California Department of Fish & Wildlife – Office of Spill Prevention and Response
California Air Resources Board
California State Lands Commission
California Department of Parks and Recreation, Division of Boating and Waterways

May 23, 2014

Docket Management Facility (M–30)
U.S. Department of Transportation – U.S. Coast Guard
West Building Ground Floor, Room W12–140
1200 New Jersey Avenue SE., Washington, DC 20590–0001

RE: Comments on Assessment Framework and Organizational Restatement Regarding Preemption for Certain Regulations Issued by the Coast Guard, 78 Fed. Reg. 79242 (proposed Dec. 27, 2013), Docket #USCG–2008–1259

The California agencies listed above respectfully ask that the Coast Guard reject and withdraw the proposed rulemaking. We provide the following comments on the above-referenced proposed rulemaking, and, in this letter's appendix, the California Office of Spill Prevention and Response provides comments that relate to its specific regulatory programs. The comments in this letter and appendix supplement, and do not replace, the agencies' preliminary comments submitted prior to the original deadline for comments, March 27, 2014. We appreciate your having granted our request for additional time to submit these additional comments.

The proposed rulemaking purports to merely "restate" and "clarify" "existing law on preemption." Extension of Comment Period, 79 Fed. Reg. 17482 (March 28, 2014). But the Coast Guard's view of existing law fails to respect states' rights, leaving states with little if any authority to exercise their historical police powers to protect the health and safety of their citizens. It misstates how conflict preemption is applied and fails to address how the scope of field preemption is limited by both the subject and the purpose of Congress's enactments. As explained in more detail below, the Coast Guard's view is contrary to Congress's intent when it passed the laws that are cited in the proposed rulemaking. It is contrary to decades of United States Supreme Court precedents, which recognize states' rights to regulate maritime commerce. And it is contrary to the President's directive that the Executive Branch should respect states' concurrent authority to regulate the environment *more aggressively* than the federal government. 74 Fed. Reg. 24693 (May 20, 2009).

California, in particular, has a history of protecting its environment more aggressively than the Federal government, and this has benefitted not only Californians, but also the entire nation. The Coast Guard should encourage states like California to contribute as much as they can to the public's health and safety rather than attempt to curtail them just for the sake of a preference for uniformity, a preference that Congress has not endorsed.

Response to Section III,
Background and Purpose

In the Background and General Preemption Principles subsections, the proposed rulemaking misstates the law and fails to recognize the longstanding and strong role that states play to safeguard the public. *See* 74 Fed. Reg. 24693. The very first sentence of the Background section claims that, "Courts have consistently upheld and reinforced the preemptive effect of Federal regulations for maritime vessels." 78 Fed. Reg. 79242, 79243. This is simply untrue. Courts, including the Supreme Court, have upheld state regulations of maritime vessels in numerous instances, a few of which are described below. *E.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

The Coast Guard further states its belief "that consistent standards of universal application and enforcement, coupled with Federal initiatives to meet unique regional concerns, best meet local and national safety and environmental goals with the least disruption to maritime commerce." 78 Fed. Reg. at 79243. But the Coast Guard misunderstands its role: it is up "to Congress," not the Coast Guard, "to evaluate whether the national interest is best served by . . . uniformity, or state autonomy." *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994). And Congress, as further discussed below, has allowed states to retain a "wide scope" of authority to regulate maritime commerce. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973), *quoting Romero v. International Terminal Co.*, 358 U.S. 354, 373 (1959). States are especially well-situated to address local and regional concerns.

The proposed rulemaking also claims "that nearly all regulations currently issued under the authority of 33 U.S.C. § 1231 have preemptive effect under a conflict preemption analysis." 78 Fed. Reg. at 79243. While it acknowledges that, "[i]n the past, the Coast Guard issued federalism statements indicating that certain preemptive regulations had no federalism implications," it now explains that the preemptive impact of its regulations was nevertheless always implied. *Id.* This wholesale revisionism is not credible – states, as well as the public, have the right to rely on the Coast Guard's determinations that its rules have no preemptive impact. Now, the Coast Guard's rewrite of the federalism statements in all those regulations in one fell swoop unfairly prejudices the states and the public, who also have the right to evaluate each rulemaking individually, so that they can provide specific, reasoned comments about how critical state law protections may be undermined by the Coast Guard's preemption determinations. *See Wyeth v. Levine*, 129 S.Ct. 1187, 1201 (2009).

