

**SPILL RESPONSE PLANNING – THE
CONTRACTOR’S PERSPECTIVE**

Presented to the

FRESHWATER SPILLS SYMPOSIUM

**March 19-21, 2002
Sheraton City Center
Cleveland, Ohio**

**Marc K. Shaye, Esq.
General Counsel
Spill Control Association of America
615 Griswold, 7th Floor, Ford Building
Detroit, Michigan 48226
Telephone: (313) 962-8255
Telefax: (313) 962-2937
E-mail: marcs@scaa-spill.org**

“Only the paranoid will survive.”

Thomas L. Friedman
The Lexus and The Olive Tree -
Understanding Globalization

Tom Friedman, in his 1999 best-selling book about globalization, grabs our immediate attention when he tells us that the world is ten years old – the world was born when the Berlin Wall fell in 1989.

That certainly is an interesting notion and a hard-hitting commentary on who we are and what we are in this fast-moving age of globalization. For some connected with emergency oil spill response, the world also began in 1989 when the **Exxon Valdez** ran aground in Prince William Sound.

Many of you will recall the 1976 NEPCO 140 barge mishap on the St. Lawrence River. Up to that time, this spill was the largest experienced in the United States, with more than 300,000 gallons of oil released along some of the most pristine inland coastline in North America. A massive response using resources from distances as far away as Oklahoma, Virginia and Michigan demonstrated a viable response infrastructure while also revealing shortcomings in planning. Generally, these planning issues underscored critical factors relating to equipment, personnel utilization and financial responsibility by both government and the private sector.

Knowing, however, the history of modern oil spill response, the facts are incontrovertible that technological and regulatory developments in the late 1960s and 1970s were the foundation for what is today a professional capability effectively meeting the challenge posed whenever and wherever releases of hazardous

substances occur. Circumstances like NEPCO 140 and other noteworthy spills before 1989 were driving forces in equipment standardization, preestablished contractual arrangements for response, enhanced training and responsible-party liability.

By way of background, it has been my privilege to serve as General Counsel to the oil spill response industry's oldest and largest trade association (www.scaa-spill.org). I was selected as the Spill Control Association of America's attorney when it was first organized in 1972. I have witnessed – up close and personally – the evolution of not only an emerging industry but a significant growth in technology; and yet, more importantly, the dedication of individuals around the world to do whatever it takes to meet the challenge of environmental contamination. The members of SCAA are an integral part of this commitment and are dedicated to respond professionally and cost-effectively.

Let us assume, for the sake of this presentation, that the world did begin in 1989, when the waters of Alaska sustained this nation's worst oil spill. What followed was a cascade of activity and events which certainly impact on how we prepare and plan for oil spills today. It is not my effort here today to discuss the billions of dollars in cleanup costs, litigation claims and penalties associated with **Exxon Valdez** – you are all sensitive to these issues – and it is not my interest nor intent to address issues “after the horse is out of the barn.” What I do want to share with you is a brief history associated with the federal and state legislative reaction to the furor caused by

spills of oil and hazardous materials, and some of the perceptions about response activities. With an insight into the legislation and the regulatory consequence, we will then consider the practical management questions associated with spill response planning, including the assessment of capabilities so that you, as individuals responsible during a spill response, may become more familiar with questions important for any evaluation or audit of a spill response organization (“SRO”).

Legislation and Regulation

Soon after the 11-million-gallon spill from the **Exxon Valdez**, Congress began to investigate:

- A. how well industry and government were prepared to respond to the spill; and
- B. what measures could be taken to help prevent similar situations from occurring in the future.

Congress, early on in its deliberations leading to enactment of OPA ‘90¹, believed that:

- A. the response was clearly inadequate to contain and recover the spilled oil from the **Exxon Valdez**;
- B. major problems were encountered because no one had realistically prepared to deal with a spill of such magnitude;

¹ See, Programmatic Regulatory Assessment of the Oil Pollution Act of 1990 (June, 2001).

- C. the state of unpreparedness was a national problem;
- D. there was no single authority to ensure adequate preparations;
- E. concerns existed about the capability of current oil spill containment and recovery technology, as well as skilled personnel; and
- F. greater emphasis on preventing spills was necessary.

