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## **Ensuring justice: Claiming livelihood for communities in the U.S. Gulf Coast after the BP oil spill disaster**

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### **Abstract**

*This policy brief focuses on the Gulf Coast Claims Facility (GCCF) process, which administers compensation funds for individuals and businesses impacted by the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. Critics have declared the claims process as cumbersome for applicants, and public officials accused the compensation program of “extortion” for underpaying area businesses to give up legal rights. Policy options include increasing eligible claims for commercial harvesters and communities claiming loss of “subsistence use” and prioritizing claimants compensated under interpretation of OPA and state laws. Furthermore, policy recommendations will be considered as the GCCF is charged to administer all claims in a “quick, fair and transparent” process.*

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## Introduction

On April 20, 2010, the Deepwater Horizon Oil Rig exploded, taking the lives of 11 workers and releasing at least 172 million gallons of oil in the northern Gulf Coast of Mexico by July (Federal Interagency Solutions Group, 2010). The environmental, economic and social impacts of the explosion resulted in devastating effects on the long-term sustainability of the Gulf Coast eco-system, the seafood industry, and the livelihoods of many coastal maritime communities throughout Texas, Louisiana, Mississippi, Alabama and Florida. At least 200,000 households were affected (National Oceanic Atmospheric Administration, 2008). The damages from the Deepwater Horizon disaster surpassed previous oil spill records, such as the Exxon-Valdez oil spill in Alaska in 1989 and the Ixtoc 1 oil spill in Southern Gulf of Mexico in 1991 (Vargas, 2010).

Under the Federal Oil Pollution Act of 1990 (OPA), British Petroleum, Inc. (BP) was held liable for the oil rig explosion. The liabilities included paying appropriate damages and losses in the form of profits or earning capacity and subsistence use to individual claimants (U.S. Oil Spill Pollution Act, 1990). Following the oil spill explosion, BP established a number of claims facilities throughout the Gulf Coast to process emergency claims for those suffering loss of income and damage to natural resources during the federal closure of the Gulf of Mexico. In June 2010, under the negotiations of President Barack Obama, BP also agreed to establish a compensation fund of \$20 billion over the next three years for individuals and businesses damaged by the oil rig explosion (White House, 2010). This compensation fund would be administered by an independent third party. Thus, President Obama appointed Kenneth Feinberg, Esq., who previously administered compensation funds for families affected by the 9/11 terrorist attacks, to administer the Gulf Coast Claims Facility (GCCF). Currently the GCCF has processed 463,795 claims and has denied 232,488 claims (Gulf Coast Claims Facility, 2010).

Critics believe the GCCF process is cumbersome for applicants because GCCF continues to design and revise uniform standards for measuring “eligible” claims. Public officials also refer to the compensation program as “extortion” for underpaying area businesses to give up legal rights (Murtaugh, 2010). Policy options include increasing eligible claims, particularly for commercial

harvesters and communities claiming loss of subsistence use, and prioritizing claimants compensated under interpretation of OPA and state laws. Under OPA and the current state law, those businesses who are directly impacted by either owning property or whose livelihoods depend on accessibility to navigable waters and other natural resources are eligible to be compensated. Policy recommendations will focus on the Gulf Coast Claims Facility, which has the responsibility to administer all claims in a “quick, fair and transparent” process (White House, 2010).