Response to Sections IV.A-E,
Ports and Waterways Safety Act

The proposed rulemaking overstates the preemptive impact of the Ports and Waterways Safety Act (PWSA). First, the proposed rulemaking misstates the preemptive effect of Title I of the PWSA. This title focuses on traffic control at local ports. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 161 (1978). But Title I does not preempt this field. Instead, Title I "preserved state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determination . . . ." *United States v. Locke*, 529 U.S. 89, 110 (2000).

While the proposed rulemaking acknowledges that conflict preemption principles apply under Title I of the PWSA, it misstates the applicable standard, asserting that these regulations "are intended to have preemptive impact over State law covering the same subject matter in the same geographic area . . . ." 78 Fed. Reg. at 79244. This assertion erroneously converts the conflict preemption analysis required under Title I "into something resembling a field preemption analysis." *United States v. Mass.*, 493 F.3d 1, 16 (1st Cir. 2007). Contrary to the assertions in the proposed rulemaking, standard conflict preemption analysis applies to state regulations in areas within the province of Title I. *Id.* at 8. Under this analysis, a state law is not preempted unless "compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Locke*, 529 U.S. at 109, *quoting California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989).

Second, the proposed rulemaking overstates the preemptive impact of Title II of the PWSA by incorrectly defining the field preempted by Title II. Title II requires the Coast Guard to issue regulations regarding tanker design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification and manning, for the purpose of promoting vessel safety and protecting the marine environment. The proposed rulemaking implies that Title II preempts all state regulations impacting these categories, regardless of the object of the state law. 78 Fed. Reg. at 79244. To the contrary, the field preempted by Title II is limited to regulations that have the same object as Title II. *Ray*, 435 U.S. at 164-65.

Indeed, in *Ray*, the Supreme Court distinguished a long line of cases upholding state and local vessel regulations, when those regulations were aimed at protecting the environment and the health and safety of a state's citizens. *Ray*, 435 U.S. at 164-65. In *Ray*, the Court explained that, in passing the PWSA, Congress intended to set uniform national standards for design and construction for vessel safety. *Id.* at 163. But these standards do not prevent the states from promulgating reasonable regulations for other purposes. In *Ray*, the Court did "not question in the slightest the prior cases holding that enrolled and registered vessels must conform to 'reasonable, nondiscriminatory conservation and environmental protection measures . . .' imposed by a State." *Ray*, 435 U.S. at 164. Instead, the field preempted by Title II of the PWSA is limited to tanker regulations that are directed at insuring vessel safety and protecting the marine environment. *Id.* at 164-65.

Response to Sections IV.F-G, re 46 U.S.C. Chapter 32,
Implementation of the International Safety Management Code

Chapter 32 of 46 U.S.C. requires that the Coast Guard prescribe regulations to establish a vessel safety management system. The proposed rulemaking asserts that Congress intended to preempt the field of safety management systems. 78 Fed. Reg. at 79246. This presumption regarding Congress's intent is premised on three other assumptions: 1) the Coast Guard's characterization of 42 U.S.C. § 3203 as describing a "pervasive scheme," 2) that because Congress required the Coast Guard to issue regulations, this implies that Congress intended that no one else be allowed to issue additional, non-conflicting regulations, and 3) there exists "significant Congressional interest to create a uniform maritime regulatory regime." 78 Fed. Reg. at 79246. The Coast Guard's assumptions are unfounded, and its conclusion is wrong.

First, simply quoting section 3203 is not an adequate basis for making a determination that it describes a pervasive scheme. That determination cannot be made in the abstract, and, even when in the context of the entire federal scheme and the factual background, it can only be made by Congress and the judiciary – this is not the role of the executive branch. *Wyeth*, 129 S.Ct. at 1200-1201.

