

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 363 Deepwater Horizon Oil Disaster/Penalties

SPONSOR(S): Coley and others

TIED BILLS: **IDEN./SIM. BILLS:** SM 218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Federal Affairs Subcommittee	13 Y, o N	Cyphers	Cyphers
2) State Affairs Committee			

SUMMARY ANALYSIS

The House Memorial urges the United States Congress to permit civil penalties recovered under the Clean Water Act (CWA) as a result of the Deepwater Horizon Oil Spill be used to provide long-term environmental and economic assistance to states bordering the Gulf of Mexico, as well as its current use in recovery efforts from any future spills.

The House Memorial does not amend, create, or repeal any provisions of the Florida Statutes.

The House Memorial has no fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

On April 20, 2010 in the Gulf of Mexico, the Deepwater Horizon drilling rig experienced an explosion¹ that would take the lives of eleven people and mark the beginning of the largest environmental disaster in the history of the United States. By the end of April 22nd, eleven members of the crew of the Deepwater Horizon were missing and presumed deceased²; several other crew members were injured; the \$350 million oil rig owned by Transocean³ had sunk to the bottom of the Gulf of Mexico; and oil and natural gas were leaking from pipes attached to the failed blowout preventer at the well head.

Response and Aftermath

The location of the leaking well site, known as the Macondo well, is approximately 45 miles southeast of Louisiana. As it became clear that the built-in measures to stop the leak had failed and that oil was beginning to spread away from the site of the leak, Governor Charlie Crist declared a state of emergency on April 30th for Escambia, Santa Rosa, Okaloosa, Walton, Bay, and Gulf counties⁴. On May 3rd, the governor's executive order was amended to add Franklin, Wakulla, Jefferson, Taylor, Dixie, Citrus, Hernando, Pasco, Pinellas, Hillsborough, Manatee, and Sarasota counties⁵.

After several failed attempts to stop the leak from the well, including a failed "top kill" effort between May 26 through 29, 2010⁶; leaking from the well was finally stopped on July 15, 2010⁷. A new "static kill" was successfully completed on August 4, 2010⁸, and on September 19, 2010, after the relief well was finished and the well was cemented from beneath, Admiral Thad Allen announced that the well was "effectively dead."⁹

The federal government estimates the amount of oil released from the Macondo well to be approximately 4.9 million barrels or 205.8 million gallons of oil¹⁰. While 17 percent of the oil was captured at the wellhead (833,000 barrels), according to official oil budget reports, the remaining oil (4.2 million barrels) escaped immediate retrieval¹¹.

¹ http://www.nytimes.com/2010/04/22/us/22rig.html?_r=1&scp=1&sq=oil+rig+explosion&st=nyt

² <http://www.tampabay.com/incoming/as-oil-rig-sinks-hope-fades/1089672>

³ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling: Report to the President, January 2011

⁴ Office of the Governor, Executive Order Number 10-99 (Emergency Management – Deepwater Horizon) April 30, 2010

⁵ Office of the Governor, Executive Order Number 10-100 (Emergency Management – Deepwater Horizon) May 3, 2010

⁶ <http://www.nytimes.com/2010/05/30/us/30spill.html>

⁷ <http://abcnews.go.com/WN/gulf-oil-spill-bps-cap-success-oil-stops/story?id=11173330>

⁸ <http://www.nytimes.com/2010/08/05/us/05spill.html>

⁹ <http://www.cbsnews.com/stories/2010/09/19/national/main6881308.shtml>

¹⁰ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling: Report to the President, January 2011

¹¹ http://www.noaaneews.noaa.gov/stories2010/20101123_oilbudget.html

Oil Budget (Released Aug. 4)		Oil Budget Technical Report		
Category	% of Total	Category	% of Total	Change
Direct Recovery	17%	Direct Recovery	17%	None
Burned	5%	Burned	5%	None
Skimmed	3%	Skimmed	3%	None
Chemically Dispersed	8%	Chemically Dispersed	16%	+8%
Naturally Dispersed	16%	Naturally Dispersed	13%	-3%
Evaporated or Dissolved	25%	Evaporated or Dissolved	23%	-2%
Other	26%	Other	23%	-3%

According to a report by Secretary of the Navy Ray Mabus, at its peak, the response to the oil spill included more than 47,000 personnel; 7,000 vessels; 120 aircraft; and many federal, state, and local agencies¹². The final Situation Report by Florida's response team also noted the use of over 791,061 feet of boom; the removal of over 500,000 gallons of oil from Florida's shoreline; the deployment of 128 National Guardsmen; and the registration of 19,899 volunteers from all 50 states and 10 different countries¹³.

Claims Process

Under the provisions of Oil Pollution Act of 1990 (OPA), all "responsible parties" are liable for recovery costs and other damages resulting from an unpermitted release of oil into the navigable waters of the United States. The OPA, however, limits the damages to be paid by responsible parties at \$75 million per incident. However, according to a U.S. Coast Guard document on Oil Spill Liability Trust Fund Funding for Oil Spills, this limitation of liability disappears if the incident is found to have been caused by gross negligence; willful misconduct; or a violation of federal operating, construction, or safety regulations.¹⁴ BP has said that it would not claim protection under the \$75 million limit under OPA¹⁵.

