

Written Testimony
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Good morning Chairman LoBiondo, Chairman Gibbs, Ranking Member Larsen, and Ranking Member Bishop.

Thank you for the opportunity to speak before this joint hearing regarding "Improving Oil Spill Prevention and Response, Restoring Jobs, and Ensuring Our Energy Security: Recommendations from the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling."

As the subcommittees are aware I am no longer in public service having retired from the Coast Guard on 1 July 2011 and having departed government service as a senior executive on 1 October 2011. Accordingly, my association with spill response and recovery activities, current legislative and regulatory reviews, and policy discussions regarding offshore oil and gas development has been limited to information contained in the public realm.

However, in regard to information pertaining to my service as the Commandant and National Incident Commander, I have had access to Coast Guard assistance. That assistance has been guided by the "Anti-Lobbying Act" (18 U.S.C. § 1913), which prohibits activities that are intended or designed (directly or indirectly) to influence in any manner a member of Congress, a jurisdiction, or an official of any government (Federal, state or local) to favor or oppose any legislation, law or appropriation.

I have been provided a copy of the Report of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling. I have reviewed the recommendations of the Commission. I am limiting my comments to the areas of the report that relate to my duties as the former Commandant and National Incident Commander. I would also add that while the Commission has issued its report there are still several inquiries underway that will provide further detailed information and recommendations regarding the accident, its causes, the response, and needed changes to the current legal and regulatory structures. It is my personal recommendation to the subcommittees that these additional investigative efforts be included with the Commission Report in considering any legislative or regulatory changes that may be considered.

For the purpose of this testimony I am providing what I consider are the high level, strategic and policy issues that need to be considered as we move forward to improve our safety and spill response preparedness in the future. The most important areas for discussion in my view are:

1. Oil Spill Response Governance and The Role of the National Response Team (NRT)
2. Spills of National Significance and the National Incident Command
3. Oil Spill Preparedness and Research and Development
4. Use of the Oil Spill Liability Trust Fund
5. Interagency Coordination
6. International Offers of Assistance and Application of the Jones Act
7. Air Space Coordination
8. Implication of Deepwater Horizon Lessons Learned for the Arctic

OIL SPILL RESPONSE GOVERNANCE

The doctrinal response to an oil spill in the United States has evolved over 4 decades and is codified at 40 CFR 300. Major changes were made to this doctrine following the EXXON VALDEZ spill and those changes have been implemented over the last 20 years. Any discussion of oil spill response governance must start here. I defined, as the National Incident Commander, “governance” to be the use of institutions, structures of authority, and even collaboration to resource and coordinate or manage activities.

Despite a governance structure that has been in place for over twenty years and the proven effectiveness of the National Contingency Plan (NCP) in countless spills, the system did not function as effectively as it could or should have in this event. While there are number of factors that were considered by the Commission in their review, I will discuss two here today that I feel merit attention.

The first is what I have termed the political and social nullification of the National Contingency Plan and associated response doctrine during the response. The two primary reasons for this were (1) a lack of understanding and acceptance of the statutorily defined role and responsibility of a “Responsible Party” (RP) at all levels of government and (2) the rejection of some state and local officials of the federal authority, direction, and control of resources in the response.

On the first issue, the public’s fundamental concern, a concerned shared by many political leaders, was that BP was not “trustworthy” to meet their responsibilities under the law. Additionally, the response doctrine that calls for the RP to contract response resources under the overall supervision and authority of the federal on scene coordinator was not understood or accepted.

The latter issue can be best understood in the context of the very different assumptions and legal authorities that form the basis for a response to a natural disaster under the Stafford Act and the National Response Framework. In those instances the federal role is restricted to providing resources and assisting local governments who have the legal responsibility for the response. In oil spill

response there is a clear federal role that preempts local authority under the Clean Water Act and federal regulations.

