

PREVENTION FIRST 2014

Preparing for Response

Overview of Environmental Regulations

Jonathan K. Waldron

October 7, 2014

The information contained herein is abridged and summarized from numerous sources, the accuracy and completeness of which cannot be assured. This should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.



Why are We Here?

- Oil Pollution Act of 1990 (OPA 90) enacted in the wake of the *Exxon Valdez* spill
- OPA 90 created a new legal regime to:
 - increase pollution prevention (through measures designed to reduce human error, in addition to those mandating certain structural requirements on tank vessels);
 - ensure better spill response capability (e.g., originally tank vessel and facility response plans, and now non-tank vessels);
 - increase liability for spills; and
 - facilitate prompt compensation for cleanup and pollution damage.



OPA 90 – Responsible Party Liability

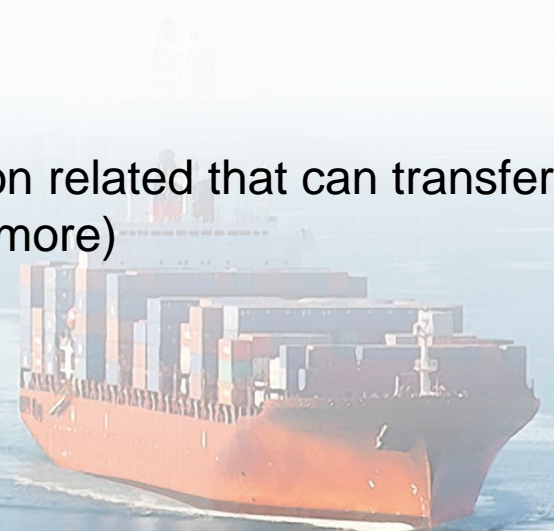
33 U.S.C. §2702

“...each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil into or upon the navigable waters or adjoining shoreline or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.”



OPA 90 – Responsible Party Liability *(cont.)*

- Responsible Party (RP) is strictly liable under OPA 90 for removal costs and damages resulting from a spill up to its limits of liability
 - *Coast Guard Authorization Act of 2010 imposes cargo owner liability, i.e., on the owner of the oil if the oil is being transported in a single hull tank vessel after December 31, 2010*
- RP includes:
 - Vessel owner, operator, or demise charterer
 - Facility owner or operator (marine-transportation related that can transfer to/from a vessel with a capacity of 250 bbls or more)



OPA 90 – Responsible Party Liability *(cont.)*

- Damages include:
 - Natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services
 - Coast Guard monitoring costs, if reasonable (*i.e.*, not arbitrary and capricious), are also recoverable from RP



OPA 90 – Responsible Party Liability *(cont.)*

Vessel	Limits of Liability (greater of)
Tank vessel >3,000 gross tons with a single hull, double sides, or double bottom	\$3,200 per gross ton or \$23,496,000
Tank vessel of 3,000 gross tons or less with single hull, double sides, or double bottom	\$3,200 per gross ton or \$6,408,000
Tank vessel >3,000 gross tons with a double hull	\$2,000 per gross ton or \$17,088,000
Tank vessel of 3,000 gross tons or less with a double hull	\$2,000 per gross ton or \$4,272,000
Any other vessel	\$1,000 per gross ton or \$854,000

- Limits of liability under CERCLA are \$300/gross ton
- Limits of liability for an Offshore Facility are removal costs + \$75 million
- \$350 million for an Onshore Facility



OPA 90 – Responsible Party Liability (cont.)

- In some states, such as California, Washington, Oregon, Maryland, and Alaska, the cargo owner is also jointly and severally liable, even though not liable under OPA 90
- Alaska and Oregon impose strict liability on the cargo owner for hazardous substance spills as well
- **An RP of a facility or vessel can lose its limits to liability:**
 - If the incident was caused by:
 - the RP's gross negligence or willful misconduct, or
 - the violation of an applicable federal safety, construction, or operating regulation, or
 - If the RP fails or refuses to report the incident, or fails to provide all reasonable cooperation and assistance in connection with removal activities



