



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 4 – Develop strategies for public sector recovery of damages

Dear Mr. Speaker:

It is an honor to present to you the findings and recommendations of Workgroup 4 tasked with developing strategies for public sector recovery of damages. The Workgroup was asked to explore the following three areas:

- *Potential Litigation*
 - Work with the Attorney General to develop strategies for recovery.
 - Identify any pre-suit actions required under federal and state law.
 - Ensure Attorney General has authority to prosecute governmental claims.
 - Identify potential negative effects of the state pursuing local government claims under federal law.
 - Identify data and information collection and preservation issues needed for potential litigation.
 - Explore mediation and arbitration possibilities.
 - Determine if revisions to state law are needed for recovery in the event federal law does not provide satisfactory recovery.
- *Natural Resource Damages*
 - Evaluate Florida law to determine whether revisions are necessary to ensure restoration of natural resources and recover costs from responsible parties.
 - Determine whether legislative action could assist in properly assessing and quantifying natural resource damages.
- *State and Local Government Data Collection*
 - Evaluate whether current data collection efforts are sufficient to ensure full compensation to state and local governments and recommend improvements, if any.

WORKGROUP ACTIVITIES

In performing our tasks, the Workgroup was mindful of the Goals and Guiding Principles you set out for us. We were especially mindful to “avoid duplicating or distracting from other efforts to respond to and recover from the disaster.”

The Workgroup held three conference calls/meetings. The first meeting, on August 9th, was used to discuss initial activities with the Workgroup members and ask for input from members and other interested parties.

During the second conference call/meeting, on August 20th, the Workgroup received information regarding claims activity, processes and expectations from representatives of the Department of Environmental Protection, the Division of Emergency Management, the Department of Revenue, the Florida Association of Counties, the Florida League of Cities, the Florida Association of District School Superintendents, the Florida School Boards Association, the Florida Association of Special Districts, and BP. Also, the Attorney General’s office presented information that assisted the Workgroup in addressing the *Potential Litigation* tasks.

The third, and final, conference call/meeting was held on August 30th to discuss the Workgroup’s recommendations.

To assist the workgroup in its deliberations, staff prepared summaries of federal and state law, and a side-by-side comparison of both laws. Also, questionnaires regarding claims activity and documentation were distributed to state agencies, counties, municipalities, school boards and special districts. The summaries, comparison and questionnaires are posted on the House of Representatives’ website at <http://www.myfloridahouse.gov/workgroupresources4.aspx>.

GENERAL OBSERVATIONS

Before addressing the specific areas the Workgroup was asked to explore, we have a couple of general observations.

The government entities affected by the oil spill have to date been mostly concerned with response and removal activities, and the claims related to those activities. They have not begun to fully focus on claims for other damages they may have experienced due to the oil spill -- this process is just beginning. The same can be said of BP. While some governmental claims activity was previously occurring, it was not until August 23rd, that BP made available a web-based government claims process.¹ Also, while the Attorney General’s office has preliminarily reviewed the government claims process, their main focus to date has been to ensure that private claims are addressed in a manner that is fair to Florida citizens and businesses.

¹ The BP government claims website can be found at www.bp.com/governmentclaims.

The process for the recovery of natural resource damages appears well-established. However, the process for recovery of other damages affecting government is not. While federal law recognizes the right of governments to recover damages for lost revenues, additional services and other damages, there is little precedent or guidance regarding how these damage claims are to be established and calculated.

While the Workgroup has a number of recommendations, none of them require immediate action by the Legislature.

SPECIFIC TASKS

Following is a brief discussion for each item the Workgroup was asked to address.

Potential Litigation

- Work with the Attorney General to develop strategies for recovery.

Representatives of the Attorney General's office appeared before the Workgroup and had meetings with staff. At this time, and before more is known regarding the types and amounts of claims, it is difficult to develop strategies.

- Identify any pre-suit actions required under federal and state law.

Under both federal and state law, a claimant must first submit a claim to the responsible party, in this case BP, prior to filing a court action.

