

Ocean and Coastal Law Journal

Volume 16 | Number 2

Article 6

2010

Spills Of National Significance And State Nullification

Russell V. Randle

Follow this and additional works at: <http://digitalcommons.maine.law.maine.edu/oclj>

Recommended Citation

Russell V. Randle, *Spills Of National Significance And State Nullification*, 16 *Ocean & Coastal L.J.* (2010).

Available at: <http://digitalcommons.maine.law.maine.edu/oclj/vol16/iss2/6>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in *Ocean and Coastal Law Journal* by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

SPILLS OF NATIONAL SIGNIFICANCE AND STATE NULLIFICATION

*Russell V. Randle**

In May 2010, at President Obama's request, outgoing Coast Guard Commandant Thad Allen delayed his retirement and became National Incident Commander for the response to the *Deepwater Horizon* oil spill, serving until the conclusion of the emergency at the end of September 2010. From that experience, Admiral Allen observed what he called "social and political nullification" of the National Contingency Plan (NCP) arising from public hostility to the responsible party and demands of state and local political officials for more active roles in the response.¹

The NCP² is the federal regulation governing oil and hazardous substance response under the Oil Pollution Act (OPA),³ the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),⁴ popularly known as Superfund, and section 311 of the federal Clean Water Act.⁵ If that rule works poorly in practice, as Admiral Allen's comments suggest, then addressing "nullification" issues will be important for responding better to future large-scale oil spills and avoiding or reducing environmental damage and economic losses.

* Member, District of Columbia Bar; author, ELI OIL POLLUTION DESKBOOK; Vice-Chair, ABA Superfund Committee; partner, Patton Boggs LLP, Washington, D.C. The views expressed are the author's own and not necessarily those of his firm or his firm's clients.

1. NAT'L OIL SPILL COMM'N MEETING, NATIONAL OIL SPILL COMMISSION ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING 44, 46 (2010), *available at* <http://www.oilspillcommission.gov/sites/default/files/documents/Transcript-%20Meeting%203.pdf> [hereinafter ALLEN TESTIMONY] (statement of Admiral Thad Allen, U.S. Coast Guard, National Incident Commander for the Unified Command).

2. 40 C.F.R. § 300 (2010).

3. 33 U.S.C. §§ 2701-2762 (2006).

4. 42 U.S.C. §§ 9601-9675 (2006).

5. 33 U.S.C. § 1321.

Admiral Allen was uniquely situated to comment on such disaster response and problems with the NCP. Before his service as incident commander, he led the federal response to Hurricane Katrina and oversaw a 2002 simulation of government capacities to respond to a spill of national significance off the Louisiana coast.⁶ He made his “nullification” comments in September 2010 testimony before the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling (National Commission).⁷ He explained that demands by state and local officials and the public resulted in substantial changes in the actual response from the approach dictated by the NCP. Some of these changes, the National Commission claims, resulted in costly and ineffective responses, overlapping and conflicting efforts, and diversion of response equipment and personnel from locations which needed the equipment most urgently.

This article uses Admiral Allen’s observations and subsequent reporting by the National Commission to highlight “nullification” and other problems with the spill response, to identify correctible sources of these problems, and to suggest changes to the NCP and related authority recommended to help resolve nullification and related problems. I leave to other authors the discussion of environmental impact reviews of offshore leasing decisions and drilling permits.

The NCP and disaster response issues addressed here include

- assigning the lead cleanup role to the responsible party for a spill of national significance raised serious questions about the party’s competence, credibility, and culpability. These questions were further reinforced by the absence of significant in-house federal spill response capability;
- elected state and local officials were poorly integrated into the spill response, and they initially understood the response procedures poorly. These elected officials demanded and eventually played a much more active role than initially assigned them. A similar political dynamic should be expected in future spills, requiring much greater inclusion of state and local elected officials in planning, practicing, and implementing future spill responses;
- outside government, academic, and industry technical experts were poorly integrated into response efforts.

6. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 136-137 (2011) [hereinafter NATIONAL COMMISSION].

7. See ALLEN TESTIMONY, *supra* note 1, at 44.

Similarly, the federal government initially lacked an independent source of information about the volume and flow rate of the discharge. Far more robust federal technical expertise, independent sources of key information, and capable outside oversight contractors will be needed to maintain public confidence in future responses to spills of national significance.

