as far as you could see."





St. Petersburg Times.

The Impacted Counties <u>Louisiana</u>



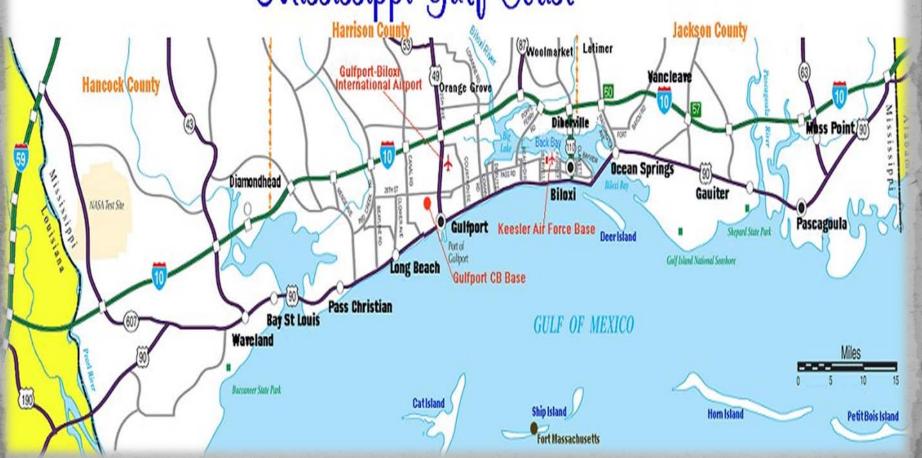
Oil in Louisiana



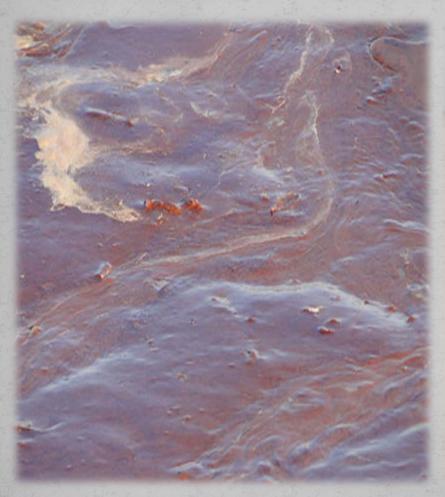


The Impacted Counties Mississippi

Mississippi Gulf Coast



Oil In Mississippi

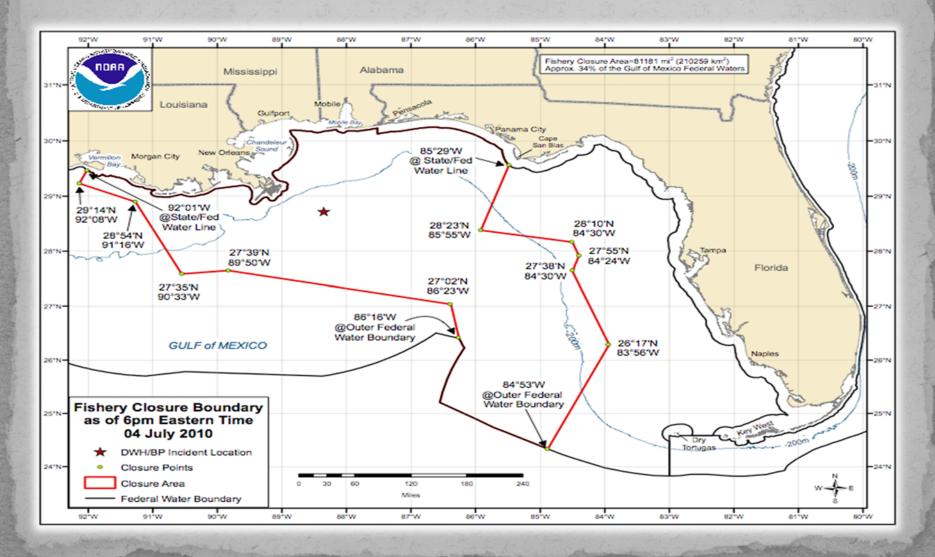




Gulf Coast Government Revenue Relies On ... Tourism



... Fishing



... White Sandy Beaches



... Bed Taxes

A Way of Life



Governmental Response Early Pitfalls - Bureaucracy

- Govt entities by their very nature are Bureaucratic. As a result, there oftentimes can be a disconnect between local, county and state governments.
- The claims system is itself bureaucratic. Many govt entities have to meander through different agencies before they can seek final approval from BP.
- Counsel must push the system in order to get their clients quick and necessary relief and protection.

