



HILTON STAMFORD, CONNECTICUT

Chairman's Corner

Welcome to the OPA 90 Forum Newsletter!
March 2025

Greetings, and welcome to the New Year!

We are pleased to bring you the inaugural edition of the OPA 90 Forum Newsletter. Our goal is to share key knowledge and information for marine professionals dedicated to safeguarding our waters. As we navigate the complexities of oil spill prevention and response, the OPA 90 Forum stands as a united front of industry experts, government officials, and concerned citizens, all committed to the principles embodied by the Oil Pollution Act of 1990.



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This issue contains insightful articles and updates that will keep you at the forefront of our ever-evolving field. Read the variety of articles specific to this space and gain a new perspective on the far-reaching issues. Most of all, discover how the OPA 90 Forum is advocating for greater consistency and transparency from regulatory authorities.

In response to the growing prevalence of alternative fuels and electric vehicles, we introduce the newly formed Technical Committee. Our newly designed web page is a go-to resource for technical insights and industry news ([OPA 90 FORUM](https://opa90forum.org)), and where we post lengthier articles of interest (including our final Newsletter article in full).

Additionally, explore a recent OPA 90 Case Summary, and learn of our newest members. We urge you to become a member of this growing organization ([OPA 90 FORUM](https://opa90forum.org)).

We hope you find this newsletter both informative and intriguing. Together, let's continue to champion a cleaner, safer marine environment.

Wishing a safe and prosperous year ahead!

Warm regards,
Douglas Martin
Chairman, OPA 90 Forum



New Members

Please welcome our newest OPA 90 Forum Members:

Esther (Estee) Pinchasin - COL, US Army, USACE
Michael Jarvis - Director of Operations, Northstar Marine
Joseph Grasso, Partner - Partner, Wiggin & Dana LLP
Ed Levine - Manager, SS&C, LLC

