



CLYDE & CO

Managing an Incident in the United States

Prevention First 2014

7-8 October 2014

Long Beach, CA

Joe Walsh

Clyde & Co US LLP

Incident Management: Presentation Overview

- Observations and Definitions
- The Players
- Common Misperceptions
 - Responsible Party/Industry
 - Insurance Coverage
 - Claims Management
 - NRD Claims and NRDA
 - Limitation of Liability/Defenses
 - Investigations and Enforcement
- Suggested Approaches



Observations:

- ✓ **US Law/Policy is based on concept: “Polluter Pays”**

- ✓ **“Source” of a spill determines who is the RP**

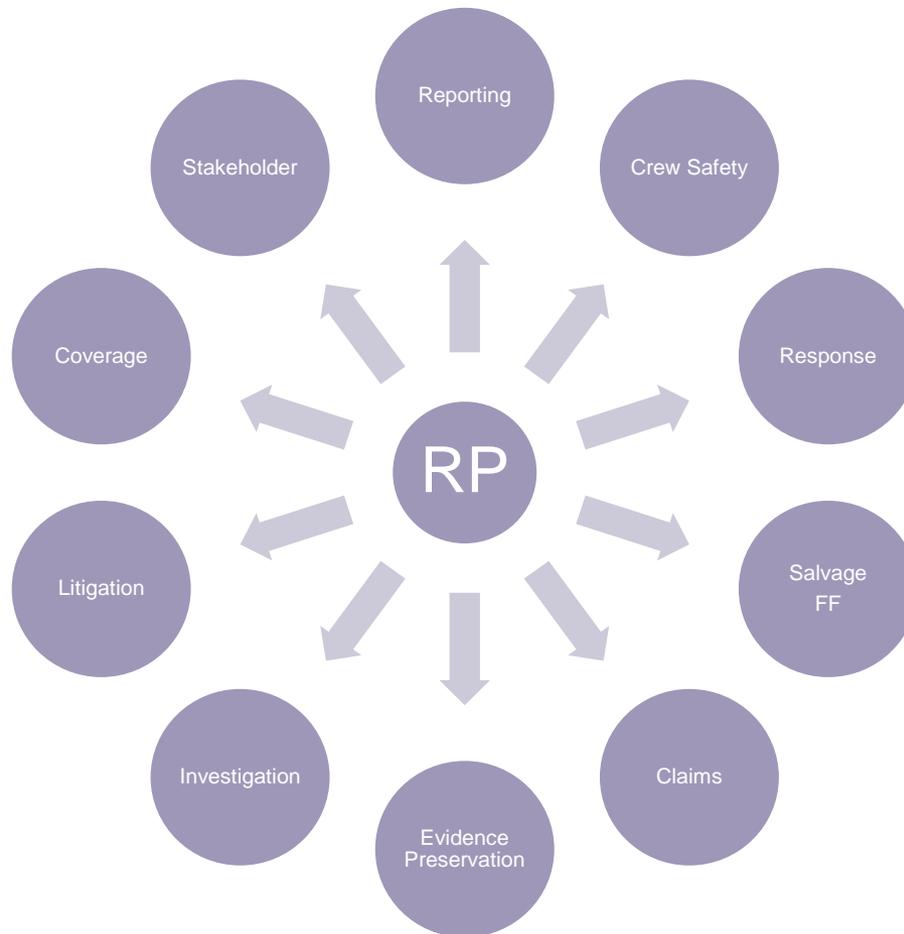
- ✓ **Liability for a spill is in the first instances is strict**
(negligence and culpability are irrelevant)
 - ❖ Removal Costs

