# **ARTICLE: The Flow of Authority To Stop the Flow of Oil: Clean Water Act Section 311(c) Removal Authority and the BP/DEEPWATER HORIZON Oil Spill**

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**Reporter**

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**Highlight**

"Surround yourself with the best people you can find, delegate authority, and don't interfere."

- President Ronald Reagan

**Text**

**[\*350]**

Though not the largest ***oil*** spill the United States has ever experienced, [[1]](#footnote-2)1 nor its worst environmental disaster, the BP/DEEPWATER HORIZON ***Oil*** Spill (DEEPWATER HORIZON) was enormous and devastating. Ignited by pressurized methane gas bubbling up from a depth of 18,360 feet below the sea, [[2]](#footnote-3)2 the DEEPWATER HORIZON ***oil*** rig **[\*351]** exploded on April 20, 2010, killing eleven men. [[3]](#footnote-4)3 After the rig sank two days later, breaks in the riser pipe connecting the rig to the ocean floor began spewing hundreds of thousands of gallons of crude ***oil*** and gas into the Gulf of Mexico. At first, the spill was nearly impossible to control effectively. ***Oil*** flowing from the well washed up on the shores of Louisiana, Alabama, and Mississippi, and polluted thousands of square miles of ocean. [[4]](#footnote-5)4 Three months later, the well was successfully capped, ending the catastrophic flow of ***oil***. Assessment of the ecological and economic damage continues, as do cleanup efforts.

Although some may believe that no one contemplated that an environmental disaster of such magnitude could occur, for catastrophes like DEEPWATER HORIZON, a coordinated national emergency response plan has existed in some form in the United States since 1968. [[5]](#footnote-6)5 The National ***Oil*** and Hazardous Substances Pollution Contingency Plan (NCP), [[6]](#footnote-7)6 created to respond to ***oil*** spills and hazardous substance releases, was borne out of the 1967 TORREY CANYON disaster off the coast of England. [[7]](#footnote-8)7 After the supertanker ran aground and spilled over thirty-one million gallons of crude ***oil*** into the Celtic Sea, [[8]](#footnote-9)8 the U.S. Government, recognizing the United States' own vulnerability, created the NCP, which provided a national response strategy for ***oil*** spills. [[9]](#footnote-10)9 Many acts of Congress required amendment and expansion of the NCP over the years, culminating in the passage of the ***Oil*** Pollution Act of 1990 (OPA), which resulted in the most recent major revisions to the NCP. [[10]](#footnote-11)10

**[\*352]** The NCP anticipates a unified inter-and extra-agency response to large ***oil*** spills using the Unified Command System (UCS) led by the Federal On-Scene Coordinator (FOSC). When appropriate, the NCP allows the designation of a higher-level organization: the National Incident Command. As the first actual Spill of National Significance (SONS) and the first time a National Incident Commander (NIC) had been designated, the DEEPWATER HORIZON response organization morphed, in a somewhat unanticipated evolution, into an entity unto itself under the general umbrella of the Secretary of the Department of Homeland Security's (DHS) authority under section 311(c) of the 1990 amendments [[11]](#footnote-12)11 to the Federal Water Pollution Control Act (Clean Water Act or FWPCA) and her Presidential Directive-5 (HSPD-5) authority.

This Article describes the evolution of, and provides terms of reference for, the organizational structure of the DEEPWATER HORIZON response through the NIC and the FOSC and the relationship of the response structure with the organizational structures of the DHS, with the Secretary of Homeland Security as the Principal Federal Official (PFO) and the United States Coast Guard as the lead agency for ***oil*** spill response in the coastal zone. In Part I, this Article reviews the development of the NCP. Next, in Part II, this Article explains the intended organizational structure for ***oil*** spill removal authority as outlined in the Clean Water Act, the NCP, and the agency organization of the U.S. Coast Guard (the agency responsible for responding to ***oil*** spills in the coastal zone, like DEEPWATER HORIZON). In Part III, this Article presents and discusses the issues that arose during the spill response, including the unanticipated ways in which section 311(c) removal authority was distributed and utilized. Finally, in Part IV, this Article makes recommendations for improving and clarifying the NCP, so that the United States is better prepared for the next environmental disaster.

**[\*353]**

I. The National Contingency Plan

A. Origins

1. The TORREY CANYON Disaster

In early 1967, the TORREY CANYON was one of the largest supertankers afloat in the world. [[12]](#footnote-13)12 As originally designed, the ship carried approximately 60,000 tons of crude ***oil***, but a refitting in Japan doubled its capacity to 120,000 tons, [[13]](#footnote-14)13 or about 879,000 barrels. On February 19, 1967, TORREY CANYON left Kuwait, carrying 118,000 tons of crude ***oil***, and headed to Milford Haven, Wales. One month later, [[14]](#footnote-15)14 in a storm off the coast of Land's End, England, the ship ran aground. [[15]](#footnote-16)15 After crashing into a reef at full speed, the ship's master ordered a full astern bell, but it had no effect except to exacerbate the damage to the ship's hull. [[16]](#footnote-17)16 Due to wind and sea currents, ***oil*** eventually sullied the coasts of France and England. [[17]](#footnote-18)17

The TORREY CANYON, then the largest vessel ever to be shipwrecked, also suffered the notoriety of having created the worst environmental disaster in history at that time. [[18]](#footnote-19)18 In 1967, no nation in the world was equipped to cope with the overwhelming quantity of ***oil*** (approximately thirty-one million gallons) [[19]](#footnote-20)19 spilled from the wreckage. This myopia proved devastating to the affected countries; the TORREY CANYON "had done its immediate damage at massive cost to both economic and natural resources." [[20]](#footnote-21)20

**[\*354]** The British and French governments' response to the TORREY CANYON ***oil*** spill was widely criticized for being slow and ineffectual. [[21]](#footnote-22)21 The disaster alerted the world to the need for laws relating to liability and ***oil*** spill response, [[22]](#footnote-23)22 especially as the ***oil*** shipping industry expanded.

2. The Dunreith Train Collision

While the TORREY CANYON alerted the American government to the dangers of large ***oil*** pollution from the shipping industry, [[23]](#footnote-24)23 a collision between two freight trains in Indiana on January 1, 1968, drew its attention to the dangers of hazardous chemical spills. [[24]](#footnote-25)24 Due to a defective rail, the trains crashed around 9:30 in the evening just outside of the small town of Dunreith, Indiana. The ensuing derailment caused the spillage of the flammable chemicals, a huge subsequent explosion, and a fire that lasted ten hours. The toxic gases released in the chemical fire required the evacuation of the town. The following day, dead cattle and fish found in a local creek confirmed fears that the chemical spill had poisoned the water table. Calcium hypochlorite treatments of surrounding waters continued for five months before the Indiana State Board determined the water was free of chemicals from the Dunreith accident. [[25]](#footnote-26)25

A report following the disaster emphasized the need for contingency planning: "This incident demonstrates that, with a growing population and advanced civilization, the hazards to public health from hazardous chemicals are increasing. All pollution control agencies should and must prepare themselves to handle emergency problems of this nature." [[26]](#footnote-27)26 The federal government agreed.

**[\*355]**

B. The Development of the National Contingency Plan

1. The NCP from 1968 until The ***Oil*** Pollution Act of 1990

a. The Original NCP

Following the TORREY CANYON disaster and Dunreith accident, the United States established the original NCP in September of 1968 in the form of an agreement between concerned federal agencies. [[27]](#footnote-28)27 Called the "National Multi-Agency ***Oil*** and Hazardous Materials Pollution Contingency Plan," and developed at the direction of President Lyndon Johnson and in coordination with the Departments of Interior, Transportation, Defense, Health, Education, and Welfare, and the Office of Emergency Planning, the original NCP focused primarily on ***oil*** spill response in American waters. [[28]](#footnote-29)28 Broad in scope, the 1968 plan covered accident reporting, spill containment and cleanup, and focused on a national response to ***oil*** discharges. [[29]](#footnote-30)29 The NCP established a response headquarters called the "Joint Operations Center," a national reaction team, and regional reaction teams. [[30]](#footnote-31)30

Several reasons support a national, federal contingency plan. First, there may be many different entities that are stakeholders in a spill cleanup, and federal oversight can ensure effective coordination between these stakeholders. Second, some spills, such as DEEPWATER HORIZON, are too large for state and local governments to handle effectively on their own. Third, also evidenced by DEEPWATER HORIZON, spills and hazardous substance releases can cross state and international borders, thereby involving foreign parties and affecting both interstate and international commerce. Finally, there is a need to broker and allocate scarce national and international resources. All of these factors called for a federal plan to address emergency planning and response to ***oil*** spills and hazardous substance release.

This "top-down" approach of the NCP contrasts directly with the "bottom-up" approach to disasters covered by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). [[31]](#footnote-32)31 **[\*356]** Administered by the Federal Emergency Management Agency, the Stafford Act is the statutory vehicle for the President to issue a major disaster declaration, authorizing federal aid to states suffering from natural disasters and other catastrophes. [[32]](#footnote-33)32 Unlike the NCP, under which the federal government may lead response efforts, the Stafford Act states that the government will provide financial and other assistance as affected states control the disaster response. [[33]](#footnote-34)33 As described in Part III below, this difference in approach had a significant impact on the DEEPWATER HORIZON spill and the response organization that evolved during the spill.

The legal authority of the federal government to act with respect to the NCP was not as straightforward in 1968 as it is today. The original NCP listed several statutes and directives that encompassed the organic legal authority of the various federal agencies to act in response to a "pollution incident." [[34]](#footnote-35)34 These laws are summarized in Annex III of the 1968 NCP, titled "A Summary of Legal Capabilities Available to the United States to Control ***Oil*** Pollution." [[35]](#footnote-36)35 Because the drafters of the original NCP relied on established law to develop the plan, no new authorities were created at the time. Instead, the 1968 NCP simply manifested the intent of these five federal agencies to coordinate their existing responsibilities to prevent, respond to, and mitigate environmental damage in a more synchronized fashion, and to delineate how those actions would be harmonized during a pollution incident. [[36]](#footnote-37)36

In April 1970, Congress passed the Water Quality Improvement Act, which required the President to publish a National Contingency Plan within sixty days. [[37]](#footnote-38)37 On June 2, 1970, the Council on Environmental Quality published a "National ***Oil*** and Hazardous Materials Pollution **[\*357]** Contingency Plan," [[38]](#footnote-39)38 which was very similar to the 1968 NCP. After the Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA) were created, the NCP required further revision to incorporate the responsibilities of the new agencies. [[39]](#footnote-40)39

b. The Clean Water Act of 1972

The 1972 Clean Water Act required that provisions for response to hazardous substance release in addition to ***oil*** discharge be incorporated into the NCP. [[40]](#footnote-41)40 Additionally, section 311 of the Clean Water Act created a new statutory framework for ***oil*** and hazardous substance removal and liability. In paragraph (c)(1) of section 311, Congress conferred authority on the President "to act to remove or arrange for the removal of [discharged] ***oil*** or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs." [[41]](#footnote-42)41 This section was the authority behind the fundamental philosophy of ***oil*** spill response: that the polluter cleans up and the polluter pays, and if the polluter is unwilling or unable to accomplish either of these tasks, the federal government will perform those functions instead of the polluter. [[42]](#footnote-43)42

Section 311(c)(2) also required the President to prepare and publish a new NCP incorporating the Clean Water Act amendments within sixty days from the act's passage. [[43]](#footnote-44)43 President Richard Nixon later signed Executive Order No. 11,735, delegating his removal authority under section 311(c)(1) to the head of the federal department or agency responsible for executing the NCP when it was activated. [[44]](#footnote-45)44

Subsequent to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) amendments to the FWPCA, the NCP was revised again in 1982 [[45]](#footnote-46)45 and 1986. [[46]](#footnote-47)46 Besides the **[\*358]** NCP and the FWPCA, at this point there were three other primary federal authorities addressing ***oil*** spill response in the United States: the Trans-Alaska Pipeline Authorization Act (1973), [[47]](#footnote-48)47 the Deepwater Port Act of 1974, [[48]](#footnote-49)48 and the Outer Continental Shelf Lands Act Amendments of 1978. [[49]](#footnote-50)49 Each of these statutes created a separate trust fund for ***oil*** spill response and cleanup related to their respective subject areas. Together with the NCP, these statutes provided the federal framework for ***oil*** spill response in the United States and its territorial waters. By 1986, the NCP was an eighteen-year work-in-progress. Three years later, its efficacy would be tested in front of an international audience.

2. The ***Oil*** Pollution Act of 1990

a. EXXON VALDEZ

The 1989 EXXON VALDEZ ***oil*** spill was larger than any offshore ***oil*** spill the United States had ever experienced and gained national and international notoriety for its catastrophic effect on Alaska's pristine natural environment and fragile ecosystem. Although EXXON VALDEZ can be credited with providing the ultimate impetus for the passage of OPA, in actuality, that act was the "product of nearly 20 years of Congressional debate on ***oil*** pollution liability and tanker safety." [[50]](#footnote-51)50 **[\*359]** But "more than anything else, [EXXON VALDEZ] provided the driving force for a revamped ***oil*** spill law." [[51]](#footnote-52)51

Just after midnight on March 24, 1989, the tanker EXXON VALDEZ ran aground on Bligh Reef in Prince William Sound, Alaska, eventually spilling eleven million gallons of crude ***oil*** into the surrounding waters. [[52]](#footnote-53)52 Due to the spill occurring in coastal waters, under the NCP, the Coast Guard was responsible for providing the FOSC, [[53]](#footnote-54)53 the federal official predesignated by the EPA or the Coast Guard to coordinate and direct ***oil*** spill response. [[54]](#footnote-55)54 The predesignated FOSC for EXXON VALDEZ was the commanding officer of the Marine Safety Office, Commander Steven McCall, who was also the Captain of the Port for the Port of Valdez. [[55]](#footnote-56)55

Much like the quote from President Reagan at the beginning of this Article, the designation of Commander McCall and other Coast Guard Captains of the Port nationwide as the FOSCs for spills in the coastal zone was consistent with long-standing Coast Guard operational doctrine known in the service as "the principle of on-scene initiative": that responsibility for operations should be pushed to the lowest level in the field appropriate for the action taken, and that field commanders should be given the authority and flexibility to manage a situation from the scene. [[56]](#footnote-57)56 That doctrine still thrives today and has served the Coast Guard very well in myriad disaster responses. However, Commander McCall and the Marine Safety Office were immediately overwhelmed with the ***oil*** spill's "sheer size and complexity" such that "it was quickly evident that this spill would require additional assistance for the [FOSC]." [[57]](#footnote-58)57 On April 7, two weeks after the EXXON VALDEZ ran aground, Rear Admiral Edward Nelson, Seventeenth Coast Guard District Commander, **[\*360]** took over as the FOSC. [[58]](#footnote-59)58 Rear Admiral Nelson had arrived on scene earlier on March 25, the day after the EXXON VALDEZ ran aground; however, his role then was to provide senior level support for Commander McCall. [[59]](#footnote-60)59 Unfortunately, his presence likely caused confusion as to who was in charge of the response efforts, because Rear Admiral Nelson was Commander McCall's senior supervisor, despite that no official transfer of FOSC authority took place until April 7. [[60]](#footnote-61)60

Adding to the response organization confusion, just four days after the spill, a high-level management steering committee evolved, consisting of: Rear Admiral Nelson as Seventeenth District Commander, the President of Exxon Shipping, and the Commissioner of the Alaska Department of Environmental Conservation. [[61]](#footnote-62)61 The steering committee assisted the FOSC in coordinating the spill response and in dealing with the ever-present press. [[62]](#footnote-63)62

The international frenzy over the ***oil*** spill and its associated political implications also prompted senior government officials to become involved in the response, further muddling the chain of command. [[63]](#footnote-64)63 On April 15, Vice Admiral Clyde Robbins, Coast Guard Commander, Pacific Area, relieved Rear Admiral Nelson as FOSC. [[64]](#footnote-65)64 Thus, present in Alaska during the critical stages of the response were FOSCs in charge of the overall spill response, as well as several government officials of equal or superior rank and seniority. This gave the impression that more than one person was in charge, deviating in many respects from the Coast Guard's doctrinal principle of on-scene initiative.

