
OPA-90 Salvage Regulations Implementation – Potential Pitfalls and Solutions

Paul Hankins (speaker/author), American Salvage Association (ASA), Donjon-Smit LLC, USA

SYNOPSIS

The impending February 2011 implementation of the new salvage regulations written under OPA-90 create a unique set of issues through which shipowners and operators must successfully navigate. These challenges are, as yet, generally unknown to the average vessel operator.

The issues include complex ones such as the tug identification requirements and required fire-fighting timelines. There are also simpler issues, but equally confusing to the owner, such as the manner in which changes to the VRP are to be handled and presented to the USCG. And, perhaps the most mysterious of all, is the requirement for the vessel owner to certify the competency of the salvor chosen as the primary emergency salvage responder. What are some potential solutions to these issues and how is the owner expected to certify his/her choice of salvor?

INTRODUCTION

The US Coast Guard's recently-published *Frequently Asked Questions; Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil*, is available online (*see reference [1] at end of paper*) and gives consolidated answers to some of these issues. This paper hopes to provide some more insight into the issues that remain unresolved. In the following pages, 10 salvage regulation issues are identified and discussed, both from the shipowner's and the salvor's perspective, with some potential solutions offered.

RESPONSE PLANNING STANDARDS: FACTS AND FICTION

But first, I will identify several salvage response planning standards that have developed their own unique mythology over the past several years in the run-up to the salvage regulations implementation. In an effort to demystify them, the following is offered:

Where do the response standards reside?

The American Salvage Association (ASA) does not maintain the salvor response standards. They are listed right in the regulation. There are two components, the planning standards and the 15 prerequisites. A salvor should be selected firstly based on the 15 prerequisites (listed in *Appendix A at end of paper*) placing that salvor in a qualified pool and then, and only then, selected based on that salvor's ability to respond within a port of interest to a shipowner, and meet the planning standards.

How does one certify salvor adequacy?

While this issue is discussed in more depth later, I raise the question here to debunk a common misperception. The Coast Guard will not be certifying salvors as it does for oil spill response organisations (OSROs). The entire

burden for certification is on the shipowner, and penalties for a bad choice will not be known until a response fails or is in some way deemed inadequate. At that point, liability becomes an important issue (beyond the scope of this paper, but important nonetheless), which I'm sure will keep a segment of admiralty law busy for years to come.

What are the standards by which a company can judge a salvor?

The Coast Guard will not be promulgating additional standards – see *Appendix A*, the 15 pre-requisites for a qualified salvor. Beyond this list, each salvor will need to represent to its potential clients its capabilities to respond to that client's ports of interest.

How does the Vessel Response Plan get changed and submitted?

The salvor does not submit the VRP changes. While it is the plan holder's (shipowner/operator) responsibility, generally the task is performed by the plan preparer under contract to or under employ of that owner/operator. Having said that, there are a broad range of proposals being considered to develop the salvage components to the VRP on the owner's behalf. One salvor, for example, has developed a standard appendix to be used (as part of its contractual responsibility) that incorporates salvage-related regulatory requirements for the plan. The general annex will be submitted to a vessel's plan preparer along with ship-specific information. The plan holder can then attach that appendix to the Vessel Response Plan, while incorporating any vessel-specific information as appropriate.

Who is responsible for the VRP changes?

Again, ultimately it is the plan holder who is responsible for changing of the plan. Certain salvors and plan

preparers will accept that responsibility for the plan holder, but it is salvor- and plan-preparer specific.

Contracting and funding requirements²

§ 155.4025 Definitions.

Contract or other approved means is any one of the following:

- (i) A written contractual agreement between a vessel owner or operator and resource provider. This agreement must expressly provide that the resource provider is capable of, and intends to commit to, meeting the plan requirements.
- (ii) A written certification that the personnel, equipment, and capabilities required by this subpart are available and under the vessel owner or operator's direct control. If the planholder has personnel, equipment and capabilities under their direct control, they need not contract those items with a resource provider.
- (1) As part of the contract or other approved means you must develop and sign, with your resource provider, a written funding agreement. This funding agreement is to ensure that salvage and marine firefighting responses are not delayed due to funding negotiations. The funding agreement must include a statement of how long the agreement remains in effect, and must be provided to the Coast Guard for VRP approval. In addition any written agreement with a public resource provider must be included in the planholder's Vessel Response Plan (VRP).

