



The Florida House of Representatives

August 31, 2010

The Honorable Larry Cretul
Speaker, Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

RE: Final Report – Deepwater Horizon Workgroup 6 – Examination of adequacy of criminal and civil penalties of offenses that caused or may arise out of the current environmental disaster

Dear Mr. Speaker:

It is an honor to present to you the findings and recommendations of Workgroup 6 tasked with examining the adequacy of criminal and civil penalties of offenses that caused or may arise out of the Deepwater Horizon disaster. Over the past 41 days, the Workgroup has worked tirelessly to accomplish its task of uncovering problems and offering meaningful legislative solutions to the issues created by the Deepwater Horizon incident.

WORKGROUP ACTIVITIES

On August 9, the Workgroup met with representatives from the Florida Department of Environmental Protection (DEP), the Florida Fish and Wildlife Conservation Commission (FWC), Assistant State Attorneys from the 1st and 11th judicial circuits, the Office of Attorney General (OAG), and the Office of Statewide Prosecution (OSP), to review the existing criminal and civil penalties that apply to environmental offenses. The Workgroup focused on penalties for pollution crimes, false reporting offenses, and other ancillary offenses that often occur during or subsequent to an environmental disaster (e.g., theft, trespass, etc.). After a roundtable discussion as to whether these penalties appropriately punish those committing such crimes, deter such behavior, and provide for adequate restitution, the Workgroup identified a number of issues that warranted further examination and additional research.

On August 23rd, after conducting research on the issues identified during the August 9th meeting, the Workgroup met again. As on the 9th, representatives from DEP, FWC, OAG, OSP, and the Florida Prosecuting Attorneys Association (FPAA) participated in the meeting. The Workgroup

examined each of the issues raised during the previous meeting, and after extensive discussion and input from the stakeholders and members of the public, the Workgroup made its initial recommendations as to what should be included in the final report. On August 31st, the Workgroup finalized these recommendations.

Mr. Speaker, we are pleased to report that after three meetings, extensive review of state and federal environmental laws, consultation with various executive agencies, and input from a multitude of stakeholders, Florida Deepwater Horizon Response and Recovery Workgroup 6 has completed its work by identifying issues that the Florida Legislature should further explore to ensure our laws appropriately punish those who commit pollution crimes, while helping prevent such crimes from occurring in the future.

DISCUSSION AND RECOMMENDATIONS

JURISDICTION OF THE OFFICE OF STATEWIDE PROSECUTION

Background

In 1985, the Florida Legislature enacted s. 16.56, F.S., which authorized the creation of the Office of Statewide Prosecution (OSP). That same year, the Legislature passed HJR 386, proposing an amendment to the Florida Constitution that would create the position of statewide prosecutor in the Office of the Attorney General. The proposed amendment was placed on the ballot in November 1986, was approved by the voters, and the position of statewide prosecutor became effective January 6, 1987.

Section 16.56, F.S., and the Florida Constitution specify that the OSP has concurrent jurisdiction with the state attorneys to prosecute the following offenses:

- Bribery, burglary, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, robbery, carjacking, and home-invasion robbery;
- Any crime involving narcotic or other dangerous drugs;
- Any violation of the provisions of the Florida RICO Act, including any offense listed in the definition of racketeering activity in s. 895.02(1)(a), providing such listed offense is investigated in connection with a violation of s. 895.03 and is charged in a separate count of an information or indictment containing a count charging a violation of s. 895.03, the prosecution of which listed offense may continue independently if the prosecution of the violation of s. 895.03 is terminated for any reason;
- Any violation of the provisions of the Florida Anti-Fencing Act;
- Any violation of the provisions of the Florida Antitrust Act of 1980, as amended;
- Any crime involving, or resulting in, fraud or deceit upon any person;
- Any violation of s. 847.0135, F.S., relating to computer pornography and child exploitation prevention, or any offense related to a violation of s. 847.0135, F.S., or any violation of chapter 827, F.S., where the crime is facilitated by or connected to

- the use of the Internet or any device capable of electronic data storage or transmission;
- Any violation of the provisions of chapter 815, F.S.;
 - Any criminal violation of part I of chapter 499, F.S.;
 - Any violation of the provisions of the Florida Motor Fuel Tax Relief Act of 2004;
 - Any criminal violation of s. 409.920, F.S., or s. 409.9201, F.S.;
 - Any crime involving voter registration, voting, or candidate or issue petition activities;
 - Any criminal violation of the Florida Money Laundering Act; or
 - Any criminal violation of the Florida Securities and Investor Protection Act.
 - Any crime enumerated above that was facilitated by or connected to the use of the Internet.

