



# 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 3 - Review the scope of private sector damages and processes for compensation.**

Dear Mr. Speaker:

It is an honor to present to you the final report of Workgroup 3 tasked with reviewing the scope of private sector damages as a result of the Deepwater Horizon oil spill and the processes available for compensation. With the goals and guiding principles in mind, I am pleased to report that Workgroup 3 was able to accomplish a great deal during the past six weeks. The Workgroup traveled twice to Pensacola to attend Town Hall meetings, met with affected persons and groups, met with representatives from BP regarding the claims process, and met with Kenneth Feinberg, the administrator of the independent claims process at the Gulf Coast Claims Facility. While in Pensacola, members also met with the Executive Director of the Santa Rosa Island Authority and the property appraisers for Santa Rosa County and Escambia County, and took a tour of the Pensacola beach area.

The Workgroup reviewed a large amount of research materials and monitored the ongoing efforts of similar Workgroups created by other entities. We reviewed relevant federal and state laws on the topic. As part of our information gathering process, the Workgroup held numerous conference calls with various affected interested parties, including:

- the Florida Justice Association,
- the Organized Fishermen of Florida,
- the Southeastern Fisheries Association,
- the Associated Industries of Florida,
- the Florida Restaurant and Lodging Association,
- representatives of various legal services organizations,
- representatives of various Florida chambers of commerce, and
- the Florida Association of Realtors.

In this letter, I provide our findings and some possible next steps. While we are ever mindful of the hardships faced by those living near the Gulf and those whose livelihood depend on it, we are also faced with the determination that no state legislative action has been identified to date that will provide any greater assistance than the resources already available through the Gulf Coast Claims Facility process to those navigating the pursuit of private claims for damages.

## **FINDINGS**

### **Background**

On April 20, 2010, an explosion and fire destroyed the Deepwater Horizon offshore drilling rig approximately 130 miles southeast of New Orleans and approximately 50 miles from the Mississippi River delta. The explosion killed 11 of the 126 workers on the rig, which eventually sank in approximately 5,000 feet of water.

While the Deepwater Horizon oil spill has been stopped, we hope permanently, the damage caused by the spill is ongoing and its impacts continue to be revealed. Those who have been affected will not know the full amount of their damages for perhaps years to come. Vast sums of oil remain in the Gulf and its effects, present and future, are unknown. Many persons are coming forward claiming health effects from the work done to help disperse the oil. Suffice it to say, no one can say at this time just what the damages will be from the spill.

### **Lawsuits**

BP and other companies involved in the Gulf spill are already facing more than 300 lawsuits filed in 12 states, with the number growing every day. Virtually every lawsuit names as defendants BP, rig owner Transocean Ltd., well contractor Halliburton Co., and Cameron International, maker of the well's failed blowout preventer. The plaintiffs in these lawsuits represent all segments of the Gulf Coast communities: shrimpers and oystermen, charter boat captains, beach resort and condominium owners, restaurants and bars, seafood suppliers, bait and tackle shops, even tourist attractions like Key West's Ripley's Believe It or Not museum. There are also wrongful death and personal injury lawsuits filed by workers who survived the Deepwater Horizon explosion and relatives of some of the 11 men who died during the incident.

It has been reported that this event could be the source of one of the largest legal battles in U.S. history and may easily consume the \$20 billion set aside so far by BP to pay for the disaster. BP's liability is already larger than the Exxon Valdez case, which ultimately led to a \$500 million payout to affected fishermen and residents and took 20 years to work through all the claims.

Consolidation of Federal Cases: On August 10, 2010, a federal judicial panel on multi-district litigation in Boise, Idaho, consolidated 77 of the federal lawsuits from the five Gulf States for pretrial decisions before a single judge in the Eastern District of Louisiana in New Orleans, Judge Carl J. Barbier. The Panel had been notified of more than 200 additional related federal

actions they said were potential “tag-along” actions and would likely be consolidated with these 77 actions. In its order, the Panel explained that Judge Barbier may choose to employ special masters and other case administration tools to facilitate certain aspects of the litigation. These cases include the federal personal injury and wrongful death actions, as well as, claims brought under the Federal Oil Pollution Act.