In a post-incident report, the government recognized the need for revising of the NCP to respond optimally to "spills of national significance," where higher-level officials, more so than normally anticipated, become involved in response efforts. [[65]](#footnote-66)65 According to the report, three different organizations evolved during EXXON VALDEZ, confounding the response: "the NCP-specified organization, the steering committee, and [the] Presidentially-directed oversight by the **[\*361]** Commandant of the Coast Guard." [[66]](#footnote-67)66 The response thus highlighted the necessity of revising the NCP to provide a more coordinated system of response and preparedness. [[67]](#footnote-68)67 The report's authors, the National Response Team, recommended a structural review of the NCP's organization in order to establish clear lines of authority. [[68]](#footnote-69)68

The National Response Team also recommended many other improvements to the overall national response framework and existing environmental protection laws. The ostensibly confused federal, state, and local response to EXXON VALDEZ also underscored the woeful "inadequacies of the existing legal regime." [[69]](#footnote-70)69 The laws in place and their relationship to each other were "undefined" - a situation, the government worried, that might threaten costly litigation, [[70]](#footnote-71)70 aside from its negative impact on response effectiveness.

The result of the National Response Team's recommendations was OPA. [[71]](#footnote-72)71 Thus, Congress intended for OPA to replace the disjointed existing laws with a comprehensive regulatory scheme that would better prepare federal, state, and local governments and private parties to prevent and respond to ***oil*** spills. [[72]](#footnote-73)72

b. The Act

Enacted on August 18, 1990, OPA contained nine separate titles that broadened the federal government's authority to respond to ***oil*** spills and consolidated ***oil*** spill response. The overarching ***oil*** spill response **[\*362]** philosophy - that the polluter cleans up and the polluter pays, and if the polluter is unwilling or unable to do so, the federal government will step in - was further reinforced within OPA title IV's numerous provisions for the prevention and removal of ***oil***, generally with regard to tank vessel safety. [[73]](#footnote-74)73

OPA title IV's amendments to section 311 of the FWPCA mandated the most significant revisions to the NCP by expanding and strengthening the plan. [[74]](#footnote-75)74 Specifically, OPA's amendment of section 311(c) gave the President much broader removal authority for any discharge of ***oil*** or hazardous substance release:

The President may -

(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of discharge, at any time;

(ii) direct or monitor all Federal, State, or private actions to remove a discharge; and

(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available. [[75]](#footnote-76)75

Thus, the President has three options during ***oil*** spills: "perform the cleanup immediately ("federalize' the spill), monitor the response efforts of the spiller, or direct the spiller's cleanup activities." [[76]](#footnote-77)76 These options are broadly defined and give the President plenary power to control removal actions. OPA also required the President to publish an NCP that prepared for a "worst case discharge" of ***oil*** [[77]](#footnote-78)77 and addressed the federal government's authority over spills that pose a "substantial threat to the public health or welfare of the United States." [[78]](#footnote-79)78 When such spills are determined to exist, OPA requires federal direction of the response and removal efforts. [[79]](#footnote-80)79 However, the Coast Guard does not interpret this provision of OPA to require mandatory federal action, but rather that the government must maintain oversight of the response efforts. [[80]](#footnote-81)80 This **[\*363]** interpretation became an issue during DEEPWATER HORIZON, because many felt that section 311 required the Coast Guard to federalize the spill, meaning that the federal government would perform the response efforts rather than monitoring or directing them. [[81]](#footnote-82)81 Federalization never happened, largely because the federal government possessed neither the experience, technical expertise, nor specialized resources needed to combat a spill at the bottom of the ocean. [[82]](#footnote-83)82 In situations where federalization could occur (e.g., if the government were dealing with a responsible party who was unable to perform cleanup actions), the government would seek reimbursement from the responsible party for such costs. [[83]](#footnote-84)83

The NCP, as envisioned by OPA, maintained much of the same regulatory structure that existed previously, [[84]](#footnote-85)84 but section 4202 of OPA also established a National Response System (NRS) within the NCP, [[85]](#footnote-86)85 which required substantial additions to the plan. Essentially, the NCP describes the NRS as an integrated network of federal, state, and local authorities and contingency plans coordinated by the National Response Team. [[86]](#footnote-87)86 This multilayered framework consists of a National Strike Force Coordination Center, [[87]](#footnote-88)87 Coast Guard District Response Groups, [[88]](#footnote-89)88 Tank Vessel and Facility Response Plans, [[89]](#footnote-90)89 Area Committees, and Area **[\*364]** Contingency Plans. [[90]](#footnote-91)90 The purpose of this framework is to ensure that ***oil*** spill response equipment, resources, and personnel are identified and responsibilities assigned prior to any spill. [[91]](#footnote-92)91 In order to implement these amendments, OPA required the President to revise and republish the NCP. [[92]](#footnote-93)92 The EPA published the revised NCP four years later. [[93]](#footnote-94)93

C. The National Contingency Plan Today

The NCP and the response system it envisions are critical components of the overarching National Response Framework (NRF) and the National Incident Management System (NIMS), administered by the Department of Homeland Security (DHS). The NRF and NIMS are concerned with overall emergency and incident response, while the NCP and NRS are uniquely focused on ***oil*** spills and hazardous substance releases. [[94]](#footnote-95)94 Implemented in 40 C.F.R. part 300, the NCP is administered by the EPA, though many agencies (most prominently, the Coast Guard) play key contributory roles in its administration. The NCP's purpose "is to provide the organizational structure and procedures for preparing for and responding to discharges of ***oil*** and releases of hazardous substances, pollutants, and contaminants." [[95]](#footnote-96)95 It contemplates two stages of planning: preparation and response. Most importantly, for spills in the coastal zone, the revised NCP reinforced the Coast Guard's doctrinal principle of on-scene initiative by providing a hierarchical system of plans, procedures, and capabilities aimed at ensuring successful removal operations at the scene of the spill by all concerned, particularly the FOSC.

1. Preparation

The NCP establishes a hierarchical framework in the preparation phase of contingency planning. In this phase, contingency plans are created; procedures for ***oil*** spill response are established; and personnel, **[\*365]** resources, and supplies are identified. [[96]](#footnote-97)96 Key components of the preparation phase are:

(1) National Response Team (NRT): National planning and coordination for ***oil*** spill preparedness and response is achieved through the NRT. [[97]](#footnote-98)97 The NRT consists of representatives from fifteen federal agencies and is chaired by the EPA and vice-chaired by the Coast Guard. [[98]](#footnote-99)98 The bulk of the NRT's responsibilities occur prior to any report of an ***oil*** spill. In the planning phase, the NRT is responsible for: "maintaining national preparedness," "publishing guidance documents," "monitoring reports from all [Regional Response Teams (RRTs)]," "coordinating a national program to assist member agencies in preparedness planning and response," "developing [response] procedures," "monitoring response-related research and development" among the agencies, improving response training and coordination, evaluating the efficacy of RRT responses, and assisting with a national ***oil*** spill or hazardous substance release casualty drill/exercise. [[99]](#footnote-100)99 However, during a spill that "exceeds the response capability of the region in which it occurs," "transects regional boundaries," "involves a substantial threat to the public health or welfare of the United States," or "if requested by any NRT member," the NRT can be activated as an emergency response team and operationalized. [[100]](#footnote-101)100 For a spill in the coastal zone, once the NRT has been activated and operationalized, the chair of the NRT shifts from the EPA to the Coast Guard. [[101]](#footnote-102)101 After activation, the NRT meets at the call of the chair and may "monitor and evaluate reports from the [scene]"; "recommend … actions to combat the discharge or release"; request resources from federal, state, local, and private entities; and "coordinate the supply of equipment, personnel or technical advice to the affected region from other regions or districts." [[102]](#footnote-103)102 Thus, once activated for a response, the NRT has the ability to become much **[\*366]** more intricately involved in the inner workings of a major spill response as it occurs. As described in Part III, these expanded powers of the NRT had a major impact on the flow of authority and the ultimate structure and organization of the DEEPWATER HORIZON spill response after the NRT was activated.

(2) Regional Response Teams (RRTs): The RRTs focus on planning and response at the regional level. [[103]](#footnote-104)103 Membership on the RRTs includes parallel representation from the same federal agencies that make up the NRT in addition to representatives on the state and local levels. [[104]](#footnote-105)104 The EPA and Coast Guard co-chair the RRTs. [[105]](#footnote-106)105 RRTs have two components: a standing RRT and an incident-specific RRT. [[106]](#footnote-107)106 One of the RRT's responsibilities includes developing a Regional Contingency Plan (RCP). [[107]](#footnote-108)107 A "RCP is designed to coordinate timely and effective response among Local, Tribal, and State officials; private industry; FOSCs; … various Federal agencies; and other organizations to minimize damage resulting from releases of ***oil*** or hazardous substances, pollutants, or other contaminants." [[108]](#footnote-109)108 Further, and most importantly for the DEEPWATER HORIZON spill, the RRT, in conjunction with the Area Committee, conducts advance planning and approval of the use of certain remedial procedures, including the use of dispersants and in situ burning of ***oil*** to remove it. [[109]](#footnote-110)109 Once approved, the FOSC may authorize the use of these measures without obtaining additional approval from the RRT. [[110]](#footnote-111)110 As described in Part III, this flow of authority to the FOSC also had implications and raised issues during DEEPWATER HORIZON.

Like the NRT, the RRT can be activated and operationalized for a spill that exceeds the response capability of the FOSC, "transects state boundaries," or involves "a substantial threat to the public health and welfare of the United States." [[111]](#footnote-112)111 Once activated, as **[\*367]** during the DEEPWATER HORIZON spill, the RRT may "monitor and evaluate reports [from the scene]"; recommend actions to the FOSC to combat the discharge or release; request resources from federal, state, local and private entities; "help the [FOSC] prepare information releases for the public and for communication with the NRT"; and recommend replacement of the FOSC, if warranted. [[112]](#footnote-113)112

(3) Area Committees: Each of the thirteen regions is divided into one or more "areas." The NCP gives the President the authority to appoint members of the Area Committees from "qualified personnel of federal, state, and local agencies with responsibilities [to] include preparing an Area Contingency Plan." [[113]](#footnote-114)113 The Area Contingency Plan (ACP) must allow for response to worst-case discharges and must be tailored to the capabilities, resources, and special needs of the area that it covers. [[114]](#footnote-115)114 Besides preparing an ACP, Area Committees' responsibilities include preplanning of joint response efforts and advance decision-making regarding the use of dispersants and in situ burning, among other things. [[115]](#footnote-116)115 The Area Committees work closely with the RRTs in the preparation and response phases. [[116]](#footnote-117)116

(4) Contingency Plans: There are three levels of federal contingency planning: the NCP, RCPs, and ACPs. [[117]](#footnote-118)117 Each federal agency within the NRT must also prepare internal response plans. [[118]](#footnote-119)118 Additionally, OPA required facilities and tank vessels to create response plans, accounting for the worst-case discharge from the facility or vessel, respectively. [[119]](#footnote-120)119 These response plans must comply with the applicable ACP. [[120]](#footnote-121)120 In addition to participation on the RRTs and Area Committees, the NCP requires each State Emergency Response Committee to designate Local Emergency Planning Committees (LEPC). [[121]](#footnote-122)121 Each LEPC must also prepare a local emergency **[\*368]** response plan and response procedures. [[122]](#footnote-123)122 The ACPs must incorporate facility response plans, vessel response plans, state/local plans, and federal internal agency plans. [[123]](#footnote-124)123

Thus, in the context of the flow of removal authority in a major spill like DEEPWATER HORIZON, the NCP is the pinnacle of the planning hierarchy, supported by the RCPs and ACPs that guide the FOSC in implementing the measures needed to control effectively the flow of ***oil***. This hierarchy of plans, in effect, provides the FOSC with a toolbox of tactics, techniques, and procedures under which he or she will execute the President's authority under FWPCA section 311(c) to remove ***oil*** as required.

(5) Federal On-Scene Coordinator (FOSC): As described previously, the FOSC is the "federal official predesignated by EPA or the [Coast Guard] to coordinate and direct responses … , or the government official designated by the lead agency to coordinate and direct removal actions." [[124]](#footnote-125)124 The NCP provides that in carrying out an ***oil*** spill response, the FOSC may:

(i) Remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

(ii) Direct or monitor all federal, state, and private actions to remove a discharge; and

(iii) Remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available. [[125]](#footnote-126)125

If this language sounds familiar, it should - it is a verbatim copy of OPA section 4201(c)(1)(B) (discussed above), which amended the FWPCA to give the President broad removal authority. [[126]](#footnote-127)126 Thus, the NCP gives the FOSC the same removal authority that exists for the President under the FWPCA.

2. Response

When an ***oil*** spill occurs, the contingency plans are activated for the affected area. There are four phases of operational response contemplated by the NCP. Phase I comprises discovery of an ***oil*** spill. [[127]](#footnote-128)127 After the ***oil*** spill is discovered, the National Response Center (NRC) **[\*369]** must be immediately notified. [[128]](#footnote-129)128 The NRC then notifies the FOSC, who must notify the state agency likely to be affected by the spill. [[129]](#footnote-130)129 After the notification process is complete, Phase II begins. In this phase, the FOSC must make a preliminary assessment evaluating the magnitude and severity of the spill, the feasibility of removal, and, if possible, identifying the responsible party. [[130]](#footnote-131)130 After this initial assessment, Phase III of the operational response begins. At this point, efforts including containment, countermeasures, cleanup, and disposal begin in earnest. [[131]](#footnote-132)131 Generally, the FOSC has the discretion whether to direct or monitor response efforts, including those of private parties who are involved. This decision depends on whether the FOSC determines that the state, local government, and/or the responsible party are effectively and efficiently removing, mitigating, or preventing the discharge. However, in the situation where the "discharge results in a substantial threat to the public health or welfare of the United States," the FOSC must oversee, but not necessarily perform, all response efforts. [[132]](#footnote-133)132 The final phase of response requires the maintenance and collection of important documentation related to the discharge.

