

## Comparison of State and Federal Laws Relating to Remedies for Oil Discharges

*Prepared for the Work Group to Develop Strategies for Public Sector Recovery of Damages  
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	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
Prohibited Acts	Any discharge or substantial threat of discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or the exclusive economic zone <sup>1</sup> , makes the party a responsible party. <sup>2</sup>	The discharge of pollutants into or upon any <i>coastal waters</i> , estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state. <sup>3</sup>
Applicability	Applies to navigable waters, adjoining shorelines, and the exclusive economic zone.	Applies to spills of pollutants including crude oil in coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast. <sup>4</sup>
Prerequisites to Filing a Claim	Claims must first be presented to the responsible party. If a claim is denied or if 90 days has elapsed, the claimant may file a lawsuit or file a claim with federal fund. <sup>5</sup>	For claims made against the Florida Coastal Protection Trust Fund involving spills designated as “moderate” or “major” by DEP, the party must first present it to the responsible party before they may be presented to the trust fund. If the responsible party denies liability or the claim is not paid in 90 days, the person may proceed to present the claim to the trust fund. <sup>6</sup> A claim against the trust fund, however, may not be approved during the pendency of a judicial proceeding or other proceeding by the person to recover damages that are the subject of the claim. <sup>7</sup>

<sup>1</sup> The exclusive economic zone was announced by President Reagan in Presidential Proclamation 5030 on March 10, 1983. In general, the proclamation asserts jurisdiction over natural resources up to 200 miles off the coast. See <http://www.archives.gov/federal-register/codification/proclamations/05030.html>

<sup>2</sup> 33 U.S.C. § 2702(a)

<sup>3</sup> Section 376.041, F.S.

<sup>4</sup> Section 376.031(16), F.S.

<sup>5</sup> 33 U.S.C. § 2713(a)

	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
Interim Claims	The responsible party is required to create a program for payment of interim or short-term claims. <sup>8</sup> The apparent intent is to make quick payments to affected parties prior to final adjudication of all claims of a party.	No provision in statute (an interim claims process is neither required nor prohibited).

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<sup>6</sup> Section 376.123(2)(c), F.S.

<sup>7</sup> Section 376.123(1), F.S.

<sup>8</sup> 33 U.S.C. § 2705(a)

	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
<p>Liabilities of Responsible Parties</p> <p>(Liability provisions applicable to offshore facility spills are highlighted)</p>	<p>Liabilities Created:</p> <ol style="list-style-type: none"> <li>1. Removal Costs</li> <li>2. Damage to real or personal property</li> <li>3. Natural Resource Damages</li> <li>4. Subsistence Use</li> <li>5. State and Local Government Revenue</li> <li>6. Loss of Profits and Earning Capacity</li> <li>7. Net Cost of Increased Public Services</li> </ol> <p>Liability Limits:</p> <ol style="list-style-type: none"> <li>1. Vessel Discharges - The total liability, including removal costs is based on a formula. Different vessel types have different limits per ton.</li> <li>2. Offshore Facility Discharges - No limit on removal costs. All other damages are limited to \$75 million.</li> <li>3. Onshore Facility or a Deepwater Port - The total liability, including removal costs, is limited to \$350 million.<sup>9</sup></li> </ol>	<p>Liabilities Created:</p> <ol style="list-style-type: none"> <li>1. Cleanup costs.<sup>10</sup></li> <li>2. Damage to real or personal property.<sup>11</sup></li> <li>3. Natural Resource Damages</li> </ol> <p>Liability Limits:</p> <p>Cleanup Costs - Limitations are based on the source of the discharge as follows:</p> <ol style="list-style-type: none"> <li>1. Vessel Discharges – From \$10 million or \$1200 per gross ton to \$500,000 to \$600 per gross ton depending on the size of the vessel.</li> <li>2. “Terminal Facilities” (including offshore drilling facilities) - \$150 million.</li> </ol> <p>Property Damage – No limit.</p> <p>Natural Resource Damages – No maximum limit, but amount must be determined pursuant to s. 376.121, F.S.<sup>12</sup></p>

<sup>9</sup> 33 U.S.C. § 2704(a).  
<sup>10</sup> Section 376.12(1)&(2)(c), F.S.  
<sup>11</sup> Section 376.12(5), F.S.  
<sup>12</sup> Sections 376.12(4), F.S.

	OPA	Chapter 376 - 1970 Act (s. 376.011-21)
<p>Exceptions to Liability Limit for Cleanup cost</p> <p>(Exceptions applicable to offshore facility spills are highlighted)</p>	<p>No limit applies to offshore facilities. A responsible party must pay all cleanup costs; unless an exception to liability applies whereby the responsible party otherwise has no liability for the discharge.</p> <p>Cleanup costs for discharge costs related to vessels, onshore facilities, or ports are part of the overall liability limit, unless an exception to liability applies in which case there is no liability.</p> <p>In all cases, a responsible party is not liable for act of God, act of war, or act of an unrelated third party. These only apply if the responsible party promptly reported the spill and complied with federal regulations.</p>	<p>Exceptions to \$150 million liability limit:</p> <p>1. The department demonstrates that such discharge was the result of willful or gross negligence or willful misconduct of, or the violation of an applicable federal or state safety, construction, or operating regulation or rule by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party, except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail; or</p> <p>2. The responsible party fails or refuses: (a) To report the incident as required by law and the responsible party knows or has reason to know of the incident; or (b) To provide reasonable cooperation and assistance requested by a state or federal on-scene coordinator in connection with cleanup activities.<sup>13</sup></p>
<p>Liability for Natural Resource Damage</p>	<p>Subject to liability limits, if applicable, the responsible party is liable for damage to natural resources. Federal regulations specify alternative means for appraising the value of the damage to natural resources.<sup>14</sup></p>	<p>Determined by statutory schedule or assessment in accordance with federal rules implementing OPA.<sup>15</sup></p>

<sup>13</sup> Section 376.12(3), F.S

<sup>14</sup> See list and description of allowable methods at 43 C.F.R. § 11.83

<sup>15</sup> Section 376.121(10), F.S.

