MANAGEMENT ELEMENTS OF RESPONSE TO MAJOR MARITIME OIL SPILLS

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ABSTRACT: Implementing oil spill contingency plans in the event of a major maritime spill demands the kind of strategic and tactical planning and execution seen in military operations. Essential elements of a spill response include such diverse considerations as the initial cleanup actions best-suited for a particular situation, potential legal and economic liabilities under law, the environmental and economic sensitivities of the spill area, selection of contractors and materials for cleanup operations, proper scientific and technical support, and close liaison with federal, state and local government agencies involved in a spill or potential spill. The manager of a spill response must be able to handle every aspect of the response short of litigation, performing a "balancing act" to keep governments and the public satisfied, and to keep owner costs and liabilities to a minimum.

This paper outlines the key elements that normally come into play in the response to major maritime oil spills in the United States. Although the perspective here is that of owners of spilling vessels, the key elements are by and large present in all spill response situations. It should also be remembered that each spill is a unique event and that specific characteristics and the mix of considerations applicable to that event can vary widely.

Response to a major oil spill is very much like fighting a battle—you are faced with strategic and tactical planning and execution; mobilizing and deploying resources in a timely fashion to the points where they are needed, when they are needed; creating lines of command and control; instituting the logistics to supply your forces with the resources needed to continue operations; and establishing an intelligence-gathering capability so that data respecting changes and anticipated changes in the political climate, field conditions, weather and the posture of the spill itself may be collated and analyzed. Add to this the all-important necessity of tracking and projecting expenditures so that tactics can be kept cost-effective and you will have some idea of how things can get so busy in Command Central, particularly in the critical first hours of a spill response.

The primary objectives in managing spill response are to determine the response options available and to set up communications and the organization to direct the selected response activities.

Initial considerations

In a marine casualty under existing U.S. law,1 a decision that must be faced up front is what action, if any, an owner should take to respond to the spill or potential spill—what action, if any, because that law provides the shipowner with a limit of liability on the total amount of cleanup costs for which the owner will be held liable. The unfortunate hook here is that under the law as it is presently worded, the owner may find himself liable for as much as twice his statutory limits unless the situation is properly assessed before undertaking responsibility for a spill cleanup. Should an owner start cleanup and then find that costs will exceed his limits of liability, the money he has expended cannot be applied to his limit of liability. In other words, after instituting cleanup efforts for his own account, the statutory limitation meter will be set back to zero should the owner decide to terminate his participation in the response effort and the Coast Guard "Federalizes" the spill. The owner then will be liable for what he has spent before terminating his efforts plus (up to his limits of liability) the amount the Coast Guard spends after it has taken over the response effort. Should the owner approach, equal or exceed his limits in his own effort and should the Coast Guard equal or exceed the owner's limits in the federalized effort, the owner may be liable for twice the statutory limits or more. For these reasons, it is important that owners make an initial evaluation of the situation in order to make the decision whether or not to act. Such evaluation takes the following into consideration:

- The statutory limitation of liability, if any (gross negligence, misconduct and privity on the part of owners can lift the limitation). The amounts of limitation are based on gross registered tonnage of the spilling vessel and vary depending on whether the vessel is an inland barge or whether it could carry oil as cargo. The limitation can also vary if the vessel was carrying Trans-Alaskan Pipeline oil, was in the safety zone of a port subject to the Deepwater Port Act or was engaged in transporting oil from production facilities subject to the Outer Continental Shelf Lands Act. As can be imagined, the limitation considerations can get somewhat complex at times. For the purposes of this paper we'll simply consider the $150 per gross registered ton applicable to seagoing vessels, not subject to any of the above exceptions. Present law is emphasized in the above discussion because pending legislation may radically change initial considerations. The pending legislation will be discussed later.

- The potential liabilities. This requires an accurate estimate of the total liability involved in cleanup and control of the spill to the satisfaction of the Coast Guard and state and local agencies. The figure does not include potential liability to third parties or public entities for damages to property, business or natural resources. Cleanup costs for most spills an owner is likely to encounter will be easy to estimate—for example, the cleanup cost of the usual ship bunkering spill will obviously be well below limits at one end of the spectrum, while a spill of Amoco Cadiz size will be in excess of all liability limits at the other end. The problem in estimating comes between these extremes, as the potential cost of cleanup approaches the applicable limits.

- Who is the owner? At first blush, this question may seem inappropriate. It does, however, come into play in an important way when the owner has major public exposure. Since entities with such exposure are usually very sensitive to public opinion, they are understandably less concerned about limits of liability than

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they are to the public’s perception of how they are responding to a spill. For these reasons, response considerations based on limitation calculations will be far different for a company in the eye of the public and sensitive to public opinion than they will be for other entities.

