

Empty Nets: Finding Compensation for Commercial Fishermen after the Deepwater Horizon Disaster

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Two and a half years after the Deepwater Horizon oil spill, individuals and businesses are having difficulty receiving compensation for their losses.¹ The unprecedented release of nearly five million barrels of oil into the ocean² has led to a corresponding tangle of claims, fines, and litigation between diverse parties. As claimants navigate the legal landscape, their main decision will be whether to seek compensation from the Gulf Coast Claims Facility (GCCF) or through the civil justice system.³ Commercial fishermen, who are still ascertaining the extent of their losses due to ecological damage,⁴ are in a unique position for recovering damages through pure economic loss claims not necessarily available to other victims of the oil spill.⁵

The GCCF and pure economic loss tort theory present two different options for commercial fishermen seeking damages from the Deepwater Horizon disaster. A third, less direct means of compensation may be presented by lawsuits against BP for recovery of natural resources damages under the Oil Pollution Act (OPA) or through *parens patriae* claims—claims for damages to a sovereign's interests—advanced by municipal or state governments. While the GCCF was intended to provide a means of simpler and quicker payment than taking a claim to court, the GCCF has thus far been viewed as operating at an inefficient pace and providing arbitrary awards to claimants.⁶ Meanwhile, thousands of individual⁷ and hundreds of class

¹ ENVIRONMENTAL LAW INSTITUTE, RECEIVING COMPENSATION FOR THE BP OIL SPILL (Mar. 2011), *available at* http://www.eli.org/pdf/ocean/gulf_of_mexico/receiving_compensation_long.pdf.

² *Louisiana Files Suit Against BP, Others Over Gulf Spill*, 24-6 MEALEY'S POLL. LIAB. REP. 10 (2011).

³ Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of CrimTorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 59 (2011).

⁴ Brian Vastag, 'There's still an awful lot of oil', WASH. POST, Apr. 18, 2011, at A04.

⁵ Dr. Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH L. REV. 1, 21 (2011).

⁶ Rick Jervis, *Oil spill victims weary of wait*, USA TODAY, July 26 2011, at 3A.

⁷ Rustad & Koenig, *supra* note 3, at 53.

action suits⁸ have been filed against British Petroleum, Transocean, Halliburton, and the many other allegedly responsible parties. Damage to natural resources is still being assessed, but state and local governments have already issued claims based on the harm caused to natural resources as trustees of publicly “owned” natural resources. This paper explores the different legal channels available to commercial fishermen seeking compensation after the Deepwater Horizon catastrophe. Part I introduces the OPA and alternatives to the civil justice system created by the OPA. Part II addresses pure economic loss claims under tort theory. Part III addresses natural resource damages claims advanced by governments under the public trust doctrine and the *parens patriae* doctrine.

I. The OPA “\$75 Million Cap” and the GCCF

After the 1989 Exxon Valdez disaster in Alaska, Congress reformed national oil spill law with the 1990 Oil Pollution Act (OPA).⁹ This law intended to sort out the confusion that arose between local, state, and federal governments when responding to an oil spill.¹⁰ Under this law, “each responsible party” for the Deepwater Horizon spill is strictly liable “for the [resulting] removal costs and damages.”¹¹ Removal costs are somewhat broadly defined to include removal of oil and any other hazardous substances from affected areas, as well as any additional steps necessary to prevent and mitigate further harm “to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches.”¹² The OPA also imposes a liability cap of \$75 million,¹³ which led to initial speculation that BP

⁸ *Id.* at 72.

⁹ Perry, *supra* note 5, at 49.

¹⁰ John Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L.J. 57, 59 (2011).

¹¹ 33 U.S.C. § 2702(a) (2006).

¹² 33 U.S.C. § 1321(a)(8)(2006).

¹³ 33 U.S.C. § 2704(a)(3) (2006).

would only be responsible for damages up to that limit.¹⁴ There are two important clarifications regarding the liability cap. First, the cap does not include costs for removal or clean-up of the spill, thus leaving BP with unlimited removal costs.¹⁵ Second, if the responsible parties' actions are found to have been grossly negligent, the OPA eliminates the liability cap.¹⁶ A finding of gross negligence on the part of BP could be complicated by the contributing roles played by Transocean and Halliburton; a recent report by the Bureau of Ocean Energy Management Regulation and Enforcement and the U.S. Coast Guard suggests that BP may only have been negligent rather than grossly negligent.¹⁷