- Ensure Attorney General has authority to prosecute governmental claims.

The Attorney General has explicit authority to represent the Department of Environmental Protection for state claims filed under Chapter 376, Florida Statutes. Also, under Chapter 16, Florida Statutes, the Attorney General has general authority to represent any state agency.

- Identify potential negative effects of the state pursuing local government claims under federal law.

The Attorney General does not have statutory authority to represent local governments. In the past, if it made sense to have a joint prosecution and the state and local governments agreed on the legal theories to prosecute the claim, the Attorney General has been retained to represent local governments. In this situation, it may be difficult to have commonality of interests to prosecute joint claims. Each local government may have unique claims that the state and other local governments are not pursuing.

- Identify data and information collection and preservation issues needed for potential litigation.

The Attorney General has reached out to state agencies and local governments and stressed the necessity of documenting expenses and damages related to the oil spill. Also, as discussed below, the Governor's Office has developed a tracking system to identify and track oil spill-related expenses and lost revenues.

- Explore mediation and arbitration possibilities.

Mediation and arbitration may be available options if litigation is necessary. However, the decision to pursue either option will depend on what is ultimately being litigated. It is premature to explore these options at this time. Also, the Attorney General believes his office generally has had good results negotiating settlements without using mediators.

- Determine if revisions to state law are needed for recovery in the event federal law does not provide satisfactory recovery.

The idea of revising state law has received some consideration among those involved in dealing with the oil spill. The preliminary consensus seems to be that revising Florida law with a view towards applying the changes to this event is fraught with unknowns and may do more harm than good.

At this time, we cannot determine whether federal law will provide a satisfactory recovery, or whether Florida law may be more advantageous. In part, these decisions will depend on what types of damage claims are being pursued. For example, as it relates to government claims, federal law explicitly mentions two types of claims applicable to governments: (1) the net loss of government revenues, and (2) the cost of providing increased public services. Florida law does not explicitly address these types of damage claims and there is no precedent to help determine whether these claims are available under Florida law.

Natural Resource Damages

- Evaluate Florida law to determine whether revisions are necessary to ensure restoration of natural resources and recover costs from responsible parties.

Florida law provides similar methods for recovering natural resource damages as federal law. This process includes a pre-assessment phase, an injury assessment phase and restoration of natural resources, including recovery for the loss of use during the interim period. This process is well established at both the federal and state level.

In addition, Florida law provides an alternative assessment method that is based on a compensation schedule. The schedule takes into account such items as the volume of the discharge, the location of the discharge (inshore, nearshore or offshore), damage caused to specific types of natural resources, and others. It is not known at this time if this assessment method provides a larger recovery than the method based on federal law. Also, the applicability of this method to the BP oil spill is open to question. One feature of the method is to assess a per-gallon-of-discharge amount. It is unclear whether the appropriate measure for this oil spill is gallons discharged at the wellhead or gallons that entered Florida waters. Finally, Florida law appears to give the responsible party the option of determining whether this method may be used.

- Determine whether legislative action could assist in properly assessing and quantifying natural resource damages.

As mentioned above, we do not believe that amending the law in order to apply any changes to this event is feasible. However, the Workgroup believes that Florida law should be examined and potentially amended to reflect what we have learned and will learn from this event.

State and Local Government Data Collection

- Evaluate whether current data collection efforts are sufficient to ensure full compensation to state and local governments and recommend improvements, if any.

On July 15, 2010, the Governor's Office of Policy and Budget (OPB) provided state agencies with instructions on how to report direct costs, indirect costs and revenue losses incurred as a result of the oil spill. A review of the instructions and required documentation lead us to conclude that the appropriate structures are in place to capture the information needed to prepare claims.² Because the effects of the oil spill on state and local governments will continue to be felt into the future, however, data collection will be a continuing necessity and we want to reaffirm the importance of this task.

