

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE  
OFFICE OF SPILL PREVENTION & RESPONSE

**SECOND AMENDED** INITIAL STATEMENT OF REASONS

to

Amend Section 790

Add Section 817.04

to

Title 14, California Code of Regulations  
Regarding Definitions and Abbreviations

and

Oil Spill Contingency Plans for Inland Facilities

Date of Initial Statement of Reasons: December 2017

Date of Amended Statement of Reasons: May 22, 2018

Date of Second Amended Statement of Reasons: October 11, 2018

Dates and Locations of Hearings:

Public Hearing:      Date: February 13, 2018  
                            Time: 9:00 a.m. – 12:00 p.m.  
                            Location: Natural Resources Building  
  1416 Ninth Street, Sacramento, CA 95814

Public Hearing:      Date: February 22, 2018  
                            Time: 1:30 p.m. – 4:30 p.m.  
                            Location: Associated Builders & Contractors  
  19466 Flight Path Way, Bakersfield, CA 93308

***I. Addendum***

This Second Amended ISOR adds statements of necessity, other clarifying statements, and minor editorial changes. Pursuant to subsection (b) of section 11347,1 of the Government Code, and subsections (a)(1) through (4) of Section 44 of Title 1 of the California Code of Regulations, the Office of Spill Prevention and Response (OSPR) will provide public notice of the modified regulatory text and the Second Amended ISOR for a minimum of 15 days prior to considering the proposed regulations for adoption.

## **II. Purpose, Rationale, and Necessity for the Amendment, Addition, or Repeal of the Regulations [Gov. C. §11346.2(b)(1)]**

Government Code sections 8670.28 and 8670.29 direct the OSPR Administrator to adopt regulations regarding oil spill contingency plans, providing for the best achievable protection of waters and natural resources of the state. The proposed regulation implements, interprets, and make specific Government Code sections 8670.28 through 8670.31 as those code sections pertain to inland facilities that could impact inland waters. The proposed inland contingency plan regulation is necessary to provide specificity not found in the statutes, and to distinguish inland planning standards from marine standards. However, it is anticipated that in a year or two the marine regulations and the inland regulations will be further consolidated for increased consistency.

OSPR is initiating this regular rulemaking action to formally adopt the contingency plan requirements for inland facilities as well as amendments to the definitions regulation. This version of sections 817.04 and 790 differ from the emergency rulemaking in discrete ways that reflect valuable feedback OSPR has received from industry and staff experience implementing the emergency regulations.

The sections below set forth a discussion of the specific purpose for each regulatory provision to be amended or repealed and why each regulatory provision is reasonably necessary to carry out the purpose and addresses the problem for which it is proposed. Thus, it is to be read as a companion to the proposed regulations, which, for the readers' ease due to the regulations' length, are not inserted in their entirety herein.

### **Section 790 – Definitions:**

Subsection (a)(8), "Area Exercise" is deleted; it is an unused term.

Subsection (a)(9), "Assets" has been renumbered due to the edit at (a)(8).

Subsection (c)(2) defines "Certificate of Financial Responsibility". Revision is made to remove "to the satisfaction of the Administrator". While it is taken directly from statute, this phrase has been deemed unclear and unnecessary content. Additionally, language is added identifying the authority for the requirement to demonstrate financial responsibility.

Subsection (c)(11), "Contract or Other Approved Means", has been restructured to make its original intent more clear. No substantive changes to the language have been made. Subsection (c)(11)(B)3. has been removed as unnecessary content for purposes of defining the term.

For subsection (e)(4), "Environmentally Sensitive Area/Site," the following additional clarification is provided. This definition was revised, and explained, during the initial 45-day comment period to add geographic response plans as one of the primary

documents that industry and the federal government rely upon for site identification. During the subsequent 15-day comment period (May 23, 2018 thru June 6, 2018), OSPR added the California oil spill contingency plan as an additional source for identifying environmentally sensitive areas and sites. This was to be consistent with the statutory requirements in Government Code section 8574.7.

The text following "...or the California oil spill contingency plan" was deleted during the first 15-day comment period; the entities responsible for the creation of the area contingency plans, geographic response plans, and the oil spill contingency plan are identified in the definitions of each of those terms. No new revisions are made to this definition for the purposes of this second 15-day comment period.