OPA 90 – Responsible Party Liability *(cont.)*

- **An RP's defenses include:**
 - damages and removal costs caused solely by (1) act of God; (2) act of war; or (3) act or omission of a third party
- **RP must also demonstrate financial responsibility for vessels and facilities:**
 - For all tank vessels, vessels over 300 gross tons, or any vessel lightering in the EEZ, up to its limits of liability
 - For onshore facilities, none
 - For offshore facilities, up to \$150 million
- **Limits of liability to be adjusted every 3 years to reflect increases in the Consumer Price Index**



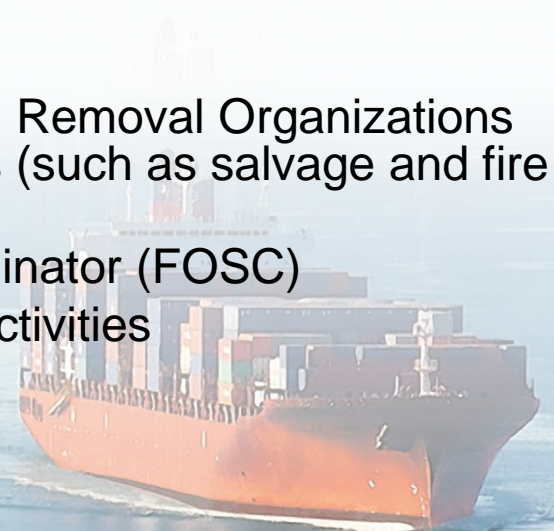
QI and Spill Management Team Liability

- **Responder immunity generally available under federal and state laws**
 - Immunity provided from claims for removal costs and damages that result from actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan (NCP) or as otherwise directed by the FOSC
- **Immunity is not available for acts that:**
 - Constitute gross negligence or willful misconduct, or
 - With respect to personal injury, wrongful death, civil penalties, or
 - CERCLA hazardous substance spills
- **QIs and SMTs can help protect themselves by seeking approvals from the Unified Command during a response**



Qualified Individual Duties And Responsibilities

- **Coast Guard regulations require that a QI or alternate QI identified in the Vessel Response Plan (VRP) or Facility Response Plan (FRP) be:**
 - Available on a 24-hour basis
 - Fluent in English
 - Located in the United States
 - Familiar with the implementation of the plan
 - Trained in the responsibilities of the QI under the plan and provided with a current copy of the entire plan
- **Each QI must have full authority to:**
 - Activate and engage in contracting with Oil Spill Removal Organizations (OSROs) and other response-related resources (such as salvage and fire fighting resources) identified in the plan
 - Act as liaison with the Federal On-Scene Coordinator (FOSC)
 - Obligate funds required to carry out response activities
 - ***QI must be designated in writing!***



Spill Management Team Duties And Responsibilities

- Coast Guard regulations require that the VRP and FRP include the organizational structure that will be used to manage the response
- Responsibilities, duties, and functional job descriptions for each Spill Management Team position within the required organizational structure must be provided for the following:
 - Command and Control
 - Public information
 - Safety
 - Liaison with government agencies
 - Operations
 - Planning
 - Logistics
 - Finance / Administration



Response Plans for Tank Vessels and Facilities

- Final Rule issued August 31, 2009, effective September 30, 2009, updating regulations relating to oil spill removal requirements for tank vessel and marine transportation related facility response plans
- Date to update response plans delayed until February 22, 2011 to coincide with the requirement for plan holders to resubmit response plans for marine salvage and firefighting
- New Requirements:
 - Mechanical Recovery
 - Dispersants:
 - Only required in pre-approved areas
 - Facilities: commencement of dispersant-application operations within 7 hours of the decision by the Federal On-Scene Coordinator
 - Tank Vessels: meet new dispersant planning standards, including appropriately trained dispersant-application personnel. Include primary dispersant staging site used by each dispersant-application platform and the corresponding distance to the associated stockpile

Response Plans for Tank Vessels and Facilities (cont.)