Governmental Response Early Pitfalls - Politics

- From top to bottom, politics predominates throughout govt.
- This often means:
 - Individuals not technically associated with govt structure may be real decision makers;
 - Delayed, indecisive or inconsistent decision making;
 - Decisions may be based more on what is politically proper, rather than what is necessary.
- Counsel must be aware of the underlying politics associated with govt entities, who the key decision makers are, and must be willing to spend time advocating and handholding to get the entity to respond in the best ways.

Governmental Response

Early Pitfalls - Informal Communications

- Most govt entities rely on informal communications (e.g., telephone calls).
- Because of the bureaucratic nature of the claims process, entities may have to seek approval of response plans or reimbursement of expenses up the chain of command. Failure to formally notate these approvals can create havoc with a government's options if BP decides to disapprove a program when others have approved it.
- Counsel must make sure the govt entity confirms the process in writing.
- In addition, counsel must be sure the govt entity keeps meticulous records of possible damages, and doesn't engage in involuntary admissions that hurt future litigation.

A Three-Front War

Front One - Loss Prevention

- The failure to mitigate damages is a formidable weapon utilized by Defendants in environmental cases ... BP and other Defendants are sure to use it.
- Keys:
 - Be proactive early;
 - Concentrate on long-term mitigation and response-funding strategies.
 - The uniqueness of an area must be taken into account. BP will most assuredly attempt a cookie cutter approach that may work for some but not all, locations.
 - Confirm approvals through written confirmation
- Awareness and action can prevent future "Monday morning quarterbacking" by BP.

A Three-Front War Front Two - Loss Assessment

- Disasters of this magnitude require a complete and forward looking assessment of damages.
- Short and long term losses must be taken into account.
- To accomplish, one must hire competent experts in a variety of scientific and financial / economic disciplines.
- In addition, legal counsel must work closely with govt entity employees, commissioners and leadership to understand the complexities of the govt entity.

A Three Front War Front Three - Loss Recovery

- BP has generally been slow to respond to interim claims, and will more than likely challenge final, year-end claims for lost revenue, royalties and taxes.
- The govt entity must be prepared to press forward quickly should BP delay, deny or "nickel and dime" govt proposals.
- As explained in additional slides, the govt entity is entitled to a host of response and damage costs pursuant to the Oil Pollution Act and state law.

Special Concerns for Govt Entities

- Emergency Response and Mitigation Costs
- Clean up and Natural Resource Restoration
- Loss of Revenue (taxes, royalties, fees, rent, etc.)
- Loss of Natural Resources
- Increased Public Service Costs
- Potential Human Health Hazards
 - The EPA reported on July 8 that air quality in two Louisiana coastal towns presented a human health risk.

The Oil Pollution Act of 1990 What it is

- Enacted in response to the Exxon Valdez disaster in 1990.
 - "Notwithstanding any other provisions or rule of law, and subject to the provisions of this Act, each responsible party ... is liable for the removal costs and damages specified in section (b) of this section that result from such incident." 33 U.S.C. § 2702(a).
- Provides the primary legal remedies against a designated oil spill responsible party

Remedies for Govt Entities The Oil Pollution Act of 1990

• *Removal Costs*: Costs associated with removing / preparation of oil discharge. 33 U.S.C. 2701(a) - (b)(1)(A)-(B).

Damages

- <u>Natural Resources</u>: injury, destruction, loss, loss of use, and reasonable costs associated with assessing damages. 2701(b)(2)(A).
- Real or Personal Property: Injury to, or economic losses resulting from destruction of real or personal property that the entity owns. 2701(b)(2)(B).
- <u>Subsistence use</u>: Loss of subsistence use of natural resources recoverable any party that utilizes those damaged resources for subsistence use. 2701(b)(2)(C).
- <u>Revenues</u>: net loss of taxes, royalties, rents, fees or net profit shares due to injury/destruction of natural resources, real or personal property limited recovery by US govt, a state or a political subdivision thereof. 2701(b)(2)(D).
- Profits and Earning Capacity: loss of profits / impairment of earning capacity associated with injury / destruction of real property, personal property or loss in natural resources. 2701(b)(2)(E).
- <u>Public Services</u>: net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil. Recoverable by a State, or a political subdivision of a State. 2701(b)(2)(F).