Second, just because Congress requires an agency of the Federal government to issue regulations does not imply that Congress intended only the Federal government to issue regulations in that field. For courts to reach the conclusion that a field is preempted, there must be additional, clear indicia of Congress's intent to preempt states from exercising their authority to protect the health and safety of their citizenry.

Third, Congress has not expressed an interest in creating a uniform maritime regulatory regime. *Contra* 78 Fed. Reg. at 79246. To the contrary, states retain a "wide scope" of authority to regulate maritime commerce. *Askew*, 411 U.S. at 338, *quoting Romero*, 358 U.S. at 373. States may regulate maritime commerce "absent a clear conflict with the federal law." *Id.* at 341; *accord American Dredging Co. v. Miller,* 510 U.S. 443, 452 n.3 (1994); *Kelly*, 302 U.S. at 15. Maritime law does not "swallow most of the police power of the States." *Askew*, 411 U.S. at 328; *accord In re Exxon Valdez (Exxon Valdez I)*, 270 F.3d 1215, 1252 (9th Cir. 2001). "Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges – and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums." *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d. 483, 491 (9th Cir. 1984) (footnote omitted).

Therefore, state laws in the field of safety management systems are valid unless they actually conflict with federal law. Paramount federal authority is recognized, but the states' ability to further protect their citizenry is preserved.

Response to Sections IV.H-I, re 46 U.S.C. Chapter 33

46 U.S.C. Chapter 33 authorizes the Coast Guard to inspect specified categories of vessels, and requires the Coast Guard to issue regulations governing the design, alteration, repair, and operation of these vessels, as well as the firefighting and lifesaving equipment on these vessels. 46 U.S.C. § 3306(a). Relying on *Kelly v. Washington*, 302 U.S. 1 (1937), the proposed rulemaking asserts that this "regulatory regime" preempts all state regulations touching on the design, construction, operation, and repair of those vessels. 78 Fed. Reg. at 79246. Contrary to this assertion, the Supreme Court has applied conflict preemption to state regulations touching on these areas and has found that states retain a broad scope of regulatory authority.

First, *Kelly* does not stand for the proposition that states may not regulate inspected vessels. Instead, *Kelly* applied conflict preemption to a Washington state law governing the inspections of motor-driven tugs to assure that they were safe and seaworthy, and upheld that law because it did not conflict with "any express provisions of federal laws and regulations." *Kelly*, 302 U.S. at 8. Furthermore, the Court found that state regulations that were "plainly essential to safety and seaworthiness" did not fall within a field where uniformity of regulation is required. The Court explained that a vessel that "is actually unsafe and unseaworthy" is not exempt from state regulation. *Id.* at 15. Instead "[t]he state may treat it as it may treat a diseased animal or

unwholesome food . . . without waiting for federal action," as long as the state law does not conflict with federal rules. *Id.*

Second, in *Huron Portland Cement*, the Supreme Court applied conflict preemption to uphold a Detroit municipal air pollution ordinance against a challenge that it was preempted by federal inspection laws. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444-46 (1960). At that time, federal inspection laws provided standards for boiler design and construction, and the vessels at issue were subject to inspection for compliance with these standards. Nonetheless, the Court upheld a smoke abatement ordinance applicable to vessels, even though compliance with this ordinance required structural alterations that would necessarily affect these vessels throughout their travels. *Id.* at 441, 448. The Court explained that the federal inspection laws and the local ordinance regulated different fields – the federal law required inspection to ensure that the vessels "may be safely employed in the service proposed," while the local ordinance was for "the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.* at 445. Thus, the Court found that there was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved." *Id.* at 446. Because both laws could be complied with, there was no conflict, and the state law was upheld. *Id*.

Thus, contrary to the proposed rulemaking, Chapter 33 does not preempt all state regulations for inspected vessels. Instead, the applicable analysis is conflict preemption, and states retain broad authority to pass laws to protect the health and safety of their citizens.

