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Jay Smith
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Dear Mr. Smith:

This letter provides my professional opinion on the question you presented: Whether the Coast Guard-approved contracts for Salvage and Marine Firefighting Services comply with the requirements of the Ocean Pollution Act of 1990 and the relevant implementing regulations.

I am a retired law professor and a member of the State Bar of Michigan. I taught for 40 years at the Villanova University School of Law, as well as at other law schools in the United States and abroad. I taught Admiralty Law for 20 years and Contracts Law for 30 years. In addition, I have practiced both areas of law in a variety of settings. My work on questions of foreign sovereign immunity have been cited with approval by the US Supreme Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and other works have been cited in numerous lower courts.

After the Exxon Valdez oil spill in 1989, Congress enacted the Oil Pollution Act of 1990, PL 101-380 (codified in various sections of the US Code), that was intended to prevent such accidents and to ensure prompt and adequate response should a spill occur. Part of the Act and its implementing regulations require ships carrying oil or other hazardous substances, and "nontank vessels" that displace more than 400 gross tons (33 USC § 1321(a)(26)) to adopt plans for "salvage and marine firefighting services." My conclusions are that the contracts currently approved by the Coast Guard are not consistent with the requirements of Oil Pollution Act and the relevant implementing regulations.

I will first briefly analyze the governing statute and regulations. Then I will analyze the contracts thus far approved by the Coast Guard pursuant to the governing statute and regulations. I will then present my conclusion.

The Legal Obligation to Provide Contracts for Salvage and Marine Firefighting Services

The Oil Pollution Act of 1990, among other matters, set about to create a national system for planning for and responding to oil spills, 33 USC § 1321(j). Part of this system authorizes the establishment of "procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges" (§ 1321(j)(1)(C)). In connection with this program, the government is given authority to issue regulations to "require an owner or operator of a tank vessel or facility vessel [and nontank vessels] to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil" (§ 1321(j)(5)(A)(i), (ii)). (The President has delegated his authority, by way of the Department of Homeland Security, to the Coast Guard.) The same authority extends to both sorts of vessels engaged in "transfers [of] noxious liquids in bulk to or from a vessel (§ 1321(j)(5)(B)). In addition to other matters, these plans must "identify, and ensure by contract or other means approved by the [Coast Guard] the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge" (§ 1321(j)(5)(D)(iii)).

There are differences between the statutory language and the regulations adopted by the Coast Guard, and further differences between the regulatory language and the contracts that the Coast Guard has approved as consistent with the regulations. These differences give rise to the questions considered in this letter.

The Oil Pollution Act of 1990 does not address in detail the contracts that would fulfill the regulatory requirements. Those details are spelled out in the regulations. that the Coast Guard, pursuant to 3 USC § 301, issued in 33 CFR part 155 to implement the planning requirements of the Act. Pertinent to the contracts under consideration in this letter, the regulations require covered vessels to provide certain salvage and marine firefighting services, listing the "resource providers that you have contracted to provide these services," 33 CFR § 155.4030. The regulations go on to require that vessel owners "ensure, by contract or other approved means, that your resource provider(s) is capable of providing the services within the required timeframes," 33 CFR §§ 155.4010(c), 155.4040(a), 155.4045. The required response times ("timeframes") are relatively short, ranging (depending on the service and the location of the problem, between one hour and 84 hours), 33 CFR § 155.4030(b). The terms of the required contracts are outlined in 33 CFR § 155.4025. In particular, the contracts must include a "written funding agreement" to ensure that responses are not delayed by funding negotiations once an incident arises, 33 CFR § 155.4025(2).

Whether the Coast Guard-approved contracts for Salvage and Marine Firefighting Services comply with the requirements of the Ocean Pollution Act of 1990 and the relevant implementing regulations

While the phrasing of the Oil Pollution Act of 1990 and the Coast Guard's regulations are not precisely the same, they are consistent. Both require that, to the extent a vessel or its owner or operator is not to provide the necessary response services itself, it must have in place contracts to provide those services in case of need. This is stated in the Act and the regulations as a hard obligation—the owner or operator is to ensure by contract or otherwise that resource providers are capable of and will provide the required services within relatively short response times. Slippage appears, however, when this requirement is translated into contracts approved by the Coast Guard. Many, if not all, of the approved contracts require that the resource provider merely promise to provide these services on a contingent basis, and not on the absolute basis that the Act and the regulations seem to require. Thus, four of the leading contracts approved by the Coast Guard promise to provide the necessary services ***if the resources are available*** (or words to that effect). These "contracts" are with four different resource providers, that for purposes of this opinion letter are termed "Resource Provider A," "Resource Provider B," and so on.

Let us take a closer look at one of the contracts from what I have termed Resource Provider A. Article 8 of the contract (which includes the aforementioned disclaimer) reads in full:

> [Resource Provider A] agrees to and is capable of providing, and ***intends to commit to providing***, the services that are listed in 33 Code of Federal Regulations (CFR) 155.4030(a) through 155.4030(h) to the OWNER. Further, these services will be provided to the best of [Resource Provider A's] capability, in accordance with the planning response timeframes listed in 33 CFR Table 155.4030(b), for each of the COTP zones listed in Schedule B. As defined in 33 CFR 155.4010(b), the timeframes referred to in Articles 3(e), 6(a) and 6(b) are planning criteria, not performance standards, and as such are based on assumptions that may or may not exist during an actual incident. [Resource Provider A] warrants that adequate response resources are available and positioned to meet response time planning criteria for the zones indicated in Schedule B, but does NOT warrant that these resources will always be available or meet the planning response time criteria in every incident. *(emphasis added)*

This article is captioned "Planning Standards." The article disclaims any real obligation to provide any resources or services, indicating that the resources and services are to be "provided to the best of [Resource Provider A's] capability." It goes on to indicate the promises in the "contract" are merely "planning criteria, not performance standards" and furthermore declares that Resource Provider A "does NOT warrant that these resources will always be available or meet the planning response time criteria in every incident." This seems to negate any real obligation to fulfill the "promises" of the "contract." Instead it seems to indicate that the "promises" are entirely illusory.

Nor are these disclaimers negated by other clauses in the "contract" that appear to be more definite commitments. These other "promises," the "contract" informs us, are things that Resource Provider A "intends to commit to providing" (article 6(a)), hardly the sort of promise that would justify confidence, and as in article 8 will be "provided to the best of Resource Provider A's capability." Such "contracts" really are letters of intent rather than firm commitments, "agreements" that cannot satisfy the obligation of

owners or operators of ships required to provide vessel recovery plans to ensure prevention or adequate response to an oil spill or other incident.

One might argue that such caveats in the contracts simply make explicit what would be understood even if the caveats were omitted, namely that the promise to provide response services is not violated if there is a legally valid excuse for why the necessary resources are not available, or are not available within the prescribed response times. Such excuses could include, for example, such heavy seas as to make response impossible, or unexpected damage without the fault of the provider to the necessary resources making them unavailable at the precise moment that they are needed, or that the resources have already been committed to respond to some other incident (related—*e.g.*, because of large storm or other cause sweeping across a broad swath of sea—or unrelated). Many of these events would be considered "*force majeure*" or "acts of God," which would indeed excuse performance under a contract. But the language in question is broader than that. If one only wanted to excuse performance because of "*force majeure*" or "acts of God," one could just say so in a contract without creating the likelihood of exculpating other failures to fulfill the "contract that" would not be allowed absent the caveats.

The language used actually excuses performance of the "contract" if the resources become unavailable for any reason, and not just for "*force majeure*" or "acts of God." For example, if a corporation undertakes to supply response services to a number of owners or operators of vessels covered by the Oil Pollution Act and the Coast Guard's regulations, and then does not stockpile sufficient ships and other resources to cover likely contingencies of several ships needing response services at the same time, arguably the necessary resources are not available for at least some of the vessels in need. This is not some overriding natural force or other instance of "*force majeure,*" but a simple case of overreach and underfunding. Yet such a failure would arguably be excused under the terms of these "contracts." Such arrangements are neither consistent with the explicit command of the relevant text of the Oil Pollution Act, (§ 1321(j)(5)(D)(iii)), nor with the express requirement of the relevant regulation, 33 CFR §§ 155.4010(c), 155.4040(a), 155.4045 (both texts are quoted *supra*).

Of course, the language of a statute or a regulation needs to be interpreted. It must be interpreted to achieve the ends that Congress sought to achieve by enacting the statute and authorizing the regulations. The goal of this statute and these regulations is to ensure that the necessary response resources are available when needed. Such a vague obligation as a promise to provide the necessary resources if they are available (without actually promising any specific level of availability) simply does not come near to meeting this goal. Any interpretation of the statute and regulations that allows such a nebulous obligation to satisfy the statutory and regulatory requirements therefore cannot be allowed.

A further interpretation that could serve to justify approval of such "contracts" is that the "contracts" are merely planning devices and not actually the means for ensuring actual responses when critical events—fires, groundings, etc.—arise. This is explicit in

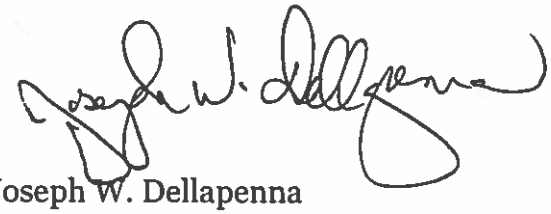
article 8 of Resource Provider A's "contract." It is true that the obligation to disclose appropriate contracts is embedded in provisions related to the development and approval of vessel response plans. If that were the only purpose of requiring such contracts, the requirement would seem to have no real point at all. While the contracts are certainly meant to be a planning tool, they are meant to be something more as well. They are, they must be, a primary means of ensuring adequate response resources are available to respond to a critical event.

While it may well be true that failure to comply with the terms of the vessel response plan is not conclusive as whether a contract to provide response services was breached, that is only because there might be some legal excuse such as "*force majeure*" or "act of God," or because breach is virtually impossible for such nebulous "contracts" as these because, for any number of reasons, resources were "not available." The result predictable—that failures to perform or to perform in a timely fashion will be defended as an anomaly and not labeled as a breach of contract.

Conclusion

If the requirement that owners or operators of covered vessels are to ensure by contract or other arrangement a prompt and adequate response to critical events threatening the discharge of oil or other hazardous materials and otherwise threating life or property on the affected vessel or elsewhere, "contracts" that only promise to respond when the resources are available are not appropriate. Such "contracts" are classic examples of illusory promises, or if you prefer letters of intent. And illusory promises, including letters of intent, are not contracts at all.

Sincerely,



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