Ensure Official OPA Presentment

- Why Important? Because the claimant needs to preserve his ability to file suit if BP denies payment.
- Currently, there is very little written correspondence that documents the presentment of damages to BP under the OPA
- Failure to have a written record of presentment could keep the claimant from filing a valid strict liability OPA lawsuit against BP to recover damages claimed.

Requirements for "Presentment"

- ☐ First things first a claimant must meet the OPA's strict notice requirements:
 - □ "All claims for removal costs or damages shall be presented first to the responsible party." 33 U.S.C. § 2713(a).
 - ☐ If the responsible party denies liability, or is unable to settle the claim within 90 days of the presentment, a party can file suit or seek relief under the Oil Spill Liability Trust Fund. 33 U.S.C. § 2713(c).
 - This notice provision is a "mandatory condition precedent" to bringing a suit under the OPA. <u>Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.</u>, 51 F.3d 235, 240 (11th Cir. 1995); see also <u>Marathon Pipe Line Co. v. LaRoche Industries Inc.</u>, 944 F. Supp. 476, 477 (E.D. La. 1996).
- □ Note: "damages" under the OPA means damages specified in section 1002(b), and includes the cost of assessing these damages. Thus, it is a reasonable conclusion that claimants may also seek costs associated with hiring accountants to assess losses.

The Oil Pollution Act General Requirements for Presentment

- A "claim" is defined as... "A request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident." 33 U.S.C. § 2701(3).
- Regulations promulgated by the U.S. Coast Guard require that claims provide "a general description of the nature and extent of the impact of the oil spill and the associated damages, a list of the damages with a 'sum certain' attributed to each type of damage listed, and evidence to support the claim. 33 C.F.R. §§ 136.105, 136.109.
 - Note: While the U.S. Coast Guard's requirements do not necessarily apply to the OPA's standard for Notice, the safest practice is the follow the USCG's list. Additionally, the "sum certain" requirement appears to conflict with the Oil Pollution Act's interim claims procedure. See 33 U.S.C. § 2704(a); 2713 (b)(2).
- Some courts have applied these regulations to the need for <u>specificity</u> in the presentment of any claim to the responsible party. <u>Furner v. Murphy Oil USA, Inc., 2007 U.S. Dist. LEXIS 72203 (E.D. La., Sept. 26, 2007)</u>; <u>Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 310 (E.D. Va. 1993)</u>; <u>Abundiz v. Explorer Pipeline Co., 2002 U.S. Dist. LEXIS 16512, 2002 WL 2030880, *2 (N.D. Tex. Sept. 3, 2002)</u>.
- Specificity in the presentment of any claim to the responsible party is an important requirement because if the claim does not have the necessary specificity, the responsible party will be unable to make an informed offer of settlement. This lack of information would then run contrary to the fundamental purpose of the OPA notice requirement, which is to promote settlement and avoid litigation. *Johnson*, 830 F. Supp at 310.

BP Locations On Gulf Coast



The Oil Pollution Act BP Governmental Claim Guide

BP Government Entity Claims Process Guidelines

This process provides guidance to parishes, counties, local governments, and sub-units of those governments who administer separate budgets ("Local Government Entities") and have or may incur costs in responding to the Deepwater Horizon Incident. BP has been working closely with Local Government Entities on the Deepwater Horizon Incident response, and this document is intended to provide guidance regarding the types of costs that BP will reimburse or advance where appropriate ("Government Entity Claims Process"). All claims by Local Government Entities will be handled by a specialized team and will be given high priority. Claimants other than Local Government Entities should refer to the document entitled "BP Claims Process Guidelines for Individuals and Businesses" for guidance on Illing claims.

BP requests that Local Government Entities intending to submit claims for reimbursement through the Government Entity Claims Process submit a list of costs incurred to date that includes a description of the activity, an explanation for why the activity was necessary in connection with the Deepwater Horizon Incident, and supporting documentation.

For guidance on the documentation that should support a claim for reimbursement, please call (302) 476-7732. This number is dedicated exclusively to the handling of Government Entity Claims. As described below, all requests for pre-approval of <u>pre-posed</u> expenditures or actions and, where appropriate, advance payment, associated with response to the Deepwater Horizon Incident should be made pursuant to a budget that has been submitted to and reviewed by BP's Government Entity Claims Team.

