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The SONS Money Tale: From Exxon Valdez to Deepwater Horizon to ??

Primary Author: Allen Thuring, BA, MBA – SONS Senior Case Officer and Senior Financial Analyst, Financial Management Division, USCG National Pollution Funds Center, Washington, DC

Co-Author: Jonathan A. Abramson – Senior SONS Case Officer/Senior Financial Analyst, USCG National Pollution Funds Center, Washington, DC

Synopsis

SONS (Spill of National Significance) have been extensively studied from multiple perspectives. In the realm of the Incident Command Structure (ICS) there have been numerous Operations, Planning, and Logistics examinations, reviews, and recommendations. The fourth ICS node – Finance – has seen little such scrutiny or review. This paper, written by two individuals at the heart of each respective response, will address that gap and identify the problems that arose, were solved, or remain problematic for the next SONS that occurs in the United States.

Each spill posed different problems, driven by statute, prior experience, fiscal systems, and the expectations of outside stakeholders. The paper will examine the following dimensions.

1) The available fund balance at the start of the response, and how the fund could be replenished under existing statute.
2) The financial role taken by the spillers/responsible parties.
3) The mechanisms to provide response funding to the FOSC during the incident.
4) Funding National Contingency Plan participants (Federal, State, Local) supporting the FOSC response.
5) Funding Trustee led natural resource damage assessments and damage restoration plans during and after the response concluded.
6) Payment of claims to injured third parties.

7) Billing the spillers/responsible parties for the incident costs and the disposition of the resulting payments.

The paper will conclude with an examination of the financial issues that remain and will probably arise for the next SONS. It will summarize possible solutions, reflecting when appropriate a number of legislative changes that have been proposed by various parties.

Introduction and Synopsis

This paper examines how the Finance function in the Incident Command System met the challenges posed by the only two declared Spills of National Significance (SONS) in the United States: the T/V Exxon Valdez grounding in 1989 (FPN 179007), and the Deepwater Horizon explosion, fire, and resulting oil spill (FPN N10036) in 2010. Both spills were extraordinary in nature. Yet, each spill posed different problems, driven by statute, prior experience, fiscal systems, and the expectations of outside stakeholders. It concludes with an examination of the financial issues that remain and will probably arise for the next SONS. It will summarize possible solutions, reflecting when appropriate a number of legislative changes that have been proposed by various parties.

Paper Segments

1) The available fund balance at the start of the response, and how the fund was replenished under existing statutes.
2) The financial role taken by the spillers/responsible parties.
3) The mechanisms to provide response funding to the FOSC during the incident.
4) Funding National Contingency Plan participants (Federal, State, Local) supporting the FOSC response.
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Fund Balances and Replenishment Regime

Exxon Valdez

In March 1989 when the T/V Exxon Valdez grounded on Bligh Reef in Prince William Sound, Alaska the federal financing mechanism was the Pollution Fund established by the by Clean Water Act (CWA) of 1972 (33 USC 1321 et seq.). This was a revolving fund, managed by the Coast Guard that depended on CWA fines and penalties, cost recoveries from spillers, and Congressional Appropriations when necessary. The fund was known by the section of the CWA that set it up: “311(k)”,

On the day of the spill, there was a total of $6.7M in the 311(k) Fund for the entire United States. The spill occurred on Good Friday. By Easter Sunday over $4M had already been assigned to this one spill. The Coast Guard Program Manager, Chief, Marine Environmental Response Division (G-MER), contacted the Responsible Party, Exxon Shipping USA, and put in place a rapid billing process to ensure the 311(k) Fund would not violate the Anti-Deficiency Act by disbursing more funds than were available at any one time. Since the fund was “Revolving”, any deposits into the Fund became immediately available, and did not require any Congressional action before they could be obligated.

