

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2072 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

90

responsibility without the "direct action" endorsement. This provision has been interpreted as authority to issue conditional permits only upon proof of at least \$50 million in insurance or other financial responsibility which has the direct action endorsement. Since the maximum financial responsibility coverage for a non-crude operator (tank vessel and barges) is \$35 million under AS 46.04.040 (c) (?), the waiver or conditional permit provisions of subsection (1) is not available to them.

The D.E.C. has, however, been issuing conditional permits to non-crude operators which have complied with the monetary financial responsibility requirements, but are unable to get such coverage with the "direct action" endorsement. The "direct action" endorsement is unavailable in the market place to some, if not most, non-crude operators. Due to the commercial unavailability of financial responsibility with the required endorsement, the DEC is in the unpleasant predicament of denying operating permits to established responsible carriers who have been doing business in Alaska for years. Denial of such operating permits because of commercial unavailability of "direct action" endorsement is potentially devastating and would likely eliminate most non-crude refined product delivery to many Alaskan communities.

This provision should be revisited by the Legislature to reflect the realities of the insurance market and availability of coverage. As of last week, D.E.C. has suspended any Conditional Permits.

IV.

SUGGESTED SOLUTIONS

Legislation which:

1. Places explicit language in statute which limits the exposure of an insurer or P&I club to the face amount of the policy;
2. Eliminates the "direct action" requirement;
3. Provides a substitute mechanism to "direct action" which satisfies the State of Alaska and yet recognizes the realities of the available insurance or P&I club coverage;

4. Clarifies D.E.C. authority to grant conditional operating permits to non-crude operators who have otherwise complied with the monetary requirements for financial responsibility; or

5. Combination of the above.



Alaska State Legislature

Please enter into the record my testimony to the Senate Oil & Gas
committee name

committee on SB 405, dated 2-25-92
bill/subject

testimony in support of SB 405

Kodiak Oil Sales Inc is a fuel distributor serving the Kodiak Area. We are a family owned business and have operated as a family business since 1950. My comments relate to the availability of insurance which meets the State of Alaska's requirements for non-crude oil terminals.

The State at times passes laws which have effects which were not the intent of the original legislation. I do not believe that it was the intent of the legislature to make it impossible to meet the financial responsibility requirements of the statute. But that is what has occurred by having the "direct access" clause as a requirement for insurance.

Kodiak Oil Sales like many non-crude operators depends on insurance to provide "proof of financial responsibility". We are able to get insurance that meets or exceeds the requirements with the exception of the "direct access" clause. At this time there is no insurance company in the world which will write a policy that contains this "direct access" clause.

Companies such as mine supply petroleum products to the people who live and work in Alaska. If the "direct access" clause is not removed from the statutes we will not be able to meet the financial responsibility requirements, and State of Alaska will have to tell us not to sell fuel anymore.

Page 1 of 2 pages

Signed: _____

Testifier

Kodiak Oil Sales Inc

Representing (Optional)

Box 1487 - Kodiak AK

Address

486-3245

Phone No.

486-3205 Fax



Alaska State Legislature

Please enter into the record my testimony to the Senate Oil & Gas
committee name

committee on SB 405, dated 2-25-92
bill/subject

What this means in real terms is that there will be no place in most of Alaska for people to buy petroleum products. Can you imagine living in Alaska without heating oil, gasoline and diesel fuel, I can't.

I further ask that the Department of Environmental Conservation have the authority to grant "conditional approval" in the case of financial responsibility. There may be a time in the future when a problem such as this arises and it may not be convenient to ask the legislature to change the law. The DEC should have the authority to work with industry till the situation can be resolved.

Jim Ramaglia
Vice President
Kodiak Oil Sales Inc.

page 2 of 2 pages

Signed:

Jim Ramaglia
Testifier

Kodiak Oil Sales Inc
Representing (Optional)

Box 1487 Kodiak AK
Address

486-3245-

486-3205 Fax

Phone No.



Electric Service for 300,000 Alaskans

Alaska

Rural

Electric

Cooperative

Association, Inc.

703 W. Tudor Rd., #200
Anchorage, AK 99503
(907) 561-6103
FAX (907) 561-5547

February 24, 1992

Dear Senator Hoffman:

Thank you for the interest and concern you have shown for a problem common to many residents throughout the state who have to handle petroleum products in the course of business. SB 405, which you recently introduced, is certainly a step in the right direction. But I fear that, as drafted, it does not go far enough toward resolving the problem.

The people I represent on this issue are small electric utilities owned by the consumers or the communities they serve. They have found it absolutely impossible to purchase insurance policies which both transfer risk and satisfy AS 46.04.040(e). We have no reason to believe this situation is temporary.

From our perspective there are three basic problems in attempting to buy insurance to cover this risk:

- (1) The "direct access" language in AS 46.04.040(e) is something no insurance company will accept. The insurance industry's method of doing business is to pay for losses experienced by their insureds rather than providing a pot of money to be used at the discretion of some third party. If there is a dispute regarding a loss, an insurance company pays only after a court determines the responsibility for and the amount of the loss. This is inherent to the insurance industry, and they will not change just because the State of Alaska would like for them to do so.

The big companies can satisfy their proof of financial responsibility without insurance by simply posting their financial statement and qualifying as self-insurers. Most of our members don't qualify as self-insurers, and they are small enough that it would be prudent for them to transfer the risk if they could do so at a reasonable cost.

- (2) The "strictly liable, jointly and severally" language in AS 46.04.040(g) is another severe problem. It is unusual for an insurance company to be willing to write a policy under those conditions because they would be required to pay a loss without any finding of fault on the part of their insureds. This provision severely limits the number of insurance companies that will issue these policies, and that seriously increases the cost of such insurance.
- (3) The third basic problem is the sheer complexity of the drafting of the statutes involved. In diagramming the statutes in an effort to understand them, I came up with this:

Page 2, line 21 of SB 405 refers to "judgments under statutes listed in (i) of this section..."

"(i) of this section" refers to:

a loss compensable under

AS 46.03.760(e) which refers to
AS 46.03.740-750 and
AS 46.03.822

or

AS 46.03.822

and assessments under

AS 46.03.758 which also includes
liability under AS 46.03.760(a)
AS 46.03.759

AS 46.03.760(a) which also refers to
AS 46.03.070(c)

or

AS 46.04.030(g)

My point is that this is such complex and confusing legalese that insurance companies simply will not deal with it unless they expect to earn very large premiums on policies issued under the law.

With large businesses able to satisfy the financial responsibility requirements in some way other than through buying insurance, the small businesses like my members face the formidable task of trying to find insurance companies willing to write this coverage just for them.

What needs to happen is for non-crude handlers to be completely separated under the law from crude handlers. There should be a simple, concise statement of the requirements that apply to them which eliminates "direct access" and "strictly liable, jointly and severally." Then the commercial insurance industry could do its job of providing insurance at a reasonable cost for businesses like those I represent.

Members of ARECA will be pleased to assist you in this effort in any way we can.

Sincerely,



David Hutchens
Executive Director



STATE OF ALASKA
LEGISLATIVE AFFAIRS AGENCY
DIVISION OF PUBLIC SERVICES

DATE: February 25, 1992

Please accept the enclosed original(s) of written testimony
for the Senate Oil & Gas Committee teleconference hearing that was
scheduled on SB 403 on 2-25-92.

A copy of this testimony was transmitted to your committee via
fax on 2-25-92.

Thank you,

LORNA Steelman

Samson Tug & Barge Company, Inc.