§ 155.4045 Required agreements or contracts with the salvage and marine firefighting resource providers.

- (b) You must obtain written consent from the resource provider stating that they agree to be listed in your plan. This consent must state that the resource provider agrees to provide the services that are listed in §§ 155.4030(a) through 155.4030(h), and that these services are capable of arriving within the response times listed in Table 155.4030(b). This consent may be included in the contract with the resource provider or in a separate document.

For the first time in the salvage world, the Coast Guard is requiring signed contracts for salvage response to be in place *prior* to an event occurring. These contracts must include a pre-arranged funding agreement as well as identified rates to be charged, all of which must be pre-approved by the Coast Guard and included in the Vessel Response Plan.

Why is this contracts issue such a difficult one? From the salvor point of view, the inherent risks in a response, not apparent until the event occurs, generally drive the type of contract and the ultimate cost. The new structure requires the salvor to take these factors into account (weigh risk) well before an event, understandably a tricky process. The challenge then becomes developing a means to account for risk in advance of the incident while keeping the contracting mechanism relatively simple.

From a shipowner's perspective, the contract must meet the approval of the respective P&I Clubs and Hull and Machinery insurers, and must also protect the interests of the owners should an event occur. Whereas prior to the new regulations these interests

were represented in negotiations conducted at the time of the event, now all factors, including risk, must be pre-negotiated.

Salvors are in the process of getting USCG approvals for their particular contracts and funding mechanisms. To date at least two salvors' contracts have USCG approval. While I can only speak of Donjon-Smit's contract, I suspect all will try to develop some type of risk methodology. I know that Donjon-Smit incorporates a risk-based mechanism that invokes specific maritime-accepted contract vehicles in the event of events with specific risk parameters. These vehicles include Towhire, Wreckhire and Lloyds Open Form possibilities, with the appropriate contract to be invoked depending on the threshold of risk presented at the onset of a response.

The owners and the salvors must work closely with the P&I Clubs and H&M Insurers to ensure the resulting contracts offered by the salvors to their clients are acceptable and ready to be signed prior to Feb 2011.

Tug identification in each COTP zone²

§ 155.4030 Required salvage and marine firefighting services to list in response plans.

- (e) *Ensuring the proper emergency towing vessels are listed in your VRP.* Your VRP must identify towing vessels with the proper characteristics, horsepower, and bollard pull to tow your vessel(s). These towing vessels must be capable of operating in environments where the winds are up to 40 knots.

§ 155.4045 Required agreements or contracts with the salvage and marine firefighting resource providers.

- (b)...the resource provider agrees to provide the services that are listed in §§ 155.4030(a) through 155.4030(h), and that these services are capable of arriving within the response times listed in Table 155.4030(b).

Emergency towing is a particularly challenging prospect for all involved. The regulation requires access to emergency towing within a specified time period, with enough horsepower to control the at-risk vessel in 40kn of wind. On the face of it, simple enough, until one examines what this really requires.

A ship transiting into any port from offshore must have a tug identified in its VRP capable of operating offshore in heavy seas (40kn offshore is no easy rescue). Given this set of rules, for the average tanker that translates to a rather large tug ready to respond. And that readiness essentially means the tug has to be in a standby mode or multiple tugs must be identified, with one available inside the response time window at any given time. Why standby? Let us look at what availability requires.

Availability means the named tug must be able to be on-scene within the time period specified. Generally it must be on-scene within 18 hours (sooner for near-shore areas). If a tug is engaged in another job or otherwise unavailable, it is likely unavailable to meet

the time standard. While these standards are ‘planning standards’, a salvor (and ultimately the ship owner) cannot certify they ‘properly planned’ if they know a tug will usually be engaged in other commerce. Nearly every tug in the US is so employed, hence the vexing problem. So, while the salvage industry does not have stand-by tug capability, the new rules tend to identify stand-by tug capability as a requirement. The ship owner needs to ask hard questions to his/her potential salvor as to how the emergency towing requirement will be met. If, in fact, the standby qualification is expected by Coast Guard, this could be a particularly (and unexpectedly) costly part of the regulation.

Shipowners need to push the Coast Guard for clarification. As reference (1) shows, answers to the FAQs are not clear in the requirement.

