

NEW MARITIME SECURITY REGULATIONS AND THE POTENTIAL IMPACT ON POLLUTION RESPONSE AND LIABILITY IN THE U.S.

Frank J. Gonynor
Eastham, Watson, Dale & Forney, L.L.P.
808 Travis, 20th Floor
The Niels Esperson Building
Houston, Texas 77002

ABSTRACT

This article presents the various issues that have arisen in connection with the handling of marine pollution incidents in the United States and the legal and practical issues that impact them due to the recent enactment of maritime security laws and regulations.

DISCUSSION

Until September 11, 2001, the issue of maritime security was, with rare exception, completely unrelated to maritime pollution. Although certain hypothetical scenarios had been published concerning terrorist acts involving pollution, it was considered more in the realm of a remote possibility, better suited for an adventure novel, than for legal or practical consideration. But then the tragic events in New York and Washington D.C., and the huge wave of legal regulatory and practical changes which subsequently occurred as a direct result, have touched many facets of the shipping industry.

An observer of the maritime industry would have seen, during the period between March 1989 (the EXXON VALDEZ incident), and September 2001, that the "hot button" issue in the maritime industry was maritime pollution. Starting with the EXXON VALDEZ, and driven onward by later pollution incidents, both in the United States and other parts of the world, the legal, commercial, scientific, and practical considerations surrounding marine environmental matters were a prime topic of conversation and legislation.

Once the terrorist attacks of September 2001 occurred, and their implications for maritime shipping security became clear, the topic of maritime security eclipsed marine environmental concerns as the focus of the shipping world.

But as part of that new trend, the nexus between pollution incidents and maritime security was established. This paper will attempt to explore that overlap between the two subjects, and discuss the legal and practical implications presented.

I. MARINE POLLUTION INCIDENTS AS SECURITY EVENTS – HOW AND WHY?

Soon after September 2001, discussions began in the maritime community concerning what security issues could be presented by the terrorist acts. Much consideration centered around the security perimeters of vessels and their cargos, and the operation of vessels in highly populated port areas, or near important military and governmental centers. Two leading institutions in this consider-

ation were the International Maritime Organization and the United States Coast Guard. The activities of both organizations resulted in the promulgation of new statutes and regulations designed to address what were perceived as vulnerabilities to the acts of terrorists, modern day pirates, or other criminal or quasi-criminal behaviors. The International Ship and Port Facility Security Code (effective July 1, 2004) as well as the Maritime Transportation Security Act of 2002 (final regulations effective July 1, 2004) were the main by-products of this activity.

It was during the discussion and formulation of these statutory responses that the notion of a connection between maritime security and marine pollution became evident.

It was easily envisioned that a terrorist could accomplish a goal of economic disruption and widespread ecological damage, by deliberately causing a major spill of petroleum or hazardous materials in a U.S. port, harbor, river, or along the coastline. With many major U.S. population centers located directly upon, or close by, navigable waters of the United States, the use of maritime transportation as the vehicle for a terrorist scheme loomed large in the minds of leaders in the shipping world.

Another nexus was the realization by the shipping industry that the same type of planning and response skills put into place to react to major marine oil and chemical spills could easily be transferred and utilized in responding to a terrorist incident, whether the prime goal of the terrorist would be to pollute, or to cause some type or source of damage, e.g. explosion, physical damage to a structure through collision, etc. Those companies, vendors and service providers in the spill response community quickly saw an opportunity to expand their portfolio of services, to include addressing maritime security needs. A cursory perusal of the literature of these various companies shows a rapid development of the additional focus on maritime security problems.

Finally, the statutory and regulatory matrix developed by U.S. and international regulatory bodies contained numerous requirements that handily overlapped with pollution abatement regulations. For example, heightened monitoring of liquid cargo transfers for threats in security fits in perfectly with the abatement of pollution incidents involving such cargos, via better control of its movement. Thus, there were natural and man-made connections, resulting in a blending of the preparations for both sets of problems into one unitized plan.

Thus, as can be seen from the above, in several different pathways, the issues of maritime security and marine pollution became linked, and the union of the two became a fixture in the maritime industry.

II. POLLUTION RESPONSE IN MARITIME SECURITY ISSUES

A major marine pollution incident engenders a significant governmental response. Federal, state and local government agencies are involved in the pollution response, and the issues that it presents to the community, state and nation. Part of the duties of governmental involvement is to investigate why a pollution incident has occurred. This is for several reasons, including the examination of fault for liability purposes (which can result in a monetary civil penalty or fine), for the development of recommendations for safety policies and regulations to prevent such an event from happening in the future, and to determine the level and scope of damage to the various ecosystems located within the zone of impact. It is the first two issues that overlap easily with the area of maritime security. By investigating the causation of the incident, government authorities include maritime security breaches, in the form of a terrorist or quasi-criminal act, as a likely or possible cause of a marine pollution incident.