Phone (907) 747-8559 • Fax(907) 747-5370 • P.O. Box 559 • Sitka, Alaska 99835

Senator Sam Cotten
Alaska State Legislature
Capitol Building
Juneau, AK. 99801-1182

February 26, 1992

Dear Senator Cotten:

This correspondence contains commentary on two bills that have been introduced this year.

Senate Bill 405/House Bill 501: We urge your support of this bill and to encourage your colleagues to support it. As a small business transporting petroleum products in Southeast Alaska, we can provide evidence of financial responsibility with insurance only. Without a change in the statutes, we and many other small operations will be forced to cease transporting petroleum products. This would place a hardship on the people of Alaska and raise the price of oil. The state government would be paying higher prices for fuel and in a year when the budget is facing real scrutiny, additional cost are unwanted. Passage of these bills would allow continuing operations by all the barge companies involved in business in Alaska.

House Bill 232 (Sunken or Abandoned Vessels Bill): We have been advised this bill will be retroactive to cover all existing wrecks and a requirement to remove them within 30 days. Senator, this is unrealistic, impractical, impossible, unwarranted, and someones pipedream. A wooden fishing boat that sinks and rolls over in fifty feet of water will be reduced to only machinery in a years time. A steel vessel sinks in a narrow channel in a 140 feet of water, tidal current 5 + knots . The first problem is locating the vessel (all but impossible). Placing divers in water with this velocity to work is placing their lives in jeopardy. For what? Weather conditions in most of Alaska prohibits salvage attempts. Why regulate, what nature prohibits?

It is our understanding the bill relates to direct action against the underwriters and there is no limit to liability. Senator, we all know the type of problem created when direct action provisions against the underwriter are placed in regulation. That is why SB 405 was introduced. But even more important, Alaska whose main route of importing and exporting its goods is by the sea, will be dealt a devastating blow with passage of this bill.

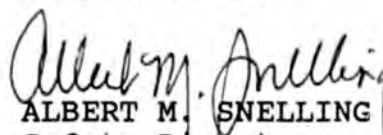
If you were an insurance underwriter, would your write a policy on a fish processor or tender or lograft tug, if you knew direct action would be taken against you and the vessel that sinks in 200 feet of water must be removed in 30 days, irregardless of safety

of lives. Does no limit of liability mean the cost to put the shells back on the beach exactly the way they were before a vessel grounded?

Senator, you are a fisherman and you have been around boats and most likely you have insurance. You know more about the sea than many of your colleagues. Tell them how it is. No one wants to damage or destroy the environment of Alaska's coast, but a bill of this nature could very well destroy a portion of it's economy.

We appreciate your time and we hope you will consider our comments.

Respectfully,


ALBERT M. SNELLING
Safety Director



JOSEPH H. LANGJAHR
Vice President & General Counsel

March 5, 1992

Re: Oil Pollution Financial Responsibility
HB 501 and SB 405

To: House and Senate Oil and Gas Committees

Foss Maritime Company respectfully submits the attached material as supplemental information to the testimony we offered, along with several other representatives of non-crude oil operators, before the Senate Oil and Gas Committee on February 25, 1992.

To briefly reiterate, while we can demonstrate financial responsibility through pollution insurance that provides us coverage of up to \$500 million -- far in excess of the amount required by HB 567 -- the Protection and Indemnity (P&I) Clubs that offer such coverage flatly refuse to submit to Alaska's "direct action" provision. We have had numerous conversations with representatives of the P&I Clubs, and their message remains unchanged: They are indemnity insurers only; they will not act as a guarantor available to be sued by third parties; they will not submit themselves to direct action lawsuits in the courts of any state or federal government.

As evidence of the clubs' steadfastness on this issue, I submit a letter from Harold E. Mesirow, a Washington, D. C. attorney for the International Group of P&I Clubs, and a transcript of a statement given before the U. S. House Merchant Marine Committee by J. Richard Youell, chairman of Janson Green Marine Ltd., a marine underwriting agency at Lloyd's of London. Although the subject at hand in both documents is the federal Oil Pollution Act of 1990 (like HB 567, OPA 90 was enacted in response to the EXXON VALDEZ spill) the primary issue addressed is the same -- the refusal of the clubs to act as guarantor or submit to direct action legal claims.

This situation has not entered into a category of crisis on the federal level so far, because the U. S. Coast Guard is under no deadline to promulgate its financial responsibility regulations and is not expected to do so before the end of the year.

The position of Alaska's smaller fuel distributors, vessel operators and rural electric utilities that maintain fuel stores find ourselves in is decidedly more urgent because we will have to come into compliance with Alaska's new rules on June 1, 1992. With that deadline now just over three months away, the simple fact is that we have found no commercially available alternatives to P&I Club coverage that can meet the state's direct action requirement. And, because most small operators lack the necessary working capital, self-

insurance and other allowable methods of meeting the financial responsibility requirements in fact are not realistic alternatives.

We support legislation that would give DEC the authority to grant us approval to operate without direct action coverage, as long as we met the other conditions of Alaska's financial responsibility requirements. This, in effect, is what the State Legislatures of California, Washington, Florida and Virginia each decided to do in the course of strengthening their pollution laws in the wake of the EXXON VALDEZ spill; all of them now accept entry into a P&I Club as proof of financial responsibility without requiring the clubs to submit to direct action.

Foss Maritime Company recognizes the need for providing evidence of financial responsibility so that government entities and other legitimate claimants can be compensated for their damages in the event of a spill. But it seems clear to us -- as it did to the Legislatures of those four states -- that between the pollution coverage offered by the P&I Clubs and the readily accessible \$1 billion federal OPA trust fund, there are more than ample funds available to deal with any incident involving non-crude operators, and direct action is not necessary.

If it appears that we are advocating for the insurance industry's position, please be assured that is not our intention. We are simply caught in the middle by being forced to meet a state requirement that insurers refuse to provide. All signs indicate the industry is not going to relent, so unless the Alaska Legislature grants us some form of relief, we will be in the decidedly distasteful position beginning June 1 of choosing to either operate out of compliance or not operate at all. As a responsible company that has been transporting products to and within Alaska for the past sixty years, neither of those choices is in any way attractive to us. We therefore urge the Oil and Gas Committees to act favorably on SB 405 and HB 501.

Respectfully submitted,

A handwritten signature in dark ink, reading "Joseph H. Langjahr". The signature is written in a cursive style with a large, sweeping initial "J".

Joseph H. Langjahr

ROBINS, KAPLAN, MILLER & CIRESI

ATTORNEYS AT LAW

ATLANTA
BOSTON
CHICAGO
DALLAS
MINNEAPOLIS
NEWPORT BEACH
SAINT PAUL
SAN FRANCISCO
WASHINGTON

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D. C. 20006-1301
TELEPHONE (202) 775-0725
FACSIMILE (202) 223-8604
TELEX 4931197 RKMC

HAROLD E. MESIROW
(202) 736-2700

January 22, 1992

VIA HAND DELIVERY

Executive Secretary
Marine Safety Council
G-LRA-2/3406
CGD 91-005
U.S. Coast Guard Headquarters
2100 Second Street, S.W.
Washington, D.C. 20593-0001

Re: Notice of Proposed Rulemaking
[CGD 91-005] -- Financial Responsibility
for Water Pollution (Vessels)

Dear Sir or Madam:

Submitted herewith, on behalf of the International Group of PandI Clubs ("the Group"), are comments on the above-referenced Notice of Proposed Rulemaking (the "NRPM").

I. INTRODUCTION

The Group consists of seventeen mutual insurance companies ("PandI Clubs" or "Clubs") who between them insure the liabilities of over 95% of the world's ocean going merchant fleet. This includes effectively all oil tankers and almost all dry cargo ships trading to the United States together with a substantial proportion of the U.S. coastal traders. All the Clubs in the Group are linked by reinsurance arrangements so that they form what is in effect one insurance pool for the larger liability risks of shipowners worldwide.

