ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
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State Response Capability: If a person, firm, or corporation which causes any discharge or spill does not act immediately to contain and remove or mitigate the effects of the discharge or spill to the commissioner's satisfaction, or if the responsible party is unknown, and the discharge or spill is not being contained, removed, or mitigated by the federal government, a state agency, a municipality, or a regional or interstate authority, the state may contract with an authorized person to contain and remove or mitigate the effects of the discharge or spill. Sec. 22a-451(b). The commissioner shall request the attorney general to recover the costs and expenses of such contractual obligations.

State Funding Mechanisms for Response and Cleanup: The state maintains a revolving fund known as the Emergency Spill Response Fund which is used, in part, for containment and removal or mitigation of oil or petroleum discharges or spills, but is not established solely to respond to oil spills. Sec. 22a-451(d). The fund is financed in part through damages collected from dischargers and is unlimited for purposes of oil spill cleanup.

Preventive Audit and Inspection Provisions: The commissioner of environmental protection may require the construction, modification, extension, or alteration of pollution abatement facilities or monitoring systems, or adopt other remedial measures as are necessary to prevent, control, or abate pollution. Sec. 22a-424(f). He may provide by regulations for the establishment and maintenance in operating condition and position of suitable equipment to contain as far as possible the discharge and spillage of any oil or petroleum. Sec. 22a-449(b). He may inspect hoses, pipelines and other equipment used in connection with the transfer and transportation of oil or petroleum to make certain that they are in good operating condition, and order the renewal of any such equipment found unfit for further use. Id. Regulations have not been adopted.

Each tank ship and tank barge from which and to which oil or petroleum liquids are being transferred shall be protected by a floating boom retention device which shall enclose the vessel. Sec. 22a-457(a). Exemptions to the use of floating boom retention devices may be adopted through regulations. Id.

Response Drill Requirements: None in statutes. Regulations have not been adopted.

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 an 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-349(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

LOUISIANA

Responder Immunity: "Notwithstanding any other provisions of law, except for the responsible person, no person, including any discharge cleanup organization, that voluntarily, pursuant to or consistent with the national contingency plan or the state oil spill contingency plan, or pursuant to or consistent with any response plan required under this chapter, or pursuant to or consistent with the request or the direction of an authorized federal or state official, or pursuant to or consistent with the request of the potentially responsible person, renders care, assistance, or advice in abating, containing, removing, cleaning up, or otherwise responding to pollution from an unauthorized discharge of threat of discharge of oil or refined petroleum products is liable for removal costs, damages, or civil penalties, whether under this chapter or other laws of this state resulting from acts or omissions committed in rendering such care, assistance, or advice. This section shall not apply to actions for personal injury or wrongful death or for acts or omissions of gross negligence or willful misconduct. A party responsible for the initial discharge is liable for any removal cost or damages for which another person is relieved under this subsection." LRS 30:2466(B).

No action or omission taken by any person to abate, contain, remove, cleanup, or otherwise respond to pollution shall be construed as an admission of responsibility or liability for the discharge. LRS 30:2466(A).

State Contingency Plan Requirements: The Louisiana oil spill coordinator ("coordinator") will develop a statewide oil spill prevention and response plan, taking into account the rules being developed by the federal government in accordance with the federal Oil Pollution Act of 1990. LRS 30:2456(A)(1). The coordinator will also adopt reasonable regulations for discharge prevention programs and response capabilities of terminal facilities and vessels. He will develop and implement criteria and plans of response to unauthorized discharges of various degrees and kinds, including realistically foreseeable worst-case scenarios consistent with federal regulations. LRS 30:2457(A)(2), (4).

Louisiana is currently developing oil spill regulations to implement the state's oil spill prevention and response act which was adopted in April in 1991.

As mentioned above, coordinator shall adopt a state oil spill contingency plan of response for actual or threatened unauthorized discharges of oil and cleanup of pollution from such discharges. LRS 30:2459(A). The plan shall include detailed emergency operating procedures, a response command structure and state response team, inventory of public and private equipment and its location, a list of available response supplies, a table of response organizations, plans for practice drills, plans for volunteer coordination and training, etc. LRS 30:2460(A).

A person may not operate a terminal facility without a discharge prevention and response certificate. The oil spill coordinator will require satisfactory evidence before issuing or renewing a certificate that an applicant has implemented a discharge prevention and response plan consistent with state and federal plans and regulations for prevention of unauthorized discharge of oil and abatement, containment, and removal of pollution. The applicant must demonstrate that it can provide directly, or through membership or contract with a discharge cleanup organization, all required equipment and personnel to prevent, abate, contain, and remove pollution from an unauthorized discharge of oil as provided in the plan. LRS 30:2470(B)(1). Each applicant for a discharge prevention and response certificate must submit information related to implementation of the applicants' discharge and prevention response plan, including: all response equipment, personnel available to deploy and operate the equipment, as well as the estimated time required to deploy the personnel after the discharge, the measures employed to prevent unauthorized discharges, the terms of agreement and operation plan of any discharge cleanup organization to which the owner or operator of a terminal facility belongs, financial responsibility for removal costs and damages, and any other appropriate information. LRS 30:2472(5).

Every owner or operator of a vessel or facility must provide to the oil spill coordinator the tank vessel and facility response plans as provided in § 4202(A)(5) of the Oil Pollution Act of 1990 (PL 101-380).

In conjunction with the U. S. Coast Guard and prior to being granted entry to any port in Louisiana, the person in charge of a vessel subject to the provisions of this chapter may be required to report or show to the coordinator that the vessel has a discharge prevention and response plan and the personnel and equipment to implement it and that the vessel has evidence of financial responsibility. LRS 30:246(4)(5).

Civil Liabilities: Any person responsible for an unauthorized discharge of oil shall immediately notify the hotline of the discharge, and undertake all reasonable actions to abate, contain, and remove pollution. LRS 30:2463(A).

A person may not leave, abandon, or maintain any structure or vessel involved in an actual or threatened of unauthorized discharge of oil in coastal waters or on public or private lands or at a public or private port or dock, in a wrecked, derelict, or substantially dismantled condition, without the consent of the oil spill coordinator. LRS 30:2469(A).

Any responsible person may be liable for a civil penalty of not more than $1 Million or the cost of any cleanup made necessary by such violation of law and a penalty of not more than $25,000 for each day of violation. LRS 30:2025(E)(1). Any person to whom a compliance order or a cease and desist order is issued who fails to take corrective action within the time specified shall be liable for a civil penalty of not more than $50,000 for each day of continued violation or noncompliance. Id., Subsection (2). In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty, the following factor shall be considered; the history of previous violations for repeated noncompliance, the nature and gravity of the violation, the gross revenues generated by the respondent, the degree of culpability, recalcitrance, defiance, or indifference to regulations or orders, the monetary benefits realized through noncompliance, and the degree of risk to human health or property caused by violation, etc. Id., Subsection (3)(a).

The total of the liability of a responsible party for all damages and removal costs shall not exceed for a tank vessel, the greater of $1,200 per gross ton; or, in the case of a vessel greater than 3,000 gross tons, $10 Million. In the case of a vessel 3,000 gross tons or less, $2 Million. For any other vessel, $600 per gross ton or $500,000, whichever is greater. For an offshore facility, except a deepwater port, the total of all removal costs plus $75 Million. For any onshore facility or deep water port, $350 Million, provided that, for onshore facilities, the limitation of liability shall be the limitation of liability established by the President of the United States under the Oil

Pollution Act of 1990 (PL 101-380). LRS 30:2479(A). The limits of liability do not apply if an incident is primarily caused by gross negligence or willful misconduct, or the violation of an applicable federal, state, or local safety, construction, or operating regulation by a responsible party, or agent or employee of the responsible party. LRS 30:2479(C). The limits of liability do not apply if a responsible party fails to report a incident as required by law, and knows or has reason to know of the incident; or to provide all reasonable cooperation and assistance requested by the responsible state or federal official in connection with removal activities.

A person is not liable if a discharge resulted solely from an act of God, war, or terrorism; an act of government, either state, federal, or local; an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act of omission; or the willful misconduct or negligence act or omission of a third-party other than an employee or agent of the person responsible for a third-party whose conduct occurs in connection with a contractual relationship with a responsible person, unless the responsible person fails to exercise due care and take precautions against foreseeable conduct of the third person. LRS 30:2481.

The Department of Wildlife and Fisheries may bring a civil suit to recover penalties for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life unlawfully killed, caught, taken, possessed, or injured. LRS 30:2491(B).

Criminal Liabilities: Any person who willfully or knowingly discharges any substance in contravention of any subtitle or of the regulations when the substance is one that endangers or could endanger human life or health is guilty of a felony and may be fined not more than $1 Million or the cost of the cleanup made necessary of such violation and shall be fined not more than $100,000 per day of violation and costs of prosecution or imprisonment at hard labor for not more than ten (10) years, or both. LRS 30:2025(F)(1). Any person who willfully or knowing discharges or disposes of any substance in contravention of any provision of the subtitle or of the regulations when the substance does not endanger or could not endanger human life of health, is guilty of a misdemeanor and may be fined not more than $25,000 per day of violation and costs of prosecution, or imprisonment for not more than one year, or both. LRS 30:2025(F)(2).

Financial Responsibility Requirements: Each owner or operator of a tank vessel with a capacity to carry 10,000 gallons or more as fuel or cargo operating within coastal waters or a terminal facility must maintain and furnish evidence of their financial responsibility for costs and damages from an unauthorized discharge of oil in accordance with the Oil Pollution Act of 1990 (PL 101-380). After an unauthorized discharge of oil, a vessel must remain in the coordinator's jurisdiction until the owner, operator, or person in charge has shown the coordinator evidence of financial responsibility. LRS 30:2478(B)(C).

State Response Capability: The Louisiana oil spill coordinator (within the Governor's office) is required to provided a coordinated response effort from all appropriate state agencies in the event of an unauthorized or threatened discharge of oil affecting or potentially affecting the land, coastal waters, or any other waters of Louisiana. LRS 30:246(A)(2).

On notification of an actual or threatened unauthorized discharge of oil, the coordinator must take immediate action to assess the discharge and prevent, abate, or contain any pollution. LRS 30:2461. He is authorized to direct all state discharge response and cleanup operations from unauthorized discharges of oil in coastal waters, as directed by the governor. LRS 30:2462(A). The Department of Environmental Quality, under the direction and control of the coordinator, is lead technical agency of the state for response to actual or threatened unauthorized oil discharges, and for cleanup of pollution from unauthorized discharges of oil. LRS 30:2462(A).

If the persons responsible for a discharge are unwilling or unable to abate, contain, and remove pollution in an adequate manner, the coordinator may abate, contain, and remove pollution from the discharge and may contract with and appoint agents to operate under his direction. LRS 30:2463(B).

The coordinator may contract with any private person or entity for the use of equipment and personnel at places the coordinator determines may be necessary for response and prevention operations, in accordance with the state oil spill contingency plan. The coordinator may contract with any public agency by inter-agency transfer of funds to conduct baseline environmental, wetlands, water quality, habitat, wildlife, and natural resources assessments, or for any other matter deemed necessary to comply with the state and national oil spill contingency plans. LRS 30:2467.

State Funding Mechanisms for Response and Cleanup: Any person or discharge cleanup organization that renders assistance in abating, containing, or removing pollution from any unauthorized discharge may receive compensation from the fund for removal costs, provided the oil spill coordinator approves compensation prior to the assistance being rendered. The coordinator, on petition and for good cause shown, may waive the prior approval prerequisite. LRS 30:2465(B).

The coordinator may use monies in the fund up to $1 Million in any fiscal year for the removal of any wrecked, derelict, or substantially dismantled vessel or structure involved in an actual or threatened unauthorized discharge of oil in coastal waters or on public or private lands, if its owner or operator cannot be located.

