

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

**INITIAL STATEMENT OF REASONS
including
ECONOMIC IMPACT ASSESSMENT**

Title 14, California Code of Regulations
Adopt Sections 790.1, 790.3, 790.5
Amend Sections 791.7, 796, 797, 816.01, 816.03, 817.02, 817.04, 819.02, 819.07,
820.01, 820.02, 826.01, 826.03, 830.7, 830.11, 852.61.11, 885.2, 885.3
Repeal Section 798

Date of this Initial Statement of Reasons: January 21, 2022

I. Description of Regulatory Action

General Background

This rulemaking pertains to subdivision 4 of division 1 of title 14 of the California Code of Regulations. This subdivision is promulgated by the Office of Spill Prevention and Response (OSPR) to implement the *Lempert-Keene-Seastrand Oil Spill Prevention and Response Act* (the *Act*).

Currently, chapter 1 of subdivision 4 consists of just one section – 790 – which provides the definitions that generally govern all of subdivision 4. This rulemaking is expanding chapter 1 to include three new miscellaneous sections that are also generally applicable to the entire subdivision.

- One new section consolidates the same or nearly similar provisions found in two places within the subdivision, regarding the topic of severability. Thus, although this section is “new” to chapter 1, really the text is identical or very similar to existing text. [new 790.1]
- One new section consolidates multiple instances of the same or nearly similar provisions within the subdivision, regarding how to designate information in a document submitted to OSPR as confidential and not publicly disclosable. Thus, although this section is “new” to chapter 1, really the text is identical or very similar to existing text. [new 790.3]
- One new section consolidates multiple instances of the same or nearly similar provisions within the subdivision, regarding how to request reconsideration of a decision made by OSPR. Thus, although this section appears “new”, really the text is identical or very similar to existing text. [790.5]

II. Problem the Regulatory Action Intends to Address [Government Code section 11346.2(b)(1)]

Chapter 1. of subdivision 4. is being recast for provisions generally applicable to the entire subdivision, in addition to the existing definitions section.

This rulemaking is intended to eliminate redundancy and minor inconsistencies. It consolidates discrete topics that are currently stated multiple times in the existing regulations but not with equal consistency.

Consolidating the various provisions of a single topic into discrete sections ensures there are not unintended drafting differences, eliminates redundancy, creates a single section that all persons can refer to, and reduces the volume of text within this subdivision. Conforming amendments are being made to delete the redundant text and cross-reference to these two new sections.

III. Purpose, Rationale, and Necessity for the Amendment, Addition, or Repeal of the Regulations [Government Code section 11346.2(b)(1)]

Government Code section 8670.7.5 authorizes the Administrator of OSPR to adopt regulations to implement the *Act*. The proposed regulations implement, interpret, and add specificity not found in the *Act*.

OSPR's regulations are codified at 790 *et seq.* of Title 14. This rulemaking adds three sections to chapter 1 of OSPR's regulations.

The following sets forth a discussion of each added, amended, or repealed regulatory provision proposed in this rulemaking action and why each provision is reasonably necessary to carry out the purpose, and addresses the problem for which it is proposed.

Adopt Section 790.1 – Severability.

General Background

Severability clauses are common and provide certainty to both the regulatory agency and to the regulated community. Severability clauses provide guidance to a Court that may be asked to review the validity of regulatory text.

Government Code section 8670.5.5 provides for severability "If any provision of this chapter [the *Act*] or the application thereof..." is held to be invalid.

Purpose: The text of this new section is presently in chapter 2, section 798 which is about financial responsibility for oil spills, and in chapter 3, section 817.04(w) which is about inland facility oil spill contingency plans. This text is being moved from chapters 2 and 3 to chapter 1 and is reestablished as 790.1. It will have general applicability to all of subdivision 4, not just chapters 2 and 3.

Necessity: If a Court were to find that a provision or the application of a provision of this subdivision is invalid, the intent of this section is to preserve the implementation and enforceability of any remaining provisions of this subdivision. Without such guidance, the Court may feel it must rule strike multiple sections even for provisions not in question, or even the entire Subdivision. For example, this could result in vessel or facility owners not being required to have any financial resources to adequately pay for oil spill response and cleanup or have a contingency plan for cleanup, depending upon the scope a Court ruling.

Applying the regulation to the entire subdivision does not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element.

This is a change without regulatory effect. [Ref. subdivision (a)(1), section 100, Title 1, California Code of Regulations]

Conforming Amendments Regarding Severability and Section 790.1

As stated above, new section 790.1 consolidates provisions regarding severability into a single section. Concurrently, the following sections have the redundant text stricken:

- 798
- 817.04(w)

Adopt Section 790.3 – Confidentiality of Submitted Documents and Information.

