

## TITLE

Spills of National Significance (SONS): De-conflicting HSPD-5 with the NCP

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## ABSTRACT

During the evening of 20 April, 2010 U.S. Coast Guard District Eight Command Center watch standers received a report of an explosion aboard the *Deepwater Horizon (DWH)*, an oil rig working on the Macondo oil well approximately 42 miles Southeast of Venice, LA (OSC Report, 2011). The explosion on board the DWH and resulting fires eventually destroyed the oil rig and caused it to sink into the Gulf of Mexico. Eleven crewmembers lost their lives in the tragic events that unfolded that night, and one of the nation's largest environmental disasters would soon follow. Estimates of the oil discharged from the Macondo oil well were between 12,000 and 25,000 barrels per day, and the response involved approximately 47,000 oil spill response personnel, 6,870 vessels, approximately 4.12 million feet of boom, and 17,500 National Guard personnel, five states (OSC Report, 2011). The massive oil spill lasted 87 days and estimates suggest that more than 200 million gallons of oil was discharged into the Gulf of Mexico, which stands as the largest oil spill event in U.S. history. From these massive response operations came important lessons learned for SONS event planning, preparedness, and response, as it became apparent during DWH response operations that oil spill response governance and doctrine was not well understood across the whole-of-government. This issue was well documented in the National Incident Commander's report and several recommendations were identified to address this issue. This paper will explore the steps taken within the U.S. Coast Guard's (USCG) SONS Exercise and Training Program to promote a better understanding of oil spill response governance and doctrine among Cabinet-level senior leadership and the interagency representatives that will ultimately be involved when the next SONS event happens.

## BACKGROUND:

A complex series of frameworks, laws, regulations, and directives govern how the U.S. Government responds to emergencies, disasters, and domestic incidents, including a SONS. A SONS is defined as an oil spill that, "due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge" (40 Code of Federal Regulations (CFR) § 300.5). The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) states that a discharge may be classified as a SONS by the Administrator of the Environmental Protection Agency (EPA)

for discharges in the inland zone and the Commandant of the U.S. Coast Guard (USCG) for discharges in the coastal zone (40 CFR § 300.323). Furthermore, the EPA Administrator may name a Senior Agency Official (SAO) for discharges occurring in the inland zone, while the USCG Commandant, in coordination with the Secretary of Homeland Security, may name a National Incident Commander (NIC) for spills in the coastal zone. The SAO assists the Federal On-Scene Coordinator (FOSC) in communicating with affected parties and the public and coordinating federal, state, local, and international resources at the national level for inland spills, while the NIC performs these same functions for coast spills. In 2019 the USCG in coordination with interagency members of the SONS Executive Steering Committee created the SONS Executive Steering Guide (SERG) to help explain how the following laws have shaped FOSC roles, responsibilities, and authorities concerning oil spill response operations, which would ultimately come into play for a SONS event:

- **National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (first in 1968, latest amendment in 1994)** - The purpose is to provide the organizational structure and procedures in preparing for and responding to discharges of oil and releases of hazardous substances. It establishes Federal On-Scene Coordinators from the Environmental Protection Agency (EPA) for the inland zone and from the Coast Guard for the coastal zone. It provides for efficient, coordinated, and effective response to a discharge or release along with national procedures for the use of dispersants and other chemicals. Codified in regulation, the NCP requires the Federal Government to direct all public and private response efforts for certain types of spills; charges Area Committees with developing detailed, location-specific Area Contingency Plans; and requires

owners/operators of vessels and certain facilities to prepare their own Vessel Response Plans or Facility Response Plans. (SERG, 2019)

