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
Amend Section 790
Regarding General Definitions and Abbreviations
and
Amend Sections 817.02, 817.03, 817.04, 818.02, 818.03
Regarding Contingency Plan Content
and
Amend Sections 819.01, 819.02, 819.03, 819.04
Regarding Oil Spill Response Organization Ratings

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

I. Description of Regulatory Action

The California Department of Fish and Wildlife (Department), Office of Spill Prevention & Response (OSPR) is proposing to adopt through this regular rulemaking the criteria for a non-floating oil spill response organization rating. This is to implement statutory changes made to Government Code sections 8670.29, 8670.3, and 8670.30 through Assembly Bill 936 (2019).

General Background

The *Lempert-Keene-Seastrand Oil Spill Prevention and Response Act* (Act) (Chapter 1248, Statutes of 1990) created a comprehensive state oil spill program including the establishment of the Office of Spill Prevention and Response (OSPR). The Act requires the Administrator to establish regulations that provide for the best achievable protection of the state's natural resources.

The Act requires that owners or operators of facilities and vessels that may pose an oil spill risk to waters of the state, to submit an oil spill contingency plan to the Administrator for approval. Additionally, these plan holders must maintain a level of readiness that allows for effective implementation of the contingency plans (Government Code sections 8670.28.5 through 8670.34).

The Act requires the Administrator to adopt and implement regulations governing the adequacy of oil spill contingency plans (Government Code sections 8670.28 and 8670.29). Among the numerous requirements, the Administrator must set standards for response, containment, and cleanup equipment and operations, which must be

maintained and regularly tested and improved to protect the state's natural resources. This may be achieved by cleanup contractors known as oil spill response organizations (OSRO). Plan holders' contingency plans must identify an OSRO that is rated by the Administrator of OSPR (Government Code section 8670.30). An oil spill contingency plan shall ensure the undertaking of prompt and adequate response and removal action in case of a spill and must demonstrate evidence for sufficient on-water recovery and storage resources.

Assembly Bill 936, signed by the Governor in October 2019, requires the Administrator to define "non-floating oil" for the purposes of the Act, and to adopt regulations to establish criteria for rating an OSRO based on its capability to effectively respond to and manage a spill of non-floating oil. Additionally, Assembly Bill 936 requires the Administrator to revise the requirements for contingency plans to address non-floating oil, including describing procedures, techniques, and demonstrated technologies effective for responding to a spill of non-floating oil and to include requirements for contracting with an OSRO rated for non-floating oil spill response.

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

Current oil spill planning and prevention does not fully address the risks associated with "non-floating" oil (NFO), i.e., oil that sinks into the water column when spilled, such as diluted bitumen from Alberta's tar sands, Venezuelan heavy crudes, and certain grades of Mexican crudes. While existing contingency planning by OSPR addresses a subcategory of these oils, called "Group 5" oils, it does not address some of the most problematic types of NFOs, as that term is more broadly defined by the U.S. Coast Guard (USCG) in its 2016 Guidance. Some of these types of oil are currently transported throughout California, via various methods including by sea across the Pacific Ocean and San Francisco Bay.

All types of NFOs pose a serious environmental threat. In the event of a spill, NFOs cannot be effectively cleaned up using conventional surface spill response methods and equipment. In many cases, these oils –and often the volatile additives used to dilute them for transportation purposes-pose a higher risk of toxic air and water contamination. Spills of NFO require immediate response due to the risk of the oil sinking into the water column, which is significantly more harmful, costly, and difficult to clean up than a surface spill. California cannot afford to put its waters, beaches, fisheries, and wildlife at risk from an oil spill of any kind.

The proposed regulatory changes will require entities involved with the transportation and handling of NFOs to file an oil spill contingency plan with OSPR that lists an OSRO that has obtained an NFO rating from OSPR. OSRO's may obtain this rating by demonstrating to OSPR that they have received the Non-floating Oils Classification from the USCG, thus showing that they have the necessary equipment and specialized training to deal with the unique characteristics of a NFO spill.

