August 15, 2012

Law and Lawyers in the Incident Command System

Clifford Villa, Seattle University
LAW AND LAWYERS IN THE INCIDENT COMMAND SYSTEM

By Clifford J. Villa*

villacl@seattleu.edu

August 2012

* Assistant Regional Counsel, U.S. EPA Region 10; Adjunct Professor, Seattle University School of Law. J.D., Lewis & Clark Law School; B.A., The University of New Mexico. As an EPA attorney, the author advises the EPA Region 10 emergency response program and serves in the Incident Command System. As an adjunct professor, the author teaches Disaster Law and environmental law courses. The views expressed in this article are the author’s alone and not necessarily positions of EPA or the United States. The author thanks reviewers including Richard Delgado, Jacquie Hand, Marilyn Berger, and Hank McGee for their generous time and comments on prior drafts. Thanks also go to Seattle University staff for infallible support through the years and to Seattle U. law student Jake Hinton for superlative research assistance for this article. This article is for Julian, with hope for the next generation and the trials to come.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>3</td>
</tr>
<tr>
<td>II. Introduction to the Incident Command System</td>
<td>9</td>
</tr>
<tr>
<td>a. Origins</td>
<td>10</td>
</tr>
<tr>
<td>b. ICS Overview</td>
<td>12</td>
</tr>
<tr>
<td>1. Organizational Structure</td>
<td>13</td>
</tr>
<tr>
<td>2. Organizational Components</td>
<td>15</td>
</tr>
<tr>
<td>c. Critiques of the Incident Command System</td>
<td>17</td>
</tr>
<tr>
<td>2. Bigley &amp; Roberts (2001)</td>
<td>20</td>
</tr>
<tr>
<td>III. Law and Application of the Incident Command System</td>
<td>26</td>
</tr>
<tr>
<td>a. ICS and Response to Oil and Hazardous Substances</td>
<td>26</td>
</tr>
<tr>
<td>b. ICS and 9/11</td>
<td>28</td>
</tr>
<tr>
<td>1. ICS on 9/11</td>
<td>28</td>
</tr>
<tr>
<td>2. ICS after 9/11</td>
<td>32</td>
</tr>
<tr>
<td>c. ICS and Hurricane Katrina</td>
<td>34</td>
</tr>
<tr>
<td>d. ICS and the Deepwater Horizon</td>
<td>43</td>
</tr>
<tr>
<td>e. ICS Applications Today</td>
<td>50</td>
</tr>
<tr>
<td>IV. The Role of the Lawyer in the Incident Command System</td>
<td>52</td>
</tr>
<tr>
<td>a. The Office</td>
<td>56</td>
</tr>
<tr>
<td>b. The Emergency Operations Center</td>
<td>58</td>
</tr>
<tr>
<td>c. The Incident Command Post</td>
<td>60</td>
</tr>
<tr>
<td>1. Technical Specialist</td>
<td>62</td>
</tr>
<tr>
<td>2. Liaison Officer</td>
<td>63</td>
</tr>
<tr>
<td>3. Legal Officer</td>
<td>67</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>75</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

[If we can’t do ICS, we cannot manage disasters.]\(^1\)

On July 25, 2010, while much of the nation’s attention remained riveted on the Deepwater Horizon disaster in the Gulf of Mexico, another environmental disaster began one thousand miles north in Marshall, Michigan. At 4:58 pm local time, an oil pipeline owned and operated by Enbridge Incorporated (Enbridge) ruptured in a wetland near a tributary of the Kalamazoo River.\(^2\) For 17 hours, the rupture went unnoticed as oil poured from the pipeline into the river system.\(^3\) Carried by heavy rains, the oil spread over 30 river miles,\(^4\) overtopping dams, injuring wildlife, prompting local evacuations, and posing an ultimate threat to Lake Michigan downstream.\(^5\)

The size and gravity of the Enbridge oil spill required a massive and immediate response, led by the U.S. Environmental Protection Agency (EPA). On July 27, 2010, within 24 hours of discovering the spill, the EPA Regional office issued an order under the federal Clean Water Act\(^6\) requiring Enbridge to provide for immediate actions to stop

---


\(^2\) NAT’L TRANSP. SAFETY BOARD, ENBRIDGE INC. HAZARDOUS LIQUID PIPELINE RUPTURE AND RELEASE, MARSHALL, MICHIGAN (2012).

\(^3\) Id.


\(^5\) EPA’s Response to the Enbridge Oil Spill in Michigan (Environmental Response Television 2011) (hereinafter Enbridge Response). As the first EPA responder to arrive later described the scene, “I expected to see oil when I got here, and I did. And actually, there was no water in the creek. When I showed up, it was oil. It was straight, black, crude oil. And it was roiling, like in a whitewater river, but in a creek.” Id. (statement of Jeff Kimble, EPA On-Scene Coordinator). See also www.epa.gov/region5/enbridgespill/index.html.

\(^6\) Clean Water Act Section 311(c), 33 U.S.C. § 1321(c) (2011). Pursuant to Section 311(c) of the Clean Water Act, EPA may “direct or monitor all Federal, State, and private actions” to remove a discharge of oil
the oil discharge, contain the oil slick, and begin environmental cleanup. By the next day, July 28, 2010, hundreds of response personnel along with heavy equipment deployed to the scene, and Enbridge reported that it had stopped the oil from flowing into the river. By that time, however, nearly 850,000 gallons of oil had discharged into the river, requiring containment and cleanup operations that would continue for weeks, months, and ultimately years. Early operations included the use of more than 200 boats, 85 miles of absorbent boom, and over 2,000 response personnel. Among this horde descending upon Marshall, Michigan, were, of course, the lawyers.

Like the legion of litigators drawn to the BP oil spill in the Gulf of Mexico in the same year, agency attorneys and corporate counsel leaped into action to address liability concerns flowing from the Enbridge oil spill in Michigan. The government would seek to recover its own response costs and injured parties would seek compensation for a variety of losses. There might be civil fines, criminal penalties, or natural resource damages. Insurance claims would be filed, defenses would be invoked, and efforts would be made to share burdens all around.

or a hazardous substance “into or on the navigable waters” or “on the adjoining shorelines to the navigable waters” of the United States. See 33 U.S.C. § 1321(c)(1)(A)-(B).
8 In June 2012, after two full years of cleanup operations, federal, state, and local agencies announced the reopening of 34 miles of the Kalamazoo River to recreational use. Certain areas still remain closed to the public, however, and oil recovery operations continue as of this writing. See U.S. EPA, Kalamazoo River and Morrow Lake to Open, June 21, 2012, available at http://www.epa.gov/region5/enbridgespill/index.html (last visited Aug. 8, 2012).
9 Jackson statement, supra note 4, at 5. See also Enbridge Response, supra note 5.
11 As of March 31, 2012, the Enbridge spill had reportedly cost the company $765 million. At the same time, some 25 lawsuits had been filed against the company in federal and state courts. Matt Pearce, NTSB Report: Enbridge’s Response to Michigan Oil Spill Was “Poor”, L.A. TIMES, July 10, 2012.
13 Id. § 309(c), 33 U.S.C. § 1319(c) (2010) (defining federal crimes and respective penalties including criminal fines and imprisonment).
These may be familiar roles for lawyers, drawing from established practice areas such as environmental law, torts, and insurance, and contributing to the emerging field of disaster law. In the literature of disaster law, disasters are often conceptualized as a “disaster cycle,” including preparedness, response, recovery, and mitigation. Within this cycle, conventional thinking confines lawyers to the recovery phase, in particular, pursuing claims or litigation seeking compensation from government agencies, insurance companies, or responsible parties. This association certainly has reason, as attested by the epic legal responses to 9/11, Hurricane Katrina, and the Deepwater Horizon.

Less obvious, however, in the Enbridge response and in other recent cases, were the roles

---

15 Recognizing the close connection between disaster law and more established areas of practice, the American Bar Association (ABA) and its various committees have sponsored a number of recent initiatives to promote the study and practice of disaster law. For example, the ABA has established a Special Committee on Disaster Response and Preparedness, which maintains a broad collection of disaster-related legal resources. See www.americanbar.org/groups/committees/disaster.html (last visited Aug. 2, 2012).

16 The first legal textbook in this emerging field was published in 2006, the year following Hurricane Katrina, and is now in its second edition. Daniel A. Farber et al., Disaster Law and Policy (2nd ed. 2010). See also Daniel Farber, Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law, 2011 BYU L. Rev. 1783, 1786-93 (arguing for disaster law as an emerging field of legal study, comparable to field of environmental law in the 1960s and ’70s).

17 Professor Nicholson describes these elements succinctly as follows: “(1) mitigation, the lessening or avoidance of a hazard; (2) preparedness, including planning, training, and exercising; (3) response, referring to actions taken in the immediate aftermath of an event to deal with its effects; and (4) recovery, bringing circumstances back to at least the status they had prior to the emergency event.” William C. Nicholson, Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys, 46 Cal. W. L. Rev. 343, 346 (2010). See also Farber, et al., supra note 16, at 3 (“circle of risk management” includes “mitigation, emergency response, compensation, and rebuilding”). Julia C. Webb, Responsible Response: Do the Emergency and Major Disaster Exceptions to Federal Environmental Laws Make Sense from a Restoration and Mitigation Perspective?, 31 WM. & MARY ENVTL. L. & POL. Rev. 529, 555-63 (2007) (“disaster cycle” includes preparedness, mitigation, response, and recovery).


20 See, e.g., John Wyeth Griggs, BP Gulf of Mexico Oil Spill, 32 Energy L. J. 57 (2011) at note 2 (over 400 lawsuits filed within year following blowout of BP oil well). The lawsuits were in addition to claims presented directly to the BP Gulf Coast Compensation Facility, which transitioned on June 4, 2012 to the
that lawyers play at other points within the disaster cycle, including the response phase. These roles include legal advisors and agency liaisons, operating within a management framework known as the Incident Command System (ICS).

ICS is a “management system designed to enable effective, efficient incident management by integrating a combination of facilities, equipment, personnel, procedures, and communications operating within a common organizational structure.”

Through the use of standardized positions (e.g., incident commander), common terminology (e.g., incident command post), and consistent management philosophies (e.g., unity of command), ICS seeks to facilitate the integration of personnel from different agencies and entities into one organization assembled quickly and effectively to meet a common objective.

In the Enbridge spill in Michigan, for example, response personnel came from agencies and organizations including the U.S. EPA, U.S. Coast Guard, U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, National Transportation Safety Board, the U.S. Pipeline and Hazardous Material Safety Administration, the Michigan Department of Natural Resources and the Environment, the Michigan State Police, the Kalamazoo County Sheriff, the Calhoun County Public Health Department, the City of Battle Creek, Enbridge itself, plus contractors for the agencies and private parties. With all these diverse authorities and interests, the oil flowing into the Kalamazoo River allowed no time for extended debate over who was in charge and

---

22 Id.
23 Jackson statement, supra note 4; Enbridge Response, supra note 5.
how all the parties should work together. Fortunately, those questions could be answered readily through the framework of the Incident Command System.

Developed in California in the early 1970s, the Incident Command System is used today throughout the United States by federal, state, tribal, and local governments, as well as nongovernmental organizations and the private sector, to plan for and respond to incidents of all kinds that require coordination among agencies and organizations. ICS applies to “all hazards,” including natural disasters (e.g., tornadoes, earthquakes, hurricanes, floods) and manmade incidents (e.g., terrorist strikes, oil spills). Local fire departments use ICS to put out structural fires and local law enforcement agencies use ICS to respond to traffic accidents and civil disorder. Court staff, school principals, and campus security use ICS to ensure the security of courthouses, school grounds, and college campuses. ICS can be used for planning events of all size, from local sporting

28 See CALIFORNIA EMERGENCY MANAGEMENT AGENCY, LAW ENFORCEMENT GUIDE FOR EMERGENCY OPERATIONS 18 (2009). See also George Buck, PREPARING FOR TERRORISM: AN EMERGENCY SERVICES GUIDE at Chap. 7 (describing response of L.A. Police Department and other agencies to riots following Rodney King verdict in 1992).
29 Personal Communication with Melissa Muir, Director of Administrative Services, Western Dist. of Wash. (Feb. 1, 2012) (federal judges and court staff receiving training in ICS).
30 See, e.g., Seattle Public Schools Policy No. 3422 (Dec. 7, 2011) (requiring “building principal to be certified on the incident command system”).
31 See Oren R. Griffin, CONSTRUCTING A LEGAL AND MANAGERIAL PARADIGM APPLICABLE TO THE MODERN-DAY SAFETY AND SECURITY CHALLENGE AT COLLEGES AND UNIVERSITIES, 54 ST. LOUIS L. J. 241, 246 (2009) (in response to campus shootings and other safety incidents, “higher education community should give careful consideration to the methods and management approaches, such as ICS, that attempt to improve coordination and effectiveness”).
matches\textsuperscript{32} to Olympic Games.\textsuperscript{33} It appears now that ICS is even being adopted by other countries.\textsuperscript{34}

While ICS has existed for some 40 years, the use of ICS grew significantly in the past decade as the United States learned hard lessons from infamous failures of incident management in response to 9/11 and Hurricane Katrina.\textsuperscript{35} Use of ICS may also be growing simply because we have more frequent and catastrophic incidents, brought upon us by climate change,\textsuperscript{36} aging infrastructure,\textsuperscript{37} and risky business endeavors.\textsuperscript{38} Whatever the cause, ICS theory and practice must be understood by legal scholars and practitioners who seek to comment upon or contribute to the growing needs for disaster response.

Filling a gap in the legal literature, Part II will provide lawyers and legal scholars with an introduction to the Incident Command System, outlining the origin, doctrines,

\begin{itemize}
\item \textsuperscript{32} Michael D. Cardwell and Patrick T. Cooney, \textit{Nationwide Application of the Incident Command System, FBI LAW ENFORCEMENT BULL.} 10, 14 (Oct. 2000).
\item \textsuperscript{33} See, e.g., Lynne Genik & David G. Smith, \textit{Command and Control Analysis of the South West Provincial Regional Emergency Operations Centre during Vancouver 2010} (describing use of ICS in planning and execution of 2010 Winter Olympics in Vancouver, British Columbia).
\item \textsuperscript{34} For example, the United States has helped train Brazilian security forces in preparation for the 2014 World Cup and the 2016 Olympics. See \url{http://brazil.usembassy.gov/securityforcesrj.html}. FEMA has also provided ICS training internationally, including in Germany in fiscal year 2012. See FEMA Emergency Management Institute website \url{http://training.fema.gov/EMICourses/docs/schedules/2012%20EMI%20Course%20Schedule%202nd%20Semester.pdf}.
\item \textsuperscript{35} See, e.g., \textit{Local Disaster Preparedness Plan Evolving, About Response}, PHILADELPHIA TRIB., Sept. 11, 2011 (ICS described as “perhaps the most important change” in emergency management since 9/11).
\item \textsuperscript{36} Legal scholars and policy makers may look to ICS as one tool for climate change adaptation. With the effects of climate change expected to include more frequent and destructive events such as fires, flooding, heat waves, and hurricanes, climate change experts have already recognized the need for adaptive strategies including planning for disaster response on local, national, and international levels. See \textsc{Chris Wold et al.}, \textit{Climate Change and the Law} 95 (2009). One crucial element of disaster response planning may be training on the use of ICS.
\item \textsuperscript{37} See, e.g., \textsc{Farber et al.}, \textit{supra} note 16 at 64-68 (describing need to repair levees and dams throughout the United States); Bobby Magill, \textit{How Much Life Is Left in the Trans-Alaska Pipeline?}, \textsc{Popular Mechanics} (Feb. 2012) (Trans-Alaska Pipeline now 35 years old and in need of investment to extend useful life).
\item \textsuperscript{38} Professor Oliver Houck describes the Deepwater Horizon disaster as a demonstration of “risk creep,” where on-shore oil drilling more than a century ago moved into wetlands, then open water, then finally water a mile deep. Oliver Houck, \textit{Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law}, 40 ELR 11033, 11034 (Nov. 2010). For another example of what some may consider risk creep, see,
and organizational framework of ICS, along with major early critiques. Part III illustrates the law and application of ICS through transformative events including 9/11, Hurricane Katrina, and the Deepwater Horizon. Part IV then examines the potential roles for lawyers in ICS, including the emerging ICS position of legal officer. Part V concludes with suggestions for future legal research and practice in the Incident Command System.

II. INTRODUCTION TO THE INCIDENT COMMAND SYSTEM

Although some 40 years old, the Incident Command System seems to have largely escaped the critical attention of the legal community. This may be changing, however, as legal scholars and practitioners are increasingly confronted by disasters of all sorts and called to service in what some legal scholars have termed an “age of

---


40 Among the legal scholarship, recent acknowledgement of the Incident Command System may be found in FARBER, ET AL., supra note 16, at 136-45 (discussion of ICS in context of the National Incident Management System); Denis Binder, Lessons from the BP Emergency Action Plan in Action, 40 ELR 11115, 11116 (2011) (discussing critical elements of an emergency action plan, including provisions for a “unified incident command and incident commander”); Gregg P. Macey, Environmental Crisis and the Paradox of Planning, 2011 B.Y.U. L. REV. 2063 (2011). Professor Macey’s article probably goes farthest in acknowledging the existence and need for organizing systems such as the Incident Command System, recognizing that “what stands between us and the scale and scope of future environmental crises are organizations.” Macey at 2066. After examining the roots of organizational challenges and failures in the context of the Deepwater Horizon response, Macey concludes that the “struggle to differentiate tasks and subunits and then piece them together during moments of great uncertainty . . . should receive greater attention.” Id. at 2111.

41 Among recent work by legal practitioners recognizing ICS, see, e.g., OTTO J. HETZEL & ERNEST B. ABBOTT, HOMELAND SECURITY AND EMERGENCY MANAGEMENT: A LEGAL GUIDE FOR STATE AND LOCAL GOVERNMENTS 252-53 (2nd ed. 2010) (“ICS permits the authority having jurisdiction over the incident to retain command and control, while accessing the resources of local, state, and federal agencies through mutual aid and other mechanisms”); Joseph V. Panesko, Are You Prepared? Lawyers’ Roles in Preparing for and Responding to Disasters, WASH. STATE BAR ASS’N NEWS (Jan. 2008) (noting that “all levels of
Disasters throughout U.S. history have helped shape our modern regulatory regime. At the same time, disasters have also compelled advances in response mechanisms such as the Incident Command System. To understand ICS today may require some understanding of how it developed. This Part thus begins by discussing the origin of ICS. For the convenience of readers new to the Incident Command System, this Part then outlines the basic structure and tenets of ICS, along with some critical evaluations of ICS theory.

a. Origins.

The Incident Command System arose in response to a series of devastating wildland fires in southern California in the fall of 1970. Within 13 days, the fires consumed 16 lives, 700 structures, and over one-half million acres, with costs and losses totaling $18 million per day. While the various fire agencies did their best to contain the conflagrations, differences in personnel, equipment, terminology, and organizational structures hampered the effectiveness of their response efforts. In 1972, Congress tried to help address those problems by providing funds to the U.S. Forest Service for research government emergency responders, whether local, state, or federal, are required to implement the ICS template into their operational structures”.

