Cook Inlet Regional Citizens Advisory Council

Please find attached our comments regarding the Oil Discharge Prevention and Contingency Plan Public Scoping.

"The mission of the Council is to represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet."

Members

Tourism Organizations

Alaska Native Groups

Environmental Groups

Recreational Groups

Aquaculture Associations

Commercial Fishing Organizations

City of Kodiak

City of Kenai

City of Seldovia

City of Homer

Kodiak Island Borough

Kenai Peninsula Borough

Municipality of Anchorage

March 12, 2020

Seth Robinson
Alaska Department of Environmental Conservation
Division of Spill Prevention and Response, Prevention, Preparedness, and Response Program
610 University Avenue
Fairbanks, AK 99709

RE: Comments in response to Oil Discharge Prevention and Contingency Plan Public Scoping on 18 AAC 75 Article 4

Dear Mr. Robinson:

The Cook Inlet Regional Citizens Advisory Council (CIRCAC) is a nonprofit corporation created by Congress under the Oil Pollution Act of 1990. Our Mission is to represent citizens in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet.

Under our Oil Pollution Act of 1990 mandate, CIRCAC is charged, among other things, with reviewing adequacy of oil spill prevention and contingency plans in Cook Inlet. CIRCAC is also one of two non-governmental entities named in State regulations as having the opportunity to review and comment on Oil Spill Discharge and Contingency Plans (ODPCP), per 18 AAC 75.408(c)(4). We take this responsibility seriously and have reviewed hundreds of contingency plan submittals, renewals, and amendments since 1992. In doing so, CIRCAC strives to provide comments that will enhance the clarity, accuracy, and utility of the documents and support compliance with Alaska regulations. In most cases, contingency plans represent the only way that our constituent communities and stakeholders can be assured of the measures in place to prevent or respond to a spill from a company's Cook Inlet operations.

Although they are not perfect, the regulations now in place provide a robust framework to ensure meaningful spill response preparedness, a basic yet critical transparency (bolstered in recent years with plan documents posted on the ADEC website), and a largely predictable process for key parties to offer suggestions based on their interest and knowledge. The oil and gas industry in Alaska has both thrived and struggled during the decades since these plan requirements were put in place: when the industry is growing and companies thriving, it has never been because of relief from contingency plan requirements. Nor have those same requirements been responsible for periodic (inevitable) downturns.

Companies whose operations pose a spill risk to Alaska lands and waters, even as they deliver crucial services, are required to prevent and respond to a spill. A company's responsibility under the plan requirements is tailored to the nature of their activities and potential spill risks. The plans are by necessity locally specific and require a consideration of the conditions, accessibility, resources, and sensitivity of the area where a spill response may occur. Reasonable incentives are in place for a company to prevent spills, while at the same time recognizing that no operation is immune to unforeseen events or errors that may result in a spill. The plans do not just inventory equipment, vessels, and personnel, but provide a holistic picture of how the many critical elements of a spill response would be brought together to protect Cook Inlet's environment and communities. These are just some of the many critical elements of the contingency planning process implemented under Alaska's regulatory framework today.

When considering the potential for changes to the regulations, we believe it is essential that they continue to meet the following key functions:

1. Provide a usable emergency plan;
2. Provide a detailed response plan and procedures;
3. Demonstrate access to equipment and resources to meet response planning standards and the ability to protect environmentally sensitive areas;
4. Assess past and potential spills and how they can be prevented;
5. Demonstrate the use of best available technology by the plan holder;
6. Ensure a company's operations comply with Article 1 regulations (18 AAC 75.005-085);
7. Represent a permit to operate as required by law.

We believe that sweeping changes to the current requirements are not warranted. Any changes that reduce spill prevention, response preparedness, or transparency would be unacceptable. At the same time, we appreciate that improvements can always be made. In response to the ADEC's request for comments of October 2019, we offer here an observation related to *implementation* of the regulations followed by a few specific recommended changes to the regulations themselves. In providing these comments, CIRCAC has chosen to address only a few examples of specific, minor changes rather than attempting to create lengthy documentation of all the parts of the regulations that are working to protect Alaska's economy, environment, and communities. Omitting an item from these comments does not imply that it is not important, or that it could not be improved.

