



**TESTIMONY OF LINDA SHEEHAN, EXECUTIVE DIRECTOR,
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**BEFORE THE ASSEMBLY COMMITTEE ON NATURAL RESOURCES
“Oil Spill in the San Francisco Bay”
November 15, 2007, 10:00 a.m.
Emeryville, California**

Good afternoon, Chair Hancock and Assembly Members. My name is Linda Sheehan, and I am the Executive Director of the California Coastkeeper Alliance, which represents California’s 12 Waterkeeper groups. California’s Waterkeepers span the coast from the Oregon border to San Diego, and include San Francisco Baykeeper, who will provide expert local testimony to you today. I also sit as a Senate appointment to the Oil Spill Prevention and Response Technical Advisory Committee (“OSPR TAC”).

California’s bays and coast are world-renowned ecosystems, deserving of our highest protection. Lempert-Keene recognizes this by setting a high standard for the “best achievable protection” of our bays and coastline from marine oil spills, a standard defined as the “highest level of protection that can be achieved” through the “greatest degree of protection available.”² This standard is supposed to be implemented through requirements for use of the “best achievable technology” that provides the “greatest degree of protection”³ for the coast and ocean. It is also supposed to be implemented through requirements for the “highest level of protection that can be achieved” from equipment, manpower levels, and training methods. This specifically includes “[p]rocesses that are currently in use anywhere in the world.”⁴ Lempert-Keene gives protection of the coast “critical” consideration; cost is but a minor factor in the evaluation. In fact, the law prohibits cost-benefit and cost-effectiveness analyses in determining “best achievable protection.”⁵ The law also requires OSPR to look regularly to see if there are better ways to prevent and respond to spills.⁶

It is clear from Lempert-Keene that OSPR has a significant amount of responsibility in preventing and responding to oil spills in California. Running through all of these duties is the

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² Government Code §§ 8574.7, 8670.3, 8670.12, 8670.17, 8670.17.2, 8670.19, 8670.21, 8670.28, 8670.35.

³ Government Code § 8670.3(c)(1) (emphasis added).

⁴ *Id.* (emphasis added).

⁵ Government Code § 8670.3(b)(2).

⁶ Government Code § 8670.13; *see also* Government Code § 8670.37.

mandate to provide the “greatest protection achievable” of our bays and coast from marine oil spills. However, in my experience on the OSPR TAC, and watching the oil spill responses in the past week as a concerned Bay Area resident, it is my judgment that this standard is simply not being met.

One reason this standard is not being met is lack of funding. In January 2005 the Governor’s own Department of Finance released a comprehensive audit of California’s oil spill response capabilities.⁷ This audit was required by SB 849 (2002), which raised the per barrel oil fee for the Oil Spill Prevention and Administration Fund, or “OSPAF,” to a ceiling of five cents. OSPR had identified a number of needs for an adequate program, including 34 new staff (“PYs”) that they felt were needed to comply with Lempert-Keene’s strict requirements for the “greatest degree of protection achievable” for the coast. However, OSPR has never received close to the 34 PYs that they determined were needed. As of the OSPR TAC meeting I attended on October 30, 2007, that staff gap still had not been closed.

Even when staff resources are allocated, pay scales can be too low to fill them. At the October 30th OSPR TAC meeting, for example, it was reported that State Lands Commission pay levels have not kept up with inflation; as a result, it has been a one-to two-year process to hire qualified marine inspectors, even when the PYs have been approved.

The Department of Finance reported in the 2005 Audit that understaffing in OSPR’s field offices could impede OSPR’s ability to respond in a major marine oil spill. In a briefing last year to the OSPR TAC on the Audit, the OSPR Administrator confirmed that Audit had a “valid concern” about understaffing in the field offices and response to large spills. The Finance Audit also found that more industry and response organization drills were needed. Given the response to the spill that those of us living in the Bay Area have witnessed, we have to wonder how much more effective the response would have been if the program had been adequately staffed with appropriate level and type of equipment, drills, and training.

Finance concluded that there was money for OSPR to improve spill prevention from SB 849, and recommended that this money be spent to “provide opportunities for OSPR to strengthen its prevention, readiness and response activities.” However, when OSPR requested the needed staff and equipment, that request was inexplicably denied. As a result, the oil companies then pushed hard in late 2005 to lower their per barrel oil fee, since the surplus fee money in OSPAFA was not being spent. CCKA appealed to the Secretary of the Resources Agency to keep the fee at five cents, with Senator Perata weighing in as well, and for now the fee remains unchanged. But there is ongoing pressure from the oil companies to reduce it, because there is still a surplus due to inadequate spending on necessary oil spill prevention and responses readiness.

Problems continue from a lack of funding. Unannounced drills of all facilities went down by half between 2005 and 2006.⁸ Oil spill response organizations (“OSROs”) under

⁷ http://www.dof.ca.gov/FISA/OSAE/AuditReports/Special_Review_OSPR_v12-30-04.pdf.