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

Government Code sections 8670.29, 8670.3, and 8670.30 grant the Administrator of OSPR the authority to adopt regulations and guidelines regarding the definition of "non-floating oil" (NFO), to adopt regulations to establish criteria for rating an OSRO for an NFO spill based on their capacity to effectively respond to and manage an NFO spill response, and requires the Administrator to revise the requirements for contingency plans to include provisions for contracting with an OSRO rated for NFO spills. The proposed regulations implement, interpret, and add specificity to the provisions of Government Code sections 8670.29, 8670.3, and 8670.30.

The sections below set forth a discussion of the specific purpose for each regulatory provision to be adopted in section(s) 790, 817.02, 817.03, 817.04, 818.02, 818.03, 819.01, 819.04, 819.07 and why each regulatory provision adopted is reasonably necessary to carry out the purpose and addresses the problem for which it is proposed.

Section 790 - Definitions and Abbreviations

Subsection (n)(3)

Purpose: New subsection (n)(3) is added to define "non-floating oil" for the purposes of OSPR's regulations. Former subsection (n)(3) is renumbered (n)(4) for consistency.

Necessity: A definition of "non-floating oil" provides specificity for the type of substances regulated by OSPR under these regulations and is necessary to implement the mandates of Government Code sections 8670.29, 8670.3, and 8670.30. In 2016, the USCG) released its latest guidelines for OSROs that added a new classification for NFOs. In those guidelines, the USCG recognized that NFOs are broader than just Group 5 oils and include other heavy oils that show characteristics that may cause the oils to submerge or sink, such as Group 5 oils that have been diluted with a diluent for transport. According to the USCG, the oil spill response capabilities required to detect and recover NFO differs significantly depending on the operating area, environmental conditions, and the type of oil spilled. Standard response methods – designed for floating oils – are inadequate and difficult to apply when most of the oil is submerged or has sunk to the bottom.

Subsection (n)(4)

Purpose: Former subsection (n)(4) is renumbered to (n)(5) for consistency. "Of which" is changed to "that are", and the acronyms for Celsius and Fahrenheit (C and F, respectively) are spelled out explicitly.

Necessity: The renumbering is necessary to accommodate the inclusion of the definition of "non-floating oil" added in subsection (n)(3). The rewording of "of which" into "that are" is necessary for the consistency of the language used in OSPR's regulations. Likewise, the spelling out of Celsius and Fahrenheit is necessary for making OSPR's

regulations consistent by reducing the use of acronyms.

Subsection (p)(1)(D)

Purpose: Amended to specify that Group 5 oils are also classified as NFOs under subsection (n)(3), and to revise the specific gravity requirement to make it consistent with the definition used in the Guidelines for the USCG Oil Spill Removal Organization Classification Program. The citation in the 'Note' with regard to Group 1 oils is also revised to account for changes at (n)(4).

Necessity: The amendments to this subsection are necessary to specify that Group 5 oils are included within the definition of "non-floating oil", the definition of which is added at (n)(3).The amendment redefining the specific gravity for Group 5 oil as "equal to or greater than" is necessary to make OSPR's terms for Group 5 oil and NFO consistent with those used by the USCG in their OSRO guidelines, as these regulations seek to make the USCG NFO OSRO classification the basis for an OSRO to obtain an NFO rating from OSPR.

Section 817.02 – Marine Facility Plan Content

Subsection (d)(5)(E)

Purpose: Amended to change all mention of "Group 5 Oils" to "Non-floating Oil" for the contingency plan requirements of marine facilities that handle NFOs.

Necessity: This amendment is necessary to implement the mandate of Government Code section 8670.29 to specify the coverage of contingency plans for marine facilities that handle NFOs, as this category of oil includes Group 5 oils and Group 5 oils that have been diluted with a diluent for transportation. A primary example is diluted bitumen from the Alberta tar sands, which is typically transported by rail and barge and was the primary concern of Assembly Bill 936 (2019).