OCONUS challenges²

§ 155.4035 Required pre-incident information and arrangements for the salvage and marine firefighting resource providers listed in response plans.

(d) *How to apply the timeframes to your particular situation.*

(3) If your vessel transits within an OCONUS COTP zone that is outside the areas described in paragraph (a)(2) of this section, but within the inland waters or the nearshore or offshore area, you must submit in writing, in your plan, the steps you will take to address salvage and marine firefighting needs in the event these services are required.

Outside the continental US, in places such as Alaska, Guam, and Hawaii, the rules are generally relaxed. In these areas the response zone is only around the COTP Zone’s port, so salvor/firefighter response times do not apply to remote places such as Dutch Harbor, Alaska. But what are the expectations for these areas?

The VRP must list steps to be taken to address salvage and marine fire-fighting needs in these areas, but it is still unclear what will be acceptable to the Coast Guard, and it is not likely to be clarified given the latest round of FAQs from the Coast Guard. If my interpretation is correct, there are no specific time requirements for these areas outside 50nm from COTP ports and therefore no response issues other than identifying from where the resources would come. For these areas, the only salient salvor qualification therefore becomes the 15 pre-requisites.

Lightering and salvage equipment identification²

§ 155.4030 Required salvage and marine firefighting services to list in response plans.

(f) *Ensuring the proper type and amount of transfer equipment is listed in your VRP.* Your salvage resource provider must be able to bring on scene a pumping capability that can offload the vessel’s largest cargo tank in 24 hours of continuous operation. This is required for both emergency transfer and lightering operations.

(h) *Ensuring the proper subsurface product removal.* You

must have subsurface product removal capability if your vessel(s) operates in waters of 40 feet or more. Your resource provider must have the capability of removing cargo and fuel from your sunken vessel to a depth equal to the maximum your vessel operates in up to 150 feet.

This part of the regulation is perhaps the most straightforward and easiest to meet from a response time perspective. The salvor owns, or has access to, a variety of equipment to perform the tasks required, and the time lines are reasonable. The key to the salvor’s readiness is access to the equipment in a particular port for which it provides coverage. If not relying on its own equipment, the salvor must have contracts in place with the company(ies) that will provide the equipment.

When querying a salvor’s capability in a specific port, be sure to ask where the equipment comes from and what the status of that equipment (in terms of contract mechanism) happens to be.

The lightering time requirement (largest tank lightered in 24-hour period) initially brings up similar issues to that of the tug standby issue, until one realises there is no starting time for commencement of the lightering mandated in the regulation.

A quick note on subsurface oil removal: this requirement speaks directly to removal of oil from a tank that is subsurface. It is not about non-floating oil that has escaped and is sitting free along the ocean/river bottom.

Identifying proper firefighting capabilities²

§ 155.4045 Required agreements or contracts with the salvage and marine fire-fighting resource providers.

(a) You may only list resource providers in your plan that have been arranged by contract or other approved means.
(b) You must obtain written consent from the resource provider stating that they agree to be listed in your plan. This consent must state that the resource provider agrees to provide the services that are listed in §§ 155.4030(a) through 155.4030(h), and that these services are capable of arriving within the response times listed in Table 155.4030(b). This consent may be included in the contract with the resource provider or in a separate document.

Aside from the standby tug issue, from the salvor’s point of view the inport fire-fighting requirement is perhaps the most problematic issue. Fire-fighting adds an ‘inport’ time requirement, and requires on-scene assessment by a firefighter in two hours. So what does that mean? Essentially a salvor providing this capability must have firefighters available in every port in which it offers services, a capability none have (nationwide) to date.

Traditionally, these initial assessments (inport) have come from the local public fire departments, whose duty it is to provide the service. Now, under the impending regulations, if a salvor wants to rely on this existing

local service, the salvor must sign a contract with that public agency, not an easy or routine process.

The salvage industry, through the ASA, has urged the Coast Guard to reconsider this requirement as a means to contain costs. Instead of requiring each individual department is individually contracted by each salvor operating in a port, they should instead be listed in the Area Contingency Plan (ACP). These ACPs are in-place plans in each port created for exactly this purpose, and using them would save hundreds, if not thousands, of individual contracts from being developed and negotiated with each of the companies trying to cover a port's firefighting requirements. When one realizes that each of these departments has its own unique set of contracting issues, the problem becomes enormous.

