Understanding the Valuation Issues

Presented by
William "Chip" Merlin, Jr., Esq.

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UNDERSTANDING THE VALUATION ISSUES

Claims against BP offer a unique intersection of environmental, tort, administrative, maritime, and insurance law. In addition to the environmental remedies the Oil Protection Act (OPA) provides, it essentially insures every United States citizen and business against economic loss caused by discharge of oil by a private party in United States waters. Each claimant can pursue many theories of recovery, but the OPA will be common to all. For that reason, the theories of valuation discussed in this paper are presented in order of the claims available under the OPA.

The OPA has never been applied in a large scale disaster such as this, so there is very little case law on the areas of recovery and valuation that will be at issue. The litigation in response to the Exxon Valdez disaster did not fall under the OPA and the state statutes promulgated in accordance with it,[1] so we are entering relatively uncharted territory. Especially in the areas of subsistence use and economic loss without accompanying property damage, the BP oil spill litigation will become precedent.

THE OIL PROTECTION ACT

As mentioned above, the OPA essentially provides insurance for all who suffer economic damage caused by a discharge of oil into United States water. The amount of recovery one can achieve may likely depend upon whether the injured party seeks recovery from BP, by claim or lawsuit, or from the Oil Spill Liability Trust Fund (the Fund). Claims against BP are broadly defined by the OPA and require little more than presenting a loss that was proximately caused by the oil spill. For that reason, litigation against BP should be similar to that routinely encountered under a broad insurance policy. Recovery from the Fund, however, is much more limited and subject to specific requirements outlined in the Code of Federal Regulations.

In every case, a private claimant must first submit a claim for a certain amount to BP.[2] If BP chooses to pay the claim (or interim claim pursuant to 33 U.S.C. § 2705), there is no need to go to court or the Fund. If BP denies the claim, a claimant can seek compensation from the Fund without going to court. However, compensation under the Fund is specifically limited, sometimes to the lesser of several theories of recovery. Accordingly, a claimant may not be able to fully recover, especially for damage to real or personal property, through the Fund. Theoretically, a claimant should be able to recover more by presenting the claim to a jury. Further, the recent United States Supreme Court

[1] *See Tex.Nat.Res.Code Ann*. § 40.002(d)("The legislature declares that it is the intent of this chapter to support and complement the Oil Pollution Act of 1990."); 30 *La.Rev.Stat.* § 2453(B)("The legislature declares that it is the intent of this Chapter to support and complement the Oil Pollution Act of 1990")

[2] *See Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc*., 51 F.3d 235 (11th Cir. 1995) (OPA's requirement that all claims be presented first to parties responsible for spill was mandatory condition precedent to filing of private lawsuits under OPA); *Johnson v. Colonial Pipeline Co.*, 830 F.Supp. 309 (E.D. Va. 1993)(presentation of a claim must contain enough information to allow the defendant to determine its liability and enter into settlement negotiations, i.e., the nature and extent of the damages and the amount of monetary damages sought).

case, *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), suggests that punitive damages may be available pursuant to maritime common law, in addition to recovery under the OPA and individual state laws. There may be a benefit to bringing both compensatory and punitive damages in one claim; if the same jury will hear evidence of reckless and wrongful conduct, in addition to compensatory issues, this could lead to a greater compensatory verdict. In turn, as common law maritime punitive damages can be no greater than the amount of compensatory damages, trying both issues before the same jury could result in greater punitive damages as well.

Though the C.F.R. limits a private claimant's recovery from the Fund, the Natural Resources Damage Assessment (NRDA) process and the case law that lead to the current standards reveal that a true restoration cost recovery should be obtained in claim or suit against BP. Prior to the mid-1990s, NRDA procedures allowed valuation of damages to natural resources to reflect the lesser cost of "restoration, rehabilitation, replacement, and or acquisition of the equivalent of the injured natural resources and the services those resources provide." This allowed polluters to avoid paying to remedy the full damage. States and environmental groups challenged these regulations, and, in *State of Ohio v. U.S. Dept. of the Interior*, 880 F. 2d 432 (D.C. Cir. 1989), the D.C. Court of Appeals held that regulation was invalid because it was contrary to Congressional intent.[3] The Court also held that the regulation prescribing a hierarchy of methodologies to determine lost use value of natural resources which focused exclusively on market values was not a reasonable interpretation of CERCLA.[4] At the heart of the Court's decision, was the Congressional recognition that natural resources have intangible value that is not reflected by a lost use valuation.[5] As a direct result of this decision, the regulations were changed, and now the Department of the Interior's valuation procedures favor restoration costs over lost use values and damages are accessed, not just on market value, but on the use value, option value, and existence value. These valuations more accurately reflect the true value of our resources.

That NRDA procedures put a significant value on restoration costs as the appropriate standard for recovery from the responsible party and supports the proposition that restoration value is the standard for assessing an individual claimant's damages.

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[3] "The trustees, in developing plans under subsection (c), shall give priority to efforts to restore, rehabilitate and replace damaged resources. The alternative of acquiring equivalent resources should be chosen only when the other alternatives are not possible, or when the costs of those alternatives would, in the judgment of the trustee, be grossly disproportionate to the value of the resources involved. "Equivalent" resources under this section are resources that the trustee determines are comparable to the injured resources. Equivalent resources should be acquired to enhance the recovery, productivity, and survival of the ecosystem affected by the discharge, preferably in proximity to the affected area."
H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 108-09 (1990) reprinted in 1990 U.S.C.C.A.N. 779, 786-87.