Supporting Consistent Implementation of the Regulations

Regulations provide the framework for a set of requirements and actions to be undertaken by the regulator and regulated entity. The operations regulated under 18 AAC 75 are incredibly diverse and complex, extending throughout Alaska and our state waters. Over years of reviewing plans and plan amendments, evaluating drills and exercises, and participating in other plan-related activities for a variety of operators, we have become concerned about the inconsistent application of regulatory requirements across plan holders. Industry representatives have shared similar concerns in public comments already provided during this scoping process. This does not necessarily indicate any problem with the regulations themselves, but does highlight the importance of consistent training and oversight of ADEC personnel charged with reviewing the plans. Personnel turnover and reorganization of the Division of Spill Prevention and Response in recent years has exacerbated this issue.

One example that we have observed from our work in Cook Inlet is some inconsistency in how plan reviewers determine whether a proposed plan amendment should be considered routine and minor (not requiring a public review) or major (requiring public review). 18 AAC 75.415 grants significant discretion to ADEC on this point. Operators can also submit multiple amendments for what are seemingly small adjustments to their operations, which may obfuscate larger effects on preparedness. We suggest that this is a case where clearer guidance to ADEC in applying its discretion is required. While this is primarily an *implementation* issue, not requiring a language change, we do also suggest below that CIRCAC and other reviewers should be notified at the time a minor amendment is proposed. Doing so will allow us to raise any concerns regarding the proposed amendment early in the process.

ADEC must ensure that all personnel are sufficiently trained in all roles and that those individuals receive adequate support to implement state laws consistently across industry sectors and geography. This is important to creating a predictable regulatory landscape for industry while also keeping the doors open for the parts of Alaska's economy that depend on a clean environment. *CIRCAC recommends that ADEC develop and adopt a training regime that ensures consistency in interpretation, implementation, and enforcement of regulations. It is equally important for training to span the entire chain of command within the department, for supervisors and environmental specialists to act as one cohesive unit regarding regulatory application.*

Minor Suggested Changes to Current Regulations

ADEC has undertaken minor improvements to the regulations many times over the past three decades, always retaining the seven critical elements of the contingency planning process within Alaska's regulatory framework. These have included, for example, adopting the use of email and web postings, clarifying the use of streamlined plans, and extending the plan approval period from three years to five barring the need for any amendments The recommendations here are similarly "adjustments" intended to ease the use of the regulations for all involved by ensuring consistency within the regulations themselves, clarifying some requirements, and further enhancing the transparency of the process.

1. ***Add requirement that international standards such as ASTM F2709-19 be used to establish nameplate capacities for skimmer testing.***

   The regulations at 18 AAC 75.425(e)(3)(F)(iii) and 18 AAC 75.445(g)(5) contain the requirement for including manufacturer's rated capacities, limitations, and operational characteristics for skimmers and pumps which are appropriate and adequate for recovery of the response planning standard volume of oil. At this time, there is no generally required methodology for how manufacturers determine their "nameplate capacities" and it is therefore difficult for response organizations to determine the best equipment to use or for plan reviewers to assess the adequacy of the equipment included in plans.

   CIRCAC requests that a standard methodology for determining oil recovery rates and efficiencies be required in regulation. One such methodology commonly used is described in ASTM F2709-19. Requiring a standard methodology would help ensure that when response organizations, plan holders, and others compare the capabilities of skimming equipment they are comparing equivalent efficiency information.

2. ***Provide minor amendment documentation to identified plan reviewers at the time of submittal.***

   The regulations at 18 AAC 75.408(c) describe the process for submitting an ODPCP for ADEC review. In the case of new plans, renewals (every five years), and major amendments, all copies of the planning documents must be submitted to ADEC, Alaska Department of Natural Resources, Department of Fish and Game, the regional citizens' advisory councils (CIRCAC is one of two), and "other persons designated by the department." This is made clear at 18 AAC 75.408(c)(4).