The liability cap confusion was soon overshadowed by BP voluntarily waiving the \$75 million cap¹⁸ and BP's establishment of a \$20 billion escrow account to respond to claims for damages.¹⁹ BP initially created its own claims review entity, pursuant to an OPA requirement to set up such a process to quickly compensate injured parties, but this was replaced by the independent Gulf Coast Claims Facility with President Obama's direction.²⁰ The \$20 billion BP-established account funds the GCCF, which was established to be a neutral organization to expediently assess, review, and pay out claims falling under one of the four acceptable categories: property damages, loss of income or earning ability, removal costs, and injury or death.²¹ The category of "loss of earning capacity or profits"²² represents the type of damages sought by most commercial fisherman through the GCCF. As of July 2011, the GCCF had paid

¹⁴ Mark Knoller, *Raising BP's Oil Spill Liability Limit – No Matter What the Constitution Says*, CBS NEWS (May 5, 2010, 1:06 PM), http://www.cbsnews.com/8301-503544_162-20004217-503544.html#ixzz1bkamb1ze.

¹⁵ Perry, *supra* note 5, at 54.

¹⁶ *Id.* at 55.

¹⁷ Peter Cripps, *BP Shares Up After Deepwater Report*, THE GUARDIAN (Sept. 14, 2011), <http://www.guardian.co.uk/uk/feedarticle/9846425>.

¹⁸ Griggs, *supra* note 10, at 68.

¹⁹ Perry, *supra* note 5, at 54.

²⁰ *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com/faq#Q1> (last visited Oct. 20, 2011).

²¹ Rustad & Koenig, *supra* note 3, at 60-61.

²² ENVIRONMENTAL LAW INSTITUTE, *supra* note 1.

200,000 claims totaling almost \$5 billion.²³ Once a claimant receives final compensation from the GCCF, s/he may not take the claim to court.²⁴ Concerns have arisen regarding the GCCF's transparency and objectiveness with Kenneth Feinberg acting as its sole administrator and designer.²⁵ Fishermen who have filed claims complain that they are offered much less compensation than requested; issues of who receives payment and how much they receive seem to be resolved arbitrarily.²⁶ As a result of such concerns, the Department of Justice announced that it would be auditing the GCCF.²⁷

Separate and independent from the BP-funded GCCF is another avenue of compensation, the Oil Spill Liability Trust Fund (the Fund). The OPA authorizes use of up to \$1 billion per oil pollution incident from the Fund to help pay for damages either in excess of the liability cap or not otherwise paid by the responsible party.²⁸ Another purpose of the Fund is to aid with clean-up and removal costs in the case of a catastrophic oil spill; up to \$500 million may be spent on such removal activities.²⁹ The Fund receives revenue primarily from a tax levied on every barrel of crude oil received, used in, or exported from the United States, as well as any petroleum products imported to the United States.³⁰ The Fund is also set to receive any fines assessed to BP for violations of the OPA and Clean Water Act, although Congress is currently debating whether to send those funds directly to the Gulf States to assist with ongoing recovery efforts instead.³¹

²³Jervis, *supra* note 6.

²⁴Rustad & Koenig, *supra* note 3, at 62.

²⁵*Id.* at 60-61, 65-66. Feinberg was appointed to head the GCCF, but he is technically paid by BP and retains ultimate authority in deciding which claims to grant and which to deny.

²⁶Jervis, *supra* note 6.

²⁷Ali Helgoth, *BRIEF: Justice Department to audit Gulf Coast Claims Facility*, THE NEWS HERALD (Panama City), July 23, 2011.

²⁸U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-90R, DEEPWATER HORIZON SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES (2010).

²⁹Perry, *supra* note 5, at 57.

³⁰*Id.*

³¹*On Spill's Anniversary, Support Grows To Spend Penalties on Gulf Cleanup*, INSIDE WASHINGTON PUBLISHERS, Apr. 22, 2011, available at LEXIS.

The Fund will not likely play a key role in compensation for fishermen with the Deepwater Horizon disaster, as all claims must be presented to the responsible party before seeking compensation from the Fund, and even then, the Fund does not guarantee compensation.³²

II. Pure Economic Loss Tort Claims

Relational losses have typically been excluded from recovery under pure economic loss claims;³³ this is known as the exclusionary rule as established by *Robins Dry Dock*.³⁴ However, there is a widely recognized exception to the exclusionary rule for commercial fishermen—including oystermen, crabbers and other marine harvesters—who are permitted to recover for lost profits caused by pollution.³⁵ Some courts have reasoned that the exception for fishermen is more analogous to a property claim rather than an economic loss claim since fishermen depend upon their particular fishing grounds.³⁶ This privilege is not extended to other sufferers of relational losses, such as hoteliers, seafood restaurants, charterers and other third-parties.³⁷ After the Exxon-Valdez catastrophe, such relational claims were denied under the exclusionary rule, while 10,000 commercial fishermen successfully recovered \$286.8 million in federal court largely through pure economic loss liability claims “based on the market value of the fish they would have caught but for the spill.”³⁸

However, since tort law is largely determined on a state-by-state basis, differences in states’ approaches to pure economic loss claims could create drastically different outcomes to

³² Perry, *supra* note 5, at 57.

