

**Supplemental Appendix  
(5-18-10)**

to

**Lawyers, Booms, & Money**

**Understanding the Traditional Damages Collection Response  
to the *Deepwater Horizon* Oil Spill, and Using the Rule of Law  
to Support Increased Damage Prevention**

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**BUILDING  
FORTRESS FLORIDA**

**A GRASSROOTS ENPOWERMENT KIT  
FOR VERIFIED COMPLAINTS BY FLORIDA  
CITIZENS IN RESPONSE TO THE *DEEPWATER  
HORIZON* OIL SPILL UNDER SECTION 403.412,  
FLORIDA STATUTES**

## **CONTENTS**

- Item 1**      **Disclaimer**
- Item 2**      **Explanation**
- Item 3**      **Simplified Verified Complaint Form  
(PDF/ADOBE ACROBAT VERSION)**
- Item 4**      **Simplified Verified Complaint Form  
(MICROSOFT WORD VERSION)**

Item 1

## **DISCLAIMER**

**I AM NOT YOUR LAWYER, AND I AM NOT TELLING YOU THAT YOU CAN OR SHOULD BE YOUR OWN LAWYER. YOU NEED COUNSEL OF A QUALIFIED FLORIDA LAWYER TO TELL YOU IF THIS KIT IS APPLICABLE TO YOUR CASE AND IN YOUR BEST INTERESTS.**

**DO NOT USE THIS KIT WITHOUT FIRST GETTING YOUR OWN QUALIFIED FLORIDA LAWYER TO SPECIFICALLY ADVISE YOU:**

**(1) ABOUT WHAT TYPE OF ACTION, IF ANY, IS RIGHT FOR YOU, AND**

**(2) ABOUT ANY RISKS, INCLUDING RISKS THAT THE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION OR SOME OTHER PERSON OR ENTITY WILL SEEK ATTORNEY'S FEES OR COSTS OR TAKE OTHER UNPLEASANT ACTIONS OR STEPS AGAINST YOU.**

**AND, SIMILARLY, IF YOU ALREADY HAVE A LAWYER RELATING TO THE *DEEPWATER HORIZON* OIL SPILL, PLEASE MAKE SURE THAT YOU BRING THIS KIT TO HIM OR HER FOR APPROVAL BEFORE USING THIS KIT.**

**FINALLY, PLEASE NOTE THE OBVIOUS: EVENTS ARE CHANGING FAST WITH THIS SPILL, LITERALLY EVERY SECOND. THIS SUPPLEMENTAL APPENDIX AND THE ORIGINAL PAPER TO WHICH IT IS APPENDED ARE BOTH PROVISIONAL AND NOT SPELL-CHECKED. THESE ARE EXIGENT CIRCUMSTANCES WHERE FLORIDA CITIZENS NEED ENPOWERMENT NOW. HOWEVER, WHAT SEEMS TO MAKE SENSE TODAY MAY NOT MAKE SENSE TOMMORROW. THE ONLY SOUND STRATEGY IS FOR YOU TO GET A QUALIFIED FLORIDA LAWYER TO SPECIFICALLY ADVISE YOU.**

## Item 2

# EXPLANATION

### *People's Summary (Executives Can Read Too)*

Now is *our* day to be protected by Florida's state government, not BP's. The Florida DEP must be promptly taught this lesson, which cuts against its institutional grain. DEP must be forced to immediately do its job of forcing the responsible parties to build or fund Fortress Florida. This is why we have citizens' suits in environmental legislation to begin with.

What are the ways in which DEP can betray the citizens' interests with respect to the *Deepwater Horizon* Oil Spill? Let me count the ways: By giving oil industry lobbyists private meetings with state officials, for one. By giving oil industry lobbyists the ability to influence the state's own legal strategy against their clients, for another. By cutting a sweetheart deal that sells the state or its citizens short, for a third. ...

However, the problem immediately at hand—by not suing the responsible parties now if they do not immediately build Fortress Florida for us, or cough up much bigger bucks for damage prevention, adding zeros to BP's previous paltry check for \$25 million, so that we can really build Fortress Florida for ourselves, before it is too late. Yes, the immediate problem is that DEP could wait until it is too late to start demanding full damage prevention or damage prevention funding from the responsible parties.