The oil spill contingency fund was created to immediately provide available funds for response to all threatened or actual unauthorized discharges of oil, or cleanup of pollution from unauthorized discharges of oil, natural resources damages, damages sustained by any state agency or political subdivision, and removal costs from threatened, unauthorized discharges of oil. LRS 30:2483(C). All fees, taxes, penalties, judgments, reimbursements, charges, and federal funds collected pursuant to the state's Oil Spill Prevention and Response Act shall be deposited immediately upon receipt into the state treasury. Money in the fund may be dispersed for the following purposes and no others: administrative and personnel expenses of the office of the oil spill coordinator (not to exceed $250,000 in any fiscal year); removal costs related to abatement and containment of actual or threatened unauthorized discharges of oil, protection, assessment, restoration, or mitigation of damages to natural resources, and operating costs in contracts for response and prevention not to exceed $500,000 in any fiscal year. LRS 30:2484. An oil spill contingency fee is imposed on every person owning crude oil in a vessel at the time such crude oil transferred to or from a vessel at a marine terminal within the state of Louisiana. The operator of the marine terminal collects the fee from the owner of the crude oil and remits it to the Secretary of the Department of Revenue and Taxation. The fee is imposed only once on the same crude oil. For expenses of collecting the fee, the operator is authorized to withhold 1 1/2% percent of the fees collected during each quarter provided that the amount due was not delinquent at the time of payment.

LRS 30:2485. The rate of the fee is $.02 per barrel of crude oil until the state treasurer certifies that the balance in the fund has reached $50 Million. If the balance in the fund falls below $8 Million, the treasurer shall certify that fact to the secretary of the Department of Revenue and Taxation. On receiving the state treasurer's certification, the secretary shall resume collecting the fee. LRS 30:2486. The fee shall be levied at the rate of $.04 per barrel under some circumstances. LRS 30:2486(C).

The coordinator must prescribe appropriate forms and requirements and by rule establish procedures for filing claims for compensation from the fund and for removal cost reimbursements to other state agencies from the fund. LRS 30:2488(A). The fund shall be liable for removal costs and damages, provided that such are not recoverable under the federal Oil Pollution Act and the claimant has exhausted all federal remedies. The damages include all proven, reasonable damages and removal costs incurred by state agencies or local government authorities, and all natural resources damages from an unauthorized discharge of oil. The coordinator must diligently pursue reimbursement to the fund of any sum expended or paid from the fund in accordance with the state and national oil spill contingency plans. The coordinator will recover for the use of the fund, either from persons responsible for the unauthorized discharge or otherwise liable, or from the federal oil spill liability trust fund, all sums owed to or expended from the fund. LRS 30:2489(B).

Preventive Audit and Inspection Provisions: The Louisiana oil spill coordinator is authorized to enter property when he finds it necessary to conduct a vessel or terminal-facility audit, inspection, or drill, or to respond to an actual or threatened unauthorized discharge. The coordinator may enter the property after making a reasonable effort to obtain consent. LRS 30:2456(E). The coordinator shall adopt reasonable regulations which establish requirements for complete and thorough inspections of terminal facilities. LRS 30:2457(A)(6).

The coordinator will adopt regulations for complete and thorough audits of vessel contingency and response plans. LRS 30:2457(A)(5).

The coordinator, in conjunction with U. S. Coast Guard, may subject a vessel covered by the state's Oil Spill Prevention and Response Act, as a condition to being granted entry into any port in the state, or a terminal facility to an announced or unannounced audit, inspection, or drill to determine the discharge prevention and response capabilities of the terminal facility or vessels. LRS 30:2477.

Response Drill Requirements: The state contingency plan must include plans for practice drills for the response command structure and state response team. LRS 30:2460(A)(5).

The coordinator, in conjunction with U. S. Coast Guard, may subject a vessel covered by the state's Oil Spill Prevention and Response Act, as a condition to being granted entry into any port in the state, or a terminal facility to an announced or unannounced audit, inspection, or drill to determine the discharge prevention and response capabilities of the terminal facility or vessels. LRS 30:2477.

DEC 20 1991

OIL DISCHARGE PREVENTION AND POLLUTION CONTROL
State of Maine

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OIL DISCHARGE PREVENTION AND POLLUTION CONTROL

SYNOPSIS

The Department of Environmental Protection is the lead agency for cleanup and removal of oil discharges. When a spill occurs in coastal waters the Commissioner of the department shall represent the governor in all abatement, cleanup and resource protection; he shall cooperate with federal, industry and other states that are responding to the spill.

Any person responsible for the spill shall begin immediate cleanup and removal of the pollution. The department may undertake the cleanup or retain agents to do so. The department is also empowered to replenish water supplies contaminated by the oil spill.

The Department of Environmental Regulation shall promulgate all rules and regulations to carry out this subchapter. It shall establish and maintain personnel and equipment at any ports it deems necessary.

The department has exclusive power to deal with the hazards of oil tankers that anchor in Maine ports. The department shall adopt necessary regulation to protect the coastal waters, tidal flats and beaches from any anchorage of oil-carrying vessels.

The commissioner of the Department of Environmental Protection shall review all c-plans. He shall, with other state agencies, assess all sensitive areas and resources in marine waters that could be threatened by a spill. The department shall then develop policies and determine priorities for the protection of these areas.

The Department of Inland Fisheries and Wildlife, in cooperation with other state agencies, shall prepare a rehabilitation plan for wildlife damaged by an oil spill.

Responders are not liable for their actions unless those actions are grossly negligent and the actions are not consistent with the national contingency plan or any state plan. Responders are not immune from acts or omissions caused by willful misconduct or from claims for personal injury or wrongful death.

Any vessel or fixed terminal that handles petroleum and petroleum products must obtain a license from the department. As a condition for obtaining a license the facility or vessel must show that it has, or is in the process of, implementing state and federal plans for controlling oil pollution and abating the pollution when a discharge occurs.

Any person operating an oil terminal facility must obtain a license from the department. Licenses issued to a terminal include any vessels under the control of that facility and vessels that are used to transport oil to or from that facility and that travel within State waters.

Any vessel not under the direction or control of a fixed facility must obtain its own license. Any vessel at anchorage in Maine waters for more than seven days must also obtain a license.

Maine laws make no provisions for financial requirements; however, each facility and vessel subject to the state licensing requirements shall file with the department a copy of its c-plan submitted to the President of the United States pursuant to OPA 90 requirements.

The commissioner must develop a state c-plan by December 31, 1991. He shall hold public hearings during the development of the plan. Along with the identification of a oil spill coordinator and a state structure for handling a spill, the plan must address a range of possible scenarios, including spills of 100,000 gallons, one million gallons and six million gallons. The plan also must address worst-case scenarios in designated ports.

The Maine law does not subject dischargers to penalties if they report the discharge within two hours, promptly remove the pollution in accord with rules and regulations and pay any costs within 30 days of demand. The department shall, however retain a vessel until it has paid any fines or penalties imposed upon it.

The Maine Coastal and Inland Surface Oil Cleanup-Fund, limited to $6 million, is funded with license fees for facilities and vessels. The assessment is 4 cents per barrel of petroleum or petroleum products transferred by a licensee. Additionally, any person who transports by highway or rail more than 25 barrels of petroleum or petroleum products at any one time must register with the department and pay the same fee of 4 cents per barrel.

The assessment will decrease to 3 cents per barrel after

July 1, 1994. Additionally, when the balance in the Fund reaches $6 million, the license and registration fees shall be decreased proportionately to cover only administrative costs.

Disbursements from the Fund may only be used for cleanup, abatement and removal, payment of third party claims, payment for arbitration and arbitrators, personnel and equipment located at designated ports and costs for environmental impact studies.

I. BACKGROUND AND AGENCY STRUCTURE

Maine's laws on oil discharge and prevention are found in subchapter II, 38 M.R.S.A. § 541-560. The legislature was concerned about the impact of oil pollution on the recreation and commercial fishing industries when it passed the laws in 1969.

The laws have been amended several times since their original passage. In 1990 the cap on the spill fund was increased to $6 million. At the same time the licensing fees that support the fund were also increased. In 1991 the state, facilities and vessels were required to establish c-plans. In 1991 the legislature also passed a law regarding responder liability.

GOVERNOR. When a spill occurs the governor shall proclaim an emergency and shall cooperate with federal and other agencies involved in the cleanup and removal. He shall also announce when the emergency is ended. 38 M.R.S.A. § 547.

LEAD AGENCY. Maine's Department of Environmental Protection is responsible for the response to oil spills. 38 M.R.S.A. § 544. In the event of a spill in coastal waters the

Commissioner of Environmental Protection shall directly represent the governor in all abatement, cleanup and resource protection in cooperation with federal, industry and other states' response teams. 38 M.R.S.A. § 547.

Any person discharging oil shall immediately begin removal of the pollution. The cleanup shall be under the direction of the department and it must meet the satisfaction of the department. The department may undertake the removal and cleanup and may retain agents and contracts to do so under its direction. 38 M.R.S.A. § 548.

The department may implement remedies to restore or replace water supplies contaminated by a discharge, using the most cost efficient, technologically feasible and effective alternative. 38 M.R.S.A. § 548.

The department shall promulgate rules and regulations to carry out this subchapter. Matters which shall be regulated by the department include:

> (1) operation and inspection requirements for facilities, vessels, personnel and other matters relating to licensee operations;
> (2) procedures for reporting discharges;
> (3) procedures, methods and equipment to be used in the removal of oil and petroleum products;
> (4) establishment of a state contingency plan; and
> (5) safety requirements for vessels and other motorized equipment used in the transport of oil and petroleum products.

38 M.R.S.A. § 546.

The department shall establish and maintain at such ports within the state and other places it determines, employees and equipment it believes necessary to carry out this subchapter. Salaries of such employees and equipment shall be paid from the Fund. 38 M.R.S.A. § 549.

Finally, the department has the exclusive power to deal with the hazards and threats of danger caused by the anchorage of oil carrying vessels in State waters. It shall adopt regulations to protect the coastal waters, tidal flats, beaches and lands adjoining the waters. When promulgating regulations the department shall consider the following:

> (1) the location, duration and type of anchorage;
> (2) the type and capacity of vessels permitted anchorage;
> (3) the systems and precautions necessary for safety on each vessel;
> (4) the training, number of availability of crew members aboard each vessel;
> (5) a requirement for c-plans in case of fire, accident, storm or other unforeseen acts;
> (6) the protection of the natural environment, aesthetic and recreational use of State waters; and
> (7) the protection of fisheries and the fishing industry of the State.

38 M.R.S.A. § 560.

<u>COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION</u>. The commissioner shall annual review all c-plans and make recommendations to revise the plans. 38 M.R.S.A. § 546-A.

He shall also, in consultation with the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, the Department of Conservation, the State Planning Office, the U.S. Fish and Wildlife Service and other appropriate agencies and organizations, assess the nature and extent of sensitive areas and resources in marine waters that may be threatened by oil spills. The department shall then develop policies and guidelines to set priorities for protection of sensitive areas. 38 M.R.S.A. § 546-B(1)-(2).

DEPARTMENT OF INLAND FISHERIES AND WILDLIFE. This department, in cooperation with other state agencies and organizations, shall prepare a rehabilitation plan for wildlife resources damaged by oil spills. The plan must include:

> (1) policies, priorities and guidelines to address rehabilitation activities;
> (2) an analysis of the cost-effectiveness of wildlife rehabilitation efforts;
> (3) a mechanism for the use of volunteers;
> (4) identification of needed resources and facilities for rehabilitation efforts and an inventory of those available;
> (5) preliminary agreements with treatment centers or facilities; and
> (6) recommendations on implementation of the plan and any required training efforts.

38 M.R.S.A. § 546-C.

BOARDS OF ARBITRATION. Boards of arbitration shall be used to hear and determine all claims arising from or related to a common single discharge. The hearings shall be informal; determinations made by a majority of the board shall be final. Determinations of the board may be subject to review by the Superior Court by only as to matters relating to abuse of discretion by the board. 38 M.R.S.A. § 551(3).

II. RESPONDERS

Responders are not liable for removal costs, damages, civil liabilities or penalties that result from actions taken or omitted in the course of rendering assistance or advice consistent with the national contingency plan, a federal or state contingency plan or as otherwise directed by the federal onscene coordinator. This immunity does not apply to personal injury or wrongful death or if a responder is grossly negligent or engages in willful misconduct or if the responder is the responsible party. 38 M.R.S.A. § 552, sub-§ 4.

III. <u>LICENSING OF FACILITIES</u>

No person shall operate or cause to be operated an oil terminal facility without a license. 38 M.R.S.A. § 545. Licenses issued to any fixed or permanent oil terminal facility shall include vessels under the direction or control of such facility and used to transport oil between such facility and vessels within State waters. 38 M.R.S.A. § 545, sub-§ 4.

