



SB 414

Vessel of Opportunity Taskforce

Report to the Oil Spill Technical Advisory Committee

10.4.2016

Background

California Senate Bill 414 (SB 414) was signed into law by Governor Edmund G. Brown, Jr. and became effective January 1, 2016. Through SB 414, the Legislature has directed the state Oil Spill Technical Advisory Committee (TAC) to convene a Taskforce (TF) to evaluate and make recommendations regarding the feasibility of using vessels of opportunity (VOO) for oil spill response in marine waters.

By January 1, 2017, the TAC must provide the Legislature and the Administrator of the Office of Spill Prevention and Response (OSPR) with final recommendations on whether VOO should be included in oil spill response planning.

See Exhibit 1 for California Government Code section 8670.55.1.

Task Force Membership and Statutory Requirements

The members of the TF must include appropriate state and federal government representatives, nongovernmental organizations, oil spill response organizations, and commercial fishing and other potential vessels of opportunity.

See Exhibit 2 for a list of Taskforce Participants.

The TF is established to evaluate and make recommendations to the TAC regarding the feasibility of using vessels of opportunity for oil spill response in marine waters. The evaluation is to examine the following:

1. Appropriate functions of vessels of opportunity during and oil spill.
2. Appropriate management of a vessels of opportunity spill response program.
3. Vessels of opportunity equipment, training, and technology.
4. Liability and insurance.
5. Compensation.

The TF must hold at least two public meetings, one in southern California and one in northern California, prior to making final recommendations.

The TF held first its first meeting on May 4, 2016 at the Marine Spill Response Corporation offices in Richmond, CA. At the meeting, five subcommittees were formed to match the topics required to be evaluated under SB 414. On July 20, 2016 a second public meeting was held in southern California at the Clean Seas support yard in Carpinteria. A third public meeting was held in northern California on July 28, 2016 at the Bay Model Visitor Center in Sausalito, CA.

The following section of this report is a compilation of the subcommittee considerations and final recommendations to the TAC.

Subcommittee Considerations and Final Recommendations

1. Appropriate Functions of VOO During an Oil Spill

The following list of appropriate functions of VOO during an oil spill was developed by the subcommittee:

1. Boom Towing and Tending
2. Oil Skimming and Temporary Storage of Recovered oil
3. Shoreline Protection Booming
4. Logistics
 - a. Supply distribution
 - b. Meals, delivered and prepared
 - c. Hotel
 - d. Light Boats for night operations
5. Wildlife Operations
 - a. Collection/Capture
 - b. Observation
6. Alternative Response Technology
 - a. SMART
 - b. Plume Monitoring/ Sub-Surface and Atmospheric Monitoring
 - c. In-situ Burn operations
7. Surveillance and UAV Platform
8. Communication Support
9. Command and Control Platform
10. NRDA Support

In order to establish the reality of activating one of the listed functions, input from the other workgroups must be considered. All of the listed functions have varied exposure levels, safety considerations and operating parameters which must be evaluated prior to activation.

The list generated identifies ten (10) functional activities that the workgroup agreed that VOOs could perform during an oil spill. Most of the functions identified have been employed in historical oil spill responses throughout the United States and abroad. Therefore, as a standalone topic, the workgroup believes the identified functions are feasible for VOO.

The need of a statewide VOO program does not appear to be currently supported by the State of California or USCG regulations. Vessel and Facility plan holders are required to provide by contract or other means, resources to address oil spilled into the Marine Waters of California. Many plan holders rely on DFW-OSPR "Rated" OSROs to provide oil spill response services. The rating process contains written response narratives that address required resources, including vessels needed to respond to plan holder's discharges.

An online registration page could be developed for interested VOO owners. The VOO participants could enroll based on their ACP area and other vessel specific information, (i.e. size, configuration, crewing etc.). This will allow plan holders and OSROs to search by ACP area and contact interested VOO owners should they have the need for such asset. Then, the vessel owners and plan holder could develop a contractual relationship.