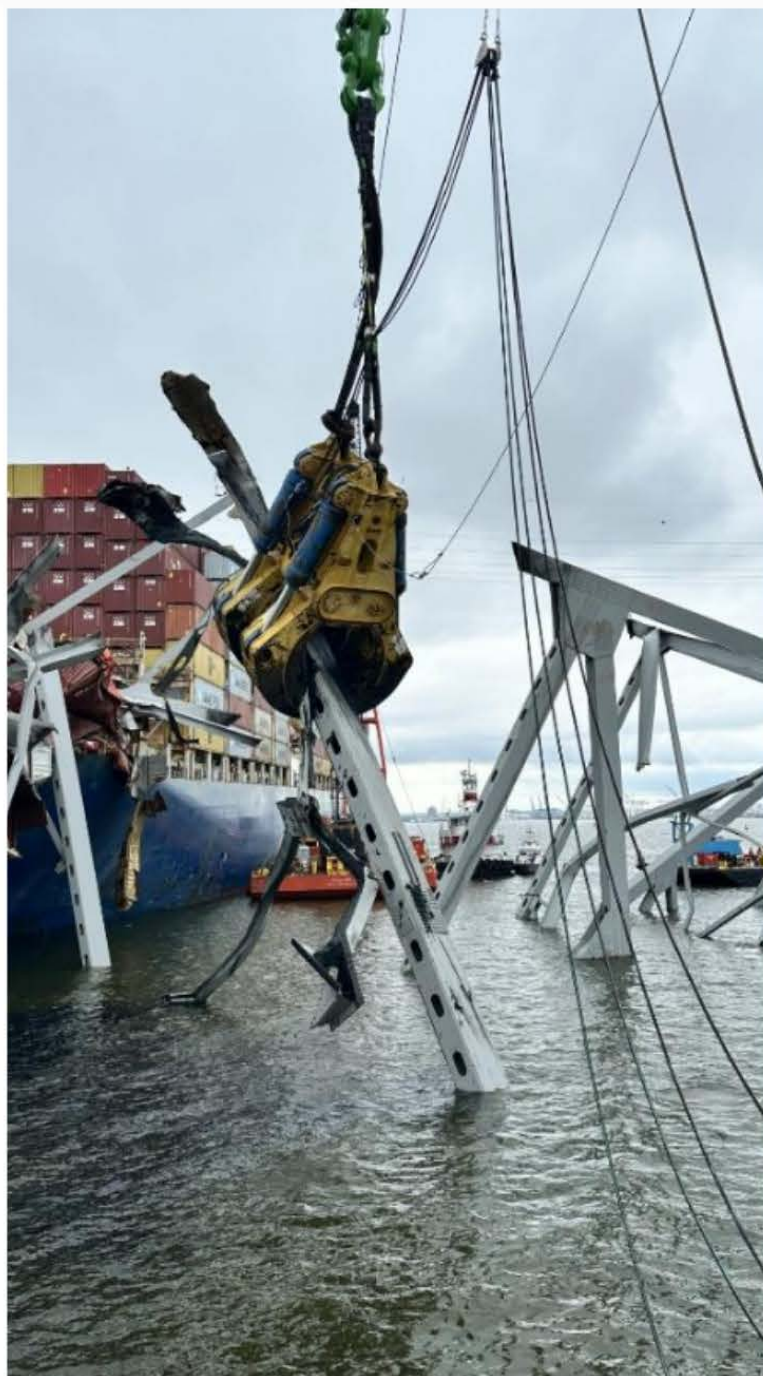
M/V DALI and OPA 90

By Dennis Bryant, Principal, Bryant's Maritime Consulting

The M/V DALI lost power on March 26, 2024, in the Baltimore Harbor and allided with the Francis Scott Key Bridge (leading to the death of six bridge workers). That tragic event has initiated a major examination of the safety of maritime structures and the threats presented by megaships. It also has the potential of examining two obscure aspects of the Oil Pollution Act of 1990 (OPA 90): the substantial threat of an oil spill and the ability to recover pure economic damages.

The U.S. Coast Guard administratively determined that the *DALI* incident, at least for a time, presented a substantial threat of a discharge of oil into navigable waters of the United States. This met the statutory definition of an OPA 90 incident. Thus, the Oil Spill Liability Trust Fund (OSLTF) was opened to cover various response costs. Subsequently, the Department of Justice sued the vessel's owner and operator. OPA 90 was among the numerous legal authorities cited to justify recovery. The vessel's owner and operator quickly settled for \$102 million with the federal government. The impact of the Coast Guard's administrative determination, albeit temporary, on third parties that may have been adversely impacted has not previously been fully explored.

Among the multiple owners and operators of ships delayed by the bridge collapse, several brought suit for damages incurred, citing OPA 90 and arguing this statute overrides the general doctrine that third parties not physically affected by a casualty are barred from recovering their pure economic losses (the so-called *Robins Drydock Rule*). While several district courts have ruled that, where there has been an oil spill, third parties can recover pure economic losses because OPA 90 has superseded the general doctrine, the concept has only been tested once in a case involving the substantial threat of an oil spill. In that case, United States v. Jacob, 691 F.Supp.3d 421 (D.P.R. 2023), the trial court deferred to the Coast Guard's administrative determination of a substantial threat of an oil spill. The matter is now on appeal.





The Polluter Pays – *Sometimes*

By Fred Kuffler, Partner, Montgomery, McCracken, Walker & Rhoades LLP

OPA 90 PRECLUDES USA'S LIABILITY FOR CONTRIBUTION TO THE RESPONSIBLE PARTY FOR REMOVAL COSTS AND DAMAGES

Savage Services Corp v. USA, 25 F. 4th 925 (11th Cir. 2022)

In the first case to examine the issues, the Federal Court of Appeals held that the even where it is negligent OPA 90 as the exclusive vehicle for a remedy shields the federal government for liability to the spiller for contribution covering the OPA 90 removal costs and damages the spiller had incurred.

The essential facts are quickly recited: The Army Corps of Engineers' negligence holed Savage's loaded barge, spilling its oil cargo. Savage paid the removal costs and then sought contribution from the government under the provision in OPA 90 whereby "Any person may bring a civil action for contribution against any other person who is liable or may be potentially liable under this Act or another law." 33 USC §2709.

The Court analyzed first whether OPA 90 provides any remedy, and then whether OPA 90 provided the injured party's exclusive remedy precluding Savage from resorting to "another law."

OPA 90 Fails to Provide a Remedy by Way of Litigation.

The court began its reasoning noting that OPA 90 in amending the earlier Federal Water Pollution had stripped the spiller of the defense of government negligence. The Court then held that the government was not a "person" under the above section as that term is defined in OPA 90 itself. Finally, the court held that Savage could not take advantage of the defense to liability where the spill is the sole fault of a "third party." 33 USC §2703, because the United States as the entity to which the spiller is liable is not a "third party," i. e. a stranger to the event, but rather is the "second" party.

OPA 90 Provides the Spiller's Exclusive Litigation Remedy.

The Court rejected Savage's contention, based on its recognition that the government must waive its immunity for a claim to proceed, that it could bring its claims under common law because the government had waived its sovereign immunity under the Suits in Admiralty Act. But the Court held first that The SAA was only a general waiver, whereas OPA 90, the specific statute, was silent, thus indicating there was no waiver. Savage relied on the Savings Clause stating that "Except as otherwise provided in this Act, this Act does not affect...admiralty and maritime law."