### **Drilling Moratorium**

Numerous individuals and businesses have claimed economic injury from the six-month ban on deep-water drilling in the Gulf of Mexico imposed by the federal government. It has been reported that this moratorium could potentially put more than 9,000 people out of work and indirectly affect another 14,000 jobs. The first attempt at a moratorium was struck down by a federal judge in New Orleans. The federal government issued a new moratorium July 12, 2010, that included additional statements of safety concerns. BP has established a \$100 million fund for rig workers affected by the moratorium. It is unknown what economic impact the moratorium will have in Florida, but it is anticipated to be greater in the other Gulf Coast states.

### **Federal Oil Pollution Act of 1990 (OPA)**

Enacted following the *Exxon Valdez* oil spill, OPA unified a variety of then-existing federal liability provisions into a single oil-discharge framework, under which a “responsible party” is liable for removal costs and damages incurred by governmental or private entities. A central component of the framework is the non-court submission of claims to the responsible party designated by the federal government (which is BP for this incident). Specifically, under OPA:

- Removal costs include eligible costs incurred by governments, individuals, and businesses.
- Damages include:
  - *Natural resource* injury, destruction, or lost use;
  - *Real or personal property* injury, as well as economic losses from destruction of property;
  - *Revenues* lost by governmental entities due to property or natural resource damage;
  - *Profits or earning capacity* lost or impaired due to property or natural resource damage;
  - *Public service* increases or additions during or after removal activities (e.g., providing protection from fire, safety, or health hazards); and
  - *Subsistence-use* losses if natural resources depended on for subsistence-use purposes have been injured, destroyed, or lost.
- Punitive damages are not available.
- A claimant must submit the claim first to the responsible party.

- If the responsible party denies liability or the claim is not settled in 90 days, the claimant may:
  - File a lawsuit in state or federal court; or
  - Present the claim to the federal Oil Spill Liability Trust Fund, which is funded through a federal tax on oil of 8 cents per barrel.
- The responsible party is liable for interest beginning on the 30th day after a claim is presented.
- Strict liability is imposed:
  - In the case of an offshore facility, removal costs are not limited but other damages are limited to \$75 million (BP has said this cap is “irrelevant” to them and they will not try to invoke its protections).
  - The claimant must establish that the damages qualify for compensation and establish the amount of the damages.

### **Florida’s Pollutant Discharge Prevention and Control Act (Pollutant Discharge Act)**

Sections 376.011 - .21, Florida Statutes: This act is a comprehensive regulatory scheme designed to protect Florida’s coastal waters from discharges of pollutants. The act’s definition of “pollutant” is not limited to oil. With respect to liability, the Pollutant Discharge Act:

- Provides for the Department of Environmental Protection to designate a responsible party in the event of a discharge.
- Makes a responsible party liable to an affected “person,” which includes individuals, businesses, and governments, for destruction to or loss of real or personal property.
  - The types of damages available are not as broad as under the federal OPA (e.g., state law does not cover lost profits or earning capacity or increased public services).
  - Under state law, damages are not capped; under OPA they are.
  - Under state law, cleanup costs are capped; under OPA they are not.
- Authorizes a private cause of action against a responsible party (s. 376.205, F.S.). An additional cause of action related to a pollutant discharge is authorized separately from the Pollutant Discharge Act for impacts on ground and surface waters (s. 376.313, F.S.).
- Establishes the Florida Coastal Protection Trust Fund (Fund) to ensure moneys are available for abatement of discharged pollutants and for remediation and restoration of environmental resources. The Fund is funded through a state excise tax on each barrel of pollutant produced in or imported into the state, as well as through fines,

fees, and recoveries under the act. (Currently, the Fund is projected to have a balance of \$818,054 at the end of Fiscal Year 2010-11.)

- Authorizes a person to make a claim against the Fund. However:
  - The person must first present the claim to the responsible party.
  - If the responsible party denies liability or the claim is not paid in 90 days, the person may present the claim to the Fund.
- Makes the responsible party liable to the Fund for cleanup costs, subject to prescribed limits.

