

**STATE OF CALIFORNIA
DEPARTMENT OF FISH AND WILDLIFE
OFFICE OF SPILL PREVENTION & RESPONSE (OSPR)**

Amend Sections 791, 791.6, 791.7, 793, 794, 795, 796, 797
Adopt Section 798

to

Title 14, California Code of Regulations
Regarding Oil Spill Financial Responsibility

FINAL STATEMENT OF REASONS

- I. **Date of Initial Statement of Reasons:** December 19, 2017
- II. **Date of Amended Initial Statement of Reasons:** May 22, 2018
- III. **Date of Final Statement of Reasons:** December 13, 2018
- IV. **Dates and Locations of Public Hearings:**

Public Hearing:	Date:	February 13, 2018
	Location:	Natural Resources Building 1416 Ninth Street Sacramento, CA 95814

Public Hearing:	Date:	February 22, 2018
	Location:	Associated Builders & Contractors 19466 Flight Path Way Bakersfield, CA 93308

V. **Update:**

45-Day Comment Period

During the 45-day comment period of December 30, 2017 through February 22, 2018, comments were received from several interested parties. A summary of the comments and responses are included in Attachment A.

Changes to Text of Proposed Regulation, Amended Initial Statement of Reasons, Addition of Documents Incorporated by Reference, and Revised Economic and Fiscal Impact Statement (STD Form 399): 15-Day Continuation of Public Comment Period

After the 45-day comment period, modifications were made to the originally proposed text of the regulations. The modified text, Amended Initial Statement of Reasons (ISOR), addition of documents incorporated by reference, and a revised Economic and Fiscal Impact Statement (STD Form 399) were made available to

the public for a 15-day public comment period from May 23, 2018 through June 6, 2018. The notice was sent by electronic mail on May 22, 2018 to all persons specified in subsections (a)(1) through (4) of Section 44 of Title 1 of the California Code of Regulations and Government Code section 11347.1(b).

The proposed changes to the regulatory text noticed for the 15-day comment period are as follows. **Note: the following do not include minor spelling or grammatical corrections/edits.**

Section 791.6 – Purpose and Scope

Subsection (c) – A non-substantive edit is made to clarify the 120 days an application must be submitted is ‘calendar’ days.

Section 791.7 – Procedures for Application for California Certificate of Financial Responsibility

Subsection (h) – The previous defining characteristics of inland water that is “less than three inches deep” and “more than three inches deep but for less than 182 days a year” or “at least three inches deep for more than 182 days a year” are revised to designations recognized by the U.S. Geological Survey’s National Hydrography Dataset as “intermittent” and “ephemeral” or “perennial”, respectively. This change is made after multiple suggestions/requests from the public during the 45-day comment period and is made throughout this regulation. While the comments were made primarily to content in an interrelated rulemaking (section 817.04), it also has reference to this regulation and therefore the change is made here as well.

Section 795 – Evidence of Financial Responsibility

Subsection (a) – The term “discharge” is changed to “a spill” for uniformity with the regulations as a whole, as well as defined terms in section 790.

Subsection (f) – A non-substantive heading change is made without changing the content. This is a non-substantive change.

Documents Incorporated By Reference:

The addition of documents incorporated by reference in the rulemaking file during the 15-day comment period, is as follows:

- ERMA. 2015. Web Application: Southwest Environmental Response Management Application, National Oceanic and Atmospheric Administration (NOAA)

This item, as well as the documents incorporated by reference during the initial 45-day comment period, was/were reasonably available to the affected public from a commonly known or specified source, made available upon request directly from

OSPR, and also available on OSPR's website during the 15-day comment period. The above named item is not a document as much as it is a web-based Geographic Information System (GIS) tool that assists both emergency responders and environmental resource managers in dealing with incidents that may adversely impact the environment. ERMA integrates and synthesizes various real-time and static datasets into a single interactive map, thus provides fast visualization of the situation and improves communication and coordination among responders and environmental stakeholders.

