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Proactive Spill Response Planning and Execution: Preparing for the Defense of Civil Claims

In the wake of a major spill, oil companies, the owners and managers that transport their cargo, and their insurers expend enormous sums and resources on shoreline remediation, claims handling, and the myriad other requirements of the Oil Pollution Act of 1990 (OPA 90). These efforts generate reams of data and countless reports and photographs documenting the spill's impact on all manner of human and environmental receptors. While this information plays a critical role in effectuating a comprehensive and thorough cleanup, it also documents the scope and extent of a potentially devastating injury to the environment, natural resources, and private property.

Despite OPA 90's claims process, and the Oil Spill Liability Trust Fund that backs it up, civil claims rarely lag far behind a major spill. While the timely and thorough response efforts of the Responsible Party (RP) under the watchful eyes of a host of federal, state, and local authorities should bolster its defense in any ensuing litigation, that is not always the case. Rather, those response efforts and their careful documentation can have the opposite effect. Unless the postincident response is handled carefully and deliberately, the RP may find that it has "made" the plaintiffs' case without building its own.

By bearing in mind the following measures during the post incident response, however, RPs may be able to minimize their liability exposure and even litigation expenditures. With a modicum of additional planning and effort on the front end, a sound and comprehensive cleanup can yield the salutary benefit of strengthening defenses and possibly avoiding civil claims altogether.

These proactive steps fall into three general categories: response planning, documentation, and claims handling.

Response Planning

Following an oil spill, the RP, through the Unified Command process, typically is focused on meeting a host of Coast Guard and other agency requirements. It is never too early, however, to consider the defense of future civil claims during the planning stage of the cleanup. While activity can be frenetic in the days and weeks after a spill, some advance planning can yield significant benefits.

- Consider the RP representatives as potential fact witnesses. While RP consultants and other vendors should be selected based on their technical proficiency and experience, they ultimately could be called to testify in the event of ensuing civil claims. Indeed, as any defense likely will hinge on the effectiveness of the cleanup and shoreline restoration effort, those individuals may be key witnesses for the defense. A competent, credible, and capable RP representative can serve two important functions: implement an effective cleanup, and also narrate to a jury from personal experience the "story" of that response

action.

- Ensure consistency of the response action. For a smaller spill affecting a single community or a discrete shoreline area, it can be assumed that one or more RP representative will be sufficiently familiar with the entire effected area. For a larger spill, however, stretching over miles of coastline and affecting multiple towns and municipalities, that continuity cannot be assumed, yet it is just as important to have at least one individual on the RP team who is personally familiar with, and can testify to, conditions up and down the shoreline.
- Deploy all necessary and appropriate resources. While spill response requirements are largely governed by federal and state law, a prompt, efficient and comprehensive deployment of resources to clean the affected area and prevent additional oiling from reaching the shore can later demonstrate to the jury a company's commitment to fixing the problem. A response that cuts corners and does only the minimum necessary to comply with legal requirements can disproportionately increase civil exposure.
- Involve the litigators in response planning. While the legal team will be focused on engaging consultants, working with the authorities, contracting with vendors, and perhaps addressing an internal or external investigation, the civil litigator on the team can be focused from the outset on ensuring that the RP is taking the steps necessary to insulate itself as best it can from civil exposure.

Documenting the Response

The RP should recognize the importance of thorough documentation detailing all aspects of the spill response and shoreline restoration. Comprehensive, reliable, and consistent documentation of the remediation effort will not only inform the decisions made during the cleanup but also will strengthen the RP's defense in any ensuing litigation. Litigating an oil spill case is often a stark tale of before and after: how bad was the spill and how effective was the cleanup. As a litigation strategy, it may be prudent to embrace the incident and its effects but only if the RP can demonstrate the thoroughness of the subsequent cleanup. In addition, unlike the typical environmental case involving contaminated soil and groundwater, the oil spill case is surficial and, therefore, more visual. The images of the spill, its effects, and the cleanup are more likely to favor the plaintiffs if they are imprecise or incomplete. Conversely, accurate, comprehensive, and well-catalogued photographic and other documentary evidence is paramount to a successful defense.