However, the OSP only has the power to investigate and prosecute the above offense when the offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction, or when the offense is connected with an organized criminal conspiracy affecting two or more judicial circuits. Currently, the OSP does not have jurisdiction to prosecute environmental crimes – only local state attorneys are authorized to prosecute such crimes.

Expanding the Jurisdiction of the OSP

The Workgroup, citing the recent Deepwater Horizon incident as an example, noted that environmental crime cases often involve multiple jurisdictions, numerous complex statutes and a vast array of state and federal environmental regulations. We heard testimony that local state attorneys may not possess the expertise and manpower necessary for adequately prosecuting such crimes. It was also indicated that these offices may hesitate to prosecute environmental crimes due to local political issues. To address these issues, it was suggested that multijurisdictional environmental crimes could be better enforced and prosecutions of environmental crimes might increase if the OSP was given jurisdiction to investigate and prosecute such offenses. The FPAA, however, asserted that local state attorneys did not lack the expertise or manpower to adequately prosecute such crimes, stated that politics does not factor into a state attorney's decision to prosecute a case, and argued that expanding the jurisdiction of the OSP so that two entities were authorized to prosecute a crime could pose logistical legal problems. The FPAA was also concerned that expanding the jurisdiction of the OSP would remove local control of prosecutions.

In light of this information, the Workgroup members had differing opinions as to whether expanding the jurisdiction of the OSP would be advisable. While some believed that environmental crimes could be better enforced if the OSP was given jurisdiction to investigate and prosecute such offenses, others had concerns that doing so would remove local control of prosecutions, result in a lack of accountability, and ultimately result in an inefficient use of state resources. The consensus was that the jurisdiction of the OSP should not be expanded, but that further research into whether local state attorneys are adequately prosecuting environmental crimes was warranted.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Consult with DEP and local state attorneys to determine whether local state attorneys are adequately prosecuting environmental crimes.

STATUTE OF LIMITATIONS – FRAUD OFFENSES

Background

Statutes of limitations set forth the maximum amount of time after a crime is committed that a prosecution can be commenced. Such limitations are designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. In Florida, general statutes of limitations in criminal cases are set forth in s. 775.15, F.S., which provides that:

- A prosecution for a capital felony, a life felony, or a felony that resulted in a death may be commenced at any time.
- A prosecution for a first degree felony must be commenced within 4 years after the crime is committed.
- A prosecution for any other felony must be commenced within 3 years after the crime is committed.
- A prosecution for a first degree misdemeanor must be commenced within 2 years after the crime is committed.
- A prosecution for a second degree misdemeanor or a noncriminal violation must be commenced within 1 year after the crime is committed.

In addition to the general statutes of limitations outlined above, the Legislature has determined that certain offenses warrant a longer statute of limitations period. For example:

- Prosecutions for perjury in proceedings relating to capital cases and prosecutions for violations of many statutes relating to sexual battery may be commenced at any time.
- Prosecutions for felony violations of chapter 403 (pollution offenses) must be commenced within 5 years after the date of discovery of the violation.
- Prosecutions for felony violations of certain statutes relating to crimes against the elderly must be commenced within 5 years after the violation is committed.
- Prosecutions for felony violations of certain statutes relating to workers compensation or insurance fraud must be commenced within 5 years after the violation is committed.

Extending the Statute of Limitations for Fraud-Related Crimes

The Workgroup recognized that in the wake of an environmental disaster, there are persons who will commit fraud-related crimes in an effort to financially benefit from the disaster (e.g.,

insurance fraud, perjury, using false receipts, etc.). We were concerned that due to the complex and enduring nature of such disasters and the multitude of state and federal entities that are oftentimes involved, fraudulent activities would not be discovered until the statute of limitations for the offense had expired. To address this issue, it was suggested that the statute of limitations for fraud-related offenses be extended.