- Imminent changes with new legislation. The essential features of the Comprehensive Oil Spill Liability and Compensation Act have been pending before Congress for over a decade now. Contained in this legislation is an entirely new limitation-of-liability scheme that will radically alter the considerations now involved in initially determining whether or not an owner should respond to control a spill from his vessel. In addition to an increase in the limits of liability, the new legislation will allow an owner to apply the costs of his response efforts against his limits of liability, thereby enabling him to respond without concern for the ultimate costs of cleanup. Another incentive for the owner to act without delay is the other edge of the sword provided in the new legislation: If he does not cooperate with the government, his limits of liability can be lifted altogether. The result will be a much more straightforward array of considerations upon which owners must make their initial decision to react. This will really simplify considerations during the all-important first phases of an operation and put the incentives all in the right direction.

**Pre-operational considerations**

The following factors must be taken into consideration in mounting a response to a major oil spill.

- Environmental/economic sensitivities of the areas involved. A primary consideration in framing the strategy and extent of a spill response is the nature of the environmental and economic resources at risk. Obviously a larger and/or more complex response is required where more sensitive resources are liable to be impacted. The National Oceanic and Atmospheric Administration (NOAA) has developed general area environmental sensitivity for most U.S. coastal regions. Installation and local area contingency plans should also be sources of sensitivity information. The final extent of the response required will, in the main, be defined by governmental entities; however, potential third party liabilities are independent motivators for the owner.

**Selection of resources.** In selecting contractors, the considerations include:

- Capability to respond. The capability of contractors to respond to an oil spill can range from the provision of specialized services (including vacuum truck pumping, hauling, and disposal) to across-the-board control and cleanup ashore and on the water. Except for the Louisiana Offshore Oil Port (LOOP) and certain cooperatives, there are no private resources available in this country that are capable of control or cleanup of spills on the high seas. Size of the contractor also bears on capability since it indicates the extent to which a contractor can support a response effort and, in the case of existing contractor workload, his ability to respond at all.

- Cost and location. The contractor’s rates, method of applying those rates to services and proximity to the spill site all come into play in selecting contractors or, as is more often the case, in determining which of several contractors remain on the job after the initial press of response is over.

- Reputation. The contractor’s past experience and his performance in past operations are very important considerations. The demonstrated level of his performance in the past as an indicator of the manner in which he can be expected to perform is very useful in determining which, among several contractors, should be used in a response. Although all contractors need to be monitored and controlled in their activities, those of good repute impose a lighter monitoring workload than do others.

- As for equipment and materials, it is essential that they be appropriate for the particular type and location of the spill for which the response is being mounted. This requires an understanding of the capabilities of resources that can be applied to the spill and a knowledge of their availability. Local area and facility contingency plans are extremely useful in making the latter determination. It is important that an assessment of need and determination of availability be made as early as possible so that shipment of long lead time resources, not available locally, can be instituted without undue delay.

**Operational considerations**

In outlining the elements involved in response, we have the luxury of examining them without stress of emergency or need for rapid decision pressing on us. Obviously, in a response situation, the elements are treated in the order required, not necessarily in the neat, measured order set out below. The operational considerations involved in the spill response are the following:

- Prioritizing environmental and economic sensitivities. Very seldom, in the initial phases of a response to a major oil spill, are...
there enough resources to protect all that needs protecting. It is therefore important that sensitivities be properly evaluated and ranked so that the available resources can be most effectively applied. Proper evaluation is usually based on the potential long-term effects of oil spills rather than the sometimes more obvious short-term effects. For example, protection of a highly used bathing beach over an isolated salt marsh may, at first glance, seem to be of higher importance. The biologically barren beach can, however, be more readily cleaned with minimal damage to the environment. The long-term effects of destruction of the food chain combined with the difficulty, if not impossibility, of cleaning the marsh without substantial additional damage to the environment make the unobvious prioritization of the marsh more prudent.

- Deploying and activating available resources according to the prioritization. It is very important that resources ticketed for protection of the various sensitive areas be deployed as rapidly as possible and be given clear direction as to their duties and objectives. Where conditions do not permit immediate deployment, the resource should be staged and prepared in advance so that its activation can be as rapid as possible when the time for engagement comes.

- Establishing a command center and field communications. A command center to which information can be channeled and from which coordinated direction can be given is obviously essential to a response. It does not have to be elaborate and, in the early stages, can consist of any impromptu facility where communications are available so long as everyone involved knows where it is and how it can be contacted. Communications for gathering intelligence and directing operations are the heart of an effective response. In operations where conditions and priorities may change as rapidly as (and usually with) the weather, as happens in oil spill response, good communications are essential for timely response to changing conditions and prevent misdirection of effort.

- Planning for contingencies and identifying resources to cope with credible scenarios. The Murphy’s Law always useful to point out that good effect in oil spill response is: “If everything appears to be going all right, you are obviously overlooking something.” In directing a response, you must always be looking over your shoulder and keeping a “weather eye” to be prepared for the unexpected. It is essentially a game of “what if” and it is important to avoid getting too extended or vulnerable without fallback contingency plans.