2. Appropriate Management of a VOO Program

There are several possible approaches for managing a VOO program, each with pros and cons, which is also dependent on what the program would consist of:

Elements of a VOO program could include:

- Recruitment/Enlistment
- Arrangement or Commitment
 - A general spill response Contract, or MOU, or Guideline document with plan holders, local fishing communities, OSRO's, and/or Port Associations, which describe expectations and protocols for activating, communicating with, and utilizing VOO's.
 - Each party to the agreement should identify a VOO point person to coordinate spill and non-spill activities.
 - Note: Contracts are binding, and have consequences for non-performance. MOU's and guidelines are not binding and have no consequences for non-performance.
 - Establishment of an onshore VOO representative as a point person during oil spill response.
 - A VOO Program Liaison/Project Manager should be assigned for each spill event for coordination with the UC and local outreach. This would be coordinated with the OSROs in the Operations Section.
 - A VOO Program should include adaptive management provisions, so that the program can be revised and adapted as new technologies or tactics become available.
- Registration / Participant Retention
 - A database and registry of qualified VOO participants. This could be housed with each plan holder, OSRO, OSPR, or in a private organization such as the Pacific Coast Federation of Fisherman's Associations or Institute for Fisheries Resources.

- A database/registry should require information about vessel type and particulars, crew training, contact information and previous spill response experience to enable quick decision making by spill response managers as to whether to activate a particular VOO.
- Vessel owners who want to participate in oil spill response a VOO program should be required to re-register at least annually to indicate continued interest, ensure that their vessel continues to meet minimum standards of operation, and maintain an active status in the registry/database.
- A contact system to quickly alert registrants of the opportunity to engage in spill response. Mass cell phone or text messaging alerts are cost effective and efficacious.

- Organization
 - VOO's could be organized geographically and possibly based on different Area Contingency Plan (ACP) regions.
 - VOO's could be managed in "tiers" based on location, certifications, level of crew training, vessel condition, and indicated levels of VOO participation, and other important factors.

- Training
 - Organized trainings should be managed and geared toward needs, location, and VOO functions.
 - Organized trainings should be held regularly to ensure adequate VOO preparedness. Active participation in training and exercises is the ongoing nexus between all VOO participants.

Program Management Responsibility

- **Voluntary OSRO Management.** This is the current California model.
 - Pros
 - VOO's work directly with the OSROs so that call-out and integration are efficient during a spill event.
 - Existing communication networks are established between OSRO's, the local fishermen, and other response resources.
 - OSRO led training and preparedness exercises can create an important nexus between OSRO'S and VOOs between oil spills.
 - OSROs already have relationships with plan holders, if VOO's are required for contingency planning.

 - Cons
 - Costs.
 - OSRO voluntarily managed programs are not guaranteed and may not be sustainable overtime.

- OSRO voluntarily managed programs currently are limited in scope. Only two regions in CA currently have voluntary VOO programs in place (SB Channel and LA Basin).
- Some areas of the state do not have Rated OSRO's large enough to manage a VOO program. There are only two OSPR rated OSRO's in four of the six ACP's.

- **Vessel Operator Management**

- Pros

- Single organization for the program. The vessel operators could form a single entity to represent and organize vessel operators willing to perform spill response duties.
 - The operators know the dedication and interest (or lack of) of their members and fellow operators.
 - The operators know their vessel capabilities.
 - The operators know the commercial fishing seasons and general availability of commercial fishing operators.
 - They have a communication network already established with the local fishermen and maritime resources.
- Vessel operators can work directly with plan holders, if VOO's are required for contingency planning.

- Cons

- Vessel operators do not have funding or staff to dedicate to a Vessel Operator Management program.
 - Funding could be obtained from the legislature, private foundations, or oil companies. The TAC and Administrator consider should potential problems with willingness or continuity of funding for this type of program.
- Vessel Operators lack the spill response protocol expertise shared by OSROs and OSPR – would need ongoing OSPR or OSRO input to implement a Vessel Operator Management program.
 - The TAC and Administrator should consider whether to require a Vessel Operator Management Regime, and if so, whether it would be redundant and/or marginally more expensive to fund and train vessel operator/managers as opposed to establishing a managerial position within OSPR or OSROs.
- **Plan holder Management.** A plan holder managed program could be established and implemented if VOO's are required for contingency planning.

- Pros

- Single location for the program. The plan holder could create an "in-house" type program to meet contingency plan requirements, if required.

- A plan holder managed VOO program would be beneficial in areas where rated OSRO's (most typically contracted by the plan holder to meet contingency planning requirements) are not available or large enough to manage a VOO program, if required.

Cons

- Costs
- Plan holders may not be familiar with or engaged with local community/potential VOO's.