The billing process involved daily updates from the Finance Cell in Valdez Alaska to the G-MER Funds Management Staff in Washington DC. Every Friday the G-MER Funds Management Staff prepared a draft Invoice which the CG Finance and Accounting Office (C-

CAC) formally submitted to Exxon Shipping USA in New York City by FAX. Exxon Shipping USA would then approve the invoice for payment over the weekend, and deposit the payment to the Department of Treasury on Monday morning using the Federal Reserve Bank of New York. Upon receipt of the payment the Department of Treasury would notify the Coast Guard. That notification then triggered the G-MER Funds Management Staff in Washington DC to allocate those funds back to the CG FOSC in Valdez, AK for the coming week's activities. By July 1989 the billing frequency slowed to a monthly process, and remained so until the spill response ended with a settlement between the US Department of Justice and Exxon Corporation in 1993. Ultimately, over $120M in Coast Guard FOSC approved costs were fully reimbursed using this process. At no time did the 311(k) Fund balance drop below $1.5M, even though there were dozens of large spills before the OSLTF was activated by the passage of the Oil Pollution Act (OPA) in August, 1990.

Deepwater Horizon

In April 2010, the OSLTF Fund balance was approximately $1.5B, but there was a balance of just $50.6 million in the Emergency Fund – monies OPA provides annually which are explicitly for response operations, and which are automatically available without going to Congress through the budget process. During May 2010, as the Emergency Fund balance started to diminish at a rate of $10M each week, there were several events that kept that part of the Fund viable for the growing response. The Office of Management and Budget (OMB) released $26M that OMB had held back a decade earlier due to budgetary considerations. The Coast Guard also activated in late May 2010 a special provision in OPA that allowed an additional $100M advance to the Emergency Fund to continue response operations. This provision had been added in 2006. While these two actions kept the response funds flowing, they resulted in draws against the main OSLTF Fund balance of $1.5B. So, it was equally important when BP agreed to pay initial bills from the Coast Guard promptly back into the main OSLTF Fund. USCG bills of $1.8M, $69M, 51M, $99M, and $167M were paid quickly by BP, allowing the main OSLTF Fund to recover from the advances to the Emergency Fund. Finally, the NPFC approached Congress for emergency authorization to draw more than the single $100M advance per year from the main OSLTF Fund into the Emergency Fund. The Congress responded quickly and amended OPA to authorize, for just the Deepwater Horizon Spill Response, multiple advances of $100M as needed for the duration of the spill response.

Financial Role of the Responsible Parties

Exxon Valdez

From the start of the spill Exxon Shipping USA, and later Exxon Corporation, assumed financial responsibility for the spill response. They marshalled thousands of personnel to work all over Prince William Sound, organized berthing and feeding for that workforce, and set up transportation to the work sites from the main base camp at Valdez, AK. Exxon and the Coast Guard formed a “unified command” before that term became widely known and ensured that all spill response decisions were collaborative.

Exxon handled all commercial contracting for the spill. If a service could be provided by either private parties or a government entity, the preferred route was to treat it as a commercial service between Exxon and the service provider.

For governmental costs, from a financial standpoint, the Coast Guard funded all the federal agencies responding using the 311(k) Fund, whose costs were reimbursed by Exxon using the process noted previously. This was because under then current fiscal rules the other federal agencies could keep the 311(k) funds to offset their expenses, whereas if Exxon had paid them directly those monies would have been characterized as “miscellaneous receipts” and been deposited directly to the US Treasury. That was particularly important for the DOD transportation costs incurred by TRANSCOM and by the US Navy.

At the outset of the spill there was serious concern about Exxon’s role after government costs had exceeded the CWA limit of liability for the vessel. Under CWA, that limit was just over $14M. In May, 1989 311(k) costs passed that milestone, but Exxon continued to reimburse the Coast Guard without any issues raised. Ultimately CWA response costs exceeded $120M and all were paid.

Deepwater Horizon

During a SONS spill cooperation from a responsible party’s financial section is imperative. In this case, without BP’s financial cooperation, the Fund would have been bankrupted within the first three months. BP was more than responsible (financially speaking) by providing each of the impacted States $25M to assist in the response, hiring any and all response resources that they could, and paying the Government bills in a timely manner.

FOSC Response Funding Mechanisms

Exxon Valdez

FOSC funding for the first year could best be termed "hand to mouth". Funds had to be in place, in advance, before any obligation could be made or contract issued. There was no working fund or similar source for advances before an Exxon payment was received. The FOSC was the funding manager, as specified in the CWA and the National Contingency Plan.