Could DEP still betray the public interest later, even if it begins to do the right thing now? Sure. Could it slow roll citizens' suits? Sure. Could it take punitive actions against those who lodge complaints? Sure. Could it purposely or inadvertently mess up any litigation against the responsible parties? You betcha. Could it forthrightly finally do the right thing and still fail? Yes.

Brownies<sup>1</sup> do not always do a heckuva job, especially with toxic petroleum pollutants. Brownies are used to the subservient, lobbyist-friendly, budget-begging, prep-school befriending, legislative model of action—not big time, tough as nails litigation against the “best” cutthroat corporate defense lawyers in the country. Brownies mostly only litigate hard against pro se Mom and Pops, especially those filing citizen suits and seeking to protect, not exploit, the earth.

Brownies game the system and cut corners for the fictional “community” of fictional “persons” who really run things and from whom they hope to get jobs one day, imposing risk on the actual living and breathing peopled communities. Brownies will go cheap, taking the measly publicity act crumbs from the Oil King's table, forgetting this is

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<sup>1</sup> Extra heavy mixed metaphor usage alert applies to the rest of the People's Summary.

our state, for all its faults still a beautiful one-of-a-kind environmental wonder, home to the graceful, innocent, slow moving Florida manatee, priceless fishing grounds, and the memories of our mothers and fathers.

Let's bake (metaphorically, using the rule of law) any Brownies who will not immediately muster all of Florida's legal and political will to demand that Fortress Florida be built now.

### Introduction

This is an open access grassroots kit intended as a good faith public service in a time of environmental emergency. The purpose of this kit is to assist regular citizens of the state of Florida, and their concerned "street lawyers" within the Florida Bar,<sup>2</sup> in a grassroots effort to protect Florida waters, air, and people from pollution relating to the *Deepwater Horizon* Oil Spill.

This is a highly limited kit that may not best fit any particular situation. But it is the most generally available damage prevention legal tool that I can come up with sitting in front of my home computer in my converted garage on May 18, 2010.

This might help a concerned street lawyer. But it is not going to win any contests for pretty legal writing, and the analysis might miss something that would be obvious to someone else or otherwise be incorrect. And **IT SHOULD NEVER BE EMPLOYED WITHOUT A QUALIFIED FLORIDA LAWYER FIRST PERFORMING A CAREFUL INDIVIDUAL ASSESSMENT OF WHAT IS BEST FOR A PARTICULAR CLIENT. (See Disclaimer, Item 1 above).**

The tool chosen to put in this kit is an "out-of-court" verified complaint by a citizen of the state against the State of Florida Department of Environmental Protection ("DEP") under the state Environmental Protection Act, Section 403.412, Florida Statutes.<sup>3</sup>

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<sup>2</sup> By street lawyers in this context, I mean lawyers who want to get involved if only to help their friends and neighbors put pressure on responsible officials to prevent damages to our beautiful state.

<sup>3</sup> "403.412 Environmental Protection Act.--

(1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."

(2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

(b) In any suit under paragraph (a), the Department of Legal Affairs may intervene to represent the interests of the state.

(c) As a condition precedent to the institution of an action pursuant to paragraph (a), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint

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setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(d) In any action instituted pursuant to paragraph (a), the court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.

(e) No action pursuant to this section may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.

(f) In any action instituted pursuant to this section, other than an action involving a state NPDES permit authorized under s. [403.0885](#), the prevailing party or parties shall be entitled to costs and attorney's fees. Any award of attorney's fees in an action involving such a state NPDES permit shall be discretionary with the court. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him or her in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.

(3) The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.

(4) The doctrines of res judicata and collateral estoppel shall apply. The court shall make such orders as necessary to avoid multiplicity of actions.

(5) In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. As used in this section and as it relates to citizens, the term "intervene" means to join an ongoing s. [120.569](#) or s. [120.57](#) proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. [120.569](#) or s. [120.57](#). Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. [120.569](#) or s. [120.57](#). A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.

(6) Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. [120.569](#) or s. [120.57](#), provided that the Florida corporation not for

This is by no means the only tool that could be considered in an attempt to leverage increased damage prevention from the spill. But I think it might be a good one for many everyday citizens of the state of Florida (whom I will call “COS,” for “citizens of the state”), including their Florida environmental organizations, to seriously consider. Many want to do something significant now to protect our beautiful state and not to simply file for after-the-fact damages.

Coastal Florida local governments may wish to consider doing something like this too. They have a lot at stake here. They have been given the largely unfunded mandate to protect their communities from a human-caused disaster and to spend several months if not years in the responsible parties’ involuntary servitude.