[4] The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.

[5] "The bill makes it clear that forests are more than board feet of lumber, and that seals and sea otters are more than just commodities traded on the market. It would clarify that in the wake of spills like the Exxon Valdez, all reasonable demonstrable natural resource damages caused by a spill are paid by the responsible parties, rather than borne by the public." H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 108-09 (1990) reprinted in 1990 U.S.C.C.A.N. 779, 786-87.

While BP will undoubtedly argue that the measure of damages should be that required by the C.F.R. for a claim under the Fund, there are several reasons why that argument should fail. First, the OPA, which passed unanimously in both the House and Senate in reaction to the Exxon Valdez disaster, was created for the purposes of deterring oil spills by holding the responsible party strictly liable for full restoration to natural resources.[6] If a responsible party is not held fully responsible to all claimants, there is little deterrent effect. Further, Congress did not include "lesser of" language in defining the measure of damages to natural resources. 33 U.S.C. § 2706(d) provides that the measure of natural resource damages is:

> A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
> (B) the diminution in value of those natural resources pending restoration; plus
> (C) the reasonable cost of assessing those damages.

Congress did not indicate anywhere in the OPA that the measure of damages for a private claimant should be any less. Finally, when claimants seek recovery from the Fund, they are asking for government money. The government is obligated, in theory, to use the money as conservatively as possible to preserve it for future claims. The *Ohio* Court easily explained the reason for this disparity in rejecting the NRDA's "lesser of" requirement:

> The Interior's "lesser of" rule operates on the premise that, as the cost of a restoration project goes up relative to the value of the injured resource, at some point it becomes wasteful to require responsible parties to pay the full cost of restoration. *See* 51 Fed.Reg. at 27,704-05; 50 Fed.Reg. at 52,141. The logic behind the rule is the same logic that prevents an individual from paying $8,000 to repair a collision-damaged car that was worth only $5,000 before the collision. Just as a prudent individual would sell the damaged car for scrap and then spend $5,000 on a used car in similar condition, DOI's rule requires a polluter to pay a sum equal to the diminution in the use value of a resource whenever that sum is less than restoration cost. What is significant about Interior's rule is the point at which it deems restoration "inefficient." Interior chose to draw the line not at the point where restoration becomes practically impossible, nor at the point where the cost of restoration becomes grossly disproportionate to the use value of the resource, but rather at the point where restoration cost exceeds-by any amount, however small-the use value of the resource. Thus, while we agree with DOI that CERCLA

[6] Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 Tul. Mar. L.J. 481 482-483 (Spring 2000)

> permits it to establish a rule exempting responsible parties in some cases from having to pay the full cost of restoration of natural resources, we also agree with Petitioners that it does not permit Interior to draw the line on an automatic "which costs less" basis.

Ohio, at 443-444.

In deciding whether to seek recovery in court from BP or go directly to the Fund, claimants should carefully weigh the potential benefits of both options. Recovery from the Fund should be quicker than litigation, but a claimant may not be able to fully recover the value of his or her losses. Litigation could result in a significantly higher recovery, but it could take years.

There are essentially four theories of recovery for private parties under the OPA: removal and mitigation costs, property damage, loss of subsistence use, and loss of profits and earning capacity. Each of these losses will be addressed in turn, with suggestions for valuation in a claim against BP and then valuation methods required for a claim to the Fund. This is followed with a brief section regarding lost revenue valuation by a city, county or other political subdivision.

1. Removal and Mitigation Costs

Who can recover

33 U.S.C. § 2702(b)(1)(B) provides that "any person" can recover "any removal costs incurred" that are "consistent with the National Contingency Plan"

How to Value the loss in a claim against BP

Perhaps the most instructive case on this issue is *U.S. v. Hyundai Merchant Marine Co.*, 172 F.3d 1187 (9th Cir. 1999), even though it concerned the United States' attempt to recover costs and not those of an individual or private business. In *Hyundai*, the United States brought an action against a vessel owner under the OPA, seeking to recover costs of the Coast Guard's response to the grounding of vessel and the resulting threatened oil spill. Among other things, Hyundai argued that the United States was not entitled to recover monitoring costs; only "necessary" costs were recoverable; and "base" costs were not recoverable. The Ninth Circuit rejected each argument.

Hyundai argued that the OPA did not permit the United States to recover the Coast Guard's cost of monitoring Hyundai's salvage operation, as opposed to the cost of actual removal of oil, because the costs of monitoring do not constitute "removal costs." *Id.* at 1189. The Court rejected this argument, finding that "removal" costs under the OPA include monitoring costs. The Court explained that the relevant term in OPA § 2702(a) is "removal costs," not "removal." *Id.* at 1190. § 2702(b) specifically references the Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(1)(A)(ii), which

requires the President to mitigate damage and specifically gives the President the authority to "*direct or monitor* all Federal, State, and private actions to remove a discharge." *Id.* Moreover, "removal costs" is defined under the OPA at 33 U.S.C. § 2701(31) as the "costs to prevent, minimize, or mitigate oil pollution." The Court concluded that the "Coast Guard's monitoring activities are part of its effort to prevent or minimize a threatened oil discharge." *Id*.