Every Monday, after the Exxon deposit into the 311(k) fund, the G-MER Funds Management Staff in Washington DC would issue a Funds Transfer Allocation (FTA) to the Commander, Coast Guard District 17 (CCGD17) in Juneau and send those funds back to the CG FOSC in Valdez, AK for the coming week's activities. CCGD17 did not have a formal Comptroller organization. Those District entities had all been consolidated into the Maintenance and Logistics Commands (MLC) in Alameda, CA, Governor's Island NYC, and the CG Finance Center in Chesapeake VA by the Gilbert I support consolidation efforts/reorganization in 1986. MLC Pacific Comptroller, CAPT Ralph Anderson, USCG assumed major responsibilities for all the inter-agency agreements, funding obligations, and subsequent reimbursements to the Federal agencies supporting the FOSC. Ultimately 28 distinct federal agencies supported the FOSC during the spill response. For them, they could use the reimbursable funds mechanism only after they had incurred the cost, submitted their bills to the Coast Guard, and the Coast Guard was paid by Exxon. At that point they received their payment for the support they had provided. MLCPAC also coordinated the accounting for funds the FOSC assigned to CG units supporting him and paid the invoices as they came due. This included Travel Orders and Reservist Orders for several thousand CG personnel, as well as untold thousands of miscellaneous obligations over the four year period of the spill response.

Deepwater Horizon

The main mechanisms to assist the Coast Guard in responding to any spill are PRFAs, MIPRs, and direct contracts. Each of these were extensively used during the Deepwater Horizon response. Military Interagency Procurement Requests (MIPRs) are a department of Defense financial mechanism used to obligate and pay for services between Government agencies. More than forty different military agencies assisted the response by way of the MIPR. Pollution Removal Funding Authorizations (PRFAs) are an ad hoc financial obligation used to quickly bring in resources from Federal, State, or local governmental agencies. More than 100 different governmental agencies were issued PRFAs during the response. Thousands of direct contracts were also issued by the USCG to bring in services and supplies for the response

Funding NCP Participants (Federal, State, Local) Supporting the FOSC

Exxon Valdez

At the outset of the spill there were no formal financial mechanisms in place between the Coast Guard and other NCP Participants. There were Federal Regulations at 33 CFR 153 that laid out broad authority for other agencies supporting the Coast Guard to request funds for work performed on a spill response. Using that authority, the Coast Guard entered into MIPRs with various Defense Department entities for transportation and vessel support in Alaska. For other civilian agencies, broad Inter-Agency Agreements (IAAs) served the same purpose.

However, the broad IAAs over time became difficult to manage, as Agencies such as the Park Service (DOI) and NOAA would often mix their response costs (allowable under 311(k)) with Trustee functions (not allowable under 311(k)). To solve this issue, the follow-on FOSC, RADM Dave Ciancaglini (USCG), instituted highly focused IAAs that not only provided funding but limited that funding to specific response tasks. Those IAAs were the precursors to the PRFAs that came into being under OPA in the1992-93 time frame.

Deepwater Horizon

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Funding Trustee led Natural Resource Damage Activities

Exxon Valdez

The Clean Water Act had no provision for funding Trustee led Natural Resource Damages. However, in May 1989, recognizing the valid role of the four Trustees (NOAA, DOI, USDA, and the State of Alaska) Exxon Corporation presented a check for $15M to the President, with a commitment of an additional $15M for Natural Resource Damage Assessment. At the direction of the White House and the Office of Management and Budget. Those funds were deposited in the 311(k) Fund in a sub-account explicitly for NRD purposes. The Coast Guard managed the funds. The initial $15M was disbursed only when all four Trustees agreed on a plan of action and the final $15M was provided as part of the 1993 comprehensive settlement agreement negotiated by the Department of Justice.

Deepwater Horizon

NRD Trustees must first go to the responsible party for their NRD requests. During 2010 BP agreed to initial NRD activities and paid for same. Later, when certain disagreements over NRD occurred, the Trustees came to the Fund for NRD claims. Many of those claims were paid by the Fund. Later on BP and the Department of Justice made reconciliation of all costs including NRD.

