

Oil Spill Response Under the NCP and the NRF/Stafford Act - Incompatible Regimes?

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ABSTRACT 300035:

This paper examines oil pollution response during disaster situations when the Stafford Act is invoked by the President and the National Response Framework provides funding under ESF-10.

The interrelationship between the National Contingency Plan (NCP), created by various pollution statutes (Clean Water Act/CWA, Comprehensive Environmental Response, Compensation, and Liability/CERCLA, Oil Pollution Act/OPA) and the National Response Framework (NRF), created to deal with declared disasters under the Stafford Act, is becoming more fractious as time passes and the financial scope of disasters grows. The paradigm that existed when Hurricane Katrina made landfall in 2005 was not in evidence when Hurricanes Isaac and Sandy made landfall in the fall of 2012.

The NCP envisions oil and chemical spill response in the context of a single spill, ideally with a known responsible party (RP), who takes action to respond to the spill. That RP is liable for costs and damages resulting from the spill. Action commences when the spill occurs and the Federal On-Scene Coordinator (FOSC) determines that federal action is required. If the federal funds (Oil Spill Liability Trust Fund/OSLTF, CERCLA/SUPERFUND) are used, the federal government seeks cost recovery afterwards.

The NRF envisions the federal government acting like a “no-fault insurance” regime, providing federal resources/funds to states when their capabilities are overwhelmed and their citizens require immediate succor. FEMA action commences when the State requests and the President approves aid. The states agree to a cost share – not to exceed 25% of Federal funding. There is no private party liability when actions are complete.

The Homeland Security Act established the NRF, and operationally subsumes the NCP under it. However, the Homeland Security Act does not address what fund (Stafford or the pollution funds) will be used when a declared disaster occurs. Furthermore, the Stafford Act structure (State requests, Presidential approvals, Federal Emergency Management Agency Federal Coordinating Officer (FEMA FCO) appointment, area surveys, mission assignments) becomes sclerotic in a large incident when compared to the much more nimble NCP process (spill, FOSC decision, immediate funding). The effect for Coast Guard (CG) and Environmental Protection Agency (EPA) field responders is to lean forward with NCP processes to protect the public. FEMA, faced with dwindling resources, observes this tendency and declines to provide disaster funding when the other federal funds “can be used”.

The paper proposes a new paradigm for the “Makris-Suiter” Agreement of 1998 between EPA and FEMA.

The opinions stated in this paper are the author’s alone, and do not reflect the official policies of the United States Coast Guard.

INTRODUCTION:

The interrelationship between the National Contingency Plan (NCP), created by various pollution statutes (CWA, CERCLA, OPA) and the National Response Framework (NRF), created to deal with declared disasters under the Stafford Act, is becoming more fractious as time passes and the financial scope of disasters grows. The paradigm that existed when Hurricane Francis made landfall in 2004 or Hurricane Katrina made landfall in 2005 was not in evidence when Hurricanes Isaac and Sandy made landfall in the fall of 2012 or in the aftermath of the extraordinary September 2013 flooding in Colorado.

The differences can be attributed to a variety of factors, even though the underlying federal statutes have not changed. Paramount is the fiscal condition of the various participants: the respective states, FEMA and the Stafford Act Disaster Recovery Fund (DRF), and the federal spill response funds – CERCLA/SUPERFUND and OSLTF. A second factor has been policy interpretations that occurred as the Department of Homeland Security became more directly involved with disaster response in the context of the National Response Framework. Finally, the public’s expectations of state and federal responsibilities when a spill or disaster occurs continues to change, in part based on the nature of the current event but also the public’s assessment of responses to previous events.

DISCUSSION:

The fiscal factor is the easiest to explain. A decade ago most states had the fiscal resources to allow them to accept the Stafford Act cost share responsibility to gain access to the Disaster Recovery Fund for pollution response. At the same time, FEMA was more likely to recommend reduced cost share (including a full waiver) when the Presidential Disaster Declaration was issued and the DRF was activated, because the Congress was much more willing to provide supplemental appropriations to the DRF during the course of a fiscal year. The federal pollution funds CERCLA/SUPERFUND and OSLTF were under serious fiscal stress. The excise taxes that supported both funds had expired in 1995, and there was no support in the Congress to reinstate that source of funding. The Congress was funding CERCLA through annual appropriations that were not increasing, and the OSLTF was being gradually drawn down from its peak balance of \$1.5 billion reached in 2000 when the last of the Trans-Alaska Pipeline (TAPS) funds had been deposited as directed by the Oil Pollution Act of 1990. By the middle of the decade (2005) the OSLTF balance was just over \$600 million and annual OSLTF expenditures (congressional appropriations to agencies, response costs, and claims) were exceeding \$160 million.