General Background

For years OSPR's regulations have allowed for certain information that is submitted to OSPR to be flagged as "confidential" so that it is not subject to public disclosure. The contexts include, for example, marine vessel and facility contingency plans, inland facility contingency plans, oil spill response organization rating applications, spill management team certification applications, and independent drill monitor applications.

The confidentiality provisions are designed to allow legitimate assertions of protection from disclosure. The burden is on the document submitter to flag what information should be considered confidential or privileged and provide specific justification; OSPR would not initially know this. Wholesale claims of confidentiality would put OSPR in the position of deciding for the submitter what is confidential and deciding why. However, allowing the submitter to simply declare an entire document (e.g., a contingency plan) is "confidential" defeats the legislative intent of the *California Public Records Act*.

This new section is consolidating multiple instances of existing text into a single section. Consolidating the various provisions into a single section ensures there are not unintended drafting differences, ensures a single review process, creates a single section that all persons can refer to, eliminates redundancy, and reduces the volume of text of this subdivision.

Thus, although this section is new, really the text is very similar to existing text found in a number of OSPR's regulations. This new section is modeled on subsections 817.04(k) and 830.7(f), which are the most recent iterations of the confidentiality-designation process.

Subsection (a)

Purpose: Subsection (a) provides that a claim of confidentiality can be made.

Necessity: Generally, documents in the possession of a state agency are public records pursuant to the *California Public Records Act*. And specifically, oil spill contingency plans must be available to the public for review. (Government Code section 8670.28(b)). However, other laws give people the right to protect certain privileged or proprietary information from public disclosure.

Subsection (b)

Purpose: Subsection (b) establishes that each instance of claimed confidentiality must be legally supported.

Necessity: Subsection (b) sets the expectations for privilege claims. For example, OSPR has received contingency plans with information that was redacted based on a mere claim of “privilege”. However, mere claims are not sufficient justification. OSPR also has received redacted information that was readily available on the internet, even on the plan holder’s own public-facing website. Withholding such redacted information from public review cannot be legally justified. Specific and legitimate authority is required to supersede the *California Public Record Act’s* presumption that documents in the possession of a state agency shall be publicly disclosable.

Subsection (c)

Purpose: Subsection (c) establishes the process for making a claim of privilege or confidentiality.

Necessity: This subsection describes how to designate the information as confidential or privileged and how to submit the documents. The requirement for two-copies is not new, this has been in the regulations since 1994. [e.g., ref. 14 CCR § 816.01(d)] This allows OSPR to consider the adequacy of the document by reviewing the un-redacted version; and allows the public access to the document while protecting legitimate privacy concerns of the document-submitter.

Subsection (d)

Purpose: Subsection (d) explains the process of OSPR will handle requests for documents.

Necessity: This subsection provides a balance between the public’s statutory right to review a public record and the document-submitter’s legal rights to protect legitimate confidential or privileged information. Ten business days essentially provides two weeks’ time for the document submitter to assert their claimed privileges in Court and seek an order to not release the information.

Subsection (e)

Purpose: Subsection (e) specifies who makes the decision regarding disclosure or withholding.

Necessity: This makes clear either the Administrator or a Court will rule on the claim of confidentiality or privilege, not the document submitter or a member of the public requesting the documents.

Conforming Amendments Regarding Confidentiality and Section 790.3

As stated above, new section 790.3 is consolidating into a single section various provisions about identifying information as confidential. The following subsections have redundant text stricken, and a cross-reference to new section 790.3 added:

- 816.01(d)
- 817.02(c)(3)(B)
- 817.04(e)(5)
- 819.02(g)
- 820.01(k)(3)(D)
- 826.01(d)
- 830.7(f)

These conforming amendments do not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element, and do not have regulatory effect, because their substance is retained in new section 790.3.

Adopt Section 790.5 – Request for Reconsideration

General Background:

For years OSPR's regulations have allowed for reconsideration of decisions by OSPR. The contexts include review of financial responsibility, marine vessel and facility contingency plans, inland facility contingency plans, oil spill response organization ratings, spill management team certifications, exercise credit requests, independent drill monitor applications, local government grants, and oil spill cleanup agent licenses. [e.g. ref. 14 CCR §§ 791.7(j), 796(c), 816.03(g), 817.04(f), 819.07(a), (b), 820.01(j), 820.02(l), 826.03(g), 830.11, 852.61.11(f), 885.2(d), 885.3(b)]

This new section consolidates the existing text into a single section, and it would be applicable to decisions made by OSPR pursuant to subdivision 4. It generally follows section 830.11, which is the most recent iteration of this process. Consolidating the various provisions into a single section ensures there are not unintended drafting differences, creates a single reconsideration process, creates a single section that all persons can refer to, eliminates redundancy, and reduces the volume of text of this subdivision.