Response to Sections IV.J-K, re 46 U.S.C. §§ 3717, 6101,
Marine Safety Information System and Marine Casualty Reporting

In sections J and K, the proposed rulemaking analyzes the preemptive impact of 46 U.S.C. §§ 3717 and 6101. 78 Fed. Reg. at 79246-47. Section 3717 requires the Secretary to "establish a marine safety information system that shall contain information about each vessel to which this chapter applies that operates on the navigable waters of the United States, or that transfers oil or hazardous material in a port or place under the jurisdiction of the United States." Section 6101 requires the Secretary to "prescribe regulations on the marine casualties to be reported and the manner of reporting," which "shall require reporting the following marine casualties: (1) death of an individual. (2) serious injury to an individual. (3) material loss of property. (4) material damage affecting the seaworthiness or efficiency of the vessel. (5) significant harm to the environment."

Relying on *United States v. Locke*, 529 U.S. 89 (2000), the proposed rulemaking asserts that with sections 3717 and 6101, Congress intended to preempt the fields of "marine safety information systems" and "marine casualty reporting requirements," respectively. But this characterization of *Locke*'s reach is overly broad and fails to address the fact that the scope of field preemption is limited by both the subject and the purpose of Congress's enactments. For example, section 3717 does not preempt the collection of information generally, but only the collection of specific types of information from specific types of vessels operating on navigable waters or transferring oil or hazardous materials in a United States port. And section 3717's preemptive impact extends only to regulations that share its objective. *See Ray*, 435 U.S. at 164-165.

In addition, the proposed rulemaking does not take into account the fact that Congress has allowed states to retain authority with respect to marine casualty reporting. According to the federal statutory scheme, states are to play a role in the reporting of marine casualties. But the proposed rulemaking ignores section 6102, which gives states the express authority to compile "reports, information, and statistics on casualties." It contemplates that states' marine casualty reporting systems will differ, and provides that if a state prohibits the public disclosure or use of information derived from casualty reports, the Secretary shall also be prohibited from using such information. Congress has also determined that the states should play a role in regulating recreational boating safety. 46 U.S.C. § 13103; 33 C.F.R., pt. 173, subpt. C. Further, the regulations implementing section 6101 relate to personal injury, property damage, and environmental protection. *See* 46 C.F.R. 4.05-1 – 4.05-10, 35.15-1, 197.484 – 197.488, 401.260. These are all areas historically subject to the police power of the individual states to protect the health and safety of their citizens. Thus, contrary to statements in the proposed rulemaking, Congress did not intend for section 6101 to completely foreclose all state involvement in the broad category of marine casualty reporting, and the proposed rulemaking should recognize the states' traditional and continuing authority in this regard.

Response to Sections IV.L-M, re 33 U.S.C. §§ 1901 – 1912,
The Act To Prevent Pollution From Ships

In these sections, the proposed rulemaking analyzes the preemptive impact of the Act To Prevent Pollution From Ships, 33 U.S.C. §§ 1901 - 1912. 78 Fed. Reg. at 79247. The Coast Guard concludes that regulations it issued pursuant to §§ 1901 - 1912 "preempt conflicting, similar, or identical State or local laws or regulations with the exception of State or local laws or regulations specifically permitted by" "certain and limited express statements of nonpreemption." 78 Fed. Reg. at 79247. The Coast Guard's extraordinarily narrow reading of the applicable statements of nonpreemption is unsupportable and contrary to Congress's expressed intent.

Section 1911 contains the following savings clause:

> Authorities, requirements, and remedies of this chapter supplement and neither amend nor repeal any other authorities, requirements, or remedies conferred by any other provision of law. Nothing in this chapter shall limit, deny, amend, modify, or repeal any other authority, requirement, or remedy available to the United States or any other person, except as expressly provided in this chapter.

A "person" is defined as including a state. 33 U.S.C. § 1901(a)(10). This savings clause negates any argument that Congress intended the act to preempt state authority. Thus, unless the state laws actually conflict with federal law (i.e., where compliance with both federal and state regulations is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress), the state laws are not preempted.

