

A large red ship's propeller and rudder assembly is shown in a dry dock. The propeller has four large, curved blades. The rudder is a large, red, curved structure. The background shows the dark interior of the dry dock with some structural elements.

CLYDE & CO

**Managing and Defending a Pollution Incident  
in the United States**

**Joseph A. Walsh II**

**Houston Marine Insurance Seminar  
19 September 2017  
Houston**

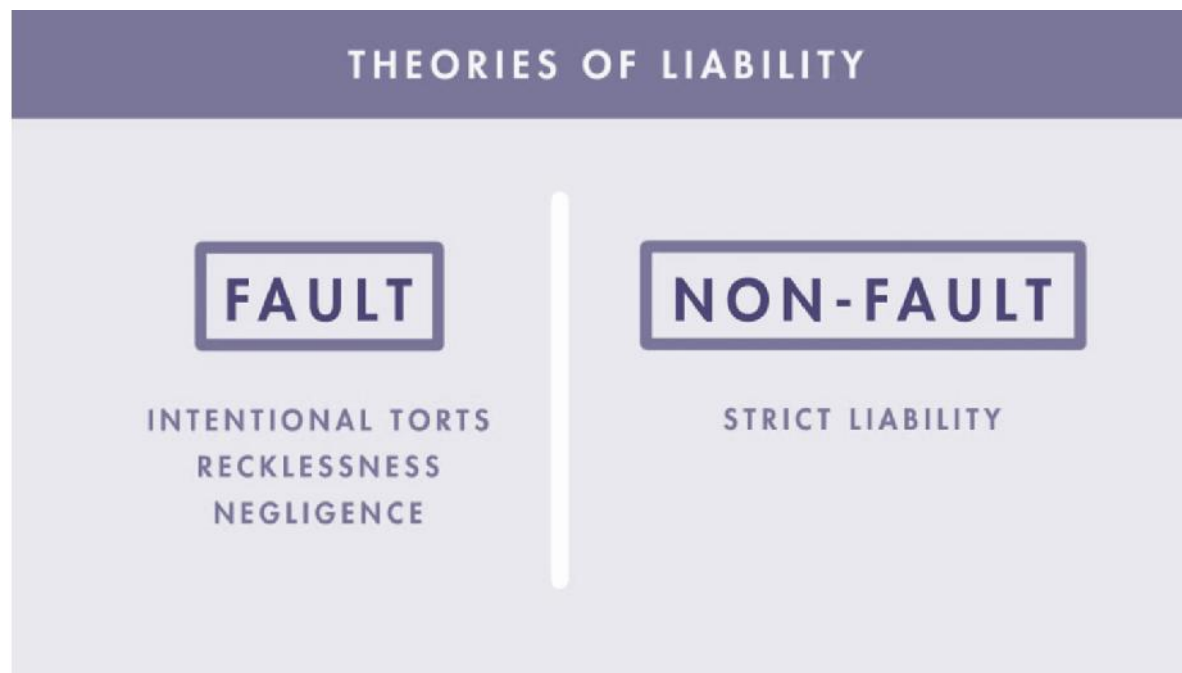


# Overview: The Oil Pollution Act of 1990

Liability is “strict.”

Culpability, negligence or intent is not relevant.

Accidents and innocent mistakes do not matter.



## General Observations:

- ✓ **US Law/Policy is based on concept: “Polluter Pays”**
  
- ✓ **“Source” of a spill determines who is the Responsible Party (“RP”)**
  
- ✓ **Liability for a spill is in the first instances is STRICT**  
(negligence and culpability are irrelevant)
  - ❖ Removal Costs
  
  - ❖ Damages
  
- ✓ **The deck is stacked!!!!!!**



# The Oil Pollution Act of 1990 Defenses and Limitations



## Complete Defenses

RP not liable for removal costs or damages

# IF

- Preponderance of evidence...
- caused solely by...
  - (1) Act of God
  - (2) Act of War
  - (3) Act or omission of \*3rd Party\*
    - (A) Exercise of due care
    - (B) Precautions against foreseeable risks
  - (4) any combination of the above