Subsection (a)

Purpose: Subsection (a) provides that a claim of reconsideration can be made.

Necessity: An appeal process is necessary to provide due process. Examples of contexts for which this could apply include, but are not limited to, a deficiency letter regarding a contingency plan; denial of evidence of financial responsibility; modification, suspension, or revocation of a spill management team's certification or an oil spill response organization's rating; or other decisions made pursuant to subdivision 4.

Subsection (b)

Purpose: Subsection (b) describes the process for requesting reconsideration of a determination by the Administrator.

Necessity: This subsection provides the minimum elements for submitting a request for reconsideration to be accepted.

Subsection (c)

Purpose: Subsection (c) provides the time for requesting a reconsideration, based on business days (currently defined in section 790). It also provides for the option to have a preliminary meeting with the Administrator.

Necessity: This subsection provides certainty for when the requestor should receive a response from OSPR, depending on if the requestor has a meeting with OSPR. This sets the limit for when a request for reconsideration needs to be submitted. Fifteen business days is considered reasonable and is commonly used already in this subdivision. Regulated entities should already be aware of this time frame.

(c)(1) sets the process if there is no request for a preliminary meeting.

(c)(2) sets the process if a meeting is requested and what happens after the meeting.

There are a few minor substantive changes. In the context of receiving credit for completing objectives during a marine oil spill exercise [section 820.01(j)(1)-(3)], the substantive change is that the request for reconsideration must occur within *15 business days*, instead of *20 calendar days*. This change only makes a difference of a day or two, depending on the month and holidays, and may give the requestor a few extra days when measured as calendar days.

In the context of termination of a grant of funds to a local government for the update of its local hazardous materials plan to account for oil spills [section 852.61.11(f)], the substantive change is that the grant applicant must request reconsideration within *15 business days* rather than *10 calendar days*; and the Administrator will have *10 business days* rather than *10 calendar days* to decide whether to grant the request. This change gives the applicant a few more days to make the request, and gives the Administrator a few more days to decide, depending on the month and holidays.

In the context of issuing a license for an oil spill cleanup agent [section 885.2(d)], the only substantive change is that after a request for reconsideration has been made, the Administrator will have *15 business days* rather than *30 calendar days* to issue his/her determination. Thus, by this rulemaking the applicant will have an answer about week sooner, depending on the month and holidays.

Subsection (d)

Purpose: Subsection provides a process for a hearing regarding OSPR decisions, based on business days (currently defined in section 790).

Necessity: This is not new. OSPR's regulations have provided an option for reconsideration of certain decisions for many years regarding oil spill contingency plans,

rating of oil spill response organizations, and exercise credit. (ref. 14 CCR §§ 816.03(g)(3), 817.04(f)(4)(C), 819.07(b), 820.01(j)(4), 820.02(l)(4), 826.03(g)(3))

This subsection provides due process to the aggrieved person/entity in the event of a decision to deny reconsideration. This provision makes this option available for review of all decisions pursuant to Subdivision 4. Fifteen business days is considered reasonable for requesting a reconsideration, for OSPR to make decisions, and for a formal hearing to be requested. Fifteen business days (or “working days”) is commonly used already in OSPR’s regulations. [e.g., ref. 14 CCR §§ 791.7(j), 796(c), 816.03(g), 817.04(f), 819.07(b), 820.01(j)(4)(B), 820.02(l), 826.03(g), and 830.11]

One substantive change, in the context of requesting a hearing regarding the denial of a request for reconsideration of completion of objectives during a marine oil spill exercise [section 820.01(j)(4)], the request for a hearing would have to occur within 15 *business* days, instead of 15 *calendar* days. This change gives the requestor four to five more days to make the request, depending on the month and holidays.

This subdivision provides a hearing process administered by the Office of Administrative Law, which the existing regulations already provide. [*Id.*]

If a formal hearing for review is requested and is held, 30 calendar days for a hearing officer to issue a decision is reasonable and is already used in the regulations [Ref. sections 819.07(b)(2), 820.01(j)(4)(B), 820.02(l)(4)(B), 830.11(b)(1)(B)] and is provided in section 11517(c)(1) of the Government Code regarding formal hearings.

Subsection (e)

Purpose: Subsection (e) clarifies this section does not apply to administrative enforcement actions initiated by OSPR.

Necessity: This subsection avoids any ambiguity or unintended overlap or conflict with the time frames and process of administrative enforcement actions. Government Code sections 8670.68 and 8670.68.1 describe the statutory process for these actions. Also, by their nature, they can be adversarial, subject to different rules, and may be resolved by negotiated settlement. Or ultimately an administrative enforcement action may be heard and decided by an administrative law judge/hearing officer; this would be the “final” decision.