The constituent PandI Clubs of the Group are mutual, non-profit organizations which exist to insure the liabilities of their

shipowner Members. In this capacity, the Clubs provide shipowners with services extending to up-front claims handling, including the appointment of lawyers, surveyors and other experts and the swift settlement of claims. This is particularly true in the case of oil pollution where Clubs play an active role in the shipowners' response to a spill. (This approach contrasts with that of the traditional commercial insurance industry, which normally leaves the insured to deal with the incident and reviews the insurance implications after the event.) The Clubs therefore have many years of experience throughout the world in responding to oil spills both as regards clean-up and damage settlement.

The Clubs are virtually the sole providers of insurance backing for the certificates currently issued by the US Coast Guard ("USCG") under the Clean Water Act ("CWA") for ocean going vessels. The only significant exception to this is a group of US insurers known as the Water Quality Insurance Syndicate ("WQIS") who provide certificates limited to USD 5 million for certain small coastal and inland waterway carriers.

In addition, the Clubs are effectively the sole providers of the insurance certificates required by international law under the 1969 Civil Liability Convention ("1969 CLC") in order for participating countries to issue certificates of financial responsibility to oil tankers under that international Convention. This position has enabled the Clubs to cooperate closely with the Director of the International Oil Pollution Compensation Fund ("the Fund") both in the handling and settlement of oil spills under the 1969 CLC and under the 1971 Fund Conventions.

In the circumstances it would be fair to state that the smooth working of both the CWA and the 1969 CLC owes much to the Clubs.

These comments submitted on behalf of the Clubs consist of: (1) general comments concerning the position of the Clubs on the issue of certification and the role of the Clubs as mutual indemnity insurers; (2) a discussion of the financial responsibility requirements of the Oil Pollution Act of 1990 ("OPA 90") and the NPRM; (3) the Group's responses to the specific questions posed in the NPRM; and (4) a discussion of possible changes to the NPRM.

II. GENERAL COMMENTS

A. The Position of the Clubs on Cover and Certification

1. Cover

The Clubs currently provide insurance cover for their shipowner members which is wide enough in scope to include all US civil liabilities and in terms of oil pollution is more than sufficient in amount to meet the financial responsibility require-

ments of OPA 90. It is the current intention of the Clubs to maintain this cover.

2. Certificates of Financial Responsibility

In debates during the legislative process which culminated in OPA 90, the Clubs consistently stated the position that they would not provide certification of financial responsibility under any law which differed markedly from the 1984 Protocols to the 1969 CLC. The Clubs' position remains the same, and they will not be providing certification under OPA 90 or under any of the state oil pollution laws.

3. Cover but no Certification

Although the Clubs do not exclude liabilities under OPA 90 from the cover under their Rules, they will not provide certification of financial responsibility. The reasons for this may be summarized in the statement that the Clubs' function is to act as indemnity insurers not guarantors. As a general policy the Clubs have consistently refused to give anticipatory guarantees. Exceptions have been made to this with regard to certificates required under International Conventions where different criteria apply, and the limited certification under the CWA. (The basis for each of these exceptions is discussed later in these comments.) In addition, the Clubs believe that the reinsurances which they obtain from the commercial insurance market, and which are vital to their coverage, would be imperilled by the giving of certificates under OPA 90.

B. The Clubs are Indemnity Underwriters, not Guarantors

The essential role of the Clubs is to act as indemnity insurers, not guarantors. The Clubs have a longstanding policy of not providing anticipatory guarantees for the potential liabilities of their shipowner members. The reasons for this policy become clear on consideration of the consequences of acting as guarantor for all the potential liabilities arising from many different risks (not just oil pollution) in every country of the world in respect of every merchant ship currently trading.

Exceptions have been made to this policy in providing the insurance backing to the USCG certificates currently issued under the CWA and the insurance backing given to the government certificates issued under the 1969 CLC. As to the first exception, in this context it should be recalled that the Clubs have always supported the policy of prompt and even voluntary clean-up. The giving of USCG certificates in 1970 was consistent with that policy as they were specifically limited in scope to federal costs of oil spill clean-up, and in amount to USD 150 per grt. In addition, the CWA did not require that insurers giving certification forego the

policy defenses which are abrogated under OPA 90. The decision to issue such certificates came at the time of the first CWA (1970) when the United States was seen as introducing interim protection for federal clean-up costs in advance of the 1969 CLC coming into force (1975) and in the expectation that the USA would ratify the Convention when it came into force. That expectation was never fulfilled. With respect to the second exception, the Clubs have traditionally supported International Conventions in the interests of international uniformity of approach and consider that such Conventions provide a consistent and predictable liability regime.

C. The Extraordinary Scope of the Liabilities to be Guaranteed under OPA 90

Our discussion is confined to the issue of certification. Accordingly it does not include a full review of the liability provisions of OPA 90. However, in order to understand the position taken by the Clubs on certification it is necessary to be aware of the overall effect of those provisions. OPA 90 has drastically increased the liability of shipowners in respect of oil spills, both in amount and scope. Liability under the CWA was limited in amount to USD 150 per gross ton and, as stated above, applied to the federal government's costs of clean-up. OPA 90 has increased liability limits fourfold for dry cargo vessels (more for smaller ships) and eightfold for tank vessels. Moreover, OPA 90 has introduced a completely new range of liabilities and penalties relating to oil spills which extend to both economic and non-economic losses, including losses relating to damages to natural resources calculated under OPA 90's Natural Resource Damage Assessment procedure and expenses of state and local governments for fire, police and other safety services. Even more significantly, OPA 90 abandons the principles of the Robins Dry Dock case so that "claimants" could apparently include anyone who has suffered any loss whatsoever from the spill, whether or not they have any direct connection with the incident. This change runs counter to the policy which has been adopted by the US Courts for many years and which was justified and explained very neatly by Chief Justice Cardozo when he said that without such a direct connection defendants would be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" Ultramares Corporation v. Touche, 255 NY 170, 174 N.E. 441 (N.Y. 1931). This is precisely the unfortunate situation in which shipowners now find themselves. OPA 90 also makes specific provision for individual states to introduce their own legislation which may be inconsistent with or additional to Federal requirements, thus introducing a series of potentially overlapping additional liabilities and indeed financial responsibility requirements. Thus the way is cleared for speculative damages which are potentially recoverable by an exceptionally wide range of plaintiffs.

The limitation of liability for shipowners provided for in OPA 90 is equal to the amount for which certification of financial responsibility is required. However, it is generally agreed that the limitation of liability provided in OPA 90 is illusory. OPA 90's liability limit is not available if the incident is proximately caused by the gross negligence of the responsible party, his servants, agents or contractors, or if it is caused by the violation of an applicable federal safety, construction or operating regulation by the responsible party, his servants, agents or contractors. Given the likelihood of establishing a breach of some applicable federal regulation and the unknown and highly flexible nature of the test for "gross negligence" at the shipboard level, denial of the right to limit liability is a probability in any major spill.

It may be argued that OPA 90 only requires an insurer to certify up to the fixed amounts stated in OPA 90. However if, as the NPRM proposes, the insurer is forced to submit to the jurisdiction of the US federal courts as a guarantor (which submission will probably also be construed as de facto submission to the jurisdiction of state courts), he will lose the contractual defenses which are a very important part of the cover given by any insurer and he will become exposed as the deepest available pocket to the risk of having to pay sums in excess of the amount certified, or even insured. It may be said that this should not happen, but all insurers genuinely fear the possibility of a US federal or state court finding some reason to impose such excess liability.