For subsection (f)(1) "Facility", the following additional clarification is provided. "Facility" was redefined consistent with statutory changes expanding OSPR's jurisdiction to include inland surface waters. Previously the primary term was "marine facility" because OSPR was only a coastal program. But since OSPR's jurisdiction now covers facilities both along the coast and near inland waterways, the primary concept of "marine" has been relegated. Thus, the term "facility" now covers both coastal and inland facilities. The term "facility" appears to be new, but it is not; it is conceptually the same, and is building upon the statutory and regulatory term that has been used for years.

Section 790 has historically defined the word "Facility" merely as "see Marine Facility". OSPR is using the term "facility" and its historical position within the list of definitions as the overarching term to refer to all facilities (marine and inland), as the statute does. [Ref. Gov. C. §8670.3(g)(1)]

In (f)(1)(A)1., during the first 15-day comment period, OSPR added "and is" to indicate the conjoined requirements of the thing (e.g. building) also be part of the supply chain of oil.

OSPR also expressly listed distinct facility types within the definition of "facility" for ease of reference and to avoid uncertainty:

"Marine facility" is expressly listed. This is not a new concept, as just explained above. A marine facility has always been a facility by statutory and regulatory definition.

"Marine terminal" is expressly listed. This is not a new concept, as explained above. A marine terminal has always been a facility by statutory and regulatory definition.

"Small marine fueling facility" is expressly listed. This is not a new concept, as explained above. A small marine fueling facility has always been a facility by statutory and regulatory definition.

“Drill ship” is expressly listed. This is not a new concept, as explained above. A drill ship, etc. has always been a facility by statutory and regulatory definition.

“Pipeline” is expressly listed, consistent with statute. This is not a new concept, as explained above. A pipeline has always been a facility for regulatory purposes.

“Railroad” is expressly listed, consistent with statute as a facility type, and it is defined at subsection (r)(1).

“Inland facility” is expressly listed because it is a facility type, as defined in subsection (i)(4).

The only new revision in the definition of “facility”, for purposes of the second 15-day comment period, is within subsection (f)(1)(B)2. The citation to the Health and Safety Code is corrected to align with statute.

Subsection (l)(1) “Letter of Approval” is deleted as a common expression or reference not required or necessary to be defined.

Subsection (p)(4) “Pipeline” has a grammatical revision to avoid any confusion about when it may be a facility. During the initial 45-day comment period, OSPR deleted the words about a pipeline’s proximity to marine water, because those words are no longer consistent with OSPR’s new jurisdiction and they are incomplete. Relevant pipelines are those proximate to both marine waters and now inland waters, and if some other factors are present. Thus, OSPR replaced those words with direction to look at sections 817.01 and 817.04 for the complete specificity regarding when a pipeline will be deemed a facility.

In subsection (r)(1), “Railroad”, OSPR defines and explains the types of railroads that come within OSPR’s jurisdiction. During the early 2010’s there was an increase in U.S. domestic and Canadian crude oil production, and there were several dramatic rail accidents in the U.S. and Canada involving oil tank cars. Senate Bill 861 (2014) was inspired in large part by the significant increase of railroads bringing more oil tank cars into California. This boom was colloquially referred to as “crude-by-rail”. Oil moved in rail tank cars is considered a bulk commodity (cargo), similar to corn or coal. Bulk oil does not include oil in packaged items (e.g. on pallets), intermodal containers, or oil that might be in an automobile in an “autorack” train car. OSPR has long defined “oil in bulk”, but previously it had been limited to oil moved by vessels. Now that OSPR’s jurisdiction expressly includes railroads moving oil “cargo”, the term “oil in bulk” is used as intended, by S.B. 861 and consistent with historic use of the familiar term “oil in bulk”, which is defined at (o)(5).

In subsection (s)(13) “Spill”, an edit is made to add “oil spill” as part of the definition to align with statute, as is the change from “was” to “is”.

Subsection (s)(14) “Spill Management Team” is revised to align with the definition in statute.

### **Section 817.04 – Inland Oil Spill Contingency Plans:**

#### **Subsection (b)**

Subsection (b)(1)(B), was revised during the first 15-day comment period to allow the provision for facility owners and operators to reference the National Hydrography Dataset (NHD) in determining the applicability of OSPR’s oil spill planning requirements to a facility. In this 15-day comment period, a revision is made to eliminate the incorporation by reference. Since this on-line source is owned and managed by the U.S. Geological Survey, is live and constantly updated, OSPR is instead relying on the status conferred upon the U.S. Geological Survey to the designation of waterways.

At subsection (b)(2), a revision is made to remove language that may be considered unclear, however, still preserving the Administrator’s ability to determine that there may be a facility beyond ¼ mile from state waters that should be regulated. Hypothetically, a large transportation pipeline running across the ridge of a steep canyon that is just beyond ¼ mile above a river below may need a contingency plan. This serves the legislative intent to provide best achievable protection of state waters.

