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June 28, 2023

Rear Admiral Jo-Ann F. Burdian
Assistant Commandant for Response Policy
U.S. Coast Guard
2703 Martin Luther King Avenue SE
Washington, DC 20593

Re: Request for Information on Coast
Guard Vessel Response Plan and
Maritime Oil-Spill Response Plan
Advisory Group (MORPAG)
Recommendations
(Docket No. USCG-2022-0702)

Dear Rear Admiral Burdian:

The American Waterways Operators is the tugboat, towboat, and barge industry's advocate, resource and united voice for safe, sustainable and efficient transportation on America's waterways, oceans and coasts. Our industry's 5,000 towing vessels and 33,000 barges comprise the largest segment of the U.S.-flag domestic fleet. The tugboat, towboat and barge industry support more than 270,000 jobs in related industries nationwide. Each year, our vessels safely, securely, and efficiently move more than 665 million tons of cargo critical to the U.S. economy.

On behalf of AWO's member companies, thank you for the opportunity to comment on the Coast Guard's Vessel Response Plan (VRP) program and the recommendations of the Maritime Oil-Spill Response Plan Advisory Group (MORPAG). AWO shares the Coast Guard's goal of protecting the marine environment from oil spills and AWO's members are committed to reducing our industry's environmental impact while preserving its safety and efficiency. This commitment is demonstrated by AWO's active partnership with the Coast Guard, Congress, and our industry's shipper-customers to reduce oil spills since the enactment of the Oil Pollution Act of 1990. This partnership has produced results: a 2012 Coast Guard Report to Congress directly attributed a downward shift in oil spill volumes since 1997 to the implementation of the AWO Responsible Carrier Program, which is now a Coast Guard-accepted Safety Management System under 46 CFR Subchapter M. Subchapter M is in fact an outgrowth of the Coast Guard-AWO Safety Partnership, through which we have also taken steps to further reduce oil spills through the cooperative development of data-driven, results-oriented best practices.

AWO has an interest in the Coast Guard's management of the VRP program on behalf of its members that are required to prepare vessel response plans under 33 CFR Part 155. In addition, AWO is the administrator of an Alternative Planning Criterion (APC) for emergency towing for inland tank barges and towing vessels over 400 GRT operating on the Western Rivers, and AWO members who operate tank barges in western Alaska utilize the Alaska Petroleum Distributors and Transporters (APD&T) APC for oil spill response planning and equipment requirements. We offer the following comments on the areas of improvement identified and recommendations developed by MORPAG, as well as the questions that the Coast Guard has posed in its request for information.

General Comments

AWO has long believed that APCs are an important and necessary component of the vessel response plan framework. Tank vessel response plan regulations at 33 CFR §155.1065(f), echoed by nontank vessel response plan regulations at §155.5067(a), state: "When the owner or operator of a vessel believes that the national planning criteria contained elsewhere in this part are inappropriate to the vessel for the areas in which it is intended to operate, the owner or operator may request acceptance of an alternative planning criteria by the Coast Guard." There is no question that there are areas for which the national planning criteria (NPC) are inappropriate, to different degrees and for various reasons. On the Western Rivers, there is not a dedicated fleet of stand-by vessels stationed throughout the extensive inland waterways system for the purpose of providing emergency towing services. In western Alaska, the vast geography, lack of infrastructure, and adverse environmental conditions create a uniquely remote and challenging operating environment in which to mobilize response resources. The APC request and acceptance process is a means for both vessel operators and the Coast Guard to acknowledge areas in which the NPC are ill-fitting and allows us to work together to identify a compliant alternative approach that upholds prevention, preparedness, and response capabilities.

Recommendation (2), Equivalence.

