Alternative Arrangements to Meet National Environmental Policy Act Requirements for Issuing and Implementing the Emergency Temporary Interim Rule - Temporary Suspension of Certain Oil Spill Response Time Requirements to Support Deepwater Horizon Oil Spill of National Significance (SONS) Response

Introduction

The Department of Homeland Security (DHS), with its component the U.S. Coast Guard (USCG), began consulting with the Council on Environmental Quality (CEQ) while developing the Emergency Temporary Interim Rule [ETIR] to facilitate response to the Spill of National Significance (SONS) from the *Macondo* well in the Gulf of Mexico while continuing to ensure public and maritime safety. The Environmental Protection Agency (EPA), which jointly prepared and issued the ETIR, has participated in the consultations, assisted in developing these alternative arrangements, and will assist DHS and the USCG during implementation.

These alternative arrangements, which take the place of an Environmental Impact Statement, provide that DHS and the USCG will consider the potential for significant impacts to the human environment as they implement the ETIR and shift additional response resources (primarily equipment such as skimmers and boom) from around the country to the Gulf of Mexico to assist in the cleanup of the SONS. These alternative arrangements have been developed in consultation with CEQ pursuant to the CEQ National Environmental Policy Act (NEPA) regulations found at 40 CFR 1506.11.

I. Scope of the Emergency

The April 20, 2010, explosion and sinking of the *Deepwater Horizon* Mobile Offshore Drilling Unit while drilling the *Macondo* oil well in the Gulf of Mexico created a release of oil into the waters of the Gulf that is unprecedented in United States history. Pursuant to the National Contingency Plan (NCP), a SONS may be declared for spills that because of severity, size, location, response effort and/or threat to public health and welfare, require extraordinary coordination of federal, tribal, state, local and responsible party resources. 40 CFR §§ 300.5, 300.323(a). The release was classified a SONS by the Commandant of the Coast Guard in a Memorandum issued on 29 April 2010 (Memorandum from Admiral Allen, Commandant of the Coast Guard (29 April 2010)). This SONS emergency has created the emergent need for unprecedented levels of spill response capability in the Gulf of Mexico and the urgent need for the ETIR and its implementation to minimize ongoing degradation of natural resources and the threats to human health and safety. Mobilization of available response equipment has proven inadequate to contain or clean-up the spill, resulting in continued threats to human health and safety, and the natural resources including wildlife and shorelines, in the Gulf of Mexico.

The ETIR was developed because an adequate number of available U.S. oil spill response vessels capable of skimming oil could not be employed in a timely manner to recover the oil released from the Deepwater Horizon oil spill (Memorandum from RADM J. A. Watson, FOSC BP Deepwater Horizon Oil Spill, to National Incident Command (June 16, 2010)). The immediate issuance and implementation of this ETIR was needed to address the ongoing environmental and public health emergency posed by the SONS and to minimize the potential for environmental damage in those areas that will have fewer response resources available as those resources are deployed to the Gulf of Mexico as quickly as possible. The *Deepwater Horizon* SONS and the issuance of the ETIR are the first of their kind and we are not aware of any direct comparisons or studies available to predict the potential environmental consequences for the ETIR and its implementation. The alternative arrangements will conclude at the earlier of completed relocation of response resources or the termination of the ETIR.

II. Actions Needed to Control the Immediate Impacts of the Emergency

One important impediment to the mobilization of response capability is the regulatory regime that requires much of the U.S. spill response capacity to remain where it is presently located to meet regulatory requirements established by DHS and USCG, the EPA, or both. To meet the urgent need to respond to the real and present emergency in the Gulf of Mexico, DHS with its component the USCG and EPA issued a joint ETIR dated June 30, 2010, amending the requirements that impede relocation of urgently needed response equipment. The present best estimate of the end of the emergency for purposes of these alternative arrangements is the earlier of the completed implementation of the ETIR or the termination of the ETIR. The current estimate for the termination of the ETIR is December 31, 2010.

