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Kenneth R. Feinberg  
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RE: Gulf Coast Claims Facility Draft Protocol

Dear Mr. Feinberg,

We are writing on behalf of the Vietnamese American Volunteer Law Corps (“Law Corps”) to offer comments to your draft protocol for the Gulf Coast Claims Facility (“GCCF”), dated July 9, 2010 (“Draft Protocol”).<sup>1</sup> We hope that this letter will be implemented in establishing a claims process that is more equitable, transparent and just than the existing BP claims process while being compliant with the statutory mandates of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2701 *et seq.*

As you may know, the Vietnamese American community is one of the most severely and disproportionately affected ethnic communities by the Deepwater Horizon Oil Incident (or “BP Oil Spill”). Of the 40,000 Vietnamese in Louisiana, Mississippi, and Alabama, one in five works in a seafood factory. Vietnamese and Southeast Asian fishers make up one-third of all shrimping vessels in the Gulf. Many also work catching oysters, crabs, and other seafood. In all, as much as 80 percent of all Vietnamese Americans in this region are affected by the oil spill due to their connections to the seafood industry. The BP Oil Spill has threatened this way of life for an indeterminate period. The effects of the Exxon Valdez spill have shown that recovery may not come for 20 plus years.

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<sup>1</sup> Currently, the Vietnamese American Volunteer Law Corps comprises over 30 bilingual lawyers and law students from over seven different states. Our membership continues to grow as have our partnerships with legal bar associations, legal aid, and other non-profit organizations from across the country.

Given the devastating nature of the BP Oil Spill, the resulting high number of unemployed people in the region, the Gulf Vietnamese American community faces significant legal needs that remain unmet by BP, government agencies and existing community or legal aid organizations in the region. Our Law Corps was organized to address these concerns and provide services to the Gulf Vietnamese American community affected by the BP Oil Spill on an entirely pro bono basis.

As you already know, the OPA, unlike other environmental laws such as the Clean Water Act (“CWA”), 33 U.S.C. 1251 *et seq.*, creates a right for private party claimants<sup>2</sup> to directly recover from BP, the responsible party, for certain injuries resulting from the oil spill.<sup>3</sup> A central part of our Law Corps’ mission is to ensure fairness, transparency and justice for affected victims in the claims process mandated by the statute. With these goals in mind, we have evaluated the GCCF Draft Protocol against the requirements of the OPA. The current Draft Protocol is defective because: in some areas, it contains procedures that are contrary to the OPA; and in other areas, fails to address BP’s obligations under OPA altogether. Specifically, we point out the following:

- The GCCF steps into the shoes of BP, and therefore its claims procedure must meet all applicable requirements of the OPA.
- Under the OPA, the 90-day period for BP to honor a claim began to run when a claimant first submitted its claim to BP, and cannot reset by the GCCF.
- As an agent of BP, the GCCF is not in a position to advise a potential claimant whether or not to file a claim.
- A claimant is entitled under the OPA to make a claim for a sum certain, and any acceptance for a lesser amount does not preclude the claimant from pursuing future recovery for unrecovered amounts with the NPFC or through litigation.
- The requirement that a claimant sign a general release of all rights and claims the claimant may have is contrary to the OPA.
- The Draft Protocol’s absolute limitations period is inconsistent with the OPA’s limitations period, which incorporates the “discovery rule.”
- Advance Emergency Payments under the Draft Protocol do not equate to Interim Payments under the OPA, which allows a claimant to make successive Interim Claims.

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<sup>2</sup> A “claimant” is “any person or government who presents a claim for compensation under [the OPA]”. 33 U.S.C. § 2701(4).

<sup>3</sup> Under the OPA, BP is liable for direct and indirect damages resulting from the spill and the costs of cleaning up the spill. 33 U.S.C. § 2702(a). Among other things, the OPA allows private parties to recover damages for lost revenues, profits, and earning capacity due to injury, destruction, or loss of real or personal property and nature resources caused by an oil spill. 33 U.S.C. § 2702(b)(2)(D),(E). Damages also include injuries to real or personal property and economic losses resulting from property damage caused by the spill. 33 U.S.C. § 2702(b)(2)(B).

