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
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

- Reporting
- Crew Safety
- Coverage
- Response
- Salvage FF
- Claims
- Evidence Preservation
- Investigation
- Litigation
- Stakeholder

RP
Observations: Managing Chaos

- Reporting
- Crew Safety
- Stakeholder
- Coverage
- Response
- Salvage FF
- Litigation
- Investigation
- Evidence Preservation
- Claims
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.

Incident – means any occurrence or series of occurrences having the same origin, involving one or more vessel, facilities, or any combination thereof, 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.
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.
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.
Unified Command Structure
Unified Command Structure

- SOSC(s)
- FOSC
- RP
  - Operations
  - Planning
  - Logistics
  - Finance
Unified Command Structure

SOSC(s) — FOSC

- Operations
- Planning
- Logistics
- Finance

RP
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

International Group of P&I Clubs

[Logos of various P&I Clubs]
The Pooling Agreement

The image depicts a hierarchical diagram illustrating the structure of an insurance pooling agreement, specifically focusing on P&I (Property and Casualty Insurance) and Oil Pollution coverage. The diagram segments the coverage into various layers and shares, each with specific limits and retention levels. The text within the image outlines the structure of the General Excess of Loss Reinsurance Contract, detailing owned and chartered entries, including excess limits and respective shares. The diagram visually represents the allocation of risks and responsibilities among participating parties, with a focus on the management of potential losses due to oil pollution incidents.
Misperception #1: “It’s 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
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.
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;
Misperception #3: RP Should Not Attempt to Limit Liability
Misperception #4: NPFC’s Direct Payments Support RP
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--
1,500 Lawyers and fee earners worldwide
1st Law Firm of the Year Legal Business Awards 2011
300 Partners worldwide
39 Offices across Europe, Americas, Middle East, Africa and Asia.

Clyde & Co US LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co US LLP.

© Clyde & Co US LLP 2014