- In-Situ Burning: Not required
- Aerial Tracking
 - Capable of arriving on scene in advance of the arrival of response resources identified in a plan for Tiers 1, 2, and 3 Worst Case Discharge response times and for a distance of 50 miles or more from shore
 - (1) Appropriate resources to meet response times commencing from assessment, and (2) the capability of supporting oil spill removal operations continuously for three 10-hour operational periods during the initial 72 hours of the discharge



Salvage and Marine Firefighting Requirements

- Final Rule published December 31, 2008 with effective date January 30, 2009
- Submit new VRP to include these requirements by February 22, 2011 in harmonization with OPA 90 VRP/FRP amendments for dispersants and aerial tracking resources so that response plans do not have to be updated twice within 12 months
- Vessels that carry group I-IV oils must disclose the resource providers that it has contracted with to provide the specific services detailed in Table 155.4030(b) – Salvage and Marine Firefighting Services and Response Timeframes



SUMMARY OF NEW REQUIREMENTS

Required Salvage and Marine Firefighting Services to List in a VRP

- Must identify the salvage and marine firefighting services in the geographic specific appendices of a VRP
- List the resource providers you have contracted to provide those resources
- May list multiple resources but include the primary resource for each COTP zone and the method of contract consistent with the final rule



SUMMARY OF NEW REQUIREMENTS (cont.)

- Salvage Services

- *Assessment & Survey*

- (A) Remote assessment and consultation

- (B) Begin assessment of structural stability

- (C) On-site salvage assessment

- (D) Assessment of structural stability

- (E) Hull and bottom survey

Location of incident response activity timeframe hours	
0-12 Miles from COTP city	12-50 Miles from COTP city
1	1
3	3
6	12
12	18
12	18



SUMMARY OF NEW REQUIREMENTS (continued...)

- *Stabilization*

- (A) Emergency towing
- (B) Salvage plan
- (C) External emergency transfer operations
- (D) Emergency lightering
- (E) Other refloating methods
- (F) Making temporary repairs
- (G) Diving services support

- *Specialized Salvage Operations*

- (A) Special salvage operations plan
- (B) Subsurface product removal
- (C) Heavy lift (contract and provide description but no definite response times)

Location of incident response activity timeframe hours	
0-12 Miles from COTP city	12-50 Miles from COTP city
12	18
16	22
18	24
18	24
18	24
18	24
18	24
18	24
72	84
Estimated	Estimated



SUMMARY OF NEW REQUIREMENTS (continued...)

- Marine Firefighting Services

- *Assessment & Planning*

- (A) Remote assessment and consultation

- (B) On-site assessment

- *Fire Suppression*

- (A) External firefighting teams

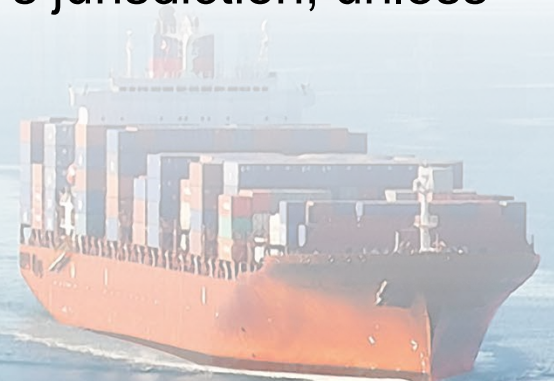
- (B) External vessel firefighting systems

At Pier	0-12 Miles from COTP city	12-50 Miles from COTP city
1	1	1
2	6	12
4	8	12
4	12	18



SUMMARY OF NEW REQUIREMENTS (cont.)

- Required Agreements/Contract Requirements
 - May only list resource providers in VRP that have been arranged by contract or other approved means
 - Must obtain written consent from the resource provider including statement that the services are capable of arriving within the listed response times
 - Written consent must be available to the Coast Guard and identified in VRP as on the vessel or with the QI
 - Public marine firefighters may only be listed out to the maximum extent of the public resource's jurisdiction, unless other agreements are in place



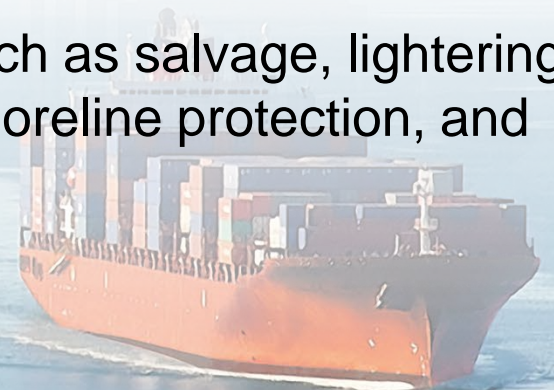
Response Plans for Non-Tank Vessels (“NTVRPs”)

- Final Rule issued on September 30, 2013
- Owners and operators of non-tank vessels greater than 400 gross tons must prepare and submit NTVRPs by January 30, 2014
- Requirements similar to those for tank vessels
- NTVRP requirements tailored to non-tank vessels based on a risk assessment to minimize the burden on vessels that pose less risk to the environment should a casualty occur based on combined fuel and cargo oil capacity in three groups:
 - less than 250 barrels;
 - less than 2,500 barrels, but greater than or equal to 250 barrels, and
 - 2,500 barrels or greater (same functional requirements as tank vessels)



Response Plans for Non-Tank Vessels (“NTVRPs”) (cont.)