In addition, the Act contains a number of penalties which attach to the handling of a spill and its settlement, for all of which the guarantor itself could be personally liable. This introduces a new and serious risk. Indeed, it places a financial guarantor in an extraordinary position in which he is transformed by the Act from financial guarantor into spiller.

As a consequence of the foregoing, the Clubs are not willing to act as guarantors under OPA 90. While, as has always been the case, they are prepared to live up to their obligations to pay claims pursuant to the terms of their contracts of insurance, they are not prepared to offer themselves to the US courts as guarantors directly responsible for all claims made as a consequence of oil spills of their shipowner Members, thus in effect becoming the property insurers for claimants under OPA 90 rather than the liability insurers of shipowners.

D. The Mutuality of the Clubs

The shipowner directors of the Clubs have a special responsibility to the totality of their membership, many of whom never trade to the United States, to ensure that the mutual insurance structure and the reinsurance arrangements which protect

that structure are not put at risk. There is frequent pressure on the Clubs in various parts of the world to give anticipatory guarantees for unknown claims in unknown circumstances to potential claimants, both Governments and private parties. These pressures have always been firmly resisted. In this regard it is important to distinguish between on the one hand, a Club indemnifying its Members' liabilities, with policy defenses preserved, and, on the other, becoming a financial guarantor of those liabilities in each jurisdiction in which the liability may arise. Moreover, a fragmented approach to the certification of oil pollution liabilities would seriously weaken the development of the International Conventions by encouraging countries to believe that the Conventions have no future and that the only way forward is to follow the example of the United States, take unilateral action and demand their own certification. This would not only be detrimental to the development of orderly international law, but also would lead to (1) administrative chaos, (2) serious repercussions in terms of insurance cost, and (3) much more importantly in the long term, severe reduction in the availability of adequate insurance coverage for shipowners' liabilities generally.

The United States has chosen not to ratify the International Conventions in this area and has in their place created its own uniquely onerous liability regime for oil spills. Those who insure risks worldwide on behalf of an international community must take this unique risk into account. The Clubs and their international shipowner Members have given careful consideration to the exposure created by OPA 90 and have concluded that it would be wrong for them to give certificates and submit to United States jurisdiction as guarantors. It is difficult to justify providing certificates in respect of one risk in a single country, however important, when this exposes the whole international system to the dangers described above.

E. Other Insurers Take the Same Position

The Clubs are not alone in taking this position.

Other insurers in the international market have reacted to OPA 90 and state certification by ensuring that all their policies contain a standard market clause which reads as follows:

"This policy of insurance is not evidence of financial responsibility under the Oil Pollution Act of 1990 or any similar federal or state laws and may not be shown or tendered to the USCG or any federal or state agency as evidence of financial responsibility or evidence of insurance. The insurers do not consent to be guarantors."

The only possible exception to this relates to certification for small domestic inland and coastal vessels. However, the scope of the cover provided by WQIS is limited, as described in particular in the oral testimony of its president, Robert S. Lagatolla, at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation. (The printed transcript of the Hearing containing this oral testimony is expected to be publicly released in the near future. As soon as it becomes available, pertinent portions will be provided for the record herein.)

F. The Clubs' Reinsurers are Likely to React Adversely to Certification

The Clubs, although competing for business between themselves, combine to purchase reinsurance collectively. The resultant economy of scale enables each Club to purchase more coverage than would be available to it as a separate entity, and also at reduced cost. Furthermore, this approach, combined with the arrangements between the Clubs for pooling their losses above a certain figure, helps to ensure continuity and stability in a highly cyclical market. The Group's reinsurance contract is one of the biggest liability contracts in the world and absorbs the available cover worldwide. There is no alternative reinsurance market. Indeed, some of the largest insurers in the world are reluctant to accept the risk of providing the necessary reinsurance -- less than ten percent of the current reinsurance contract is underwritten in the United States.

The worldwide reinsurance market for large risks of this type is very limited and in effect all large insurance claims worldwide are paid by the same limited number of reinsurers. This market has been badly affected recently by an unusually large number of major incidents such as, for example, the Piper Alpha oil platform explosion, the Phillips refinery fire, the EXXON VALDEZ oil spill, Hurricane Hugo and severe storm damage in Europe. This has led to a dramatic contraction of the market and greatly increased cost.

When an insurance market enters this phase of its cycle, underwriters are forced to cut back on the risks they accept and attempt to exclude the most dangerous or uncertain.

OPA 90 and the emotion attendant on the EXXON VALDEZ oil spill are considered to have increased the US oil pollution risk very significantly. This is against the background that the US is already considered a high risk area, with an unpredictable and expensive legal system. Nowhere is this fear greater than in uncertain areas of claims, and OPA 90 has made US oil pollution claims highly uncertain. The market has reacted to the possibility

of being asked or deemed to have certified liabilities under OPA 90 with the sort of exclusionary wording set out above.

The existing reinsurances of the Clubs are provided on the basis of the stated position of the Clubs that they will not provide certificates under OPA 90. If the Clubs were to depart from this position it is understood that many of the existing reinsurers would refuse to continue their reinsurances.

Reference is made above to the importance for the Clubs of maintaining the present mutual structure, including the necessary reinsurances. In that regard, it is now clear that the giving of certificates under OPA 90 is not a merely theoretical or long term threat to that structure and those reinsurances, but that it could provoke an immediate withdrawal of support from the reinsurance market. (See specifically in this regard the testimony of J. Richard L. Youell at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation, attached as an Exhibit hereto.)

III. FINANCIAL RESPONSIBILITY REQUIREMENTS OF OPA AND THE NPRM

A. General Comments on the NPRM

Since a high percentage of existing USCG certificates are issued on the basis of insurance certificates provided by the Clubs and the Clubs will not be issuing the certificates required under OPA 90, there must be the possibility that ocean going operators of all vessels, not just tankers, will encounter difficulty in complying with the financial responsibility requirements of OPA 90.

It is correct for the NPRM to state that the Clubs have continued and propose to continue to provide the insurance cover against liabilities under both OPA 90 and state legislation and thus that virtually all shipowners using US waters have obtained insurance to meet OPA 90 financial responsibility limits.

It is, however, not correct to state as does the NPRM that "without the higher [than existing USCG] guarantees, the value of the insurance in the event of a catastrophic spill is highly questionable."

Since the EXXON VAL 7 spill in March 1989 there have been more than twenty serious spills in the United States including the incidents involving WORLD PRODIGY, PRESIDENT RIVERA, AMERICAN TRADER, B.T. NAUTILUS, MEGA BORG and SAMMI SUPERSTARS. Many of these incidents had financial consequences in excess of the CWA guarantee limits and liabilities. In every case where the Clubs were insurers they have responded in full under the terms of their cover. However Clubs are insurers of legal liability and therefore naturally reserve the right to examine all claims and resist those

which are exaggerated or spurious. Equally where an assured has breached the terms of his insurance policy, cover will be withheld.

Since the USCG certificates were first issued in 1970 there have been a large number of incidents insured by the clubs where liabilities have considerably exceeded the limits and liabilities of the CWA guarantee with perhaps the most notable instance of an insurance payment in excess of the CWA guarantee being the USD 400 million paid to Exxon following the AMER VALDEZ incident. This represented the limit of insurance cover as opposed to the maximum liability under the CWA certificate of USD 14,249,850.

(It is however true that there is no means of obtaining any form of guarantee from a ship exercising the right of innocent passage or not entering US waters, other than under an International Convention. Oil may of course be spilled from a vessel passing along either the East or West Coast of the US or indeed visiting a Caribbean, Latin American or Canadian port and this oil can have a serious impact on the US coastline. The 1969 CLC and the 1984 Protocol to the CLC were expressly designed to deal with this sort of problem.)

B. The NPRM's Treatment of Section 1016 of OPA 90

We would note that the Coast Guard has made no reference in its NPRM to key portions of the statute bearing upon certification. OPA 90 provides that financial responsibility "may be established by any one, or a combination of the following methods which the Secretary determines to be acceptable: evidence of insurance, surety bond, guaranty, letters of credit, qualification as a self-insurer, or other evidence of financial responsibility." (emphasis added)

Despite the flexibility in approaches to financial responsibility contemplated under OPA 90, the NPRM proposes only insurance, surety bonds, guarantees and self insurance as means of establishing financial responsibility and makes no mention of any "other evidence of financial responsibility" that might be utilized in satisfying the statutory requirements.

In addition, the NPRM does not in any way address the issue of what policy conditions and defences might be utilized in establishing evidence of financial responsibility. The Act, however, authorizes the Coast Guard, in promulgating financial responsibility requirements, to "specify policy or other contractual terms, conditions, or defenses which are necessary or which are unacceptable." (emphasis added) Moreover, as stated at pages 119-120 of the Conference Report which accompanied OPA 90, the Coast Guard's authority in this regard is to be exercised in a manner

that will foster a continuing market for providers of financial responsibility."

A possible explanation for these omissions is that the USCG have taken a restrictive view of what Congress intended in passing OPA 90.

The Clubs also note with concern that Sections 130.8 and 130.9 of the NPRM do not appear to reflect accurately the provisions of Section 1016(a) of OPA which require proof of financial responsibility only in respect of the largest vessel in a fleet and not for each vessel individually in the aggregate.

C. Consolidation of Financial Responsibility Requirements Under OPA 90 and CERCLA

The NPRM proposes that the financial responsibility requirements of OPA 90 should be combined with those of the Comprehensive Environmental Response, Compensation and Liability Act [42 USC 9601] ("CERCLA"). CERCLA concerns liability for hazardous substances and has been in force since 1980. Regulations implementing its financial responsibility provisions, however, have never been issued because no insurer could be found willing to provide the necessary certificates. By combining the two regimes the NPRM increases the amount required under each vessel certificate by USD 300 per grt and significantly extends the already large potential liabilities of OPA 90. In effect every vessel trading in US waters will require a minimum USD 5 million certificate under CERCLA.

The Clubs note with interest Section 108(b)(2) of CERCLA which states that:

"To the maximum extent practicable the President shall co-operate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements."

And the Clubs note also with considerable concern the ambiguity inherent in Section 108(d) of the NPRM which appears to expose a guarantor to liability beyond the amount of his guarantee. The section reads:

"Any guarantor acting in good faith shall be liable only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or of the

guaranty or other evidence of financial responsibility furnished"

D. Continuation of Present Regulations

The NPRM suggests that it might be possible to allow existing certificates to remain valid until their normal expiry date "if evidence of financial responsibility sufficient to meet OPA and CERCLA requirements is established and maintained." The reason for this is "to avoid unnecessary disruption of commerce and the burden on vessel operators."

It would seem, however, that this proposed administrative short cut will only be possible if the existing insurance guarantors are willing to provide the new certificates. In the case of the Clubs this is not the case.

E. Regulatory Evaluation

The NPRM states that "This proposal is not major under Executive Order 12291" (EO 12291). The Clubs disagree; the criteria under EO 12291 define a "major rule" as any regulation which is likely to result in:

- an annual effect on the economy of \$100 million or more; or
- a major increase in cost or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or
- significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of US based enterprises to compete with foreign-based enterprises in domestic or export markets.

There can be no doubt that the proposed regulations qualify as a major rule under not just one but under each of the criteria. Indeed, the Clubs consider that the potential impact of the present NPRM on owners of all types of vessels is so serious that preparation of a Regulatory Impact Statement ("RIA") pursuant to Executive Order 12291 is essential and that the promulgation of any final rule should be postponed until the fullest possible opportunity for comment on the RIA and reconsideration of the NPRM has been given.

IV. THE QUESTIONS

The Group submits the following responses to the questions posed in the NPRM. Paragraph numbers correspond to the numbers assigned to each question in the NPRM.

1. The Clubs would suggest relaxation of the criteria necessary to qualify as a self-insurer and consideration of the "other evidence of financial responsibility" permitted under OPA 90.
2. & 3. The Clubs consider that the requirement for net worth in the US is likely to have a very restrictive effect on the ability of foreign shipowners to meet the self-insurance requirements.
4. The Clubs cannot comment.
5. See 2 and 3 above.
- 6,7,8,9. The Clubs are not in a position to comment.
10. The percentage of oil imported by the major oil companies is relatively small and it seems unlikely that the oil companies would be willing to provide guarantees for independent companies or non-tank vessels.
11. The Clubs consider it unlikely that any independent vessel operator would be able to meet the standard of self-insurance proposed in the NPRM.
- 12,13,14,15. The Clubs are not in the best position to answer these questions.
16. No, for the reasons set out above. The amount of the guarantee is not the only or the most important factor.

V. POSSIBLE CHANGES IN THE NPRM

With regard to possible changes to the NPRM, two important considerations need to be taken into account. The first is that the Clubs currently provide insurance cover which is wide enough in scope to meet the civil liabilities imposed by both Federal and

State legislation and sufficient in amount to more than satisfy the maximum financial responsibility requirements of both OPA 90 and CERCLA. The Clubs cannot guarantee that this cover will always be available, but they intend to continue it if possible. The reality of the position is therefore that any owner who has entered his vessel in one of the Clubs with full oil pollution cover has shown financial responsibility sufficient to meet the requirements of OPA 90.

The second consideration is that the NPRM takes a restrictive view of OPA 90. The self-insurance requirements could be made considerably less onerous and "other evidence of financial responsibility" could be taken into account.

Regulatory agencies and legislatures in the states of California, Washington, Florida and Virginia, which have already considered the question of financial responsibility, do not share the USCG's opinion that "the value of insurance in the event of a catastrophic spill is highly questionable because of the multitude of policy defences, exclusions and conditions." Indeed, these states have all accepted entry in a PandI Club as sufficient proof of financial responsibility in itself without requiring the Clubs to submit to direct action, even where applicable authorising legislation permits direct action against insurers. Their only concern has been with how this entry should be evidenced.

We understand there is a difference of views as to whether or not there is any legal impediment to the Coast Guard adopting a similar approach in drafting federal regulations. However, given the severity of the consequences of the Coast Guard's narrow view on possible methods for certification of financial responsibility, careful and thorough consideration should be given to expanding those regulations. If this is not possible, then legislative amendment may be called for.

Failing such action, either in a regulatory or legislative framework, certification of financial responsibility under OPA 90 will not be possible for tanker and dry cargo vessels presently operating to and from the United States.

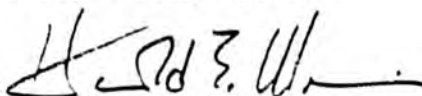
VI. CONCLUSION

In conclusion, OPA 90 is fundamentally different from comparable legislation elsewhere in the world. It departs from the norm of the civil liability conventions and their attendant protocols, and encourages the problem of multiple state and federal liabilities and penalties.

The Clubs cannot agree to provide any form of certification under OPA 90 not because of any one aspect of the law, but rather because of the cumulative effect of its individual provisions.

There is therefore nothing which can be done by way of regulation or minor legislative amendment which will enable the Clubs to change their position. The Clubs, however, are striving to maintain their cover and do not object if a way can be found through regulation or legislative change to utilize the existence of this cover so as to enable shipowners to demonstrate their financial responsibility under OPA 90, provided that the Clubs do not thus become guarantors under the Act. In permitting their cover to be used in this way the Clubs are going beyond the position adopted by commercial insurers in an effort to enable their members to continue to trade to the United States.

Very truly yours,



Harold E. Mesirow
Robert J. Stefani
Robins, Kaplan, Miller & Ciresi

Counsel for The International
Group of P&I Clubs

HEM:RJS:vmc
Attachment

STATEMENT OF J. RICHARD L. YUELL
BEFORE THE
HOUSE MERCHANT MARINE AND FISHERIES
SUBCOMMITTEE ON COAST GUARD
AND NAVIGATION

November 6, 1991

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before you today.

My name is J. Richard L. Youell. I am a marine Underwriter at Lloyd's of London and Chairman of Janson Green Marine Ltd., which is an underwriting agency at Lloyd's. Lloyd's is one of the oldest insurance institutions in the world, having begun in 1688. Lloyd's, however, is not a company but a marketplace of some 27,000 individual underwriting members. These underwriting members operate through some 300 syndicates, and I am the principal professional Underwriter for several of the syndicates managed by the Janson Green agency.

Because Lloyd's is a marketplace in which each syndicate decides for itself what risks it will accept, there is no one voice which can speak for the whole of the Lloyd's market on

This material is prepared by Richard Youell of One Lime Street, London, England and LeBoeuf, Lamb Leiby & MacRae, 1875 Connecticut Avenue, N.W., Washington, D.C., who are registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as agents of Lloyd's of London, One Lime Street, London, England. This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

any matter of underwriting judgment. Therefore, my remarks today are, strictly speaking, only one Underwriter's view.

Nevertheless, as an Underwriter with 26 years' experience at Lloyd's and as a member of several market committees within the Lloyd's community, I believe I can fairly say that my views on guaranteeing financial responsibility under the U.S. Oil Pollution Act of 1990 (OPA) are widely held among marine Underwriters at Lloyd's.

The Lloyd's market collectively is one of the largest sources of insurance capacity in the world, and over its 303-year history it has earned a reputation for innovative and flexible responses to unusual risks, as well as unsurpassed security. Lloyd's pioneered marine oil pollution insurance, and Lloyd's is still one of the world's principal sources for such cover for both offshore production facilities and tankers and other vessels. Indeed, the U.S. insurance market generates virtually no capacity for liability insurance for oil pollution from vessels. London and other non-U.S. markets provide most of the coverage worldwide. We at Lloyd's have every intention of continuing to provide oil pollution insurance for our many insureds, some of whom have been insured at Lloyd's for many years. We would hope to go on providing this insurance for U.S. waters even though the growing multiplicity of liability rules imposed at the Federal and State levels makes this cover increasingly difficult to underwrite.

Although the amount of coverage available at Lloyd's or elsewhere in the world varies from year to year, our capacity at this moment in time is more than sufficient to meet on an indemnity basis the monetary limits of the financial responsibility requirements of OPA for vessels and offshore facilities. However, because the vessel owner's limit of liability might be easily breached under OPA Section 1004(c) and further because OPA does not preempt State laws imposing additional liability for the same incident, vessel owners may have exposures well in excess of the OPA financial responsibility requirements for which they endeavor to buy insurance cover to cover this risk. For example, the Lloyd's market currently makes available a layer of \$200 million per incident in excess of the \$500 million primary cover offered by P&I Clubs to all tanker owners. However, the owner's U.S. liability risk from these cumulative sources may now be well beyond the bounds of insurance cover available even if the owner meets the applicable financial responsibility amounts.

Please be assured that we are in the business of writing difficult classes of insurance, and we take pride in providing our insureds with continuity of coverage even in difficult times. We will continue to provide as much insurance capacity as possible to these insureds. However, we are unable to provide unlimited insurance coverage, because such risk cannot be quantified to determine the appropriate premium, nor can we be sure of our ability to respond, for an unlimited amount, to the

promise to pay that is a fundamental element of an insurance contract.

The proposed financial responsibility rules under OPA present us with a situation which is fundamentally different from simply entering into contracts of insurance with our insureds. As a result, while we expect to continue writing pollution insurance for U.S. waters, it is clear that we cannot responsibly agree to be a "guarantor" under these rules. As indemnity insurers, we promise an insured that we will make good any liability losses he sustains within the terms and limits of the contract. As I have said, the promise is not for an unlimited amount and is subject to contractual restrictions, such as safe warranties which the insured ignores at his peril. Such requirements serve to concentrate the insured's mind on his responsibilities under the contract, on which any recovery relies.

Moreover, our contract is with the insured, not the rest of the world. By specific endorsement, insurance contracts are often amended to name additional parties as loss payees, such as banks holding mortgage interests or consignees. These parties might then be entitled to receive the policy proceeds directly, but always subject to the terms and conditions of the original contract. These parties are always identified in advance and specifically agreed to by the insurer.

In the past, we have considered the insurance form required by the 1972 Clean Water Act (Form CG 5358-9) to be, effectively, a policy endorsement naming the U.S. Government as a loss payee. We support the prompt clean-up of oil spills. We have been willing to deal directly with the U.S. Government under the terms of Form CG 5358-9, but always with the expectation that Federal legislation would eventually be harmonized with international convention. That hope was dashed by OPA. We do not, however, customarily agree to be sued directly by unnamed, indeed unimagined third parties.

Added to this is the problem that OPA Section 1014 appears to require a guarantor, if the responsible party fails to act, begin local advertising and the like immediately after the spill. Until regulations defining the scope of this responsibility are written, it is another reason why insurers must refuse to be a guarantor.

The proposed OPA version of Form CG 5358-9 (the "OPA Insurance Form") is, superficially, similar to the Clean Water Act version, but it poses very different problems. First, it would require the insurer to agree to non-governmental third-party direct actions. Second, the insurer's policy defenses in direct action are not clearly preserved. OPA Section 1016(e) gives the Secretary of Transportation authority to specify which original policy defenses (and other terms and conditions) are preserved in direct actions. Yet the proposed OPA Insurance

states "[t]he Insurer shall be entitled to invoke only the right and defenses specifically permitted to guarantors by the Act under which the action is brought." Unfortunately, this begs the question. The Act, OPA, says that the Coast Guard will by regulation, specify which terms, conditions and policy defenses will be permitted or not in a direct action. But the regulation fails to do so.

Third, OPA's failure to preempt State liability and certification laws leaves open the possibility that third-party claimants will be able to assert State law claims outside of OPA against an insurer/guarantor, creating the possibility of horizontal exposure to multiple limits against an insurer for which no premium was collected and no insurance capacity remained. Our fear is that every State requesting a certificate will construe it to be a separate limit for the same spill thus multiplying the amount an insurer would have to pay for a single spill. Worse, already we have seen a law passed in Texas after OPA's enactment which seems to say that if an insurer files an Insurance Form CG 5358-9 with the Coast Guard in Washington, Texas will assert the right of its citizens to sue that insurer in Texas courts under the Texas law, possibly for damages in excess of the limit the insurer may have agreed to pay paid out under the OPA certificate. This may occur even though the insurer in no way may have consented to providing evidence of financial responsibility to Texas. Thus, he may be powerless

limit his Federal Insurance Form to its intended purpose of certifying a single limit of liability to the Coast Guard.

We at Lloyd's wish to respond in a constructive fashion to the insurance requirements which arise any where in the world. However, it is impossible to justify employing our capital and resources in an insurance environment where some of the fundamental principles of insurance practice are not able to operate. If the OPA rules were no less arbitrary than those enforced under the Clean Water Act and the risk of multiple limits under State legislation for a single spill were removed, then we would earnestly endeavor to continue to provide the protection to our insureds that your laws require.

