

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2018 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

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### C. Practical Implications for Oil Spill Response

We will consider a worst-case scenario to explore the possible limitations of the federal approach to the Holder-RAC relationship.<sup>30</sup> In this hypothetical situation, a tanker vessel owned and operated by its own shell corporation (only asset is the vessel) has contracted with a RAC, and the RAC contract has been reviewed and approved by the Coast Guard as part of the tanker vessel c-plan. The RAC contract reflects that the RAC is excused from performance if the Holder is bankrupt or insolvent. The tanker has a spill in Prince William Sound.

Assuming the entire tanker contents were spilled, this would undoubtedly qualify as a spill posing a "substantial threat", which the OSC must take control of. Assume further that the RAC determines the Holder to be insolvent because the tanker itself was severely damaged, and refuses to perform under the c-plan. The OSC has the following options:

(1) The OSC could order the Holder to provide response, but the Holder could not comply without the cooperation of the RAC. Further, the tanker owner might simply declare bankruptcy in an attempt to protect itself from liability.

(2) The OSC could consider ordering the RAC to respond, notwithstanding its interpretation of the contract. It is open to question whether the OSC has legal authority to order action from a party not legally liable to the government to provide such action.<sup>31</sup> Any third party contract theories (direct enforcement of the Holder-RAC contract by the contract's beneficiary) would have to be litigated in court before RAC response action would be required.

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<sup>30</sup> Many of these hypothetical facts were taken from Mike Frank's letter to Sheila Gottehrer.

<sup>31</sup> I have not researched this issue under federal law. Based on my experience as a state government enforcement lawyer, however, the authority to issue orders is directly proportional to the order recipient's liability for some violation of law. See, also, § 4201(a)(3)(A), OPA, which directs federal agencies, states, the owner/operator and any other person participating in a removal action to act in accordance with the OSC's direction. Is the RAC covered by this section if it does not choose voluntarily to participate in the response action? Can this section of the statute be used to force a RAC to participate in the response action? I suspect that to force them to participate without reimbursement could be considered a taking of property without due process of law.

(3) The OSC could order the RAC to respond and reimburse the RAC's costs from the Fund, thus making the RAC an OSC contractor. This may be the only practical solution for a federal response, if no other federal response equipment and personnel is available for timely use in Alaska. It is assumed the OSC's willingness to federalize the response would not be influenced by the likelihood of an unsuccessful cost recovery for the Fund (since the tanker owner lost its only asset).

The OSC options do not change significantly if we assume that some lesser quantity was spilled which did not qualify as a "substantial threat" scenario, and the RAC refused to perform for whatever reason (including the Holder's cancellation of the contract). The major difference is that a viable owner/operator would still exist from whom the OSC could successfully cost recover. The potential delay in response action remains while the broken Holder-RAC relationship is discovered and addressed.

#### D. State Options

It appears that the federal government will not, and to some extent cannot, address the Holder-RAC relationship in a manner which satisfies RCAC and others' concerns. The state can address its concerns in three ways: (1) influence federal c-planning regulatory developments to incorporate Alaska concerns on this issue to the greatest extent possible; (2) adopt state legislation to impose RAC liability for response in the event of a spill; (3) develop state contingency planning requirements that incorporate the Holder-RAC relationship.

The first option -- influencing federal regulations -- is easy and has already been initiated. Proposed and developing proposals for the NCP, area c-plans, vessel c-plans, and fixed facility c-plans should be monitored, and informal and formal comments submitted at every opportunity.

The last two options -- liability legislation and state c-planning changes -- cannot be evaluated without an analysis of OPA 90 preemption issues. Although OPA 90 purports not to preempt state law, the nature of overlapping jurisdictions, OPA 90 legislative history and the common law of preemption suggest that duplication of requirements should be undertaken cautiously.

As the following discussion of preemption supports, imposing liability on RACs under state statute is not preempted. Contingency planning efforts should, however, be tailored to supplement (rather than contradict) federal c-planning requirements. To the extent that a void currently exists in federal requirements for c-plans under OPA 90, however, there may be a window of opportunity for quick action.

### Preemption<sup>32</sup>

OPA 90 provides that there is no preemption of

the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to --

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge.<sup>33</sup>

Similarly, OPA 90 does not

affect the authority of any State or political subdivision thereof --

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law

relating to the discharge, or substantial threat of discharge, of oil.<sup>34</sup>

The statutory language is extremely broad -- no preemption of additional liability or additional requirements with respect to oil spills and their removal. The legislative history, however, is not as clear about the breadth of preemption. The committee reports specifically address preemption (or non-preemption) of state liability schemes, state oil spill funds (uses and sources of funding), and state penalties.<sup>35</sup>

There is only one instance in which state contingency plans are referred to. HR 1465, which was the basis for the conference committee report and the legislation as enacted, apparently

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<sup>32</sup> I have not exhaustively researched the law of preemption. This analysis is based on a review of the OPA 90 statute, its legislative history and selected preemption case law in oil spills preceding OPA 90 enactment.

<sup>33</sup> § 1018(a)(1), OPA.

<sup>34</sup> § 1018(c), OPA.

<sup>35</sup> See, e.g., *Conference Report, supra*, at 121; *House Report 101-402, Part 1: Committee on Public Works and Transportation (9-18-89)* at 38; *Senate Report 101-94: Committee on Environment and Public Works (7-28-89)* at 6, 17 and 18.

originally included a section stating that there was no preemption of "any authority that the State of Alaska may have to regulate oil tankers or provide for oil spill contingency plans in State waters."<sup>36</sup> This language is not found in OPA 90, nor does the legislative history clarify why it was dropped. It is possible that the conference committee decided that the broad preemption language of Section 1018 encompassed these concepts. Alternatively, it is possible that preemption of contingency planning was not intended.

The statements made in both the House and Senate for adoption of the conference report reflect that the Congresspersons were under the impression that the preemption issue was limited to liability and state oil spill funds.<sup>37</sup> Rep. Craig's statement reflects that the intent may have been to preempt state contingency planning in an effort to promote coordination and consistency.

Assuming, *arguendo*, that OPA 90 does not preempt state c-planning requirements, how will federal and state c-planning requirements work together as a practical matter? If there are contradictory requirements, whose requirements will be enforced? These types of questions are likely to be answered in the context of an industry challenge to state regulations, asserting preemption by OPA 90.

In order to avoid such a challenge, or to avoid federal support for such a challenge, it may be wise to design any state c-planning requirements to supplement, rather than contradict, federal requirements. This is difficult, however, when the federal requirements are not yet known.

If Alaska c-planning requirements can be developed before the federal NCP, area c-planning, or vessel/facility c-plan regulations are promulgated, it is possible that preemption arguments may be decided in the state's favor since contradictions will not yet be able to be determined.<sup>38</sup> In addition, the state's requirements may provide a minimum standard (floor) for the federal requirements to build from.

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<sup>36</sup> House Report 101-402, Part 2: Committee on Merchant Marine and Fisheries (9-18-89) at 92.

<sup>37</sup> I have attached my notes from these Congressperson statements on the issue of preemption at the end of this memo.

<sup>38</sup> The common law of preemption is that a state can act in the absence of federal regulations in a particular area. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 8 E.L.R. 20255 (1978). The application of this general rule in the case of anticipated federal regulation is unknown.

#### 4. Conclusion

The Holder-RAC relationship is not directly addressed in OPA 90, and does not appear to be addressed comprehensively in the federal government's OPA 90 implementation. The State is not precluded from addressing this issue by imposing liability on RACs or developing c-plan requirements to document or explore the relationship.

Senate Adoption of Conference Report - 136 Cong., Rec. S11536-  
S11548 - 8-2-90

Sen. Kerry (Mass.): "Lastly, I want to applaud the fact that the legislation preserves the right of States to require stricter standards of liability than current international protocol standards. I believe this is a key provision in the legislation in that it preserves Massachusetts' tougher standards of liability for anyone responsible for polluting our coastline."

Sen. Stevens (Alaska) Exhibit 1 - summary of OPA 90:  
A good samaritan provision protects persons (other than the spiller) acting under the direction of the President or in compliance with the NCP from liability, with the exception of gross negligence or willful misconduct

Sen. Gorton (Wash) - ... I take great pride in seeing that the Senate's insistence against preempting State unlimited liability laws prevailed in the conference. This provision was essential to preserve our right in Washington State to require unlimited liability."

Sen. Lautenberg (NJ) - The conference report also protects the right of States to impose their own standards of liability on oil operations. ... The rights of States to have tough oil spill laws are protected.

Sen. Bentsen (Texas) - The bill also preserves the right of States to have oilspill [sic] liability laws

Sen. Levin (Mich) - It also preserves the right of individual States to enact even tougher spill response and prevention measures

Sen. Moynihan (NY) - ... we did something of large importance to our Federal System and to the majority leader. We did not preempt State law in the handling of these matters.

House Adoption of Conference Report - 136 Cong. Rec. H6933-H6949  
- 8-3-90

Mrs. Lowey (NY) - ... preserves the rights of States to impose liability for spills as they judge appropriate. ... The conferees wisely agreed to preserve the right of States to establish their own liability and compensation systems. States like New York, whose waters and coastlines are threatened by heavy tanker traffic, should have the freedom to impose standards that reflect the importance of the resources at risk. This legislation rightly protects those essential rights from encroachment by Federal law or international convention.

Jones (NC) - In addition, the Federal law does not preempt States, so they can impose even stricter requirements if they choose. [in paragraph discussing liability]

Conte (Mass) - Second, the legislation does not preempt State liability laws, therefore allowing States to pass even tougher standards, if they so desire.

Hammerschmidt (Ark) - This bill will ensure that we have a uniform Federal approach to liability even though it is not a national or an international approach without preemption and without the protocols.

Stangeland (Minn) - We've also included a limited immunity clause for certain public or private response efforts. This important provisions [sic] is meant to help foster greater use of cleanup contractors and cooperatives by meeting their concerns about financial risks and liability exposures.

Shumway (Cal) - And finally, this bill purports to be a comprehensive domestic regime but it is not. For 14 years, this house has strongly supported an oilspill bill which replaces the existing patchwork of State and Federal laws with one single, clear-cut regime. Despite this longstanding, principled position, we have now bowed to the rhetoric and misperceptions of the environmental lobby and eliminated the guts of the liability section of the bill by removing the preemption provision. This bill, then, only perpetuates much of the existing confusion in liability and compensation that follows an oilspill -- the very type of confusion which originally was one of the driving forces behind the bill.

Lagomarsino (Cal) - Also, by expressly preserving States' authority to impose additional liability or requirements, and preserving the States' authority to establish their own spill funds and to impose fines and penalties, the conference report recognizes the need for States to protect their shores and lands.

Miller (Wash) - States like Washington will be able to keep their

unlimited liability laws. And Washington will be allowed to determine cleanup standards to ensure that we can protect our waters and beaches.

Ms. Snow (Maine) - In particular, I am pleased that the conferees have retained the right of the States to set their own oil spill liability limits and cleanup funds.

I say that because the State of Maine has consistently been recognized as a leader in the adoption of effective oil spill prevention, cleanup, and liability laws. Maine has more stringent safety standards than Federal law and many other States. ... I applaud the decision of the conferees to recognize that State laws, like those of Maine, should augment and not be replaced by Federal standards. ... In addition, we have taken the important step ensuring that the States also have the opportunity to enact laws that will protect their coasts. This is a vital provision that will allow States to take the necessary actions to ensure that specific needs of their marine environment are addressed.

\*\*\*\*\* Craig (Idaho) Public Works & Transpo Committee (on conference committee for S 405 and H 2004)- During conference committee consideration, I was concerned that the legislation might preempt a considerable amount of State authority, making it the sole responsibility of the Federal Government to deal with spills. This would not be acceptable -- I believe that States need to be assured an adequate role in these situations. However, I also understand the need of the Federal Government to coordinate contingency planning and response efforts for major spills. There is no doubt that this was a difficult balance to strike, but one I believe had to be reached. As a result, I was glad that we were able to arrive at a compromise, settling upon workable Federal-State balance.

Pelosi (Cal) - Additionally, this legislation will maintain the right of States to develop their individual liability and compensation standards.

INSURANCE  
ISSUES RELATED  
TO SPILL RESPONSE  
CONTRACTORS

**INSURANCE ISSUES RELATED TO  
RESPONSE ACTION  
CONTRACTORS**

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Prepared by Gene Burden  
Tesoro Alaska Petroleum Company  
October 30, 1991

The work plan established by the Citizen's Oversight Committee on Oil and Other Hazardous Substances (hereinafter the "COC") in response to the legislature's directives under H.B. 196 included a section on the status of insurance as it relates to the Response Action Contractor (hereinafter "RAC") as defined under AS 46.03.822. Tesoro Alaska agreed to provide input on this topic with the initial objective of determining to what extent insurance is available for RACs; the costs of such coverage; and the affects on coverage based on the existence of state responder immunity law.

**INTRODUCTION**

The availability and cost of insurance coverage for a RAC is subject to the same factors as other insurance applicants and can vary substantially between geographic areas based on the applicant's experience, local and state laws/regulations, and the perceived risks of a particular operation. The variability in these ratings makes concise cost comparisons between jurisdictions difficult; and based on our review, precludes offering definitive conclusions as to the specific effects of RACs liability immunity

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on actual expected premiums.