Next, Hyundai argued that the United States could not recover costs unless the district court determined they were "necessary" to mitigate or prevent a discharge of oil. *Id*. at 1191. Hyundai based its argument on § 2701(30), which defines "remove" and "removal" for the OPA as:

> "Remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines *or the taking of other actions as may be necessary* to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

Id. According to Hyundai, actions other than actual removal must be deemed "necessary" by a court before they are compensable. The Court rejected this argument.

> First, the words "as may be necessary" do not purport to be a limitation on reimbursement. They are more naturally read as an acknowledgment of executive discretion in determining the steps a particular situation requires. In any event, as we explained above, the relevant term in § 2702(a) is "removal costs," not "removal." The former is defined at subsection (31) as the "costs to prevent, minimize, or mitigate oil pollution." The word "necessary" is nowhere to be found in this more pertinent definition.

Id. at 1191. Further, the Court noted that if Congress intended to limit which actions of the Coast Guard were reimbursable, the intent should be found in the liability portion of the OPA, not in the definitions section. The liability section, § 2702(b), specifies "all removal costs incurred by the United States" are recoverable under § 2702(a). Nowhere in the liability section is the United States limited to recovery of only "necessary" removal costs. *Id.*

Hyundai also argued that the United States should not be reimbursed for unnecessary and unreasonable actions. Regarding this argument, the Court noted that "many of the actions that Hyundai now regards as unreasonable or unnecessary appear so, if at all, only by hindsight." *Id*. at 1191. "The grounding of the Hyundai No. 12 contained the seeds of a major ecological disaster. In the circumstances, it was only prudent for the government to rush personnel and equipment to the scene and maintain

them there until the threat was over. Be that as it may, the OPA does not restrict the recovery of the United States to costs that were prudent, or necessary, or reasonable." *Id*. The Court did note, however, that the general standard of the Administrative Procedure Act applies to preclude recovery for acts that are arbitrary or capricious.

Hyundai then argued that the Coast Guard's base costs, such as the salaries of personnel, that the Coast Guard would have incurred even were it not responding to the potential disaster, were not recoverable. *Id.* at 1192. For this contention, Hyundai relied on the OPA's language that the government may recover costs that "result from" an oil spill. The Court rejected this argument, finding that the Coast Guard's allocable base costs did "result from" the incident. The fact that the personnel would have been paid to perform other tasks, had the accident not occurred, does not change the fact Coast Guard personnel were paid to monitor a potential spill, and while they were monitoring the potential spill, they could not carry out their other duties. The same conclusion applied to other assets used by the Coast Guard in responding to the accident. The Court concluded that base costs were recoverable to the extent they were expended in response to the threatened oil spill. *Id*. at 1192.

Much of this analysis can be extended to the private individual or business. While an individual or business has no duty or obligation to monitor a spill, they can be reimbursed for actions taken to minimize or mitigate potential losses. § 2702(B) provides that the responsible party is liable for "*any* removal costs incurred by *any* person for acts taken by the person which are *consistent with the National Contingency Plan*." (emphasis added) As the *Hyundai* Court noted, § 2701(30) defines "remove" and "removal" "containment and removal of oil or a hazardous substance from water and shorelines *or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and* ***private property****, shorelines, and beaches*."

Likewise, mitigation or removal need not be deemed "necessary" by a court in order for an individual or business to recover costs, so long as the mitigation is *consistent* with the National Contingency Plan. As in the provision at issue in *Hyundai*, § 2702(b) references "removal costs," not just "remove" or "removal." As "removal costs" are defined as "costs to prevent, minimize, or mitigate oil pollution," and the word "necessary" is not found in this definition, any mitigation consistent with the National Recovery Plan should be covered, whether or not it was ultimately necessary.

Finally, *Hyundai* makes it clear that base costs can be recovered for removal and mitigation efforts. This includes salaries of employees who are working on removal or mitigation and not their regular duties, as well as materials that are used for mitigation and removal, even if they are generally otherwise used in running a business or household. Additional salaries for people hired specifically to remove or mitigate pollution and materials bought specifically for those purposes also recoverable, so long as the actions taken are *consistent* with the National Contingency Plan and directly relate to the mitigation or removal of oil. *See Alabama State Docks Dep't v. Compania Antares de Navigacion*, not reported in F.Supp. 2d , 1998 WL 1749264 (S.D. Ala. 1998).

For a successful claim, every cost should be documented with receipts, payment information, and affidavits of time and work performed. If an individual or business has concerns about whether an action is consistent with the National Contingency Plan, they should contact the Coast Guard, preferably in writing.

Valuation under CFR to recover costs from the Oil Spill Liability Trust Fund

33 C.F.R. §136.203:

> (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
> (b) That the removal costs were incurred as a result of these actions;
> (c) ***That the actions taken were determined by the FOSC*** (Federal On-Scene Coordinator designated under the National Contingency Plan or that person's authorized representative) ***to be consistent with the National Contingency Plan or were directed by the FOSC.***

33 C.F.R. § 136.205 Compensation allowable.

> The amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken *that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.* ***Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC***.

2. Real or Personal Property[7]

Who can recover

33 U.S.C. § 2702(b)(2)(B) states, "Damages for injury to, or economic losses resulting from destruction of, real or personal property" "shall be recoverable by a claimant ***who owns or leases that property***."