On June 1, 2010, the United States Attorney General Eric Holder announced the federal government would pursue all legal remedies to the disaster, including civil and criminal penalties in order to ensure accountability on the part any responsible party.¹⁶ Later in June, at the request of President Obama, BP announced that it would create a trust that would total \$20 billion to pay all "legitimate claims"¹⁷.

All claims under OPA including recovery and damages related to individuals, governments and natural resources were to be paid out of this fund, though the \$20 billion amount was not intended to be a cap, according to BP.¹⁸

Until August 23, 2010, BP administered the payment of claims out of the trust fund, but the process of paying claims to individuals and businesses was subsequently turned over to an independent claims facility managed by Kenneth Feinberg with the opening of the Gulf Coast Claims Facility (GCCF)¹⁹.

¹² America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill, September 2010

¹³ Deepwater Horizon Response: Situation Report #114 (Final) August 26, 2010

¹⁴ <http://www.epa.gov/regulations/laws/opa.html>

¹⁵ <http://www.bloomberg.com/news/2010-05-21/bp-waiver-of-75-million-spill-damage-cap-may-recognize-liability-reality.html>

¹⁶ http://www.upi.com/Top_News/US/2010/06/01/Obama-pledges-investigation-of-spill/UPI-57771275397263/

¹⁷ <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>

¹⁸ *Id.*

¹⁹ <http://www.gulfcoastclaimsfacility.com/>

As of March 2, 2011, the total number of claimants to the GCCF reached 802,411. Of these claimants, 263,054 have been paid a total of \$3.46 billion thus far. Florida makes up 32% of all claims (254,557 claims) and 35.6% of all claims paid to date (97,271 claims paid totaling \$1.23 billion).²⁰

Claims for Natural Resource Damage

As mentioned above, the OPA makes responsible parties liable for damage caused as a result of unauthorized releases of oil. Pursuant to OPA, the party responsible for an oil spill is liable for any loss of natural resources (e.g., fish, animals, plants, and their habitats) and the services provided by the resource (e.g., drinking water, recreation).

When a spill occurs, natural resource trustees conduct a natural resource damage assessment to determine the extent of the harm. Trustees may include representatives from tribal governments as well as officials from state agencies (designated by the relevant Governor) and federal agencies (designated by the President), such as NOAA.²¹

The Oil Pollution Act (OPA) of 1990 states that the measure of natural resource damages includes:

- the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- the diminution in value of those natural resources pending restoration; and
- the reasonable cost of assessing those damages.

Pursuant to OPA, NOAA developed regulations pertaining to natural resource damage assessments in 1996. Natural resource damages may include both losses of direct use and passive uses. Direct use value may derive from recreational (e.g., boating), commercial (e.g., fishing), or cultural or historical uses of the resource. In contrast, a passive-use value may derive from preserving the resource for its own sake or for enjoyment by future generations.²²

The damages are compensatory, not punitive. Collected damages cannot be placed into the general treasury revenues of the federal or state government, but must be used to restore or replace lost resources. Indeed, NOAA's regulations focus on the costs of primary restoration -- returning the resource to its baseline condition -- and compensatory restoration -- addressing interim losses of resources and their services.²³

Pursuant to OPA, the separate process of the Natural Resource Damage Assessment (NRDA) and restoration following the Deepwater Horizon began with the efforts of groups like the Deepwater Horizon Oil Spill Trustee Council to assess the damage.²⁴ The Council is comprised of trustees from each member state as well as representatives from the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service.

In addition to the Council, the Gulf Coast Ecosystem Restoration Task Force was authorized through an Executive Order by President Obama in October, 2010.²⁵ The Task Force is intended to work with stakeholder groups (like the Deepwater Horizon Oil Spill Trustee Council) and build upon the Natural Resource Damage Assessment (NRDA) effort in order to achieve comprehensive, long-term recovery

²⁰ Gulf Coast Claims Facility website; Overall Program Statistics; February 28, 2011

²¹ Congressional Research Service: Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress

²² *Id.*

²³ *Id.*

²⁴ <http://www.dep.state.fl.us/deepwaterhorizon/who.htm>

²⁵ Executive Order 13554, by President Obama found at <http://www.whitehouse.gov/the-press-office/2010/10/05/executive-order-gulf-coast-ecosystem-restoration-task-force>

of the Gulf of Mexico. The Task force is comprised of state and federal leaders, and is chaired by U.S. Environmental Protection Agency Administrator, Lisa Jackson.²⁶

The NRDA is to be conducted in three phases: Assessment, Planning, and Implementation,²⁷ and the process allows for the cooperation by the responsible parties. At this time, however, there are uncertainties regarding the magnitude of the environmental consequences of the spill as observed. There is some risk that the amount of long-term environmental restoration dollars that may be needed will be greater than the amount BP has committed, and it is not known if all environmental impacts identified by the State of Florida will be addressed through the NRDA process.