I. RESPONSIBLE PARTY ISSUES

A. *Cleanup under the NCP*

Section 311 of the Clean Water Act governs oil spill cleanups.⁸ Its allocation of duties has changed little since first enacted in 1970 in response to the 1969 Santa Barbara oil spill.⁹ The federal government has broad powers under the Act to respond to discharges or threats of discharge of oil or hazardous substances in navigable waters or shorelines,¹⁰ including the authority to “remove, and if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.”¹¹ These powers are to be exercised “in accordance with the National Contingency Plan and any appropriate Area Contingency Plan.”¹²

Private parties, including an “owner or operator participating in [removal] efforts . . . shall act in accordance with the National Contingency Plan and the applicable response plan,” which may include the Area Contingency Plan and the Facility Response Plan, both required under section 311(j).¹³ The Facility Response Plan should respond “to the maximum extent practicable, to a worst case, discharge . . . of oil.”¹⁴

The liability provisions of OPA make “responsible” parties such as an offshore oil lease holder like BP strictly liable for “removal costs,”¹⁵ i.e., the costs of containing and cleaning up the spill. Consistent with this financial obligation, the NCP provides that the responsible party may be permitted to undertake the response as directed by the On-Scene

8. 33 U.S.C. § 1321.

9. *Compare* Pub. L. No. 91-224, § 2, 84 Stat. 100 (1970), *with* 33 U.S.C. § 1321.

10. 33 U.S.C. § 1321(c).

11. *Id.* § 1321(c)(1)(B)(iii).

12. *Id.* § 1321(c)(1)(A).

13. *Id.* § 1321(c)(3)(B).

14. *Id.* § 1321(j)(5)(A).

15. 33 U.S.C. § 2702(a).

Coordinator, consistent with the provisions of the NCP.¹⁶ Under OPA, the federal government may conduct the cleanup itself and send the bill to the responsible party, although that is not the preferred approach in practice.

Private parties, in fact, conduct most spill cleanups under federal supervision. This was the approach reportedly used in Louisiana before the *Deepwater Horizon* disaster, an approach which appeared to work well.¹⁷

The 1990 OPA statute amended section 311(b) to add strong federal authority to order private party response efforts. A court may impose severe penalties on any responsible party who “without sufficient cause” fails to properly carry out removal of the discharge under a federal order.¹⁸ This approach is quite consistent with the “polluter pays” approach under federal Superfund, which was used as a model for many of the OPA provisions. Most Superfund cleanups are conducted by potentially responsible parties pursuant to consent agreements or administrative orders.

B. Conflicting Roles

Admiral Allen testified that this system had worked well for twenty years after the enactment of OPA but broke down in the extreme circumstances of the *Deepwater Horizon* spill: “I think the public’s tolerance for a responsible party is inversely proportional to the size of the spill.”¹⁹ The large size of the spill, the loss of life, and the spectacular nature of the casualty inevitably raised questions about the “responsible party’s” competence, culpability, and credibility. The atrophy of federal spill response capability reinforced these questions.

1. Why Do We Think the Party Who Created This Mess Can Fix It?

The public and the press reacted badly to the prominent role BP was playing as the “responsible party,” as it had been legally designated at

16. 40 C.F.R. § 300.320(a)(3) (2010).

17. NAT’L OIL SPILL COMM’N MEETING, NATIONAL OIL SPILL COMMISSION ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING 110-112 (2010), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Transcript-%20Meeting%203.pdf> [hereinafter STANTON TESTIMONY] (statement of Captain Edward Stanton, New Orleans, U.S. Coast Guard).

18. 33 U.S.C. § 1321(b)(7)(B)(i), noted in ENVTL. LAW INST., OIL POLLUTION DESKBOOK 12 (1991).

19. See ALLEN TESTIMONY, *supra* note 1, at 43.

the outset of the spill response. This skepticism was understandable. The explosion, the fire, the loss of the rig, the death of eleven crewmen, and the injury of even more made for spectacular television. That spectacle was followed by distressing footage of large volumes of oil coming to the surface and the increasingly frantic stories about the failure to contain it. People reasonably wondered why the party “responsible” for creating this dramatic disaster was believed to be competent to implement the remedy, even under Coast Guard supervision.

2. Why Is the Government Putting A Criminal Suspect in Charge of Public Safety?

Justice Department guidance for criminal prosecutions in environmental cases has made clear for more than two decades that criminal investigations are in order where lives are lost, serious environmental damage occurs, or there is widespread public attention to the matter.²⁰ In this instance, all three factors favoring criminal investigation were present. Without identifying BP, Attorney General Eric Holder confirmed the fact of such a criminal investigation,²¹ a confirmation which should have surprised no one.

The tension between OPA’s strict liability approach and the Justice Department’s criminal prosecution guidance became quite apparent in this case, begging the question: Why should a party under criminal investigation for possible misconduct in causing the spill be leading the spill response? In BP’s case, that question became more pointed because of past criminal proceedings arising out of the 2005 explosion at BP’s Texas City, Texas refinery, in which fifteen workers were killed and many more injured, as well as earlier proceedings arising out of oil spill problems on Alaska’s North Slope.²²

20. See David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1246-47 (2009) (noting examples of prosecutions where significant environmental damage or fatalities have occurred).

21. Matt Grutman & Bradley Blackburn, *Attorney General Eric Holder Announces Criminal Investigation into Gulf Oil Spill*, ABC NEWS, June 1, 2010, <http://abcnews.go.com/WN/bp-gulf-oil-spill-cut-cap-begins-president/story?id=10797393>.

22. Sarah Lyall, *In BP’s Record, a History of Boldness and Costly Blunders*, N.Y. TIMES, July 12, 2010, <http://www.nytimes.com/2010/07/13/business/energy-environment/13brisk.html>.

3. Why Should Anyone Believe the Responsible Party?

The safety and environmental record of offshore oil drilling have been controversial political issues since the Santa Barbara Oil Spill in 1969. For several decades, the federal government has restricted or forbidden oil drilling off the Atlantic and Pacific coasts of the lower forty-eight states, and off of the Florida Gulf Coast. The oil industry and its supporters argued for many years that offshore safety records had greatly improved over the offshore safety records in the late 1960s and early 1970s. The industry had considerable operating experience to support that argument. These arguments were making political headway in 2010: President Obama endorsed increased offshore drilling on March 31, 2010.²³ Three weeks later, the *Deepwater Horizon* exploded and sank, prompting many second thoughts.

Any company suffering this disaster would have encountered increased skepticism, given the political history and heated past arguments. These credibility problems grew worse as successive efforts to control the well failed. Public reaction seemed to alternate between ridicule and rage.²⁴

4. Why Doesn't the Federal Government Conduct the Cleanup?

Section 311 of the Clean Water Act not only authorizes, but requires the federal government to respond to oil spills.²⁵ Despite the addition of such mandatory language in 1990, the great depth of this discharge meant that the federal government lacked the in-house equipment, personnel, and expertise to take over the *Deepwater Horizon* cleanup operation. According to the Commission Report, when Secretary of the Interior Salazar asked staff at the Minerals Management Service (MMS) what they would do if the government took over the cleanup, he was

23. John M. Broder, *Obama to Open Offshore Areas to Drilling for First Time*, N. Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/03/31/science/earth/31energy.html>.

24. One particular satiric video reportedly had over eleven million views by mid-February 2011. UBCcommedy.com, *BP Spills Coffee*, YOUTUBE, <http://www.youtube.com/watch?v=2AAa0gd7C1M> (last visited Apr. 25, 2011). Public outrage was the theme of a number of stories. E.g., Kristin Jensen & Jim Snyder, *BP Hires Army of Washington Insiders to Help Manage Outrage Over Oil Spill*, BLOOMBERG (June 17, 2010), <http://www.bloomberg.com/news/2010-06-17/bp-hires-army-of-washington-insiders-to-help-manage-outrage-over-oil-spill.html>.

25. 33 U.S.C. § 1321(c)(1)(A) (2006).

advised that the MMS would have to contract with a major oil company to carry out the work.²⁶

The absence of this independent federal response capability reinforced the public impression that regulators were much too close to the offshore oil industry they were supposed to regulate. Past scandals with MMS personnel accepting drugs and sexual favors from industry counterparts²⁷ made the impression worse. Reliance on BP and its contractors for most of the cleanup effort was an unpleasant necessity, resulting from the failure of the federal government to build the capacity to respond to such deepwater spills, not from a careful choice between capable public and private party response teams.

II. FEDERAL ROLES: THEORY AND REALITY

A. Legal Theory: Federal Preeminence in Oil Spill Cleanup

Although OPA tracks many Superfund provisions,²⁸ a comparison between Superfund statutory language and OPA/Clean Water Act section 311 language shows that Congress expected state and local governments to play a much less active role in maritime oil spill response actions than such governments play in responding to Superfund sites on shore. For example, CERCLA section 104(d) provides for cooperative agreements between states and the federal government, under which states are reimbursed for much of their effort to conduct Superfund response actions.²⁹ The federal government is ordinarily obliged to defer placing a site on the National Priority List (NPL) for Superfund cleanup if the state is conducting an adequate cleanup and requests such deferral.³⁰ Note that NPL sites are the most severely contaminated ones under CERCLA and qualify for long-term remedial action. CERCLA also provides elaborate procedures to assure state involvement in determining what sites are placed on the NPL in that state, as well as in the choice of remedy and the allocation of liability for the site.³¹

By contrast, neither OPA nor section 311 of the federal Clean Water Act requires such elaborate consultation with and deferral to the states.

26. NATIONAL COMMISSION, *supra* note 6, at 136.

27. Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, www.nytimes.com/2008/09/11/washington/11royalty.html.

28. ENVTL. LAW REPORTER, ENVIRONMENTAL LAW INSTITUTE, OIL POLLUTION DESKBOOK 3 (1991).

29. 42 U.S.C. § 9604(c)(5), (d) (2006).

30. *Id.* § 9605(h).

31. *Id.* § 9621(f).