Key components of the NRS include:

(1) The National Response Center (NRC): Federal law requires responsible parties (facilities or vessel owners) to report to the NRC any spills of ***oil*** or hazardous substances. The NRC is the national communications center located at the U.S. Coast Guard Headquarters in Washington, D.C. [[133]](#footnote-134)133 "The NRC acts as the single point of contact for all pollution incident reporting." [[134]](#footnote-135)134 In addition to pollution-incident reporting, the NRC also receives reports of infrastructure security breaches, suspicious activities, and terrorist-related events involving ***oil*** spills or hazardous substance release. Staffed twenty-four hours per day, every day of the year, the NRC receives on average over 32,000 notifications per year. [[135]](#footnote-136)135 Just as **[\*370]** importantly, if the NRT is operationalized during a major spill, the NRC acts as the NRT's communications center. [[136]](#footnote-137)136

(2) Responsible Party (RP): The facility or vessel owner responsible for an ***oil*** spill or hazardous substance release must report the incident to the NRC and must help, if not control, containment and cleanup efforts. [[137]](#footnote-138)137 The OPA amendments to the FWPCA required responsible parties to participate in removal actions. [[138]](#footnote-139)138

(3) Unified Command System (UCS): The UCS links the federal and state governments and the responsible party responding to a discharge and provides a forum for those organizations to make consensus decisions. [[139]](#footnote-140)139 The UCS does not actually fall under the NCP but is part of the overall NIMS. Thus, a UCS may be established for any national incident, not just for ***oil*** spills or hazardous substance releases. However, its establishment is not automatic, it requires an affirmative decision on the part of the FOSC or higher authority.

(4) National Incident Commander (NIC): A discharge that poses a substantial threat to the health or welfare of the United States may be classified further as a "Spill of National Significance" (SONS), [[140]](#footnote-141)140 which the NCP defines as "a spill that due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge." [[141]](#footnote-142)141 When a discharge in the coastal zone is designated a SONS, the Coast Guard Commandant has the authority to name a NIC "who will assume the role of the [FOSC] in communicating with affected parties and the public, and coordinating federal, state, local, and international resources at that national level." [[142]](#footnote-143)142 The NIC should coordinate with the "NRT, RRT(s), Governor(s) of affected state(s), and the mayor(s) or other chief executive(s) of local government(s)." [[143]](#footnote-144)143

**[\*371]** These two cursory provisions comprise the entirety of the NCP's treatment of a SONS and a NIC. Notably, if a discharge occurs in the inland zone, the EPA Administrator does not appoint a NIC, but rather a "senior Agency official to assist the [FOSC]." [[144]](#footnote-145)144 Thus, for an inland-zone SONS, the EPA will appoint an official to assist the FOSC, but for a coastal zone SONS, the Coast Guard will appoint a NIC to augment the role of the FOSC for the specified functions listed above. [[145]](#footnote-146)145

The concept of a SONS and a NIC developed after EXXON VALDEZ. [[146]](#footnote-147)146 As described above, post-incident analysis concluded that the FOSC, the NRT, and the RRT had been "overwhelmed" by the international media attention, senior governmental scrutiny, and the severity of the crisis. [[147]](#footnote-148)147 For spills such as EXXON VALDEZ, the government "developed a "strategic management' framework designed to assist the [FOSC] in dealing with resource administration, government coordination, public relations, and communication for SONS." [[148]](#footnote-149)148 The "strategic management" framework consisted of defining a SONS and creating the position of the NIC. [[149]](#footnote-150)149 Thus, the 1994 revisions to the NCP implementing OPA created and defined these terms, expecting the assistance of the NIC only in a truly catastrophic event.

The NRT believed that a NIC would "relieve the [FOSC] of certain communication and coordination burdens associated with directing response efforts." [[150]](#footnote-151)150 In doing so, the FOSC would be better able to focus on response operations. Additionally, the NRT recognized that for spills in which a SONS is declared, it is probable that the response actions may very well spread outside of the area with which the FOSC is familiar. In that situation, the NIC would bring a national perspective to the spill response. "The [FOSC] in charge of responding to a spill that affects several regions, districts, or countries may benefit from communication **[\*372]** assistance [provided by the NIC] to identify and coordinate resources, evaluate site-specific conditions, and assess threats to the environ-ment." [[151]](#footnote-152)151 In an internal instruction delineating the responsibilities of the NIC, the Coast Guard emphasized the comforting role that the NIC must play. According to the instruction, the NIC will provide "the confident, reassuring explanation of strategic decisions, response asset prioritiza-tions and distributions to the affected governors, senators, administration officials, media and the public." [[152]](#footnote-153)152

If a SONS is declared and a NIC named, a National Incident Command is established. The National Incident Command consists of a "flexible staff that reports directly to the NIC." [[153]](#footnote-154)153 However, prior to DEEPWATER HORIZON, the activation of a National Incident Command staff had only been conducted in exercise scenarios, including an exercise held less than a month before the incident; the requirements for a National Incident Command staff had never been tested in real-time operations.

II. The Flow of Removal Authority After EXXON VALDEZ and Before DEEPWATER HORIZON: The President's Authority and Its Delegation

As described above, the statutory authority to ensure ***oil*** and hazardous substance spill removal has ultimately rested with the President since 1972. At that time, the President's authority was somewhat discretionary, allowing the President "to act to remove or arrange for the removal of [spilled] ***oil*** or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs." [[154]](#footnote-155)154 After the OPA amendments to the FWPCA and section 311(c), Congress tasked the President more directly, requiring him or her to remove spilled ***oil***. [[155]](#footnote-156)155 Congress also gave the President broad removal powers to accomplish this duty. [[156]](#footnote-157)156 Further, section 311 of the FWPCA authorizes the President to issue administrative orders that **[\*373]** may be necessary to protect public health and welfare. [[157]](#footnote-158)157 Thus, the current section 311(c) of the FWPCA answers the question of what the President is responsible for; that is, the "effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of ***oil*** or a hazardous substance." [[158]](#footnote-159)158 In contrast, through the NCP, the President answers the question of how removal will be accomplished.

Of course, Congress did not intend for the President to oversee personally the removal of ***oil***, except in the most dire of circumstances. Instead, the expectation is, as had been done since 1968 through the NCP and its predecessors, that those agencies with the technical expertise and specialized resources to combat ***oil*** spills are delegated the President's removal authority. [[159]](#footnote-160)159 Indeed, 3 U.S.C. § 301 gives the President authority to delegate functions vested in him by law. For spills in the coastal zone, that delegee agency is the Coast Guard.

To summarize, the FWPCA vests the President with the authority and responsibility for removing ***oil*** that threatens the United States. [[160]](#footnote-161)160 The OPA amendments to the FWPCA expanded the President's removal authority. "Removal," in this context, is a term of art and is now defined very broadly to encompass almost any action the President believes would be necessary to prevent, mitigate, and respond to an ***oil*** spill, including directing or overseeing the actions of the responsible party. [[161]](#footnote-162)161

**[\*374]**

A. The Dual Track of Removal Authority

 THE DUAL TRACK OF REMOVAL AUTHORITY

OPA also requires the President to publish a revised NCP that would incorporate the act's amendments to the FWPCA and concurrently execute the removal authority Congress had granted by requiring that the President execute removal actions "in accordance with the National Contingency Plan and any appropriate Area Contingency Plan." [[162]](#footnote-163)162 This congressional mandate married removal authority with planning requirements, thereby achieving an important policy objective. Unlike EXXON VALDEZ, where potentially different or multiple lines of authority existed between different (or sometimes the same) state and federal agencies, marrying removal authority with the NCP ensures that **[\*375]** only one agency would be in charge and that all agencies' organic authorities would flow through the NCP without usurping it. [[163]](#footnote-164)163

Responding to Congress's dictate, President George H.W. Bush issued Executive Order No. 12,777 on October 18, 1991. In section 1, the President delegated responsibility for revising and administering the NCP to the Administrator of the EPA. [[164]](#footnote-165)164 The NCP, under the EPA's responsibility to promulgate with the concurrence of other affected agencies, is implemented in 40 C.F.R. part 300. Under the NCP, there exists an NRT for policy and program development at the national level [[165]](#footnote-166)165 and thirteen RRTs that prepare regional contingency plans, [[166]](#footnote-167)166 which encompass the Area Contingency Plans (ACPs) for the areas within that region. Each ACP pre-designates a FOSC, and the NCP gives the predesignated FOSC removal authority for ***oil*** spills in that person's area. [[167]](#footnote-168)167 This removal authority is identical to the authority given to the President in the OPA amendments to the FWPCA. [[168]](#footnote-169)168 Thus, there is a general track of removal authority leading from the President, through the NCP, to the FOSC.

An alternate track for removal authority exists. Beginning in the same place as the general NCP track, the OPA amendments to section 311(c) of the FWPCA gave the President broad removal authority for ***oil*** spill response. The President delegated this removal authority, specifically in section 3 of Executive Order No. 12,777, to the Secretary of Homeland Security. In DHS Delegation 0170.1, the Secretary delegated her section 311(c) removal authority to the Commandant of the Coast Guard for spills in the coastal zone. This removal authority, with some limitations, was further delegated to the Coast Guard Sector Commanders in 33 C.F.R. § 1.01-80. Section 3.01-1(d) of Title 33 of the C.F.R. provides that the Sector Commanders' "authorities include … Federal On-Scene Coordinator." [[169]](#footnote-170)169 Thus, this track constitutes the **[\*376]** specific delegation of removal authority. Despite the duality, both tracks of removal authority lead to the FOSC. For spills in the coastal zone, the removal authority of the Coast Guard is delegated in two ways: first, directly to the agency itself and second, through the NCP.

Of course, the ultimate goal of both sections is to ensure effective removal of ***oil*** and hazardous substances from the marine environment. Thus, both the general track and the specific track ultimately move authority to the FOSC to ensure that personnel responsible for removal on-scene have the authority needed to accomplish the task. While some might question the necessity of two tracks for the same authority, the reasoning behind such a structure is quite sound. Rather than being duplicative, both tracks complement each other. The agency - or specific track - ensures that appropriate levels of the DHS/Coast Guard organization are vested with removal authority within specific positions, which may be subject to organizational change that may not be reflected in the NCP because of the organizational rate of change. The NCP - or general track of authority flow - ensures that the NRT, RRTs, and Area Committees have structural attachment (or buy-in) for the President's removal authority to fulfill the statutory mandate that all removal actions occur in accordance with the NCP. Moreover, both tracks of removal authority in the coastal zone ultimately have the same destination - the FOSC. Thus, in addition to reinforcing the congressional objective of ensuring that only one agency is in charge of responding to any spill, the dual track of authority also reinforces the Coast Guard's doctrinal principle of on-scene initiative. The next section describes the delegations that allow the President's authority to flow to the FOSC.

B. Sources of Delegated Authority

1. Executive Order No. 12,777

To implement the OPA amendments to the NCP, the White House issued Executive Order No. 12,777 on October 18, 1991. [[170]](#footnote-171)170 In section 3, President George H.W. Bush delegated, without abdication, the removal authority of section 311(c) for spills in the coastal zone to the "Secretary of the Department in which the Coast Guard is operating." [[171]](#footnote-172)171 He also delegated to the Administrator of the EPA the responsibility for amending and administering the NCP in section 1. [[172]](#footnote-173)172

**[\*377]**

2. DHS Delegation No. 0170.1 and 33 C.F.R. § 1.01-80

The Coast Guard generally has operated under the DHS since 2002. [[173]](#footnote-174)173 In DHS Delegation No. 0170.1, the Secretary of Homeland Security further delegated section 311(c) removal authority to the Commandant of the Coast Guard. [[174]](#footnote-175)174 Section 311(c) removal authority, with some limitations, was then delegated by the Commandant in 33 C.F.R. § 1.01-80 to the Coast Guard official predesignated as FOSC through the NCP. [[175]](#footnote-176)175 In most cases, the predesignated FOSC is the Coast Guard Sector Commander. In a few parts of the country, the predesignated FOSC is the commander of the Marine Safety Unit, a subordinate commander to the Sector Commander, serving both FOSC and Captain of the Port functions within that area of responsibility. [[176]](#footnote-177)176 The FOSC has the power to allow subordinates under his or her command, known as "FOSC representatives" (or FOSCRs), to exercise all or part of his or her authority, although responsibility ultimately lies with the FOSC. [[177]](#footnote-178)177 Notably, these authorities are not delegated to a NIC when a SONS is designated, as described in Part III below. This absence of delegated authority to a NIC became an issue during DEEPWATER HORIZON.

3. Homeland Security Presidential Directive-5

On February 28, 2003, President George W. Bush issued Homeland Security Presidential Directive 5 (HSPD-5). [[178]](#footnote-179)178 HSPD-5 was a general directive to the DHS Secretary to "enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive [NIMS]." [[179]](#footnote-180)179 HSPD-5 designates the Secretary as the PFO for domestic incident management. [[180]](#footnote-181)180 Though NIMS encompasses ***oil*** spill response implicitly, its scope is far broader than the NCP. The NCP, specific to ***oil*** spills and hazardous substance release, falls under the **[\*378]** umbrella of the NIMS and the NRF. Because the EPA has not significantly revised the NCP since 1994, the NCP does not contemplate HSPD-5 or the Homeland Security Act of 2002, the organic act for the DHS. Nevertheless, the NCP is one part of the overall NIMS and NRF. HSPD-5 plays a somewhat peripheral role in the removal authority delegation analysis. In HSPD-5, the President designated the Secretary of Homeland Security as the PFO for all domestic incidents. The term "domestic incidents" anticipates an infinite array of national calamities, including environmental disasters such as large ***oil*** spills. Consequently, HSPD-5 is not specific to ***oil*** spill responses, nor does it speak to FWPCA removal authority. In fact, paragraph 5 of HSPD-5 states that this directive does not alter or impede "the authorities of Federal departments and agencies to perform their responsibilities under law." [[181]](#footnote-182)181 It does provide, however, that "all Federal departments and agencies shall cooperate with the Secretary in the Secretary's domestic incident management role." [[182]](#footnote-183)182 Thus, as the PFO under HSPD-5, the Secretary of Homeland Security has the authority to coordinate and manage all domestic incidents, which may include large ***oil*** spills. However, that mandate, in and of itself, does not confer any removal authority on the Secretary. Instead, the Secretary's removal authority derives from section 3 of Executive Order No. 12,777. While the two delegations have no specific linkage and HSPD-5 provides no particular authority to act, the latter does serve to reinforce the authority of the Secretary to act in the event of a major spill.

III. The DEEPWATER HORIZON Flow of Authority and the Issues That Arose

A. Initial Actions

1.