This joint ETIR provides oil spill removal organizations (OSROs) and facilities and vessels with their own response resources, the opportunity to relocate additional response resources from their current locations to the Gulf of Mexico. This rule also confirms that the Federal On-Scene Coordinator (FOSC) for the SONS has requested that the Armed Forces relocate response resources, in particular those of the Navy, from their current locations within the continental United States to the Gulf of Mexico to aid in the response. This temporary rule immediately relieves designated or contracted OSROs, and facilities and vessels with their own response resources, from current regulatory requirements and enables them to participate in the Deepwater Horizon SONS response. This rule also facilitates any incorporation of Armed Forces response resources into cascade practices (further described below) which will mitigate the risks of potentially significant environmental impacts from the relocation of response equipment from current locations to the Gulf.

The ETIR will be implemented and will result in the relocation of specific spill response equipment will be relocated from coastal areas outside the Gulf. The rule change allows owners and operators of response equipment, OSROs, and the Armed Forces to determine that they can meet the reduced response time requirements with less equipment

close at hand than possible under the rules in effect prior to promulgation of the ETIR. This is expected to allow more of them to have equipment available for them to volunteer to the National Incident Commander (NIC) for response action in the Gulf. The identification of the type and amount of relocated response resources will be determined as the ETIR is implemented. The process through which this will occur is described in IV below.

III. Potential Significant Effects of the Proposed Action

The unprecedented nature of this SONS required the promulgation of the ETIR while there remained some uncertainty over the potential for adverse environmental impacts that may result. Potentially longer response times to a large spill could result in an increase in adverse environmental impacts over those which would otherwise occur had the rule not changed. Likewise, there is a potential that more than one large spill could occur simultaneously in areas which have reduced the speed with which local or regional OSROs are required to respond. The likelihood of such events occurring is small, given the historical evidence of spills of oil and hazardous substances into the waters of the United States, (available at http://www.nrc.uscg.mil/download.html).

Additionally, there may be some negative impacts (human safety and health, potential for collisions, and operational impacts on marine life – noise, strikes etc.) from sending additional equipment/vessels to the Gulf. Nevertheless, we believe that the beneficial impacts of more capacity to clean up the Gulf spill far outweigh any negative impacts that might occur from the operation of that equipment outside the range of the Deepwater Horizon spill. Even though the DHS and USCG believe that the beneficial impacts of more capacity to clean up the SONS outweighs any negative impacts to the Gulf or other US ports from moving the equipment, the DHS and USCG recognize the possibility that significant environmental impacts could occur.

As DHS and USCG move forward in assessing those possible environmental effects and reducing the uncertainty of this effects assessment, one of the sources for the assessment of the potential for environmental impact is the environmental sensitivity index, available on the National Oceanic and Atmospheric Administration (NOAA) website at http://response.restoration.noaa.gov/type_subtopic_entry.php?RECORD_KEY%28entry_subtopic_type%29=entry_id,subtopic_id,type_id&entry_id(entry_subtopic_type)=74&subtopic_id(entry_subtopic_type)=8&type_id(entry_subtopic_type)=3. Environmental Sensitivity Index (ESI) maps are used by the Captain Of The Port (COTP) in oil spill response to help determine resources at risk and guide response strategies. ESI is a measure of a coastal zone's natural and socio-economic resources as depicted through the use of maps, atlases, and tables. ESI maps are used in oil spill impact evaluation, prevention, clean up, and contingency planning activities. The maps themselves consist of three main types of information:

1. Shoreline Classification—a relative sensitivity ranking, on a scale from 1 to 10, based on a number of factors such as relative exposure to wave and tidal energy, shoreline slope, substrate type, biological productivity, and difficulty of cleanup activities. This ranking provides responders with an idea of which shorelines need to be protected with the highest priority and which shorelines may be easier to clean after oiling.

2. Biological Resources—oil-sensitive animals and habitats such as the Least Tern and salt marshes. Information on biological resources is very detailed including; seasonality, threatened/endangered status, activity, and relative concentration.

3. Human-Use Resources—specific areas, such as water intakes, recreational beaches, and archaeological sites, which have added sensitivity and value because of their cultural significance or use by humans.

The COTP would utilize information in these ESI maps to aid them in making decisions and understanding the potential for environmental impacts in any port from which additional equipment would be moved as a result of the ETIR.