BP's GOVERNMENT CLAIMS PROCESS

A review of the documents promulgated by BP leads us to advise affected governments to critically examine BP's instructions regarding the calculation of government claims to ensure they result in an accurate assessment of the true loss to the government. For example, BP's instructions for determining loss of revenue contemplate a comparison of the period(s) affected by the oil spill with a prior period(s). Because of the impact on the Florida economy of the past two year's recession, the use of a prior period will tend to underestimate the loss of revenues suffered due to the oil spill.

² See ATTACHMENT for a description of the instructions.

Also, BP's documents seem to imply that it will not recompense governments for "already budgeted expenses." At this time, we are not sure of this phrase's meaning. However, we believe that governments are entitled to compensation when expenditures budgeted for one purpose are actually spent on activities necessitated by the oil spill.

PREPARATION OF STATE CLAIMS

A number of different groups have been examining the economic impact of the oil spill on Florida's economy. These include the Economic Impact Assessment Working Group of the Governor's Oil Spill Recovery Economic Taskforce, and the Senate Select Committee on Florida's Economy. These groups, a number of state agencies, and the Legislature's Office of Economic and Demographic Research (EDR) have been capturing information necessary to prepare state damage claims. The Legislature has also authorized EDR to explore and acquire some of the economic studies that may be needed to support state claims.

Now that the response and removal phase of the oil spill is coming to an end, the Workgroup believes it is time to focus on the claims process. In this regard, we believe that the best way to move forward is to form an inter-agency group for the sole purpose of addressing the preparation and submission of state government claims. The group should be responsible for reaching consensus on the appropriate strategies to employ in quantifying the claims and for the ministerial duties associated with preparing the claims. Because of the nature of its duties, the Department of Financial Services has the requisite infrastructure and skills to prepare the state's claims. Therefore, that department should coordinate the group's activities.

RECOMMENDATIONS

Based on our review of applicable law, the responses to the questionnaires, and the information provided by affected agencies and local governments during our deliberations,³ we offer the following recommendations.

1. Chapter 376, Florida Statutes, should be thoroughly reviewed to clarify what damages a responsible party must pay, and how those damages are to be determined. Ideally, this review should take place in time for the Legislature to address the issue in the 2011 Session.
2. Efforts should continue to monitor the government claims process and assist local governments as needed, either through an extension of this Workgroup's activities or another mechanism.
3. State and local governments should critically examine BP's instructions regarding the calculation of government claims to ensure they result in an accurate assessment of the true loss suffered by the government as a result of the oil spill.

³ See ATTACHMENT for a summary of responses and other information received by the Workgroup.

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4. State government should consider the formation of an inter-agency group, including representatives of the Governor's Office, the Office of the Attorney General, the Chief Financial Officer, the Commissioner of Agriculture, the Legislature, the Department of Environmental Protection, and others, dedicated to begin formulating state government claims.
5. State agencies and local governments should continue to aggressively identify and document expenditures incurred and additional services provided as a result of the oil spill.

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

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Matt Hudson", with a long horizontal flourish extending to the right.

Representative Matt Hudson, Lead Member

Representative Mia Jones

Representative Jimmy Patronis

Representative Kelli Stargel

Representative James Waldman

Representative Ritch Workman

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Summary of Responses to Questionnaires, Information Received From Representatives of Local Governments, and State Government Data Collection Efforts

Counties and Municipalities

Responses to the questionnaire show that the majority of expenses incurred to date were for emergency management planning, preparedness, and response. There were also expenditures for natural resource damage pre-assessment. The sources of lost revenue identified thus far include the tourist development tax and ad valorem tax revenues associated with an anticipated decrease in property values. The recommendations from respondents included: an online tracking system for claims; sending payments directly to applicants (no State involvement); develop a methodology to recover ad valorem tax decrease; and keep pressure on BP to pay county claims.

Representatives for the cities and counties indicated that they have three main objectives:

- Ensure that BP and the Coast Guard clarify their long term recovery plans;
- Work with the state to track and identify revenue losses, including the effects of property value declines on property tax receipts.
- Have a third-party administrator handle local government claim issues.