"The Well from Hell" [[183]](#footnote-184)183

DEEPWATER HORIZON was not the largest ***oil*** spill in the United States' history. That distinction belongs to the "Lakeview Gusher," a pressurized ***oil*** well that exploded in 1910, 100 years prior to DEEPWATER HORIZON, spilling 378 million gallons of crude ***oil*** over **[\*379]** eighteen months in ***Kern*** County, California. [[184]](#footnote-185)184 Of the documented ***oil*** spills of the world, DEEPWATER HORIZON, with its estimated 205.8 million gallons of crude ***oil*** spilled, ranks just below the Kuwaiti ***oil*** fires of the first Gulf War and the Lakeview Gusher in size. [[185]](#footnote-186)185 To put it into perspective, DEEPWATER HORIZON was almost five times greater than the TORREY CANYON ***oil*** spill and sixteen times greater than EXXON VALDEZ. [[186]](#footnote-187)186 Despite its inferiority in size to the Lakeview Gusher, DEEPWATER HORIZON is the most complex ***oil*** spill the United States has ever confronted. [[187]](#footnote-188)187

Complicating the DEEPWATER HORIZON response further was its eventual characterization as the first-ever SONS, leading to the first-ever establishment of a NIC. [[188]](#footnote-189)188 However, the designation of DEEPWATER HORIZON as a SONS was not immediate. After the explosion on April 20, the government did not declare the spill a SONS until April 29, [[189]](#footnote-190)189 though there were "high-level" discussions about the necessity of declaring a SONS in the interim. [[190]](#footnote-191)190 In the ten days following the spill, before DEEPWATER HORIZON was declared a SONS: the rig sank, the extensive rescue efforts for the missing crew members were suspended, efforts were made to activate the blowout preventer using underwater robots, and efforts to remove the ***oil*** began, including the wide use of dispersants and in situ burns, [[191]](#footnote-192)191 with the FOSC ordering these actions under authority granted in the NCP. [[192]](#footnote-193)192 Only when efforts to **[\*380]** activate the blowout preventer failed and the true magnitude of the spill began to be appreciated was the spill declared a SONS and a NIC established. [[193]](#footnote-194)193 It was originally estimated that the well was leaking 1000 barrels per day. [[194]](#footnote-195)194 This estimation continued until April 28, when NOAA scientists produced an estimate of 5000 barrels per day. "It was only after this five-fold escalation in the flow-rate estimate that the National Incident Command structure was added to the spill response frame-work." [[195]](#footnote-196)195

2. The First "Spill of National Significance"

On April 29, 2010, Secretary of Homeland Security Janet Napolitano declared DEEPWATER HORIZON a SONS. Two days later, she designated Admiral Thad Allen, then serving as the Commandant of the Coast Guard, to be the NIC. [[196]](#footnote-197)196 Before Admiral Allen's designation as NIC, the NRT was operationalized per 40 C.F.R § 300, Appendix E, and Secretary Napolitano began to chair twice-daily NRT meetings to monitor the spill response and provide high-level policy guidance. [[197]](#footnote-198)197

Designation of a NIC did not terminate the role of the original FOSC; by design, the roles were intended to be complimentary. [[198]](#footnote-199)198 However, the NCP is silent on how the NIC and the FOSC are supposed to coordinate their responsibilities and says nothing about who may or should serve as the NIC. [[199]](#footnote-200)199 Throughout the DEEPWATER HORIZON response in the summer of 2010, there were five sequential FOSCs, three of whom worked in conjunction with the NIC. [[200]](#footnote-201)200

**[\*381]**

B. Issues Arising from the Initial Actions Taken

1. Delegation of Removal Authority to a Coast Guard District Commander

At the time of the rig explosion, while recognizing the potential for an ***oil*** spill and monitoring for signs of ***oil*** outflow, the Coast Guard was primarily concerned with mounting a search-and-rescue operation for the eleven missing rig crewmembers. [[201]](#footnote-202)201 At the time, the concerns for ***oil*** flow were primarily focused on flow from the fuel tanks of the rig itself; however, it was also apparent to the responders that the spill would very likely cross over the sector boundaries. Therefore, it was necessary to designate the Coast Guard District Commander, Rear Admiral Mary Landry, as the FOSC to oversee removal actions of the multisector spill, although at the time of her designation the spill had not been classified as a SONS. [[202]](#footnote-203)202 On April 24, once it was discovered that ***oil*** was flowing from the bent wellhead riser pipe at the bottom of the ocean, the potential for the spill as a SONS was realized. Upon receiving news that the riser was leaking, Admiral Landry became the FOSC. However, the District Commander is not expressly redelegated the Commandant's delegated removal authority. [[203]](#footnote-204)203 Further, the "general track" delegation of removal authority through the NCP, despite allowing for other personnel to assume duties as the FOSC in a multisector spill, does not expressly contemplate the District Commander assuming those duties, unless so stated in the RCP. [[204]](#footnote-205)204 The RCP for the Gulf of Mexico does not expressly name the Commander of the Eighth Coast Guard District as a regional FOSC. Hence, at the time the Coast Guard recognized that the spill would cross sector boundaries, Admiral Landry was without FOSC removal authority.

Fortunately for the Coast Guard, this hole in the flow in the delegation of authority had been recognized earlier, during a SONS exercise held in March 2010. [[205]](#footnote-206)205 During the exercise, the Coast Guard considered two options to give the District Commander removal **[\*382]** authority: either have the Commandant redelegate his authority or revise the RCP to allow the District Commander to serve as FOSC. As revision of the RCP would require notice-and-comment rulemaking under the Administrative Procedure Act, [[206]](#footnote-207)206 the more expedient course of action was a direct delegation from the Commandant. This was accomplished on April 24, 2010. However, this delegation process should now be formalized by amending all RCPs and 33 C.F.R. § 1.01-80 to allow Coast Guard District Commanders to assume the role of the FOSC in a spill that crosses more than one Coast Guard sector.

2. Authority of the Secretary of Homeland Security to Designate a SONS and a NIC

Another question raised by DEEPWATER HORIZON is whether Secretary Napolitano had the authority, outside the NCP, to designate the spill a SONS and to name a NIC. This question does not refer to the appropriateness of characterizing the spill as nationally significant (it clearly was), but rather whether the Secretary herself had the authority to do so. Section 300.323 of the NCP gives the Commandant of the Coast Guard the discretion to classify a coastal discharge as a SONS. [[207]](#footnote-208)207 It further gives the Commandant the discretion to name a NIC. [[208]](#footnote-209)208 The power of the Secretary also to make these designations is not stated explicitly. Why the omission of the Secretary of Homeland Security (who is generally referred to in the regulations as "the Secretary of the Department in which the Coast Guard is operating") occurred is unclear. Consider that for discharges in inland zones, the Secretary's equivalent at the EPA, the Administrator of the EPA, is given discretion to declare a SONS and then subsequently, to designate a NIC. [[209]](#footnote-210)209 Throughout the NCP, references are made to the Commandant's authority for discharges in the coastal zone and, alternately, the EPA Administrator's authority for inland discharges. The Secretary's intended involvement, based on the design of the NCP, derives from her position as senior executive of the department in which many of the agencies closely involved in the NCP operate. Thus, viewed from the NCP, despite her status as the Commandant's senior executive, it could be argued that Secretary Napolitano may have acted outside of her regulatory authority in **[\*383]** declaring a SONS and designating the NIC because the NCP does not provide for such, and any removal action must be taken pursuant to the NCP. However, this argument fails for two reasons.

First, designation of a spill as a SONS and naming of a NIC is not a removal action per se. Neither designation carries with it any additional explicit removal authority, save one not relevant to DEEPWATER HORIZON. [[210]](#footnote-211)210 Second, the "specific" track of removal authority exists outside of the NCP. The delegation of FWPCA section 311(c) removal authority for spills in the coastal zone to the Secretary of Homeland Security in Executive Order No. 12,777, coupled with the express statutory role of the Secretary as the head of DHS and the PFO for domestic incident management per HSPD-5, arguably gave Secretary Napolitano the authority to designate a SONS and name a NIC. It must be remembered that the NCP has not been significantly revised since 1994; thus, incorporation of the statutory role and authority of the Secretary of Homeland Security (a role that was created in 2002) into the NCP has not occurred. Nevertheless, the NCP should be read in conjunction with the Secretary's inherent authority. Accordingly, although the NCP did not give the Secretary explicit authority to designate a SONS and name a NIC, there is a strong argument favoring such actions as appropriate based on her role as the head of DHS. Moreover, she had full power to act, through the delegation of authority given to her, provided her actions were conducted in accordance with the NCP. If the Commandant could designate a SONS or a NIC, so too could the Secretary (or the President, for that matter).

In order to avoid future issues raised by the Secretary acting outside the explicit regulatory authority outlined in the NCP, it should be revised to encompass the Secretary of Homeland Security's inherent authority as the PFO per HSPD-5 as a potential chair of the NRT to provide the Secretary express authority in the NCP to declare a SONS and designate a NIC.

**[\*384]**

3. Removal Authority of the NIC

 THE ACTUAL FLOW OF REMOVAL AUTHORITY DURING DEEPWATER HORIZON

As described above in Part II.A, there are two tracks of statutory removal authority. The first flows specifically via delegation of the President's FWPCA removal authority, beginning with section 3 of Executive Order No. 12,777, through the Secretary of Homeland Security and the Commandant of the Coast Guard and ending with the FOSC. The second flows generally from section 1 of Executive Order 12,777 through the NCP, also ending with the FOSC. [[211]](#footnote-212)211 However, these two tracks do not lead to the same scope of removal authority. The removal authority delegated to the FOSC from the section 3 specific- **[\*385]** delegation track is limited: the Commandant reserved the authority to remove or destroy a vessel or take any action that would constitute an intervention under the Intervention on the High Seas Act. [[212]](#footnote-213)212 The removal authority granted to the FOSC via the NCP, however, is the full authority granted to the President in the OPA amendments to the FWPCA. [[213]](#footnote-214)213 Hence, the dual tracks of removal authority conflict. However, the Coast Guard's manual for environmental response, like the Commandant's reserved delegation in 33 C.F.R. § 1.01-80(e), limits the FOSC's removal authority for interventions [[214]](#footnote-215)214 and destruction or removal of vessels. [[215]](#footnote-216)215 Thus, in practice, the FOSC will exercise the limited authority delegated via the section 3 specific track and seek permission from the Commandant if removal of a vessel or other intervention action is necessary.

Notably, neither track of removal authority extends to the NIC. In DEEPWATER HORIZON, Secretary Napolitano, who was delegated removal authority from the President in Executive Order No. 12,777, delegated sections 311(c) and 311(e) removal authority to Admiral Allen as the NIC. [[216]](#footnote-217)216 Section 311(e), together with section 311(c), are the provisions giving the President and his delegates broad authority to respond to ***oil*** spills. It was Admiral Allen's belief, however, that the Secretary did not delegate section 311(e) authority to issue administrative orders. [[217]](#footnote-218)217 In the memorandum from the Secretary to Admiral Allen delegating her authority, she said, "I delegate authority under 33 U.S.C. § 1321 (section 311(c) of the [FWPCA]) to the National Incident Commander." [[218]](#footnote-219)218 Despite the memorandum's lack of specific reference to section 311(e), arguably, the authority in section 311(e) was included in the Secretary's 311(c) delegation to the NIC. This is because section 311(e) is inextricably linked to section 311(c). For example, section 311(e), discussing civil enforcement, states, "In addition to any action taken by a State or local government, when the President determines that **[\*386]** there may be an imminent and substantial threat to the public health or welfare of the United States … because of an actual or threatened discharge of ***oil*** … the President may" issue administrative orders protecting the public health. [[219]](#footnote-220)219 And section 311(c) provides, "The President shall, in accordance with the [NCP] and any appropriate [ACP], ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of ***oil*** … [and] may … direct or monitor all Federal, State, and private actions to remove a discharge … ." [[220]](#footnote-221)220

Thus, the President's responsibility and broad authority to remove a discharge could include issuing administrative orders to protect the public health. Under this assumption, the Secretary's explicit delegation of 311(c) removal authority implicitly included delegation of 311(e). Nevertheless, Admiral Allen believed his authority in the response was limited and that he was forced to rely on the FOSC to accomplish section 311(e) functions. [[221]](#footnote-222)221

Should Secretary Napolitano, using her individual authority, have given the NIC any removal authority at all, considering there is no provision in either the section 1 general track of removal authority or the section 3 specific-delegation track of removal authority for the NIC to possess removal authority? When the Secretary delegated removal authority to Admiral Allen, a separate chain of authority emerged, not contemplated in either the statutory or regulatory regime. The authority flowed from the Secretary to the NIC then to the FOSC via the NCP. Although Secretary Napolitano did not delegate removal authority to the NIC within the lines of express statutory contemplation, giving the NIC removal authority was a reasonable and appropriate decision to make in the circumstances. Although Admiral Allen did not exercise the authority explicitly, several situations arose during the spill where serious consideration to issuing administrative orders or other direction did arise. [[222]](#footnote-223)222

**[\*387]** In order to resolve this issue for future SONS, the following language should be added to section 311(c) of the FWPCA, which covers removal authority: "During a removal action classified as a Spill of National Significance, the President may designate a National Incident Commander." Giving the President authority to designate a NIC in the organic statute would validate the Secretary's decision to delegate removal authority to the NIC. The authority would flow from the President through the removal delegations already encompassed in Executive Order No. 12,777 or its successors to the Secretary, who could then delegate removal authority to the NIC with statutory support.

However, a note of caution should be sounded when implementing these changes. The media and public also seemed to perceive the initial government response to the spill as inadequate, believing instead that BP was "calling the shots." According to Admiral Allen, "the public did not initially have visibility of the government's direction and decision-making [through the FOSC]. This reinforced the public's perception that BP was "in charge' of the Deepwater Horizon response and not the federal government." [[223]](#footnote-224)223 The National Commission investigating DEEPWATER HORIZON for the President likewise found that "local resentment became a media theme and then a self-fulfilling prophesy. Even those who privately thought the federal government was doing the best it could under the circumstances did not say so publicly." [[224]](#footnote-225)224 When a major ***oil*** spill occurs in the future, governmental officials may feel pressured to prematurely declare a SONS and designate a NIC in order to avoid accusations of inaction. Thus, clearer criteria for SONS designation and the circumstances for designating a NIC should be promulgated to temper any "knee-jerk" desire to attach additional layers of control of a response not requiring such scrutiny.

4. The Role and Authority of the NRT During the DEEPWATER HORIZON SONS

As described in Part II above, normally the NRT is an interagency, interdisciplinary body that provides technical policy guidance to the RRTs and Area Committees in implementing the NCP. Usually, the EPA is the chair and the Coast Guard is the vice-chair of the NRT. [[225]](#footnote-226)225 However, when a spill involves a substantial threat to the public health and welfare **[\*388]** of the United States, substantial amounts of property, or substantial threats to natural resources, the NRT can be activated as an emergency response team to monitor the actions of the NIC or FOSC and recommend further actions. [[226]](#footnote-227)226 In these instances, the chair of the NRT is the agency providing the FOSC. [[227]](#footnote-228)227 The OPA amendments to the NCP contemplated that the NRT would be a national-level technical policy group with respect to ***oil*** spills, [[228]](#footnote-229)228 and the NCP at 40 C.F.R. § 300.110(k) can be interpreted as limited to monitoring and evaluating reports from the FOSC in order for the NRT to provide technical advice and coordinate resources to combat the spill. However, as was shown during the DEEPWATER HORIZON response, this interpretation can be too limiting.