Any person operating or causing to be operated a vessel not subject to the direction or control of a fixed and permanent terminal facility shall obtain a license. 38 M.R.S.A. § 545, sub-§ 4.

Any vessel at anchorage in Maine waters for more than seven days must have a current license from the department. 38 M.R.S.A. § 560, sub-§ 6.

Licenses shall be issued upon application and shall be subject to terms and conditions as the department determines as necessary to carry out the purposes of this subchapter. 38 M.R.S.A. § 545, sub-§ 1. As a condition precedent to the issuance or renewal of a license the department shall require satisfactory evidence that the applicant has or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, petroleum products and their by-products and the abatement of such pollution when a discharge occurs. 38 M.R.S.A. § 545, sub-§ 2.

IV. LIMITS ON LIABILITY FOR RESPONSIBLE PARTIES

Licensees are strictly liable for discharges occurring at facilities under their control or for discharges attributable to carriers or others for whom the licensee is responsible. Persons owning or controlling real property, structures, equipment or conveyances are strictly liable for causing a discharge from their property. 38 M.R.S.A. § 552, sub-§2.

A licensee shall be liable for all acts and omissions of its servants and agents and carriers destined for the licensee's facilities from the time such carrier shall enter State waters until such time as the carrier leaves State waters. 38 M.R.S.A. § 552, sub-§ 1.

Defenses to liability are: (1) an act of war; (2) an act of state, federal or municipal government; (3) an act of God, which shall mean an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency. 38 M.R.S.A. § 551, sub-§ 7.

VI. FINANCIAL RESPONSIBILITY

The Maine statutes have no requirements for financial responsibility.

VII. CONTINGENCY PLANS

STATE C-PLAN. The commissioner shall develop by December 31, 1991, a preliminary marine oil spill contingency plan. He shall hold a public hearing process of developing the plan. 38 M.R.S.A. § 546-A, sub-§ 1. The plan shall contain the following:

(1) designation of a state oil spill coordinator;
(2) a clear definition of the roles of the department, the oil industry and the U.S. Coast Guard in various circumstances as well as other state agency roles;
(3) a clear definition of the State's role under the joint agreement between the U.S. and Canada known as CANUSLANT;
(4) an inventory of oil spill response equipment available in the State;
(5) a listing of sources for qualified, trained spill responders with the state;
(6) preapproved criteria for the use of dispersants, bioremediation and in situ burning developed with the U.S. Coast Guard and other agencies and the names of persons authorized to make the final decision for the State in their use;
(7) identification of sensitive areas and resources and management strategies for protecting them;
(8) identification of resources for wildlife rehabilitation; and
(9) identification of facilities for disposal of oily debris and for separation, transport and storage of recovered oil.

38 M.R.S.A. § 546-A, sub-§ 3(a)-(i)

The plan must include provisions for annual drills, sometimes unannounced, to determine the adequacy of response plans and the preparedness of response teams. 38 M.R.S.A. § 546, sub-§ 4. When developing the plan, the need for prepositioned response teams and additional equipment shall be considered. 38 M.R.S.A. § 546-A, sub-§ 4.

The plan must address a range of scenarios, including spills of 100,000 gallons, one million gallons and six million gallons and the worst-case scenario in each major port area in both favorable and adverse conditions. The worst-case scenario in each major port area is the loss of an entire vessel of the following capacities:

(1) Portland: 30 million gallons;
(2) Penobscot Bay and Penobscot River: 13 million gallons;
(3) Portsmouth, N.H.: 13 million gallons;
(4) St. John, New Brunswick: 90 million gallons
(5) Eastport: 100,000 gallons; and
(6) Elsewhere on the coast: 30,000 gallons.

38 M.R.S.A. § 546-A, sub-§ 2(A)-(F).

<u>FACILITY PLANS</u>. Each facility subject to licensing requirements shall file with the department a copy of any oil discharge response plan submitted to the President under OPA 90 or a statement that a plan is not required by that licensee under federal law. 38 M.R.S.A. § 546, sub-§ 5.

<u>VESSELS PLANS</u>. Each vessel entering State waters and subject to licensing requirements shall file with the department a copy of any oil discharge response plan submitted to the President of the United States under OPA 90 or a statement that a plan is not required by that licensee under federal law. 38 M.R.S.A. § 546, sub-§ 6.

VIII. <u>ENFORCEMENT</u>

Any person causing or responsible for a discharge in violation of § 543 shall not be subject to fines or penalties if he reports the discharge within two hours, if he promptly removes the discharge in accord with the rules, regulations and directions of the department and if he pays to the Fund within 30 days of demand all costs expended for cleanup and removal. 38 M.R.S.A. § 550.

Whenever the department has probable cause to believe a vessel violated this subchapter, that vessel shall be detained until payment of any fine or penalty has been received. 38 M.R.S.A. § 552-A.

IX. <u>STATE RESPONSE MECHANISMS</u>

The Maine Coastal and Inland Surface Oil Clean-up Fund is established to be used by the department as a nonlapsing, revolving fund for carrying out the purposes of this subchapter. It shall be limited to $6 million. When the balance in the Fund reaches $6 million the fees shall be reduced proportionately to cover only administrative costs. 38 M.R.S.A. § 551, sub-§ 4(B).

To this Fund shall be credited all license fees, penalties, reimbursements and other fees and charges related to this subchapter. The money in this Fund may be invested as provided by statute. 38 M.R.S.A. § 551.

<u>FUNDING</u>. The Fund shall receive its moneys from licensing fees and registration fees.

<u>LICENSE FEES</u>. License fees shall be determined on the basis of 4 cents per barrel until July 1, 1994, and 3 cents per barrel after July 1, 1994, of unrefined crude oil and all other refined oil including #6 fuel oil, or #2 fuel oil, kerosene, gasoline, jet fuel and diesel fuel transferred by the licensee during the licensing period. Fees must be paid monthly by the licensee on the basis of records certified to the commissioner.

38 M.R.S.A. § 551, sub-§ 4A.

REGISTRATION FEES. Any person who transports by rail or highway more than 25 barrels of oil into Maine at any one time shall register annually with the department. 38 M.R.S.A. § 545-B.

Any person required to register with the commissioner pursuant to § 545-A and who first transports oil in Maine shall pay fees determined on the basis of 4 cents per barrel until July 1, 1994, and 3 cents per barrel after July 1, 1994, for all refined oil including #6 fuel oil, #2 fuel oil, kerosene, gasoline, jet fuel, diesel fuel and liquid asphalt transported by the registrant during the period of registration.

This provision does not apply to waste oil transported into Maine by any motor vehicle with a valid license issued by the department for the transportation of waste oil. These vehicles are subject to fees established under § 1319-O. 38 M.R.S.A. § 551, sub-§ 4(D).

DISBURSEMENTS FROM THE FUND. Money in the Fund shall be disbursed for the following purposes only:

> (1) Administrative expenses, personnel expenses and equipment costs of the commission related to the enforcement of this subchapter;
> (2) All costs, including, without limitation, personnel and equipment costs, involved in the removal of oil, abatement of pollution and the implementation of remedial measures including restoration of water supplies related to the discharge of oil or petroleum products and by-products;
> (3) Research and development sums;
> (4) Payment of third party claims awarded in accordance with this section;
> (5) Payment of arbitration and arbitrators;
> (6) Payment of costs of insurance by the State to extend or implement the benefits of the Fund;

(7) Sums, up to $50,000 each year, which have been allocated by the Legislature on a contingency basis in accordance with § 555 for payment of costs for studies of environmental impacts of discharges which may have adverse economic effects and which occur subsequent to such allocation and which are deemed necessary by the commissioner;
(8) Payment of costs for the collection of overdue reimbursements.

38 M.R.S.A. § 551, sub-§ 5(A)-(H).

REIMBURSEMENTS TO THE FUND. The department shall seek recovery to the use of the Fund all sums expended therefrom, including overdrafts, for the following purposes:

(1) All disbursements made by the Fund for cleanup, abatement and removal costs related to the discharge of oil, petroleum products and by-products;
(2) All disbursements for payment of third party claims awarded;
(3) All disbursements for payment of arbitration and arbitrators;
(4) All disbursements made for environmental impact studies.

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SPILL COMPENSATION AND CONTROL ACT
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SPILL COMPENSATION AND CONTROL ACT

SYNOPSIS.

The New Jersey Department of Environmental Protection is the lead agency for cleanup of hazardous substances discharges (including crude oil and petroleum products). Whenever notified of a discharge, the department either arranges for the removal of the pollution or requires the discharger to remove it. The department may be present at any discharge cleanup operation.

The department is responsible for promulgating regulations to implement the Act. It reviews and approves or disapproves all contingency plans.

Arbitration boards are used to settle disputes over the validity or amount of damages or cleanup and removal costs. The decisions of the boards are reviewable by the court.

Discharge cleanup organizations are immune from liability unless their actions are shown to have been negligent. Activities and services in accordance with state-of-the-art knowledge and the utilization of the best technology reasonably available create a rebuttable presumption that the actions were not negligent.

The department may indemnify a discharge cleanup contractor against claims if the department determines that adequate environmental liability insurance is either not available or not available at a reasonable cost. Discharge cleanup organizations must register with the department and submit a list of their qualified personnel who will respond to a discharge. The organization must also submit a list of its available equipment.

Persons responsible for a discharge are strictly, jointly and severally liable for all cleanup and removal costs. Defenses are identical to the defenses provided under OPA 90.

The owner of a major facility or transmission pipeline (storage capacity of more than 200,000 gallons) shall have on file with the department evidence of financial responsibility. A facility with a storage capacity of more than 200,000 gallons of a hazardous substance shall demonstrate financial ability in the minimum amount of $1 million per occurrence and $2 million aggregate. A vessel is considered a major facility only when hazardous substances are transferred between vessels.

Owners and operators must submit both discharge prevention, control and countermeasure plans and discharge, cleanup and removal plans to the department for approval. The prevention plans must be reviewed and certified by a licensed engineer who must attest that the plan complies with all applicable departmental requirements and has been prepared in accord with sound engineering practices. All plans must be kept on file at the department.

The department may assess civil administrative penalties up to $10 million for discharges of more than 100,000 gallons of a hazardous substance. The department may also assess penalties for any violations of the Act and may assess higher penalties for second and third violations.

The New Jersey Spill Compensation Fund is a revolving fund in the Department of Environmental Protection. All taxes and penalties related to this Act are deposited in the Fund. In 1990 the legislature increased the tax to $0.0175 per barrel of hazardous substance transferred to a major storage facility in the state.

In the case of a major discharge or series of discharges of crude oil or petroleum products that results in reasonable claims against the Fund, the tax shall be levied at the rate of $0.04 per barrel of petroleum or petroleum product transferred until the revenue produced by the increase is 150% of the pending claims.

I. BACKGROUND INFORMATION AND AGENCY STRUCTURE

The Spill Compensation and Control Act was originally passed by the New Jersey Legislature in 1976. The legislature intended that the Act would both control the transfer and storage of hazardous substances and provide liability for damage sustained as the result of any discharge of such substance. The Act required prompt containment and removal of the pollution and it provided a fund for swift and adequate compensation to resort businesses and other persons damaged by discharges.

The Act, for the most part, does not differentiate between crude oil or petroleum products and hazardous substances. Crude oil and petroleum products are included in the definition of "hazardous substances." § 58:10-23.11b(k); N.J. Reg. 7:1E-

1.7(a)(1).

Some sections of the Act have been amended since its passage in 1976. In July 1990, the governor signed a six-bill oil spill package that provided for: (1) amendment of the existing Spill Fund by the imposition of a $10 million fine for catastrophic spills of 100,000 gallons or more of oil and authorization of the Department of Environmental Protection to recover damages and administrative penalties; (2) the placement of containment devices around sites where a hazardous substance is being transferred or alternatively, devices and crews on standby during the transfers; (3) the implementation of certain pipeline safety measures; (4) illumination around transfer sites during nighttime transfers of hazardous substances; (5) added requirements for c-plans and prevention control plans and an increase in the fees assessed to fund the Spill Fund; and (6) no tax deductions for penalties, fines and treble damages assessed subsequent to discharges of hazardous substances.