- **OSPR Management.** An agency managed/regulated VOO model is used in AK, WA.

Pros

- Single location for the program, within a government entity.
- Statewide in Scope for Marine Waters.

Cons

- Costs.
- OSPR currently does not have the funding or staff to manage a VOO program.

3. VOO Equipment, Training, and Technology

The following is a list of equipment, training and technology issues evaluated by the subcommittee:

VOO Equipment

1. **Deck space** - The amount of available deck space will obviously dictate which spill response tasks can be assigned to the VOOs. In general, the more open deck space will enable the VOO to perform more response related tasks.
2. **Crane** - Some of the on-water spill response tasks will require lifting capabilities, such as deploying skimmers and other heavy response equipment. I would not expect many fishing VOOs to have cranes.
3. **Temporary storage** - Typically temporary storage will not be a capability found on fishing VOOs and it may or not be available on commercial vessels. Temporary storage will be the limiting factor in assigning VOOs the task of skimming during a response.
4. **Radar/GPS** - A radar/GPS should be a mandatory requirement on all VOOs.
5. **Communication** - A marine radio should be a mandatory requirement on all VOOs.
6. **Hydraulic power** - Many skimmers are powered utilizing hydraulics since skimmers might be deployed in or near a "hot zone."
7. **Horsepower** - The type and length of boom that can be towed by a VOO will be a function of the VOOs horsepower.
8. **Safety** - Depending on the type/class of the VOO the safety equipment required to be maintained on the VOO will most likely be covered by the USCG regulations. PPE will need to include such items as safety glasses, steel toed shoes, PFDs, tyvek clothing, hearing protection.
9. **Other** - Depending on the type of incident there may be special response requirements and these

“other” items will need to be addressed/determined at the time of the incident

VOO Training

1. **Classroom** - Classroom training should cover the various types of skimmers, boom, temporary storage and other response resources typically needed to respond to an incident. Booming techniques should be discussed with attendees including the special requirements for deploying boom at sensitive sites.
2. **Field deployment/recovery** - This training should cover the deployment of skimmers, boom, sorbents and other materials from a VOO. Training should also involve the deployment and towing of boom used in the collection of oil. Training would need to cover sensitive sites, nearshore and offshore environments and will be based on the type/size of each VOO.
3. **HAZWOPER** (Hazardous Waste Operations and Emergency Response Standard) - There are 3 basic HAZWOPER training courses (8, 24 and 40 hour). Most commercial VOOs involved in supporting the oil industry will have at a minimum the 24 hour training. Most fishing VOO personnel involved in the Clean Seas FORT Program and the MSRC MOST Program will have received at a minimum an annual 8 Refresher Training. Providing HAZWOPER training will be one of the primary cost drivers for a VOO program. The level of HAZWOPER training will dictate the type of tasks that can be assigned to a VOO.

VOO Technology

Given the upfront acquisition costs for sophisticated technology I would not expect VOOs to have technology that would typically be used in responding to oil spills. At best you might find some VOOs that own an infrared camera. I do not believe it is practical to expect VOOs to operate state of the art response technology given the ongoing need for recurring training to maintain a high level of operational proficiency.

4. Liability and Insurance

Issues/Questions:

1. Do fishing vessel operators typically carry insurance that covers activities that may be encountered during spill response?
 - A. Common coverage would just be your standard Hull and P&I with sudden and accidental pollution coverage. So basically they would be covered for “normal” losses arising out of the operation of the vessel such as normal navigation and work. Most likely there would not be an exclusion for them while they were working a spill but that would need to be confirmed. If the VOO re-spilled recovered oil without a proper pollution policy, they would not be covered for any damages arising out of that spill. If they ended up on the rocks and the vessel’s fuel tank were ruptured, they would be covered for that pollutant.
2. What types of insurance should be available to VOO’s and at what level?
 - A. It would be the standard Hull and P&I policies that are available to all commercial vessels. As far as limits go, there is no way to say. Almost all commercial Hull and P&I policies have a

minimum P&I limit but some are lower. As far as the Hull coverage goes, it would depend on the value of the vessel and what the owner was willing to pay for it.