Instead, section 311(d) of the Clean Water Act establishes the requirements for the NCP, with a far stronger emphasis on federal response.³² References to state and local agencies concern “coordination” and providing for reimbursement for certain state response activities.³³ While state and local governments are expected to be participants in Area Committees and Area Contingency Plans, the President appoints the members “from qualified personnel of Federal, State, and local agencies.”³⁴ There is no formal role for state and local elected officials. The Gulf Strike Team’s informal handbook “An FOSC’s Guide to Environmental Response” mentions governors only once as someone to be notified of a spill.³⁵

Area Contingency Plans are to be implemented “in conjunction with the National Contingency Plan,” and to detail the “responsibilities of an owner or operator and of Federal, State, and local agencies in removing a discharge,” identify the most sensitive areas, list available equipment, dispersants and personnel available to address the discharge, as well as local scientists “with expertise in the environmental effects of spills of the types of oil typically transported in the area.”³⁶ The Area Contingency Plan was also supposed to be integrated into offshore facility response plans, such as the one for the *Deepwater Horizon*.³⁷

B. Federal Preeminence, Federal Nonfeasance

While the Coast Guard was responsible for both the National and Area Contingency Planning efforts and response efforts, the MMS at the Department of the Interior was responsible for the review and approval of the facility plan for the *Deepwater Horizon*. MMS did this job without any interagency review of the plan or the MMS proposed approval of it.

Section 311 required that the facility plan “identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting

32. 33 U.S.C. § 1321(d) (2006).

33. *Id.* § 1321(d)(2)(A), (H).

34. *Id.* § 1321(j)(4)(A).

35. THE GULF STRIKE TEAM, AN FOSC’S GUIDE TO ENVIRONMENTAL RESPONSE 36 (2008), available at www.uscg.mil/hq/nsfweb/docs/FOSCGuidev07.pdf.

36. 33 U.S.C. § 1321(j)(4)(C).

37. *Id.* § 1321(j)(4)(C)(vi).

from fire or explosion)”³⁸ Such plans were required to be updated periodically and resubmitted for approval with each significant change.³⁹

As the National Commission’s Report documents, and as quickly became apparent, the facility plan failed to work: “BP’s oil-spill response plan for the Gulf of Mexico claimed that response vessels provided by the Marine Spill Response Corporation and other private oil-spill removal organizations could recover nearly 500,000 barrels of oil per day. Despite these claims, the oil-spill removal organizations were quickly outmatched.”⁴⁰ The Interior Department could not have performed the most basic due diligence on the plan before approving it; two comic mistakes showed that the plan was badly out of date and not tailored to Gulf waters:

- it listed as a key emergency consultant someone who had been dead for several years when the plan was submitted;
- it referred to protection of seals and walruses, creatures not found in the Gulf of Mexico in human memory.⁴¹

More fundamentally, the plan failed to take the possibility of a catastrophic well blowout seriously enough and to require adequate preparations to address such a disaster. Despite the large scale of this and other deepwater drilling operations in the Gulf, those approving the plan omitted Coast Guard review or consultation with any other agency about the plan’s sufficiency. Consequently, the mistaken plan assumptions remained unexamined by the most knowledgeable response agencies.

III. ROLES FOR STATE AND LOCAL ELECTED OFFICIALS

A. Failure to Include Local Elected Officials

Admiral Allen testified that he had participated in an April 2002 drill for a “spill of national significance” (SONS) as the incident commander.⁴² That drill had taken place in the New Orleans Superdome and had assumed a well blow-out about eighty miles west of where the *Deepwater Horizon* sank eight years later.⁴³ In retrospect, Admiral Allen

38. *Id.* §1321(j)(5)(D)(iii).

39. *Id.* §1321(j)(5)(D)(v), (vi).

40. NATIONAL COMMISSION, *supra* note 6, at 132.

41. *Id.* at 133.

42. ALLEN TESTIMONY, *supra* note 1, at 37.

43. *Id.*

explained that while that 2002 drill had seemed to go “pretty well,” experience with the *Deepwater Horizon* now led him to believe that fundamental changes in area contingency planning had to be made.⁴⁴ The Admiral’s critique focused on the absence of local officials and the mistaken assumption that state officials could speak for local interests in deciding response actions:

The entire exercise was conducted with a State of Louisiana representative, and there were no parishes present. We know now that if you’re going to interact with state and local responders at a local level – and it can be a county in Mississippi or a parish in Louisiana – that as part of the contingency planning process, the designation of sensitive areas, the negotiation of protocols for dispersant use, in situ burning, and so forth, that has to be taken down to the local government level where the responders are going to be interacting with on an actual spill. We can’t always rely on the fact that this will be integrated at the state level and that the state will speak with one voice for all the political interests of the state.⁴⁵

One example of unresolved local conflicts he cited concerned whether to give greater protection to marshes or beaches.⁴⁶ The contingency plans made marsh protection a priority because of their sensitivity and the difficulty cleaning them.⁴⁷ Beaches are much easier to clean so “there is a presumption in response doctrine that you will push oil to a beach because it can be recovered there.”⁴⁸ Admiral Allen testified that this is “not universally agreed within the Gulf,” in part because of economic losses to beachfront communities.⁴⁹

According to the National Commission’s Report, parishes and counties made noisy and conflicting demands for booms and skimmers, and for their deployment in places where they would not work or not work very well.⁵⁰ These demands sometimes caused the allocation of these resources based on political demands rather than the most urgent need.⁵¹ These were tangible local “nullifications” of the contingency plans, sometimes hindering rather than helping the overall response.

