

10M
8
6
4
2
9M

BRIDGE LOOK-OUT

EDITION
NO. 02/21

**EMERGENCY PROCEDURES IN THE USA,
A NIGHTMARE OR A PROFESSIONAL RESPONSE SYSTEM?**

EMERGENCY PROCEDURES IN THE USA, A NIGHTMARE OR A PROFESSIONAL RESPONSE SYSTEM?

Trading in the US has been exceptionally challenging ever since the U.S. government took the stance not to follow international conventions, and instead to enforce local regulations.

The various U.S. regulations require specialist knowledge and the assistance of a US service provider to fulfil these requirements. An example of which can be seen with the Oil Pollution Act of 1990, commonly known as OPA 90, which stipulates that the Shipowner must have a response plan for emergency situations and salvage funding agreements in place.

In this edition of Bridge Look-Out, it is our aim to further understand and explore whether the OPA 90 regulation and in particular the salvage funding agreement scheme is an administrative nightmare, or should it be considered as an effective response system when it comes to a casualty in US territorial waters?

To answer this, we are pleased to have James W. Calhoun of T&T Salvage as guest author to share his professional opinion.

OPA 90 is a United States law enacted to further strengthen existing statutes governing oil spills from vessels in U.S. waters seaward to 200 nautical miles. The safety and marine fire fighting (SMFF) regulations, which implement OPA 90, are intended to improve response by defining the services that must be listed in vessel response plans (VRP), establishing contracting standards, setting standards for the adequacy of responders, and setting new response planning time requirements.

It is the key fact of the OPA 90 that the compliance rests with the Shipowner, irrespective if a spill occurred from a vessel directly, or there is the likelihood for a spill. In both scenarios the Shipowner becomes the responsible party and must initiate the response, regardless of fault.

Primary requirements for oil spill response were implemented already in 1993 and applied to U.S and foreign-flag tank vessels. However, a need was identified by several studies and industry-government workshops to expand and strengthen these vessel regulations. In 2008 and 2013, regulations were published applicable to foreign and U.S. flag tank vessels and non-tank self-propelled commercial vessels for 400 gross tons or greater.

The U.S. Coast Guard is the principal agency that enforces OPA 90 as it applies to vessels and oil transfer facilities. Furthermore, certain individual states have interests in marine pollution in their waters. When a casualty occurs, typically a “Unified Command”, comprised of Coast Guard, state, local and responsible party representatives, is established to manage the response, with the Coast Guard having the final authority in any decision.

Importantly, the SMFF regulations require pre-arranged contracts, including a signed funding agreement, between the Shipowner and a SMFF service provider to ensure there will be no delay in mobilizing resources when a casualty occurs. These contracts must include certification by the SMFF provider listed in the vessel’s response plan that it has the capability to meet the SMFF regulations within the required planning timeframes and that the salvage company commits to responding as stated in the vessel’s response plan. Again, the responsibility that the response is in accordance with OPA 90 rests with the Shipowner. This responsibility includes activating the vessel’s response plan by mobilizing required resources to initiate the response.



EMERGENCY PROCEDURES IN THE USA, A NIGHTMARE OR A PROFESSIONAL RESPONSE SYSTEM?

The vessel's response plan must be activated when there is a spill, or potential for a spill, caused by a grounding, fire, collision, allision, explosion or other event that the personnel and resources on board cannot control and where external response resources are necessary. Such a determination on the need for external resources may be made alternatively by the vessel's master, Shipowner or the "Qualified Individual" (a shore-based person located in the U.S. retained by the Shipowner with authority to make such determinations). Note the decision as to who makes the determination will vary by company.

Failure to make timely notifications and properly activate the vessel's response plan, when conditions warrant, will have serious consequences. A delayed response may worsen the impact of the spill. The Coast Guard may assume management of the response and retain its own responders, in which case the Shipowner will lose control of costs, responders, and actions taken. The Coast Guard may also initiate civil or criminal proceedings. Finally, limits of liability may be lost as well.

The vessel's response plan activation is not defined in the regulations, only the circumstances under which it must be undertaken. Under the SMFF regulations, the usual first step in a response is a remote assessment of the casualty by the salvage company in consultation with the vessel's Master, Qualified Individual, or Shipowner. This may result in sending an SMFF assessor to the casualty scene with possible subsequent equipment and personnel deployment, or simply monitoring the situation.

In any event, a good case can be made that consultation with the salvage company would be considered the vessel's response plan activation as it incorporates mobilization which, by definition, includes "bringing parties together for action."

There are two other noteworthy aspects of the SMFF regulations. The regulations are planning, not performance standards. Perfect conditions are assumed and there will be no penalty if resources do not arrive as required due to weather, waterway closure, or other unforeseen circumstance. Secondly, the SMFF regulations do not require dedicated resources that are on 24-hour standby, or "firehouse ready." The regulations assume personnel and equipment will be employed in routine work and that the salvage responder will have sufficient in-house and subcontracted resources to meet the regulatory requirements. This is evidenced by the economic impact analysis of the regulations.

Concerning the choice of the SMFF service provider, the Shipowner needs on the one hand to consider operational aspects of the SMFF providers such as personnel and equipment which must be ready to respond. On the other hand, the Shipowner needs to consider the fee structure under the SMFF agreement, mechanisms of which vary between the major approved providers. An agreement under "day rate" is one reasonable option. Such agreements are accepted by the International Group of P&I Clubs, Coast Guard and several hull Underwriters, and have been successfully used globally. They do not employ risk or peril-based metrics to only then enter

into a response contract upon the vessel's response plan activation and control remains with the Shipowner. The day rate agreements are further flexible and straightforward and they should be seriously considered in comparison to other agreements in the marketplace that default to the LOF or other standard salvage contracts.

In summary and based on the experience, one can conclude that the SMFF regulations achieved their goal to ensure adequacy of resource provider and to have pre-arranged contracts in place for immediate emergency response.

For a Shipowner, there is the major benefit that a proactive and prepared planning of a salvage response is available under the SMFF contract. In case of emergency, the Shipowner simply needs to activate the vessel's response plan to ensure proper identification of resources, contracting and timelines without seeking for approval of the local authorities.

From a commercial perspective, the Shipowner will benefit from a commercial agreement between the Shipowner and the Salvor based on a fixed tariff unless peril based metrics are included into the funding agreement and the Shipowner is subsequently always aware of the budget.

Please feel free to contact your Brokers at Georg Duncker if you would like to discuss the OPA 90 regulations in more detail or if you would like us to review your current SMFF agreement.



EDITORS

GUEST EDITORS

James W. Calhoun
Regulatory Affairs Manager
T&T Salvage
Phone: +1 504 908 6524
E-Mail: jcalhoun@ttsalvage.com

GEORG DUNCKER EDITORS

Tobias Thesen
Associate Director
Phone: +49 40 37 60 04 27
E-Mail: Tobias.Thesen@georg-duncker.com

DISCLAIMER

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only and should not be considered as legal advice.

WWW.GEORG-DUNCKER.COM

HAMBURG

Alter Wall 20-22
+49 40 376004 0

SINGAPORE

48A Amoy Street
+65 6916 3760

MIAMI

78 SW 7TH Street, Suite 500
+1 786 577 4764