3. What about work comp coverage?
 - A. Worker's Comp coverage is not applicable working on a vessel. Crew Liability and/or Jones Act coverage is typically provided in P&I coverage.
4. Should the RP provide insurance coverage or indemnification to the VOOs engaged in spill response? Whose insurance applies: VOO, OSRO, State, RP?
 - A. It will depend on contractual language. Just like an employee driving his/her personal car on company business, his or her insurance would be primary then the companies would be secondary. Under normal circumstances, if an employer hiring someone, (a contractor) to do work for the company the employer would want the contractor to indemnify them.

Findings/Observations:

1. Level of insurance coverage varies widely fishing vessel to fishing vessel. Some owner/operators cannot afford any insurance. Hence, there is a need for insurance during spill response activities. It would be a shame to turn away potential VOOs for lack of their own coverage.
 - A. It is highly recommended to not use un-insured vessel(s)

Recommendations:

1. On-hire and off-hire surveys for each vessel. Washington's VOO program asks for USCG Auxiliary Dockside Courtesy Inspection (USCG AUX inspection) for recreational vessels and/or USCG compliance inspection or boarding along with Date of most recent Marine Survey for commercial vessels.
 - A. On-hire and off-hire surveys are recommended best practice for any charter as you don't want someone claiming damage that was already there before the charter.
 - B. While the USCG AUX inspection will verify safety equipment aboard, it will not speak to the condition of the vessel.
2. Charter terms need to be consistent for fishing vessels.

5. Compensation

Issues/Questions:

1. What would be concerns with regards to wage and hour issues that relate to utilizing commercial passenger fishing vessel or commercial fishing vessels for oil spill cleanup?

- A. If you hire a commercial passenger fishing vessel or commercial fishing vessels as subcontractors with the subcontractor's employees, the subcontractor would likely be liable for the wages paid to its employees.
 - a. First, you should have a written agreement with each subcontractor. This written agreement would define who will hire, train, supervise and pay any employees who will be working on the vessel.
 - b. If the employees are to be provided by a different employer or consortium of employers, the rules are different. If it is a group of employers, you could all have one common payday, pay periods and wage rates. This could eliminate issues that come up with regard to the payment of wages to employees who work on various vessels. This is similar to a hiring hall arrangement. The only drawback to this is you have to pay overtime based on combined hours. See Labor Code § 204 (a). There are requirements that must be performed before setting up such a program that are not included here.
2. What level or type of compensation is adequate to ensure engagement with the program?
 - A. As to any employees hired to perform oil spill cleanup, the normal requirements under the IWC Wage Orders would apply. This would be daily overtime after eight (8) hours of work at one and one half the regular rate, double-time after twelve (12) hours of work, time and one half for the first eight (8) hours of work in the seventh consecutive day of work in a workweek and double-time for any work hours over eight (8) on the seventh consecutive day of work in a workday.
3. The question was also asked if compensation was required for employees sleeping overnight on vessels.
 - A. See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. In *Mendiola*, security guards were required to reside on the employer's premises and remain on-call during the night. The Supreme Court ruled that all such time was hours worked. This rationale would seem applicable to vessels where the employee has no way of leaving the vessel.
4. In hiring commercial passenger fishing vessels, or commercial fishing vessels, a question was asked as to whether or not there would be any specific exemptions for employees of such vessels who perform oil spill cleanup.
 - A. IWC Wage Order 10 has an exemption for crew members employed on a commercial passenger fishing boat. The overtime section of Wage Order 10 also has an exemption (Section 3 (N)) which reads the provisions of this section are not applicable to any crew member employed on a commercial passenger fishing boat licensed pursuant to Article V commencing with Section 7920 of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code. Generally, this relates to sport fishing boats. There are also restrictions contained in the minimum wage section of IWC Wage Order 10 in Section 4 (E). This concerns the payment of the minimum wage and includes minimum payment to employees depending on whether it is a one-half day trip, three-quarter day trip or full day trip. An overnight trip is also comprised of a maximum of twelve (12) hours worked with a period of no less than twenty-four (24) hours compensated at a rate of no less

than twelve (12) times the minimum wage. Wage Order 14 has a complete exemption from overtime for crew members of commercial fishing boats.

