

Summary of State Compensation Remedies For Discharges of Crude Oil

*Prepared for the Work Group to Develop Strategies
for Public Sector Recovery of Damages
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Background

Chapter 376 of Florida Statutes sets forth the state's regulatory scheme for pollutant discharge prevention and removal. It includes provisions establishing liability for persons responsible for prohibited pollutant discharges and creates causes of action to compensate individuals, businesses, and governmental entities harmed by such discharges. The chapter contains two separately enacted antipollution laws. The first was enacted in 1970, and is currently entitled the "Pollutant Discharge Prevention and Control Act." It is found at sections 376.011 – 376.21, Florida Statutes ("the 1970 Act"). The second was enacted in 1983 to support and complete provisions of the Federal Water Pollution Control Act relating to the national contingency plan for removal of pollutants ("the 1983 Act").¹ These provisions are located at sections 376.30 – 376.317, Florida Statutes. Spills of crude oil occurring offshore that reach Florida coastal waters and shorelines are covered by the provisions of the 1970 Act.²

Florida Coastal Protection Trust Fund

The Florida Coastal Protection Trust Fund was created to carry out the purposes of the 1970 Act provisions of Chapter 376.³ It was designed to provide a mechanism to have financial resources immediately available for prevention of, and cleanup and rehabilitation after, a pollutant discharge, to prevent further harm, and to pay for damages.⁴ The trust 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. The Fund is expected to have a balance of approximately \$800,000 at the end of Fiscal Year 2010-11. Money from the trust fund is used for the following purposes as they pertain to pollutant discharges:

- All costs in the prevention and abatement of pollution from discharges covered by the 1970 Act provisions.

¹ Section 376.30(5), F.S. The references to the 1970 Act and the 1983 Act also refer to subsequently enacted amendments to those provisions.

² Under s. 376.031(16), F.S., of the 1970 Act, "oil of any kind and in any form" is a pollutant. However, s. 376.301(36), F.S., of the 1983 act, defines "pollutants" as any "product as defined in s. 377.19(11), pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas." Section, 377.19(11) describes "product" as any commodity made from oil which includes refined oil, processed crude petroleum, and other oil products, but not crude oil. Crude oil, is specifically incorporated into the definition of "oil" in subsection (4) of s. 377.19 which is not listed as being a "product," which in turn means it is not a "pollutant" under the 1983 act. The exclusion of crude oil from "pollutants" under the 1983 provisions indicates that, with respect to discharges of crude oil in coastal waters, only the 1970 Act provisions apply.

³ Section 376.11(2), F.S.

⁴ Section 376.11(1), F.S.

- All costs and expenses of the cleanup, restoration, and rehabilitation of waterfowl, wildlife, and all other natural resources damaged by the discharge of pollutants, including the costs of assessing and recovering damages to natural resources, whether performed or authorized by the department or any other state or local agency.
- All provable costs and damages which are the proximate results of the discharge of pollutants covered by the 1970 Act provisions.⁵

Protection of Public Interest by the State

The responsibility for protecting the public interest on behalf of the state resides with the Department of Environmental Protection (DEP). Section 376.051(4), F.S., provides:

Whenever it becomes necessary for the state to protect the public interest under ss. 376.011-376.21 [the 1970 Act provisions], it shall be the duty of the department to keep an accurate record of costs and expenses incurred and thereafter diligently to pursue the recovery of any sums so incurred from the person responsible or from the Government of the United States under any applicable federal act.

DEP is authorized to bring action on behalf of the state to enforce each type of liability created by s. 376.12, F.S., and the Department of Legal Affairs represents DEP in such proceedings.⁶

Liability of Responsible Parties

Section 376.041, F.S., prohibits the discharge of pollutants into coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state. Under s. 376.12, F.S., a party responsible for a pollutant discharge is liable for cleanup costs and damages.⁷ In any action brought by DEP to enforce any of these liabilities, there is no requirement to prove negligence of the responsible party, but merely that the prohibited discharge or other polluting condition occurred.⁸

Cleanup costs consist of costs of removal, containment, and abatement of a prohibited discharge.⁹ For a mobile drilling platform such as the Deepwater Horizon, liability for cleanup cost is limited to \$150 million.¹⁰

⁵ Section 376.11(4), F.S.

⁶ Section 376.051(5), F.S.

⁷ Section 376.12(1),(4) & (5), F.S.

⁸ Section 376.12(7), F.S.

⁹ Section 376.12(1), F.S.

¹⁰ Section 376.12(2)(c), F.S. There are two exceptions to the limit of liability for cleanup costs. They are when:

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
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. Section 376.12(3), F.S.

Damages under the 1970 Act are limited to those specified in s. 376.031(5), F.S. These damages are defined as “. . . 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.”

Responsible parties are liable for all damage to real or personal property sustained by an affected person as a result of a spill.¹¹ They may also be liable for natural resource damage which impacts private parties as well.¹² In Curd v. Mosaic Fertilizer, - - - So.3rd - - - (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. The Court 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.¹³

Natural resource damages are determined pursuant to s. 376.121, F.S., which sets out procedures to be used in assessing the cost of damage to the state’s natural resources. The goal of s. 376.121, F.S., is to recover the cost of restoration from the responsible parties and to restore damaged natural resources to their predischarge condition or, when that is not feasible, to recover the cost of all damage to natural resources.¹⁴ Damage to natural resources includes death or injury of living things and damage or destruction of habitat.¹⁵ Under this section, the Legislature created a schedule for compensation for damages to the state’s natural resources. The compensation schedule is based upon the cost of restoration and the loss of ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. The compensation schedule takes into account the volume of the discharge and specified characteristics of the pollutant discharged.¹⁶ As an alternative to the compensation schedule, DEP may conduct a cooperative damage assessment with federal agencies using methods of calculating natural resource damages in accordance with federal rules under the Oil Pollution Act of 1990 (OPA).¹⁷

Recovery for Natural Resource Damages by the State

Compensation to the state for damage to natural resources are facilitated by DEP pursuant to s. 376.121.¹⁸ Payment for natural resource damages must be made within 90 after receipt of a written request from the department. All compensation and recovered costs received by DEP are deposited into the Florida Coastal Protection Trust Fund.