Economic Impact Assessment

No changes were made to the overall estimate of economic impact; however in response to requests made during the 45-day comment period, an additional analysis was added, investigating regulatory compliance costs. A revised Economic Impact Assessment was developed and included in the Amended Initial Statement of Reasons, which was noticed to and made available to the public for comment from May 23, 2018 through June 6, 2018.

Changes to Text of Proposed Regulation, and Amended Initial Statement of Reasons: Second 15-Day Continuation of Public Comment Period

On June 25, 2018, OSPR filed the proposed regulations with the Office of Administrative Law (OAL) for approval. OAL recommended changes to the rulemaking file documents and/or associated regulations that necessitated an additional comment period. As a result, OSPR withdrew the regulatory package, revised the proposed regulations, and initiated another comment period.

The modified text and an Amended Initial Statement of Reasons (ISOR) were made available to the public for an additional 15-day public comment period from October 11, 2018 through October 25, 2018. The notice was sent by electronic mail on October 10, 2018 to all persons specified in subsections (a)(1) through (4) of Section 44 of Title 1 of the California Code of Regulations and Government Code section 11347.1(b).

The proposed changes to the regulatory text noticed for the 15-day comment period are as follows. **Note: the following do not include minor spelling or grammatical corrections/edits.**

Authority & Reference

In all sections except 795, either the Authority or Reference citations were revised to list out all relevant Government Code sections rather than a range, which was previously illustrated.

Section 791.7 – Procedures for Application for California Certificate of Financial Responsibility

Subsection (a) – Titles of forms were revised for accurate reflection of the actual

name of the form.

Subsection (h)(1)(A) through (h)(1)(E) – A few revisions/corrections were made for clarity, accuracy, and to avoid confusion. These modifications are deemed nonsubstantive; specifics of which may be found in the amended Initial Statement of Reasons.

Subsection (h)(1)(G) – The incorporation by reference to the National Hydrography Dataset was eliminated. OSPR is instead relying on the status conferred upon the expertise of the U.S. Geological Survey to the designation of waterways.

Subsection (j)(3) – In the Second Amended ISOR, the revision to this subsection is incorrectly noted as (h)(1)(j)(3). Revisions made were for consistency with the reconsideration procedures described at subsection 796(c). The revisions clarify without materially altering the requirements, and are therefore nonsubstantive.

Section 792. – In Lieu of Reliance on the Certificate: Tankers, Nontank Vessels, Large Tank Barges, and Owners of Oil.

Subsection (a) – Two non-substantive revisions were made for clarity and consistency with the use of terms throughout this chapter.

Subsection (b) – Explanation was provided for terminology that was added during the first 15-day comment period. Further revisions were made to make more clear the method by which owners or operators notify OSPR prior to operating in waters of the state.

Section 795. – Evidence of Financial Responsibility.

Subsection (a)(5) - Revisions were made to eliminate language that may be considered unclear or overly broad, and to update OSPR's present practices. The necessity for the revisions was to identify from which insurers OSPR will accept insurance coverage.

Subsection (c)(1) – Section is corrected to subsection.

Subsection (e) – During the initial 45-day comment period an incorrect version date of the Guaranty form was included and stricken out. The correction was made during the second 15-day comment period.

Subsection (e)(2) – During the initial 45-day comment period, subsection (e)(2) was stricken out. Renumbering of the subsections following it did not occur. In the second 15-day comment period, subsections (e)(3) through (e)(6) were correctly renumbered.

Section 796. Certificate Revocation.

Subsection (c) – At (c)(1), (2), and (4), revisions were made to include the

provision of reconsideration applying also to decisions to suspend certificates of financial responsibility. Necessity for this is to be consistent with the intent and language of reconsideration procedures at subsections 797(c) and (e).

Subsection (c) – At (c)(3), original language that was intended to be stricken out during the first 15-day comment period was added back in and illustrated as a strike out.