- Establishing monitoring for field activities, costs and logistics. Monitoring of these elements is obviously mandatory for proper control. In major spills, it is usually necessary to have individuals delegated to cover reasonable geographical areas to provide first-hand information on what is happening, what resources are actually being engaged, and what additional input is needed. In large operations, cost-tracking and verification as well as the logistics of acquisition, transport, and distribution of resources can be full-time jobs for other individuals. The effectiveness of each of these operations is directly dependent on the workload and level of manning.

- Setting up procedures for information collection and exchange (including log keeping, news clipping, photography, daily meetings, and reporting procedures). Regular meetings, including all elements of the response, are perhaps the most effective means of information transfer available to a response. Daily evening meetings provide means by which all involved can get a picture of what is happening in each area of the response and enable the formulation and dissemination of plans for the following day. Accurate recording of events as they unfold is an important function that is often overlooked in response. It not only serves as a reporting vehicle through which information concerning events can be conveyed, it also may provide an important evidentiary document should it be needed in subsequent litigation or arbitration. Accurate records are also a tool by which lessons can be learned for future responses.

- Setting up government liaison on a continuing basis. Representatives of the governmental bodies concerned should be included in the daily meetings so that they can be apprised of progress and their input can be elicited. Past experience, particularly with the Coast Guard, dictates that a spirit of cooperation and attention to their concerns can go a long way in establishing a productive relationship and, at the end of the day, a reasonable and practical resolution to whatever problems come up.

- Establishing third party claims handling procedures and the vehicle for carrying them out. Where there is a large public impact scenario, such as with boat owners, fishermen or waterfront property owners, the rapid establishment and publication of claims handling procedures is critical if adverse public reaction and the generation of wasteful and costly class action suits are to be avoided. Even where no legal obligation is likely to exist relative to individual losses (loss of use of public beaches, sport fishing, hunting or other activities), adverse public reaction can drive the political arm to make unreasonable demands. Care should therefore be devoted to providing a vehicle to receive claims from the public, settle them where indicated and demonstrate concern or attempt to satisfy complainants where possible. To let people know that you hear them, sympathize with their problem and will do what can reasonably be done to solve it is often enough.

- Setting up wildlife receiving and treatment facilities and procedures as necessary. After numerous experiences with adverse public reaction to apparent lack of concern over the welfare of wildlife impacted by oil spills, there has been very little need to justify the importance of proper provision of reception and treatment facilities for impacted wildlife. Experience tells us that, in spite of the demonstrable cost-ineffectiveness of most wildlife care programs, wildlife treatment by competent, qualified people can generate so much good will that any reasonable cost can be more than justified.

- Identifying disposal sites and preparing proceedings for collecting, transporting and disposing of recovered oil and oily debris. Disposal of oil and oily debris is becoming an increasingly difficult and expensive aspect of spill response efforts. The laws governing disposal are primarily within the jurisdiction of the states so that the law, attitude and relationship with the state in which the spill occurs play an important part in effective resolution of the disposal problem. Some states are very cooperative and realistic in dealing with the problem while others absolutely forbid disposal or make it prohibitively expensive, requiring that debris and oil be hauled out of state for disposal.

### Owner considerations

Depending on the nature of the owner and the amount of direct involvement he chooses to have, the following considerations are included in his responsibilities:

- Setting up provisions for continuing input from the owner to the degree he desires.
- Setting up procedures for progress reports at whatever frequency the owner requires (preferably daily). These reports will include: the current situation; progress to date; projected activities and target dates; unusual events/problems; anticipated problem areas; and costs to date and estimated total costs.

### Wrap-up of operations

The wrap-up of the operation can cover an elapsed period of months or even years depending upon the governmental agencies and impacts involved. Elements of the wrap-up are:

- Disposal of oil and oily debris
- Demobilization of contractors
- Information collection, analysis and final report to the owner
- Cost analysis and final negotiations with contractors and, if applicable, governmental entities
- Environmental damage assessments and negotiations with governmental entities over damage and compensation if applicable
- Wind-up of third-party-claims settling operations

### Conclusion

To summarize the activities in responding to a major spill, it might be said that, short of being able to litigate, a manager must have the
capability of handling almost every other aspect of the response. In this respect it is also noteworthy that the technical aspects of response are usually fairly straightforward; the "people" aspect usually provides the biggest headaches and occupies the most effort and time. It takes a real balancing act to keep the governments and public satisfied without "giving away the store." Costs and liabilities must also be kept to a minimum without provoking unnecessary ill will or inducing litigation. The response manager is therefore often as much a diplomat as he is a technician.

References

2. H.R. 1632, Comprehensive Oil Spill Liability and Compensation Act, 1988