

13th January 1993

TO ALL TANKER MEMBERS

The Britannia Steam Ship
Insurance Association Limited

United States Oil Pollution Act 1990 (OPA 90) - Vessel Response Plans

You are aware that in order to continue trading to U.S. ports all tankers must submit Vessel Response Plans (VRP) to the United States Coast Guard (USCG) before 18 February 1993 and that the VRP must be fully operational by 18 August 1993. Following the submission of a VRP the Coast Guard will review and either approve it or require that it be revised before approval will be granted.

These VRPs must be prepared in accordance with the interim guidelines for development of VRPs as set forth in the USCG's Navigation and Inspection Circular No. 8-92 (NVIC 8-92), dated 15 September 1992, as revised by change 1 to the NVIC dated 4 December 1992. Also to be utilised in the preparation of a VRP are the USCG guidelines for the classification of clean-up contractors (now known as Oil Spill Response Organisations - OSRO) set forth in the USCG's Navigation and Inspection Circular No. 12-92, dated 4 December 1992 (NVIC 12-92).

Certain aspects of these NVICs have caused problems and this circular is intended to assist Members by highlighting issues involved in the appointment of a Qualified Individual (Q.I.) and appropriate OSRO for the ports and places which their tankers may visit. More detailed guidance is given on the principles to be adopted for contractual provisions on indemnities and funding. Tanker owners/operators are also required under the NVICs to describe the organisational structure that will be used to manage the response and Members may wish to appoint an outside organisation to act for them as "Response Managers". If this is done the same principles should be applied to any contract with such an organisation and this circular makes suggestions as to the functions of an outside Response Manager.

Qualified Individual

Under the latest USCG requirements issued in NVIC 8-92 the VRP must identify a Q.I., and at least one alternate, as a shore-based representative of a vessel owner or operator who must meet the following requirements:

- (1) speak fluent English;
- (2) be located in the United States;
- (3) be available on a 24 hour basis;
- (4) be familiar with the implementation of the VRP; and
- (5) be trained in the responsibilities of the Q.I. under the VRP.

The Q.I. must be supplied with a document designating him as Q.I. and specifying his full authority to activate and contract with OSRO(s), act as liaison with the Federal on Scene Co-Ordinator (FOSC) and obligate funds required to carry out response activities. p.t.o.

It should be noted that the authority required is full, not unlimited. This is very similar to the authority given to a ship's master and we would recommend that a Q.I. is controlled in the same way as a ship's master, with a specific set of instructions.

Our recommendation with regard to appointing a Q.I. is that, where possible, a U.S. office of the Member should be designated. If, however, an outside agency is used provision should be made for it to be replaced as soon as possible after any substantial spill with a senior representative from the Member's head office. This individual would then take over the functions of the Q.I. Provision should therefore be made in the contract with an outside Q.I. for the termination and/or hand-over of authority. In addition where an outside agency is used the Q.I. should warrant that he will comply with the requirements imposed on a Q.I. under OPA 90 as set out above and he should agree to participate in any drills which may be necessary. Naturally the Q.I. should also abide by the control and reporting requirements of the Member.

The NVIC 8-92 also states that the Q.I. is not responsible for the adequacy of the owner/operator's plans or for contracting or obligating funds for response resources beyond the full authority contained in his letter of designation. This provides a considerable degree of protection for the Q.I. and should eliminate any need for him to be provided with an indemnity.

In our view, it is essential that the Q.I. remains at all times under the control of the Member and keeps the Member fully informed.

Clean-up Contractors - OSRO

Owners/Operators are required by NVIC 8-92 to identify and ensure the availability, "through contract or other approved means"; of sufficient resources to deal with:

- (1) an average most probable discharge;
- (2) a maximum most probable discharge; and
- (3) a worst case discharge to the maximum extent practicable;

in any area inside the Exclusive Economic Zone of the USA which their tankers visit.

This will probably involve contracts with regional or national organisations to provide the required offshore response capability and local contractors to provide the local response typically required for the average most probable discharge.