RP not liable as to Claimants - gross negligence or willful misconduct

# The Oil Pollution Act of 1990 Defenses and Limitations



## Limitations on Defenses

- Failure to report
- Failure to reasonably cooperate
- Failure to comply with an order without cause



# The Oil Pollution Act of 1990

## Defenses and Limitations

**Limits on Liability as of December 21, 2015: (33 CFR 138.230, as amended 80 FR 72342)**

Tankers = \$2200/ton

Non-tankers = \$1100/ton

Offshore = \$633,850,000, except in the LOOP = \$96,366,600

### Exceptions

- RP's gross negligence or willful misconduct
- RP's violation of an applicable Federal safety, construction or operating regulation
- Same exceptions for complete defenses
  - Failure to report
  - Failure to reasonably cooperate
  - Failure to comply with an order without cause

# Removal Costs

Costs of **containing** and **removing** oil from waters and shorelines;

Costs of other actions taken to **minimize** or **mitigate damage** to the public health and welfare including natural resources, public/private property, shorelines and beaches; and

Costs incurred to prevent, **minimize**, or **mitigate oil pollution** when a ship is aground, on fire, or otherwise imperiled, and there is a “substantial threat” of a discharge of oil from that ship.







# Damages

Natural Resource Damages

Damage to Real or Personal Property

Loss of Subsistence Use

Government Revenue

Profits and Earning Capacity

Increased Public Services

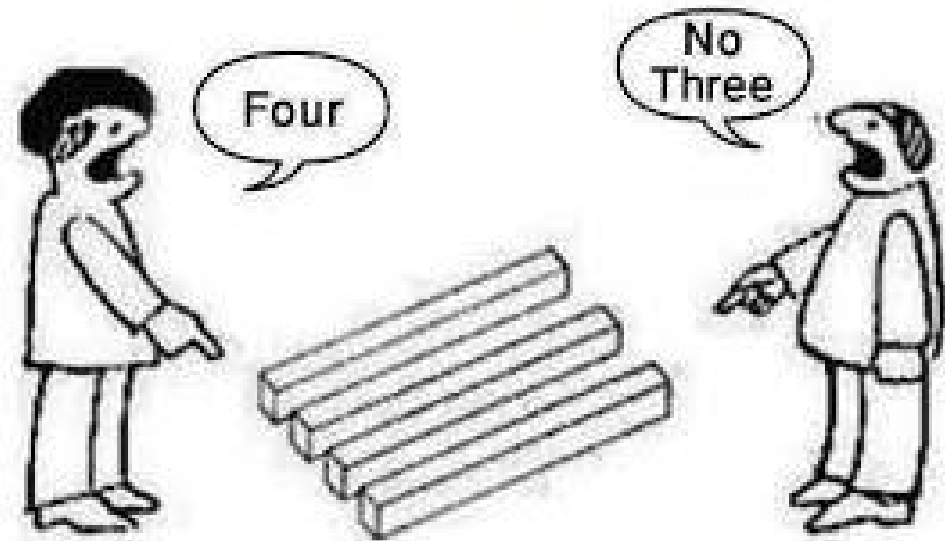


Image: [brianridgley.com](http://brianridgley.com)

# Damages: Third Party Claims

33 USC § 2714 – Notice of designation and third party claims advertisement

33 USC § 2705 – Interim payments

- In re DEEPWATER HORIZON, 808 F. Supp. 2d 943 (E.D. La. 2011)
- *cf.* Cheverez v. Plains All American Pipeline, LP. (C.D. Cal. March 3, 2016), 2016 WL 861107 (rejecting full releases)

33 USC § 2713 – Allows presentation to NPFC if RP does not pay within 90 days

# Damages: Third Party Claims

Private claimant must submit claims to RP before it can sue or seek recovery from the NPFC (Oil Spill Liability Trust Fund).

