

How the Political Climate Impacts OPA 90 Responder Immunity

By Steven Candito



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Many people today are frustrated with the current US political process as we endure various government stalemates on budgets, Supreme Court appointments, and, of course, the Presidential election. The general theme is voters are angry with the political establishment and, as a result, outsiders like Donald Trump and Bernie Sanders are doing well in the polls. Much of this anger is directed at

the influence big money donors and lobbyists have over the process. Thus, Trump who has committed to self-financing his campaign and Sanders, who has grassroots support having sworn off Wall Street money, are both doing much better than most would normally expect. Perhaps not surprisingly, we have a similar dynamic occurring with the Oil Pollution Act of 1990's (OPA 90) responder immunity provisions.

As most in the industry are aware, immediately following the explosion on the Deepwater Horizon in April 2010, emergency response vessels rushed to the rig to save lives and begin the lengthy process of cleaning up the ensuing oil spill. Despite these valiant efforts to mitigate the environmental impact of the worst oil spill in U.S. history and OPA 90's responder immunity protection, these cleanup responders were "rewarded" by being sued and are still entwined in complex and protracted litigation.

In a positive development on February 16, 2016, after five years of litigation and millions of dollars in legal fees, the court dismissed most of the claims against the cleanup companies. However, the case is not over and legal fees continue because the ruling allows 11 claims to proceed. As a result, cleanup companies are still hesitant to engage in response activities in light of this liability risk.

Previously, in an effort to minimize the chilling effect of the suit's filing, a group of concerned industry members formed a Coalition. The Coalition has worked to develop a legislative amendment to OPA 90 that protects responders, still allows injured parties to be made whole, and does not increase Responsible Party (RP) liability since they are already responsible under current law.

Interestingly, the February 16, 2016 decision makes no reference to OPA 90's responder immunity provisions. OPA 90's responder immunity has several exceptions for claims based on actions such as gross negligence or personal injury. Since the claims against the cleanup responders

in the Deepwater Horizon suit were for personal injuries and there were claims of gross negligence, OPA 90's responder immunity terms never really came into play.

Without the benefit of OPA 90's responder immunity, the judge looked to other well established immunity concepts and determined that the cleanup responders, who acted under the orders of the Federal On Scene Coordinator (FOSC) were entitled to "derivative" immunity pursuant to other federal laws including the Clean Water Act and Federal Torts Claims Act, provided the cleanup responders actions were consistent with the FOSC's instructions. Although most of the claims were dismissed because the plaintiffs never provided even very basic information that the cleanup responders did not follow the FOSC's orders, the 11 remaining plaintiffs that provided this minimal information can still proceed with their claims.

The decision is certainly significant and beneficial in that the court found private parties with no contractual relationship to the government are entitled to the government's immunity, provided such actions were consistent with the government's instructions. Very importantly, the decision recognizes that private parties who work with government employees may think twice about doing so if they are not afforded the same protection.

It's helpful that the court recognized this risk that responders may hesitate to act for fear of liability, but the decision does not solve the problem and encourage responders to act. While this ruling is favorable generally, it does not accomplish what the Coalition set out to do when cleanup responders' potential liability for "exposure" to oil and dispersants first arose in the litigation. More specifically, the Coalition is continuing its effort to amend OPA 90's responder immunity provisions to exclude "exposure" claims from OPA 90's personal injury exception. Without this type of more direct protection, cleanup responders are still at risk of at least incurring substantial legal fees defending themselves, even if they are ultimately found not to be responsible.

Perhaps most importantly, the court decision does not provide sufficient protection for cleanup responders to act immediately without considering the liability risks. This decision is certainly better than the prior uncertainty, but the ruling does not provide protection for responders that are not acting directly for the government, which is probably the case in most spill responses. Even on larger responses, where the government is clearly "directing" the re-

sponse, cleanup responders are still likely to hesitate while evaluating whether the benefits of responding outweigh the very significant legal cost and management distraction risks, if a particular response has the potential to result in substantial legal actions against them.

The Coalition's proposed legislative fix is simple and straightforward. It provides that responders would not be liable for "exposure" claims related to the spilled oil or dispersants that may be used during a response. It also discourages frivolous suits by establishing a presumption that response actions do not constitute gross negligence and requires claimants who are found to have filed meritless claims to pay attorneys fees.

Unfortunately, because of some minor, but politically influential lobbying organization opposition, the Coalition's proposal has not made it to a Congressional vote. There has not been a vote despite strong support from most interested parties including big oil, environmental organizations, and, of course, the response community that would directly benefit and no longer hesitate to respond. Specifically, the lobbying organization objected to the Coalition's proposal due to concerns that the exception for "exposure" claims would

potentially expand RP liability. However, as previously noted, the RP is already responsible for any such damages.

Once again, we have the legislative process being stymied by a well-funded lobbyist acting for a vocal minority, rather than a needed legislative solution being implemented that the vast majority prefers. One can only hope that the outrage that many are expressing about our current political climate as evidenced by the oddities in the ongoing Presidential election will trickle down to this important issue. If not, we may not be able to count on the response community to respond immediately when the next calamity hits.



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