During DEEPWATER HORIZON, the NRT was activated as an emergency response team and was used by the Secretary (as the parent department to the Coast Guard and as the PFO pursuant to HSPD-5) to perform these monitoring, oversight, and coordination roles, but in a manner that may not have been originally envisioned when the NCP was constructed after OPA. The international media attention surrounding DEEPWATER HORIZON resulted in a highly challenging political environment, requiring political coordination by senior executive government officials participating in the response. [[229]](#footnote-230)229 The logical body to perform that political coordination was the NRT. The daily NRT meetings, which often included Cabinet-level representation by the members of the NRT, coupled with the daily calls to the governors of the affected states, allowed that political coordination to occur. Thus, as in EXXON VALDEZ, the practical execution of the NCP differed from the intent of the plan. With the NRT functioning as a general policy and political coordination body, it largely ceased functioning as a technical policy group. However, the function could not be left unattended during a major spill, especially one as technically complex as DEEPWATER HORIZON. Admiral Allen's solution was to create the Interagency Solutions Group (IASG):

Rather than serving its intended purpose, direct engagement by Cabinet-level officials from the outset of this response essentially redirected the NRT to the role of support to intra-Cabinet communications and briefings, **[\*389]** diminishing its ability to serve as a deliberative body and its value to the response organization. To provide the originally intended functions of the NRT, a new organization named the [IASG] was created within the NIC. The IASG essentially assumed the doctrinal responsibilities of the NRT, and proved exceptionally adept in promoting interagency unity of effort. [[230]](#footnote-231)230

The IASG, consisting of representation from seventeen agencies, was an incident-specific workgroup for the NRT whose role was to "coordinate the "whole of government' policy and procedural recommendations for the NIC, [Unified Area Command], and applicable [Unified Incident Commands]." [[231]](#footnote-232)231 It handled communications that required immediate interagency coordination and institutionalization for policy questions arising from the field. Indeed, it truly fulfilled the roles anticipated for the NRT, but diminished when the NRT became a political coordination body. [[232]](#footnote-233)232

Admiral Allen has spoken publically about the "political nullification" of the NCP during the DEEPWATER HORIZON spill. [[233]](#footnote-234)233 Political coordination issues did interfere with some specific implementation aspects of the NCP and the RCP, particularly the use of dispersants to combat the spill and the deployment of boom. [[234]](#footnote-235)234 It was also apparent in the confusion that existed in the affected states' governments regarding the "top-down" regime of the NCP (described in Part I), as opposed to the "bottom-up" regime of the Stafford Act, with which the Gulf state governments, routinely affected by hurricanes, were more intimately familiar. However, the characterization of political nullification is not appropriately applied to the morphing of the NRT from its expected technical policy coordination role to its political **[\*390]** coordination role during DEEPWATER HORIZON. The plain language of the NCP, at 40 C.F.R. § 300.110(k), is broad enough that it can be read in a political context. Moreover, that interpretation is reasonable, given the political coordination issues that arose during EXXON VALDEZ and Congress's desire to address that problem through the OPA amendments to the FWPCA. Indeed, having the NRT perform the bulk of the political coordination role in conjunction with the NIC during a SONS can become a significant "pressure relief valve" for the FOSC. It allows him or her to execute the President's removal authority under the direction of the NIC and the NRT, as envisioned in the NCP, but without the FOSC being overly distracted in that role.

However, as recognized by Admiral Allen in creating the IASG, the political coordination function of the NRT during a large spill cannot supplant the critical need for a technical coordination body to assist the FOSC. Therefore, the NCP should be amended to allow, when activated during a SONS, the NRT to split into (1) a political coordination body and (2) a technical coordination body (under the general direction of the chair.)

5. The Flow of Removal Authority and the Role of the PFO and the NIC: A New Agency?

As described in Part II, the flow of coordination for removal was expected to run to the FOSC through the NCP, with the FOSC supported by the Commandant of the Coast Guard for certain actions. However, once the SONS was declared and the NIC designated, coupled with the assumption of Chair of the NRT by Secretary Napolitano and her designation of the NIC (including the granting of section 311 removal authority and the role of the NRT and NIC in coordinating the political and technical coordination aspects of the spill), the overall organizational structure of the DEEPWATER HORIZON response became one where the flow of coordination flowed down from the President. From the President, the flow of coordination trickled down through the Secretary of Homeland Security in her dual role as the PFO, pursuant to HSPD-5, and as Chairman of the NRT, pursuant to 40 C.F.R. § 300.110(b), to the NIC, the FOSC, and ultimately, to the incident commands in the affected states. This transformation became particularly evident after Admiral Allen relinquished his role, by law, as Commandant of the Coast Guard, but retained the role of the NIC, and Admiral Landry returned to her duties as the Eighth Coast Guard District Commander and relinquished her role of FOSC in favor of Admiral James Watson (brought from **[\*391]** outside the District to serve). [[235]](#footnote-236)235 In turn, this flow of coordination between the political senior officials in the White House and the NRT to the NIC and its IASG caused the Coast Guard to become more of a supporting agency for a new organization within DHS rather than the lead agency for the spill as anticipated by the NCP. That is not to say the new entity that the PFO/NRT/NIC/FOSC relationship evolved into was not inextricably linked to the Coast Guard to provide, among other things: personnel support, logistical support, technical expertise for spills in the coastal zone, and mentoring/direction to Coast Guard field personnel combating the spill. [[236]](#footnote-237)236 However, given the flow of coordination that evolved as described above, particularly the fact that Secretary Napolitano, and not the Commandant, designated the NIC, it is doubtful that Admiral Papp, the Commandant succeeding Admiral Allen, could have replaced the NIC if that situation had arisen. Moreover, since the Secretary designated her removal authority personally, without directing that delegation through the Commandant, it is doubtful that the Admiral Papp could have directed the NIC in the use of that authority either.

Though the Secretary's responsibilities as PFO are more broadly defined in HSPD-5 than those of the NIC in the NCP, one could easily confuse the PFO's role with that of the NIC. [[237]](#footnote-238)237 Coast Guard Instruction 16465.1A addressed the differences in roles between the two positions, emphasizing the general authority of the PFO for "all-hazards" versus the specific authority of the NIC in responding to a SONS. [[238]](#footnote-239)238 Despite the ease with which the instruction disposes of the question, even Admiral Allen, acting as the NIC, cited confusion by the organizational overlap, specifically addressing the issue in his post-incident report to Secretary Napolitano. [[239]](#footnote-240)239

The principal issue with respect to the interrelationship of the roles of the NIC, the FOSC, and the PFO is the lack of statutory and **[\*392]** regulatory guidance defining these roles. The obvious solution to the problem is to clarify the roles legislatively and/or administratively. First, the NCP needs a revised and much more robust description of the NIC's roles and responsibilities, and of the role of the interagency in supporting the NIC. Second, the HSPD-5 overlay for a SONS should be clarified within the NCP and NRF. However, the Secretary's reliance on HSPD-5 for removal authority was not necessary. Executive Order No. 12,777 already provided the Secretary with full removal authority to respond to DEEPWATER HORIZON. Even so, specifically distinguishing the role of the PFO and the NIC would be very helpful in future spills. Congress and administrators should analyze the SONS framework established in DEEPWATER HORIZON for its strengths and weaknesses. The organizational structure of the SONS established by the DEEPWATER HORIZON could become the standard for subsequent major spills.

6. The NIC Organizational Structure, Its Authorities, and the NCP

The regulatory doctrine covering the NIC is sparse. The NCP simply states, "[the] NIC … will assume the role of the [FOSC] in communicating with affected parties and the public, and coordinating federal, state, local, and international resources at the national level." [[240]](#footnote-241)240 The Coast Guard further clarified the role of the NIC in a somewhat vague internal instruction that expanded upon the NIC's responsibilities and provided guidance on naming an NIC. [[241]](#footnote-242)241 Quoting the Federal Register, the instruction emphasizes the specific and limited role of the NIC, but does so by assigning the NIC the nonspecific and broad roles of national coordination, strategy, and communication. [[242]](#footnote-243)242

Due to the lack of regulatory guidance about the role of the NIC, Admiral Allen's actions in carrying out that role depended largely on how he defined the position for himself, which he appeared to base on the internal Coast Guard instruction, [[243]](#footnote-244)243 but with much broader scope and impact than could have been inferred from the guidance that existed before the spill. During DEEPWATER HORIZON, Admiral Allen formed a robust staff in Washington, D.C., at Coast Guard Headquarters. [[244]](#footnote-245)244 The NIC Staff structure included a Deputy National **[\*393]** Incident Commander, a Chief of Staff with his own assistants and aides, and then several subsidiary staffs focused on key functions of the NIC mission. [[245]](#footnote-246)245 Overall, the NIC organization was robust. It is somewhat remarkable, given the dearth of guidance in the NCP regarding a SONS and the NIC, that the NIC organization was implemented in such a comprehensive way; however, given the complexity and scope of the DEEPWATER HORIZON response, this is not entirely surprising. Yet, Admiral Allen "created a "thin client,' a lean NIC staff with a relatively small footprint." [[246]](#footnote-247)246

As anticipated by the NCP, Admiral Allen, as the NIC, "became the face of the federal response" to DEEPWATER HORIZON. [[247]](#footnote-248)247 Admiral Allen's stated intention was for the NIC to "function[] as a national coordination and communications center to deal with high-level political and media inquiries so that the Unified Area Command and the Incident Command Posts could focus on response efforts." [[248]](#footnote-249)248 The NIC's purpose was "not to direct tactics or response operations, but to deal with political and high-level strategy issues associated with the response." [[249]](#footnote-250)249 The actual response efforts were within the purview of the FOSC, with his or her focus on "coordinating resources, communications, and the relationship with the responsible party." [[250]](#footnote-251)250 The incident commands had power to make tactical and operational decisions on location. [[251]](#footnote-252)251 However, acting as the NIC, Admiral Allen "directed the [Responsible Party's] actions, authorized removal, and approved expenditures against the ***Oil*** Spill Liability Trust Fund." [[252]](#footnote-253)252 The first two of those functions directly implicate removal authority under section 311(c) of the FWPCA; thus the delegation of such authority from the Secretary to the NIC was indeed a prudent decision. However, the lack of memorialization of the flow of authorities to the NIC, and the flow of coordination through the NIC staff is troubling. The NCP must be updated to (1) firmly establish the authority of the NIC, (2) more fully describe the functions and duties of the NIC and the NIC staff when responding to a SONS, and (3) clarify **[\*394]** the interface between the NIC and the Coast Guard when the NIC and staff are formed.

IV. Conclusion and Summary of Recommendations

The National Contingency Plan, borne out of the TORREY CANYON disaster, has been a work-in-progress since 1968. The role of the federal government in responding to ***oil*** spills and hazardous substance releases falls within the vast, multilayered National Response Framework and National Incident Management System. DEEPWATER HORIZON, 2010's catastrophic and first-ever spill of national significance, required the first-ever designation of a National Incident Commander and the creation of a NIC staff to serve as a key interface between the FOSC executing removal actions at the scene and senior-level federal officials working through the NRT to coordinate the political aspects of the spill. With this construct, other issues arose regarding the flow of removal authority to those designated as FOSCs by the Coast Guard, the relationship between the Coast Guard and the NIC, and the structure necessary to allow for the flow of technical advice needed to combat the spill effectively. The unprecedented nature of the DEEPWATER HORIZON response exposed these statutory and regulatory holes in the National Contingency Plan and the National Response Framework (despite the earlier revisions post-EXXON VALDEZ) and highlighted the need for serious policy reflection and revision in the wake of the spill. With the "well from hell" finally killed, the time for revising and updating the NCP is now, as lessons learned from this disaster are analyzed. Specifically:

1. All Regional Contingency Plans and 33 C.F.R. § 1.01-80 should be revised to explicitly allow Coast Guard District Commanders to assume the role of the FOSC in a spill that crosses more than one Coast Guard Sector.

2. The NCP should be revised to encompass the Secretary of Homeland Security's inherent authority as the PFO per HSPD-5, and as a potential chair of the NRT to provide the Secretary express authority in the NCP to declare a SONS and designate an NIC.

3. The NCP should be revised to include a more robust description of the NIC's roles and responsibilities and the role of interagencies in supporting the NIC.

4. The HSPD-5 overlay for a SONS should be clarified within the NCP and NRF.

**[\*395]** 5. The NCP must be updated to: (1) firmly establish the authority of the NIC, (2) fully describe the functions and duties of the NIC and the NIC staff when responding to a SONS, and (3) clarify the interface between the NIC and the Coast Guard when the NIC and staff are formed.