	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
Recovery for Natural Resource Damages	The Governor appoints a trustee or trustees to supervise the assessment and restoration activities and to determine natural resources damages claim.	DEP recovers for natural resource damages on behalf of the state. <sup>16</sup>  Causes of action are authorized for persons/governments for damage <i>resulting from</i> a discharge of pollution. In <u>Curd v. Mosaic Fertilizer</u> , - - - So.3 <sup>rd</sup> - - - (Fla. 2010), in a case brought under s. 376.313(3), F.S., the Florida Supreme Court noted that under the definition of “damage” provided in s. 376.031, F.S., one can recover for damage to natural resources and held that commercial fisherman could bring a cause of action for the loss of income due to damage done to the commercial fishing industry without owning property damaged by the pollution. <sup>17</sup>
Causes of Action by Persons/Governments for Damages	A claimant must file a claim with the responsible party. If the claim is denied or is not paid within 90 days, the injured party may file suit in state or federal court. <sup>18</sup> Three year statute of limitations commences on date that the loss was discovered or reasonably discoverable. <sup>19</sup> Recovery under OPA does not preclude recovery under any other law. <sup>20</sup>	A cause of action may be brought against a responsible party in state court for damages suffered by that person as a result of a pollutant discharge. A party bringing a suit under this section need only allege and prove the fact of the prohibited discharge or polluted condition and that it occurred. It is not necessary to prove negligence of the responsible party. <sup>21</sup> Persons/governments proceed under s. 376.205, F.S. DEP proceeds under s. 376.12, F.S. and s. 376.051, F.S. Remedies under the 1970 act are cumulative and not exclusive.

<sup>16</sup> Section 376.121(1), F.S.

<sup>17</sup> *Curd v. Mosaic Fertilizer*, 2010 WL 2400384 (Fla.).

<sup>18</sup> 33 U.S.C. § 2717

<sup>19</sup> 33 U.S.C. § 2717(f)

	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
Cleanup Cost Recovery	<p>The responsible party is liable for coordinating, arranging for, and paying for all cleanup costs. Where the responsible party does not pay, the Coast Guard may arrange for cleanup and seek reimbursement from the responsible party.</p> <p>Any person other than the responsible party may seek reimbursement for cleanup costs from the responsible party or from the Oil Spill Liability Trust Fund.</p>	<p>DEP must recover from the person or persons causing the discharge or from the federal government, jointly or severally, all sums owed or expended out of the Florida Coastal Protection Trust Fund or paid from any other state moneys not budgeted for but expended for cleanup, abatement, and damages.<sup>22</sup></p> <p>Any person/government, except a responsible party, who aids in the containment or cleanup of any pollutant may assert a claim against the trust fund for reimbursement of their reasonable costs, however, prior departmental approval is required unless it has been waived for good cause.<sup>23</sup></p>

<sup>20</sup> 33 U.S.C. § 2718

<sup>21</sup> Section 376.205, F.S.

<sup>22</sup> Sections 376.11(6) and 376.123(10), F.S;

<sup>23</sup> Section 376.09(7)(a), F.S.

	<b>OPA</b>	<b>Chapter 376 - 1970 Act (s. 376.011-21)</b>
<b>Defenses to Liabilities</b>	<p>There is no liability for a discharge that was allowed pursuant to permit issued by state or local government. 33 U.S.C. § 2702(c)</p> <p>There is no liability for a discharge caused by an act of God or an act of war. 33 U.S.C. § 2703(a)</p> <p>There is no liability for a discharge caused by an act or omission of an unrelated third party provided that the responsible party exercised due care and took precautions against foreseeable acts or omissions of third parties. 33 U.S.C. § 2703(a)(3)</p> <p>The liability defenses under § 2703 only apply if the responsible party reported the incident and provided reasonable cooperation and assistance regarding the discharge.</p>	<p>Only defenses are that the discharge was solely the result of any of:</p> <ul style="list-style-type: none"> <li>- An act of war.</li> <li>- An act of government.</li> <li>- An act of God</li> <li>- An act or omission of a third party other than an employee or agent of the responsible party or a third party whose act or omission occurs within contractual relationship with the responsible party, except a contractual regarding only carriage by rail.</li> </ul> <p>However, the responsible party must prove they used due care regarding the pollutant concerned, taking into consideration the characteristics of the pollutant and in light of all relevant facts and circumstances, and took precautions.<sup>24</sup></p>
<b>Damages</b>	<p>Removal costs</p> <p>Damage to natural resources</p> <p>Damage to real property</p> <p>Damage to personal property</p> <p>Loss of subsistence use</p> <p>Loss of government revenues</p> <p>Loss of profits</p> <p>Increased cost of providing public services</p>	<p>“Damage” means the documented extent of any destruction to or loss of any real or personal property, or the documented extent, pursuant to s. 376.121, of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant. Natural resource losses have been construed to include loss of income due to the damage to the resource.</p>

<sup>24</sup>

Section 376.12(7), F.S.