

**LEGAL CONSIDERATIONS AND USE OF COAST GUARD ATTORNEYS ON SCENE
- ADVICE FOR FEDERAL ON SCENE COORDINATORS -**

PURPOSE: Actions that Federal On Scene Coordinators (FOSC) take during a major pollution response can substantially affect the ability of the United States to recover clean-up costs, defend on-scene decisions, and enforce both criminal and civil laws. It is crucial that FOSCs maintain a high degree of independence within the Incident Command Structure (ICS) structure while working with various entities, including the responsible party (RP). The ICS structure was originally developed as a system for working with many parties that share very common goals. On the contrary, many of the Coast Guard major spill responses have ended up in protracted federal litigation with parties that were involved in the ICS. While an FOSC's primary responsibility is to manage the clean up effort, long-term litigation impacts are a necessary consideration. Participation of agency counsel during responses will help ensure that FOSC actions and the government's interests are properly protected. With that in mind, this paper makes recommendations to FOSCs dealing with oil or hazardous substance responses.

BACKGROUND: FOSC responsibilities are set forth in the National Contingency Plan, 40 CFR Part 300. Pursuant to 40 CFR Part 300.135(a), FOSCs are responsible for directing response efforts and coordinating all of the efforts at the scene of a discharge or release. These responsibilities include collecting pertinent facts about the discharge, notifying trustees of natural resources about discharges or releases; consulting with the Departments of Interior and Commerce if the discharge may have affected endangered or threatened species, collecting and maintaining documents to support cost recovery actions, and collection and safeguarding samples and reports.

Although the ICS structure foresees coordination between the RP and FOSC, the FOSC and RP in CG cases often have vastly divergent interests. The Oil Pollution Act of 1990 ("OPA") 33 U.S.C. § 2701, *et seq.* makes a responsible party for a vessel or facility from which oil is discharged or threatened to be discharged strictly liable for removal costs and damages. CERCLA, 42 U.S.C. § 9601, *et seq.*, provides a similar liability scheme for hazardous substances. Both statutes reward cooperative parties by providing limitations on their liability. It is crucial to remember, therefore, that RPs commonly participate in the ICS structure not out of pure goodwill or sense of duty, but because they have a huge financial and legal incentive to do so.

Although it may seem as if cost recovery and enforcement actions are separate and distinct from a response, their success often depend largely on the FOSC's decisions and actions during the response. Maintaining a civil, but fully independent relationship with the RP throughout the response process is best. Several FOSCs have faced the unpleasant experience of explaining under oath that, despite the on-scene representations to the press that the RP was cooperating, the RP turned out to be less than cooperative in the long run. On occasion, FOSCs have also unknowingly aided an RP in establishing a defense against the United States. The following guidelines are intended to protect Coast Guard's interests both short-term and long-term, and to protect the FOSCs from falling into common pitfalls.

Involve Agency Counsel Early

The district legal office should be consulted immediately upon notice of a significant spill. Agency counsel will often be dispatched to assist the FOSC. While some FOSCs have initially been puzzled about the presence of a JAG officer on scene, virtually all have concluded that their presence was highly valuable. The Coast Guard attorney should report directly to the FOSC. Coast Guard counsel work exclusively for agency and federal government interests--they are not logistics or operational staff members. FOSCs should have their counsel present whenever other attorneys are present, and whenever major decisions are made. Counsel help determine answers to unique fiscal, environmental law, search and seizure, claims, and other legal questions. They are also a valuable resource for scrubbing press releases and any significant decision documents that the FOSC signs.

In a typical response, several lawyers descend on scene representing a wide variety of interests. It is imperative that FOSCs not accept advice from any attorney except federal counsel. An RP attorney does not represent the federal government, and is paid to minimize the exposure of the RP. At times, even state and local government attorneys represent divergent interests. Therefore, all non-federal attorneys should be directed to communicate with the Coast Guard exclusively through agency counsel--normally the JAG officer on scene. Requiring private counsel to deal exclusively with Coast Guard counsel limits distractions for the FOSC, and improves the agency's position in federal court years after the spill. Some FOSCs have initially felt they could easily deal with RP and potential claimants' counsel on their own. In practice, unfortunately, many casual conversations between Coast Guard employees and private counsel have haunted the federal position in later negotiations. Non-federal counsel are not engaged in the process merely to support the ICS structure. While some FOSCs may take some time warming up to the idea of using an agency lawyer as a buffer and advisor, they almost always end up truly appreciating the arrangement--especially when subpoenas and depositions follow.