Looking back at the DEEPWATER HORIZON spill, it is apparent that the flow of removal authority from the President to the FOSC through the "dual track" system described in this Article was appropriate and largely adequate to meet the monumental task faced by the nation and that the NCP and its mechanisms are sound. In particular, the uninterrupted flow of full removal authority from the President to the FOSC, embracing the Coast Guard's long-standing principle of maximizing on-scene initiative, should be reinforced, even in the most challenging incidents. With the changes recommended in this Article, the nation will be better prepared to respond to the next disastrous spill, which we hope will never occur, but inevitably will. In this way, national leaders responding to the spill will be better able to "surround themselves with the best people they can find, delegate authority, and not interfere." [[253]](#footnote-254)253

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1. 1 See infra Part III.A. [↑](#footnote-ref-2)
2. 2 Nat'l Comm'n on the BP Deepwater Horizon ***Oil*** Spill & Offshore Drilling, Chief Counsel's Report 59 (2011) [hereinafter Chief Counsel's Report]. The rig was located in the Macondo Prospect, less than fifty miles southeast of the Mississippi River Delta. "Macondo" bears the same name as the cursed fictional town in Gabriel Garcia Marquez's novel, One Hundred Years of Solitude (1970). [↑](#footnote-ref-3)
3. 3 Blowout: The Deepwater Horizon Disaster, CBS News, http://www.cbsnews.com/stories/2010/05/16/60minutes/main6490197.shtml (last updated Sept. 21, 2010, 1:16 PM). [↑](#footnote-ref-4)
4. 4 Ray Mabus, America's Gulf Coast: A Long Term Recovery Plan After the Deepwater Horizon ***Oil*** Spill 2 (2010). [↑](#footnote-ref-5)
5. 5 See EPA, National ***Oil*** and Hazardous Substances Pollution Contingency Plan Overview, EPA.gov, http://www.epa.gov/oem/content/lawsregs/ncpover.htm (last visited Mar. 14, 2012) [hereinafter NCP Overview]. [↑](#footnote-ref-6)
6. 6 National ***Oil*** and Hazardous Substances Pollution Contingency Plan, currently codified at 40 C.F.R. § 300 (2002). [↑](#footnote-ref-7)
7. 7 Federal Water Pollution Control Administration, National Multi-Agency ***Oil*** and Hazardous Materials Pollution Contingency Plan 2 (1968) [hereinafter 1968 NCP]. [↑](#footnote-ref-8)
8. 8 See Grey Hall, Torrey Canyon Alerted the World to the Dangers that Lay Ahead, Prof'l Mariner, http://professionalmariner.com (search "Torrey Canyon"; follow hyperlink for article in results) (last visited Mar. 28, 2012). [↑](#footnote-ref-9)
9. 9 See 1968 NCP, supra note 7, at 2; NCP Overview, supra note 5. [↑](#footnote-ref-10)
10. 10 Since the passage of the ***Oil*** Pollution Act of 1990 and its resulting revisions to the NCP, there have been other, less sweeping revisions. For example, the definition of Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) in § 300.5 was revised in Amendment to the National ***Oil*** and Hazardous Substances Pollution Contingency Plan (NCP); CERCLIS Definition Change, 60 Fed. Reg. 16,053-54 (Mar. 29, 1995) (codified at 40 C.F.R. § 300). Additionally, in 1997, Congress reinstated regulations pertaining to the involuntary acquisition of property by the government under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This change was implemented in Subpart L of the NCP by National ***Oil*** and Hazardous Substances Pollution Contingency Plan; Involuntary Acquisition of Property by the Government, 62 Fed. Reg. 34,602 (June 26, 1997) (codified at 40 C.F.R. § 300). [↑](#footnote-ref-11)
11. 11 ***Oil*** Pollution Act of 1990, Pub. L. No. 101-380 § 4201(a), 104 Stat. 484, 523 (amending 33 U.S.C. 1321(c) 1988). [↑](#footnote-ref-12)
12. 12 Hall, supra note 8. A credit to multiculturalism, "the ship was the property of a U.S. company based in Bermuda, sailed under the Liberian flag with an Italian crew and was working for British Petroleum." Id. [↑](#footnote-ref-13)
13. 13 Id. [↑](#footnote-ref-14)
14. 14 The TORREY CANYON was too big to pass through the Suez Canal and so the ship had to transit south around the Cape of Good Hope, Africa, to reach its western destinations. Id. [↑](#footnote-ref-15)
15. 15 Nat'l Oceanic & Atmospheric Admin. [NOAA], Torrey Canyon, IncidentNews.gov, http://www.incidentnews.gov/incident/6201 (last visited Mar. 14, 2012). [↑](#footnote-ref-16)
16. 16 Hall, supra note 8. Fourteen of the eighteen cargo tanks carrying crude ***oil*** were breached in the crash. Id. [↑](#footnote-ref-17)
17. 17 Id. [↑](#footnote-ref-18)
18. 18 See id. When almost two weeks' worth of effort had proven futile in saving the ship, British authorities decided to bomb the TORREY CANYON and light the massive ***oil*** slick on fire. The ship was destroyed easily, but igniting the slick proved impossible because the sea state was too rough and the flammable layer of the crude ***oil*** was too thin. The British Royal Navy even fired rockets at the floating ***oil*** to no avail. Id. [↑](#footnote-ref-19)
19. 19 Id. [↑](#footnote-ref-20)
20. 20 Id. [↑](#footnote-ref-21)
21. 21 See Videotape: ***Oil*** Menace Hits French Beaches, (British Pathe 1967) (on file with author) ("Early cleaning up efforts seemed pathetically inadequate especially as each tide brought new ***oil***."). [↑](#footnote-ref-22)
22. 22 In particular, the Torrey Canyon ***oil*** spill "galvanized the United States into action and caused us to assess our own capabilities to cope with massive spills of ***oil*** or other hazardous substances." 1968 NCP, supra note 7, at 2. [↑](#footnote-ref-23)
23. 23 Almost one year after the grounding of the TORREY CANYON, on the morning of March 3, 1968, the tanker OCEAN EAGLE ran aground in San Juan Harbor, Puerto Rico. NOAA, Ocean Eagle, IncidentNews.gov, http://www.incidentnews.gov/incident/6202 (last visited Mar. 14, 2012). Id. The OCEAN EAGLE incident also motivated the United States to create a contingency plan for ***oil*** spill response. See J.S. Robinson, Hazardous Chemical Spill Cleanup 14 (1979). [↑](#footnote-ref-24)
24. 24 See Robinson, supra note 23, at 14. [↑](#footnote-ref-25)
25. 25 See id. at 14-15. [↑](#footnote-ref-26)
26. 26 Id. at 15. [↑](#footnote-ref-27)
27. 27 1968 NCP, supra note 7, at 2. [↑](#footnote-ref-28)
28. 28 See id. at 2; NCP Overview, supra note 5; see also Robinson, supra note 23, at 15 ("Each of the agencies … was assigned primary roles because of its resources or expertise that would be particularly useful in cleanup and countermeasure actions."). [↑](#footnote-ref-29)
29. 29 1968 NCP, supra note 7, at 2. [↑](#footnote-ref-30)
30. 30 Id. at 2-3. These teams were the predecessors to the National Response Team and Regional Response Teams of the current NCP. [↑](#footnote-ref-31)
31. 31 See Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified as amended at 42 U.S.C.§§5121-5202 (2006)). The Stafford Act, which was signed into law November 23, 1988, amended the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143. [↑](#footnote-ref-32)
32. 32 See 42 U.S.C.§§5121-5202. [↑](#footnote-ref-33)
33. 33 Id. § 5121(b)(6). It is important to note that despite the NCP's top-down nature, the plan envisions and requires considerable state and local contributions to its development, implementation, and execution, as described infra Part I.C. Although ultimate responsibility lies with the President for ***oil*** spill and hazardous substance removal - as opposed to state direction of disaster response under the Stafford Act - it would be inaccurate to characterize the NCP as a purely federal government enterprise. The plan anticipates significant coordination between the responsible party, the affected state or locality, and the federal government in both the preparation and response phases of the plan. See infra Part I.C. [↑](#footnote-ref-34)
34. 34 1968 NCP, supra note 7, at 1, Annex III. "Pollution incident" is defined as "a discharge of ***oil*** or other hazardous substance of such magnitude or significance as to require immediate response to contain, cleanup or dispose of the material to prevent a substantial threat to public health or welfare." Id. at 1. [↑](#footnote-ref-35)
35. 35 Id. Annex III. [↑](#footnote-ref-36)
36. 36 See id. at 4. [↑](#footnote-ref-37)
37. 37 Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84. Stat. 91, 93. [↑](#footnote-ref-38)
38. 38 35 Fed. Reg. 8508-14 (June 2, 1970). This version changed some of the original terminology used in the 1968 NCP and reformatted the NCP for publication as a federal regulation. In scope and purpose, however, the 1970 NCP closely mirrored the original. [↑](#footnote-ref-39)
39. 39 See National ***Oil*** and Hazardous Substances Pollution Contingency Plan, 36 Fed. Reg. 16,215-21 (Aug. 20, 1971). In publishing this version of the NCP, the Council on Environmental Quality also made a subtle change to the title of the plan, changing "Materials" to "Substances." Id. at 16,215. [↑](#footnote-ref-40)
40. 40 See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 311(c)(2), 86 Stat. 816, 865. [↑](#footnote-ref-41)
41. 41 Id. § 311(c)(1). [↑](#footnote-ref-42)
42. 42 See generally Colin De La Rue & Charles B. Anderson, Shipping and the Environment: Law & Practice 22-23 (1998). [↑](#footnote-ref-43)
43. 43 Pub. L. No. 92-500, § 311(c)(2), 86 Stat. at 865. [↑](#footnote-ref-44)
44. 44 Exec. Order No. 11,735, 38 Fed. Reg. 21,243-46 (Aug. 7, 1973). [↑](#footnote-ref-45)
45. 45 The passage of CERCLA, also known as "the Superfund," created a tax on the chemical and petroleum industries and increased the federal government's authority to respond to hazardous substance releases that threatened the public health or welfare. Pub. L. No. 96-510,§§104, 211, 94 Stat. 2767, 2774, 2797-801 (1980). CERCLA section 105 directed the EPA to revise the NCP to establish procedures and standards for responding to hazardous substance release, which were published in the Federal Register at 47 Fed. Reg. 31,180 (July 16, 1982) and later revised at 50 Fed. Reg. 47,912 (Nov. 20, 1985). [↑](#footnote-ref-46)
46. 46 In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, the NCP was expanded again - this time to require that remedial actions be cost effective and that they must at least attain federal environmental benchmarks, which determine the technical standards for cleanup activities at CERCLA sites. SARA also required compliance with state standards where they were more stringent than federal standards. See id. §§121(a)-(d)(2)(A), 100 Stat. at 1672-76 (codified as amended at 42 U.S.C.§§9621(a)-(d)(2)(A) (2006)). The Emergency Planning and Community Right-To-Know Act of 1986, encompassed in title III of SARA, included provisions to strengthen emergency response planning at state and local levels and to make information more readily available to the public on hazardous chemicals stored in local facilities. See id.§§300-330, 100 Stat. at 1728-36. [↑](#footnote-ref-47)
47. 47 Act of Nov. 16, 1973, Pub. L. No. 93-153, 87 Stat. 576 (codified as amended at 43 U.S.C. § 1651 (2006)). [↑](#footnote-ref-48)
48. 48 Pub. L. No. 93-627, 88 Stat. 2126 (1975) (repealed 1990). [↑](#footnote-ref-49)
49. 49 Pub. L. No. 95-372, 92 Stat. 630 (1978) (codified as amended at 43 U.S.C. §§1801-1802). [↑](#footnote-ref-50)
50. 50 R. Craig Anderson et al., Environmental Law Handbook 170 (Thomas F.P. Sullivan ed., 13th ed. 1995); see also Jonathan L. Ramseur, Cong. Research Serv., RL 33705, ***Oil*** Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress 8 (2008) ("For more than 15 years prior to the EXXON VALDEZ incident, Congress made attempts to enact a unified ***oil*** pollution law. Several contentious issues produced deadlocks, hindering the passage of legislation."). [↑](#footnote-ref-51)
51. 51 Cynthia M. Wilkinson et al., Slick Work: An Analysis of the ***Oil*** Pollution Act of 1990, 12 J. Energy Nat. Resources & Envtl. L. 181, 183 (1992). [↑](#footnote-ref-52)
52. 52 See ***Oil*** Terminal and ***Oil*** Tanker Environmental Oversight and Monitoring Act of 1990, Pub. L. No. 101-380, § 5002(a)(2)(A), 104 Stat. 544. [↑](#footnote-ref-53)
53. 53 40 C.F.R. § 300.120(a)(1) (2010). For spills inland, the EPA provides the FOSC. Id. § 300.120(a)(2). [↑](#footnote-ref-54)
54. 54 See 40 C.F.R. § 300.5 (defining "On-scene coordinator"); see also infra Part I.C (describing the FOSC in more detail). [↑](#footnote-ref-55)
55. 55 Nat'l Response Team, The EXXON VALDEZ ***Oil*** Spill: A Report to the President 7, 12, 21 (1989) [hereinafter EXXON VALDEZ Report]; The Coast Guard's Role in the EXXON VALDEZ Incident 1 [hereinafter CG Role in EXXON VALDEZ], available at http://www.uscg.mil/history/articles/EV.pdf. [↑](#footnote-ref-56)
56. 56 See U.S. Coast Guard, U.S. Coast Guard: America's Maritime Guardian 82-84 (2009), available at http://www.uscg.mil/doctrine/CGPub/Pub\_1.pdf. [↑](#footnote-ref-57)
57. 57 EXXON VALDEZ Report, supra note 55, at 21. The spill's remote location added a layer of logistical complexity to the response and cleanup effort. That, coupled with the enormity of the spill and the intense media scrutiny, complicated the duties of the FOSC. See id. at 13, 21. [↑](#footnote-ref-58)
58. 58 CG Role in EXXON VALDEZ Incident 1, supra note 55, at 1. [↑](#footnote-ref-59)
59. 59 Id. [↑](#footnote-ref-60)
60. 60 EXXON VALDEZ Report, supra note 55, at 21. [↑](#footnote-ref-61)
61. 61 Id. [↑](#footnote-ref-62)
62. 62 Id. "Public and media interest required a disproportionate amount of the [FOSC]'s time." Id. at 23. [↑](#footnote-ref-63)
63. 63 See id. [↑](#footnote-ref-64)
64. 64 Id. at 22. [↑](#footnote-ref-65)
65. 65 See EXXON VALDEZ Report, supra note 55, at 1, 10. The term "spill of national significance" had no regulatory meaning at the time of EXXON VALDEZ, but would be defined in the revisions of the NCP following the disaster. See 40 C.F.R. § 300.323. [↑](#footnote-ref-66)
66. 66 EXXON VALDEZ Report, supra note 55, at 23. [↑](#footnote-ref-67)
67. 67 See id. at 36. [↑](#footnote-ref-68)
68. 68 Id. [↑](#footnote-ref-69)