Requests for pre-approval of Response and Removal Costs and other direct spill response operations will be directed by the Government Entity Claims Team to the Operations Section Chief or Deputy Incident Commander of the Unified Command Center.

Local Government Entities should mail or fax claims for reimbursement through the Government Entity Claims Process to the following:

> ESIS Government Entity Claims Team PO Box 17160 Wilmington DE 19850

FAX: (302) 476-6272

Local Government Entities may also submit claims by phone by calling (302) 476-7732.

Each month (or shorter period if required due to rapidly changing conditions). Local Government Entities should provide BP with a budget of all similar <u>anticipated future costs</u> associated with the proposed expenditures or actions for which the Local Government Entity seeks pre-approval and, where appropriate, advance payment. The goal is to maximize pre-approval and, where appropriate, advance payment of compensable costs under the Oil Pollution Act of 1990

reimbursement of expenses incurred by Local urdens on those Local Government Entities. For ted after the first budget should include an eceding budget period and should be compared awadvancement request adjusted accordingly.

requests for reimbursements or pre-approval of ces when presented. BP will have the right to The Local Government Entity must maintain ide BP reasonable access to those records. As so for reimbursement to BP or requests for predor advance payments through the Government ver by the Local Government Entity for claims able under OPA. In addition, pre-approval of for payments by BP should not be viewed as awace, or reimburse any particular claims in the

ovide guidance to Local Government Entities Team will consider different types of claims e Guidelines are intended to be illustrative, not

c Services

mal administrative costs, costs of additional sets incurred for material and equipment that are tity as a result of its response to the Deepwater

ude ordinary administrative, personnel, or costs to upgrade equipment) that the Local irs and would have incurred regardless of the

to include leases or major capital purchases for r equipment unless otherwise pre-approved by erations, to the extent they have not fifed Command. For this reason, BP emoval Costs by Local Government is Process will decrease over time and ermment Entity intend to undertake or moval actions, BP urges the Local with the Federal On-Site Coordinator to Operations Section Chief or Deputy Center.

ed for reimbursement are those costs vent, minimize, or mitigate impact to m the Deepwater Horizon Incident, res.

red Response and Removal Costs due ed by BP, and (2) were performed in sits should be submitted to and will be trocess. Local Government Entities he Response and Removal Costs were

red Response and Removal Costs due the FOSC or BP, then the Local costs to BP through the Government ion for why the costs were necessary removal and were consistent with the approved efforts already planned, if the Unified Command.

bursement include claims for revenue profit shares that a Local Government mitigate, as a direct result of the

ble

mentioned above, may include those rect result of the Deepwater Horizon to respond to the Deepwater Horizon as non-reimbursable costs include:

erials that BP reasonably determined to hat the Local Government Entity would urred by another Federal, State, or Local owater Horizon Incident;

upgrades to equipment or materials that atity's normal day-to-day functioning;

e Local Government Entity before the for the <u>additional</u> costs of expediting or materials in order to insure timely

te Local Government Entity function or t as a result of the Deepwater Horizon

considers a cost to be non-reimbursable, s with the Local Government Entity

if this process is revised or modified.

- 2 -

p://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/inc

- 3 -

Expedited Claims

• According to BP's claim booklet, govt agencies may be entitled to expedited claims.



BP CLAIMS PROCESS

Subject:

MC 252 Incident

Date:

26 May 2010

Report Topic:

Description of Clai

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2.6 Expedited Government Claims Process.

Expedited Claims cont...

 Claimants may be asked to provide additional information to support claim(s). If claimants have queries during the processing of the claim(s), they will be encouraged to call a toll-free number (800.573.8249), which is dedicated to handling such queries.

All claims require a claim number in order to be processed. Claimants must log claims online or call the toll-free phone number as described above to obtain a claim number. In the event a claimant comes to a claim center without a claim number, the claim process is explained. The claimant is provided with the toll-free number or advised to visit the online website to file his/her claim.

2.5 Large Loss Claims

Claims that are of large monetary value or are based on complex economic predictions of loss should be routed to:

ESIS Large Loss Team PO Box 17160 Wilmington DE 19850

FAX: (302) 476-6272

These claims will be handled by experienced claim adjusters with the assistance of accountants and lawyers. Financial documents supporting the claimed loss and identifying the ultimate beneficiary of the business should be provided with the submission. A list of acceptable documentation by industry is attached. The adjuster will review the documentation provided and request additional supporting information as needed.