In this fiscal environment, the prevalent solution was to use the mechanisms of the DRF – most specifically Emergency Support Function 10 (ESF-10) to deal with resulting pollution

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events, whether chemical or oil, except when a major industrial source could be identified (eg: Murphy Oil in Hurricane Katrina). Buttressing this approach was the Makris/Suiter policy letter of 2001 between EPA and FEMA. At the time, the DRF was the preferred funding option for dealing with pollution resulting from natural disasters. It allowed one fund to clean up both oil and hazardous materials, avoiding the oil exclusion clause of CERCLA and the hazmat exclusion clause of OPA. It simplified field response efforts – one contract could be issued for a set area for all pollution – so the oil and hazmat co-mingled in a marina full of beached and sunk vessels was one contract. It made the response cost documentation for those same field responders simpler – there was one project number covering everything in the same state, rather than many different project numbers based on source and material involved. Finally, it removed the issue of response cost liability from the owner of the wrecked boat or the homeowner whose flooded basement was now a hazardous waste site, through no fault of the homeowner. The Makris/Suiter letter drew a clear distinction between when the DRF would be used for pollution resulting from a disaster and excluded using the DRF for existing pollution responses under either CERCLA/SUPERFUND or the OSLTF. In other words, while the DRF would be available under standard Stafford Act processes (including state concurrence and cost share provisions), the DRF would not be used to fund pre-existing responses by EPA or the Coast Guard. A copy of the Makris-Suiter letter is attached.

A decade later, the fiscal environment had significantly changed. The states were under extreme financial pressure as their tax revenues fell during the recession. Disasters, particularly after Hurricane Katrina, were becoming ever more costly for the DRF, and the Congress was less and less willing to provide FEMA with supplemental appropriations to the DRF. While CERCLA/SUPERFUND status had not changed, the OSLTF excise tax revenue had been reinstated in 2006, and that fund was once again growing, even after the extreme expenses resulting from the Deepwater Horizon spill. Both FEMA and the states accordingly were less willing to turn to the DRF for pollution response after a disaster declaration.

Policy changes that resulted from the creation of DHS and the development of the National Response Framework also have played a role in how the Stafford Act and the DRF are used. The shift from the National Response Plan and its natural disaster focus to the National Response Framework with an “all-hazards” operational scope matters. The NRF looks to local “first responders” to start the process, which flows up through the state government. If the state cannot deal with the scope of the matter, then DHS/FEMA can become involved. In short, the NRF envisions the federal government acting like a “no-fault insurance” regime that provides federal resources/funds to states when their capabilities are overwhelmed. FEMA action commences when the State requests and the President approves aid. The state(s) agree to a cost share – not to exceed 25% of Federal funding. Support is state specific – a disaster that crosses state lines does not automatically result in multi-state activity. For example, pollution response that is authorized on the New Jersey bank of the Hudson River is not automatically extended to the New York bank of that same river, unless New York State has received a Presidential Disaster Declaration *and also* requests such assistance from FEMA. Work is organized as “Mission Assignments” (MAs) along the various Emergency Support Functions, but nearly all authorized MAs require state concurrence *BEFORE* FEMA authorizes DRF funds and work can begin. While MAs in theory can be issued very quickly, the process includes initial assessments,

discussion with the State/states involved, and then a decision on which federal support will be provided. In practice it is often days, if not longer, before FEMA issues an MA.

The National Contingency Plan for Oil and Chemical Spill Response (NCP) has a decidedly different operational concept. The NCP envisions oil and chemical spill response in the context of a single spill, ideally with a known responsible party (RP), who takes action to respond to the spill. That RP is liable for costs and damages resulting from the spill. Action commences when the spill occurs or is discovered and the Federal On-Scene Coordinator (FOSC) determines that federal action is required. Federal funds (OSLTF, CERCLA) are immediately available for emergency actions to respond and/or mitigate the effects of the spill. If the Federal funds are used, the federal government seeks cost recovery from the responsible party/parties afterwards. The emphasis is on quick, immediate action, since time is an enemy when dealing with a spreading oil slick or a leaking container of hazmat. Notification processes, funding mechanisms, contracting protocols, and inter-agency coordination are all built around the need for fast action. Initial response time standards are measured in hours, or at most one or two days. The state(s) involved participate through the various unified commands or regional response teams, but are not a fiscal contributor – in fact the states can receive funding from the national funds (OSLTF or CERCLA/SUPERFUND) if they are supporting the FOSC's efforts. The response is not limited by political jurisdiction boundaries, but rather is based on the geographical scope of the incident.