[7] Case law interpreting this provision makes it clear that there must be a present physical injury to recover under this provision. *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (Tex. C.A.5 2001)(claim denied where there was no evidence of close, direct and proximate link between discharges of oil and any resulting actual, identifiable oil contamination of particular body of natural surface water.)*; Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008 (E.D.La. 1993)("The Court reads "injury" to mean physical injury; "injury" does not encompass economic loss because where Congress intended recovery for "loss," it specifically used that word.")

How to value the injury or destruction of property in a claim against BP[8]

Valuation of property damage is often not as simple as it seems. Perhaps the biggest contributing factor to the unintentional under valuation of property is misunderstanding regarding replacement value/market value and repair value. In many cases, the cost to repair a structure far exceeds the replacement value. For example, BP may determine the cost of a structure based on the purchase price or market value of a similar structure immediately before the oil spill. However, after a loss, the claimant should be put in the same position as before the loss, so the structure (or land) should be *repaired or restored* rather than simply replaced. Specialized work for hazardous substance removal, scarcity of materials needed, and new building codes can push the repair costs well over an estimated replacement value. Additional factors, such as temporarily high prices in the wake of a catastrophe, can also significantly increase the repair costs.

To ensure that an amount claimed or accepted will cover the costs of repairs or restoration, it is advisable to consult an expert, such as an engineer, contractor, or marine biologist, who is knowledgeable about assessing the physical damage as well as the current costs of restoration and construction, including current costs of materials and code requirements.

As explained above, BP will undoubtedly argue that the measure of damages should be that required by the C.F.R. for a claim with the Oil Spill Liability Trust Fund, but there are several reasons why that argument should fail: deterrent effects only work when enforced; the "lesser of" language was not included in defining the measure of damages; the importance the statute and corresponding regulations place on restoration; and the fact that the Fund is government money.

Another scenario might arise where BP offers settlement based on actual cash value rather than replacement cost. Actual cash value is the cost of replacing damaged or destroyed property with identical or comparable property, less accumulated depreciation and obsolescence. Only rarely will actual cash value provide sufficient benefits to replace or restore damaged property.

The most reasonable interpretation of 33 U.S.C.§ 2702(b)(2)(B) is that it essentially provides for additional living expenses if a home is destroyed, loss of rents if a rental property is destroyed, or business expense and interruption expenses if a business is destroyed. Additional living expenses are those incurred for rental or temporary housing when a covered event renders a home uninhabitable. In addition to the rent for alternative housing, other additional expenses could be claimed, such as the additional

[8] The OPA does not provide recovery for loss of use and enjoyment of real property for the private claimant, though loss of use and enjoyment is considered in claims that the government can make for the public trust. Accordingly, these claims must be pursued under state statutory or common law. Use and enjoyment values can be measured through market-based methods like fees paid for use of similar natural resources or comparing the pre-loss market values of similar property not appurtenant to the injured natural resources.

expense in travel to and from work due to the new living location. The actual costs incurred are the measure of damages. Loss of rents should apply if the property is destroyed, as a renter has no obligation to continue to make rental payments due to *force majeure*. A lease or a rental agreement will be helpful in valuing the economic loss. Business expenses allow a business to take the necessary steps to continue the business at another location during the period of restoration to the destroyed property. This is much like additional living expenses, in that it should offset the "extra expense" associated with returning to the normal operation of the business. Business expenses are relatively easy to value at the additional expenses incurred. The more difficult loss to value under this provision is that caused by business interruption. Business interruption presents a wide variety of valuation issues which are explained in the section on Profits and Earning Capacity.

Valuation under CFR to recover costs from the Oil Spill Liability Trust Fund

33 C.F.R. § 136.217 Compensation allowable.

> (a) ***The amount of compensation allowable for damaged property is the lesser of--***
> (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
> (2) The difference between value of the property before and after the damage; or
> (3) The replacement value.
> (b) Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.
> (c) Compensation for a claim for loss of profits or impairment of earning capacity under § 136.213(b) is limited to that allowable under § 136.235.

33 C.F.R. § 136.235 Compensation allowable.

> The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered.

> Calculations for net reductions or losses must clearly reflect adjustments for--
> (a) All income resulting from the incident;
> (b) All income from alternative employment or business undertaken;
> (c) Potential income from alternative employment or business not undertaken, but reasonably available;
> (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
> (e) State, local, and Federal taxes.

3. Subsistence Use

Who can recover

33 U.S.C. § 2702(b)(2)(C) provides: "Damages for loss of subsistence use of natural resources, [] shall be recoverable by ***any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources***." Notably, 33 U.S.C. 2702(b)(2)(C) provides a claim for any claimant who makes subsistence use of natural resources; claimants are not limited by ethnicity, race, or tradition of subsistence use. However, courts have held that businesses cannot recover under this provision.[9]

How to value loss of subsistence use in a claim against BP

The OPA does not define subsistence use, but it is defined in other statutes.[10] At a minimum, it is reliance on natural resources "to obtain the minimum necessities for life."[11] The regulations detailing a claim to the Fund reveal that subsistence includes, at a minimum, food, home, and livelihood. Accordingly, a claimant should be able to recover the replacement costs of equivalent food, shelter, materials. This could be valued by comparing expenditures before and after the spill, if such records were kept, or by presenting evidence of the market price of the materials previously gathered from the natural resources. A claimant can also recover lost earnings or earning capacity, the valuation of which is explained below, in the section on Profits and Earning Capacity, if it was derived from subsistence use.