Paying Claims

Exxon Valdez

The Clean Water Act had no provision for paying claims to parties damaged by a spill. All claims fell under the Federal Tort Claims Act and were litigated in the Federal Courts.

Deepwater Horizon

BP set up a robust claims center and handled thousands of claims in a fair fashion. So much so that all third party claims that were thereafter submitted to the NPFC (non-NRD claims) were denied as uncompensable.

Billing the Spiller and Resulting Fund Disposition

Exxon Valdez

The billing process involved daily updates from the CG FOSC Finance Cell in Valdez Alaska to the G-MER Funds Management Staff in Washington DC. Every Friday the G-MER Funds Management Staff prepared a draft Invoice which the CG Finance and Accounting Office (C-CAC) formally submitted to Exxon Shipping USA in New York City by FAX. Exxon Shipping USA would then approve the invoice for payment over the weekend, and deposit the payment to the Department of Treasury on Monday morning using the Federal Reserve Bank of New York. Upon receipt of the payment the Department of Treasury would notify the Coast Guard. That notification then triggered the G-MER Funds Management Staff in Washington DC to allocate those funds back to the CG FOSC in Valdez, AK for the coming week's activities. By July 1989 the billing frequency slowed to a monthly process, and remained so until the spill response ended with a settlement between the US Department of Justice and Exxon Corporation in 1993. Ultimately, over $120M in Coast Guard FOSC approved costs were fully reimbursed using this process.

Deepwater Horizon

Billing of the government's costs to an RP is often delayed because of lagging paperwork. In this case, it was one month after the incident began before the NPFC issued its first bill to BP. While the bill only amounted to $1.8M, it set the way for a process that later allowed for all costs to be processed, billed and (by the RP) reimbursed in a timely manner. A total of $1.1B was ultimately billed to BP, and all was paid back to the OSLTF.

Fund Challenges for the Next SONS

There are three major funding challenges for the next SONS. They involve available Emergency Fund monies to perform the response, processing Claims presented to the OSLTF, and the overall limit in OPA that no more than $1B can be expended out of the Fund for any one incident. Even with a financially viable Responsible Party they will exist. In the event the Responsible Party does not have the deep assets of an Exxon or BP, the challenges will be even greater.

Available Fund Balance for Response

The Emergency Fund, though robust, is a limited fund. At this writing it has a balance of $171M. Provisions in OPA (33 USC 2752(b) allow it to borrow an additional $100M in any given fiscal year. After that, the Congress must provide and the President must sign Emergency Legislation allowing additional funds, which was done exclusively for the Deepwater Horizon response. Ultimately that response needed over $700M from the OSLTF.

Possible Solution: A legislative amendment that allows borrowing in $100M tranches for a Declared SONS.

Processing Claims presented to the OSLTF

OPA provides extremely flexible funding for Claims that are presented to the OSLTF and paid. However, the provision at (33 USC 2752(b) does not extend to the costs of accepting, reviewing, and adjudicating those claims, nor hiring private sector claims managers to perform those functions. For the Deepwater Horizon spill, those costs to the Coast Guard came to over $5M, entirely funded by annual Coast Guard Operating Appropriations that were diverted from other Coast Guard needs.

Possible Solution: A legislative amendment that expands the definition of Claims Costs to include the costs of processing claims that arise from a Declared SONS.

The Overall $1B Limit in OPA for any one Incident

This provision has not been re-examined since OPA was enacted in 1990. It was predicated on the authorized size of the Fund ($1B). In 2008 that limit was removed by the Congress. The OSLTF currently has a balance of $6.6B. In light of thirty years of rising costs, the effects of inflation alone suggest an increase. OPA provided for CPI amendments to various liability limits, but not for this absolute limit. The Deepwater Horizon incident came very close to exceeding this value. In a future spill with the OSLTF covering all costs, this limit could very well limit the government response while there is still large amounts remaining in the OSLTF.

Possible Solution: A legislative amendment that raises the limit to $2B. with an automatic increase to $3B in the event of a Declared SONS.

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Funds Center, U.S. Coast Guard, Department of Homeland Security