

CIVIL COMPENSATION REMEDIES ISSUE BRIEF

** This document relies heavily on work shared by Senate staff - the Summary is followed by a more detailed brief

Summary

I. **Federal Oil Pollution Act (OPA)**: Includes a broad definition of damages, but is to oil.

- Damages (partial list):
 - *Revenues* lost by governmental entities;
 - *Profits or earning capacity* lost or impaired;
 - *Public service* increases or additions; and
 - *Subsistence-use* losses.
- A claimant must submit the claim first to the responsible party.
- OPA imposes strict liability.

II. **Independent Claims Process**: The claims process begun by BP is a voluntary process. Ken Feinberg will take over private party claims in August - details still evolving. An escrow account of \$20 billion over a four-year period will fund the claims process.

III. **State Pollutant Discharge Prevention and Control Act (Pollutant Discharge Act)**: Limited damages, but not limited to oil. Authorizes a private cause of action against a responsible party.

IV. **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.

Background

Key existing remedies to compensate individuals, businesses, and governmental entities harmed by an oil discharge are:

I. **Federal Oil Pollution Act (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. 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 shall 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.
- OPA imposes strict liability.
 - In the case of an offshore facility, removal costs are not limited but damages are limited to \$75 million.
 - The claimant must establish that the damages qualify for compensation and establish the amount of the damages.

II. **Independent Claims Process**: In June, the White House announced the creation of an “independent claims process” for the Deepwater Horizon discharge, to be administered by Kenneth Feinberg, who administered the September 11th Victim Compensation Fund. An escrow account, to which BP agreed to contribute \$20 billion over a four-year period, will fund the claims process. It is anticipated that the independent claims process will, at a minimum, take over from BP administration of claims by individuals and businesses. August is the anticipated start of the independent claims process. The administrator has yet to issue program guidance; thus, the interplay between this claims process and the standards and procedures of OPA is not known.

III. **State Pollutant Discharge Prevention and Control Act (Pollutant Discharge Act)**: Sections 376.011 - .21 - This act is a comprehensive regulatory scheme designed to protect the state’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 (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 expected 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.

IV. **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 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.

Considerations/Research

- *Retroactive Application*: There will be limits on the retroactive application of statutory enactments, particularly substantive provisions, to certain claims stemming from the current oil discharge.
- *Management of Cases*: The potential volume of litigation stemming from an oil discharge may create a need to manage the cases and the awards (e.g., addressing the potential awarding of multiple, separate punitive damage awards). To the extent a policy

option purports to affect practice and procedure in the courts system, it may raise concerns about encroachment on the constitutional authority of the Florida Supreme Court to govern court procedures. It remains to be seen how much litigation actually ends up in Florida's courts – versus claims being made through the independent process or in federal court.

- *Jurisdiction/Venue*: If a case is brought in state court, a defendant in litigation of this type most likely will remove the lawsuit from state to federal court. There is also the possibility – in light of the volume and complexity of the litigation – that the federal court system's multidistrict litigation (MDL) process may result in the transfer of all federal oil litigation cases to one federal court for coordinated and consolidated pretrial proceedings.
- *Practitioners' Perspectives*: Consultation with private or governmental attorneys who are experienced in complex environmental litigation may aid in the identification of gaps in existing compensation remedies and the development of policy responses.