

MEMORANDUM OF UNDERSTANDING WITH  
BP EXPLORATION AND PRODUCTION, INC.



INFORMATIONAL REPORT  
ISSUED FEBRUARY 13, 2013

**LOUISIANA LEGISLATIVE AUDITOR  
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LOUISIANA LEGISLATIVE AUDITOR  
DARYL G. PURPERA, CPA, CFE

February 13, 2013

The Honorable John A. Alario, Jr.,  
President of the Senate  
The Honorable Charles E. "Chuck" Kleckley,  
Speaker of the House of Representatives

Dear Senator Alario and Representative Kleckley:

Subsequent to the Deepwater Horizon oil rig explosion on April 20, 2010, the State and BP Exploration and Production, Inc., implemented programs to mitigate the negative impact upon Louisiana's tourism and seafood industries. These programs were developed by the Office of the Lieutenant Governor, the Louisiana Department of Wildlife and Fisheries, and the Seafood Promotion and Marketing Board.

This report examines the administrative structure of these programs and provides a matter for legislative consideration.

This report is an informational report in my capacity as fiscal advisor to the Legislature. Appendix A contains an Attorney General's opinion related to current law. Appendices B and C include the responses of the departments and related Foundations. I trust this report will benefit you in your legislative decision-making process.

Sincerely,

Daryl G. Purpera, CPA, CFE  
Legislative Auditor

DGP/dl

BP EXPLORATION AND PRODUCTION, INC. 2013

## INFORMATIONAL REPORT

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Subsequent to the Deepwater Horizon oil rig explosion on April 20, 2010, the State and BP Exploration and Production, Inc., (BP) implemented programs to mitigate the negative impact upon Louisiana's tourism and seafood industries. These programs were developed by the Office of the Lieutenant Governor, the Louisiana Department of Wildlife and Fisheries, and the Seafood Promotion and Marketing Board. Funding for the programs was provided by BP and the majority of the funds were subsequently directed to and then held and distributed by two private, non-profit organizations: the Community Foundation of Acadiana (CFA) and the Louisiana Wildlife and Fisheries Foundation (LWF Foundation).

To administer the programs, the parties entered into a Memorandum of Understanding (MOU) providing that, while the majority of the funds would be held by the non-profits, the State would maintain control over the expenditure of the funds, developing procedures and protocols for these expenditures. Furthermore, the State agreed to indemnify, hold harmless, and defend the non-profits in carrying out their responsibilities.

BP agreed to provide the majority of these funds, \$60 million, directly to the non-profits; the funds were not deposited into the accounts of the State. In addition, although the executive branch of the State exercised significant control over the disbursements, the funds were neither included within the budgets of these two agencies nor was the Legislature given the opportunity to consider these expenditures while exercising its appropriation authority. Furthermore, these funds were neither included within the financial accounting records of these agencies nor reported within the financial statements of the State, except for certain administrative costs of the Department of Wildlife and Fisheries. An additional \$18 million for seafood testing was directed to the Louisiana Department of Wildlife and Fisheries and was deposited, budgeted, and reported.

The Attorney General (AG) has opined (see **Appendix A**) that, based on the MOU, the majority of these funds (\$60 million) are not "public funds" and did not require deposit into the State Treasury or legislative approval for expenditure. Although the AG has opined that existing law allows this treatment of the funds, we suggest that these transactions could have been structured and conducted in a manner that improved transparency and accountability in Louisiana government. In reaching this conclusion, we considered:

- (1) the role these agencies exercised in crafting the MOU agreement with BP;
- (2) the significant control these state agencies exercised over the disbursement of these funds;
- (3) the role of the non-profits to act as fiscal agents of the State;
- (4) the liability assumed by the State by indemnifying and holding harmless the LWF Foundation and the CFA;

- (5) the authority of the Legislature to appropriate funds and approve the budget of the State; and
- (6) the goal of the State to conduct its business in a manner that is transparent and accountable to the citizens of Louisiana.

Following is a summary of the two primary programs carried out through this MOU.

**Lt. Governor and the Department of Culture,  
Recreation and Tourism (CRT)**

The Lt. Governor and BP agreed through the Memorandum of Understanding (MOU) that the Lt. Governor would develop and implement a “Tourism Program” to mitigate the negative impact on Louisiana tourism as a result of the Deepwater Horizon oil rig explosion. The Tourism Program included making distributions to parishes as specified in an attachment to the MOU. To accomplish this, BP agreed to provide \$30 million to the Community Foundation of Acadiana (CFA) in \$5 million quarterly installments. CFA is a non-profit organization. The MOU specifies that the CFA “...shall hold these funds, which shall be distributed under the direction of the Office of the Lieutenant Governor...” The MOU was structured so that the funds were provided directly to CFA. Since the funds were not first provided to CRT and subsequently disbursed to CFA, CRT did not deposit the funds into the treasury, did not request an appropriation for the \$30 million to be received under this agreement, nor were the funds accounted for within CRT’s accounting records or the State’s financial statements.

Based on quarterly reports provided by CFA to CRT, through June 30, 2012, CFA received \$30,000,000 from BP and reported actual expenditures totaling \$26,050,652 (\$7,078,821 in FY2011 and \$18,971,831 in FY2012) with approval from CRT. The balance of the \$30,000,000 that was tendered to CFA was by agreement used by CFA in conducting its duties as a fiscal agent for the State, holding the BP monies until they were directed by CRT to tender these monies to the parishes and other entities.

The State, through CRT, exercised significant control over expenditure of tourism program funds. Parishes received \$23.5 million of the BP funds based on an allocation formula agreed to between BP and the State. Each parish had to submit a budget and scope of work to CRT for approval. Once reviewed and approved by CRT, it was submitted to BP for approval. Parishes with small allocations of BP funds received their full funding in a single disbursement. The remaining parishes received their allocations in quarterly installments. The parishes received their funding in advance and then submitted quarterly expenditure and activity reports, including supporting documentation, to CRT for review and to ensure that the expenditures were in compliance with the approved budget/scope of work and the terms of the MOU and the Louisiana Tourism Recovery Program. After review, CRT forwarded the reports to BP.

In addition to the allocated distributions to parishes, as the CRT began to carry out its mission under the MOU, the Lt. Governor entered into various agreements to accomplish further goals of the Louisiana Tourism Recovery Program. In those agreements, wording stated that the Community Foundation of Acadiana will serve as a “*Third Party Fiscal Agent for the State.*” The MOU and related agreements required the Lt. Governor to maintain control over the direction, allocation, and expenditure of the monies, including audit provisions under Louisiana Revised Statute (R.S.) 24:513, budget approvals, periodic reporting, compliance with State travel regulations, etc.

The Lt. Governor was required to exercise significant control over the expenditure of Tourism Program funds and assumed liability. The Fund Agreement Letter, Addendum #1 stated, in part, “*It is expressly understood and agreed that CFA has no responsibility or obligation under this Addendum or the MOU to determine how or to whom funds shall be distributed or whether or not distributions directed by the OLG [Office of Lt. Governor] are consistent with and in accordance with the provisions of the MOU regarding allocation of funds, scope of work, funding schedule or in accordance with any plans for the Tourism Program developed by the OLG and BP pursuant to the MOU. OLG agrees to defend, indemnify, hold harmless and defend CFA its officers,...in performing the obligations of the OLG to develop, implement and administer the Tourism Program pursuant to the MOU other than any obligation undertaken by CFA under this Addendum.*”

Management’s response to this report is included in **Appendix B**.

**Additional Information:** The Lt. Governor, through his Deputy Secretary’s response (see **Appendix B**), contends that the Legislative Auditor has shifted positions, and potentially threatened and undermined both the Tourism Program and Louisiana’s legal claims against BP with this report. The Legislative Auditor has not shifted in his position that the State and its agents should be accountable for funds affecting State programs. The Legislative Auditor has in no way threatened or undermined the Tourism Program or Louisiana’s legal claims against BP for the Deepwater Horizon oil rig explosion.

In anticipation of receiving these monies from BP, the Lt. Governor’s staff requested that we provide suggested “audit procedures” to include in sub-agreements planned for the Tourism Program to be funded by BP grants. The Legislative Auditor provided that requested language.