Documents Incorporated By Reference

For simplicity sake and to avoid confusion, the May 22, 2018 *15-Day Notice of Modifications to Text of Proposed Regulations* was generated to serve as one notification on the multiple companion rulemaking actions. The notice identified several documents incorporated by reference and/or relied upon. Clarification is made that while the notice was for all four interrelated rulemaking actions, not all documents identified apply to each rulemaking. The only incorporation by reference applicable to this rulemaking (Financial Responsibility) is to the ERMA web application. Subsequently, in the second 15-day comment period (from October 11, 2018 to October 25, 2018), OSPR eliminated its incorporation by reference to this web application, instead conferring status on the expertise of the U.S. Geological Survey.

The documents incorporated by reference were reasonably available to the affected public from a commonly known or specified source, made available upon request directly from OSPR, and also available on OSPR's website. They will not be printed in the California Code of Regulations in that doing so would be cumbersome, unduly expensive, or otherwise impractical.

Economic Impact Assessment

OSPR discovered an additional typographical error in the Economic Impact Assessment of the Amended ISOR. On page 22, the text should read as follows: *(Note: the 39 cents originally reflected here was a typo and is corrected now to **8** cents)*

Comments Received During Comment Periods

Summaries of the comments received during the 45-day comment period of December 30, 2017 through February 22, 2018, the 15-day comment period of May 23, 2018 through June 6, 2018, and the second 15-day comment period of October 11, 2018 through October 25, 2018, as well as OSPR's responses to them, are provided in Attachment A.

VI. Alternatives Determination:

Based on the information OSPR currently possesses, and the reasons stated in response to public comments, no reasonable alternative considered would be more effective in carrying out the purpose for which this regulation is proposed, or

would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost-effective to affected private persons, or equally effective in implementing the statutory policy or law.

The proposed regulations implement, interpret, and make specific Government Code sections 8670.37.51 through 8670.37.58. The proposed regulations are necessary to provide specificity not found in the statutes.

VII. Local Mandate Determination:

The proposed rulemaking does not impose any mandate on local agencies or school districts.

VIII. Small Business Impact:

OSPR has determined that the proposed regulations have no substantial effect to small business. No alternatives were proposed that would lessen any adverse economic impact on small businesses.

ATTACHMENT A

Consideration of Public Comments

Proposed Changes to:
Financial Responsibility (14 CCR §791 – 798)

The Department of Fish and Wildlife, Office of Spill Prevention and Response (OSPR) thanks all commenters who submitted comments on the proposed changes to these regulations.

OSPR held two public hearings and three comment periods. The first 45-day public comment period was December 30, 2017 through February 22, 2018. The subsequent 15-day public comment periods were May 23, 2018 through June 6, 2018, and October 11, 2018 through October 25, 2018. OSPR received comments from the public hearings and from one or more of the three public comment periods relevant to the regulatory sections identified above as well as three other companion rulemakings. Those companion rulemakings are for Oil Spill Contingency Plans and Definitions & Abbreviations (14 CCR §817.04 and §790); Inland Facility Drills and Exercises (14 CCR §820.02); and Inland Ratings of Oil Spill Response Organizations (14 CCR §819-819.07). OSPR received only one comment from the last public comment period related to the financial responsibility rulemaking.

The following reflects all comments received, as they pertain only to the rulemaking identified at the top of this page.

A list is provided of the people or organizations making comments, both written and verbally. Each is assigned a two-digit identifier. The comment summaries and responses are organized by the subsection being addressed. At the end of each comment summary are one or more comment keys. The comment keys match the two-digit identifier followed by a number referring to the marked-up copies of the written comments, and the transcribed verbal comments received at the public hearings, all of which are included in the rulemaking record.

Duplicate or similarly related comments and irrelevant comments have been aggregated in separate tables at the end of each comment period.

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I. List of Commenters

The following have provided **written** comments.

