MARCH 6, 2014 BP NEWS UPDATE

To: BP Clients

From: Charles P. Wilson, Jr.

Re: Update on the status of BEL claims

Note: Since my firm's last update, there have been some very positive developments with regards to business economic loss claims (BEL claims).

Please do not forget to check my firm's website for periodic updates that will be listed under the "BP NEWS" link.

Also, please feel free to contact me directly with any questions regarding your claim.

Below is the latest information regarding BEL claims.

<u>What is the status of BELs as of March 5, 2014?</u>
In a nutshell, we have been waiting on three main events to happen before the payment of BEL claims would resume (and, of course, we needed favorable outcomes):

1. The "certification panel" to rule on whether or not it should affirm the District Court's Order that certified the settlement class and approved the Settlement Agreement.

2. The Claims Administrator to adopt a "matching" policy.

3. The "BEL panel" to rule on whether or not causation (i.e., how a claimant qualifies for a BEL claim) should be changed and made more strict.

Certification Panel

The Certification Panel consists of three Circuit Judges, namely Judges Davis, Dennis, and Garza.

On January 10, 2014, the certification panel affirmed the District Court's certification of the class and approval of the Settlement Agreement by a 2-1 vote. Judges Dennis and Davis voted to affirm, but Judge Garza dissented. The majority's decision was favorable to claimants, so BP and some of the other objectors to the Settlement Agreement have requested that the 5th Circuit Court of Appeals grant an *en banc* rehearing of the matter.

When a case is heard by the 5th Circuit Court of Appeals *en banc*, that means that all of the active judges will participate in the hearing and ultimate decision. Presently, the 5th Circuit has fourteen (14) active judges. BP and/or the objectors will need eight (8) of the fourteen (14) judges to vote in favor of hearing the matter *en banc* or else the petition for rehearing will be denied. (Actually, the certification panel on its own initiative could grant the petition for rehearing, but that is very unlikely.)

Matching Policy

The Claims Administrator has circulated his proposed matching policy to the Plaintiffs' Steering Committee ("PSC") and BP for review and comments. I have reviewed this proposed policy and do not like it. In its current form, it treats businesses in construction, farming (including forestry/timber companies), and professional services (such as CPAs and attorneys) differently than other industries. Also, the policy appears to change causation for some businesses (i.e., how revenues will be used when performing the V-test). If the current form of the policy is approved by the District Court, then some businesses that qualified for a BEL settlement under the original terms of the Settlement Agreement could ultimately find themselves not qualifying.

The PSC is on the side of claimants and will vehemently object to the unfavorable, proposed terms. I am optimistic that the claims administrator will change many of these objectionable terms. However, I still believe that the new policy will cause the settlement amounts to be reduced. Once a final policy is adopted, I will provide all of you with another update.

BEL Panel

The BEL Panel consists of three Circuit Judges, namely Judges Clement, Dennis, and Southwick.

You may recall that the BEL Panel issued a ruling in October 2013 that caused BEL settlement payments to halt. That ruling dealt with the "matching" issue. Basically, the BEL Panel reversed the District Court's previous Order regarding BEL loss calculations and remanded the matter to the District Court with instructions to adopt a policy that would more accurately match revenues and expenses. Also, the BEL Panel instructed the District Court to consider BP's argument regarding causation (i.e., BP wanted the District Court to create an additional burden upon claimants with regards to qualifying for a BEL settlement).

On December 24, 2013, the District Court entered an Order that denied BP's request for an additional burden being placed upon the BEL claimants. This Order provided voluminous reasons why the District Court was not accepting BP's attempt to rewrite the deal that BP co-authored, asked the Court to accept, and later instructed the Claims Administrator on how to interpret. Also, this Order instructed the Claims Administrator to create a "matching" policy or protocol.

By a 2-1 vote, the BEL Panel issued its ruling on March 3, 2014 regarding the District Court's December 24, 2013 Order referenced previously. Judges Dennis and Southwick voted to affirm, but Judge Clement dissented. Judge Southwick wrote the majority opinion. (A copy of this opinion is available under BP NEWS as well.)

