

Members

Alaska State
Chamber of
Commerce

Alaska Native
Groups

Environmental
Groups

Recreational
Groups

Aquaculture
Associations

Fishing
Organizations

City of Kodiak

City of Kenai

City of Seldovia

City of Homer

Kodiak Island
Borough

Kenai Peninsula
Borough

Municipality
of Anchorage

Docket Management Facility
U.S. Department of Transportation
Submitted electronically via Federal eRulemaking Portal

RE: Assessment Framework and Organizational Restatement Regarding Pre-emption for Certain Regulations Issued by the Coast Guard (Docket No. USCG-2008-1259)

May 23, 2014

To Whom It May Concern:

Cook Inlet Regional Citizens Advisory Council (RCAC) submits this letter on behalf of our constituents regarding the Notice of Proposed Rulemaking (NPR) entitled "Assessment Framework and Organizational Restatement Regarding Pre-emption for Certain Regulations Issued by the Coast Guard."

Cook Inlet RCAC's Mission

Cook Inlet RCAC represents the citizens of Cook Inlet, Alaska in promoting environmentally safe marine transportation and oil facility operations in our region, which was directly impacted by the 1989 *Exxon Valdez* oil spill. Our existence is mandated by the Oil Pollution Act of 1990, and our work includes:

- Providing advice and recommendations on policies, permits and site-specific regulations for terminal and tanker operations and maintenance;
- Monitoring environmental impacts of the operation of terminals and tankers;
- Monitoring terminals and tanker operations and maintenance that may affect the environment near terminals;
- Reviewing the adequacy of oil-spill prevention and contingency plans for terminals and tankers;
- Providing advice and recommendations on port operations, policies and practices; and
- Reviewing standards for tankers bound for, loading at, or exiting from oil terminals.

In Alaska, we have worked closely with State and Federal regulatory agencies, including the U.S. Coast Guard, to develop a statutory and regulatory framework for marine transportation safety and oil spill prevention, preparedness and response. This system is supported by a robust and long-standing foundation of overlapping State and Federal rules and oversight that is critical to our ability to perform our federally-mandated mission.

Cook Inlet RCAC is concerned that the proposed application of federal pre-emption to State laws and regulations in subject areas covered in 33 CFR and 46 CFR will affect Cook Inlet RCAC's ability to implement our OPA 90 mandate to promote environmentally safe marine transportation and oil facility operations in Cook Inlet, because the framework for marine environmental protection relies heavily on Alaska statutes and regulations that fall into subject areas described in the proposed rule as "foreclosed from State regulation" or otherwise pre-empted. If the proposed rule is finalized as written, it will create significant uncertainty and confusion among the regulated industries, stakeholders, and the public about the disposition of each of these state regulations and requirements.

Cook Inlet has the following concerns, which are explained in detail in this letter:

1. The Coast Guard did not adequately consider the impact of the proposed rulemaking to a wide body of state law and regulation concerning oil spill prevention, contingency planning, and response.
2. The proposed rule may foreclose States from implementing oil spill contingency planning requirements for tank vessels.
3. The rulemaking process oversteps the Coast Guard's agency authority.

We have focused our comments on areas where we note obvious conflicts between federal and state jurisdiction, based on the specific citations within the CFR in the proposed rule.

1. Lack of Consideration of Impacts to State Oil Spill Programs

As evidenced by the large number of comments in the rulemaking docket from state governments and stakeholders, the proposed rule has created confusion and uncertainty about state maritime environmental protection regimes. Cook Inlet RCAC believes that the Coast Guard has exacerbated this situation by developing this proposed rule in an apparent vacuum, absent any collaboration with, or even notice to, potentially impacted stakeholders. We believe that the presidential directives cited in the proposed rule (Executive Order 13132 and President Obama's May 2009 Memorandum) establish a clear expectation for consultation with state and local stakeholders by directing federal agencies to "ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications."