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[9] *See Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008 (E.D. La. 1993)(Owner of oil platform could not recover for subsistence loss due to shutdown during pollution investigation.); *Petition of Cleveland Tankers, Inc.*, 791 F.Supp. 669 (E.D.Mich. 1992)(subsistence use provision did not allow recovery for economic loss claims where claimants used river for business activity rather than subsistence use.)

[10] For example, 16 U.S.C.A. § 3113 provides: ""subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade."

[11] *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1015 (E.D. La. 1993)

Most authorities, including Congress, federal administrative officials, federal courts, Alaska courts, and commentators in the fields of anthropology, sociology, psychology, and law have recognized that subsistence also includes cultural identity.[12] Congress was aware of this aspect of the term when drafting the OPA and chose not to define subsistence use or limit damages under this section only to economic harm. Accordingly, a claim for noneconomic cultural subsistence use may be possible under the OPA and, in essence, this may be the only recovery for a private individual for lost use and enjoyment of natural resources. [13]

Currently, the NRDA process uses contingent valuation to measure the nonuse values of natural resources. Contingent valuation uses a survey of questions which attempt to put a monetary value on resources. A survey designed to value cultural aspects of subsistence use could be asked of similarly situated subsistence users of natural resources who have not been affected by the oil spill.[14]

Valuation of a claim to the Fund[15]

33 C.F.R. § 136.233

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[12] *See* Byrner, William, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 Alaska L. Rev. 293, 299-300 (1995) *citing* 16 U.S.C. s 3111(1) (1994) ("[T]he continuation of the opportunity for subsistence uses ... is essential to Native ... traditional [[[ ] and cultural existence ...."); *North Slope Borough v. Andrus*, 486 F. Supp. 332, 342 (D.D.C.)(quoting an environmental impact statement prepared by the Department of Interior for the proposition that subsistence is "the socio-cultural identification of a traditional and unique lifestyle"); *United States v. Alexander*, 938 F. 2d 942, 945 (9th Cir. 1991)("If [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life."); *Katelnikoff v. United States Dep't of Interior*, 657 F. Supp. 659, 665 (D. Alaska 1986)("[W]hat was to be protected [by a subsistence exemption to the Marine Mammal Protection Act] was the right [of Alaska Natives] to be left alone and to continue their centuries-old way of life ...."); *State v. Tanana Valley Sportsmen's Ass'n*, 583 P. 2d 854, 859 n.18 (Alaska 1978)("[S]ubsistence hunting is at the core of the cultural tradition of many [Alaska Natives]."); Christopher L. Dyer, *Tradition Loss as Secondary Disaster: Long-Term Cultural Impacts of the Exxon Valdez Oil Spill*, 13 Soc. Spectrum 65, 75 (1993)("[S]ubsistence ... provide[s] the primary means of cultural existence.")("A subsistence lifestyle practiced by ancestors defines the contemporary cultural identity of [[[Alaska Native] communities."); Lawrence A. Palinkas et al., *Community Patterns of Psychiatric Disorders after the Exxon Valdez Oil Spill*, 150 Am. J. Psychiatry 1517, 1522 (1993)("[S] ubsistence activities ... provide the foundation for social support and community cohesion."); Lawrence A. Palinkas et al., *Social, Cultural, and Psychological Impacts of the Exxon Valdez Oil Spill*, 52 Hum. Organization 1, 3 (1993) ("[T]he social processes of taking, processing, and distributing [subsistence] foods has cultural significance beyond the importance of the food consumed.")

[13] Though the Ninth Circuit rejected a non-economic cultural damage claim in *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997), it is important to note that was a public nuisance claim for non-economic damage under federal maritime law.

[14] For more information on contingent valuation, please see Christine M. Augustyniak, *Economic Valuation of Services Provided by Natural Resources: Putting a Price on the "Priceless*, 45 Baylor L. Rev. 389, (1993); Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 Duke L.J. 879 (1994).

[15] Subsistence use claimants should note that 33 C.F.R. § 136.219(b) states: "A claim for loss of profits or impairment of earning capacity due to loss of subsistence use of natural resources *must be included as part of the claim under this section*." Valuation of lost earnings and earning capacity is explained in the next section.

In addition to the requirements of subparts A and B of this part, a claimant must establish the following:

(a) That real or personal property or natural resources have been injured, destroyed, or lost.

(b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.

(c) ***The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.***

(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. ***All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established***.

33 C.F.R. § 136.223 Compensation allowable.

(a) ***The amount of compensation allowable is the reasonable replacement cost of the subsistence loss suffered by the claimant if, during the period of time for which the loss of subsistence is claimed, there was no alternative source or means of subsistence available***.

(b) The amount of compensation allowable under paragraph (a) of this section must be reduced by--

(1) All compensation made available to the claimant to compensate for subsistence loss;

(2) All income which was derived by utilizing the time which otherwise would have been used to obtain natural resources for subsistence use; and

(3) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.

(c) Compensation for a claim for loss of profits or impairment of earning capacity under § 136.219(b) is limited to that allowable under § 136.235 (The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for: (a) All income resulting from the incident; (b) All income from alternative employment or business

> undertaken; (c) Potential income from alternative employment or business not undertaken, but reasonably available; (d) Any saved overhead or normal expenses not incurred as a result of the incident; and (e) State, local, and Federal taxes.)