Prior to OPA '90, the Federal Clean Water Act provided a national contingency plan aimed at achieving coordinated action for responding to and minimizing damage from oil spills. The plan and its regulations set up an organizational structure, including a national response team and on-scene coordinators, to coordinate oil spill contingency plans and response. The owner/operator of a facility/vessel bore the responsibility and liability, within defined limits, for spill removal costs. Planning, prior to **Exxon Valdez** and OPA '90, considered what was thought to be the “most likely spill” – in Alaska before 1989, estimated between 42,000 and 84,000 gallons. Actually, Alaska’s plan was seen as atypical, since most planning in the United States was on a hit-or-miss basis.

Planning was also viewed as inadequate relative to the amount of equipment and the inadequacy of the recovery technology. Interestingly enough, the fact that spill response technology had not progressed since the 1970s was viewed, in large part, to the cuts

made in research and development budgets in the federal government.

Congress' ultimate passage of OPA '90² took preparedness not just to the next level, but into the stratosphere. Funding levels went from millions to billions, and the entire concept of planning reached levels of sophisticated planning not seen since the allies prepared for the D-Day landings in France. OPA '90's enactment (33 U.S.C. §2701) and the new mandates for spill response can be best understood when we selectively look at regulatory requirements found at 33 C.F.R. §§154 and 155.

Under subparts F (§154) and G (§155), the response plan addresses:

C marine transportation-related facilities that handle, store or transport oil in bulk and certain vessels operating in the navigable waters of the United states with delineations for regulatory agency responsibilities;

C the volume and group of oil on which the required level of response resources are calculated, worst case and other discharges (§§154.029, 155.1035);

C required federal or state notifications applicable;

² See, 65 F.R. 53335 (9/1/00).

- C identification of the qualified individuals (“QIs”) (33 C.F.R. §§154.1026, 155.1026);
- C identification of the oil spill removal organization(s) (“SROs”) that are identified and ensured available, through contract or other approved means (§155.1035), and the spill management team; and
- C the organization(s) identified must be capable of providing the equipment and supplies necessary to meet the requirements specified in the regulations, and sources of trained personnel to continue operation of the equipment and staff the oil spill removal organization(s)³ and spill management team identified for the first seven days of the response.

It is interesting to note that in recent months California has taken the initiative to target SROs’ performance. Legislation has been proposed which establishes performance standards by June 30, 2002 that each rated SRO is required to meet during unannounced drills, with the operator responsible for the cost it incurs while carrying out those drills.

I trust the following information will be valuable to provide an insight into the optimum ways in which to access the capabilities of SROs and manage the costs associated with their services.

First, any SRO worth its salt will encourage you to inspect its facility, meet its key personnel and kick its tires so that you feel comfortable with the technological and personnel resources

³ See, 65 F.R. 17697 (4/4/00).

available to do the response you are planning for and hope will never happen. Let's then discuss specific aspects of doing business with an SRO. The following has been distilled from contractual documents commonly used by SROs as well as from insurance industry sources. Keep in mind, emergency response circumstances which have been anticipated often entail pre-negotiated agreements or, in the case of government contracting, Basic Ordering Agreements. Nevertheless, the outline provided covers the major considerations you will want to incorporate.

I. COST PROPOSALS

A cost proposal should include:

- C a task-based description of the work to be performed in accordance with applicable regulations and/or directives;
- C a line item accounting of all personnel, including job classification per task;
- C a line item accounting of all equipment, subcontractors and other expenses per task; and
- C subcontractor bids or cost estimates.

II. INVOICE SPECIFICATIONS

Invoices should include:

- C a line item accounting of all personnel, equipment, direct expenses and subcontractors utilized during the billing period, including hourly rates and the hours expended, in tenth-of-an-hour increments (“block” billing is not acceptable);
- C a written description of the work performed or a report submitted to a regulatory agency;
- C all subcontractor invoices; and
- C a copy of any executed waste disposal manifests/bills of lading.