- **Federal Water Pollution Control Act (FWPCA) (1972), or, the Clean Water Act (CWA) as amended in 1977 (P.L. 95-217)** - The goal of this law was to restore and maintain the chemical, physical, and biological integrity of the Nations' waters, with a goal to, among other things, eliminate all discharges of pollutants into federally protected waters by the year 1985. This law prohibits the discharge of oil and hazardous substances in harmful quantities into the navigable waterways of the United States, contiguous shorelines, or the contiguous zone, or which may affect natural resources of the United States; provides federal authority to respond to oil discharges or substantial threats of discharge on the navigable waters; provides for the establishment of a National Response System and preparation of the NCP to guide private parties and federal authorities in removing a discharge; and, authorizes the withholding of a clearance or permit if any owner, operator, or person in charge of a vessel is liable or believed to be liable for a civil penalty under this law. (SERG, 2019)
- **Clean Water Act (1977)** - Passed to amend the FWPCA. Establishes regulations administered by the EPA and the states, the goal of which is to eliminate the pollution of the waters of the United States. Requires the Federal Government to direct all public and private responses for certain spill types; makes it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit is issued; defines harmful and reportable quantities; created the 311(k) Fund (the first Federal Government pollution response and cleanup fund); and created the National Response Center (NRC). (SERG, 2019)

- **Oil Pollution Act (OPA) (1990)** - Establishes provisions that expanded the Federal Government's ability to prevent and respond to oil spills. This Act: establishes the Oil Spill Liability Trust Fund, financed by a tax on oil; increases penalties, potential liabilities for costs, and damages of the Responsible Party; requires Response Plans from oil terminals and tank vessels; requires double hulls for tank vessels by 2015; and tasks Area Committees consisting of federal, state, and local officials with developing location specific Area Contingency Plans. (SERG, 2019)
- **Executive Order (EO) 12777 (1991)** - The President delegated, without abdication, the implementation of § 311(c) and § 311(e) of the Clean Water Act and the Oil Pollution Act of 1990, to the Administrator of the EPA (for the inland zone), and the Secretary of the Department in which the Coast Guard is operating (in the coastal zone). (SERG, 2019)

Under these legal frameworks, FOSCs from the EPA (for the inland zone) and the Coast Guard (for the coastal zone) have the authority to direct all aspects of a response to an oil discharge, including notification and monitoring of the responsible party's requirements to pay for all actions needed to remove the oil (Allen, 2010). The NCP calls for close coordination of federal, state, local, and tribal governments and responsible parties, as part of the National Response System, during the planning for and response to oil spills. "During spill incidents, responders are predominately drawn from federal, state, and local environmental management communities; the responsible party's contracted OSROs; and responsible party personnel. Other state and local emergency response personnel may be asked to provide support as needed by the FOSC" (Allen, 2010). Additionally, the NCP allows for the Coast Guard Commandant or the EPA Administrator to classify a spill as a SONS (in their respective zones) (40 CFR § 300.323(a)).

The involvement of and close coordination between state, local, and tribal governments is also a critical component during other types of domestic incidents and disaster responses such as hurricanes, flooding, severe storms, and tornadoes. However, the laws and national policy for these situations differ from the concepts found in the NCP on several fronts. Although the first presidential disaster declaration occurred in 1953, many of these laws and policies were revised or newly developed during the past two decades. A summary of the most pertinent policies, presidential directives, and laws related to domestic emergencies and natural disasters were also explained in the SERG were explained in this guidance document as follows:

- **The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (1988)** - Authorizes the programs and processes by which the Federal Government provides major disaster and emergency assistance to the state, territorial, tribal, and local governments, eligible private nonprofit organizations, and individuals and households affected by a major disaster or emergency. The Stafford Act gives the President the authority to declare that an emergency or a major disaster exists, provided that the governor of the affected state(s) has requested a declaration. Title III authorizes the President to direct any federal agency, with or without reimbursement, to use its available personnel, equipment, supplies, facilities, and other resources in support of state and local disaster assistance efforts. Additionally, the Act originally authorized the Administrator of the Federal Emergency Management Agency (FEMA) to prepare a Federal Response Plan, which was replaced by the National Response Framework (SERG, 2019).
- **Homeland Security Act (2002)** - Signed into law following the September 11th terrorist attacks, this Act established the U.S. Department of Homeland Security (DHS), created the new cabinet-level position of Secretary of Homeland Security, and set forth the primary

mission of the Department. DHS assumed many services and offices previously conducted independently or in other departments such as the Customs Service, the Coast Guard, the Secret Service, and FEMA. This Act also requires the FEMA Administrator to be prepared to carry out “emergency operations to save lives and property through positioning emergency equipment, personnel and supplies, through evacuating potential victims, through providing food, water, shelter, and medical care to those in need, and through restoring critical public services.” Additionally, it charges the FEMA Administrator with assisting the President in carrying out the Stafford Act (SERG, 2019).