 - ❖ Damages

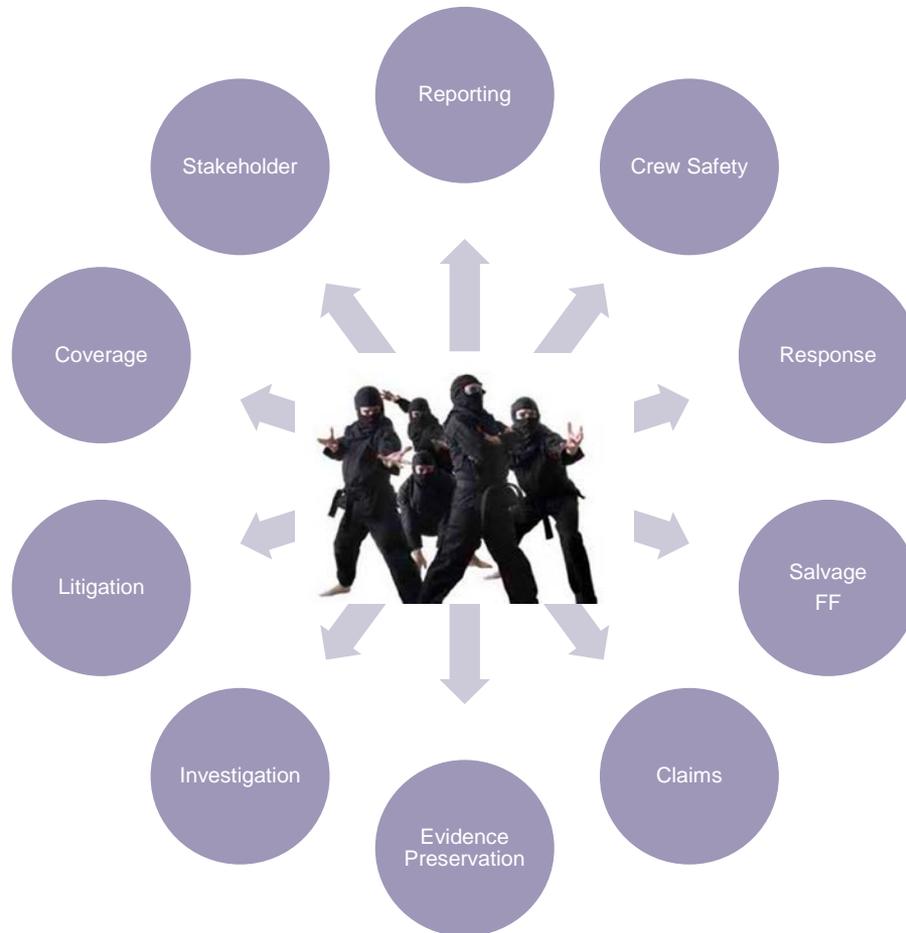
- ✓ **The deck is stacked.**



Observations: Managing An Incident



Observations: Managing Chaos



Definitions: Incident

Incident -- An occurrence either man-made or natural phenomenon, that requires action or support by emergency service personnel to prevent or minimize loss of life or damage to property and/or natural resources.

U.S. Coast Guard
INCIDENT MANAGEMENT HANDBOOK
COMDTPUB P3120.17B
May 2014

Incident is an occurrence or series of occurrences having the same or more vessel, facilities, or any combination of the above resulting in the discharge or substantial threat of discharge of oil.

Oil Pollution Act 1990
33 USC §2701(14)



Definitions: Incident Command System

Incident Command System- A standardized on-scene emergency management concept specifically designed to allow its user(s) to adopt an integrated organizational structure equal to the complexity and demands of single or multiple incidents, without being hindered by jurisdictional boundaries.

U.S. Coast Guard
INCIDENT MANAGEMENT HANDBOOK
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Definitions: Unified Command

Unified Command- The UC is a structure that brings together the “ICs” of all major organizations that have jurisdictional authority for the incident to coordinate an effective response while carrying out their own organization’s jurisdictional responsibilities.

A UC links responding organizations to the incident and provides them a forum to make decisions together.

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Definitions: Unified Command