33 USC §2751. Reasoning this clause related only to matters OPA 90 did not address, the court found that OPA 90 had addressed the matter of the government's liability as already discussed above and so the Savings Clause was inapplicable.

But the result runs afoul of the public policy principle undergirding OPA 90 - "the polluter pays." The Court failed to discuss this issue. Instead, it treated policy in terms of whether the taxpayer funded the costs, as was the case with the Oil Spill liability Trust Fund as constituted under the FWPCA, or the oil industry, as is the case under the Fund as modified by OPA 90. The Court reasoned that if it allowed Savage to recover, the funding would come from the general treasury and not the oil industry, thus contravening OPA 90's purpose.

Also, by insulating the government from liability, the Court has deprived the government of any incentive to act carefully - another policy at OPA 90's foundation.

However, OPA 90 through the vehicle of the Oil Spill Liability Trust Fund may afford a spiller an alternate means of recovery. If the spiller either has a defense under OPA 90 or is entitled to limit its liability to the gross registered ton cap, the spiller may look to the Fund for compensation. 33 USC §2708. Savage could not claim the benefit of the defenses, Act of God, Act of War, or Act of a Third Party. The above litigation concerned only removal costs and damages as defined in OPA 90, but explicitly allowed claims for non OPA 90 losses such as repair costs to go forward. On these claims the court found that Savage alone caused the casualty. 666 F. Supp 1177. As to Savage's prospects of sustaining limitation, the facts as reported do not disclose whether the OPA 90 losses Savage claimed exceeded the tonnage cap.

Note that because a tax on imported oil provides the money for the Fund to pay claims, the policy concerns the Savage court raised are avoided.

While a future case will need to resolve the conflicting policies Savage has implicated, the Fund may provide an alternative road to a spiller's recovery.



Predictability, or Call Your Response Provider Early & Often

By Rik van Hemmen, President of Martin Ottoway

Predictability is the aim of every human, company, or society.

Humanity simply strives to increase its level of predictability whether as a person, or as a group of people. When humans attain a certain level of predictability, their hope for the future goes up and their level of anxiety goes down.

Predictability and decision-making are closely tied together. One can make better decisions when the future can be predicted more accurately. OPA 90 was created to increase predictability. The entire structure allows stakeholders to proceed with a level of predictability where predictability can appear to be sorely absent. When predictability increases, it becomes easier to make decisions, and that will help to gain control of a disaster. OPA 90 has succeeded in that regard but due to its measurable success, its predictability decreased.



Since there are few large oil spills today, we have created a conundrum. We do not know if we can manage a large oil spill today, there are exercises, but exercises are not the real thing. A real oil spill is unpredicted and unpredictable, and while we hope everybody will show up in time we do not know if this will occur. Since we have not had a sizable number of serious oil spills recently, shipowners and operators now start to imagine that a small oil spill will not turn into a big oil spill. However, this ignores an underlying reality. Small disasters not rigorously managed can turn into big disasters.

If this occurred, the salvors and response contractors will be called in after the small disaster turned into a large disaster. From their point of view this may not be a bad deal, because big disasters make more money than small disasters, but - from an overall disaster management point of view, this approach is, well, disastrous.

Imagine these scenarios:

- **Scenario 1:** A vessel has a soft grounding. It is expected the vessel can be refloated on the next high tide without external assistance. At the next high tide, the vessel is being refloated under direction of the captain and use of her own engines and ancillary equipment, but during the refloating the vessel passes over an abandoned anchor and tears out the bottom. Fuel oil spills and the vessel is flooding and settles down. The Owner now must call the QI and the designated Salvage and Marine Firefighting contractor (salvor). They cannot immediately be on site and now the USCG becomes uncomfortable. The spill continues and eventually the salvors and spill contractor secure the vessel and cargo and pick up the mess. In the postmortem analysis everyone is embarrassed since the response was less effective than desired.
- **Scenario 2:** A vessel has a soft grounding. Same expectations of refloat on next high tide. The Owner calls the contact number for the designated spill contractor and the designated salvor; both are engaged. At the next high tide, the vessel is refloated, and no spill occurs, and the vessel continues its voyage. The salvage and spill contractors stand down, but everybody has become a little smarter. The vessel owner and its personnel know how to contact the spill contractor and the designated salvor and how to instruct them. The contractors get to exercise their first-level response and make fixes as needed. The USCG knows that in a real disaster the initial system response will kick off reliably and Scenario 1 is less likely to occur.