- A claimant is not required to make non-OPA claims to the GCCF, and settlement of OPA claims have no preclusive effect on non-OPA claims.
- Under the OPA, a claimant is entitled to interest on late paid claims.
- The OPA is a strict liability statute that does not require that a claimant show “proximate cause” in order to recover damages.
- The OPA allows a claimant to submit non-traditional alternative documentation to prove a claim.

Each of these eleven (11) points is explained in more detail below.

**1. The GCCF steps into the shoes of BP, and therefore its claims procedure must meet all applicable requirements of the OPA.**

While the GCCF is funded by an escrow account payable with BP dollars, the GCCF cannot, in any way, abrogate BP’s statutory obligations under the OPA or other laws. The OPA expressly prohibits BP from transferring its liabilities to any other entity or person. 33 U.S.C. § 2710(b).<sup>4</sup> Moreover, the OPA *requires* that BP, as the responsible party, “establish a procedure for payment or settlement of claims for interim, or short term damages.” 33 U.S.C. § 2705(a). The Draft Protocol acknowledges that the GCCF was created to fulfill BP’s obligations under the OPA:

*The GCCF fulfills BP’s obligations as a designated Responsible Party to establish a claims procedure; presentation of a claim to the GCCF satisfies a claimant’s obligation to present a claim to the responsible party before the claimant presents a claim to the Coast Guard for payment.*

Draft Protocol, FN1 (*emphasis added*).

The Draft Protocol further requires that “[a] Claimant asserting a claim under OPA must first present the claim to the GCCF for consideration and potential resolution (33 U.S.C. §§ 2702, 2713).” Draft Protocol, ¶III.B.1. Because GCCF essentially “fulfills” and assumes BP’s obligations, it is also bound by the strictures of the OPA, including but not limited to providing the full scope of recovery required by the statute.<sup>5</sup>

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<sup>4</sup> The OPA has no provisions for transferring BP’s obligations to an “independent” third party for establishing a claims procedure. We also understand that BP is paying your salary and the salaries of your GCCF staff, including all claims processors. Moreover, based on your statements at the Congressional hearing on July 21, 2010, BP approves the hiring of the GCCF staff and has the right to fire escrow administrator of the GCCF. Based on these facts, the GCCF is not an independent third party.

<sup>5</sup> We agree that the GCCF is non-governmental, and thus its procedures are not necessarily bound by the Administrative Procedures Act (“APA”). 5 U.S.C. § 701, et. seq.<sup>5</sup> However, the OPA establishes a claimant’s scope of liability and recovery, which applies to the NPFC Fund, the existing BP claims process, the successor GCCF

Based on these indicia, we cannot but conclude that the GCCF steps into the shoes of BP, as an agent of BP. As such ***no claimant should receive any less compensation in the GCCF claims process than they are entitled to under the OPA.*** In addition, as is consistent with the OPA, no claimant should be required to waive or relinquish any rights that they are otherwise entitled to under the law.<sup>6</sup>

**2. Under the OPA, the 90-day period for BP to honor a claim began to run when a claimant first submitted its claim to BP, and cannot reset by the GCCF.**

The Draft Protocol states, “[f]or the purposes of presentment requirements under the OPA, the GCCF shall deem a claim presented when a Claim Form is submitted and the Claim Form is sufficiently complete for consideration.” Draft Protocol, ¶ III.B.2. This provision suggests that the approximately 138,000 claimants who have already submitted a claim to BP, must resubmit their claims to the GCCF, and wait *another* 90 days for the GCCF to pay their claims before their the right to appeal vests. This is contrary to the OPA.