The former Lt. Governor and LDWF agreed in a MOU with BP to direct most of the BP monies to non-profit entities, and not to the State Treasury. To ensure accountability and transparency of State-sponsored activities, the Legislative Auditor officially requested an AG Opinion, attached to this report, which posed several questions about the nature of the BP monies directed by the two State departments and the responsibility of the State to account for those funds.

As the Lt. Governor indicates in his attached response, BP has been clear that the funding for the Tourism Program and the Seafood Marketing Program “would never have been provided if the funding were subject to deposit in the state treasury and subject to appropriation” by the Legislature. Had BP not caused the State severe damage in its massive oil rig explosion and resulting oil spill, these “donations” would likely have not occurred. Consequently, it is a reasonable question by the Legislative Auditor whether the Legislature, who is empowered by the Constitution to direct State funds, should have been involved in directing these monies, which came to the State as a result of that disaster.

### **Louisiana Department of Wildlife and Fisheries**

The Louisiana Department of Wildlife and Fisheries (LDWF) and BP agreed through the MOU that the Louisiana Wildlife and Fisheries Foundation (LWF Foundation) and the Louisiana Seafood Promotion and Marketing Board (LSPMB), a State board under the department, would develop and implement a “Seafood Marketing Program” to mitigate the negative impact on the Louisiana seafood industry as a result of the Deepwater Horizon oil rig explosion. BP agreed to provide \$30 million through the LWF Foundation over a three-year period to fund the Seafood Marketing Program. The MOU specifies that the funds should be “directed to the Board to develop, implement, and administer the Seafood Marketing Program” and would be “subject to review and approval by LDWF.”

Subsequently, the LWF Foundation provided a portion of the BP funds to the LDWF for certain administrative costs. In attachments to a fiscal year 2011 “Request for Mid-Year Budget Adjustment” form, LDWF explains that

\$12,418,263 will be expended through the department’s operating budget beginning this fiscal year and going through at least FY 2013-2014. These expenditures will be reimbursed by the Wildlife and Fisheries Foundation from the funds received from BP.

The total requested amount for expenditure authority totaled \$12,418,263, split over fiscal years 2011, 2012, 2013, and 2014, which by law, would be subject to annual appropriation. There was no request for appropriation of the remaining \$17.6 million that were a part of the MOU.

Based on quarterly reports provided by the LSPMB to BP, through June 30, 2012, the LWF Foundation received \$15,000,000 from BP and incurred actual expenditures totaling \$5,699,081, which were approved by LDWF. Of this amount, only \$887,903 was actually expended through the department’s operating accounts, accounted for in its accounting records, and deposited in the State Treasury. The remaining \$4,811,178 was expended by the LWF Foundation outside of LDWF’s accounts. Of the \$15,000,000 received from BP, \$14,112,097 was not deposited in the State Treasury. The MOU-related appropriations to the department for fiscal years 2011 and 2012 were \$479,909

and \$6,382,629, respectively. The MOU-related expenditures through the department's operating accounts for fiscal years 2011 and 2012 were \$143,243 and \$744,660, respectively, totaling \$887,903.

The Louisiana Department of Wildlife and Fisheries was required to exercise significant control over the expenditure of seafood marketing program funds and assumed liability. The third Addendum to the MOU stated, in part, *"It is expressly understood and agreed that the LWFF (Foundation) has no responsibility or obligation under this Addendum or the MOU to determine how or to whom funds shall be distributed or whether or not distributions directed by the LDWF and the LSPMB (Board are consistent and in accordance with the provisions of the MOU regarding allocation of funds, scope of work, funding schedule or in accordance with any plans for the Seafood Marketing Program developed by the LSPMB and approved by LDWF pursuant to the MOU. The LDWF and the LSPMB agree to indemnify, hold harmless and defend the LWFF, its officers,...in performing the obligations of the LSPMB to develop, implement and administer the Seafood Marketing Program or the obligations of the LDWF to approve the Seafood Marketing Program pursuant to the MOU other than any obligation undertaken by the LWFF under this Addendum."*

Management's response to this report is included in **Appendix C**.

## OPINION OF THE ATTORNEY GENERAL

The Louisiana Attorney General, in AG Opinion 12-0223 (see **Appendix A**), in examining current law and the structure of the MOU, characterized the tourism and seafood marketing program funds as private funds and onerous donations to non-profits. According to the Attorney General, the Lt. Governor and LDWF serve as an "advisor" to CFA and the LWF Foundation.

The Louisiana Constitution states in relevant part at Article VII, Sec 9:

- (A) Deposit in State Treasury. All money received by the state or by any state board, agency, or commission shall be deposited immediately upon receipt in the state treasury, except that received:
  - (1) as a result of grants or donations or other forms of assistance when the terms and conditions thereof or of agreements pertaining thereto require otherwise;

R.S. 49:308(A) states that except for certain exceptions, all funds received by State entities must be deposited in the State Treasury. Further, R.S. 49:308(B) states, "Only such monies shall be available for expenditure by state agencies as are appropriated by the legislature or dedicated by the constitution."



Further, Article 2, Section 1 of the Louisiana Constitution divides governmental power into separate legislative, executive, and judicial branches and Article 2, Section 2 provides that no one branch shall exercise powers belonging to the others.

**Matter for Legislative Consideration:** The Attorney General has opined (see **Appendix A**) that based on the MOU and current law, the majority of the \$78 million covered by the MOU are not “public funds” and did not require deposit into the State’s accounts or legislative approval for expenditure. Although the AG opined that existing law allows this treatment of the funds, we suggest that these transactions could have been structured and conducted in a manner that improved transparency and accountability in Louisiana government. In reaching this conclusion, we considered:

- (1) in crafting the structure of the agreement, both agencies agreed with BP to allow the funds to be provided directly to the non-profits thereby not requiring the deposit of the funds into the public accounts at the State Treasury;
- (2) the state agencies exercised substantial control and administrative responsibility over the disbursement of these funds;
- (3) the non-profits simply held and distributed the funds as fiscal agents of the State;
- (4) the non-profits assumed no responsibility for the Tourism Program or the Seafood Marketing Program, while the Lt. Governor and the Department of Wildlife and Fisheries, respectively, have assumed significant liability by indemnifying and holding the CFA and LWF Foundation harmless;
- (5) while the State Treasury is the central depository of the State and maintains certain controls to safeguard public funds, the majority of these funds were never deposited into the State Treasury; and
- (6) while the Legislature has the authority, as the legislative branch of government, to appropriate funds and approve the budget of the state, the legislative process was bypassed.

In its efforts to foster accountability and transparency in Louisiana government, the Louisiana Legislature may wish to consider legislation that clearly communicates the goal of ensuring transparency and accountability by prohibiting agencies from structuring agreements to control the expenditure of funds and conduct programs in a manner that bypasses the budget, appropriation, and reporting processes of the State.

## MEMORANDUM OF UNDERSTANDING WITH BP

On or around October 2010, BP began discussing the possibility of providing funding to Louisiana to implement a Seafood Safety, Marketing, and Tourism program in order to mitigate the adverse impacts to Louisiana's seafood and tourism industries as a result of the Oil Spill. A Memorandum of Understanding ("MOU") executed by and between BP, the Lieutenant Governor, and the Department of Wildlife and Fisheries ("LDWF") for \$78 million was designed to create certain seafood testing, seafood marketing, and tourism programs to benefit the State with funds provided by BP.

The MOU creates a \$78 Million, 3 point program funded entirely by BP. The State will use three entities to disburse the funds under the direction of the Lt. Governor and the LDWF. The three Programs (with funding amounts) are:

1. Seafood Testing - \$18 Million to LDWF - These monies were appropriated by the La. Legislature and deposited in the State Treasury.
2. Seafood Marketing - \$30 Million to the Louisiana Wildlife and Fisheries Foundation (LWF Foundation), which shall be directed to the Louisiana Seafood Promotion and Marketing Board (Board) to develop, implement, and administer the Seafood Marketing Program under the direction of the LDWF. Of these monies, \$12.4 Million are intended to be appropriated for administrative costs to LDWF.
3. Tourism - \$30 Million - Under the direction of the Office of the Lieutenant Governor, the Community Foundation of Acadiana (CFA) shall hold these funds, which shall be distributed under the direction of the Office of Lieutenant Governor to parishes and other entities.

### LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES BA-7 in FY2011

The LDWF went before the Joint Legislative Committee on the Budget (JLCB) in **May 2011** and received approval of a BA-7 to appropriate a portion of the BP funds to LDWF. The supporting documentation for that BA-7 gives an explanation of the arrangement whereby the LDWF will receive and/or direct \$30,000,000 from BP for a seafood marketing program.

On page 7 of the 2011 BA-7, LDWF explains, *"BP will provide the funds to the Foundation, and they will reimburse the department for operating budget expenditures and make direct payments to contractors as directed by the department and the board."* They go on to explain, *"Of the \$30,000,000, \$12,418,263 will be expended through the department's operating budget beginning this fiscal year and going through at least FY 2013-2014. These expenditures will be reimbursed by the Wildlife and Fisheries Foundation from the funds received from BP."*

In addition to the explanation provided, LDWF provided a complete budget breakdown of the entire \$30 million, including amounts to be expended directly by the LWF Foundation for contracts and administrative fees.

Although the LDWF gives an explanation and breakdown of the \$30,000,000 involved in the Seafood Marketing Program, it did not ask for that amount in the BA-7. The BA-7 requests only \$12,418,263, and breaks that amount down over four fiscal years:

FY 2010-2011	\$479,909
FY 2011-2012	6,382,629
FY 2012-2013	4,044,075
FY 2013-2014	<u>1,511,650</u>
<b>Total</b>	<b><u><u>\$12,418,263</u></u></b>

Consequently, even though the LDWF notified the JLCB of the \$30,000,000 that will eventually be received from BP, LDWF only requested that \$12,418,263 be appropriated over four years in the BA-7, at issue. Therefore, only \$12,418,263 of the \$30,000,000 going to LDWF has received legislative review and approval, subject to annual appropriation. As a result, LDWF has only secured the legislative authority needed to expend \$12,418,263, subject to annual appropriation. The supporting documentation discussing the \$30,000,000 is irrelevant to the actual appropriation request granted, which was \$479,909 for FY11.

Only the monies passing the LDWF's accounts were actually deposited, appropriated, and accounted for by that department. The remaining monies under the control of either the Lt. Governor/CRT or the LDWF related to this MOU were not deposited in the Treasury, appropriated by the Legislature, or accounted for by the State departments in those departments' financial accounts or reported in the State's Comprehensive Annual Financial Report.

## APPENDIX A

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### Attorney General's Opinion



JAMES D. "BUDDY" CALDWELL  
ATTORNEY GENERAL

State of Louisiana  
DEPARTMENT OF JUSTICE  
P.O. BOX 94005  
BATON ROUGE  
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January 9, 2013  
OPINION 12-0223

3 APPROPRIATIONS  
15-A CONSTITUTIONAL LAW  
90-A-1 PUBLIC FUNDS & CONTRACTS

Mr. Daryl G. Purpera  
Louisiana Legislative Auditor  
1600 North Third Street  
P.O. Box 94397  
Baton Rouge, Louisiana 70804-9397

La. Const. Art. III, Sec. 11; La. Const. Art. III, Sec. 16; La. Const. Art. VII, Sec. 9; La. Civ. Code. Arts. 1528; 3071; 3080; La. R.S. 24:651; 24:652; 24:654; 34:3102; 34:3492; 39:2; 49:308; La. Atty. Gen. Op. Nos. 77-148; 79-1362; 86-366; 92-657; 09-0156; and 10-0292.

Addresses several questions concerning the Seafood Safety, Marketing, and Tourism Memorandum of Understanding, including whether the funds tendered by British Petroleum are required to be placed into State Treasury.

Dear Mr. Purpera:

You have requested an opinion from this office regarding a Memorandum of Understanding ("MOU") among the Louisiana Department of Wildlife and Fisheries ("LDWF"), the Louisiana Department of Culture, Recreation, and Tourism ("CRT"), and BP Exploration & Production ("BP"), which was designed to implement and to fund certain seafood testing, seafood marketing, and tourism programs in Louisiana. More specifically, the opinion request asks whether the funds tendered by BP should have been deposited into the Treasury and/or appropriated by the Legislature.

La. Const. Art. VII, Sec. 9 contains the general requirement that all monies received by the State or by any state board, agency, or commission be deposited into the State Treasury. As an initial matter, this provision applies only to monies received by the State. Further, as stated in your request, there are exceptions to this general requirement; the pertinent to this matter is the first enumerated exception in the constitutional provision – La. Const. Art. VII, Sec. 9 (A)(1), as well as the statutory companion thereto – La. R.S. 49:308. The constitutional provision states, in pertinent part:

(A) Deposit in the State Treasury. All money received by the state or by any state board, agency, or commission shall be deposited immediately upon receipt in the state treasury, *except that received:*

(1) as a result of grants or donations or other forms of assistance when the terms and conditions thereof or of agreements pertaining thereto require otherwise.<sup>1</sup>

Thus, the two primary questions presented are: (1) whether the funds tendered by BP pursuant to the MOU are monies received by the State, and if so, (2) whether the funds are the result of a grant or donation or other form of assistance, as contemplated by the

<sup>1</sup> La. Const. Art. VII, Sec. 9(A)(1) (emphasis added); *see also* La. R.S. 49:308.

exception to La. Const. Art. VII, Sec. 9. Additionally, you have asked for the legal opinion of this office regarding the following questions:

- (1) Are the monies tendered by BP State funds?
- (2) Is the MOU a partial settlement of claims for damages to the State?
- (3) How explicit must the "terms and conditions" noted in the constitutional exception be to meet the requirement of the Constitutional Article in light of AG Op. No. 86-366 where the AG appears to opine that the Act of Donation must explicitly provide that the monies donated are not to be placed in the Treasury and are not subject to appropriation?
- (4) Should the monies tendered by BP be deposited into the Treasury?
- (5) Should the monies tendered by BP be appropriated by the Legislature?
- (6) Does the Legislature have any oversight authority over the monies tendered by BP?
- (7) Do the Secretary of LDWF and the Lt. Governor have the legal authority to direct monies to the Foundation and the CFA to hold and distribute?

#### **I. BACKGROUND**

On April 20, 2012, the mobile offshore drilling unit *Deepwater Horizon* experienced a well blowout, explosion, fire, and subsequent sinking in the Gulf of Mexico. This incident resulted in the release of nearly 5 million barrels of oil, as well as other gas and pollutants (hereinafter "Oil Spill"). This oil, and other pollutants, invaded Louisiana's waters and the adjoining coastline, severely injuring Louisiana's natural resources including, but not limited to, its wetlands, shorelines, habitat and wildlife, and they endangered the health, safety, and welfare of Louisiana's citizens. On or around October 2010, BP began discussing the possibility of providing funding to Louisiana to implement a Seafood Safety, Marketing, and Tourism program in order to mitigate the adverse impacts to Louisiana's seafood and tourism industries as a result of the Oil Spill. On November 18, 2010, BP, LDWF, the Office of the Lieutenant Governor of the State of Louisiana ("OLG"), and the Louisiana Seafood Promotion and Marketing Board (the "Board") executed the Seafood Safety, Marketing, and Tourism Memorandum of Understanding ("MOU").

The purpose of the MOU is outlined therein, and includes the following relevant provisions:

WHEREAS, the Parties believe that continued testing of seafood and communication of those test results are appropriate measures to take to provide the public with appropriate assurance that Gulf seafood is safe to eat, which could help address impacts to Louisiana's seafood industry, and which are an appropriate response to the Oil Spill;

WHEREAS, the Parties believe that expenditures on marketing of Louisiana Seafood could also help address impacts to Louisiana's seafood industry and are an appropriate response to the Oil Spill; and

WHEREAS, the Parties also believe that expenditures to increase and benefit tourism could help address impacts to Louisiana's tourism industry as a result of the Oil Spill and are an appropriate response to the Oil Spill.<sup>2</sup>

## II. THE SEAFOOD SAFETY, MARKETING, AND TOURISM MOU

### A. Funding for Programs

Pursuant to the MOU, BP agreed to provide \$78 million to three separate entities for purposes of funding three different programs, as follows:

1. **Seafood Testing Program** – BP agreed to provide \$18 million to LDWF to fund the development of a seafood safety testing program pursuant to certain parameters outlined in the MOU, including requirements for the testing of certain seafood groups, sample locations, sample sizes, testing methods, and components of concern. The MOU also requires LDWF to provide BP with all data generated by the Program.<sup>3</sup>
2. **Seafood Marketing Program** – BP agreed to provide \$30 million to the Louisiana Wildlife and Fisheries Foundation (the "LWFF") to fund a Seafood Marketing Program, which is to be developed and implemented by LWFF and the Louisiana Seafood Promotion and Marketing Board. The MOU requires the Seafood Marketing Program meet certain parameters, including that the Program be developed in a manner that raises consumer awareness of the Testing Program and its results, and is subject to the review and approval of LDWF. The MOU also requires LDWF to provide BP with quarterly updates of the Seafood Marketing Program activities.<sup>4</sup>
3. **Tourism Program** – BP agreed to provide \$30 million to the Community Foundation of Acadiana ("CFA") to develop, implement, and administer the Tourism Program under the direction of the Office of the Lieutenant Governor. Funds received as part of the Tourism Program are required to be used in a manner that is consistent with certain allocations, including cost allocations

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<sup>2</sup> See MOU, on file with the Office of the Louisiana Attorney General.