4. Profits and Earning Capacity

Who can recover

33 U.S.C. § 2702 (b)(2)(E) provides that, "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources" shall be recoverable by "***any*** claimant." With one exception,[16] almost every court that has applied the provision has held it applies to loss even in the absence of property damage.[17][18]

How to Value the loss for a claim against BP

Courts that have addressed claims under this provision have interpreted it as a form of business interruption coverage and have afforded claimants the types of recovery typically included in business interruption insurance claims, including lost earnings, extra expense, diversion of workforce, injury to goodwill, and business stress. Business interruption insurance is designed "to do for the insured what the business itself would have done had no interruption occurred and the interest protected is the right to income generated by an operating business enterprise." 4 Appleman Ins.L. and P. § 2329. In addition to lost earnings, continuing operating expenses should be recoverable to the extent the claimant would have been able to pay for them, had the interruption not occurred.

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[16] *See Petition of Cleveland Tankers, Inc.*, 791 F.Supp. 669 (E.D. Mich. 1992)

[17] *See Ballard Shipping Co. v. Beach Shellfish*, 32 F. 3d 623, 630 (1st Cir. 1994) (noting OPA "almost certainly provides for recovery of purely economic damages in oil spill cases"); *In re Oriental Republic Uru.*, 821 F.Supp. 950, 956 (D. Del. 1993) (agreeing OPA provides for recovery of economic losses unrelated to specific property damage); *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008 (N.D. Cal. 2002).

[18] Just last week, the Florida Supreme Court interpreted Florida Statue § 376.313(3) and common law as providing a claim for commercial fishermen who suffer economic loss without accompanying property damage. The Court's interpretation of § 376.313(3) may likely extend recovery for economic loss without accompanying property damage to any claimant. In *Curd v. Mosaic Fertilizer, LLC*, No. SC08-1920, June 17, 2010--- So.3d ---- , at page 10, the Court wrote:

> In sum, the Legislature has enacted a far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands. To effectuate these purposes, the Legislature has provided for private causes of action to any person who can demonstrate damages as defined under the statute.

Perhaps the most instructive OPA case on this provision is *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F. 3d 58 (1st Cir. 2000). South Port was a family owned marina that was planning to increase the number of slips it offered to recreational boaters from one hundred to one hundred and twenty five. *Id*. at 60 The defendant's boat spilled gasoline into Portland Harbor, resulting in two to three inches of gasoline floating on the surface of the water at the marina. *Id*. at 61 The Styrofoam flotation of the marina's dock segments began to disintegrate, causing the docks to sink, list, and fully submerge. This caused a number of electrical posts to fall off the docks and into the water. *Id*.

South Port alleged extensive property damage, lost profits, and "other economic losses." *Id*. It claimed that the spill destroyed between sixty and eighty Styrofoam floats and severely damaged forty-five dock segments. The repair and cleanup were costly and time-consuming, and it occurred at a critical time in South Port's plans to expand its business. *Id*. According to South Port, the spill delayed its planned dredging an entire year and put the construction of new slips on indefinite hold because of a cash flow crisis caused by the accident and the diversion of South Port's employees from gainful work to cleanup and repair tasks.

South Port claimed economic losses for lost slip revenues, business interruption in form of diversion of labor force, injury to goodwill, and business stress. While the Court ultimately held that the damages awarded by the jury for injury to good will and business stress were not supported by the evidence, the Court recognized both as available theories of impaired earning capacity under the OPA. *Id*. at 62

South Port's claim for goodwill injury was based upon a projected loss of value of the business after the spill. Its expert testified that South Port's goodwill following the spill was approximately $100,000, or ten percent of the value of the business. However, the expert "never gave any basis for concluding that this goodwill had been reduced to zero or to any other number." *Id*. at 67. Though South Port presented evidence that it was located in a cove susceptible to spill-related pollution and media coverage suggesting damage to its reputation in the community, it presented no evidence of "concrete numbers," "explaining how these factors affected all, or even part, of the goodwill of the business." *Id*. The Court explained that South Port could have proved injury to good will by discounting the estimated loss of future revenues to present value or by assessing the decrease in value of the business to potential buyers after the spill repairs. *Id.*

Similarly, South Port provided no basis for its estimated value of business stress, which the Court explained as the reduction in the value of the business due to the bank loan default and the risk that the recovery plan may not succeed. *Id*. at 67-68. The court noted that a "reasonable calculation of loss due to business stress might take into account general data concerning the reduced value of businesses in default or a specific showing that this property had declined in market value." *Id*. At the very least, the Court noted, the calculation of business stress "required a specific computation of its risk of failure in the same arrangement." The value offered by South Port's expert was simply as a portion

of South Port's net value after deducting its business loan and not sufficient evidence to support an award of damages. *Id.*

FGDI, Llc v. M/V Lorelay, 193 Fed.Appx. 853 (11th Cir. 2006), an unreported case, also provides guidance. In *Lorelay*, a grain elevator operator sued a ship owner under the OPA for business damages resulting from a delay in loading cargo. The United States District Court for the Southern District of Alabama awarded the operator $167,173.33 in damages for delay, interest, overtime pay, railcar delay and holding charges, and railcar lease charges. On appeal, the Eleventh Circuit held that specific awards were not supported by the evidence, but the Court did not contest the validity of those kinds of damages.