DEPARTMENT OF ENVIRONMENTAL PROTECTION. The New Jersey Department of Environmental Protection is the lead agency for responding to discharges of hazardous substances. § 58:10-23.11f(a). After notification of a discharge the department may either arrange for the removal of the discharge or require the discharger to remove it or arrange for its removal. Id. If the spill occurs at a major facility, the department has the authority to order the facility closed.

Pursuant to the Act the department established regulations to implement the Act. § 58:10-23.11f6. The department also adopted standards and requirements for retrofitting existing structures, pipelines, monitoring systems. § 58:10-23.11d11. The department prescribed the size of storage tanks that must be tested and the nature and frequency of the testing. § 58:10-23.d11(b)(2).

The department must review all submitted c-plans; it approves or disapproves them. § 58:10-23.d9. Copies of all preventions plans and contingency plans must be kept on file with the department. § 58:10-23.11d9(b).

Notice of new construction or substantial modification of existing above- or below-ground storage facilities, storage space, transmission pipelines or monitoring devices shall be reported to the department at least 60 days prior to the construction or modification. § 58:10-23.11d11.

The department shall develop base maps, including but not limited to, waterways, wetlands, coastal areas, water supply areas, shellfish growing areas and endangered and threatened species areas in order to provide comprehensive, contiguous coverage of land and water areas. § 58:10-23.11d3(c).

ARBITRATION BOARDS. The administrator of the New Jersey Spill Compensation Fund shall convene boards of arbitration when persons alleged to have caused a discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. § 58:10-23.11n. At the discretion of the administrator a board of arbitration may have three members or a single neutral person.

Decisions of the arbitration boards shall be final; any action for judicial review shall be filed in the appellate division of the Superior Court within 30 days of filing of the decision. § 58:10-23.11n(g). In any case where the discharger seeks judicial review reasonable attorney fees and costs shall be awarded to the claimant if the decision of the board is affirmed. § 58:10-23.11n(h).

II. LIABILITY OF DISCHARGE CLEANUP ORGANIZATIONS.

LIABILITY. The liability of persons performing cleanup or mitigation services in accordance with state or federal procedures or law is limited to acts or omissions of the person which can be shown, based on a preponderance of the evidence, to have been negligent. For the purpose of this section, a demonstration that the actions and services were in accordance with generally accepted practice and state-of-the-art scientific knowledge, and that the cleanup organization utilized the best technology reasonably available at the time of its services shall create a rebuttable presumption that the actions were not negligent. § 58:10-23.g1.

INDEMNIFICATION. The department may contract to secure prospective removal services. It may also agree to defend and indemnify a contractor against claims or court suits that arise as a direct result of the contractor's cleanup or mitigation services pursuant to his contract with the department if the department determines that adequate environmental liability insurance is not available or not available at a reasonable cost to the contractor. § 58:10-23.11f(a).

Legal defense and indemnification shall not apply to claims and actions which are proven to have arisen from gross negligence, willful misconduct, fraud, intentional tort, bad faith or criminal misconduct or to claims for exemplary or punitive damages. Id.

Nothing in this section precludes removal or mitigation services performed by any person threatened by such discharges provided that such persons coordinate and obtain approval for his services with ongoing State or federal operations. Id. These persons shall not be liable for any civil damages to third parties resulting solely from acts or omissions except for acts or omissions of gross negligence or willful misconduct. Id.

REGISTRATION OF DISCHARGE CLEANUP ORGANIZATIONS. Discharge cleanup and removal organizations, other than owners or operators of major facilities covered by DCR plans who intend to clean up only discharges from their own facilities, shall submit the following information to the department:

> (1) name and mailing address of the organization;
> (2) form of the organization, i.e. corporation, cooperative or association;
> (3) name, address and telephone number of the manager in each office maintained by the organization;
> (4) a list of the containment and removal equipment owned, leased, contracted or otherwise available for immediate response by the organization (includes chemicals, sorbents, tools and communications devices) and the location of the equipment;
> (5) names of the trained personnel available to operate the equipment and a brief description of their qualifications;
> (6) areas of the State where the organization will

respond to discharges;
(7) a brief two-year record of the organization's response history in New Jersey and other states, including the magnitude of the discharges and the types of hazardous substances handled.

N.J. Reg. 7:1E-3.3.

III. LIABILITY OF RESPONSIBLE PERSONS

LIABILITY. Any person who has discharged a hazardous substance or is in any way responsible for the hazardous substance which the department has removed pursuant to this Act is strictly, jointly and severally liable for all cleanup and removal costs. § 58:10-23.11g(c).

DEFENSES. An act or omission caused solely by war, sabotage, or God or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this Act. § 58:10-23.11g(d).

IV. FINANCIAL RESPONSIBILITY

The owner of a major facility or a transmission pipeline shall, at all times, have on file with the department evidence of financial responsibility for cleaning up and removing pollution from a discharge or release of a hazardous substance and for the removal of any abandoned structure owned or operated by the owner or operator of the facility or transmission pipeline.

A major facility has a total combined storage capacity of (1) 20,000 gallons or more for hazardous substances other than petroleum products, or (2) 200,000 gallons or more for hazardous substances of all kinds. A vessel may be considered a major facility only when hazardous substances are transferred between vessels. N.J. Reg. 7:1E-1.6.

The amount, nature, terms and conditions of financial responsibility shall be determined by the department. § 58:10-23.11d5. The owner or operator of a major facility shall demonstrate financial responsibility in the minimum amount of $1 million per occurrence and $2 million annual aggregate. N.J. Reg. 7:1E-3.6(b).

MECHANISMS. Financial responsibility may be established by any one or a combination of the following: (1) financial test of self-insurance; (2) guarantee; (3) insurance or risk retention group coverage; (4) surety bond; or (5) letter of credit. N.J. Reg. 7:1E-3.6(d)(1)-(5). The N.J. regulations set out specific requirements for each of the five mechanisms and also provide suggested forms to be used to establish the proof. N.J. Reg. 7:1E-3.6 et seq.

V. CONTINGENCY PLANS

DISCHARGE PREVENTION, CONTROL AND COUNTERMEASURE PLANS. Each owner or operator of a major facility or a transmission pipeline shall submit to the department a discharge prevention, control and countermeasure (DPCC) plan reviewed and certified by a professional engineer licensed in the state of New Jersey. The engineer shall attest that the plan complies with all applicable departmental requirements and has been prepared in accordance with sound engineering practices. The DPCC plan shall contain the following information:

(1) name and address of the facility or pipeline and the name and address of its owner or operator; (2) a description and site plan for the facility or pipeline showing above- and below-ground storage structures or flow diagrams of the pipe systems; (3) the number of barrels or storage capacity of the facility or the transportation capacity of the pipeline and the type of hazardous materials either stored at the facility or transmitted through the pipeline; (4) topographic and other maps of the facility's or pipeline's site and offsite land and water areas in proximity to the facility or pipeline that could be affected by a discharge, any residential or environmentally-sensitive areas; (5) drainage and diversion plans, location of major sewers, storm sewers and other surface runoff patterns; (6) identification of safety systems, devices, monitoring systems or equipment; (7) testing procedures and schedules and inspection procedures; (8) qualifications of personnel specifically charged with implementing the DPCC plan and the authority delegated to them, and (9) a summary of emergency response training programs and requirements for personnel.

§ 58:10-23.11d2(b)(1)-(10); N.J. Reg. 7:1E-3.4(a).

The plan must employ state of the art technology and shall appoint a response coordinator for each site who shall be responsible for insuring compliance with the DPCC plan, the Act and this chapter. The response coordinator shall be responsible for submitting all reports to the department. N.J. Reg. 7:1E-3.4(a).

State of the art technology is defined as up-to-date technology which will result in a significant reduction in the probability of a discharge. The technology represents an advancement in reduction of spills and discharges and shall have been demonstrated at a similar facility to be reliable in commercial operations or in a pilot operation. It shall be in the public domain at reasonable cost commensurate with the reduction of probability of spills or discharges achieved. N.J. Reg. 7:1E-1.6.

DISCHARGE RESPONSE, CLEANUP AND REMOVAL CONTINGENCY PLANS.

Each owner or operator of a major facility or transmission pipeline shall submit to the department a discharge response, cleanup and removal contingency plan (DCR), attested by the owner or operator, who shall certify:

> (1) the maximum emergency response capability at the facility or pipeline,
> (2) that the trained personnel and response equipment as specified in the c-plan are available or at the disposal of the facility or pipeline,
> (3) that the equipment is in good repair and
> (4) that the plan is consistent with the applicable local, regional and State emergency response plans.

§ 58:10-23.11d3(a).

The plan shall contain the following information:

> (1) a description of its action plan, discharge cleanup contractors, if applicable, chain of command and deployment of employees and equipment;
> (2) provisions for annual simulated emergency response drills;
> (3) identification of all personnel and equipment available for cleanup and the amount of time required to mobilize and deploy the personnel and equipment;
> (4) names, addresses and qualifications of all emergency response personnel trained and required to respond to a discharge or emergency and who will operate containment, cleanup and removal equipment;
> (5) a plan identifying priorities for off-site deployment of personnel and equipment to protect residential and environmentally-sensitive areas;
> (6) an environmentally-sensitive areas and

habitat protection plan, reviewed and certified by a marine biologist and an ornithologist, that shall identify the sensitive areas or habitats and any seasonal sensitivities. These persons shall also provide for the protection against and mitigation of any impact of the discharge of hazardous substances, and
(7) a copy of an agreement with a local emergency planning committee that coordinates the emergency responses of the parties to the agreement.

§ 58:10-23.11d3(b)(1)-(7); N.J. Reg. 7:1E-3.5(a).

GENERAL PROVISIONS.

1. If the department disapproves a plan or requests amendments or modifications and the party responsible for the plan does not make the corrections, additions or modifications within 30 days, the plan shall be deemed to have been disapproved. § 58:10-23.d119(b).

2. Each DPCC plan and contingency shall be renewed every five years unless the department requires more frequent submissions. § 58:10-23.11d4.

3. Copies of DPCC and contingency plans, plan renewals, modifications and amendments shall be filed by the owner or operator of the major facility or transmission pipeline with the local emergency prevention or local emergency planning committee or committees. § 58:10-23.11d7.

4. The department may, at any time after an onsite inspection of the major facility or transmission pipeline, or after a discharge or emergency, direct the owner or operator of the facility or pipeline to submit amendments to a DPCC plan or contingency plan or to submit additional documentation or

information in conjunction with a filed plan. § 58:10-23.11d9(b).

5. DPCC and DCR plans shall be submitted by deadlines provided in the regulations. Major facilities with storage capacity of 300,000 to 1 million gallons shall submit their plans by January 1, 1992; facilities with storage facility from one million to three million gallons must be submitted by July 1, 1992 ard those from four million or more shall be submitted by January 1, 1993. Facilities with less than 300,000 gallons of storage capacity must submit their plans from July 1993 to July 1994. N.J. Reg. 7:1E-3.7(b)(1)-(6).

6. The department may inspect major facilities prior to approving that facility's DPCC or DCR plan. N.J. Reg. 7:1E-3.8(d).

VI. ENFORCEMENT

PROVISIONS. Whenever, on the basis of available information, the department determines that a person is in violation of any provision of this Act or that a person has knowingly given false information, testimony or documents to the department, the department may (1) bring a civil action seeking injunctive relief or payment of the cleanup and removal costs, restoration and replacement costs of real or personal property or natural resources damage; (2) levy an administrative penalty, or (3) bring a civil action for a civil penalty. § 58:10-23.11u(a) and (b).

ADMINISTRATIVE PENALTIES. The department may assess a civil administrative penalty of not more than $50,000 per violation of the Act. (Each day of violation shall constitute a separate, distinct and additional violation.) Violations include the submission of false or inaccurate information and failure to allow lawful entry and inspection of a facility. N.J. Reg. 7:1E-5.6 and 5.7.

Penalties may be increased if the violations are for second or third offenses. N.J. Reg. 7:1E-5.5 to 5-8. The department may also assess administrative penalties of not more than $50,000 for any discharge of less than 100,000 gallons and not more than $10 million for any discharge of 100,000 gallons or more. N.J. Reg. 7:1E-5.2(a).

A civil administrative penalty shall not be levied until the violator has been notified by certified mail or personal service. § 58:10-23.d11u(c).