Subsection (d)(5)(F)2.

Purpose: Amended to add a space after "agent".

Necessity: This change is necessary to fix a grammatical mistake.

Subsection (f)(1)(A)

Purpose: The subsection is amended to include "as" in the sentence.

Necessity: This addition is necessary to make the language used in OSPR's regulations consistent.

Section 817.03 – Small Marine Fueling Facility Plan Content

Subsection (d)(5)(C)

Purpose: This subsection is added to establish the contingency plan requirements for small marine fueling facilities and mobile transfer units that handle NFO.

Necessity: This addition is necessary to implement the mandates of Government Code section 8670.29 to specify the coverage of contingency plans for small marine fueling facilities and mobile transfer units that handle NFOs.

Subsection (f)(1)(A)

Purpose: The subsection is amended to include “as” in the sentence.

Necessity: This addition is necessary to make the language used in OSPR’s regulations consistent.

Section 817.04 – Inland Facility

Subsection (j)(2)(D)

Purpose: Amended to change all mention of “Group 5 Oils” to “Non-floating Oil” for the contingency plan requirement that inland facilities provide a description of the type that an inland facility is handling or transporting. This description is typically included in a safety data sheet, as specified by this subsection.

Necessity: Inland facilities are currently required to include Group 5 oil as a “type” of oil being handled or transported in their description of their facility that is included within their contingency plan. This change would expand this requirement to specify “non-floating oil” in order to implement the mandate of Government Code section 8670.29 to specify the coverage of contingency plans for inland facilities that handle NFOs, as this category of oil includes Group 5 oils and Group 5 oils that have been diluted with a diluent for transportation.

Subsection (n)(4)

Purpose: Amended to change all mention of “Group 5 Oils” to “Non-floating Oil” for the contingency plan requirements of inland facilities that handle NFOs.

Necessity: This amendment is necessary to implement the mandate of Government Code section 8670.29 to specify the coverage of contingency plans for inland facilities that handle NFOs, as this category of oil includes Group 5 oils and Group 5 oils that have been diluted with a diluent for transportation. A primary example is diluted bitumen from the Alberta tar sands, which is typically transported by rail and barge and was the primary concern of Assembly Bill 936 (2019). Perennial waters are specified as NFO does not pose the same risk of submerging in the water column in intermittent and

ephemeral waters, and the reference to perennial waters is made in a manner consistent with subsections (k)(2) and (m)(1)(B) of this section.

Section 818.02 – Tank Vessel Plan Content

Subsection (e)(5)(D)

Purpose: Amended to change all mention of “Group 5 Oils” to “Non-floating Oil” for the contingency plan requirements of tank vessels that handle NFOs.

Necessity: This amendment is necessary to implement the mandate of Government Code sections 8670.29 and specify the coverage of contingency plans for tank vessels that handle NFOs, as this category of oil includes Group 5 oils and Group 5 oils that have been diluted with a diluent for transportation. A primary example is diluted bitumen from the Alberta tar sands, which is typically transported by rail and barge and was the primary concern of Assembly Bill 936 (2019).

Subsection (f)

Purpose: The subsection is amended to include “as” in the sentence.

Necessity: This addition is necessary to make the language used in OSPR’s regulations consistent.

Subsection (g)(1)(A)

Purpose: The subsection is amended to include “as” in the sentence.

Necessity: This addition is necessary to make the language used in OSPR’s regulations consistent.

Section 818.03 – Vessels Carrying Oil As Secondary Cargo Plan Content

Subsection (f)

Purpose: This subsection is amended to include “as” in the sentence. Additionally, a period after “annually by OSPR staff” is corrected to be a comma.

Necessity: These changes are necessary to make the language used in OSPR’s regulations consistent and to fix a grammatical mistake.

Subsection (g)(1)(A)

Purpose: The subsection is amended to include “as” in the sentence.

Necessity: This change is necessary to make the language used in OSPR’s regulations consistent.