What the OPA *does* require is that a claimant first presents his claim to *BP*, the responsible party. 33 U.S.C. § 2713(a). If BP denies liability, or the claim is not settled after either 90 days of presentment of the claim to BP or BP’s initial advertisement of the claims process (whichever is later), the claimant has a right to appeal the uncompensated portions of his claim to the National Pollution Funds Center (“NPFC”) or in court. 33 U.S.C. § 2713(c)(1)-(2). BP first published and advertised its claims process in May 2010. The statute does not allow the responsible party to “re-advertise” a claim through its agent or any other entity, for the purposes of “resetting” this period.

Most have already waited for months without payment. Any requirement to re-present a claim to the GCCF which has the effect of delaying an appeal to the NPFC or the courts is in clear violation of the OPA. 33 U.S.C. § 2713(a) & (c)(1)-(2). If, as you say, the GCCF “fulfills BP’s obligations as the responsible party,” one of these key responsibilities is to pay a claim within 90 days of presentment to BP. *Id*; Draft Protocol, FN1.

Also, for those bringing claims to the GCCF for the first time, we request that you clarify that the Draft Protocol’s seven (7) day GCCF “Appeals Board” period and fourteen (14) day “Payment of Claims” period is folded into the overall 90-day period to settle a claim.<sup>7</sup> Under the OPA, a claim is settled only “by *payment* within 90 days”—not by agreement on a cash amount.

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claims process or any other claims process BP seeks to establish or fund directly or indirectly. In other words, a claimant’s scope of recovery from the GCCF must be the same as the scope of recovery had the claimant made a claim to BP or the NPFC Fund. For example, appeals from BP or the GCCF are heard by the NPFC to determine whether the costs recovered were consistent with the OPA. [Citation]

<sup>6</sup> These rights include but are not limited to common law claims for nuisance, trespass, negligence, strict liability or citizen suits under the CWA.

<sup>7</sup> See Draft Protocol, V.A.2 (90-day time-to-settle procedure), V.D.1 (7-day GCCF appeals procedure), V.E (14-day payment provision).

33 U.S.C. § 2713(c)(2)(*emphasis added*). In other words, if a claimant does not have a check *in hand* after 90 days, he may appeal his action to the NPFC or in court. This statutory requirement is absolute, and *any* extension of the 90-day period violates the OPA.

Finally, we also bring to your attention that interest on payments starts to accrue *30 days* after a claimant's presents his claim to BP. 33 U.S.C. § 2705(b)(1). BP, and now the GCCF, is liable for interest on these payments. A claimant's entitlement to interest on late claims is discussed further in item 9 of this letter.

Memories fade with each passing day, but the economic needs of the Gulf community do not. On the contrary, every day is cumulative, and the economic stress faced by the injured community only becomes more acute with the passage of time. Thus, we hope that you will make good on your promise to assure claimants speedy payment to the damages for which they are entitled. In order to do so, the GCCF final protocol must clearly show that the OPA 90-day waiting period for appeals began to run when claimants first presented their claims to BP.

**3. As an agent of BP, the GCCF is not in a position to advise a potential claimant whether or not to file a claim.**

The Draft Protocol encourages a claimant to visit a GCCF claims office to “seek advice as to whether or not to file a claim.” Draft Protocol, ¶III.C.2 . This is a clear conflict of interest. As we stated above, the GCCF steps into the shoes of BP, and is in no position to provide advice to an injured party whether or not to file a claim. In fact, we cannot contemplate any advice by the GCCF to a claimant *not* to file a claim as legitimately serving a claimant's interest. This provision should be stricken from GCCF final protocol.

**4. A claimant is entitled to make a claim for a sum certain, and any acceptance for a lesser amount does not preclude the claimant from future recovery from the NPFC or through litigation.**

The OPA defines a “claim” as “a request, made in writing, *for a sum certain*, for compensation for damages or removal costs resulting from the incident.” 33 U.S.C. § 2701(3)(*emphasis added*). Under the Draft Protocol, it's unclear whether the GCCF claims processor first assesses what amounts the claimant is entitled to, or whether the claimant is entitled to make a claim “for a sum certain,” as is claimant's right under the OPA. *Id.* This distinction has important legal ramifications.