42 See, e.g., Ass’n of Am. Law Schools, 2012 MidYear Meeting: Workshop on Torts, Environment and Disaster (meeting brochure) (available at www.aals.org/midyear2012/) (last visited May 5, 2012). As the AALS 2012 Mid-Year conference planners succinctly observed, “Since Katrina, not only hurricanes, but also oil spills, earthquakes, floods, tornadoes, terrorist attacks, volcanoes, heat waves, blizzards, and all manner of other disasters seem to be occurring in the United States and across the globe with increasing regularity and destructiveness.” Id.

43 See Mark C. Niles, Punctuated Equilibrium: A Model for Administrative Evolution, 44 J. MARSHALL L. REV. 353 (2011) (observing that singular events such as the Triangle Shirtwaist Factory fire in New York in 1911 and the Mississippi River flood of 1927 have helped accelerate regulatory development in fits and starts, a process the author – borrowing from paleontology – identifies as ‘punctuated equilibrium’).

44 RADVANOVSKY, supra note 26, at 97.

45 One account described the California wildfires of 1970 as a scene of “total chaos that enveloped the dozens of emergency services agencies that responded to these fast moving, erratic wildfires.” Fire engines from the northern part of the state were sent south, passing engines on Interstate 5 from the south moving north, each deployed to fires hundreds of miles from their respective bases. Dana Cole, The Incident Command System: A 25-Year Evaluation by California Practitioners at 209 (Feb. 2000).
on methods to “strengthen fire command and control systems. . . .”\textsuperscript{46} That research, drawing upon Forest Service collaborations with local fire agencies in southern California, resulted in a system that came to be known as FIRESCOPE (Firefighting Resources of California Organized for Potential Emergencies).\textsuperscript{47}

In 1973, a FIRESCOPE technical team assembled to guide development of a command structure that would facilitate multi-agency coordination in responding to emergency incidents.\textsuperscript{48} In developing this command structure, technical team members drew organizational ideas from contemporary research on systems theory\textsuperscript{49} and operational structures from existing models for fire response.\textsuperscript{50} Reflecting growing interest in a command structure that could apply to all types of emergencies, the focus expanded beyond fire and the “Incident Command System” was born.\textsuperscript{51}

By the mid-1970s, the FIRESCOPE agencies had agreed upon the major features and terminology of the Incident Command System, and by 1980, had successfully tested

\begin{flushright}
\textsuperscript{46} Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 92-369 (1972). \textit{See Senate Subcomm. on Appropriations for the Dept. of the Interior and Related Agencies, 92\textsuperscript{nd} Cong. 2\textsuperscript{nd} Sess. at 1734 (Mar. 7, 1972) (appropriating $900,000, for research at Riverside, California, and Fort Collins, Colorado).}
\textsuperscript{47} \textit{Id.} For a detailed history of FIRESCOPE and its continuing role in California fire and emergency response, see \url{www.firescope.org}.
\textsuperscript{48} \textit{Radvanovsky, supra} note 26.
\textsuperscript{49} \textit{Cole, supra} note 45, at 209. Systems theorists “see common principles in the structure and operation” of systems and seek to improve systems through doctrines including the use of a common language to enable interdisciplinary collaborations. \textit{Lars Skyttner & Danis Rose, General Systems Theory: An Introduction} (1997). Systems theory enjoyed particular popularity in the early 1970s. \textit{See, e.g., Robert M. Pirsig, Zen and the Art of Motorcycle Maintenance} 101-02 (1974) (philosophical meditation on systems including governments, churches, and motorcycles). In 1972, establishing the research program that would lead to the creation of the Incident Command System, Congress appeared to have systems theory distinctly in mind when it provided funding for “systems research” at Riverside, California. \textit{See supra} note 46. Reconnecting ICS to systems theory 30 years later, Cole observes that the “Incident Command System may well be considered one of the longest-running experiments in applied systems thinking.” \textit{Cole, supra} note 45, at 211 (emphasis in original).
\textsuperscript{50} Telephone Interview with Chuck Mills, Emergency Management Systems, Inc. (April 22, 2012) (hereinafter, Mills interview). Mr. Mills served as a member of the FIRESCOPE technical team that developed ICS, and as of this writing, remains actively engaged in ICS training and assistance as a private consultant. Models for operational structure drew from existing fire response systems including the
ICS on several major wildland fires. ICS was soon being used widely on fires throughout southern California and considered for use nationally on a much broader array of emergencies, including floods, earthquakes, airplane crashes, and hazardous materials incidents.\(^{52}\) In 1994, ICS received one of its first tests in a major disaster when applied in response to the Northridge Earthquake in Los Angeles.\(^{53}\) Over time, the experiences of different organizations implementing ICS in different settings led to the development of different versions of ICS,\(^ {54}\) leading to some initial confusion over which “ICS” model an individual organization should follow.\(^ {55}\)

b. ICS Overview.

Today, while many versions of ICS exist, there is one national standard for ICS, incorporated within the National Incident Management System (NIMS)\(^ {56}\) and published by the U.S. Department of Homeland Security. Individual agencies may publish their own ICS guides,\(^ {57}\) but they must be “NIMS-compliant.”\(^ {58}\) Private organizations or

---

Fireground Command System developed by the Phoenix Fire Department. For more on the Fireground Command System, see ALAN V. BRUNACINI, FIRE COMMAND (1985).

Mills interview, supra note 50.

RADVANOVSKY, supra note 26.

\(\text{Id.}\)

\(\text{Id.}\)

Different versions of ICS include “Hospital ICS,” see CALIFORNIA EMERGENCY MEDICAL SERVICES AUTHORITY, HOSPITAL INCIDENT COMMAND SYSTEM GUIDEBOOK (Aug. 2006) and “Law Enforcement ICS,” see CALIFORNIA EMERGENCY MANAGEMENT AGENCY, LAW ENFORCEMENT GUIDE FOR EMERGENCY OPERATIONS (2009). See also Walter G. Green III, Command and Control of Disaster Operations (2001) at 9 (noting different ICS versions developed by organizations including the National Wildfire Coordinating Group, the National Fire Academy, and the American Society for Testing and Materials).


In an evident attempt to address common confusion on this point, FEMA published on its website the following Frequently Asked Question:

Q: In order to meet NIMS compliance, does it matter which brand of ICS is used...?

A: To be NIMS compliant, you need to use the Incident Command System (ICS) structure described in the current version of NIMS.
authors may also publish their own ICS guides. For a wealth of information and materials on ICS, FEMA maintains an on-line ICS Resource Center. For the convenience of legal scholars and practitioners, this sub-part provides an overview of the basic doctrines and structures of the Incident Command System as described in the National Incident Management System.

1. Organizational Structure.

The basic organizational structure of the Incident Command System appears below in Figure 1. ICS terminology and organizing principles draw from classical theory in military operations and business management. Consistent with military doctrine, ICS is intended to be flexible and scalable, so that the size and complexity of a particular ICS organization will depend upon the size and complexity of a particular incident. Where multiple individuals are required to support an ICS function, ICS


61 Note that the brief outline of ICS provided for convenience in this Part should not be regarded as a substitute for proper training in ICS as may be required for compliance with NIMS. For information on NIMS-compliant ICS training opportunities, see www.training.fema.gov.

62 See infra note 80 and accompanying text (general staff system).

63 BUCK, supra note 28, at 1.

64 Cf. HEADQUARTERS, DEPT. OF THE ARMY, COMMANDER AND STAFF OFFICER GUIDE 2-3 (Sept. 2011) (hereinafter COMMANDER AND STAFF OFFICER GUIDE) (“The mission determines which activities to accomplish. These activities determine how commanders organize, tailor, or adapt their individual staffs to accomplish the mission. The mission also determines the size and composition of a staff to include staff augmentation.”)

65 See NIMS Document at 6.

66 BUCK, supra note 28. For example, if a certain incident does not require a public information officer, the ICS structure for that incident will not include one. If, on the other hand, a major incident requires significant production and dissemination of public information, then the public information officer (PIO) may be assisted by a Deputy PIO and a team of assistants.
doctrine requires maintaining an appropriate “span of control” to ensure effective command throughout the ICS organization. This may require adding deputies or expanding an organization to include additional organizational levels or units, each with their own designated supervisors. To ensure clarity in the chain-of-command, the ICS principle of “unity of command” requires that each individual within an ICS organization report to one and only one supervisor.

![Figure 1: ICS Structure](image)

---

67 Under NIMS, an appropriate span of control between supervisors and individuals is defined as a ratio between 1:3 and 1:7, with 1:5 being optimal. *NIMS Document* at 47, 147. Of course, span of control, along with many other elements of ICS, was not invented for purposes of ICS, but borrowed from other sources including business management. *See, e.g., NATIONAL INDUSTRIAL CONFERENCE BOARD, THE CHIEF EXECUTIVE AND HIS JOB: STUDIES IN PERSONNEL POLICY, No. 214 at 15 (1968) (noting studies of span of control in U.S. and foreign companies, finding that roughly half the companies had between four and seven direct reports to the CEO).*

68 *NIMS Document* at 91. Radvanovsky observed in his 2006 textbook, “One of the greatest strengths of ICS is the ability to expand or contract the organization as needed to fit the activity level at the incident. Deputies may be added as needed to maintain span of control, sections may be subdivided, and the organization can grow to include other agencies and jurisdictions as needed.” RADVANOVSKY, *supra* note 26, at 110.

69 *Id.* at 149. Of course, this principle considerably predates development of the Incident Command System. *Cf. Matthew 6:24* (“No one can serve two masters”).

14
2. **Organizational Components.**

   i. **Incident Command.** The ICS structure builds from the top down, beginning with the incident commander. As an ICS organization expands or contracts, the incident commander maintains overall responsibility for managing the incident. Where a single incident may involve the jurisdiction and responsibilities of two or more agencies or organizations, two or more incident commanders may be designated to work together as “unified command.” Together, unified command supports the ICS principle of “management by objectives” by establishing a common set of objectives and strategies. At the same time, each organization maintains its authority, responsibility, and accountability. Where one large incident or multiple related incidents require establishing multiple ICS structures, an “area command” may be established to facilitate overall incident coordination without engaging in direct operational support.

   ii. **Command Staff.** The ICS command staff typically includes a safety officer, liaison officer, and public information officer, who report directly to the incident commander or unified command. Command staff may also include other officers, as needed by an individual incident. The safety officer monitors all ICS operations and advises incident commanders on all matters related to health and safety of

---

70 Id. at 91.
71 See id. at 47.
72 See generally NIMS Document at 49 and 149 (definition of “Unified Command”).
73 See id. at 50.
74 Id. at 115-17, 135 (definition of “Area Command”).
75 Id. at 92, 137.
76 Additional command staff may include a medical officer or a legal officer. See id. at 95. See infra notes 340-385 and accompanying text (discussion of legal officer). In military doctrine, the legal officer is a required component of the command staff. Military doctrine also requires appointment of an inspector general and a chaplain, see COMMANDER AND STAFF OFFICER GUIDE, supra note 64, at 2-3, positions that have yet to be prescribed for an ICS organization.
responders. The safety officer also has authority to stop or prevent unsafe actions during incident operations. The liaison officer facilitates coordination with all agencies, non-governmental organizations, and private sector parties that have some interest in the incident without having legal authority over the incident. Such assisting or cooperating organizations may appoint representatives to the liaison officer to ensure effective coordination. The public information officer is responsible for communicating with the public, news media, and other agencies to provide timely and accurate information about the incident. For large incidents, the public information officer and assistants may establish a “joint information center” for ease of disseminating information.

iii. General Staff. Consistent with classical military organization, the ICS general staff includes the section chiefs for operations, planning, logistics, and finance/administration, plus other major ICS functions, as needed. The operations section is responsible for developing tactics and carrying out actions in order to achieve the incident objectives. The planning section is responsible for collecting, evaluating, and disseminating operational information. The planning section also prepares an incident action plan to guide the response and continues to update it as needed.

77 Id. at 52.
78 Id.
79 Id.
80 Military historians report that the general staff system employed by the military today dates back more than two centuries, to around 1809 when it was invented by the Prussian army after its defeat by Napoleon. This system was later adopted by the U.S. military in 1903. The system organized needs by functional areas including plans, operations, logistics, administration, and intelligence, ROBERT GREENHALGH ALBION, INTRODUCTION TO MILITARY HISTORY 140-141 (1929), which almost precisely reflects the functional structure of the modern Incident Command System. For the modern military equivalent, see, e.g., Command and Staff Officer Guide, supra note 64 at 2-5 (“coordinating staff” supporting functions to include plans, operations, logistics, and intelligence).
81 NIMS Document at 54. One optional functional area explicitly identified by ICS is intelligence/investigations. Id. at 91.
82 See generally id. at Tab 2 – The Operations Section.
necessary throughout the incident. The logistics section provides and manages all support needed for an incident response. This includes ordering and tracking all necessary personnel and equipment, and also ensuring food, fuel, medical services, and facilities needed to support response personnel. ICS facilities supported by logistics typically include an incident command post for the incident commander or unified command and base camps for housing personnel. The finance/administration section manages funding, monitors expenditures, and ensures compliance with procedures for procurement, compensation, and claims related to the incident response.

c. Critiques of the Incident Command System.

Given the decades of experience with implementing the Incident Command System across the country, social scientists and emergency responders naturally have undertaken critical evaluations of ICS. One consistent observation through these studies is that practitioners almost invariably express support for the Incident Command System, a phenomenon that social psychologists may associate with system justification.

---

83 Id at 105. To carry out these responsibilities, the planning section may be assisted by any number of technical specialists, including experts in meteorology, epidemiology, law, cultural resources, and hazardous materials.
84 Typically, the incident action plan will be updated continuously throughout the response for each operational period, generally 12 or 24 hours. In this way, the IAP can continually reflect changing conditions, new objectives, and lessons learned. Radvanovsky, supra note 26, at 108.
85 See generally id. at Tab 4 – The Logistics Section.
86 For more on ICP facilities, see id. at Tab 7 – Facilities and Locations.
87 See generally id. at Tab 5 – The Finance / Administration Section. Because of these administrative functions, the finance section may be situated at the incident scene or may operate remotely wherever an organization’s finance and administration units would normally function.
88 See, e.g., Buck, et al., infra note 115, at 3 (“The response community has been almost universal in its praise of ICS,” citing several studies between 1986 and 2001); Cole, supra note 45, at 207 (“the consensus among long-time practitioners seems to be that ‘ICS works’”). This is not, of course, to claim there is no grumbling about ICS among incident commanders and first responders. See, e.g., Cynthia Renaud, The Missing Piece of NIMS: Teaching Incident Commanders How to Function at the Edge of Chaos, 8 Homeland Sec. Affairs at 3 (June 2012) (noting that “many in the first-responder community complain that NIMS doesn’t work” because ICS bureaucracy cannot adequately prepare responders for initial engagement in chaotic environments).
theory. The support for ICS from practitioners may not be surprising, given that many responders have participated together in exercises and deployments in ICS for years, thus developing social relationships grounded in ICS. Moreover, support for ICS may simply reflect the lack of any serious alternative to ICS within the last 40 years.

Supporters of ICS may submit that ICS has stood the test of time and has withstood the scrutiny of numerous critical studies. Early critiques of ICS appeared to mistake failures of ICS implementation for defects in ICS design. Failures reflecting human error will always challenge any social organization, of course, but such failures also suggest relatively modest remedies such as training and experience, rather than invention and deployment of whole new systems. Other critical evaluations of ICS, however, deserve closer consideration to discern both the appropriate uses of ICS and perhaps its limitations. Three leading studies on ICS will be considered in turn below.


In 2000, Dana Cole, of the California Department of Forestry and Fire Protection, published the results of a study evaluating 25 years of practice with ICS in California.
In view of this quarter-century of experience, Cole begins with the overall conclusion that, “While not perfect, ICS is a proven structure for making people productive in working together to accomplish critical tasks during times of crisis.” However, reviewing the literature on ICS to that point, Cole noted a number of common criticisms of ICS. While ICS evidently worked well for fire incidents, Cole noted suggestions that it failed to accommodate non-fire entities into the ICS structure, in particular failing to integrate law enforcement and volunteers. Cole also noted concerns regarding the “considerable differences in how [ICS] is implemented from one agency to another.”

Cole further acknowledged concerns with “mobilization overkill,” an idea that ICS may lead to “serious problems of convergence and congestion at the disaster site.”

To evaluate these and other criticisms, Cole conducted a statistical survey of experienced practitioners of ICS within the California fire services. Asked to evaluate the relative strength or weakness of ICS according to 16 attributes, respondents statistically identified no weaknesses among the 16 listed attributes and a strong tendency toward unanimity among the highest rated attributes. Not surprisingly, the ICS attributes with the highest mean ratings, including “Predefined hierarchy,” “Uniform terminology,” “Incident Action Plan,” and “Span-of-Control,” reflect some of the most fundamental features of ICS and align with internal applications of ICS within a given response community. The Cole study also found that the lowest rated attributes of ICS, including “Resource mobilization,” “Effectiveness of integrating non-government organizations,”

92 Id. at 233.
93 Id. at 212-13.
94 Id. at 215.
95 Respondents rated each attribute individually on a scale from 1 (maximum weakness) to 10 (maximum strength), without regard to ranking attributes against each other. Id.
96 Id. at 218-19.
and “Consistency of implementation among various agencies,” reflect external applications where ICS comprehension and social relationships among responders may be most likely lacking.

From this statistical evaluation, Cole posits “the single biggest threat to the effective use of ICS: external misalignment.” The challenge then, as Cole sees it, is one of expanding the community of individuals and organizations familiar with ICS, assisted by standardizing the ICS model while at the same time allowing for continual feedback and improvement. To meet these challenges, Cole emphasizes the need for expansive training and practice in ICS. Cole also makes three systemic recommendations: (1) “Establish a multi-disciplinary national systems management process to ensure the integrity and consistency of implementation of ICS”; (2) “Develop a strategy for promoting ICS as the standardized model for emergency incident management”; and (3) “Institutionalize an ongoing systems evaluation process.”

In fact, since the Cole (2000) study, all three of these recommendations appear to have been embraced through the 2004 publication of the National Incident Management System, as will be seen in Part III.


In 2001, social scientists Gregory Bigley and Karlene Roberts, respectively from the University of Washington and the University of California, undertook a critical study of ICS from the perspective of reliability, which they submit “is becoming a vital

---

97 Id. at 223 (emphasis in orginal).
98 Cole notes in particular the need for meaningful practice, making the following observations: “’Imagine trying to build a great theater ensemble or a great symphony orchestra without rehearsal. Imagine a championship sports team without practice. In fact, the process by which such teams learn is through continual movement between practice and performance.’” Id. at 223 (emphasis in original).
99 Id. at 224-25.
organizational quality or competency.”

Drawing from data collected systematically through interviews with personnel from a large county fire department in California, Bigley & Roberts conclude that “ICS-based organizations may perform more reliably under extreme conditions than organizations founded on alternative approaches.”

Bigley & Roberts suggest that this reliability derives from “three main ICS factors—structuring mechanisms, organizational support for constrained improvisation, and cognition management methods.”