The Extension of Comment Period notice filed in the Federal Register on March 28, 2014 provides a blanket statement assuring that the proposed rule would not interfere with existing State regulations, stating:

"The Coast Guard has received requests for extension of the comment period. Some of these requests are from members of the public and of State agencies who are concerned that the proposed rule would

interfere with existing State permitting practices, or would require a thorough review of State regulations to find out what State regulations may be pre-empted by the proposed rule. The Coast Guard does not believe the proposed rule should raise such concerns. As stated here and throughout the NPRM, the proposed rule merely restates the current pre-emptive impact of our regulations as it exists today as a result of statute and court decisions. The proposed rule does not make any new determinations or assertions, but only summarizes in one location existing law and the Coast Guard's statement of pre-emptive impact. The proposed rule does not alter in any way the rights of States. Likewise, it does not serve to prospectively give pre-emptive impact to any future regulatory effort. The proposed rule does not change the law as it exists today.

Contrary to the Coast Guard's assertion that this proposed rule would not have any direct impact on "the law as it exists today," we believe that there are a wide array of provisions in Alaska statutes and regulations that fall squarely within the subject areas identified in the proposed rule as expressly pre-empted by federal rules. Cook Inlet RCAC is concerned that the Coast Guard has not been duly diligent in evaluating the full spectrum of potential implications of this broad and sweeping rulemaking to State governments and the stakeholders who rely on environmental protections established, implemented, and enforced by state agencies. In fact, in our outreach to our Coast Guard partners in Alaska, we were surprised and alarmed to learn that this rulemaking had been developed absent any direct input from Coast Guard field units.

Cook Inlet RCAC also noted that the proposed rule does not acknowledge or explain how the non-pre-emption language in Section 1018 of the Oil Pollution Act of 1990 (Public Law 101-380) relates to the pre-emption assertions in areas that overlap with state or local oil spill laws and regulations. In several locations, the proposed rule explicitly acknowledges exemptions where non-pre-emption language in the federal law implementing the International Convention for the Prevention of Pollution from Ships (Section 2003 of Public Law 100-220) preserves state and local authority in key areas. Similar treatment should be applied to state or local authorities that are preserved in the Oil Pollution Act of 1990.

The confusion caused by this rulemaking creates a climate of uncertainty for both regulators and the regulated community. It also creates the opportunity for third party legal challenges of long-established state policy and practice that would significantly burden coastal states like Alaska.

Request:

Cook Inlet RCAC requests that the Coast Guard explain the process that was used to evaluate the state regulations that would be potentially impacted by the pre-emption assertions in the proposed rule. In this analysis, please clarify

those areas where state or local authorities are preserved through the non-preemption clause in the Oil Pollution Act of 1990.

If the Coast Guard decides to proceed with this rulemaking, we request that the Coast Guard provide consultation opportunities to all potentially impacted jurisdictions, including U.S. states, local governments, and federally recognized tribes.

2. Foreclosure of state oil spill contingency planning requirements

The proposed rule lists parts of the Coast Guard's Tanker Vessel Response Plans for Oil (33 C.F.R. 155.1010 –155.1070) as having field preemptive effect. Alaska is one of a handful of U.S. states that requires operators, including tank and non-tank vessel owners, to prepare oil discharge prevention and contingency plans (oil spill contingency plans) for vessels operating in state waters (AS 46.04.030). Alaska law specifies "response planning standards" for specific volumes of oil and timeframes in which tanker operators must plan to contain and clean-up spills (AS 46.04.030(k)). Vessel operators must show that they have access to personnel and equipment to respond to the state response planning standards, which often exceed federal worst case response planning volumes. Alaska also has a state system for registering and qualifying oil spill response contractors. (AS 46.04.035)

Alaska statutes and regulations establish an agency and public review process for oil spill contingency plans that provides an opportunity for key stakeholders to review and evaluate oil spill prevention, preparedness and response. As a named contingency plan reviewer under the state process, Cook Inlet RCAC has equivalent status to a state regulatory agency, and we actively contribute to the process by providing comments and input on behalf of our constituents. There is no equivalent process under the federal Vessel Response Plan system, so elimination of the state oil spill contingency planning requirements would significantly reduce the opportunity for stakeholder oversight.

The State of Alaska also has requirements for oil spill drills and exercises that demonstrate the operators' ability to implement their state oil spill contingency plans. Cook Inlet RCAC routinely participates within the Incident Command System during drills and actual spills as defined in the Unified Alaska/Federal Area Plan and Subarea plans.