Thank you.



American Steamship Owners Mutual Protection and Indemnity Association, Inc.
Shipowners Claims Bureau, Inc., manager

Five Hanover Square, New York, N.Y. 10004
(212) 269-2350

Cable Address "PANDICLUB"
Telex No. 222091
Telefax (212) 825-1391

February 25, 1992

TO ALL MEMBERS

RE: CERTIFICATES OF ENTRY

Dear Sirs:

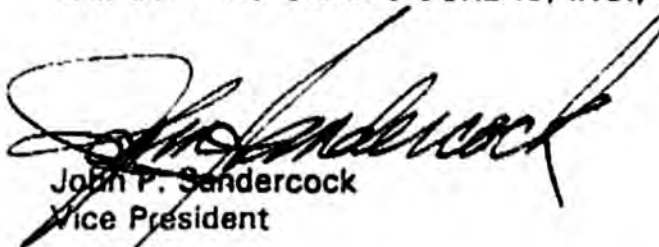
For 1992/93 all policies which are issued by the Club will automatically contain the following endorsement:

"This policy is evidence only of the contract of indemnity insurance between the above named Member(s) and the Association and shall not be construed as evidence of any undertaking, financial or otherwise, on the part of the Association to any other party.

If a Member tenders this policy as evidence of insurance under any applicable law relating to financial responsibility, or otherwise shows or offers it to any other party as evidence of insurance, such use of this policy by the Member is not to be taken as any indication that the Association thereby consents to act as guarantor or to be sued directly in any jurisdiction whatsoever. The Association does not so consent".

The purpose of the endorsement is to make clear to Members and to any person who may receive a copy of a policy or confirmation from a Member or his agent that the document is no more than evidence of the Member's entry in the Club at a particular date.

Very truly yours,
SHIPOWNERS CLAIMS BUREAU, INC., MANAGER



John P. Sandercock
Vice President

The American Waterways Operators



Pacific Regional Office

5615 West Marginal Way, SW
Seattle, WA 98106

TEL: (206) 764-1321
FAX: (206) 764-1323

Gerald P. McMahon
Vice President - Pacific Region

February 20, 1992

Senator Lyman Hoffman
Capitol Building
P.O. Box V
Juneau, AK 99811

Dear Senator Hoffman

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal barge and towing industry. Several of our members are based in Alaska or operate in Alaskan waters involving the marine transportation of petroleum and petroleum products.

I write in support of Senate Bill 405 which will provide statutory relief from the existing State of Alaska "direct action" requirements of evidence of financial responsibility. This requirement has been a longstanding problem with our industry which makes it impossible to obtain insurance to meet this Alaskan requirement. This is a responsible bill which would establish a financial responsibility standard which protects claimants who have been harmed by a spill and recognizes the realities of the insurance marketplace, and does not bring a major and essential portion of Alaska's petroleum distribution network to a grinding halt.

We thank you for introducing HB 501 and urge your colleagues to support its passage as soon as possible.

Sincerely,

Gerald P. McMahon



ALASKA

NUSHAGAK ELECTRIC CO-OPERATIVE, INC.

P.O. BOX 350
DILLINGHAM, ALASKA 99576

TELEPHONE (907) 842-5251
TELECOPIER (907) 842-2799

GS

January 16, 1992

Honorable George Jacko
PO Box V
Juneau, Alaska 99811

Dear Representative Jacko:

This is to follow up on my conversation with Bryce Tuesday, January 14 concerning the Financial Responsibility requirements of AS 46.04 which was amended by HB 567 in 1990.

First of all I want to assure you that NEC wants to be squeaky clean in its fuel handling operations because we are very sensitive to the fact that we owe our existence to the natural resources provided by the waters in and around Nushagak Bay.

With that thought in mind we turn to the statute which requires terminal oil operators (i.e., those with storage capacity exceeding 10,000 BBLs) to provide proof of financial responsibility. According to our understanding financial responsibility may be achieved in several ways as follows:

1. Pollution liability insurance
2. Letter of credit
3. Self-insurance
4. Surety bonds
5. Guarantee

For all practical intent and purposes, only items 1 and 2 above are available to us. We opted to purchase insurance over a letter of credit because the potential liability created if a letter of credit had to be exercised would likely bankrupt the cooperative thus increasing the likelihood that a spill would have to be cleaned up with the use of public (i.e. state) funds. (In addition to destroying the ability of the Cooperative to provide power to the community at a price anyone could afford).

Representative Jacko
January 16, 1992
Page 2

Since 1985 we have purchased pollution liability insurance from Lloyds of London with a current cost in excess of \$30,000 per year. (This insurance is not provided by U.S. Carriers.) The policy now reads more restrictive than it once did. The underwriters have added (as of November, 1990) a section (copy enclosed) to the policy which reads as follows:

"This insurance does not constitute evidence of financial responsibility under the Oil Pollution Act of 1990 or any similar Federal or State law and it is a condition of this insurance that it shall not be submitted to the United States Coast Guard or any other Federal or State agency as evidence of financial responsibility. The underwriters do not consent to be guarantors."

We renewed the policy simply because we had no alternatives. We have copied DEC and they recognized that the new policy "does not have the endorsement required by regulation 18 AAC 20.065 (b)." I believe that the required endorsement is probably also addressed in AS 46.04 as well.

DEC has communicated with us on October 25, 1991; November 19, 1991; and December 26, 1991 on this issue. Copies of this correspondence are enclosed. We have asked our attorney to comment on this matter and he raises some serious questions. A copy of his letter of December 5, 1991 is also enclosed.

As we see it now, it is impossible for Nushagak Electric Cooperative to meet the requirements of the statute. Yet it does appear that, legally or no, DEC is willing to waive certain requirements. This is not a good situation and it does nothing to address concerns that generated HB 567 in the first place.

Our perception of this matter is twofold; namely,

1. The absolute necessity to prevent spills at all costs.
2. Should a spill occur, have the resources immediately available to proceed with cleanup and restoration.

The current statute and regulations do little to encourage prevention. From a practical matter, we believe that spills will continue to occur, most of them small but occasionally one of large magnitude such as the recent Cook Inlet spill. The number and diversity of fuel storage facilities in the state are simply too great to address all situations in a single statute or set of regulations.

Representative Jacko
January 16, 1992
Page 3

Additionally, terminal oil facilities are not treated consistently by provisions of the statute. We previously mentioned five different methods by which an entity can provide financial responsibility acceptable to DEC. However, only the first two methods are available to the smaller operator. The smallest operators (i.e. those with under 10,000 BBS of storage capacity) have no financial responsibility requirements at all and yet they probably have 90% of the risk (although only a fraction of the volume). The first two methods of financial responsibility are badly flawed as previously described and also commented on by DEC. They really do not adequately address either prevention or cleanup and restoration.

Finally there is the standard of volume vis-a-vis thruput of product. You could have two terminals with identical capacities of 1,000,000 gallons each sitting side by side. Terminal no. 1 might be filled once a year but terminal no. 2 might be filled ten times a year; however, financial requirements based on AS 46.04 require identical amounts of coverage for each terminal. This feature really doesn't make much sense because the exposure to a potential spill is ten times greater in terminal no. 2.

What are possible alternatives to these issues?

It probably should be recognized that HB 567 which attempted to address deficiencies in existing statutes was enacted in response to concerns raised by the Exxon Valdez oil spill. If this piece of legislation did nothing else, it raised our awareness of what could go wrong under certain conditions.