By “structuring mechanisms,” Bigley & Roberts refer to the features of ICS that allow for rapidly developing and altering organizational structures to meet the specific and changing needs of an individual incident. These features include the flexible structure of ICS that allows for building an ICS organization from the top down, beginning with the incident commander and including only those components needed to meet incident objectives.

On this point, data collected by Bigley & Roberts confirmed the concern reported by Cole about the threat of organizational “overkill,” agreeing that “overdevelopment of higher-level components, such as sections, branches, and divisions, can compromise system effectiveness.”

Such excessive development, in the words

---

100 Gregory A. Bigley & Karlene H. Roberts, The Incident Command System: High-Reliability Organizing for Complex and Volatile Task Environments, 44 ACAD. MGMT. J. 1281 (2001) (hereinafter, Bigley & Roberts). Bigley and Roberts define “reliability” to mean “the capacity to continuously and effectively manage working conditions, even those that fluctuate widely and are extremely hazardous and unpredictable.” Id.

101 Id. at 1281-82.

102 Id. at 1282.

103 Id. at 1286. Confirming this connection between structure and reliability, Peter Senge has observed that, for good or ill, “structure influences behavior.” PETER M. SENGE, THE FIFTH DISCIPLINE 42 (1990). “The systems perspective tells us that we must look beyond individual mistakes or bad luck to understand important problems. We must look beyond personalities and events. We must look into the underlying structures which shape individual actions and create the conditions where types of events become likely.” Id. 42-43 (emphasis added).

104 For example, beyond the incident commander, most fires were reported to require ICS activation only for the operations section. Bigley & Roberts, supra note 100, at 1287.

105 Bigley and Roberts illustrated this concern with a colorful quote from one battalion chief:
of one battalion chief quoted by Bigley & Roberts, is “not using the incident command system as designed. . . .”

Another ICS factor contributing to high reliability Bigley & Roberts identify as “organizational support for constrained improvisation.” By this, Bigley & Roberts recognize that complex and dynamic systems are never fully comprehensible by any one member of an organization. As such, all supervisors, including the incident commander, must allow subordinates a degree of latitude to improvise. Improvisation may mean creative use of a set of tools, as with the available equipment on a fire truck, or it may mean a form of breaking the rules, varying from routine or standard operating procedures. However, for purposes of reliability, Bigley & Roberts note that improvisation must be constrained within certain limits. Within the ICS context, for example, improvisation will not tolerate “freelancing,” the conduct by individuals or organizations acting wholly outside of the ICS command structure.

I’ll tell you where it doesn’t work. . . . You get some people in the incident command system, the first thing they start doing is they start filling in bodies in all the boxes. “I’m the incident commander. I need operations, plans. . . . I’ll just fill in the boxes.” And there’s nobody left to put out the fire.

Id. at 1287.

Id.

Id. at 1288.

Concurring with Bigley & Roberts on the key role of improvisation, another researcher elaborated, “The discipline provided by the ICS and the improvisation required by a problem-solving, open-system response are often assumed to be opposite ends of a linear scale. Recent experience . . . however, suggests that these are not opposites, that agility and discipline can both be achieved.” John R. Harrald, Agility and Discipline: Critical Success Factors for Disaster Response, 604 ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI. 256, 267 (2006) (citing studies of successful improvisation and creativity in the 9/11 responses at the World Trade Centers and Pentagon).

Id. at 1289

Id. at 1290 (explaining how freelancing on a structural fire can lead to fatal consequences for firefighters).
A final ICS factor contributing to high reliability Bigley & Roberts call “cognition management methods.” These are methods by which any individual member of an organization builds and maintains a viable understanding of the system to which they belong. Maintaining this understanding can be particularly challenging in many ICS contexts such as emergencies and disasters, where the rapidly changing needs of the incident are accompanied by adjustments in organizational structures. As Bigley & Roberts observed, ICS helps individuals meet these cognitive challenges through a series of mechanisms, including a clear set of incident objectives and defined roles within the ICS structure to help maintain mental focus and avoid “cognitive overload.”

Bigley & Roberts (2001) concluded that investing in ICS capacity “seems imperative for the growing number of organizations facing an expanding number of catastrophic scenarios.” At the same time, the study recognized that additional research was needed to ascertain the decree to which ICS could succeed in cases where participants did not share clearly defined values and organizational interests.


In 2006, researchers from the University of Delaware published what may be the most comprehensive evaluation of the Incident Command System as a tool for managing disaster response activities in the United States. As compared with Cole (2000) and

---

111 Id. at 1290.
112 Id. at 1291-92. As one example of managing cognitive demands, Bigley and Roberts cite comments from one firefighter, who in the face of a structural fire may be thinking about running low on fuel in a chainsaw, while at the same time the truck captain is anticipating needs for additional manpower. Id. at 1292.
113 Id. at 1297.
114 Id. at 1295-96. Such cases may include, for example, oil spills, where the ICS organization may encompass both government regulators and a responsible party. See infra discussion of Deepwater Horizon response.
Bigley & Roberts (2001), Buck, *et al.* (2006) expressed more reserved support for ICS, suggesting that the relative success of ICS may depend on the specific characteristics of an incident where it is used and on the organizations who may be called upon to use it.

Synthesizing from an expansive review of the literature, as well as from primary data collected from members of FEMA’s Urban Search and Rescue teams, Buck, *et al.*, identifies several factors that it suggests predict an effective use of ICS. The first factor may be a type of incident where responders operate with established tactics, including technical aspects of ICS. Buck, *et al.*, cites the response by the Oklahoma City Fire Department to the 1995 bombing of the Murrah Federal Building as a case where ICS “worked effectively,” in part because the “command staff was well trained in ICS.”\(^{116}\) As a second factor predicting ICS success, Buck, *et al.*, suggests that responders should have a “shared vision of the response through planning, practice, and experience.” An example given here was the ICS response to the bombing at the 1996 Summer Olympics in Atlanta, for which responding agencies, including the FBI and the Georgia Bureau of Investigations, had specifically practiced months in advance.\(^{117}\) A third factor predicting ICS success for Buck, *et al.*, is a response community, one characterized by a common language, common purposes, and personal ties developed over time through shared experiences. For Buck, *et al.*, the ICS response to the Northridge Earthquake in 1994 succeeded “because the local responders were part of a greater Los Angeles response community . . . nurtured over a number of years by the California Office of Emergency Services.”\(^{118}\)

\(^{116}\) *Id.* at 7-8.

\(^{117}\) *Id.* at 12

\(^{118}\) *Id.* at 12.
While identifying factors that predict ICS success, Buck, *et al.*, also suggested conditions where ICS deployments might prove more challenging. These include incidents where boundaries are diffuse, defying efforts to establish perimeter control. One example offered here was the uncoordinated response to the 2003 crash of the Space Shuttle Columbia, which disintegrated over Texas and Louisiana upon re-entry to Earth’s atmosphere. In the response to that incident, there appeared no central control over the collection of shuttle debris by local residents for at least the first few days, hampering the accident investigation.\(^{119}\) Similarly, according to Buck, *et al.*, ICS responses may be hampered by cultural differences among responders (as with the Humberto Vidal gas explosion in Puerto Rico in 1996) and by an assault of untrained volunteers who arrive at a disaster scene eager but ill-prepared to help\(^ {120}\) (as with the 2007 oil spill from the Cosco Busan\(^ {121}\)).

Buck, *et al.*, concludes that, “ICS works well when official responders have trained in ICS and have a strong sense of community.”\(^ {122}\) The study also agrees with practitioners and prior researchers that “the deficiencies identified are not inherent in ICS but rather are related to inadequate implementation.”\(^ {123}\) The remedy for these deficiencies may thus lie outside of ICS itself. Such remedies may, in fact, be found

\(^{119}\) *Id.* at 9.

\(^{120}\) *Id.* at 11, 20.


\(^{122}\) *Id.* at 21.

\(^{123}\) *Id.*
within allied systems such as the National Incident Management System, which specifies training requirements for ICS positions.\footnote{See ICS Resource Center at \url{http://training.fema.gov/EMIWeb/IS/ICSResource/TrainingMaterials.htm}.}

As all responders and reviewers appear to agree, the Incident Command System is not perfect. Yet over time, ICS has proven itself as a highly reliable system for managing disasters, emergencies, and other incidents requiring coordinated efforts within and among organizations. As the following Part will show, since 2001, ICS has endured and evolved through some of the most challenging trials in American history, including 9/11 and Hurricane Katrina.

\section*{III. Law and Application of the Incident Command System}

While the Incident Command System has been known in the response community for four decades now, it has become widely applied only within the past decade or two. Prompted by national catastrophes including 9/11, Hurricane Katrina, and the Deepwater Horizon, the use of ICS grew rapidly within the last ten years, propelled by forces including public outrage, executive order, and legislative changes. This Part will examine the evolving and expanding applications of ICS in the United States propelled by such forces.

a. ICS and Response to Oil and Hazardous Substances.

One type of case where ICS has long been the rule is in response to oil spills and releases of hazardous substances into the environment. Incidents such as the Enbridge oil spill in Michigan, and the Deepwater Horizon disaster in the Gulf of Mexico, are subject to federal statutes including the Clean Water Act,\footnote{See generally Clean Water Act § 311, 33 U.S.C. § 1321 (2010).} Oil Pollution Act,\footnote{See ICS Resource Center at \url{http://training.fema.gov/EMIWeb/IS/ICSResource/TrainingMaterials.htm}.} and the Comprehensive Environmental Response, Compensation, and Liability Act
(CERCLA),\textsuperscript{127} better known as “Superfund.” Environmental responses under these three statutes are guided by one set of federal regulations known as the “National Contingency Plan.”\textsuperscript{128}

Prompted by the Exxon Valdez oil spill in 1989 and passage of the Oil Pollution Act in 1990,\textsuperscript{129} EPA amended the National Contingency Plan (NCP) in 1994 for purposes including adoption of the Incident Command System for oil and hazardous substances responses.\textsuperscript{130} While the NCP provides only a fleeting direct reference to the “Incident Command System,”\textsuperscript{131} the NCP expressly embraces the ICS concept of unified

\textsuperscript{127} See generally Oil Pollution Act (OPA), 33 U.S.C. §§ 1001 et seq.


\textsuperscript{129} National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (2010). In a twist on administrative law, which generally assumes that statutes come before their implementing regulations, the first National Contingency Plan actually predates the modern Clean Water Act, CERCLA, and the Oil Pollution Act. The original NCP was developed in response to a massive oil spill from the tanker \textit{Torrey Canyon} off the coast of England in 1967, leading the United States to realize the need for a comprehensive system of spill reporting and response. See U.S. EPA, National Oil and Hazardous Substances Pollution Contingency Plan Overview, available on-line at http://www.epa.gov/oem/content/lawsregs/ncpover.htm (last visited May 12, 2012). Following the 1968 publication of the NCP, passage of the modern Clean Water Act in 1972, CERCLA in 1980, and OPA in 1990 embraced requirements of the NCP and required amendments to it. See Clean Water Act § 311(d) (1) (“The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances…”), 33 U.S.C. § 1321(d)(1) (2010); CERCLA § 105(a) (“Within one hundred and eighty days after December 11, 1980, the President shall … revise and republish the national contingency plan for the removal of oil and hazardous substances…”), 42 U.S.C. § 9605(a).

\textsuperscript{130} In one of the starkest demonstrations of “punctuated equilibrium” in modern U.S. history, the Exxon Valdez oil spill into Alaska’s Prince William Sound in 1989 prompted Congress to pass the Oil Pollution Act in 1990. “OPA 90” passed by unanimous vote, following almost 15 years of failed efforts to achieve similar legislation before the Exxon Valdez spill. See RUSSELL V. RANDLE, OIL POLLUTION DESKBOOK at 3 (1991).

By emphasizing unified command, the EPA signaled that its version of ICS “is not one of the several systems currently in use by local fire fighters around the country and separately referred to as ‘the’ traditional incident command system.”

Under “traditional” ICS, a single incident would be handled by a single incident commander. By contrast, a unified command structure would allow for two or more incident commanders, working together as unified command to achieve a common set of objectives. In the ICS response to the 2010 Enbridge oil spill, for example, unified command included the U.S. Environmental Protection Agency, the Michigan Department of Natural Resources and Environment, the City of Battle Creek, and Enbridge (as responsible party).

Having a party, such as Enbridge, that is legally responsible for an incident working alongside regulatory agencies within unified command obviously raises issues of law, legal ethics, and public perceptions. Nevertheless, consistent with the National Contingency Plan, the Incident Command System remains the rule in the United States for integrated responses to oil spills and hazardous substances.

b. ICS and 9/11.

1. ICS on 9/11.

Some 30 years after the creation of the Incident Command System, the events of September 11, 2001, demonstrated tragically how uncoordinated responses to disasters

---

132 See, e.g., 40 C.F.R. § 300.105(d) (2010) (“The basic framework for the response management structure is a system (e.g., a unified command system) that brings together the functions of the Federal government, the state government, and the responsible party to achieve an effective and efficient response, where the [on-scene coordinator] maintains authority”) (emphasis added). See also id. at Fig. 1a (depicting a “Unified Command Structure”).


134 EPA ICS HANDBOOK.

may exacerbate injuries and losses of life. In its extraordinary accounting of the events leading up to and following the terrorist attacks on that day, the 9/11 Commission acknowledged the astounding heroics and the staggering losses of life among agencies responding on 9/11. At the same time, the Commission also documented how failures of incident command and communications hampered the response and likely led to greater casualties and other impacts.

Two months before 9/11, Mayor Giuliani issued a directive, “Direction and Control of Emergencies in the City of New York,” which promoted ICS concepts such as unified command and the designation of incident commanders. After a meticulous review of the record, the Commission concluded that it was “clear, however, that the response operations” at the World Trade Center, “lacked the kind of integrated communications and unified command contemplated in the directive.” Despite the directive’s call for unified command, “the FDNY and NYPD each considered itself operationally autonomous.” Of course, beyond the FDNY and NYPD, the response to the World Trade Center attacks was supported – and complicated – by agencies from all levels of government: federal, state, and local. In general, the Commission observed

---

136 See, e.g., infra note 250.
137 9/11 COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (1st ed.) (hereinafter, 9/11 COMMISSION REPORT). On 9/11, the Fire Department of New York (FDNY) suffered 343 fatalities, the single largest loss of life of any emergency response agency in history. This was followed by 37 fatalities among the Port Authority Police Department (PAPD), which ranks as the highest loss of any police force in history. The New York Police Department (NYPD) lost 23 people on that day, which ranks as the second highest loss among any police force. Id. at 311.
138 Id. at 319.
139 Id. at 285. For a detailed examination of the communication failures and cultural gaps between the FDNY and NYPD hampering the response on 9/11, see Jim Dwyer et al., 9/11 Exposed Deadly Flaws in Rescue Plan, N.Y. TIMES, July 7, 2002, at A1.
140 Id. at 285. For a detailed examination of the communication failures and cultural gaps between the FDNY and NYPD hampering the response on 9/11, see Jim Dwyer et al., 9/11 Exposed Deadly Flaws in Rescue Plan, N.Y. TIMES, July 7, 2002, at A1.
141 Principal first responders to the World Trade Center on 9/11 were the FDNY, NYPD, PAPD, and the Mayor’s Office of Emergency Management. 9/11 COMMISSION REPORT at 281. However, in addition to these agencies, other responding agencies included FEMA and the New York City Department of Health, id. at 293, along with the U.S. Environmental Protection Agency, the Occupational Safety and Health
that “incident commanders from responding agencies lacked knowledge of what other agencies and, in some cases, their own responders were doing.” In some cases, this lack of knowledge led to direct consequences on 9/11. For example, after the South Tower collapsed at 9:58 a.m., many chiefs and firefighters in the North Tower remained unaware and perished when the North Tower collapsed 29 minutes later.

While the extraordinary circumstances of both the World Trade Center and the Pentagon on 9/11 defy comparisons, the Commission did note some differences in the responses to each attack. As the Commission observed:

While no emergency response is flawless, the response to the 9/11 terrorist attack on the Pentagon was mainly a success for three reasons: first, the strong professional relationships and trust established among emergency responders; second, the adoption of the Incident Command System; and third, the pursuit of a regional approach to response.

The Commission specifically credited the Incident Command System with helping Pentagon responders to overcome “the inherent complications of a response across jurisdictions.” As in New York, the attack on the Pentagon prompted response across disciplines (e.g., fire, law enforcement) and at all levels of government. Consistent with ICS, the Pentagon response was overseen by an incident commander, provided by the Arlington County Fire Department, and an incident command post was

---

9/11 COMMISSION REPORT at 305.

Id. at 307-08. Of course, had all responders in the North Tower known of the collapse of the South Tower, it is not likely that they all would have evacuated. However, several surviving firefighters later expressed belief that they and others would have evacuated more urgently had they known of the South Tower’s collapse. Id. at 307.

Id. at 314 (emphasis added). Concurring in this assessment, one scholarly study concluded, “The use of ICS and unified command in the Pentagon incident response was in many ways a textbook example of high effectiveness.” Buck, et al., supra note 115, at 6.

Id.
promptly established near the crash site to allow assessment of the situation at all
times.\textsuperscript{147}

Despite the relative success of the Pentagon response, Arlington County’s
“after-action report” identified significant problems with incident command.\textsuperscript{148} These
included confusion over the names for organizational units and difficulties caused by
freelancing units self-dispatching to the scene.\textsuperscript{149} Acknowledging the successes and
failures with the responses at both the Pentagon and World Trade Center, the 9/11
Commission concluded that “the problems in command, control, and communications
that occurred at both sites will likely recur in any emergency of similar scale. The task
looking forward is to enable first responders to respond in a coordinated manner with the
greatest possible awareness of the situation.”\textsuperscript{150} To meet this challenge directly, the 9/11
Commission offered the following recommendation:

\textbf{Emergency response agencies nationwide should adopt the Incident
Command System (ICS). When multiple agencies or multiple jurisdictions
are involved, they should adopt a unified command. Both are proven
frameworks for emergency response.}\textsuperscript{151}

\textsuperscript{146} Agencies responding to the Pentagon attack included, for example, the FBI, FEMA, the Virginia State
Police, the Virginia Department of Emergency Management, and the fire departments of Alexandria,
Fairfax County, and the District of Columbia. \textit{Id.}
\textsuperscript{147} \textit{Id.} at 314-15.
\textsuperscript{148} ARLINGTON COUNTY, AFTER-ACTION REPORT ON THE RESPONSE TO THE SEPTEMBER 11 TERRORIST
ATTACK ON THE PENTAGON, available on-line at
\textsuperscript{149} \textit{Id.} A-25-26.
\textsuperscript{150} 9/11 COMMISSION REPORT at 315.
\textsuperscript{151} \textit{Id.} at 397 (emphasis in original). In addition to this express endorsement of ICS for government
agencies, more subtly, the 9/11 Commission also indicated support for adoption of ICS in the private
sector. In a separate recommendation, the 9/11 Commission endorsed “the American National Standard
Institute’s recommended standard for private preparedness” as a means of promoting employee safety,
business continuity, and protection of critical infrastructure. 9/11 COMMISSION REPORT at 398. This
recommended standard, which encourages voluntary use of ICS, was developed by the National Fire
Protection Agency (NFPA) and is known as “NFPA 1600.” \textit{See} NFPA 1600 Standard on
http://www.nfpa.org/assets/files/pdf/nfpa1600.pdf. For a more detailed examination of NFPA 1600 as a
voluntary preparedness standard, see William C. Nicholson, \textit{Seeking Consensus on Homeland Security
Standards: Adopting the National Response Plan and the National Incident Management System}, 12 WID.
2. ICS after 9/11.