After the file has been reviewed and the current amount of loss is determined by the adjuster, a recommendation for an advance payment is forwarded to the BP Claims authorization team for approval.

If BP approves the requested payment, the adjuster will fill out a payment request form and forward it to the claims processing center, where an automated check will be issued. The check will be sent to the mailing address of the individual or business unless other arrangements are made.

If BP does not accept the advance recommendation, it will return the file with an explanation of why the request was denied. In certain cases, additional supporting documentation may be submitted for further review.

2.6 Expedited Government Claims Process

BP is aware that parishes, counties, local governments, and other political subdivisions administering separate budgets ("Local Governmental Entities") have incurred expenses in responding to the Deepwater Horizon Incident. Therefore, BP has developed an expedited process to reimburse or advance Local Governmental Entities for certain expenses and/or anticipated budgeted expenses ("Expedited Government Claims Process"). The establishment of the Expedited Government Claims Process should not be interpreted as an indication that BP will not honor other legitimate claims submitted through the normally-paced claims process,

but rather as simply a means to expedite handling of certain types of claims for costs incurred by Local Governmental Entities. Any other claimants besides Local Governmental Entities should refer to the claims process described in the preceding sections for guidance on submitting claims.

BP has made advanced funds available to the States of Louisiana, Mississippi, Alabama, and Florida, as well as certain Louisiana Parishes for the purposes of expedited payment for costs incurred by governmental entities related to the Deepwater Horizon Incident. Therefore, Local Governmental Entities should first submit claims to be considered on an expedited basis to the Parish if that Parish previously received advance funds, and subsequently to the State if the Parish declines to pay the claim. In Parishes not previously receiving advance funds and in the States of Mississippi, Alabama, and Florida, Local Governmental Entities should first submit claims to be considered on an expedited basis to the State.

Local Governmental Entities seeking to submit claims for expedited reimbursement from BP through the Expedited Government Claims Process should submit written confirmation that the Parish and/or State declined to pay the claim and a list of costs incurred to date that includes:

- · a description of the activity;
- an explanation for why the activity was necessary in connection with the Deepwater Horizon Incident; and
- supporting documentation.

For additional guidance on documentation that should support a claim for reimbursement, Local Governmental Entities should call (302) 476-7718.

Local Governmental Entities intending to submit claims for advancement or reimbursement of future costs should submit a monthly budget to BP for review that includes all similar anticipated future costs for which the Local Governmental Entity seeks advance payment. The goal is to maximize pre-payment of covered costs and minimize retroactive reimbursements, thereby easing cash flow burdens on the Local Governmental Entities. Each subsequent monthly budget submitted after the first budget should include an accounting of costs actually incurred for the preceding budget period and should be compared (and documented) against the budget with the new advancement request adjusted accordingly.

A Local Governmental Entity's submission of claims for reimbursement to BP or requests for advance payments through the Expedited Government Claims Process shall not constitute a waiver by the Local Governmental Entity of claims for reimbursement of other costs not submitted pursuant to the Expedited Government Claims Process. BP will evaluate each submission for reimbursement or advancement through the Expedited Government Claims Process, and payment by BP on an expedited basis should not be viewed as binding precedent that BP will pay or reimburse any particular claims in the future.

The Expedited Government Claims Process will continue on an interim basis to address the need for expedited claims processing. BP will notify the Local Government Entities when the interim expedited process is being discontinued or modified.

-8-

BP's Guidelines to Claims

- Each month (or shorter if required due to rapidly changing conditions), Local Government Entities should provide BP with a budget of all similar <u>anticipated future costs</u> associated with the proposed expenditures or action for which the Local Government Entity seeks pre-approval and, where appropriate, advance payment. The goal is to maximize pre-approval and, where appropriate, advance payment of compensable costs under the Oil Pollution Act of 1990 ("OPA") and minimize uncertainty regarding reimbursement of expenses incurred by Local Government Entities, thereby easing cash flow burdens on those Local Government Entities.
- The Government Entity Claims Team will review requests for reimbursement or pre-approval of proposed expenditure or actions and-or advances when presented. BP will have the right to audit reimbursements of the basis of advances. The Local Government Entity must maintain appropriate supporting documentation and provide BP reasonable access to those records.

BP's Guidelines to Claims cont....