Conforming Amendments Regarding Reconsideration of Decisions and Section 790.5

As stated above, amended section 790.5 is consolidating into a single section various provisions about requesting a reconsideration a decision made by OSPR. The following sections have redundant text stricken, and a cross-reference to amended section 790.5 added.

- 791.7(h)(1)(A)3.
- 791.7(h)(1)(B)2.
- 791.7(h)(1)(C)2.
- 791.7(h)(1)(E)2.
- 791.7(j)
- 796(c)
- 797(e)
- 816.03(g)
- 817.04(c)(2)(B)
- 817.04(f)(4)
- 817.04(u)
- 819.07(a), (b)
- 820.01(j)
- 820.01(k)(3)(I) and (J)
- 820.02(I)
- 826.03(g)
- 830.11
- 852.61.11(f)
- 885.2(d)
- 885.3(b)

These conforming amendments do not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element, except as described above, and have minimal regulatory effect, if any. Any change is only a few days plus or minus depending on the month.

Authority and Reference

The authority and reference of current 790.5 is deleted and updated for these amendments. The authority cited includes the following sections of the Government Code: 8670.7.5 which authorizes the Administrator to adopt regulations to implement the *Lempert-Keene-Seastrand Oil Spill Prevention and Response Act*; and 8670.5.5 which provides that provisions of the *Act* and applications thereof are severable from other provisions that are held to be invalid.

Other Amendments to Section 819.02

Subsection (a)

Subsection (a) includes an update to the methods of delivery of an application to become a rated oil spill response organization. Consistent with other OSPR regulations, the update eliminates the option to deliver in person. Additionally, the address for OSPR is also updated.

Subsection (c)(6)

A non-substantive change is made to correct the punctuation at the end of the sentence.

Subsection (c)((1)(E)

A non-substantive spelling edit is made.

IV. *Economic Impact Assessment* [Government Code sections 11346.2(b)(2); 11346.3(b)(1)]

The proposed rulemaking amends one section and adds two new sections, with the purpose of consolidating existing text regarding discrete topics, as described above.

This rulemaking also makes conforming amendments consistent with these changes.

(a) What is the evidence supporting a finding of No Significant Statewide Adverse Economic Impact directly affecting business, including the ability of California businesses to compete with businesses in other states?

These regulations will not have a significant statewide adverse economic impact.

There is no cost associated with severability (790.1). Severability provisions have been in the regulations for six years.

The section regarding requesting confidentiality of information in documents submitted to OSPR (790.3) has no cost, and industry already has this option; the text is just being refined.

The section regarding requesting reconsideration of a decision by OSPR (790.5) has no cost, and industry already has this option; the text is just being refined.

These are not considered “major regulations” because the economic impact assessment concludes that the impacts, summing both costs and benefits, will be negligible if any at all – i.e., considerably less than \$50 million dollars annually that would trigger major regulation status.

Costs

As stated above, a section on severability has no costs, and its essence has been placed for six years in two other sections.

Designating information in a document as confidential or proprietary is optional for the submitter and has no cost. This process is not new, it has been in place for many years.

Requesting reconsideration of a decision made by OSPR is optional for the requestor and has no cost. This process is not new, it has been in place for many years.

The conforming amendments have no costs.

(b) Will there be any effects of the regulation on the creation or elimination of jobs within the State?

None.

(c) Will there be any effects of the regulation on the creation of new businesses or the elimination of existing businesses within the State?

None.

(d) Will there be any effects of the regulation on the expansion of businesses currently doing business within the State?

No. There is no cumulative impact to this rulemaking regarding severability, confidentiality, or reconsideration. These are existing provisions being reorganized.

(e) Will there be any benefits to the health and welfare of California residents, worker safety, and the State’s environment?

No. These are existing provisions merely recast.

(f) Will there be any other benefits of the regulations?

They create consistency of requirements and expectations.

V. Studies, Reports, or Documents Relied Upon [Government Code section 11346.2(b)(3)]

None. There are no studies, reports, or documents relevant to this rulemaking.

VI. Reasonable Alternatives to Regulatory Action [Government Code section 11346.2(b)(4)(A)(B)]

None. No alternatives were identified that would have the same regulatory effect.

VII. Specific Technology or Equipment Required by Regulatory Adoption [Government Code section 11346.2(b)(1)]

None. The regulations do not require specific technology or equipment to accomplish the requirements.

VIII. Duplication or Conflict with Federal Regulations [Government Code section 11346.2(b)(6)]

None. The proposed regulations do not duplicate or conflict with federal regulations.

IX. Mitigation Measures Required by Regulatory Action

The proposed regulatory action will have no negative impact on the environment therefore, no mitigation measures are needed. These are existing provisions recast.

END