Subsequent research into the issue revealed that Florida law currently addresses this scenario in s. 775.15(12), F.S., which provides that prosecutions may be commenced within a year after discovery of the crime in cases where fraud or breach of fiduciary duty is an element of the crime. The statute further specifies that the limitation period cannot be extended by more than an additional 3 years. For example, a crime that could be prosecuted in cases of fraud relating to the recent Deepwater Horizon incident is s. 817.03, F.S., which provides:

Any person who shall make or cause to be made any false statement, in writing, relating to his or her financial condition, assets or liabilities, or relating to the financial condition, assets or liabilities of any firm or corporation in which such person has a financial interest, or for whom he or she is acting, with a fraudulent intent of obtaining credit, goods, money or other property, and shall by such false statement obtain credit, goods, money or other property, shall be guilty of a misdemeanor of the first degree.

This crime is a first degree misdemeanor, which generally carries a 2 year statute of limitations. However, since fraud appears to be an element of the offense, the statute of limitations can be extended up to 5 years after the crime was committed pursuant to s. 775/15(12), F.S. The Workgroup feels that this statutory provision is adequate to ensure that those committing fraud-related crimes in the aftermath of a disaster can be punished.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ No change in Florida law.

TRAINING – LAW ENFORCEMENT OFFICERS

Background

In Florida, the Criminal Justice Standards and Training Commission (CJSTC), housed within the Florida Department of Law Enforcement, establishes uniform minimum standards for the employment and training of full-time, part-time, and auxiliary law enforcement officers. Every prospective law enforcement officer (LEO) must successfully complete a CJSTC-developed Basic Recruit Training Program in order to receive their certification.

The Basic Recruit Training Program for LEOs consists of 770 hours of training. At this time, environmental crimes are not included in the curricula for the Basic Recruit Training Program.

Including Environmental Crimes Training in the Basic Recruit Training Program for LEOs

Although tasked with assessing the adequacy of the criminal and civil penalties that apply to environmental crimes, the Workgroup also examined ways in which such crimes could be better enforced. DEP's Division of Law Enforcement is authorized to investigate environmental crimes. However, local law enforcement officers share this duty in that they are responsible for the prevention and detection of crime. While DEP employs persons specifically trained in environmental crimes, many local law enforcement officers are not. Consequently, local law enforcement officers might not recognize environmental crimes when they occur, which could lead to poor enforcement. To address this issue, it was suggested that environmental crimes training be included in the LEO Basic Recruit Training curricula.

Upon further research and review, the Workgroup acknowledged that while environmental crimes were of great importance, local law enforcement officers would rarely be involved in such investigations. As such, while environmental crimes training would be helpful to law enforcement officers, requiring such training of *all* law enforcement officers in the state was not practical, especially when considering the significant cost of providing such training.

Similarly, the Workgroup considered requiring each state attorney to develop standards of instruction for prosecutors to receive training on the prosecution of environmental crimes. Again, the Workgroup concluded that such a requirement was not practical given the limited number of prosecutors who might handle environmental crimes and the cost associated with providing such training.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ No change in Florida law.

POLLUTION OFFENSES – STRICT LIABILITY

Background

The Legislature has wide latitude in creating statutory definitions and defining crimes. Generally, criminal laws must consist of both a mental and physical element. *Mens rea*, a person's awareness of the fact that his or her conduct is criminal, is the mental element, and *actus reus*, the act itself, is the physical element. Crimes that have no intent requirement are sometimes referred to as "strict liability" crimes.

The Legislature can create strict liability crimes but such crimes are disfavored by the courts. Additionally, such crimes can raise due process concerns and subject a statute to constitutional challenge. In *State v. Giorgetti*, 868 So. 2d 512, 518-519 (Fla. 2004), the Florida Supreme Court outlined the constitutional limitations on the Legislature's ability to eliminate intent from criminal statutes:

It is true that the Supreme Court has determined that a certain class of “public welfare offenses” do not require intent. However, the Supreme Court has made it clear that intent is less necessary as an element of a public welfare offense because the “penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.” In *Staples*, the Court recognized the limitations on such offenses noting that “the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.” Thus, the Court determined that “absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.” Hence, where harsh penalties apply or there is the potential to punish otherwise law-abiding, well-intentioned citizens for reasonable behavior, the Court is reluctant to impute to Congress the purpose of doing away with the *mens rea* requirement simply to “ease the prosecutor’s path to conviction.”¹

In sum, the ability of the Legislature to remove intent requirements in criminal statutes is limited.