This is a significant additional factor in marine pollution cases, since that would include the involvement of law enforcement agencies that are normally not active in marine pollution investigations, and, furthermore, calls for a level of intensity of investigation not heretofore seen in environmental cases.

This escalation of governmental involvement and investigation can result in several significant effects in marine pollution response. One effect could be simply an acceleration and exaggeration of a phenomenon already seen, namely the criminal pollution investigation. This is an area that has been discussed in many publications and presentations in the marine pollution field over the past several years. A scanning of recent pollution cases reveals a significant increase in the number of criminal investigations and prosecutions as a cause of pollution incidents, but not involving breaches of maritime security. Thus, such criminal investigators are already present on the scene in major (and some times minor) pollution cases, and it is easy for them to simply segue into an examination of maritime security issues, since they are somewhat intertwined with a criminal style investigation.

The involvement of such government agencies as the Federal Bureau of Investigation, the Department of Defense, in addition to the U.S. Coast Guard, the Department of Homeland Security, and others, in connection with an investigation of a major marine pollution incident, certainly has the potential to change the character, not only of the investigation, but of the cleanup itself. First, the exchange of information between the vessels' officers and crew, and such investigation and pollution response officials, may be chilled or hampered by the presence of those officials conducting security investigations. Fear of criminal prosecution or other type of legal trouble could prove to muzzle the exchange of information that is part of understanding the character and nature of the pollutant and its quantity. Second, the control of access to the scene of the pollution event would be a necessary part of the forensic aspect of a criminal and security investigation, but could also serve to chill not only the causal investigation, but could also interfere with an unfettered cleanup operation. Overall and open access by groups of cleanup responders, at or near the source of the spill, is essential in order to conduct an effective spill cleanup. The process of clearing these people from a security perspective, before allowing them to enter the scene, could take a considerable period of time, resulting in a direct impact on the efficacy of the pollution response. As of this writing, enhanced security identification, such as the Transportation Worker's Identity Credential ("TWIC") is still in the testing stage¹, and has not been implemented on a wide ranging basis with transportation workers. Furthermore, it is not clear whether pollution cleanup contractors will be required to have such identity cards, for their employees or will have the ability to provide such identity cards on their own,

particularly due to their expense in background checks, preparation and issuance.

Indeed, will these workers be allowed to enter the pollution zone in the initial stages even with proper security checks, background checks, etc.? It may be that the government forensic experts will not want outsiders to enter the scene of the pollution, for fear of disturbing or contaminating evidence that could lead to the threshold determination of whether a terrorist act has occurred, and, furthermore, the identity of those persons who perpetrated such an act. Government officials have stated when this question is posed to them that they believe their efforts will not interfere with cleanup, and they do not want the environment to suffer as a result of delays, due to security investigations. However, is this a realistic position, when faced with a potential of a terrorist incident having occurred on a U.S. waterway? The political and media pressures to swiftly determine whether a terrorist act has occurred, particularly when there may be some potential that the pollution source was instigated by such an act, will be tremendous, and therefore the balance between environmental protection and security issues may almost immediately tilt in the balance of the latter, rather than the former.

Indeed, the media "firestorm" that would be unleashed if news organizations detect a possible terrorist act within U.S. jurisdiction, would likewise have a potential impeding effect on pollution investigation and the cleanup. Even with exclusionary zones for boats and helicopters in the immediate location of a spill, swarms of media personnel at equipment delivery sites, marshaling points, command posts, etc., and the scrutiny that they would cast over the scene, would most certainly affect the behavior of the oil spill response organizations involved, most particularly the spill management team.

If the specter of a terrorist act is raised, from the circumstances and/or by governmental investigation, another aspect to consider is how the vessel's pollution underwriters will react to such news. Some insurance policies exclude terrorist acts as covered events, and thus vessel owners may soon receive a message from their insurance company that either there is no coverage for the particular spill, or that coverage is being conditionally provided, it may later be revoked, depending on the outcome of further factual investigation. That having been said, this issue has been examined by many insurance underwriters and the consensus is that they will go forward and cover pollution incidents in the main, even if there is a potential taint of an outside terrorist instigator, with the notion being that if such later proves to be the case, the underwriters will be reimbursed by the U.S. government, from the Oil Spill Liability Trust Funds, administered by the National Pollution Funds Center, or some other funding mechanism.