CIVIL PENALTIES. Any person who violates any provision of this Act or who fails to pay a civil administrative penalty shall be subject to a civil penalty not to exceed $50,000 per day for each violation and each day's continuance of the violation shall constitute a separate violation. § 58:10-23.d11u(d).

Any person whose intentional or unintentional acts or omissions proximately result in the unauthorized releasing, spilling, pumping, pouring, emitting, emptying or dumping of 100,000 gallons or more of a hazardous substance or combination of hazardous substances into the waters or onto the lands of the State, or entering the lands or waters of the State, is liable to a civil administrative penalty or a civil penalty of not more than $10 million. § 58:10-23.d11u1. This penalty is in addition to assessments for costs incurred for cleanup and removal or compensation or damages recoverable for the loss of wildlife or destruction of the environment. Id.

In assessing this penalty the department shall take into account the circumstances of the discharge, the conduct and culpability of the violator, or both, prior to, during and after the discharge, the extent of the harm to persons, property, wildlife or natural resources. Id. This provision shall not apply to any discharge which is contained in a containment area or areas approved by, or otherwise meeting the requirements of the department or which containment area is designed to and is reasonably capable of preventing the hazardous substance from entering the waters of the State or entering the lands of the State, except when 100,000 gallons or more of the hazardous substance escapes beyond the containment area. Id.

FORFEITURE. All conveyances used or intended to be used in the willful discharge of any hazardous substance are subject to forfeiture to the State pursuant to the provisions of § 13:1K-1 et seq.

VII. STATE RESPONSE MECHANISMS

FUNDING. The New Jersey Spill Compensation Fund is established as a nonlapsing, revolving fund in the Department of Environmental Protection to carry out the purposes of this Act. All taxes and penalties related to this Act and all interest received on moneys in the Fund shall be credited to the Fund.

§ 58:10-23.11i.

Each owner or operator of a hazardous substance transferred to a major facility which operates as a public storage terminal for hazardous substances shall be responsible for the tax. § 58:10-23.11h(a). The tax shall be $0.0175 per barrel transferred. § 58:10-23.11h(b).

In the event of a major discharge or series of discharges of petroleum or petroleum products that results in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied at the rate of $0.04 per barrel of petroleum or petroleum products transferred until the revenue produced by the increase is 150% of the total dollar amount of all pending reasonable claims. The rate may be set at less than $0.04 per barrel if the administrator of the fund determines that the revenue produced by the lower rate will be sufficient to pay all outstanding claims against the fund within one year of such levy. Id.

An amount of $0.0025 of the tax levied shall be deposited in the compensation fund and dedicated for the purpose of preventing the discharge of hazardous substances. § 58:10-23.11h(b)(2).

COSTS WHICH SHALL BE PAID FROM THE FUND. The fund shall be liable for the following costs and direct and indirect damages:

> (1) costs of restoring, repairing or replacing real or personal property damaged or destroyed by the discharge, any income lost from the time of the discharge to the time of restoration and any reduction in value of such property caused by the discharge;
> (2) cost of restoration and replacement of any natural resources damaged or destroyed by the

> discharge;
> (3) loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged provided that such loss or impairment is more than 10% of the amount which the claimant derives from activities related to the property or natural resources;
> (4) loss of tax revenue by the State or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;
> (5) interest on loans or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of the claim in full.

§ 58:10-23.11g(a).

The damages which may be recovered by the fund, without regard to fault, subject to allowable defenses against an owner or operator of a major facility or vessel, shall not exceed $50 million for each major facility or $150 per gross ton for each vessel. However, these limits shall not apply if it can be shown that the discharge was the result of gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge or a gross or willful violation of applicable safety, construction or operating standards or regulations. § 58:10-23.11g(b).

VIII. <u>DRILLS AND INSPECTIONS</u>

<u>INSPECTIONS</u>.

1. The department shall have right to inspect any facility, vessel, building or equipment in order to ascertain compliance or noncompliance with the Act. This right includes the right to test or sample materials, copy or photograph documents

and equipment and to interview employees. N.J. Reg. 7:1E-1.8.

2. All equipment and portions of a major facility shall be visually inspected by a schedule provided in the regulations. Some equipment shall be inspected daily; other equipment must be inspected on a weekly, monthly or quarterly basis. Records must be kept for all inspections. N.J. Reg. 7:1E-2.11(a) and (b).

DRILLS. The owner or operator of a transmission pipeline shall conduct annual practice drills of emergency leak response procedures. The department shall be notified 30 days prior to the drill to afford the department an opportunity to observe or participate in the drill. N.J. Reg. 7:1E-2.4(g).

IX. PROCEDURES FOR NOTIFICATION OF DISCHARGES & DISCHARGE RESPONSE PROVISIONS.

1. Any person responsible for reporting a discharge shall immediately notify the department. Notification within 15 minutes of the time that the person responsible for the notification knew, or should have known, of the discharge shall be considered immediate. It is presumed that more than 15 minutes is not immediate. N.J. Reg. 7:1E-4.2

2. The department may determine, after receipt of evidence from the person responsible for notification, that a period of time longer than 15 may be considered immediate. The department will consider the essential immediate response activities, the circumstances under which the discharge occurred and under which the discharge was first discovered and any other

valid cause or reason. N.J. Reg. 7:1E-4.7(a).

3. The department, upon notification of a discharge, shall orally notify the contact person for the governing body of the municipality and the local board of health in which the discharge occurred. N.J. Reg. 7:1E-4.8(a). The department shall take appropriate action to certify that a discharge has occurred and shall authorize the agent or officer of the municipality or local board of health to investigate the site of the discharge. The investigation shall include a visual assessment of the site of the discharge. The department shall also contact the party potentially responsible for the discharge. N.J. Reg. 7:1E-4.8(d).

4. The department may, in its discretion, observe, supervise or participate in any aspect of the containment or cleanup and removal activities. The department may also order any person to cease cleanup activities and other response activities if it determines that the person is not capable of properly containing, cleaning up or removing a discharge or if that person fails to do so in a proper and expeditious manner. N.J. Reg. 7:1E-4.5(d).

X. SAFETY AND PREVENTION PROVISIONS

PROVISIONS.

1. If oil or other nonmiscible lighter-than-water hazardous substances are transferred at a marine transfer facility there shall be kept available a length of flotation boom or other containment device sufficient to totally enclose a vessel engaged in the transfer of the hazardous substances from a

vessel to the facility or from the facility to a vessel or between vessels at the facility. N.J. Reg. 7:1E-2.8(b).

2. Major facilities which transfer hazardous substances to or from vessels between the hours of sunset and sunrise shall perform all such transfers using fixed lighting that adequately illuminates each transfer connecting point in use at the facility or on the vessel and each hazardous substances transfer work area on the vessel or facility. N.J. Reg. 7:1E-2.9(a).

3. The owner or operator of a major facility or transmission pipeline shall immediately notify the department of any malfunction of a leak detection or other discharge monitoring, prevention or safety system or device. Notification within 15 minutes of the time that the owner or operator knew, or reasonably should have known, of the occurrence shall be considered immediate. N.J. Reg. 7:1E-4.4(a) and (b). Within two hours of the initial notification the owner or operator shall notify the department that one of the following situations exists: (1) the malfunction has been repaired: (2) an alternate system has been activated; or (3) the equipment protected by the system has been shut down. N.J. Reg. 7:1E-4.4(c).

HOUSE BILL 1027

State of Washington

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HOUSE BILL 1027

SYNOPSIS

H.B. 1027 is a comprehensive oil spill prevention and response bill that establishes an interim Office of Marine Safety that will oversee, administer and coordinate all aspects of the new law. The new law also establishes several new commissions and boards that will help in this process.

Under the law response action contractors are immune from liability unless they are the responsible party or unless their actions are wilful misconduct or grossly negligent. Also, they are responsible for personal injury or death that results from their actions during response activities.

Persons who are responsible for unauthorized discharges of oil into state waters are strictly liable without regard to fault, for damages to persons, property, public or private. Responsible parties shall be liable for damages in one of two ways. (1) The responsible party may be liable for the costs to restore the damaged resource to its condition prior to injury to the extent technically feasible and compensation for lost value incurred during the period between injury and restoration; or (2) if the Department of Ecology determines that costs for restoration are not technically feasible or not quantifiable at a reasonable cost or the restoration and enhancement are insufficient to adequately compensate the people of the State for damages, damages shall be assessed under a compensation schedule. This compensation schedule ranges from $1 to $50 per gallon of oil spilled and is determined by factors set forth in § 812.

Proof of financial responsibility for cargo ships carrying bulk oil is much higher than the limits on liability set by OPA 90. Vessels carrying oil as bulk cargo must show an ability to pay at least $500 million. Financial responsibility for other vessels mirrors the limits on liability set by federal law. Inland barges carrying hazardous substances must establish financial responsibility in the amount of $150/gross ton or $1 million, whichever is larger. Cargo vessels or passengers vessels carrying oil as fuel must demonstrate financial ability to pay at least $600/gross ton or $500,000, whichever is larger. Financial responsibility for offshore and onshore facilities will be determined by the Director of the Department of Ecology.

The Director of Ecology is responsible for preparing and annually updating a state-wide master oil and hazardous spill prevention and contingency plan. He is head of the state incident command system and is primarily responsible for the spill response. He must coordinate the state agencies and local emergency personnel during a spill response.

Under this law environmentally-sensitive areas are given special attention. The Director of Ecology must locate and map the sensitive areas of the state. The Office of Marine Safety must establish regional marine committees for these areas. The committees are responsible for preparing safety plans to protect the areas. The Board of Marine Pilotage must have two licensed pilots from two districts that contain sensitive environments, Puget Sound and Grays Harbor.

The vessel c-plans must describe environmentally-sensitive areas and fish and wildlife habitats found in the district in which the vessel will travel. State environmental agencies must help provide data for this part of the c-plan. The plan must also include measures of protection and mitigation that will be used in case of a spill. The Office of Marine Safety will consider the environmentally-sensitive areas and the means of protection when it approves or disproves the vessel c-plan.

I. BACKGROUND AND GENERAL INFORMATION

House Bill 1027 was passed by the Washington house on March 15, 1991, and by its senate on April 19, 1991. This bill amends RCW 90.48.315 et seq., the existing chapter concerning Water Pollution Control. It specifically addresses the discharge of oil and other hazardous substances into the waters of the state. The bill easily passed both the state house and senate.

The goal of this act is to establish state agency expertise in marine safety and to centralize prevention and cleanup of marine oil spills. The legislature intended for this act to support and complement the federal law and to provide broad powers of regulation to the Department of Ecology. § 101.

ESTABLISHMENT OF AGENCIES TO OVERSEE THE NEW LAW. Under the old law the Department of Ecology regulated and administered oil spill response and cleanup but there was no state agency responsible for marine safety. Under the new law the Department of Ecology is responsible for preparing a state prevention and spill contingency plan and for the coordination of the spill response. §§ 107 and 103. But an interim office, the Office of Marine Safety, is created to administer the new law and to promote marine safety. In July 1997 the Office of Marine Safety will be merged back into the Department of Ecology. §§ 430-436.

Under H.B. 1027 the Office of Marine Safety is carved from the Department of Ecology. § 401. Staff, equipment and records related to marine safety are transferred to the jurisdiction of the new office. §§ 408-411. The Office has broad powers. § 402.

The executive head of the Office is an administrator who is appointed by the governor. § 404. This administrator also sits on a newly-created marine oversight board and newly-created maritime commission. §§ 500 & 900. This structure offers continuity within the whole spectrum of state spill prevention and response.

The administrator of the Office of Marine Safety is an executive state officer position. In this position he has the powers and weight of other executive state officers. The administrator can develop rules to carry out the provisions of the new law, appoint advisory committees, enter into contracts, undertake research, etc. § 405. He also has administrative powers and may assess civil penalties up to $100,000 per violation for vessels or facilities that operate without an approved contingency plan. §§ 407 and 422.

OFFICE OF MARINE SAFETY. This office shall review federal and Coast Guard vessel inspection programs. The office has the discretion of either using those programs or developing a Washington program. The office, in either event, shall develop rules that provide for annual inspections of vessels that enter state waters. § 416. Additionally, the office may adopt rules that will determine standards for oil spill response equipment that must be maintained on each tank vessel. § 425.