In short order, the Commission’s recommendation for adopting ICS nationwide was accepted and mandated by the federal government. In 2002, Congress passed the Homeland Security Act, signed into law on November 25, 2002. Most famously, the Homeland Security Act established the U.S. Department of Homeland Security (DHS), created through a massive reorganization and consolidation of federal workers from 22 agencies, including FEMA and the U.S. Coast Guard. Less visibly, but consistent with the 9/11 Commission’s recommendation, the Homeland Security Act also set in motion a process leading to the effective mandate of the Incident Command System nationwide.

Through the Homeland Security Act, Congress charged DHS with “building a comprehensive incident management system with Federal, State, and local government personnel, agencies, and authorities, to respond to [terrorist] attacks and disasters.”

Four months later, on February 28, 2003, the President acted in furtherance of this charge by issuing Homeland Security Presidential Directive 5 (“HSPD-5”). HSPD-5 directed the Secretary of Homeland Security to “develop … and administer a National Incident Management System (NIMS).” NIMS was intended to provide a “consistent nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents,

---

157 Id. ¶ 15.
regardless of cause, size, or complexity.””158 Importantly, HSPD-5 required that the National Incident Management System “include a core set of concepts . . . covering the incident command system. . . .”159


On its face, Homeland Security Presidential Directive-5, as a Federal directive, only applies to Federal departments and agencies. However, HSPD-5 also invokes the mighty power of the federal purse to effectively compel adoption of the National Incident Management System and ICS by all levels of government. In brief but powerful terms, HSPD-5 specifically provided, “Beginning in Fiscal Year 2005, Federal departments and agencies shall make adoption of the [National Incident Management System] a requirement … for providing Federal preparedness assistance through grants, contracts, or other activities.”161 In September 2004, while rolling out this new condition for federal funding, DHS declared that “ICS is a critical component of the NIMS” and called for nationwide adoption of the Incident Command System in unequivocal terms:

If State, territorial, tribal, and local entities are not already using ICS, you must institutionalize the use of ICS (consistent with the concepts and principles taught by DHS) across the entire response system. . . . All Federal, State, territory,

---

158 Id. See also NIMS Document.
159 Id. (emphasis added).
160 See Nicholson, supra note 151, at n.10-30 and accompanying text.
161 Id. ¶ 20.
tribal, and local jurisdictions will be required to adopt ICS in order to be compliant with NIMS. 162

By the time DHS issued this unequivocal mandate, the ICS concept was already 30 years old. NIMS, however, was new, with a broader objective to help prevent and mitigate the impacts of all incidents, providing a systematic approach to training and exercises, personnel qualifications, equipment certification, information management, mutual aid agreements, research and development, and other preparedness measures. 163

In view of the sweeping scope of NIMS, local governments and other stakeholders complained about the federal mandate to begin complying with NIMS in the very year that NIMS was published. 164

Despite the federal mandate and the growing adoption of the Incident Command System across the country, the changes in incident management inspired by 9/11 required time to take root. Unfortunately, in the very year that the National Incident Management System was being rolled out to the country, the Gulf Coast states were struck by the single most destructive disaster in American history. 165

c. ICS and Hurricane Katrina.

Whatever else might be said about Hurricane Katrina, it can’t be said that we didn’t see it coming. Unlike the sudden and shocking attacks on 9/11, Katrina developed

162 Letter from Tom Ridge, Secretary of Homeland Security, to State Governors (Sept. 8, 2004), reprinted in Nicholson, supra note 151, at App. 1. To clarify the criteria for NIMS compliance, HSPD-5 also directed the DHS Secretary to “develop standards and guidelines for determining whether a State or local entity has adopted the NIMS.” HSPD-5 ¶ 20. Such standards may be identified today through the NIMS Resource Center, managed by FEMA and available on-line at www.fema.gov/emergency/nims/.

163 See generally NIMS Document at 7-8.

164 By one estimate, upon its initial publication, NIMS had “518 measurable requirements,” making compliance by the start of fiscal year 2006 “a Herculean and perhaps unreasonable task.” Los Angeles County Fire Chief Michael Freeman, quoted in Nicholson, supra note 151, at n.438.

165 While Hurricane Katrina will always overshadow the narrative and memories of 2005 for most people, the 2005 Atlantic hurricane season also produced a record 15 hurricanes, including the most Category 5 hurricanes in a single season: Katrina, Rita, and Wilma. ROBERT R. M VERCHICK, FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD 225 (2010).
predictably under the watchful eyes of weather forecasters, forming as a tropical depression on August 23, 2005. On Friday, August 26, the National Hurricane Center issued a warning that Hurricane Katrina appeared to be headed for New Orleans. On Saturday, the massive evacuation of New Orleans begun, with more than a million residents leaving the area in just over 24 hours. When Katrina made landfall in the early morning of Monday, August 29, 2005, TV crews were in place to capture it as a live, televised event.

New Orleans may have been the hardest hit, but the storm’s surge reached all the way across the Gulf Coast from Texas to central Florida. In terms of land mass, Katrina laid waste to some 90,000 square miles, an area the size of the United Kingdom. In terms of lives, at least 1,836 people died as a result of the hurricane and the ensuing floods. In terms of economic losses, Katrina far exceeded the damage from the 9/11 terror attacks or any other single disaster to strike the United States. Indeed, Hurricane Katrina in many ways defied conventional metrics and genre; for lawyers and legal scholars, it even helped usher in the new field of disaster law.

166 A NATION STILL UNPREPARED, supra note 1, at 22.
167 Id. In addition to warnings through regular channels, Max Mayfield, Director of the National Hurricane Center, also took the extraordinary step of personally calling the governors of the affected states on the weekend before hurricane landfall. Id. at 5.
168 Id. at 24.
169 For an extraordinarily detailed daily accounting of Hurricane Katrina from tropical depression to landfall, see THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED at 53 (2006) (hereinafter LESSONS LEARNED) at Chap. 3. For a humanizing and harrowing view of these same events, from the perspective of one family who evacuated from New Orleans and their father who stayed behind, see DAVE EGGERS, ZEITOUN (2009).
170 VERCHICK, supra note 165, at 2.
171 A NATION STILL UNPREPARED, supra note 1, at 21.
172 In 2005 dollars, Hurricane Katrina was estimated to have caused economic damages of $125-150 billion. The 9/11 terror attacks were estimated to have caused $87 billion in damages, and Hurricane Andrew (the next most destructive hurricane) was estimated to have caused $48.5 billion in damages. A NATION STILL UNPREPARED, supra note 1, at 37.
173 See FARBER, ET AL., supra note 16, at xxi, noting that in the years since Katrina (2005) and the first edition of the DISASTER LAW (2006), “courses on disaster issues have begun to spring up around the country, and a small, but growing, body of legal scholarship has emerged.”
Given the sheer scale of Hurricane Katrina, it is doubtful that even the best plans and policies, flawlessly implemented, could have spared the region from devastating impacts. The collective response to Katrina, however, was far from flawless. The infamously anemic response to Katrina was even more incomprehensible in that it was anticipated not just by weather forecasters six days before landfall, but by a whole suite of policymakers, engineers, emergency professionals, and others – months and even years in advance.\(^{174}\) In 2004, the year before Katrina hit, federal, state, and local officials had even participated in a planning exercise, dubbed “Hurricane Pam,” that specifically anticipated massive flooding in New Orleans.\(^{175}\) In April 2005, the Department of Homeland Security sponsored a large-scale exercise, “Top Officials 3” (“TOPOFF 3”), involving responders from all levels of government in a scenario implementing the newly minted National Incident Management System. According to a report by the Homeland Security Inspector General, the TOPOFF exercise revealed “a fundamental lack of understanding for the principles and protocols set forth in . . . NIMS.”\(^{176}\) This lack of understanding for the National Incident Management System reflected resoundingly in the response to Hurricane Katrina four months later.

Through all the official post-mortems that followed Katrina, including voluminous reports from the U.S. Senate,\(^{177}\) the House of Representatives,\(^{178}\) and the

\(^{174}\) As the Senate committee noted, the potentially devastating threat of a catastrophic hurricane to the Gulf Coast and New Orleans in particular has been known for decades. In 1965, Hurricane Betsy caused flooding in New Orleans that in some ways was remarkably similar to flooding from Katrina. In 1969, Hurricane Camille brought devastation to the Gulf Coast. Hurricane Georges hit the Gulf Coast in 1998, and prompted the State of Louisiana to ask FEMA pointedly for assistance with hurricane planning. \(Id.\) at 4.

\(^{175}\) \(Id.\) After “Hurricane Pam” in 2004, lessons learned were still being translated in draft plans in 2005 when the real Hurricane Katrina struck later that year. \(Id.\)

\(^{176}\) *Quoted in A Nation Still Unprepared* at 552.

\(^{177}\) *A Nation Still Unprepared*, supra note 1 (732 pages)
the lack of planning, coordination, and leadership was noted at every level of government. Part of the problem could be explained by the massive shifts in governmental organization and orientation that had been wrought by 9/11. These included the placement of FEMA under the Department of Homeland Security; the DHS creation of a new coordinating figure, the “principal federal official”, notwithstanding the federal coordinating officer established by the Stafford Act; and an overall national emphasis on terrorist threats.

As with the Homeland Security Act in the year following 9/11, Congress stepped in the year after Hurricane Katrina with new legislation: the Post-Katrina Emergency Management Reform Act. The new law attempted to fix a number of the problems identified with the Katrina response – even if it meant undoing some of the “reforms” in response to 9/11. The Post-Katrina Act, for example, gave FEMA a measure of autonomy within DHS; designated the FEMA Administrator as a direct advisor to the

---

179 LESSONS LEARNED, supra note 169 (217 pages).
180 A Nation Still Unprepared, supra note 1, at 552.
181 Id. See Stafford Act § 302(a): “Immediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area.” 42 U.S.C. § 5143(a) (2010). Where he deems necessary, the President shall also request the Governor of an affected State to appoint a state coordinating officer for purposes of coordinating state and local disaster assistance efforts with those of the Federal government. Id. § 5143(c).
182 Commenters on draft version of NIMS had specifically voiced concerns that the new government policies focused too heavily on terrorism, to the possible loss of attention for natural disasters and other hazards. William C. Nicholson, Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System, 12 Wid. L. Rev. 491-97 (2006). Consistent with that focus, the TOPOFF 3 exercise, four months before Katrina, involved over 10,000 participants from federal, state, tribal, and local agencies, as well as the private sector, all engaged in a training scenario involving terrorist strikes. See http://www.dhs.gov/files/training/editorial_0594.shtm (last visited May 30, 2012).
184 Among other things, the Post-Katrina Act recognized FEMA as a “distinct entity” with DHS; exempted FEMA from DHS reorganizational authority; and limited DHS’s authority to reduce FEMA’s responsibilities or divert its resources. See 6 U.S.C. § 316(a)-(c) (2010).
President; and affirmed FEMA’s primary mission to “reduce the loss of life and property and protect the Nation from all hazards. . . .”

One thing the Post-Katrina Act did not do, however, was alter the fundamental, nationwide mandate to adopt the National Incident Management System (NIMS), including the Incident Command System. Quite the contrary, the post-mortems recognized that major deficiencies in the Katrina response often simply reflected failures to implement the Incident Command System properly. In particular, critical reviews later found that the Katrina response failed to meet the ICS principles of unity of command and unified command. Behind these two concepts is an intention and expectation that proper use of ICS “clarifies reporting relationships and eliminates confusion caused by multiple, and potentially conflicting, directions and actions.”

Unity of command, the ICS principle that each individual reports to one and only one supervisor, proved challenging and elusive as 9/11 reforms and reorganizations created an abundance of officials with unclear lines of reporting. These included the Secretary of Homeland Security, the head of FEMA, the DHS principal federal official (PFO), and the Stafford Act’s federal coordinating officer (FCO). In the early days of the Katrina response, Michael Brown served as both the head of FEMA and the designated PFO – a “dual-hatted” role that the Senate committee later found in express violation of

---

185 Id. § 313(c)(4). Reflecting the widely panned performance of FEMA head Michael Brown (aka “Heckuva Job Brownie”) during Hurricane Katrina (see, e.g., A NATION STILL UNPREPARED at 556), the Post-Katrina Act also included extraordinary provisions to establish some minimal level of qualifications for appointment as FEMA Administrator. See id. § 313(c)(2) (FEMA Administrator must have “demonstrated ability in and knowledge of emergency management” and “not less than 5 years of executive leadership and management experience”).

186 Id. § 313(b)(1) (emphasis added).

187 LESSONS LEARNED, supra note 169, at 13.

188 See supra note 69 and accompanying text.
When Brown was shortly relieved of duty on Katrina, the second principal federal official, Coast Guard Admiral Thad Allen, “went operational,” again in conflict with official doctrine as well as the Stafford Act, which recognizes only the federal coordinating officer as the federal official in charge of field operations. This confusion of authority between the PFO and the FCO, a violation of the principle of unity of command, was resolved only when Allen was subsequently appointed as both federal coordinating officer and the principal federal official. Addressing this confusion directly, Congress through the Post-Katrina Act later provided that the “Principal Federal Official … shall not – (a) direct or replace the incident command structure established at the incident; or (b) have directive authority over the … Federal Coordinating Officer, or other Federal and State officials.” Accordingly, the new law affirmed and strengthened support for both the Incident Command System and the federal coordinating officer acting within it.

Beyond the confusion of authority at the federal level during the Katrina response, there was widespread confusion of authority at all levels of government. At the local level, this confusion of authority, contrary to the principle of unity of command, may have resulted in truly tragic consequences. At the Superdome, for example, where more than 20,000 evacuees had gathered and both the National Guard and the New Orleans Police Department has established a presence, there was no consensus on who was in

---

189 A NATION STILL UNPREPARED, supra note 1, at 536. See U.S. Dept. of Homeland Security, National Response Framework (Jan. 2008) (hereinafter National Response Framework) at 66 (“Once designated for an ongoing incident, the PFO relinquishes the conduct of all previous duties to focus exclusively on his or her incident management responsibilities”).

190 A FAILURE OF INITIATIVE, supra note 178, at 189.

191 More than just a confusion of position titles and reporting obligations, liabilities could arise from an individual exceeding his legal authority to obligate funds. See id. at 190 (“Only the FCO has authority to obligate money”).

charge, with both agencies denying lead responsibility. Similarly, at the Cloverleaf, an elevated highway structure where up to 7,000 people had gathered, senior officials for both the National Guard and state police did not know who was supposed to be in charge. Outside of these central locations, in areas where the Red Cross attempted to establish emergency shelters, the Red Cross was denied access by local law enforcement. Agency squabbles and confusion over command literally deprived people of shelter and left lives hanging in the balance.

Beyond the failures of unity of command, Katrina revealed widespread failures with establishing a unified command. In Louisiana, unified command was attempted, at least initially, to include the federal coordinating officer (FCO) from FEMA, a state coordinating officer (SCO) from the Louisiana Office of Homeland Security and Emergency Preparedness, and a Defense coordinating officer (DCO) from the U.S. Department of Defense. As unified command, these three officials should have established and maintained control of field operations in Louisiana, but they did not. Instead, command was hindered, as on 9/11, by freelancing agencies “just showing up” or agencies bypassing the command structure. For example, the head of Louisiana’s National Guard bypassed unified command and requested troops directly through the National Guard Bureau and the Department of Defense.

Part of the failure of unified command in Louisiana could be attributed to the direct hit the state took from Hurricane Katrina and the breach of the levees that

193 See A FAILURE OF INITIATIVE, supra note 178, at 185.
194 Id. at 186.
195 Id. at 349.
196 See supra note 71-73 and accompanying text (unified command).
197 A NATION STILL UNPREPARED, supra note 1, at 561.
198 A FAILURE OF INITIATIVE, supra note 178, at 189.
199 Id. at 561-62.
followed. Part of the failure could be attributed to our American system of federalism, with the federal government infamously waiting for state and local officials – overwhelmed and often victims of the hurricane themselves – to issue proper requests for federal support. Part of the failure could be explained by a lack of personnel needed to support the ICS structure, both in terms of numbers and in terms of key individuals. But according to the Senate report, “Perhaps the most significant reason for the failure to establish unified command in Louisiana is the lack of NIMS . . . training.” Indeed, as the Senate report noted, “the state brought in consultants a few days after Katrina made landfall to give basic ICS courses to [civilian response personnel] and to members of the Louisiana National Guard.”

In contrast with Louisiana, the State of Mississippi appeared to demonstrate considerably more success with its response to Hurricane Katrina. This success was attributed, in part, to “extensive prior training on the Incident Command System received by state and local responders in Mississippi.” Of course, successful responses to Katrina were also demonstrated by other state and federal agencies, most notably

---


201 Among other local impacts, the City of New Orleans had to abandon its emergency operations center when City Hall flooded, cutting off power from emergency generators. Numerous other local operations centers, including the headquarters for the Louisiana National Guard, also had to be abandoned due to flooding. A FAILURE OF INITIATIVE, supra note 178, at 185.

202 As the House Select Bipartisan Committee observed, “[F]aith in federalism alone cannot sanctify a dysfunctional system in which DHS and FEMA simply wait for requests for aid that state and local officials may be unable or unwilling to convey.” Id. at x.

203 A NATION STILL UNPREPARED, supra note 1, at 563.

204 Id. at 562.

205 Id. (emphasis in original).

206 Id. at 564. In fact, the state coordinating officer for Mississippi was critical of the weak knowledge of NIMS and ICS exhibited by federal responders, reporting, “I don’t think most people understood it at all. I don’t think anybody read the National Response Plan. . . .” Id.
including the U.S. Coast Guard, for whom training represents a fundamental qualification for duty. 207

After Katrina, in its “Lessons Learned” report, the White House reemphasized the critical need for training, specifically recommending that the Department of Homeland Security “institute a formal training program on NIMS . . . for all department and agency personnel with incident management responsibilities.” 208 In issuing this recommendation, the White House cogently observed, “The key to the implementation of ICS is training.” 209 Through the Post-Katrina Act of 2006, Congress adopted the recommendation of the White House and the House and Senate reports by establishing the National Integration Center within FEMA. 210 As established by Congress, the National Integration Center “shall ensure ongoing management and maintenance of the National Incident Management System . . . and any successor to such system or plan.” 211

Given all the lessons learned from Hurricane Katrina and the emphatic conclusions from the White House and both houses of Congress, it should be no surprise that training in NIMS and the Incident Command System accelerated in the years following Katrina. But would there be enough people trained well enough – and soon enough – to use the Incident Command System properly during the next big disaster? Five years after Katrina, the United States would face the next major trial of ICS.