- NTVRPs must:
 - identify a QI having full authority to implement removal actions
 - identify and ensure by contract or other approved means the availability of personnel and equipment to respond to a discharge
 - describe training, equipment testing, drills, and roles of individuals in the event of a discharge
 - depending on fuel and cargo capacity, have plans that meet response resource requirements for an average most probable discharge (AMPD), maximum most probable discharge (MMPD), or worst case discharge (WCD)
 - address a variety of types of resources, such as salvage, lightering, fire fighting, dispersants, aerial tracking, shoreline protection, and shoreline cleanup



Ramifications of Response Plan Non-Compliance

- Cannot handle, store, or transport oil
- Limits of liability broken if the response is not in accordance with response plan, Area Contingency Plan (ACP), or NCP
- Fines/penalties for failure to comply with response planning regulations



Key Issues in Spill Response

- **Spill notification requirements:**
 - National Response Center, state, and local agencies;
 - **Failure to report a discharge is a felony** and may result in fines of up to \$250,000 (up to \$500,000 for companies) or imprisonment of up to 5 years, or both
- **Health and safety and related training requirements, e.g., HAZWOPER**
- **Taking or harassment of protected wildlife related to response operations (MOA between EPA, NOAA, USCG, and DOI addresses federal operations)**



Key Issues In Spill Response *(cont.)*

- Identification and protection of environmentally sensitive areas and prioritization for protection
- Deviations from applicable response plans (must be approved by FOSC and must lead to more expeditious and effective response)
- Conflicting direction from state and federal officials
- Dispersant application and *in situ* burning
- Oily waste disposal and hazardous waste handling issues, demobilization, response equipment cleaning



QI and SMT Recommendations

- 1) Review VRP or FRP to determine if it has necessary flexibility to call upon any resources in accordance with the plan
- 2) Develop checklists to identify key operational and legal requirements in response plans, ACPs, NCP, and state laws
- 3) Train and exercise with key people and checklists
- 4) Determine who in company and which contractors to rely on
- 5) Coordinate response activities with Unified Command and RP, and seek approval of actions
- 6) Ensure QI and SMT contract provides adequate protections and that QI and SMT personnel are familiar with scope of authority in the contract for QI and SMT services
- 7) Monitor documentation of spill response actions and financial management



Strategy To Minimize Costs

Removal Costs (direct costs to respond) vs. Monitoring Costs (indirect costs)

- Removal costs in excess of liability limits are recoverable from the OSLTF, but **documentation is critical**
- Coast Guard regulations require proof that:
 - (1) actions were necessary to prevent, minimize, or mitigate the effects of the incident; and
 - (2) actions taken were determined by the FOSC to be consistent with NCP or were directed by the FOSC
- Becomes challenging when the FOSC has immediate objectives different from a claimant's
- Monitoring costs determined to be "removal" (e.g., Coast Guard Aircraft, vessels, equipment/vehicles, and personnel)



Cost Control

- Have pre-spill contracts in place
- Identify new resources arriving on scene to avoid duplication
- Confirm quantity and effectiveness of resources daily (require contractor reports)
- Document directions and decisions of Unified Command with P&I representative
 - Confirms actions taken are consistent with FOSC direction (memos with signatures recommended)
 - Confirms costs were “reasonable and necessary” to facilitate reimbursement
 - Assists with invoicing to recover response costs
- Implement immediate claims handling strategy
- Plan and execute an aggressive decontamination and demobilization plan



Maintaining Limits To Liability

- Report the incident to the NRC – verify reports made
- Cooperate in the response – ensure it is in accordance with NCP, ACP and response plan
 - *the response is different from the investigation*
- Comply with orders of the FOSC
- Seek approval for deviations from VRPs and FRPs
- Coordinate with FOSC and seek written approvals for key actions



Legislative and Regulatory Updates



**Transportation
Security
Administration**

Coast Guard / BSEE MOU

- **Coast Guard and BSEE Memorandum of Understanding regarding safety and environmental protection**
 - Signed on November 27, 2012 and requires:
 - Coordinated regulatory action
 - Review of and improvements to oil spill response and preparedness
 - Improvements regarding OCS inspector oversight, competency, and capacity.