The RAC liability concerns arise from damages caused by their negligence in the clean-up operations and in the disposal of the contaminating substances. The availability of public liability insurance for emergency response contractors including oil spill response contractors is typically available in the London market and is rated based on the following factors:<sup>1</sup>

- 1) Revenues and/or payroll size;
- 2) Historical loss experience;
- 3) Contractual indemnities and their value;
- 4) Statutory immunities; and
- 5) The general state of the insurance market.<sup>2</sup>

**INSURANCE SCENARIO FOR A RAC**

A recommended package of coverage for a RAC was developed by a Soriero & Seffens broker to include the following:<sup>3</sup>

1. Hull & Machinery: covering equipment, barges, service boats/tugs, and crew/miscellaneous boats;

The Hull & Machinery coverage would provide

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<sup>1</sup>Source: Mark R. Mozell, Commercial Broker, Soriero & Seffens, Inc., 1300 Post Oak Boulevard, Suite 1800, Houston, Texas 77056-3013 (713)993-9913 in letter dated August 20, 1991.

<sup>2</sup>Mr. Mozell reports that the London insurance market is currently suffering through its worst results in years which has prompted rises in rates and additional underwriting restrictions.

<sup>3</sup>Recommendations provided by Soriero & Seffens in letter dated September 20, 1991.

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physical damage coverage on an "all risks" basis subject to a rate of approximately 1.25% of value. Coverage would be the usual required for vessels subject to a deductible of \$25,000 each occurrence.

2. Protection and Indemnity Risks;

Protection and Indemnity covers liabilities over water arising out of the owned vessels. This can include injuries to the crew. The costs for coverage provided by Soriero and Seffens were as follows:

- Barges.....\$ 7,500 each
- Crewed Boats.....\$10,000 each
- Crew coverage.....\$ 7,500 - \$10,000 per crew member
- Pollution coverage...\$25,000

The above premiums would obtain \$1,000,000 coverage subject to a \$25,000 deductible.

3. Real and personal property;

This would cover the office and contents, miscellaneous property and inventory, materials and equipment. The expected premium would be based on a rate of 1.0% of coverage with a \$10,000

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deductible for each loss.

4. Comprehensive General Liability; and

The General Liability insurance provides the "land based" liability coverage. It is expected that the limits would be \$1,000,000 with this coverage placed as underlying to an Excess Liabilities section.

5. Excess Liabilities.

The Excess Liabilities coverage would augment the underlying placements described above. Limits for excess can presently be obtained at a pricing of approximately \$2,000 per million of coverage. A \$25 million limit would cost \$50,000. The coverage would include Pollution liabilities on a "sudden and accidental" basis.

Our inquiry into insurance rates for RACs focused on two different RAC scenarios:

1) **SPILL CO-OP:** The model spill co-op for insurance underwriter evaluation was described as located in Alaska with approximately \$10 Million in capital equipment; 15 employees; one 30,000 bbl barge; four response assist boats (24' - 40' each); 1 larger service boat (50'+); and most likely responding to small

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fuel spills of less than 100 barrels. The planning standard required for crude oil response by this co-op is to remove 50,000 barrels within 72 hours after a spill.

The above description illustrates that a co-op such as described above would expect to incur annual insurance costs in excess of \$245,000 as illustrated below:

|                                               |            |
|-----------------------------------------------|------------|
| > Hull and Machinery (rate 1.25% of value)... | \$ 12,500  |
| > Protection & Indemnity.....                 | \$ 132,500 |
| > Real & Personal Property.....               | \$ 10,000  |
| > Comprehensive general liability.....        | \$ 40,000  |
| > Excess Liability of \$25 Million.....       | \$ 50,000  |

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ESTIMATED TOTAL FOR A CISPRI SIZED RAC      \$ 245,000

2) **GENERAL ENVIRONMENTAL SERVICE COMPANIES:** This type of firm may offer a variety of services to a wide range of clients. This could include refineries, processing plants, etc. for operations and maintenance work and for land based environmental clean-ups. In addition this firm may maintain a cadre of trained response personnel and support equipment to assist in response to a spill that is managed by another party such as a Responsible Party, a Spill Response Co-op, or a governmental entity.

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Soriero & Seffens views this type of organization much differently than a pure spill response co-op. Such an organization would probably not have as much spill response equipment and as high a capital investment to insure. In addition these firms were expected to rely more heavily on limited indemnity provisions in their agreements.

A review of RAC indemnifications was attempted via a survey conducted by the Alaska Department of Environmental Conservation. The survey information solicited included questions about the level of general liability coverage maintained and its cost. In addition information regarding the RAC's requirements for indemnification was requested. The ADEC will report the results of their survey to the Citizens Oversight Council.

Tesoro Alaska has response agreements with five different response action contractors: Cook Inlet Spill Prevention & Response, Inc. (CISPRI); Alyeska Pipeline Service Company (Alyeska); VECO; Martech; and VRCRA. A summary of the relevant indemnity language in each of these contracts is provided on the following page.

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**SUMMARY OF TESCRO ALASKA CONTRACTS WITH  
SPILL RESPONSE CONTRACTORS AND  
EXISTING INDEMNITY PROVISIONS**

| <b>R A C</b> | <b>DATE OF<br/>CONTRACT</b> | <b>GENERAL DESCRIPTION<br/>OF SERVICES</b>                                                      | <b>INDEMNIFICATION<br/>LANGUAGE</b>                                             |
|--------------|-----------------------------|-------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| CISPRI       | 5/29/91                     | Spill response<br>services in Cook<br>Inlet, Alaska                                             | Article 7 of the<br>Agreement is enclosed<br>as Attachment 1 to<br>this report. |
| ALYESKA      | 10/1/91                     | Spill response<br>services (minimum<br>of 72 hours after a<br>spill) in Prince<br>William Sound | Article 5 of the<br>Agreement is enclosed<br>as Attachment 2 to<br>this report. |

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|        |         |                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|--------|---------|---------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| VECO   | 8/14/90 | Back up manpower and clean up assistance in Cook Inlet                          | "Any damage or loss of equipment, tools or consumable, etc., utilized in the course of any response efforts will be considered part of the cost of the response effort and repair and/or replacement cost will be the responsibility of the Client. If, however, gross negligence on the part of VECO's employees is determined to be reason for said damage or loss, then VECO would stand responsible for said additional cost, but only to the extent of repair or replacement cost that were a direct result of VECO's negligence." |
| MARTEC | 8/14/90 | Back up manpower and clean up assistance in Cook Inlet and Prince William Sound | "In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profits or loss of use of property."                                                                                                                                                                                                                                                                                                                  |

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|      |         |                                                                                 |                                                                                                                                                                                                                       |
|------|---------|---------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| VRCA | 8/15/90 | Back up manpower and clean up assistance in Cook Inlet and Prince William Sound | "In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profit or loss of use of property." |
|------|---------|---------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**CONCLUSION**

There is insurance available to Response Action Contractors to cover potential damage claims arising from their activities in response to a spill. The cost of the insurance is dependent on numerous variables including the existence of indemnities and state provided immunities. The spill response co-ops such as CISPRI and Alyeska have broad indemnity provisions in their response action contracts while the contracts examined that have been executed by the General Environmental Service Companies are more limited.

**ATTACHMENT I**

**CISPRI  
RESPONSE ACTION CONTRACTOR**

**May 15, 1991**

**Article 7. Indemnification**

4.2. any applicable remedial action plan approved by the Alaska Department of Environmental Conservation,

4.3. any applicable contingency plan held by CISPRI and approved by the Alaska Department of Environmental Conservation, and

4.4. any applicable order by a State or Federal agency asserting jurisdiction over the actual or threatened release.

5. Spill Notification. User shall provide, and confirm to CISPRI the receipt of, all notifications of any release or threatened release of liquid hydrocarbons to the Alaska Department of Environmental Conservation in the manner prescribed by law.

6. User Warranty. User warrants that all directions and mandates given by User to CISPRI in connection with any release or threatened release of liquid hydrocarbons will be consistent with the plans and orders described in Paragraph 4, above. In the event CISPRI believes that a direction or mandate given by User to CISPRI is not consistent with such plans and orders, CISPRI may suspend or discontinue all or any part of the services being provided, or to be provided, by CISPRI under this agreement.

## 7. Indemnification.

7.1. Special Recitals. User acknowledges that:

7.1.1. Neither this agreement nor any other instrument requires User to use the services of CISPRI or its contractor(s), or to use equipment or materials acquired by CISPRI in connection with any spill control or clean up activities;

7.1.2. User is solely responsible for all planning, preparation, equipment acquisition, contracting and operations in connection with spill control or clean up necessitated by a spill originating from User's equipment or facilities;

7.1.3. For the purposes of any dispute related to the enforceability of these indemnification provisions, User waives any claim that:

7.1.3.1. it did not have adequate opportunity to participate in decisions made by or on behalf of CISPRI with regard to planning, equipment and materials acquisition and maintenance, operations, and other functions;

7.1.3.2. it did not have adequate opportunity to inspect the equipment, materials and supplies that have been acquired by CISPRI and to evaluate their condition and usefulness to the member in the event of a spill;

7.1.3.3. it did not have adequate opportunity to evaluate the ability of contractor(s) engaged by CISPRI to be of assistance to User in the event of a spill;

7.1.4. Any and all equipment, supplies, materials, and services provided by CISPRI to User are provided "as is, where is," and neither CISPRI nor any member of CISPRI makes any representation as to the merchantability or fitness for any particular purpose of the same.

7.1.5. If these indemnification provisions were not included in this agreement, CISPRI would be unwilling to enter into this agreement.

7.2. Indemnification. It is the intent of the parties that User shall assume all indemnification responsibilities provided herein. User hereby agrees to indemnify, defend, and

hold harmless CISPRI, its members, directors, officers, managers, executive committee, contractors and employees, together with all officers, directors, employees and affiliates of each of the members of CISPRI, and each of them, from and against any and all claims, demands, causes of action, damages, costs, fees (including reasonable attorneys' fees), expenses, penalties, losses or liabilities, in law or in equity, of every kind and nature whatsoever, arising out of or in any way connected with:

7.2.1. Any and all actions, or failures to act, on the part of CISPRI, its members, staff and contractor(s), carried on under or in connection with materials, equipment, supplies or services (hereinafter, collectively, "assistance") requested or received by User, including, without limitation, the activities of members of CISPRI as participants in business entities providing vessels, equipment and material to CISPRI;

7.2.2. Any and all penalties, fines or other liability imposed on account of the violation of any law or regulation, compliance with which is left by these bylaws to User, if such penalties, fines or other liability arise out of or are in any way connected with assistance requested or received by User; and

7.2.3. Any and all liens, claims, assessments, levies and stop notices of labor, and any other liens or claims on account of overdue or other deficient handling of charges for labor or materials, if such liens, claims, assessments, levies, and stop notices of labor, or other liens or claims arise out of or are in any way connected with assistance requested or received by User.

7.3. Extent of Indemnification. The indemnification obligations of User are fully effective even if such claims, demands, causes of action, damages, costs, expenses, penalties, losses or liabilities were caused or contributed to, in whole or in part, by:

7.3.1. The active or passive negligence or other fault (including gross negligence) of CISPRI, its members, staff or contractor(s), or their agents, representatives or employees;

7.3.2. Any equipment or materials supplied to User by CISPRI, howsoever caused, whether by failure, malfunction or defect, latent or otherwise, in said equipment or materials, or by the maintenance thereof; or

7.3.3. The liability without fault of CISPRI, its members or contractor(s), or their agents, representatives or employees.

The obligations of indemnification are not limited, restricted, or in any way affected by the amount of insurance carried by User, or by any terms or conditions of any insurance policies. The obligations of indemnification shall survive the termination of this agreement, the dissolution of CISPRI and the withdrawal of any member from CISPRI.

7.4. Indemnification Duties. User assumes, without limitation, the following obligations:

7.4.1. At its own cost, expense and risk, to accept and conduct the defense of any and all suits, actions and other legal proceedings that may be brought or instituted against the indemnitees, or any of them, and prosecute any appeals;

7.4.2. To pay and satisfy any and all settlements, final judgments and decrees that may be paid by, or enforceable against, the indemnitees, or any of them;

7.4.3. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, in order to enforce the indemnification provisions of these bylaws; and

7.4.4. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, prior to the assumption of indemnification responsibilities by User in connection with any and all suits, actions and other legal proceedings described above.

7.4.5. After User has assumed such responsibility, any and all indemnitees are entitled to participate at its or their sole cost and expense in the defense of any suit, action, or other legal proceeding without affecting the indemnity obligations of this agreement.

#### 7.5. Administration.

7.5.1. In requesting that CISPRI furnish assistance, and in utilizing and receiving the benefits of assistance, User reaffirms thereby its commitment to perform its indemnification obligations as provided herein.

7.5.2. CISPRI may, if it so elects, pay and discharge any liens or overdue charges for labor, equipment, or materials incurred by User as may be reasonably necessary to protect the interests of CISPRI. Any and all such payments shall be for the account of User.

7.5.3. The provision of assistance by CISPRI to User does not constitute or affect any construction contract under AS 45.45.900.

8. Insurance. At all times during the term of this agreement, User shall carry and maintain in force with carriers satisfactory to CISPRI, Workers' Compensation (including adjustments for marine service) and Employers' Liability Insurance in accordance with the law that may be applicable to its employees, and Comprehensive General Liability and Automobile Liability Insurance covering injury or death of persons and property damage in an amount not less than ten million dollars. User shall provide certificates of insurance for each of these policies at the request of CISPRI. No such insurance will be materially changed during the term of this agreement without at least thirty days' written notice to CISPRI. Nothing contained in this clause shall limit or waive User's legal or contractual responsibilities to CISPRI or others.

8.1. User agrees to have its insurers add CISPRI as an additional insured or loss payee under any policies of insurance applicable to this agreement, and to obtain a waiver of its insurers' rights of subrogation against CISPRI and CISPRI's members and their employees.

8.2. In the event User elects to self-insure, CISPRI reserves the right to approve such self-insurance and to request and receive such information as CISPRI deems necessary to evaluate the self-insurance provided by User. In any case, if User elects to self-insure, User shall treat CISPRI as an additional insured or loss payee and hereby waives any rights of subrogation against CISPRI and CISPRI's members and their employees.

#### 9. Accounting and Audit.

9.1. CISPRI agrees that all financial settlements, billings, and reports rendered to User, as provided for in this agreement, and/or any amendments to it, will reflect properly the facts about all activities and transactions handled for the account of User, which data may be relied upon as being complete and accurate in any further recording and reporting made by User for any purpose.

**ATTACHMENT II**

**ALYESKA**

**RESPONSE ACTION CONTRACTOR**

**October 1991**

**Article V. Indemnify**

Alyeska shall use its best efforts to include in any contracts with its subcontractors a provision similar to the foregoing so that Contracting Vessel shall have access to pertinent records of such subcontractors for the purpose of verifying the accuracy of Alyeska's costs in performing services under this Agreement.

## ARTICLE V

### INDEMNITY

5.1 Alyeska and Contracting Vessel recognize that, in connection with the performance of this Agreement: (i) AS 46.03.826(15) defines a response action contractor as a person who is retained by a person potentially liable for a release or threatened release of a hazardous substance to provide response actions to such release; (ii) AS 46.03.825(a) provides that a person who is a response action contractor with respect to a release or threatened release of oil (defined to mean a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product) whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that the response action contractor (1) would have been liable for the initial release or threatened

release under AS 46.03.822, (2) acted with gross negligence or intentional misconduct, or (3) without the approval by the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822; provided, however, the above limitations of liability do not apply to (1) an action for personal injury or death, (2) an action for damages to tangible personal property not caused by oil, or (3) an act or omission that occurs more than 15 days after the release; (iii) the Services to be performed by Alyeska are in the public interest to protect the environment and are in the best interests of Contracting Vessel to attempt to minimize its exposure to liabilities; (iv) accidents and events may occur that result in the damage to or loss of property, in the injury to or death of persons, in spillage, or pollution, or environmental damage; (v) the extraordinary nature of the Services may require actions by Alyeska, its Owner Companies or their respective subcontractors that can give rise to fines, penalties, and claims, including but not limited to claims based on negligence; (vi) Alyeska has based the charges for its Services on the understanding that Contracting Vessel, or anyone asserting rights on its behalf, will not challenge Alyeska's right to be indemnified as provided in this Article V and that without such assurances Alyeska

considers its potential risks and liabilities to be too substantial to provide the Services for the charges set forth herein; and (vii) certain risks and liabilities may be covered by Financial Responsibility, Insurance, or other means not addressed in this Agreement. Notwithstanding any such Financial Responsibility, Insurance, or other means that Alyeska or Contracting Vessel may have or acquire to cover such risks and liabilities, and notwithstanding that certain legal authorities may have questioned the concept of one party contractually agreeing to indemnify another party for its sole negligence, Alyeska and Contracting Vessel fully understand and recognize that the nature of the Services to be provided under the terms set forth in this Agreement make it appropriate and equitable to allocate the risks and liabilities as set forth in this Article V. Therefore Alyeska and the Contracting Vessel agree that responsibility for risks and liabilities arising out of the performance of (or the failure to perform) the Services by Alyeska shall be allocated to Contracting Vessel in the manner set forth in Sections 5.2 and 5.3, regardless of who may be at fault or otherwise responsible under any statute, rule, or theory of law, even if the subject damage, loss, injury or death is wholly or partially attributable to the active or passive negligence of Alyeska or its Owner Companies or Alyeska's subcontractors or the unseaworthiness of any vessel.

5.2 The following risks and liabilities that may occur as a result of or in connection with the Services performed by Alyeska are allocated solely to the Contracting Vessel:

(a) Any damage to or loss of: barges, lighters, tugs and other vessels owned, chartered or used by Alyeska or third-parties, specifically including but not limited to all items set forth in Sections 4.1 (e), (f) and (g) of this Agreement; docks, berths, wharfs, shoreside facilities and installations; and navigation aids, and any other property that may be damaged or lost.

(b) Bodily injury including but not limited to physical injury, death, sickness, disease or any other type of injury to: employees of Alyeska, its Owner Companies or the Contracting Vessel; employees of subcontractors of Alyeska, its Owner Companies or Contracting Vessel; and all other persons.

(c) Any fines, penalties, or other charges or costs imposed by any federal, state or local authority.

(d) Any claims for environmental damage to, or loss of, natural resources, wildlife, or public and private property; any other claims concerning the environment; any claims by fishermen, boat owners, or any other party or interest asserting any claim.

5.3 For the risks and liabilities set forth in Section 5.2, Contracting Vessel shall indemnify, defend and hold harmless Alyeska, its Owner Companies, their affiliates (including any person or entity controlling, controlled by, or under common control with Alyeska or any of its Owner Companies), subcontractors of Alyeska who assert claims against Alyeska, and each of their respective directors, officers, employees, agents, successors, and assigns (collectively, the "Indemnified Parties")

against all claims, liabilities, obligations, demands, losses, deficiencies, or damages in personam and/or in rem (including but not limited to compensatory, incidental or consequential damages, to the fullest extent permitted by law) that may be asserted against the Indemnified Parties by any party. The obligations undertaken by Contracting Vessel in this Article V are in addition to the reimbursement of expenses provided in Article IV.

5.4 The Contracting Vessel shall, at its sole expense, investigate, respond to, and provide defense for, any claim, demand or suit for which it gives an indemnity herein. Nothing in this Article V is intended to, or shall be construed to, constitute an admission of liability on the part of either Alyeska, its Owner Companies or Contracting Vessel with respect to third parties, and Alyeska and Contracting Vessel expressly disclaim any intention that any third party (other than the Indemnified Parties and third parties providing evidence of Financial Responsibility) shall be a third party beneficiary of the provisions of this Article V.

5.5 Contracting Vessel shall reimburse the Indemnified Parties for all legal expenses (including but not limited to actual attorneys' fees, costs and allocated expenses for in-house legal services) related directly or indirectly to (i) the Spill Prevention Services that are in addition to the regular vessel escort services and Oil Spill Response Services provided by Alyeska, (ii) any claim against the Indemnified Parties for which liability is allocated to Contracting Vessel, or (iii) any action

or proceeding to enforce the rights provided the Indemnified Parties under this Article.

5.6 Notwithstanding any of the provisions of this Article V, Alyeska and Contracting Vessel agree that the Contracting Vessel's responsibility to Alyeska to indemnify, defend, and hold harmless does not include risks and liabilities arising out of Alyeska's gross negligence, willful misconduct and/or criminal misconduct.

#### ARTICLE VI

##### FINANCIAL RESPONSIBILITY

6.1 Contracting Vessel, prior to the effective date of this Agreement, shall provide written evidence to Alyeska of Financial Responsibility, Insurance or a combination thereof.

6.2 The minimum amount of Financial Responsibility that Contracting Vessel shall provide to cover Contracting Vessel's obligations under this Agreement shall be in an amount equal to one billion dollars (\$1,000,000,000); provided, however, if Contracting Vessel uses a combination of Financial Responsibility and Insurance, or solely Insurance, to underwrite its obligations under this Agreement, the amount shall be One Billion Two Hundred Million Dollars (\$1,200,000,000). In the event Alyeska agrees to a lesser amount of financial responsibility and/or insurance during the term of this Agreement, the lesser amount will also be available to Contracting Vessel by a mutually agreed to amendment to this Agreement.

- LEGISLATIVE  
HISTORY OF  
IMMUNITY FOR  
RESPONSE ACTION
- CONTRACTORS UNDER  
THE OIL POLLUTION  
ACT OF 1990

LAW OFFICES  
**GROSS & BURKE**  
A PROFESSIONAL CORPORATION  
424 NORTH FRANKLIN STREET  
JUNEAU, ALASKA 99801

1

AVRUM M. GROSS  
SUSAN A. BURKE

(907) 586-2777

October 10, 1991

To: Sheila Gottehrer

From: AV Gross

Re: Legislative History of Immunity  
for Response Action Contractors  
under Oil Pollution Act of 1990

Section 4201(a) of OPA 90 amends 311(c) of the Federal Water Pollution Control Act to create a limited liability for certain persons who assist in the clean up of an oil spill. The relevant portion of Sec. 4201 reads as follows:

SEC. 4201. FEDERAL REMOVAL AUTHORITY.

(a) IN GENERAL. -- Subsection (c) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) is amended to read as follows:

"(c) FEDERAL REMOVAL AUTHORITY. --

\* \* \* \* \*

(4) EXEMPTION FROM LIABILITY. -- (A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

(B) Subparagraph (A) does not apply --  
(i) to a responsible party;  
(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);  
(iii) with respect to personal injury or wrongful death; or

(iv) if the person is grossly negligent or engages in willful misconduct.

\* \* \* \* \*

You have asked that we provide you with a brief history of how this limited exemption from liability became a part of OPA 90 and, in addition, an analysis of what was intended by the Congress that included the provision in the Act. Toward that end, we have reviewed the complete legislative history of OPA 90, including all committee reports and the floor debate. That review has produced a fairly clear picture of both the history of and intent behind the limited liability provision.

OPA 90 is the result of an amalgamation of two separate proposals; S.686, which was introduced in the Senate on April 4, 1989 and HR 1465, which was introduced in the House on March 16, 1989. Neither of the bills as initially introduced included any provision limiting the liability of parties who assisted in cleaning up an oil spill. The Senate bill went through limited committee hearings and passed the Senate on August 15, 1989 without any provisions relating to the liability of response action contractors.

The House of Representatives held extensive hearings on HR 1465 as well as on HR 3027, a similar measure. The early mark ups in the Public Works and Transportation Committee and the Science, Space and Technology Committee did not deal with the issues of liability for those who assist in spill

clean-up activities. The first committee to focus on that problem was the Committee on Merchant Marine and Fisheries. The committee added a new section to HR 1465 to deal with clean up activities directed by the President. The new section (Sec. 431 of HR 1465) amended section 311(c) of the Federal Water Pollution Control Act to read in part as follows:

Sec. 431. FEDERAL REMOVAL AUTHORITY

(a) REMOVAL. -- Paragraph (1) of section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)(1)) is amended to read as follows"

(c)(1)(A) The President shall ensure an effective and immediate removal of a discharge of oil or hazardous substance --

(i) into or on the navigable waters; or  
(ii) on the adjoining shoreline to these navigable waters; or

(iii) on the waters of the exclusive economic zone or

(iv) that may affect a natural resources belonging to, appertaining to, or under the exclusive management authority of the United States;

in accordance with the National Contingency Plan, any other contingency plans prepared under subsection (j) of this section, and applicable state law.

(B) The President may remove or arrange for the removal of a discharge, or the threat of a discharge, of oil or a hazardous substance at any time.

(C) The President may direct all Federal, state, responsible party and private actions to remove a discharge, or the threat of a discharge, of oil for a hazardous substance.

(D) When the President retains or directs a person (other than a responsible party) under the authority of subparagraph (B) or (C) of this paragraph, that person is not liable for removal costs or damages other than personal injury or wrongful death arising from his or her removal activities conducted in

accordance with the direction of the President, except in the case of gross negligence or willful misconduct.

(E) Each responsible party shall act in accordance with the National Contingency Plan, the applicable contingency plans required under subsection (j) of this section, and as otherwise directed by the President.

(F) Nothing in this paragraph affects the liability of a responsible party under the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989 (emphasis supplied).

The Committee explained the meaning of the limitation on liability at page 84 of its September 18, 1989 report in these terms:

Under section 311(a)(1)(D) the Committee allocated the primary risk of liability arising from removal and cleanup activities to the responsible party rather than to those persons responding to the spill under the direction of or retained by the Federal government. The Committee intends to ensure immediate response to oil and hazardous substance spills and believes this provision is necessary in light of the substantial financial risks and liability exposure which would otherwise deter vessel operators, spill cooperatives, and spill contractors from providing active assistance. To avoid paralysis of remedial action to spills, this paragraph provides that those persons -- other than responsible parties -- who are retained or directed by the President to participate in a cleanup action will not be liable for removal costs or damages as defined in this legislation, except in the case of gross negligence or willful misconduct. This limitation of liability does not affect liability for wrongful death or personal injury. Nor does it diminish the liability of those responsible for the spill nor the amount of compensation available to claimants. This limited protection will encourage individuals to assist in cleanup

operations without fear of collateral attacks from responsible parties. The Committee expects that all who take part in removal actions will act responsibly and believes that the elimination of the liability except for gross negligence or willful misconduct will serve as sufficient protection.

Section 311(c)(1)(E) requires the responsible party to act in accordance with the National Contingency Plan, other applicable contingency plans, and as otherwise directed by the President. This provision is also intended to underscore the fundamental obligation that the responsible party has to be prepared at all times and to take immediate and effective action in the event of a discharge. Report of the Committee on Merchant Marine and Fisheries on the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989, September 18, 1989 - Part 2.

The limitation on liability for simple negligence drafted by the Committee of Merchant Marine and Fisheries differs significantly from the language that eventually became part of OPA 90. The proposed limitation as only applicable to a person who was retained or directed by the President to clean up the spill. It had no application to volunteers or to contractors retained by responsible parties to clean up spills or to anyone else except those directed or retained by the Federal government.

The House debated and subsequently passed HR 1465 on November 9, 1989. The provision for limited liability drafted by the Merchant Marine and Fisheries Committee was included in the final bill without amendment.

