Responder Immunity – Closing the Gap

By Brian McEwing

Everyone in the maritime industry wants to believe that oil spill responders remain ready, willing and able to respond to any and all oil spills. In fact, almost every marine interest that handles oil has at least one Oil Spill Response Organizations (OSRO) named in its response plan. Failure to respond to an oil spill can have very significant impacts on any port, and the lack of a response effort can lead to its closing and untold economic and environmental damage. It was not very long ago that the ATHOS I spilled 265,000 gallons of crude oil into the Delaware River. While the spill itself is something that most would soon forget, the responders who worked to mitigate the spill and protect valuable natural resources need to be remembered. More recently the efforts to clean up the DEEPWATER HORIZON oil spill, which was much greater in geographic scope, are a testament to the ability, if not the complete readiness, of the oil spill response community. But doubt now exists as to the willingness of oil spill responders in a post-DEEPWATER HORIZON world.

Following the EXXON VALDEZ Oil Spill, Congress provided immunity to oil spill responders under the Oil Pollution Act of 1990 (OPA 90) consistent with the "polluter pays" principle. The principle is a simple one-- the "Responsible Party" should be liable for all damages flowing from their acts or omissions that result in the spilling of oil. Responder immunity under OPA 90 is not, however, absolute. Responder immunity does not apply if a responder acts with gross negligence or willful misconduct, or in cases involving personal injury or wrongful death. These "gaps" in immunity are now in the forefront of concern for many OSROs and for good reason.

In their final report to the President, the National Commission on the DEEPWATER HORIZON and Offshore Drilling commended the efforts of responders, stating that, "There were remarkable instances of dedication and heroism by individuals involved in the rescue and cleanup. Much was done well—and thanks to a combination of good luck and hard work, the worst-case scenarios did not all come to pass".

There is one lurking question, unanswered by the Commission's report, that is – Will the oil spill response community answer the call when the next spill occurs?

While one would believe that this question is easily answered, an unfortunate aftermath of the clean-up of the DEEPWATER HORIZON spill is that thousands of lawsuits were filed against the response companies who answered the call. These lawsuits have been consolidated into what has become known as the Multi-District Litigation, or "MDL". As a result of these "gaps" in immunity, response companies now face millions of dollars in litigation fees to defend these lawsuits. There is a second, but no less important, reason that Congress granted immunity to oil spill responders-- to ensure that there would be no delay in responding. The MDL lawsuits cast doubt on the willingness of oil spill response companies to respond to the next spill.

As a result these issues, efforts are currently underway by industry to convince Congress to close the gaps in responder immunity. While some might argue against providing immunity for gross negligence or willful acts as being contrary to public policy, the reality of the MDL lawsuits is that upon discovering that responders were immune from claims based upon negligence, plaintiffs simply amended their complaints to allege gross negligence and willful acts (In addition to gap closing legislation, a minimum pleading standard may also be appropriate). Absent complete immunity for

responder actions which are consistent with the national contingency plan, oil spill responders will still face the real possibility of spending millions of dollars to defend lawsuits that are more appropriately directed to the Responsible Party.

Recent decisions in the MDL have been favorable to the responders, most notably, the court's recognition of the principle of derivative immunity. The theory of derivative immunity is that so long as the responders were acting in accordance with the national contingency plan and the federal government was directing such action, the responders would enjoy the same immunity as the government. Nevertheless, those decisions have come with significant litigation cost to oil spill response companies and they must continue to defend the claims as the question as to whether the government or BP was directing the clean-up efforts is yet unanswered.

Until such time as Congress acts to amend responder immunity, both maritime interests, and response companies should seek advice of counsel in reviewing their insurance policies and responder agreements and any associated agreements to ensure that they have appropriate coverage, and indemnity and defense provisions.

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