### **Common Law Claims**

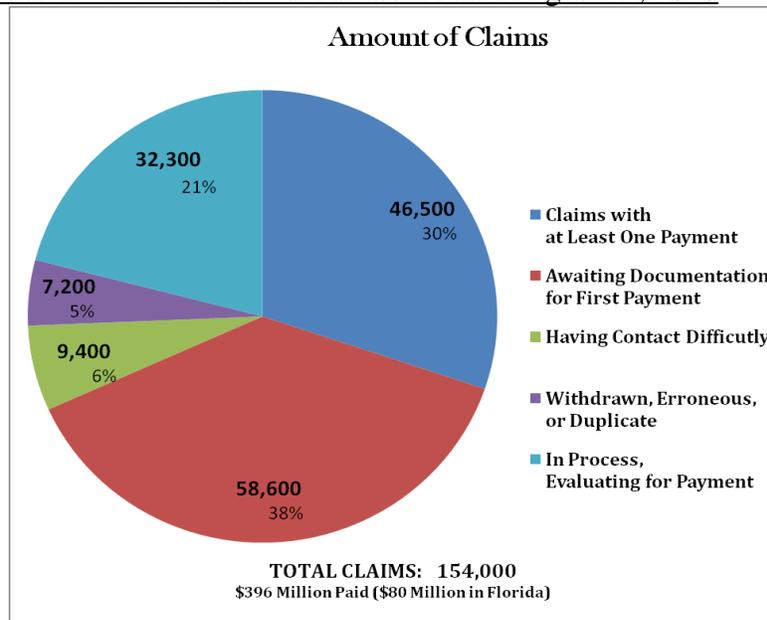
Persons damaged by pollutant discharges may have a variety of common law causes of action, such as negligence, trespass, nuisance, or products liability. For example, in June of this year, the Florida Supreme Court, in *Curd v. Mosaic Fertilizer*, held that commercial fishermen can recover for economic losses proximately caused by the negligent release of pollutants (in that case a spill into Tampa Bay resulting from inland mining waste), even though the fishermen do not own any property damaged by the pollution.

A sample lawsuit might include counts under common law, the state Pollutant Discharge Act (or the separate cause of action under s. 376.313, F.S.), and the federal OPA. Under case law, a federal court dismissed an OPA claim when the plaintiff had not first presented the claim to the responsible party under the non-court process prescribed in OPA. A lawsuit based solely on a common law theory of recovery presumably would not be dependent upon making a non-court claim to a responsible party under OPA. Similarly, making a non-court claim to the responsible party does not appear to be an explicit condition precedent to filing a lawsuit under the state Pollutant Discharge Act.

### **The Claims Process**

As required by OPA, BP set up its own claims process for those seeking compensation from damages suffered as a result of the oil spill, including opening claims offices throughout the Gulf Coast region. However, that process was inconsistent and frustrating to many of those participating. Concerns were expressed regarding the uncertainty and lack of guidance regarding the process – how to file a claim, who and what qualifies, what information is necessary to support a claim, the amount of time it was taking for BP to act on claims, as well as the amount of compensation BP was providing.

Key Claim Statistics from the BP Claims Process - As of August 21, 2010



Gulf Coast Claims Facility

For private individuals and businesses, the claims process was transferred on August 23, 2010, to the Gulf Coast Claims Facility (GCCF) administered by Kenneth Feinberg. The GCCF is the product of an agreement between the federal government and BP due to concerns and frustrations claimants were experiencing. Mr. Feinberg was the Special Master for the Federal September 11th Victim Compensation Fund, Executive Compensation under the Troubled Asset Relief Program (TARP), the Hokie Spirit Memorial Fund following the shootings at Virginia Tech, as well as for claims involving Agent Orange, asbestos, Dalkon shield, DES (pregnancy medication) cases, and Hurricane Katrina.

The \$20 Billion BP Fund

Payments made by the GCCF will come from an escrow account created by BP, to which BP has agreed to contribute \$20 billion over the next four years. In August, BP made its first deposit of \$3 billion into the account. A \$2 billion deposit will be made in the fourth quarter of this year, with the company adding \$1.25 billion a quarter, or \$5 billion a year, until all \$20 billion has been deposited. BP has repeatedly stated that the account will be funded beyond the \$20 billion, if needed, to pay all claims. It appears the account will be used to pay government claims as well as the cost of running the GCCF.