Making Florida’s Pollution Offenses Strict Liability Crimes

Sections 373.430, 376.302, and 403.161, F.S., are pollution offenses that provide criminal penalties. Each of these statutes currently require that the person polluting do so *willfully* or with *reckless indifference or gross careless disregard* in order to be criminally prosecuted. The Workgroup recognized that proving a person polluted *willfully* or with *reckless indifference or gross careless disregard* could be difficult and examined whether the intent element should be removed from these offenses (i.e., make them strict liability offenses).

The Workgroup acknowledged that removing the intent element from pollution offenses would make it easier for state attorneys to successfully prosecute pollution cases in that they would no longer have to prove willfulness or reckless indifferences. However, we ultimately concluded that doing so would create a risk of making innocent conduct a crime. Additionally, we believed that doing so would likely be challenged as violating one’s right to due process.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ No change in Florida law.

¹868 So. 2d 512, 518-519 (Fla. 2004).

CRIMINAL PENALTIES - WILLFULLY POLLUTING VERSUS POLLUTING DUE TO RECKLESS INDIFFERENCE OR GROSS CARELESS DISREGARD

Survey of Florida Statutes – Penalties for Willful Acts v. Acts Due to Reckless Indifference

Florida law is not consistent in how it penalizes acts committed willfully versus acts committed due to reckless indifference or gross carelessness (or culpable negligence). For example, s. 373.430, (relating to the management and storage of surface waters), 379.501, (relating to aquatic weeds and plants), and 403.161, F.S., (relating to pollution control), currently penalize acts that are willful and acts that were committed through reckless indifference or gross carelessness/culpable negligence differently. In contrast, s. 403.4154, (relating to the phosphogypsum management program), 403.727, (relating to hazardous waste), 825.102, (relating to abuse of an elderly person or disabled adult), 827.03, (relating to child abuse), and 831.032, F.S., (relating to offenses involving forging or counterfeiting private labels) currently penalize willful acts and acts that were committed through reckless indifference or gross carelessness/culpable negligence similarly. Additionally, many statutes relating to immunity from liability and punitive damages treat willful acts and acts committed due to reckless indifference or gross carelessness/culpable negligence similarly.

Section 403.161, F.S. - Statutory History

Prior to 1989, s. 403.161, F.S., provided that any person who willfully *or negligently* caused pollution that resulted in harm committed a 3rd degree felony (the penalties were the same). However, the Florida Supreme Court held a portion of the statute unconstitutional stating that while culpable negligence could be criminalized, simple negligence could not be. Subsequently, the statute was changed and now makes it a crime for a person to *willfully* cause pollution or to cause pollution due to *reckless indifference or gross careless disregard*. Notably, when this change was made, the Legislature also chose to penalize willful pollution and pollution due to reckless indifference or gross careless disregard differently. Willful pollution became punishable by a 3rd degree felony and pollution due to reckless indifference or gross careless disregard became punishable by a 2nd degree misdemeanor.

Similar Criminal Penalties for Willful Pollution and Pollution Due to Reckless Indifference

As noted above, s. 403.161, F.S., makes it a 3rd degree felony for a person to *willfully* cause pollution and a 2nd degree misdemeanor for a person to cause pollution due to *reckless indifference or gross careless disregard*. In examining the adequacy of these penalties, the Workgroup questioned whether pollution due to reckless indifference or gross careless disregard should be penalized in a different manner than willful pollution.

The Workgroup reviewed the statutory history of s. 403.161, F.S., and noted that prior to 1989, when the statute penalized willful pollution and pollution due to negligence, the penalties for each were the same – a 3rd degree felony. It was only when the statute was changed to prohibit willful pollution and pollution due to reckless indifference or gross careless disregard did the penalties for each become different. It is unclear to us why this change was made. Additionally, a review of the Florida Statutes revealed that with few exceptions, the Legislature penalizes willful acts in the same manner as acts committed due to reckless indifference or gross careless

disregard. As such, the Workgroup believes that the Legislature should get input from DEP and the FPAA and continue to review whether willful pollution and pollution due to reckless indifference or gross careless disregard should be penalized in the same manner.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Gather input from DEP and the FPAA and continue to review whether willful pollution and pollution due to reckless indifference or gross careless disregard should be penalized in the same manner.