Since different versions of the bill had passed the House and the Senate, the two measures were sent to a conference committee. Through the Washington D.C. office of Birch, Horton, Bittner and Cherot, I have obtained a copy of an undated memo that purports to set out the status of negotiations between the Senate and House conferees as of March 13, 1990. I have no way of independently verifying the accuracy of the contents of the memo. Assuming the memo is accurate, during the course of the negotiations the Senate conferees offered a new section to replace the section on limited liability, which had passed the House. The proposed section would have read as follows:

[A]mend proposed CWA Sec. 311(c)(1)(C)(1) as follows:

"No person shall be liable for removal costs or damages under this Act or the Oil Pollution Act of 1990 as a result of actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any discharge of oil or the substantial threat thereof."

If the memo is accurate, the Senate proposal is the first instance in which a broader immunity was proposed for those who respond to a spill. The Senate proposal apparently sought to immunize those who responded to a spill so long as their activities were consistent with the National Contingency Plan or occurred at the direction of an

on scene coordinator. The language of the proposal is not crystal clear, was never explained in detail and did not appear in the final act; but it does represent the first effort to expand immunity beyond those working at Presidential direction.

The language that ultimately was adopted as a part of OPA 90 first appears in the tentative agreement of the conference committee contained in its report on HR 1465, issued on July 26, 1990. Section 4201 of the bill proposed by the conference committee contains the language that ultimately became section 4201 of OPA 90. Because the language was new, the conference committee included a specific explanation as to the meaning of the provision. That explanation is contained at page 146 of the conference report accompanying HR 1465 issued on August 1, 1990, to the House of Representatives. The report states:

The Conference substitute establishes a new paragraph (4) of FWPCA section 311(c) to provide limited immunity for persons involved in oil spill cleanup. The provision is similar to that contained in section 420(a) of the House bill except that the limited immunity is extended not only to those persons retained or directed by the Federal On-Scene Coordinator but also to those persons rendering care, assistance or advice consistent with the NCP. The substitute's provision also clarifies that it does not apply to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

This subsection provides immunity from liability established under the substitute for those taking action in response to an oil

spill or the threat of a spill whether that action is performed under the aegis of the National Contingency Plan or under the direction of the President. This takes into account the fact that the NCP and Presidential orders may not cover every detail or eventuality of a spill response and that actions that are in keeping with the overall objectives of the NCP or Presidential order are deemed to be within the scope of this provision. This section reflects the Conferees' intention that responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response.

There was no specific debate on the section of the conference committee report limiting immunity for response action contractors. Therefore, we can assume that the conference committee report will be taken as the definitive source of legislative intent on response action liability, particularly since the report specifically discussed the section in question. Two points bear mention in reference to the final provision. First, what started as an idea to protect those who were retained by Federal authorities to clean up a spill grew into a Congressional effort to insure "that responses to oil spills be immediate and effective." Congress apparently was convinced that if the risk of exposure to liability was not limited to gross negligence or intentional conduct, it "could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response." Disputes over the meaning of the act,

then, will be resolved with this Congressional intent in mind -- a deliberate relaxation of liability to encourage more aggressive spill response efforts. However, even though Congress clearly intended to take some risks to encourage spill response actions, it did not extend immunity to all situations in which a party participated in cleaning up a spill. Even in the expanded version, Congressional immunity only applies to actions "consistent with the National Contingency Plan or as otherwise directed by the President." The Federal Act does not go as far as Alaska's present law, which specifically permits deviations from a contingency plan so long as they are not "material." While it is possible that a court would permit parties seeking immunity under Federal law to show that Congress meant to allow some deviation from the National Contingency Plans so long as that deviation was not material, the words of the act, at least, do not permit any deviation.

Hopefully, this analysis of the federal immunity provision will prove of some benefit in formulating an overall strategy concerning HB 196. Please make this memorandum available to all appropriate parties and advise them to contact us directly if they desire any further information.

OTHER STATES'  
LAWS ON RESPONSE  
ACTION CONTRACTOR  
LIABILITY

*Master*

SB 2040  
STATE OF CALIFORNIA

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California Code

SB 2040

SYNOPSIS

The California oil spill law, called the Lempert-Keene Oil Spill Prevention and Response Act, was passed in September 1990. Regulations have not been finalized.

The lead agency for oil spills is the Department of Fish and Game. The governor is responsible for the establishment of the state contingency plan and the response to oil spills. He appoints, subject to the advise and consent of the state senate, an administrator who becomes a chief deputy director of that department.

The administrator's primary responsibilities are to direct prevention and response, promulgate all necessary regulations, to represent the state in major oil spills and to act as a coordinator with the Coast Guard and federal agencies in the event of a spill. He must be on site for any spill that is greater than 100,000 gallons. Additionally, the administrator shall establish rescue and rehabilitation stations for wildlife and mammals and he shall administer the oil spill funds. He also has the authority to assess administrative penalties for violations of the Act.

The new law establishes harbor safety committees responsible for developing safety plans for their respective harbors. The law also establishes the Oil Spill Technology Advisory Committee to oversee the administrator's actions and the activities of the

State Interagency Oil Spill Committee. It shall provide public input and independent judgment of the administrator's actions. This committee shall provide recommendations to any state agency and on any provision of this act. Additionally, the committee may attend any drills or spills.

Under this law the State Lands Commission, which has jurisdiction over submerged lands offshore, has added responsibilities as to the regulation of existing and new marine terminals.

Persons and response action contractors are immune from liability for costs, damages or other claims that are incurred as a result of any actions taken or omitted in the course of rendering assistance or advice in accordance with the national contingency plan, state c-plan or any onscene coordinator, the administrator or the Coast Guard. Immunity from liability does not extend to acts of gross negligence or wilful misconduct nor for acts that result in personal injury or wrongful death. This immunity is limited to response personnel whose contracts with potentially responsible parties have been approved by the administrator and for response actions for which the responsible party cannot be identified or a responsible party who will not or is unable to provide the cleanup.

Further, the liability is limited to 60 days for response personnel that are regularly engaged in cleanup activities. The administrator may extend the liability for an additional 30 days upon specific findings: (1) due to inadequate or incomplete

containment the size of the spill will specifically expand and threaten uncontaminated marine or land resources; (2) the remaining work is of such a difficult and perilous nature that extension of the immunity period is clearly in the public interest; and (3) no other qualified and financially responsible contractor is prepared and willing to complete the response effort in the absence of the extended immunity. This limitation is not applicable to those response efforts by commercial fishermen or persons who dedicate their lives to the preservation and rehabilitation of wildlife.

The administrator may enter into indemnification agreements with qualified and financially responsible response action contractors. The indemnification can include payment of any damages for response costs covered under the immunity and for reasonably-related legal fees and costs.

Responsible parties are strictly, jointly and severally liable for any damages incurred by any party which are caused by the discharge of oil into or onto the marine waters of the state. Defenses are similar to those provided under OPA 90; however, the defenses shall not apply if the responsible party fails to immediately begin cleanup in accordance with his plan or if he fails to report the spill.

Damages include all costs of response, containment, cleanup and removal of pollution, injury to and economic losses to personal or real property, injury to or destruction of natural resources and the costs of assessing that damage. Damage also

includes loss of subsistence use and loss of taxes, royalties or profits or earning capacity for persons who derive at least 25% of their income from the activity.

Vessels must demonstrate an ability to pay at least \$500 million for any damages that arise from an unauthorized spill. This amount shall increase to \$750 million in July 1995 and to \$1 billion in 2000. The administrator may require smaller limits for barges.

Marine facilities must demonstrate financial ability to pay for damages that arise from a reasonable worst case oil spill. The administrator shall determine the financial ability based on the amount of oil that could be spilled from a facility, the frequency of operations at the facility and any other criteria that he determines to be relevant.

The state must develop a contingency plan that sets out the hierarchy and responsibilities of the state and local agencies that will respond to a spill. It must show environmentally-sensitive areas and state how the coastline will be protected.

Both marine terminals and vessels must submit interim c-plans by July 31, 1991, to the administrator for his approval. These interim plans must establish a chain of command for response and reporting a spill to the proper federal or state authorities. The plans shall also provide information as to actual response activities and any contracts with response action contractors.

The administrator must promulgate regulations for permanent

c-plans by December 31, 1991. The regulations must be discussed at public hearings prior to formal acceptance. C-plans shall be submitted by vessels and marine facilities within 90 days after regulations have been established by the administrator.

The administrator shall draft guidelines and standards for area c-plans required pursuant to the Health and Safety Code. Any local government within the jurisdiction of the applicable area may apply for a grant to update or revise any element of the area plan.

The new law provides for civil, criminal and administrative penalties. A person who knowingly fails to follow the directions of the administrator during an oil spill, if convicted, may be sentenced up to one year in prison and from \$5,000 to \$500,000 in fines. A person who knowingly fails to notify the Coast Guard of a disabled tanker, and that tanker subsequently discharges oil into the waters or a person who knowingly causes a spill may be subject to a jail sentence up to one year.

Persons who knowingly fail to notify the state of a discharge or who knowingly operate a vessel or marine facility without an approved c-plan or who fail to follow a c-plan may be liable for fines from \$2,500 to \$250,000 or imprisonment up to one year. Negligent actions are punishable by fines from \$25,000 to \$500,000 for each violation.

The new law provides for the creation of both an oil spill prevention/administrative fund and an oil spill response fund. Both funds are administered by the administrator and he shall

determine the amount of fees annually required to carry out the Act and to provide for response activities.

The administrative fund is a permanent fund that shall only be used to finance prevention programs, research and administrative costs. This fund has no cap or upper limit. The administrator shall determine the assessment for each marine facility based on the risks and potential size of the spills that could occur at that facility. The assessment cannot exceed four cents per barrel.

The owner of the crude oil is liable for the fee which is based on the number of barrels of crude delivered through the terminal. Owners of petroleum products are liable for the fees on products received at the terminal only if the products are imported from outside the state of California. Also, the fee will be assessed to pipeline owners who transport crude oil originating at an offshore production facility and travelling through a pipeline.

The oil spill response fund shall be limited to \$100 million, adjusted for inflation after January 1, 1991. \$50 million of the fund shall be cash; the other \$50 million must be accessible in the form of financial security. The law provides that if the fund reaches its \$50 million limit and there are no outstanding claims or costs for spills the administrator shall provide for refunds. The fund reached its limit in February 1991 and the fees lapsed in March 1991. Approximately \$8-\$10 million has been refunded to pipeline owners and owners of crude on a pro

rata basis.

Cargo owners are assessed 25 cents per barrel of crude and products delivered through a marine facility. The fee is not assessed on crude exports unless the total volume of crude exported from the state is more than 6% of the total volume of crude oil and products on which the fee was paid during the preceding year.

The administrator may raise the fees to a maximum of \$1 per barrel upon the following: (1) a calamitous event or series of events has severely depleted the fund; (2) the governor has requested the treasurer to borrow funds and the treasurer finds that the fee is insufficient for him to borrow enough money to meet the reasonably anticipated demands on the fund to pay for all costs, rehabilitation and other authorized expenditures; and (3) failure to raise the fee will result in unmet or unpaid authorized expenditures.

The governor has the authority to request the state treasurer to borrow and deposit in the fund any amount by which the estimated response costs exceed the designated amount of the fund.

The law provides for specific notification of any spill through a chain of command and it further provides that the responsible party shall immediately carry out activities according to its respective c-plan as to containment and cleanup. It further provides that any vessel docked at a marine facility at the time of a spill shall carry out its c-plan and follow any

directions given by either the administrator or the Coast Guard.

## I. BACKGROUND INFORMATION AND STRUCTURE

Senate Bill 2040 was passed by the California Legislature and signed by the governor in September 1990. The bill took effect immediately. It has subsequently been amended as to the collection of fees for the oil spill funds and the liability of crude oil refiners for those fees. Both the original law and the amendments will be discussed below.

This law makes the governor fully responsible for oil spill prevention and response. It creates harbor safety committees, an oil spill technical advisory committee and an environmental enhancement committee. Additionally, it enhances the role of an existing interagency oil spill committee and expands the authority of the State Lands Commission over marine terminals.

RESPONSIBILITY OF THE GOVERNOR. Pursuant to this act the governor of California is responsible for the establishment of a state oil spill contingency plan. § 8574.1. He shall ensure that the state fully and adequately responds to all oil spills in marine waters. § 8670.5.

ADMINISTRATOR FOR OIL SPILL RESPONSE. The governor shall appoint an administrator who, at the governor's direction, shall implement activities relating to oil spill prevention and response. The administrator shall be a chief deputy director of the Department of Fish and Game; his appointment shall be subject to the advice and consent of the state Senate. § 8670.4.

The administrator is the primary authority to direct

prevention and response to marine spills. He shall represent the state in any coordinated response efforts with the federal government. § 8670.5. He shall coordinate and cooperate with all federal response efforts and the federal onscene coordinator. § 8670.7.

The administrator shall be present at all spills of more than 100,000 gallons of oil as soon as possible after notification of discharge. § 8670.7(b)(1). He must ensure that persons trained in cleanup and response efforts are onsite; he shall keep local governments affected by the spill apprised of response efforts and he shall, with the federal onscene coordinator, determine the amount of the discharge. § 8670.7(2).

The administrator is required to amend the existing state oil spill contingency plan by adding a marine oil spill c-plan which provides for the best achievable protection of the coast and marine waters. § 8574.7. He is responsible for the implementation of the state plan. § 8670.7(b). Also, he must carry out programs that will provide training for persons who will respond to oil spills. § 8670.8. These programs may also include volunteers and commercial fisherman who might help in response efforts.