At the federal level the governance of this spill was also complicated by the overlapping structures contained in the National Contingency Plan which predates the creation of the Department of Homeland Security and the role of the Secretary of Homeland Security as outlined in Homeland Security Presidential Directive 5 and the Homeland Security Act which designate the Secretary as the Principal Federal Official for incident management. While these roles were adjudicated and integrated during the response, work remains to clarify how the two structures interact to create unity of effort and a whole of government response.

Finally, an opportunity to address these key issues was lost in March 2010 (just prior to the accident) when a Spill of National Significance exercise was held in the Northeast United States. Because this exercise was not considered a Tier One Exercise there was no mandatory participation by cabinet-level leaders. In my opinion there should be another SONS Exercise scheduled and held within one year to turn around lessons learned and increase our preparedness, including resolution of NCP/HSPD-5 overlaps and gaps.

THE ROLE OF THE NATIONAL RESPONSE TEAM (NRT)

When the Deepwater Horizon sank on 22 April, I requested a meeting of the National Response Team (NRT) as the Commandant. My intent was to employ this long-standing interagency coordinating body in support of the deepening crises and potential for a catastrophic oil release. However, since we had not exercised the NCP with DHS leadership, the role of the NRT was not fully understood. The NRT, an interagency body, is comprised of 15 federal agencies responsible for developing, de-conflicting, and reconciling intergovernmental policy issues that surface during oil spill response. The EPA serves as the Chair and the Coast Guard serves as the Vice Chair of the NRT. When a spill involves a substantial threat to public health and welfare, substantial amounts of resources or substantial threats to natural resources, the NRT can be activated as an emergency response team to monitor the response actions and provide counsel and recommendations to the NIC to assist in the response. 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, 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 Interagency Solutions Group (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.

In the future any recommendations made in this testimony or proposed changes the Commission or other entities should be closely reviewed for integration into the existing roles and responsibilities of the NRT. Most of the functions of the IASG (discussed later) should be institutionalized in the NRT.

SPILLS OF NATIONAL SIGNIFICANCE AND THE NATIONAL INCIDENT COMMAND

The only current official doctrine related to the designation of a National Incident Commander is contained in 40 CFR 300.323. Those responsibilities were further refined in a draft Coast Guard Commandant Instruction (16465.1A), *Spills of National Significance Response Management System*.

Before the *Deepwater Horizon* incident was designated a SONS and prior to my designation as the NIC, Rear Admiral Mary Landry assumed the role of FOSC and served as the Coast Guard lead federal official for strategic communication and operational decision-making. In this capacity, RADM Landry worked with other federal partners, senior BP officials, state, and local representatives to establish a unified response organization. As the Federal On Scene Coordinator (FOSC), by law, she was responsible for:

Providing access to federal resources and technical assistance.

Coordinating all federal containment, removal, and disposal efforts and resources during the oil spill.

Serving as the point of contact for coordination of federal efforts with the local response community.

Coordinating, monitoring, and directing response efforts.

As this incident expanded across the entire Gulf Region, so did the need to involve other national-level and international resources outside the span of control of the FOSC. This response clearly called for a NIC. By design, the FOSC's responsibilities are complementary to the NIC responsibilities. Strategic objectives and intent should be clear and transparent and designating a single individual, responsible for all aspects of the federal government's response, established a clear chain of command for communications and decisions.

As the NIC, I followed the doctrine outlined in the NCP and assumed the responsibilities for addressing and coordinating national-level issues. In the 10 days that passed between the fire, explosion, and subsequent sinking of the *Deepwater Horizon* and my designation as the NIC, multiple federal government agencies acted within their existing authorities to execute their particular agency responsibilities. Initially, I viewed my role as the Unified Area Command's (UAC) relief valve for political and national pressures and a national-level resource broker. To this end, I created a –thin client, a lean NIC staff with a relatively small footprint located in Washington, D.C., and I traveled to the Gulf region frequently. I was also designated as the primary national spokesperson for the *Deepwater Horizon* response. Given the intensity of media coverage and public interest, I spent a considerable portion of my time briefing and interacting with national and local media to inform the public

of the whole-of government's efforts. Significant effort was also focused on strategic and policy issues using existing interagency resolution bodies as well as creating a new policy resolution group, the Interagency Solutions Group (IASG). By assuming these responsibilities, I enabled the UAC to focus on operational response issues.