Special Districts

There was minimal direct impact on independent special districts. There are not many special districts in the areas most affected by the oil spill. Only one special district, the South Walton Fire District, had expenses related to the oil spill. These expenses were for providing EMS services to BP response and clean-up workers and HAZMAT training.

Like other local governments that rely mostly on property taxes to fund their budgets, special districts are concerned about the effect of the oil spill on property values.

School Districts

School Districts were not directly affected by the oil spill. They are concerned that the effect of the oil spill on state revenues and on property tax revenues will diminish the resources available to fund schools.

Also, School Districts, particularly in the most affected areas, are concerned that the effect of the oil spill on property values will result in an increase of property valuation appeals to the Value Adjustment Boards (VABs). This increase, if it materializes, will result in increased expenditures by School Districts since they help pay for the VABs' operations. Also, an increase in the number of VAB appeals has the potential to further lower the property tax base.

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State Government

The Governor’s Office of Policy and Budget (OPB) has developed a process for state agencies to report direct costs, indirect costs and revenue losses incurred as a result of the Deepwater Horizon oil spill.

Three levels of activities resulting from the disaster are included in OPB’s instructions. The first level is limited to direct response or direct services. Direct services are provided by entities actively responding to the disaster and assisting in the completion of an assigned emergency operations mission. Expenditures associated with direct services include payment of salaries and benefits for employees who are in the field. The direct services are linked to the missions in the EM Constellation system that is maintained by the Division of Emergency Management. The EM Constellation system is a collaborative emergency management application that supports incident management and information gathering and sharing among state and county groups during disaster response.

The second level of activity is support for direct response or direct services. These costs are tracked using the Deepwater Horizon special appropriation categories. OPB developed six appropriation categories for agencies to use when recording expenditures associated with the disaster.

The third level captures the impact on current resources. This level includes loss of efficiencies, diversion of resources, increase in public assistance, and loss of revenue.

State agencies must report the costs to OPB by the 25th of each month. To facilitate the submission, OPB developed various forms that agencies must complete. State agencies are complying OPB’s instructions.

The Workgroup also surveyed state agencies, universities, community colleges and water management districts to determine the type of programs that are being affected by the oil spill and how each entity is documenting the associated costs. Of the 38 surveys returned by state agencies, 21 had increased expenses due to the oil spill. The largest reported request to date submitted to BP is from the Department of Agriculture and Consumer Services. The department submitted a request for more than \$59 million to cover the estimated ten-year cost of monitoring and analyzing Florida seafood to ensure its safety.

The Escambia County Clerk of Courts reported a reduction in their caseload and revenue. He believes that fewer visitors to the area resulted in fewer citations being issued. Other Clerks of Courts expressing similar concerns were those from Bay, Franklin, Gulf, Indian River, and Walton counties.

The only two community colleges with expenses directly related to the disaster were Gulf Coast Community College and Florida Keys Community College. They reported increased

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expenditures for oil spill worker training and HAZMAT training, respectively. Twenty-six community colleges reported they had no increase in expenditures due to the disaster.

Nine of the eleven universities reporting indicated increased expenditures due to the disaster. These expenses ranged from attending meetings to the University of West Florida being “ground zero” due to its location and resources. Florida A&M University and Florida Gulf Coast University were the only universities that reported no impacts.

The St. Johns Water Management District and the Suwannee River Water Management District both reported expenses related to the disaster. The St. Johns River Water Management District reported very minor pre-event baseline monitoring. The Suwannee River Water Management District assisted the City of Cedar Key by providing specialized maps that identified claim lease areas.

Many of the responders to the survey are concerned about reduced revenues due to a decline in tourism. The concern ranges from the number of traffic tickets issued to lower sales tax collections that are shared with various agencies.

The survey results were encouraging with regards to data retention. It appears the entities that have been affected by the disaster are documenting their costs associated with the disaster.