Claims for lost earnings are inherently speculative because the claimant must establish, with reasonable certainty,[19] what they would have earned, had the disaster not occurred.[20] In the majority of cases, a loss in earnings[21] will not be an easy calculation, as most of the losses resulting from this disaster will not be short term.[22] Once the period of loss is established, quantification of business loss requires an analysis of pre- and post-loss revenue, costs and operating expenses, and a projection -- based on reasonably certain data, as to the market for the product or service, had the disaster not occurred.[23] For new businesses, this task is even more difficult. Without a track record of earnings, any estimation of lost earnings will be entirely speculative. New businesses may be able

[19] *Holt Atherton Industries, Inc. v. Heine*, 835 S.W. 2d 80, 84 (Tex. 1992)("the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty.") However, lost profits are not subject to exact calculation. *White v. Southwestern Bell Tel. Co.*, 651 S.W. 2d 260, 262 (Tex. 1983).

[20] For a short term loss, this can be a relatively easy calculation. For example, in *Maritrans Operating Partners, LP v. Port of Pascagoula*, 73 Fed.Appx. 733, (5th Cir. 2003), the Fifth Circuit held that the owner of barge that went aground in port proved that it suffered lost profits given uncontroverted evidence establishing that there was steady, uninterrupted demand for the barge and rest of owner's fleet both before and after the grounding. *See also In re M/V Nicole Trahan*, 10 F.3d 1190, 1195 (5th Cir. 1994)(shipowner is entitled to recover lost profits upon a showing that its "vessel was active in a market ready for its services."); *Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F. 2d 995, 1001 (5th Cir. 1984)(Uncontroverted proof that the vessel operated in an active market is sufficient to establish lost profits.); *Skou v. United States*, 526 F. 2d 293, 298 (5th Cir. 1976)("Most clear ... is the proof that [the vessel] was in immediate demand, as were her sister ships, upon her return to service. This demonstrates 'that profits may be reasonably supposed to have been lost because the vessel was active in a ready market.")

[21] The statute's reference to "profits" is misleading. The regulations promulgated pursuant to this section make it clear that a claimant should be able to recover lost net earnings, whether or not the earnings actually realize a profit. *See* 33 C.F.R. § 136.233; 33 C.F.R. § 136.235

[22] The duration of lost earnings for certain claimants, like commercial fishermen, should not be under estimated. Two decades after the Exxon Valdez, neither the shellfish in the western sound nor the otters that depended on them returned. http://articles.latimes.com/2008/dec/06/nation/na-exxon6

[23] Claimants should recognize, at least in certain business and areas, that evidence of the market in the five years preceding the spill is not a reliable measure of future performance, as many areas were slowly recovering from the devastating hurricanes in 2004 and 2005, as well as the current recession. Projections for lost earnings should take into account any upturn in the economy or particular industry that was expected before the oil spill.

to recover lost prospective earnings if there is some standard by which the amount of damages may be adequately determined.[24]

Problems sometimes arise in determining what exactly are lost earnings during a period of restoration. The case *Gates v. State Auto. Mut. Ins. Co*., 196 S.W. 3d 761 (Tenn Ct. App. 2005), is illustrative. The insured's furniture store was damaged by a tornado and he sought business income coverage for the eight months it took to repair the store. *Id*. at 762. The insured sold furniture under "rent to own" payment plans, where customers paid for the furniture over time. The policyholder claimed he was entitled to the entire value of sales contracts that would have been signed during the period of closure, even though most of the payments under those contracts would have been due after the eight-month restoration period. *Id*. The insurance company argued that Gates should be compensated only for payments that he would have *received* during the eight-month restoration period, not for the entire value of the contracts that would have been signed during that period. *Id*.

The Tennessee Court of Appeals sided with the policyholder. The Court noted that "Business Income"[25] is "net income ... that would have been earned during the restoration period," and looked to Black's Law Dictionary, which defined "earn" as "To acquire by labor, service or performance.... To do something that entitles one to a reward or result, ***whether it is received or not***." *Id*. at 766 *citing Black's Law Dictionary* 525 (7th ed.) (emphasis in original). Thus, the Court concluded, "[t]his definition of "earn" suggests that a "reward or result" is earned when the actor becomes entitled to the reward or result, "whether [the reward or result] is received or not." *Id.* The Court also looked to Gates' books and accounting practices. While not controlling on the issue, the Court held they should be given the weight necessary for a practical determination of lost business income. *Id*. Likewise, "the nature of the business and the methods employed in its operation" were also relevant. *Id.* at 767. As payments for the furniture were made over time, the insured would have received payments during the period of repair on contracts that were signed prior to the tornado. *Id.* at 767. Accordingly, "much of the real loss would occur after the store had been closed for a period of time, as payments on existing contracts diminished and no new contracts were signed." *Id.* The Court found for the insured, concluding the "interpretation advocated by State Auto, given the nature of Furniture World's business and its method of operation, would defeat the essential purpose of business interruption insurance, that is, to place the insured "in the position it would have occupied if the interruption had not occurred."" *Id*.

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[24] *See W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd*., 545 So. 2d 1348 (Fla. 1989)(studies prepared by reputable economic analysts for loan applications provided a sufficient standard to support the experts' testimony concerning lost profits*); but see D/FW Commercial Roofing Co., Inc. v. Mehra*, 854 S.W. 2d 182 (Tex. Ct. App. 1993)("A party must show either a history of profitability or the actual existence of future contracts from which lost profits can be calculated with reasonable certainty.")