## **Background**

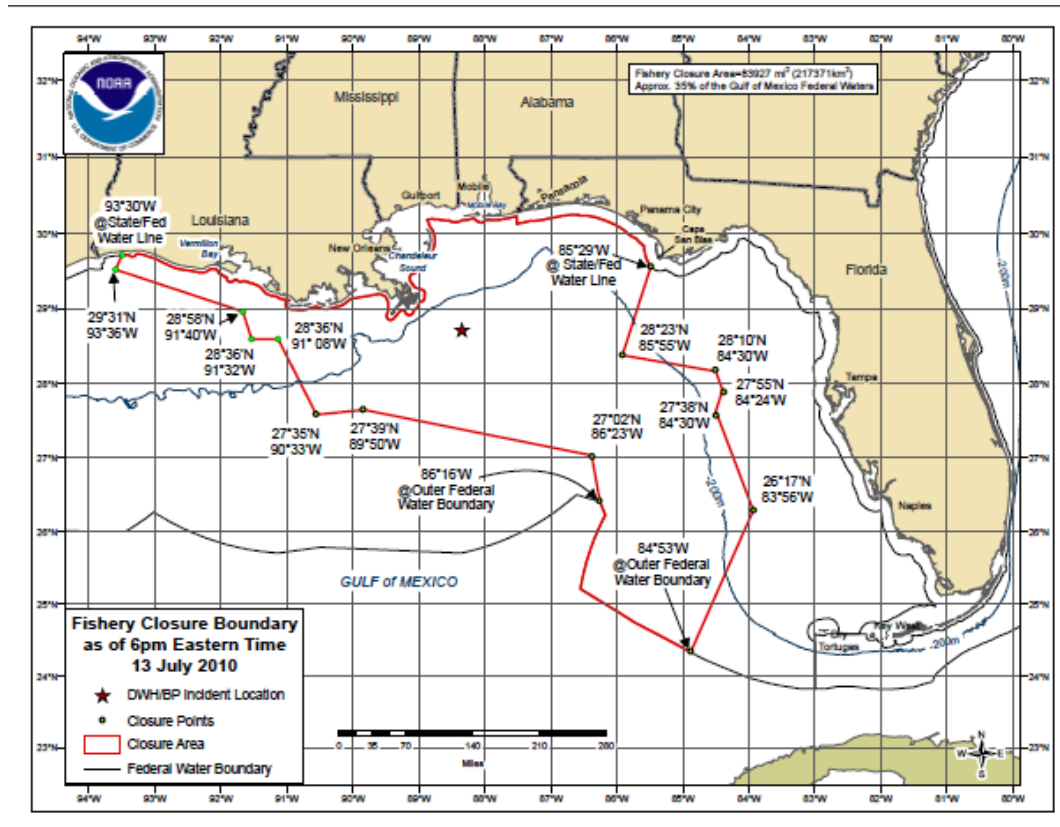
The leases of offshore oil rigs account for \$5.6 billion of federal revenue in the U.S. The Gulf of Mexico accounts for 30 percent of domestic U.S. oil production, and half of the oil comes from wells 1,000 to 4,999 feet deep, such as the Macondo well where the Deepwater Horizon exploded (Bourne, 2010). With the Macondo well releasing 4.9 million barrels (172 million gallons of oil) into the northern Gulf of Mexico, this oil disaster surpasses the previous record, the Ixtoc 1, which released 3.5 million barrels of oil from the shallow well in Mexico (Tunnell, 2010).

The economic and environmental impacts of oil spills on surrounding communities and ecosystems still require further research (IEM for Greater New Orleans Inc., 2010). For instance, during the Ixtoc 1 oil spill, fishing communities, such as Ciudad del Carmen in Campeche, Mexico, had permanently damaged oyster-beds and clam populations, though shrimping had returned to normal catch rates two years later (Vargas, 2010; Tunnell, 2010). Many of the city’s original fishermen had taken up other trades or moved away to other fishing communities because it was difficult to navigate closed waters. More oil rigs have since been developed in the Bay of Campeche. Oil spills proved to be even more devastating to maritime communities in Alaska after the Exxon-Valdez spill of 1989. Fisheries including salmon, herring, shrimp and crab were closed in the Prince William Sound for the entire 1989 season (Exxon-Valdez Oil Spill Trustee Council, 2010). It was not until 1994 that pink salmon populations were declared to be recovered. As of 2010, the Pacific herring fishery remains closed (Exxon-Valdez Oil Spill Trustee Council, 2010). While the effects of these disasters still linger, the Ixtoc 1 and Exxon-Valdez oil spills prompted Congress to

create the Oil Spill Pollution Act of 1990 (OPA), which consolidated all existing laws concerning oil liabilities.