Presentment requirement is:

- Jurisdictional. Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235 (11th Cir. 1995); Johnson v. Colonial Pipeline Co., 830 F. Supp. 309 (E. D. Va. 1993); Marathon Pipe Line Co. v. LaRoche Indus. Inc., 944 F. Supp. 476, 477 (E.D. La.1996)
- Mandatory condition precedent. Leboeuf v. Texaco, 9 F. Supp. 2d 661, 665 (E.D. La.1998); In re DEEPWATER HORIZON, 2011 WL 5520295, 74 ERC 2190 (E.D. La. Nov. 14, 2011) (citing Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428 (2011))

Presentment applies to government claims?

- Yes, In re DEEPWATER HORIZON, 2011 WL 5520295, 74 ERC 2190 (E.D. La. Nov. 14, 2011)
- No, US v. M/V COSCO BUSAN, 557 F. Supp. 2d 1058 (N.D. Cal. 2008)

Compare w/ Class Action lawsuits...

Contribution against third parties under OPA or other applicable laws is permitted (33 USC § 2709).

Subrogation (33 USC § 2715)

# Contribution

"A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law."

33 U.S.C. § 2709

**Is a Responsible Party entitled to contribution for purely economic damages from a third party found to be partially liable?**

Yes. In re Settoon Towing, L.L.C., 859 F.3d 340 (5th Cir. 2017)

# Interplay of state law

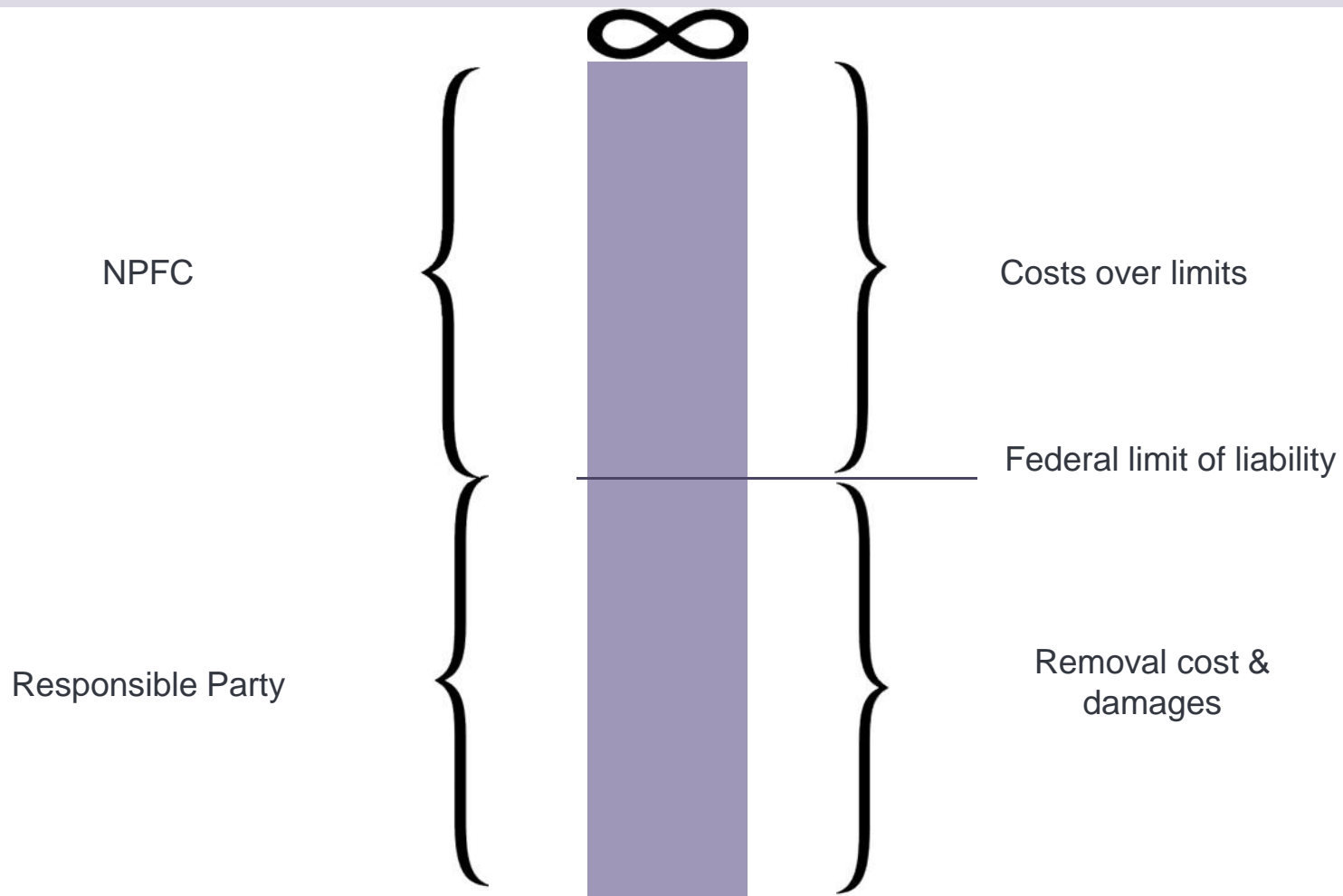
## **OPA '90 contains a savings clause at 33 USC § 2718**