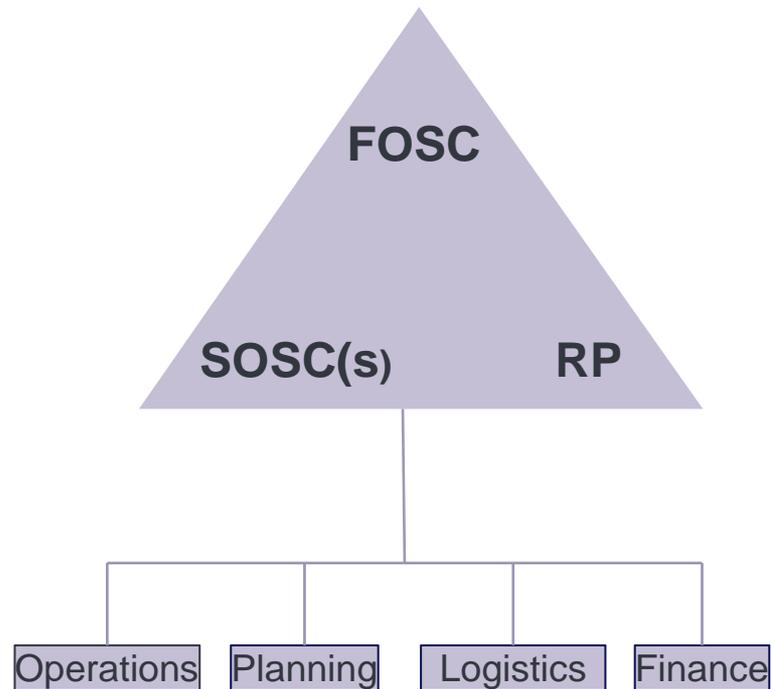
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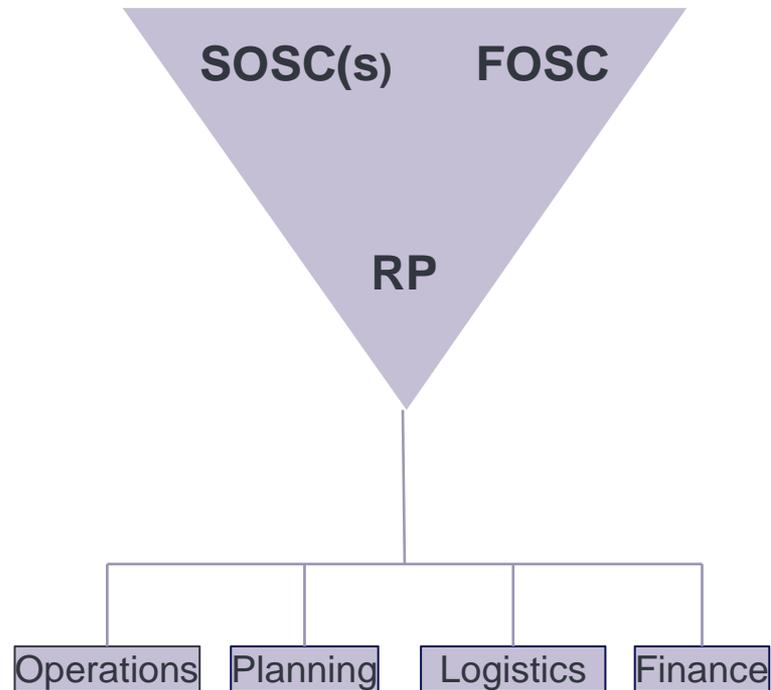