<sup>3</sup> See MOU, Section 1.

<sup>4</sup> See MOU, Section 2.

outlined in the MOU by parish. The MOU also requires the Lt. Gov. to provide BP with quarterly updates of Tourism Program activities as well as State, industry, and trade association data about the Louisiana tourism market.<sup>5</sup>

### **B. Conditions**

The MOU also places certain other conditions on the use of funding and the implementation of these three programs. Specifically, the MOU requires that the funding be made in accordance with a funding schedule agreed upon by BP and each entity or Program Administrator charged with developing, implementing, and administering the Program.<sup>6</sup> The MOU further provides that failure to provide BP with the data required to be provided relative to each Program or any other material breach of the provisions of the MOU may result in the delay of payment or application of funding until the data has been provided or the breach has been cured.<sup>7</sup> The Program Administrators are also required to keep records of how the funding is used and disbursed, and at the end of every 90-day period, to send BP a report of expenditures and supporting documentation.

### **C. Reservation of Rights**

In each Section of the MOU providing for the funding of each program, the State of Louisiana specifically reserves its right to seek full relief and compensation for the damages it suffered as a result of the Oil Spill. Sections 1.E.(ii), 2.C.(ii), and 3.C.(ii) provide:

Except as outlined in paragraph 5 of this MOU, this MOU does not prevent the State or any other entity from seeking full relief or compensation, as provided by state, federal or international law, for injuries or damages through administrative or judicial processes, including, without limitation, applicable Natural Resource Damages Assessment procedures.

Section 4.E of the MOU further provides:

The State, including but not limited to LDWF and the Office of the Lieutenant Governor, reserves all claims it may have against BP arising out of the Oil Spill, including, without limitation, any causes of action or requests for relief, administrative or judicial, under State or federal laws, or any other claims procedure related to the Oil Spill.

Section 5 of the MOU further reserves the State's right to file suit or to submit a claim to BP for claims arising out of the Oil Spill. To the extent that such claims include losses

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<sup>5</sup> See MOU, Section 3.

<sup>6</sup> See MOU, Section 4.A.

<sup>7</sup> *Id.*



associated with tourism or seafood marketing related revenue, the State agreed to stay the portion of that claim that involves matters encompassed by the MOU and agreed to “engage in good faith negotiations to attempt to resolve any such claim or suit.”<sup>8</sup>

Finally, BP reserved its rights to seek an appropriate “credit or set-off” for any restoration *actually achieved* by the Programs, in response to any claim for natural resource damages asserted against it in connection with the Oil Spill.<sup>9</sup>

#### **D. MOU Addenda**

On January 27, 2011, the CFA signed an Addendum to the MOU, making CFA a party to the MOU for the purpose of receiving, holding, and distributing the Tourism funds.<sup>10</sup>

On or around February 21, 2011, the Parties executed a First Amendment and Addendum to the MOU to clarify certain reporting requirements and to amend the MOU to provide, as a condition of the MOU, that the Louisiana Legislative Auditor “shall have the authority to audit all records and accounts that relate to the Louisiana Tourism Recovery Program to determine compliance with all applicable laws, ordinances, regulations, policies, procedures, and the terms of this Memorandum.”<sup>11</sup>

On April 27, 2011, the Parties executed a Second Amendment and Addendum to the MOU to clarify the roles of LDWF, the Board, and LWFF.<sup>12</sup> On that same date, the Parties also entered into a Fund Agreement Letter, which was the Third Addendum to the MOU. The Fund Agreement Letter added LWFF as a party and signatory to the MOU for purposes of clarifying LWFF’s agreement to receive, hold, administer, and distribute the funds provided for the Seafood Marketing Program.<sup>13</sup>

### **III. OPINION REQUEST**

In your request, you ask for the legal opinion of our office, based on our interpretation of the MOU and relevant constitutional and statutory authorities, on seven questions, each of which will be addressed below.<sup>14</sup>

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<sup>8</sup> See MOU, Section 5.

<sup>9</sup> See MOU, Section 6.

<sup>10</sup> See “Addendum II,” on file with the Office of the Attorney General.

<sup>11</sup> See “First Amendment, and Addendum to the Memorandum of Understanding Between BP Exploration & Production, Inc. (“BP”), the Louisiana Department of Wildlife and Fisheries, and the Office of the Lieutenant Governor of the State of Louisiana (“OLG”) agreed to by the Parties on November 18, 2010”, on file with the Office of the Attorney General.

<sup>12</sup> See “2<sup>nd</sup> Amendment and Addendum to Memorandum of Understanding Between BP Exploration & Production Inc., the Louisiana Department of Wildlife and Fisheries and the Office of the Lieutenant Governor of the State of Louisiana,” on file with the Office of the Attorney General.

<sup>13</sup> See Fund Agreement Letter, “Addendum No. 3 to Memorandum of Understanding Between BP Exploration & Production Inc., the Louisiana Department of Wildlife and Fisheries and the Office of the Lieutenant Governor of the State of Louisiana,” on file with the Office of the Attorney General.

<sup>14</sup> The questions, and answers thereto, have been re-ordered to first answer certain questions that form the foundation for the remaining questions.

**1. Is the MOU a partial settlement of claims for damages to the State?**

For the reasons stated below, it is the opinion of this office that the MOU is not a partial settlement of claims for damages to the State of Louisiana in connection with the Oil Spill. In general terms, “settlement” is equated with “compromise”. La. Civ. Code art. 3071 defines a “compromise” as a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship. A compromise precludes the parties from bringing a subsequent action based upon the matter that was compromised.<sup>15</sup> Parties typically enter into settlements or compromises to end or prevent litigation. Here, the MOU clearly and explicitly states that the MOU does not prevent the State from seeking full relief or compensation through judicial processes and the State specifically reserves its rights to all claims it may have against BP, including any causes of action or requests for relief.<sup>16</sup> Moreover, in addition to the \$78 million that BP agreed to provide to Louisiana, BP agreed to pay Florida \$10 million for seafood testing and \$10 million for seafood marketing; Alabama \$4 million for seafood testing and \$5 million for seafood marketing; and Mississippi \$1.5 million for seafood testing and \$3.5 million for seafood marketing. This money, all paid outside of the context of litigation, was not provided in the context of a partial settlement but rather as assistance to benefit the Gulf States, their citizens, and their seafood and tourism industries, for the purpose of addressing adverse impacts to industries of great economic importance.

This conclusion is further supported by two additional provisions of the MOU. First, while the State did agree to stay any subsequently-filed suit or claim related to losses associated with tourism or seafood market-related revenue, both the State and BP also agreed to engage in good faith negotiations to attempt to resolve any such future-filed claim or suit. If this MOU were intended to be a partial settlement of claims, then BP would have required the State to release its claims for losses associated with tourism or seafood market related revenue that are the subject of the MOU. Instead, the parties agreed that if such a future claim or suit was filed, the parties would make a good faith effort to attempt to settle or compromise those claims at that appropriate time.

Second, as part of the MOU, BP reserved its right to seek a credit or set-off for any restoration actually achieved by the Programs, in response to any claim for natural resource damages asserted against it in connection with the Oil Spill. However, the MOU does not guarantee that BP would receive such a credit, nor does it prohibit Louisiana from refuting BP’s right to receive a credit, should BP request same in the future. Thus, by only reserving a right to request a credit at some point in the future, BP receives no advantage from the MOU. All of these factors support a finding that this MOU is not a partial settlement.