### **Why I Like This Tool**

Here is why I like this tool. In a nutshell, it is a tool that seems reasonably usable by a good many regular folk who share my concern that **DEP should be filing in court “yesterday” to demand that the responsible parties fully protect state air, waters, and public health right now**. Since DEP is not doing that, my opinion is that citizens of the state should help DEP get to this point involuntarily. Fortress Florida cannot be built in a day, and by now DEP should realize this. **DEP should not wait until it is too late to get the protective actions or the money from the responsible parties to build Fortress Florida.**

Specifically, there are four underlying reasons why this tool seems reasonable for a COS to consider at this time.

#### ***(1) It Is Calculated To Stay Out Of Federal Court, Especially Out of Federal Court in a Major Oil State***

First, it is less likely to force the COS to go to federal court. Many, if not most, everyday Florida citizens are not willing or able to take action that is going to cause them to have to go personally to a federal courthouse. The nearest federal courthouse may be far away from them. And, in the context of this oil spill, the federal court system could decide that any federal claim relating to the spill will be shipped far away to be heard, even out of state into a major oil state jurisdiction. While this seems unfair, it seems like it could happen. And at best, in the federal court system, an individual COS seeking

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profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

(7) In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.

(8) Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.”

damage prevention could be lost in the huge time-consuming shuffle of damage collection litigation.

There are two common ways for a complaining party to wind up in a federal courthouse. One is to file a claim involving a “federal question,” such as a claim under a federal statute. The other is to file a claim against out-of-state or foreign defendants, possibly giving rise to the “diversity” jurisdiction of the federal courts.

Therefore, in this kit, I am trying to avoid selecting any tool that seems to me certain or nearly certain to raise a federal question or the federal courts’ diversity jurisdiction. Hence, the tool selected does not involve a federal statute or claims against the responsible parties themselves.

### ***(2) It Asks DEP To Do Its Job***

Second, it puts responsibility where it appropriately lies within Florida state government. DEP is the agency vested with responsibility for enforcing Florida’s state environmental laws, including Chapter 403, Florida Statutes. It is the entity each COS pays to do the job of protecting this state and its people from pollution.

In my opinion, DEP should not escape this responsibility simply because this situation involves a massive oil spill, or one emanating at a malfunctioning well in deep waters of the Gulf of Mexico nearer to another state. For reasons discussed further in my paper to which this supplemental appendix is appended, I do not believe DEP is preempted from doing its job due to the oil spill emergency.

As of May 3, 2010, Governor Charlie Crist had named nineteen Gulf-fronting Florida counties as being in a state of emergency due to the oil spill. In doing so, he designated DEP “as lead state agency to coordinate emergency response activities among the various state and local governments responding to this emergency.” Similarly, DEP is controlling the purse strings on the grossly inadequate \$25 million pot established with BP’s “grant” funds to protect the state of Florida.

DEP (and Jeb! you can do this too!) needs to demand a whole lot more now. The buck and the muck (oil that is) largely stop with DEP when it comes to protecting Florida’s waters, lands, and citizenry from an environmental disaster. While Governor Crist has not, as of this writing, declared an emergency for all of Florida’s coastal counties, oil pollutants seem in part destined for the Loop Current that will carry them to the Florida Keys and Atlantic coast of Florida. To me, DEP has no excuse for not suing now to demand protection of these Florida coastal areas too.

***(3) This Tool May Allow a COS to Stay Out of Court Altogether,  
And May Reduce Liability for Attorney’s Fees or Costs***

Third, if employed carefully by an appropriate complainant, the state Environmental Protection Act may provide a legal tool that avoids court altogether. Similarly, it might also be used, at least in part, to help the complainant avoid an unacceptable risk in terms of potential liability for costs and attorney’s fees.

The statute has a two-part filing process. The first part involves the out-of-court filing of a verified complaint with DEP itself. The idea is that DEP will get a period of 30 days to do the right thing. This non-court filing is a “condition precedent” for the second part, unless circumstances justify an action for a temporary restraining order under the last sentence of Section 403.412(2)(c), Florida Statutes. But even if a temporary restraining order will soon be sought against DEP, no harm is likely to arise by filing the out-of-court verified complaint with DEP to start the 30-day clock running and signal to DEP that it has been delinquent.