The company announced that it sold almost \$9 billion in assets to have cash on hand for the escrow account and other costs. BP named two individual trustees to administer the account: John Martin, a former U.S. district judge for the Southern District of New York, and Kent Syverud, Dean of the Washington University School of Law. Citigroup will serve as the corporate trustee and paying agent for the account.

### The GCCF Process

There are 13 Florida Claims Office locations for the GCCF. Following are some of the key features of the GCCF claims process:

- Emergency advance payments will be available on a monthly basis or for up to six months of losses. Emergency advance payments to individuals will be issued within 48 hours of determining eligibility; business claims will be evaluated within 7 days of receipt. Claims for emergency advance payments must be filed on or before November 23, 2010.
- Eligibility will be determined based on proximity to the Gulf Coast, type of industry, and dependence on the natural resources of the Gulf.
- Documentation or proof of loss will be required for all claims, although Mr. Feinberg has stated there will be flexibility in documents required for the emergency advance payments. Assistance will be provided to complete the claims forms, including legal assistance through the GCCF. Information submitted will remain confidential.
- A claim may be submitted in a number of ways:
  - Through the website at [www.GulfCoastClaimsFacility.com](http://www.GulfCoastClaimsFacility.com).
  - By visiting a GCCF claims site office.
  - By calling GCCF's toll free number 1-800-916-4893; TTY: 1-866-682-1758.
  - By regular, overnight, certified or registered mail, or by fax.
- Claims previously filed with the BP Claims Process have been transitioned to the GCCF for review, evaluation and determination; however, claimants will be required to file new forms with the GCCF to receive payments.
- Claimants requesting an Emergency Advance Payment or receiving an Emergency Advance Payment will not be asked or required to sign a release or waive any rights to assert additional claims, to file an individual legal action, or to participate in other legal actions associated with the spill. The right to sue is waived only if people or businesses accept the final settlement offered by the GCCF, not if they simply apply for the payment. People and businesses seeking a lump-sum settlement from BP's \$20 billion oil spill compensation fund may be asked to waive their right to sue not only BP, but also all the other major defendants involved with the spill.
- Eligible claims include:
  - Property damaged by the oil spill or the cleanup efforts (example: damage to a boat);
  - Loss of income/earning capacity (example: lost your job or had your hours cut because of the spill — fishermen, workers in seafood industry, workers in hotels or restaurants);

- Net loss of profits or earnings from a business you own (example: boat owners, hotel owners, restaurant owners);
  - Subsistence loss (example: can no longer catch fish to feed your family); and
  - Removal and clean up costs for your own property (example: costs related to cleaning oil from a dock you own).
- There will be no reimbursements by the GCCF for anyone adversely affected by the federal moratorium on most deepwater drilling in the Gulf as these claims are being handled by a separate process.
  - The GCCF will reduce wage loss claims if the individual is also receiving government benefits, such as unemployment compensation, food stamps or other assistance to families in need.

#### Real Estate Brokers and Agents

The GCCF will set aside \$60 million from the fund in a special pool to compensate negatively affected real estate brokers and agents in the Gulf Coast region. Mr. Feinberg is on record that he does not believe these damages are legally compensable (though the Association of Realtors disagrees with his analysis), but has agreed to set aside these funds because he feels “it is the right thing to do.” The claims process and distribution of funds will be managed by state Associations of Realtors in Alabama, Florida, Louisiana, Mississippi and Texas. The national association will set eligibility requirements for these claims, subject to review by Mr. Feinberg. Florida’s share is reported to be \$16 million.

#### Real Estate Values

Property owners near the affected coastal areas are greatly concerned with lost property values. There have been reports of real estate sales that fell through and that property values are depressed due to the spill. Based on Mr. Feinberg’s public statements, it is not anticipated that the GCCF process will compensate owners for lost property values, except perhaps in instances where the sale price was reduced as a direct result of the oil spill. We do not know if Mr. Feinberg’s statements are based on his interpretation of applicable law or on the difficulty of determining fair compensation.

Potential losses of property values are very difficult to assess. It will take a long time for any concrete data on these losses to come to light. Going forward will require good data on how property values have been affected, and on the duration of any such effect. Further, it is not conclusive that a loss of property value is not compensable under applicable federal and state law. Because of these uncertainties, the Workgroup is unable to make any recommendation at this time.