---

207 As the public witnessed, the Senate report confirmed, “The Coast Guard performed heroically during Katrina, rescuing more than half of the 60,000 survivors who were stranded by the storm.” Id. at 27. Less famously, another distinguished Katrina response agency was the Louisiana Department of Wildlife & Fisheries, the state’s lead agency for search and rescue, which rescued many of the other survivors who were not rescued by the Coast Guard. Id.

208 LESSONS LEARNED, supra note 169, at 89.

209 Id. Hammering home the point, the White House report expressly declared, “All departments and agencies should undertake an aggressive ICS training program for all personnel who may deploy during a disaster. It is essential that personnel have a working knowledge of ICS before a disaster occurs.” Id.


211 Id. § 319(b)(1).
d. ICS and the Deepwater Horizon.

Officially, no one saw this coming. When in February 2009 British Petroleum submitted their exploration plan for the Macondo well in the Gulf of Mexico, they asserted that it is “unlikely that an accidental oil spill release would occur from the proposed activities.” 212 In April 2009, the former Minerals Management Service of the U.S. Department of the Interior approved BP’s plan with a “categorical exclusion” under the National Environmental Policy Act. 213 With hindsight, one commentator remarked, “What we had here was willful blindness.” 214

Twelve months after BP’s plan was approved, the “unlikely” spill came to pass as the Macondo well was being completed deep in the waters of the Gulf of Mexico. On April 20, 2010, an explosion tore through the Deepwater Horizon drill rig, killing 11 crew members, injuring many others, and eventually resulting in what President Obama described as “the worst environmental disaster America has ever faced.” 215

On April 22, 2010, two days after the explosion and fire on the Deepwater Horizon, the drill rig sank into the waters of the Gulf. The next day, April 23, remotely operated vehicles one mile below the surface were investigating the blow-out preventer on the Macondo well when they discovered oil leaking from the end of a riser pipe where

214 Houck, supra note 38, at 11037.
it had broken off when the Deepwater Horizon sank.\textsuperscript{216} For at least 87 days, through Top Kill, Junk Shot, and other failed control efforts, oil flowed from the pipe into the Gulf of Mexico.\textsuperscript{217} How much oil flowed into the Gulf during this event remains uncertain. One official government estimate put it at approximately 205 million gallons,\textsuperscript{218} a volume that would make the Deepwater Horizon spill almost 20 times larger than that of the Exxon Valdez in 1989.\textsuperscript{219} The Deepwater Horizon was not only the largest oil spill in U.S. history; it was the largest accidental spill the world has ever seen.\textsuperscript{220}

The Deepwater Horizon disaster also triggered a response unlike one the world had ever seen. At its peak, the response involved more than 120 aircraft, 7,000 vessels, and 47,000 people.\textsuperscript{221} As lead agency, the U.S. Coast Guard deployed active-duty members and called up reservists from across the country. Responders joined in from other federal agencies, including the EPA, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration.\textsuperscript{222} Some 1,100 National Guard troops from Louisiana supported the response effort, joined by scores of other federal, federal, federal.

\textsuperscript{216} NAT’L COMM. ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT (2011) (hereinafter DEEPWATER COMMISSION)
\textsuperscript{217} Id. at 148-165. The flow of oil was first contained through a test of “static kill” on July 15. After that successful test, mud and then cement were pumped into the well and the static kill was declared a success on August 4, 2010. Id. at 167.
\textsuperscript{218} Id. at 167-68 (4.9 million barrels x 42 gallons per barrel). See Clean Water Act § 311(a)(13), 33 U.S.C. § 1321(a)(13) (definition of “barrel”).
\textsuperscript{219} Zygmunt J.B. Plater, Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?, 40 ELR 11041 (Nov. 2010). The Exxon Valdez spill is commonly estimated to have released approximately 11 million gallons of crude oil into the waters of Alaska’s Prince William Sound. Id.
\textsuperscript{220} See Rebecca M. Bratspies, A Regulatory Wake-Up Call: Lessons from BP’s Deepwater Horizon Disaster, 5 GOLDEN GATE U. ENVTL. L. 7 at n.80 (noting that the only oil spill surpassing that of the Deepwater Horizon was the intentional release of oil from the Kuwaiti oil fields by the Iraqis during the First Gulf War).
\textsuperscript{221} RAY MABUS, SEC’TY OF THE NAVY, AMERICA’S GULF COAST: A LONG TERM RECOVERY PLAN AFTER THE DEEPWATER HORIZON OIL SPILL 2 (Sept. 2010). By one estimate, the Deepwater Horizon response “coordinated more vessels, aircraft, and personnel than all the oil spill events in the last 20 years combined.” R. Charles Epperson, A Perspective from Within Deepwater Horizon’s Unified Command Post Houma at 9 (Deepwater Horizon Study Group, Working Paper, Jan. 2011) (emphasis added).
state, and local agencies. Thousands of volunteers offered to help with wildlife rescue. Together with BP as the “responsible party,” the “co-combatants” placed nearly four million feet of floating boom to capture the oil slicks, applied some 1.9 million gallons of chemical dispersants to break up the oil, and relocated 25,000 sea turtle eggs from the Gulf Coast to the Atlantic coast of Florida. Meanwhile, with the riser pipe still spewing millions of gallons of oil per day one mile below the surface, the President channeled the Manhattan Project by assembling the brightest scientists of a generation to find a technical solution.

With an army of responders including rocket scientists and shrimp fishermen, National Guardsmen and Audubon volunteers, uniformed troops and corporate executives, and with every federal, state, and local agency in the Gulf Coast seeming to play some role, the need for command and control on the Deepwater Horizon response could not have been greater. At least for a while, many seemed to wonder who was in charge and by what authority. For a region still recovering from Hurricane Katrina, state governments seemed to think reflexively of FEMA and the Stafford Act in the face

---

222 Deepwater Commission at 133.
223 Id.
224 According to the Audubon Society, more than 12,000 volunteers signed up to help during a single week in early May. Id. at 141.
225 Mabus, supra note 221, at 2.
226 For a close examination of the science, law, and controversy surrounding the record use of dispersants on the Deepwater Horizon spill, see Abby J. Queale, Responding to the Response: Reforming the Legal Framework for Dispersant Use in Oil Spill Response Efforts in the Wake of Deepwater Horizon, 18 Hastings W.-N.W. J. Envtl. L. & Pol’y 63, 82 (2012).
227 Mabus, supra note 221, at 31.
228 The scientists were led by Dr. Steven Chu, the Secretary of Energy and Nobel Prize-winning physicist who had previously directed the Lawrence Livermore National Laboratory. Secretary Chu’s team also included Tom Hunter, the Director of Sandia National Laboratories, and Richard Garwin, who helped design the world’s first hydrogen bomb and had worked on extinguishing the oil fires in Kuwaiti after the First Gulf War. Deepwater Commission at 148-49.
229 See Griggs, supra note 20, at 59.
of an environmental disaster. They apparently did not realize immediately that FEMA’s money was not needed where the Oil Pollution Act made the responsible party liable for the full costs of the response and the National Contingency Plan put the U.S. Coast Guard squarely in charge of responding to an oil spill in the marine environment. While the legal framework may have been unfamiliar to some, by 2010, all levels of government should have been quite familiar with the operational framework for managing the response: the Incident Command System.

The Incident Command System structure begins with appointment of an incident commander. For a spill involving oil or hazardous substances, the incident commander will likely be an on-scene coordinator (OSC), a position with authority under the National Contingency Plan to direct a response and obligate funds of the government. For the Deepwater Horizon, the first on-scene coordinator was a Coast Guard Captain, assuming command on the evening of the explosion and fire to initiate search and rescue operations. The next day, command was transferred to Rear Admiral Mary Landry, commander of Coast Guard District 8 (Gulf Coast), who served as federal on-scene coordinator (FOSC). On April 22, the day the rig sank, a unified command structure was established including Admiral Landry plus senior executives from the former

---

230 DEEPWATER COMMISSION at 138 (noting that Louisiana Governor Bobby Jindal’s advisors reportedly spent days trying to determine whether the Stafford Act or the National Contingency Plan applied).
231 Oil Pollution Act § 1002, 33 U.S.C. § 2702 (2010). In general, “each responsible party for a vessel or a facility from which oil is discharged … into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages … that result from such an incident.” OPA § 1002(a). The removal costs for which a responsible party is liable include “all removal costs incurred by the United States, a State, or an Indian tribe” under authorities including OPA and state law. Id. § 1002(b).
232 See 40 C.F.R. § 300.120(a)(1) (2010).
233 See National Contingency Plan at 40 C.F.R. § 300.322(b) (duties of OSC). In this way, the OSC for an oil or hazardous substances spill functions similarly to a Federal coordinating officer (FCO) appointed during a Stafford Act event. See supra note 181 and accompanying text (authority of FCO).
234 DEEPWATER COMMISSION at 130.
Minerals Management Service and BP.\textsuperscript{235} As the scope of the response broadened, unified command expanded to include state OSCs from Louisiana, Mississippi, Alabama, and Florida.\textsuperscript{236} Additional incident command posts were set up in Mobile, Alabama; St. Petersburg, Florida; and Houston, Texas.\textsuperscript{237} To provide an overall management structure, a Unified Area Command was stood up in Robert, Louisiana, and later moved to New Orleans.\textsuperscript{238} To clarify the overall command, on April 29, the Coast Guard declared the Deepwater Horizon a “Spill of National Significance,”\textsuperscript{239} permitting the appointment of a National Incident Commander.\textsuperscript{240} On May 1, Homeland Security Secretary Napolitano appointed as National Incident Commander the outgoing Coast Guard Commandant, Admiral Thad Allen.\textsuperscript{241}

As the highest ranking officer in the U.S. Coast Guard,\textsuperscript{242} with distinguished leadership on the Gulf Coast in response to Hurricane Katrina,\textsuperscript{243} and having even overseen a simulated Spill of National Significance off the coast of Louisiana in 2002,\textsuperscript{244} Admiral Allen knew command, the Incident Command System, and the National Contingency Plan. Other career responders throughout the federal, state, and local

\textsuperscript{235} Epperson, supra note 221, at 2.
\textsuperscript{236} Id. at 2. See also DEEPWATER COMMISSION at 138.
\textsuperscript{237} Epperson, supra note 221, at 3.
\textsuperscript{238} Id. at 7.
\textsuperscript{239} See National Contingency Plan at 40 C.F.R. § 300.323.
\textsuperscript{240} This was the first declaration of a Spill of National Significance (SONS) since this authority was added to the NCP in 1994. DEEPWATER COMMISSION at 136. See NCP at 59 Fed. Reg. 47,484 (Sept. 15, 1994). The NCP provisions provide little guidance on the meaning of a SONS declaration, other than it allows the appointment of a National Incident Commander and that, for a SONS in the coastal zone, the National Incident Commander “will assume the role of the OSC in communicating with affected parties and the public, and coordinating federal, state, local, and international resources at the national level.” 40 C.F.R. § 300.323(c). As the SONS provision of the NCP was originally proposed (and finally promulgated), at least one commenter expressed concern that designation of a National Incident Commander would threaten the integrity of the Incident Command System structure. In response, EPA dismissed this concern, noting that having a senior official responsible for communications and coordination on a national level during major events simply “reflects historical practices.” 59 Fed. Reg. 47,403 (Sept. 15, 1994) (preamble).
\textsuperscript{241} DEEPWATER COMMISSION at 136.
\textsuperscript{242} See id. (Allen then the only four-star Admiral).
\textsuperscript{243} See supra notes 166-117 and accompanying text.
governments knew these things too. If ICS and the National Incident Management System were still new to some responders before Katrina hit in August 2005, they were not new when the Deepwater Horizon exploded and sank in April 2010, particularly with the intervening experiences of Hurricane Rita in September 2005, other major hurricanes including Gustav and Ike in 2008, and other national disasters as well as training exercises.\textsuperscript{245}

Consistent with their training and experience in ICS, state on-scene coordinators for Louisiana, Alabama, and Mississippi participated in the Deepwater Horizon Unified Command, at least at first. However, the Governors of these states and other state and local officials appeared much less familiar with ICS and resentful of federal control over the response. Accordingly, the Governors of Louisiana, Mississippi, Alabama, and Florida declared state emergencies in response to the oil spill, and began coordinating state response efforts outside of the unified command framework.\textsuperscript{246} Instead of unified command, state and local officials began creating their own response structures and their own response plans, repudiating the area-specific oil spill-response plans that they had previously developed and approved in conjunction with the federal government. Admiral Allen later called this “the social and political nullification” of the National Contingency Plan,\textsuperscript{247} with its ICS principles of unified command and unity of command.

\textsuperscript{244} See DEEPWATER COMMISSION at 137.

\textsuperscript{245} Perhaps the largest training exercise between Katrina and the Deepwater Horizon was TOPOFF 4 in 2007, which simulated terrorist attacks in Oregon, Arizona, and the U.S. Territory of Guam with detonation of Radiological Dispersion Devices, aka “dirty bombs.” The exercise involved more than 15,000 participants representing federal, state, territorial, and local agencies. See http://www.dhs.gov/files/training/gc_1179430526487.shtm (last visited June 3, 2012).

\textsuperscript{246} DEEPWATER COMMISSION at 138-39.

\textsuperscript{247} Id. at 139.
Of course, if the National Contingency Plan was nullified socially and politically, it remained in effect legally, as a rule promulgated under statutory authority. Admiral Allen certainly understood this, along with all other participants in the Deepwater Horizon Unified Command, including BP. However, BP’s participation within unified command, consistent with ICS and the National Contingency Plan, understandably raised many questions in the eyes of the public and political leaders.

Aside from the broader questions suggested above, the actual implementation of ICS in the Deepwater Horizon response exhibited familiar challenges seen with prior disasters. These included (1) a lack of appropriately trained ICS personnel and (2) difficulties with assigning trained personnel to appropriate ICS positions. Nevertheless, for all the challenges with training and chafing over federal control, after the Macondo well was finally capped and the post mortems began, the common view seemed to be that ICS framework for the Deepwater Horizon response worked fairly as intended. For the Enbridge spill near Marshall, Michigan, happening in the same

---

248 See supra note 39. See also Clean Water Act § 311(c)(3): “Each Federal agency, State, owner or operator, or other person participating in efforts under [Clean Water Act Section 311] shall act in accordance with the National Contingency Plan. . . .” 33 U.S.C. § 1321(c)(3)(A)(2010). As a rule promulgated by an agency pursuant to an express grant of statutory authority, the National Contingency Plan may be considered a particular species of regulation known as a “legislative rule,” carrying a binding force of law. See DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 7:9-14 (2d. ed. 1979).

249 As BP explicitly acknowledged in its “lessons learned” report, “The entire spill response has been and will continue to be conducted under the Unified Command structure, in which ultimate authority resides in the United States Coast Guard.” BP, Deepwater Horizon Containment and Response: Harnessing Capabilities and Lessons Learned (Sept. 2010).

250 As one legal commentator observed, “That the responsible party is both an adversary and a partner may be confusing to the general public but is a direct result of the incongruent obligations imposed by [the Oil Pollution Act].” Griggs, supra note 20, at 60.

251 For one frank, inside perspective on the ICS operation for the Deepwater Horizon response, see R. Charles Epperson, A Perspective from Within Deepwater Horizon’s Unified Command Post Houma (Deepwater Horizon Study Group, Working Paper, Jan. 2011).

252 See, e.g., U.S. Coast Guard, Deepwater Horizon ISPR Final Report at 74 (2011) (“NIMS/ICS generally worked well for this incident”); Griggs, supra note 20, at 79 (“The existing regulatory structure appears for the most part to have functioned as it was intended”).
summer of 2010, responders seemed to share this same assessment that ICS worked effectively.253

e. ICS Applications Today.

Since the Deepwater Horizon response, as the Commission suggested, federal and state agencies have made efforts to establish liaisons between unified command and local communities, and have added local officials to the federal and state officials directing operations through unified command. In June 2011, for example, the U.S. Coast Guard and the State of Washington included local officials in a full-scale exercise254 simulating response to a major oil spill in the Puget Sound.255 Consistent with recommendations from both ICS practitioners and scholars, the Salish Sea exercise allowed participants to practice their ICS roles and helped instill a sense of “response community” among federal, state, and local responders in the Puget Sound area. Responding pointedly to concerns expressed by some ICS critics,256 the exercise also included simulation of coordinated support from volunteers.257

Of course, there are costs associated with inclusivity. More than a decade ago, social scientists and ICS practitioners recorded concerns with “mobilization overkill,” congesting field operations with bodies seemingly present merely to fill out

253 “For [EPA] Region 5, this is one of our first big incidents utilizing the Incident Command System. It’s working very well.” Enbridge Response (Statement of Steve Renninger, EPA Region 5 Planning Section Chief).

254 Such drills are specifically authorized by Congress, pursuant to Section 311 of the Clean Water Act, and suggested to include “participation by Federal, State, and local agencies” as well as private industry and responsible parties. 33 U.S.C. § 1321(j)(7)(2010).


256 See supra notes 93, 120 and accompanying text.
organizational charts. Excessive elaboration of organizational structures may also create more opportunities for misplacing people within the organization. Experience with the Deepwater Horizon response, as one Coast Guard evaluator observed, demonstrated “how critical the correct use of our members in the right positions is to the success of the operation.” Most recently, Professor Gregg Macey, applying organization theory to the Deepwater Horizon response, described a “paradox of organizing”: while we rely upon organizations to prevent and respond to crises, organizations may themselves contribute to the cause or exacerbation of those crises. As prior studies have hinted, the paradox of organizing may never admit of any simple solutions, although it may benefit from future research by practitioners, policymakers, and academics.

Any organizational construct will have its upsides and downsides. But ICS has evolved over decades of experience, learned from successes and failures, and emerged as the standard for incident management in the United States. Today, beyond simply a measure promoted by federal pursue strings, ICS is now the law far and wide.

---


258 See supra note 105 and accompanying text (including comments from battalion chief about too many bodies filling boxes and “nobody left to put out the fire”).

259 Epperson, supra note 221, at 5. Epperson proceeds to emphasize that this systemic problem is not one likely to be resolved through additional ICS training. Epperson notes, however, that many fear such additional training will be the “likely reaction for States, local, and industry,” recognizing that “it is much easier to blame training” than to alter fundamental organizational structures. Id.

260 Macey, supra note 40, at 2068-72.

261 See, e.g., Cole, supra note 45, at 225 (“no easy answers” to questions of how to improve or even distinguish among ICS problems of system, implementation, and context).

262 Macey, supra note 40, at 2111 (“Future commissions, those who develop emergency management systems, and legal scholars should consider how this paradox could be better managed”).

263 As Cole in his 2000 evaluation of ICS pragmatically acknowledged, “there may be an unavoidable price to pay in the form of additional complications and workload” whenever expanding an organization’s structure and mission in order to satisfy external demands. Cole, supra note 45, at 220-21.