The office shall establish standards for oil spill prevention plans and contingency plans. §§ 417 & 418. It shall approve or disapprove the plans. § 417. Under the new law vessels and facilities that transfer oil and lighter vessels shall have containment and cleanup equipment available. The office shall adopt rules regarding the standards of equipment that must be available and the standards under which the equipment will be deployed.

MARINE SAFETY COMMITTEES. The Office of Marine Safety shall establish regional marine safety committees for environmentally-sensitive areas. § 424. Each committee shall prepare a regional safety plan for vessel traffic within its jurisdiction. These plans must consider any variables that could impact the safety of water traffic and the environment. They shall include tug escort requirements, speed limits, communications systems and the placement of navigational aids. § 424. The regional plans must be submitted to the Administrator for approval.

. The new law also establishes a marine oversight board that oversees the actions of the federal government, industry, the Department of Ecology, the Office of Marine Safety and other state agencies involved in oil spill prevention and response. § 501. This board shall recommend to the legislature changes in the law it believes to be necessary; it shall annually report to the governor regarding programs which have been established or should be established. § 501(c). Its five-member board, appointed by the governor, shall have a demonstrable knowledge of environmental protection and the study of marine ecosystems or familiarity with marine transportation systems. § 501(c)(3).

MARITIME COMMISSION. The new law also creates a Maritime Commission. This commission will be the chief enforcer of the new law. The commission consists of nine voting members. § 903. Seven of the nine members, all appointed by the governor, shall represent specific business classes: steamship liner companies, towboat companies, fishing vessels, protection and indemnity clubs or insurance brokers. Two of the members must represent steamship liner companies; one must represent an American flag company and the other must represent a foreign flag. § 903. One member shall have marine labor or spill cleanup experience and the final member shall be from the environmental community. § 903. The administrator of the Office of Marine Safety shall be a nonvoting member of the commission. § 903.

The commission shall establish an oil spill first response communication network for commercial vessels travelling in state waters. § 902(10). In the event of a spill or threat of a spill this first response system shall be responsible for the first 24 hours of response activities. § 902(10).

The commission enters into contracts with cleanup contractors and other organizations (such as communications companies) needed for spill response. § 902(11). It also recovers oil spill first response system costs from the responsible vessel owner or operator. It holds response readiness drills with state and federal agencies. §§ 902(11-13). Finally, the commission may increase the assessments that fund the oil spill fund if it finds that the moneys collected are insufficient. § 906.

BOARD OF PILOTAGE COMMISSIONERS. The new law also establishes a Board of Pilotage Commissioners. The administrator of the Office of Marine Safety is a member of this commissioner, along with seven members appointed by the governor. § 1001. The commission is chaired by the Assistant Secretary of Marine Transportation. § 1001(1). Members of the commission must be licensed pilots, two of whom must be pilots from the Puget Sound and Grays Harbor pilotage districts. Two other members must be actively engaged in the ownership, operation or management of vessels; one member must represent an environmental organization concerned with marine waters.

The Board of Pilotage Commissioners shall develop the pilotage test for each district and establish minimum health standards for its licensed pilots. § 1001(6). The board has the discretion to require simulator training and shall prescribe rules to govern the size of vessels a newly-licensed pilot may be assigned to pilot. § 1003.

II. LIABILITY OF RESPONSE ACTION CONTRACTORS

A person is not liable for removal costs or damages that result from omissions or actions taken in the course of rendering care, assistance or advice consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the official within the Department of Ecology who has the responsibility for oil spill response. This section does not apply:

> (1) to a responsible party
> (2) with respect to personal injury or wrongful death; or
> (3) if a person is grossly negligent or engages in willful misconduct.

§ 304.

III. LIMITS ON LIABILITY

Strict liability of responsible persons. Persons responsible for unauthorized discharges of oil into state waters are strictly liable without regard to fault, for damages to persons, property, public or private. § 90.48.366(1). Defenses for relief from strict liability are: (1) an act of war or sabotage; (2) an act of God; (3) negligence on the part of the federal government; or (d) negligence on the part of the state of Washington. The defenses must be the sole cause of the discharge. § 90.488.366(2) and (4). Strict liability does not affect the rights the owner may have against any party who contributed to the discharge. § 90.48.336(3).

Provisions. Any person who violates this chapter or chapter 90.56 or who fails to perform duties imposed by this chapter or chapter 90.56 or who causes a reduction in the quality of state waters or causes the death of or injury to fish, animals, vegetation or other natural resources of the state shall be liable to pay the state and affected counties and cities damages in the amount determined by chapter 90.48.367. § 810.

Assessment of Damages. The Department of Ecology, in consultation with other state agencies, shall adopt rules to establish a compensation schedule for the discharge of oil in violation of this chapter and chapter 90.56. § 812.

Under the schedule the assessment shall be at least $1 per gallon of oil spilled and no greater than $50 per gallon spilled. § 812. The schedule shall reflect adequate compensation for unquantifiable damages or for damages not quantifiable at reasonable cost for any adverse environmental, recreational, aesthetic or other effects caused by the spill and shall consider:

(1) characteristics of the spill, i.e., toxicity, dispersibility, solubility and persistence, that might affect the severity of the effects on the environment;
(2) sensibility of the affected area;
(3) actions of the responsible party that demonstrate acceptance of responsibility for the spill, immediate response to and cleanup and removal of the oil.

§ 812(1) - (3).

Preassessment Screening. After a spill the Department of Ecology shall conduct a formal preassessment screening and use the compensation schedule to determine the amount of damages if the screening determines that restoration or enhancement of the injured resources is not technically feasible, damages are not quantifiable at a reasonable cost and the restoration and enhancement are insufficient to adequately compensate the people of the State for the damages. § 813(1) and (2). If the prescreening committee determines that the compensation schedule should not be used, the compensation shall be the amount of money necessary to restore any damaged resource to its condition prior to the spill, to the extent technically feasible, and compensation for the lost value incurred during the period between injury and restoration. § 813(3).

Restoration shall include costs to restock the waters, replenish or replace the resources and to restore the water, shoreline, banks and other lands adjoining the water to its condition prior to the injury. § 813(4). The lost value of a damaged resource shall be equal to the sum of consumptive, nonconsumptive and indirect use values as well as lost taxation and other revenues. § 813(4).

Compensation assessed under this section shall be recoverable in an action brought by the attorney general on behalf of the people of Washington and affected counties and cities. Moneys recovered shall be deposited in the coastal protection fund. Compensation assessed under this section shall preclude claims under this chapter by local governments for damages to publicly owned resources resulting from the incident. § 813(5)-(6).

For the purposes of this chapter "technically feasible" means that given available technology, a restoration or enhancement project can be successfully completed at a cost that is not disproportionate to the value of the resource before the injury.

IV. FINANCIAL RESPONSIBILITY

REQUIREMENTS. Requirements vary for the size and purpose of the vessel:

1. Inland barges that carry hazardous substances in bulk as cargo using any Washington port or travelling the waters of Washington shall estaclish financial responsibility in the amount of $1 million or $150/gross ton, whichever is larger. § 703(1).

2. The Administrator may set lesser standards of financial responsibility for barges of 300 gross tons or less but the standard must be determined on the quantity of cargo the barge is capable of carrying. § 703(2)(b).

3. A tank vessel that carries oil as cargo in bulk must establish financial responsibility to pay at least $500 million. The owner or operator of a tank vessel who is a member of an international protection and indemnity mutual organization and is covered for oil pollution risks up to the amounts required by this section is not required to demonstrate financial

responsibility under this chapter. §§ 703(2)(a) and (c). The Office of Marine Safety may set lesser amounts of financial responsibility for a tank vessel that meets standards for construction, propulsion, equipment and personnel established by the Office. § 703(5).

4. A cargo vessel or passenger vessel that carries oil as fuel shall demonstrate financial responsibility to pay the greater of at least $600 per gross ton or $500,000. § 703(3).

5. An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the Department of Ecology as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. § 704.

V. PREVENTION AND CONTINGENCY PLANS

SPILL PREVENTION PLANS. The owner or operator for each tank vessel must prepare both a prevention and spill contingency plan. He shall prepare and submit an oil spill prevention plan to the Office of Marine Safety by January 1, 1993. § 417(1). The spill prevention plan must:

1. Establish compliance with OPA 90 and both federal and state financial responsibility requirements. It must also establish compliance with federal drug and alcohol programs.
2. State all discharges of oil within the prior five-year period that were more than 25 barrels and the measures taken to prevent another occurrence. It must also state all groundings, near misses, accidents and collisions that occurred during the past five years.
3. Describe vessel operations as to staffing, vessel inspection programs and training programs.

4. Describe oil spill technology that has been incorporated into the vessel and relevant prevention measures incorporated into any plan which the vessel has not adopted. It must also describe the procedures used to ensure that at least one bridge officer on the vessel is proficient in the English language.

§ 417(2)(a)-(k).

The prevention plan will not be approved unless it provides the best achievable protection from damages caused by the discharge of oil into state waters. § 417(3). "Best achievable protection" means the highest level of protection that can be achieved through the use of the best achievable technology and those staffing levels, training procedures and operational methods that provide the greatest degree of protection achievable. § 414(2).

CONTINGENCY PLANS. Each covered vessel shall have a contingency plan for the containment and cleanup of oil spills from the vessel into the waters of the state and for the protection of fisheries and wildlife, natural resources and public and private property from such spills. § 419. Plans must be submitted within 18 months after the Office of Marine Safety has adopted rules and standards for the plans. § 419(2)(b).

The vessel's c-plan may be submitted by either the owner or operator of the tank vessel or the owner or operator of the facilities where the vessel will unload its cargo. § 419(3)(a). The c-plan may also be submitted by the person who has contracted with the vessel to provide containment and cleanup services. § 419(3)(c).

At a minimum, the C-plans must meet the following standards:

1. Include full details of the method of response to spills of various sizes from any vessel covered by the plan.
2. Be designed, in terms of personnel, materials and equipment, to promptly and properly remove oil and minimize any damage to the environment resulting from a worst case spill. § 419(1)(b).
3. Provide a clear and detailed description of how the plan relates to and is integrated into relevant c-plans prepared by cooperatives, ports, regional entities, the state and federal governments.
4. Provide procedures for early detection of spills and timely notification of spills. Also state the number, training and fitness of the personnel assigned to direct and implement the plan.
5. Incorporate training and drill programs to evaluate readiness for a spill.
6. Describe important features of the environment, including fish and wildlife habitat, public facilities and environmentally-sensitive areas. State environmental agencies shall provide information for this requirement. The plan must also state the means of protecting and mitigating effects on the wildlife and the environment to ensure that implementation of the plan does not pose unacceptable risks to the public or the environment.
7. Establish guidelines for use of response equipment to minimize vessel damage, stop or reduce the oil spill and when vessel safety is assured, to contain and cleanup the spill. It must provide arrangements for prepositioning of spill containment and cleanup equipment and trained personnel at strategic locations from which they can be deployed to the spill site.
8. Provide arrangements for enlisting the use of qualified and trained cleanup personnel to implement the plan. Also, provide for disposal of the recovered spilled oil.
9. Describe the circumstances and manner, if any, for application of dispersants.

§ 419(a)-(o).

<u>STATUTORY CONSIDERATIONS FOR APPROVAL OF C-PLANS</u>. The Office of Marine Safety shall consider the following factors when approving a c-plan: (1) adequacy of the containment and cleanup

[illegible] communications equipment, notification procedures and logistical arrangements for coordination and implementation of response efforts; (2) nature and amount of vessel traffic within the area covered by the plan; (3) navigational hazards within the area covered by the plan and history and circumstances of prior spills in the area and (4) sensitivity of wildlife, fisheries and other natural resources in the area. § 419(5)(a)-(h).

PENALTIES FOR NONCOMPLIANCE WITH PLAN REQUIREMENTS. It is unlawful for owners and operators to knowingly and intentionally operate in the state or on the waters of the state without an approved c-plan, an approved prevention plan and compliance with financial responsibility requirements. § 421(1). The first conviction under this section shall be a gross misdemeanor and punishable by not more than one year in the county jail or $5,000 fine or both. A second conviction shall be a class C felony and is punishable by not more than five years in a state correctional institution or not more $10,000 in fine or both. § 421(1).

The Administrator may also assess penalties for noncompliance with this section of up to $100,000 for each violation. Each day that the owner or operator is in violation of the law shall be considered as a separate violation. § 422 (3).