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<sup>15</sup> La. Civ. Code art. 3080.

<sup>16</sup> See *supra*, Section II.C.

## 2. Are the monies tendered by BP State funds?<sup>17</sup>

This office has previously addressed the issue of whether certain funds are properly classified as public funds. In Attorney General Opinion Nos. 09-0156 and 10-0292, we noted that the Legislature, in various statutes, has defined public funds as “any funds obtained from legislative appropriation or any form of state or local taxation.”<sup>18</sup> We further stated that:

[i]n addition to these other laws, the Louisiana Supreme Court General Administrative Rules, Part G, § 1(a)(ii) similarly asserts that the phrase ‘public funds’ means legislatively appropriated funds, judicial expense funds, self-generated funds, funds of federal, state, local, parish or municipal governments; and any other sources of public funds. Black’s Law Dictionary (8<sup>th</sup> ed. 2004) defines ‘public funds’ as “[t]he revenue or money of a governmental body” or [t]he securities of a state or national government.”<sup>19</sup>

The monies tendered by BP are not legislatively appropriated, nor are they self-generated funds. Thus, a determination of whether these funds can be considered funds of state, local, parish, or municipal governments or other sources of public funds requires an analysis of the conditions placed on funding for each of the three Programs under the MOU, including the designated recipient of the monies.

### The Testing Program

Pursuant to the MOU, BP agreed to provide \$18 million to LDWF to fund the Testing Program, in accordance with a funding schedule to be agreed upon between BP and LDWF. The terms and conditions of the MOU do not require that the money be placed somewhere other than the State Treasury. As such, and because LDWF is a state entity, it is the opinion of this office that the funds tendered by BP to LDWF for the Testing Program are public funds.

### The Seafood Marketing Program

Pursuant to the MOU, including the addenda thereto, BP agreed to provide \$30 million to LWFF to fund the development, implementation, and administration of the Seafood Marketing Program. LWFF is designated as the entity to receive and hold these funds disbursed by BP and is required to distribute the funds under the written instruction of LDWF and the Board, in accordance with the final budget prepared by the Board. According to the MOU, upon receipt of written instructions from LDWF and the Board, LWFF is further required to distribute payments directly to designated recipient entities.

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<sup>17</sup> The terms “State funds” and “public funds” are used interchangeably in Louisiana law; therefore, for the purposes of this opinion, “State funds” and “public funds” are synonymous.

<sup>18</sup> La. R.S. 34:3102; La. R.S. 34:3492.

<sup>19</sup> La. Atty Gen. Op. Nos. 10-0292 and 09-0156.

The LWFF is a non-profit corporation organized exclusively for religious, charitable, scientific, literacy, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Service Code. The LWFF was created to promote the welfare of LDWF and the Louisiana Wildlife and Fisheries Commission (“Commission”) and to develop, expand, and improve the facilities of LDWF and the Commission.<sup>20</sup> Pursuant to LWFF Articles of Incorporation, they are authorized to solicit and accept, “whether by way of outright, limited, or conditional gifts, grants and bequests, in trust or otherwise, funds of all kinds” for the purpose of activities in research, or other such designated benefits of LDWF and their staff “as may be prescribed by testators or donors to the corporation” and “to receive, hold and administer such donations, bequests, devises and gifts” subject to such terms or conditions as may be imposed by the respective donors.<sup>21</sup>

LWFF is a private foundation that was not created by the Legislature; their powers are not defined by the Legislature; and their property does not belong to the public. It is, therefore, the opinion of this office that because BP donated funding for the Seafood Marketing Program directly to LWFF, as opposed to the State, these monies are the private funds of LWFF. After the Oil Spill, BP had a legal obligation to mitigate their damages and a self-serving obligation to minimize their exposure. BP chose to meet both of these obligations by making an onerous donation to LWFF to promote seafood marketing. Therefore, as the donor, BP had the authority to outline the conditions required to be placed on the expenditure of funds. One of these conditions was to appoint LDWF as the entity with the expertise in seafood marketing in Louisiana. Although LDWF directed how the funds were to be spent, LDWF did not receive any gratuitous benefit from the expenditures.<sup>22</sup> Rather, the purpose of this condition was likely to ensure that BP could maximize the value of their donation and achieve the result they intended from the donation (*i.e.* minimize their legal exposure and mitigate their damages). The fact that LDWF retains authority to advise, direct, and ensure that the money is spent in accordance with the conditions of the MOU does not transform these private funds into public funds.

This office concludes that the Seafood Marketing Program monies tendered by BP are not public funds. This conclusion is further supported by the LWFF’s 2011 Internal Revenue Service (“IRS”) Tax Form 990, which lists monies received from BP (the

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<sup>20</sup> See Amended and Restated Articles of Incorporation of LWFF, filed with the Louisiana Secretary of State on September 12, 2007, on file with the Office of the Attorney General.

<sup>21</sup> *Id.*

<sup>22</sup> In certain instances, LDWF was reimbursed by LWFF for the time and work its employees spent developing the Seafood Marketing plan; however, this reimbursement is not akin to the type of gratuitous benefit often associated with grants and donations. Further, any reimbursement monies actually received by LDWF from the LWFF did become public funds and were properly placed into the State Treasury. The question addressed in this opinion is whether the original donation from BP to the LWFF constitutes public funds, not whether any of the grant funds distributed by LWFF are public funds. The answer to the latter is, *inter alia*, dependent on the entity receiving the distribution.

designated contributor) in 2011 for the Seafood Marketing Program as a grant to the LWFF.”<sup>23</sup>

#### The Tourism Program

Pursuant to the MOU, including the addenda thereto, BP agreed to provide \$30 million to CFA to fund the development, implementation, and administration of the Tourism Program. CFA is designated as the entity to receive and hold these funds disbursed by BP and is required to distribute the funds under the direction of OLG. The CFA is a Louisiana non-profit corporation which is a public charity and exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CFA was established to receive gifts, endowments, and bequests from donors and to act on the donors’ charitable wishes.

As part of the MOU, the CFA established the BP Louisiana Tourism Recovery Fund, a non-endowed Field of Interest Fund created for the exclusive purpose of satisfying the Tourism Recovery Program as outlined in the MOU.<sup>24</sup> This Fund received \$30 million directly from BP, and OLG was designated as the Fund Advisor.<sup>25</sup> Pursuant to Internal Revenue Service Treasury Regulation 1.170A-9(e)(10)-(14), a Field of Interest fund is a form of donor controlled fund where the donor (here BP) chooses the charitable field of interest or area of concern that the fund will support.

Like the LWFF, CFA was not created by the Legislature; their powers are not defined by the Legislature; and their property does not belong to the public. It is, therefore, the opinion of this office that because BP donated funding for the Tourism Program directly to CFA, as opposed to the State, these monies are the private funds of CFA. After the Oil Spill, BP had a legal obligation to mitigate their damages and a self-serving obligation to minimize their exposure. BP chose to meet both of these obligations by making an onerous donation to CFA to promote tourism. Therefore, as the donor, BP had the authority to outline the conditions required to be placed on the expenditure of funds. One of these conditions was to appoint the OLG as the entity with the expertise in promoting tourism in Louisiana. Although OLG directed how the funds were to be spent, OLG did not receive any gratuitous benefit from the expenditures. Rather, the purpose of this condition was likely to ensure that BP could maximize the value of their donation and achieve the result they intended from the donation (*i.e.* minimize their legal exposure and mitigate their damages). The fact that OLG retains authority to advise, direct, and ensure that the money is spent in accordance with the MOU does not transform these private funds into public funds.

This office concludes that the Tourism Program monies tendered by BP are not public funds. This conclusion is further supported by the CFA’s 2011 IRS Tax Form 990,

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<sup>23</sup> See LWFF 2011 IRS Tax Form 990, on file with the Office of the Attorney General.

<sup>24</sup> See January 27, 2011 Fund Agreement Letter.

<sup>25</sup> See Fund Agreement Letter, Addendum #1.

which lists monies received from BP in 2011 for the Tourism Program as a grant to the CFA.”<sup>26</sup>

In summary, the monies tendered by BP directly to LDWF for the Seafood Testing Program are public funds. The monies tendered by BP directly to LWFF for the Seafood Marketing Program and to CFA for the Tourism Program were onerous donations by BP to those Foundations. As such, those monies are not public funds.

### **3. Should the monies tendered by BP be deposited into the Treasury?**

La. Const. Art. VII, Sec. 9 requires that monies received by the State be placed into the State Treasury, unless one of the enumerated exceptions applies. This provision provides, in pertinent part, as follows:

**(A) Deposit in State Treasury.** All money received by the state or by any state board, agency, or commission shall be deposited immediately upon receipt in the state treasury, *except that received:*

(1) as a result of grants or donations or other forms of assistance when the terms and conditions thereof or of agreements pertaining thereto require otherwise.<sup>27</sup>

The language in La. Const. Art. VII, Sec. 9 is clear and unambiguous and must be applied as written.<sup>28</sup> The requirement that monies be deposited in the State Treasury is conditioned upon a finding that the monies are received by the State (*i.e.* state or public funds). This office has concluded that of the three Programs funded by the MOU, only the Seafood Testing monies are public funds received by the State. Therefore, the constitutional provision requiring that monies received by the State be deposited into the State Treasury is not applicable to non-public funds (*i.e.* funds that are not received by the State). As such, it is the opinion of this office that the monies received by LWFF and CFA for the Seafood Marketing Program and the Tourism Program, respectively, are not required to be placed into the State Treasury since these monies are not public funds.

In light of our opinion regarding the non-public nature of the monies tendered for the Seafood Marketing and Tourism Programs, the only remaining question is whether monies tendered by BP to LDWF for the Seafood Testing Program are required to be placed into the Treasury. In order to qualify as an exception to the requirement of placing State money into the Treasury, money provided to the State must meet two requirements: (1) the money received must be through a grant, donation, or other form of assistance; and (2) the terms and conditions of the grant, donation, or other form of assistance must indicate that the money is to be deposited somewhere other than the State Treasury. It is the opinion of that office that the funds provided by BP for the Seafood

<sup>26</sup> See CFA 2011 IRS Tax Form 990, on file with the Office of the Attorney General.

<sup>27</sup> (emphasis added); see also La. R.S. 49:308.

<sup>28</sup> La. C.C. Art. 9.

Testing Program qualify as a grant, donation, or other form of assistance under La. Const. Art. VII, Sec. 9(A).

More specifically, the MOU states that the parties believe that continued testing of seafood, expenditures on marketing of Louisiana seafood, and expenditures to increase and benefit tourism could help address the impacts to Louisiana's seafood and tourism industries.<sup>29</sup> In effect, BP agreed to provide assistance for the implementation of Programs that would benefit industries that are vital to Louisiana's economy and this assistance was in the form of reimbursement of expenditures and costs associated with developing the Programs. As such, the MOU contemplates that funding for the Seafood Testing Program is a grant, donation, or an other form of assistance.<sup>30</sup>

In addition to qualifying as a grant, donation, or an other form of assistance, in order for the constitutional exception to apply, the terms and conditions of the MOU must also indicate the monies be placed somewhere other than the State Treasury. The terms and conditions of the monies tendered by BP to LDWF state only that the funds will be given to LDWF. Since LDWF is a State agency, the funds provided for the Testing Program are monies received by the State pursuant to an agreement that does not require that the monies be placed in a location other than the State Treasury. As such, it is the opinion of this office that the monies tendered by BP to LDWF for the Testing Program are required to be placed into the State Treasury.<sup>31</sup>

**4. How explicit must the “terms and conditions” noted in the constitutional exception be to meet the requirement of the Constitutional Article in light of AG Op. No. 86-366 where the AG appears to opine that the Act of Donation must explicitly provide that the monies donated are not to be placed in the Treasury and are not subject to appropriation?**

In La. Atty. Gen. Op. No. 86-366, the Governor's Special Commission on Educational Services (“GSCES”) stated that the Louisiana Public Facilities Authority (“LPFA”) was in the process of selling bonds for Parent Loans to Undergraduate Students. According to the facts presented, the monies from the sale were to be donated by the LPFA to the GSCES.<sup>32</sup> In light of La. Const. Art. VII, Sec. 9 and the exceptions contained therein, GSCES requested an opinion regarding whether these funds were required to be deposited into the Treasury.<sup>33</sup> The Attorney General stated as follows:

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<sup>29</sup> See MOU at 2.

<sup>30</sup> The MOU also constitutes a conditional, or onerous, donation. Donations may be burdened with charges or conditions, so long as they are not contrary to law or good morals. La. Civ. Code art. 1528. Donations burdened with charges imposed on the donee are categorized as onerous donations. Louisiana law recognizes that onerous donations can impose on the donee an obligation to fulfill the terms of the condition or charge to which the donation is subject. *Howard v. Adm'rs of Tulane Educ. Fund*, 299702224 (La. 7/1/08), 986 So.2d 47..

<sup>31</sup> It is the understanding of this office, through discussions with LDWF, that the \$18 million provided to LDWF for the Testing Program was, or will be upon receipt, deposited into the State Treasury.

<sup>32</sup> La. Atty. Gen. Op. No. 86-366.

<sup>33</sup> *Id.*

I have not seen the act of donation; however, if it provides that the monies donated are not to be placed in the treasury, and are not subject to appropriation, the monies would not be deposited in the state treasury.<sup>34</sup>

This office does not interpret this language as explicitly requiring that the language of a grant, donation, or other form of assistance to state “that the monies donated are not to be placed in the Treasury and are not subject to appropriation” for the exception to apply. First, the exceptions found in La. Const. Art. VII, Sec. 9 are not contingent upon whether monies are subject to appropriation, but rather whether monies are required to be deposited into the Treasury, which would then necessitate an appropriation. Second, the pertinent constitutional language excepts certain monies from being deposited into the Treasury as long as the terms and conditions of the grant, donation, or other form of assistance *require otherwise*.<sup>35</sup>

This office does not here offer a general opinion on what language is sufficient to meet the requirement of “requiring otherwise.” As stated above, the monies tendered by BP for the Seafood Marketing Program and the Tourism Program are not public funds; therefore, the La. Const. Art. VII, Sec. 9 is not applicable. The monies tendered by BP for the Seafood Testing Program are public funds, and we have concluded that they do constitute a grant, donation, or other form of assistance. However, the terms and conditions of the MOU do not require that these funds be placed somewhere other than the State Treasury. Therefore, the \$18 million received by LDWF for this Program is required to be placed in the Treasury.

##### **5. Should the monies tendered by BP be appropriated by the Legislature?**

La. Const. Art. III, Sec. 16(A) states, “[e]xcept as otherwise provided by this constitution, (a) no money shall be withdrawn from the state treasury except through specific appropriations...” The constitution does not define what constitutes an appropriation; however, La. R.S.39:2 defines appropriation as “an authorization by the legislature to a budget unit to expend from public funds a sum of money, for purposes designated, under the procedure prescribed in this Chapter.” Budget unit is further defined as “any spending agency of the state which is declared to be a budget unit by the division of administration and which is identified for accounting purposes by a five-digit number code.”<sup>36</sup> Because both LWFF and CFA are private foundations, neither constitute spending agencies of the state; thus, neither are budget units. Further, the monies tendered by BP to fund the Seafood Marketing Program and the Tourism Program are not public funds and, therefore, are not required to be placed in the Treasury. For both of these reasons, it is the opinion of this office that the monies tendered by BP for these two Programs are not required to be appropriated by the Legislature.

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<sup>34</sup> *Id.*

<sup>35</sup> La. Const. Art. VII, Sec. 9(A)(1).

<sup>36</sup> La. R.S. 39:2.



However, as stated above, the terms and conditions of the MOU required BP to provide the funding for the Testing Program directly to LDWF. As a result, these funds were not only deposited into the Treasury by LDWF, but LDWF, as a budget unit of the State, also sought appropriations through the legislative process for the expenditure of these funds.