#### Hospitality Industry

One of the hardest hit business sectors is Florida’s hospitality industry, and it has been reported that tourism across the State of Florida has been negatively impacted by the oil spill. The Florida Restaurant & Lodging Association became involved in the response efforts early on, including

the claims process. Although association representatives met repeatedly with Mr. Feinberg as he developed the GCCF protocol, many concerns about the process remain for the hospitality industry, particularly the criteria relating to proximity to the actual oil spill. The association has obtained legal assistance for its members and others in the industry to help in navigating the process.

#### Attorney General's Concerns

Florida Attorney General Bill McCollum has been closely monitoring the independent claims process administered by BP and the roll out of the GCCF process, and has communicated concerns to BP and Mr. Feinberg on occasion. On August 20, 2010, he wrote a letter to Mr. Feinberg laying out significant concerns and objections regarding the protocol developed for emergency payments and the GCCF claims form. These concerns include:

- **Proximate Causation:** The protocol includes language requiring a claimant to show that his or her damages were “proximately caused” by the oil spill, a requirement that places a heavier burden of proof upon a claimant than is required by OPA.
- **Limitation on the Right to File Interim Claims:** The protocol proposes a limitation on the ability of claimants to file “interim claims” with no legal basis for doing so.
- **Presentment:** The protocol fails to acknowledge that filing a claim with the GCCF for an emergency Advance Payment satisfies OPA’s requirement that a claimant first present a claim to a responsible party before they can either obtain money from the Oil Pollution Liability Trust Fund or file a suit for damages.
- **Refiling of Claims:** While pending claims previously filed with BP will be transferred to the GCCF, claimants are required to refile their claims with the GCCF using the new 18-page claims form. Claimants with pending claims should not and cannot be required to refile and thus restart the 90-day clock provided in OPA for processing their claims.

#### **DISCUSSION AND RECOMMENDATIONS**

As I mentioned above, the Workgroup does not suggest any legislative action at this time. Although we recognize there may be shortcomings with the Gulf Coast Claims Facility process and legal framework, we believe Floridians will be best served by initiating the claims process developed by Kenneth Feinberg and making use of the resources available through the GCCF. Creating a separate claims office or process we believe would be confusing and duplicative. In the area of damages and litigation, the law on the date of the incident is the law that will apply to those claims. Because of these constitutional limits on the retroactive application of statutory enactments, particularly substantive provisions, the Legislature is unable to alter the law as to the remedies available to these claimants and the damages they may be entitled to collect.

The Workgroup does, however, offer the following recommendations:

1. Continue to monitor the private sector damages and compensation process. The Gulf Coast Claims Facility is only in its second week. Much will be learned about this process in the coming weeks and months. The process is only addressing interim payments at this time and it is still unknown how it will handle final payments. Also, much will be learned as related lawsuits work their way through the state and federal courts. It is important to keep in mind, however, that this independent process is governed by OPA.
2. State agencies interacting with those impacted by the spill should consider making relevant information available to their respective industries, licensees, and end-users as appropriate regarding the claims process and resources that are available. Further, such information should be provided to legislative district offices to assist in responding to constituent concerns.
3. Continue an examination of the legal framework of state laws to ensure such laws are adequate and fair in their potential application after any similar future event. While many claims will be pursued and handled under the GCCF process and OPA, claims will also be pursued under existing state laws. As courts are asked to apply and interpret these provisions, it may become apparent that these laws have possible limitations or gaps in helping those harmed. While there are limits to our ability to change these laws for this incident and for these claimants, we can ensure that Florida is in the best position possible in case any similar instances arise in the future.

Mr. Speaker, it has been an honor and a privilege to accept your charge relating to the review of the scope of private sector damages as a result of the Deepwater Horizon oil spill and the processes available for compensation. Your leadership in this area has given us another opportunity to serve the people of Florida.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steve Crisafulli", followed by a period.

Representative Steve Crisafulli, Lead Member  
Representative Clay Ford  
Representative Tom Grady  
Representative Janet Long  
Representative Darryl Rouson  
Representative John Wood