Clean Water Act

The Clean Water Act contains provisions not covered by the OPA or other federal laws which allow for penalties to be levied when pollutants are discharged from a vessel or facility without authorization²⁸. The civil penalties awarded as a product of the Clean Water Act can be assessed on two separate scales which can be chosen by federal authorities; per day or volumetrically. Section 311(b)(7) of the Act allows for a penalty of \$37,500 for each day in which a violation occurs or \$1,100 per-barrel of oil discharged without a permit. These penalties can be increased significantly if the unlawful discharge is the result of gross negligence or willful misconduct by the owner, operator, or any person in charge of a vessel, or in the case of the Deepwater Horizon, an offshore facility. In fact, the per-barrel penalty for discharges as a result of gross negligence or willful misconduct can be as much as \$4,300. The provisions, as potentially applied in this case, provide for a civil penalty range between \$5.4 billion and \$21.1 billion²⁹.

Currently all funds derived from oil spill related civil penalties under the Clean Water Act must be placed into the Oil Spill Liability Trust Fund (OSLTF).³⁰ These funds can only be used for the purpose of unmet claims by responsible parties in future spill events. Further, all the total of all claims to the trust fund are limited by the cap of \$1 billion per pollution event.³¹ In the case of the Deepwater Horizon disaster, no funds collected as a result of CWA penalties (other than the capped \$1 billion from the current balance in the OSLTF) could be used for economic or environmental recovery in the five Gulf states including Florida.

In his September 2010 report to the president regarding the Gulf oil spill, Secretary of the Navy, Ray Mabus recommended that federal law be changed to allow the use of penalties collected under CWA as a result of the Deepwater Horizon oil leak to be used for long-term economic and environmental recovery in the Gulf states. He believed that these funds should be used to mitigate economic and natural resource damage not covered by the OPA. He also called for a portion of penalties to go directly to the states for their individual long-term recovery and economic development efforts. Finally, he recommended that the remaining balance should go to the OSLTF for future spills.³²

Effects of Proposed Changes

If enacted, this memorial would request that Congress enact legislation which would change the distribution of civil penalties collected through the Clean Water Act as a result of the Deepwater Horizon oil spill.

Rather than all of the proceeds from penalties going to the Oil Spill Liability Trust Fund which would be used for damages and recovery from future oil spills, some portion of the proceeds would be deposited

²⁶ <http://www.restorethegulf.gov/task-force/about-task-force/about-task-force>

²⁷ <http://www.dep.state.fl.us/deepwaterhorizon/nrda.htm>

²⁸ Section 311(j)(1) of the Clean Water Act of 1972

²⁹ Range for penalty amounts is based on assumed unauthorized oil discharge of 4.9 million barrels

³⁰ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling; Staff Working Paper Number 14

³¹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling; Staff Working Paper Number 14

³² America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill, September 2010

into the Gulf Coast Recovery Fund which would be administered by the Gulf Coast Recovery Council. The memorial also stipulates that proceeds should be directed to the five Gulf States (Florida, Alabama, Mississippi, Louisiana, and Texas) so that they may pursue their individual recovery efforts as well. Finally, the memorial provides that some amount of the civil penalties would still be deposited into the Oil Spill Liability Trust Fund for future spill events.

Copies of the memorial are to be sent to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and to each member of the Florida delegation to the United States Congress.

The legislation also includes whereas clauses in order to support the memorial. The whereas clauses include:

WHEREAS, on the night of April 20, 2010, there was an explosion at the Deepwater Horizon oil rig which caused at least 170 million gallons of oil to spill into the Gulf of Mexico over the course of several months and wash up onto the coastlines of the five Gulf states, and

WHEREAS, this man-made disaster spoiled portions of Florida's coastline and waterways and devastated its fishing and tourism industries, and

WHEREAS, this man-made disaster has directly resulted in the loss of jobs and business for Floridians, and

WHEREAS, a preliminary study by the University of Central Florida predicted job losses of 195,000 and spending losses of \$10.9 billion if Florida's 23 counties along the Gulf Coast lose 50 percent of their tourism and leisure jobs and spending, and

WHEREAS, that preliminary study also predicted job losses of 39,000 and spending losses of \$2 billion if those same counties lose 10 percent of their tourism and leisure jobs and spending, and

WHEREAS, despite clean-up efforts, oil remains buried in the sand on the Gulf states' coastlines and in the waters offshore, and

WHEREAS, the amount of oil remaining in the Gulf waters is still unknown and some researchers have discovered oil below the sea's surface, including on the ocean floor, and

WHEREAS, although seafood caught off of Florida's coast is safe to eat and approximately 90 percent of the fishing closures in federal waters have been lifted, the long-term effect on the Gulf's sea life is still unknown, and

WHEREAS, under current law, any civil penalties recovered pursuant to the Clean Water Act must be deposited into the Oil Spill Liability Trust Fund to be used for clean-up and response efforts for future oil spills, and

WHEREAS, United States Secretary of the Navy, Ray Mabus, recommended that Congress dedicate a significant portion of any civil penalties recovered under the Clean Water Act to providing assistance for the region where the damage from the disaster occurred...

B. SECTION DIRECTORY:

None.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable

2. Other:

None

B. RULE-MAKING AUTHORITY:

Not Applicable

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES