

Alaska Fuel Storage & Handlers Association

The Alaska Fuel Storage & Handlers Alliance (AFSHA) is an industry trade association comprised of members whose operations are subject to ADEC, EPA and/or USCG regulations. AFSHA has previously presented concerns of its members to ADEC staff and management. We are providing herewith historical documents associated with Industry issues and concerns identified in 2012 regarding the state's contingency plan review process and interpretation of regulations. Many of these issues are still relevant and we are formally introducing and submitting them into the regulatory public scoping process. We may submit additional comments prior to the closing of the comment period.

At this time, AFSHA members intend to also submit individual comments to the docket for DEC's considerations.

**Alaska Fuel Storage and Handlers Association
Meeting with ADEC Commissioner Hartig
Friday, January 13, 2012
9:00 AM 1 11:00 AM AST
ADEC Anchorage Office
555 Cordova Street
1st Floor Main Conference Room**

**Teleconference Information
Dial In Number: (605) 475-4700
Access Code: 949803#**

Purpose of Meeting: Explain the Need to Review and Update Alaska’s Contingency Plan Renewal and Agency Review Process

Attendee List: ADEC Commissioner Hartig, Larry Dietrick-SPAR Director, Betty Schorr- IPP Manager, Jim Beckham-Harbor Enterprise, Bob Cox- Crowley Maritime Service, Pat Duffy- Petro Star, Jim Butler-Baldwin & Butler, Leslie Pearson-Pearson Consulting, Bev Neiman, Delta Western (teleconference), Capt. Dan Nutt-K Sea Transportation (teleconference)

Agenda

9:00 AM Welcome and Introductions Leslie Pearson
Purpose and BackgroundAFSHA
Issues & ConcernsAFSHA
Guidance Document & CPR Project Status..... ADEC
Discussion on a “Way Forward”AFSHA/ADEC
Review of any Action Items Leslie Pearson

Meeting Adjourn at 11:00 AM

MEETING PURPOSE:

Explain the Need to Review and Update Alaska's Contingency Plan Renewal and Agency Review Process

ISSUE:

Alaska Fuel Storage and Handlers Association (AFSHA) members are required to have state-approved contingency plans to operate in Alaska. Increasingly, plan renewal is needlessly complicated and delayed because regulatory interpretation relies on ADEC staff discretion to determine regulatory compliance. The lack of clear regulatory language or department wide policy for plan renewal results in arbitrary and subjective renewal process adding uncertainty, unpredictability and avoidable costs to the plan renewal process.

BACKGROUND:

AFSHA members are required to have state-approved contingency plans to operate in Alaska. After initial review and approval these plans are renewed by ADEC on a 5-year cycle. During the 5-year life span, planholders frequently provide ADEC with updates or amendments to plan information. Updates most often involve minor changes to operations or plan administrative information. In the event of a major change to a plan, ADEC treats the plan similar to a new plan submittal. Prior to the end of the 5 year approval term, a planholder requests ADEC renew the previously approved and updated plan. Although 18 AAC 75, Article 4 regulations became effective in 1992 and for the most part have remained unchanged current practice by the department during the plan renewal process has evolved into a sweeping review of a plan despite the fact the department has already reviewed minor revisions or substantive changes to that plan during the preceding approval period.

DISCUSSION:

Alaska's contingency plan regulations became effective in 1992 after passage of more stringent oil spill statutes adopted after the Exxon Valdez oil spill. In July 1994 contingency plan application and review guidelines were developed by ADEC to provide additional guidance and interpretation of the regulations to the regulated community. Recognizing the need for a review of the regulations, in 2003-04, ADEC's Industry Preparedness and Pipeline Program (IPP) implemented the Contingency Plan Review (CPR) project. The goal of the project was to re-evaluate the adequacy of existing regulations, identify ways of making the contingency plan review process simpler and more effective based on lessons-learned since implementation, and create better plans for prevention and response using stakeholder scoping and negotiated rulemaking¹.

Phase 1 of the CPR project evaluated proposed changes to the contingency plan requirements for oil exploration and production facilities. Phase 2 of the project,

¹ http://omb.alaska.gov/ombfiles/04_budget/DEC/comp1922.pdf

reviewed and revised the oil pollution prevention regulations located in 18 AAC 75, Article 1. During a November 9, 2004 CPR public workshop, attendee's were informed that Phase 3 of the project would involve revising the application process and reviewing schedule for contingency plans and Phase 4 would involve updating and streamlining contingency plan requirements for other types of regulated operations.² Regulation review and updates continued to be listed as key component challenges in IPP's FY 2006 and FY 2007 component budget summaries. The FY 2007 key component challenge was to:

- Complete Phase 2 of the contingency plan regulations review project to update the spill prevention regulations in Article 1 of 18 AAC Chapter 75; and,
- Complete Phase 3 of the contingency plan regulations review projects to re-evaluate the adequacy of existing regulations; *specifically update the contingency plan review process to make it simpler and more effective based on lessons learned since the 1992 regulations implementation* [emphasis added].³

The Final Oil Pollution Prevention Regulations from Phase 2 of the CPR project became effective on December 31, 2006. In reviewing the proposed IPP component budget summaries from FY 2008 through FY 2013, there is no mention of implementing Phase 3 or 4 of the CPR project yet ADEC made past commitments to the public and industry of continuing reviewing and updating the contingency plan regulations.

Members of AFSHA met with the Division of Spill Response Prevention and Response Director and Program Managers in 2007 to introduce them the AFSHA organization and bring to their attention issues associated with the review and renewal of their contingency plans. Since 2007, the review and renewal of many AFSHA member contingency plans confirm that no change or improvements have been made. The regulations in many places remain vague, open to interpretation and often interpreted differently between industry and ADEC staff, and between ADEC staff in different IPP Sections. AFSHA believes plan review and renewal should be objective rather than subjective and all plans must be reviewed to the same standards and scrutiny.

SUMMARY:

AFSHA believes the need exists for industry and ADEC to work together and develop a consensus strategy with the following goals:

1. Explore a process and schedule for review and update of the Guidance Document with the goal of completion by June 30, 2012.

² Public Workshop and Solicitation of Informal Comments on Changes to Alaska Department of Environmental Conservation Regulations Meeting Minutes, November 9, 2004

³ http://omb.alaska.gov/ombfiles/07_budget/DEC/comp1922.pdf

2. Consider implementation of Phase 3 and 4 of the CPR project originally established in 2004.
3. Re-evaluate ADEC contingency plan regulations based on lessons learned and propose revisions or updates.
4. Develop a collaborative initiative, which aligns the mutual interests of the industry and ADEC on contingency plan submittal and renewal issues.

Examples of Industry Issues and Concerns associated with Contingency Plan Review

GENERAL

Consistency between reviewers over time. The plan is accepted and approved; and then when an applicant applies for renewal or another large operational change, suddenly it's not acceptable. What to put in the plan or "what ADEC staff want to see" to fill the requirement of the section changes over time. The regulations are vague and open to interpretation and often interpreted differently by industry and ADEC, and between reviewers in different sections of IPP. The inconsistency between reviewers and review standards need to be corrected.

Guidance Document. The 1994 Guidance Document was originally written to assist ADEC plan reviewers and industry in understanding/clarifying regulatory intent, as well as establishing a level of consistency. Since 1994, regulations have changed and the guidance document is not in line with the regulations. A copy of the guidance document cannot be obtained nor is it available online. In addition, no consistency exists between plan reviewers and sections within ADEC's Industry Preparedness Program. Although ADEC is attempting to update the Guidance Document the unpredictable interpretations by plan reviewers of the regulations is having a negative impact between the plan holder and reviewer(s).

Web links, including web addresses, e-mail addresses, cross references, etc. – ADEC is always asking the applicant to add them to a plan, and then asking for the references to be removed. Asking the applicant to include the information in the plan rather than reference: "information must be included within this Section of the Plan as website links often break or are no longer in service." Most of the references are AK government agency links (ACP, SCP, GRS, MESA, maps, STAR, etc.), which should be consistently maintained by the agencies.

PROCESS

Renewal/Review Determination- Plans are typically approved per 18 AAC 75.460(a). When a plan holder submits a plan for renewal per 18 AAC 75.420(a), regardless of the number of plan amendments that have occurred during the 5-year period all plans are being treated as a major renewal. This determination is made regardless of the fact that the department has already reviewed amendments during the preceding period. 18 AAC 75.420 needs to be re-examined to allow for a timely review and renewal process.

Sufficiency for Review- Sufficiency needs to be defined in the regulations and the process for determining sufficiency need to be articulated. Plans previously approved and submitted for renewal are being deemed "insufficient" and the method used by DEC is not clear.

Public Review Requirements- The review of industry contingency plans is a public process under state law controlled by the Alaska Coastal Zone Management Program (ACMP). Even though the ACMP has been obsolete since 2008, ADEC reviewers have continued to list them in the plan

holders sufficient for review letters and the plan holders have had to provide documentation that they received a copy of the plan into 2011.

The public review requirements need to be updated allowing for electronic submission and posting of plans. In the past plan reviewers were very accepting of electronic submissions of revisions and amendments, and it was quite efficient. Now only paper submissions with duplicate copies are required. The regulations should be revised to allow for either option. Plans can be submitted as pdf files, posted on the ADEC website for anyone to access and review.

Request for Additional Information (RFAI)- Plans previously approved and submitted for renewal are receiving RFAI letters up to 35 pages in length. The reviewers should be required to clearly state what is missing to meet the regulations. The RFAI comments should be clear and concise. If the reviewer can offer a solution or text to insert, or offer the correct reference they wish to see, that would be helpful. In working for the State as reviewers, these persons are in a position not only to regulate but also to assist the plan holder in meeting the regulations and getting their plans approved to the benefit of all.

The incessant requests for additional information by reviewers that does not contribute any value to the plan, and/or is not required to be provided per the regulations (i.e. copies of Certificate of Inspections) needs to be addressed by DEC managers.

Clear guidance for RFAI's needs to be established by DEC. Once an RFAI is issued and corrections submitted, only the revised text submitted should be subject to review. The reviewer should not be allowed to come back again and again with more comments from different sections of the plan that were not identified initially.

CONTRACTS

Statutory Citation: AS 46.04.030(k), Except as provide in (m) and (o) of this section, the holder of an approved contingency plan required under this section shall maintain, or have available under contract, in its region of operation or in another region of operation approved by the department, singly or in conjunction with other operators, sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet the response planning standard.

Regulatory Citation: 18 AAC 75.440, "...plan holder **shall** maintain or **have available under contract** within the plan holders region of operation or another approved location sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and other resources..." The word contract is not defined under 18 AAC 75.990 (definitions). Webster's Encyclopedic Unabridged Dictionary defines contract as, "1) an agreement between two or more parties for the doing or not doing of something specified; 2) an agreement enforceable by law; 3) the written form of such an agreement." Wikipedia definition states – "In some cases depending on the exact wording, MOUs can have the binding power of a contract; as a matter of

law, contracts do not need to be labeled as such to be legally binding. Whether or not a document constitutes a binding contract depends only on the presence or absence of well-defined legal elements in the text proper of the document.” “A **contract** is a legally enforceable agreement between two or more parties with mutual obligations.”

Not accepting an MOU as a contract. The MOU for storage barge assets is a federal USCG requirement, lays out specific terms, and therefore should be accepted as a contract per AS 46.04.030(k). Federal regulations state “contract or other approved means”. MOU should be accepted as other approved means.

Having to have a contract for every piece of equipment, vessel, truck, machinery, person or consultant used to respond to the RPS. This is simply impossible. Regardless of whether a contract exists between two or more parties does not guarantee a resource’s availability at the time of a spill. Due to the uncertainties associated with the cause, location, and time of year a spill may occur, many resources will have to be identified and hired at the time of a spill. It’s unrealistic and impracticable for each plan holder to foresee all resource and personnel needs with the intent of consummating all contracts prior to a spill. It’s common for plan holders to rapidly negotiate contracts at the time of a spill with the intent of filling resource and specialized needs for an incident. The burden placed on a plan holder to confirm training, availability, audit, maintain and inspect each piece of equipment, personnel records are unrealistic. Equipment and resources listed in the Unified Plan and each Subarea Plan is not updated and maintained and should also be held to the same standard as industry.

MECHANICAL RECOVERY (SKIMMERS)

Skimmer De-rating- 18 AAC 75.455(g)(5) requires a recovery rate of 20 percent of the equipment manufacturer’s rated throughput capacity unless proven to be greater. In a September 11, 2009 letter issued by ADEC a decision was made that all plan holders must use a 20% recovery rate for calculating how they meet the response planning standard for the scenario(s) in their plan. In order to attempt to justify a higher recovery rate the plan holder must:

1. Submit a request specific to their plan or one operating area
2. The request must be supported by an analysis which includes oil type(s) and characteristics, operating environment(s), response times, support for response, and any other applicable aspects of the response
3. The information will be reviewed by ADEC and a determination made, specifically for the individual plan.

There are no established procedures based on industry standards and testing methodologies referenced to support a plan holders submission. This vague and arbitrary approach is flawed and assumes that each DEC reviewer has enough of an engineering background to interpret test data associated with all factors. Response equipment, which has already been rated by OHMSETT, using a nationally accepted standard (ASTM) should be accepted by ADEC.

Skimmer classification based on receiving environment- Various reference sources can be used to attempt to classify or categorize a skimmer type to environmental conditions. Actual environmental conditions such as location of spill, weather, and type of oil and weathering and operating environment determine the appropriate type/use of containment equipment/configuration and recovery devices. Deployment configuration, considerations and limitations are always evaluated during an actual spill. The STAR Manual rather than the World Catalogue recognizes these variables and provides latitude to the Operations Section Chief to evaluate and determine the most appropriate combination of tactics to minimize environmental impacts. Relying on one document such as the World Catalogue to determine whether one component within the on water recovery system is appropriate is prescriptive and counter-intuitive to effective oil recovery.

Skimmers are not rated to work in OPEN WATER – then Open water is defined (in 18AAC.75.990(79) as “marine waters below mean low low water and freshwaters of the state, excluding wetlands and the wetland or shoreline perimeter of lakes, rivers, and streams.” This implies that no skimmer is rated to work in the nearshore zone or can work below mean low low water (lowest tide), in a protected bay, calm water away from shore, etc. only “wetlands and the wetland or shoreline perimeter of lakes, rivers, and streams” This basically excludes all of the Chadux portable skimmers. This is another example of discrepancy of definitions.

SCENARIOS

Scenarios (General)- There is an overzealous emphasis on the construction of scenarios, the requirement of multiple scenarios in a single plan and the creation of a performance standard rather than a planning standard. In some cases, plan holders (renewal) are being told to develop new scenarios in an area of the state where they MIGHT make one trip per year and told to discard a scenario where they do a majority of the work.

Master scenarios using a standard format should be developed for each region. 18 AAC 75.425(e)(1)(F) allows “if the information required by this paragraph is contained within a separate document developed by the plan holder or the plan holder’s PRAC identified in (3)(H) of this subsection, the plan holder may incorporate the information by reference upon obtaining the department’s approval;”

Scenario Format- 18 AAC 75.425(e)(1)(F) states, “ a written description of a hypothetical spill incident and response that demonstrates a plan holders ability to respond to a discharge.... the response scenario must be usable as a general guide for a discharge of any size...”

The Marine Vessels Section suggests that the online scenario template be used for creating each of the contingency plan scenarios required by 18 AAC 75.425(e)(1)(F). “This template is intended to ensure that adequate information is included in the scenario to not only meet regulatory requirements, but also allow it to fulfill its purpose as a usable guide to a response. It is incumbent on the plan holder to ensure that the information provided is accurate and

complete. The conclusion of the scenario must demonstrate that the response planning standard can be met as detailed in the contingency plan". Scenario needs to include the following sections in order to be complete:

1. A description of scenario conditions and assumptions
2. An overview of command objectives, actions, and decisions
3. A timeline describing the strategic actions taken to meet the tactical objectives
4. Information to support the conclusion that the response planning standard can be met in the required timeframe

Plan holders are being informed by DEC's Marine Vessel staff the online template must be used to update older version scenarios and/or for new scenarios. It's clear under the regulation and based on the language found online that the template "may be used" by plan holders and is not required. A key point in the regulation is that the scenario format be "usable as a guide".

"Impact to shoreline indicates that the spill has not been contained or controlled." Industry is required to show shoreline cleanup tactics in the scenario. The STAR Manual contains numerous shoreline containment and recovery tactics, which don't imply failure of the plan holder to contain or control a discharge. It's recognized by mature and seasoned spill responders that when a spill occurs there is a high probability of shoreline impact, especially when the incident occurs near shore. It's apparent the plan reviewer(s) need to attend a basic oil spill course to understand oil spill transport, fate and effects in the environment.

Scenario Trajectories: 18 AAC 75.425(e)(1)(F) states, "...the relevant environmental conditions, including weather sea state, and visibility, the spill trajectory..."

Vessel plans submitted to ADEC for review have received the following RFAI: "trajectories do not contain sufficient information... including geographical features that could be potentially impacted by the spill. Consider placing the trajectories on overlaid maps". This is a consistent comment and was noted in RFAI's for the COSMO and TransMontaigne spot-charter ODPCP's. The scenario trajectory is intended to show where oil is going, not all of the resources at risk. Other lists information and maps should show that. A map is provided in another example – they can compare. The regulation is not prescriptive and does not list additional parameters outside of the intent of a trajectory. To satisfy ADEC's request all past scenario trajectories would need to be re-formatted with a cost range of \$3,000 to \$20,000 per trajectory depending upon the company and model contracted to conduct the trajectory. The trajectories were approved in the past and serve the intent of guiding the scenarios strategy and tactics.

Response Planning Standards (RPS)

The RPS for non-crude carriers need to be updated. The current 15% RPS has applied to a non-crude barge of either single or double hull construction for years, with no recognition of the decrease in risk by using the double-hull. Incorporating some recognition of the value of double hull barges as preventing a catastrophic discharge is warranted.

**Alaska Fuel Storage and Handlers Alliance Meeting with ADEC
Meeting Summary
Anchorage, AK
January 13, 2012
9:00 AM- 11:00 AM**

Attendance List

Bob Cox, Crowley Marine Services; Jim Beckham, Harbor Enterprise; Bev Neiman, Delta Western; Pat Duffy, Petro Star; Capt. Dan Nutt, K-Sea Transportation; Jim Butler, Baldwin & Butler; Leslie Pearson, Pearson Consulting; ADEC Commissioner Larry Hartig; Lynn Tomich Kent, ADEC Deputy Commissioner; Larry Dietrick, Division of Spill Prevention & Response Director; Betty Schorr, Industry Preparedness Program Manager.

Introduction: Commissioner Hartig expressed his appreciation for having the meeting. DEC is currently developing an approach for what they would like to do with Phase 3 of the Contingency Plan Review Project (CPR). Reinitiating the CPR project took a little longer than DEC had planned. The spills on the North Slope from pipelines and corrosion related issue became a priority. Commissioner Hartig indicated the Governor has a permit reform initiative out and all departments are actively looking at where changes are necessary. DEC's focus at today's meeting will be to generally look at the issues raised by AFSHA for Phase 3 consideration. DEC is not prepared to make any decisions or resolve any issues immediately. Bob Cox indicated that AFSHA is also hoping to come out of the meeting with DEC making a commitment to work with industry on either updating the guidance document or regulatory reform.

Background: AFSHA was formed in 2007. Operators saw the need for an organization to represent the concerns of industry. AFSHA is a forum created to cut across the regulatory agencies and as a group can bring their concerns to an agency for negotiation and resolution. AFSHA has 17 members, which represent the major barge, storage, and seafood processing industries in Alaska. The organization looks for solutions to resolve issues. Currently, Jim Beckham is President, Bev Neiman-Vice President and Bob Cox is Secretary/Treasure of AFSHA.

Purpose: AFSHA members are required to have state contingency plans to operate. The contingency plan renewal and approval process is needlessly complicated and delayed because of regulatory interpretation that relies on DEC staff discretion to determine regulatory compliance. AFSHA believes there's a lack of clear regulatory language or department wide policy for plan renewal and the result is an arbitrary and subjective process, which adds uncertainty, unpredictability and increased cost. Predictability in the process is necessary. AFSHA isn't here to say we want the regulations reduced; AFSHA wants predictability and consistent interpretation of the regulations.

After initial review and approval, AFSHA member plans are renewed by ADEC on a 5-year cycle. During the 5-year life span, plan holders frequently provide ADEC with updates or amendments to plan information. Updates most often involve minor changes to operations or plan administrative information. In the event of a major change to a plan, ADEC treats the plan similar to a new plan submittal. Current practice by ADEC during the plan renewal process has evolved into a sweeping review of a plan despite the fact the department has already reviewed minor revisions or substantive changes to that plan during the preceding approval period.

Issues & Concerns: (See AFSHA document Examples of C-Plan Review and Regulations Issues)

DEC was provided a copy of AFSHA's paper, which provides examples of issues and concerns associated with the contingency plan review process. The paper is broken down into the following topics—process, contracts, skimmers, and scenarios. AFSHA members lead the discussion on each topic.

General- Bev Neiman covered some of the general concerns such as consistency between reviewers over time and between each DEC section; guidance document; web links and references. In addition, Bev provided examples of unclear determinations by DEC associated with the renew process, sufficiency for review, and public review requirements. DEC indicated that the Coastal Zone Management Program is gone and that DEC is unsure how to handle the coastal zones in the review process. This issue would likely addressed and discussed in Phase 3 review of the regulations. AFSHA indicated that they would support electronic submission of plans rather than hard copies.

The issue of RFAI's was discussed. In some instances the RFAI's provided by the reviewer aren't related to the regulations or are vague. The reviewer needs to be more specific as to what they're asking or and why, and they shouldn't be requesting the plan holder to add information that's not supported by the regulations.

DEC needs to establish clear guidance to the reviewer for RFAI's. The guidance should require the reviewer to provide citations, the regulation and specifics as it relates to the plan. AFSHA members are concerned that the RFAI process was being used to lengthen the review process and that it gets moved up to the sufficiency for review. AFSHA's concern is keeping the process moving and not getting bogged down.

Contracts (led by Dan Nutt)- AFSHA members have had some concerns about some recent and past discussion as to what constitutes a contract and in what manner a piece of equipment is under contract. AFSHA members believe the regulation intended this be applied to big-ticket items to contain and control a spill.

Members have contracts with Alaska Chadux to provide response services. In addition members have agreements or memorandum of understanding with other operators or facilities. DEC is no longer recognizing the MOUs or MOAs as a contract. In many cases it's not practiced to negotiate a contract until a company needs the service. Some contractors are not accustomed to signing a response action contract. Regarding scenarios, the plan reviewer expects the plan holder to have a binding contract for all resources identified. Contingency plans are a planning document and not a performance-based document. AFSHA members have some very important MOU's in place. For federal requirements, tank barge operators in Alaska have an agreement that states the companies will help each other by providing barges for lightering and storage during an incident. Members are being told by DEC to remove this reference in their plans. Additional MOU's include a Dutch Harbor MOU, Alaska Chadux has a barge of opportunity MOU and SEAPRO has a listing from members to provide barges for lightering and storage. There's several other MOU's such as the Nome MOU. AFSHA members feel the MOU's should be allowed to be used and referenced in our contingency plans. By DEC not allowing MOU's diminishes the value of a cooperative effort. It's important to show the public that industry can cooperate and keep costs down. The cost associated with a fuel delivery comes right out of an Alaskans pocket.

DEC indicated that it'd take some detailed thinking on this topic. The contract issues has been reviewed in the past and litigated (PWS shippers). The history and findings from the adjudicatory process will need to be reviewed.

Skimmers (led by Jim Beckham)- Central to all plan scenarios and the largest variance in interpretation across the different sections of DEC is calculating the daily recovery capacity. Calculating EDRC drives the basic parts of the plan and affects the amount of temporary storage required supporting the scenarios. The 20% de-rating of the equipment is a subject wide interpretation depending upon the plan reviewer, their experience and length of service. It apparently comes from the federal regulations which explain, yet the Alaska regulations do not, that the de-rating of equipment is to account for various items such as daylight, cleaning and servicing, refueling and maintenance break downs. Some reviewers say the figure is 50% water and 50% oil and other reviewers say plan holders need 5 times the temporary storage for the recovered volume, and still others require additional de-rating to account for servicing. There's a lack of understanding between the terms efficiency and effectiveness. These terms are used frequently interchangeable and therefore demonstrates a lack of understanding and the difference between the words. As a result, temporary storage is not well defined in the regulations and subject to wide interpretation. A letter issued in September 2009 by the department uses the words effective and efficient interchangeably at the beginning and end of the letter. The letter indicates that if a plan holder would like to have a skimmer rated higher than

20% documentation must be submitted to DEC for determination for a higher rating. What this infers is that members have to do this individually every time a plan is submitted. This approach demonstrates a lack of progress since the regulations have been written, which is part of the issue AFSHA members are trying to highlight with this meeting. Industry has changed, adapted and proved up over the years yet the regulations haven't kept pace with the times. Members have new skimmers and more effective skimmers. Specific to skimmers, OHMSETT tests equipment using ASTM methods and standards. ASTM standards are specifically called out in federal regulation but not state regulations. Members believe that data from OHMSETT should be accepted by DEC for a specific make and model of equipment. No further case-by-case review should be necessary. Clarifying the regulations would be a long-term solution to this issue.

ADEC have been involved with looking at OHMSETT work. Marine Vessel staffs have been to the facility a number of times and they are familiar with ASTM and OHMSETT. DEC would have liked to have some feedback from the 2009 letter. There's been a considerable amount of work that's been done in the past 20 years. EDRC continues to be an issue. The federal government is looking to conduct a review and overhaul of the regulations. There is an effort to open the rule making.

Scenarios (led by Bev Neiman)- One thought AFSHA has had is the use of a master scenario for non-persistent tank barge and facilities for each region. It appears that the regulations do allow for this approach by incorporating scenarios by reference. The scenario format change occurs at every renewal period and it primarily occurs from the Marine Vessel section. There's quite a cost for getting trajectories and scenarios reformatted. The template format that the DEC provided expands the length of the scenario. It makes sense as a planner but not as a useable guide. Plan reviewers are asking members to write new scenarios for different regions and told to delete key scenarios where business is either year round or seasonal. Under the regulations, a scenario in any of our operating locations would be acceptable for demonstrating how plan holders would respond to a spill. The scenarios become a real hang up in the approval process.

DEC indicated that the Marine Vessel sections attempt to provide a template was to make a master guide for scenarios. The scenarios are the cornerstone and piece of the plan. DEC is open to discussion on finding a way collaborative way to make scenarios a useable guide.

Process (led by DEC): The Phase 3 CPR project would look at regulatory and perhaps statutory changes and would likely result in a change to the existing guidance document. There may be items that can be updated in the current guidance to address some immediate issues for clarification.

DEC recently formed seven internal work groups to review Article 4. The review is something that affects every section in the program. Staff is looking at consistency across the board. DEC wants to eliminate ambiguity and make the regulations easier to use by industry and DEC. Currently DEC is drafting a straw man of the issues and regulations. They'll have to look at it hard to determine if the regulatory package can be done all at once or parceled out. By early summer DEC wants to start the informal public process. DEC is not sure if it would go to negotiated rule making or the standard regulatory package process. There will likely be multiple times for industry to provide input. Depending upon how much will be tackled will determine the timeframe. It's likely the end of 2013 will complete the regulatory project. DEC is open for input or thoughts regarding the negotiated rule making process since it would take more time and also whether to take it all on at once or piece meal.

DEC Commissioner suggested that DEC review the issues and concerns AFSHA brought to their attention and schedule another meeting in a month or so to provide an update on DEC's plan. He also suggested that at the next meeting a discussion on some of the issues in more detail.

Review of Action Items

- Schedule a follow-up progress report meeting with ADEC in late February/early March

Meeting Adjourned at 11:00 AM

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Examples of Industry Issues and Concerns Associated with Contingency Plan
Review

1. GENERAL

- a) Guidance Document: The 1994 Guidance Document was originally written to assist ADEC plan reviewers and industry in understanding/clarifying regulatory intent, as well as establishing a level of consistency. Since 1994, regulations have changed and the guidance document is not in line with the regulations. A copy of the guidance document cannot be obtained nor is it available online. In addition, no consistency exists between plan reviewers and sections within ADEC's Industry Preparedness Program. Although ADEC is attempting to update the Guidance Document the unpredictable interpretations by plan reviewers of the regulations is having a negative impact between the plan holder and reviewer(s).

Issue Analysis:

Action/Resolution:

- b) Consistency Between Reviewers Over Time: The plan is accepted and approved; and then when an applicant applies for renewal or another large operational change, suddenly it's not acceptable. What to put in the plan or "what ADEC staff want to see" to fill the requirement of the section changes over time. The regulations are vague and open to interpretation and often interpreted differently by industry and ADEC, and between reviewers in different sections of IPP. The inconsistency between reviewers and review standards need to be corrected.

Issue Analysis:

Action/Resolution:

- c) Web Links, Including Web Addresses, E-mail Addresses, Cross References, Etc.: ADEC is always asking the applicant to add them to a plan, and then asking for the references to be removed. Asking the applicant to include the information in the plan rather than reference: “information must be included within this Section of the Plan as website links often break or are no longer in service.” Most of the references are AK government agency links (ACP, SCP, GRS, MESA, maps, STAR, etc.), which should be consistently maintained by the agencies.

Issue Analysis:

Action/Resolution:

2. PROCESS

- a) Renewal/Review Determination: Plans are typically approved per 18 AAC 75.460(a). When a plan holder submits a plan for renewal per 18 AAC 75.420(a), regardless of the number of plan amendments that have occurred during the 5-year period all plans are being treated as a major renewal. This determination is made regardless of the fact that the department has already reviewed amendments during the preceding period. 18 AAC 75.420 needs to be re-examined to allow for a timely review and renewal process.

Issue Analysis:

Action/Resolution:

- b) Sufficiency for Review: Sufficiency needs to be defined in the regulations and the process for determining sufficiency need to be articulated. Plans previously approved and submitted for renewal are being deemed “insufficient” and the method used by DEC is not clear.

Issue Analysis:

Action/Resolution:

- c) Public Review Requirements: The review of industry contingency plans is a public process under state law controlled by the Alaska Coastal Zone Management Program (ACMP). Even though the ACMP has been obsolete since 2008, ADEC reviewers have continued to list them in the plan holders sufficient for review letters and the plan holders have had to provide documentation that they received a copy of the plan into 2011.

The public review requirements need to be updated allowing for electronic submission and posting of plans. In the past plan reviewers were very accepting of electronic submissions of revisions and amendments, and it was quite efficient. Now only paper submissions with duplicate copies are required. The regulations should be revised to allow for either option. Plans can be submitted as PDF files, posted on the ADEC website for anyone to access and review.

Issue Analysis:

Action/Resolution:

- d) Request for Additional Information (RFAI): Plans previously approved and submitted for renewal are receiving RFAI letters up to 35 pages in length. The reviewers should be required to clearly state what is missing to meet the regulations. The RFAI comments should be clear and concise. If the reviewer can offer a solution or text to insert, or offer the correct reference they wish to see, that would be helpful. In working for the State as reviewers, these persons are in a position not only to regulate but also to assist the plan holder in meeting the regulations and getting their plans approved to the benefit of all.

The incessant requests for additional information by reviewers that does not contribute any value to the plan, and/or is not required to be provided per the regulations (i.e. copies of Certificate of Inspections) needs to be addressed by DEC managers.

Clear guidance for RFAI's needs to be established by DEC. Once an RFAI is issued and corrections submitted, only the revised text submitted should be subject to review. The reviewer should not be allowed to come back again and again with more comments from different sections of the plan that were not identified initially.

Issue Analysis:

Action/Resolution:

3. CONTRACTS

Statutory Citation: AS 46.04.030(k), Except as provide in (m) and (o) of this section, the holder of an approved contingency plan required under this section shall maintain, or have available under contract, in its region of operation or in another region of operation approved by the department, singly or in conjunction with other operators, sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet the response planning standard.

Regulatory Citation: 18 AAC 75.440, "...plan holder shall maintain or have available under contract within the plan holders region of operation or another approved location sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and other resources..." The word contract is not defined under 18 AAC 75.990 (definitions). Webster's Encyclopedic Unabridged Dictionary defines contract as, "1) an agreement between two or more parties for the doing or not doing of something specified; 2) an agreement enforceable by law; 3) the written form of such an agreement." Wikipedia definition states - "In some cases depending on the exact wording, MOUs can have the binding power of a contract; as a matter of law, contracts do not need to be labeled as such to be legally binding. Whether or not a document constitutes a binding contract depends only on the presence or absence of well-defined legal elements in the text proper of the document." "A contract is a legally enforceable agreement between two or more parties with mutual obligations."

- a) Not Accepting an MOU as a Contract: The MOU for storage barge assets is a federal USCG requirement, lays out specific terms, and therefore should be accepted as a contract per AS 46.04.030(k). Federal regulations state "contract or other approved means". MOU should be accepted as other approved means.

Issue Analysis:

B.S. - ADEC accepts MOU for storage barge assets
D.N. -
M.F. - ADEC accepts APDET. But no assurances
J.K. - ADEC was told that APDET only applies to food regit

Action/Resolution:

ADEC participation in APDET discussions.
Equipment sharing between planholders via OSRO/PRAK

(b) Equipment Contract Requirements: Having to have a contract for every piece of equipment, vessel, truck, machinery, person or consultant used to respond to the RPS. This is simply impossible. Regardless of whether a contract exists between two or more parties does not guarantee a resource's availability at the time of a spill. Due to the uncertainties associated with the cause, location, and time of year a spill may occur, many resources will have to be identified and hired at the time of a spill. It's unrealistic and impracticable for each plan holder to foresee all resource and personnel needs with the intent of consummating all contracts prior to a spill. It's common for plan holders to rapidly negotiate contracts at the time of a spill with the intent of filling resource and specialized needs for an incident. The burden placed on a plan holder to confirm training, availability, audit, maintain and inspect each piece of equipment, personnel records are unrealistic. Equipment and resources listed in the Unified Plan and each Subarea Plan is not updated and maintained and should also be held to the same standard as industry.

5 year schedule of review

Issue Analysis:

Planning Criteria = 15% in 48 hours *"contain & control"* *"in region"* High degree of certainty for critical assets

PRAC resources - are they valid? Vetted?

program in place?

example of fishing vessels availability (RWS)

Action/Resolution:

AFSHA to review with PRAC

4. MECHANICAL RECOVERY (SKIMMERS)

a) Skimmer De-rating: 18 AAC 75.455(g)(5) requires a recovery rate of 20 percent of the equipment manufacturer's rated throughput capacity unless proven to be greater. In a September 11, 2009 letter issued by ADEC a decision was made that all plan holders must use a 20% recovery rate for calculating how they meet the response planning standard for the scenario(s) in their plan. In order to attempt to justify a higher recovery rate the plan holder must:

1. Submit a request specific to their plan or one operating area
2. The request must be supported by an analysis which includes oil type(s) and characteristics, operating environment(s), response times, support for response, and any other applicable aspects of the response
3. The information will be reviewed by ADEC and a determination made, specifically for the individual plan. There are no established procedures based on industry standards and testing methodologies referenced to support a plan holder's submission. This vague and arbitrary approach is flawed and assumes that each DEC reviewer has enough of an engineering background to interpret test data associated with all factors. Response equipment, which has already been rated by OHMSETT, using a nationally accepted standard (ASTM) should be accepted by ADEC.

Issue Analysis:

Action/Resolution:

- b) Skimmer Classification Based on Receiving Environment: Various reference sources can be used to attempt to classify or categorize a skimmer type to environmental conditions. Actual environmental conditions such as location of spill, weather, and type of oil and weathering and operating environment determine the appropriate type/use of containment equipment/configuration and recovery devices. Deployment configuration, considerations and limitations are always evaluated during an actual spill. The STAR Manual rather than the World Catalogue recognizes these variables and provides latitude to the Operations Section Chief to evaluate and determine the most appropriate combination of tactics to minimize environmental impacts. Relying on one document such as the World Catalogue to determine whether one component within the on water recovery system is appropriate is prescriptive and counter-intuitive to effective oil recovery.

Issue Analysis:

Action/Resolution:

- c) Skimmers Are Not Rated to Work in OPEN WATER: Open water is defined (in 18AAC.75.990(79) as “marine waters below mean low low water and freshwaters of the state, excluding wetlands and the wetland or shoreline perimeter of lakes, rivers, and streams.” This implies that no skimmer is rated to work in the near shore zone or can work below mean low low water (lowest tide), in a protected bay, calm water away from shore, etc. only “wetlands and the wetland or shoreline perimeter of lakes, rivers, and streams” This basically excludes all of the Chadux portable skimmers. This is another example of discrepancy of definitions.

Issue Analysis:

Action/Resolution:

5. SCENARIOS

- a) Scenarios (General): There is an overzealous emphasis on the construction of scenarios, the requirement of multiple scenarios in a single plan, and the creation of a performance standard rather than a planning standard. In some cases, plan holders (renewal) are being told to develop new scenarios in an area of the state where they MIGHT make one trip per year and told to discard a scenario where they do a majority of the work.

Master scenarios using a standard format should be developed for each region. 18 AAC 75.425(e)(1)(F) allows “if the information required by this paragraph is contained within a separate document developed by the

plan holder or the plan holder's PRAC identified in (3)(H) of this subsection, the plan holder may incorporate the information by reference upon obtaining the department's approval;"

Issue Analysis:

Action/Resolution:

- b) Scenario Format: 18 AAC 75.425(e)(1)(F) states, " a written description of a hypothetical spill incident and response that demonstrates a plan holders ability to respond to a discharge.... the response scenario must be usable as a general guide for a discharge of any size..."

The Marine Vessels Section suggests that the online scenario template be used for creating each of the contingency plan scenarios required by 18 AAC 75.425(e)(1)(F). "This template is intended to ensure that adequate information is included in the scenario to not only meet regulatory requirements, but also allow it to fulfill its purpose as a usable guide to a response. It is incumbent on the plan holder to ensure that the information provided is accurate and complete. The conclusion of the scenario must demonstrate that the response planning standard can be met as detailed in the contingency plan". Scenario needs to include the following sections in order to be complete:

1. A description of scenario conditions and assumptions
2. An overview of command objectives, actions, and decisions
3. A timeline describing the strategic actions taken to meet the tactical objectives
4. Information to support the conclusion that the response planning standard can be met in the required timeframe

Plan holders are being informed by DEC's Marine Vessel staff the online template must be used to update older version scenarios and/or for new scenarios. It's clear under the regulation and based on the language found online that the template "may be used" by plan holders and is not required. A key point in the regulation is that the scenario format be "usable as a guide".

Issue Analysis:

Action/Resolution:

- c) “Impact to shoreline indicates that the spill has not been contained or controlled.” Industry is required to show shoreline cleanup tactics in the scenario. The STAR Manual contains numerous shoreline containment and recovery tactics, which don’t imply failure of the plan holder to contain or control a discharge. It’s recognized by mature and seasoned spill responders that when a spill occurs there is a high probability of shoreline impact, especially when the incident occurs near shore. It’s apparent the plan reviewer(s) need to attend a basic oil spill course to understand oil spill transport, fate, and effects in the environment.

Issue Analysis:

Action/Resolution:

- d) Scenario Trajectories: 18 AAC 75.425(e)(1)(F) states, “ ...the relevant environmental conditions, including weather sea state, and visibility, the spill trajectory...”

Vessel plans submitted to ADEC for review have received the following RFAI: “trajectories do not contain sufficient information... including geographical features that could be potentially impacted by the spill. Consider placing the trajectories on overlaid maps”. This is a consistent comment and was noted in RFAI’s for the COSMO and TransMontaigne spot-charter ODPCP’s. The scenario trajectory is intended to show where oil is going, not all of the resources at risk. Other lists information and maps should show that. A map is provided in another example – they

can compare. The regulation is not prescriptive and does not list additional parameters outside of the intent of a trajectory. To satisfy ADEC's request all past scenario trajectories would need to be reformatted with a cost range of \$3,000 to \$20,000 per trajectory depending upon the company and model contracted to conduct the trajectory. The trajectories were approved in the past and serve the intent of guiding the scenarios strategy and tactics.

Issue Analysis:

Action/Resolution:

6. Response Planning Standards (RPS)

The RPS for non-crude carriers needs to be updated. The current 15% RPS has applied to a non-crude barge of either single or double hull construction for years, with no recognition of the decrease in risk by using the double-hull. Incorporating some recognition of the value of double hull barges as preventing a catastrophic discharge is warranted.

Issue Analysis:

Action/Resolution: