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Title

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"Catastrophe: Viewpoints on Marine Disasters"

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Good morning.

You are hearing a number of viewpoints today on maritime disasters. I was asked to speak – not so much because of my legal brilliance, but because of my background in Coast Guard investigations and maritime regulatory law. For the benefit of those who do not know me, I spent over 20 years in the Coast Guard: the second half as an attorney and the first half mostly as what we used to call an M-Type. That means that I was a license examiner, a marine inspector, and a designated investigating officer.

Today I will be speaking with reference to the same scenario that Mr Bonner and Mr Hayden provided you. But the particulars don't make much difference: what I will be saying applies generally to any significant maritime disaster.

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Here Come the Feds

There are three phases to such a disaster from the federal perspective: Response, investigation, and the aftermath. By response I mean everything that pertains to stabilizing the situation. In this context, that again means three things: saving life, saving property, and dealing with environmental issues.

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Response Types

Search and Rescue

I do not intend to focus on Search and Rescue, or SAR, beyond mentioning it as an obvious component of the federal response. Broadly speaking, the Coast Guard handles maritime SAR. If any of you have a keener interest in this aspect, I suggest you get yourself a copy of the National SAR Plan and other SAR policy. Here is the website.¹

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SAR Plan website

One reason to consider this is, for example, if you want to get to the poor crewmembers in a hurry, there is probably a policy governing where they were taken.

The rest of the federal Response

That leaves Port Safety, Infrastructure, and Environmental response, all aspects of Incident Management.

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¹ <http://www.uscg.mil/hq/g-o/g-opr/manuals.htm> (visited 27 Sept 2005).

In Homeland Security Presidential Directive 5 (HSPD-5), Management of Domestic Incidents, the President told the Secretary of Homeland Security to develop and administer a National Incident Management System (NIMS) and a National Response Plan (NRP).²

SLIDE NIMS

NIMS is supposed to integrate good practices among all possible agencies so that they can work together effectively no matter what the hazard or what its scale.³ It is not about substance but about standards and procedures – for example, specifying radios so that the firemen can talk to the police and to the Coast Guard.

SLIDE NRP

The NRP goes to the substance of incident management.

The National Response Plan was finished this past January,⁴ and was supposed to be fully implemented by this past May.⁵

It is mainly for Incidents of National Significance (IONS). There is a terrible definition, but that means something with high impact requiring an extensive and well-coordinated response.⁶

Hurricane Katrina was the first declared IONS. How did that work? A 3-syllable expression comes to mind, starting with Cluster and rhyming with Thunderstruck.

SLIDE Spill table I

But in fairness, I should mention that the NRP is more directed to not only IONS, such as Katrina, but towards domestic security generally. On the one hand, I searched the NRP for mention of marine or maritime disaster and found nothing.⁷ On the other hand, if there had been an element of terrorism or other security aspect to the disaster we are considering, the NRP would definitely apply, because it is precisely for the purpose of roping in lots of other federal assets when the need arises. Suppose this hypo had been the result of a terrorist attack. Five years ago, even if everyone knew that terrorism were involved, there would probably have been a tussle between the Coast Guard, waving the NCP, and the FBI waving whatever it is that they wave. Now there is at least a plan, however rough, to simply raise the organization a level or two and deal with more than one aspect at a time.

SLIDE Spill table II

Luckily, we can forget about NIMS and the NRP as such. Lesser spills – even big ones like this – are handled under the previous system. Pollution incidents that are not declared IONS or Stafford Act Disasters or Emergencies continue to fall under the National Contingency Plan.

SLIDE NCP

² Homeland Security Presidential Directive/HSPD-5 of 28 Feb 2003, at <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html> (viewed 1 Oct 2005).

³ <http://www.fema.gov/nims/> (visited 28 Sept 05).

⁴ <http://www.dhs.gov/dhspublic/display?content=4270> (viewed 26 Sept 2005). I recommend that readers review the summary and analysis offered by Blank Rome LLP at

http://www.blankrome.com/publications/maritime/update0105_04.asp (viewed March 2005 and 26 Sept 2005).

⁵ National Response Plan, available online at http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf, at ix (visited 26 Sept 2005).

⁶ <http://www.dhs.gov/dhspublic/display?content=4270> (visited 24 Sep 2005).

⁷ Searches within Adobe Acrobat Reader by the author on 26 Sept and 1 Oct 2005.

So what's in that plan? Among other things, it calls for Area Committees of the people who will be involved, and it calls for Area contingency plans.⁸

In our hypothetical situation we are interested in the New York/New Jersey Area Contingency Plan.

SLIDE NY-NJ ACP

It is on the web in redacted form.⁹ The redactions are for security reasons, and they take it pretty seriously: for example, they won't give me a full copy because I have no "need to know". But I spoke to the Coast Guard and you may be able to persuade them that you have a need to know – that you need a full copy. For example, Annex F, the Summary of Area Resources, is a directory of everything they have on file from pollution booms to tugs. If my client could ever have a big bent boat spewing oil in the area, I'd want to know everything the feds planned to do! In this case, there is the possibility of some oil being salvaged from the OIL CARRIER into barges. What an opportunity for the cargo interests to get at the FOSC and have this done their way, not whatever way he sees fit! If you think you should have a copy, talk to LCDR Sanchez, the Chief of the New York Incident Management Division. If you need help putting together a pitch on this, let's talk.

SLIDE Sanchez contact info¹⁰

The ACP

Even the redacted version has good information. There are four basic phases to what's going on from the federal perspective. Discovery, preliminary assessment, cleanup, and paperwork.

SLIDE Response Phases

Phase I, in a case like this one, is simply when someone on one of the vessels rings the National Response Center, whether by the 800 phone number or by radio or whatever. I mention this just to emphasize how dependent the feds are upon others for notice. That call is the trigger for everything that follows, which is why there are so many penalties for not making the call. By the way, here is the number: 800-424-8802.

Let's look at Phase II. We need to classify this incident. Is it an IONS, a SONS (Spill of National Significance), or just another spill?

SLIDE NCP Flowchart

This slide, from the ACP, just shows the flow from notice through the early assessment.¹¹ Everything starts with notice to the National Response Center. Now it's decision time: do they

⁸ 40 CFR § 300.205(c) (2004): "Area Committees ... shall be responsible for ... [p]reparing an ACP for their areas...".

⁹ Start at <http://homeport.uscg.mil/mycg/portal/ep/home.do>.

Click on the "Port Directory" tab.

Select "New York" (or any port you are interested in) from the drop-down "Select Captain of the Port Zone" box. And then click on "Area Contingency Plan" halfway down the right side of the page under "Safety".

¹⁰ Coast Guard Sector New York

212 Coast Guard Drive

Staten Island, NY 10305

Ghermes-sanchez@actny.uscg.mil

718 354 4146

¹¹ NEW YORK/NEW JERSEY ACP NY COTP area contingency plan, available online per note 9, supra, at A-VIII-B-1.

need federal assistance or not? If not, the responsible party deals with it, with the State and local officials doing whatever their rules call for. Otherwise, the FOSC takes charge, and with that comes a lot of resources, from the National Strike Force to the Navy's SupSalvage. In this case it is quite clear that the feds would take over, which is precisely why all of you might be interested in the ACP.

We have one vessel badly damaged if not a constructive total loss, probably some people dead, and lots of oil all over the place. Even so, this is not unheard of: Nobody in Omaha, for example, will likely care one way or the other. Given that Katrina is the only declared IONS to date, it is very doubtful that this incident would rise to that level. When we consider the definition of a SONS, it is even plainer that this is not an IONS, since it is probably not a SONS either.

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SONS

Was this spill a rare event? I hope so. But was it really catastrophic? I don't think so. Nor do I imagine it *greatly* exceeds the local response capabilities. Only the Coast Guard Commandant gets to declare a SONS in the coastal zone,¹² but New York being the port that it is, I think this spill can be dealt with locally.

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ACP chart

The ACP is also where we find out who the pre-designated Federal On-Scene Coordinator is. In this case, it is the Coast Guard Captain of the Port New York (COTP NY).¹³

One thing we certainly have is lots of people crawling all over the place. That would include many of you, as well as Coast Guard or other investigators. I'll get to investigations in a minute, but let me say a word here about the problem of a case like this going criminal. We are all wondering about that, of course, but it may not have occurred to you that the investigators on scene are probably wondering the same thing. They are trying to do different things: pollution response, make a preliminary investigation and yet preserve any needed evidence in case it goes criminal. In this case I would not be surprised if one or both of the navigating officers were charged, so they may well have criminal lawyers telling them not to talk to anyone.

Everyone has talked about trying to hang onto witnesses, not let them be repatriated. Keep in mind that the Coast Guard investigator can help here: you educate him about the risk, and he may be willing to use his power to issue subpoenas on the spot. That won't solve your problems, but it might buy you some time. Similarly, some of your concerns about hanging onto the vessels for security might be eased if you persuade the COTP to order the vessels' movement, or get him to have Customs withhold clearance, so that the vessels are available to the Marine Board.

I would like to say a word about policy. Policy is like pie-crust: easily made and easily replaced. But until it is replaced, it is binding on the agency which uttered it. So the more you know about the principal policies, such as the ACP and the Coast Guard's rules for deciding to refer a criminal case, the better position you are in to influence what is happening.

For example, the FOSC will not be very impressed if you say "Don't do X because it will cost my client lots of money." So what? It's not HIS money. But if you can say "You shouldn't do X because your policy says that you're supposed to do Y", that is a horse of a very different

¹² Id.

¹³ Id. at A-VII-1.

color. The spectre of bad things from minor official admonition up to a Bivens action¹⁴ or worse may give you some leverage if used tactfully. Yet another reason to be very familiar with the area contingency plan.

Turning now to the clean-up phase:

My assumption here is that you are all familiar with the federal role in the actual clean-up. In summary, the FOSC can either take charge himself or else leave it to the Responsible Party. It depends upon whether we know who is responsible and whether the Responsible Party is competent to clean up. Either way, the Responsible Party is liable for the cleanup costs.¹⁵ Those not recoverable are borne by the OSLTF. In this case, it seems that the owners of OIL CARRIER are responsible in the sense that it's their oil. They are dealing with it -- obviously, with help from TESTBANK because at the end of the day there will almost certainly be liability to share. But from the federal perspective, that is irrelevant. So long as they have OIL CARRIER on the hook, they are happy to leave the private parties to sort out shares later.¹⁶ And the federal definition of Responsible Party is very broad: not only OIL CARRIER, but TESTBANK, and their operators or charterers, can all be considered the Responsible Party.¹⁷

And now to paperwork and cost recovery, Phase IV.

This phase really includes not just paperwork and money, but also the whole matter of the investigation which I'll address next. Suffice it to say, as the other presenters have already stressed, that most of the outlay here is coming out of your clients' pockets. To the extent there is any chance of getting some of it back from the feds, you had better know what they are going to require in the way of documentation.

SLIDE Investigations

Investigation

And now, a word about investigations. Both the Coast Guard and the National Transportation Safety Board (NTSB) have investigation authority.¹⁸ The main difference is one of scale: the Coast Guard does thousands of investigations a year, while the NTSB does very few marine investigations.

SLIDE Types of Investigation

That is because the Coast Guard does *something* every time a broad range of minor and major casualties are reported to them, and it calls them all "investigations". The overwhelming majority, in my experience, are of the Oiler-with-a-sore-back variety, and consume perhaps 10 minutes of a junior officer's time while he decides that the apparent cause is "Carelessness".

Turning to our hypothetical collision today, I imagine this would be a toss-up between a Marine Board by the Coast Guard and a NTSB investigation. In fact, there might not be a toss-up: the

¹⁴ A Constitutional tort against a federal officer in his personal capacity, so called from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁵ 33 U.S.C. 1321(b) (10) (2004).

¹⁶ See generally the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (2004). 33 U.S.C. § 1321(b) (3) prohibits discharges into US waters, regardless of fault.

¹⁷ 33 USC § 2701(32) (2005).

¹⁸ For the Coast Guard: 46 U.S.C. 6310 (2004). For the NTSB: 49 U.S.C. § 1131 (2004).

regulations provide for independent investigations but “to avoid duplication as much as possible.”¹⁹

SLIDE More on NTSB

There is a Memorandum of Understanding (MOU) between the NTSB and USCG to determine when the NTSB will take the lead.²⁰ Last weekend’s tragedy up in Lake George is a classic example of an NTSB case because of the helpless nature of the elderly passengers.

SLIDE What gets Investigated

The Coast Guard has authority to investigate virtually all marine casualties that meet the threshold requirement of being “reportable”, which means things like groundings, injuries beyond first aid, anything affecting the seaworthiness of the vessel, damage over \$25,000, and so on.²¹

Well, why are they doing these investigations?

SLIDE What are investigations for

At least here we have some similarity between the NTSB and the Coast Guard. The general purpose is to promote safety of life and property at sea.²² With slightly different wording, both the Coast Guard and the NTSB are going after cause.²³ What matters most to us here today is the different ways they go about it.

Slide: Types of investigation

As the damage or other criteria increase, the formality of Coast Guard investigations increases with them.²⁴ For example, a matter becomes a “serious marine incident” (SMI) when there is a death, damage over \$100,000, loss of a vessel over 100GT, 10,000 gallons of oil spilled, or a reportable quantity of hazardous material.²⁵ When that label of Serious Marine Incident is applied, it means that every marine employee directly involved must be tested for drugs and alcohol.²⁶ Our hypothetical collision clearly meets the SMI standards. There is no real trigger for a Marine Board, the most formal Coast Guard investigation, beyond the discretion of the Commandant to order one if he thinks it would be in the public interest.²⁷ For our OIL CARRIER/TESTBANK collision, we are in the upper range, so let’s consider the difference between a Coast Guard Marine Board and an NTSB investigation.

One big difference is that all Coast Guard investigations are public.²⁸ By contrast, NTSB investigations start at the other end: there will never be a public hearing *unless* the Board thinks one is “necessary in the public interest.”²⁹

¹⁹ 46 CFR § 4.40-3(b) (2004).

²⁰ http://www.nts.gov/Surface/marine/MOU_USCG_20020912.pdf (visited 3 Oct 2005).

²¹ 46 CFR § 4.05-1(a); 46 CFR § 4.07-1(a) (2004).

²² 46 CFR § 4.07-1(b) (2004).

²³ Coast Guard: 46 CFR § 4.07-1(c) (1) (2004). NTSB: 49 CFR § 850.20 (2004).

²⁴ See, e.g., the definition of a Serious Marine Incident, 46 CFR § 4.03-2 (2004), in contrast to the basic reportable marine casualty.

²⁵ 46 CFR § 4.03-2 (2004).

²⁶ 46 CFR § 4.06-1(b) (2004).

²⁷ 46 CFR § 4.09-1 (2004).

²⁸ For example, 46 CFR § 4.09-17 (2004) governing Marine Boards.

²⁹ 49 CFR § 845.10 (2004) (“The Board may order a public hearing as part of an accident investigation...”).

Slide: Parties in Interest

Another difference is the matter of parties. The Coast Guard's rules are far more generous. Parties in Interest include anyone found to have a direct interest in the investigation, and **shall** include vessel owners or charterers or their agents, along with any merchant mariners whose conduct may be at issue.³⁰ Furthermore, the Coast Guard's Marine Safety Manual, defining Parties in Interest, states that status as an underwriter, for example, is a factor to consider in designating someone a party.³¹

Slide: NTSB Parties

The NTSB has a very different notion. The investigator-in-charge picks the parties, and they are expressly limited.³² There is a similar condition about direct involvement, but the second condition is that would-be parties offer "suitable qualified technical personnel" to assist.³³ In other words, they might allow free tech experts. And in case there was any doubt about their intentions, the next section explicitly states that no one who represents claimants or insurers shall be a party, nor anyone in a legal position!³⁴ The moral: your chances of being named a party are much better in a Coast Guard investigation.

In either case, the benefit of being a party is that you can bring evidence and examine witnesses.³⁵

Slide: Report of Investigation

The report of investigation.

Investigation reports are not generally admissible in civil or administrative proceedings.³⁶ So why all this talk about the investigations? That brings me to the aftermath phase.

Slide: Aftermath

The underlying purpose of these investigations is not to fix civil or criminal responsibility.³⁷ But to the end of improving safety, there are at least three issues that the findings and recommendations address:³⁸

Would a new or different regulation have prevented this? Then the report becomes the basis for a rulemaking project.³⁹

Did a piece of inspected or approved equipment fail?⁴⁰ Then the report is the basis for condemning the equipment or revoking an approval.

³⁰ 46 CFR § 4.03-10 (2004).

³¹ Marine Safety Manual, Volume V, Investigations, Chapter 3, paragraph A-5-e. (Commandant Instruction M16000.10 (series)), (available online at <http://www.uscg.mil/hq/g-m/nmc/pubs/msm/v5/c3.htm>) (viewed 3 Oct 2005).

³² 49 CFR § 831.11(a) (1) (2004).

³³ Id.

³⁴ 49 CFR § 831.11(a) (3) (2004). See also 49 CFR § 845.13(a) regarding parties at hearings.

³⁵ Coast Guard: 46 USC § 6303 (2004); 46 CFR § 4.07 (2004). NTSB: Such rights for parties are implicit and are referred to in 49 CFR § 845.23 (Prehearing Conference) (2004).

