REPORT

To: Jay Smith
From: Jonathan Gutoff
Date: October 17, 2017
Re: "As is" contracts and the SMFF Regulations

I. Introduction

This is the independent Report of Jonathan Gutoff, Professor of Law at Roger Williams University School of Law, on the practice by parties required to have a plan ("Plan Holders") of using contracts that promise to provide salvage and marine firefighting resources "as available," (an "'as available' contract") or contracts that rely on the services of subcontractors who promise their resources on an "as available" basis, to satisfy the requirements of the Coast Guard's salvage and marine firefighting regulations, *see* 33 C.F.R. pt. 155, in particular 33 C.F.R. 155.4010(c) (the "Regulation").

The Regulation provides in full:

> A planholder must ensure by contract or other approved means that response resources are available to respond. However, the response criteria specified in the regulations (e.g., quantities of response resources and their arrival times) are planning criteria, not performance standards, and are based on assumptions that may not exist during an actual incident, as stated in 33 CFR 155.1010. Compliance with the regulations is based upon whether a covered response plan ensures that adequate response resources are available, not on whether the actual performance of those response resources after an incident meets specified arrival times or other planning criteria. Failure to meet specified criteria during an actual spill response does not necessarily mean that the planning requirements of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. 1251- 1376) and regulations were not met. The Coast Guard will exercise its enforcement discretion in light of all facts and circumstances.

In short, the use of "as available" contracts by a provider or its subcontractors does not satisfy the Regulation because "as available" contracts cannot "ensure" that "adequate response resources are available." Moreover, the Coast Guard's contrary understanding of the Regulation is not entitled to any deference, and to the extent the Coast Guard's understanding is controlling,

the Regulation is arbitrary and capricious and in violation of the provisions of the Administrative Procedure Act codified at 5 U.S.C. § 706(2)(a).

II. Background.

A. The Salvage Industry

1. A very brief history.

The salvage industry, as a set of specialized vessel operators able to respond to instances of maritime peril to preserve maritime property -- vessels and cargo -- from that peril has its roots in the advent of steam powered vessels able quickly to attend to vessels in distress in the face of adverse seas and weather. William I. Milwee, Jr., *Modern Marine Salvage,* 4 (1996) ("*Modern Salvage*").[1] Under the law of salvage, salvors could rely on an often-substantial award for their services based on the risk of the salvage operation; the preparation, equipment, and skill of the salvor; and the value of the property recued from marine peril. *See The Blackwall*, 77 U.S. (10 Wall.) 1 (1869). With the adoption of the London Convention on Salvage of 1989, *codified at* 9 U.S.C. §§ 201-208, the ratifying nations, including the United States, have recognized that preventing damage to the environment is part of the duty of a salvor. *See Modern Salvage* at 536-37.

2. Problems starting in the 1990s.

While the law of salvage had provided sufficient encouragement for private salvors to be available for most vessels in distress since the 1990s, the decreasing number of vessels carrying cargo, as a result of increased vessel size, along with increased vessel safety has led to a decrease in the call for commercial salvage services. *See id.* at 537-38. Starting in the last decade of the

[1] The Coast Guard has explained that *Modern Salvage* is "is authoritative and widely accepted in the industry." 73 FR 80625-26.

last century a company providing salvage service (a "Provider") would not maintain all of the assets it needed to deal with a particular salvage operation in a particular location. Rather, providers would assemble salvage assets available and not otherwise occupied in a particular geographic area to provide needed salvage services to a vessel. While this system had, and has, certain efficiencies, in that it avoids the deployment of redundant assets, it is unable to deal with the worst case scenario, for which the Clean Water Act as amended by the Oil Pollution Act of 1990 ("OPA") requires the Coast Guard to promulgate regulations requiring planning for a worst case discharge. *See* 33 U.S.C. §§ 1231, 1321(j).

3. Initial regulation.

Initially the Coast Guard's requirements for a plan for salvage and marine firefighting were first promulgated in 1993. *See* 58 FR 7376. They required only that the vessel owners and operators required to have a plan to identify salvage and marine firefighting resources and that those resources be capable of being deployed within 24 hours to the port nearest to where the vessel to which the plan applied was operating. *See id.; see also* 73 FR 80619.