- **Homeland Security Presidential Directive (HSPD)-5 – Management of Domestic Incidents (2003)** - The purpose of this Directive is to enhance the ability of the United States to execute a more coordinated federal response to domestic incidents by establishing a national incident management system. It designates the DHS Secretary as “the Principal Federal Official for domestic incident management” and authorizes the Secretary to coordinate the Federal Government’s resources utilized in response or recovery from terrorist attacks, major disasters, or other emergencies under applicable conditions (SERG, 2019).
- **National Response Framework (NRF) (2008)** - Describes the capabilities needed to save lives, protect property and the environment, and meet basic human needs during “all hazards” incidents. All hazards incidents include natural disasters, terrorist attacks, public health emergencies, and oil/chemical incidents. The NRF is considered always active and provides structures, roles, and responsibilities that can be partially or fully implemented in the context of a threat or a hazard, allowing for a scaled response. It recognizes that different types of emergency responses may be led by various federal agencies under

assorted federal authorities and regulations. The NRF is based on the use of the National Incident Management System (NIMS) and includes Emergency Support Function (ESF) annexes, as well as support annexes that further describe doctrine for building and delivering core capabilities to the community (SERG, 2019).

Unlike the NCP, the above mentioned policies support a system in which the state and local governments direct the emergency response and the Federal Government provides a supporting role. With the increase of natural disasters in recent years, the whole of government, public, and political leaders have become more familiar with the NRF system and approach to handling incidents. However, many of these same entities are not as familiar with the unified “top down” leadership approach to managing oil spill and hazardous substance incidents as mandated in the NCP, which remain in effect and are referenced in the domestic emergency response laws and policies listed in the SERG.

These differences between the NCP and NRF did not seem to be commonly known and understood during the DWH incident response and contributed greatly to the confusion among leaders within the federal, state, and local governments during the only designated SONS incident in our nations history (SERG, 2019). The Coast Guard assumed the role as the lead federal official for oil removal and response operations in the coastal zone in accordance with the NCP. The DHS Secretary declared the incident a SONS on April 29, 2010 and designated a National Incident Commander (NIC) to assume the lead role of coordinating the affected parties and the public, and coordinating all federal, state, local, and international resources at the national level. British Petroleum (BP), as the primary responsible party, provided the resources and capabilities (OSC Report, 2011). The DWH event and response marks the only time in U.S. history that an oil spill was declared a SONS. This declaration brought on-line a cadre of upper-echelon emergency

managers to facilitate an added degree of national-level support, led by the NIC. When the NIC was activated, the roles and responsibilities germane to the Principal Federal Official (PFO) and the NIC became difficult to disentangle. There were similarities in the roles of each, and the governmental frameworks in which each operated were largely the same. The proper channels of communications, including which position should have the “public-face” of the incident and how information would be channeled up to the White House from the Response/Event had not been ironed out in advance, and each official held strong and differing opinions about how communications should flow both outward and upward. This caused redundancies and interfered with interagency collaboration.