Response to Section IV.N,
Regulations Under Authorities Not Described Above

Section IV.N addresses "Regulations Issued Under Authorities Not Described Above." To the extent section IV.N states that the proposed framework will be applied to future regulations and to regulations that are currently issued but not specifically addressed in the proposed Assessment Framework, the same concerns identified above with respect to the proposed framework apply.

Response to Section IV.O,
Determinations That No Regulation Should Issue

The proposed rulemaking states, "In some cases, the Coast Guard makes a determination that no regulations are needed on certain subjects or in a certain geographic area. These determinations can have preemptive impact over a contrary State determination." 78 Fed. Reg. at 79247. This statement may be true in certain instances, but it cannot be said that whenever the Coast Guard has failed to regulate a particular area, the Coast Guard has necessarily made a "negative determination" that has preemptive impact. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 65-67 (2002) (noting it is "quite wrong" to view the "Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats" "as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation"). Whether a particular negative determination has preemptive impact depends on the circumstances, including the type of preemption applicable, as well as the particular negative determination at issue. The Coast Guard apparently recognizes that such a sweeping statement would be improper, as the proposed rulemaking rightfully reserves any specific preemption analyses for existing negative determinations for future determination on a case-by-case basis as necessary. It also requires future negative determinations to contain a statement of the preemptive impact.

With respect to particular statutes, such as Title I of the PWSA, the proposed rulemaking states that the Coast Guard's "decision that no regulation should be promulgated" must be given preemptive effect. 78 Fed. Reg. at 79244. But this abstract statement contradicts Section IV.O's conclusion that negative determinations should be evaluated on a case-by-case basis, as well as general principles of conflict preemption. Any negative determination must be identified, and its preemptive effect must be analyzed separately on a case-by-case basis.

The proposed rulemaking provides that future negative determinations "may or may not be published in the Federal Register, so long as they are published in a medium likely to reach the affected audience as the decision of the Coast Guard on the question of preemption." 78 Fed. Reg. at 79248. This notice requirement should be changed to require publication in the Federal Register in order to honor the spirit of the Presidential Memorandum Regarding Preemption dated May 20, 2009, which requires statements of preemption to be included in codified regulations.

Response to Section V.M, re NEPA,
Asserted Categorical Exemptions

The proposed rulemaking cites paragraphs 34(a) and (b) of the Coast Guard's Commandant Instruction M16475.1D as a basis for the Coast Guard's preliminary determination that the rulemaking is categorically exempt from National Environmental Policy Act of 1969 (NEPA). 78 Fed. Reg. at 79249. However, neither paragraph supports the Coast Guard's preliminary determination. Paragraph 34 exempts promulgation of: (a) "Regulations which are editorial or procedural, such as those updating addresses or establishing application procedures;" or (b) "Regulations concerning internal agency functions or organization or personnel administration, such as funding, establishing Captain of the Port boundaries, or delegating authority." Yet, the proposed rule is worlds apart from a regulation "updating addresses," "establishing application procedures," "concerning funding," "establishing Captain of the Port boundaries," or "delegating authority." As described herein, the rule, as proposed, attempts to expand the preemptive effect of federal law to the detriment of state health and safety laws that protect millions of Americans. If it were upheld and treated by the courts as authoritative, then it could potentially have a significant effect on public health and safety in many states. For example, in California the rule could be used to challenge air pollution laws designed to protect the environment, which have already been upheld by the courts.

Even if the proposed rulemaking did appear to fit within one of the categories described in paragraph 34, extraordinary circumstances exist such that the proposed action may have a significant environmental effect and an environmental impact statement (EIS), or at least an environmental assessment (EA), should be prepared. *See Foundation for Global Sustainability Inc.'s Forest Protection and Biodiversity Project v. McConnell*, 829 F. Supp. 147, 152 (W.D.N.C. 1993). Indeed, the Coast Guard's Commandant Instruction M16475.1D acknowledges that "[s]ome actions that normally would be categorically excluded in Figure 2-1 could require additional environmental review and, for this reason, responsible personnel should be alert for circumstances that dictate the need to prepare an EA or EIS." § 2.B.2.b, p. 2-4. "A determination of whether an action that is normally excluded requires additional review must focus on the significance of the potential environmental consequences." *Id*.

