



Homeland
Security

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MEMORANDUM FOR: THE RECORD

FROM: Dr. Teresa R. Pohlman

SUBJECT: National Environmental Policy Act Requirements

Purpose:

Developing Alternative Arrangements to Meet National Environmental Policy Act Requirements for Issuing and Implementing the Emergency Temporary Interim Rule - Temporary Suspension of Certain Oil Spill Response Time Requirements to Support Deepwater Horizon Oil Spill of National Significance (SONS) Response

Background:

The April 20, 2010, explosion and subsequent sinking of the DEEPWATER HORIZON Mobile Offshore Drilling Unit caused a release of oil into the waters of the Gulf of Mexico that was unprecedented in United States history. The release was classified a Spill of National Significance (SONS) (pursuant to 40 CFR §§ 300.5, 300.323(a)) by the Commandant of the Coast Guard in a Memorandum issued on 29 April 2010 (Memorandum from Admiral Allen, Commandant of the Coast Guard (29 April 2010)). Pursuant to the Oil Pollution Act of 1990 (OPA-90) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), a SONS may be declared for spills that because of severity, size, location, response effort and/or threat to public health and welfare, require extraordinary coordination of federal, tribal, state, local and responsible party resources.

Existing regulations promulgated by the US Coast Guard (USCG) (see 33 CFR parts 154 and 155) set forth the requirements for spill response plans for vessels and shore-side facilities, while EPA regulations establish the requirements for spill response plans for inland facilities that could release oil or hazardous substances. Three levels of specific response resources and response times were established in USCG implementing regulations: (1) worst case discharge (WCD) (USCG regulated facilities and vessels), (2) maximum most probable discharge (MMPD), and (3) average most probable discharge (AMPD). The AMPD represented a smaller volume spill than the WCD or the MMPD. EPA implementing regulations under the Federal Water Pollution Control Act (FWPCA) provide for oil spill responses at similar levels: (1) A worst case discharge to the maximum extent practicable (EPA regulated facilities WCD), (2) discharges greater than 2,100 gallons and less than or equal to 36,000 gallons or 10 percent of the capacity of the largest tank at the facility, whichever is less, provided that this amount is less than the worst case discharge (Medium Discharge), and (3) a discharge of 2,100 gallons or less, provided that this amount is less than the worst case discharge amount (Small Discharge). See 40 CFR

part 112, subpart D. These EPA and USCG regulations collectively form the basis of establishing approvable response plans for both vessels and covered facilities. Approval of those response plans for OCS activities was the responsibility of the Department of the Interior's Minerals Management Service (DOI/MMS), now the Bureau of Energy Management, Regulation and Enforcement (DOI/BOEMRE). Those response plans require that the facility own or contractually ensure the availability of response equipment within specified times.

Emergency Response under the Oil Pollution Act of 1990. On June 16, USCG RADM Watson, Federal On-Scene Coordinator for the SONS response effort, wrote a memo to the National Incident Commander (NIC), stating that current levels of oil skimming resources were insufficient to contain the oil spill, and requesting both foreign and domestic resources be brought in to help protect the Gulf coast. On Friday evening, June 18, the USCG was tasked by the NIC with providing regulatory relief from constraints that precluded spill response equipment and vessels across the United States from relocating to the Gulf to help respond to the SONS.

On Saturday, June 19, staff at the Council on Environmental Quality invited me and my staff to participate in a teleconference with the USCG regarding the development of Alternative Arrangements (AA) to support the issuance of an Emergency Temporary Interim Rule (ETIR). The proposed ETIR would temporarily ease the spill response requirements in the response plans established as part of the National Response System under the Federal Water Pollution Control Act as amended by OPA-90 (codified at 33 U.S.C. 1251 et seq.). As explained above, those response plans and contracts (to support the plans) require equipment to be available to respond in case of a local spill, preventing movement of the equipment out of the area to respond to the SONS. AA are an optional method to meet the requirements of the National Environmental Policy Act (NEPA) during emergency situations when there is a potential for significant adverse impact to the human environment.

My staff and I participated in over thirty telephone calls to address this emergency. DHS/USCG proceeded to consult with CEQ to determine whether to begin to develop AA. In accordance with NEPA, AA can substitute for an Environmental Impact Statement (EIS) when a federal official is not able to either make a Finding of No Significant Impact or complete an EIS due to the nature of the emergency situation. While the risk of a significant release in a location from which equipment might move to the Gulf was certainly real, and is always present, the likelihood of a significant impact resulting from moving the equipment or vessels appeared very speculative. USCG personnel and my staff accomplished rapid research to understand exactly how action would unfold when the rule took effect and to provide the information needed to make a reasoned determination.

