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For Immediate Release:

Making Claims for Damages Due to the Deepwater Horizon Oil Spill

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(Gainesville, Fla.) – Specialists at Florida Sea Grant have developed a brief overview and additional resources that will assist business owners and private citizens who may need to prepare damage claims due to the Deepwater Horizon oil spill. This advisory does not include information for claims by local or state governments for damages to natural resources, cleanup costs, or loss of local government revenues.

Background

The Oil Pollution Act (OPA) of 1990—passed in part as a response to the Exxon Valdez oil spill—set up a system of liability and funding for responding to oil spills. The pollution act recognized that a significant barrier to rapid response to an oil spill could be a lack of immediately-available funding for cleanup activities. To remedy this, the act created the Oil Spill Liability Trust Fund. That fund is administered by the National Pollution Funds Center, or the NPFC. In addition to funding cleanup activities, the NPFC can also accept applications for payment of damages due to an oil spill and pay for such damages out of the liability trust fund.

The Act also established that claims by the public for damages must first go to the “responsible party” designated for the spill. In this case, that party is BP. The pollution act envisioned that those

responsible for a spill would shoulder most of the cost. Thus if claims are paid by the pollution funds center, it can seek reimbursement for the cost of those claims from BP.

Types of Claims Available to the Public Under the National Pollution Funds Center

Generally, if you believe it can be demonstrated that the oil spill has caused you to lose business or income, or you have real estate or personal property damaged by oil from the spill, you may have a claim.

The first step is determining whether you have a claim for damages in one of the two general categories of claims established under the Act:

Real or Personal Property Damage: damage or economic loss related to destruction or harm of real or personal property. For example, if you own a boat or property that is oiled, the owner or lessee may submit a claim to have the boat or property cleaned.

Loss of Profits and Earning Capacity: damages for loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources. For example, shrimpers who cannot operate due to closed Gulf waters will suffer lost profits. Others who could apply for damages may potentially include businesses dependent on the fishing industry, such as seafood processors, packers and distributors, or tourism concerns like hotels, restaurants, fishing guides and charter operators. Any business that can document loss may file a claim, but there is no guarantee that claims will be determined acceptable and paid.

Immediate Short-Term Relief

In the immediate aftermath of the Deepwater Horizon leak, BP has focused great effort on giving short-term financial assistance to shrimpers, crabbers, fishermen, and certified boat operators unable to work. If you fit within this category, you may be eligible for a quite rapid (within 48 hours) claim payment of up to \$5,000 for a 30-day period to assist with your damages. After 30 days you would be able to reapply for another short-term payment.

Any short-term payments will be subtracted from any long-term damage claims that you may settle with BP.

Claimants in this category should be prepared to give BP a copy of their current licenses or permits, and documentation of the areas in which they operate to demonstrate that they qualify for short-term assistance. BP may also likely request tax returns or other financial information to document comparable past income.

How To Apply

To begin this process, you should first contact BP at 1-800-440-0858. You **must** submit claims to BP **before** you can submit a claim to the National Pollution Funds Center.

If you are incurring damages from the oil spill, whether direct or indirect, your claim must indicate that it is a claim under Section 2713(a) of the Oil Pollution Act. BP phone operators may only take basic information from you, such as name, address, phone number, and e-mail, and assign a claim number.

We have placed calls to the BP claims hotline. One call indicated that BP would have a claims adjuster contact you within 5-7 days, while another call resulted in an estimate of 7-10 days. This time span may pose real hardships for those dependent on short-term revenues at this time of year, so you should make clear to BP that you are a shrimper, crabber, fisherman, or licensed boat operator that seeks immediate, short-term assistance prior to full compensation.

Little information has thus far been available by phone about the specific types of documentation, information, and evidence that BP will require to process claims once you are contacted by an adjuster. Some information needed by a claims adjuster may include name, address, contact phone number, social security number, and date of birth. Other information will be required depending on the type of damage claim.

For example, the BP claims process will require commercial fishermen, and most likely for-hire operators, to indicate the location of their fishing activities and species targeted. The intent is to verify that the activities typically occur in an area that has been impacted by the Deepwater Horizon leak. Commercial fisherman may want to extract their fishing location data that can be found from their archived Trip Tickets and ensure that any estimated losses are linked with a specific area that they have historically fished, but is now off-limits due to the spill. Fishermen may also inquire with the National Marine Fisheries Service (NMFS) regarding their logbooks for various fisheries (reef fish, sharks, tilefish, pelagic, etc). Fishermen often record lat/long data, as well as grid zone codes and depth, all of which will help narrow down fishing locations on a much more detailed basis than is required for the Florida Trip Ticket system. In addition, VMS data may be potentially useful. Vessel operators would need to check with the NMFS Southeast Regional Office (727-824-5301) regarding VMS data and the Southeast Fisheries Science Center (305-361-5761) about log book data.

Despite the lack of current public guidance from BP about the types of specific proof required for claims, the Oil Pollution Act has regulations detailing the types of information for varying claims to

the NPFC. While these regulations are not binding on BP, they do provide an excellent framework for you to follow unless BP specifies other requirements. They are discussed below in more detail.

If BP denies your claim or does not pay within 90 days of filing, you may file a claim with the National Pollution Funds Center, www.uscg.mil/npfc/Claims/default.asp.

Making a Claim: Information Required by the NPFC and Suggested for BP Claims

The National Pollution Funds Center does not have a required format for claims to the oil spill trust fund, but it has provided an optional claim form. The optional claim form is available as an appendix to its "Claimant's Guide" at two online locations:

- <http://www.uscg.mil/npfc/docs/PDFs/urg/Ch6/NPFCClaimantGuide.pdf>
- http://www.uscg.mil/npfc/docs/PDFs/Forms/Claims_Form.pdf.