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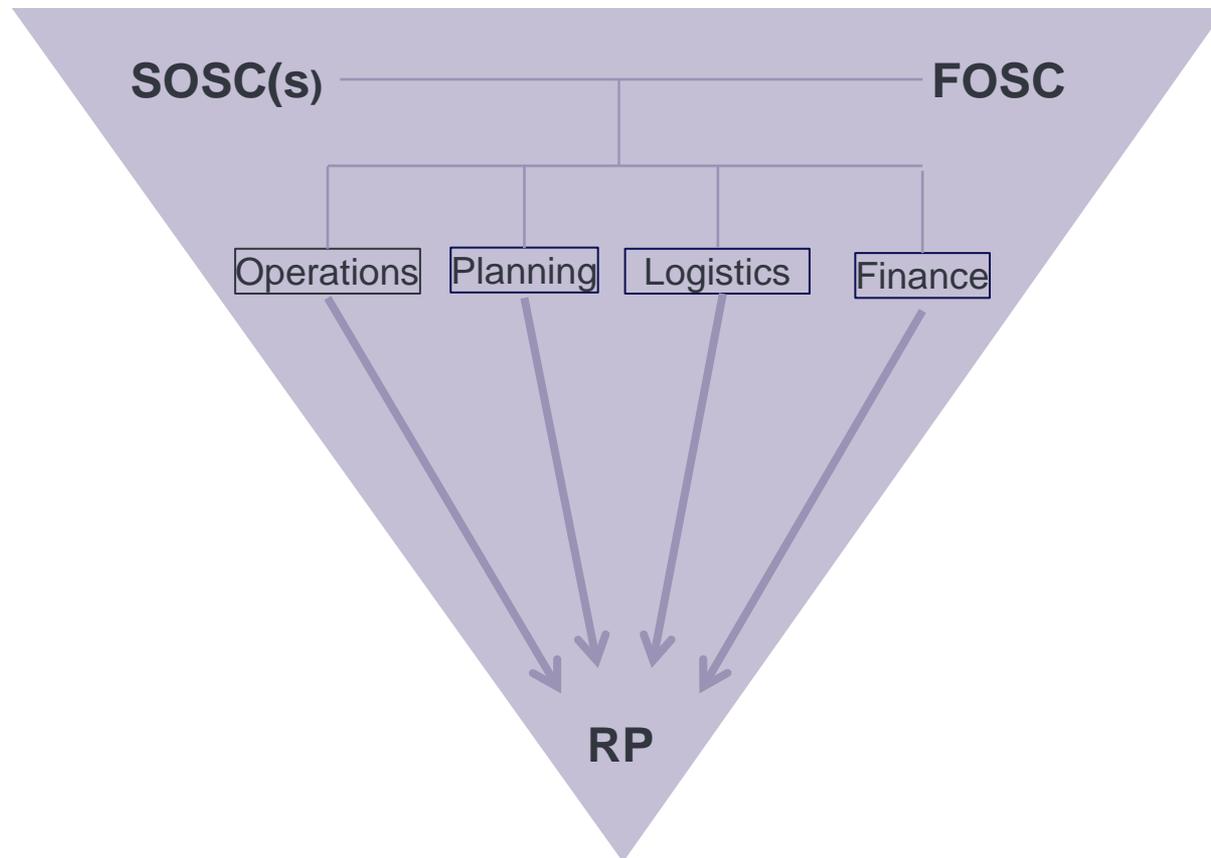
Unified Command Structure



Unified Command Structure



Unified Command Structure



The Players: Responsible Party Side

- “Responsible Party”
 - Not necessarily the “cause” of the spill
- Qualified Individuals/Spill Management Team
 - Not necessarily the same persons or entity
 - Implement, execute and fund response
- Claims Management Team
 - In take of claims
 - Constrained to adhere to state claims handling requirements
 - Auditors to ensure funds being spent are properly
 - “reasonable and necessary”
- Correspondent/Counsel

The Players: Responsible Party Side



- Insurer(s)
 - Vessels: COFR issuer (P&I Clubs or Fixed Premium Domestics)
 - Facilities: Domestic or Offshore insurance vehicles (with layers)