W1.	Commercial Global Insurance Services of California, Bart J. Le Fevre, Founder & President, and Kristen Kang, Co-Founder & Executive Vice President; letter dated 2/22/18
W2.	Whitney Leake, Patriot Maritime Compliance; email dated 5/23/18
W3.	Harry Fujii, MSRC; email dated 6/05/18
W4.	John Berge, Pacific Merchant Shipping Association; email dated 10/11/18

The following have provided **verbal** comments at one or both of the public hearings.

VS refers to the verbal comments made at the public hearing held in Sacramento on February 13, 2018.

VB refers to the verbal comments made at the public hearing held in Bakersfield on February 22, 2018.

VS1.	Willie Rivera, California Independent Petroleum Association
VS2.	Chris Hall, Drilling and Production Company
VS3.	Kristen Kang, Commercial Global Insurance Services of California
VS4.	Nic Winslow, BNSF Railway
VS5.	Harry Fujii, MSRC

VB1.	Dale Strieter, Patriot Environmental Services
VB2.	Kristen Kang, Commercial Global Insurance Services of California
VB3.	Tim Lovley, McPherson Oil Company
VB4.	Chris Hall, Drilling and Production Company

II. Comments

Comments and suggested modifications are summarized and responded to below.

1. First Comment Period – (45-Day)

The following consist of comments received from the first 45-day comment period, December 30, 2017 – February 22, 2018.

Topic	Summary of Comments	Agency Response
Financial Responsibility – Economic Impact Assessment (ISOR) [§791-798]	The suggestion is that the cost estimates OSPR used to develop its Estimated Cost of Insurance (Table 1 of the ISOR) are derived from insurance policies which cover maritime operations. It may not have factored in some other mitigating circumstances. [Comment W1-(2); VB2-(a)]	OSPR rejects this comment/suggestion. At various times in the Economic Impact Assessment of the Initial Statement of Reasons, OSPR points out the cost data was generated from 21 of the 41 companies who submitted applications for a COFR under the emergency regulations, pursuant to SB 861. SB 861 authorized the promulgation of regulatory requirements for inland facilities. The cost data was generated from inland facilities. The commenter does not describe “other mitigating circumstances”
Financial Responsibility [§791-798]	In lieu of the COFR, it is recommended the State continue to accept evidence of sudden and accidental pollution insurance (copies of policies and acord certificates) from its inland operators. [Comment W1-(7)]	OSPR rejects this comment/suggestion. Statute (Gov. C. §8670.37.51 – 8670.37.58) requires that plan holders demonstrate insurance coverage or another mechanism of financial responsibility to cover specific spill-related liabilities.

Repetitive/Similarly Related Comments

The following comments are either repeated by multiple parties, or are of similar content, so are aggregated here for efficiency.