[25] Though the outcome in *Gates* hinged on the interpretation of the business income policy at issue, the Court's analysis of lost earnings should apply to claims under the OPA.

Another issue arises when a business takes steps to mitigate losses by spending money to continue the business during the period of restoration.[26] In *American Medical Imaging Corp. v. St. Paul Fire and Marine Ins. Co*., 949 F.2d 690 (3rd Cir. 1991), the insured (AMIC) provided ultrasound testing services to physicians and health care institutions. The ultrasound procedures were performed at physicians' offices, but scheduling, marketing, billing, and clerical functions were performed at AMIC's headquarters. *Id.* at 690. A fire at AMIC's headquarters resulted in smoke and water damage, so AMIC immediately rented space at another location and relocated there the next day, securing telephone service that afternoon. AMIC did not return to its headquarters for approximately six weeks. During the six weeks, AMIC had access to substantially fewer telephone lines. AMIC sought coverage for lost earnings and extra expenses based on the disruption of the telephone system. *Id.* at 691. AMIC argued that because it depended on the telephone system for orders, scheduling, and preparation of written test reports, disruption cost the company new and existing business. The Court held that if "a trier of fact believes AMIC's evidence," AMIC was entitled to lost earnings or extra expenses during the time it took to repair the telephone system. *Id*. at 692. The fact that AMIG was able to mitigate its losses was not a bar to recovery. *Id*. The Court concluded that, if it were to hold otherwise, "the insured would have no motivation to mitigate its losses." *Id.*

Valuation of a claim to the Fund

33 C.F.R. § 136.233 Proof.

> In addition to the requirements of subparts A and B of this part, a claimant must establish the following:
>
> (a) That real or personal property or natural resources have been injured, destroyed, or lost.
> (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
> (c) ***The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established***.
> (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of

[26] As a claim under the Fund essentially imposes a duty to mitigate losses and provides for extra expenses in doing so, money spent to mitigate business loss should be recoverable in a claim against BP. *See* 33 C.F.R. § 136.233; 33 C.F.R. § 136.235

> the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

33 C.F.R. § 136.235 Compensation allowable.

> ***The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered***. Calculations for net reductions or losses must clearly reflect adjustments for—
> (a) All income resulting from the incident;
> (b) All income from alternative employment or business undertaken;
> (c) Potential income from alternative employment or business not undertaken, but reasonably available;
> (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
> (e) State, local, and Federal taxes.

5. Taxes, Royalties, Rents and Fees Recoverable by a Governmental Entity

Who can recover

33 U.S.C. § 2702 (b)(2)(D) provides: "Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources [] shall be recoverable by the Government of the United States, a State, or a political subdivision thereof."

How to Value the loss for a claim against BP

As with a claim for profits and earning capacity, a claim for lost revenues will be inherently speculative. The claimant must prove, with reasonable certainty, the revenues it would have received, had the disaster not occurred. Though cancellations in hotel and rental car reservations and decreased flights into the area may provide starting point, it is impossible to determine how many trips to the beach did not occur, and how many accompanying meals, souvenirs, and tanks of gas were not purchased. While revenues from previous years are a starting point for the calculation, a claim for lost revenues should include evidence of market conditions and other factors to assess any increase in revenue that were expected before the spill.

Valuation of a claim to the Fund

33 C.F.R. § 136.227 Proof.

> In addition to the requirements of Subparts A and B, a claimant must establish--

> (a) The identification and description of the economic loss for which compensation is claimed, including the applicable authority, property affected, method of assessment, rate, and method and dates of collection;
> (b) That the loss of revenue was due to the injury to, destruction of, or loss of real or personal property or natural resources;
> (c) The total assessment or revenue collected for comparable revenue periods; and
> (d) The net loss of revenue.

33 C.F.R. § 136.229 provides that the amount of compensation allowable is the total net revenue actually lost.

6. Conclusion

So long as courts continue to interpret the OPA as providing broad theories of recovery, we have a tremendous opportunity to help victims get fully compensated for their economic loss. Attorneys should leave no stone unturned in assessing and valuing claims and pursuing every theory that could restore the livelihoods, property and way of life that have been indefinitely disrupted.

William F. "Chip" Merlin, Jr.

Firm:	Merlin Law Group, P.A.
Firm Website:	www.merlinlawgroup.com
Business Phone:	813 229 1000
Cell Phone:	813 695 8733
Business Fax:	813 229 3692
E-mail Address:	cmerlin@merlinlawgroup.com
Blog:	propertyinsurancecoveragelaw.com

Background:

William F. "Chip" Merlin, Jr. is founder and president of Merlin Law Group, P. A. A graduate of the University of Florida, School of Law, Mr. Merlin was admitted to the Florida Bar in 1983. He has dedicated his career to seeking justice both in and beyond the courtroom for property insurance policyholders in disputes with insurance companies. He is a Board Certified Civil Trial Lawyer and currently holds Bar certifications in Florida, Mississippi, Texas, and the District of Columbia. His thriving legal practice focuses solely on first and third party property and insurance bad faith claims. Mr. Merlin routinely speaks at some of the nation's most prestigious conferences and seminars on insurance issues and insurance bad faith. He has authored a number of articles and papers and is widely regarded as one of the foremost practitioners of insurance claim litigation in the country.