Revisions to subsection (b)(4) establish that, in the event of an oil spill that impacts state waters, the Administrator will reevaluate program applicability if previously the requirements were inapplicable or an exemption had been granted to an inland facility. This serves the legislative intent to provide best achievable protection of state waters. For example, a facility could initially be granted an exemption based on primary and secondary containment infrastructure, but later a spill gets through the containment because the infrastructure was not maintained. Another example is where physical conditions may have changed, such as the installation of a culvert that was not present at the time of an applicability/exemption determination, and an oil spill passes through the new culvert into state waters. Unless the culvert is re-engineered to prevent spills, the facility has demonstrated it poses a risk.

#### **Subsection (c)**

In (c)(1)(A), common sense criteria are identified as the bases for finding that an operation would not reasonably be expected to impact state waters. The following additional clarification is provided. “Measures that prevent releases” ((c)(1)(A)5.) would be described as such things as engineering controls like cellar depth, line riders, controlled channels, berms, slope, elevation, daily monitoring, apps that monitor well production and pressure, etc. No revisions are made to the text.

For subsection (c)(2)(A), clarification is made to the two previous ISORs, which incorrectly references exemption requests resetting OSPR’s review period. What should

have been stated is that (c)(2)(A) allows for multiple exemption requests, but each request does not reset the contingency plan submittal time frame requirement. OSPR found early on that it seemed some operators were simply trying to delay compliance by submitting repeated requests based on little or no new facts. The language in this subsection has been revised to make more clear the requirement to submit a contingency plan is not extended by one or more exemption denials.

#### Subsection (d)

A revision is made at subsection (d)(1) changing “single plan” to “multiple facility plan” to avoid confusion.

At subsection (d)(2)(E), a minor grammatical and punctuation edit is made at the end of the sentence.

#### Subsection (e)

Subsection (e)(1) is revised to clearly state that contingency plans and applications for certificates of financial responsibility must be submitted immediately by inland facilities that meet OSPR’s applicability requirements that are currently engaged in operations. Since having a contingency is an express requirement of statute (Gov. C. §§8670.28 and 8670.29), the 120-calendar day timeframe within which to do so is eliminated.

Subsection (e)(2)(A) is revised to eliminate any uncertainty as to the required time frame in which information must be submitted prior to commencement of future operations. This pre-transition notice should not be foreign to operators. Operators are already required to notify the Division of Oil, Gas, & Geothermal Resources (DOGGR) in writing when acquiring the right to operate a well prior to final acquisition. [Public Resources Code section 3202] And, notices of offers to sell and notices of intention to purchase must be provided to DOGGR in advance. [Sections 1881 and 1881.5 of Title 14 of the Code of Regulations]

At subsection (e)(2)(A)4., a non-substantive edit is made for clarity. Contact information means the spill management team’s information.

Subsection (e)(2)(B) is revised to make clear that upon receipt of, and cursory review of the minimal information outlined in (e)(2)(A), OSPR will grant a preliminary approval of a contingency plan. This ensures continuity of oil spill coverage for existing facilities during the transition of ownership or operation, and ensures pre-planning for facilities that will be coming online. These “future operations” provisions are modeled from the preliminary approval requirement for marine contingency plans at section 816.03(e).

At subsection (e)(3)(A), during the first 15-day comment period, the second use of the word “Administrator” was erroneously stricken out. This was an unintentional strike-out;

certainly the sentence would not make sense without it. OSPR is adding that word back in now.

At subsection (e)(4) revisions are made to replace the words “acceptable” and “approved” with less ambiguous terms “usable, readable, and searchable”. OSPR will not accept a scanned document or an image. A scanned PDF, by way of a printer or other scanner, as opposed to a conversion from software, looks like a normal PDF file, but results in the content being captured like an image. There is no text content but only an image embedded in the PDF file. The result is not searchable.

The language “and that is searchable” and “preferably in a searchable format” are deleted as duplicative to the added text immediately preceding it.

#### Subsection (f)

At subsection (f)(1)(A), the following additional clarification is provided for edits made during the first 15-day comment period. OSPR substantively reviews a contingency plan; not only for its compliance with OSPR’s regulatory requirements, but that it is complete and adequate in its content and supportive documents. The purpose of the inclusion of “substantively” at (f)(1)(A), is to indicate that the Administrator has a mandate to ensure best achievable protection for state waters and natural resources, thus the Administrator can and will question the validity of all provisions of a contingency plan (cf. *Alaska Wilderness League, et. al. vs Jewell* (2015) 788 F.3d 1212 [review and approval of contingency plan is “nondiscretionary” action]). The addition of “for approval” is made for clarity and consistency.