Cook Inlet RCAC is concerned that the assertion of field pre-emption for regulations covered by the Tanker Vessel Response Plans for Oil (33 C.F.R. 155.1010 –155.1070) would impact the wide body of Alaska state requirements establishing oil spill contingency planning requirements for tank vessels operating in state waters, including 18 AAC 75.007, 18 AAC 75.27, 18 AAC 75.37, 18 AAC 75.425, 18 AAC 75.455, and 18 AAC 75.460. It is unclear how or whether the savings cited in Section 2003 of P.L. 100-220 would extend to state oil spill contingency planning requirements. Cook Inlet RCAC

interprets the proposed rule as precluding state regulation in many of the areas that are critical to our state oil spill contingency planning program, including:

- **Training requirements for vessel crew with responsibilities for oil spill response and spill management** (covered in 33 CFR 155.1060, potentially pre-empting state regulations at 18 AAC 75.007, 18 AAC 75.020).
- **Prevention requirements that overlap with safety management system regulations** in 33 CFR Part 96 (identified in the proposed rule as an area foreclosed from State regulation) or addressed in 46 CFR 30 (tank vessel provisions that field pre-empt state requirements). This would impact Alaska regulations at 18 AAC 75.005-18 AAC 75.085, which address oil spill prevention from tank vessels, along with components of 18 AAC 75.425 and 18 AAC 75.445, which establish requirements for tank vessel operators to meet standards for oil spill prevention and safety as part of their state-approved Oil Discharge Prevention and Contingency Plan (ODPCP). For example:
 - 18 AAC 75.007 establishes general oil pollution prevention requirements for vessels, barges, pipelines, railroad tank cars, and other facilities. The state regulation specifies that in the case where state standards are more stringent than (but do not conflict with) federal law, the state standard would apply.
 - 18 AAC 75.020 establishes oil discharge prevention training and recordkeeping requirements to ensure that company personnel are appropriately trained in job duties related to oil spill prevention, and that training records and oil spill discharge records are maintained by the operator and available for inspection by the State of Alaska.
- **State oil spill notification and reporting requirements**, which appear to be subject to field pre-emption under 46 USC 3717 and 6101. The cited sections of federal law relate to marine casualty reporting, and therefore could be construed as preventing any additional state-level requirement to report oil spills and other marine incidents. For example:
 - 18 AAC 75.300 establishes oil spill reporting requirements for vessels and facilities in Alaska. The regulation includes reporting thresholds by spill quantity, and specifies information to be included on state situation reports.
- **Federal spill prevention and vessel safety requirements that are incorporated by reference into Alaska state law and regulations.** The incorporation by reference of key federal prevention and vessel safety requirements into the Alaska Administrative Code (AAC) is a key component of the state oil spill contingency planning regulations. This practice provides a mechanism for state environmental enforcement officials and inspectors to ensure that regulated operators

are meeting their commitments to both federal and state standards. This system provides a benefit to both the state and federal government, particularly in Alaska where U.S. Coast Guard personnel resources are limited. In many remote communities, state officials have more consistent access to vessel operators and are the “boots on the ground” to oversee and enforce key provisions of state and federal regulations. The state’s incorporation by reference of federal requirements extends the Coast Guard’s enforcement and inspection capabilities, yet the field pre-emption exerted in the proposed rule under 33 CFR 96 would presumably preclude Alaska from enforcing any federal standards. For example:

- 18 AAC 75.007 requires that Alaska ODPCP holders must have substance abuse and medical programs in place that meet the requirements of 49 CFR Part 16. Alaska Department of Environmental Conservation (ADEC) inspections of covered vessels provide an opportunity to ensure compliance with this federal standard.
- **State regulations addressing oil and hazardous material transfer operation** are identified as being field or conflict pre-empted by sections of 33 CFR 156.100 to 156.330. The State of Alaska has established requirements for oil transfers aimed at reducing the potential for oil spills during high-risk oil transfer and lightering operations, which would presumably be pre-empted by federal law. For example:
 - 18 AAC 75.025 establishes transfer requirements including overfill prevention measures, pre-booming of vessels during crude oil transfers, limitations on certain operations during cargo offloading, communication procedures, procedures to stop the transfer using best available technology, and equipment checks.
 - 18 AAC 75.027 establishes additional requirements for laden oil tank vessels to ensure that they carry sufficient oil transfer equipment to facilitate lightering to and from other vessels. This requirement includes crew training provisions, English language proficiency, discharge detection procedures, operating requirements for vessels under escort, and towline configuration.
 - 18 AAC 75.037 establishes additional requirements for laden oil barges to ensure that they carry sufficient oil transfer equipment to facilitate lightering to and from other vessels. This requirement includes crew training provisions, English language proficiency, discharge detection procedures, towing equipment inspection requirements, and a means of recovering a barge that suffers a towing vessel casualty or breaks free of its tow.

- **State oil spill prevention and response-related vessel inspections** have been identified as field or conflict pre-empted by various sections of 33 CFR 160.1 through 160.320 and 46 CFR 2.01-1 to 2.95-10. Alaska Department of Environmental Conservation enforcement personnel currently conduct vessel inspections to enforce statutes (AS 46.05.040 and AS 46.05.055) and regulations (18 AAC 75.400-496) related to oil spill contingency planning, extending from vessel-focused spill prevention practices to crew training and readiness to spill response procedures and equipment. This state-level inspection process is one mechanism through which the State of Alaska is also able to increase regulatory and enforcement presence on vessels, and includes all of the federal requirements that are adopted by reference in state law and regulation. Because of the large size of Alaska coastline and the limited Coast Guard resources in our state, this state-federal partnership provides a valuable and cost-effective system to enhance oil spill prevention and vessel safety. For example:
 - 18 AAC 75.480 gives the Alaska Department of Environmental Conservation authority to conduct announced and unannounced inspections of vessels, barges, and other operations subject to state oil spill contingency planning laws and regulations. This inspection authority is critical to the State's ability to oversee and enforce the oil spill contingency planning process. In practice, these inspections are often coordinated with the U.S. Coast Guard, and the state inspectors provide a supplemental resource in Alaska.

Request:

Cook Inlet RCAC requests that the Coast Guard specifically address the pre-emption implications of the proposed rule to the Alaska statutes and regulations listed above. For each instance, please provide a copy of how the pre-emption framework has been applied to make the specific determination, so that the State of Alaska and its stakeholders can better understand the potential implications of this rule to state oil discharge prevention and contingency plans.

3. Agency Authority

The proposed rulemaking enters an area of authority typically addressed by the courts, not executive agencies. There is an extensive body of case law addressing the complex relationship between state and federal authorities in the field of marine oil spill prevention and response. The Coast Guard has used the agency rulemaking process to make broad and sweeping legal determinations in an effort that, to the best of our knowledge, is unprecedented. Cook Inlet RCAC questions whether the Coast Guard as an executive agency has legal authority to exert field pre-emption so broadly and without judicial review.

Cook Inlet RCAC does not believe that the Coast Guard has the authority to assert Categorical Exclusion under the National Environmental Policy Act, given the broad-reaching impacts of this proposed rule. A full Environmental Analysis should be performed for all areas where this proposed rule would impact state regulations.

Request:

Cook Inlet RCAC requests that the Coast Guard provide an opportunity for external legal review of the rulemaking process to ensure that the Coast Guard is acting within its agency authority and the rulemaking complies with the Administrative Procedures Act.

Cook Inlet RCAC requests that the Coast Guard conduct an Environmental Assessment for the proposed rule.

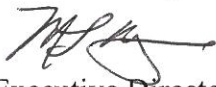
Conclusion

Cook Inlet RCAC strongly urges the Coast Guard to reconsider the proposed rule. If the Coast Guard seeks to clarify the relationship between state and federal frameworks for marine vessel safety and oil spill preparedness, we suggest that the agency undertake a more comprehensive and broadly informed effort to avoid creating additional confusion or uncertainty.

Thank you for considering these comments. Please contact me at 907-283-7222 if you have any questions.

Sincerely,

Michael Munger



Executive Director