44. *Id.* at 38.

45. *Id.*

46. *Id.* at 40.

47. *Id.* at 39.

48. *Id.*

49. *Id.*

50. NATIONAL COMMISSION, *supra* note 6, at 153.

51. *Id.* at 154.

Much of this controversy resulted from the failure to include local elected officials in the earlier planning efforts. These elected leaders had no stake in those earlier plans: as the National Commission's Report noted, when one state official was told he was departing from the previously approved contingency plan, he said simply that he had not signed it.⁵²

These elected leaders had angry constituents demanding immediate action to protect their parishes, counties, beaches, and fishing grounds, and they saw an inadequate and, at times, bumbling response by BP and the federal government. These elected officials had every incentive to ignore or denigrate contingency plans which seemed to be working very badly, and to push hard to protect local interests. These officials' lack of familiarity with some aspects of oil spill cleanup also led them to demand steps which were ineffective, such as trying to boom waterways where strong tidal flows predictably moved oil past the booms.⁵³ Despite these problems, these local leaders might reasonably argue that their constituents might forgive their mistakes, but not their inaction, and that, in any event, it would be hard to do a worse job than BP appeared to be doing.

B. Conflicts with Other Emergency Procedures

Admiral Allen and other witnesses before the National Commission explained that elected officials in the Gulf were far more familiar with emergency procedures under the Stafford Act, used in order to respond to hurricanes and other disasters.⁵⁴ Under the Stafford Act, the President acts on a governor's request for a disaster declaration; once the President does so, state and local governments generally take the lead in responding, using federal financial assistance to help pay for the response efforts.⁵⁵ That approach is quite familiar to state and local

52. *Id.* at 139.

53. *Id.* at 154.

54. ALLEN TESTIMONY, *supra* note 1, at 34 (citing 42 U.S.C. §§ 5121-5195 (2006)); NAT'L OIL SPILL COMM'N MEETING, NATIONAL OIL SPILL COMMISSION ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING 66-67 (2010), *available at* <http://www.oilspillcommission.gov/sites/default/files/documents/Transcript-%20Meeting%203.pdf> [hereinafter HARRELL TESTIMONY] (statement of Richard Harrell, On-Scene Commander for Alabama).

55. 42 U.S.C. §§ 5121-5195 (2006).

governments in the Gulf, both from actual experience and from annual Gulf-wide hurricane drills in which they participate.⁵⁶

By contrast, the federal government is clearly in control of OPA response efforts. OPA and section 311 contemplate rapid seaborne responses which states are not equipped to handle and which require the on-scene commander (OSC) to make quick decisions without waiting to consult “chairborne” superiors on shore, much less state and local politicians untrained in commanding a vessel or leading a dangerous maritime rescue operation. The statute expressly contemplates responses as dramatic as sinking a vessel where the OSC considers such steps necessary.⁵⁷ In keeping with this approach, Admiral Allen explained that he viewed his role as National Incident Commander as being responsible for dealing with high level political and policy issues, while avoiding micromanagement of officers on the scene.⁵⁸

Nine days after the *Deepwater Horizon* explosion, as it became apparent that the combined BP and federal response was failing to contain the discharge, Governor Jindal of Louisiana declared a state of emergency, followed the next day by such declarations from Mississippi, Alabama, and Florida.⁵⁹ As the Commission Report explained:

At the outset of the spill, the pre-designated State On-Scene Coordinators for Louisiana, Alabama and Mississippi participated in the Unified Command. These officials were career oil-spill responders: familiar with the National Contingency Plan, experienced in responding to spills, and

56. HARRELL TESTIMONY, *supra* note 54, at 68. The blundering response of all levels of government to Hurricane Katrina in 2005 illustrates some of the severe limitations of the Stafford Act approach. The Bush Administration was severely condemned for its failure to federalize the response to the Hurricane without waiting for requests from the State of Louisiana. Ironically, President Bush asked Admiral Allen to take command of the federal response from the FEMA director when the federal disaster relief effort faltered so badly in the first days after Katrina. The political lesson of Katrina is that neither the public nor the press has patience with jurisdictional issues when the substantive response fails to work quickly, effectively, and visibly.