Section 819.01 – Oil Spill Response Organization (OSRO) Ratings

Subsection (a)

Purpose: The purpose of this change is to include the NFO rating as a rating category that OSROs can voluntarily apply for from OSPR.

Necessity: This addition is necessary to implement the mandates of Government Code section 8670.30 to establish a rating category for NFO per Assembly Bill 936 (2019).

Subsection (b)(4)

Purpose: This subsection is amended to include “in” in the sentence.

Necessity: These additions are necessary to make the language used in OSPR’s regulations consistent and to fix a grammatical mistake.

Section 819.02 – Oil Spill Response Organization Rating Application Content.

Subsection (a)

Purpose: The requirement for submitting an OSRO application in person or by mail is and amended to only requiring submission via email or mail. The mailing address is updated to reflect the current post office box used by OSPR.

Necessity: This addition is necessary to update the regulations to reflect that in-person deliveries are no longer accepted, and to allow OSROs to submit their applications to the correct mailing address for OSPR or by email.

Subsection (e)(1)(A)

Purpose: Amended to include “non-floating oil detection and recovery” to the list of examples of services offered by OSROs.

Necessity: This amendment is necessary to implement the mandate of Government Code section 8670.30 and to specify the types of coverage provided by OSROs that handle NFOs.

Subsection (e)(5)

Purpose: Amended to include the requirement for OSROs to submit a copy of their application of their USCG NFO classification as part of their application for an NFO rating from OSPR.

Necessity: This amendment is necessary to implement the mandate of Government Code section 8670.30 for OSROs that handle NFOs by requiring that they demonstrate their capacity to respond to such a spill in a manner that is at least consistent with the requirements of the USCG.

Section 819.04 – Oil Spill Response Organization Rating Standards, Updates, and Renewals

Subsection (a)(3)

Purpose: Amended to change all mentions of “Group 5 Oils” to “Non-floating Oil” and amended to delete the previous requirements for an OSRO applying for a Group 5 Oils rating and replace it with the requirements for an NFO rating. These requirements include providing proof of an NFO classification from the USCG to demonstrate that the organization meets federal standards for NFO cleanup, detection, and recovery. The USCG NFO classification requires an OSRO to provide details on how it deploys its detection and recovery assets to Captain of the Port zones or Alternate Classification Cities; the proposed amendments ask OSROs to adapt this information to the applicable area contingency plans or geographic contingency plans established by OSPR. OSRO’s are given 14 calendar days to submit any changes to its USCG NFO classification to OSPR.

Necessity: This amendment is necessary to implement the mandate of Government Code section 8670.30 for OSROs that handle NFOs by requiring that they demonstrate their capacity to respond to such a spill in a manner that is at least consistent with the requirements of the USCG. This category of oil includes Group 5 oils and Group 5 oils that have been diluted with a diluent for transportation. A primary example is diluted bitumen from the Alberta tar sands, which is typically transported by rail and barge and was the primary concern of Assembly Bill 936 (2019). It is also necessary to require OSROs to adapt their asset deployment information from the Captain of the Port zones and Alternate Classification Cities used by the USCG into the area contingency plans and geographic contingency plans used by OSPR so that OSPR has a clear understanding of their deployment capabilities in the event of an NFO spill. The period of 14 calendar days to submit any changes to an OSRO’s USCG NFO classification is consistent with the 14 calendar day period outlined in the provisions for notifying OSPR of changes in OSRO response resources as outlined in subsection 819.05(a).