Lacking this concession, the salvor will be forced to either to put in place its own capability, (meaning hiring a private capability – expensive), or to identify and sign public resources (time consuming – expensive). However it is resourced, the inport fire-fighting component stands to be an expensive piece of the coverage, a piece that up to now has been available and adequate.

Vessel Response Plan requirements²

§ 155.4030 Required salvage and marine firefighting services to list in response plans.

(a) You must identify, in the geographical-specific appendices of your VRP, the *salvage* and *marine firefighting* services listed in Table 155.4030(b)—Salvage and Marine Firefighting Services and Response Timeframes. Additionally, you must list those *resource providers* that you have contracted to provide these services. You may list multiple *resource providers* for each service, but you must identify which one is your primary *resource provider* for each Captain of the Port (COTP) zone in which you operate. A method of contact, consistent with the requirements in §§ 155.1035(e)(6)(ii) and 155.1040(e)(5)(ii), must also be listed, in the geographical-specific appendices of your VRP, adjacent to the name of the *resource provider*.

Perhaps the biggest singular headache for the vessel owner or operator is the submission of the vessel response plan that includes all the salvage information in it. It is not a trivial task and one that could be overwhelming for someone not familiar with the rules. Each salvor has chosen his/her own way to deal with this issue for clients. For example, Donjon-Smit is offering to write the salvage annex in cooperation with the vessel's plan writer. This takes the burden off the owner and plan writers and places it on the salvor, who needs to know these plans backwards and forwards anyway.

Some other salvors are not offering any plan writing assistance, but, whatever the set-up, the owner must ask himself how the salvor intends to comply with the terms of the plan and/or annex. Familiarity with the plan(s) becomes critical in the time of an actual response.

Pre-Fire Plan identification and development²

§ 155.4035 Required pre-incident information and arrangements for the salvage and marine firefighting resource providers listed in response plans.

(b) *Marine firefighting pre-fire plan.*

(1) You must prepare a vessel pre-fire plan in accordance with NFPA 1405, Guide for Land-Based Firefighters Who Respond to Marine Vessel Fires, Chapter 9 (Incorporation by reference, see § 155.140). If the planholder's vessel pre-fire plan is one that meets another regulation or international standard such as International Convention for the Safety of Life At Sea (SOLAS), a copy of that specific fire plan must also be given to the resource provider(s) and be attached to the VRP.

The pre-fire plan issue had been greatly simplified recently by guidance in the latest FAQ document cited above. The existing SOLAS plan is sufficient to meet the requirement, and a separate plan does not need be developed. This is a great relief to those that thought a separate plan was going to be required. However, the requirement to share that plan with the salvor and its firefighting component has not gone away. There will be a flurry of plans being exchanged with the salvors/firefighters to ensure the intent of this regulation is met.

Certification of the salvor by the planholder²

§ 155.4050 Ensuring that the salvors and marine firefighters are adequate.

(a) You are responsible for determining the adequacy of the resource providers you intend to include in your plan.
(c) A *resource provider* need not meet all of the selection criteria in order for you to choose them as a provider. They must, however, be selected on the basis of meeting the criteria to the maximum extent possible.
(d) You must certify in your plan that these factors were considered when you chose your resource provider.

So, after all is said and done, how does a shipowner certify the capability of its selected salvor(s)? Make no mistake, the Coast Guard is not going to issue any semblance of a 'certified' list of those salvors meeting the 15 criteria listed in the regulation (see *Attachment A*). Instead, they have specifically stated in the regulation that the burden is on the individual owner to make that assessment. The criteria by which the owner will judge the salvor is listed in the 15 salvor qualifications. Many of these 15 qualifications are subjective, posing an interesting dilemma in which the shipowner must develop a means to rate or choose the salvor's capability. To make matters more interesting, the regulations require the selection of a salvor more qualified rather than less qualified. This raises a whole host of related issues as to how the selection criteria are to be defined and ranked.

Once the 15 prerequisites are considered and rated, then comes the assessment of the salvor's capability of meeting the time standards. How this is done can also be rather subjective, since there is no clear way to prove response times. Any potential

salvor should be ready to make this evaluation relatively easy, but it still comes down to a subjective evaluation by the shipowner that the facts stated are, in fact, trustworthy.