If payment or settlement of claims is less than the full amount of damages which the claimant is entitled, the settlement “*shall* not preclude recovery by the claimant for damages not reflected in the paid or settled claim.” 33 U.S.C. § 2705(a). In other words, if a claimant makes a claim for an sum certain, and the GCCF responds to the claim with a settlement offer less than the full amount, the claimant is still entitled under the OPA to accept the settlement and

pursue the unpaid amounts in court or with the federally-sponsored NPFC. The OPA, in relevant part, states that for uncompensated damages:

[A] claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the [NPFC] Fund.

33 U.S.C. § 2713(d).<sup>8</sup>

In addition, the claimant may instead elect to pursue a claim for uncompensated damages in court. 33 U.S.C. § 2713(c). The Draft Protocol should be amended to clearly identify a claimant's right to make a claim for a "sum certain."

**5. The requirement that a claimant sign a general release of all rights and claims the claimant may have is contrary to the OPA.**

The Draft Protocol is inconsistent with the OPA because it requires a general release upon settlement of a claim:

If the Claimant decides to accept the Final Decision, the Claimant shall return to the GCCF a signed Release. The Release will waive any rights the Claimant may have against BP to assert additional claims, to file an individual legal action, to participate in other legal actions associated with the Spill, or to submit that claim for payment by the National Pollution Funds Center.

Draft Protocol, V.C.

This take-it-or-leave-it release provision is both unconscionable and inconsistent with the OPA, which assures due process for full recovery by a claimant. The full scope of injury to the Gulf communities is yet to be determined, and waiver of future claims is contrary to the OPA's statute of limitations. See item 6 below. Specifically, the OPA allows a claimant to bring a series of interim claims for continuing damages. See items 6 & 7 below. Moreover, the Draft Protocol's release appears to require that the claimant waive his non-OPA claims in order to recover damages for he is entitled to under the statute. See item 8 below. Because the proposed general release is contrary to the OPA, we ask that you strike it from the GCCF final claims procedure.

**6. The Draft Protocol's absolute limitations period is inconsistent with the OPA's limitations period, which incorporates the "discovery rule."**

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<sup>8</sup> When these uncompensated portions of the claim are paid by the NPFC Fund, the claimant's right to the uncompensated portion of damages is subrogated to the NPFC and the Attorney General may pursue the responsible party for those damages. 33 U.S.C. § 2715(a)-(b).

The Draft Protocol states that “no claim may be submitted to the GCCF more than three years after [sic] this Protocol becomes operative.” This limitations period violates the OPA. The period of limitations for *damages* under the OPA is within three (3) years after “the date on which the loss and the connection of the loss with the discharge in question are reasonably discovered with the exercise of due care.” 33 U.S.C. § 2717(f)(1)(A). In other words, a claimant is entitled to submit successive interim claims for damages so long as it is made within three (3) years within *discovery* of the injury. Not only is the OPA’s limitations period appropriate in this case—where the long-term effects of the oil spill on the fisheries is yet to be determined—it is mandated by the OPA statute. The GCCF has no authority to set an absolute three (3) year limitations period. As such, we request that the GCCF final claims procedure adopts the statute of limitations periods mandated by the OPA.

**7. Advance Emergency Payments under the Draft Protocol do not equate to Interim Payments required under the OPA, which allows a claimant to make successive Interim Claims.**

Under the OPA, BP is required to “establish a procedure for the payment or settlement of claims for interim, short-term damages.” 33 U.S.C. § 2705(a). Although your proposal to make emergency payments of up to six (6) months to injured parties will help to relieve the claimants of the burdens of having to file claims more frequently, the Draft Protocol’s Advance Emergency Payment does *not* equate to Interim Claims as defined by the OPA.<sup>9</sup> Both the proposed Advance Emergency Payments and Interim Claims do not require waiver of further claims, but that is where the similarity ends. Moreover, there appear to be significant differences that have substantial impact a claimant’s entitlements to recovery. For example, it appears that the Draft Protocol limits the Advance Emergency Payment to a single payment to a claimant and purports to replace Interim Claims allowable under the statute. In contrast, the OPA allows a claimant to make successive claims for interim damages beyond 90 days subject only to the statute of limitations and built in discovery rule described in item 6 above. 33 U.S.C. §§ 2705, 2717(f)(1)(A). Thus, we request that the final protocol clearly reflect a procedure for interim claims as required by the OPA. However, we would agree with an approach that an interim claim should cover a six (6) month, rather than a month-to-month period.