Because the development and evolution of the National Incident Command was precedent setting and unique I directed that our operating procedures, decisions, and organizational structure be documented in a living document that was revised continually. My initial guidance, *Deepwater Strategy Implementation Version 1.0*, was issued on 23 June 2010 to codify direction that I had given to date and to memorialize key decisions taken on 14 June during my meeting with the President. It was 43 pages. The final *Version 5.0* that was issued in my last week as NIC is over 600 pages. Finally, a 59-page *National Incident Command Lessons Learned Report* was issued at the disestablishment of the NIC. Both should serve as useful tools in considering a more formal doctrine for future SONS.

I also make the following specific comments and recommendations regarding NIC authorities based on the complexity and size of a SONS in relation to smaller events. These authorities should be established and described in doctrine. I recommend the following legal authorities for future NICs.

Presidential designation of a NIC

Currently the Commandant of the Coast Guard can designate a NIC for a coastal zone SONS and the EPA Administrator can designate a NIC for an inland SONS (40 C.F.R. § 300.323). Since the NIC is responsible for coordinating the whole-of-government response to include the Cabinet, the President should designate the NIC if required for a SONS.

Establish standing delegation of NIC Clean Water Act §311(c) and (e) authorities

A NIC must have the authority to control significant aspects of a response to a major oil spill, including directing the actions of a RP. When I was relieved as Commandant, I was only able to retain the §311(c) authority through delegation by DHS Secretary Napolitano. Without this delegated authority I would not have been able to legally direct the RPs actions, authorize removal, and approve expenditures against the Oil Spill Liability Trust Fund.

In the future, a NIC, by designation, should have §311(c) and (e) authority organic to the position. This should be explicitly articulated in the NCP and Executive Order rather than delegated during a SONS. This will ensure all future NICs and response stakeholders understand the authorities inherent to a NIC *prior to* a major pollution response.

Re-direct response assets nationally

During the response, the Coast Guard and the EPA issued an emergency temporary rule that waived certain Plan Holder requirements across the country to allow resources to be re-directed to the Gulf. Although this emergency rule was drafted, published and became

effective within days, it was an unnecessary step in trying to get oil spill response resources on-scene. The exigent resource requirements of a SONS require flexibility regarding response plan requirements. I recommend that when a SONS is designated, certain requirements contained in response plans be eased in order to free up equipment. This will provide the NIC and the FOSC the ability to rapidly acquire critical resources for response efforts. Area Committees should consider the potential of supporting a SONS outside of their geographic area and incorporate contingencies into their Area Contingency Plans.

OIL SPILL PREPAREDNESS AND RESEARCH AND DEVELOPMENT (R&D)

The Interagency Coordinating Committee on Oil Pollution Research (ICCOPR) has served as the primary governmental body for oil spill response research and development since 1991 directing interagency research and university grant programs. Unfortunately, Congressionally-directed funding to support ICCOPR was discontinued in 1995 and they have struggled to maintain relevance in a post 9-11 security-focused R&D environment. To ensure we have 21st century oil spill response capabilities available before the next major oil spill occurs, we should amend the oil pollution research and development program described in 33 USC §2761 to reinvest funds in the ICCOPR. The ICCOPR should be required to conduct and sponsor research into oil fate and its effects, and the enhancement of capabilities suitable for preventing, responding to, and mitigating the impacts of spilled oil in the maritime environment. The ICCOPR should also be directed to permanently establish a program similar to the Interagency Alternative Technologies Assessment Program (IATAP) to evaluate new technologies *before* a spill occurs. The ICCOPR must receive *permanent* funding for R&D through annual distributions from the Oil Spill Liability Trust Fund or some other recurring funding source.