In addition, the Federal Resource Agencies (including EPA, NOAA National Ocean Service (NOS) and National Marine Fisheries Service (NMFS) and DOI Fish and Wildlife Service (USFWS) and National Park Service) will be advising the COTP of any changes and updates to the ESI maps to ensure that sensitive areas are recognized and considered in relocation decisions. DHS is requesting this assistance from the Federal Resource Agencies.

IV. The Essential Elements of the NEPA Process

A. The Pre-existing Status of the Potentially Impacted Environment

The overall impacts on the human environment of the Gulf of Mexico are expected to be positive as more response resources are provided to contain and remove the oil spilling from the *Macondo* well. Consequently, the focus of these alternative arrangements is on the potential impacts to areas from which response equipment has been relocated and the potentially longer response times resulting from having fewer response resources close at hand. To aid understanding of the pre-existing conditions (and thus potential impacts) that may be involved, the Regional Response Teams (RRT) have been and will continue coordinating with Area Committees (AC) as implementation proceeds and access available information such as the Environmental Sensitivity Index (ESI) Maps, ongoing monitoring programs (such as http://ccma.nos.noaa.gov/about/coast/nsandt/welcome.html), and pre-assessments prepared by Natural Resource Damage Assessment teams. The Coast Guard is also aggregating previous NEPA documentation as well as all NEPA analyses for other similar rules addressing vessel and facility response plans. Those materials will be itemized and available to the public (see the Public Involvement section below).

B. Alternatives

The no action alternative was not considered by DHS and USCG to be a viable alternative for issuing the ETIR because it does not meet the urgent purpose and need as delineated in Section II of this document to obtain all additional equipment resources possible to combat the SONS while still supplying a reasonable level of protection to ports outside the area of the SONs.

No action, not relocating response resources, will be considered when determining what, if any, response resources are available for relocation to the Gulf of Mexico or to facilitate the cascade practices described in the mitigation section below. The no action alternative is used for comparing potential environmental effects with the status quo (state of the environment) prior to implementation of the ETIR.

It would have been possible to establish a process that merely asked for the nearest resources to the Gulf of Mexico to be relocated to combat the SONS. However, establishing a process that was indifferent to environmental risks and potential environmental impacts was determined not to be reasonable and consequently was dropped from further consideration.

Moving forward with implementation of the ETIR, DHS and USCG will build on the existing processes and procedures of the NCP for considering resource allocation. The chosen level of retained capability set out in the rule, that is, above average most probable discharge (AMPD), is expected to make enough resources available.

Each COTP will consult with the AC and pertinent Regional Response Teams to determine what assets may be made available to address the SONS using the Area Contingency Plans (ACP). Each ACP includes an annex containing a Fish and Wildlife and Sensitive Environments Plan prepared in consultation with the USFWS, -NOAA (NMFS, Office of National Marine Sanctuaries), and other interested natural resource management agencies and parties (including coastal zone management agencies). The ACP incorporates information from applicable ESI maps (See Section III, above.). The annex addresses fish and wildlife resources and their habitat, and other areas the Area Committee (AC) recommended be considered sensitive environments. The annex provides the information and procedures to immediately and effectively respond to discharges that may adversely affect fish and wildlife and their habitat and sensitive environments. The determination of what response resources are needed considers local and regional factors such as environmental risks, logistic limitations, and unique local or regional circumstances. This relative risk will include considering the development of equipment relocation and backfilling which will expand the interlocking response back up of the various OSROs and will integrate military resources which have previously been kept independent of supporting the civilian OSROs (see the discussion of cascade planning in the Mitigation Measures section). The COTP will also consider available information on availability of current response resources, particularly in areas with large vessel traffic lanes, heavy vessel traffic, oil refineries, oil storage and pipeline facilities,

seasonal risks associated with weather, and trends associated with weather, currents and tides.

With the help of the AC, the COTP will make the determination whether or not the temporary response equipment levels are adequate to respond to and remove oil from spills at the response time standard of Average Most Probable Discharge (AMPD). If the COTP determines that assets can be made available, facilities and vessels would be free to voluntarily re-negotiate contracts with Oil Spill Response Organizations (OSROs). The contracts would be amended and signed to allow for the assets to be moved, if deemed necessary by the FOSC and NIC. The COTP and AC will effectively be proposing emergency temporary modifications to the response plans and any proposed amendments will be determined by the Coast Guard District Commander.