   CIRCAC requests that 18 AAC 75.408(c)(6) should be modified such that all copies of a plan holder's proposed minor amendment are provided to named reviewers prior to approval. This will ensure that these entities will have the opportunity to raise any concerns to ADEC before the Department issues a decision on the amendment. This could be easily done since email transmissions are explicitly allowed by regulations, and the regulated entities in Cook Inlet are already familiar with the requirement to provide plans and plan amendments to named reviewers.

3. ***Notify identified reviewers in cases of non-readiness of equipment.***

   Under 18 AAC 75.475(a), plan holders must ensure that their equipment is maintained in operational condition. If something occurs such that this is not the case, the plan holder must notify ADEC within 24 hours. Understanding the equipment's change of status and the reason behind it is an important aspect for all agency stakeholders and of CIRCAC's OPA 90 mandated responsibilities, however there is currently no requirement to notify anyone but the Department.

CIRCAC requests that 18 AAC 75.475 be modified to state that ADEC will notify the plan reviewers identified above (and listed within 18 AAC 75.408) when a notification of non-readiness is received, along with any conditions ADEC place on the plan holder.
This could be easily done since email transmissions are explicitly allowed by regulations, and the regulated entities in Cook Inlet are already familiar with the requirement to provide plans and plan amendments to CIRCAC and other named reviewers.

4. ***Consider changes of ownership a major amendment.***

According to 18 AAC 75.414, "A change in the owner, operator, or name of the owner or operator of a facility or operation with an approved oil discharge prevention and contingency plan or a non-tank vessel equivalent plan requires that the new owner or operator submit an application package as an amendment under 18 AAC 75.415." However, 18 AAC 75.415 defines "major amendments" requiring public review, and "minor amendments" which do not in the context of changes made in ownership. An effective spill response, including management of that response, is directly tied to the capabilities and capacities of the plan holder. Those capabilities and capacities cannot be assumed to be the same when ownership transfers from one owner/operator to another. Consequently, actual change of owners (as opposed to simple name changes) should be treated as major amendments.

CIRCAC requests that all amendment applications changing the owner or operator of a facility or operation for an approved ODPCP be treated as "major amendments" subject to public review.

5. ***Address inconsistencies in the organization and content of sections* 18 AAC 75.425 Oil discharge prevention and contingency plan contents *and* 18 AAC 75.445 Approval criteria for oil discharge prevention and contingency plans.**

Two sections of Article 4 describe what is required in an ODPCP, with many other subsections referenced within them. Section 18 AAC 75.425 describes the required plan *contents* and organizes those contents into five parts. This facilitates plan review. Section 18 AAC 75.445 lists requirements for plan *approval*. The two sections identify somewhat different requirements and in a different order. This organization means that plan writers and reviewers must follow two different sections of the regulations at the same time, in addition to other referenced subsections in order to comprehensively write or review an ODPCP.

For example, 18 AAC 75.425(e)(3)(D) requires plan holders to describe potential limitations on their response due to weather conditions, including the percent of time a response would be ineffective due to weather, operating limits of the response systems, and measures they will implement to compensate when conditions exceed those maximums. Regulations at 18 AAC 75.445(f) simply state that severe weather and environmental limitations must be identified, but add that the plan must use realistic efficiency rates to account for reduced recovery when conditions are poor but do not prevent a response entirely. This is one of several examples where the evaluation criteria (in one section of regulations) differ from what plan holders are being told they must provide (in another section of regulations).

Another example is the fact that 18 AAC 75.425(e)(1)(F) requires "a written description of a hypothetical spill incident and response" and lists the information such as location, weather, etc. that must be included. However, it is 18 AAC 75.445(c) and (d) that state that the scenario must demonstrate, using the resources described in the contingency plan, that the identified personnel and equipment are sufficient to meet the applicable response planning standards for each applicable type of product that could be discharged and can be deployed and operating within the time specified under 18 AAC 75.430 – 18 AAC 75.442. This takes into account the realistic maximum response operating limitations and their effects on response

capability and the deployment of resources. Having the requirements for how scenarios are to be written in two different places is inefficient and confusing.

Aligning 18 AAC 75.425 and 18 AAC 75.445 sections (and the referenced subsections) would reduce the burden of both compliance and review. This can and should be done while retaining all current requirements, simply streamlining the regulations themselves to eliminate inconsistencies.

CIRCAC requests that plan sections should be consistent to reduce burden on both plan writers and reviewers, and that this be done while retaining all current requirements.

6. ***Ensure that best available technologies are used to protect Alaska's lands and waters.***

Under 18 AAC 75.425(e)(4) and 18 AAC 75.445(k), a contingency plan must provide for the use of the best technology. ADEC must identify the prevention and response technologies that are subject to a best available technology determination but may find that any technology meeting the established response planning standards or prevention performance standards is the best available technology. This requirement has been hotly contested for many years, for a number of different reasons. The interpretation and enforcement of the BAT regulations and the three-tier treatment of technologies used in contingency plans is highly complex and technical. The individualized analysis called for by the BAT regulations has not been consistently applied by ADEC staff and consequently by industry. Finally, ADEC has not lived up to the intent behind 18 AAC 75.447 in evaluating new break-through technologies outside of the contingency plan approvals themselves because of inadequate funding and staff. ADEC has not used the 18 AAC 75.447 process to identify and then require use of new technologies in individual contingency plans. Some of these problems would be solved by additional training of ADEC staff and more rigorous enforcement of the existing requirements. Renewed funding and ADEC regulatory focus on the role of 18 AAC 75.447 would address another part of the controversy. That said, the BAT process set out in 18 AAC 75 should be re-evaluated with specific attention given to better description and clarity in the regulations of what technologies under 18 AAC 75.425(e)(4)(A) must undergo the individualized BAT analysis under 18 AAC 75.445(k)(3). One area where the ADEC has worked to promote BAT is the Alaska Oil Spill Technology Symposium required by 18 AAC 75.447 (a) (1) over the last 7 years. However, that program has seen support from the ADEC Administration wax and wane with an overall decrease in support. ADEC, industry, and stakeholders should work together to find ways to ensure Alaska is protected by the best spill prevention and response equipment, tactics, and operations available.

CIRCAC strongly recommends that ADEC develop and adopt a training regime that ensures that all plan reviewers are trained to interpret, implement, and enforce the BAT regulations consistently. CIRCAC also recommends that ADEC seek renewed funding and regulatory focus on the 18 AAC 75.447 process to identify break-through technologies for use in contingency plans and require their application in appropriate contingency plans. CIRCAC recommends that the 18 AAC 75 should be re-evaluated with specific attention given to better description and clarity in the regulations of what technologies under 18 AAC 75.425(e)(4)(A) must undergo the individualized BAT analysis under 18 AAC 75.445(k)(3). Finally, CIRCAC recommends that the requirements set forth in 18 AAC75.447 be exercised vigorously to identify and promote the use of BAT.

Process Going Forward

Regarding the process going forward, if ADEC chooses to initiate a revision of the Article 4 regulations, CIRCAC believes that it is critical for the process to be cooperative and must involve interested stakeholders. Convening a work group that includes ADEC staff, industry representatives, and public-interest representatives to work cooperatively on revising the regulations will ensure that the process is transparent and comprehensive. This approach should yield a beneficial effect for subsequent public reviews.

Likewise, CIRCAC requests that if any changes to regulations are proposed the public review period should be significantly longer than the 30 days required under regulation. This will allow the public sufficient time to thoroughly review any revisions. Furthermore, all comments received should be posted on the ADEC website as was done for this first scoping to uphold the highest level of transparency around this unprecedented "open-ended" process.

We hope our enclosed comments will be helpful to ADEC. If you have any questions or wish to discuss this further, I can be reached at (907) 283-7222 or via email at Munger@circac.org.

Sincerely,

Michael Munger
Executive Director