69. 69 Wilkinson, supra note 51, at 183; see also S. Rep. No. 101-94, at 3-4 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 724 (detailing the differences and inadequacies of the five federal statutes covering ***oil*** spills prior to OPA); Ramseur, supra note 50 at 8 ("The spill highlighted the inadequacies of the existing coverage and generated public outrage. The end result was [OPA]."). [↑](#footnote-ref-70)
70. 70 See EXXON VALDEZ Report, supra note 55, at 35. [↑](#footnote-ref-71)
71. 71 See Wilkinson, supra note 51, at 183. Congress also was influenced to pass OPA due to "four major ***oil*** spills within a three-month period." S. Rep. No. 101-94, at 3, reprinted in 1990 U.S.C.C.A.N. at 724. As far as the United States Senate was concerned, these spills and their impact on their respective environments "demonstrated that any ***oil*** spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, preventing ***oil*** spills is more important than containing and cleaning them up quickly." Id. at 2-3, reprinted in 1990 U.S.C.C.A.N. at 724. The spills also demonstrated that "[***oil***] spills are still too much of an accepted cost of doing business for the ***oil*** shipping industry." Id. at 3, reprinted in 1990 U.S.C.C.A.N. at 724. Quite perceptively, in 1989 the Senate essentially predicted DEEPWATER HORIZON: "The Nation's continued heavy dependence on ***oil*** will result in … greater offshore exploration and production in deeper waters and harsher environments. These conditions can only increase the potential for future catastrophic ***oil*** spills and the need to prevent such pollution and minimize its damage." Id. [↑](#footnote-ref-72)
72. 72 See id. [↑](#footnote-ref-73)
73. 73 See Pub. L. No. 101-380,§§4101-4306, 104 Stat. 484, 509-541 (1990). [↑](#footnote-ref-74)
74. 74 See id. §§4201-4306, 104 Stat. at 523-41. [↑](#footnote-ref-75)
75. 75 Id. § 4201(a), 104 Stat. at 523-24. Section 311(c)(1)(A) of the Water Pollution Control Act was amended to require the President to "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge, of ***oil*** or a hazardous substance. Id. [↑](#footnote-ref-76)
76. 76 Ramseur, supra note 50, at 9. [↑](#footnote-ref-77)
77. 77 Pub. L. No. 101-380, § 4201(b), 104 Stat. at 525-27. OPA defined "worst case discharge" as "(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and (B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions." Id. [↑](#footnote-ref-78)
78. 78 Id. § 4201(a), 104 Stat. at 524. [↑](#footnote-ref-79)
79. 79 Id. [↑](#footnote-ref-80)
80. 80 The foregoing statement is based solely on the personal observations of the authors. [↑](#footnote-ref-81)
81. 81 See, e.g., Mimi Hall, Rick Jervis & Alan Levin, Is ***Oil*** Spill Becoming Obama's Katrina?, USA Today, http://www.usatoday.com/news/washington/2010-05-27-spill-poll\_n.htm (last updated May 27, 2010, 10:12 AM) (describing public discontent with the federal government's oversight of BP during the first month of DEEPWATER HORIZON). [↑](#footnote-ref-82)
82. 82 See id. ("Critics … acknowledge that the government doesn't have the technological know-how to plug the well and stop the gusher."); see also Jeffrey Brown, Coast Guard's Allen Outlines Roles of BP, Government in Gulf ***Oil*** Cleanup, PBS Newshour (May 24, 2010), http://www.pbs.org/newshour/bb/environment/jan-june10/thadallen\_05-24.html ("The private sector is involved in the drilling and the government has an oversight responsibility. But those capacities, those technologies are not replicated inside the federal government."). [↑](#footnote-ref-83)
83. 83 See Pub. L. No. 101-380, § 1002, 104 Stat. at 489. [↑](#footnote-ref-84)
84. 84 The NCP's primary purpose was unchanged: to assign duties and responsibilities for ***oil*** spill prevention, containment, removal, and cleanup among federal, state, and local governments and private responsible parties. [↑](#footnote-ref-85)
85. 85 Pub. L. No. 101-380, § 4202, 104 Stat. at 527-32. [↑](#footnote-ref-86)
86. 86 See discussion infra Part I.C. [↑](#footnote-ref-87)
87. 87 The National Strike Force Coordination Center maintains a database of personnel and equipment available for ***oil*** spill response as well as current copies of all Area Contingency Plans, among other responsibilities. 40 C.F.R. § 300.5 (2010). The Center was originally called the "National Response Unit" and is located at Elizabeth City, North Carolina. Pub. L. No. 101-380, 104 Stat. at 527-28. [↑](#footnote-ref-88)
88. 88 Coast Guard District Response Groups are responsible for maintaining response equipment within the respective Coast Guard district and for providing assistance to the FOSC when requested, among other responsibilities. 40 C.F.R. § 300.5; Pub. L. No. 101-380, § 4202, 104 Stat. at 528. [↑](#footnote-ref-89)
89. 89 See Pub. L. No. 101-380, § 4202, 104 Stat. at 529-32. See also discussion infra Part 1.C for a further explanation of vessel and facility response plans. [↑](#footnote-ref-90)
90. 90 Pub. L. No. 101-380, § 4202, 104 Stat. at 529; 40 C.F.R. § 300.5. See also discussion infra Part I.C for an explanation of area committees and area contingency plans. [↑](#footnote-ref-91)
91. 91 See 40 C.F.R. § 300.1. [↑](#footnote-ref-92)
92. 92 Pub. L. No. 101-380, § 4201(c), 104 Stat. at 527. [↑](#footnote-ref-93)
93. 93 National ***Oil*** and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,384 (Sept. 15, 1994) (codified at 40 C.F.R. § 300). [↑](#footnote-ref-94)
94. 94NIMS works hand in hand with the [NRF]. NIMS provides the template for the management of incidents, while the NRF provides the structure and mechanisms for national-level policy for incident management." About the National Incident Management System (NIMS), FEMA.gov, http://www.fema.gov/emergency/nims/AboutNIMS.shtm (last visited Mar. 15, 2012). [↑](#footnote-ref-95)
95. 95 40 C.F.R. § 300.1. [↑](#footnote-ref-96)
96. 96 See id. § 300.210(c). For a schematic representation of the preparation phase, see id. § 300.105 fig. 1b. [↑](#footnote-ref-97)
97. 97 Id. § 300.110. [↑](#footnote-ref-98)
98. 98 Id. § 300.110(a)-(b). The agencies are: the EPA (chair), the Coast Guard (vice chair), the Departments of Interior, Commerce, Justice, Transportation, Defense, State, Energy, Agriculture, Labor, Health and Human Services, the General Services Administration, the Nuclear Regulatory Commission, and the Federal Emergency Management Administration. Id. § 300.175(b). [↑](#footnote-ref-99)
99. 99 Id. § 300.110(h). [↑](#footnote-ref-100)
100. 100 Id. § 300.110(j). [↑](#footnote-ref-101)
101. 101 Id. § 300.110(b). [↑](#footnote-ref-102)
102. 102 Id. § 300.110(k). [↑](#footnote-ref-103)
103. 103 Id. § 300.115(a). There are thirteen RRTs. There are ten continental U.S. regions, plus Alaska, Oceania, and the Caribbean. The Oceania region consists of the United States' Pacific island possessions. See id. § 300.115(b)(1). [↑](#footnote-ref-104)
104. 104 Id. § 300.115(d). [↑](#footnote-ref-105)
105. 105 Id. § 300.115(c). [↑](#footnote-ref-106)
106. 106 Id. § 300.115(b). The standing teams consist of designated representatives from each federal agency, while participation on incident-specific teams relates to the technical nature of the specific ***oil*** spill and its location. Id. [↑](#footnote-ref-107)
107. 107 Id. § 300.210(b). [↑](#footnote-ref-108)
108. 108 Federal Region 9 Regional Contingency Plan 2-3 (2005). [↑](#footnote-ref-109)
109. 109 40 C.F.R. §§300.115(i)(6), .910(a)-(d). [↑](#footnote-ref-110)
110. 110 Id. § 300.910(a). [↑](#footnote-ref-111)
111. 111 Id. § 300.115(j)(1)(i)-(iii). [↑](#footnote-ref-112)
112. 112 Id. § 300.115(j)(4)(i)-(iv). [↑](#footnote-ref-113)
113. 113 Id. § 300.5. [↑](#footnote-ref-114)
114. 114 See id. [↑](#footnote-ref-115)
115. 115 Id. § 300.205(c). [↑](#footnote-ref-116)
116. 116 Id. § 300.115(a)(2). [↑](#footnote-ref-117)
117. 117 Id. § 300.210. [↑](#footnote-ref-118)
118. 118 See id. [↑](#footnote-ref-119)
119. 119 Pub. L. No. 101-380, § 4202(a), 104 Stat. 484, 529-30 (1990) (codified as amended at 33 U.S.C. § 1321(j)(5) (2006)). [↑](#footnote-ref-120)
120. 120 40 C.F.R. § 300.211. [↑](#footnote-ref-121)
121. 121 Id. § 300.205(d). This requirement actually derives from requirements within the Emergency Planning and Community Right-To-Know Act of 1986. Pub. L. No. 99-499, 100 Stat. 1728. [↑](#footnote-ref-122)
122. 122 40 C.F.R. § 300.205(e). [↑](#footnote-ref-123)
123. 123 Id. § 300.210(c). [↑](#footnote-ref-124)
124. 124 Id. § 300.5. [↑](#footnote-ref-125)
125. 125 Id. § 300.305(d)(1). [↑](#footnote-ref-126)
126. 126 See discussion supra Part I.B.2. [↑](#footnote-ref-127)
127. 127 40 C.F.R. § 300.300(a). [↑](#footnote-ref-128)
128. 128 Id. § 300.300(b). [↑](#footnote-ref-129)
129. 129 Id. § 300.300(d). [↑](#footnote-ref-130)
130. 130 Id. § 300.305(b). [↑](#footnote-ref-131)
131. 131 Id. § 300.310. [↑](#footnote-ref-132)
132. 132 Id. § 300.305(d)(2). The actions required by the FOSC when he or she determines that the discharge poses a substantial threat to the health or welfare of the United States are delineated in 40 C.F.R. § 300.322. As discussed above, the Coast Guard interprets this provision as a requirement for federal oversight of response efforts, not necessarily mandatory action. [↑](#footnote-ref-133)
133. 133 Id. § 300.125. [↑](#footnote-ref-134)
134. 134 Id. [↑](#footnote-ref-135)
135. 135 Statistics: Incident Type 2000-2011, Nat'l Response Ctr., http://www.nrc.uscg.mil/incident\_type\_2000up.html (last visited Mar. 15, 2012). [↑](#footnote-ref-136)
136. 136 See 40 C.F.R. § 300.125(a). [↑](#footnote-ref-137)
137. 137 See Pub. L. No. 101-380,§§1001(32), 1004(a)(c)(2), 104 Stat. 484, 488-89, 491-92; 40 C.F.R. § 300.5. [↑](#footnote-ref-138)
138. 138 See Pub. L. No. 101-380, § 1004(a), (c)(2), 104 Stat. at 491-92. [↑](#footnote-ref-139)
139. 139 See 40 C.F.R. § 300.105(d). [↑](#footnote-ref-140)
140. 140 See id. § 300.323. [↑](#footnote-ref-141)
141. 141 Id. § 300.5. [↑](#footnote-ref-142)
142. 142 Id. § 300.323(c). [↑](#footnote-ref-143)
143. 143 Id. [↑](#footnote-ref-144)
144. 144 Id. § 300.323(b). [↑](#footnote-ref-145)
145. 145 For an inland-zone spill, the EPA emphasized that the senior agency official assisting the FOSC is not subordinate to the FOSC, but rather that "this official will simply fill the role of the [FOSC] for specific, limited activities related to communications and coordination." National ***Oil*** and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,403 (Sept. 15, 1994) (codified at 40 C.F.R. § 300). If that is the case, one wonders why the EPA used the distinct language between the two provisions of subsections 300.323(b) and (c). For the senior agency official to simply "fill the role" of the FOSC during an inland-zone SONS for communications purposes sounds very similar to the NIC "assuming the role" (40 C.F.R. § 300.323(c)) of the FOSC for communications purposes during a coastal zone SONS. [↑](#footnote-ref-146)
146. 146 Commandant Instruction 16465.1A, Brian M. Salerno, Rear Admiral, U.S. Coast Guard, Spills of National Significance Response Management System (on file with author). [↑](#footnote-ref-147)
147. 147 See EXXON VALDEZ Report, supra note 55, at 21. [↑](#footnote-ref-148)
148. 148 59 Fed. Reg. 47,403 (to be codified at 40 C.F.R. § 300). [↑](#footnote-ref-149)
149. 149 See id. [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 Id. at 47,402-03. [↑](#footnote-ref-152)
152. 152 Commandant Instruction 16465.1A, supra note 146, at 3. [↑](#footnote-ref-153)
153. 153 Id. at 9. The Coast Guard instruction calls the National Incident Command the "NIC Assist Team," but the terminology used during DEEPWATER HORIZON was "the National Incident Command" or colloquially, "the NIC." [↑](#footnote-ref-154)
154. 154 Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 311(c)(2), 86 Stat. 816, 865. [↑](#footnote-ref-155)
155. 155 See Pub. L. No. 101-380, § 4201(a), 104 Stat. 484, 523-24. [↑](#footnote-ref-156)
156. 156 See id. [↑](#footnote-ref-157)
157. 157 Id., § 4306, 104 Stat. 484, 541. [↑](#footnote-ref-158)
158. 158 Id. § 4201, 104 Stat. 484, 523. [↑](#footnote-ref-159)
159. 159 See H.R. Rep. 101-653, at 147-50 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 826-29. [↑](#footnote-ref-160)
160. 160 See 33 U.S.C. § 1321 (2006). [↑](#footnote-ref-161)
161. 161 See supra Part I.B.2. [↑](#footnote-ref-162)
162. 162 Pub. L. No. 101-380, § 4201(c)(1), 104 Stat. 484, 523. [↑](#footnote-ref-163)
163. 163 As discussed in Part III below, during DEEPWATER HORIZON, there were certainly instances where it appeared that the flow of authority through the NCP had indeed been usurped, largely due to some elected officials not fully understanding its mechanisms. [↑](#footnote-ref-164)
164. 164 Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 22, 1991). [↑](#footnote-ref-165)
165. 165 See 40 C.F.R. § 300.110 (2010). [↑](#footnote-ref-166)
166. 166 See id. § 300.115. [↑](#footnote-ref-167)
167. 167 See id. § 300.120 (charging the predesignated on-scene coordinators with removal of ***oil***, pollutants, and hazardous substances); id. § 300.305(d)(1)-(2) (explaining in detail the removal options available to the FOSC during the response phase of an ***oil*** spill). [↑](#footnote-ref-168)
168. 168 Compare Pub. L. No. 101-380, § 4201(a), 104 Stat. 484, 523-24, with 40 C.F.R. § 300.305(d)(1). [↑](#footnote-ref-169)
169. 169 33 C.F.R. § 3.01-1(d) (2010). 40 C.F.R. § 300.120(b) provides: "In general, USCG Captains of the Port shall serve as the designated [FOSC] for areas in the coastal zone … ." 40 C.F.R. § 300.120(b). In most cases, the Sector Commander is also the Captain of the Port, thus title 33 of the Code of Federal Regulations and the NCP correspond to one another. [↑](#footnote-ref-170)
170. 170 Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 22, 1991). [↑](#footnote-ref-171)
171. 171 Id., 56 Fed. Reg. at 54,763. [↑](#footnote-ref-172)
172. 172 Id., 56 Fed. Reg. at 54,757-58. [↑](#footnote-ref-173)
173. 173 See 14 U.S.C. § 1 (2006). [↑](#footnote-ref-174)
174. 174 Dep't Homeland Sec., Delegation No. 0170.1: Delegation to the Commandant of the Coast Guard 1, 11 (2003). [↑](#footnote-ref-175)
175. 175 33 C.F.R. § 1.01-80(d). [↑](#footnote-ref-176)
176. 176 The designation of commanders subordinate to the Sector Commander is most common on the Gulf Coast. [↑](#footnote-ref-177)