The second part of the statute involves filing of an action in court for injunctive relief. This kit only contains a form for complying with the first part, i.e., a form for potential use at the out-of-court stage. Therefore, unless the complainant (hopefully only with the assistance of counsel) thereafter pulls the trigger and actually files in court, the threatening “prevailing party” costs and attorney’s fees provision ostensibly should not apply.<sup>4</sup> Nonetheless, the 30-day clock will be ticking and the statewide pressure hopefully mounting on DEP to stand up and demand full damage prevention of Florida waters, lands, humans, and aquatic critters and plants.

Moreover, by filing against DEP, and not directly against the deep pocket responsible parties with their silk-stocking lawyers, even if a court action is later filed, DEP may be less likely to have the magnitude of the costs and lawyers’ bill of BP and the like. You may wonder, “Are there cases in which complainants have been stuck under this statute paying DEP’s lawyer fees?” My answer is, “I think maybe so, but I do not

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<sup>4</sup> An attorney filing under the statute in court on behalf of an indigent COS might also consider a second count (after the first count for injunctive relief against DEP), one that seeks a declaratory judgment of the unconstitutionality of at least a portion of the attorney’s fee provision. The argument seems plausible that the statute’s “bond or cash” requirement could violate the due process or equal protection rights of an indigent COS. Similarly, the fact that the prevailing party language does not apply with respect to an action involving a state NPDES permit implies Congressional and Florida Legislature awareness that the language could have a chilling effect, particularly on indigent plaintiffs. *See* Lee, “Attorneys’ Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When are Attorneys’ Fees and Costs Appropriate?” 26 *Pace Environmental Law Review* 494, 503 (2009) (“This judicial restraint on defensive fee shifting provides a logical limit to the fee shifting provision, promoting the act as desired and furthering pro-environmental policies by diminishing the chilling effect a broad ‘plaintiff pays’ option would have on a citizen litigant. Without such restrictions on the attorney fee provisions environmental groups might think twice if they were to face the burden of paying attorney fees.”). In my opinion, Florida’s Attorney General should not defend this language any more than he should defend a poll tax. However, before filing such a declaratory judgment count, the indigent’s attorney may want to consider whether or how much any objectionable portions of the attorney’s fee provision are severable from the rest of the statute under which the suit is being filed.

have that information at this time, and, in any event, I certainly do not want you to unknowingly take that chance.” Again, please get your own qualified Florida lawyer to advise you about all risks, including those perhaps having nothing to do with costs or attorney’s fees.

***(4) It May Allow a COS to Do Something Now to Establish Fortress Florida***

Fourth, this statute is intended by its terms to get ordinary Florida citizens involved to demand timely action. On its face, it is available even to citizens who do not live on the coast. It allows an ordinary COS to be a “citizen attorney general,” that is, a non-governmental person who stands in the shoes of governmental officials and demands that action be taken (in this case, by government itself).

Perhaps most importantly, under this statute arguably the COS should not have to wait for the pollution to get on the COS’ property prior to filing suit. This may be extremely important for damage prevention.

There is nothing radical or Un-American in this kit. Certainly, there are good democratic policy reasons why no COS should have to wait for direct damage to his or her property, or exposure of his or her children to unpleasant, chronic or acute levels of airborne contaminants, in order to demand protective action. It reflects an in some ways healthy governmental system, if not a healthy environment, for a COS to be able to forcefully demand that DEP take protective action.

That seems to be the kind of foresight that inspired the statute. It would be shortsighted for DEP to wait to mobilize protective assets until the last minute, a point DEP seems to implicitly concede through its marshalling out of some of the BP \$25 million “grant.” Unfortunately, BP’s check probably left off some zeros.

Where this all would shake out requires a case-by-case analysis and perhaps a crystal ball. However, knock on wood, it seems to me that any COS can file with DEP a good-faith verified complaint as soon as the outside atmosphere within any part of the state, or any part of any water body within the territory of the state, are polluted as a result of the oil spill.

According to some witnesses, this is already happening. For instance, with respect to air pollution, as reported from Escambia and Santa Rosa Counties, citizens on or near the beach have smelled offensive pollutants which they believe to be from the oil spill. Similarly, some Tampa Bay residents reportedly have smelled burning oil from the spill. Surely given that tar balls have already washed up right across the state line in coastal Alabama, it is at best a matter of a little time before Florida waters are directly invaded by the oil pollutants, if they have not already been.