³⁶ 46 USC § 6308 (2004), 46 CFR § 4.07-10 et seq. (2004).

³⁷ 46 CFR § 4.07-1(b) (2004).

³⁸ Marine Safety Manual, *supra* note 30, Chapter 3, paragraph A-2.

³⁹ Id.; see also id. at paragraph D-1-a.

⁴⁰ 46 CFR § 4.07-1(c) (2) (2004).

Did someone do something wrong? If it was a seafarer, then the report leads to suspension or revocation proceedings against the person's license or document.⁴¹ If someone in the Coast Guard is the culprit, the report can lead to court-martial proceedings.⁴² And of course, nowadays, there is the question of criminal proceedings. NTSB procedures call for criminal matters to be turned over to the FBI, while Coast Guard procedures call for them to be referred to the local US Attorney.⁴³

These possible outcomes are important. It is simply in your interest, representing various parties to this collision, to try to achieve your desired outcome through all means available. One of those means is doing what the regulations allow for to affect the recommendations and conclusions of these reports.

If I were investigating this, I would encourage the various attorneys to submit proposed findings of fact -- one of the rights of parties. But I might say that I'm not going to consider them unless they get together and provide me a set of findings that they agree on.

Another reason to be involved is that, regardless of their admissibility, these reports make a record. You may have a separate duty to have that record reflect matters of interest to your clients. And keep in mind that all the logs and records you may need will probably be subpoenaed for the Marine Board. Since the report is publicly available, that may be another way for you to get those records.

Finally, there is the possibility of some litigation use of these reports, at least for impeachment. That issue has only come up a couple of times, and both times the courts deferred deciding it on ripeness or other grounds.⁴⁴

Slide: NPFC Brochure

Then there's money. In a case like our hypo, a lot of parties have spent a lot of money. As others have said today, record-keeping is a big part of that. One reason is so that there may be a chance of getting some of it from the Oil Spill Liability Trust Fund. This brochure⁴⁵ is one place to start, or you can look to the general requirements for making a claim at 33 CFR § 136.105.

Generally, claims can be made for removal costs that the responsible party (RP) does not pay.⁴⁶ Even the RP may make claims for removal costs beyond his limits of liability or where the spill was solely caused by a third party, an Act of God, or an Act of War.⁴⁷

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Conclusion

Conclusion

You are all experts in the private side of dealing with marine disasters. I hope this has given you a better understanding of the federal side. Perhaps there is a market for

⁴¹ 46 CFR § 4.07-1(c) (3) (2004).

⁴² 46 CFR § 4.07-1(c) (4) (2004); see also Marine Safety Manual, *supra* note 30, Chapter 3, paragraph B-16-c (6).

⁴³ 49 USC § 1131(a) (2) (B) (2004); 46 CFR § 4.23-1 (2004).

⁴⁴ *In re Danos & Curole Marine Contrs., Inc.* (2003, ED La) 278 F Supp 2d 783; *Eckstein Marine Service, Inc., v. The Crescent Marine Towing, Inc.*, 1999 U.S. Dist. LEXIS 1019, 1999 WL 58264 (E.D.La.1999).

⁴⁵ "Funding Guidance for Oil Spills and Hazardous Materials Releases," at http://www.uscg.mil/hq/npfc/Documents/PDFs/urg/URG_AppB.pdf (visited 1 Oct 2005).

⁴⁶ 33 CFR 136.205 (2005); Funding Guidance for Oil Spills and Hazardous Materials Releases, *supra*, at 1.

⁴⁷ Funding Guidance for Oil Spills and Hazardous Materials Releases, *supra*, at 1-2.

consultants or others experts who can help you make the federal results more palatable. I'm counting on it -- you have my phone number?

A year ago, Chairman Kwan-Hai Mao spoke at your annual general meeting.⁴⁸ He described the role of Average Adjusters in a casualty eloquently, how they meet everyone's demands.⁴⁹ His conclusion was that the Average Adjuster is "the General Manager of any multifaceted maritime disaster."⁵⁰

But if he is right, then adjusters should have a lock on relations with federal officials! My point today is that anyone can be better at that by knowing better what the feds are trying to do throughout the course of a disaster. The available policies are a great place to start.

Slide: Questions

Thank you. Any questions?

⁴⁸ at <http://www.usaverageadjusters.org/2004KHM.pdf>, visited 26 Sept 05.

⁴⁹ Id. at p.3.

⁵⁰ Id.