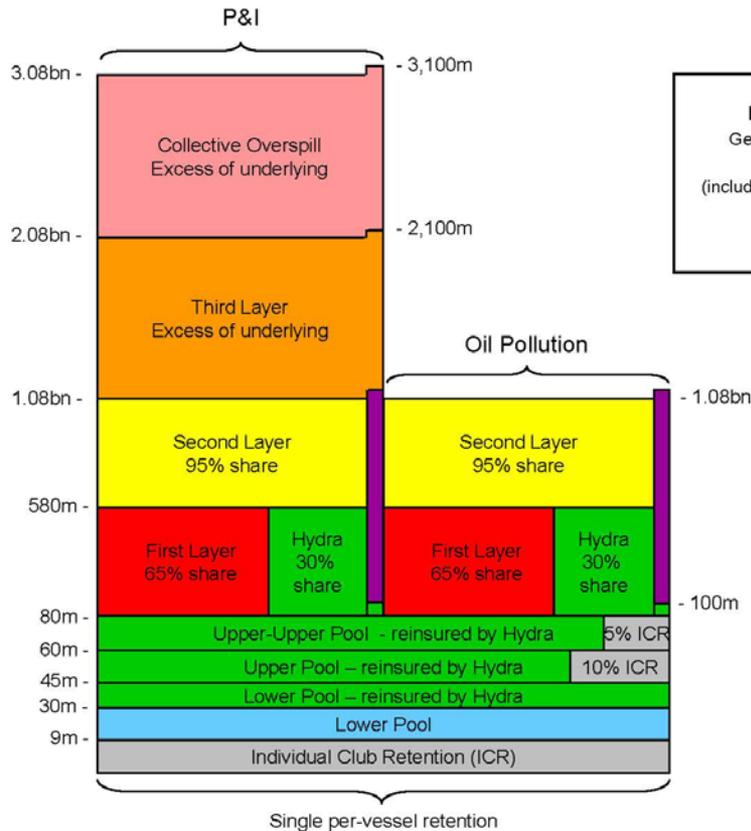
The P&I Market

IGP&I

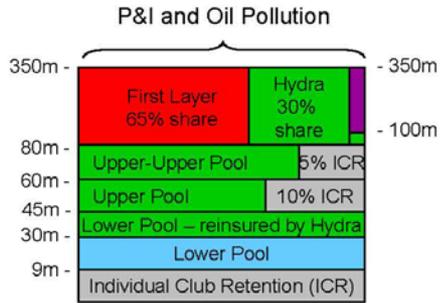
International Group of P&I Clubs



The Pooling Agreement



International Group of P and I Associations
 General Excess of Loss Reinsurance Contract Structure
 Owned and Chartered Entries
 (including Overspill Protection, Hydra Participation, Pooling and Individual Club Retentions)
 12 months at Noon GMT 20th February, 2014



Owned Entries

■ Multi-Year Fixed Placement, 5% share

Chartered Entries

Misperception #1: “Its All Covered by Insurance”

Controlled by Terms of Contract

Rules of the P&I Mutual Association

Controlled by Terms of Federal and State COFR

Constrained by “Insurable Interest”

Only Covered to \$1B

- Subject to terms of Pooling Agreement and Term of Excess Coverage
- For large claim, competing interests for response costs, damages, NRD, civil fines and penalties.

Willful Misconduct

Criminal Penalties?

Punitive Damages?



Misperception #2: Response RP should be (made) “more responsible”

Constrained by Insurance Terms, Policy or Club Rules

Constrained by Stakeholders including Shareholders, and regulating authorities (SEC, FTC, etc.)

Must adopt fair and reasonable approach to claims administration consistent with Insurers needs, NPFC standards, etc.

Should be able to properly document expenditures and necessity for potential contribution and/or indemnity claims against culpable 3rd parties

Should be able to act but be free from risk of fraudulent claims and invoicing.



Misperception #3: RP Should Not Attempt to Limit Liability



Chronicle / Michael Masco, File



Chronicle / Katy Raddatz, File



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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES OF AMERICA

46. Pursuant to OPA, Defendants REGAL STONE and FLEET MANAGEMENT are liable to the United States of America, without limitation, and SIGCO is liable to the United States of America up to the monetary limits of its statutory and regulatory liability, for all such costs, damages, and/or disbursements which may be sustained by the Fund.

UNITED STATES DISTRICT COURT
OF LOUISIANA

2. Enter a declaratory judgment that all Defendants are jointly and severally liable without limitation under Section 1002(a) of OPA, 33 U.S.C. § 2702(a), for all removal costs and damages resulting from the Deepwater Horizon Spill (except that Lloyd's be declared liable only to the limit of its COFR), which will be binding on this action and on any subsequent action or actions to recover removal costs or damages;

Plaintiff, the United States of America, alleges upon information and belief
follows:

Misperception #3: RP Should Not Attempt to Limit Liability



Misperception #4: NPFC's Direct Payments Support RP



National Pollution Funds Center
Funding Today for a Cleaner Tomorrow



Misperception #5: NRD and NRDS Government Always Wears the White Hat



"Of course, the really big money
is in junk science."

Suggested Approaches:



Holistic Approach

- Relationships → trust → confidence → cooperation/collaboration
- Resist Vigilantism!
- Everyone has a job to do– find a means to allow them to do it
- No two incidents are the same; be creative and flexible
- Help find “business” reasons to justify expenditure
- No one wants to be the patsy–
- Try to leave the other guy a way out--

CLYDE & Co

Newport Beach



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