USE OF THE OIL SPILL LIABILITY TRUST FUND

The Oil Spill Liability Trust Fund (OSLTF) was created under OPA 90 and is used to pay for costs not paid directly by the RP. As of September 19, 2010 (the last date in which I was involved as the NIC), over \$580 million in costs had been paid from the OSLTF. To ensure funding remained available for the federal response, Congress passed Public Law 111-191 that allowed for unlimited advancements of up to \$100 million from the principal to the emergency fund, but only for the Deepwater Horizon response. As of September 19th this additional advancement authority had been exercised five times, providing \$500 million in advancements to the emergency fund. Funding must be adequate to support effective and efficient federal oil removal when there is a major spill or a SONS. Accordingly, the changes made by Public Law 111-191 should be made permanent.

The Deepwater Horizon response has also demonstrated the extraordinary public expectations of prompt and effective compensation. While claims payments are currently available from the OSLTF, the cost to administer such payments, including adjudication costs, are payable only through Coast Guard operating funds. The cost to the federal government to administer and adjudicate claims in the event of a SONS would be

enormous if there were no RP, or if the RP reached their limit of liability and refused to pay. The Deepwater Horizon claims footprint consists of over 35 claims centers and over 1,500 staff with an estimated payroll of \$42 million per month. While legislation has been proposed to eliminate this claims funding gap, it was not approved as requested. There remains an urgent need to enact a legislative provision for surge claims funding out of the OSLTF.

Additionally, there is a \$1 billion limit on use of the OSLTF for a particular event, of which only \$500 million may be used for Natural Resource Damages. The costs that count against this limit include removal and Natural Resource Damage Assessment (NRDA) Initiate costs as well as any claims that ultimately might get paid from the fund. An underlying tenant of OPA 90 is that "the polluter pays", and as of September 19th BP had reportedly spent over \$9.5 billion on the Deepwater Horizon response and has put an additional \$20 billion into a trust fund to pay Natural Resource Damages and additional claims. That is nearly \$30 billion the American taxpayers were not saddled with – reinforcing the wisdom of the current system described in the NCP and OPA 90. However, even with a viable and cooperative RP, the \$1 billion limit is clearly inadequate for a SONS-level event and should be significantly raised if a SONS is designated in the future.

INTERAGENCY COORDINATION

In addition to my NIC staff, the National Response Team (NRT) would normally serve as my primary advisory body to develop, de-conflict, and reconcile intergovernmental policy issues that surface during a SONS. Once the NRT was diverted from its traditional advisory role to provide daily high-level operational briefings to Cabinet members and agency heads, the IASG, led by DHS Assistant Secretary for Intergovernmental Affairs Juliette Kayyem, addressed many of the issues typically adjudicated by the NRT. The IASG became a self-contained interagency body with decision-making authority capable of resolving time-sensitive policy issues. The group was staffed at the action officer level and had representatives from over 20 agencies and Departments.

Along with adjudicating policy issues, the IASG assumed functions that were not anticipated in legal authorities or addressed in doctrine. For example, the IASG created the Interagency Alternative Technologies Assessment Program (IATAP) to evaluate thousands of offers of innovative response technologies from both domestic and international entities. Likewise, the IASG stood up the Flow Rate Technical Group (FRTG) composed of scientific technical experts, from government and academia, to quantify the daily rate of release from the Macondo well and the total amount of oil released into the Gulf. The IASG also chartered an Oil Budget Calculator Science and Engineering Team to estimate the fate of the oil. They developed a tool called the Oil Budget Calculator to estimate the fate of the oil (recovered, dispersed, evaporated, residual, etc.). To provide oversight of BP's claim process, the Integrated Services Team (IST) was created under the IASG. They oversaw over \$875 million in claim payments from over 200,000 individuals, businesses, and government entities, and served as a

transition facilitator for the Gulf Coast Claims Center. The IST also deployed experts to promote public awareness of the claims process and other social services programs.