The last sentence in subsection (f)(1)(E) is moved here from (f)(3) as the more appropriate location for discussion about the letter of denial or revocation; (f)(3) is about revocations of existing plans.

Subsection (f)(2) explains the approval process, including preliminary approval of the plan upon submission while the plan is being reviewed. This is similar to approval of marine contingency plans. It is necessary to consider the contingency plan to be preliminarily approved upon submittal to provide certainty to all parties as to the terms that would apply if there were a spill during the review period prior to formal approval or denial. In subsection (f)(2)(B) revision is made to align with the revised language at (e)(2)(B).

In subsection (f)(2)(E), revisions are made clarifying the criteria for which the Administrator may deem a once approved contingency plan, subsequently deficient. “Submitted or” is deleted to avoid confusion with provisions already covered in (f)(1). Subsection (f)(2)(E) is only about deficiency after a plan has been submitted, reviewed and approved.

At subsection (f)(3), the subtitle has a revision to more accurately reflect the revised content of the subsection, which is only about revocation of already approved plans. Approved plans are not “denied”, but they may be revoked if deficiencies are not rectified.

Subsection (f)(3)(A) is revised to remove provisions of denial of a new plan, which are already addressed in (f)(1). Subsection (f)(3)(A) now addresses revocations of existing, approved plans. The purpose of changing “or” to “and” is to make the connection between this subsection and the review process in (f)(1), including deficiencies.

Subsection (f)(3)(B) is moved to (f)(1)(E). See discussion in (f)(1)(E).

### Subsection (g)

Subsection (g)(1)(F) has a revision to clarify that the wildlife care and treatment organization the plan holder notifies, whether it be the Oiled Wildlife Care Network or other, must be listed in the contingency plan.

In subsection (g)(2)(A), “notifications” is changed to refer to “calls” to the contacts identified in (g)(1).

In subsection (g)(2)(B), the revision is to clarify that the wildlife care and treatment organization the plan holder calls, whether it be the Oiled Wildlife Care Network or other, must be the one listed in the contingency plan.

Subsection (g)(5) does not have a revision; rather, additional clarification is provided for the purpose of (g)(5), which is to require plan holders to consider spills larger than their reasonable worst case spill planning volume, because the plan holder will be responsible to clean up the spill regardless of how large the spill is. This, including the call-out of additional resources within 24 hours, is similar to the long-standing marine requirements (subsections 817.02(g)(3), 817.03(g)(3), 817.04(h)(5), 818.02(h)(3), 818.03(h)(3)). One day’s notice aligns with the Administrator’s requirement to provide best achievable protection to state waters. This puts the Administrator on notice to determine whether adequate coverage remains in the area or whether additional resources need to be identified. There are no revisions to the text for purposes of this 15-day comment period.

### Subsection (h)

Subsection (h)(1)(E) does not have a revision; rather, additional clarification is provided for the need for a statement signed under of penalty of perjury. This is consistent with the marine plan holder requirements. [See sections 817.02(a)(1)(D); 817.03(a)(1)(D); 818.02(a)(1)(E); 818.03(a)(1)(D); 827.02(a)(1)(E)] It would be improper to treat inland plan holders differently from marine plan holders by not holding them to the same standard.



### Subsection (j)

Two edits are made at subsection (j)(2)(D) to clarify it is the location of the information that should be identified and maintained, not the oil. Two additional edits are made changing “should” to “shall” for consistent expression of mandatory provisions.

Additional clarification is provided regarding the “timetable” referred to at subsection (j)(3)(B), and is further explained as follows, and as previously explained at (j)(4): General track speed limits are established by the Federal Railroad Administration (FRA). Each railroad can decide for itself what its company maximum operating speed will be, which they do with a published document called a “timetable” that is reported to the FRA.

At (j)(4)(B)1., typographical edits are made to remove the brackets as unnecessary.

### Subsection (k)

At (k)(2), a revision is made to provide cross-reference to another part of this section where the National Hydrography Dataset designation of waterways may be found.

There are no revisions at subsection (k)(3)(A)(i); the existing italics are an illustration from the first 15-day comment period, and are meant to be illustrated in italics as the intended font for publication in the California Code of Regulations.