At that point, OSROs are free to make resources above AMPD threshold available to COTP. If COTP concurs and decides to offer assets, the accepted proposals will be forwarded to the National Strike force Command Center (NSFCC), along with a memorandum for record describing all factors, including the potential environmental impacts, which were considered. The National Strike Force Coordination Center (NSFCC) (http://www.uscg.mil/hq/nsfweb) will forward those recommendations to the FOSC and NIC.

The FOSC and NIC then consider the available resources and decide whether or not to accept resources, and if so, which resources. If accepted, the message is transmitted back down the CG chain of command. At that point, a notice to proceed (if needed) will be given by the cognizant Contracting Officer and the OSRO will relocate the requested response resources to the Gulf of Mexico. The decision to ask response resources to move to the Gulf will be made by the FOSC and NIC based on recommendations from the various Captains of the Port who understand the relative increase in risk created by movement of the assets they offer to the NIC. Since all ACs will evaluate asset availability using a similar set of criteria and standards, the only differentiating factor will be local conditions such as those identified in the ESI referenced in III, above. Thus, a national picture will emerge from the levels of assets offered.

C. Mitigation Measures

The ETIR includes the following mitigation measures:

1. Cascade planning (referred to as cascade plans in the ETIR):

    a. Cascade planning creates a domino-like sequential application of response resources previously not included in a response plan, based on factors such as other obligations and needs, and the logistics involved (distance, weather, etc.) in relocating response resources.

    b. The Area Committees and the RRT will consider the response need to be met and the required time frame for doing so. They will then recommend to the COTP

resources previously uninvolved in their response plan, and the order in which those resources should be called for response, creating the aforementioned domino-like process of resource application. They will also discuss any other locally generated potential mitigation measures which may be accomplished by the RRTs, in conjunction with the Unified Command as set forth in (40 CFR 300.115).

2. Existing Measures: those designed to reduce risk will be emphasized in areas from which response resources are relocated. Such measures include the adequacy and availability of storage capacity for recovered slurry, bar pilots, tractor tugs, International Tug of Opportunity System, vessel traffic management measures, and electronic vessel traffic monitoring.

3. Guidelines (such as National Vessel Inspection Circulars) for COTP: these will be issued to minimize the potential increase of risk in areas with off-shore drilling and heavy vessel traffic.

4. DHS and USCG are asking industry to reemphasize self imposed industry standards designed to lower risks (such as Oil Spill Prevention through Risk Management Beaufort Sea Exploratory Drilling, Shell Exploration. http://www-static.shell.com/static/usa/downloads/about_shell/strategy/major_projects/alaska/final_shell_ospr_booklet_10-1-07.pdf)

5. State and Local Spill Response Requirements: These are not pre-empted by federal actions and thus, where they exist, such requirements reduce the risk of significant spills and will be considered by the AC and COTP as the ETIR is implemented.

D. **Assessing and Monitoring Impacts**

The Captains of the Port are in a position to evaluate the potential impacts associated with the emergency rule in relation to their individual areas of responsibility. They will do so in advance any offers of equipment, as discussed above. Potential impacts from implementing the rule involve the removal of vessels and equipment from various U.S. ports, transiting of those vessels to the Gulf, and their participation in the SONS response effort. Actual impacts from the rule may occur in the event of a release of oil or hazardous substance in an area from which response equipment has been moved to the Gulf, incidents that could occur in transit, as well as operations of additional equipment and vessels in the Gulf of Mexico. Impacts to marine life and to safety and health of human life (additional potential for collisions and operational impacts on marine life - noise, vessel strikes etc.) will be considered as described in Section IV, Alternatives). Information on this process is available through the USCG homeportwebpage (http://homeport.uscg.mil).

Monitoring impacts that may occur from release of oil or hazardous substances in an area from which response equipment has been moved to the Gulf or any incidents that may occur in transit will also be addressed when the emergency response processes are initiated in the area of such an incident. The potential for any adverse impacts to marine and human life in the Gulf of Mexico from the additional equipment moved as a result of the ETIR is considered by the NIC as a part of the overall SONS response and mitigated to the extent practicable.