Public perceptions also have changed. The public expects a more robust response – no matter what caused the incident or who is conducting the response. The scope of response extends beyond physical restoration to include addressing economic and social impacts. At the same time, there is a much lower tolerance for ineffective efforts, let alone waste or potential fraud that may be uncovered well after the event took place. The public expectations for Deepwater Horizon, conducted under the NCP as a pollution incident, were significantly influenced by the earlier response to Hurricane Katrina, which was conducted under a NRF/Stafford Act regime. Similarly, public expectations after Hurricane Isaac (under the NRF/Stafford Act) were likewise compared to the Deepwater Horizon three years earlier. In the public mind the new reality is: “A spill is a disaster, and a disaster is a spill. Treat them all the same.”

Funding Considerations and Constraints under the NRF

The Homeland Security Act established the NRF, and operationally subsumes the NCP under it. However, the Homeland Security Act does not address what fund (Stafford or the pollution funds) will be used when a declared disaster occurs. Furthermore, the Stafford Act structure (State requests, Presidential approvals, FEMA FCO appointment, area surveys, mission assignments) becomes sclerotic in a large incident when compared to the much more nimble NCP process (spill, FOSC decision, immediate funding). The effect for CG and EPA field responders in a disaster is to lean forward with NCP processes to protect the public. FEMA and State Governors, faced with dwindling resources, observe this tendency and decline to provide disaster funding when the CG and EPA have the statutory response mission (even if it is discretionary) and it appears that other federal funds “can be used” at no cost to the State or the Disaster Response Fund.

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So, why not just use the federal pollution funds? The challenge facing this default approach is that the laws that govern OSLTF and CERCLA/SUPERFUND were designed to compel parties responsible for the spill (typically private sector business) to clean it up – the federal funds were only a “last resort”. There is removal cost liability involved for whatever is determined to be the source of the pollution. If a town is flooded and everyone ends up with heating oil and household chemicals floating in their basements, the pollution statutes would contemplate each homeowner being a “responsible party” because they own the property. The oil may not be theirs, but it’s on their property. The “logic” follows that each flooded homeowner gets a bill for the cost of removing the pollution in their basement. Such a scenario may be considered “legal”, but it hardly seems appropriate under the circumstances. Consider the public reaction after a disaster that Stafford Act funds can be used to repair the house or local school, but not remove the hazmat from the basement or the playgrounds of that same school. Remember - in the public mind the new reality is: “A spill is a disaster, and a disaster is a spill. Treat them all the same.”

A second problem is that the pollution laws are very specific in what they can be used for. OSLTF can only be used for oil spills. CERCLA can only be used for hazardous materials, pollutants, and contaminants – but NOT oil. If oil is contaminated with CERCLA substances, the mix is now a CERCLA substance, and the OSLTF cannot be used. While the OSLTF has a very healthy balance (\$3.2 billion as of FY 2014), CERCLA funds are extremely limited for both EPA and Coast Guard emergency responses. Since the vast majority of ESF-10 work after natural disasters is driven by mixed substances that by definition cannot be cleaned up by the OSLTF, the CERCLA fund problem becomes acute. EPA shares FEMA’s challenge in getting supplemental appropriations from the Congress.

The Changing Face of NRF Responses 2004/2005 Florida Hurricanes/Hurricane Katrina

When the multiple storms of 2004 and 2005 struck the Gulf Coast, FEMA, EPA, and Coast Guard resources in Florida, Alabama, Mississippi, Louisiana, and Texas were stretched to their limits. However, in every case the respective FEMA Regional Office was issuing ESF-10 mission assignments to the EPA and Coast Guard in a matter of days. Funds in the tens of millions flowed quickly through the MA approval channels of the respective states and were in the hands of response organizations nearly as fast as would have occurred under the NCP and the pollution funds. When there was a clear responsible party, the provisions of the Makris-Suiter memo came into play and the appropriate pollution fund was used instead of the DRF. One example of this occurred when the Murphy Oil Company refinery in Chalmette, LA was flooded and it’s tanks ruptured. Murphy stepped forward as the responsible party, the OSLTF was accessed to oversee their response, and no DRF funds were used. To reflect on the size of the Katrina response, over \$200 million for ESF-10 was assigned across the five states that were affected. By and large the states stepped forward to meet the cost share, although in 2004 by the fifth hurricane Florida had the cost share waived, and in 2005-6 for Hurricane Katrina Louisiana likewise had its cost share waived.