- * Compensable cost include additional administrative costs, costs of additional personnel, and other out-of-pocket costs incurred for material and equipment that are incurred by a Local Government Entity as a result of its response to the Deepwater Horizon Accident.
- * Compensable cost do not include ordinary administrative, personnel, or equipment/material costs (including costs to upgrade equipment) that the Local Government Entity customarily incurs and would have incurred regardless of the Deepwater Horizon Incident.

BP's Guidelines to Claims cont...

- * BP anticipates that all <u>direct</u> spill response operations, to the extent they have not already done so, will fully transition to the Unified Command. For this reason, BP anticipates claims for future Response and Removal Costs by Local Government Entities as part of the Government Entity Claims Process <u>will decrease over time and eventually be unnecessary.</u> Should a Local Government Entity intend to undertake or anticipate undertaking future response or removal actions, BP urges the Local Government Facility <u>first to coordinate</u> its efforts with the Federal On-Site Coordinator (FOSC) and Unified Command by contacting the Operations Section Chief <u>or</u> Deputy Incident Commander of the Unified Command
- * Response and Removal Costs to be considered for reimbursement are those costs incurred by a Local Government Entity to prevent, minimize, or mitigate impact to natural resources within its jurisdiction from the Deepwater Horizon Incident, including both preventative and clean-up measures.
- * If a Local Government Entity has to date incurred Response and Removal Costs due to actions that (1) have not yet been reimbursed by BP, and (2) were performed in coordination with the FOSC and with BP, such costs should be submitted to and will be paid under the Government Entity Claims Process. Local Government Entities should include documentation indicating that the Response and Removal Costs were coordinated with FOSC or BP.

BP's Guidelines to Claims cont...

*Lost revenue claims to be considered for reimbursement include claims for revenue lost from taxes, royalties, rents, fees, and net profit share that a Local Government Entity was unable to collect, and <u>unable to mitigate</u>, as a <u>direct</u> result of the Deepwater Horizon Incident.

BP's Guidelines to Claims cont...

- Non-reimbursable costs, in addition to those mentioned above, <u>may</u> include those costs that were, in fact, not incurred as a direct result of the Deepwater Horizon Incident or that were <u>not reasonably necessary</u> to respond to the Deepwater Horizon Incident.
- Examples of costs that **BP may view** as non-reimbursable costs include:
 - * Costs for equipment, personnel, or materials that **BP reasonably determined** to have duplicative of similar cost that the Local Government Entity would **have had a reason to know** were being incurred by another Federal, State, or Local Governments Entity as a result of the Deepwater Horizon Incident;
- ❖ In all cases for which <u>BP determines</u> that it considers a cost to be non-reimbursable, BP is committed to good-faith discussions with the Local Government Entity regarding the reasons such costs were incurred.

What We Learned



What We Learned

- Everything is on BP's terms under their claims process.
- By forcing govt agencies through unified command and other federal agencies, BP can create a more bureaucratic system for the entity to deal through.
- There will be major arguments over
 - Whether the entity mitigated its costs
 - Whether the costs are those the entity "would have reasonably incurred" anyway.
 - Whether documentation meets BP's standards

BP Denies Your Claim For Costs and Damages What's Next?

- File claim against the Oil Spill Liability Trust Fund
- File suit under the OPA against the responsible party, including state law causes of action.

The Oil Spill Liability Trust Fund

- The Oil Spill Liability Trust Fund (Fund) is a billion dollar fund established as a funding source for removal costs and damages from oil spills or substantial threats of oil spills to navigable waters of the United States.
- A party may not submit a claim to the Fund unless it was first presented to the RP pursuant to the OPA. 33 U.S.C. § 2713(a).
- A Brief History Lesson:
 - The OPA of 1990 established a tax which fills the Fund.
 - Oil companies pay 8 cents per barrel they produce or import into the Fund.
 - Fund is used to compensate for losses from an oil spill accident.
 - Up to \$1 billion of the reserve can be used for an incident.
 - Currently, the fund contains \$1.6 billion.

Oil Spill Liability Trust Fund Specific Parameters

- Two Major Components
 - Emergency Fund: Available for Federal On-Scene Coordinators (FOSCs) to respond to oil discharges and for Federal natural resource trustees to initiate natural resource damage assessments. The Emergency Fund is capitalized by an annual \$50 million apportionment from the Fund.
 - Remaining Principle and Balance: Used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of OPA and support research and development.
- Manager: The United States Coast Guard's National Pollution Funds Center (NPFC), in Arlington, Virginia, manages use of the Fund.
- The general requirements for submitting a claim to the Fund are found in 33 CFR § 136.105. Courts have found these guidelines instructive for submitting notice to the RP as well.