Nothing in this Act or the Act of March 3, 1851 shall —(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivisions thereof from imposing any additional liability or requirements with respect to—

- (A) the discharge of oil or other pollution by oil within such State; or
- (B) any removal activities in connection with such a discharge; or

SCOTUS “has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 870 (2000) (citations and quotations omitted).

# Interplay of state law



# Punitive Damages



## **Exxon Shipping Co. v. Baker, 544 U.S. 471 (2008)**

- CWA did not preempt a claim for punitive damages under the general maritime law.
- Found the punitive damage award against Exxon excessive as a matter of federal maritime common law (“in the circumstances of this case the award should be limited to an amount equal to compensatory damages”).

## **In Re DEEPWATER HORIZON, 808 F. Supp. 2d 943 (E.D. La. 2011)**

- General maritime law claims against non-Responsible parties had not been displaced by OPA to extent that those claims existed before OPA.
- OPA did not displace general maritime law claims for punitive damages and therefore punitive damages may be recoverable against RP’s (subject to presentment) and non-RPs.



# Trends: Incident Response

## **Perceptions will govern your new reality**

Public Perceptions:

- Politics! Politics! Politics!
- Media-- increased influence through social media

USCG Perceptions:

- Over response has become fashionable
- Early interest in third party claims
- “ I need a number, and I need it now”

## **Location! Location! Location!**

Who is running the show?

The (undue) influence of SCAT

# Politics! Politics! Politics!

How an incident is *reported* and how the response is *perceived* should not be marginalized!

## Anticipate Political Interference —

“In the Cosco Busan response, the result was heavy political pressure at all levels.... This had an impact on the ability of the UC [Unified Command] to carry out spill response operations.”

ISPR 11 Jan 2008

DHOS-- “The intensity of political demands was unprecedented and unanticipated.”