State waters under Article II, Section 1 of the Florida Constitution go out three leagues (i.e., nine nautical miles) into the Gulf of Mexico, and three geographic miles

along the Atlantic coastline. As discussed above and in my original paper, my belief is that my state government should be filing in court now to demand that the responsible parties fully protect state air and waters now, and not wait until it is too late or continue begging. Since so far the state is not doing that, citizens of the state should help it get to this point involuntarily.

But some if not most coastal Florida citizens may wish to take a more cautious approach to confrontation with DEP. For them, this tool may still be a good one to be aware of, if and when the oil spill descends directly into state waters or air that they particularly care about. Even if a COS has no desire to file a non-court verified complaint now, the COS may feel differently when and if the pollutants reach the specific portion of paradise the COS directly uses or enjoys. Of course, by then it may be too late, at least in part.

In this form verified complaint, I am giving several options for getting involved, depending on the preference of the complainant, including one tied, in part, to residence or property ownership in one of the declared “state of emergency” counties. However, a gubernatorial declaration of emergency is not a requirement under the statute, which simply requires that one be a citizen of the state.

The statute *does* require the complaint to set forth the facts upon which it is based “and the manner in which the complaining party is affected.” To assist in presenting these facts (consistent with at least some of the more obvious potentially pertinent substantive environmental provisions), I have written this form to require at least one of the following options:

(a) personally observed or experienced, or publicly reported, air pollution associated with the oil spill present within the territorial limits of the state (including over state Gulf of Mexico waters, and which may, now or ultimately, also include the state waters off the Florida Keys and Atlantic coastal waters);

(b) personally observed or experienced, or publicly reported, presence of oil spill-related pollutants within the territorial limits of the state (including within state Gulf of Mexico waters, and which may, now or ultimately, also include the state waters off the Florida Keys and Atlantic coastal waters);

(c) residence or real property ownership in a county in a declared or undeclared oil spill-related state of emergency where the local government is financially or technically unable to provide assurance that if and when the oil spill nears state waters off that county that air and water pollution related to the spill will not enter state waters off that county or expose nearby waters, beaches, lands or persons within the county to such pollution.

(d) other threatened use, enjoyment, or interest in Florida waters and air being free from oil spill-related pollutants, as more specifically described in the verified complaint by the complainant.

Both options (a) and (b) are intended to provide some basis for documenting *present* oil spill-related pollution within Florida airspace or waters. Both implicitly take note of the “pollution” definition in Section 403.031(7), Florida Statutes:

(7) "Pollution" is the presence in the outdoor atmosphere or waters **of the state** of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law.

(Emphasis added.)

Further, both options (a) and (b) allow personal observations or experiences to provide a basis for the verified complaint. Both options (a) and (b) also allow public reports, including academic and media reports, to provide a basis for the verified complaint. Public documentation is *not* limited to governmental findings or admissions about the spill. It may be years before DEP admits that the tar balls are BP's or that they are not appropriate children's toys.

However, the approaches under option (a) and (b) are arguably less aggressive and protective than one should be able to demand under Section 403.412, Florida Statutes. The act seems to contemplate that, at least in an action directly against the responsible polluters (i.e., BP, et al.), such persons can be enjoined “from violating” Florida environmental law. See § 403.412(2)(a)2, Fla. Stat. This would arguably imply that one should be able to obtain injunctive relief prior to the violations of Florida law commencing. This seems logical, because if one reasonably expects the violations might soon ensue, it makes sense to have damage prevention measures in place or on hand to prevent them.

By the same token, a verified complaint against DEP arguably should be justified right now “to compel such governmental authority to enforce such laws, rules, and regulations.” See § 403.412(2)(a)1, Fla. Stat.

Section 403.161(1) states, in pertinent part:

403.161 Prohibitions, violation, penalty, intent.--

(1) It shall be a violation of this chapter, and **it shall be prohibited** for any person:

(a) **To cause pollution**, except as otherwise provided in this chapter, **so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.**

(Emphasis added.)

Therefore, since the responsible parties are “prohibited” from doing this, DEP arguably should be enforcing this provision now by ensuring that the responsible parties either take, or pay for, any and all protective measures that might need to be taken to prevent any harm or injury to human health or welfare, animal, plant, or aquatic life or property within counties that are in fact in a state of emergency.

