



City of Pensacola


*America's First Settlement
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*Office of
City Attorney*

MEMORANDUM

TO: Mayor and City Council

DATE: May 27, 2010

FROM: William D. Wells 
City Attorney

RE: Pensacola-Based Deepwater Horizon Oil Spill Cleanup Measures

At its Committee of the Whole meeting on May 25, 2010, Council requested the City Attorney's Office to review the range of potential measures that may be taken to protect the community from any potential adverse effects from the oil spill cleanup operation which is being staged out of the Pensacola Shipyard location in Bayou Chico within the City limits. Since that time, the City Manager has worked with local BP officials to arrange for an on-site visit for Councilmembers, Escambia County officials, the press, and other interested individuals.

In the opinion of the City Attorney's Office, there is very little opportunity for the Council to prohibit or substantially regulate the cleanup activities which are being planned. The cleanup operation will utilize the navigable waterways of Pensacola Bay and Bayou Chico, which federal law substantially limits and protects from local government regulation. In addition, the site of the cleanup operation is properly zoned for that type of activity, the State has promulgated an emergency order which has suspended most public hearing and permitting requirements, and the privately-owned Pensacola Shipyard is already under contractual obligation with other parties who are well underway in staffing up and acquiring equipment to engage in the cleanup operation.

Nevertheless, it is the opinion of the City Attorney's Office that certain measures can be considered which could provide an enhanced level of protection for the interests of the City and its residents in serving as a community host for this oil cleanup operation. The basis for this authority is as follows. First, pursuant to the Florida Constitution in Chapter 166, Florida Statutes, the City possesses home rule to adopt legislation coequal with the State of Florida's own authority to exercise its police powers in the protection of the life and property of its citizens, unless specifically prohibited by law. We have examined the provisions of the Federal Oil Pollution Act of 1990, 33 USC §2718 and have found that it does not preclude the City from adopting reasonable protective measures:

Nothing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to - - (A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge; or (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act or State Law, including common law.

33 USCA §2718. In addition, State law provides:

Nothing in ss. 376.011-376.21 [oil pollution legislation] shall be construed to deny any county or municipality authority to exercise police powers by ordinance or law under any general or special act, and laws and ordinances promulgated in furtherance of the intent of ss. 376.011-376.21 to promote the general welfare, public health, and public safety shall be valid unless in direct conflict with the provisions of ss. 376.011-376.21 or any rule, regulation, or order of the department adopted under the authority of [law].

F.S. §376.19.

Accordingly, we believe that the City Council can consider an emergency ordinance (requiring one reading with seven affirmative votes), containing the following features:

1. Reciting specific findings of fact that:

(a) The Deepwater Horizon Oil Rig explosion of April 22, 2010 has caused emulsified oil and thick crude oil to leak into the Gulf of Mexico and that this leakage threatens to become or has become a major environmental disaster in the northern and eastern waters of the Gulf of Mexico.

(b) Chapter 166 (the Home Rule Act) authorizes the City to adopt through an emergency enactment procedure an ordinance declaring that an emergency exists and that the immediate enactment of this ordinance is necessary to protect the lives, public health, safety and property of the citizens of Pensacola.

(c) The transport of oil and oil contaminated material and other activities associated with oil constitute ultrahazardous activities for which there is an absolute duty to prevent oil from escaping containment into the environment and that such oil leaks and spills have the potential to kill, injure, or otherwise harm marine and terrestrial biota, including human beings, through physical contact, ingestion, or inhalation of fumes.

(d) Oil leaks and spills damage and reduce the value of public and private coastal properties.

(e) Oil spills threaten the financial well-being of those citizens that derive their income and livelihood from the local waters, beaches and other coastal environs, including those businesses that cater to tourist who are present to enjoy our natural resources.

(f) Bayou Chico has been the subject of intensive environmental improvement in recent years.

(g) Safeguarding the life and property of its citizens is an inherent responsibility of the City of Pensacola, Florida and that action is required by Council to prevent and ameliorate the creation of public nuisances and irreparable damage to our coastal environment.

2. The City Council may require the following commitments from any person or firm engaging in the activity or business of transporting equipment, material or liquids tainted and polluted with oil discharge:

- a. A requirement to post a cash security in escrow or post a security bond to be used for the payment of damage claims and necessary remediation resulting from any spillage or mishandling of the polluted and ultrahazardous material during the transport and cleanup activities taking place within the City limits of the City of Pensacola, and
- b. To engage in a procedure for receiving and assessing claims and provide a quasi-judicial due process hearing for persons and firms and property owners claiming damage or requiring reimbursement as a result of oil spillage or contamination or mishandling of the ultrahazardous material within the City limits of the City of Pensacola. Appeal to court would also be a necessary component.

3. Each such person or firm engaging in the activities defined shall, individually or collectively, establish a fund from which the City of Pensacola may draw the necessary amounts to contractually provide for continuous monitoring of all activities within the City limits of the transport and cleanup activities occurring within the City limits of the City of Pensacola, Florida.

In this manner, the City Council could have the capacity to immediately contract with an appropriate environmental engineering firm which would be charged with the responsibility of monitoring, on a 24 hour basis, the activities of those firms engaged in the Deepwater Horizon oil spillage cleanup activities taking place within the City limits of the City of Pensacola. Since these activities will be occurring at a location to which the public does not have access and will be occurring around the clock, it is recommended that such monitoring be provided in a similar manner on-scene. The monitoring firm would be expected to report to the City Council and other appropriate agencies any spillage, contamination, pollution, or other event which its assessment leads it to conclude would create an unnecessary hazard to the environment within the City of Pensacola.

In addition, the City Council would have available to it both a reasonable fund and a constitutionally required process for receiving, adjudicating, and remediating any spillage or other events of damage that the cleanup activities and its participants may create, whether

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inadvertently or otherwise. In this manner, the businesses and residents of Bayou Chico and elsewhere in the City may be reasonably assured that those involved in the cleanup activities will have every incentive to take every reasonable precaution to prevent further harm to the environment and that should such harm occur, a rapid and fair process will be available for remediation.

In the event that the City Council embraces the concepts reflected here, the City staff will work with our environmental consultants and our environmental legal resources to produce a proposed, final ordinance for Council's review as soon as possible. In addition, we have been in preliminary contact with the County Attorney's Office, and in the event that Escambia County wishes to participate in these measures since a large portion of Bayou Chico is bordered by County jurisdiction, we would invite participation by Escambia County through an interlocal agreement or some similar procedure, with the approval of Council.