In addition, the entanglement of NIC and PFO roles and responsibilities resulted in a deviation from practice under the NCP, which was widely regarded to have reduced the efficiency of the entities within this construct. Specifically, the NCP establishes the National Response Team (NRT), an advisory body comprised of 15 federal government agencies that work together using their various roles and responsibilities to effect an optimized response. The NRT has specific responsibilities when activated for an incident response. These responsibilities include providing technical recommendations to the FOSC for spill response actions and facilitating provision of resources from across the interagency. During the DWH response, the PFO made use of the NRT as a briefing body to fulfill the PFO responsibilities. However, this side-tracked the NRT from their own primary responsibilities during the response. There were ad hoc groups formed, such as the Inter Agency Solutions Group, in order to supplement the void felt by this nullification of the NRT. There is some concern among the NRT member agencies that a similar approach will be taken, by default, absent an overt effort in “peace-time” to reconcile these two overlapping responsibilities. Under the umbrella of the NRT, gathered together for emergency response



activation, these agencies are mandated to fulfill certain responsibilities under the NCP to assist the FOSC in amounting an effective response and their authority to act under the NCP's direction must be preserved. (NIC Report, 2010)

### **SONS EXECUTIVE STEERING COMMITTEE AND THE INTERAGENCY:**

Following the Deepwater Horizon oil spill, several lessons learned reports indicated that senior interagency leadership at the national and regional levels were not sufficiently aware of or practiced in addressing critical issues that could arise during a declared SONS event. This was due, in part, to the fact that senior leaders were largely reluctant to participate in the large-scale exercises, such as those being orchestrated by the SONS Exercise and Training Program prior to DWH. In 2012, the office of Marine Environmental Response Policy (CG-MER) drafted a memo that outlined a new vision for a progressive SONS Exercise and Training Program to include a series of strategic executive seminars and exercises that would gradually increase in complexity and intensity, appealing to the needs of leadership and garnering more senior engagement.

USCG Director, Emergency Management (CG-5RI) serves as the chair of the SONS Executive Steering Committee (ESC) and leads the development of executive seminars. The overarching goals of the SONS Executive Seminar, which is held every one-to-three years, are designed to focus on discussions of complex and politically-sensitive national-level issues by the most senior leaders of the Department of Homeland Security (DHS), USCG, EPA, and other federal agencies that compose the NRT. For the purposes of executing a successful response to a SONS, the USCG established a SONS Exercise and Training Program designed to increase the preparedness of the response organization. Since 2002, senior leader seminars and executive-level tabletop exercises included in the Coast Guard's SONS Exercise and Training Program have provided senior Coast Guard officers, Department of Homeland Security (DHS) officials and

members of the NRT with an opportunity to explore and discuss policy considerations related to a major oil spill. The goals of this program are to:

- Increase national preparedness for a SONS scenario in a coordinated response.
- Improve, through practice, the ability of the NIC organization to manage a SONS.
- Maintain awareness of agency heads and their senior advisors in Washington, D.C., of their role during a SONS response.

The purpose of the SONS ESC is to enhance the Federal government's preparedness for a coordinated and efficient response to a SONS incident via the development of exercises and tools that foster understanding and cooperation between Federal agencies at the highest levels. The USCG chairs and provides staff support (via the SONS Training and Exercise Coordinator) for the SONS ESC. The SONS ESC Chair will also serve as the SONS Exercise Director. The SONS ESC membership is comprised of Senior Executive Service (SES)/General Schedule (GS)-15 level representatives from agencies that have the authorities, resources, or capabilities for planning for or responding to SONS incidents to include:

- U.S. Coast Guard (USCG)
- National Pollution Funds Center (NPFC)
- The Federal Emergency Management Agency (FEMA)
- U.S. Department of Agriculture (USDA)
- U.S. Department of Commerce (DOC), represented by the National Oceanic and Atmospheric Administration (NOAA)
- U.S. Department of Defense (DOD)

- U.S. Department of Energy (DOE)
- U.S. Department of Health and Human Services (HHS)
- U.S. Department of Homeland Security (DHS)
- U.S. Department of the Interior (DOI)
- U.S. Department of Justice (DOJ)
- U.S. Department of Labor (DOL), represented by the Occupational Safety and Health Administration (OSHA)
- U.S. Department of State (DOS)
- U.S. Department of Transportation (DOT)
- U.S. Environmental Protection Agency (EPA)
- U.S. General Services Administration (GSA)
- U.S. Nuclear Regulatory Commission (USNRC)

Additionally, the development of goals and objectives for SONS training and exercises are completed in consultation and coordination with the White House, National Security Council staff, as appropriate.