In its NVIC 12-92 the USCG has recently agreed to classify OSRO but expressly declined to take any responsibility for the classification. Members therefore need to assure themselves that an OSRO with whom they are planning to contract can perform to the standards required. In particular Members should ensure that any contract contains requirements for the OSRO to perform the required drills (giving prior notice to enable the Member to participate) and keep proper documentation evidencing the drills and for his employees to have the necessary qualifications and certifications (Health and Safety/Hazardous Materials). It is important that the OSRO agrees to have his services and invoices audited by a person or organisation appointed by the Member. The OSRO should also be required to take out his own insurances, in particular for wrongful death and personal injuries under Health and Safety legislation. The contract should provide for the OSRO's service to be terminated at the owner/operator's request.

Response Managers

The NVIC 8-92 requires details of the organisational structure that will be used to manage the response actions, including;

- (i) Command and control;
- (ii) Public information;
- (iii) Safety;
- (iv) Liaison with government agencies;
- (v) Spill operations;
- (vi) Planning;
- (vii) Logistics support; and
- (viii) Finance.

It should be noted that Federal and State agencies will be providing their own management organisations and that some of the above functions should properly be performed by a competent OSRO (items (iii) and (vii)). Many of the other functions could and in most cases should be performed by one person who would be the owners' representative (items (ii), (iv), (vi) and (viii)). There is therefore a minimum requirement for two people, a technical expert (items (i) and (v)) and an owners' representative. Members should consider very carefully whether they need to commit themselves in advance to anything more elaborate.

Indemnities and Funding

In the event that Members are asked to provide indemnities or assurances of funding, we would recommend incorporation of the following provisions, which have the effect of assuring the OSRO of his statutory protection under OPA 90 and that he will be reimbursed:-

Funding

The Association will not provide anticipatory guarantees or promises to advance funds.

The Association will however, be prepared within a reasonable period of time (say 48 hours) after a casualty to guarantee payment by the Member of invoices relating to the services provided under the contract in accordance with the contract terms. Such a guarantee should be subject to the following provisos:

- (a) A fixed US dollar amount;
- (b) A fixed time limit for the services i.e. the letter would guarantee expenses incurred in providing response services up to a fixed period of time as appropriate (e.g. seven days from the incident date) subject to extension by written agreement of the Association; and
- (c) A haul-off clause which provides for the Association's liability to be terminated upon 24 hours notice.

Indemnities

The Association is in principle opposed to the giving of indemnities, however some potential OSROs have requested indemnities to assure them of responder immunity under the provisions of OPA 90. The Association considers this to be a reasonable request and would therefore be willing to consider indemnities based on the following principles:

- (a) The OSRO indemnifies the owner/operator against liabilities for removal costs and damages incurred as a result of breach by the OSRO of the response agreement, the gross negligence or wilful misconduct of the OSRO, or breach of applicable law or regulation by the OSRO.
- (b) The owner/operator indemnifies the OSRO against liabilities for removal costs and damages incurred as a result of the owner/operator's breach of the response agreement, breach of applicable law or regulation, or the gross negligence/wilful misconduct of the owner/operator.
- (c) The owner/operator indemnifies the OSRO for any liabilities for removal costs and damages arising out of a discharge of oil from the vessel concerned save to the extent that:
 - 1. the OSRO is entitled to responder immunity under OPA;
 - 2. the liabilities arise from the gross negligence or wilful misconduct of the OSRO;
 - 3. the liabilities are incurred in respect to personal injury or wrongful death;
 - 4. the owner/operator would have been entitled to a defence if sued directly;
 - 5. the owner/operator would have been entitled to limit liability if sued directly.

It would also be advisable for Members to include a general limitation provision so that the total aggregate of all liabilities incurred cannot exceed the limit of Club cover.

Contracts

The Managers will be happy to assist in vetting any contracts with OSROs and proposals to appoint particular Q.I.s or Response Managers. Members should take great care to ensure that full control of any operation and expenditure remains with them at all times since they have the ultimate responsibility under OPA 90. In order to ensure recovery from the Association, Members should make certain that the Association and any experts appointed to advise the Member, including any representative of the International Tanker Owners Pollution Federation (ITOPF), are kept fully informed at all times and that Q.I.s and Response Managers are obliged to report to them.

Members are strongly advised to submit their VRPs to the Association in good time and in particular to consult with the Association on any proposed contracts and before the appointment of any Q.I. or Response Managers.