E. Public Involvement

1. Current and Ongoing:

The National Response System (NRS), an extensive network for coordination and consultation developed within the National Oil and Hazardous Substances Pollution Contingency Plan (commonly referred to as The National Contingency Plan (NCP)) (40 C.F.R. part 300) is operated by the National Incident Command Center and at the unified area commands. The NRS consists of the National Response Team (NRT), Regional Response Teams (RRT), and ACs. ACs typically include members of state and local government agencies as well as industry representatives, such as state emergency management agencies, state department of environmental protection, local fire departments, local emergency management organizations, marine services companies, power companies and more. Beyond those on the committees, ACPs include identification of appropriate agencies and their responsibilities, procedures to notify these agencies following a discharge or threat of a discharge; protocols for obtaining required fish and wildlife permits and other necessary permits, and provisions to ensure compatibility of related activities with removal operations. Many of these processes include public participation processes.

2. Additional:

a. DHS/CG will review the list of interested parties, in industry, in the NGO community and in the general public DHS/CG compiled from previous regulatory environmental reviews and use it as a basis for creating a public notice list to notify potential stake holders and interested parties.

b. The DHS and USCG will establish a web page and provide links (to sites such as http://www.incidentnews.gov/map) and to post important documents on the worldwide web at http://www.restorethegulf.gov/. The website will advise the public on how they can continue to provide comments and information during the implementation of the ETIR. Documents posted will include the COTP memoranda and reviews described in the following subsection.

c. As provided in the ETIR, comments were requested on the potential environmental impacts, and will be reviewed after August 15, 2010. The Office of Occupational Safety and Environmental Programs of the Department of Homeland Security [DHS/OSEP] will continue to review comments and any new information at subsequent 30 day intervals.

V. Duration of the Emergency

The emergency identified above started at the moment that the need for additional spill response capability was needed (Memorandum from RADM J. A. Watson, FOSC BP Deepwater Horizon Oil Spill, to National Incident Commander (June 16, 2010)) and will continue until the FOSC and NIC determine that the SONS response no longer requires relocated response resources. Currently, DHS and USCG and USEPA believe that the emergency will be significantly reduced by the time that the temporary interim rule expires, December 31, 2010, and the duration of the alternative arrangements is the earlier of completed relocation of response resources or the termination of the ETIR.

As DHS and USCG will determine whether an earlier termination is possible or a delay in that termination is necessary, taking into account, information on the effectiveness of activities to: (1) stop the release; (2) avoid damages to the waters of the Gulf and the species that inhabit them; and (3) repair damage that has occurred to the Gulf environment, the species that inhabit it, and the residents of the area who either rely on it for their livelihood, enjoy it, or both. The rule does provide moving that date either forward or backward in time as warranted. A change to that date would be accomplished in another rulemaking action which will include public notice and the opportunity to provide input tailored to the time available.

VI. Documentation

Documentation analyzing the decisions on offers of response capability and the potential for significant impacts to the human environment will consist of a memorandum for record provided at each location as described above (see Section IV, Alternatives). That memorandum will indicate that the COTP (with the Area Committee) has considered all environmental impacts of the decision, along with available documents incorporated by reference, the unique local conditions that were considered, and any other environmental impact analysis which may have entered the decisions of the FOSC/ACP to free up response resources, including any decisions to amend ACPs. The memorandum will also describe the mitigation measures used, such as cascade practices. All memoranda will be posted on the web and kept by HQ USCG (Office of Incident Management and Preparedness). The NIC will not request any assets without such a memorandum for the record. As noted above, the cumulative impacts will be considered in the reviews by CG and EPA mentioned in the preamble to the rule, to be held after August 15, 2010, and at 30 days intervals thereafter.

DHS and USCG intends to incorporate and utilize, to the extent feasible and practical, the environmental documentation or information prepared or gathered by other agencies before and during the SONS response

DHS and USCG will also document and incorporate ongoing consultation efforts with other regulatory and environmental resource agencies.

VII. Review of the Alternative Arrangements

DHS and USCG, assisted by EPA, will review these alternative arrangements with the Council on Environmental Quality on a quarterly basis to assess their effectiveness and longevity and a Memorandum for Record will be prepared and posted on the web.

A review of the value and effectiveness of the alternative arrangements will be provided to CEQ within sixty days of terminating the ETIR.

# # #