The administrator shall carry out announced and unannounced drills and shall establish standards for such drills. § 8670.10. He shall conduct studies necessary for improving oil spill response and wildlife rehabilitation. § 8770.12(a). These studies shall include the use of dispersants, bioremediation and

incineration and their effects on the environment and public health. § 8670.12(b). Also, he shall study the feasibility of requiring new technologies, such as vessel traffic systems, electronic devices and other emerging technologies. § 8670.13.

The administrator shall develop and implement regulations and guidelines for c-plans. § 8670.28(a). He shall hold public hearings as to the regulations. Within one year after he establishes these regulations he shall review all c-plans. § 8670.19(a). He shall segment the state coastline into areas and determine if the coastline is adequately protected. If deficiencies exist in equipment, personnel or training he shall remand the c-plans to the originating parties for modification or amendment. § 8670.19(b).

The administrator shall establish rescue and rehabilitation stations for seabirds, otters and other marine mammals. § 8670.37.5. He shall consult with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the California Coast Commission as to the design and maintenance of these facilities; there shall be public hearings prior to the construction and operation of the facilities. § 8670.37.5(a) and (b).

The administrator shall administer the oil spill funds and he shall promulgate regulations for maintenance of the funds. § 8670.38. He shall determine the annual assessments. The administrator is also empowered to assess administrative penalties for violations of the act. § 8670.67.

Finally, he shall actively promote the adoption of federal regulations and statutes such as bridge alarms on tankers, bridge-to-bridge radio telephones, collision avoidance radar devices and other safety systems. § 8670.16. He shall also promote studies and research regarding new vessel technologies, such as electronic vessel location charts, advanced shipboard oil and water separation systems. § 8670.12 and 13. He shall negotiate with the Coast Guard by December 31, 1991, regarding a vessel traffic service system to protect the state's harbors. § 8670.21.

STATE INTERAGENCY OIL SPILL AGENCY. The existing State Interagency Oil Spill Agency has enhanced duties under this new law. The agency shall consist of the administrator, who shall serve as chairman, and the chairpersons of the State Lands Commission and the California Coastal Commission. § 8574.9 (a)(1)-(2). It shall have representatives from the Office of Emergency Services, Water Resources Board, Department of Transportation, Highway Patrol, National Guard and several water and environmental agencies. § 8574.9(3)(A)-(P).

A Review Subcommittee of this agency is established under the new law. § 8574.10. All regulations and guidelines adopted pursuant to this act shall, prior to adoption, be submitted to the subcommittee for review and comment. § 8574.10(b). The comments and recommendations made by the subcommittee are not binding but any agency that departs from the subcommittee's findings and recommendations must submit a written response as to

why its own action is more effective. § 8574.10(d).

HARBOR SAFETY COMMITTEES. The administrator shall create harbor safety committees for the harbors of San Diego, Los Angeles/Long Beach, Port Hueneme, San Francisco, San Pablo, Suisan Bays and Humbolt Bay. § 8670.23(a). The administrator shall appoint the following persons to each committee: (1) a designee of the applicable port authority and a representative of the organizations of: tanker operators, pilots' organization, commercial fishermen, a recognized labor organization involved with the operation of vessels, dry cargo vessel operators and a recognized nonprofit environmental organization whose purpose is to protect marine resources. § 8670.23(b)(2)-(10).

Each harbor safety committee shall be responsible for a safety plan that ensures the safe navigation and operation of tankers, barges and other vessels in its harbor. § 8670.23(c). The safety plan shall be submitted to the administrator for review and approval. § 8670.23(e) and (f). The administrator shall adopt any regulations necessary to implement the plans. § 8670.23(f).

OIL SPILL TECHNICAL ADVISORY COMMITTEE. The Oil Spill Technical Advisory Committee is established by this new law. Its responsibility is to provide public input and independent judgment of the actions of the administrator and the State Interagency Oil Spill Committee. § 8670.54(a). The nine-member committee shall have five of its members appointed by the governor, two by the Speaker of the Assembly and two by the

Senate Rules Committee. § 8670.54(a). Each member shall have an area of expertise, such as marine transportation, environmental protection or the petroleum industry. § 8670.54(a)(1)-(7).

The committee shall provide recommendations to the administrator, the State Lands Commission, the California Coastal Commission and the State Interagency Oil Spill Committee on any provision of this act. § 8670.55(a). The committee may, at its discretion, study, comment on, or evaluate any aspect of the oil spill prevention and response in the state. § 8670.55(b). It may also attend any drills or any oil spills. § 8670.55(c).

STATE LANDS COMMISSION. The State Lands Commission is part of the Resources Agency. It has jurisdiction over submerged lands and ungranted tidal areas in the state. Public Resources § 6101. Under the new law the administrator and executive officer of the State Lands Commission shall confer and propose, and the commission shall adopt rules, regulations, guidelines and commission leasing policies for reviewing the location, type, character, performance standards, size and operation of all existing and proposed marine terminals within the state to minimize the possibility of discharge of oil. § 8755(a).

This commission shall consult with the administrator, the State Interagency Oil Spill Committee and other federal, state and local agencies with respect to these rules, regulations and guidelines. § 8755(c). Also, the commission shall inspect or cause to be inspected, on a regular basis, all marine facilities and the associated equipment. It shall monitor their operations

and the effects of the operations on public health and safety and the environment. § 8757(a).

ENVIRONMENTAL ENHANCEMENT COMMITTEE. The law establishes an environmental enhancement fund that shall be used only for environmental enhancement projects. § 8670.70. An Environmental Enhancement Committee, consisting of the administrator, the executive officer of the State Coastal Conservancy and a public member appointed by the administrator, is established. § 8670.72. Only environmental enhancement projects approved by this committee shall be funded from the enhancement fund. § 8670.71.

## II. LIABILITY FOR RESPONSE ACTION CONTRACTORS

LIABILITY. Except as otherwise provided, no person, including, but not limited to, an oil spill cooperative, its agents, subcontractors, or employees, shall be liable under this chapter or the laws of the state to any person for costs, damage, or other claims or expenses as a result of actions taken or omitted in good faith in the course of rendering care, assistance or advice in accordance with the national contingency plan, the state contingency plan or at the direction of the administrator, the onscene coordinator or the Coast Guard. § 8670.56.6(a)(1). Cooperatives and other persons are not immunized from liability for acts of gross negligence or wilful misconduct in connection with response to a spill; neither is there immunization from actions that result in personal injury or wrongful death. § 8670.56.6(d) and (e). For purposes of this section, there is a rebuttable presumption that the act or omission was taken in good

faith. § 8670.56.6(h).

This immunity shall only apply to those response personnel operating under contracts approved by the administrator and for response actions taken for spills for which the responsible party cannot be identified or is unwilling or unable to respond, contain, or cleanup the spill. § 8670.56(j)(1). The immunity from liability is limited to 60 days for response personnel who are regularly engaged in the business of response activities. § 8670.56(k)(1). This period may be extended for an additional 30 days if the administrator finds all of the following: (1) that due to inadequate or incomplete containment, the size of the spill will significantly expand and threaten previously uncontaminated marine or land resources and endanger the public safety or welfare; (2) the remaining work is of such a difficult and perilous nature that extension of the immunity is clearly in the public interest and (3) no other qualified and financially responsible contractor is prepared and willing to complete the response effort in the absence of immunity. § 8670.56.6(k)(2)(A)-(C). This limitation on liability does not apply to those response efforts by persons not regularly engaged in response activities such as commercial fishermen and those who dedicate their lives to the preservation and rehabilitation of wildlife. § 8670.56.6(k)(5).

INDEMNIFICATION OF RESPONSE ACTION CONTRACTORS. The administrator is authorized to negotiate and enter into indemnification agreements with qualified and financially

responsible contractors who respond to spills where the responsible party either cannot be found or cannot or will not respond to the spill. § 8670.56.6(j)(2). The indemnification may be payment of all damages for response costs covered under the immunity and for the reasonably-related legal fees and costs. § 8670.56.6(j)(3).

### III. LIMITS ON LIABILITY FOR RESPONSIBLE PARTIES

STRICT LIABILITY. Any responsible party shall be strictly, jointly and severally liable for any damages incurred by any injured party which arise out of, or are caused by, the discharge or leaking of oil into or onto marine waters of the state. § 8670.56.5(a) and (h).

DEFENSES. A responsible party is not liable to an injured party if the damages, other than costs of removal incurred by the state or local government, were caused solely by an act of God or of an exceptional, inevitable and irresistible character, any act of war, hostilities, civil war or insurrection, or by an unanticipated grave natural disaster, which could not have been prevented or avoided by the exercise of due care or foresight. § 8670.56.5(b)(1). Also, a responsible party is not liable for damages caused solely by the negligence of intentional malfeasance of the injured party or damages caused solely by the criminal act of a third party other than the defendant or an agent or employee of the defendant. § 8670.56.5(b)(2)-(3).

These defenses are not available to responsible persons who fail to immediately begin cleanup in accordance with the

applicable c-plan or who fail to report the spill.

§ 8670.56.5(b).

DAMAGES. A responsible party is liable for the following damages: (1) all costs of response, containment, cleanup, removal and treatment incurred pursuant to the state c-plan or actions taken pursuant to the directions of the administrator; (2) injury to or economic losses resulting from destruction of or injury to real or personal property; (3) injury to, destruction or loss of natural resources, including but not limited to rehabilitating wildlife, habitat and other resources, and the costs of assessing that destruction or loss; (4) loss of subsistence use of natural resources which shall be recoverable by any claimant who uses the resource; (5) loss of taxes, royalties, rents or profits caused by the injury or destruction; (6) loss of profits or impairment of earning capacity due to the injury, destruction or loss of real or personal property or natural resources for persons who derive at least 25% of their earnings from the activity; (7) loss of enjoyment of natural resources, public beaches or facilities.

§ 8670.56.5(g)(1)-(7).

#### IV. FINANCIAL RESPONSIBILITY

PROVISIONS. No vessel may be used to transport oil across marine waters of the state unless the operator has obtained a certificate of financial responsibility issued by the administrator for either the vessel or the owner of all the oil contained in and being transferred to or from the vessel.

§ 8670.37.51(a). Nor can the operator of a marine terminal

transfer oil to or from a vessel or from one vessel to a second vessel unless he has received a copy of the vessel's or vessels' certificates from the administrator. § 8670.37.51(b) and (c).

No person may operate a marine facility unless the owner or operator has first obtained a certificate of financial responsibility from the administrator for the facility. § 8670.37.51(d).

FINANCIAL REQUIREMENTS. In order to obtain a certificate of financial responsibility a vessel's applicant must demonstrate the financial ability to pay at least \$500 million for any damages which may arise during the term of the certificate. § 8670.37.53(a). The level of financial responsibility shall be increased to \$750 million in July 1995 and to \$1 billion in 2000. The administrator may require lower limits for small barges.

To receive a certificate for a marine facility, the applicant must demonstrate the financial ability to pay for any damages which might arise during a reasonable worst case oil spill into marine waters that results from the operations of the marine facility. § 8670.37.53(b). The administrator shall determine the financial responsibility and he shall consider such criteria as the amount of oil that could be spilled into the marine waters, the cost of cleaning up spilled oil, the frequency of operations at the facility and the damages that could result from the spill. Id.

#### IV. CONTINGENCY PLANS

STATE OIL SPILL CONTINGENCY PLAN. The marine oil spill

contingency plan shall contain all of the following elements:

- (1) the hierarchy of state and local agency response to an oil spill. This includes the necessary tasks for oversight and control of cleanup and removal activities and each agency's specific responsibilities. It should also include an organizational chart of the state marine oil spill response organization and a definition of the resources, capabilities and response assignments of each agency involved in the cleanup and removal of the oil;
- (2) the framework for the involvement of local and regional agencies in the response. It should include traffic and crowd control, firefighting, boating and traffic control and radio and communications control, equipment and resources available for cleanup, identification of private and volunteer resources or personnel with special capabilities related to oil spill cleanup and provisions for emergency medical services;
- (3) a statement that establishes the state standard for coastline protection. This shall include appropriate shipping lanes and navigational aids for vessels, ship position reporting and communications requirements, required predeployment of protective equipment for sensitive environmental areas, required emergency response vessels which are capable of preventing disabled tankers from running aground, an expedited decisionmaking process for dispersant use in coastal waters, required rehabilitation facilities for injured wildlife, and
- (4) regional maps depicting environmentally-sensitive areas in marine waters or along the coastline.

§ 8574.7(a)-(e).

#### PRIVATE C-PLANS.

1. Provisions. The administrator shall adopt and implement regulations and guidelines governing the adequacy of plans for vessels and marine terminals. He shall consult with the State Interagency Oil Spill Committee and the Oil Spill Technology Advisory Committee. The administrator shall hold a public hearing on the regulations. These regulations and

guidelines shall provide for the best achievable protection of coastal and marine resources. The regulations shall also allow the development of blanket contingency plans for similar vessels, terminals and facilities within a single company and across companies or organizations. § 8670.28.

The regulations shall, at a minimum ensure:

- (1) that all areas of the marine waters of the state are at all times protected by prevention, response, containment and cleanup equipment and operations;
- (2) that all standards set for response and cleanup are maintained and regularly improved to protect the natural resources;
- (3) all appropriate personnel employed by operators receive training in response and cleanup equipment usage and operations;
- (4) each c-plan for vessels and marine facilities demonstrates that plans are in place, including all financial and contractual arrangements for equipment and response activities;
- (5) that each plan identifies the types of equipment that can be used, the location of the equipment and the time needed to deliver the equipment;
- (6) that each marine facility identifies hazards associated with its operations;
- (7) that each c-plan contains a list of contacts to call in case of a discharge of oil;
- (8) that each marine facility, in its plan, identifies the measures that will be taken to protect the recreational and environmentally-sensitive areas.

§ 8670.28(a)(1)-(11).

The administrator shall ensure that the rules, regulations and guidelines are in effect not later than December 31, 1991.

§ 8670.28(d).

## 2. Interim plans.

Marine Facilities. Every operator of a marine facility shall, by July 31, 1991, prepare a written interim c-plan that establishes a chain of command and describes the responsibilities

of facility personnel, details the procedures for reporting spills to federal, state and local agencies, details the lines of communications between the facility and on-scene commanders and response teams, provides for site security and control and emergency medical services and provides for personnel training. The interim plan should also provide detailed procedures for responding to a spill and undertaking removal actions for different size oil spills and procedures that will be taken to protect environmentally-sensitive areas. § 8670.29(a)(1)-(11).

Vessels. On or before July 31, 1991, every vessel operating in the marine waters of the state shall submit an interim vessel c-plan which shall include the following: a demonstration that the operator is capable of providing timely and effective spill response and removal directly or through membership in, or contract with, cleanup organizations; it shall also show proof of financial responsibility. It shall detail its procedures for reporting oil spills to state and federal agencies. § 8670.30(a)(1)-(3).

These interim c-plans shall be reviewed by the administrator and if they are deficient, the plan shall be returned to the operator for modifications or alternatives. § 8670.30.5(a) and (b).

3. C-plans. In accordance with the regulations established by the administrator each vessel operator and marine operator shall prepare and implement a contingency plan within 90 days after the effective date of the rules, regulations and policies

required under § 8670.28. The administrator shall review each plan and each plan shall be approved or disapproved within 180 days after receipt by the administrator. § 8670.31(a)-(d). Before he approves a c-plan the administrator may, at his discretion, make an onsite inspection and require a drill of any contingency plan. After the plan has been approved it shall be resubmitted at least once every two years. The administrator may require more frequent submissions. § 8670.31(f) and (g).

4. Area contingency plans. Prior to January 1, 1992, the administrator shall draft guidelines, standards and formats regarding the adequacy of area c-plans that are required pursuant to § 25503 of the Health and Safety Code. § 8670.35(a). Any local government with jurisdiction over marine waters or located adjacent to marine waters may apply for a grant to complete, update or revise an element of an area c-plan. Each element prepared under this section must provide provisions for training fire and police personnel in oil spill response and cleanup equipment and use. It must also be consistent with the local government's local coastal program as certified under § 30500 of the Public Resources Code, the state c-plan and the national contingency plan. § 8670.35(b)-(d).

#### V. ENFORCEMENT

INJUNCTIVE RELIEF. When the administrator determines that any person is engaged in, or threatens to engage in activities that violate any provisions of this act, the district attorney in the applicable county may make application for an order enjoining

that activity. Upon a showing that the person has engaged in such activity a permanent or preliminary injunction, restraining order or other order may be granted. § 8670.57(a).

CIVIL PENALTIES. Any person who commits any of the following shall, upon conviction, be punished by imprisonment in the county jail for not more than one year or the state prison: (1) knowingly fails to follow the directions of the administrator in connection with an oil spill; (2) knowingly fails to notify the Coast Guard that a tanker is disabled within one hour of the disability and the tanker, while disabled, discharges oil which enters marine waters; (3) knowingly engages in or causes the discharge of oil into marine waters; (4) knowingly fails to begin cleanup, abatement or removal of spilled oil. § 8670.64(a)(1)-(4). A person convicted of violating (1) above shall also be fined not less than \$5,000 and not more than \$500,000 for each violation. § 8670.64(b).

A person who knowingly does any of the following acts shall, upon conviction, be punished by a fine of not less than \$2,500 and not more than \$250,000, or by imprisonment in the county jail for not more than one year or by both fine and imprisonment: (1) failing to notify the Office of Emergency Services of a discharge of oil into marine waters; (2) operating a vessel or marine facility without an approved c-plan, or knowingly failing to follow the material provisions in the c-plan. § 8670.64(c)(1)-(3).

A person who intentionally or negligently does any of the

following acts shall be subject to a civil penalty of not less than \$25,000 and not more than \$500,000 for each violation: (1) failing to follow the directions of the administrator during the response activities of a spill; (2) failing to notify the U.S. Coast Guard that a tanker is disabled and the tanker, while disabled, discharges oil into marine waters; (3) discharging or spilling oil into marine waters, (4) or failing to begin cleanup, abatement or removal of spilled oil. § 8670.66(a)(1)-(3).

Any person who negligently or intentionally violates any provision, regulation, standard or requirement of this act shall be liable for a civil penalty not to exceed \$250,000 for each violation of a separate provision, or for continuing violations, for each day that the violation continues. § 8670.66(b).

CRIMINAL PENALTIES. A person who knowingly violates any provision of this chapter or any permit, rule, regulation, standard or requirement is, upon conviction, guilty of a misdemeanor, punishable by a fine of not more than \$50,000 or by imprisonment in the county jail for not more than one year or by both fine and imprisonment. § 8670.65.

ADMINISTRATIVE PENALTIES. Any person who intentionally or negligently does any of the following acts shall be subject to an administrative penalty not to exceed \$100,000 for each violation: (1) failing to follow an applicable c-plan or the directions of the administrator in connection with an oil spill; (2) failing to notify the Coast Guard that a tanker is disabled within one hour of the disability and the tanker, while disabled discharges oil

into marine waters; (3) discharging or spilling oil into marine waters; (4) failing to begin cleanup, abatement or removal of spilled oil. § 8670.67(a)(1)-(4).

Any person who intentionally or negligently violates any provision of this act or any permit, rule, regulation, standard or requirement shall be liable for an administrative penalty imposed by the administrator not to exceed \$100,000 for each violation, or, for continuing violations, for each day that the violation occurs. § 8670.67(b). No person shall be liable for a civil penalty under this section for the same act. § 8670.67(c).

A penalty may be administratively imposed for the discharge of oil that enters marine waters in an amount not to exceed \$10 per gallon of discharged. The amount of the penalty shall be decreased for every gallon of discharged oil that is recovered and properly disposed of in accordance with applicable law. § 8670.67.5(1) and (2). Whenever the discharge of oil resulted from gross negligence or reckless conduct, the administrator shall impose a penalty in the amount of \$30 per gallon discharged but the penalty shall be decreased for every gallon of discharged oil that is recovered and properly disposed of in accordance with the applicable law. § 8670.67.5(c).

## **VI. STATE RESPONSE MECHANISMS**

FUNDING. This law creates two oil spill trust funds.

1. Oil Spill Prevention and Administration Fund. This fund was established to fund the implementation of oil spill prevention programs and research for prevention and control

technology, to fund environmental and economic studies relating to the effects of oil spills and to implement, install and maintain emergency programs and equipment and facilities to respond to oil spills. § 8670.40(e)(1)-(5).

The administrator shall administer the fund; he shall collect annually a fee he determines will be sufficient to carry out the purposes set forth above and to maintain a reasonable reserve for contingencies. § 8670.40(a). He shall determine the amount of fees that will be paid by owners based on each marine facility and the risks and the potential size of the spills that could occur at that facility. § 8670.40(b). The assessment cannot exceed 4 cents per barrel of oil. § 8670.40(a).

Under the original law the marine terminal operator was responsible for paying the determined assessment for each barrel of crude oil and petroleum products that was delivered through his terminal; the pipeline operator was responsible for each barrel of crude and products transported through the state via his pipeline. § 8670.40(b).

Under the present amendment the owner of the crude oil received at a marine terminal is liable for the fee assessment. Also, only those petroleum products imported from outside the State are subject to the assessment. The marine facility operator collects the fees from the owners.

Under the amendment fees assessed on pipeline owners is limited to crude oil originating from offshore production facilities in California waters and does not apply to crude oil

shipped into the state.

Money in this fund shall not be used for responding to an oil spill. § 8670.40(f). This is a permanent assessment and the fund has no cap or upper limit. The administrator may establish regulations and rules necessary to carry out this provision.

§ 8670.39(b).

2. Oil Spill Response Trust Fund. This fund is created to: (1) provide funds to cover promptly the costs of response, including damage assessment costs and wildlife rehabilitation, (2) provide emergency loans and to cover response costs and other damages suffered by the state or other persons or entities from oil spills which cannot otherwise be compensated by responsible parties or the federal government, and (3) pay claims for damages. § 8670.48(j)(1)-(3). Additionally, money in this fund shall be used to arrange for the \$50 million of financial security and for indemnity and related costs and expenses related to response action contractors. § 8670.48(j)(5) and (6).

The administrator shall administer this fund and develop rules and regulations necessary to carry out this provision. § 8670.47(a) and (b). The following moneys shall go into this fund:

- (1) federal funds received to pay for response costs
- (2) funds borrowed to pay for cleanup
- (3) fees assessed pursuant to § 8670.48 (see below)
- (4) interest earned on the fund
- (5) costs recovered from responsible parties

§ 8670.47.5

The designated amount of the fund shall be \$100 million adjusted for inflation after January 1, 1991, subject to the

following: \$50 million shall be retained in the fund as cash, adjusted for inflation and \$50 million shall be immediately accessible in the form of financial security. § 8670.48(g)(1) and (2). During any period when the total amount in the fund exceeds the designated amount and the moneys in the fund are not needed to pay for costs resulting from an oil spill into marine waters or to retire any debt, the administrator shall provide refunds to each owner proportionate to the amounts he paid into the fund. § 8670.48(h).

Under the original law each marine terminal operator paid 25 cents per barrel of petroleum products received at his terminal via vessel from a point outside the state; pipeline owners paid 25 cents per barrel of products transported into the state via their pipeline. § 8670.48(a) and (b). Marine operators and pipeline owners also paid 25 cents per barrel of crude oil transported from within the state via vessel, barge or pipeline to points outside the state. § 8670.48(d) and (e).

Also under the original law only refiners were assessed the fee on crude oil imported into the state by either pipeline or vessel. § 8670.48(c). No fees were imposed on crude oil produced by independent crude oil producers who performed no refining and did not possess or own retail gasoline marketing facilities. § 8670.48(c)(2).

Under the amendment the cargo owner, rather than the marine terminal owner, is liable for the fees; the facility operator only collects the fees. Also, fees are not collected on exports

of crude oil until the total volume of crude oil exported from California during a year exceeds 6% of the total volume of crude oil and products on which the 25 cents response fees were paid in the prior calendar year.

The administrator may raise the fees to a maximum of \$1.00 per barrel upon the following findings: (1) a calamitous event or series of events has severely depleted the fund; (2) the governor has requested the treasurer to borrow the funds and the treasurer finds that the fee is insufficient for him to borrow enough money to meet the reasonably anticipated demands on the fund for all authorized expenditures, response costs, wildlife rehabilitation, emergency loans and damage claims; and (3) failure to raise the fee in the amount proposed will result in unmet, or unpaid, authorized expenditures. § 8670.48.5(a)(1)-(3).

This increase may be raised by maximum increments of 25 cents not more frequently than once every three months. § 8670.48.5(a). No single incremental increase shall be effective for more than one year unless renewed by the director before the expiration of the year upon making the findings required in subsection (a) above. § 8670.48.5(c).

BORROWING AUTHORITY. At any time that an oil spill into marine waters has occurred and the administrator determines that the costs of responding to the spill are likely to exceed the designated amount in the Oil Spill Response Trust Fund and the costs exceed the financial ability of the responsible party or there is no responsible party, the administrator shall notify the

governor. The governor, upon notification, shall request that the federal government pay the response costs, wildlife rehabilitation costs and damages. If federal funds are not available he shall make a written request to the treasurer to borrow and deposit in the fund the amount by which the estimated response costs exceed the designated amount. § 8670.53.15(a).

The treasurer shall make the necessary financial arrangements to obtain the needed moneys. These arrangements may take the following forms, or any combination thereof: (1) line of credit, letter of credit or other standby arrangement with one or financial institutions; (2) sale of bonds or notes of the state; (3) borrowing from the Pooled Money Investment Account, or (4) any other financial arrangement the treasurer determines to be appropriate and cost-effective. § 8670.53.3(a)(1)-(4).

Any financial arrangements made pursuant to this article and repayment of any obligation shall be special obligations of the state secured solely by the moneys in the fund. The obligation shall not become a lien or liability against the State nor shall the taxing power of the state be pledged to its repayment.

§ 8670.53.5.

## **VII. DRILLS AND INSPECTIONS**

**DRILLS.** The administrator shall periodically carry out announced and unannounced drills to test response and cleanup operations, equipment, c-plans and procedures implemented by this chapter. All state and local entities and all operators of marine facilities and vessels shall cooperate with the

administrator in carrying out these drills. § 8670.10(a).

#### INSPECTIONS.

1. Vessels. The administrator may inspect or cause to be inspected on a regular basis all vessels. He shall evaluate the adequacy of vessel inspection programs conducted by the Coast Guard and any other federal, state or local agency and he may establish a state inspection program if he determines that the existing programs are deficient. § 8670.13.

2. Marine facilities. The State Lands Commission shall inspect or cause to be inspected on a regular basis all marine facilities, along with associated equipment. The commission shall monitor the operations and the effects on public health, safety and the environment. § 8657(a).

#### VIII. STATE PROCEDURES FOR OIL SPILL RESPONSE

Any person responsible for the discharge or threatened discharge of oil in marine waters shall report the discharge to the Office of Emergency Services within one hour of the disability if the disability occurs within 12 miles of the shore. § 8670.20. Immediately upon notification, the Office of Emergency Services shall notify the administrator, the designated representatives of the State Lands Commission, the California Coastal Commission, the regional water quality board having jurisdiction over the location of the discharged oil and any public agency which may be affected by the spill.

§ 8670.25.5(a) and (b). Spills of more than one barrel must be reported through these channels. § 8670.25.5(d).

All parties responsible or potentially responsible for the discharged oil, the tanker, barge or marine facility from which the oil was discharged, all of their agents and employees, the operators of all vessels docked at a marine facility which is a source of a discharge, and all state and local agencies shall carry out response and cleanup operations in accordance with applicable c-plans, unless directed otherwise by the administrator or the Coast Guard. § 8670.27(a).

If a responsible party reasonably, and in good faith, believes that the directions or orders given will substantially endanger the public safety or the environment, the party may refuse to act in compliance with the orders. He shall state, at the time of the refusal, the reason for refusing and shall give the administrator written notice of the reasons for his refusal within 48 hours. § 8670.27(b).

NOV 18 1991

**Alyeska pipeline**  
SERVICE COMPANY

1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512. TELEPHONE (907) 273-1611. TELEX 090-25-127

VIA U. S. MAIL AND FACSIMILE

November 14, 1991

Michele Brown, Esq.  
Executive Director  
Citizens' Oversight Council on Oil and Other Hazardous Substances  
3111 C Street, Suite 150  
Anchorage, Alaska 99503

Re: Responder Immunity Research

Dear Michele:

Please find attached the summary of Florida. I'm in Washington, D. C., this week and part of next. As soon as I return, I'll send you a copy of the actual laws of Florida.

I'm still working on the Louisiana summary and hope to get it to you soon. Thank you for being so patient.

Yours very truly,

ALYESKA PIPELINE SERVICE COMPANY

*Coyet Selman*  
*for* Larry D. Wood  
Senior Attorney-External Affairs

LDW42/cas

Enclosure

cc w/summary: Ms. Pat Kincaid  
Mr. Paul M. Richards  
Mr. Michael K. Abbott  
Ms. Karen L. Kilty

## FLORIDA

**Responder Immunity:** "No person who, voluntarily or at the request of the department [of Natural Resources] or its designee, renders assistance in containing or removing pollutants shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct." Florida Statutes Annotated § 376.09(4).

"Notwithstanding the provisions and subsection (4) [FSA § 376.09(4)], any person who is authorized by the department or the federal government or the person alleged to be responsible for the discharge or by designee thereof, to render assistance in containing or removing pollutants shall not be liable for costs, expenses, and damages, unless such cost, expenses, and damages are an approximate result of acts or omissions caused by gross negligence or willful misconduct of such authorized person." FSA § 376.09(5). Nothing in the Pollutant Spill Prevention and Control Act shall affect the right of any person to render assistance in containing or removing any pollutant, or any rights which that person may have against any third-party who acts or omissions in any way have caused or contributed to the discharge of a pollutant. FSA § 376.09(6).

**State Contingency Plan Requirements:** As a condition precedent to the issuance of a registration certificate for the operation of a terminal facility, the Department of Natural Resources shall require satisfactory evidence that the terminal facility has implemented, or is in the process of implementing state and federal plans for prevention, control, and abatement of pollution when a discharge occurs. FSA § 376.06(3). The department must require a showing that the applicant can provide all required equipment to prevent, contain, and remove discharges of pollutants. FSA § 376.06(6). A terminal facility registration certificate application must include a description of all prevention, containment, and removal equipment to which the facilities has access whether by direct ownership or by membership in an approved discharge cleanup organization. FSA § 376.06(7). Every owner or operator of a terminal facility shall also obtain a spill prevention and response certificate issued by the department. FSA § 376.065(1). The application for this certificate must include the capacity of the terminal facility, all prevention, containment, and removal equipment to which the facility has access whether through direct ownership or by membership in an approved discharge cleanup organization. FSA § 376.065(1)(b). No person may operate a terminal facility without access to minimum containment equipment measuring five times the length of the largest vessel docking at or the largest vessel providing service from the terminal facility whichever is larger. FSA § 376.065(3). The containment equipment shall be available to begin deployment on the water within one hour after discovery of a spill. Within a reasonable time, additional cleanup equipment must be available to reasonably cleanup 10,000 gals of pollutants, unless the terminal facility does not store or service vessels having the capacity to carry that quantity as fuel or cargo. Id.

The Department of Natural Resources may not require vessels to maintain spill prevention gear, holding tanks of any kind, and containment gear in excess of federal requirements. FSA § 376.07(2)(a). However, a terminal facility transferring heavy oil to or from a vessel with a heavy oil storage capacity greater than 10,000 gals shall be required to adequately boom or seal off the area between the vessels, or the area between the vessel and the dock during a transfer or bunkering operation.

Any vessel operating in state waters with a storage capacity to carry 10,000 gals or more of pollutants (including oil) as fuel and cargo shall maintain an adequate written ship-specific spill prevention and control contingency plan. Any such vessel shall have on-board a "spill officer," designated by the contingency plan who is responsible for training crew members to carry out spill response efforts. An adequate plan must include provisions for on-board response, including notification, pollutant incident assessment, vessel stabilization, discharge mitigation, and on-board discharge containment. FSA § 376.071. A plan in compliance with the federal requirements for a ship-specific spill contingency plan shall satisfy the requirements of this section. Id.

Regulations for the safety and operation of vessels shall be accordance with the prevailing rules of the U. S. Coast Guard. 16 Florida Administrative Rule 16N-16.013.

**Civil Liabilities:** The discharge of pollutants into or upon any coastal waters, beaches, and lands is prohibited. FSA § 376.041. Any person discharging pollutants (including oil) shall immediately undertake to contain, remove, and abate the discharge. FSA § 376.09(1).

With respect to individual causes of action or damage, no person is prohibited from bringing a cause of action for all damages resulting from a discharge. In any such suit, it shall not be necessary for the person to plead or prove negligence in any form or manner. FSA § 376.205. The person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it occurred. Defenses are specified in FSA § 376.12(3).

The owner of a pollutant transported as cargo on any vessel suffering a discharge shall be liable for all cleanup costs within the applicable liability limits which are not paid for by the owner or operator of the vessel. FSA § 376.12(4). However, the cargo owner is not liable if the vessel owner or operator was in compliance with the vessel financial security requirements. Id.

Any person who renders assistance in containing or removing any pollutant (including oil) may be eligible for reimbursement of the cost of containment or removal, provided prior approval for such reimbursement is granted by the Department of Natural Resources. However, the department may waive the prior-approval prerequisite. FSA § 376.09(7).

The Department of Natural Resources may recover on behalf of the Florida Coastal Protection Trust Fund from the person or persons causing the discharge, jointly and severally, all sums expended from the fund in response to a pollutant discharge. FSA § 376.11(6). Any vessel, or its agents or servants, who permits or suffers a prohibited discharge shall be liable to the fund for all cost of cleanup or abatement up to an amount not to exceed \$50 million, or \$625 per gross registered ton of such vessel whichever is the lesser. FSA § 376.11(1). When the Department of Natural Resources can show that the discharge was the result of willful or gross negligence or willful misconduct on the part of the vessel owner or operator, such owner or operator shall be liable to the fund for the full amount of fund sums expended. Id. When a discharge of pollutants occurs from a terminal facility, recovery of costs of abatement and cleanup shall be limited to an amount not to exceed \$25 million, except that when the department can show that the discharge was the result of willful or gross negligence or willful misconduct by the owner or operator, such owner or operator shall be liable to the fund for the full amount of fund monies expended. The limits on liability of owners and operators of vessels and terminal facilities does not apply if the responsible party fails or refuses to report the incident,

having reason to know of the incident, or the responsible party fails or refuses to provide reasonable cooperation and assistance as requested by a state or federal on-scene coordinator. FSA § 376.12(1)(b).

In any suit to enforce claims of the Florida Coastal Protection Trust Fund, or any other state claims, it is not necessary for the Department of Natural Resources to prove negligence in any form or manner. The department need only plead and prove that the prohibited discharge occurred. FSA § 376.12(6). The defenses of a person alleged to be responsible for discharge will be unavailable if the responsible party failed to report the discharge, having had reason to know of the discharge, or failed to provide reasonable cooperation and assistance requested by state or federal authorities in connection with cleanup activities. FSA § 376.12(b).

After reporting a discharge, a vessel shall remain in the jurisdiction of the department for a sufficient time to prove financial responsibility for the damages resulting from the discharge. FSA § 376.12(11).

Whoever violates the prohibition of FSA § 376.041 prohibiting the discharge of pollutants into or upon state waters and lands shall be liable to the state and shall pay the state sums necessary to restore any injured or destroyed natural resource to its condition prior to a spill, to the extent technically feasible. FSA § 376.121(1)(a). Restoration shall include the cost to restock waters and coastal areas, replenish or replace natural resources, and otherwise restore coastal waters, estuaries, tidal flats, beaches, and submerged lands to their condition prior to a spill. *Id.* Compensation will also be paid for damages to nonrestorable natural resources in accordance with a compensation schedule established by the Department of Natural Resources. FSA § 376.121(1)(b). The state shall also establish guidelines for determining the restoration value of injured or destroyed natural resources using generally accepted and cost-effective resource evaluation methods. The compensation schedule for accessing damages to nonrestorable natural resources will include standards for determining the cost of any lost ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of injured or destroyed resources. FSA § 376.121(b). The amount of compensation shall not be less than \$1 per gallon of pollutant spilled or per square foot of habitat impacted, and no greater than \$1,000 per gallon of pollutant spill or per square foot of habitat impacted.

Liability limits only apply to cleanup costs; liability is unlimited for natural resource damages and third-party damages; "nothing contained herein shall be construed to limit the liability of vessels, terminal facilities, or the fund for the damages." FSA § 376.12(10).

The Department of Legal Affairs, any political subdivision of municipality of the state, or a citizen of the state may maintain an action for injunctive relief against any person, natural or corporate, or governmental agency to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state. FSA § 403.412(2)(a). However, the complaining party shall first file with the appropriate governmental agency a verified complaint setting forth the facts upon which the complaint is based. The agency receiving the complaint has 30 days within which to take appropriate action. FSA § 403.412(1)(c).

**Criminal Liabilities:** If a vessel transporting pollutants as cargo within the state's waters is operating in violation of the financial security provisions and suffers a moderate discharge, the master of the vessel shall be charged with a felony of the third degree.

FSA § 376.12(3). The pilot and master of any vessel or person in charge of any terminal facility who fails to give immediate notification of a discharge to the department or to the nearest Coast Guard station commits a felony in the third degree. FSA § 376.12(11).

The pilot and master of a vessel which fails to remain in the department's jurisdiction for a reasonable time after notice of a discharge shall be guilty of a felony in the third degree. FSA § 376.12(11).

It is unlawful for any person to violate any provision of the Pollutant Spill Prevention and Control Act or any regulation or order of the Department of Natural Resources made pursuant to it. Violations shall be punishable by a criminal penalty of up to \$50,000 per violation per day. FSA § 376.16(1). Penalties assessed for a discharge under this section shall be the only penalties assessed by the state, and the assessed person will be excused from paying any additional penalty for water pollution under the Florida Air and Water Pollution Control Act for the same occurrence. FSA § 376.16. But, the penalty provisions do not apply to any discharge which is promptly reported and removed by a facility or vessel in accordance with the regulations and orders of the Department of Natural Resources. Id.

**Financial Responsibility Requirements:** The owner or operator of any vessel transporting pollutants (including oil) as cargo within state waters must have financial security equal to or greater than the amount of liability for cleanup cost applicable to the vessel pursuant to FSA § 376.12 (in an amount not to exceed \$50 million or \$625 per gross registered ton). The financial security may be in the form of a cash deposit, self insurance, insurance, guarantee, or surety, or any combination which is payable to the Florida Coastal Protection Trust Fund. Id.

Each owner or operator of a terminal facility or vessel using any port in Florida is required to establish and maintain evidence of financial responsibility pursuant to federal laws and regulations. FSA § 376.14(1).

**State Response Capability:** Whenever it becomes necessary for the state to protect the public interest, the Department of Natural Resources is to keep an accurate record of costs and expenses incurred and thereafter diligently to pursue the recovery of any sums so incurred from the responsible persons. FSA § 376.051(4). The Department may bring an action on behalf of the state to enforce the cleanup liabilities imposed by FSA § 376.12. If a person causing a discharge fails to act, the Department of Natural Resources may arrange for the removal of the pollutant. If the pollutant was discharged onto federal waters, the department shall act in accordance with the National Contingency Plan. Id. Federal funds provided under the Federal Water Pollution Control Act shall be used to the maximum extent possible prior to the expenditure of state funds. In the event of a discharge where the source is unknown, any local discharge cleanup organization shall, upon the department's request, immediately contain and remove the discharge. FSA § 376.09(3).

The Department of Natural Resources is authorized to establish and maintain equipment and personnel at such ports within the state and other places as in its judgment may be necessary to carry out its responsibilities under the Pollutant Discharge Prevention and Removal Chapter. FSA § 376.10. The salaries of the employees and the cost of equipment is paid from the Florida Coastal Protection Trust Fund. Id.

Monies recovered by the Department of Natural Resources for damages to restorable natural resources shall be used for their restoration. FSA § 376.121(4)(a). Compensation recovered by the state for damages to none restorable natural resources shall be used for developing restoration and enhancement techniques for natural resources, investigating methods for improving techniques for containment and removal of pollutants from the environment, investigating the long-term effects of pollutant spills on natural resources, developing an adequate wildlife rescue and rehabilitation program, expanding the state's pollution and control education program, restoring natural resources, and funding special projects. FSA § 376.121(4)(b).