4. Failure of the initial regulation.

As the Coast Guard has explained in its statement of "Background and Purpose" to the current regulation, the Coast Guard had expected that "benefits of a quick and effective salvage and marine firefighting would be sufficient incentive for the industry to develop" resources to provide for those capabilities. 73 FR 80619. By early 1997, however, "it had become apparent that the expected salvage and marine firefighting capability development was not occurring." *Id.*

It has been generally recognized by emergency planners that redundancy, which market forces do not encourage, is necessary for planning for an emergency. *See, e.g.,* National Infrastructure Advisory Council, *Critical Infrastructure Resilience: Final Report and*

Recommendations, 10 (Sept. 8, 2009) ("**Current market mechanisms may be inadequate to achieve the level of resilience needed to ensure public health, safety, and security.** Even with a strong business case, there are low-probability, high-consequence events for which investments in resilience by private companies cannot be justified.") (boldface in original); Department of Homeland Security, *Supplemental Tool: Incorporating Resiliency Into Critical Infrastructure Projects,* 3 (n.d.) (encouraging decision makers to consider, among other things "[b]uilding redundancy into an infrastructure system so it can handle localized failure.") So, it is not surprising that a regulatory regime that allowed Plan Holders to identify, without retaining, and ensuring the availability of, salvage and marine firefighting resources, would not develop the resources necessary to deal with a worst-case scenario.

B. Current Rules

1. The Rules.

The current rules are set out in 33 C.F.R. pt. 155, and were initially promulgated in 2008 for tank vessels in 2008, *see* 73 FR 80649, and were amended in 2013 to include non-tank vessels. *See* 78 FR 60123. The rules set out the salvage and marine firefighting services and equipment required to be available within proscribed periods of time depending on the type and location of a vessel. The means by which a Plan Holder needs to satisfy the requirements are in the Regulation, set out in full in Section I of this Report.

2. <u>The Coast Guard's understanding of the rules at their promulgation.</u>

In promulgating the current rules the Coast Guard made it clear that the development of salvage and marine firefighting resources had not been adequate under the prior rules, and that the new rules were meant to encourage an increase in those resources.

The Coast Guard acknowledged two comments that suggested the industry be allowed to follow a "placing the right people in the right place at the right time" approach, but disagreed, because such an approach had had the chance to develop, and "and based past performance the from 1990 to 2002, it [was] unlikely that such an approach has been, or would be successful." 73 FR 80621. Another commentator asserted that the then present (2008) salvage capacity was appropriate given the "casualty data and economics," and, again, the Coast Guard disagreed, pointing out that both the Oil Pollution Act of 1990 and the Federal Water Pollution Control Act require planning for a "worst case discharge," which "might have the effect of sustaining or raising the level of salvage and marine firefighting resources in place." 73 FR 80622. Yet another commentator expressed the worry that the extra resources required by the new rules would compete with existing resources for maritime business, and the Coast Guard "recognize[d] that the response resources [would] be created by [the new] regulations that [would] most probably be put to other uses when not in use per [the new] regulations." 73 FR 80629. It is clear from these responses by the Coast Guard that the it understood the new rules would require the creation of additional salvage and marine firefighting resources, and that addition resources were needed to allow planning for worst case scenarios, as required by statute.

C. The Current System: "As Available" Contracts and Inadequate Responses

In spite of the current rules and the Coast Guard's position on their promulgation, the current system in practice is very similar to what it was before the promulgation of the current rule. Plan Holders have entered into contracts where either the Provider promises to provide resources "as available," or where the Provider promises to provide resources, but the Providers subcontract with owners of salvage and marine firefighting resources on an "as available" basis. These contracts are, undoubtedly economical for both Providers and Plan Holders, who do not

have to invest in, or pay for, dedicated salvage and marine firefighting resources, but as demonstrated in Section III, below they do not "ensure" an adequate response. Moreover, recently two fires on large vessels have resulted in wholly inadequate responses.