This most recent decision of the BEL Panel was extremely important for many reasons. Without question, the end result of this ruling is excellent for claimants. Also, the ruling provides some insight into how Judge Southwick views not only the causation issue, but also the certification issue. Because Judge Southwick is considered by many as the "swing vote" on the BEL Panel, and because the 5th Circuit Court of Appeals could hear the certification matter *en banc* (which would allow Judge Southwick to vote on that issue), it is very encouraging to read the following statements from Judge Southwick in the March 3, 2014 decision:

1. Footnote on page 10: "We observe that the difficulties that BP points out as to causation are outgrowths of the definition of the class and the terms of the Settlement Agreement that were sustained by the Certification panel. We do **not** perceive any basis for saying Article III, Rule 23, and the Rules Enabling Act are violated at the claims processing stage that has not already been addressed by the prior panel." (Emphasis mine.)

2. Page 11: "These requirements are not as protective of BP's present concerns as might have been achievable, but they are the protections that were accepted by the parties and approved by the district court. It was a contractual concession by BP to limit the issue of factual causation in the processing of claims. Causation, or in Rule 23 terms, traceability, was not abandoned but it was certainly subordinated."

3. On page 12, when referring to the 3 person accounting firm example submitted by the Claims Administrator to BP: "BP responded that such a claim should be paid."

4. On page 12, when referring to BP telling the Claims Administrator to pay the 3 person accounting firm claim: "Instead, we mention it in order to identify the practical problem mass processing of claims such as these presents, a problem that supports the logic of the terms of the Settlement Agreement."

5. Page 12: "The inherent limitations in mass claims processing may have suggested substituting certification for evidence, just as proof of loss substituted for proof of causation. Because the Settlement Agreement at least requires a formal assertion of the causal nexus, we conclude that what the certification panel relied upon in

approving the class definition and Settlement Agreement remained in place during the processing of claims."

6. Page 13: "Far from proposing a specific procedure or even guidelines for crafting one, the entirety of BP's requested relief, exemplified in its Renewed Motion for Injunction, is 'a permanent injunction barring the [claims administrator] from issuing or paying awards to claimants whose alleged injuries are not traceable to the spill.' BP identifies its desired relief but does not identify a part of the Settlement Agreement that in any way suggests that each submitted claim would be examined as to whether it satisfies a traceability requirement. Relevant to this concern is that **BP did not object** in this appeal to a decision made in October 2012 that the claims administrator was not to look at potential alternative causes for claimants' losses." (Emphasis mine.)

7. Page 14: "The Settlement Agreement contained many compromises. One of them was to provide in only a limited way for connecting the claim to the cause. The claims administrator, parties, and district court can resolve real examples of implausible claims as they resolve other questions that arise in the handling of specific claims."

8. Page 14: "We conclude that the injunction [which halted payments] should be dissolved, but the injunction remains in place until the mandate of the court is issued."

<u>What are we waiting on now?</u>
Presently, we are awaiting the 5th Circuit Court of Appeals' decision on whether or not it will grant an *en banc* rehearing of the certification issue. Also, it is expected that BP will ask the 5th Circuit to grant an *en banc* rehearing on the causation issue. If the 5th Circuit grants rehearing on either or both of these matters, then the oral arguments should take place in either May or September. Obviously, if rehearing is granted, it will cause further delays. However, if rehearing is denied, then payments should resume once the 5th Circuit enters its mandate.

Also, payments will not resume until the claims administrator finally adopts his matching policy. However, the release of the matching policy should be in the near future. Depending upon the final terms of the matching policy, an appeal of this policy by BP or the PSC could follow. Nonetheless, I suspect that an appeal of the matching policy to the 5th Circuit will not by itself cause payments to halt so long as the District Court approves the matching policy.

I hope to share good news with you in the coming months. In the meantime, please do not hesitate to contact me with any questions. E-mail is the quickest means of contacting me, but I certainly do not mind taking phone calls or meeting in person.