By mid-July 2010, a third of the Gulf of Mexico’s federal waters were closed due to the oil spill (see Figure 1). With an annual income of \$659-million in fisheries landings, studies project damages to shrimp, oyster, crab and finfish production in the Gulf Coast region will be significant for another two years (National Oceanic and Atmospheric Administration, 2010; IEM for Greater New Orleans Inc., 2010). In Louisiana, the fisheries industry’s gross revenue losses are projected to be from \$285 million to \$428 million over the next three years, and job losses will affect between 2,700 and 4,000 workers (IEM for Greater New Orleans Inc., 2010). This disaster will result in ongoing losses of natural resources and subsistence use for at least another three years.

Figure 1: Fishery Closure Boundary Map (2010 July 13)



Source: National Oceanic and Atmospheric Administration.

The “responsible party” under OPA to pay all liabilities is British Petroleum, Inc. (BP). In June 2010, President Obama and BP agreed to have Kenneth Feinberg, Esq., act as an independent administrator of the financial claims process in the Gulf by assuming responsibility for the disbursement of funds through the GCCF (Gulf Coast Claims Facility, 2010).

Similar to the development of the 9/11 victim compensation fund, Mr. Feinberg has discretion in creating and designing a program to interpret the existing statutory framework of OPA and to disburse money to claimants as claims filed with GCCF do not establish BP’s liability under state or federal laws (Goldman, 2010). It is also designed as a voluntary, alternative system to litigate and provide compensation for victims of the oil rig disaster (Feinberg, 2005). Claimants have three options during the final settlement phase: (1) accept a final, lump-sum payment of all damages that resolves a claim against BP and any other parties responsible for damages; (2) apply for interim payments on past damages and losses received per quarter; or (3) accept a quick-pay option of \$5,000 for individuals and \$25,000 for businesses, who have previously received an Emergency Advanced Payment, which requires no further documentation (Gulf Coast Claims Facility, 2010). Mr. Feinberg (2010) designed the third option as a “no-pressure alternative for those who don’t have additional documented losses” (Hammer, 2010).

The GCCF has currently processed over 460,000 applications, denied 232,488 claims, and paid over \$2.4 billion to claimants. Many voiced concern during the GCCF’s four-month Emergency Advance Payment phase, regarding fairness of eligibility standards for claims, what claims were being paid, as well as protecting the legal rights of individuals and businesses.

*Who is eligible? Will the most impacted victims receive compensation?*

The GCCF claims process does not evaluate or establish BP’s liability under federal or state law; it is under complete discretion of Kenneth Feinberg and the appeals panel. Feinberg (2010) describes eligible claimants as “individuals and businesses that have incurred damages as a result of the Spill for Removal and Clean Up Costs, Damage to Real and Personal Property, Lost Earnings or Profits, Loss of Subsistence Use of Natural Resources,

or Physical Injury or Death” (GCCF, 2010). In interpreting both OPA and state laws, John Goldberg, a law professor at Harvard Law School, states that claimants seeking to recover from economic losses have the burden to prove both their business are damaged as the result of discharge of oil *and* loss of profits which impaired their earning capacity “due to” damage or loss (Goldman, 2010). Under OPA, the “due to” clause can be interpreted to include individuals and business owners who have physical property damage and businesses that have been made physically unavailable, regardless of whether they own that resource, as in the case for commercial fishermen and harvesters. Fishermen and directly contaminated on-shore businesses would be considered “first-line” users impacted (Goldman, 2010). This interpretation would deter claimants, who did not have a commercial right-of-use of natural resources that are damaged.

“Second-order” would be those businesses whose livelihoods do not depend on the use of resources, land, structures, and equipment that are rendered unusable by the spill. For instance, a Fireworks store owner located 150 miles north of the Gulf Coast beaches, who relied on tourists traveling to the Gulf Coast and claimed loss of profits, would not be considered “front-line” users, nor would the beachfront hotel located on the Gulf Coast that has not had any oil touch its near-by coastline (Goldman, 2010). An interpretation of OPA would also include compensation for businesses connected to local economies where the resource and properties have been damaged, such as a dockside restaurant that relied on fishermen as customers or real estate brokers who relied on beachfront hotel property values contaminated by the spill (Goldman, 2010). Regarding OPA interpretation, Feinberg has used oil-spill compensation policies to process 64,346 (52 percent) of claims from the “Food, Beverage, and Lodging” industry, 40,217 (33 percent) of claims from the “Retail, Sales and Service” industry, and 6 percent of claims from the “Fishing” industry (GCCF, 2010). Claimants can file multiple claim types.