1. The Contracts.

All of the contracts examined for this Report are, to some extent, dependent on assets being available. The resource provider's funding agreement, after agreeing to provide the vessel owner ("VO") with the required salvage and marine firefighting services, contains the following provision:

> Notwithstanding, VO understands [resource provider's] resources may not be immediately available and assets from other providers/locations shall be mobilized in accordance with this Agreement.

[Resource Provider] Funding Agreement, USA, Version Feb. 2016, at ¶ 3.3. The agreements between the resource provider and its subcontractors appear to provide salvage and marine firefighting resources. The agreement provides: "All responses will be on an "as available basis" with such availability determined by [the subcontractor]." Letter from resource provider to subcontractor (Aug. 14, 2010). Similarly, the agreements between another resource provider and its subcontractors simply make the provider promise to provide "services for transport of equipment and personnel, as available, …" [*Resource Provider*] *Network Agreement* (n.d.) (specifically dealing with helicopter services.)

2. Recent Inadequate Responses.

Two recent cases involving fires on large vessels at sea have, in fact, resulted in inadequate responses. On March 15, 2015 M/V Grey Shark, a roll-on, roll-off automobile carrier out-bound from New York, experienced rough seas and a loss of propulsion, and a fire erupted on one of the vehicle decks due to shifting cargo. After several days at sea with the crew

attempting to extinguish the fire, the Grey Shark was eventually towed to Gravesend Bay in New York, and then to Staten Island, where the Coast Guard established a safety cordon around her until the fire could be extinguished. *See,* Ryan Lavis, "FDNY battles fire aboard ship docked at Homeport Pier in Stapleton" (Mar. 18, 2015), *available* at http://www.silive.com/news/2015/03/fdny_battles_fire_aboard_ship.html (last visited oct. 16, 2017). While the fire broke out well outside the 50-mile limit for the applicability of the Coast Guard's regulation, *see* 33 C.F.R. § 155.4030(b), even after the Grey Shark had entered within 50 miles of the continental United States no external firefighting resources fought the fire until the vessel was at the pier in Staten Island. The Grey Shark was was carrying 55,000 gallons of fuel oil. *M/V Grey Shark* at https://incidentnews.noaa.gov/incident/8892 (last visited Oct 5, 2017). In another incident, on August 17, 2016, the Ferry Caribbean Fantasy caught fire outside of San Juan Harbor. While all 511 passengers were eventually evacuated, the officer has stated that the response to the fire was wholly inadequate. *See* Testimony of Cmdr. Janet Espino-Young, USCG, Before the Nat'l Trans. Safety Auth. (n.d.) (audio file in possession of author) ("I would say getting an active firefighting component on the vessel did not meet the criteria as required by the regulations.") At the time of the accident the Caribbean Fantasy was carrying 6,279 barrels – 263,718 gallons – of fuel oil. *Ferry Caribbean Fantasy,* https://incidentnews.noaa.gov/incident/9343 (last visited Oct 5, 2017). In both incidents, while it is possible that some unforeseeable set of circumstances prevented an adequate response, it would appear that in both instances the Plan Holder had failed to "ensure" and adequate response.

III. AN "AS AVAILABLE" CONTRACT RELYING ON VESSELS OF OPPORTUNITY DOES NOT *ENSURE* AN ADEQUATE RESPONSE

A. The Plain Meaning of "Ensure"

The Regulation requires that a plan holder "ensure" "by contract or other means" that there is an adequate response. The terms "ensure" is not a technical term with a wide variety of nuanced meanings. It is an ordinary word with a generally recognized ordinary meaning. Of course dictionaries are a leading source of words' ordinary meaning. *See, e.g., Schindler Elevator Corp. v. United States ex rel. Kirk,* 563 U.S. 401, 407-08 (2011); *United States v. Bestfoods,* 524 U.S. 51, 66–67 (1998); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 224–26 (1994). Dictionaries are in agreement. "Ensure" means "to make certain or sure." *American Heritage Dictionary of the English Language*, 613 (3d ed. 1992); *accord Miriam Webster*, https://www.merriam-webster.com/dictionary/ensure (last visited Oct. 5, 2017) ("To make sure certain or safe); *Cambridge Dictionary*, http://dictionary.cambridge.org/us/dictionary/english/ensure (last visited Oct. 5, 2017) ("To make something certain to happen") (British usage); *English: Oxford Living Dictionaries*, https://en.oxforddictionaries.com/definition/ensure (last visited Oct. 5, 2017) ("Make certain that (something) will occur or be the case").