When the State of Louisiana submitted permitting proposals to construct a series of sand berms, rock dikes, and pipe booms to protect sensitive areas from oil, the IASG identified key issues to help address environmental and engineering concerns. The synergies created through the establishment of this group directly supported planning efforts by the Council of Environmental Quality (CEQ) and the Natural Resource Trustee Steering Committee to consolidate countermeasure proposals for consideration by the FOSC as removal projects. The 24 projects submitted, valued at over \$500 million, were carefully considered by the IASG and they developed recommendations on the merits of each project against the criteria outlined in the Clean Water Act.

The scope and the magnitude of this spill surfaced a number of other critical issues that would not normally arise during a routine or traditional oil spill response. The IASG was challenged to resolve issues such as immediate and long-term behavioral and public health monitoring, seafood testing, and social and economic impacts. This was especially difficult since OPA 90 limits the use of the Oil Spill Liability Trust Fund (OSLTF) for cleanup and removal of the oil, and compensation for environmental damages. The expectations of the federal government in crisis response grows with each new event and transcends existing legal authorities and limits on the use of federal funding. Going forward, we need to examine law, policy, and doctrine to account for what has become a changing perceived social contract by the American public to provide a range of immediate and long-term services as a result of a major domestic incident.

Cabinet-level Deputies Committee meetings were also convened to ensure senior administration officials were regularly briefed on response efforts. Deputies Committee meetings focused on key policy issues and friction points to ensure alignment throughout the administration and were especially helpful in addressing challenges posed by issues outside traditional oil spill response such as seafood safety. In the future, an incident-specific Deputies Committee should be convened, chaired and moderated by the NIC.

INTERNATIONAL OFFERS OF ASSISTANCE AND APPLICATION OF THE JONES ACT

Offers of Assistance

The Deepwater Horizon incident required access to and use of spill response resources from Oil Spill Removal Organizations (OSROs) around the country. An immediate and on-going challenge throughout the response was the lack of a usable database listing OSROs either domestically or globally, let alone listing equipment that might be available to support the response. Domestically, while we could locate most OSROs, it took time to identify what equipment they had to offer, and more time to determine how moving the equipment they were offering to the Gulf of Mexico would impact the response posture of the contributing region. These information gaps became critical in determining the location of potential response resources to support the Deepwater

Horizon incident and in ensuring that areas outside the Gulf of Mexico maintained enough response capability to meet federal and certain state requirements. This experience underscores the critical need for the establishment and maintenance of a response resource inventory database that includes updated listing of all OSRO equipment nationwide, including real-time location and status of all OSRO equipment so that it can serve as a primary management tool for all major responses. Internationally, in addition to the absence of a useful equipment database, the challenge is that except for regional agreements for resource sharing with our neighbors in Canada, Mexico and Russia, we had never engaged other countries regarding sharing response equipment. The first task we faced was in sorting out who to talk with and what countries had potentially useful resources to offer. We found that there was no common lexicon regarding resource specifications (e.g., no common description of open ocean containment boom and skimming systems). There were no protocols for making requests or accepting offers, no mechanisms for reimbursing costs or even for determining costs in the first place. The NIC staff did manage to work through all of these issues with many of the offers, and to receive and employ some foreign resources, but the process was needlessly arduous and inefficient. Another major challenge was contending with political pressure to accept all international offers of assistance regardless of utility to the response. Going forward, we need to expand the response inventory database described above to include international oil response resources and establish processes and procedures for review and approval of international offers of assistance to help speed the delivery of critical resources in a future oil spill response. Finally, any offshore containment and recovery system developed in the future should be integrated into this system.