MORPAG has found that the evaluation of "equivalence" between an APC and the applicable NPC, as presented in the regulations, is subjective in nature because it lacks a defined standard, resulting in a challenge for industry when developing alternatives and for the Coast Guard when evaluating alternative measures. MORPAG recommends the introduction of an Equivalency Board made up of members from the Area Committee "that could assist with the delineation of standards for equivalency specific to an operating area(s)," and that this concept would "standardize the process of submission and evaluation for acceptance of an APC for inclusion in a VRP."

The APC regulations are similar to many Coast Guard regulations that authorize the agency to approve alternatives to regulatory provisions if those alternatives provide an equivalent level of safety, security, or environmental protection (see, for example, 33 CFR §101.130 or 46 CFR §136.115). The lack of a definition of equivalence in these and other regulations allows the Coast Guard to use its discretion when determining whether equivalence has been established.

This is helpful in situations in which, as with APCs, the proposed alternative may be multi-layered with procedures, methods, or equipment.

As a general matter, AWO believes that if the Coast Guard agrees with MORPAG that APC submission and evaluation process needs to be further standardized, it is appropriate to do so through the agency's existing rulemaking or policy development processes to ensure procedural predictability, transparency, and stakeholder engagement. By contrast, the establishment of Equivalency Boards to develop equivalency standards is unprecedented and uncertain. AWO has two additional concerns with the inclusion of Area Committees in the APC process. First, Area Committees are comprised of representatives of federal and state agencies that, unlike the Coast Guard, do not have authority over or expertise in vessel operations. Second, for an APC that encompasses the operating areas of multiple Area Committees – such as the AWO APC, which covers seven Coast Guard sectors and five EPA regions – this proposal is extremely impracticable, with the potential to create significant inconsistency, delay, and administrative burden. For these reasons, AWO does not support this recommendation.

Recommendation (3), Enforcing NPC Compliance.

MORPAG has concluded that there are not sufficient accountability mechanisms in place to verify if a vessel operator submitting an APC request has identified all available response resources specific to their vessel and recommends the development of processes to assist a vessel operator in considering all available resources during the submission of a VRP.

AWO notes that the Coast Guard already maintains the Response Resource Inventory System, which was mandated by the Oil Pollution Act of 1990 and which is available to both support vessel operators in identifying available resources and to inform the Coast Guard's evaluation of an APC request. However, it is AWO's view that at a higher level, MORPAG's conclusion elevates the identification of available resources over other important considerations. A resource's availability does not automatically assure that it is feasible, practical, or otherwise appropriate for the vessel operator to contract with the resource provider. The reasons for an APC request may be many-sided, based not only on lack of equipment but also on geographic, operational, environmental, or economic limitations. The minimum required elements of an APC request include “[p]roposals for alternative procedures, methods, or equipment standards [...] to provide for an equivalent level of planning, response, or pollution mitigation strategies,” affirming that equivalence is evaluated on the basis not only of alternative equipment but also of alternative procedures or methods.

Therefore, AWO does not support this recommendation. We believe that the existing RRI fulfills the function of assisting vessel operators in the identification of available response resources. If the Coast Guard, in the evaluation of an APC request, has concerns that all available resources have not been identified, we recommend that the agency work cooperatively with the vessel operator or APC administrator to address those concerns.

Recommendation (4), Resource Availability.

MORPAG believes that the identification of vessels of opportunity (VOO) on an “as available” status, with “no commitment” to respond, “removes an incentive for industry to develop additional response capability.” As a result, MORPAG has recommended that existing policy and regulations are reviewed and clarified to ensure that agreements with VOOs “guarantee availability to the required planning standard.”

AWO strongly contests the idea that VOOs identified on an “as available” basis undermine industry preparedness. Under our APC for emergency towing for tank and non-tank vessels operating on the Western Rivers, AWO has secured letters of agreement from our member companies indicating their willingness to respond to a nearby vessel in need of emergency towing. The APC is based on the mutual assistance approach to emergency response that has long characterized the inland towing industry and has been successful since its initial approval by the Coast Guard in 2011. A user of the AWO APC agrees to “[r]espond to a request for assistance from another vessel response plan holder to provide emergency towing services in accordance with this APC, provided that the company has a towing vessel that is reasonably available in the vicinity of the stricken tank barge or towing vessel to do so.” For over 10 years, this agreement has supported the effective provision of emergency towing services for APC users in need.