264 See supra note 161 and accompanying text (discussion of HSPD-5).
mandated by state statutes\(^\text{265}\) and regulations,\(^\text{266}\) as well as regional compacts,\(^\text{267}\) local ordinances,\(^\text{268}\) and executive orders.\(^\text{269}\) As such, ICS must be understood by those who would engage in it, as well as those lawyers and legal scholars who would advise clients and policymakers competently on how it should be considered, applied, or changed.

### IV. The Role of the Lawyer in the Incident Command System

[T]he law and lawyers must support . . . operations in new ways. . . .\(^\text{270}\)

\(^{265}\) See, e.g., ALASKA STAT. §§ 26.23.077(a)-(b) (local, interjurisdictional, regional, and state emergency plans shall include “an incident command system that describes the respective roles of affected persons and agencies”); CAL. GOVT CODE § 8670.29 (“oil spill contingency plan shall . . . provide for the use of an incident command system to be used during a spill”); CAL. GOVT CODE § 8588.12 (terrorism awareness curriculum shall include understanding “the structure and function of an incident command system”); GA. CODE ANN. § 38-3-57 (Georgia Emergency Management Agency “shall establish and maintain . . . a standardized, verifiable, performance based unified incident command system”); KAN. STAT. ANN. § 48-928(o) (state division of emergency management shall implement the use of an incident management system during emergency and disaster situations by all state, county, city and interjurisdictional disaster agencies which respond to such emergency and disaster situations”); WASH. REV. CODE § 38.52.030 (state director must develop comprehensive, all-hazard emergency plan which “must specify the use of the incident command system for multiagency/multijurisdiction operations”); WASH. REV. CODE 43.43.963 (regional fire service plans “shall be consistent with the incident command system”); WASH. REV. CODE § 43.43.974 (mobilization of regional law enforcement “shall be consistent with the incident command system”).

\(^{266}\) See, e.g., CAL. CODE REGS. tit. 19, § 2405 (“Emergency response agencies operating at the field response level of an incident shall utilize the Incident Command System, incorporating the functions, principles and components of ICS”); CAL. RULES OF CT. § 10.172(b)(1)(C) (“Each court security plan must . . . address the following general security subject areas . . . Incident command system”); LA. ADMIN. CODE tit. 48 § 6041(C) (ambulance services must have a disaster plan that “shall include an incident command system that is compliant with [NIMS]”); N.Y. COMP. CODES R. & REGS. tit. 58 § 155.7(e)(2)(v) (school emergency response plan “shall include . . . definition of the chain of command in a manner consistent with the National Incident Management System / Incident Command System”); WASH. ADMIN. CODE § 296-824-50010 (businesses must ensure protection of employees from releases of hazardous substance by making sure that “a single individual, acting as the incident commander (IC), is in charge of the site-specific incident command system”).


\(^{268}\) See, e.g., King County, WA, Ordinance 15,114 (“The National Incident Management System is hereby adopted”).

\(^{269}\) See, e.g., N.Y. Exec. Order No. 26 § 5.26 (1996), N.Y. COMP. CODES R. & REGS. tit. 9 § 5.26 (“NOW, THEREFORE, I, GEORGE E. PATAKI, Governor of the State of New York . . . do hereby establish the . . . Incident Command System as the State standard command and control system during emergency operations”).

In late July 2010, as unified command on the Gulf Coast was still struggling to seal the cap on the Macondo well, the Enbridge oil spill occurred up north near Marshall, Michigan. As with the Deepwater Horizon response, the Enbridge spill required a massive mobilization of personnel and resources from all levels of government and a responsible party, working together through unified command.\textsuperscript{271} Within six months, yet another oil spill, one of minimal volume but with potentially grave environmental and economic implications,\textsuperscript{272} occurred in the middle of winter on Alaska’s North Slope.\textsuperscript{273} Before 2011 was two-thirds through, an EF-5 tornado tore through the heart of Joplin,\textsuperscript{274} massive flooding struck the Midwest,\textsuperscript{275} the Southwest experienced record fires,\textsuperscript{276} an

\textsuperscript{271} See supra notes 2-9 and accompanying text.


\textsuperscript{273} TAPS Pump Station No. 1 oil spill was discovered by workers on the morning of January 8, 2011, with oil collecting in the basement of a pump building at the head of the pipeline on Alaska’s North Slope. Repair of the leak required shutting down the 800-mile Trans-Alaska Pipeline, stopping oil production on the North Slope of approximately 630,000 barrels per day. Restart of the pipeline raised grave concerns about the loss of pipeline integrity while the pipeline idled in the bitter Arctic temperatures. See Casey Grove, Leak at Pump Station Shuts Down Pipeline, AnCh\textsc{anchorage Daily News}, Jan. 9, 2011, available at \url{http://www.adn.com/2011/01/08/1638862/pump-station-leak-shuts-down-pipeline.html}.

\textsuperscript{274} The Joplin tornado, on Sunday, May 22, 2011, with winds in excess of 200 miles per hour, claimed an estimated 157 lives, making it the single deadliest tornado since modern recordkeeping began in 1950. See \url{http://www.noaanews.noaa.gov/2011_tornado_information.html}.

\textsuperscript{275} Flooding in 2011 struck the entire drainage of the Mississippi River, from North Dakota, through Illinois, Missouri, Mississippi, and Arkansas, to the Mississippi Delta, and east to Western Kentucky and Tennessee. It was the largest flooding along the Mississippi in the past century, comparable to the Great Mississippi Flood of 1927. See http://en.wikipedia.org/wiki/2011_Mississippi_River_floods.

earthquake rattled the Washington Monument, and Hurricane Irene swept up the Atlantic Seaboard, swelling rivers from Puerto Rico to Vermont and bringing New York City to a standstill. 278

In major incidents such as these, the success of ICS operations will depend on the coordinated efforts of many participants, including legal counsel. Consider just a few of the legal questions raised in the early days of the Hurricane Katrina response: Can FEMA initiate a response without a request from the Governor? 279 If a responding agency deploys personnel who have not had proper immunizations, can the agency be held liable? 280 Can evacuees bring their family dog to the shelter? 281 Can an undocumented worker who lost his home to the hurricane seek emergency shelter from

277 See Joel Achenback, 5.8, Virginia Earthquake Shakes East Coast, Rattles Residents, WASH. POST, Aug. 23, 2011.
278 Crossroads of World Shuts Down and Waits, SEATTLE TIMES at A1, Aug. 28, 2011 (discussing eerie quiet in New York City after evacuations ordered in advance of Hurricane Irene).
279 At the time Katrina hit, the U.S. Department of Justice Office of Legal Counsel had reportedly determined that the federal government had authority to respond even over the objection of local officials. See Ryan, supra note 200, at 529, a position apparently consistent with the long-held (but little exercised) view of FEMA. FARBER, ET AL., supra note 16, at 98. Upon review, the House criticized FEMA’s reliance on a “pull” system of waiting for requests to deploy assets rather than utilizing a “push” system to deploy assets based upon need rather than just request. A FAILURE OF INITIATIVE, supra note 178, at 136-37. To clarify FEMA’s authority to respond without a specific state request, Congress amended the Stafford Act to add Section 402(5), which provides that, in any major disaster, the President may “provide accelerated Federal Assistance and Federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, which may be provided in the absence of a specific request. . . .” 42 U.S.C. § 5170a(5) (2010).
281 At the time Hurricane Katrina hit New Orleans, with a population of 500,000, as many as 69 percent of the people were pet owners. By some estimates, as many as 600,000 pets and animals were affected by the hurricane. Introduction of the Pets Evacuation and Transportation Standards (PETS) Act of 2005, 151 Cong. Rec. E1943, (Sept. 22, 2005) (statement of Rep. Tom Lantos). Many people reportedly risked their lives to save their pets, among other things by refusing to board evacuation buses without their pets. See Casey Chapman, Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property, 38 CAPITAL U. L. REV. 187, 205-06 (2009). For a compelling documentary on the impacts of Hurricane Katrina on pets and prolonged efforts to return them to rightful owners, see Mine (film movement 2009). In response to these concerns, Congress passed the Pet Evacuation and Transportation Standards (PETS) Act of 2006, Pub. L. No. 109-38, codified at 42 U.S.C. §§ 5196b(g) (2008), requiring that state and local preparedness plans “take into account the needs of individuals with household pets and service animals prior to, during, and following a major disaster or emergency.”
FEMA? What are the specific requirements for providing reimbursement to states contributing mutual aid? What are the requirements for out-of-state health care professionals to practice in states where they are not licensed? Can contaminated flood waters from New Orleans be pumped into Lake Pontchartrain without a permit? For purposes of removing hurricane debris from private property, consistent with the Fourth Amendment and the Stafford Act, how can government agencies obtain access to private properties when the owners cannot be identified or located? Do requirements

Among the massive devastation wrought by Hurricane Katrina were severe impacts on immigrant communities. By one estimate, the flood following Hurricane Katrina displaced nearly 40,000 Mexican citizens living in the New Orleans area. VERCHICK, supra note 165, at 141. U.S. law generally bars non-citizens from receiving federal assistance. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, codified at 8 U.S.C. §1611(a)-(c). However, it allows an exception for “short-term, non-cash, in-kind disaster relief.” Id. § 1611(b)(1)(B). Reflecting that exception, FEMA issued a public notice stating, “Regardless of immigration status, all individuals impacted by Hurricanes Katrina and Rita are eligible for non-cash emergency food, water, medical care, shelter, clothing, and other urgent disaster-related needs from FEMA.” FEMA, Disaster Assistance Available for Non-Citizens (Nov. 12, 2005). For a thorough analysis of the rights and limitations of immigrants respecting assistance in response to a major disaster or declared emergency, see Ashley L. Morey, No Shelter From the Storm: Undocumented Immigrants and Federal Disaster Aid, 11 SEATTLE J. SOC. JUST. __ (2012).

Mutual aid in response to Hurricane Katrina included deployment of more than 67,891 personnel from 48 states, the District of Columbia, the Virgin Islands, and Puerto Rico, and was viewed as successful by state officials from Louisiana and Mississippi. A FAILURE OF INITIATIVE, supra note at 144-45. For an excellent introduction to mutual aid framework and requirements, see Alan D. Cohn, Mutual Aid: Intergovernmental Agreements for Emergency Preparedness and Response, 37 URB. LAW. 1 (2005).

Telephone Interview with Catherine Bernstein, Acting Chief Counsel, California Emergency Management Agency (July 13, 2012) (hereinafter, Bernstein interview). In general, the Emergency Management Assistance Compact, established pursuant to federal statute, Pub. L. No. 104-321 (1996), provides, “Whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance . . . subject to such limitations and conditions as the Governor of the requesting state may prescribe. . . .” Emergency Management Assistance Compact, Art. V.


Under Stafford Act § 407, no removal of debris is authorized for federal funding “unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property . . . .” 42 U.S.C. § 5173(b).

To allow hurricane debris removal to proceed, state and local governments sought to obtain access by signed consent from the property owners whenever practicable. See, e.g., Right of Entry Agreement City of Gulfport, Mississippi (on file with author). When consent proved impracticable or impossible, state and local governments obtained legal authority by other means, including invocation of state emergency powers and placement of public notices on television and in print media prior to commencing debris removal and/or demolition. See, e.g., letter from Harry P. Hewes, City Attorney, Gulfport, MS, to William L.
for conducting an environmental impact statement under the National Environmental Policy Act apply to siting new disposal facilities for the mountains of debris left by the hurricane? 288

The stream of legal issues left in the wake of a disaster raises one more obvious question: Where are the lawyers? The legal literature on this question has been rather spare so far, although given the major events of the past decade, it appears to be growing. 289 This Part will begin to formulate answers or at least suggestions for where the lawyers are, or where they might go, in order to (1) support clients who integrate within an ICS structure or (2) support the response directly by integrating into the ICS structure themselves. Where lawyers integrate directly into ICS, this Part will examine the various roles lawyers may serve within the ICS organization, including the emerging role of the ICS legal officer.

a. The Office.

The most likely place that lawyers will support their clients during an ICS activation will be wherever those lawyers support their clients ordinarily; i.e., their usual

---

288 See generally Stafford Act § 316, 42 U.S.C. § 5159 (2010) (NEPA environmental impact procedures generally inapplicable to federal actions taken or funded in response to a major disaster or emergency for the specific purpose of “restoring a facility substantially to its condition prior to the major disaster or emergency”).

legal office. Staying put, as it were, has many advantages: saving the time and costs of travel; reducing the logistical pressures of providing additional workspace, meals, and lodging to another body at an incident scene; avoiding concerns about “mobilization over-kill” and over-crowding in an incident command post. Perhaps most important, staying put will ensure the lawyer has the resources (including phones, computers, Internet access, and administrative support) that lawyers often need in order to provide clients with quality legal support.

Lawyers provide legal support to remote clients every day, assisted by advances in information technology and collaboration tools. In the ICS context, this has been reported to work well. However, when interacting with clients integrated within an ICS structure, a lawyer should understand at least the basics of ICS doctrine. Once integrated within an ICS structure, clients may have a new position title; e.g., Operations Section Chief or Environmental Unit Leader. Moreover, consistent with the ICS

---

290 Of course, legal offices themselves can be impacted by disasters and other incidents. See, e.g., G.M. Filisko, What Did Katrina Teach Us?, ABA J. at 33 (July 2011) (noting that almost 9,000 Louisiana lawyers were evacuated for more than a month as a result of Hurricane Katrina, many lawyers losing both their offices and their homes). As a result of the Katrina experience, the American Bar Association has encouraged law firms to adopt preparedness measures to ensure the protection of assets for both the firm and its clients. See, e.g., ABA COMMITTEE ON DISASTER PREPAREDNESS AND RESPONSE, SURVIVING A DISASTER: A LAWYER’S GUIDE TO DISASTER PLANNING (2011), available on-line at http://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.authcheckdam.pdf.

291 By contrast, one trio of FEMA field counsel supporting the Hurricane Katrina response had to share a data cable in their first week, allowing each lawyer only 20 minutes of email and Internet access each hour. FEMA, DISASTER OPERATIONS LEGAL REFERENCE A-28 (Nov. 2011) (hereinafter DOLR).


293 Telephone Interview with Leif Palmer, Associate Regional Counsel, U.S. EPA Region 4 (Mar. 16, 2012) (incident commander “is not shy about calling me” from the command post, whenever he needs legal assistance); Telephone Interview with Bruce Jones, Associate Regional Counsel, U.S. EPA Region 6 Mar. 12, 2012 (senior EPA official sent to the field during Hurricane Katrina response “reached back” to EPA attorney for legal advice).
principle of unity of command, the client integrated within an ICS organization may have a new ICS supervisor. This means that a client’s responsibilities and supervisor within the ICS context may differ from that individual’s usual assigned duties and supervisor. The reality and significance of these different demands and relationships facing a client in ICS may be difficult for a lawyer to appreciate remotely, particularly for a lawyer with no concept of ICS doctrine.

But even if the remote lawyer is able to comprehend the client’s different work environment, there are still particular challenges for lawyers who attempt to serve ICS clients remotely from the relative comfort of the usual offices. For one thing, it may be difficult or impossible for a lawyer to reach a client who is at the scene of a disaster, with communications channels impaired by power outages, downed phone lines, and remote areas that lie beyond reach of cell signals or Internet service. Moreover, even where communications are working fully, responders may not have time or patience to keep their lawyers posted on changing site conditions. Distant lawyers may, in fact, discover that their clients in the field have been engaging in activities such as negotiations beyond their lawyer’s knowledge. As such, in order to better serve their clients, lawyers may consider leaving their offices and moving closer to the response activity.

b. The Emergency Operations Center.

---

294 See supra note 69 and accompanying text.
295 See Joseph G. Jarret & Michele L. Lieberman, When the Wind Blows: The Role of the Local Government Attorney Before, During, and in the Aftermath of a Disaster, 36 STETSON L. REV. 293, 312 (2007) (“the power outages that accompany most disasters deny attorneys the use of electronic research, the ability to confer with colleagues, access to computer databases, and the use of other helpful resources”).
296 See Filisko, supra note 290 (quoting Judge Madeleine M. Landrieu on the aftermath of Hurricane Katrina: “The system was challenged by the devastation to the infrastructure—no power, no cellphone signals, no working landlines”).
If not sitting in their usual offices, lawyers might step closer to the response activity by deploying to an emergency operations center (EOC). EOCs are facilities established by many federal, state, and local agencies, as well as private organizations, ready to activate in the event of an incident. Specifically equipped for situational awareness and communications, EOCs assist coordination among field components and external parties by facilitating exchanges of information and movement of resources. Deployment to an EOC may mean a modest step, perhaps only moving to a different floor within the same building, or it may mean moving a little farther away, for instance, to a FEMA Regional Response Coordination Center. Either way,

---

297 NIMS describes the “Emergency Operations Center” as a “physical location at which the coordination of information and resources to support incident management (on-scene operations) activities normally takes place. An EOC may be a temporary facility or may be located in a more central or permanently established facility….” NIMS Document at 139.

298 Among federal agencies, the EPA maintains Regional emergency operations centers co-located with the ten EPA Regional offices. Among the states, the California Emergency Management Agency, for example, maintains a state-of-the-art “State Operations Center” at its headquarters within a 12.5-acre complex at the former Mather Air Force Base near Sacramento. See http://www.calema.ca.gov/NewsandMedia/Pages/Operations-Center.aspx (last visited July 13, 2012). In 2009, the City of Los Angeles opened a new EOC on a ten-acre parcel in downtown L.A., seismically isolated to withstand earthquakes and other threats. See Los Angeles EOC – 2009, DISPATCH MAG. ONLINE, available at http://www.911dispatch.com/info/la_eoc/.

299 In the Seattle area, for example, EOCs have been established by the Boeing Company and Seattle Children’s Hospital. See Katherine Beck, When Disaster Hits, BOEING FRONTIERS 36 (May 2011), available at http://www.boeing.com/news/frontiers/archive/2011/may/i_ssg02.pdf (Boeing EOC in Renton, Washington); Interview by Jacob Hinton with Jeff Sconyers, General Counsel, Seattle Children’s Hospital, in Seattle, WA (Feb. 16, 2012).

300 See NIMS Document at 66-67. Serving a coordination function, the term Emergency Operations Center may be somewhat of a misnomer, with actual operations managed in the field by the incident commander at the incident command post. Emphasizing the point, NIMS states plainly, “An EOC does not command the on-scene level of the incident.” Id. at 66 (emphasis in original).

301 For example, the Regional Emergency Operations Center for EPA Region 10 in Seattle is currently four floors away from the author’s EPA office.

302 Each of FEMA’s ten regions maintains a Regional Response Coordination Center (RRCC), which when activated may provide a base for federal response support and help coordinate with emergency operations centers for state and local governments and other response organizations. National Response Framework at 61. The RRCC for FEMA Region 10 is located in Bothell, Washington, a short distance outside of Seattle.
work in an EOC during a major incident may be intense, requiring some understanding of ICS and possibly specific training.\textsuperscript{303}

The EOC offers advantages to a lawyer that may not be available in the lawyer’s usual office. Operating within an EOC may put the lawyer in direct contact with elected officials, senior managers, financial officers, and other key individuals responsible for helping to coordinate a response. It may provide direct communications links to the incident command post, other EOCs, and additional incident facilities and assets. It may also allow the lawyer to focus on legal support for the ICS activity, removing the lawyer from daily distractions and competing demands of his usual work. For such reasons, some organizations practice and deploy legal counsel to their EOC when they are needed,\textsuperscript{304} consistent with longstanding guidance from FEMA.\textsuperscript{305}

c. The Incident Command Post.