57. See 33 U.S.C. § 1321(c)(1)(B)(iii) (2006).

58. See ALLEN TESTIMONY, *supra* note 1, at 21 (stating that “as a 39-year veteran of the Coast Guard, the last thing anybody wants is what we would call the 3,000-mile screwdriver making adjustments and changes. So one of the first principles was that we would leave tactical control as close to the problem as we could, and that we would try and develop awareness in Washington. And then the staff and myself would travel back and forth, which we did, weekly, to not only see what was going on on-scene downrange, but also to take care of the extraordinary amounts of data required to brief up to the various levels of government and to deal with the media as well”).

59. NATIONAL COMMISSION, *supra* note 6, at 138.

accustomed to working with the Coast Guard. Some had participated in the 2002 spill exercise run by Admiral Allen. They shared the Coast Guard's view that the responsible party is an important ally, not an adversary, in responding to a spill . . . [with unprecedented state involvement] State and local officials largely rejected the pre-spill plans and began to create their own response structures.⁶⁰

The states as well as affected parishes and counties set up their own response centers, duplicating existing procedures and slowing down decisions needed in the response.⁶¹ The states and localities demanded and received money from BP to help fund these efforts.⁶² The Coast Guard eventually assigned liaison personnel to these additional command centers in order to improve coordination.⁶³ Despite the untidiness and fragmentation of the state and local responses, the state and local emergency declarations resulted in mobilization of additional response personnel and resources, including the National Guard.⁶⁴

The conflicting state and local responses were sometimes chaotic. At that point in the response effort, however, neither BP nor the federal government could claim that their combined response was stopping or containing the discharge. From the governors' perspective, they needed to take local command because of the failure of federal efforts. As for the criticism that the procedures had not been blessed in advance by the Area Contingency Plan, the governors could reasonably claim that such independence of the failed federal effort was a virtue, not a defect. Politically, establishing state independence from both the federal government and more particularly from BP was an additional virtue.

The turmoil also provided Louisiana the opportunity to press for federal approval and BP financing to build many miles of sand berms to protect barrier islands. The sand berm idea had originally been advanced before the spill to address the alarming loss of wetlands along the Louisiana coastline, an issue made acute by Hurricane Katrina.⁶⁵ Although federal reviewers argued that the proposed construction could not be completed in time to prevent oil from reaching the shorelines and might do more environmental harm than good, Governor Jindal and local

60. *Id.* at 138-139.

61. *Id.* at 139.

62. *Id.*

63. *Id.*

64. STANTON TESTIMONY, *supra* note 17, at 60; HARRELL TESTIMONY, *supra* note 54, at 67-68, 86.

65. NATIONAL COMMISSION, *supra* note 6, at 154.

officials pressed hard for federal approval in late May meetings with President Obama.⁶⁶ Federal approval was eventually given, and the bill sent to BP. In practice, only a small portion of the proposed berm project was completed before the discharge was contained. Little oil was stopped; but the bill, for more than \$220 million, was by far the costliest containment measure per barrel of oil contained or removed.⁶⁷ There may have been good environmental reasons to build the berms, but effective protection against oil pollution was not one of them.

IV. ACCURATE INFORMATION AND TECHNICAL EXPERTS

A. Source Control and Bad Information

Initial source control efforts focused on trying to make the blow-out preventer (BOP) work as it should have in the first place.⁶⁸ These efforts were largely frustrated because the BOP had been altered in the field, but the changes had not been recorded, resulting in control and closure efforts focused on the wrong controls.⁶⁹

Although BP acted quickly after the sinking to survey the damage to the undersea well and related equipment, early BP and federal estimates of the discharge volume and flow rate—initially reported as around 1,000 barrels a day, soon increased to 5,000 barrels a day—were disastrously wrong, as the true figure was apparently nearer 60,000 barrels a day.⁷⁰ Corrections to the 5,000 barrels per day estimate came very slowly. It was not until late May that the federal government began systematic efforts to evaluate these estimates.⁷¹ These later federal efforts eventually resulted in the approximate 60,000 barrel per day estimate.⁷²

Admiral Allen testified that his decisions were unaffected by the bad information about discharge rate because units were dispatched on the

66. *Id.* at 151.

67. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, THE STORY OF THE LOUISIANA BERMS PROJECT, STAFF WORKING PAPER NO. 8, 39-40 (2011), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Berms%20Working%20Paper.pdf>.

68. NATIONAL COMMISSION, *supra* note 6, at 131.

69. *Id.* at 137-138.

70. *Id.* at 146.

71. *Id.* at 146-147.