VI. STATE RESPONSE MECHANISMS

Funding. Two taxes will be imposed on the owner of crude oil or petroleum products that are off-loaded at a marine terminal within the state from a vessel or barge that operates on the navigable waters of the state.

Oil Spill Response Tax. An oil spill response tax is levied upon the owner of the crude oil or petroleum product. The tax is 2 cents/barrel. § 802(1).

Oil Spill Administration Tax. An oil spill administration tax is levied upon the owner of the crude oil or petroleum product. § 802(2). This tax is 3 cents/barrel. § 802(2).

CAP ON THE FUND. Tax assessments will cease when the balance in the fund exceeds $25 million and will not again be imposed until the balance in the fund is less than $15 million. § 802(10).

PROVISIONS. The tax will only be imposed on the first off-loading at a marine terminal. § 803.

Credit shall be allowed against the taxes imposed for any crude oil or petroleum product off-loaded at a marine terminal and subsequently exported from or sold for export from the state. § 804.

Payment of costs from this fund shall be limited to spills which the director has determined to be more than $50,000. § 805. Moneys in the fund shall be spent only after appropriation. § 805.

ALLOWABLE RESPONSE COSTS. The following response costs may be paid from the fund:

1. Natural resource damage assessment and related activities:

2. Spill-related response, containment, wildlife rescue, cleanup, disposal and associated costs;
3. Interagency coordination and public information related to a response; and
4. Appropriate travel, goods and services, contracts and equipment.

§ 805.

VII. DRILLS AND INSPECTIONS

1. The administrator of the Office of Marine Safety has the discretion to use federal and Coast Guard inspection programs or to develop a state program; however, the program that he chooses must ensure that all vessels will be inspected at least annually. § 416.

2. The Maritime Commission shall hold response readiness drills with state and federal agencies. § 902 (13).

SENATE BILL 14

Texas Oil Spill Prevention and Response Act of 1991

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Texas Code

<u>Senate Bill SB 14</u>
<u>Texas Oil Spill Prevention and Response Act of 1991</u>

<u>SYNOPSIS</u>

Spill response to unauthorized discharges of hazardous materials and oil is handled by different agencies in Texas. Under the old law the Water Commission was responsible for discharges of hazardous materials and oil into state waters; the Railroad Commission had jurisdiction over oil spills occurring during drilling and production operations and the transportation of crude oil through pipelines.

Under the new law the General Land Office has jurisdiction over unauthorized discharges of oil into the state coastal waters. The Water Commission will continue to handle spills of hazardous spills into state waters and the Railroad Commission will continue to handle spills that occur during drilling, production and transportation through pipelines. The new law mandates that all three agencies cooperate and work to prevent any duplication within the state system. It also mandates that the General Land Office will supplement the Water Commission response to discharges of hazardous substances.

The General Land Office is the lead agency for the response to both actual and threatened oil spills. The commissioner of the General Land Office, upon notification of an oil spill, shall assess the discharge. He shall also initiate the response for abatement, cleanup and removal of the pollution.

The new law establishes an oil spill oversight council whose primary task is to provide advice and recommendations to the governor and the commissioner of the General Land Office on various issues and problems. The council is large and political. Members include heads of various governmental agencies, judges and 12 members appointed by the governor. These appointed members must have knowledge in the fields of environmental protection, marine ecosystems, terminal operations or marine transportation experience.

No person or discharge cleanup organization is liable for acts or omissions when he renders assistance or advice in abating, containing or removing pollution pursuant to the national contingency plan or plan required under this chapter except for acts or omissions of gross negligence or wilful misconduct. Discharge cleanup organizations may be incorporated, unincorporated or cooperatives; they are loosely governed by the commissioner. The organizations may be compensated for their response activities if they have approval prior to the action. They may refuse to comply with directions or orders given to them if they reasonably believe that the order may cause harm and if they give written notice as to why they refused within 48 hours of the refusal.

Responsible parties are liable for response costs, damages and natural resources damage. The only defenses are acts of war or terrorism, acts of government, unforeseen occurrences caused by violent acts of nature and the gross negligence or wilful misconduct of third persons.

The limits on liability for persons responsible for the discharge of oil from vessels vary as to the size of the vessel from which the oil is discharged. For vessels of 300 gross tons or less the limit is $1 million. Vessels of 8,000 gross tons or less are liable for $5 million and vessels larger than 8,000 gross tons shall be liable for $600 per gross ton or the aggregate amount of the coastal protection fund ($50 million).

Persons responsible for discharge from a terminal are liable for up to $5 million. Persons responsible for discharges from offshore drilling or production facilities are liable for all response costs.

In addition, responsible persons are liable for damages caused by the discharge of oil. The limits on liability are the same as listed in the previous paragraph. Finally, responsible parties are responsible for all natural resources damages. The natural resources damages amounts are determined by the commissioner. The commissioner's determination of damages creates a rebuttable presumption of the damage amount.

Owners and operators of vessels and terminal facilities must show evidence of financial responsibility equal to that required by federal law.

Under the new law the commissioner shall promulgate a state contingency plan which will identify environmentally-sensitive areas and provide for detailed emergency response procedures. The plan will also provide for drills and wildlife recovery teams.

The plan shall be filed with all state agencies that will be involved in spill response.

Terminal facilities will be registered after they submit a contingency plan to the commissioner. They must also show evidence that they can provide the services of a discharge cleanup organization through membership or contract. Terminals must also provide information as to the storage capacity of the facility, the vessels that use the facility and the response equipment and supplies which will be readily available for use during a spill.

Vessels must provide a contingency plan and evidence that they will be able to provide the services of a discharge cleanup organization. They must also detail their response procedures and mitigation procedures to protect the environment.

The new law creates a coastal protection fund. Every person owning crude oil that is transferred to or from a terminal is taxed at the rate of 2 cents per barrel. The tax will continue until the fund reaches $25 million and then will cease until the balance in the fund falls below $14 million. All penalties, judgments, reimbursements shall be credited to this fund. The total amount in the fund shall not exceed $50 million.

The commissioner may increase the tax on transferring oil to 4 cents per barrel under all of the following circumstances: (1) if the balance in the fund is less than $25 million; (2) if there has been a spill of more than 100,000 gallons of oil in the last 30 days, and (3) it is expected that the expenditure for cleanup will substantially deplete the fund.

The fund may only be used for administrative and training costs pursuant to this act, response costs for discharges of both oil and hazardous substances, and the assessment, restoration, rehabilitation, restoration, replacement or mitigation of damages to natural resources. The fund is absolutely liable for all reasonable response costs, all natural resources damage and all proven damages.

Under the new law it is a Class A misdemeanor: (1) to operate a vessel or facility without an approved c-plan; (2) to operate a vessel or facility without proof of financial responsibility; (3) to remove a vessel which has discharged oil from the jurisdiction without showing proof of financial responsibility to the commissioner, or (4) to cause, permit or allow an unauthorized discharge of oil.

Additionally, a person responsible for a discharge who does not notify the commissioner of the discharge is liable for a fine from $500 to $250,000 for an individual or up to $500,000 if the responsible person is a corporation. There are additional penalties for a person responsible for a discharge and for a responsible person who fails to abate, contain and remove the pollution caused by a discharge. The penalties range from $250 to $25,000 per day or up to $1,000 per barrel discharged. A responsible person who fails to abate, contain, or remove pollution can be fined up to $25,000 per day and up to three times the cost incurred by the fund. Also, any person who violates a rule or order during response can be fined from $100 to $10,000 per day. The commissioner has the power to assess any of the above penalties in an administrative hearing.

The commissioner may inspect any vessel that is required to file a c-plan. Prior to entry into port the commissioner may require a vessel to report any discharges from the vessel during the voyage, any mechanical or operational problems, show proof of financial responsibility and to show his contingency plan.

I. BACKGROUND AND GENERAL INFORMATION

SB 14 is a comprehensive oil spill prevention and response act that unanimously passed both the House and Senate of Texas on March 21, 1991. This Act becomes Chapter 40 of Subtitle C, Title II, Natural Resources Code of the Texas Revised Statutes. The legislative intent was to complement the federal Oil Pollution Act of 1990 and to specifically pass provisions relating to the responsibilities of the state agencies that are designated as natural resources trustees.

The response to threatened and actual spills of oil and other hazardous substances is under the jurisdiction of various state agencies. The General Land Office is the lead agency for response to threatened or actual oil spills in coastal waters. § 40.004. Threatened or actual discharges of other hazardous substances are under the jurisdiction of the Texas Water Commission; the Railroad Commission of Texas shall continue to exercise authority over the pollution of surface and subsurface waters caused by oil exploration, production and transportation by pipeline. §§ 40.005 and 40.008.

COMMISSIONER OF GENERAL LAND OFFICE. The General Land Office has jurisdiction over the public lands of the state and the coastal lands which extend from the coastline to the Three Marine League line. V.T.C.A. §§ 31.051; 31.063. The General Land Office, under the direction and control of the commissioner, is the lead agency for initiating response to oil spills and for cleanup of the pollution caused by the spill. § 40.004. The commissioner of the General Land Office is elected at a general election every four years. Tex. Nat. Res. Code Ann. § 31.012.

The commissioner shall direct all state discharge response and cleanup operations. § 40.004. He shall initiate the response to threatened or actual discharges. § 40.005. When responding to a discharge he may appoint a state-designated onscene coordinator to act in his place. § 40.102. When notified of an unauthorized discharge, he shall act to assess the discharge and prevent, abate or contain any pollution that results. § 40.051. The commissioner shall determine when a harmful quantity of oil has been discharged into the coastal waters. § 40.003(11). The commissioner has the discretion to abate, contain and remove pollution resulting from discharges if the responsible party is either unknown or unwilling to respond to the spill. § 40.101(b).

The commissioner shall administer this chapter. § 40.004. Under the new law the Commissioner of the General Land Office has the authority to develop a state coastal contingency plan, to prevent spills and discharges of oil and to provide for prompt response to abate and contain spills. § 40.002. He shall promulgate rules to administer this chapter and establish procedures under the Texas Administrative Procedure and Texas Register Act. § 40.007(a) and (b).

He has the discretion to promulgate regulations as to standards and requirements for discharge prevention for terminal facilities and vessels, standards and requirements for procedures and equipment used in the abatement, containment and removal of pollution. § 40.117(a)(1)-(3). He also has the discretion to develop criteria and plans of response for discharges of various degrees, including worst case scenarios. § 40.117(4).

OIL SPILL OVERSIGHT COUNCIL. The new law establishes an oversight council which shall provide advice and recommendations to the commissioner on various issues. § 40.303(j). The council shall also attend drills and advise the governor and commissioner on the identification of environmentally-sensitive areas that may require special protection. § 40.303(j)(4) and (7). Staff and funding up to $200,000 will be appropriated annually for the council. § 40.303(k).

The council consists of the governor, the commissioner, the executive director of the Parks and Wildlife Department and a representative of the Railroad Commission of Texas. § 40.303(b). It also includes directors of other state agencies, county judges and members of local governments located on the coasts of Texas. § 40.303(b) and (c).

Additionally, the governor shall appoint 12 council members who have demonstrable knowledge in the areas of discharge cleanup, crude tanker operations, commercial fishing, environmental, conservation and sportsmen's groups, the oil industry and terminal facility and port operations. § 40.303(e).

II. LIABILITY FOR DISCHARGE CLEANUP ORGANIZATIONS

DEFINITION. Discharge cleanup organizations include incorporated or unincorporated groups, cooperatives, owners or operators of vessels or terminal facilities organized for the purpose of abating, containing, removing or cleaning up pollution from discharges of oil. Groups organized for rescuing and rehabilitating wildlife or other natural resources through cooperative efforts and shared equipment are also included in this definition. § 40.003(8). The commissioner shall, from time to time, adopt and enforce reasonable regulations regarding the certification of discharge cleanup organizations. § 40.117(a)(6).

PROVISIONS. Any person or discharge cleanup organization may assist in abating, containing or removing pollution from any unauthorized discharge of oil. § 40.103(a). They may be compensated from the fund provided the commissioner approves the compensation prior to the assistance being rendered. § 40.103(b).

Any discharge cleanup organization, other than the Marine Spill Response Corporation and any discharge cleanup organization operated for profit, shall maintain on its governing body a minimum of two ex officio representatives from the local government within the area served by the organization. § 40.117(b).

LIABILITY. No person or discharge cleanup organization that voluntarily, or pursuant to the national contingency plan or state coastal discharge contingency plan, or pursuant to the request of an authorized federal or state official or a responsible party, renders assistance or advice in abating, containing, or removing pollution from an unauthorized discharge of oil is liable for response costs, damages or civil penalties resulting from acts or omissions committed excepts for acts or omissions of gross negligence or wilful misconduct. § 40.104(b).

A discharge cleanup organization under the control of a responsible person, participating in operations to abate, contain and remove pollution from a discharge, if it reasonably believes that any directions or orders given by the commissioner will unreasonably endanger public safety or natural resources or conflict with directions or orders of the federal on-scene coordinator, may refuse to comply with the direction or orders. § 40.106(a). The organization must state, at the time of refusal, the reason why it refuses to comply and shall give written notice of the refusal to the commissioner within 48 hours. § 40.106(b).

III. LIMITS ON LIABILITY

PROVISIONS. A responsible party shall be liable for response costs, damages and natural resources damages. The only defense of a person responsible for an actual or threatened unauthorized discharge of oil shall be to plead and prove that the discharge resulted solely from any of the following or any combination of the following:

(1) an act of war or terrorism;
(2) an act of government, either state, federal or local;
(3) an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act or omission; or
(4) the wilful misconduct or negligent act or omission of a third party, other than an employee or agent of the person responsible or a third party whose conduct occurs in connection with a contractual relationship with the responsible person, unless the responsible person failed to exercise due care and take precautions against unforeseeable conduct of the third party.

§ 40.204

Response costs. Any person responsible for unauthorized discharges of oil from a vessel is liable for all response costs from actual or threatened discharges not to exceed $1 million for vessels of 300 gross tons or less that do not carry oil as cargo; for vessels of 8,000 gross tons or less the liability shall not exceed $5 million. If the vessel is greater than 8,000 gross tons the liability shall equal $600 per gross ton but shall not exceed the aggregate amount of the fund established under § 40.151(b). § 40.202(a).

Any person responsible for an actual or threatened discharge from a terminal facility shall be liable for all response costs up to $5 million. § 40.202(b). Any person responsible for an actual or threatened discharge of oil from an offshore drilling or production facility is liable for all response costs. § 40.202(b)(1).

Damages. In addition to the response costs, a responsible person shall be liable for all damages other than natural resources damages in an amount not to exceed $1 million for vessels of 300 gross tons or less that do not carry oil as cargo. For vessels of 8,000 gross tons or less the liability shall not exceed $5 million. If the vessel is greater than 8,000 gross tons the liability shall be $600 per gross ton but shall not exceed the aggregate amount of the fund established under § 40.151(b). § 40.202(b).

In addition to the response costs a person responsible for an actual or threatened discharge of oil from a terminal facility shall be liable for all damages other than natural resources damages in an amount not to exceed the aggregate amount of the fund established under § 40.151(b). A person responsible for an unauthorized discharge from an offshore drilling or production facility is liable for all damages. § 40.202(b)(2).

Natural resources damages. In addition to liability for response costs and damages, a responsible party is liable for all natural resources damages attributable to the discharge. § 40.203. In any action to recover natural resources damage, the amount of damages established by the commissioner, in conjunction with state-designated natural resources trustees and according to the procedures and plans contained in the state coastal discharge contingency plan, shall create a rebuttable presumption of the amount of the damages. § 40.107(a) and (b).

GROSS NEGLIGENCE AND WILFUL MISCONDUCT. A responsible person is liable for the full amount of all damages and response costs if the actual or threatened discharge of oil was the result of gross negligence or wilful misconduct. § 40.202(c)(1).

FAILURE TO COOPERATE. If the responsible party fails to cooperate with discharge response and cleanup operations he shall be responsible for the full amount of all response costs and damages. § 40.202(c)(4).

EXCLUSIONS FROM LIABILITY LIMITS. Liability limits under this section do not include interest or attorney fees to which the state is entitled. § 40.202(d).

IV. FINANCIAL RESPONSIBILITY

The owner or operator of any vessel who must file a prevention and contingency plan and who operates within the coastal waters or waters adjoining and accessible from coastal waters or any terminal shall establish and maintain evidence of financial responsibility equal to that required by federal law or in a lesser amount as provided in this chapter. § 40.201(a). If a vessel or terminal is not required under federal law to establish and maintain evidence of financial responsibility, the owner or operator shall establish and maintain evidence as prescribed by rules promulgated under this code. § 40.201(b).

V. CONTINGENCY PLANS

STATE CONTINGENCY PLAN. The commissioner shall promulgate a state coastal discharge contingency plan of response for actual or threatened discharges and the cleanup of pollution resulting from that discharge. Additionally, in cooperation with the commissioner, the Texas Water Commission shall promulgate provisions that relate to the discharge of hazardous substances and the Parks and Wildlife Department shall promulgate provisions relating to the rescue and rehabilitation of aquatic life and wildlife and their habitats. The commissioner shall cooperate with the Railroad Commission of Texas as to provisions that would relate to that commission's jurisdiction for response. § 40.053(a).

The plan shall include the designation of environmental and sensitive zones and a procedure for incident-specific response recommendations, evaluation of industry and federal government response capabilities and temporary storage locations for removed oil or hazardous substances. It shall also include detailed emergency operating procedures for initiating response actions, a list of persons on a response command structure and state response team and an inventory of public and private equipment, its location and a list of available sources of supplies necessary for response. Additionally, the plan must provide for practice drills and a hotline for notification of discharges of hazardous substances and oil. It must also provide for wildlife recovery teams. § 40.053(d) and (e).

The plan shall also describe the circumstances under which a discharge reaches catastrophic proportions and may be declared a disaster. § 40.053(e)(10). It shall provide procedures for disposal of removed oil and for the assessment of natural resources damage and plans for mitigation of damage to and restoration, rehabilitation or replacement of damaged natural resources. § 40.053(e)(13) and (14).

Finally, the plan shall be filed with all state agencies participating in response operations and federal officials responsible for federal discharge response within coastal waters. § 40.053(g).

Regional response capabilities. When promulgating the plan the commissioner shall develop response capabilities on a regional basis for all coastal areas and he shall establish regional response committees to advise and provide input in the development of site-specific discharge c-plans. § 40.053(c) and (d).

REGISTRATION OF TERMINAL FACILITIES. A person may not operate a terminal facility without a discharge prevention and response certificate issued by the commissioner. The following evidence must be presented:

> (1) the applicant has implemented a discharge prevention and response plan consistent with state and federal plans; and
> (2) the applicant can directly provide, through membership or contract with a discharge cleanup organization, all required equipment and trained personnel to prevent, abate, contain and remove pollution as provided in his plan.

§ 40.109(a)-(b).

A certificate will not be issued by the commissioner until the following information has been submitted by the applicant:

> (1) the barrel capacity of the terminal facility;
> (2) the dimensions and barrel capacity of the largest vessel docking at the facility;
> (3) the storage and transfer capabilities and the average daily throughput of the facility;

> (4) the types of oil stored, handled or transferred at the facility;
> (5) information related to the implementation of the applicant's c-plan (i.e., all the response equipment, vehicles, pumps, skimmers, bioremediation supplies to which the facility has access, trained personnel, measures employed to prevent discharges, agreements with discharge cleanup organizations and information as to its financial responsibility.)

§ 40.111

CONTINGENCY PLANS FOR VESSELS. Any vessel operating in state coastal waters or waters adjoining and accessible from coastal waters and with a capacity to carry 10,000 gallons or more of oil as fuel or cargo that operates in the coastal waters or waters adjoining and accessible from coastal waters shall maintain a written vessel-specific discharge prevention and response plan. This plan must:

> (1) provide for notification to the commissioner, verification of the spill, identification of the pollutant, assessment of the discharge, vessel stabilization and discharge abatement and mitigation;
> (2) designate an on-board spill officer who meets the training criteria in § 40.003 and who shall train the vessel's crew in response operations; and
> (3) contain any other provisions the commissioner reasonably requires by rule.

§ 40.114(a)-(c).

The owner or operator of the vessel must be able to directly provide, through membership or contract with a discharge cleanup organization, all required equipment and trained personnel to prevent, abate, contain and remove pollution caused by a discharge of oil. § 40.114(d).

VI. STATE RESPONSE MECHANISMS

FUNDING. Every person owning crude oil in a vessel at the time that the oil is transferred to or from a marine terminal shall pay a fee of 2 cents per barrel of oil. § 40.154(a). The collected fees shall be placed in the coastal protection fund. The fee shall be levied until the balance in the fund reaches $25 million. § 40.155. At that time the levy shall cease and shall not be reinstated until the fund's balance is less than $14 million. § 40.155(b).

To this coastal fund shall be credited all penalties, judgments, reimbursements and charges provided for in this chapter. The fund shall not exceed $50 million. § 40.151(b).

Notwithstanding the provisions of § 40.154(a) or (b) of this section, the fee shall be levied at the rate of 4 cents per barrel if the commissioner certifies to the comptroller a written finding of the following facts:

> (1) the balance in the fund is less than $25 million;
> (2) an unauthorized discharge of oil in excess of 100,000 gallons has occurred within the previous 30 days; and
> (3) expenditures from the fund for response costs and damages are expected to deplete the fund substantially.

The fee shall be collected at the rate of 4 cents per barrel until the balance in the fund reaches $25 million or any lesser amount that the commissioner determines is necessary to pay response costs and damages without substantially depleting the fund. § 40.155(c).

<u>USE OF THE FUND</u>. Money in the fund may be disbursed for the following purposes and no others:

> (1) administrative expenses, personnel and training expenses, equipment maintenance and operating

costs related to implementation and enforcement of this chapter;
(2) response costs related to abatement and containment of actual or threatened discharges of oil incidental to discharges of hazardous substances;
(3) response costs and damages related to actual or threatened discharges of discharges of oil;
(4) assessment, restoration, rehabilitation or replacement of or mitigation of damage to natural resources damaged by a discharge of oil;
(5) interagency contracts with state colleges and universities for research, testing and development in an amount not to exceed $1.25 million;
(6) purchase of response equipment within two years of the effective date of this chapter in an amount not to exceed $4 million; thereafter, for the purchase of replacement equipment; and
(7) other costs and damages authorized by this chapter.

§ 40.152(a).

LIABILITY OF THE FUND. Except for persons responsible for an unauthorized discharge of oil, the fund is absolutely liable for:

(1) all proven, reasonable response costs approved by the commissioner under § 40.103;
(2) all natural resources damage from a discharge of oil; and
(3) except for damages proportionately attributable to the negligence or wilful misconduct of the claimant, all other proven damages from the discharge of oil.

§ 40.158(a).

All persons who incur response costs or who are entitled to damages as a result of a discharge of oil may receive compensation from the fund. § 40.157(a). If the claim is more than $50,000 the claimant shall first submit the claim to the responsible party. If there is no reasonable response within 90 days the claimant shall submit the claim to the federal fund. If there is no reasonable response within 60 days, the claimant may submit the claim to the state fund. § 40.159(b)(1).

If the claim is less than $50,000 the claimant shall first submit the claim to the responsible party. If there is no reasonable response within 30 days, the claimant may submit the claim to the state fund. § 40.159(b)(2).

VII. <u>ENFORCEMENT AND PENALTIES</u>

<u>PROVISIONS</u>. The act provides for penalties for operating a vessel or facility without a c-plan and for failure to immediately notify the commissioner of a discharge. There are also penalties for discharge of the oil and failure to abate, contain and remove the pollution.

<u>Class A misdemeanors</u>. A person who intentionally commits any of the following acts shall be guilty of a Class A misdemeanor:

> (1) intentionally operating a terminal facility or vessel without a discharge prevention and response plan;
> (2) operating a terminal facility or vessel without establishing and maintaining financial responsibility;
> (3) causing, allowing or permitting an unauthorized discharge of oil;
> (4) making a material false statement with a fraudulent intent in an application or report; or
> (5) with respect to the person in charge of a vessel from which there is a discharge of oil, taking the vessel from the jurisdiction of the commissioner prior to proving financial responsibility.

§ 40. 251(a)(1)-(5).

A Class A misdemeanor is punishable by not more than $2,000, confinement in jail for not more than one year or both. V.T.C.A. § 12.02.