Beyond the emergency operations center, it is possible – and perhaps increasingly likely – that a lawyer supporting a major disaster or incident may be sent to “the field,”\textsuperscript{306}

\textsuperscript{303} See DEPT. OF HOMELAND SECURITY, NATIONAL INCIDENT MANAGEMENT SYSTEM TRAINING PROGRAM (Sept. 2011) (hereinafter NIMS Training Program) at 59 (“G-775: Emergency Operations Center (EOC) Management and Operations”).

\textsuperscript{304} The California Emergency Management Agency, for example, has an “established position” for legal counsel within its State Operations Center in the event of an activation and has, in fact, deployed attorneys there for training exercises and real incidents such as response to the 2011 Japanese earthquake and tsunami. Bernstein interview, supra note 284. The City of Seattle Law Department recently rotated some 20 city attorneys through its EOC during the 2012 Evergreen Earthquake exercise, and has developed a cadre of four legal “first responders” ready to deploy to the City EOC at any time. Interview with Bill McGillin, Senior Asst. City Attorney, Seattle, Wash. (July 5, 2012). For the same exercise, the Washington Attorney General’s Office placed one lawyer in the state EOC and had other state lawyers on-call for support. Telephone Interview with Joe Panesko, Asst Atty General, State of Washington (July 6, 2012). The Evergreen Earthquake exercise also involved coordination among six county EOCs within the Puget Sound area, plus dozens of other federal, state, tribal, and local agencies. See http://www.emd.wa.gov/training/documents/EQESOverview04-18-12.pdf (last visited June 20, 2012).


\textsuperscript{306} Besides the incident command post, other “field” offices may include a joint field office (JFO), often established by federal agencies including FEMA to help coordinate federal, state, tribal, and local governments, along with private sector and nongovernmental organizations involved with supporting response and recovery efforts. See National Response Framework at 62-63. Like an emergency operations
working out of a facility such as an incident command post. Only in the field may the lawyer fully grasp the situation and the response, an awareness attained by attending 6:00 am shift briefings, engaging in hallway conversations, and accepting the need to provide legal advice in the face of uncertainty. The lawyer may discover problems that would never be reported back to the emergency operations center or senior leadership. The lawyer will see difficult decisions made on the fly every day – decisions that could benefit from legal advice, if only there was a lawyer in the house. Of course, many responders will not welcome lawyers into the house, seeing them as more of a hindrance than a help. To prove their worth, lawyers must arrive at a command post prepared to assist the response – not just with their substantive legal knowledge and keen analytical skills, but with comprehension of the system within which they will be operating; that is, the Incident Command System.

Ideally, any participants in an ICS structure will have proper training in ICS beforehand, including baseline ICS training at a minimum. Any person deployed to the center, a joint field office does not manage on-scene operations but focuses instead on providing support to the on-scene operations. See NIMS Document at 141 (definition of “Joint Field Office”). Federal policy specifically contemplates the deployment of legal counsel to a joint field office. See DEPT. OF HOMELAND SECURITY, JOINT FIELD OFFICE ACTIVATION AND OPERATIONS at 16 (Ver. 8.3, April 2006) (“JFO Coordination Staff may include . . . representatives providing specialized assistance in the following areas: safety, legal counsel, equal rights, and security”). Consistent with this policy, attorneys have in fact been deployed to support activities within a joint field office. See, e.g., Bernstein interview, supra note 284 (Cal EMA attorney deployed to JFO in Pasadena to assist response to winter flooding in 2010); Telephone Interview with Elizabeth Cox, Asst. Regional Counsel, U.S. EPA Region 9 (June 25, 2012) (EPA attorney deployed to FEMA JFO to support response to California wildfires in fall 2007).

As FEMA advises its own field counsel, “It is unlikely you will have the time and information necessary to consider thoroughly all of the potential options and consequences associated with a particular decision in crisis operations.” DOLR, supra note 291, at A-44.

See, e.g., William C. Nicholson, Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys, 46 Cal. W. L. Rev. 343, 361 (2010) (“Like many Americans, [responders] may dislike attorneys, regarding them as conceited and arrogant. Overall, many believe that attorneys are a hindrance rather than an asset, and do not regard legal counsel as an important part of the [response] team”).

Baseline training in ICS consists of ICS-100 and IS-700. NIMS Training Program at 11. ICS-100 is offered in several versions, including ICS for Health Care / Hospitals (ICS-100.HC); ICS for Higher Education (ICS-100.HE); and ICS for Law Enforcement (ICS-100.LE), id. at 65, all of which are available...
incident command post should probably also have completed the ICS core curriculum\(^\text{310}\) plus position-specific coursework, as appropriate.\(^\text{311}\) Training requirements aside, lawyers in the field should be ready to help in almost any way needed.\(^\text{312}\) This Part will consider the major roles that lawyers may fill in the Incident Command System.

1. Technical Specialist.

One place where ICS literature mentions lawyers specifically is within the planning section as a technical specialist.\(^\text{313}\) Among a wide range of diverse disciplines, technical specialists may include experts in explosives, forensics, faith communities, toxicology, and law.\(^\text{314}\) Technical specialists are to be activated only as needed, and could be assigned within a discrete “talent pool” in the ICS planning section or sent anywhere else they are needed within the ICS organization.\(^\text{315}\)

---

\(^{310}\) The ICS core curriculum includes ICS-100; ICS-200, ICS-300, ICS-400, IS-700, and IS-800. See NIMS Training Program at 29 (App. B).

\(^{311}\) In the past, many of these training requirements may have been honored more in the breach by some organizations, although recent efforts have been made to scrutinize individual qualifications for “key leadership positions,” including incident commander, public information officer, and liaison officer.

\(^{312}\) Such assistance may actually be a matter of law. See, e.g., CAL. GOV'T CODE § 3100: “It is hereby declared that the protection of the people of the state from the effects of natural, manmade, or war-caused emergencies which result in conditions of disaster . . . is of paramount state importance. . . . In furtherance of the exercise of the police power of the state in protection of its citizens and resources, all public employees are hereby declared to be disaster service workers subject to such disaster service activities as may be assigned to them by their supervisors or by law.” See also id. § 3101 (“disaster service worker” defined to include public employees of any county, city, and state agency – with no exception for public lawyers). Even where not required by law, many lawyers would certainly volunteer to help in any way, a practice that may be encouraged by their agency or organization. See, e.g., DOLR, supra note 291, at A-14 (advising FEMA field counsel, when arriving at an EOC or JFO, to “find ways you can help, even if it does not involve the practice of law”).

\(^{313}\) NIMS Document at 105. The title of “technical specialist” may be a bit misleading because it may encompass a broad array of disciplines, whether or not traditionally considered “technical.”

\(^{314}\) Id. NIMS does not suggest the need for “legal counsel” with expertise in any particular area of law, but presumably a particular lawyer would not be deployed as a technical specialist unless the lawyer’s specialty were well-known in advance.

\(^{315}\) Id.
By working together within the planning section, technical specialists may benefit from inter-disciplinary synergies, with their collective expertise and recommendations reflected in revisions to the incident action plan. Alternatively, by serving in other units within the ICS organization, legal specialists may be in the best position to gather the facts about a particular legal issue and respond with timely legal advice. In the context of an oil spill such as the Exxon Valdez or Deepwater Horizon, for example, one can envision a legal specialist advising an operations section on how to carry out a dispersant application consistent with requirements of federal wildlife law. Similarly, one can imagine a legal specialist advising a finance section on the requirements of state law respecting mutual aid agreements.

2. Liaison Officer.

Higher up in the Incident Command System organization, one position that lawyers may fill capably is the ICS liaison officer. A member of the ICS command staff, the liaison officer “is Incident Command’s point of contact for representatives of other governmental departments and agencies, NGOs, and/or the private sector (with no jurisdiction or legal authority) to provide input on their organization’s policies, resource availability, and other incident-related matters.”

---

316 For a recent argument in support of inter-disciplinary collaborations involving lawyers, see Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791 (2012) (recent scientific inquiries revealing that “most inventions primarily result from fostering diverse connections among a broad spectrum of people and professions”).

317 For example, the EPA’s ICS handbook provides, “The Legal Specialist will act in an advisory capacity,” carrying out duties that may specifically include “Advise on legal issues relating to the use of response technologies. . . .” EPA ICS HANDBOOK at 9-12.


320 See *supra* note 78 and accompanying text (general functions of a liaison officer).

321 *NIMS Document* at 95 (emphasis added).
liaison officer, agency representatives and personnel from NGOs and the private sector may be assigned to the liaison officer, forming a liaison office.

As with other command staff positions, appointment as a liaison officer presumes position-specific training and appropriate experience. It also appears to presume some ability to conduct legal analysis, as the liaison officer must engage in threshold questions of which agencies or organizations have “jurisdiction or legal authority” to respond to an incident. Those that do have jurisdiction or legal authority to respond should participate directly in unified command. Those that do not, however, may still have a significant role or interest in the response, so that their involvement should be facilitated through the liaison officer. The liaison officer may have to evaluate whether another agency is currently providing resources to the incident, such as tactical or scientific support, or whether it could provide such resources if requested. To make this determination, the liaison officer must understand the overall incident objectives, the current needs to achieve those objectives, and the agencies or organizations that may have the technical or legal resources to fill those needs. On the other hand, whether or not an agency or organization has resources to contribute, it may have a particular interest

---

322 “Agency representative” is another designated position within ICS, defined to mean, “A person assigned by a primary, assisting, or cooperating Federal, State, tribal, or local government agency, or nongovernmental or private organization, that has been delegated authority to make decisions affecting that agency’s or organization’s participation in incident management activities following appropriate consultation with the leadership of that agency.” Id. at 135. The delegation of decision-making authority distinguishes an agency representative from other interested stakeholders.

323 Id. at 95. The liaison office is typically situated within the incident command post, near the incident commander or unified command and the public information office.

324 See NIMS Training Program at 46 (E/L 956: All-Hazards Position Specific Liaison Officer).

325 See supra note 321.

326 On this point, recall Radvanovsky’s observation that one of the greatest strengths of ICS is its ability to expand or contract the ICS organization to “include other agencies and jurisdictions as needed.” See supra note 68.

327 For example, if an incident may have an impact on cultural resources, the liaison officer may need to enlist the support of a state historic preservation office or a tribal historic preservation office, consistent
in the incident response. Most often, this would be the case where the agency or organization represents a community or region impacted or threatened by the incident and holding a unique stake in the outcome.\footnote{328}

To promote effective coordination with interested stakeholders and participating agencies, the liaison officer may invite them to send representatives to the liaison office, may organize and host public meetings, or may send liaisons (true to the position title) to other locations, including other incident command posts and emergency operations centers.\footnote{329} Liaison assignments to other locations may be particularly appropriate where relationships among organizations may be strained, or where incident impacts may cross sovereign territories.\footnote{330} Such assignments may require the exceptional communication and diplomatic talents often associated with lawyers.\footnote{331}

Given the liaison officer’s diplomatic functions and coordination duties, combined with the need to comprehend the legal authorities and resources of other agencies and organizations, the liaison officer position in the Incident Command System has often been staffed by a lawyer. EPA lawyers, for example, have served liaison roles with requirements of the National Historic Preservation Act, 16 U.S.C. § 470a et seq. (2010), and implementing regulations at 36 C.F.R. § 800.1-.16 (2000).\footnote{328}

\textsuperscript{328} Such agencies or organizations are generally recognized as “stakeholders.” U.S. EPA, Incident Command System Liaison Officer Job Aid (July 2009).

\textsuperscript{329} In certain circumstances, such liaison assignments could take on an ambassadorial character.

\textsuperscript{330} In the 2011 Salish Sea exercise, for example, which simulated an oil spill on Puget Sound threatening to enter Canadian waters, a liaison was detailed from the U.S. incident command post to the command post established by the Canadian government.

\textsuperscript{331} Throughout American history, from the Founding Fathers forward, lawyers have proven success as diplomats. \textit{See, e.g.}, DAVID McCULLOUGH, JOHN ADAMS (2001) (John Adams as American diplomat in Europe helping negotiate peace treaty with Great Britain signed in 1782); WILLIAM HOWARD ADAMS, THOMAS JEFFERSON: THE PARIS YEARS (1997) (Jefferson as minister to France, 1784-1789). Today, lawyers continue to fill key diplomatic posts, including the current U.S. Ambassador to China (Gary Locke, Boston University School of Law) and the U.S. Ambassador to Canada (David Jacobsen, Georgetown Law).
for the ICS responses to the Enbridge oil spill in Michigan, along with responses to Hurricane Katrina, the Cosco Busan oil spill in San Francisco Bay, and the Salish Sea spill exercise in Puget Sound. For the Enbridge spill in particular, where agencies and contractor personnel descended upon Marshall, Michigan, to address the massive spill into the Kalamazoo River system, EPA’s Chicago region sent five EPA lawyers to serve liaison roles in two-week rotations. Reflecting on these experiences, lawyers recognized the value their legal training brings to the liaison position. Lawyers are “used to dealing with opposition and hostility” and in the face of public pressures during a disaster response, liaison officers “must be comfortable, without getting confrontational,” remaining calm and focused on the mission objectives.

Service as a liaison officer, however, may bring certain challenges for lawyers. First, lawyers serving as a liaison officer must remember that legal privileges that would ordinarily apply in their legal practice may not apply when engaged in an ICS response. This may be particularly important to remind others who may be used to working with a certain lawyer outside of the ICS context, where the attorney-client privilege may be presumed. Second, lawyers serving as a liaison officer must be careful to “stay in their lane,” focusing on their liaison duties, and not be tempted away toward addressing legal issues. However, this focus may be difficult to maintain when other ICS participants discover “the lawyer in the house” and begin to bring that individual all manner of legal

---

334 Cox interview, supra note 306. For background on the 2007 Cosco Busan spill, see supra note 121.
335 This was the author’s assigned role in the exercise, although it evolved somewhat during the period of play. See infra note 339 and accompanying text.
336 Krueger and Breslin interview, supra note 332. Some lawyers also served more than one rotation. Id.
337 Telephone Interview with Connie Pulchalski, Asst. Regional Counsel, U.S. EPA Region 5 (Mar. 9, 2012).
issues. In such cases, the lawyer can still bring value to the liaison position by helping to identify legal questions and then directing those questions to the proper attorneys, who may be able to assist remotely.

3. Legal Officer.

For legal practitioners and scholars, one signal development with the Incident Command System is a specific role on the command staff for lawyers: the legal officer. At this writing, the legal officer still seems to lack any explicit mention in the official literature of the National Incident Management System, but authority for appointing a legal officer can be construed from the present text of NIMS. Beyond the liaison officer, safety officer, and public information officer, NIMS recognizes that “[a]dditional Command Staff positions may also be necessary,” depending on the nature of the incident or “specific requirements established by Incident Command.” NIMS specifically recognizes, for example, that “a legal counsel may be assigned . . . directly to the Command Staff to advise Incident Command on legal matters.” When a position is created on the command staff, it carries the position title of “officer.” When a legal counsel assumes the title of officer, the result is a legal officer. Thus, depending on the

338 Cox interview, supra note 306.
339 Breslin interview, supra note 332. The author’s own experience in the Salish Sea exercise may be illustrative. When it became known to the incident commander and others that the author was the only lawyer among over 200 participants in the exercise, the author was quickly called upon by the incident commander to provide advice on a number of legal issues arising in the oil spill scenario.
340 NIMS Document at 95.
341 Id. As provided by NIMS, examples of “legal matters” justifying appointment of a legal officer specifically include “emergency proclamations, legality of evacuation orders, isolation and quarantine, and legal rights and restrictions pertaining to media access.” Id. The world of legal issues that may actually suggest appointment of legal officer will, of course, be far greater.
342 NIMS Document at 92 (Table B-1).
nature of the incident and the demands of the incident commander, NIMS provides “a legal officer, or at least the potential for a legal officer, in every command post.”

Thus far, the authority to appoint a legal officer seems little used in ICS, but the concept of a legal officer has deep roots in American law. For perhaps a century in the corporate world, legal officers have been among the corporate officers providing senior leadership in U.S. companies. In the U.S. military, lawyers have served as military officers from the beginning of the republic, commanding troops and even at times seeing the face of combat. Over the last half-century, the role of legal officers in support of combat operations has evolved considerably, and today, may provide an instructive model for the increasing role of legal officers in support of ICS operations.

Legal officers in the military have long been called upon to provide legal counsel for military members across the full spectrum of legal affairs, a general legal practice that

343 Telephone Interview with Matthew Bernard, FEMA Regional NIMS Coordinator (June 29, 2012).
344 In the State of Washington, for example, this authority has been used “hardly ever” so far. Telephone Interview with Joe Panesko, Asst. Atty General, State of Washington (July 6, 2012).
345 See, e.g., THOMAS CONYNGTON AND R.J. BENNETT, CORPORATION PROCEDURE: A MANUAL FOR OFFICERS, DIRECTORS, ATTORNEYS, AND ALL OTHERS CONCERNED WITH CORPORATE MANAGEMENT at 338 (1922) (noting by-laws of U.S. Steel Corporation that established the general counsel as the “chief consulting officer of the company in all legal matters”). More recently, alongside the Chief Executive Officer, Chief Financial Officer, and other corporate officers, corporations have begun to establish the position of Chief Legal Officer, a move that may connote both a broader portfolio among company affairs and elevated rank over the traditional general counsel. See Rees Morrison, What's the Difference between General Counsel and Chief Legal Officer?, L. DEPT' MGMT. (Mar. 22, 2006, 6:21 AM), http://lawdepartmentmanagement.typepad.com/law_department_management/2006/03/whats_the_diffe.html (“CLO also elevates the legal leader to the so-called C-Suite, the titular peer of the Chief Financial Officer . . ., Chief Technology Officer . . . and others in the executive teepee”).
346 Thomas Jefferson served with the rank of colonel during the Revolutionary War, a war that Jefferson personally helped to start by drafting of the Declaration of Independence. DUMAS MALONE, JEFFERSON, THE VIRGINIAN at 140, 291(1948).
347 During World War II, for example, Army lawyer Samuel Spitzer was awarded a Silver Star for a courageous act that resulted in the capture of more than 500 German soldiers. In the Korean War, Army lawyer Bruce C. Babbitt took command of a rear perimeter defense after the front collapsed during a Chinese attack, and successfully repulsed the enemy attack. In later combat operations, Army lawyers accompanied the first wave of U.S. troops on the October 25, 1983, assault on Grenada in Operation Urgent Fury and parachuted into combat in Panama in the 1989 Operation Just Cause. BORCH, supra note 270, at 62, 315, 321.
continues today. However, particularly since the Vietnam War, legal officers have also become increasingly engaged with direct support for military operations, contributing to the new legal discipline of “operational law.”