Types of information required by the NPFC regulations include:

- Type and amount of damages for each type of claim
- Total amount claimed
- Your full name, street and mailing address(es), and telephone numbers for your home and business
- Time, date, and geographic location of the oil spill; identification of the navigable water impacted; and an explanation of how the oil impacted the water
- Identify the vessel, facility, or person causing or suspected of causing the spill, if possible, and include an explanation of why you suspect the vessel, facility, or person to have caused the spill
- A general description of the impact of the spill, including the removal costs or damages claimed by category
- Explanation of how the damage happened, the location, and the date and time (this may/may not be the same as the location, date, or time of the spill)
- Descriptions of actions taken to minimize or avoid damages
- Costs of assessing the damage (do not include attorney's fees or other costs for claim preparation or filing)
- Name, street and mailing address(es), and telephone numbers of any witnesses and a brief description of what the witness knows
- Copies of any written communications and content of any verbal communications with the Responsible Party, including any claims submitted to it.
- Information on any attempts to submit claims to the person or company responsible for the oil pollution
- Information on any insurance claim made for removal costs or damages
- Any compensation you have received for removal costs or damages from the spill
- Statement that no action has been taken in court or, if action has been taken, the status of the pending court case
- Certification statement of the accuracy of the claim to the best of your knowledge and belief
- Your signature and, if applicable, your legal representative's signature

Specific Information About NPFC Claims

Regulations also include specific information for each of the two kinds of claims.

Real or Personal Property Damages Claims:

- If your claim includes only property damage, you may only file if you can document that you owned or leased the property at the time of the damage.
- Damage-to-property claims should include a description of the property and pictures of the damage. You should also give a specific cost for each item or parcel of property, including any costs you have incurred to remedy or decrease the harm (for example, if you have already paid to have an oiled boat cleaned or removed from the water).

Loss of Profits and Earnings Capacity Claims:

Claims for lost profits or earnings capacity due to property damages or natural resource damages are a separate category of claim that involves greater complexity in proof. You should only use this category of claim if you are not also claiming property damages. If you claim damages both for property and lost profits, you should file as a claim for property damages, and add the specific information for both the property damages and the lost profits and earnings.

Federal regulations indicate that lost profits and earnings capacity claims should include, at a minimum:

- The total net revenue actually lost.
- The property or natural resources damages that led to the lost profits or damages to earning capacity.
- The amount of profits or earnings capacity lost. You will need to be prepared to demonstrate this part of the claim with documentation of comparable periods through presentation of income tax returns, financial statements, and similar documents. Providing meaningful and accurate information could present real challenges for businesses in areas that have been affected over the past several years by hurricanes in the Gulf and whose businesses may not have been producing at typical levels during the past years.
- Fishermen that claim profits and earning capacity damage will also need to demonstrate that they have typically fished and gained revenue in areas directly affected by the spill or closed due to the spill.
- Claims for damages to profits or earnings capacity should include a statement about whether there is available to the claimant alternative business or opportunities to offset the claimed losses (for example, a fishing fleet might have the opportunity to work in spill cleanup for hire, such as the current Vessels of Opportunity program that allows vessels to participate in the on-going monitoring and sampling of coastal waters). If yes, you should indicate the profits and costs associated with undertaking such alternatives. In addition, you should calculate any income or saved overhead expenses that have resulted from the spill (for example, if you have not been able to fish, you should calculate the savings in fuel for not taking out your fishing boats and not paying the crew).

If it is not possible for you to assess your damages without specialized assistance (for instance, if you need an accountant to assist in calculating business damages), costs for these services can be

included in the damages. However, you will not be reimbursed for any general expenses associated with preparing a damage claim, such as hiring an attorney or consultant to help fill out a claims form.

What Happens Next?

NPFC reviews claims in the order received and will request additional information if necessary. The need for additional information is the leading cause of delay for claims, so be sure to include all information requested and as much detailed evidence and documents as possible for any damages claimed.

Once NPFC makes a claim determination, you must respond in 60 days or the offer to pay is voided and the claim closed. You have two options:

- 1) accept the determination and sign a release, which will result in processing of the agreed-upon payment; or
- 2) reject the claim, provide additional information, and request reconsideration. If you receive reconsideration, this second determination is final and cannot be “reconsidered” again.

Accepting Claim Money from BP

Before accepting funds from BP for a claim and signing any documents, please be sure you understand the implications of what you are doing. Do the documents indicate that you agree to release BP from any further damage claims? It would be acceptable to release BP from liability for the damages claimed, but since it is not yet possible to know the full extent of damages due to the ongoing nature of the Deepwater Horizon leak, you will want to maintain your ability to present further claims if you have additional damages not included in your original claim. Please consult with a legal professional before signing any claims settlement documents. This may include even signing and cashing a claim check paid to you, as sometimes signing such checks may waive some legal rights.

References

Oil Spill Claims—U.S. Coast Guard National Pollution Funds Center

<http://www.uscg.mil/npfc/Claims/default.asp>

Claimant's Guide (2003, updated 2009), published by the National Pollution Funds Center

<http://www.uscg.mil/npfc/docs/PDFs/urg/Ch6/NPFCClaimantGuide.pdf>

The Oil Pollution Control Act

<http://www.epa.gov/oem/content/lawsregs/opaover.htm>

Oil Pollution Control Act Regulations—33 Code of Federal Regulations Section 136

BP's Deepwater Horizon Response <http://www.deepwaterhorizonresponse.com/go/site/2931/>

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