**6. Does the Legislature have any oversight authority over the monies tendered by BP?**

Generally, the plenary power of the Legislature includes the power over State finances.<sup>37</sup> Courts have recognized that the Legislature has absolute control over the finances of the State, except as otherwise limited by constitutional provisions.<sup>38</sup> Indeed, La. Const. Art. III, Sec. 16(A) provides:

Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

As provided by this constitutional provision, the Legislature's plenary power is absolute with regard to monies withdrawn from the State Treasury. Pursuant to the MOU, as interpreted herein, funding for the Seafood Marketing Program and the Tourism Program are not public funds and were not required to be placed in the State Treasury. These monies are not subject to legislative appropriation or oversight as they are private funds belonging to the LWFF and the CFA. On the other hand, the monies received by LDWF for the Testing Program were placed in the Treasury and are subject to appropriation pursuant to La Const. Art. III, Sec. 16(A).

The Legislature and its Committees have additional powers that are inherently part of their authority over State finances. For example, the Joint Legislative Committee on the Budget was statutorily created as the budgetary and fiscal representative of the Legislature with the power to assist that body in the discharge of its fiscal and budgetary responsibilities.<sup>39</sup> La. R.S. 24:652(A) authorizes the Committee to study and examine "matters pertaining to the budgeting and fiscal affairs of the state and its political subdivisions, their funds, revenues, expenditures, and other financial affairs of the state..." Additionally, all agencies boards, commissions, and departments of the State are required to assist the Committee and furnish such information, reports, aid, services, and assistance as may be requests.<sup>40</sup> Thus, pursuant to La. R.S. 24:651 *et seq.*, the Legislature, through the Joint Legislative Committee on the Budget, has general oversight authority over all budgetary and fiscal matters of the State. As such, the Legislature has the same oversight authority over the Seafood Testing Program funds,

<sup>37</sup> *Wall v. Close*, 14 So.2d 19 (1943).

<sup>38</sup> See 20 La. Civ. L. Treatise, Legis. Law & Proc. § 11.1 (2012 ed.), *citing* La. Const. Art. III, Sec. 16.

<sup>39</sup> La. R.S. 24:651 *et seq.*

<sup>40</sup> La. R.S. 24:654.

which are public funds, as is provided to them by Louisiana law (e.g., power to study and examine the funds and expenditures; hold hearings; request certain reporting; etc.).

Additionally, La. Const. Art. III, Sec. 11 provides that there shall be a legislative auditor responsible solely to the Legislature who shall serve as a fiscal advisor with authority to audit the fiscal records of the State and its agencies. Although the monies tendered by BP for the Seafood Marketing and Tourism Programs are not public funds, the MOU and its addenda specifically provides that, as a condition of the Programs, the legislative auditor is authorized to audit all records and accounts relating to the Programs funded pursuant thereto.<sup>41</sup> Therefore, the Legislature, through the legislative auditor, has additional oversight authority over the monies tendered by BP through the MOU, as well as general budget authority over LDWF and CRT, as provided by law.

**7. Do the Secretary of LDWF and the Lt. Gov. have the legal authority to direct these monies to the LWFF and the CFA to hold and distribute?**

Pursuant to the provisions of the MOU, BP agreed to direct \$30 million to the LWFF for purposes of the Seafood Marketing Program and \$30 million to the CFA for the Tourism Program. As provided herein, the funding for these programs are grants, donations, or other forms of assistance from BP to the Foundations and do not constitute public funds. As such, this office opines that neither the Secretary of LDWF nor the Lt. Gov. directed monies to the Foundations to hold and distribute. Rather, LDWF and the Lt. Gov. serve only as advisors to the Foundations, directing how the money should be spent to maximize seafood marketing and tourism pursuant to the terms of the MOU set forth by BP. This advisory role is a condition of the grants to the Foundations and these conditions are not contrary to Louisiana law or to public morals.<sup>42</sup>

This conclusion is supported by La. Atty. Gen. Op. No. 92-657, wherein Attorney General Ieyoub addressed whether the Affiliation Agreement between the Louisiana Educational Television Authority (“LETA”) and Friends of Louisiana Public Broadcasting, Inc. (“Friends”), was consistent with Louisiana law. Under the agreement at issue, LETA was to employ a Director of Development (“DOD”) to raise funds.<sup>43</sup> These funds were to be deposited with Friends or with the Foundation for Excellence In Louisiana Public Broadcasting (“Foundation”); these private entities would act as depositories for LETA.<sup>44</sup> In that opinion, the Attorney General stated that LETA cannot deposit State funds with either Friends or the Foundation.<sup>45</sup> Rather, should a benefactor desire a grant or donation to go to Friends or the Foundation, the funds should be given directly by the benefactor to Friends or the Foundation.<sup>46</sup> Under the facts of the current

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<sup>41</sup> See MOU, First Amendment and Addendum; Tourism Program Fund Agreement Letter, Addendum #1; and Seafood Marketing Program, Addendum No. 3, Fund Agreement Letter.

<sup>42</sup> See *supra*, n. 30.

<sup>43</sup> La. Atty. Gen. Op. No. 92-657.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup>

opinion request, the benefactor of the grant, donation, or other form of assistance – BP – provided the funds directly to the LWFF and the CFA, as allowed under Louisiana law and La. Atty. Gen. Op. No. 92-657.

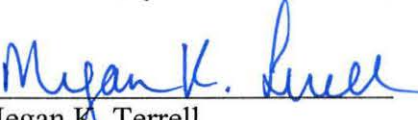
**CONCLUSION**

In summary, pursuant to the Seafood Testing, Marketing, and Tourism MOU, BP agreed to fund three separate Programs. The monies tendered by BP for each of these Programs constitute a grant, donation, or other form of assistance. The monies provided for the Seafood Testing Program were given directly to LDWF and the terms and conditions of the MOU do not except the monies from being placed into the State Treasury, as allowed by La. Const. Art. VII, Sec. 9(A)(1). Therefore, the Seafood Testing funds are required to be placed into the State Treasury and are subject to Legislative appropriation. The monies tendered for the Seafood Marketing Program and the Tourism Program were provided directly to the LWFF and the CFA, respectively, and do not constitute public funds since both Foundations are private, not-for profit entities. As such, these funds are not State monies and La. Const. Art. VII, Sec. 9 is not applicable (*i.e.* the monies are not required to be placed into the State Treasury).

We hope that this sufficiently answers your inquiry, however, if we may be of further assistance please do not hesitate to contact our Office.

Yours truly,

**JAMES D. "BUDDY" CALDWELL**  
**ATTORNEY GENERAL**

By:   
Megan K. Terrell  
Assistant Attorney General

JDC/MKT/tp

## APPENDIX B

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### Lt. Governor and Community Foundation of Acadiana's Responses



JAY DARDENNE  
LIEUTENANT GOVERNOR

**State of Louisiana**  
OFFICE OF THE LIEUTENANT GOVERNOR  
DEPARTMENT OF CULTURE, RECREATION & TOURISM  
OFFICE OF THE DEPUTY SECRETARY

CHARLES R. DAVIS  
DEPUTY SECRETARY

January 28, 2013

Mr. Daryl G. Purpera  
Louisiana Legislative Auditor  
1600 North Third Street  
P.O. Box 94397  
Baton Rouge, LA 70804-9397

Re: "Informational Report" issued by the LLA pertaining to the November 2010 Memorandum of Understanding between the State of Louisiana and BP Exploration and Production, Inc.

Dear Mr. Purpera:

On November 18, 2010, three days before Jay Dardenne took office as Louisiana's Lieutenant Governor, a Memorandum of Understanding (MOU) was executed between the State of Louisiana (State) and BP Exploration and Production, Incorporated (BP). To our knowledge, it is a unique arrangement that serves the public purposes of supporting Louisiana's seafood and tourism industries while carrying out BP's legal and business obligations to mitigate damages resulting from the April 2010 Deepwater Horizon explosion and oil spill.

The MOU imposes administrative responsibilities upon the State of Louisiana through the Office of the Lieutenant Governor (OLG), to carry out functions related to a Tourism Program, and the Department of Wildlife and Fisheries (DWF), to carry out functions related to two Seafood Programs.

Shortly after Lt. Governor Dardenne took office, the OLG initiated a series of phone calls, e-mails, correspondence, and in-person meetings with you and your staff at the LLA. The purpose of this extensive outreach was to provide your office an opportunity to recommend audit language and procedures to build into the MOU-funded Tourism Program to strengthen the transparency, accountability and efficacy of that three-year program.