- Utilize modeling data to anticipate where the oil will land and photograph the beaches that potentially could be impacted in their "pre-spill" condition. To the extent these images can be captured, the photos provide the defense team with a valuable benchmark. The alternative could be the plaintiffs' more one-sided view of pre-spill shoreline conditions, often including potentially prejudicial photos of family outings, picnics, and other recreational activities.
- Capture the restoration teams at work. These professionals will be utilizing a variety of cleanup techniques, and pictures of teams engaged in the strenuous, taxing work of responding to an oil spill will help to depict the cleanup to the jury.
- While the scope and extent of shoreline oiling typically is well documented in the course of a response action under OPA 90, it is not always common practice to document a shoreline segment after the oil has been removed. It certainly will be an official document acknowledging that an oiled segment has met certain end-point criteria, but a before and after photo sequence is powerful evidence, particularly when the cleanup is performed expeditiously. On a stretch of sandy beach for which the cleanup will be relatively uncomplicated, the difference between heavy oiling and a "clean" beach can be a matter of only a few days. For an RP defending claims of "lost use" of the shoreline resulting from the spill, the duration of any such interference can be sharply curtailed by a series of time-stamped photographs demonstrating the short time necessary to restore the shoreline to its prior uses.
- In addition to photographs, the reports and observations of shoreline cleanup assessment teams who walk the shoreline can be critical evidence at trial. This is particularly so as those teams typically include representatives from various government agencies, making the point that spill response is a collaborative effort involving a host of stakeholders. While the RP funds the work, the authorities typically oversee and direct, or at least have decision-making power over, response activities. These reports typically note: (i) team

members; (ii) location; (iii) date; and (iv) observations. If the Unified Command establishes a protocol for these teams and the preparation of these forms, it is important that it be adopted. For example, if team members are required to sign off on reports, it should be the RP representative's duty to ensure that signatures are obtained.

- Shoreline locations should be documented carefully in these reports, by GPS if available, so that there can be no later dispute as to precisely what area a team's observations relate to. In addition, when cataloguing photos, there should be a system in place that readily marries a photo or series of photos to a specific report.

Utilizing the OPA 90 Claims Process

Because of the transactional costs and the uncertain outcome associated with litigation, companies should consider embracing the OPA 90 claims process at the outset. In so doing, the RP may be able to address legitimate claims, satisfy claimants and minimize exposure to inflated or unwarranted civil claims.

In most instances, OPA 90 instructs claimants to first submit covered claims to the RP. Only if the RP denies the claim or fails to pay in a timely manner does the claimant resort to the National Pollution Funds Center administered by the Coast Guard. While OPA 90 does not prevent claimants from utilizing the judicial system, and does not address certain potential injuries, the statute does encompass a broad scope of claims, including those for real or personal property damage and loss of profits and earning capacity. By embracing the claims process and maximizing the resolution of covered losses by competent adjusters, the RP has an opportunity to treat claimants fairly and address damages outside of a courtroom.

In mobilizing the claims-handling process, the RP should consider taking these steps:

- Provide a simple and timely claims handling process and publicize it widely.
- Employ well-trained and competent claims adjusters to evaluate claims by utilizing sound claims-handling practices.
- Send claims adjusters to impacted neighborhoods to gain public trust and foster goodwill.
- Resolve other potential claims as part of the OPA 90 process, including any lost recreational use that might not be covered under the statute or the Natural Resource Damage Assessment process. In the event that other claims are addressed, those resolutions should be documented carefully and contain full and complete releases.
- In certain instances, execute tolling agreements with claimants to provide the RP with additional time to investigate claims and potentially address any underlying health and environmental concerns.
- Fostering relationships outside of the Unified Command process with other local agencies, departments and public interest groups. This provides the RP with an opportunity to address their concerns and bolster credibility when concerned citizens approach these local organizations for guidance.

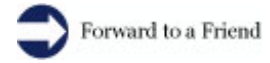
Nothing is preventing businesses and property owners impacted by an oil spill from engaging counsel and litigating claims. By taking a broad view of the OPA 90 claims-handling process, and using those procedures to fairly and timely compensate legitimate claims, RPs have an opportunity to reduce the risk of civil litigation. It is increasingly likely, however, particularly with large spills that at least some of those claims will be litigated rather than negotiated. By planning for a defense at the outset of a spill, and instituting a number of prudent practices in connection with the spill response, RPs can effectively utilize the cleanup and restoration effort to their benefit when arguing their case to a jury.

Robinson & Cole has represented a variety of clients in connection with claims arising from oil spills and other marine and environmental incidents, including class action defense. For further information, please contact Ron Zdrojeski, Peter Knight or other members of Robinson & Cole's Environmental, Class Action or Maritime Teams.

Ronald W. Zdrojeski
860-275-8240
rzdrojeski@rc.com

Peter R. Knight
860-275-8387
pknight@rc.com

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