72. *Id.* at 167.

theory that everything available was needed, and that conditions could grow worse quickly.⁷³

But BP's source control responses were apparently more adversely affected by these mistaken figures. For example, BP's early efforts to put a containment dome on the discharge failed. The failure resulted in large part because natural gas forms methane hydrate crystals at the temperatures and pressures found at a 5,000 foot depth.⁷⁴ BP substantially underestimated the volume of hydrocarbons being discharged, including methane, and so underestimated the methane hydrate problem when it made its calculations for the containment dome.⁷⁵ While it is unclear if the containment dome could have succeeded if the accurate information had been used, it is likely that had BP used more accurate data, BP would instead have focused on more promising approaches rather than the risky containment dome.⁷⁶

The underestimated discharge volume also adversely affected the "top kill" and "junk shot" efforts. "A top kill . . . involves pumping heavy drilling mud into the top of the well through the BOP's [Blow-out Preventer] choke and kill lines, at rates and pressures high enough to force escaping oil back down the well and into the reservoir."⁷⁷ BP engineers used the 5,000 barrel per day figure in their planning; when the actual figure was closer to 60,000 barrels.⁷⁸ A BP engineer had reportedly calculated that the effort would not work if the discharge exceeded 13,000 barrels per day.⁷⁹ By underestimating the discharge volume, these efforts underestimated the pressure needed to stop the discharge. These efforts failed.

Similarly, BP had too little collection capability at the well site to handle the actual volume discharged once it was able to put the "top hat" in place to funnel oil to collection vessels at the surface.⁸⁰

73. ALLEN TESTIMONY, *supra* note 1, at 40-41. Other Coast Guard officers gave similar testimony: Captain Stanton who had been at the command center in Houma, Louisiana noted that Coast Guard policy was to mobilize very substantial resources to make an overwhelming response. NATIONAL COMMISSION, *supra* note 6, at 98-100.

74. NATIONAL COMMISSION, *supra* note 6, at 145-46.

75. *Id.*

76. The National Commission noted that at one point the containment dome started to float to the surface, buoyed by the large volume of hydrocarbons, including potentially explosive methane. *Id.* at 146. One of the little noted achievements of the response effort was its excellent safety record, particularly given the thousands of people and vessels involved. STANTON TESTIMONY, *supra* note 17, at 56.

77. NATIONAL COMMISSION, *supra* note 6, at 149.

78. *Id.* at 150.

79. *Id.*

80. *Id.* at 159.

Whether BP could have made these earlier efforts succeed if it had used the correct discharge volume information is debatable. The containment dome available probably could not have been modified to handle the larger discharge; it is unclear if enough pressure could have been brought to bear for the “top kill” to succeed, even if correct figures had been known. It is also unclear whether any additional production vessels to collect and process the oil could have been deployed sooner.

It is very clear, however, that the dissemination of the early and inaccurate information, BP’s reliance on these figures as the basis to make several highly public but unsuccessful source control efforts, and the grudging manner in which corrections were made, badly damaged both BP’s and the federal government’s credibility. As a result, state and local elected officials came under great pressure to do something else to protect their constituents’ property and livelihoods, since the BP and federal efforts had lost public confidence.

B. Technical Experts, Federal and Private

As the federal spill response effort floundered and as BP’s initial efforts to control the well failed, President Obama asked Dr. Steven Chu, Secretary of Energy and Nobel Prize winning physicist, to become personally involved in the supervision of BP’s source control efforts.⁸¹ Dr. Chu made some significant contributions to the effort, such as the suggestion to use gamma ray imaging of the blow-out preventer.⁸² He also brought in many other highly capable federal scientists, who made significant contributions.⁸³

Secretary Chu’s involvement is a testament to his talent, skill, and the great regard in which he is held. It made great journalism. It was good politics, as it was an easily understood way to demonstrate the President’s commitment to fixing the problem.

Sadly, it is also a searing indictment of the current system that it was necessary to enlist the Secretary of Energy to do line-level scientific oversight, when his statutory duties are to supervise a vast federal scientific establishment, including the nation’s nuclear energy programs and many national laboratories.

As the National Commission’s report makes clear, the MMS lacked the expertise needed to oversee BP’s spill response.⁸⁴ No other agency

81. *Id.* at 148.

82. *Id.* at 149.

83. *Id.* at 148.

84. NATIONAL COMMISSION, *supra* note 6, at 135-136.

seemed to have that expertise either. Scientists and engineers from other companies were also brought in to consult, but their role was unclear and BP had legitimate concerns about conflicts of interest.⁸⁵

The provisional company of federal scientists and engineers detailed to the task, aided by outside scientists, eventually provided very good technical oversight of BP's decisions, but not until more than a month had elapsed and much damage had occurred.⁸⁶ According to the National Commission's report, their efforts were grafted onto the spill response and their contributions unevenly shared with those who would have benefited from their insights.⁸⁷

V. BETTER SPILL RESPONSE AVOIDS NULLIFICATION

The problems identified by Admiral Allen and in the National Commission's report are very serious. These problems suggest that major reforms are needed in the United States' spill response system to avoid repeating serious mistakes with the *Deepwater Horizon* when the next spill of national significance occurs, particularly if it occurs in connection with offshore oil and gas production. The needed changes, however, require much less in the way of statutory revision than revisions in the way the United States implements current legal requirements.