Application of the Jones Act

There was a misperception that the Jones Act (46 USC § 55102) impeded the use of foreign flag vessels for Deepwater Horizon response operations. In reality, the Jones Act had no impact on response operations. As the NIC, I provided specific guidance to ensure accelerated processing of requests for Jones Act waivers. This process was used to expedite the Jones Act waiver requests for seven vessels engaged in source control operations in the event they were forced to alter operations in a manner that might implicate the Jones Act. This expedited process resulted in DHS Secretary Napolitano approving the waiver request in less than 10 days from the initial request. During the entirety of the response, there were no Jones Act waiver denials. Any decision not to use a foreign flag vessel during the response was based upon an operational decision not any limitations imposed by the Jones Act.

AIR SPACE COORDINATION

Historically, the coordination of aviation assets and sorties has proved to be a recurring challenge for major responses. We also experienced difficulties during the initial stages of the *Deepwater Horizon* response. With over a 120 aircraft and hundreds of daily public, private, and military flights in support of the response, there was a high risk of aerial collision and we experienced several near mishaps during the early stages of this

response. We needed to quickly establish command and control over the airspace. This required engagement and coordination at a national level with the U.S. Air Force and U. S. Northern Command (NORTHCOM) to bring DOD capabilities and capacity to the response. In collaboration with NORTHCOM, we established the based out of Tyndall Air Force Base. The Aviation Coordination Center allowed us to control, de-conflict, and monitor the air space over the offshore waters and coastline of the Gulf and significantly improved our ability to verify oil trajectory modeling and direct resources such as skimmers, vessels of opportunity, and boom deployment to where it was most needed.

IMPLICATION OF DEEPWATER HORIZON LESSONS LEARNED FOR THE ARCTIC

The Commission has called for “an immediate, comprehensive federal research effort to provide a foundation of scientific information on the Arctic.” The Commission further states “countries of the Arctic should establish strong international standards related to Arctic oil and gas activities. Such standards would require cooperation of policies and resources.”

I support these recommendations and offer these additional comments and recommendations.

There is currently inadequate infrastructure to support extensive response and recovery operations on the North Slope with the exception of the oil industry facilities at Dead Horse in Prudhoe Bay. Point Barrow, the only location close to the new Beaufort and Chukchi Sea lease areas, has limited access and no ability to support large-scale operations. The closest port with any capacity is Nome and it is restricted to vessels with 21-foot drafts or less.

In the absence of forward operating bases and infrastructure, seaborne command and control capability will be vital in any response, including search and rescue and other activities. The only vessels in the U.S. fleet capable of operating in those environments in all ice conditions are Coast Guard icebreakers.

The current condition of the Coast Guard icebreaker fleet should be of great concern to the senior leaders of this Nation. Two of the three vessels are currently inoperable and key decisions regarding future icebreaking needs continue to be delayed. The current funding mechanism for operating this vessel is dysfunctional and should be changed. The National Science Foundation (NSF) current holds the operating funds and requires the Coast Guard to submit an annual operating plan for their approval. Congress has moved these funds back to the Coast Guard in several previous appropriations only to see the funds requested in the following year for the NSF in the President’s budget. This funding structure should not be continued and operating funds for Coast Guard icebreaking operations should be requested in the Coast Guard’s budget. Serious discussion must begin immediately regarding the imminent loss of capability as two of these vessels have reached the end of their service lives.

In my previous discussions with the Office of Management and Budget I was advised that there was no policy decision to change the status quo. I would submit that National Security Presidential Directive 66, signed by President Bush and continued by this Administration is adequate policy guidance to take appropriate and responsible action regarding next steps in the Arctic.

Finally, in considering governing frameworks for response in the Arctic the United States should move immediately to ratify the Law of the Sea Treaty. This treaty is the de facto governing structure for the Arctic and should underpin any domestic and international planning for spill response. We have waited long enough and the Treaty should be ratified without delay.