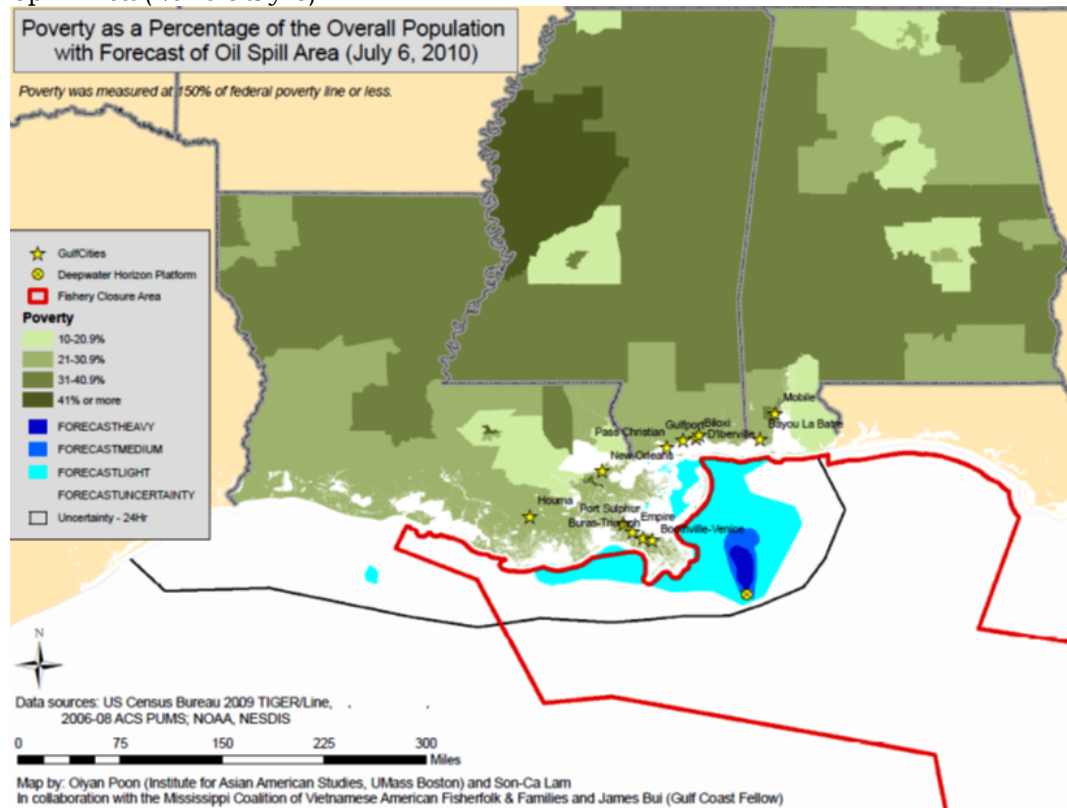
Proponents, who advocate for a more limited preference of GCCF claims, argue for a prioritization of claims based on need and urgency. The State of Louisiana, the Louisiana Department of Child and Family Services (LDCFS), and ten local partnering technical assistance and case management organizations have raised questions about the claims process. Although Louisiana has

submitted the most claims (40 percent) out of the Gulf Coast states to the GCCF, only 25 percent of total Louisiana claims have been paid. Meanwhile, the amount of claims (30 percent) in Florida that have been paid is much higher at 35 percent (GCCF, 2010). The State of Louisiana found a lack of consistency in claims and proposes claims to be prioritized by (a) medical need, (b) the threat to one's livelihood if not paid, and (c) claims by small, family-size businesses (LDCFS, 2010). LDCFS Secretary, Ruth Johnson, explains the financial strain for families: "The lack of consistency in payments and clear process is further increasing emotional strain between families as award amounts can vary greatly between persons that have worked and lived next to each other for years." She continues, "Across south Louisiana technical assistance providers are reporting that families are struggling to pay utility, housing and credit card bills and provide food for their children. In some areas there are concerns that families may have to remove children from rural parochial school systems because of a lack of payments" (LDCFS, 2010). Johnson's statement shows the dire circumstances in the Gulf Coast states, which are home to large populations, who live at or near 40 percent of the U.S. Poverty Line.