Requiring by policy or regulation that VOOs “guarantee availability to the required planning standard” is not only unnecessary, but also could have a detrimental impact on the willingness of operators to agree to participate in a VOO system and deplete available response resources – to a potentially calamitous degree. The word “guarantee” implies that the standard is not planning-based but performance-based, which is contrary to the longstanding approach of the Coast Guard in developing, implementing, and enforcing VRP regulations. VOO operators are unlikely to offer their vessel as a response resource if they must “guarantee” its availability no matter the vessel’s location, operating or crewing status at the time of an incident. In fact, in order to “guarantee availability” to provide emergency towing services on the Western Rivers, a dedicated fleet of vessels would need to be constructed and stationed throughout the inland waterways; the lack of such a standby fleet, and the extreme impracticality (if not impossibility) of creating such a fleet, is the reason the AWO APC was established. The assessment of the effectiveness of a VOO system should not be based on the language of its agreements but on its record of success and on the density of VOOs within the area of operation. AWO does not support this recommendation.

Recommendations (7) and (8), Tools and Staffing.

AWO supports both of these recommendations. Provided that they are based on Coast Guard regulations and policy and are developed in collaboration with industry as well as the agency’s subject matter experts, we believe that it would be helpful for vessel operators to have planning tools and templates that give them a clearer understanding of the agency’s expectations for VRP and APC submissions. We also believe that additional staffing could be helpful to improve the administration of the VRP program by improving throughput in the approval of

VRPs and acceptance of APCs, as delays and backlogs can create adverse commercial effects for vessel operators.

AWO takes this opportunity to recommend, in the interest of facilitating maritime commerce by reducing delays, that the Coast Guard create a mechanism for the automatic “interim approval” of a VRP amendment to add a vessel to a previously approved plan under 33 CFR §155.1070(c)(8) that would permit the vessel to begin operating under the plan while the Coast Guard reviews the amendment, provided that the vessel’s operating area is covered by the previously approved plan. The current requirement to submit such an amendment 30 days in advance of operation is challenging for towing vessel operators, who regularly purchase or charter vessels for work that commences within far shorter timeframes – sometimes as soon as a few days. Therefore, the requirement for 30-day advance submission of amendments can delay an operator from beginning work – or even prevent them from taking it. AWO believes that the risk of an automatic interim approval mechanism is minimized if the vessel operator has a previously approved plan that covers the new vessel’s operating area because that indicates the required response resources are already secured.

Question (1): Build-out provides the means to ultimately reach NPC in areas where response capability is inadequate for vessels. What are tactics the Coast Guard should consider to promote improvement of response capabilities and make it possible for vessels to meet NPC in remote areas?

AWO strongly disagrees with the question’s assumption that response capability is inadequate if the NPC are not met and that the ultimate goal of the APC process is to improve response capabilities to meet NPC. First, the regulations require that APCs provide an equivalent level of planning, response, or pollution mitigation strategies to the NPC, and in fact, APCs may improve on the planning, response, or pollution mitigation strategies of the NPC. Second, the regulations do not specify that APCs are only acceptable in areas where the NPC cannot be met, and only until the NPC can be met. Per the APC regulations, a vessel operator can request Coast Guard consideration of an APC under any set of circumstances in which they believe that the NPC are inappropriate.