This the purpose of option (c). Governor Crist has entered Executive Order Nos. 10-99 and 10-100, dated April 30 and May 3, 2010, respectively, intended to apply to certain Gulf coast counties. However, these are only the counties of “declared” states of emergency as of this moment. It could change tomorrow, and probably should since the tar balls may already be in the Florida Keys and are almost certainly headed around the bend along the Atlantic Coast. Therefore, undeclared but effective states of emergency are something many Florida counties are or may soon be faced with outside of the parameters of any Executive Order. A COS in such a county should not have to wait to be a victim to demand that DEP make the responsible parties either provide or fund all potentially necessary damage prevention measures that might be needed to prevent damages in the first place.

Lastly, option (d) is the broadest of the categories, although even here, it is arguably not as broad as the statute allows. It is open to any Florida citizen who uses, enjoys, or is otherwise interested in Florida waters and air being free from oil spill-related pollutants. Under this category, the complainant using the form is asked to more specifically describe his or her use, enjoyment, or interests.

#### **A Final Note: Venue Under Florida’s Environmental Protection Act**

Finally note that, because travel for litigation may be impossible or prohibitively expensive for many Florida citizens outside of their immediately affected areas, this is another reason to focus on pollution prevention efforts that, if they become the subject of judicial action, could be filed in local state court. When and if the complainant’s attorney ultimately files in court against DEP, he or she may want to be mindful of the venue provision in Section 403.412(8), Florida Statute:

(8) Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.

How this might apply is to me unclear. From the viewpoint of many individual Florida citizens, the arguable cause of action they will be most concerned about will be the one about to occur in the waters and air nearest to where they live. Taking an “affected county resident” perspective may, or may not, help to keep an action filed by the COS against DEP in his or her local state circuit court.

Certainly, local judicial control might also make policy sense. The local court will be most familiar with the local terrain, the local government personnel who are being pressed into service to protect their local citizenry, and the local damage prevention needs. DEP itself is evaluating damage prevention measures on a county by county basis. Therefore, it seems logical that the judge best equipped to evaluate the situation will be a local state circuit court judge.

Item 3

**SIMPLIFIED  
VERIFIED COMPLAINT FORM  
(PDF/ADOBE ACROBAT VERSION)**

**WARNING! The simplified verified complaint form beginning on the next page is designed for rapid use by a busy street lawyer who may be collecting similar information from multiple clients. Nonetheless, this is not to imply that a careful analysis should be skipped concerning whether or not to submit such a form to DEP, or to take any other out-of-court or in-court steps concerning any particular client. Further, counsel is always free to draft a better verified complaint letter!  
See Disclaimer, Item 1 above.**

# VERIFIED COMPLAINT UNDER SECTION 403.412, FLORIDA STATUTES

SENT BY [Place "X" next to any which apply; always at least use Certified Mail, Return Receipt Requested, although additional measures are encouraged to assure the 30-day period begins running as soon as possible]:

\_\_\_ CERTIFIED MAIL, RETURN RECEIPT REQUESTED

\_\_\_ HAND-DELIVERY

\_\_\_ OVERNIGHT MAIL

\_\_\_ FAX (850-245-2303)

TO:

State of Florida Department of Environmental Protection  
Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

## Description of Party Making Complaint

I, \_\_\_\_\_ [print full name],  
hereinafter Complainant, whose address is

\_\_\_\_\_ [print street address], am a citizen  
of the state of Florida,

residing or owning real property in the following county(ies):

\_\_\_\_\_ [print County(ies) name(s)]

### **Description of Party Complaint is Being Made Against**

This complaint is made against the State of Florida Department of Environmental Protection (DEP). DEP is the state agency charged with the duty to enforce laws, rules and regulations for the protection of the air, water, and other natural resources of the state, including Chapter 403, Florida Statutes, including, but not limited to, the duty to prohibit any person from causing pollution so as to harm or injure human health or welfare, animal, plant, or aquatic life or property under Section 403.161(1)(a), Florida Statutes.

### **Brief Description of Complaint**

This verified complaint seeks to compel DEP to enforce against the companies responsible for the *Deepwater Horizon* oil spill\* the laws, rules and regulations for the protection of the air, water, and other natural resources of the state, including Chapter 403, Florida Statutes, including, but not limited to, the duty to prohibit any person from causing pollution so as to harm or injure human health or welfare, animal, plant, or aquatic life or property under Section 403.161(1)(a), Florida Statutes.