Unless the contract or contracts entered into by a Plan Holder make sure that the responders are capable of providing adequate salvage and marine firefighting resources the Plan Holder is not in compliance. As the Regulation itself recognizes by explaining that that it sets out planning not performance requirements, this does not mean that any untimely response will *necessarily* indicate that a Plan Holder has failed properly to ensure an adequate response. The plan holder must however take reasonable steps to make certain, not merely likely or possible, that there will be an adequate response. Moreover, where a contractual provision by which a Plan Holder has purported to "ensure" an adequate response has repeatedly failed, in fact, to produce an adequate response, there is compelling evidence that the contractual provision has not ensured

an adequate response and is in violation of the regulation. *See Springwood Associates v. Lumpkin,* 606 N.E.2d 733, 740 (Ill. App. 1992) (explaining that where a regulation required that a nursing home "ensure" that bath water temperature was below 110 degrees, and the home checked the water temperature daily, "the fact the water temperatures exceeded 110 degrees on the day of the inspection was compelling evidence that [the home] did not 'ensure' temperatures would not exceed 110 degrees.") (discussing *Moon Lake Convalescent Center v. Margolis,* 535 N.E.2d 956 (Ill App. 1989)).

B. Plans Relying on "As Available" Contracts Do Not "Ensure" An adequate Response

Plan Holders generally have engaged with salvage companies to provide fire-fighting services on an "as available" basis, or on the stated condition that a response depends on assets being available, or with an underlying agreement between the salvage company and its subcontractors that the subcontractors only need to provide firefighting equipment as available. This does not "make certain" there will be an adequate response any more than would an airplane owner's simply instructing an airplane mechanic employed by the owner to make appropriate entries in a log would satisfy the Federal Aviation Administration's (the "FAA") requirement that a plane owner "[s]hall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service." 14 C.F.R. § 91.405(b). Not surprisingly, it would not. As the FAA has explained even a photo of an entry sent by the mechanic to the owner might not be sufficient:

> If the photo that is faxed, emailed, or texted has sufficient indicia of accuracy or reliability that the entry is, in fact, in the aircraft's maintenance records, the owner or operator can be considered to have ensured that the mechanic made the entry.

Department of Transportation (D.O.T.), Federal Aviation Administration, Legal Interpretation, 2015 WL 8519305 (Dec. 3, 2015). Here, simply relying on a contract with a Provider who at best promises to provide adequate marine and response by parroting the statutory language regarding adequate resources, fails the carry out the intent of the regulations to *ensure by contract, or other approved means,* that those resources will be able to respond to the Plan Holder vessels.

C. The Failure of Plan Holders to Obtain an Adequate Response Is Compelling Evidence That They Have Not Ensured an Adequate Response

While the response times set out in the regulations are planning, not performance requirements, the fact that in cases of fires aboard vessels owned by Plan Holders there has been a failure to adequately respond, is "compelling evidence" that the contractual arrangements of the Plan Holders do not, in fact "ensure" an adequate response. This based on the simple proposition that repeated failure of a condition that a responsible party was required to "ensure" was taken indicates that whatever steps the responsible party took were not reasonably calculated to make certain, that is, "to ensure," that the act would be taken. *Moon Lake Convalescent Center v. Margolis,* 535 N.E.2d 956 (Ill App. 1989), provides a useful illustration of this principle.

In *Margolis,* the regulations underlying the sanction on appeal required that "facilities [were] to have protective measures to ensure that water temperatures do not exceed 110 degrees Fahrenheit." 535 N.E.2d at 960. A review of the logs and an inspection of the facility in question ("Moon Lake") revealed that on five dates prior to the inspection the temperature was over 100 degrees and that on the date of the inspection the water temperature measured between 105 and 120 degrees. *Id.* While Moon had had a policy that it's staff maintain the water

temperature between 90 and 100 degrees, *id.* at 960, and asserted it had required daily check of the water temperature, *id. at* 967, the court concluded that evidence that the water temperature had been over 110 degrees was "overwhelming evidence that Moon Lake's measures did not "ensure" temperatures would not exceed 110 degrees. *Id; accord Springwood Associates v. Lumpkin,* 606 N.E.2d at 740.

Here, as in *Margolis,* the fact that what was supposed to have been ensured repeatedly failed is "overwhelming evidence" that the Plan Holder's contracts do not "ensure" an adequate response.[2] The fires on the GREY SHARK and the CARIBBEAN FANTASY, the responses for which were wholly inadequate provide "overwhelming evidence" that "as available" contracts used by Plan Holders for the Grey Shark and the Caribbean Fantasy to satisfy the requirements of the Regulation failed, as a planning matter, to ensure an adequate response.

D. Failure to Respond by a Salvage Company Party to an "As Available" Contract Does Not Subject the Salvage Company to A Breach of Contract Action.

In its unsigned, three-page issue paper of this year, CG-LMI, *Issue Paper,* "Salvage and Marine Firefighting Contract" (Jan. 27, 2017) ("Issue Paper") the Coast Guard asserts that the possibility a salvage company that is party to an "as available" contract may be subject to a breach of contract satisfies the Regulations requirement that Plan Holders "ensure" an adequate response. As set out above, the possibility of a breach of contract action does not "ensure" an adequate response, any more than the fact that an airplane owner simply instructed an employee

[2] In this matter, the contracts used by the Plan Holders in an attempt to satisfy the regulatory requirement that they "ensure" an adequate response are not better, and in fact much worse than the instructions given to the staff by Moon Lake. The "as available" contract that the Plan Holders would be similar to an instruction given by Moon Lake to its employees "check the water temperature if you have a chance, and if you do, we'll pay you overtime." That could not ensure the water was at the proper temperature any more than an "as available" contract could ensure an adequate response.

properly to log repairs to an airplane "ensures" that the repairs will be properly logged, or that an nursing home had a policy for the proper maintenance of water temperature that its employees were instructed to follow "ensures" that water will be at the right temperature, even though the employers in either case might discipline or fire their employees. More fundamentally, however, is the fact the contracts used by Plan Holders is not subject to breach of contract actions. A party to an "as available" contract cannot bring an action when the object the contract turns out to be unavailable.

For example, in *Nautilus Marine Enterprises Inc. v. Valdez Fisheries Development Ass'n,* 943 P.2d 1201 (Alaska 1997), one party ("VFDA") had promised to deliver another ("Nautilus") "'50,000 fish a day … as available.'" 943 P.2d at 1202 (ellipsis in original). Nautilus claimed that VFDA had delivered to it an unreasonably small number of fish, and the court held that as a result of the contractual language VFDA's obligation to deliver fish "on any given day could reasonably vary anywhere between a minimum of zero fish to a maximum of 50,000 fish per day, since VFDA's obligation depended on availability. The court further held that Nautilus' "reasonable expectations" were not relevant to the VFDA's performance.

Here, as with the contract for fish in *Nautilus,* the salvage companies have agreed to provide salvage and marine firefighting resources to the Plan Holders "as available." If a Plan Holder's vessel is faced with a fire and a salvage company has no or insufficient assets available adequately to respond then such a response will be within the reasonable expectation of the Plan Holder, who would not, contrary to the assumption of the Coast Guard, be able to sue for breach of contract.

