Summary of State and Local Government Claims under the Federal Oil Pollution Act

Prepared for the Work Group to Develop Strategies
for Public Sector Recovery of Damages
July 30, 2010

Background

The federal Oil Pollution Act (OPA) was enacted after the Exxon Valdez disaster. In general, it provides for private and government claims against the company causing an oil spill, known as the responsible party.

On April 20, 2010, the Deepwater Horizon, a dynamic deepwater drilling platform, burned and sank, opening up the well and causing millions of barrels of oil to foul the Gulf of Mexico. Oil has directly hit Florida beaches, and the stigma has damaged Florida's tourism and fishing industries.

OPA provides for unlimited liability for removal costs, and limits liability of a responsible party for other damages except in certain circumstances. BP is currently taking the position that it will pay all claims regardless of the limit.[1]

Categories of Allowable Claims

OPA authorizes the following categories of claims:

- Removal costs
- Damage to real and personal property
- Loss of subsistence use of natural resources
- Loss of government revenues
- Loss of profits and earning capacity
- Increased cost of providing public services
- Natural resource damages

The categories related to loss of subsistence use and loss of profits do not seem applicable to governments and are not discussed in this brief.

[1] Technically, the responsible party is BP Exploration & Production, Inc., a Delaware corporation, as the holder of lease G32306. The total assets of this corporation are unknown. It is believed that BP Exploration & Production, Inc. is a wholly owned subsidiary of BP America, Inc., a Delaware corporation, which in turn is a wholly owned subsidiary of BP, PLC, a British corporation.

Removal Costs

OPA requires a responsible party to pay all removal costs.[2] Removal costs are the expenses related to state and local government efforts to prevent, minimize and mitigate oil spill damage. Removal costs also cover the cost of cleanup of public oceans, bays and waterways, real property and personal property.[3] A government may clean private property and seek reimbursement as a government removal claim.[4] There is no liability cap on such damages, the responsible party is liable for all removal costs.

Federal law requires the U.S. government to create a National Contingency Plan for responding to oil spills. Removal costs that are consistent with the plan are chargeable against the responsible party. Additionally, removal costs that are consistent with state law are chargeable against the responsible party.[5]

Removal costs are not limited to just incremental (additional) costs incurred by a government. A government may charge the base cost of employees and equipment that have responded to the oil spill.[6]

Damage to Real and Personal Property

OPA requires a responsible party to reimburse any property owner for damage to real and personal property.[7] Damages are determined by:

- Actual cost of repairs;
- The difference between the value before and after the damage; or
- The replacement value.

Damages for injury to real or personal property may also include the cost of substitute property. So, for instance, if a law enforcement patrol boat is damaged by contact with oil, the law enforcement agency can claim the cost of repairs and the

---

[2] 33 USC 2702(b)(1)
[3] 33 USC 2701(31)
[4] Cleaning private property is a reimbursable public expense because the government can effectively handle the cleaning and disposal of hazardous waste. For instance, if the hull of a private boat is spoiled with oil, the government can effectively clean the hull and will dispose of the waste in an environmentally responsible manner. Otherwise, a private owner might ineffectively clean the hull, improperly dispose of waste, and thereby spread rather than contain the pollution.
[5] 33 USC 2702(b)(1)
[6] *United States v. Hyundai Merchant Marine Co., Ltd.*, 172 F.3d 1187 (9th Cir. 1999), *cert. denied*, 528 U.S. 963. In this case, the Coast Guard submitted a claim for the cost of a Coast Guard cutter that stood by while an oil spill from a grounded freighter was removed. Hyundai argued that the Coast Guard would have incurred the cost of the cutter and its crew anyway. The court disagreed, finding that the diversion from other duties warranted charging Hyundai the full value of the cutter's presence.
[7] 33 USC 2702

cost of renting another patrol boat until the damaged boat is placed back into service. The total of damages for use of substitute property may not exceed the value of the property.[8]

Loss of Government Revenue

OPA requires a responsible party to pay state and local governments for 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.[9]

It is possible that determination of lost government revenues will be related to lost private revenues.

> *Example:* It is clear that many Florida beachfront hotels are eligible for reimbursement for lost profits related to the oil spill. Related to those losses, the state has lost sales tax revenue that would have been collected from those hotel rooms, and local governments have lost sales tax sharing and tourist tax revenue that would have been collected from those hotel rooms.
>
> Other Florida businesses rely on those hotels and their tourists. It is unclear how far removed from the hotel a business has to be before private claims will not be honored. It is possible that such private claims threshold may also be the point at which government claims (such as related lost sales tax revenue) will end.

It is unclear at this time how to calculate the extent of government revenue loss related to a spill. It will be important for the state and local governments to identify all possible categories of loss. Possible state government revenue losses include:

- Sales and use tax
- Corporate income tax
- State park entrance fees
- Fishing licenses
- Documentary stamp tax[10]
- Fuel tax
- Unemployment tax
- Taxes on alcohol and tobacco
- Rental car surcharge
- Fines and penalties

---

[8] 15 CFR 136.217
[9] 33 USC 2702(b)(2)(D)
[10] From lower property values and from economic slowdown.

Possible local government revenue losses include:

- Local share of the state sales and use tax
- Local option sales taxes
- Local option tourist development taxes
- Lowered property values leading to lowered property tax assessments
- Park entrance fees
- Concession revenues
- Building permit fees
- Local business taxes
- Utility taxes
- Utility revenues[11]
- Fines and penalties

Increased Public Services

OPA requires BP to reimburse state and local governments for the net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil or directly attributable to response to the oil spill incident.[12] There is little guidance on how to calculate these damages.

