Marine First Responder:
Liability and Immunity

Marine Firefighting Curriculum Design Conference
California State University Maritime Academy
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Joseph A. Walsh, II
Lessons Learned
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Federal Law

Title 33 – Navigation and Navigable Waters
Federal Water Pollution Control Act
Clean Water Act
Oil Pollution Act of 1990

Title 42 – The Public Health and Welfare
Comprehensive Environmental Response, Compensation, and Liability Act
Title 33 – Protection of Navigable Waters

- Clean Water Act
- Federal Water Pollution Control Act
- Oil Pollution Act of 1990
Title 33 Statutory Exemption from Liability

Responder is Not Liable for Damages Caused…

The FWPCA precludes liability for "rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President relating to a discharge or a substantial threat of a discharge of oil or a hazardous substance.“

Unless:

“[T]he person is grossly negligent or engages in willful misconduct.”
The Comprehensive Environmental Response, Compensation, and Liability Act

§ 9607(d)(1) – Private Liability
No person shall be liable . . . for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment.

Unless there is negligence.

§ 9607(d)(2) – Public Liability
No liability for . . . for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person.

Unless there is gross negligence.
What is “Gross Negligence”?

Conduct that is:
• Negligence Plus?
• Willful
• Wanton
• Reckless Disregard of the Consequences of a Particular Act or Omission.

*The Tower of Babel*
Pieter Bruegel the Elder (c. 1568)
Museum Boijmans Van Beuningen
Rotterdam, Netherlands
The Doctrine of Derivative Discretionary Immunity

The Doctrine of Sovereign Immunity

Waiver of Sovereign Immunity

Discretionary Function Immunity

Qualified Immunity

_Yearsley_ – U.S. Supreme Court & *Derivative* Discretionary Function Immunity

1. The discretionary authority must be validly conferred by Congress.
2. The party claiming to have *derived* discretionary function immunity must strictly comply with the federal agency’s instruction.
The Doctrine of Derivative Discretionary Immunity

In re: Oil Spill by the Oil Rig “Deepwater Horizon”

- Yearsley’s Derivative Discretionary Function Immunity in the pollution response context.
- Clean Water Act = Valid conferral of discretionary function immunity from Congress.
- Marine environmental responders strictly complied with USCG instructions.

“[T]he FOSC's decision to use Corexit [oil dispersant] . . . [was] precisely [among] the types of governmental decisions that are afforded discretionary function immunity and shielded from 'second-guessing' via an action in tort."
Federal Regulations Affecting Salvage and Marine Firefighting

33 C.F.R. § 155.4025
Stated Purpose
• Establishment of “vessel response plan salvage and marine firefighting requirements.”

Definitions
• Contract or Other Approved Means
• Resource Provider
• Primary Resource Provider
Resource Providers & Public Firefighters

33 C.F.R. § 155.4045(d):
“Public marine firefighters may only be listed out to the maximum extent of the public resource’s jurisdiction, unless other agreements are in place. A public marine firefighting resource may agree to respond beyond their jurisdictional limits, but the Coast Guard considers it unreasonable to expect public marine firefighting resources to do this.”

USCG Certification Requirement Applies to Public Firefighters
The resource provider must certify the VRP as acceptable.

Vessel Response Plans Must Include Public Resource Provider Agreements
“In addition any written agreement with a public resource provider must be included in the planholder’s Vessel Response Plan (VRP).”
Resource Providers & Public Firefighters

<Ball of Yarn Photo>