V. THE COAST GUARD'S DECISION TO ALLOW "AS AVAILABLE" CONTRACTS TO SATISFY THE REGULATION IN NOT ENTITLED TO DEFERENCE

In its Issue Paper, the Coast Guard has claimed that the agency's approval of Plans, which rely on "as available contracts" are entitled to deference under the Supreme Court's decision in *Auer v. Robbins,* 519 U.S. 542 (1997). Looking to *Bowles v. Seminole Sand & Rock Co*, 325 U.S. 410 (1945), *Auer* granted deference to an agency's own interpretation of an ambiguous statute. Under *Auer,* an agency's interpretation of an agency's own regulations is entitled to deference when three elements are satisfied: (i) the regulation must be ambiguous, *Christensen v. Harris County,* 529 U.S. 576, 581 (2000); (ii) the agency's interpretation of the regulation must represent the agency's fair and considered judgment rather than an *ad hoc* rationalization, *see Auer,* 519 U.S. at 461; and (iii) the agency's interpretation cannot be contrary to the agency's understanding of the regulation at the time it promulgated the regulation. *See Chase Bank USA, N.A. v. McCoy,* 562 U.S. 195, 209 (2011). The Coast Guard's decision to allow "as available contracts" to satisfy the Regulation fails to satisfy any one of the elements much less all three. Moreover, because the Issue Paper is not well considered and relies on no special technical expertise in its construction of "ensure" – indeed, it does not deal with the term – it is not entitled to deference under *Skidmore v. Swift &Co.,* 323 U.S. 134 (1944), which counsels deference to certain agency statements to the extent they have the "power to persuade." *Id*. at 140. As the Issue Paper is unpersuasive it does not deserve deference.

A. The Regulation is Not Ambiguous.

The Issue Paper claims that "[a]n agency receives deference in interpreting its own regulations." Issue Paper at 2, text at n.5. This is not an accurate statement of the law. As the Supreme Court has explained in *Christensen:*

> … *Auer* deference is warranted only when the language of the regulation is ambiguous. … To defer to the agency's position would be to permit the agency,

> under the guise of interpreting a regulation, to create de facto a new regulation. Because the regulation is not ambiguous …*Auer* deference is unwarranted.

529 U.S. at 581.

To consider the ambiguity, if any, of the Regulation, its material language is worth repeating:

> "A planholder must ensure by contract or other approved means that response resources are available to respond. … Compliance with the regulations is based upon whether a covered response plan ensures that adequate response resources are available. ..."

33 C.F.R. § 155.4010(c).

The Issue Paper never explains what exactly about the Regulation is ambiguous, nor does it even claim that the Regulation is ambiguous. While there is a good bit of discussion what contractual language is need to satisfy the requirement that "adequate response resources are available, the Issue Paper simply avoids discussing the meaning of "ensure." As set out above, the meaning of ensure is clear. It means, "to make certain." There is no ambiguity, and "as available" contracts, and contracts that depend on subcontractors be available cannot ensure that "response resources are available to respond." There will only be availability if assets out of control of the Plan Holder or the Provider happen to be in the area of a casualty and not otherwise occupied. Similarly, a contract, no matter what its terms, between a Plan Holder and the author of this report, who neither owns nor has access to salvage and marine firefighting equipment, could ensure that "adequate resources are available." For the Coast Guard to approve contracts without regard to whether a Provider has secured the resources to fulfill them, that is to *ensure* that the resources are available to respond" is to go against the plain language of the Regulation and is entitled to no deference.

B. The Coast Guard's Position is Not the Result of Its Fair and Considered Judgment

Even were the requirement that Plan Holders *ensure* that adequate response resources are available to be ambiguous, the Coast Guard's position would be entitled to no deference as it is not a result of the Coast Guard's fair and considered judgment. *See Auer* at 462 (explaining "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question). Here the Issue Paper has not even bothered to consider the key language of the Regulation. Its lack of considered judgment mean the Issue Paper is not entitled to deference under *Auer,* or as discussed in below, any other form of deference.

C. The Coast Guard's Position is Contrary to Its Position When It Promulgated the Regulation

While the Coast Guard's position is not the result of its considered judgment, even if it were, and even if the Regulation were ambiguous, the Coast Guard's position would not be entitled to deference because it is directly contrary to the views expressed at the time it promulgated the Regulation. As the Court of International Trade recently explained, "Auer deference may be unwarranted if the agency's interpretation conflicts with the intent the agency expressed at the time of promulgation." *Glycine And More* 107 F. Supp. 3d at 1356, 1364(Ct. Intl. Trade 2015) (citing *Chase* 562 U.S. 195 at 209).