BSEE – SEMS and SEMS II

- ***SEMS (October 2010 Final Rule)***
 - Policy and objectives to deal with safety hazards and environmental impacts with a focus on reducing human error and driving continuous improvement offshore
 - Key components: Hazards Analysis, Management of Change, Operating Procedures, Mechanical Integrity and Contractor Management
- ***SEMS II (April 2013 Final Rule)***
 - Added requirements for:
 - Stop Work Authority
 - Employee Participation Plan, Guidelines for Reporting Unsafe Conditions
 - Third Party Audits



Coast Guard's SEMS Effort – ANPRM

- Issued September 2013 with 16 questions
- Would require all vessels engaged in “OCS Activities” to develop, implement and maintain a vessel-specific SEMS
- Much consternation:
 - Multiple and overlapping management programs
 - Complicates an already complicated regime with existing controls
 - Duplication and overlap with ISM Code and BSEE's SEMS, with requirements flowing to vessels from lessees



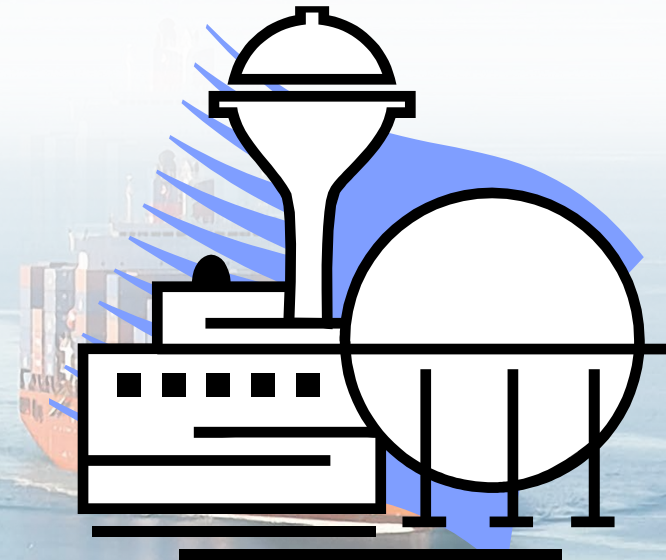
Financial Responsibility NPRM

- Notice of Proposed Rulemaking on August 19, 2014 to increase liability:
 - Tank Vessels – from \$2,000 to \$2,200/gross ton (double hull)
 - Tank Vessels – from \$3,200 to \$3,500/gross ton (single hull)
 - Non-Tank Vessels – from \$1,000 to \$1,100/gross ton
 - Onshore Facilities – from \$350,000,000 to \$404,600,000



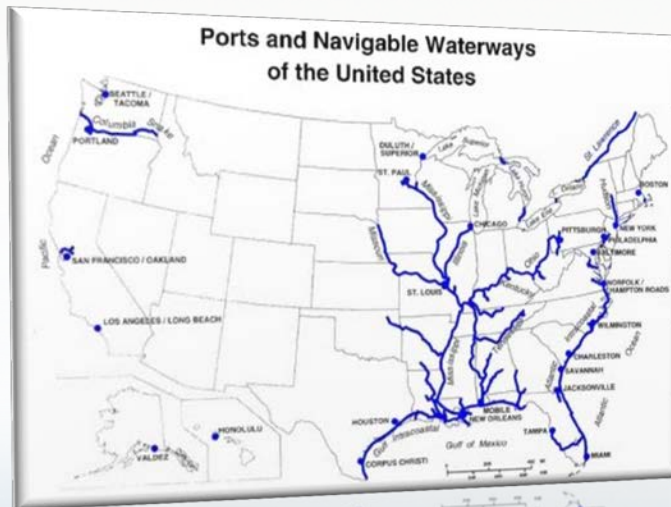
Response Plans for Hazardous Substances

- **Tank Vessel and Marine Transportation-Related Facility Response Plans for Hazardous Substances**
 - Coast Guard re-opened comment periods on these two proposed rules, published in 1999 and 2000, respectively
 - Comments were due by May 18, 2011
 - The final rule must be published by April 2012 – NOT
 - Still pending