However, another possibility in connection with such a spill incident would be the immediate "federalization" of the spill cleanup by the U.S. Coast Guard. Under the Oil Pollution Act of 1990, the federal government can choose to step in and take over the management of the spill response, and could indeed exercise the option in a case of this sort. The U.S. Coast Guard may choose to do so, since it would give it better control of the situs of the spill and its impact zones, direct control of the cleanup actions, and most importantly better coordination with other government agencies investigating the possible nefarious origins of the spill incident. Since this would not be a case of federalizing the spill due to inaction or other fault of the vessel owner, such an action by the U.S. Coast Guard could indeed prove to be an indirect benefit to the vessel interests and its underwriters, since at that point they would not be directly involved in the considerable efforts in a pollution cleanup. The extraordinary expenses incurred by the U.S. Coast Guard due to their federalization could be argued attributable to security concerns, rather than pollution issues, and thus should not be billed to the vessel owners. This would be particularly true in the event that the vessel owners are not able to uphold

a complete defense against such an incident or if the investigation later proves terrorist implications to be unfounded.

Another aspect of particular concern is if the vessel involved is a foreign flagged ship. Necessarily, under such a circumstance, a pollution incident may also be required to be investigated by a foreign state. However, such foreign officials' investigation may be placed on hold, due to the over-arching security concerns of U.S. authorities when an incident occurs within the U.S. jurisdiction. Thus, the usual type of investigation undertaken by foreign shipping administrations officials could be delayed, abbreviated or otherwise prohibited, due to the implications of a terrorist source of the spill incident.

The above factors could be further heightened if the spilled pollutant was not simply petroleum, but was a hazardous substance or material. It is, regrettably, completely conceivable that a terrorist would choose to try to create a spill of a material of a very nature poses public health risks, in order to satisfy their nefarious goals. The implications of a hazardous material spill are far reaching, and further complicate the spill response. In fact, the likelihood that government officials will want to closely examine an incident as a potential terrorist event would be enhanced in a spill of a hazardous material versus simply petroleum, due to the increased public health threat of the material itself. All of the other factors, such as media coverage, public concerns, political pressures, and the rest, would all be brought to a fever pitch in the case of a hazardous material being spilled in a populated area, even where there are only slight circumstances indicating a criminal or terrorist origin of such a pollutant.

III. CONCLUSIONS

It is an unfortunate fact that, in the future, a major pollution event will almost certainly have the initial element of government investigation, as far as potential terrorism or security breach. Due to the very nature of a pollution incident and the parties involved, it is natural and logical that such security issues come to the fore, and that there is the need for government and private industry to consider beforehand the implications of security issues, in marine pollution response and investigation. Vessel interests, as potential Responsible Parties, need to consider the type of pressures that will be placed on them by government officials, if factual circumstances present themselves to indicate even the slightest possibility of a terrorist act causing a pollution event. It is likely unrealistic to expect that the government, in the face of such circumstances, will allow a spill cleanup to be conducted in a normal fashion. Certainly there will then be additional consider-

ations brought into the mix, that will significantly affect pollution cleanup and the determination of a source of pollution. In addition to practical concerns, there are also potential legal implications under such circumstances. Depending on the political events and circumstances of the time, a major oil spill could indeed become the immediate focus of investigation as to possible terrorist origin, and if factual circumstances then support further investigation, this could significantly affect the investigation of the pollution source itself, as well as the cleanup. It is an issue that has been discussed between industry and government, but is serious enough and far reaching enough in its potential, to require even more detailed discussion than what has already occurred, and the development of practice and procedure agreements, to be put in place before such an incident may occur, so that both security and environmental issues can be addressed in tandem.

BIOGRAPHY

Frank J. Gonynor, a partner with the Houston firm of Eastham, Watson, Dale & Fomey, L.L.P., Frank Gonynor practices in various aspects of admiralty jurisprudence, particularly the area of marine pollution.

Since 1983, Mr. Gonynor has been involved in several hundred pollution cases during his tenure with the firm, several of which were spills of U.S. national or regional significance, including the M/T MEGA BORG in June, 1990 (5th largest oil spill in U.S. history). Most recently, he was involved in the TORM MARY spill at Port Neches, Texas, in August 2004.

REFERENCES

- The International Ship and Port Facility Security Code, SOLAS/CONF .5/33, (effective July 1, 2004), International Maritime Organization
- Maritime Transportation Security Act of 2002, 46 U.S.C. 70100, *et seq.* (final regulations in effect July 1, 2004, 33 Code of Federal Regulations, Subchapter H); *See also* USCG Navigation and Vessel Circular 9-02, Change 1, December 15, 2003
- Oil Pollution Act of 1990, 33 U.S.C. §2701, *et seq.*

ENDNOTES

- 1 The Transportation Security Administration ("TSA") announced in a press release dated August 10, 2004 that a 7-month prototype program, at a cost of \$12 million, would begin, in select ports in California, New York, New Jersey, Delaware and Florida.