The audit language included in the Tourism Program guidelines is a result of that communication. The Tourism Program also includes processes, forms, controls, documentation requirements, and other administrative elements that far exceed what is required under the MOU, all to ensure that Louisiana's tourism industry and citizens statewide benefit fully from the program. In the two years that have followed, the OLG has spent countless hours responding to the LLA's questions and requests for documents, photocopying records, assisting auditors on-site, and opening our files without hesitation.

B-1

Mr. Daryl G. Purpera

January 28, 2013

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Likewise, these same records, accounts, and information are available to the Legislature, and we welcome the opportunity to provide a briefing on the activities and outcomes of the Tourism Program.

Consistent with the OLG's responsibilities under state law and under the MOU, we have been maintaining meticulous records and data related to the Tourism Program and tourism indicators since the 2010 Oil Spill.

At some point during the three-year Tourism Program, the LLA has chosen to pivot, shifting from advisor and collaborator on the development of the Tourism Program, to critic of the very guidelines the LLA helped develop.

Further, the LLA began leveling a variety of charges and legal arguments against this office and the MOU itself, arguments that threatened to undermine not only the program, but also the State of Louisiana's spill-related claims against BP.

Attorney General Buddy Caldwell, as the chief legal officer of the State of Louisiana, working alongside representatives from the Governor's office, the LLA, the Department of Wildlife, and Fisheries, and our office, has responded to the LLA's laundry list of issues including the LLA's unfounded assertion that the MOU is a "partial settlement of claims for damages to the State."

We defer to General Caldwell's well-researched and compelling analysis and conclusions, which are provided with this report as La. Atty. Gen. Op. 12-0223.

As for the main issue that remains in the LLA's "informational report" - the complaint that the Legislature does not direct and control the MOU funding - it is important to remind the LLA that the funding was contingent on this very condition. BP has been clear that the funding for the tourism and seafood promotion programs would never have been provided if the funding were subject to deposit in the state treasury and subject to appropriation.

Of the \$30 million funded through the MOU for the Tourism Program, the MOU allocated \$23.5 million for the 64 parishes. The role of the OLG, which is the legislatively-designated office responsible for the state's tourism industry, is to ensure that these decentralized expenditures and activities are strategic, effective, complementary, and rapid in achieving the intended effect of mitigating damage to the tourism industry, all while maintaining compliance with the terms by which the funding was provided.

While the MOU has presented some unique administrative challenges, the OLG has met the challenges, and has implemented a program which features extensive record-keeping, performance tracking, compliance, and efficacy. We believe Louisiana's Tourism Program should be a source of pride for our state. The extra time and effort devoted to ensuring compliance and successful outcomes have benefitted Louisiana's tourism industry statewide. The program is scheduled to be completed by April 1, 2014. It is with pleasure that we look forward reporting on the final outcomes.

Very truly yours,



Charles R. Davis  
Deputy Secretary



February 8, 2013

Daryl G. Purpera  
Louisiana Legislative Auditor  
1600 North Third Street  
P. O. Box 94397  
Baton Rouge, Louisiana 70804-9397

Dear Mr. Purpera,

Community Foundation of Acadiana (CFA) has received the confidential informational report provided by the Louisiana Legislative Auditor's office and the related Appendices dated January 23, 2013; thank you for sharing this with us. Our response follows:

First, we would be remiss if we did not clarify that CFA was honored to be a partner in helping the Lieutenant Governor's Office and BP bring \$30 Million of funding for the Louisiana Tourism Recovery Program, all to benefit the state of Louisiana, following the tragic Deepwater Horizon oil rig explosion.

Second, CFA's core purpose is to connect all generous people to the causes they care about. We believe CFA's involvement in this activity was completely in line with our purpose and believe because of the high level of service and transparency we provided the Lieutenant Governor's office, CFA will be called to action in the future to support other efforts of our great State.

Community foundations, by their very nature and structure, are well positioned to be a conduit of channeling private dollars into the public arena. In fact, our ability as an honest broker in bringing together public/private dollars to reduce the burden of government is something very unique to community foundations.

In reference to the confidential informational report provided we have the following comments:

- A. The Lieutenant Governor's office exercised a high level of diligence and professionalism in their oversight of the dollars entrusted to CFA in this effort, in compliance with the MOU.
- B. CFA in turn managed the activity, for which it was responsible, in accordance with the MOU, professionally, with care and attention and believe the processes in place met the business standards of the State on accountability and transparency.
- C. CFA encourages future Private/Public investment through reputable non-profit entities capable of acting as a trusted, professional, transparent organization, especially when the State is experiencing economic challenges. One can use the success of the transaction noted in the informational report as a model for such activity. CFA welcomes the opportunity to be involved in the future in such activity.

On behalf of CFA, its Board of Directors, and stakeholders throughout Acadiana and Louisiana, we want to thank the Lieutenant Governor's Office and BP for their trust in our organization to act as a trusted, professional and transparent partner in the Louisiana Tourism Recovery Program.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Hebert", is written over the word "Sincerely,".

Raymond J. Hebert - President & CEO

1035 Camellia Boulevard  
Suite 100  
Lafayette, LA 70508  
P: 337.769.4840  
F: 337.769.4879  
www.cfacadiana.org

## APPENDIX C

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Department of Wildlife and Fisheries  
and  
Louisiana Wildlife and Fisheries Foundation's  
Responses





BOBBY JINDAL  
GOVERNOR

State of Louisiana  
DEPARTMENT OF WILDLIFE AND FISHERIES  
OFFICE OF SECRETARY

ROBERT J. BARHAM  
SECRETARY

February 7, 2013

Daryl Purpera  
Louisiana Legislative Auditor  
P.O. Box 94397  
Baton Rouge, LA 70804-9397

Dear Mr. Purpera:

I have received your informational report concerning the structure of the funding in the Memorandum of Understanding (MOU) between BP Exploration & Production, Inc. and the Department and the Lieutenant Governor. The well blowout of the *Deepwater Horizon* mobile drilling platform released nearly five million barrels of oil which invaded Louisiana's waters and adjoining coastlines, severely injuring Louisiana's natural resources, the wildlife and fisheries, and their habitat. The inundation of the crude oil severely affected the people of Louisiana who make their living and enjoy these natural resources along the coast. Under the MOU, BP provides \$78 million to the state for a seafood testing program, seafood marketing program, and a tourism program in order to mitigate the unprecedented injuries to these natural resources and people of the state.

While the Attorney General found that the MOU complies with Louisiana law, your report identifies several concerns over the transparency and accountability of the terms of the MOU. It is always the predominant goal of the department to protect and conserve the wildlife and aquatic resources of this state and to serve the residents who rely on them in the best manner possible. With that in mind, I have thoroughly reviewed your concerns and will certainly take those concerns into consideration when negotiating and drafting future agreements.

Sincerely,

Robert J. Barham  
Secretary

C-1



LOUISIANA | WILDLIFE & FISHERIES | FOUNDATION

*Board of Directors*

**Tom Gattle**  
*President*  
Lake Providence

**Bert Jones**  
*Vice President*  
Simsboro

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**Joe Herring**  
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**Christopher M. Kinsey**  
Shreveport

**John F. Schneider**  
Ponchatoula

\* Past President

---

**A. Kell McInnis, III**  
*Executive Director*  
Baton Rouge

February 6, 2013

Mr. Daryl G. Purpera, Legislative Auditor  
Office of the Legislative Auditor  
Post Office Box 94397  
Baton Rouge, LA 70804-9397

RE: DRAFT Informational report on the funds received under the MOU (with attached Addendums) dated November 18, 2010 between BP Exploration & Production, Inc., the Department of Wildlife and Fisheries, and the Lieutenant Governor of the State of Louisiana.

Dear Mr. Purpera:

We have received and reviewed the DRAFT report and concur with the well-reasoned Attorney General's Opinion #12-0223 (Appendix A) that the funds received by the Louisiana Wildlife and Fisheries Foundation by donation from BP are private, not "Public" funds. The foundation, along with our advisors LDWF and LSPMB, report quarterly to BP on the expenditures as required by the MOU.

We have worked cooperatively with the Louisiana Legislative Auditor's Office to identify the expenditures to date and expect to do so until the project is completed.

Sincerely,

A. Kell McInnis, III  
Executive Director  
Louisiana Wildlife and Fisheries Foundation

CC: Tom Gattle, President, LWFF