ISPR General Findings 2010



## Misperceptions:

Can you find the  
the **mistake?**

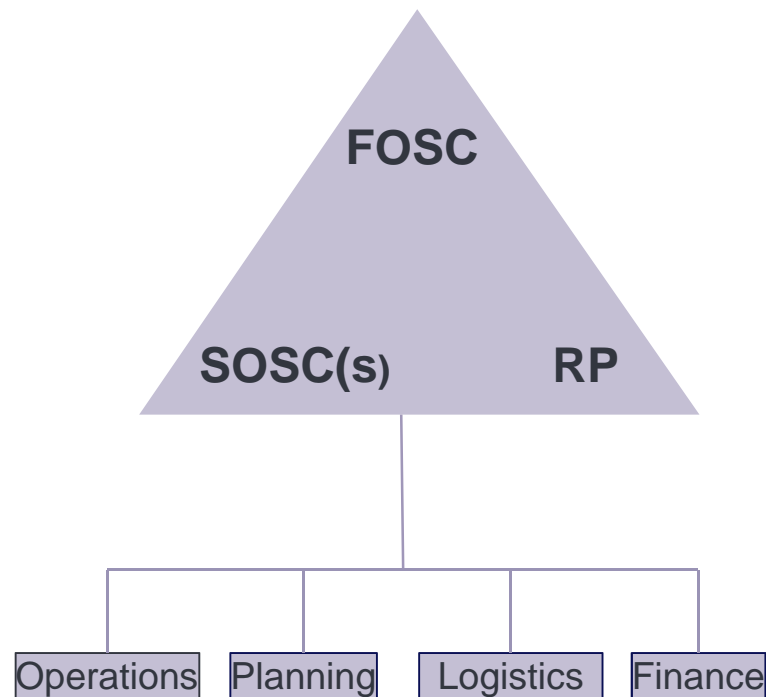
1 2 3 4 5 6 7 8 9

*usmagazine.com and play  
buzz.com*

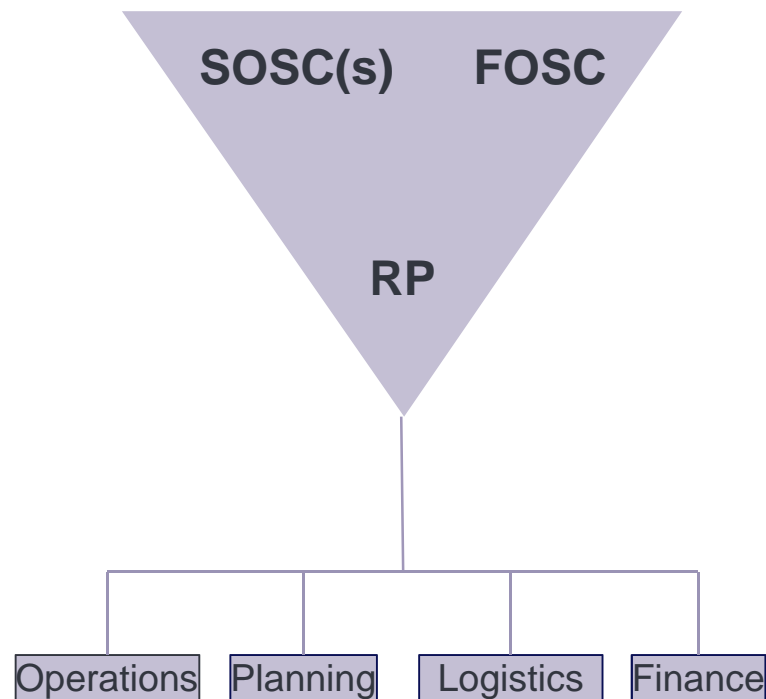
# USCG Perceptions



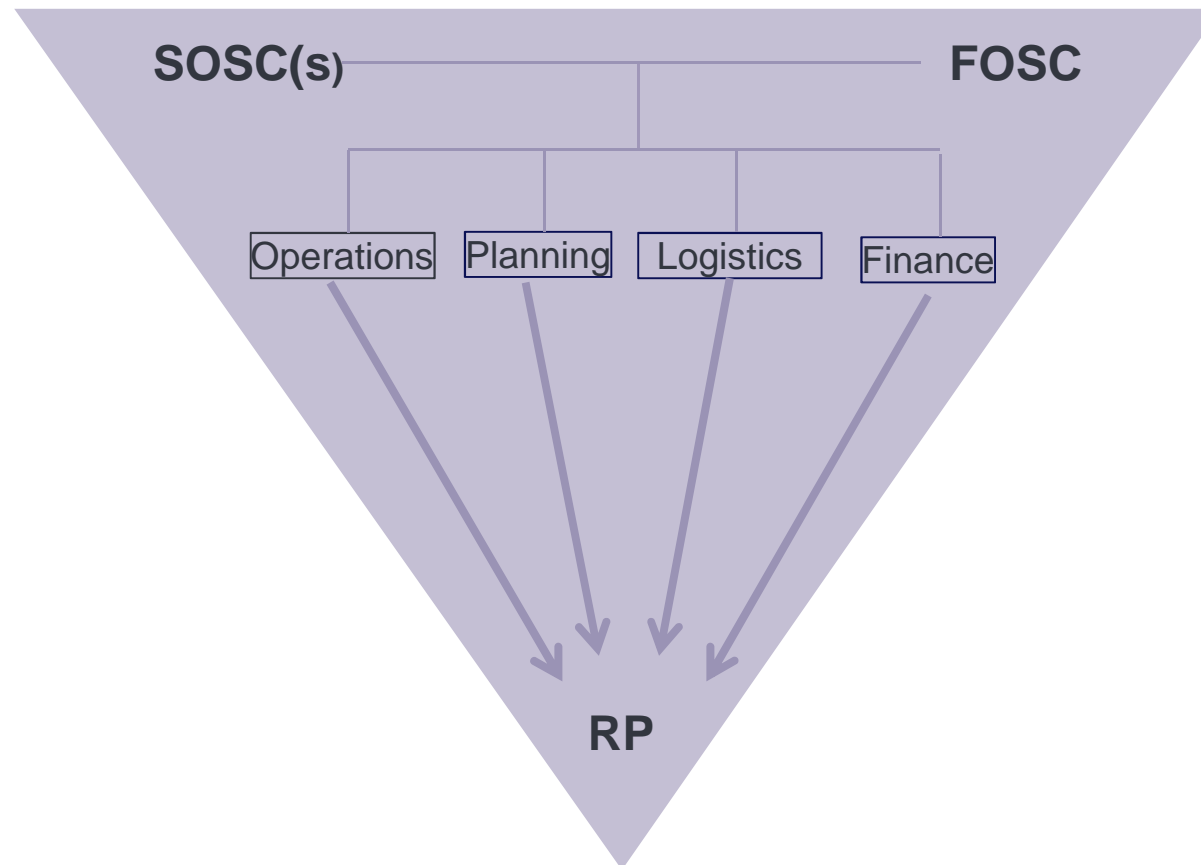
# Players: Unified Command Structure



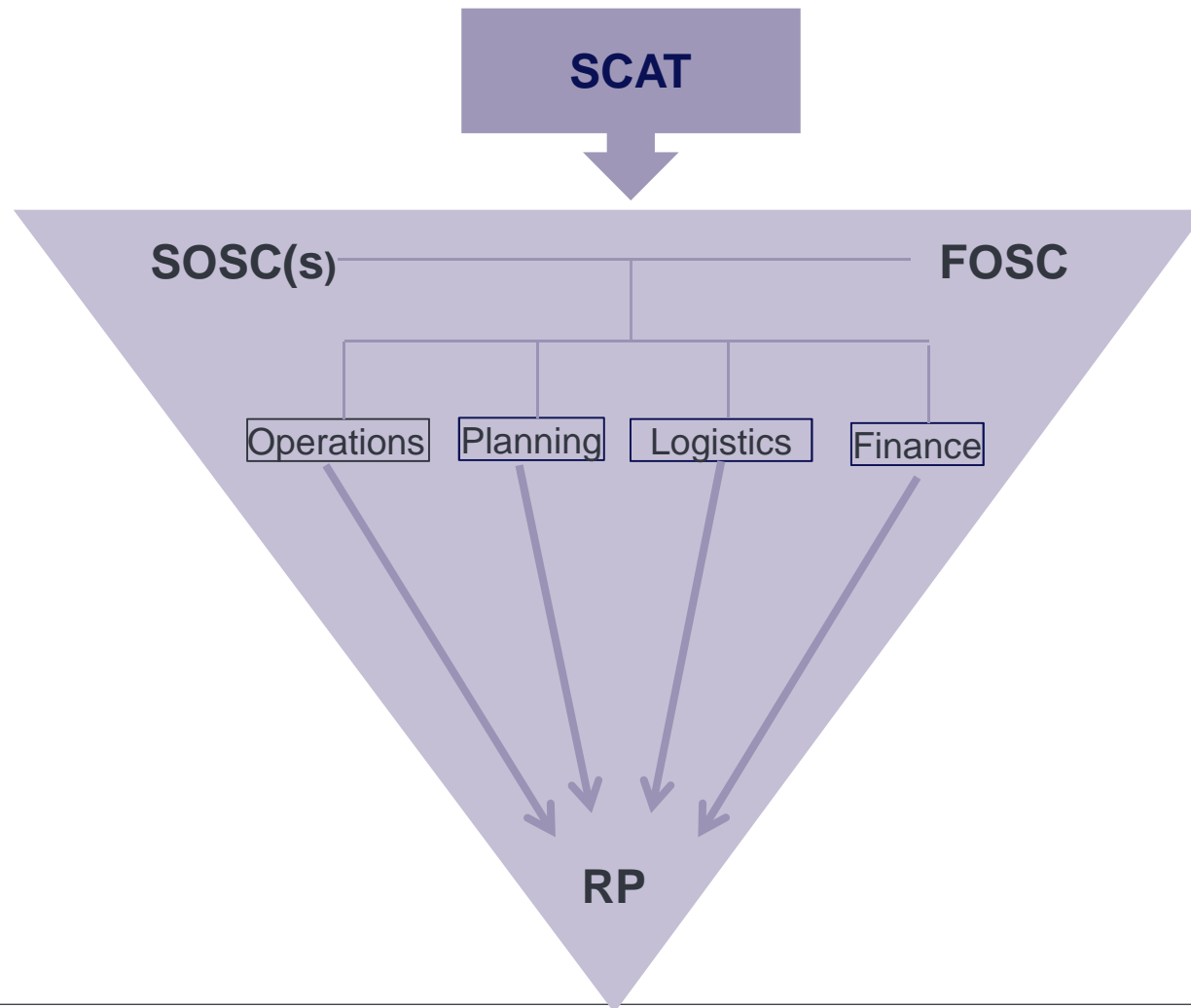
# Players: Unified Command Structure



# Players: Unified Command Structure



# Players: Unified Command Structure





# Trends: Enforcement

**Administrative:** “Fix it Ticket”

**Civil Penalties/Action:**

USA filing civil actions: Cosco Busan: 23 days; DHOS: w/ 90 days

- US Department of Justice - describing spills as "gross negligence and willful misconduct."