CIVIL PENALTIES – COMMERCIAL VERSUS NON-COMMERCIAL POLLUTERS

Currently, Florida law does not distinguish between commercial and non-commercial polluters. This is evidenced by the fact that the term “person,” as used in all of Florida’s pollution offenses, is defined to include individuals as well as corporations, associations, and governmental entities. As a result, business entities that violate the statutes are criminally and civilly punished in the same manner as individuals who violate the statutes.

The Workgroup acknowledged that civil penalties for pollution offenses should act as a deterrent. In other words, they should be of sufficient amount so as to discourage others from polluting. A civil penalty that might act as a deterrent to an individual might be of too small an amount to act as a deterrent to a business entity. Accordingly, the Workgroup recommends that the Legislature review the civil penalty provisions of pollution offenses to determine whether business entities that pollute should be penalized differently than individuals who pollute.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Review the civil penalty provisions of Florida’s pollution offenses (sections 373.430, 376.16, 376.302, 377.37, and 403.141, F.S.) to determine whether business entities that pollute should be penalized differently than individuals who pollute.

UPDATE CIVIL PENALTIES AND CRIMINAL FINES TO ADJUST FOR INFLATION

As noted above, we believe penalties for pollution offenses should be of sufficient severity so as to discourage others from polluting. In examining the adequacy of the criminal and civil penalties that apply to pollution-related offenses, the Workgroup discovered that many of the civil penalties and criminal fines currently in effect were established in the 1970s. These penalties and fines may need to be updated to adjust for inflation and to reflect current economic conditions in order to effectively serve as a deterrent.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Review the civil penalties and criminal fines that apply to pollution-related offenses to determine whether they need to be adjusted for inflation and to reflect current economic conditions.

CIVIL PENALTIES – ASSESS BASED ON VOLUME OF POLLUTANT DISCHARGED

Background

Currently, Florida law establishes civil penalties that apply to pollution-related offenses using fixed dollar amounts that range from \$10,000 to \$50,000. Civil penalty amounts are not based on the volume of pollutant discharged. In contrast, the federal Water Pollution Prevention and Control Act specifies that a person who violates the act may be assessed a fixed dollar amount civil penalty *or, in the alternative*, may be assessed a civil penalty based on the volume of pollutant discharged.

Basing Civil Penalty Amounts on Volume of Pollutant Discharged

The Workgroup recognized that fixed amount civil penalties may not serve as effective deterrents depending on the nature and scope of the pollution incident. During our meetings, DEP (the entity responsible for assessing and imposing civil penalties for environmental crimes) suggested that it might be helpful if they had the option of imposing a fixed dollar amount civil penalty *or, in the alternative*, imposing a civil penalty that is based on the volume of pollutant discharged. Doing so would give DEP the ability to impose an increased penalty in situations where a fixed dollar amount would be an inadequate punishment or deterrent.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Work with DEP and continue to review civil penalty provisions of Florida's pollution offenses to determine whether DEP should have the option of imposing a fixed dollar amount civil penalty or a civil penalty that is based on the volume of pollutant discharged.

CRIMINAL AND CIVIL PENALTIES – CONSISTENCY

As noted above, many of the criminal and civil penalties for pollution offenses were established at various times in the 1970s, 1980s, and 1990s. As a result, the penalties are inconsistent. For example, s. 376.302, F.S., contains a provision making it a 1st degree misdemeanor for a person to willfully pollute surface and ground waters. In contrast, there are no criminal penalties in s. 376.041, F.S., for those who willfully pollute coastal waters, or in s. 377.371, F.S., for oil drillers who willfully pollute. Additionally, s. 376.16, F.S., contains a provision imposing a \$50,000 civil penalty upon persons who pollute coastal waters. In contrast, s. 376.302, F.S., imposes a \$10,000 civil penalty upon persons who pollute surface and ground waters. The Workgroup

believes that the statutes warrant further review to provide some measure of consistency in the severity of punishments imposed.

Florida Deepwater Horizon Response and Recovery Workgroup 6 recommends:

- ❖ Conduct a comprehensive review of the criminal and civil penalties that apply to pollution-related offenses to ensure that they consistently and appropriately punish polluters.

Mr. Speaker, it has been a privilege to serve on this Workgroup.

Respectfully submitted,



Representative Chris Dorworth, Lead Member
Representative Janet Adkins
Representative Debbie Boyd
Representative Adam Fetterman
Representative James Frishe
Representative Michael Weinstein