**8. A claimant is not required to make non-OPA claims to the GCCF, and settlement of OPA claims should have no preclusive effect on non-OPA claims.**

The Draft Protocol states that “[a] Claimant asserting a non-OPA claim, such as a claim for death or physical injury, *may* also submit a claim to the GCCF for consideration and potential

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<sup>9</sup> The Draft Protocol states, in error, that “[a]n Advance Emergency Payment is an “interim” payment under OPA.” Draft Protocol, FN1.

resolution.” Draft Protocol, ¶II.B.1. (*Emphasis added*). We note appropriate use of permissive language here. While we recognize that BP is not required to pay non-OPA claims through the GCCF claims process, neither is the claimant required to bring such a claim to the GCCF. In other words, a claimant who has both economic damages and death or physical injury claims need not submit these latter non-OPA claims to the GCCF. The claimant must be able to reserve the right to make a non-OPA claim in another forum, such as in federal court, without the threat of waiving his rights by accepting an OPA claim settlement. This is contrary to the expansive release language contained in paragraph V.C. of the Draft Protocol (requiring claimants to release BP from “any rights the Claimant may have against BP to assert additional claims” when accepting final settlement). As written, the Draft Protocol release provision has a preclusive effect on non-OPA claims, which is inconsistent with the OPA.

Any release a claimant is asked to sign upon acceptance of a “Final Claim” from the GCCF should clearly indicate that the releasing party is not releasing any non-OPA claims if such claims are not reflected in the Final Claim. Claimants must be adequately informed of the distinction between OPA-covered claims and non-OPA claims before signing any release.

For those who opt to submit both OPA and non-OPA claims to the GCCF for settlement, we request that the GCCF final protocol contains procedures which delineate and separately account for these distinct OPA and non-OPA claims.

#### **9. Under the OPA, a claimant is entitled to interest on late paid claims.**

The Draft Protocol fails take into a claimant’s entitlement to accrued interest on late-paid claims. Under 33 U.S.C. § 2705(b)(1), BP is required to pay interest on claims not paid within thirty (30) days of presentation. 33 U.S.C. § 2705(b)(3) contains the only exception, where payment is “not paid due to reasons beyond the control of the interest of the responsible party or because it would no serve the interests of justice, no interest shall accrue under this section during that period.” 33 U.S.C. § 2705(b)(3). Due to the obvious conflict, the GCCF is not in the position to independently make this assessment for when this exception applies. Thus, we request that the GCCF final procedures reflect claimant’s entitlement to interest on claims not paid within thirty (30) days as mandated by the OPA.

#### **10. The OPA is a strict liability statute that does not require that a claimant show “proximate cause” in order to recover damages.**

The Draft Protocol states that “[t]he GCCF will only pay for harm or damage that is proximately caused by the spill.” Draft Protocol, ¶II.F. The Draft Protocol further states that “causation determinations will be guided, as applicable, by OPA and other federal law, and the law of the state that would be applicable to a tort claim brought by the Claimant.” Draft Protocol, II.F. These causation requirements are inconsistent with the OPA, which like most environmental statutes is a strict liability statute. Under the OPA, a claimant need only

demonstrate that damages were incurred as a result of the oil spill. 33 U.S.C. §2702(a), (b)(2)(B)-(E).

The Draft Protocol also states that the customer or supplier to a business that is injured cannot make a claim to the GCCF. Draft Protocol, ¶ II.F. The OPA has no such limitation and permits any claimant who suffers loss revenues from the destruction or loss of natural resources to make a damages claim to the responsible party. 33 USC § 2702(b)(2)(D).