Increased predictability has been achieved. I am not suggesting in any form that all the response personnel and equipment needs to be loaded up and sent to the casualty. What I am suggesting is that dropping a nickel on your designated responders early need not cost a lot, and overall saves money - making a strong predictor for success. *First published in MarineLink 23Jan2024 and edited for brevity.*



In-Port Marine Casualties are Marine Casualties

By Dennis Bryant, Principal, Bryant's Maritime Consulting

A casualty on a vessel tied up at a pier, dock, or wharf is still a marine casualty and the master/owner/operator must still notify the U.S. Coast Guard. If the vessel falls within the purview of the Oil Pollution Act of 1990 (OPA 90), the Qualified Individual (QI) must also be consulted and the vessel response plan (VRP) possibly activated. Notifying the local fire department is prudent and possibly necessary, but it doesn't override the federal requirements..

Failure to timely notify the Coast Guard and to notify the QI (and activate the VRP) can have serious consequences.

On June 4, 2020, a fire broke out on the roll-on/roll-off cargo vessel *Hoegh Xiamen*, at the pier in the Port of Jacksonville, Florida. While the crew attempted to fight the fire, the master attempted to call the ship's agent by mobile phone but could not reach the agent. He then unsuccessfully tried to reach the non-existent "Jacksonville Port Control" by VHF radio. Later, the Coast Guard called the ship via VHF channel 14. The master reported the fire and requested assistance, but then left the bridge without giving the ship's position. Soon thereafter, a passerby observed the smoke and called 911, which alerted to local fire department. At about the same time, a passing vessel observed the smoke and notified the Coast Guard. None of the ship's crew were injured, but nine of the shoreside firefighters responding to the incident were injured during firefighting efforts. The vessel and its cargo were declared a total loss. The ship had an approved VRP, but at no relevant time was the ship's QI notified of the casualty, and the VRP was never activated, so the contracted salvage and marine firefighting resources never responded.

On July 5, 2023, a fire broke out on the roll-on/roll-off cargo vessel *Grande Costa d'Avorio* at the pier in Port Newark, New Jersey. The casualty investigations remain incomplete, so there are various unknowns. What we do know is that two shoreside firefighters died and several others were injured. The local fire department had little or no maritime firefighting training, experience, or familiarization with cargo vessels of any type. Vessel fires require more firefighting resources and different technical skills than many land based firefighting agencies traditionally possess. The vessel had an approved VRP, but it is unclear if the ship's QI was notified of the casualty.

As the Coast Guard noted, these are two of several vessel fires in the past five years where the lack of familiarity with commercial vessels and inexperience with shipboard firefighting techniques has unduly endangered the safety of responding personnel.

It bears repeating that a marine casualty in port is still a marine casualty. While notifying the local fire department is prudent, applicable laws and regulations require the master/owner/operator to immediately notify the Coast Guard and the ship's QI and for the VRP to be activated. The VRP includes contact details for the ship's contracted salvage and marine firefighting (SMFF) resource provider. That resource provider has the trained personnel and specialized equipment to effectively respond.