¹¹ Section 376.12(5), F.S.

¹² Section 376.205, F.S.

¹³ Curd v. Mosaic Fertilizer, 2010 WL 2400384 (Fla.).

¹⁴ Section 376.12(4), F.S.

¹⁵ Section 376.121(1), F.S.

¹⁶ Section 376.121(2), F.S.

¹⁷ Section 376.121, F.S.

¹⁸ Section 376.121(1), F.S.

Statutory Causes of Action for Damages

Section 376.205, F.S., authorizes any person to bring a cause of action against a responsible party in state court for damages suffered by that person as a result of a pollutant discharge. Any governmental entity is considered “a person” for purposes of these actions.¹⁹ 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.²⁰

Recovery for Cleanup Cost

Under 376.11, F.S., relating to the Florida Coastal Protection Trust Fund, 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 trust fund or paid from any other state moneys not budgeted for but expended for cleanup, abatement, and damages.²¹

Any person, 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.²²

Defenses to Statutory Liabilities

For actions brought under the 1970 Act, the only defenses available against the liabilities for cleanup costs, natural resource damage and property damage is for the responsible party to prove that the discharge was solely the result of any of the following or any combination of the following:

- An act of war.
- An act of government, either federal, state, county, or municipal.
- An act of God, which means only an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.
- 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 in connection with any contractual relationship with the responsible party, except where the sole contractual arrangement arises in connection with carriage by rail.

Furthermore, in order to establish any of these defenses, the responsible party must prove that they used due care with respect to the pollutant concerned, taking into consideration the characteristics of the pollutant and in light of all relevant facts and circumstances, and took precautions against foreseeable acts or omissions of others and the foreseeable consequences of those acts or omissions.²³

¹⁹ Section 376.031(14), F.S.

²⁰ Section 376.205, F.S.

²¹ Sections 376.11(6) and 376.123(10), F.S.;

²² Section 376.09(7)(a), F.S.

²³ Section 376.12(7), F.S.

Claims Against the Florida Coastal Protection Trust Fund

Section 376.123, F.S. sets forth requirements for persons to make claims against the trust fund for recovery of cleanup costs and damages. As a preliminary matter, a person making a claim against the fund may not have their claim approved during the pendency of a judicial or other proceeding to recover costs or damages which are the subject of the trust fund claim.²⁴

In cases where DEP has designated the discharge as a “moderate” or “major” discharge, all claims for cleanup costs or damages must first be presented to the responsible party before they may be presented to the trust fund.²⁵ 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.²⁶

Persons authorized by DEP to seek reimbursement for cleanup costs may file a claim against the trust fund if they present the claim within 180 days from completion of the person’s cleanup assistance (unless the time period is waived) and provide proper documentation of their cleanup cost amounts.²⁷

Persons sustaining damages resulting from a pollutant discharge, excluding natural resource damages, may apply for reimbursement from the trust fund within 180 days of the discharge. The 180 day time period may be waived by the department, however, the requirement in the case of moderate or major spills that such claims must first be presented to the responsible party operates to toll this provision until that period ends.²⁸

The secretary of DEP determines the amount to be awarded under the trust fund and certifies the amount and the name of the claimant to the Chief Financial Officer who then pays the award from the fund.²⁹ If the claimant agrees with the amount of the award determined by the secretary, the settlement is binding on both parties as to all issues and cannot be attacked collaterally or by separate action in the future.³⁰ If either the claimant or the responsible party disagrees with the amount of the damage award such person may request an administrative hearing pursuant to s. 120.57, F.S.³¹

²⁴ Section 376.123(1), F.S.

²⁵ Section 376.123(2), F.S. DEP has defined “Moderate Discharge” as a discharge of pollutant of 1,000 gallons to 10,000 gallons into waters within the jurisdiction of the department located landward of the COLREG demarcation line for the state, or 10,000 to 100,000 gallons in waters located seaward of the COLREG demarcation line for the state. Fla. Admin. Code r. 62N-16.009(15). A “Major Discharge” means a discharge of pollutant of more than 10,000 gallons into waters within the jurisdiction of the department located landward of the COLREG demarcation line for the state or more than 100,000 gallons in waters located seaward of the COLREG demarcation line for the state. Fla. Admin. Code r. 62N-16.009(16). The COLREG demarcation line is a line shown on a nautical chart which indicates the boundary between the use of inland rules of navigation versus international rules of navigation. Vessels inland of the demarcation line use inland rules and vessels seaward of the demarcation line use international rules.

²⁶ Section 376.123(2)(c), F.S.

²⁷ Section 376.123(3), F.S.

²⁸ Section 376.123(4), F.S.

²⁹ Section 376.123(5), F.S.

³⁰ Id.

³¹ Section 376.123. (6), F.S.

Common Law Claims

Persons, including governments, damaged by pollutant discharges may have a variety of common law causes of action, such as negligence, trespass, nuisance, or products liability. The remedies provided by the 1970 Act provisions are cumulative in nature and therefore do not preclude the pursuit of common law causes of action.³²

³² Section 376.205, F.S.