Crucial Information for Cost Recovery Actions

One of the FOSC's responsibilities under the National Contingency Plan is to collect and maintain documents for future cost recovery actions. In fulfilling this obligation, we recommend that FOSCs issue a Notice of Federal Interest (NOFI) early in the response and retain a copy of it. The NOFI is a crucial piece of evidence that is often used in cost recovery actions. It serves to put the RP on notice that it is liable for, among other things, removal costs and damages.

Agency counsel will work to ensure that the United States' interests in the RP's insurance policies are protected. Typically, vessel owners carry two different types of coverage: Protection and Indemnity (P&I) and Hull and Machinery (Hull). P&I coverage covers various risks and can be used for wreck removal. Hull insurance covers loss or damage to the vessel and her machinery, and is typically paid out when the vessel is declared a total loss. The proceeds from these policies frequently serve as the sole sources of recovery for the United States' cleanup costs. On several occasions, the RPs have received insurance proceeds and disbursed them illegally. In one case, the RP informed the FOSC that he had not yet received insurance proceeds only to disburse \$500,000.00 of insurance proceeds to family members and creditors. Cost recovery was limited by the fact that the RP had no other assets except the \$500,000.00

insurance proceeds that had already been disbursed. Under the Federal Debt Priority Statute, 31 U.S.C. § 3713, the United States has rights of first recovery over these policies. Legal will coordinate with Department of Justice to draft a letter on behalf of the FOSC that should deter the RP from illegally disbursing proceeds contrary to the interest of the United States. Again, timely involvement of agency counsel can preserve the United States' long term interests.

The importance of accuracy in POLREPS

POLREPS are crucial pieces of evidence in cost-recovery actions and other causes of actions that arise out of spills. Misstated facts in POLREPS can negatively impact our ability to recover costs and may impact cases related to pollution responses. In one case, inaccurate coordinates on a series of POLREPS placed the location of a grounded vessel involved in an oil spill on land rather than in navigable waters. This created a dispute as to whether admiralty jurisdiction applied--a critical matter when these issues go to court. After several depositions of MSO personnel, DOJ was able to disprove the inaccurate coordinates in the POLREPS and establish that the vessel was in fact located in the navigable waters of the United States. Other POLREPS have vastly underestimated the amount of oil that has been spilled or could be remaining on board. Such underestimation can severely hurt the United States later and undercut the credibility of those who approved the messages. Finally, it is better to not be over-enthusiastic about response plans or extent of environmental impact in POLREPS or other correspondence. All too often, time lines are pushed back and impacts increase due to natural and man made events.

Public Relations

40 CFR Part 300.155 sets out the FOSC's responsibility to give the public information about the nature of the incident and the actions undertaken to mitigate the damage. This typically takes the form of press releases and press conferences. The public relations arena is plagued with potential landmines for FOSCs. For this reason, we recommend that FOSCs involve agency counsel in review of press releases to avoid misrepresentations, inclusion of disputed facts, or manipulation of facts by the RP.

Many FOSCs believe that it is their duty to personally inform the public about the spill and assure the public that the situation is under control. While it is important to update the public about any known health risks, assurances that the situation is under control and that the RP is cooperating fully are often based on sketchy information and can eventually be adverse to the interests of the United States. Downplaying the size of the spill or overestimating the RP's cooperativeness can harm Coast Guard credibility in court and in the press if the facts turn out differently. Since there is a strong likelihood that FOSCs and their senior staff will be deposed about statements and representations they made during press conferences, the more Public Affairs Officers (PAOs) are used as a mouthpiece for the Coast Guard, the better. Some FOSCs have paid an inordinate amount of attention to preparation for the press gatherings. Public affairs professionals are an integral part of any major response, and the details of press conferences and releases should typically be delegated to the PAOs. One alternative strategy uses the FOSC to make a prepared statement and then announce he/she is returning to work on the operation; the Q & A process is then handed over to the PAO. Q & A handled by PAOs better preserves the