Some opponents argue Feinberg's interpretation of liability in the OPA should be expanded to include employees of affected businesses, such as low-wage casino workers in the Gulf Coast tourism industry (Lee, 2010). According to Goldberg's OPA interpretation, the congressional interpretation of OPA favors commercial fishermen and beachfront property owners, while beachfront property employees, including casino dealers and wait staff, are overlooked. There have been recent public protests by casino workers because an overwhelming amount of their claims have been denied. Many have also stated Feinberg does not take into account that casino worker salaries are driven mostly by tips and not by casino revenue along the Gulf Coast (Lee, 2010). The "Tourism and Recreation" industry accounts for just 1.6 percent of claims paid, and this category can also include large casino corporations filing losses and commercial charter boat businesses. Accordingly, Feinberg has recently appointed an attorney to serve as a casino liaison to work with casino workers and operators and understand the wage and salary impact of casino workers (Lee, 2010).



Figure 2: Poverty as a Percentage of the Overall Population with Forecast of Oil Spill Area (2010 July 6)



Other opponents, who advocate for a strict reading of Feinberg’s claim eligibility, are facing claim denials based on their proximity to the Gulf, especially food distributors and suppliers down the economic value-chain. For example, 170 businesses in South Carolina were denied emergency claims payments from Feinberg. A local seafood owner, who recently closed his warehouse due to high Gulf Coast oyster prices, asks, “How would this be any different from a seafood restaurant or oyster bar in Panama City Beach (Fla.) that has been paid?” Dean asked. “They serve the same kind of stuff. Why should that make the Noisy Oyster any different when they are both ordering oysters from the same location?” (Fretwell, 2010)

*What is subsistence use? Do you keep grocery receipts?*

Claimants may also claim damages based on subsistence use of natural resources. This includes “any Individual who uses the natural resources that have been injured, destroyed, or lost as a result of the Spill to obtain food, shelter, clothing, medicine, or other subsistence use (GCCF, 2010).” While 39,958 emergency claims have been filed for loss of subsistence use, only five emergency claims have been paid for claims of subsistence use (GCCF, 2010). This poses a problem for hard-to-document issues of communities whose cultures have historically survived on seafood for generations. In a recent focus group, many fishermen believed gross income for food and shelter costs should be included and not only net income because many fishermen pay income before their own bottom line is calculated (IEM for Greater New Orleans Inc., 2010). Fishermen, who operate in a commercial boat, often divide their revenue by percentage of seafood caught and harvested as documented in a study of Vietnamese-American fishermen in Louisiana (Bankston & Zhou, 1996). Thus, the GCCR has not found an effective way of documenting subsistence use in the forms of bartering as a dependent food source or cultural participation.

Damage to subsistence is highlighted through Native Alaskan fishing communities in the wake of the Exxon-Valdez oil spill. Dolly Reft (1990), a Native advocate from the village of Kodiak explains:

“You cannot take people from a village and put them into modern society where others are competing for the dollar. It’s a totally different way of thinking, a totally different way of living...subsistence is our last tie with who we are...in our subsistence way of living we are not competing...we go fishing together...we work together to help provide for our friends and relatives” (Reft, as cited in Davidson, 1990).

Patience Andersen-Faulkner of Cordova District Fishermen United (2010) adds:

United adds: “It is by participating in subsistence that culture and traditions are preserved; those are important for a society to thrive. Absent that resource, the culture suffers. Each gathering of people is important. At the end of the day, your grandmother will tell again of how to share the food and recipes she’s invented and used. She will

teach the younger ones in the family how to best use the shrimp, crab, fish, plants. She continues to tell of plants she uses, the goodness and nutrition in them all. She passes on her cultural experiences that cannot be just thought up without the food product in front of her.”