An edit is made at subsection (k)(3)(B) to clarify the type of contacts associated with resources at risk that must be identified in a contingency plan. “Relevant” is deleted as superfluous. If a particular type of entity or activity is not at risk from an operator, then there is no contact to include. But if such activity or entity could be impacted, then it would be appropriate (and required) to include them as possible contacts if there is an oil spill.

There is a minor edit at (k)(4) to clarify the reference to subsections (A), (B), and (C) is to subsection (k)(3).

### Subsection (l)

Subsection (l)(1) lets the plan holder know how response times are calculated. Revision is made to more narrowly define the time frame from which arrival and operational deployment of response resources is measured. Statute requires immediate cleanup of a spill; clearly a common sense interpretation implies the spiller must have some reason to suspect they actually have a spill occurring – they learn about it, or are notified about it. (Gov. C. §8670.25)

There are no revisions at subsection (l)(2); the existing italics are an illustration from the first 15-day comment period, and are meant to be illustrated in italics as the intended font for publication in the California Code of Regulations.

In subsection (l)(4), additional clarification is provided that OSPR acknowledges response time frames may be affected by actual conditions, such as weather, earthquake, unsafe entry conditions, etc.

Subdivision (l)(5) requires the response resources be appropriate for use. The purpose of this is to ensure the plan holder considers the type of equipment needed based on the types of oil they handle and the locations where a spill could occur. Handlers of oil generally are already knowledgeable about the characteristics of the oil they handle, but may not have thought about the habitat types through which the oil is transported and thus the appropriate cleanup equipment necessary. However, reliance on an oil spill response organization (OSRO), instead of plan holder owned equipment, will help address this; the OSRO's are very knowledgeable about matching the right equipment with the oil type and spill location environment.

#### Subsection (m)

At subsections (m)(1)(A) and (m)(1)(B), a revision is made to provide cross-reference to another part of this section where the National Hydrography Dataset designation of waterways may be found.

There are no revisions to the Table title at subsection (m)(1)(C); the ~~strikeout of this italicized bolded title~~ is an illustration from the first 15-day comment period. Likewise, there are no revisions to the Table title at subsection (m)(1)(D); the addition of this italicized bolded title is an illustration from the first 15-day comment period, and is the intended font for publication in the California Code of Regulations.

A revision is made at subsection (m)(2)(B) to clarify that "each" is referring to the equipment.

#### Subsection (n)

At subsections (n)(1)(A) and (n)(1)(B), revisions are made to provide cross-reference to another part of this section where the National Hydrography Dataset designation of waterways may be found.

There are no revisions to the Table title at subsection (n)(1)(B); the ~~strikeout of this italicized bolded title~~ is an illustration from the first 15-day comment period. Likewise, there are no revisions to the Table title at subsection (n)(1)(C); the addition of this italicized bolded title is an illustration from the first 15-day comment period, and is the intended font for publication in the California Code of Regulations.

### Subsection (o)

Language is added at (o)(1)(B), to clarify that a plan holder may designate a wildlife care and treatment organization other than the Oiled Wildlife Care Network, but must identify one or the other in the contingency plan. It is assumed that operators do not possess the in-house capability to rescue and treat wildlife; it is assumed operators will have to rely on professional, licensed wildlife care organizations.

### Subsection (p)

Subsection (p)(2)(A) is deleted as unnecessary. The response technology reviewing and approving persons are already identified in (p)(1) and (p)(2). Accordingly, subsection (B) is renumbered to (A).

A single minor grammatical revision is made at (p)(2)(A)3.

### Subsection (q)

There are no new revisions to subsection (q)(2)(A). The bolded and italicized edit is an illustration from the first 15-day comment period, and is meant to be illustrated in italics in the California Code of Regulations.

### Subsection (u)

In subsection (u)(3)(A), a revision is made to italicize the name of the table to be consistent with the intended typography elsewhere in section 817.04.

### Subsection (v)

A revision is made to correct the Government Code section citation.

### Authority & Reference

Minor grammatical revisions are made in the Authority and Reference citations eliminating commas for uniformity with these and other OSPR regulations.

### **III. *Specific Technology or Equipment Required by Regulatory Adoption* [Gov. C. §11346.2(b)(1)]**

None.

### **IV. *Duplication or Conflict with Federal Regulations* [Gov. C. §11346.2(b)(6)]**

The proposed regulations do not duplicate or conflict with federal regulations.

**V. *Mitigation Measures Required by Regulatory Action***

The proposed regulatory action will not have negative impact on the environment; therefore, no mitigation measures are needed.

END