Technical Committee Introduction

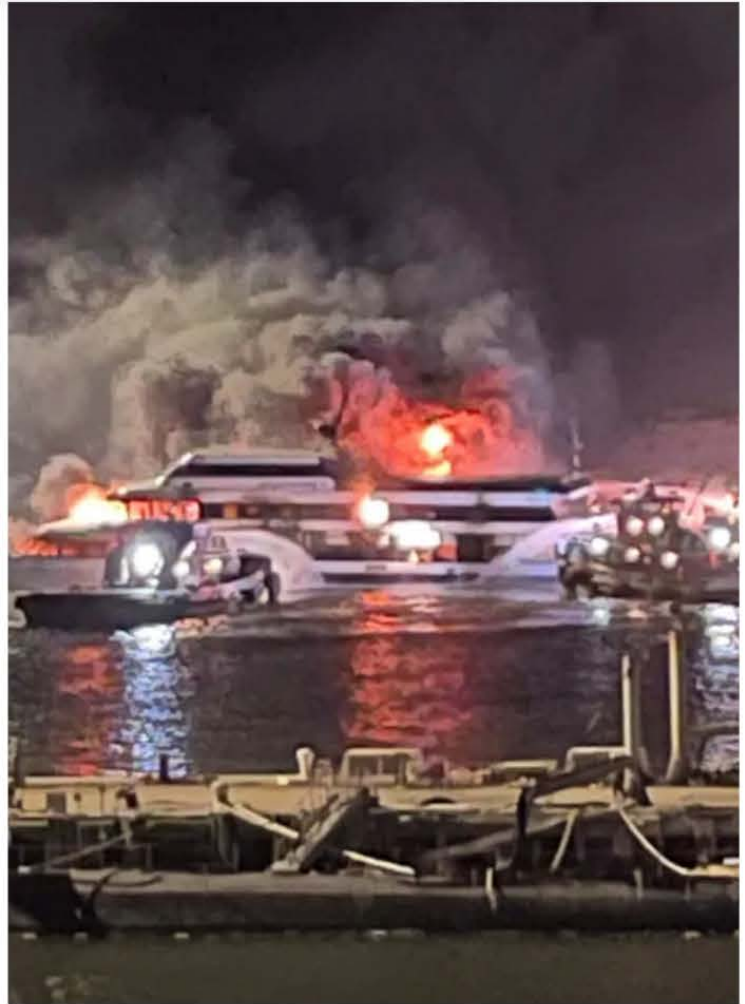
OPA 90 Forum Technical Committee

The OPA-90 Forum's Technical Committee works at the direction of the Membership and the Forum's leadership with the goal to be opportunistic to outside factors affecting the OPA 90 Forum. The Committee strives to minimize duplicative efforts, rather maximize utilization of resources while being supportive of other committees' efforts.

The Committee contributors are from the more technical, scientific, and operationally oriented members of the Forum, with diverse and extensive skill sets across multiple disciplines. The Committee is currently focused on several timely, albeit stimulating, topics including: Alternative Fuels, Carbon Capture, Arctic Operations, and Marine Fires. The latter embraces the subtopics of hazardous cargoes, lithium-ion batteries, and trends.

With the stand-up of the Forum's expanded website, the Technical Committee will maintain a clearing house for reference materials, links, and regulations for the technical topics. There exists a goal to expand the topics towards meaningful and opportune areas, keeping within the Forum's mission.

To increase the topic breadth and maintain quality, the Committee would benefit from additional contributors. If there is an interest, please join the OPA-90 Forum, and contact the Technical Committee chair (salvor@marineresponse.net - Ken Edgar)



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"I Just Bought an Oil Terminal – Now What?"

ICP Timelines - EPA, USCG, PHMSA Requirements

By John Carroll III, Assoc. Managing Director, Witt O'Briens/Ambipar

To fully take ownership and begin operations, companies acquiring new assets have a plethora of pre-and-post transaction due diligence requirements. That said, getting a product to market is priority one, and the reporting requirements don't get the attention they warrant. This article will focus primarily on several large plans tied to new purchases. State and local permits, federal permits, and other regulatory plans are also part of this requirement and must be reviewed. This is not a catch-all blueprint for new ownership. Beyond plans and permits, you will have training, inspections, and a host of other "fun" activities to navigate.

Common question post-acquisition: *"We just bought 'ABC Terminal' from 'ABC Terminal Company;' can we just use their old plans?"*

Generally, midstream operators use Integrated Contingency Plans (ICP) to house their Pipeline and Hazardous Materials Safety Administration (PHMSA) Oil Spill Response Plan (OSRP), Environmental Protection Agency (EPA) Spill Prevention, Control, and Countermeasure (SPCC) Plan, EPA Facility Response Plan (FRP), and United States Coast Guard (USCG) FRP. Sometimes, these include a USCG Dock Operational Manual (DOM). Separate from the ICP, you will also have a USCG Facility Security Plan (FSP) which relates to today's conversation.

It's hard to believe, but these plans have different submission requirements, which makes the process all the more fun.

What are the new owner submission requirements?

The following are summaries of the agencies' requirements. There may be alternatives or other exceptions to some cases, but in most cases, these timelines and actions will apply to all plans.

PHMSA's OSRP

PHMSA, unlike the USCG, does not require approval of your plan before operating; however, you must submit your plan to phmsa.opa90@dot.gov during or before taking ownership. If it is too large to email, request an FTP link by emailing phmsa.opa90@dot.gov.

A common mistake amongst new operators is that new ownership can be managed similarly to PHMSA's significant plan revision requirement, which states: *"If a new or different operating condition or information would substantially affect the implementation of a response plan, the operator must immediately modify its response plan to address such a change and, within 30 days of making such a change, submit the change to PHMSA."*

PHMSA's new management has affected how OSRP reviews are administered and the implications on plan content. It is essential to be mindful of this, as simply making plan edits for new ownership and personnel, depending on the age of the OSRP, may not be enough. Additionally, as discussed below with the EPA's FRP, these plans have a handful of additional items that must be readdressed with new ownership.

<https://www.ecfr.gov/current/title-49/subtitle-B/chapter-I/subchapter-D/part-194>.

Read more at:

<https://bit.ly/OPA90-OilTerminalNowWhat>