With regard to pollutant discharge prevention and removal, the powers and duties of the Department of Environmental Regulation extend to the land mass of the state not described in the Pollutant Spill Prevention and Control Act. FSA § 376.303(2). The act relates generally to terminal facilities and coastal waters.

**State Funding Mechanisms for Response and Cleanup:** The Florida Coastal Protection Trust Fund was established to be used by the Department of Natural Resources as a revolving fund for carrying out the purposes of the Pollutant Discharge Prevention and Removal Act. FSA § 376.11(2). This fund is financed by terminal facility registration fees, penalties, judgments, and damages recovered by the state from responsible persons, and excise tax revenues. *Id.* Monies in the fund may be dispersed to provide for the department's administrative, personnel, and equipment expenses related to enforcement of the Pollutant Discharge Prevention and Removal Act and all costs involved in the prevention and abatement of pollution generally. The fund may also be used to pay for costs and expenses of the cleanup, restoration, and rehabilitation of waterfowl, wildlife, and all other natural resources damaged by the discharge of pollutants. FSA § 376.11(4)(c). The Department of Natural Resources may spend up to \$1 million per year from the principal of the fund to acquire, design, train, and maintain emergency cleanup response teams located at appropriate ports throughout the state for the purpose of cleaning oil and other toxic materials from coastal waters. FSA § 376.11(4)(h).

Any person claiming to have suffered damages as a result of a discharge of pollutants may apply for reimbursement from the Florida Coastal Protection Trust Fund. FSA § 376.12(5). If reimbursement is made, the fund shall be subrogated to any cause of action that the claimant may have had. FSA § 376.12(5)(d). The fund is absolutely liable for all proven damages against the fund. FSA § 376.12(5)(e). The fund must diligently pursue the reimbursement to the fund of any sum expended from the fund for cleanup, abatement, and damages. FSA § 376.12(6).

There is also a Port Trust Fund administered by the Department of Natural Resources as a condition of a permit or other form of approval for environmental mitigation required as a condition of a state, federal, or local environmental permit, and for the acquisition of spoil disposal sites and improvements to existing and future spoil sites in several listed ports. FSA § 376.22(1).

**Preventive Audit and Inspection Provisions:** Every owner or operator of a terminal facility must obtain a spill prevention and response certificate issued by the Department of Natural Resources. FSA § 376.065(1). The certificate shall describe the barrel capacity of the terminal facility, all prevention, containment, and removal equipment to which the facility has access, and the terms of agreement and operation plan of any discharge cleanup organization to which the owner or the operator of the terminal facility belongs.

FSA § 376.065(3). The Department of Natural Resources is required to adopt requirements that any terminal facility required to possess a valid registration certificate which is also causing or permitting the discharge of a pollutant (including oil) at reasonable time be subject to a complete and thorough inspection. FSA § 376.07(h). If the Department determines there are unsatisfactory preventive measures or containment and cleanup capabilities, it shall, following notice in hearing suspend the registration until compliance. Id.

**Response Drill Requirements:** The Department of Natural Resources must create a state response team which shall be responsible for creating and maintaining a contingency plan of response, organization, and equipment for handling emergency cleanup operations and wildlife rescue and rehabilitation operations. FSA § 376.07(e). The state plans shall include detailed emergency operating procedures for the state as a whole, and the team must from time-to-time conduct practice alerts. Id.

November 1991

## HAWAII

**Responder Immunity:** "No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law to any government or private parties for costs, damages, or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with this chapter or at the direction of an on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person." Hawaii Revised Statutes § 128D-6(e).

Although not specifically related to oil spill response and cleanup, there is another provision which provides that any person who in good faith without remuneration or expectation of remuneration renders assistance at the scene of a vessel collision, accident or other casualty (without objection of any person assisted) shall not be liable for any civil damages resulting from the person's acts or omissions in providing or arranging towage or other assistance, except for damages as may result from the person's gross negligence or wanton acts or omissions. HRS § 267-8(b).

**State Contingency Plan Requirements:** The Health Department shall adopt by rules a Hawaii state contingency plan which, as appropriate and practicable, shall comport with the National Contingency Plan. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans. HRS § 128D-7. According to Ms. Claire Hong of the Hazardous Evaluation and Emergency Response Office, rules implementing recent legislation will be completed in mid-1992. Senate Bill 1756 amended the Environmental Response Law in 1991.

**Civil Liabilities:** No person, including any public body shall discharge any water pollutant into State waters except as authorized. HRS § 342D-50(a)p. In case of an injury to or loss of natural resources, liability shall be to the State for natural resources within the State. HRS § 128D-6(h). Any party who has incurred removal or remedial action costs in accordance with the Environmental Response Law may seek contribution or indemnity from any person who is liable. HRS § 128D-\_\_\_(d). Any person may commence a civil action on the person's behalf against any person who has alleged to be in violation of any requirement under the Environmental Response Law or against the Director of Health where there is an alleged failure to perform any state act or duty. HRS § 128D-\_\_\_(a)(2). No action may be commenced if the Director has issued a notice letter to the violator concerning the violation or has undertaken a response action. *Id.*, (c)(2).

If the Director of Health determines that any person is violating the Water Pollution Chapter, or any rule adopted pursuant to the Chapter, he may issue an order specifying a reasonable time during which that person shall be required to take necessary measures to correct the violation. HRS § 342D-9(a). He may also require the alleged violator to appear for a hearing and may impose penalties. *Id.* He may issue a cease and desist order against any activities that violate the Water Pollution Chapter or any rule adopted pursuant to the Chapter. *Id.*, (b)(3).

Any person who violates the Water Pollution Chapter shall be fined no more than \$10,000 for each separate offense. Each day of violation constitutes a separate offense. HRS § 342D-30(a)b. The Director is authorized to impose the penalties and factors to be considered include the nature and history of the violation and of any prior violations, and the opportunity, difficulty, and history of corrective action. HRS § 342D-31. Any costs incurred by the Environment Response Revolving Fund shall also be recovered by the attorney general from the liable person or persons including legal interest. HRS § 128D-5(a). Any person who is liable for a release of hazardous substances (including oil) and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an state administrative order may be liable to the state for punitive damages up to three time amount of any cost incurred by the Environmental Response Revolving Fund. In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release, any person who willfully, knowingly, or recklessly violates the Environmental Response Law Chapter or any rule of order issues pursuant to it, shall be subject to a civil penalty not to exceed \$50,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The court is directed to take into account the nature, circumstances, and gravity of the violation and with respect to the violator ability to pay, prior history, the degree of culpability, economic benefit of savings, if any, resulting from the violation. HRS § 128D-8(e).

**Criminal Liabilities:** Any person who negligently violates the Water Pollution Chapter or related rules shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or by both. HRS § 342D-32. Any person who knowingly violates the Water Pollution Chapter or any Department rule adopted under the Chapter shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three (3) years or by both. HRS § 342D-33. Any person who knowingly violates the Water Pollution Chapter or a Department rule adopted pursuant to the Chapter, and who knows at that time that the violation places another person in imminent danger of death or serious bodily injury, shall be subject to a fine of not more than \$250,000 or imprisonment of not more than fifteen (15) years, or both. HRS § 342D-34(a). A person which is an organization, upon conviction shall be subject to a fine of not more than \$1,000,000. HRS § 342D-34(b). Any person who knowingly releases a hazardous substance (including oil) into the environment in amount above the reportable quantity established in administrative rules shall be subject to prosecution for a Class C Felony or shall be punished by a civil penalty of not more than \$100,000 per day of violation. No criminal penalties shall be imposed under the Environmental Response Law Chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority. HRS § 128D-15. (The criminal penalties set forth in HRS § 128D-3 & 128D-10 shall not take effect until the State Contingency Plan has been adopted. HRS § 128D-7(e)).

**Financial Responsibility Requirements:** None.

**State Response Capability:** The Director of Health shall prevent, control, and abate water pollution in the State. HRS § 342D-4.

Whenever any hazardous substance (including oil) is released or there is a substantial threat of such a release, the Director of Health is authorized to act consistent with the State Contingency Plan to remove or arrange for the removal of such hazardous substance,

pollutant, or contaminant at any time, including its removal from any contaminated natural resources. HRS § 128D-4(a). The Director may issue such orders as may be necessary to protect the public health, welfare, and the environment upon determining that there is an imminent and substantial endangerment to the public health, welfare, or environment. Id., (a)(2). He may solicit the cooperation of responsible parties to encourage voluntary cleanup efforts and undertake investigations, monitoring and other information gathering to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved. He may perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment. Id., HRS § (a)(4). He may also contract the services of appropriate organizations to perform the actions

**State Funding Mechanisms for Response and Cleanup:** There is an Environmental Response Revolving Fund within the Department of Health consisting of appropriated monies and court-ordered awards or judgments, and other funds, which may be expended by the Department for emergency response actions under the Environmental Response Law Chapter. HRS § 128D-2. Monies in the fund may be expended by the Director to pay for all removal costs or remedial actions incurred by the State or the counties in response to a release, and payment of all State costs in the restoration, rehabilitation, or replacement of natural resources injured or destroyed of a result of a release. HRS § 128D-4(c).

**Preventive Audit and Inspection Provisions:** For the purposes of determining or investigating an actual release or a suspected release, or enforcing the Environmental Response Law Chapter, the Department of Health may issue reasonable and necessary information requests and obtain reasonable access to any facility, vessel, or location to inspect, review, and copy all pertinent documents and records. HRS § 128D-4(b).

The Director of Health may enter and inspect any building or place to investigate an actual or suspected source of water pollution, and to ascertain compliance with the Water Pollution Chapter, or any rule or standard adopted by the Department. HRS § 342D-8(a).

**Response Drill Requirements:** None.

November 1991

VIA U. S. MAIL AND FACSIMILE

November 7, 1991

Michele Brown, Esq.  
Executive Director  
Citizens' Oversight Council on Oil and Other Hazardous Substances  
3111 C Street, Suite 150  
Anchorage, Alaska 99503

Re: Responder Immunity Research

Dear Michele:

I have enclosed two of the four summaries which have been prepared thus far. I want to apologize again for being late in the delivery of these. We have already compiled the laws of Florida and Louisiana, and I will send on the summaries just as soon I finish preparing them. I have also enclosed copies of the actual laws from Connecticut and Hawaii to place in your file.

In preparing the summaries, I endeavored to follow the format suggested in your August letter which discusses the "Other State Laws" assignment. Thank you for your patience. Best wishes.

Yours very truly,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood  
Senior Attorney-External Affairs

LDW41/cas

Enclosures

cc w/summaries: Ms. Pat Kincaid  
Mr. Paul M. Richards  
Mr. Michael K. Abbott  
Ms. Karen L. Kilty

## CONNECTICUT

**Responder Immunity:** "No person, firm or corporation which renders assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of oil or petroleum or chemical liquids or solid, liquid, or gaseous products, or hazardous materials or which assists in preventing, cleaning-up or disposing of any such discharge shall be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in rendering such assistance or advice, except acts or omissions amounting to gross negligence or wilful or wanton misconduct, unless he is compensated for such assistance or advice for more than actual expenses." Sec. 22a-452(b). Immunity does not apply to responsible persons, or to persons under a duty to mitigate effects of a discharge or spill. Sec. 22a-452(c).

Persons rendering assistance or advice are entitled to reimbursement for the reasonable costs expended for containment, removal or mitigation, if the discharge or spill resulted from negligence of the responsible party. Sec. 22a-452(a).

**State Contingency Plan Requirements:** The commissioner of environmental protection must develop and implement a program and adopt regulations for oil spill contingency planning and coordination with local officials. Sec. 22a-453a. The commissioner is given the authority to adopt regulations to implement this section. *Id.* According to Charles Szmenski of the Bureau of Waste Management, Oil and Chemical Spills, the regulations have not yet been promulgated.

**Civil Liabilities:** Any person, firm, or corporation which directly or indirectly causes pollution and contamination of any land or waters of the state or causes an emergency through a discharge or spill of oil or petroleum is liable for all costs and expenses incurred in containing, removing, or mitigating such pollution or contamination. Sec. 22a-451. In addition, if the pollution or contamination was negligently caused, such person, firm, or corporation may be assessed damages equal to one and one-half times the incurred costs and expenses. If the pollution or contamination was willfully caused, such person, firm, or corporation may be assessed damages equal to two times the incurred costs and expenses. *Id.*

Any person who knowingly or negligently violates these provisions shall also be liable to the state for the reasonable costs and expenses of the state in detecting, controlling, and abating such violation, and the reasonable costs and expenses of the state in restoring the air, waters, lands and other natural resources, including plant, wild animal and aquatic life, or, if restoration is not practicable or reasonable, for any damage caused by such violation. Sec. 22a-6(a). The commissioner of environmental protection is authorized to adopt a schedule establishing the amounts of the civil penalties which may be assessed, but not to exceed statutory limitations. Sec. 22a-6(b). Civil penalties may be imposed for a violation up to \$25,000 per day. Sec. 22a-438(a). In assessing the amount of any penalty, the court may consider the nature, circumstances, the economic benefit resulting to the person from the violation, and other appropriate factors.

**Criminal Liabilities:** A willful or criminally negligent violation is punishable by a fine of not more than \$25,000 per day or one year imprisonment, or both. Sec. 22a-438(a).

**Financial Responsibility Requirements:** None in statutes and regulations not yet adopted.