One measure of the significance of potential environmental consequences is whether the proposed action is likely to involve public health and safety. Commandant Instruction M16475.1D, § 2.B.2.b, p. 2-4. Another is whether the consequences to the quality of the human environment are likely to be "highly controversial in terms of scientific validity or public opinion." *Id*. p. 2-5; see also 40 C.F.R. §§ 1508.4, 1508.27(b)(4) (Agency must consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial."). Applying this exception, the First Circuit Court of Appeal found the Coast Guard failed to comply with its NEPA obligations when it completed an environmental checklist and concluded a categorical exemption applied. *United States v. Coalition for Buzzards Bay*, 644 F.3d 26, 34-36 (1st Cir. 2011). Concerned comments submitted by local officials and representatives of state government, including the state's principal environmental regulator, led the court to conclude the proposed action was "highly controversial" and therefore environmental review was necessary. *Id*. at 36.

As in *Buzzards Bay*, the proposed rulemaking here is also likely to have significant environmental consequences not adequately discussed in the preliminary environmental analysis checklist. Further, numerous states and state agencies have voiced concerns regarding the environmental implications of the proposed rulemaking. "[I]n a democracy, citizens may justifiably rely on political leaders to speak for them, and the fervent community concern expressed here [goes] directly to potentially serious environmental effects of the Coast Guard's proposed action." *Buzzards Bay*, 644 F.3d at 36. Given the potential for significant environmental consequences resulting from the proposed rulemaking, an EIS, or at least an EA, is necessary.

Conclusion

For these reasons, we respectfully ask you to reject and withdraw the proposed rulemaking.

Sincerely,

THOMAS M. CULLEN, JR.

Administrator
Office of Spill Prevention & Response
California Department of Fish & Wildlife
916-324-7626
thomas.cullen@wildlife.ca.gov

RICHARD W. COREY

Executive Officer
California Air Resources Board
916-445-4383
rcorey@arb.ca.gov

JENNIFER LUCCHESI

Executive Officer,
California State Lands Commission
916-574-1800
jennifer.lucchesi@slc.ca.gov

MAJOR GENERAL ANTHONY L. JACKSON, USMC (RET)

Director
California Department of Parks and Recreati
916-653-8380
Anthony.Jackson@parks.ca.gov.

APPENDIX
Additional Comments Addressing Specific Concerns of the California Office of Spill Prevention and Response

The California Office of Spill Prevention and Response (OSPR) disagrees with the scope of the USCG's assertion of preemption over every topic, subject, or field that is claimed in the regulations identified in this proposed rulemaking. Concerns with the scope of preemption being asserted is fully discussed in the comment letter to which this appendix is attached.

It is difficult to ascertain from the rulemaking what aspect of a particular regulation is supposed to be preemptive. Thus, OSPR can only assume, unfortunately, that the USCG intends every aspect and detail found in a particular regulation, including the general topic of the regulation, to be preemptive. And if this is accurate, then the USCG's interpretation will seriously hamper OSPR's ability to protect the people of the State of California, and anyone visiting its beautiful world-renowned coastline, from pollution by oil.

This rulemaking should have been focused, direct, and specific; these vague preemptive generalizations are not informative or useful. This rulemaking – without any prior discussion with states – has set an unfortunate tone. OSPR would have welcomed a dialog with the USCG to workout details of collaborative implementation as an alternative to this rulemaking, and OSPR is still open to such a dialog.

In 1990 the *T/V American Trader* hit her own anchor, spilling approximately 400,000 gallons of crude oil onto Southern California beaches; that same year California enacted the Lempert-Keene-Seastrand Oil Spill Prevention & Response Act (OSPRA 90), Cal. Gov't. Code § 8670.1 *et seq*. The OSPRA 90 goals are similar to those of the federal Oil Pollution Act of 1990. Thus, for over 23 years the coastline of Coast Guard District 11 has been protected by the cooperative efforts of the USCG and OSPR, respectively implementing the provisions of OPA 90 and OSPRA 90. However, the USCG now seems to be shunning this cooperation.