Finally, you had stated in town hall discussions and other media that you intend to employ state law concepts on “business interruption” as a model to structure final settlements. The majority of state law business interruption claims generally reflect the period of recovery as the period required to restore damaged property back to productive use. In this case, the individual fisherman’s economic loss is tied to damage to a natural resource—the fisheries in the Gulf themselves—rather than privately-held real or personal property.<sup>10</sup> Currently, the period of restoration of the Gulf waters and fisheries is yet to be determined. As a result, we ask that you detail in the GCCF final protocol how the GCCF will calculate the period of recovery in a final lump sum settlement procedure.

#### **11. The OPA regulations allow a claimant to submit non-traditional alternative documentation to prove a claim.**

The standard of evidence required in our justice system of the courts is that of a “totality of the circumstances.” Many of those affected have endured horrific losses due to BP Oil Spill and are not engaged in a profession where a detailed document/record keeping system is a necessary component of their job description. As such, many of the requested documents which the BP claims process requires are either impractical or non-existent.

Our organization understands that you are grappling with complex issues, but time is of the essence. Mortgages, boat payments, car payments, and supporting the livelihood of real families are realities which those on the ground face. Currently, the current BP claim’s process requires documentation to support loss. These documents include tax records, trip tickets, wage loss statements, deposit slips, boat registrations, copies of current fishing licenses, business-specific records, photographs, replacement/cleaning receipts, and bookkeeping records. As of July 31, 2010, pursuant to the BP website, there were a total of 138,000 claims, with only 38,000 (or 28%) of those claims paid with at least one payment. That leaves 72% of claimants unpaid months after the spill without a single payment from BP.

With such an urgent need, an alternative and more flexible means of documentation should be utilized to ensure recovery to which the claimant is entitled under the law. Declarations, statements, videos, appraisals, valuation reports, and the like should be utilized as this is the

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<sup>10</sup> The OPA allows a claimant to recover “damages equal to the loss of profits or impairment of earning capacity due the injury, destruction, or loss of real property, personal property, *or natural resources...*” 33 U.S.C. § 2707(b)(2)(E) (*Emphasis added*).

standard of proof utilized in our court system. A totality of the circumstances requires that a combination of supporting documents, not only those documents specifically requested by the current claims process, be used to prove economic loss.

You could also decide to create a presumptive award based on governmentally held catch records and industry wide expense ratios and catch splits rates between owner/captain and crew, based on the size of the vessel. That measure would require no individual determinations at all and would have the additional benefit of extreme ease of application and speed. We note this concept is supported by the NPFC regulations which take into account “comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident” for calculating loss profits. 33 CFR § 136.233(c). This presumptive award can be structured as a claimant “option” that would run in conjunction with a more traditional claims process.

### **Concluding Remarks**

This may be the breaking point for the Vietnamese American community in the Gulf if immediate solutions are not in place. However, we are hopeful that future iterations of the GCCF claims procedures will provide the remuneration to the Gulf communities for which they are entitled to under the law. While the devastation wrought from the BP Oil Spill may never be reversed, through your work with the GCCF, BP has every opportunity to fulfill its obligations under OPA to make these communities whole.

We invite further discussion on the issue and eagerly await your response.

Sincerely,

THE VIETNAMESE AMERICAN VOLUNTEER LAW CORPS

cc: Vietnamese Bar Association of Northern California (VABANC)  
Vietnamese Bar Association of DC (VABA-DC)  
Louisiana Asian Pacific American Bar Association (LAPABA)  
Vietnamese American Young Leaders of New Orleans (VAYLA)  
National Asian Pacific American Bar Association (NAPABA)  
Mississippi Center for Justice  
Southeast Louisiana Legal Services  
Boat People SOS  
Asian Americans for Change  
Mary Queen of Vietnam CDC  
National Association of Vietnamese Services Agency (NAVASA)  
Honorable Zoe Lofgren  
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Honorable Joseph Cao  
Honorable Jo Bonner  
Honorable Gene Taylor  
Honorable Mike Honda  
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