IV. Economic Impact Assessment [Gov. C. §11346.2(b)(2)(A),(5); 11346.3(a)]

(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 are not considered “major regulations” because the economic impact assessment concludes that the impacts, summing both costs and benefits, will be considerably less than $50 million dollars annually. The cost associated with an OSRO obtaining an NFO rating with OSPR will be the same as obtaining the NFO rating from the USCG, which is already required by Federal regulation for OSROs dealing with Group 5 oils (33 CFR Section 154.1047, 33 CFR Section 155.1052, 33 CFR Section 155.5052), which are the primary oils targeted by the NFO designation. The costs associated with obtaining the USCG classification include meeting the equipment and

personnel requirements, which can be found in the USCG OSRO Guidelines; however, it must be noted that these costs have already been paid by the five OSROs in California that already possess USCG NFO classifications (MSRC, NRC, Clean Harbors, Global Diving & Salvage, and T&T Salvage) and would not represent a cost incurred from these proposed regulations. Additionally, MSRC and NRC cover 95% of contingency plan holders, and together with the other five OSROs the majority of plan holders are already covered by OSRO contracts that already include provisions for NFO, meaning that if any of these plan holders elected to handle NFO they would not face an additional cost to switch contracts to an OSRO rated for NFO.

There may be some costs associated with the staff time to submit the USCG rating to OSPR, but this would not increase from what is currently required of OSRO's dealing with Group 5 oils and would not change under the proposed regulations.

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

There are already 5 OSRO's operating in California that possess an NFO classification from the USCG: MSRC, NRC, Clean Harbors, Global Diving & Salvage, and T&T Salvage. If conditions for refining NFO were to become less cost-prohibitive then these companies may hire more staff in order to meet the demand. However, NFO is also costly to refine due to the costs associated with removing the particulates which are prevalent in that particular form of crude oil. While the per barrel price of crude oil is currently higher than in the previous two years (average annual price of $36.86/barrel in 2020 vs an average price of $84.87/barrel for the first two months of 2022 according to the U.S. Energy Information Administration), a change in demand would not necessarily force contingency plan holders, such as vessels transporting oil or processing facilities, to incur a new cost from these regulations (U.S. Energy Information Administration, U.S. Crude Oil First Purchase Price, 2022). As the name implies, these plan holders are already required to retain OSRO services for their contingency plans under OSPR's current regulations and under Federal regulations for handling NFO, and the costs for retaining OSROs tends to scale with the size of the plan holder's reasonable worst case spill volume, which would not change under these proposed regulations.

Some facilities in California are converting to process renewable fuels, which would prevent them from processing NFOs such as the Canadian tar sands. There are currently five active conversion projects within the state: Phillips 66 and Marathon are converting two existing diesel hydrotreaters to renewable diesel production; Chevron, Global Clean Energy, and World Energy are converting refineries in El Segundo, Bakersfield, and Paramount to renewable diesel, respectively. The conversion of additional facilities to process renewable fuels will likely continue as California gets closer to its goal of lowing its carbon emissions to 40% of 1990 levels by 2030 to achieve carbon neutrality by 2045 as set out in Executive Order B-55-18, which would further reduce the demand for refining NFOs within the state (Executive Order B-55-18, September 10, 2018). The negligible cost for OSROs to comply with these regulations is unlikely to be passed onto contingency plan holders that handle NFO and therefore are

unlikely to represent the kind of prohibitive costs that would cause a contingency plan holder to change their behavior with regards to handling NFO.

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

Existing OSRO's may elect to pursue an NFO rating from the USCG, but the new regulations will not change this process, aside from allowing them to use the USCG rating to obtain an NFO rating from OSPR. As mentioned above, there are already 5 OSRO's operating in California that possess an NFO rating from the USCG: MSRC, NRC, Clean Harbors, Global Diving & Salvage, and T&T Salvage.

OSROs may offer oil spill response services whether or not they are rated. However, facilities that are required to have contingency plans and that rely on an OSRO must specify a rated OSRO in their contingency plans. Thus, becoming a rated OSRO is a certificate of approval that increases the OSRO's participation in the market. Hiring an OSRO is a cost to a plan holder. This cost, because it is paid for by the plan holders as they seek to meet the requirements of a contingency plan, is already quantified under the current contingency plan regulations, which includes Group 5 oils. Plan holders that currently handle Group 5 oils would be unlikely to see an increase in their retainer costs from the OSROs listed above, as these requirements do not add any additional equipment requirements beyond those already required by the USCG.