⁸ http://www.dfg.ca.gov/ospr/commit/tac/tac_2005-2006_biennial_report.pdf.

contract to respond to spills are not drilled as required by law. Specifically, state law mandates at least one unannounced OSRO drill every three years after rating,⁹ and all are subject to annual drills. But according to OSPR, there have never been surprise drills of rated OSROs.¹⁰ Staff cannot even attend many of its own, announced facility drills, even though industry has requested this and finds it valuable to have OSPR staff there.

In addition to problems associated with a lack of funding, many of the state's oil spill prevention and response standards simply do not meet Lempert-Keene's mandate of "best achievable protection" on their face. For example, the first-time skimming and booming requirements for non-tank vessels in San Francisco Bay, like the Cosco Busan, is six hours. In a rapidly changing and dynamic environment like the Bay, this simply cannot be the "best achievable technology" for protecting the environment from an oil spill. Adequate equipment to contain the spill must get out there more quickly, certainly within the first hour or two. As another example, the question has been raised whether the booms that were available for use in the Bay could withstand Bay tides. According to Lempert-Keene, if there are booms anywhere in the world that can withstand tides such as those in the Bay, they must be used.¹¹ Regulatory requirements must be clear on such points; they cannot allow the state, the responsible parties or the OSROs to skate by on inadequate equipment or processes.

In light of this background, I would urge this Committee to examine the following issues as more information from the spill comes to light in the coming weeks. First, I would ask that the Committee call for immediate funding of – at a minimum – the long-requested 34 needed PYs, and then look at whether that number is sufficient. I would then ask that the Committee look at whether the existing five cents per barrel fee is sufficient to support the needed PYs as well as necessary equipment, training, studies and other needs. The OSPR TAC was told recently that at the current, slightly increased spending level, the OSPAF surplus would be spent down to a prudent reserve within a few years or shorter. The ongoing OSPAF funding stream should match the staffing, equipment, training, research and other needs of an oil spill prevention and response program that meets Lempert-Keene's strict requirements, which the current program does not. The Committee should consider legislation to increase the fee cap to meet Lempert-Keene's mandate to achieve the "best achievable protection" of the coast.

Another area to look at more closely is with respect to the OSROs themselves. Lempert-Keene is clear that:

[t]he Governor shall ensure that the state fully and adequately responds to all oil spills in marine waters. The [OSPR] administrator, acting at the direction of the Governor, shall implement activities relating to oil spill response, including drills and preparedness and oil spill containment and cleanup."¹²

⁹ Government Code § 8670.30(f).

¹⁰ "Governor Blamed over Spill," *Sacramento Bee* (Nov. 13, 2007) ("Ted Mar, chief of the marine safety branch at OSPR, told The Bee that his agency inspects less than 1 percent of the cargo ships each year, and has never conducted surprise annual inspections of the cleanup companies. Instead, inspections typically occur only when a license is renewed....").

¹¹ Government Code § 8670.3(c)(1).

¹² Government Code § 8670.5 (emphasis added).

The law is clear that the ultimate responsibility for oil spill response lies with the Governor, and response and prevention authority is implemented by OSPR acting at the direction of the Governor. The law is not clear, however, about the apparent delegation of some of this responsibility to the OSROs, nor is it clear about the necessary number and accountability of the OSROs. Lempert-Keene states that OSPR, acting at the direction of the Governor, must ensure that someone – whether a private company, the state, or another party – shows up to respond to the spill in a manner consistent with the “best achievable protection” standard:

The [OSPR] administrator shall . . . [e]nsure that persons trained in oil spill response and cleanup, whether employed by the responsible party, the state, or another private or public person or entity, are onsite to respond to, contain, and clean up any oil spill in marine waters, as soon as possible after notice of the discharge.¹³

I would ask that the Committee look more closely at how much reliance is being placed on nine OSROs scattered around the state, and whether this is appropriate given the high priority to Californians of quickly containing and cleaning up spills. I would also ask that this Committee look specifically at whether the Bay Area in particular has enough people in equipment in place to respond immediately and effectively to a spill, given the significant threat of a spill in the Bay and the well-known dynamic nature of Bay waters.

Finally, I ask that the Committee look at the use of the Oil Spill Response Trust Fund. There appears to be some lack of clarity in the code over the use of the Trust Fund, and in particular whether OSPR can and should access immediately if a responsible party seems to be failing to respond to adequately to a spill, as was the case here.¹⁴ I ask that this Committee consider legislative changes to make it clear that OSPR can and must access the Trust Fund as needed to ensure the “best achievable protection” of California’s marine waters from an oil spill, even if a responsible party exists. There is no time in the first few critical hours to make detailed legal assessments of potential financial liability; OSPR must have the flexibility to respond as needed and then seek reimbursement of the Fund after the necessary containment and cleanup has been performed.

Thank you for the opportunity to testify before you today.

¹³ Government Code § 8670.7 (c)(2).

¹⁴ See Government Code §§ 8670.49, 8670.50.