The U.S. Coast Guard (USCG) hosted the 2020 Spill of National Significance (SONS) Executive Seminar on Wednesday, September 9, 2020 with in-person participation (limited to 10 personnel due to COVID-19 restrictions) at the Joint Base Andrews General Jacob E. Smart Conference Center and via webinar. The U.S. Coast Guard Commandant, Admiral Karl Schultz, hosted approximately 150 participants, which included 22 agency principals and their advisors from 16 federal agencies and the Indiana Department of Environmental Management (IDEM). The

three-hour seminar addressed the following three major objectives through the backdrop of an exercise scenario that involved a major oil spill due to a petrochemical tank explosion at an oil refinery near Chicago, located adjacent to the Lake Michigan shoreline:

- 1) Familiarize government principals on the SONS response structure and their respective agencies' potential roles in a SONS response;
- 2) Exercise and assess communications between the senior leadership through the National Operations Center (NOC), to include the Principal Federal Official (PFO), Secretary of Homeland Security, the USCG, and/or the Environmental Protection Agency (EPA).
- 3) Explore the process of transitioning response management from the EPA Senior Agency Official (SAO) to the USCG National Incident Commander (NIC) when a SONS transitions into the coastal zone from the inland zone.

#### **DE-CONFLICTING HSPD-5 AND THE NCP:**

During a SONS, interagency coordination and involvement of senior officials is key to assuring Congress and the public that the Federal Government is taking all appropriate action to mitigate the adverse impacts to public health, the environment, and the economy. It is essential that senior level leadership participate in SONS Executive Seminars. This was fully illuminated during the SONS exercise held in March of 2010, where Cabinet-level senior leadership did not participate primarily because SONS exercises, at that time, were not Tier 1 level exercises under the National Exercise Program. Without senior level participation, there was a missed opportunity to address the HSPD-5/NCP overlap, and to fully explore the political and policy implications of a major oil spill response under the NCP construct. As a result of not attending the March 2010 SONS exercise, these same senior government officials lacked practical experience with the application of the NCP only a month later when the DWH suffered an explosion, subsequent fires, and eventually sank into the Gulf of Mexico. In contrast, the NRF, which provides the primary

framework for most major domestic incidents, was well understood, accepted, and exercised by many of these same officials and formed the basis of their initial expectations and approach to DWH spill response. Current SONS Exercises are now conducted and socialized to the most senior levels of government for at least assistant secretary participation.

During the DWH response, and as identified by the SONS ESC, there was no interagency mechanism that enabled the DHS Secretary to carry out Homeland Security Policy Directive 5 (HSPD-5) (Management of Domestic Incidents). As a result, the DHS Secretary leveraged the NRT, then referred to as the “Executive NRT” to carry out this function. To better enable the DHS Secretary to execute his/her HSPD-5 responsibilities, the DHS Office of Operations Coordination and the SONS ESC agreed to leverage the extensive communications capabilities of the DHS National Operations Center (NOC) to schedule and conduct SONS Strategic Coordination Calls (SSCC), eliminating the need for an “Executive NRT.” These procedures were outlined and tested both during and after the 2020 SONS Executive Seminar with great success. The SSCC construct has already proven itself as a repeatable and flexible strategic communications mechanism to allow the DHS Secretary, the USCG Commandant, the NIC, or direct representative to meet their HSPD-5 requirements during a SONS event in the coastal zone while simultaneously allowing the FOOSC and interagency to operate in compliance with the NCP. The SSCC also serves as a communications tool that can be used by the Environmental Protection Agency (EPA) Administrator, Senior Agency Official (SAO), or direct representative to coordinate interagency assistance (e.g. Emergency Support Function #10) or establish national level strategic coordination at the cabinet level regarding a SONS event in the inland zone. The SSCC process and the use of the NOC will further be tested and refined, as a 10 year solution to the communication issues

discovered during DWH, in the months to come and in preparation the Cascadia Rising Full Scale Exercise in 2022, where a SONS event will also be featured and tested.

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