This verified complaint gives DEP 30 days notice under Section 403.412(2)(c), Florida Statutes, including, but not limited to, that DEP has failed and is failing to prohibit and prevent the companies responsible for the *Deepwater Horizon* oil spill from causing pollution within the territory of the State of Florida so as to harm or injure human health or welfare, animal, plant, or aquatic life or property. Complainant reserves the

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\* BP, PLC, BP PRODUCTS NORTH AMERICA, INC., BP AMERICA, INC., TRANSOCEAN, LTD., TRANSOCEAN OFFSHORE DEEPWATER DRILLING, INC., TRANSOCEAN DEEPWATER, INC., HALLIBURTON ENERGY SERVICES, INC., and CAMERON INTERNATIONAL CORPORATION F/K/A COOPER CAMERON CORPORATION.

right to file an immediate judicial action against DEP or any other entities or persons, although this out-of-court verified complaint against DEP is intended to meet the condition precedent language of Section 403.412(2)(c), Florida Statutes, should it be deemed to apply.

**Facts Upon Which Complaint Is Based  
and Manner In Which The Complaining Party is Affected**

I allege in good faith the following:

[Place “X” in box next to any which apply]

*Air Pollution*

\_\_\_ (a) I personally observed, experienced, or heard about, or have learned of public reports about, air pollution associated with the *Deepwater Horizon* oil spill being present within the territorial limits of the state (including over Gulf of Mexico waters, and which may, now or ultimately, include over the waters off the Florida Keys and Atlantic coastal waters).

[Give date(s) and any other detailed information that you can recall about *Deepwater Horizon*-related oil spill air pollution incidents which you personally observed, experienced, or heard about, or which you learned about in public reports, including within the media, from academia, or from the government]

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*Water Pollution*

\_\_\_ (b) I personally observed, experienced, or heard about, or have learned of public reports about, the presence of *Deepwater Horizon* oil spill-related water pollution, including, but not limited to, oil-contaminated fish or wildlife, within the territorial limits of the state (including in Gulf of Mexico waters, and which may, now or ultimately, include in waters off the Florida Keys and Atlantic coastal waters);

[Give date(s) and any other detailed information that you can recall about *Deepwater Horizon*-related oil spill water pollution incidents, including, but not limited to, oil-contaminated fish or wildlife, which you personally observed, experienced, or heard about, or which you learned about in public reports, including within the media, from academia, or from the government.]

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; or

*Oil Spill-Related State of Emergency Exceeding Local Abilities*

\_\_\_\_ (c) residence or real property ownership by me in a county or counties in a declared or undeclared *Deepwater Horizon* oil spill-related state of emergency where local government is financially or technically unable to provide assurance that if and when *Deepwater Horizon* oil spill pollution nears state waters off that county that air and water pollution related to the spill will not enter state waters off that county or expose nearby waters, beaches, lands or persons within the county to such pollution.

[Give date(s) and any other detailed information that you can recall to support your concern.]

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; or

*Threatened Use, Enjoyment, or Interest in Florida Waters and Air*

\_\_\_\_ (d) other threatened use, enjoyment, or interest by me in Florida waters and air being free from *Deepwater Horizon* oil spill-related pollutants, as more specifically described below:

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*Demand for Relief*

Complainant hereby demands that DEP immediately enforce against the companies responsible for the *Deepwater Horizon* oil spill the laws, rules and regulations for the protection of the air, water, and other natural resources of the state, including Chapter 403, Florida Statutes, including, but not limited to, the duty to prohibit any person from causing pollution so as to harm or injure human health or welfare, animal, plant, or aquatic life or property under Section 403.161(1)(a), Florida Statutes, and, without limitation, undertake any and all legal action necessary to immediately force

these parties to undertake or fund any and all actions necessary to prevent air or water pollution related to the spill from entering state air or waters and to take all other action necessary to ensure protection of Florida's environment and citizens.

Respectfully submitted on \_\_\_\_\_ [Print date]

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Full Name

*Verification Before a Notary Public*

STATE OF FLORIDA

COUNTY OF \_\_\_\_\_ [Print name of county]

Before me, the undersigned authority, personally appeared the complainant, \_\_\_\_\_ [print full name], who is personally known to me or who presented the following as identification: \_\_\_\_\_, and who, being first duly sworn, deposed and said that he/she verifies the foregoing complaint and that the facts contained in the complaint are true and correct to the best of his/her knowledge.

\_\_\_\_\_  
Signature of Notary Public

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