FOSC's independence, allows for easier correction of misstatements, and helps ensure that the Coast Guard is not portrayed as a shell for the RP. FOSCs that have gone before the press personally and winged it have often been burned. PAOs are a great way to get the word out; they can take questions and get back to the press later without looking bad---plus, if inaccurate answers are later identified, correcting them does not directly undercut the FOSC's credibility.

RPs have often attempted to use press releases and gatherings as a vehicle to later assert their defense against a cost recovery or enforcement action. Under OPA, the three basic defenses that an RP can raise are: that the discharge of oil was caused solely by (1) act of God, (2) act of war, or (3) act or omission of a third party. We recommend that FOSCs have Coast Guard counsel scrub press releases and announcements in advance to ensure that the RP is not using the forum to manipulate and gain apparent USCG endorsement of their version of the facts. Many RPs have attempted to get the Coast Guard to adopt details that exaggerate RP cooperation and minimize estimated spill impacts. Coast Guard FOSCs that have agreed to these glowing reports in the name of ICS cooperation, have later been caught off guard when these very same reports were used against the government in post-spill proceedings.

While negotiating the wording of a press release can occasionally take some time, it is always best to wait until legal and PAOs determine that the press release includes only undisputed facts. This will protect the FOSC's interests, the Coast Guard's reputation, and the long-term interests of the United States.

Physical Evidence

It is crucial to protect physical evidence in a pollution case--imagine what a jury would want to see in a case tried years later. Real evidence demonstrating the impact of the spill maintained by a strict chain of custody is important. CGIS should be used to ensure proper chain of custody and for long-term safekeeping of critical items. Items seized may include the oil record book, deck and engine room logs, the incinerator log book, sounding logs, tank capacity tables, piping diagrams and more. The CG should gather original documents and logs whenever possible, and provide copies to the originators.

Sampling can be crucial evidence for both the investigation and later litigation. A sufficient number of samples should be taken to ensure proper testing. If a state or local agency is involved and sends samples of oil to their own lab for testing, an additional sample taken at the same time and place should be sent to the Coast Guard's testing lab whenever possible. Beaches can be oiled for years to come from one major incident. The level of accuracy provided by the Coast Guard's lab is crucial in cost recovery cases where an RP claims that the oil or hazardous substance in question was released by another source.

Photography and video of the spill and its effects are also important when these matters go to trial. It is best if all pictures or videos on a disk or other format are all directly related to the spill and response.

The Documentation Center

Gathering and preserving documentation is another FOSC responsibility under the National Contingency Plan. Documentation created or collected on scene often becomes the basis of the cost-recovery action. We strongly recommend that FOSCs establish and protect the record created by staffing the documentation office with experienced Coast Guard or other federal employees. This helps ensure quality control. If a Freedom Of Information Act (FOIA) request is received for documents or other matters related to the spill, notify agency counsel prior to releasing anything.

Email and Computer Servers

Any email that FOSCs and their staff create is potentially usable for or against the government. E-mail, recordings and documents of almost any kind are subject to FOIA. In addition, court discovery rules can require even wider releases of information. FOSCs and their crew may be deposed or questioned at trial about e-mail, documents, or recordings that they author or forward.

Use only federal computers and equipment if at all possible. Use of a computer server provided by the RP may void any protections otherwise available. Any communications that are created, sent, or stored using the RP's server may be accessible by the RP without a FOIA request. Using non-federal equipment also risks waiving the attorney-client privilege if sent over the RP's server.

CONCLUSION: This summary is not intended to replace legal advice specific to a particular response, and is by no means an exhaustive listing of the legal issues that arise during major responses. Engaging the district legal office early will help FOSCs avoid the common pitfalls that have hurt many federal cases. Used to their full capacity, agency counsel can be one of the FOSC's most valuable assets--during and after a major spill response.