³³ *Id.* at 9-10.

³⁴ *Id.* at 21.

³⁵ *Id.*

³⁶ *Id.* at 23.

³⁷ *Id.* at 10.

³⁸ Perry, *supra* note 5, at 22-23.

litigation for commercial fishermen.³⁹ Of the Gulf States, Florida may present the best forum in which to advance pure economic loss claims.⁴⁰ Damages recoverable by fishermen—if permitted—are typically limited to the lost profits of the time period during which fishing was not possible, but a recent Florida Supreme Court decision suggests commercial fishermen filing claims in Florida could receive compensation for lost profits beyond that limit, to include loss of profits from decreased catch in future seasons due to damage caused by the oil spill.⁴¹

The application of pure economic loss theory is largely premised on the application of state law, but the interplay between state law, traditional maritime law, and the OPA is difficult to predict. For example, Judge Carl Barbier of the Eastern District of Louisiana, who will be hearing more than 100,000 multi-district claims including those of commercial fishermen, recently dismissed state claims advanced by the plaintiffs.⁴² Judge Barbier held that the cases fall under maritime law, and accordingly, maritime law and the OPA will govern.⁴³ Judge Barbier’s decision may address speculation about whether “purely economic losses in excess of the OPA limit may be recovered under state law” if BP is not found grossly negligent and accordingly is only liable to pay out claims through the civil system totaling no more than the \$75 million cap.⁴⁴ Absent favorable state law application, commercial fishermen can seek compensation for economic loss under the OPA, which includes “loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or

³⁹ Benjamin Steinberg & Dwayne Antonio Robinson, *Making BP’s Blood Curd-le: Duty, Economic Loss, and the Potential Cardozian Nightmare After Curd v. Mosaic Fertilizer*, 63 FLA. L. REV. 1245, 1261 (2011).

⁴⁰ *Id.* at 1275.

⁴¹ *Id.*

⁴² *Judge Allows Deepwater Horizon Oil Spill Claimants To Seek Punitive Damages*, 4-2 MEALEY’S L. R. PUNITIVE DAMAGES 9 (2011).

⁴³ *Id.*

⁴⁴ Perry, *supra* note 5 at 60-61.

natural resources, which shall be recoverable by any claimant,” as one of six categories of recoverable damages.⁴⁵

Judge Barbier has also noted that the OPA does not discuss punitive damages, and has determined that the “silence” is not intended to prohibit punitive damages.⁴⁶ This declaration deviates from the previously held view that the OPA does not permit punitive damages within its liability framework.⁴⁷ Judge Barbier explains that conduct that would merit punitive damages would also be deemed grossly negligent, thus removing the OPA liability cap, and leaving no conflict between appropriate liability limits and punitive awards.⁴⁸

While punitive damages clearly are not intended to compensate for pure economic loss, such damages could assist commercial fishermen in recovering funds at a more truly commensurate value for their losses. Punitive damages may also provide an impetus for settlement between the parties, as BP and its co-defendants will want to avoid the possibility of paying out extra damages; the specter of punitive damages can be a powerful tool at the bargaining table for claimants wishing to receive more than the amount a jury would award based on compensation alone, but willing to accept less than the possible amount awarded with the addition of punitive damages.⁴⁹ Punitive damages awards played an important role in further compensating commercial fishermen after the Exxon-Valdez catastrophe.⁵⁰

III. Indirect Compensation from Natural Resources Damages

⁴⁵ 33 U.S.C. § 2702(b)(2)(E) (2006).

⁴⁶ MEALEY’S, *supra* note 42.

⁴⁷ Perry, *supra* note 5, at 62.

⁴⁸ MEALEY’S, *supra* note 42.

⁴⁹ Moira Herbst, *Damages Ruling May be Pivotal in Gulf Oil Case*, INSURANCE JOURNAL, Sept. 6, 2011, available at <http://www.insurancejournal.com/news/national/2011/09/06/213654.htm>.

⁵⁰ Perry, *supra* note 5, at 31-32.

Full assessment of the ecological toll resulting from the Deepwater Horizon disaster will take years to complete and understand.⁵¹ While much of the initial death tolls to gulf species is completed, the long-term, or “chronic” effects, will be much more complicated and time-consuming to determine, as well as more difficult to quantify in terms of monetary damage to natural resources.⁵² Commercial fishermen only have a limited ability to seek damages for lost profits from the oil spill, and it would be near impossible for them to know for how long and how much the oil spill will impact environmental factors affecting fisheries. After the Exxon-Valdez spill, several fisheries collapsed as a result of environmental damage.⁵³ A recent biological study highlights that environmental symptoms suggest the Gulf of Mexico ecosystem is on a course similar to that experienced by Prince William Sound after the Exxon-Valdez disaster.⁵⁴ Accordingly, natural resources claims advanced by state governments will likely benefit commercial fishermen as the claims fund ongoing recovery and adaptation efforts for overall environmental damage.