Natural Resource Damages

The goal of OPA is to make the environment and public whole for injuries to natural resources and services resulting from an incident involving a discharge or substantial threat of a discharge of oil (incident). This goal is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery. Under OPA, the responsible party is liable to state and local governments for natural resource damages. Costs include:

- Assessing an area's natural resource damages,
- Restoring the natural resources to the baseline condition (the condition prior to the spill), and
- Compensating the public for the lost use of the affected resources.

OPA requires the Governor to appoint a trustee to oversee the claims process related to natural resource damages. Damages are determined by the trustee. The responsible party has the right to participate in the assessment and restoration process. The process follows that used in other pollution cases.[13] The federal rules

---

[11] Where the local government operates a utility service, such as water, sewer, or electrical.
[12] 33 USC 2702(b)(2)(F)
[13] 15 CFR 990.27

list 11 possible methods of valuation for lost use, allow a trustee to elect which method or combination of methods is appropriate, and allow a trustee to elect any other method that is reliable.[14]

Costs and Damages That Are Not Recoverable

Punitive damages are not allowed under OPA.[15] There is no provision for reimbursement of attorney's fees and costs.

Challenges Related to Calculations

The biggest challenge to calculating damages to state and local governments is a lack of guidance or history in how to calculate such damages. As mentioned above, it is unclear how far the economic effects of the spill can or will be used to develop governmental claims. Also, for instance, state and local governments may only collect the net loss of government revenues. There may be relationships between expenses and revenues that will be difficult to account for.

> *Example:* A hotel, faced with lower occupancy, lays off an employee responsible for cleaning rooms. Initially, the hotel will pay less in unemployment taxes because such taxes are based on a percentage of payroll. The employee files for unemployment compensation. The state will pay the employee unemployment compensation, and has a claim against the responsible party for the cost of the unemployment compensation (an increased cost of public services). In future quarters, however, the claim against the unemployment fund will cause the hotel's future unemployment tax rate to increase, which increases government revenues and therefore decreases the state's overall lost revenue claim. Additionally, as the former employee collects less in unemployment than the employee used to collect in wages, the former employee has less disposable income, leading to lower discretionary spending and lower overall sales tax revenue. Widespread unemployment can lead to lower corporate earnings, affecting corporate income tax revenues. And lower business earnings can lead to layoffs, affecting the unemployment compensation fund and collections . . .

Similar challenges appear in most of the categories of recovery.

Claims Process

OPA requires all claimants, government and private, to first attempt to collect directly from the responsible party. If the responsible party does not pay within 90 days of the filing of a claim or if the responsible party denies the claim, the claimant

---

[14] 43 CFR 11.83

[15] *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000).

may file a lawsuit or may seek reimbursement from the federal Oil Spill Liability Trust Fund administered by the U.S. Coast Guard. Once a lawsuit is filed, however, the claimant may not file a claim for reimbursement from the Oil Spill Liability Trust Fund.[16]

OPA requires the responsible party to establish a procedure for the payment or settlement of interim, short-term damages. Payment or settlement of a short-term claim does not preclude recovery for additional damages.[17]

The limitation periods for claims under OPA are:

- Removal costs: 6 years after the completion of all removal actions
- Natural resource damages: 3 years after completion of the damage assessment phase
- All other categories of damages: 3 years after the date on which the injury and its connection with the discharge of oil was reasonably discoverable with the exercise of due care. [18]

Liability Limits

There is no limit for claims against a responsible party related to removal costs. As to all other claims, OPA limits the total liability of a responsible party operating an "offshore facility" to $75 million.[19] This limit applies to the total claims of private parties and governments. However, this liability limit does not apply and liability for all damages is unlimited if the oil spill was caused by:

- Gross negligence of the responsible party;
- Willful misconduct of the responsible party; or
- Violation of an applicable federal safety, construction, or operating regulation.[20]

The federal Oil Spill Liability Trust Fund may pay claims where the responsible party cannot be located, the responsible party has insufficient assets, or the responsible party has paid up to the limit of liability.[21]

---

[16] 33 USC 2713
[17] 33 USC 2705(a)
[18] 33 USC 2712(h). As to private claims, no limitations period runs during any period where the claimant is a minor or an incompetent person.
[19] Technically, the Deepwater Horizon spill was caused by a "mobile offshore drilling unit," which is a vessel. Liability limits for such units is the greater of the liability limits for vessels or the offshore facility limit of $75 million. The vessel limit for the Deepwater Horizon is $30,958,000 (32,588 gross tons times $1,900 per ton), thus the greater $75 million cap applies.
[20] 33 USC 2704(c)
[21] 33 USC 2712

The liability limits in OPA were established when the law was enacted in 1990. There is authority in federal law for the limits to be increased by administrative rule to reflect inflation, but there has been no increase.[22] In 2010 dollars, the $75 million limit would be $124.3 million.[23]

Relation to State Law

Many federal laws provide that such laws control over any conflicting state law and are the exclusive remedy. OPA, however, specifically provides that its remedies are not exclusive and that states may enact laws that provide for additional remedies.[24] Therefore, one must examine Florida law to determine if it provides a remedy in excess of that available under OPA.

---

[22] 33 USC 2704(d)(4)
[23] http://www.aier.org/research/worksheets-and-tools/cost-of-living-calculator
[24] 33 USC 2718