- Supersized Penalties:
  - Vessel Forfeiture
    - National Marine Sanctuary Act
    - Criminal forfeiture of vessel for illegal “takes”
    - Sea gulls are migratory birds
    - Civil Forfeiture if spill threatens a marine sanctuary.
    - California Coast is almost entirely covered by marine sanctuaries
  - Alternative Minimum Fines Act. (18 USC § 3571d)
  - Debarment: U.S. government precluded from having federal contracts with entities that "lack of business integrity."

# Trends: Enforcement



## Criminal Enforcement:

### Clean Water 33 USC § 1319(c)(1)(A)

- Negligent violations— up to \$25,000\* per day of violation, or by imprisonment for not more than 1 year, or by both.
- Knowing violations— up to \$50,000\* per day of violation, or by imprisonment for not more than 3 years, or by both.
- False statements --
  - Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter...
  - fine of not more than \$10,000\*, or by imprisonment for not more than 2 years, or by both.

\* Periodically adjusted upwards for inflation

# Environmental Compliance Programs (ECP)

**As part of the plea bargain and terms of corporate probation:**

Environmental Compliance Plan (ECP); or

Enhanced Environmental Compliance Plan (EECP)

- Applies company-wide to both the vessels' crews and the shore staff.
- Failure to comply with the ECP or allow access under the terms of the ECP can result in the modifying of the terms of probation or even lead to a company's vessels being banned from calling at US ports.