On Tuesday, June 22, my staff coordinated the proposed rulemaking with staff from the Advisory Council on Historic Preservation (ACHP) to ensure appropriate compliance with the implementing regulations for Section 106 of the National Historic Preservation Act at 36 CFR Part 800. The issue of discussion was the potential for added risk to historic properties in various ports if spill response resources are removed to respond to the SONS. ACHP staff was comfortable that any added risk would be accommodated through the processes established in the Programmatic Agreement on Protection of Historic Properties during emergency response under the NCP.

On Wednesday afternoon, June 23, Environmental Protection Agency (EPA) Administrator Lisa Jackson requested the regulation be a joint USCG and EPA ETIR, because the amendments that the USCG was making to its rules had to be mirrored by the EPA for their Clean Water Act shore-side spill response rules or the USCG action would not accomplish the goal of lifting the regulatory barriers. Therefore, even though it might delay the rule slightly, it was determined that a joint rule would be more efficient and expeditious than the independent issuance of an equally necessary EPA rule and would accelerate the ability of people to actually begin moving more vessels and equipment to respond to the SONS. We decided to go ahead with a joint rulemaking.

On Friday, June 25, having further increased our consultations with EPA, the DHS/USCG and EPA were in agreement that we did not yet have sufficient information to be able to conclude that there would not be a real risk of significant impact from publishing and implementing the joint ETIR. At that time, our counsel advised CEQ that we could not make a finding that there would be no significant impacts from the issuance and implementation of the rule. Therefore, counsel also advised that we would be requesting AA, since the exigency in the Gulf of Mexico precluded our waiting to prepare an EIS which is otherwise required before taking an action notwithstanding its potentially significant impacts on the environment. A request for such AA addressed to CEQ Chairperson Sutley was sent by the DHS USM electronically on Monday, June 28, prior to Administrator Jackson and Commandant Papp sending the ETIR to the Federal Register for publication.

The ETIR entitled “Temporary Suspension of Certain Oil Spill Response Time Requirements to Support Deepwater Horizon Oil Spill of National Significance”- USCG and EPA (joint rule) was published in the Federal Register on Wednesday, June 30, effective immediately. This ETIR altered the requirement that owners and operators of certain facilities and vessels have approved spill response plans that identify and ensure the availability of personnel and equipment, by contract or other approved means, to remove to the maximum extent practicable a worse case discharge (WCD) or to mitigate or prevent a substantial threat of such a discharge. Under the ETIR, oil spill response plan holders and Oil Spill Response Organizations (OSROs) need only plan to the less protective level of an average most probable discharge (AMPD) when existing plans and contracts will be impacted due to a diversion of response assets in support of the SONS.

Development of the Alternative Arrangements. During the months of June and July, my staff and I worked with personnel from DHS operational Components (USCG, the Federal Emergency Management Agency (FEMA), and Customs and Border Protection (CBP)), CEQ, EPA, the Department of Interior (DOI), the Advisory Council on Historic Preservation (ACHP), the National Incident Command Center and other federal agencies on this emergency regulation, its implementation, and to develop workable alternative arrangements to ensure that public participation and full governmental consultation occurs to the extent the emergency situation allows. We coordinated closely with the Council on Environmental Quality to determine relationships to other programs, and equities across the Department and the federal government. The AA for implementing the ETIR to make more resources available to the NIC provide a valuable mechanism that allows DHS and the USCG to consider the potential for significant

impacts to the human environment as we implement the ETIR and make available additional response resources from around the country to assist in the cleanup of the SONS. We did our best to ensure that we were considering as many viewpoints and getting as many facts as possible before finalizing both the determination that we needed the AA and what those AA would entail. We also worked to ensure that the AA would be workable for considering all relevant information within the time constraints necessary for timely response to the SONS.

Receipt of the Alternative Arrangements. CEQ Chairperson Sutley transmitted the Alternative Arrangements to Mr. Rafael Borrás, DHS Undersecretary, Management, under cover of a letter dated July 12, 2010, responding to his request letter mailed to her on July 6.

A handwritten signature in dark ink, appearing to read 'TRP', with a long horizontal flourish extending to the right.

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