At the time of promulgation of the Regulation the Coast Guard's views were that the purpose of the SMFF Rules was to encourage the development and expansion of salvage and marine firefighting resources, because the market, from the 1990s had failed to develop sufficient resources on its own. *See* 73 FR 80619 ("Early in 1997, it became apparent that the

expected salvage and marine firefighting capability development was not occurring. … Thus, this salvage and marine firefighting rulemaking was initiated."). Also, the Coast Guard rejected allowing vessel owners to rely on simply getting the best people available for any salvage or firefighting operation, explaining that had been the approach and, "based upon resource providers' past performance from 1990 to 2002, it is unlikely that such an approach has been, or would be successful." 73 FR 89621. In addition, the Coast Guard disagreed with a comment that the current level of salvage and marine firefighting resources was sufficient as determined by the market. 73 FR 80622. The Coast Guard responded that it was required by statute to require plans for a worst-case discharge. *Id.* Thus, in promulgating the Regulation, the Coast Guard acknowledged that the current level of resources was too low, and that the regulation was designed to require the development of resources.

Allowing the use of "as available" contracts to satisfy the requirements of the Regulation defeats the purpose of the Regulation. Plan Holders and Providers are able to satisfy the Regulation by simply listing resources, some or all of which might not be available, that might be available. Providers can satisfy their contractual obligations to Plan Holders by providing the resources that may be available. Neither Plan Holders nor Providers is under any immediate incentive to develop additional resources.

Because the Coast Guard's allowing of "as available" contracts to satisfy the Regulation is contrary to the purpose the Coast Guard articulated when promulgating the Regulation and the Coast Guard is not entitled to *Auer* deference.

D. The Issue Paper Is Not Entitled To *Skidmore* Deference.

Though not entitled to *Auer* deference, an agency's interpretation of its own regulations may be entitled to deference under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), under

which an agency's statements are entitled to deference to the extent they have the power to persuade. *See U.S. v. Mead Corp.,* 533 U.S. 218 (2001) (remanding case to the court of appeals with instructions to consider the government's position under *Skidmore*). Here, as detailed above, the Coast's Guard's position is utterly lacking any persuasive power and is entitled to no deference.

The Coast Guard did not consider the key language, "ensure," of the Regulation and its position is contrary to that it took when promulgating the regulation. Whatever the general expertise of the Coast Guard in maritime matters, in this case its position is entitled to no deference under *Skidmore. See Mead Corp. v. U.S.,* 283 F.3d 1342 (Fed. Cir. 2002) (on remand from the Supreme Court to consider the government's position in light of *Skidmore*, the court of appeals considered the government's position but did not give it any deference as it lacked the power to persuade).

VI. IF COAST GUARD'S INTERPRETATION IS CONTROLLING THEN THE REGULATION IS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT AS ARBITRARY AND CAPRICIOUS

While agencies generally have broad discretion in implementing their statutory mandates, an agency may not take actions that either make no sense in terms of, or are directly contrary, to the basis of the agency's authority. Such actions are "arbitrary and capricious" and subject to being held "unlawful and set aside" pursuant to 5 U.S.C. § 706(2)(A). As the Court in *Verizon Comm., Inc. v. F.C.C.,* 435 U.S. 467 (2002):

> [W]e must assume that Congress intended to grant the Commission broad legal leeway in respect to the substantive content of the rules, particularly since the subject matter is a highly technical one, namely, ratemaking, where the agency possesses expert knowledge.
>
> Nonetheless, that leeway is not unlimited. It is bounded, for example, by the scope of the statute that grants authority and by the need for the agency to show a "rational connection" between the regulations and the statute's purposes.

435 U.S. 451-52.

The goal of the statutory grant of authority is not to prevent financial burden on carriers and salvors, but to require a plan to deal with a worst-case scenario. If the Regulation allows the use of "as available" contracts to satisfy the planning requirement it cannot meet its statutory goal; for, "the as available" contracts neither ensure nor encourage the presence of the assets needed to deal with a worst-case discharge. On the contrary, they encourage Plan Holders and Providers to avoid building up the resources needed to make sure adequate salvage and marine firefighting resources necessary to avert or respond to a major disaster at sea.

V. CONCLUSION

"As available" contracts to provide salvage and marine firefighting resources do not and cannot ensure an adequate response to a vessel in need of such resources. The Coast Guard should enforce its own regulations and approve only vessel response plans that make certain a response.