2012 Hurricanes Isaac and Sandy

That situation was not replicated in 2012. When Hurricane Isaac struck Louisiana, no DRF funds for ESF-10 response were issued at the outset except to fund personnel to man the FEMA Regional Resource Coordination Center (RRCC) in Denton, Texas. All pollution response in southern Louisiana was done under the Federal pollution funds. The Coast Guard FOSC used OSLTF and CERCLA funds for the first 8 weeks of the response. In fact, because CERCLA emergency response funds were limited to \$250K per incident, the FOSC hazmat response in New Orleans and St. Bernard Parishes was suspended after two weeks of work, with significant amounts of hazardous materials remaining for the local authorities to deal with. After a hiatus of 6 weeks, the State of Louisiana did agree to a \$1.5 million Mission Assignment under ESF-10 so that these drums and containers could be sampled, collected, and disposed of.

The situation later that fall following Hurricane Sandy in New York and New Jersey was similar. While each state received a Disaster Declaration and only one FEMA region was involved, one state had their cost share waived, while the other did not. Pollution was immediately evident, but ESF-10 mission assignments in one state were issued very quickly, while the process in the other state took days. Some responses started under the pollution funds because of the urgency of the situation, but transitioned to the DRF MAs because the MAs had their period of performance adjusted to when the pollution was discovered, not when the MA was signed. The Coast Guard and EPA were constantly trying to ensure prompt, effective response wherever the pollution was found, but the NRF system did not facilitate the same alacrity.

In contrast, the 2012 NCP Response to the major train derailment at Paulsboro, New Jersey in November, 2012 was a model of speed. Coast Guard pollution response resources that had just been released from Sandy deployed to this incident. A major release of hazardous chemicals was averted, and the entire response was over in less than 2 weeks, at a cost to the government of \$120K. It was the same mission, same resources, same team, but a different statutory paradigm.

CONCLUSION AND RECOMMENDATIONS:

The challenge is framed by the public perception: “A spill is a disaster, and a disaster is a spill. Treat them all the same”. The NRF is concerned, and rightly so, with the State-Federal relationship/partnership when a disaster occurs and the costs associated with both sides of that partnership. The NCP is concerned, and rightly so, with a timely and effective response that through speedy processes limits the extent of the pollution (potentially limiting total costs) and thereby protects the general public and the environment. Both have a place, but their roles must be balanced, or they will result in incompatible regimes and ineffective outcomes.

FEMA Region 4 employed provisions in the Stafford Act during the Florida hurricanes of 2004 and 2005 that allowed for DRF MAs to be issued during the first 72 hours after a Disaster Declaration without a state cost share. These MAs were not limited to the “surge account” that FEMA has available before a Disaster Declaration is requested by the State Governor or issued by the President. These MAs allowed for the quick deployment of Coast Guard and EPA

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resources to perform initial assessments, mobilize contractor resources, and begin response to the most serious hazards encountered.

One administrative option would be for FEMA, EPA, and the Coast Guard to change their protocol for pollution response under the NRF and Stafford Act. It strikes a balance between the speedy response necessary and the limited funds available through the NRF structures.

- 1) Technical Assistance and Disaster Assistance MAs with NO state match for the first 72 hours, with a \$1 million limit per state. This will allow the NCP type response to start, and deal with the most serious hazards found.
- 2) If additional activity must be performed, all parties (FEMA, State, ESF-10 Agencies) follow the standard Stafford Act Mission Assignment process including applying the appropriate state match.

This approach would be formalized by an amendment to the Makris-Suiter memo, signed by FEMA, EPA, and the Coast Guard.

Legislative solutions are also possible for FEMA, EPA and the USCG, but changes to laws are not undertaken lightly, and the results tend to be less flexible. One approach would limit use of the pollution trust funds (OSLTF/CERCLA) during Presidentially Declared Emergencies and Disasters when the Stafford Act DRF had been authorized for a given area. This approach would remove any question about whether the two ESF-10 Principal Agencies had the resources available to carry out their “statutory” responsibilities. Another legislative approach could allow FEMA to pursue cost recovery against responsible parties it identified as the sources of the pollution if FEMA used the DRF for pollution response during disasters. In the author’s opinion neither of these legislative solutions have a realistic probability of passage in the present political atmosphere.