A. Build Federal Scientific and Engineering Review Capability, and Use It

The facility response plan for the *Deepwater Horizon* failed. That failure did not result from an inadequate statutory requirement in the Clean Water Act, but from the failure of those responsible for approving the facility response plan to check its claims or assumptions properly before doing so. Perhaps these failures occurred because those responsible for approving it were not responsible for the spill response. The plan's claims about adequate response capability proved false when they mattered most. Federal regulators need to be provided with the personnel and expertise to conduct a serious review of these plans; that capacity was plainly lacking for the *Deepwater Horizon*'s plan.

Current political attacks on federal employees' pay, work ethic, and professionalism, as well as current efforts to make wholesale cuts in

85. See, e.g., *id.* at 162.

86. See *id.* at 164.

87. *Id.* at 162.

regulatory agencies, suggest that these problems will arise again unless Congress recognizes that such shortcuts are dangerous and likely to cost the country dearly in the long run. Here, the solution lies in the appropriations and budget process much more than in any amendments to OPA or section 311 of the Clean Water Act.

B. Engage State and Local Elected Leaders in Planning and Practicing Spill Response

For a spill of national significance, the public expects their state and local officials to become fully engaged in the response. In order for that response to work well, these leaders need to be made an integral part of the planning process. Right now, they are not. For these large scale spill responses, the NCP should be revised to encourage active participation by elected leaders in Area Contingency Plans and in key drills. Area Contingency Plans can be revised to assure that they are better integrated with state disaster preparedness procedures, such as activation of the National Guard, and the exercise of other state and local emergency powers to aid in response to major spills. Similarly, the NCP should be revised to provide for regular Coast Guard cooperation with these elected officials as a matter of course in the event of such a large scale spill.

These responses need to be practiced regularly if they are to work well, just as hurricane responses are practiced annually in the Gulf. If elected leaders are engaged as such, they will have ownership of the plan and its response, and probably be more productive partners in the response. Regular press coverage of these drills, noting the contributions or absence of key elected leaders, will help establish a public expectation of participation, one that can be turned into a political issue by opponents if a leader skips these drills.

C. Provide for Rigorous Scientific and Engineering Oversight of Responsible Party Response Operations

The jury-rigged scientific oversight pulled together by the federal government in the *Deepwater Horizon* response underlined the need to have these scientific review procedures established in advance, including the assignment of key technical experts. Like other aspects of spill plans, these assignments need to be updated frequently in order to work in an emergency. Current responses could be substantially strengthened if a similar requirement were imposed as part of area and facility response plans, required to be updated periodically and tested annually by regulators.

Superfund, like OPA and section 311 of the Clean Water Act, provides that responsible parties can take the lead in conducting removal and responses actions.⁸⁸ In order to do so under Superfund, however, the statute requires that an oversight contractor be retained at the responsible party's expense in order to assist EPA in reviewing that response.⁸⁹ That approach can work under OPA, provided that such arrangements are made in advance with reputable engineering firms approved by both the Coast Guard and the Department of the Interior agency assigned to review such spill response plans. Once again, updating these assignments and testing them regularly will be essential to having them work in an actual emergency.

D. Insist on Accurate and Independent Information About the Discharge for Government Officials Making Decisions About the Response

The erroneous information about the most basic aspects of the *Deepwater Horizon* discharge greatly damaged public confidence in the response and helped push state and local governments to act independently of established spill response mechanisms. The National Commission has made detailed recommendations about steps to assure adequate instrumentation of drilling equipment so that this problem is not repeated.⁹⁰ Similarly, detailed information about the as-built aspects of the drilling operation needs to be accurate and readily available, to avoid the "wheel-spinning" that occurred when the blow-out preventer controls were modified on the *Deepwater Horizon* but the records were not provided to those trying to operate it after the sinking.

Experience with this spill underlines the importance of having the federal government independently verify critical information about the spill, to do so early, and to update the information regularly. While an oversight contractor can do much of the oversight of the responsible party, this information is sufficiently critical to the response that the federal government, probably through the Coast Guard, needs to develop the capability to conduct its own assessments of spill conditions. This means acquiring the remotely operated submersibles and key personnel needed to operate them, as well as the expertise needed to evaluate the results. That capability will be important to assure the public about the accuracy of the information and to make sure responsible parties are not ignoring or missing adverse information.

88. 42 U.S.C. § 9604(a)(1) (2006).

89. *Id.*

90. NATIONAL COMMISSION, *supra* note 6, at 253.

VI. CONCLUSION

Admiral Allen and the National Commission both have given the country very thoughtful advice about how to avoid repeating the *Deepwater Horizon* disaster. This article has focused on how these lessons might be best applied in planning spill responses, so that the United States can avoid committing similar mistakes when the next spill of national significance occurs. Many of these changes can be accomplished under existing law, provided that Congress and the Administration recognize that much of the solution lies in carrying out existing legal commitments with adequate resources and attention and engaging state and local elected leaders as well as key federal officials.