- B. It is unlikely that the exemptions listed in Wage Orders 10 and 14 would apply. Thus, no sleep time can be deducted and overtime would need to be paid based on the number of hours worked in the work day.
5. The question was also asked whether or not employees could be trained to receive certificates such as a twenty-four (24) or forty (40) hour HAZWOPER certificate and whether or not such training would be compensated as hours worked.
- A. Training for a specific employer is generally compensable as hours worked. However, if training is provided by a group of employers to train individuals in a particular industry, such training may not be compensable hours worked if the individuals who are being trained are not “employees” of the employer. There is a list of factors that are used to determine whether such individuals are an “employee.” The following is a summary of the factors:
 - a. Training must be given similar to a vocational school.
 - b. The training must benefit the trainees.
 - c. The trainees or students must not displace regular employees.
 - d. The skills acquired through the training must be transferable. In the case of training for certifications, the certification must be transferable.
 - e. The training must also not directly benefit the employer and no productive work activities can be performed that benefit the employer.
 - f. The trainee must not necessarily be entitled to a job at the conclusion of the training.

Findings/Observations:

- 1. VOO reimbursement for some or all costs prior to or during an incident?
 - A. People who participated in BP’s Vessels of Opportunity program can now pursue claims for damage to their boats and possibly other grievances, even if they settled claims for economic losses from the oil spill with the Gulf Coast Claims Facility. BP also reserves the right to deduct any wages that boat owners earned in the Vessels of Opportunity program from any ultimate settlements.

Recommendations:

- 1. Have a written agreement with each subcontractor (vessel owner/operator).
- 2. Local market conditions and vessel capabilities will influence vessel costs.

Exhibit 1

California Government Code section 8670.55.1

SEC. 6.

Section 8670.55.1 is added to the Government Code, to read:

8670.55.1.

(a) The committee shall convene a taskforce, including appropriate state and federal governmental representatives, nongovernmental organizations, oil spill response organizations, and commercial fishing and other potential vessels of opportunity, to evaluate and make recommendations regarding the feasibility of using vessels of opportunity for oil spill response in marine waters. The evaluation shall examine the following:

- (1) Appropriate functions of vessels of opportunity during an oil spill.
- (2) Appropriate management of a vessels of opportunity spill response program.
- (3) Vessels of opportunity equipment, training, and technology needs.
- (4) Liability and insurance.
- (5) Compensation.

(b) As part of the evaluation, the taskforce shall hold two public meetings, one in southern California and one in northern California, prior to making final recommendations.

(c) (1) On or before January 1, 2017, the committee shall provide to the administrator and to the Legislature final recommendations on whether vessels of opportunity should be included in oil spill response planning.

(2) The recommendations provided to the Legislature shall be provided pursuant to Section 9795.

(d) If appropriate, the administrator, by January 1, 2018, shall update regulations to provide for inclusion of vessels of opportunity in the oil spill prevention, response, and preparedness program.

Exhibit 2

VOO Taskforce Participants

Steve Sawyer – Facilitator
Office of Spill Prevention and Response
Steve.Sawyer@wildlife.ca.gov

Jonathan Bishop
CA Coastal Commission
415-904-5247
Jonathan.Bishop@coastal.ca.gov

Garry Brown
Orange County Coastkeeper
714-850-1965
garry@coastkeeper.org

Kyle Hanson
Clean Seas Coop
805-684-3838
khanson@cleanseas.com

Mike McCorkle
Southern CA Trawlers Association
805-886-4239
mccorkle@cox.net

Scott Morris
Marine Spill Response Corporation
510-478-0701
morris@msrc.org

Jeff Poteet
Office of Spill Prevention and Response
916-323-6285
Jeff.poteet@wildlife.ca.gov

Mark Gregory
US Coast Guard
510-437-3284
Mark.g.gregory@uscg.mil

LCDR Kristin Driscoll
US Coast Guard
Kristin.p.driscoll@uscg.mil

Tim Sloane
Pacific Coast Federation of Fisherman's Associations (PCFFA)
561-560-5080
tsloane@ifrfish.org

Jeremiah Macaulay
Ship Services
310-613-2499
jmacaulay@ship-services.com

Robert Fairbank
San Francisco Bay Keeper
650-697-4682
robertfairbank@hotmail.com

Frank Holmes
WSPA
360-789-1435
fholmes@wspa.org

Tom Umenhofer

WSPA

805-701-9142

tom@wspa.org

Michael Harrington

Commercial Fisherman – Commercial Fishermen of Santa Barbara (CFSB)

805-680-1882

Michaelharrington1@comcast.net