The Oil Spill Liability Trust Fund Seek Relief or File Suit?

- The Fund will not process a claimant's claim if he has filed suits against the RP under the OPA. 33 U.S.C. § 2713(b)(2).
- The decision will depend on the govt entity's position
 - An entity desperate for money may be better suited for trying the fund first ...
 - However, if a Claimant can remain patient, it will probably do better to file suit under the OPA.
- The threat of the courtroom under a strict liability statute rather than the Fund process may pressure BP into dealing more generously / expeditiously with govt entities.

Option 2 File Suit Against the Responsible Party

- Suit would involve an OPA claim (assuming the party has met the OPA's requirements for presentment) and various state law remedies. However
- The Economic Loss Rule
 - Basic Rule: A plaintiff cannot sue in tort for purely monetary losses caused by the Defendant's conduct without showing a physical injury to the Plaintiff or his property.
 - Except for commercial fishermen, the economic loss rule will likely apply to common law actions.
 - The Impact: Lost profits, diminution of value, costs to replace and repair, lost wages and future earning capacity likely barred.

Why the Economic Loss Rule is Important

- If you do not have a physical injury to yourself or your property because of oil (e.g., oil splattered over your home), defendants will likely argue that you cannot recover for pure economic damages to common law claims.
- <u>The Good News</u>: The OPA overrules the economic loss rule in most instances permitting you to recover purely economic losses either through the OPA instead of or in addition to state law.

Filing Suit

Are Maritime and State Law Remedies Preempted by the OPA?

- The OPA contains savings clauses that attempt to preserve state and maritime law:
 - (e) Admiralty and Maritime Law Except as otherwise provided in this Act, this Act does not affect -
 - (1) admiralty and maritime law; or
 - (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. 33 U.S.C. § 2751(e)(1)-(2).
 - (c) STATE COURT JURISDICTION A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act <u>or</u> State law and any final judgment of such court (when non longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act. *Id.* at § 2717(c).

Filing Suit

Are Maritime and State Law Remedies Preempted by the OPA cont...

- Another Savings Clause in the OPA:
 - (a) PRESERVTION OF STATE AUTHORITIES ... Nothing in this Act or the Act of March 3, 1851 shall
 - (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to
 - (A) the discharge of oil or other pollution by oil within such State; or
 - (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under ... State law, including common law.

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALITIES. – Nothing in this Act ... shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof – to impose additional liability or additional requirements;

Filing Suit

Are Maritime and State Law Remedies Preempted by the OPA cont...

- When reading the OPA saving provisions, an argument can be made that remedies specifically enumerated in the statute are preempted. Some courts have followed his path. *Gabrick v. Laurin Maritime, Inc.*, 623 F. Supp. 2d 741 (E.D.La. 2009) (OPA preempts general maritime law claims that are recoverable under OPA); *In re Setton Towing, LLC*, 2009 WL 4730969 (E.D.La. 2009).
- Arguments remain that state law remedies may be preserved, even in the face of OPA preemption of maritime law. *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998); *South Port Marine*, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 65 (1st Cir. 2000).

Are Punitive Damages Available to Govt Entities?

- There appears to be some ambiguity on whether maritime punitive damages are recoverable.
 - In Exxon Shipping Co. v. Baker, the Court ruled that the Clean Water Act did not preempt maritime law on punitive damages because Congress did not indicate its intent on the body of the Act to preempt. 128 S.Ct. at 2619. OPA, like the Clean Water Act, is silent on punitive damages. More importantly, OPA contains a saving provision for maritime and admiralty claims "not otherwise provided for in the OPA." 33 U.S.C. § 2751(e); See also United States v. Texas, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993); Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344 (11th Cir. 1998); Morgane, 398 U.S. at 387, 90 S.Ct. at 1781.
 - However, other courts have ruled that OPA 90 preempts recovery of punitive damages under maritime law.
 - South Port Marine, LLC v. Gulf Oil Ltd., 234 F.3d 58 (1st Cir. 2000) (Punitive damages preempted, amongst other things, because Congress in OPA 90 set out specific remedies as the sole recovery for federal maritime pollution and was silent on the recovery of punitive damages [appears to be contradicted by Exxon Shipping Co.]. Additionally, the Court relied on the previous Supreme Court decision, Miles v. Apex Marine, to find that "overlap" between OPA 90 and maritime law mandated against supplementing OPA 90 with maritime law).
 - Clausen v. M/V New Carissa, 171 F.Supp.2d 1127 (D. Oregon 2001)
- Courts have held state law is not preempted by the OPA due to the statute's savings clause thereby opening another window for punitive damages to be recovered. Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344 (11th Cir. 1998); South Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 65 (1st Cir. 2000).