COST IMPLICATIONS

So what does this all mean from the perspective of the bottom line? More importantly, standby salvage services are no longer going to be offered at little to no cost. Historically, over the past five years, most salvage standby contracts have been available free of charge. While some companies continued to charge for the services during this period, most were willing to absorb the relatively small administrative costs into the cost of doing business. That is no longer possible, with budgets to maintain a nationwide capability increasing tenfold in some cases. The silver lining in that cloud of bad news is that your salvor should be significantly more prepared to respond to almost any salvage incident. Further, depending on the contract provisions offered by your salvor, it should be significantly easier to enter into an operational contract that treats both salvor and shipowner equally.

The bottom line is this: Similar to OSRO services, the SMFF services will now come at an annual cost. Since initially the new SMTT regulations apply only to tank vessels, the initial cost impacts may be spread over just that subset of vessels. It isn't clear at the time of writing how the salvors will choose to address this. If the non-tank vessel owners continue to be offered the no-charge service, the tanker service will be proportionally higher. On the other hand, if the salvor increases his cost structure across all vessels, the rate will be relatively less.

CONCLUSION

This discussion is admittedly brief, but hopefully helps resolve some misperceptions that may exist, but, more importantly, identifies work that must be done between now and February 2011 by the maritime industry trading to or within the United States and its territories. The salvage regulations have been in the works for many years. Whether or not we agree with specific provisions, they have arrived and we must learn to work within their requirements. It is up to all of us to speak candidly with the Coast Guard to ensure we have a good understanding of the rules' intent and what they, the Coast Guard, will consider acceptable.

And finally, while the 2011 date is specifically for tank vessels only, the Coast Guard has gone on record and said that the non-tank vessel salvage requirements will not be far behind. It is to everyone's advantage to begin the process of salvor selection now... good luck!

REFERENCES

¹ *Frequently Asked Questions; Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil, (33 Code of Federal Regulations Part 155),*

December 31, 2008, US Coast Guard, March 2010. See the following link to the Donjon-Smit website for full details: <http://www.donjon-smit.com/opa90/faqs/>

² *Coast Guard 33 Code of Federal Regulations Part 155; Salvage and Marine Firefighting Requirements; Vessel Response Plans for Oil, Final Rule, Federal Register, December 31st, 2008. (Paragraph and section numbers are provided within each reference).*

This paper represents the opinions and interpretations of the author, and do not necessarily present the opinion or position of the American Salvage Association.

APPENDIX A: Salvor prerequisites

§ 155.4050 Ensuring that the salvors and marine firefighters are adequate.

When determining adequacy of the resource provider, you must select a resource provider that meets the following selection criteria to the maximum extent possible:

- (1) *Resource provider* is currently working in response service needed.
- (2) *Resource provider* has documented history of participation in successful salvage and/or marine firefighting operations, including equipment deployment.
- (3) *Resource provider* owns or has contracts for equipment needed to perform response services.
- (4) *Resource provider* has personnel with documented training certification and degree experience (Naval Architecture, Fire Science, etc).
- (5) *Resource provider* has 24-hour availability of personnel and equipment, and history of response times compatible with the time requirements in the regulation.
- (6) *Resource provider* has on-going continuous training program. For marine firefighting providers, they meet the training guidelines in NFPA 1001, 1005, 1021, 1405, and 1561. (Incorporation by reference, see § 155.140), show equivalent training, or demonstrate qualification through experience.
- (7) *Resource provider* has successful record of participation in drills and exercises.
- (8) *Resource provider* has salvage or marine firefighting plans used and approved during real incidents.
- (9) *Resource provider* has membership in relevant national and/or international organizations.
- (10) *Resource provider* has insurance that covers the salvage and/or marine firefighting services which they intend to provide.
- (11) *Resource provider* has sufficient up front capital to support an operation.
- (12) *Resource provider* has equipment and experience to

work in the specific regional geographic environment(s) that the vessel operates in (eg, bottom type, water turbidity, water depth, sea state and temperature extremes).

(13) *Resource provider* has the logistical and transportation support capability required to sustain operations for extended periods of time in arduous sea states and conditions.

(14) *Resource provider* has the capability to implement

the necessary engineering, administrative, and personal protective equipment controls to safeguard the health and safety of their workers when providing salvage and marine firefighting services.

(15) *Resource provider* has familiarity with the salvage and marine firefighting protocol contained in the local ACPs for each COTP area for which they are contracted.