III. A. REASONABLE AND CUSTOMARY COSTS – REIMBURSABLE:

- C Your direct expenses at cost, plus a maximum of 10% administrative markup. Examples of direct expenses include travel-related costs, disposable sampling or field equipment, Level C or above personal protection and safety equipment, rental or lease costs for equipment, telephone usage, mobile telephone charges, postage, overnight delivery charges, fax charges, courier and copy charges;
- C The primary contractor will be reimbursed a maximum of 10% administrative markup over the cost charged by subcontractors (plumbers, electricians, drilling contractors, laboratory services, waste haulers, etc.). We recommend that you inform all subcontractors of reimbursement guidelines;
- C Regardless of who actually performs a required task, only reimburse at the rate commensurate with personnel appropriate for that task. For example, if senior level personnel perform tasks that are typically performed by less experienced personnel, reimbursement will be provided at the lesser hourly rate;
- C The maximum mileage reimbursement for a standard motor vehicle, i.e., a passenger car, pick-up truck, sport utility vehicle or minivan, is 31¢ per mile. All other vehicles and equipment will be reimbursed at a reasonable rate customary to location; and

C Overtime must be justified and will only be reimbursed for nonexempt or hourly wage personnel.

B. REASONABLE AND CUSTOMARY COSTS – NON-REIMBURSABLE:

C Stand-by time attributable to the consultant/contractor's operations;

C Banking, software purchases, computer charges;

C Insurance surcharges for pollution liability, workers' compensation, employee benefits or any other type of required or elected insurance you purchase;

C Level D personal protection equipment or surcharges;

C Costs associated with providing this billing information, which are considered to be a general overhead cost; and

C No retainers or advance payments.

INVOICING GUIDELINES

- C Must have valid contract in place constituting acceptance of rates, terms and conditions;
- C Obtain and follow payment procedures;
- C SRO utilization should be specific and in writing – avoid verbal orders;
- C You live or die by your submitted rate schedule;
- C Job tickets are mandatory, and the devil is in the detail – acknowledgment by authorized personnel;
- C A job ticket is not the contract, but it should represent verification of specific day-to-day activity;
- C Personnel should be delineated by classifications;
- C Training certification should be available;
- C Payments for overnight stays for out-of-town employees, lunch on site and any item not listed on rate schedules should be approved in advance;
- C Verify what is acceptable for overtime, start and end times, night shifts, travel time, etc.;
- C Services for decontamination, site security, boom watch, offshore services should be agreed upon in advance;
- C Receipts are a must when using third-party suppliers;

- C Hourly rates for equipment should be agreed upon; demobilization and removal from service charges established;
- C Insurance coverage verified;
- C Personal protective equipment rates established and preapproved if extraordinary;
- C Communications equipment – who provides, who pays; and
- C Fuel costs – market pricing.

**CHECKLIST FOR INVOICES
RELATED TO EMERGENCY RESPONSE CLEANUP**

- ' Authorization to Perform Work
- ' Documentation of Work Performed
- ' Waste Disposal Documentation
- ' Subcontractor Invoices
- ' Regulatory Reports/Correspondence

RESOURCE REFERENCES

I. Contractors/Equipment

A. Spill Control Association of America, 615 Griswold, 7th Floor, Ford Building, Detroit, MI 48226; (313) 962-8255; (313) 962-2937 (fax); www.scaa-spill.org

B. Oil Spill Control Directory, Cutter Information Corp., 37 Broadway, Arlington, MA 02174-5552; (617) 641-5125

C. World Catalog of Oil Spill Response Products, 6154 Rockburn Hill Road, Elkridge, MD 21227-9950; (800) 937-5078; (410) 796-0553 (fax)

D. Directory of Hazardous Materials Response Teams, P.O. Box 204, Barre, VT 05641; (802) 479-2307

II. Training

A. HAZWOPER – 29 C.F.R. §1910.120

B. OSHA website at <http://www.atlintl.com/oshaw/oilspill>

C. Marine Pollution Control Corp., 8631 West Jefferson Avenue, Detroit, MI 48209; (313) 849-2333; (313) 849-1623 (fax); mpcenvir@aol.com

D. USCG Response Plan Training, 33 C.F.R. Parts 150, 154, 155; www.uscg.mil/hg

E. GARNER at Louisiana State Police Emergency Response Training Center, 26937 Response Road, Holden, LA 70744-2309; (504) 878-1911

F. Findlay College, 1000 N. Main Street, Findlay, OH 45840; (419) 424-4572; (419) 424-5303 (fax)

G. Texas Engineering Extension Service Center for Marine Training & Safety, 8701 Teichman Road, Galveston, TX 77554; (409) 740-4893; (409) 847-8992 (fax)

H. Michigan Hazardous Materials Training Center, 7426 Osborn, Lansing, MI 48913; www.hazmatems.com