The Wild Card - The ICF

- Based on recent comments from ICF claims administrator Kenneth Feinberg, Gulf Coast communities are frightened they may not get compensation:
 - "Indirect claims such as those made by companies that lost revenue because wary tourists stayed home thinking a beach would be damaged may not be compensatory."
 - "Property value has diminished as a result of the spill. Lets assume that's right. That doesn't mean that every property is entitled to compensation."
 - "Gulf Coast claims facility may set up zones of eligibility for certain claims when the damage suffered isn't physical."
 - "It sure would help if the oil would stop."
 - All the above taken from http://www.usatoday.com/money/industries/energy/2010-07-01-oilspilltourism01_ST_N
 - Once the oil stops, we will be able to get a handle "very quickly" on the extent of harm. Feinberg interview on CNN, Sunday, July 11, 2010.
 - We have also heard comments that only state laws would apply which would completely cancel out the OPA and renew the economic loss rule thereby destroying most monetary loss claims.

A Simple Lawyer's Take on the New Fund

- Hold BP, Transocean, Halliburton, and Cameron responsible for all costs.
- Flexibility for claimants.
- Presentment and denial under the ICF process constitutes presentment and denial under the OPA.
- Full and quick payments.
- The right to counsel and attorneys fees.
- Most Importantly Claimants retain all of their substantive legal rights, including those found in OPA.

Practical Counsel for Govt Understanding the Polluter's Playbook

- The Government Entity Must Be Able to Maneuver Through the Polluter's Handbook:
 - Baseline Games.
 - Diminishing the value or damage to resources by an excessive focus on human use.
 - Assuming the trustee is easily bullied by "junk science".
 - Assuming natural resource damage is prospective only instead of retrospective (Pre-pollution)
 - Ignoring strict liability by arguing non-statutory excuses as "science"
 - Manipulation of values and valuation.
 - Only making assumptions that benefit them.

Practical Counsel for Govt Understanding the Valuation Issues

- Taxing Authorities
 - Cities, counties / parishes and states;
 - Fee-based losses (tourism, licensing);
 - Mitigation Expenditures
- Compounded by the recession: Where is the break even point for cities?

Practical Counsel for Govt Fiscal Impacts on Taxing Authorities

Fiscal Losses

- Lost Tax Revenues
- "Balance the Books" on inland properties
- Cities, counties / parishes and states
- Due to the recession, there is no "resilience" in the system.

Practical Counsel for Govt Valuation Methodologies

- Fiscal Research: Urban land institute models
- Business Research: Input / output models;
- <u>Use and Enjoyment Research</u>: Surveys (both contingent valuation and conjoint surveys);
- Property Damages: Before and after models.

Practical Counsel for Govt Insurance Policies

• Review the city's insurance coverage

• Locate and preserve all potentially relevant insurance polices

• Read the policies

Notify all potentially responsive insurers immediately

• Review the Policies Again

• Verify and calendar conservatively all key deadlines, including for submission of proof of loss and suit;

Set up accounting procedures to clearly track all expenses

potentially related to loss

• Enlist an accountant who knows what insurance companies are looking for in your claim

• Review the Policies Again.

Practical Counsel for Govt Natural Resource Damage

- Natural resource damage includes:
 - Primary Restoration: Cost of any action, or combination of actions, to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and services
 - Compensatory Restoration: Loss of value, benefit and use of resource, or service for time period of pollution and restoration including contingent valuation
 - Costs associated with conducting damage assessment.

Take Home Message

- Govt entities must mitigate their damages.
- Govt entities must take care to meticulously document all losses, and formalize all communications with BP and state / federal agencies.
- Govt entities must hire competent counsel to guide them through the bureaucratic claims process and if necessary, file suit to recover the full extent of damages incurred when BP, etc. drag their feet on payment.
- Govt entities must be patient relief will come.