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ENCLOSURE: Makris – Suiter Letter of 2001

Policy Guidance on ESF #10 Mission Assignments

MEMORANDUM FOR:

FEMA Acting Regional Directors, Federal Coordinating
Officers, EPA Removal Managers, EPA On-Scene
Coordinators

FROM:

Lacy E. Suiter Executive Associate Director Response and
Recovery Directorate Federal Emergency Management
Agency
Jim Makris Director Chemical Emergency Preparedness
& Prevention Office Environmental Protection Agency

SUBJECT:

Policy Guidance on ESF #10 Mission Assignments

In September 1998, FEMA and EPA agreed that it was FEMA's intent to utilize Stafford Act funds to reimburse EPA for specific emergency response activities related to hazardous materials (hazardous substances, pollutants, contaminants, and oil) under ESF #10, when there is an Emergency or Major Disaster Declaration. In September 1999, interim guidance for Hurricane Floyd was issued which further clarified the 1998 document.

The attached Policy Guidance, for use on all ESF #10 Mission Assignments, is intended to provide further clarification for both the 1998 Policy and the FRP ESF #10 Annex. **Please ensure that all staff are informed of this Policy Guidance.** If you have any questions, please call Chuck Stuart, FEMA at (202) 646-3691 or Lea Anne Thorne, EPA at (202) 564-7387. Attachment

Guidance for Implementing Mission Assignments to ESF #10

FEMA and EPA reached an agreement in September 1998 which stated that it was FEMA's intent to utilize Stafford Act funds to reimburse EPA for specific emergency response activities related to hazardous materials (hazardous substances, pollutants, contaminants, and oil) under ESF #10, when there is an Emergency or Major Disaster Declaration. In September 1999, interim guidance for Hurricane Floyd was issued which further clarified the 1998 document.

This guidance, for use on all ESF #10 Mission Assignments, is intended to provide further clarification for both the 1998 Policy and the FRP ESF #10 Annex. There will inevitably be activities that occur following a natural disaster or terrorism attack that are not covered in this guidance which will require close coordination between the FCO, ESF #10 and State. Additionally, hazardous material releases and/or problems may not be identified for sometime after the occurrence of the disaster (e.g., the day the earthquake or hurricane hits). Decision-makers must be aware that such typical occurrences are associated with the disaster and that the determination of the threat posed by such releases is made at the time the release or incident is discovered (e.g., drums containing hazardous materials, discovered after flood waters recede, may pose a threat to public health that warrants response, even if the typical emergency phase of operations has ended).

Activities that EPA will fund:

EPA will use CERCLA funds to pay for emergency response activities related to all pre-existing Superfund sites, that is, sites that have ongoing CERCLA response actions or are currently listed on the National Priorities List (NPL.)

EPA will use Oil Spill Liability Trust Fund funds to pay for all response activities related to pre-existing Oil Pollution Act removal actions.

Activities that FEMA will fund through Stafford Act:

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Clearly, these activities must be specifically requested by the State and be beyond the State's capability for a Mission Assignment and associated funding to be issued. Decisions will be made in consultation with the ESF #10 representative. Activities listed below are typical response actions that occur following a natural disaster.

Staffing of pre-deployment teams (i.e., ROC, EST);

Retrieving and disposing of orphan tanks and drums;

Household hazardous waste program expenditures;

Technical assistance to states;

Pumping of water contaminated with hazardous materials or oil from basements when the problem is a widespread threat to public health;

Initial assessments to determine if an immediate health and safety threat exists;

Control and stabilization of releases of hazardous materials or oil to deal with immediate threats to public health and safety;

Clean-up and disposal of hazardous materials that is necessary to mitigate immediate threats to public health and safety;

Monitoring of immediate health and safety threats resulting from debris removal operations. [The term "immediate" applies to a threat whenever it may occur which may not necessarily be right after the disaster event.]

Activities that FEMA may fund through Stafford Act:

These are activities, which may occur following a natural disaster. Consultation among the FCO, ESF #10 representative, and the State is critical before a determination is made on funding.

Again, these activities must be specifically requested by the State and be beyond the State's capability before a Mission Assignment and associated funding will be issued.

Clean-up or removal of hazardous materials or oil contamination in buildings or facilities otherwise eligible for FEMA assistance (ex., public buildings.) An example of a situation where this may occur and should be funded would be decontamination of a subway system following a terrorism incident.

Activities that FEMA will not fund through Stafford Act:

Testing/assessments of soil, air and waterways for mold and contaminants to determine long term clean-up requirements;

Long term site remediation or restoration;

Permanent storage of hazardous materials;

Cleaning/replacement of equipment that is damaged/contaminated during long term clean-up activities;

State/local costs for long-term clean-up measures.

Signed May 18, 2001

Lacy E. Suiter Date
Executive Associate Director Response
and Recovery Directorate Federal
Emergency Management Agency

Signed May 21, 2001

Jim Makris Date
Director Chemical Emergency
Preparedness & Prevention Office
United States Environmental Protection
Agency