The practice of operational law would include many elements now familiar in the ICS context. These elements included a recognition that lawyers “had to take their legal services to the field” and specifically “had to be located with commanders during a deployment.” In order to provide commanders with good advice, these lawyers had to be “operations smart,” able to understand both the mission objectives and the operational system for meeting those objectives. Operational lawyers had to bring the requisite training, of course, including expertise in certain areas of practice, where needed. Operational lawyers had to provide legal support that was timely, accurate, and often creative. Finally, in support of mission objectives, lawyers on the front-lines of

---
349 BORCH, supra note 270, at 313. Borch, in his analysis of military operations from Vietnam (1959) to Haiti (1996), identifies four causes for this development: (1) the changing nature of warfare involving new technologies, humanitarian missions, and less-identifiable enemies; (2) the individual initiative of legal officers who were better educated, energetic, creative, and less fixed on traditional notions of lawyering; (3) new directives for ensuring military operations comply with the rule of law; and (4) the 1983 experience in Grenada, which resulted in institutional recognition of the need for field deployment of legal officers. See id. at 312-21.
350 Id. at 317.
351 Id. at 320-21.
352 Id. This point was also emphasized by one current military officer, who explained that the legal officer had to be in constant contact with the Commander in order to understand the Commander’s goals and to provide the Commander with the best advice on how to meet those goals. Interview by Jacob Hinton of Treb Courie, Major, U.S. Army, Ft. Lewis, WA (April 13, 2012).
353 Among training that operational lawyers may now receive is training in ICS in order to support domestic operations including responses to chemical, biological, or nuclear attack. Courie interview, supra note 352 (domestic operations law course at JAG school in Charlottesville, VA, covered ICS “in depth”).
354 For example, the need for additional military equipment and supplies in combat operations during Operation Desert Storm was noted to require the services of experts in contracts and fiscal law. Id. at 312.
355 Id. at 323.
operations had to be prepared to step out of traditional lawyer roles and serve other functions, such as a public affairs officer\textsuperscript{356} or liaison officer,\textsuperscript{357} as needed.

As a result of these demands upon their legal counsel and the expanded roles their counsel served in military operations, commanders and missions reaped substantial rewards. In Panama, for example, military lawyers addressed a problem of prolific firearms in the country by drafting a “guns for cash” policy, which resulted in the efficient removal of more than 8,000 weapons.\textsuperscript{358} Later, in Iraq, military lawyers helped navigate a complex of customary and codified international law and military regulations to devise a program that would allow commanders to retain Iraqi currency captured by U.S. troops and apply such proceeds directly to humanitarian needs of the Iraqi people.\textsuperscript{359}

Considering all the successes with integrating lawyers into military operations, one military historian concluded that legal officers had become “a key member of the commander’s staff” and “more relevant and essential” to the military organization.\textsuperscript{360}

Confirming that historical perspective, one current military officer suggested that it was “more important than ever for Commanders in the field to have a legal advisor. . . .”\textsuperscript{361}

Perhaps because of this military success with lawyers in combat operations, the military has appeared on the forefront of embracing the use of legal officers in Incident

\textsuperscript{356} \textit{Id.} at 325 (Army lawyer serving as “public affairs officer” in Haiti during Operation Uphold Democracy, 1994-1995). Civilian agencies have also recognized that lawyers can apply their polished speaking and writing skills well within ICS public information offices. Cobb interview, \textit{supra} note 333 (EPA attorney serving in public information office during ICS responses to Hurricane Katrina and the Columbia Space Shuttle disaster).

\textsuperscript{357} \textit{Id.} at 313-14, 318 (Army lawyer as “principal liaison officer” engaged in diplomatic discussions with Viet Cong and South Vietnamese during Vietnam War). See also FORGED IN FIRE, \textit{supra} note 348, at 367 (“Commands will often call upon [lawyers] to act as the command’s ‘professional liaison officer’”).

\textsuperscript{358} BORCH, \textit{supra} note 270, at 321.

\textsuperscript{359} FORGED IN FIRE, \textit{supra} note 348, at 221-23). This program, known as the Commander’s Emergency Response Program, involved the re-distribution of more than one billion dollars of Iraqi currency, consistent with defined criteria, and supporting basic Iraqi needs such as healthcare, education, irrigation, sanitation, vehicle repair, and the rule of law. \textit{Id.} at 223.

\textsuperscript{360} BORCH, \textit{supra} note 270, at 322.
Command System operations. Among other applications, this policy appears in the area contingency plans prepared by the U.S. Coast Guard and other agencies consistent with the National Oil and Hazardous Substances Pollution Contingency Plan. Extending this concept to an international level, the policy of including a legal officer on the ICS command staff has also been adopted in bilateral agreements between the United States and Canada for coordinating responses to oil and hazardous substance spills.

Beyond just words and figures on paper, these plans have in fact been implemented in response to recent spills, including the Deepwater Horizon.

For the Deepwater Horizon response, the Coast Guard established a legal office with six lawyers among the some 400 personnel deployed to Unified Area Command in New Orleans. Working 16-hour days, the lawyers in unified command wrestled with rapid-fire response issues such as the application of sub-surface dispersants, compliance with the Endangered Species Act, transportation and disposal of solid wastes, relations with state and local elected officials, marine safety, property management, records management, and any other legal issues that demanded their attention. In addition to

---

361 Courie interview, supra note 352.
362 See, e.g., Dept. of Defense, Nuclear Weapons Accident Response Procedures (DoD 3150.8-M), Incident Command System Functional App., at 1-4, available at http://www.acq.osd.mil/ncbdp/narp/. The DoD procedures specifically identify the Legal Officer as a member of the Command Staff, and define the Legal Officer’s responsibilities to include “providing legal advice to the DoD [incident commander] or [unified command] and the staff, as well as ensuring all plans . . . policies, and directives are consistent with military, and Federal, State, local, and tribal law.” The Legal Officer’s responsibilities also include ensuring that accurate records are properly maintained, working closely with the documentation unit of the planning section. Finally, in the context of nuclear weapons accidents, the DoD procedures provide that the Legal Officer “should be very familiar with CERCLA.” Id. at 4.
364 See supra note 128 and accompanying text (National Contingency Plan).
365 See CANUSWEST Regional Annex: Canada—United States Joint Inland Pollution Contingency Plan at 11 (June 1998) (“IC’s Command Staff consists of a Safety Officer, a Liaison Officer, a Legal Officer and a Public Information Officer”).
366 Interview with Mike Lodge, former U.S. Coast Guard Legal Officer (Mar. 16, 2012).
367 Id.
Coast Guard lawyers, there were lawyers within Unified Area Command representing other agencies and private organizations, including BP. There were also lawyers for various agencies and organizations sprinkled throughout the Area Command, including the incident command posts in Houston, Houma, and Mobile.

Like the Coast Guard lawyers, BP lawyers supporting the Deepwater Horizon response had to grapple with rapid-fire demands including reviewing draft documents, seeking regulatory approvals, and initiating funding mechanisms. BP lawyers also addressed issues including labor, finance, real estate, and the Vessels of Opportunity program. As a large corporation, BP had the benefit of experience from dealing, in its own way, with other major incidents, including 9/11 and Hurricane Katrina. For the Deepwater Horizon, BP also had the benefit of a crisis management system modeled upon the Incident Command System.

Environmentalists and commentators may speculate endlessly about BP’s motives for participating as it did in the massive response to the Deepwater Horizon disaster. However, given the scope of liability that this incident presented to the company, it is hard to imagine any rational chief executive who would not want the benefit of legal counsel engaged directly in looking after the company’s interests in the response. For

---

368 Telephone Interview with private attorney who wished to remain unnamed (May 25, 2012).
369 Id.
370 Id. On the Vessels of Opportunity program, see Factsheet on BP Vessels of Opportunity Program (July 7, 2010) (noting that at that time, around 3,000 local vessels were already participating in the program, contracted to help contain the oil spread through activities including skimming, tending, and maintaining boom, and transporting supplies, personnel, and wildlife as part of the response).
371 For example, on 9/11, BP had employees scattered around the world, and BP lawyers assisted with efforts to bring them home safely after the airlines shut down. Later, in response to Hurricanes Katrina and Rita, BP lawyers assisted efforts to help protect BP interests in the Gulf of Mexico. Id.
372 Id. (noting that the ICS structure for Deepwater Horizon was “not alien” to the company).
many of the same reasons that the U.S. military discerned the need for lawyers in combat operations, and the Coast Guard wrote legal officers into their contingency plans, the private sector could readily see the value of having lawyers in the field where decisions are being made that affect private interests. This same conclusion supporting the use of legal officers in ICS appears to have been reached as well by other companies, civil agencies, and even elements of the judiciary.

One federal agency with an established practice of deploying legal officers is FEMA, which over the last 20 years has developed a cadre of field counsel ready to deploy and provide command staff with legal advice whenever and wherever needed. Of course, on the front line of any major incident will be representatives of state, tribal, and local government, with local governments most often providing the first responders. Recognizing that “local government plays the vital first response role with regard to disasters,” commentators have recognized that local emergency managers “must have

of advice from BP’s in-house counsel on how the company should control costs by taking over and managing the entire Gulf oil spill response under the ICS structure of unified command).

374 The Alyeska Pipeline Service Company, for example, deployed legal counsel to the incident command post established in response to the January 2011 oil leak at the Trans-Alaska Pipeline System (TAPS) Pump Station No. 1, on Alaska’s North Slope. See Alyeska Pipeline Service Company, Incident Action Plan, ICS 207 Org Chart (Jan. 13, 2011), on-file with author.

375 For the TAPS Pump Station No. 1 incident, the U.S. EPA deployed several personnel to the incident command post, including the author as legal officer. Id.

376 For example, in response to the Occupy Seattle protests in early 2012, the Western District of Washington developed “Operation Peace Keeper,” combining resources from local and federal law enforcement agencies and including an Assistant U.S. Attorney as a legal officer in the command structure. See Incident Action Plan, Operation Peace Keeper, Jan. 20, 2012, on-file with author.

377 FEMA, DISASTER OPERATIONS LEGAL REFERENCE (Nov. 2011) at 4-23. In its literature, FEMA does not refer to its field counsel as “legal officers,” but they appear to serve the same functions. Formerly associated with the ICS planning section, they now serve primarily within the ICS command staff, advising the federal coordinating officers who often serve as incident commanders. Personal Communication with Mary Ellen Martinet, Associate Chief Counsel, FEMA Office of Chief Counsel (July 27, 2012). Core competencies for FEMA field counsel also explicitly include, “Understand, use, and comply with Incident Command System (ICS) concepts, principles, and process.” FEMA Office of Chief Counsel, Deployable Field Counsel Training Curriculum 62 (Mar. 2012).
access to competent legal counsel on a continuing basis.”

Ensuring the availability of legal counsel with competencies in disaster and emergency management is not easy on any level of government, but may pose particular issues for the many communities that do not have full-time legal staff.

One significant challenge now for lawyers of any stripe who may be called upon by an incident commander to serve as legal officers in an Incident Command System activation is to locate available training and resources that will help the lawyer prepare for this assignment. So far, neither FEMA nor any other agency or organization appears to offer ICS training specifically for legal officers. Such training should be developed and included among FEMA’s “mobile training courses” offered repeatedly around the country and even internationally. For now, lawyers who may be called to deploy in an ICS activation should avail themselves of other appropriate ICS courses, including quick, baseline courses that are available on-line without charge.

---

379 See id. at 356. Iowa, for example, was reported to have 57 communities represented by full-time legal staff and 42 communities represented by part-time legal staff. Id.
380 FEMA has developed training courses for its own field counsel, which lawyers from other agencies may be able to attend. Bernstein interview, supra note 284 (Cal EMA attorneys attending FEMA training). For fiscal year 2012, FEMA’s Emergency Management Institute (EMI) course offerings include L709: Introduction to FEMA Office of Chief Counsel (OCC) Field Operations – Response, offered in Washington, D.C. For the full course catalog, see the website at http://training.fema.gov/EMICourses/docs/schedules/2012%20EMI%20Course%20Schedule%202nd%20Semester.pdf. Beyond FEMA, individual efforts have also been made to provide such legal training, including a workshop, “The Law and Catastrophic Disasters: Legal Issues in the Aftermath,” offered in 2009 in conjunction with a meeting of the National Emergency Management Association (NEMA) and NEMA’s Legal Attorneys Committee. While the workshop attracted state attorneys, costs of registration and travel reportedly resulted in few local attorneys in attendance. Nicholson, supra note 17, at n.101.
381 Unlike hundreds of courses on other subjects offered by FEMA across the country in fiscal year 2012, including 12 offerings of NIMS ICS All-Hazards Liaison Officer, only three courses for lawyers were offered in fiscal year 2012, and none were offered outside of Washington, D.C.
382 See supra note 309 (ICS 100, NIMS 700 available on-line).
Like the current training for legal officers, the literature for legal officers remains undeveloped. This article may provide one starting point within legal scholarship.\footnote{To the author’s knowledge, this article is the first time the legal officer concept within ICS has been recognized within legal academic work. However, Professor Nicholson accurately identified the NIMS authority for a legal officer in his 2010 law review article. \textit{See} Nicholson, \textit{supra} note 17, at 350-51.} However, the need for a literature to help define the role of lawyers within ICS activations has been recently recognized by significant publications from FEMA\footnote{In November 2011, FEMA’s Office of Chief Counsel published Version 1.0 of the Disaster Operations Legal Reference, a substantial volume collecting laws, regulations, guidance, and lessons learned from 20 years of experience with FEMA field counsel, while attempting to dispel “urban myths” that have grown up around the same. It is intended to remain as a living document, capturing future lessons and remaining current with new law and legal interpretations. \textit{FEMA, DISASTER OPERATIONS LEGAL REFERENCE} at vii-viii (Nov. 2011).} and others within the emergency management community.\footnote{In 2011, the first known description of specific duties for an ICS legal officer appeared in publication. \textit{See TIM DEAL, CHUCK MILLS, \\& MIKE DEAL, ALL HAZARD FIELD GUIDE: A RESPONDER’S HANDBOOK USING THE NATIONAL INCIDENT MANAGEMENT SYSTEM’S INCIDENT COMMAND SYSTEM} at 7-12 (2011).} As incident commanders increasingly recognize the value of legal officers on their command staff, the demand for guidance and training in these positions can be anticipated to grow as well. Moreover, as lawyers gain experience serving in other ICS positions, including as liaison officers and technical specialists, the cadre of field-tested lawyers will continue to grow, deepening the pool of legal talent available to serve all legal needs for any future ICS activation.

\textbf{VI. CONCLUSION}

While lawyers can make substantial contributions to Incident Command System responses, the expanding use of ICS also raises fundamental questions in diverse areas of law including legal ethics, torts, corporations, and employment law. As a matter of legal
ethics, for example, who is the “client” of an ICS legal officer? Is it simply the lawyer’s usual client outside of the ICS response, or is it possibly the ICS incident commander or the ICS organization itself? As a matter of torts, can failure to implement ICS properly result in civil liability? As a matter of corporate law, what is the legal status of an ICS organization? Can it sue or be sued? As a matter of employment law, can personnel deployed to serve in an ICS response become the

---

386 The answer to this single question obviously carries profound implications for compliance with numerous rules of professional conduct. The lawyer, for example, owes a client the duty of competent representation, MODEL RULE OF PROF’L CONDUCT R 1.1, and must ordinarily abide by a client’s decisions, id. R.1.2(a). A lawyer must preserve client confidences, id. R.1.6, and must seek to avoid conflicts among clients, id. R.1.7. Perhaps most significant for lawyers deployed to the field, a lawyer, in representing a client, “shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter,” unless certain circumstances apply. Id. R. 4.2

387 Even without the overlay of ICS, the question of “Who is the client?” may prove confounding under ordinary circumstances. For government lawyers, the Model Rules of Professional Conduct offer little more than an intellectual shrug: “Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.” MODEL RULE OF PROF’L CONDUCT R.1.13, Comment 9. See also, William R. Dailey, Who Is the Attorney General’s Client?, 87 NOTRE DAME L. REV. 1113 (2012) (posing that the client of the Attorney General “is the American people,” but recognizing that the interests of the American people requires “mediation” through spokesmen including the President and Congressional acts).

388 See MODEL RULE OF PROF’L CONDUCT 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents”).


390 Early cases on this question suggest the matter is far from decided. Two cases illustrate the irresolution of the law on this question. Brassinga v. City of Mountain View, 66 Cal. App. 4th 195 (Cal. Ct. App. 1998), and Berger v. Mead, 338 N.W.2d 919 (Mich. Ct. App. 1983), both involved cases of city police officers injured while participating in training with regional SWAT teams. In Brassinga, the California court found that the regional tactical team, while employing a unified command structure, was not an entity that could qualify as an employer subject to suit or worker’s compensation claim. Brassinga at 210-11. In Berger, the Michigan court reached the opposite conclusion, holding that the tactical team was a “joint venture” under Michigan law. In reaching this conclusion, the court noted that “[t]he key consideration is that the parties intended a joint relationship.” Berger at 922. For further analysis of these contrasting cases, see Cohn, supra note 283, at 48-50.
employee of the ICS organization? These and many other legal questions raised by ICS doctrine remain for lawyers, jurists, and legal scholars to consider and resolve.

At the same time that lawyers begin to reflect systematically upon these questions raised by ICS, they may also become pulled into ICS themselves, either by supporting clients who deploy in ICS, or by deploying directly. Early experience with lawyers in military combat and more recently in major incidents, such as the Deepwater Horizon and the Enbridge spill in Michigan, suggests that lawyers may bring significant value to field operations. However, before deploying to the field, or attempting to assist clients who are deployed, lawyers should develop some basic comprehension of ICS doctrine.

Through tragic events including 9/11 and Hurricane Katrina, we have seen the consequences of failure in command and coordination. We have answered with serious measures to improve response efforts, including the widespread adoption of the Incident Command System. Today, ICS has been embraced by federal agencies, by state, tribal, and local governments, by the private sector, schools, and nonprofit organizations. For lawyers, these represent a lot of clients, and these clients will need timely and competent advice when disasters strike. Through training in ICS and critical analysis of questions raised by ICS doctrine, legal practitioners and scholars can be better prepared to serve their clients and the public interest when urgent needs arise.

391 At common law, an employer may “borrow” an employee from a primary employer for special purposes. The employee may then become a “special employee” of the special employer, with implications including worker’s compensation claims and potential tort liability for the special employer under the theory of respondeat superior. 30 C.J.S. Employer – Employee § 217 (2012). In the specific context of ICS, see Roma v. United States, 344 F.3d 352 (3rd Cir. 2003). Roma involved an application of ICS for coordinating a response by multiple fire companies to a major fire at a U.S. naval facility. Upon review, the appellate court found that a volunteer firefighter called to assist the Navy through a mutual aid agreement became a “paradigmatic example of a special employee.” Id. at 363-64. For a contrasting result, see Enslow v. U.S., 42 F.3d 1399 (9th Cir. 1994) (unpublished decision), where the appellate court found that a California state firefighter did not become a “special employee” of the U.S. Forest Service when called by the Forest Service to respond to a fire in a national forest.