Marine Casualty Reporting

- What must be reported in the navigable waters?
 - Grounding, allision, loss of propulsion/maneuverability, unseaworthiness/fitness for service, death, injury requiring professional medical treatment, certain property damage, “significant harm to the environment”
 - Confusion as to whether certain marine casualties need to be reported
 - Confusion whether something is a casualty



Understanding Marine Casualties

- Draft NVIC (guidance) (January 2014)
 - Goal is to provide guidance and clear policy as to the Coast Guard's expectations to facilitate compliance



So what does this mean?

- There's been a lot of confusion....
- Draft NVIC with Coast Guard interpretations published in January, 2014
- Effort to clarify existing guidance and achieve consistency across the Sectors
- Key Steps:
 - Notification
 - Evaluation
 - Action



What, When and How?

- Reports must be made immediately after addressing resultant safety concerns to the nearest Coast Guard Sector if the casualty occurred within 12 miles
- The oral report must be followed by a written report, a "Report of Marine Accident, Injury or Death" (CG-2692) Form within 5 days



3

- 1

SN 7530-01-GF3-2380

Coast Guard Enforcement

- Vessel experienced a failure of its main engine and did not report for over hours
- \$75,000 penalty for failure to immediately report a marine casualty or provide notice of a hazardous condition

17th District Public Affairs

U.S. Coast Guard

U.S. Department of
Homeland Security
**United States
Coast Guard**



Date: June 12, 2013

Contact: [Ensign Victoria Swinghamer](#)

Office: (907) 271-6741

News Release

Coast Guard completes marine investigation in Dutch Harbor, Alaska

ANCHORAGE, Alaska — Coast Guard investigators finished a one month investigation into the operation of the cargo vessel Bangkok Bridge in Dutch Harbor Wednesday.

Two Coast Guard investigators, one from Sector Anchorage and one from Marine Safety Detachment Dutch Harbor, assessed a \$75,000 penalty for failure to report a hazardous condition.

The investigation began after MSD Dutch Harbor personnel received a report of a distressed deep draft vessel in Unimak Pass, a highly trafficked pass for commercial vessels on the Aleutian Chain. After further review of local Automated Identification Systems, Coast Guard personnel discovered that the Bangkok Bridge was near the eastern shipping lane, with a track line showing a drift pattern for several hours.

MSD Dutch Harbor personnel made contact with the vessel's crew to determine the cause and severity of their casualty. The Bangkok Bridge crew reportedly experienced failure of the main engine – an occurrence that must be reported under federal law – and did not report the failure to the Coast Guard for more than 10 hours. Specifically, the vessel's crew did not provide the immediate notice of marine casualty or provide the notice of a hazardous condition per the Code of Federal Regulations.

"The Coast Guard is committed to ensuring the safety of our waterways, and enforcing the regulations that require mariners to report hazardous conditions and marine casualties is part of that mission," said Capt. Paul Mehler III, captain of the port, Western Alaska. "With the remote location of the vessel and the limited response assets for a vessel of this size, the late report of this magnitude could have resulted in a much worse scenario."

Upon successful repairs to the vessel's main engine in Dutch Harbor, the crew was cleared to continue their voyage.

The Bangkok Bridge is an 874-foot, Panamanian-flagged cargo vessel.

For more information, contact Lt. William Albright at 907-271-6763.

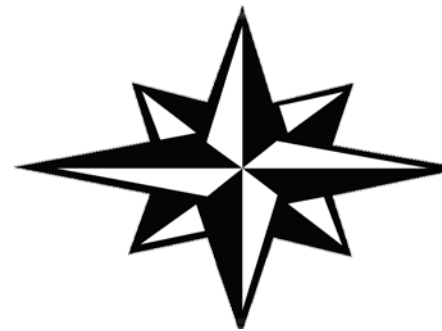
###

QUESTIONS?

Jonathan K. Waldron, Partner
Co-Chair Maritime, International Trade,
and Government Contracts Practice Group

Blank Rome LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Tel. (202) 772-5964
waldron@blankrome.com



BLANK  ROME
MARITIME