Topic	Summary of Comments	Agency Response
<p>Financial Responsibility Forms – California Endorsement for Oil Spill Liabilities (Form 1962); Surety Bond for Oil Spill Response and Damages (Form 1948); Guaranty of Financial Responsibility (Form 1928); Trust Agreement (Form 1961)</p> <p>[§791-798]</p>	<p>The language of the Endorsement form is significantly broader than terms and conditions of a policy. Pollution policies typically contain a "sudden and accidental" or "time element" provision. The OSPR Endorsement does not limit the insurer's liability in this regard. [Comments W1-(1); VS3-(a); VB2-(c)]</p> <hr/> <p>OSPR Endorsement may cause insurers to re-evaluate their capabilities in California. On-shore lease operator insurance underwriters do not have a way to rate for this type of endorsement; there's no actuarial data. [Comment W1-(3); VS3-(a); VB2-(b)]</p> <hr/> <p>Approval of OSPR's Endorsement by the California Dept. of Insurance is a required and lengthy process. [Comment W1-(4); VS3-(a); VS1-(a); VB2-(b)]</p> <hr/> <p>Alternative forms of financial responsibility are also problematic. Surety bond (Guaranty) option - Certain components of the DFW 1920 (Guaranty of Financial Responsibility for Oil Spill Response and Damages) are a challenge for oil and gas surety markets. [Comment W1-(5); VS3-(b)]</p> <hr/> <p>The self-insurance option and other policies would be a challenge, if even available, for smaller inland facility operators. [Comment W1-(6); VS2-(b); VS3-(c); VB4-(a),(b),(d)]</p>	<p>OSPR rejects these comments. Statute (Gov. C. §8670.37.51 – 8670.37.58) requires that plan holders demonstrate insurance coverage or another mechanism of financial responsibility to cover specific spill-related liabilities. OSPR created an endorsement as an aid to help both plan holders and OSPR staff know that a policy provides all the necessary coverage. Use of the endorsement is voluntary.</p> <p>OSPR is currently reviewing how it will evaluate insurance policies that do not rely on the OSPR endorsement. As an interim measure, OSPR agreed in 2015 to accept the standard pollution policies already in use by many production facilities. This review of insurance policies is not germane to the proposed regulations; it is a matter of evaluating an insurance policy in light of the specific requirements in statute. The timeline for this review is not connected to the proposed regulations.</p>

	<p>The surety will not pay defense of claims from third parties. [Comment W1-(5)]</p> <hr/> <p>The language lacks explanation of what happens if a guarantor terminates its guaranty. [Comment W1-(5)]</p> <hr/> <p>Trust Agreement lacks clarity on who the beneficiary of the insurance proceeds would be. [Comment W1-(5)]</p>	<p>OSPR neither accepts nor rejects this comment. The purpose of a Surety Bond as a means of demonstrating financial responsibility for an oil spill is to provide funds to pay for cleanup and damages caused by the spill. Defense against those claims may be a concern of the responsible party, but that is outside the scope of oil spill financial responsibility demonstration.</p> <hr/> <p>OSPR rejects this comment. If a Guaranty is terminated, an alternate form of financial responsibility would be required, same as if any other form of financial responsibility was terminated or ended. What happens upon termination or expiration is addressed in subsections 791.7(i)(2) and (3) – Application Renewals – the owner or operator must inform OSPR and submit proof of renewal or submit a change in the method of demonstrating financial responsibility.</p> <hr/> <p>OSPR rejects this comment. The Trust Agreement explicitly identifies the Administrator of OSPR as the beneficiary in the first paragraph, in paragraph 15.2 under Notices, Instructions and Directions, and on the signatory page.</p>
Economic Analysis	<p>How did OSPR come to conclusions it did concerning the economic analysis? Why was a Standardized Regulatory Impact Assessment not developed? [Comment VS1-(b)]</p>	<p>The threshold for conducting a Standardized Regulatory Impact Assessment (SRIA) is that the economic and fiscal impacts are greater than \$50 million/year. In this case, the total estimated economic benefits was \$7.7 million/year and the estimated costs were \$4.1 million in the first year and \$2.0 million/year thereafter. This includes the economic impacts for the</p>

	<p>OSPR’s regulations add to the cost of operations. OSPR’s economic analysis needs to take into consideration personnel time and recovery of the resources, and that production in California is declining. [Comment VS2-(a)]</p> <hr/> <p>Oil producers are price takers, not price makers. They do not have the ability to pass on the costs to the consumer. OSPR’s economic analysis is not accurate for producers. [Comment VS2-(a); VB4-(b)]</p>	<p>regulations on contingency plans, financial responsibility, drills and exercises, and oil spill response organizations combined. While there is some question over who is bearing the economic costs (see next comment below), that does not change the total cost figure, which is still well below the threshold for a SRIA. The expected fiscal impacts on state and local government agencies are minor.</p> <hr/> <p>This comment is responded to by way of revisions to the Economic Impact Assessment in the Amended Initial Statement of Reasons.</p> <hr/> <p>This comment is responded to by way of revisions to the Economic Impact Assessment in the Amended Initial Statement of Reasons.</p>
Changes in versions	Suggestion that OSPR articulate the changes in the regulatory text over the last two years. [Comment VS1-(c)]	OSPR rejects this comment/suggestion. OSPR has provided a fact sheet summarizing the major differences between the emergency regulations readopted on August 11, 2017 and the proposed permanent regulations being in this rulemaking action. The fact sheet is available on OSPR’s proposed regulations webpage at the following address: https://www.wildlife.ca.gov/OSPR/Legal/Proposed-Regulations