177. 177 See 9 U.S. Coast Guard, Marine Safety Manual, Marine Environmental Protection 5-3 ("The FOSC has the ultimate authority in a response operation and shall ensure an effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge of ***oil*** … ."). [↑](#footnote-ref-178)
178. 178 Dep't Homeland Sec., Homeland Security Presidential Directive 5: Management of Domestic Incidents (Feb. 28, 2003) [hereinafter HSPD-5]. [↑](#footnote-ref-179)
179. 179 Id. P 1. [↑](#footnote-ref-180)
180. 180 Id. P 4. [↑](#footnote-ref-181)
181. 181 Id. P 5. [↑](#footnote-ref-182)
182. 182 Id. [↑](#footnote-ref-183)
183. 183 See Paul Schneider, The Well from Hell, Men's J., Aug. 2010, at 80 ("The Well From Hell: It was going to be the crown jewel in BP's deep-sea empire. But on April 20, the well blew out, killing 11 - before triggering the worst environmental disaster in U.S. history.") The author's assertion that DEEPWATER HORIZON was the worst environmental disaster in U.S. history is debatable. See Justin Gillis, Where Gulf Spill Might Place on Roll of Disasters, N.Y. Times (June 18, 2010), http://www.nytimes.com/2010/06/19/science/earth/19enviro.html. [↑](#footnote-ref-184)
184. 184 Steve Harvey, California's Legendary ***Oil*** Spill, L.A. Times (June 13, 2010), http://articles.latimes.com/2010/jun/13/local/la-me-then-20100613. [↑](#footnote-ref-185)
185. 185 Maureen Hoch, New Estimate Puts Gulf ***Oil*** Leak at 205 Million Gallons, PBS Newshour (Aug. 2, 2010, 10:07 PM), http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-***oil***-leak-at-49-million-barrels.html; see John M. Broder & Tom Zeller, Jr., Gulf ***Oil*** Spill Is Bad, but How Bad?, N.Y. Times, May 4, 2010, at A1. [↑](#footnote-ref-186)
186. 186 See Curry L. Hagerty & Jonathan L. Ramseur, Cong. Research Serv., R 41262, Deepwater Horizon ***Oil*** Spill: Selected Issues for Congress 1 (2010) ("It appears [the 2010 Gulf Spill] would eclipse the 1989 Exxon Valdez spill several times over."). [↑](#footnote-ref-187)
187. 187 See Nat'l Incident Command, U.S. Coast Guard, National Incident Commander's Report: MC252 Deepwater Horizon (2010) [hereinafter NIC Report]. [↑](#footnote-ref-188)
188. 188 The National Incident Command can only be established, and a National Incident Commander named, after the Commandant of the Coast Guard declares a spill to be spill of national significance. See 40 C.F.R. § 300.323 (2011). [↑](#footnote-ref-189)
189. 189 See National Situation Update: Friday, April 30, 2010, FEMA.gov, http://www.fema.gov/emergency/reports/2010/nat043010.shtm (last updated Apr. 30, 2010, 8:24 AM). [↑](#footnote-ref-190)
190. 190 Nat'l Comm'n on the BP Deepwater Horizon ***Oil*** Spill & Offshore Drilling, Decision-Making Within the Unified Command 5 (Working Paper No. 2, 2011), available at http://www.oilspillcommission.gov/document/decision-making-within-unified-command (select pdf download) [hereinafter Commission Working Paper]. [↑](#footnote-ref-191)
191. 191 See Dana J. Quigley & Catherine McNiff, 2010 Gulf of Mexico ***Oil*** Spill Timeline, Information Please Database, http://www.infoplease.com/world/disasters/2010-gulf-***oil***-spill-timeline.html (last visited Mar. 2, 2012). [↑](#footnote-ref-192)
192. 192 See 40 C.F.R. § 300.910(a). [↑](#footnote-ref-193)
193. 193 See ***Oil*** from Massive Gulf Spill Reaching La. Coast, MSNBC.com (Apr. 30, 2010, 1:22 AM), http://www.msnbc.msn.com/id/36800673/ns/us\_news-environment/ ("Government officials said the blown-out well forty miles offshore is spewing five times as much ***oil*** as originally estimated - about 5,000 barrels, or 200,000 gallons, a day."); see also Commission Working Paper, supra note 190, at 5-6. [↑](#footnote-ref-194)
194. 194 Commission Working Paper, supra note 190, at 6. [↑](#footnote-ref-195)
195. 195 Id. [↑](#footnote-ref-196)
196. 196 Coast Guard Commandant Admiral Thad Allen Designated National Incident Commander for Continued Response to BP ***Oil*** Spill, restorethegulf.gov (May 1, 2010, 9:31 AM), http://www.restorethegulf.gov/release/2010/05/01/coast-guard-commandant-admiral-thad-allen-designated-national-incident-commander-. [↑](#footnote-ref-197)
197. 197 Juliette Kayyem, The Game Changer, Bos. Globe (Apr. 24, 2011), http://www.boston.com/news/politics/articles/2011/04/24/the\_game\_changer/?s\_campaign=8315. [↑](#footnote-ref-198)
198. 198 NIC Report, supra note 187, at 3-5. [↑](#footnote-ref-199)
199. 199 Id. Commandant Instruction 16465.1A, supra note 146, provides guidance to address these holes in the regulations. For example, it provides that the NIC shall be a senior officer holding "a rank equivalent to an Assistant Secretary (2-4 Star Admiral) given the possibility of national level briefs and hearings." Id. at 4. [↑](#footnote-ref-200)
200. 200 See, e.g., Commission Working Paper, supra note 190, at 4 & n.19. [↑](#footnote-ref-201)
201. 201 Nat'l Command Ctr., Critical Incident Report: Update 1, District 8 - Explosion - 45 NM SE of Venice, La. (2010) (on file with authors). [↑](#footnote-ref-202)
202. 202 Memorandum from Captain Anthony S. Lloyd to Admiral Thad Allen, Coast Guard Commandant (Apr. 24, 2010) (on file with authors). [↑](#footnote-ref-203)
203. 203 Cf. 33 C.F.R. § 1.01-80. [↑](#footnote-ref-204)
204. 204 See 40 C.F.R. § 300.140(a). [↑](#footnote-ref-205)
205. 205 The exercise, titled SONS 2010, was held in Maine and simulated a collision between an ***oil*** tanker and another ship, causing a 2.3 million gallon crude ***oil*** spill in the Gulf of Maine that could potentially affect 500 miles of the coastal region. See Charles McMahon, Big ***Oil*** Spill Drill Hailed a Success, Foster's Daily Democrat (Mar. 26, 2010), http://www.fosters.com/apps/pbcs.dll/article?AID=/20100326/GJNEWS\_01/703269903. [↑](#footnote-ref-206)
206. 206 5 U.S.C. § 552 (2006). [↑](#footnote-ref-207)
207. 207 40 C.F.R. § 300.323(a) ("A discharge may be classified as a [SONS] by … the Commandant of the USCG for discharges occurring in the coastal zone."). [↑](#footnote-ref-208)
208. 208 Id. § 300.323(c) ("For a SONS in the coastal zone, the USCG Commandant may name a [NIC] … ."). [↑](#footnote-ref-209)
209. 209 See id. § 300.323(a)-(b). [↑](#footnote-ref-210)
210. 210 Cf. 40 C.F.R. § 300.5, .323(c). In a spill where action is "necessary to prevent or substantially reduce a threat to human life," the FOSC may authorize the use of dispersants or procedures that have not been preapproved. 40 C.F.R. § 300.910(d). Although any SONS, by definition, arguably meets these criteria, the Coast Guard did not implement this section in combating the DEEPWATER HORIZON spill. [↑](#footnote-ref-211)
211. 211 See supra Part I.A. [↑](#footnote-ref-212)
212. 212 See 33 C.F.R. § 1.01-80(e) (referencing 33 U.S.C. § 1471-1479 (2006)). [↑](#footnote-ref-213)
213. 213 See 40 C.F.R. § 300.305(d)(1). [↑](#footnote-ref-214)
214. 214Intervention' is "any detrimental action taken against the interest of a vessel or its cargo without the consent of the vessel's owner or operator' to prevent, mitigate, or eliminate grave and imminent danger to coastlines or related U.S. interests from actual or threatened pollution of the sea by ***oil*** or other hazardous substances." 9 U.S. Coast Guard, supra note 177, at 5-47. [↑](#footnote-ref-215)
215. 215 See id. at 5-46 to -51. [↑](#footnote-ref-216)
216. 216 NIC Report, supra note 187, at 9; Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to Admiral Thad Allen, Nat'l Incident Commander (June 29, 2010) (on file with the authors). [↑](#footnote-ref-217)
217. 217 NIC Report, supra note 187, at 9. [↑](#footnote-ref-218)
218. 218 Memorandum from Janet Napolitano, supra note 216. [↑](#footnote-ref-219)
219. 219 Pub. L. No. 92-500 § 311(e), 86 Stat. 816, 866 (1972). [↑](#footnote-ref-220)
220. 220 Id. § 311(c), 86 Stat. 816, 865. [↑](#footnote-ref-221)
221. 221 NIC Report, supra note 187, at 9. When Admiral Allen was first designated the NIC, he was also the Commandant of the Coast Guard. As such, he possessed the full removal authority delegated to him in Delegation No. 0170.1, supra note 174. Thus, in the beginning stages of DEEPWATER HORIZON, Admiral Allen had the inherent authority, as Commandant - not as the NIC - for removal actions. But Admiral Allen was relieved as Commandant on May 25, 2010, just under one month after he was designated NIC, and his inherent removal authority therefore ended. He used the removal authority delegated to him as the NIC for the remainder of his tenure in that position. NIC Report, supra note 187, at 9. [↑](#footnote-ref-222)
222. 222 The foregoing statement is based solely upon the personal observations of the authors. [↑](#footnote-ref-223)
223. 223 NIC Report, supra note 187, at 12-13. [↑](#footnote-ref-224)
224. 224 Nat'l Comm'n on the BP Deepwater Horizon ***Oil*** Spill & Offshore Drilling, DEEP WATER: The Gulf ***Oil*** Disaster and the Future of Offshore Drilling 139 (2011) [hereinafter Nat'l Comm'n Report]. [↑](#footnote-ref-225)
225. 225 40 C.F.R. § 300.110(b). [↑](#footnote-ref-226)
226. 226 Id. § 300.110(j). [↑](#footnote-ref-227)
227. 227 Id. § 300.110(b). [↑](#footnote-ref-228)
228. 228 See id. § 300.110 (describing the role, makeup, and responsibility of the NRT). [↑](#footnote-ref-229)
229. 229 For example, one of the most significant politically-charged episodes of DEEPWATER HORIZON was "the boom wars," where governors of the affected states competed for a limited supply of boom to protect their state's shorelines. See Nat'l Comm'n Report, supra note 224, at 151-60. [↑](#footnote-ref-230)
230. 230 NIC Report, supra note 187, at 10. [↑](#footnote-ref-231)
231. 231 Nat'l Incident Command, U.S. Coast Guard, National Incident Commander Strategy Implementation v. 5.0, at 17 (2010) [hereinafter NIC Strategy]. [↑](#footnote-ref-232)
232. 232 See Deep Impact: Assessing the Effects of the Deepwater Horizon ***Oil*** Spill on States, Localities, and the Private Sector: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, 111th Cong. (2010) (testimony of Juliette Kayyem, Assistant Sec'y of Intergovernmental Affairs). [↑](#footnote-ref-233)
233. 233At the outset of the spill, the pre-designated State On-Scene Coordinators … were career ***oil***-spill responders: familiar with the [NCP], experienced in responding to spills and accustomed to working with the Coast Guard"; the same could not be said for high-level state officials who, after arriving on scene, "largely rejected the pre-spill plans and began to create their own response structures." Nat'l Comm'n Report, supra, note 224, at 138-39. [↑](#footnote-ref-234)
234. 234 See Raffi Khatchadourian, The Gulf War: Were There Any Heroes in the BP ***Oil*** Disaster?, New Yorker, Mar. 14, 2011, at 54-58 ("[Lisa] Jackson [Administrator of the EPA] came under intense political pressure to act aggressively [with respect to dispersants] … ." "Her decisions on dispersants … would have to be "driven in many ways by public concerns,' because "the issue, whether rightly or wrongly, was one that was very much in the front of many people's minds down there.'"); see also Nat'l Comm'n Report, supra note 224, at 151-60 (discussing "the boom wars"). [↑](#footnote-ref-235)
235. 235 Memorandum from Admiral R.J. Papp, Commandant of the Coast Guard, to Rear Admiral J.A. Watson (June 1, 2010) (on file with authors). [↑](#footnote-ref-236)
236. 236 Indeed, the Coast Guard provided a staggering 7000 personnel to conduct removal operations at the direction of the FOSC. U.S. Coast Guard 2011, Posture Statement 3 (2011), available at http://www.uscg.mil/posturestatement/docs/USCG\_2011\_USCG\_Posture\_Statement.pdf. Also, in June 2010, the Commandant of the Coast Guard, Admiral Bob Papp, directed the Commander of Coast Guard Atlantic Area, Vice Admiral Robert Parker, to oversee the execution of spill response activities for the Coast Guard, including general oversight of the actions of the FOSC. [↑](#footnote-ref-237)
237. 237 See NIC Report, supra note 187, at 10 (Admiral Allen noted that the overlapping doctrinal roles of the PFO and the NIC "created confusion regarding the nearly identical roles assigned to the NIC and PFO during a SONS."). [↑](#footnote-ref-238)
238. 238 Commandant Instruction 16465.1A, supra note 146, at enclosure 4, p. 1. [↑](#footnote-ref-239)
239. 239 NIC Report, supra note 187, at 10. [↑](#footnote-ref-240)
240. 240 40 C.F.R. § 300.323. [↑](#footnote-ref-241)
241. 241 Commandant Instruction 16465.1A, supra note 146, at 4, 8-9. [↑](#footnote-ref-242)
242. 242 Id. at 8-9. [↑](#footnote-ref-243)
243. 243 See NIC Report, supra note 187, at 13-14; Commission Working Paper, supra note 190, at 5; Commandant Instruction 16465.1A, supra note 146, at 8-9. [↑](#footnote-ref-244)
244. 244 For a time, the NIC also maintained a field office in New Orleans, LA, headed by Rear Admiral Peter Neffinger, but that office was stood down once it became apparent to the NIC leadership that the bulk of its coordination activities occurred in Washington, D.C., not down range (although the NIC leadership frequently visited field operational sites). [↑](#footnote-ref-245)
245. 245 NIC Strategy, supra note 231, at 16. [↑](#footnote-ref-246)
246. 246 NIC Report, supra note 187, at 14. [↑](#footnote-ref-247)
247. 247 Nat'l Comm'n Report, supra note 224, at 136. "When President Obama visited the Gulf on May 2, a fisherman asked who would pay his bills while he was out of work; the President responded that the National Incident Commander would take care of it." Id. [↑](#footnote-ref-248)
248. 248 Commission Working Paper, supra note 190, at 5. [↑](#footnote-ref-249)
249. 249 Id. [↑](#footnote-ref-250)
250. 250 Id. [↑](#footnote-ref-251)
251. 251 Id. [↑](#footnote-ref-252)
252. 252 NIC Report, supra note 187, at 9. [↑](#footnote-ref-253)
253. 253 American Experience: Reagan Quotes, PBS.org, http://www.pbs.org/wgbh/americanexperience/Reagan/features/general-article/Reagan-quotes/ (last visited Mar. 18, 2012). The quote is attributed to President Reagan "describing his management style" in a September 15, 1986, interview with Fortune magazine. Id. [↑](#footnote-ref-254)