Under the OPA, federal, state, foreign, or Native American tribe trustees can recover “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage.”⁵⁵ The process that will inform such claims about the amount of damage is the Natural Resources Damage Assessment (NRDA), which consists of three overlapping stages: pre-assessment, which involves investigating the nature, extent, and cause of the damage; injury assessment and restoration planning, when studies are completed to quantify the damage and advise recovery plans; and restoration implementation, whereby

⁵¹ Matthew Coglianese, *The Importance of Determining Potential Natural Resource Damages From the Deepwater Horizon Accident*, 40 ENVTL. L. REP. 11100 (2010).

⁵² *Id.*

⁵³ Dahr Jamail, *The Escalation of BP's Liability*, ALJAZEERA (Oct. 3, 2011), <http://english.aljazeera.net/indepth/features/2011/09/201192913263037831.html>.

⁵⁴ *Id.*

⁵⁵ 33 U.S.C. § 2702(b)(2)(A) (2006).

recovery efforts commence and their efficacy is assessed.⁵⁶ Through the guidance of the NRDA, the National Oceanic and Atmospheric Association identified multiple fish species, oysters, crabs and shrimp and their associated habitats as “natural resources of concern” after the oil spill.⁵⁷ Determining the true economic value for the particular ecological services and species comprising such natural resources is an inexact process subject to different formulae.⁵⁸ Nonetheless, the NRDA will inform and contextualize claims by state and federal governments acting as trustees of natural resources that are owned by the public at large.

While similar in effect to lawsuits based on the state acting as a trustee for public resources, *parens patriae* suits for natural resources can be brought based on the state’s sovereign or quasi-sovereign interests and the interests of its citizens.⁵⁹ The protection of its environment and the health of its citizens empowers a state to bring a *parens patriae* suit for what amounts to societal damages.⁶⁰ Again, such a suit is not likely to directly compensate commercial fishermen, but would enable the state to implement different programs to help stabilize damaged natural resources including a state’s fisheries. After the Exxon-Valdez catastrophe, the state of Alaska and the United States successfully sued Exxon as trustees for the public, winning \$900 million in damages to help with environmental recovery in Prince William Sound.⁶¹

In August 2010, the state of Alabama commenced a *parens patriae* suit for environmental and economic damages incurred by the state as a result of the Deepwater Horizon oil spill, including harm to the state’s fisheries.⁶² Similarly, in the spring of 2011 Louisiana began seeking a declaratory judgment action against BP, seeking compensation for harm to its natural

⁵⁶ Coglianesse, *supra* note 51.

⁵⁷ *Id.* at 4.

⁵⁸ Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 DUKE ENVTL. L. & POL’Y F. 57, 94-95 (2005).

⁵⁹ *Id.* at 101-102.

⁶⁰ *Id.* at 109.

⁶¹ Rustad & Koenig, *supra* note 3, at 83-84.

⁶² Rustad & Koenig, *supra* note 3, at 90-91.

resources including its fishing industries that provide one-third of the U.S.'s domestically consumed seafood.⁶³

Conclusion

Commercial fishermen may benefit from filing their own claims through the GCCF or through the civil justice system, and from government-advanced claims for natural resources damages. The GCCF created pursuant to the OPA has proven dubious in its efficacy of appropriately resolving and paying claims, but may still prove to be a faster means of compensation for commercial fishermen than the traditional civil lawsuit.⁶⁴ However, fishermen must beware: Once a claim is resolved by the GCCF, the claimant is largely “stuck” with the result and cannot seek further redress through the legal system.⁶⁵ Claims through the legal system are naturally being processed at a slower rate, but may provide commercial fishermen with opportunities for punitive damages in addition to damages for loss of profits.⁶⁶ Finally, as fisheries recover from ecological damage, damages won from natural resources claims pursued by governments under the doctrines of public trust and *parens patriae* may help fund stabilization efforts for the Gulf Coast ecosystem. If resolution of legal quagmires after the Exxon-Valdez disaster provides a guide, commercial fishermen may still be struggling with finding adequate compensation for decades to come.⁶⁷

⁶³ MEALEY’S, *supra* note 2.

⁶⁴ Jervis, *supra* note 6.

⁶⁵ Rustad & Koenig, *supra* note 3, at 62.

⁶⁶ MEALEY’S, *supra* note 42.

⁶⁷ Perry, *supra* note 5, at 3-4.