Irrelevant Comments

The following comments are not germane to the proposed regulations; as such, **OSPR rejects these comments.**

Topic	Summary of Comments
Contingency Plans and Definitions & Abbreviations [§817.04 & §790]	All comments related to sections 817.04 and 790 [Comments: VS4-(a); VB3-(a); VB4-(b)] These comments will be addressed in the related rulemaking.

Topic	Summary of Comments	Agency Response
Oil Spill Response Organization Ratings [§§819-819.07]	All comments related to sections 819 – 819.07: [Comments VS5-(a),(b),(c); VB1-(a),(b),(c); VB3-(a)] These comments will be addressed in the related rulemaking.	
Drills and Exercises-Inland Facilities [§820.02]	All comments related to section 820.02: [Comment VB3-(a)] These comments will be addressed in the related rulemaking.	
Oil Spill Technical Advisory Committee Membership	Inquiry as to when the vacancies on the Oil Spill Technical Advisory Committee will be open and available. [Comment VS1-(d)]	
Senate Bill 861	General complaints about how Senate Bill 861 was passed. [Comment VB4-(c); VB4-(d)]	

2. Second Comment Period – (15-Day)

Upon consideration of the comments received from the first comment period, OSPR made revisions to Sections 791 through 798 and submitted the revisions for an additional 15-day comment period. The following summarize the comments received from the 15-day comment period, May 23, 2018 – June 6, 2018.

Topic	Summary of Comments	Agency Response
Financial Responsibility [§791-798]	The California COFR regulations have revised “barge” to “tank barge”. Request to confirm the revisions eliminate the requirement of a separate COFR for the dry cargo barge of an Integrated Tug and Barge that carries oil only as fuel for the barge’s generator and the tug it’s attached to. [Comment W2-(1)]	OSPR rejects this comment as untimely. These revisions were made during the 45-day comment period. OSPR will contact the commenter to address the inquiry.
Financial Responsibility [§791-798]	Suggestion that oil spill response vessels and barges be exempt from COFR requirement given that they only carry recovered oil/water in emergency response situations. [Comment W3-(e)]	OSPR rejects this comment/suggestion as untimely.

Irrelevant Comments

The following comments are not germane to the proposed regulations; as such, **OSPR rejects these comments.**

Topic	Summary of Comments
Contingency Plans and Definitions & Abbreviations [§817.04 & §790]	All comments related to sections 817.04 and 790: [Comments W3-(a) through (d); W3-(f) through (k)] These comments will be addressed in the related rulemaking.
Oil Spill Response Organization Ratings [§§819-819.07]	All comments related to sections 819 – 819.07: [Comments W3-(l) through (t)] These comments will be addressed in the related rulemaking.

3. Third Comment Period – (15-Day)

OSPR made revisions to Sections 791 through 798 and submitted the revisions for an additional 15-day comment period. The following summarize the comments received from the 15-day comment period, October 11, 2018 – October 25, 2018.

Topic	Summary of Comments	Agency Response
Financial Responsibility [§791.7]	Question more than comment concerning possibility of time delay between when evidence of P&I coverage renewal is received and when a vessel is due to arrive in state waters. [Comment W4]	OSPR objects this question/comment as untimely. No revisions concerning this subsection were made during the third comment period. OSPR has, however, contacted the commenter to address the inquiry.