For over two decades, OSPR has had regulations in place, which have regularly been coordinated with the USCG during the state process of workshops and formal state rulemaking. Cal. Code of Regs., tit. 14, § 790 *et seq*. But the scope of the USCG's preemption claim would seriously curtail or eliminate many OSPR regulations and programs, should the USCG or industry prevail in court. Some provisions of particular concern involve the USCG's claim of preemption of the following subject matter:

- **Contingency Plans:** 33 C.F.R. § 151.26, and 33 C.F.R. §§ 155.1010 thru 155.1030, regarding response plans and qualified individual requirements. California has extensive contingency plan requirements. Cal. Code Regs., tit. 14, § 815 *et seq*. If the USCG truly intends to occupy the field of spill response plans, then it is unclear what would be left for state involvement in this important element of preparedness.

- **Exercises:** 33 C.F.R. § 155.1060, regarding plan holder exercises. OSPR has a robust announced and unannounced drills program. Cal. Code Regs., tit. 14, §§ 820.01, 817.02(k), 817.03(k), 818.03(l), 827.02(m). It is troubling that the USCG seems to

intend to usurp state involvement in spill drills and exercises. Staff from District 11 have said the USCG does not have the staff or time to run a drills and exercises program like the one OSPR runs. With California out of the field, the public and the state would have less confidence that spills could be cleaned up quickly and properly, and actual response performance would likely suffer.

- **Spill Notification:** 33 C.F.R. §§ 151.26(b)(3) and 153.203, regarding spill notification requirements; when to report, what to report, to whom to report. There are numerous California statutes and regulations requiring spill reporting. It is unclear why the USCG would want to occupy the field of notifications, such as to the state Emergency Management Agencies or other relevant first responders, to response contractors, to Qualified Individuals, to spill management teams, and to other relevant persons or entities.

- **Oil Transfers:** 33 C.F.R. pt. 156, regarding oil transfers; 33 C.F.R. §§ 155.710 through 155.715, regarding person-in-charge requirements for oil transfers; and 33 C.F.R. §§ 155.720 through 155.785, regarding oil transfer procedures. OSPR staff monitor vessel oil transfers on a daily basis. Vessels are selected based on a "risk analysis" model that determines the "priority" of vessels to be monitored each day. OSPR is not aware of any USCG concerns over OSPR's oil transfer monitoring program. Cal. Code Regs., tit. 14, § 840.1 *et seq*. Does the USCG intend to end this state involvement and state regulation which help prevent spills during significant oil transfers?

- **Discharges:** 33 C.F.R. § 151.10, regarding oil discharges past 12 miles from shore; and 33 C.F.R. §§ 151.66 through 151.77, regarding the discharge of garbage from vessels and platforms. The state Constitution and state statutes include the areas between the islands and the California mainland, in the Gulf of Santa Catalina, the San Pedro Channel, the Santa Barbara Channel, and the Gulf of the Farallones, as within California's state boundaries; these waters are inland waters of the state. Cal. Gov't. Code §§ 170-172. California has numerous statutes and regulations prohibiting water pollution, notably California Fish & Game Code section 5650. Arguably, the USCG is declaring that the application of these California laws in these geographic areas is preempted.

The USCG could have chosen to address preemption issues in Congress, to have specific laws amended to clarify the details of what is or is not preemptive. However, with this rulemaking, it can be expected that industry will seize upon the USCG's assertion of field preemption and "same or similar" preemption of these topics (and others), and challenge state regulations. In California, OSPR has enjoyed a close and collaborative relationship with the USCG preparing for and responding to oil spills. But, if the USCG truly wants OSPR out of the realms of exercises, contingency planning, transfer monitoring, and spill notifications, then it is only speculative what this collaborative effort will look like in the future.