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

As mentioned in part a), there are already 5 OSRO's operating in California that possess an NFO rating from the USCG: MSRC, NRC, Clean Harbors, Global Diving & Salvage, and T&T Salvage. These regulations will allow these OSRO's to apply for the NFO rating from OSPR using their USCG rating, which should prevent a break in their continuous operation.

While the economic conditions for refining NFO in California may reach a point of being cost effective, California's infrastructure for transporting crude by rail is more limited than states such as Washington, and only one facility currently has the capacity to unload a full train shipment per day, adding to the economic issues that make it unlikely for an increase of crude-by-rail transportation of NFO, such as Canadian tar sands, in the near future (CA Energy Commission, Crude Oil, Petroleum & Renewables Update to OSPR Technical Advisory Committee, October 2021). Additionally, the conversion of additional facilities to process renewable fuels will likely continue as California gets closer to its goal of lowing its carbon emissions to 40% of 1990 levels by 2030 to achieve carbon neutrality by 2045, which would eliminate the availability of facilities able to process and handle NFO as mentioned in (b).

(e) Will there be any benefits to the health and welfare of California residents?

Not directly, but in the event of a spill involving NFO a rated OSRO will be able to respond with the appropriate equipment and personnel, which will minimize the chance of exposure to NFO particulate matter that may be drawn into a water supply.

(f) Will there be any benefits of the regulation to worker safety?

There may be minor benefits for worker safety within a rated OSRO, as having trained divers who meet the USCG regulatory requirements for an NFO rating will ensure that personnel with the appropriate training and equipment will be deployed to an NFO spill.

(g) Will there be any benefits of the regulation to the State's environment?

Companies transporting NFO will have contingency plans that list an NFO rated OSRO, which should make them better prepared to address the unique problems presented by an NFO spill, such as sinking and weathering of the oil. A rated OSRO will have the equipment and divers necessary to suction sunken oil, which will prevent damage to the environment and nearby water supplies by limiting the exposure to NFO.

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

No.

V. ***Studies, Reports, or Documents Relied Upon*** *[Gov. C. §11346.2(b)(3)]*

- U.S. Coast Guard, Guidelines for the U.S. Coast Guard Oil Spill Removal Organization Classification Program, 2021
- U.S. Energy Information Administration, Short Term Energy Outlook, June 2022
- US Energy Information Administration, U.S. Crude Oil First Purchase Price, 2022
- California Energy Commission; Crude Oil, Petroleum & Renewables Update to OSPR Technical Advisory Committee; April 2022
- Crude Oil, Petroleum & Renewables Update to OSPR Technical Advisory Committee, CA Energy Commission, October 2021
- Executive Order B-55-18, September 10, 2018
- U.S. Bureau of Labor Statistics, Hazardous Materials Removal Workers' Salaries, 2022
- Assembly Bill 936, Rivas 2019

VI. Reasonable Alternatives to Regulatory Action *[Gov. C. §11346.2(b)(4)(A)(B)]*

The obligation for OSPR to define NFO, establish requirements in contingency plans for the handling and transportation of NFO, and establish an NFO rating for OSROs to comply with these contingency plans comes directly from changes to statute made by the California Legislature through AB 936 (Government Code section 8670.29, 8670.3(m), 8670.30). No alternatives were identified that would have the same regulatory effect.

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

None.

The USCG has a program “classifying” OSRO’s that can contain or recover sinking oil. OSPR will accept this acknowledgment from the USCG as satisfactory evidence of the OSRO’s ability to recover NFO. The USCG’s classification system is thorough, and presently exceeds the state’s ability to evaluate this capability.

This regulation would allow OSRO’s to obtain an NFO rating from OSPR using their NFO classification obtained from the USCG, which would allow them to be identified in contingency plans that require an OSRO with an NFO rating.

VIII. Mitigation Measures Required by Regulatory Action

The proposed regulatory action will have no negative impact in the environment; therefore, no mitigation measures are needed.

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