**Purpose: to introduce an Environmental Management System (EMS) which must be reviewed and approved by the US authorities:**

Corporate Compliance Officer

Third Party Auditors (TPA)

Court Appointed Monitors (CAM)

**Costly! (Note: may not be covered by P&I)**

## **ECP Trends: Expanded Use**

**OWS/Magic Pipe Cases– (Vessel Pollution Initiative since 1997)**

**Vessel Spills -- M/V COSCO BUSAN (February 2010)**

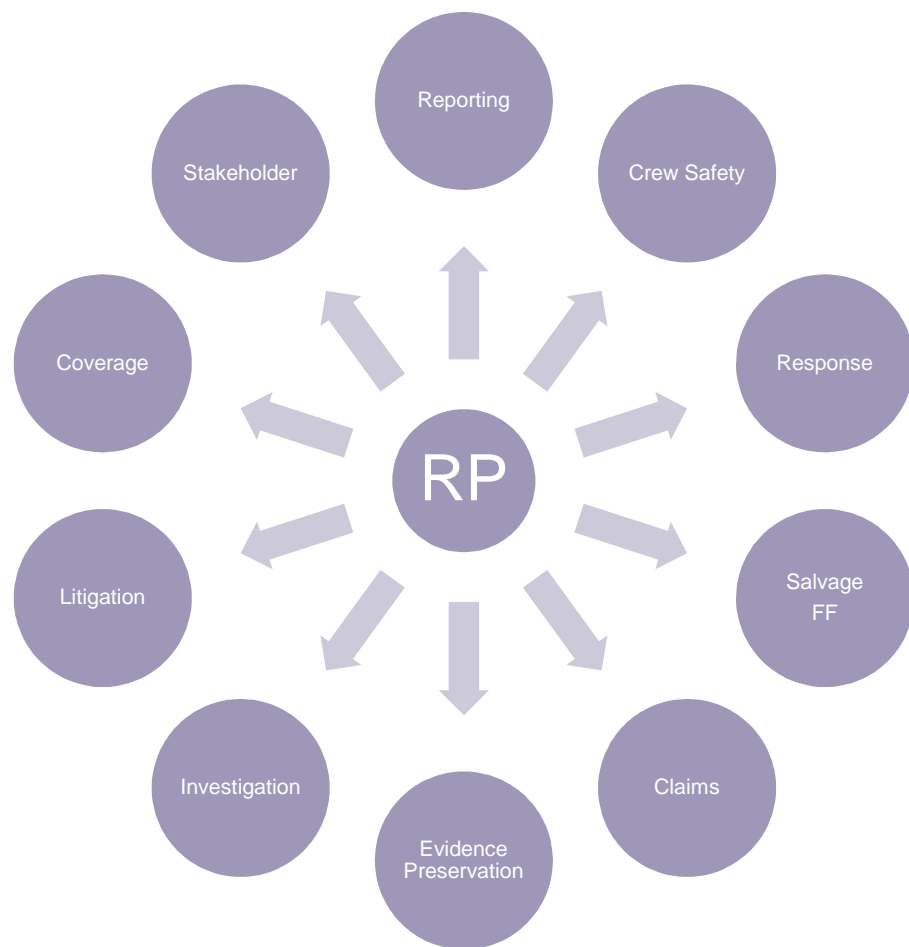
**Drilling Ops – Noble Drilling (December 2014)**

**Pipelines - Enbridge Energy LP (July 2016)**

**Ballast Water Management (EPA Administrative Orders)**

**Low Sulfur Fuel Requirements (Emission Control Area)**

# 10 Practical Considerations



# Legal Issues Relevant to Response

- A. Reporting (timely and accurate to preserve limitation)**
- B. Response (swift/effective, show of force, avoid federalization)**
- C. Clean-Up (insist on scientific justification, define end points)**
- D. Investigations (causation, privilege, avoidance of obstruction/false statement)**
- E. Claims → Settlement Proposals → Releases/Receipts**
- F. Media (drives public opinion → politics → regulators)**
- G. Politics, politics, politics!**
- H. Location, location, location!**

# Recommended Strategies:



## Holistic Approach

- Relationships    trust    confidence    cooperation/collaboration
- Everyone has a job to do– find a means to allow them to do it
- No two incidents are the same; be creative and flexible
- Help find “business” reasons to justify expenditures
- No one wants to be the patsy
- Try to leave the other guy a way out

**360+**

Partners

**2000+**

Legal  
professionals  
worldwide

**3000+**

Total Staff

**45+**

Office Locations

**6**

Continents

Clyde & Co US LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co US LLP.  
© Clyde & Co US LLP 2016