Andersen-Faulkner noticed the difficulties with documenting subsistence losses and developed a system that narrated her story and verified subsistence claims with Tribal Governments. She also launched pre-oil spill market surveys of the value of natural resources among community members. In the Gulf Coast, a method of documenting subsistence use has not been accepted or publicized by the Gulf Coast Claims Facility. Nearly 4,000 form letters, which have been submitted to explain subsistence or grocery losses, were denied by Mr. Feinberg (Hammon, 2010). A parish president, who drafted the form letters for constituents, remarks "If I give fish to my mother-in-law, how can she document that? Do you keep your grocery receipts? No one keeps grocery receipts."

Interpretation of OPA and Congress' intent supports claims to subsistence use. Representative Don Young of Alaska stated that the OPA “should result in prompt compensation for the subsistence fishermen who rely on their catch for consumption and survival” (House Adoption of Conference Report , 1990). These claims would reflect more accurately the subsistence losses by fishing communities, including Vietnamese-American and other community fishers. Airriess and Lawson (1991) describe the nature of this community practice:

“For every seafood catch that an individual puts out, Louisiana Vietnamese engage in mutual-aid. In another example, when Louisiana Vietnamese farmers harvest their extensive and genetically diverse’ gardens, crops are frequently sold or given to family members and friends who lack access to land or elderly persons who are physically unable to garden. This is another form of mutual-aid which reinforces the traditional dietary habits of the residents and strengthens the cultural distinctiveness of the entire community.”

Airriess and Lawson (1991) also demonstrate that the reciprocal caretaking culture of mutual-aid was born as part of an extended social support network. For immigrants with limited access to credit, limited English proficiency, and exposure to racial prejudice

in the United States, survival was only possible through a mutual-aid system of bartering for lack of credit.

### **Policy Recommendations**

Evaluating the administration of the GCCF in four months following the BP oil-spill reveals that the implementation of the claims process involves accepting applications in a “quick” manner and denying large volumes of applications. Nevertheless, critics, such as Louisiana Department of Child and Family Services, have found inconsistencies in the claims process. In assessing fairness for future decisions, this policy brief recommends the following actions:

1. For eligibility standards, Feinberg should adopt broader interpretations of OPA based on the seafood economic value-chain. There should also be studies on the impacts of the oil disaster on regional livelihoods and denial of claims in related industries, such as local casino workers (Lee, 2010).
2. Since Gulf Coast commercial fishermen have been unemployed for an entire fiscal year, establishing policies that prioritize claims based on medical needs and threats to one’s livelihoods in certain industry sectors should be adopted.
3. For ensure consistency with OPA and state law, commercial fishing and beachfront property should be targeted and claims should reflect the population percentages of each industry impacted in the Gulf Coast, such as Louisiana, Mississippi and Alabama.
4. The GCCF needs to develop a process that analyzes individual, community and cultural loss of subsistence use and identifies best practices of documenting loss.

By considering these policy recommendations, Mr. Feinberg and the Gulf Coast Claims Facility can design an effective and transparent process for communities to cope and recover from the environmental and economic disaster of the BP Oil Spill. The compensation fund will set further precedence for future large-scale environmental and technological disasters. We hope this document can guide policymakers and the GCCF in ensuring justice for coastal communities along the Gulf Coast.

## Policy Update

As of April 2011, due to the recent community organizing efforts from the Vietnamese-American community, legal advocates, the Native American tribe, the United Houma Nation, and 14 grassroots organizations, Mr. Feinberg has agreed to compensate fishermen who have suffered subsistence-loss (Nguyen, 2010).

"The GCCF will pay documented subsistence claims for Native American tribes and commercial fishermen, including Vietnamese fishermen and others who live off a portion of their catch," Feinberg said. "We will not pay recreational fishermen claims if the claims simply involve 'loss of enjoyment.' Such claims cannot be documented. The sticking point has always been developing a credible, workable formula for determining damage in subsistence cases." This includes using pre-spill prices for portions of shrimp catches which fishermen used to feed themselves and their family and who have bartered among community members (Hammer, 2010). While compensation for oil spill losses continues to progress, further research needs to be done on understanding the effects of community-based political advocacy in interpreting OPA and future environmental disasters.

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