We believe that the AWO APC is an example of an APC that improves on the NPC. The NPC for emergency towing services are inappropriate for inland towing vessels not only because there is not currently a fleet of stand-by vessels stationed throughout the inland waterways to provide emergency towing services, but also because it is not possible or desirable to create such a fleet in the future, given limited U.S. shipbuilding capacity and other economic considerations. This does not mean that AWO is not committed to the continuous improvement of our APC, and therefore the build-out of response capability and enhancement of response posture, through other means as part of an ongoing dialogue with APC users and the Coast Guard. The success of the AWO APC has demonstrated that the mutual assistance approach to emergency towing on the Western Rivers not only provides an equivalent level of response capability to the NPC, but is more appropriate to the operating environment – and is a practical and effective long-term solution.

Question (3): Should the Coast Guard apply performance standards when evaluating the availability of an identified resource in a VRP?

AWO strongly urges the Coast Guard not to apply performance standards when evaluating the availability of an identified resource in a VRP. This would be contrary to the Coast Guard's longstanding interpretation and application of the VRP regulations as planning standards, not performance standards. The vessel operator, not the resource provider, is the planholder and is responsible for compliance with the VRP regulations. The application of performance standards to the planholder would be misplaced, as well as extremely burdensome and disruptive to the existing VRP submission and evaluation process. If the Coast Guard has concerns regarding the activation of response resources, the agency should address them by other means, such as enhanced training for federal on-scene coordinators.

Question (4): What can the Coast Guard do to ensure that vessel owners and operators avail themselves of all available resources in an attempt to meet NPC before applying for an APC?

Again, AWO must strongly disagree with the question's implication that the administrators and users of existing APCs have not given due consideration to all available response resources. Existing APC administrators – who AWO understands to be very few in number relative to the number of VRP planholders – have demonstrated to the Coast Guard's evident satisfaction that they meet the requirements of 33 CFR Part 155, including that they have provided persuasive reasoning for the APC request and that the APC provides an equivalent level of planning, response, or pollution mitigation strategies to the NPC. An APC request does not need to be predicated on an unsuccessful attempt by the vessel operator to meet the NPC. As previously stated, the regulations allow vessel operators to request an APC if they believe the NPC are inappropriate. This may or may not be due to resource availability; geographic, operational, environmental, or economic factors may play a role. If the Coast Guard has concerns that the submitter of an APC request has not sufficiently justified the request or has failed to consider all available response resources, we encourage the agency to share those concerns with the submitter so that they may be addressed.

Questions (5) and (6): The Coast Guard is tasked with reviewing APCs and accepting them if justified. Should Area Committees have jurisdiction or have responsibilities relative to management of APC? How can Area Committees provide input to the management of an APC and VRP for the area a vessel intends to operate?

As previously stated, AWO opposes the introduction of Area Committees to the APC process. The Coast Guard has the sole statutory and regulatory responsibility to administer the VRP regulations, of which the APC process is a part, and has expertise and long experience in vessel operations that the other federal and state agencies that comprise Area Committees do not. Further, the addition of Area Committees to the APC process – particularly for APCs that cover the operating areas of multiple Area Committees – has the potential to lead to significant inconsistency, delay, and administrative burden.

Questions (9) and (10): The Coast Guard enforces the requirement for vessels to operate with an approved VRP, should APC Administrators enforce compliance with their accepted APC operating procedures? How can APC Administrators enforce accepted APC operating procedures?

As an APC administrator, AWO has no authority to enforce compliance with the operating procedures of the AWO APC. A user of the APC that is not in compliance with its operating procedures is in noncompliance with the VRP regulations, for which the Coast Guard has enforcement authority. AWO is engaged in an ongoing dialogue with users of the AWO APC to understand their experiences exercising and activating the APC and, based on those discussions, we do not believe that noncompliance with the AWO APC's operating procedures is a significant or prevalent issue.

Thank you for the opportunity to comment. AWO is pleased to discuss these comments further or provide any additional assistance as the Coast Guard sees fit.

Sincerely,

A handwritten signature in cursive script that reads "Caitlyn E. Stewart".

Caitlyn E. Stewart
Vice President – Regulatory Affairs