Almost two years has passed since the bill was enacted and it has given us some perspective and some ideas on how to generate a high level of interest in prevention as well as providing the resources for cleanup and restoration. We would suggest the following:

1. That a state agency be assigned the task of establishing an insurance pool where every terminal oil operator would be obligated to pay into it based on his thruput of product NOT CAPACITY to adequately address exposures.
2. That this state agency utilizing a portion of pooled funds for administrative and operational purposes establish a circuit rider inspection program where every terminal oil operator in the state could be inspected for compliance with Federal and State regulations as well as American Petroleum Institute (API) Specifications and Practices.

Representative Jacko
January 16, 1992
Page 4

3. That the fund pool be built to a certain level or cap until such time that the fund would be self supporting; that is, it would support the administration and operation of the program as well as establish a "pool" to draw from in the event of a spill.

We believe that this may well be an ideal undertaking for the Alaska Energy Authority. It would certainly give them an added justification for their existence, the administrative structure is already in place and dollars presently spent for foreign insurance coverages or meaningless letters of credit would remain in the state providing economic benefits.

Most important, we believe this would be a much more productive way of delivering a high level of prevention as well as the resources necessary for spill cleanup and restoration in a consistent manner.

We don't have much to lose by trying something different because the present system has too many holes in it.

Sincerely,



David F. Bouker
General Manager

ljc

Enc (5): Excerpt of Disclaimer from Pollution Liability Policy
DEC letters (10/25; 11/19; 12/26)
Kemppel letter (12/5)

Copy sent by facsimile 1/16/92

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
SPILL PREVENTION, PLANNING & MANAGEMENT SECTION
410 WILLOUGHBY AVE., SUITE 150
JUNEAU, AK 99801-1795

Telephone No.
(907) 465-5225
Fax No.
(907) 465-5245

December 26, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

DEC 1991
Received
Nushagak
Electric/Telephone
Cooperative, Inc.

Re: Financial Responsibility

Dear Mr. Bouker:

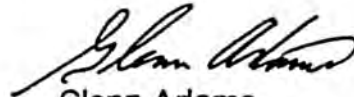
I received the insurance information that you submitted. As I said in my last letter the insurance does not meet State requirements.

We have been telling other applicants in similar situations that in the event no proof other than insurance is available, we will allow use of insurance policies that meet all State requirements except direct action in state courts, provided that all other means of proof (letters of credit, self-insurance, surety bonds, and guarantee) have been exhausted.

A letter is needed to explain why each of the methods of proof cannot be used, then a conditional/temporary approval can be issued while we wait for the insurers or legislators to make changes..

Another application form is enclosed, your approval period is determined by the date your insurance expired. Please contact me if you have questions.

Sincerely,


Glenn Adams
Financial Responsibility

File # 4.01.095

LAW OFFICES OF
KEMPEL, HUFFMAN AND GINDER
A PROFESSIONAL CORPORATION

ROGER R. KEMPEL
RICHARD R. HUFFMAN
PETER C. GINDER
DONALD C. ELLIS

ANDREW J. FIERRO
GEORGE S. HARRINGTON JR.
BOBBY DEAN SMITH
JAY D. DURYCH

December 5, 1991

ANCHORAGE OFFICE
285 E. FIREWEED LANE, SUITE 200
ANCHORAGE, ALASKA 99503
(907) 277-1604
TELECOPIER (907) 276-2493

CORDOVA OFFICE
520 2ND STREET
P.O. BOX 1829
CORDOVA, ALASKA 99574
(907) 424-7410
TELECOPIER (907) 424-7484

David F. Bouker
General Manager
Nushagak Electric Cooperative, Inc.
P.O. Box 350
Dillingham, AK 99576

Re: Financial Responsibility Requirements -
Oil Spill

Dear Dave:

You have asked me to comment upon the extent of the coverage being offered by The Coleman Wade Group at Lloyds.

I am aware that the above coverage was first sought by NEC, in part, to comply with the State's oil spill financial responsibility requirements and that this coverage through Lloyds of London seems to be the only coverage available to NEC. It is clear, however, that the policy being offered does not comply with the State of Alaska's requirements, and in fact it specifically states that it does not. There is, however, some indication that the State of Alaska, DEC, may be willing to waive certain provisions required to be in a policy of insurance presented as evidence of financial responsibility.

With respect to this last point (waiver by DEC), I have some very real concerns. It may be true that DEC, if it follows the appropriate regulatory procedure, may be able to waive certain of its regulations, specifically the provisions of 18 AAC 20.065(b). I believe that the Attorney General might, however, successfully take the position that DEC is without power to waive the statutory requirements, specifically AS 46.04.040(i). If this is in fact the case, NEC could very well be in violation of state statutes even though DEC had granted you a form of administrative waiver.

Turning to the question of coverage itself, the policy which you have provided seems to be written around the Oil Pollution Act of 1990--part of the United States Code. In fact, specific U. S. Code sections are cited in the policy. While there is some language mentioning "similar state law," that language is found in the disclaimer section at the beginning of the policy. The policy itself generally reads as if it concerns only the federal act, stating, for instance, that the insurer is liable "with respect to: second: Liability under Section 1,005(a) of the Act . . ." Given a substantial claim under this policy, I believe we might well find ourselves in the position of litigating whether the Alaska statute is "similar" to the federal statute, thereby creating coverage by this insurer.

David F. Bouker
December 5, 1991
Page 2

At the very least, the disclaimer language found at the beginning of the policy and the failure to include the 18 AAC 20.065(b) endorsement makes it clear that this policy does not cover the potential liability set out in AS 46.04.040(i). It is worth at least outlining these potential exposures.

AS 46.03.758 establishes civil penalties in the amount of \$10.00 per gallon, \$2.50 per gallon, or \$1.00 per gallon, depending upon whether the spill takes place in fresh water, marine estuaries, or unrestricted saltwater. The statute also provides for multiplying the above fines times five in the case of gross negligence.

AS 46.03.760(a) provides for:

1. Compensation for damage to the environment;
2. The State of Alaska's costs associated with detection and cleanup;
3. Economic savings to the insured (NEC) of not complying with the oil spill statutes and regulations.

AS 46.04.030(g) provides for potential strict liability for the holder of an oil spill contingency plan who fails to respond and clean up an oil spill as quickly or to the extent which DEC finds reasonable.

Turning now to the cover note and exclusions which are a part of the policy. You should note that the policy is subject to seven exclusions which are named by number and are set out in a document dated December 1988 which I assume is the document which has been provided to us and attached to the cover notes.

You should note, however, that the "U. S. Oil Pollution Exclusion Clause November 1990" has also been included, although I cannot find the text of this exclusion.

Turning to what I presume to be the December 1988 exclusions, I would note that No. 8 excludes damage or loss arising from disposal or transportation of any oil or oil-soaked dirt. You should also note that "removing and/or nullifying and/or cleaning up" are also not covered. It should also be noted that "subsurface operations" are not covered, although the term "subsurface" is not defined, and it is unclear whether our buried pipeline would constitute such operations.

Paragraph No. 12 excludes all penalties which would of course include all of those penalties created under the Alaska statutory section cited earlier.

The policy excludes coverage for directors and officers "by reason of any breach of their fiduciary duty," but the policy goes well beyond this in exclusion paragraph number 20. This paragraph excludes coverage for damage caused by negligence or "mistake of a professional nature committed or alleged to have been committed by or on behalf of the insured" [Emphasis added.] You should note that this exclusion not only excludes coverage for oil spill damage caused by your engineer but also that oil spill damage caused by NEC's own actions of a professional nature. For instance, what if the oil spill occurred because NEC failed to adequately design the valving of the system? What if the oil spill was found to have occurred because NEC negligently supervised the oil transfer operation? What if the oil spill was found to have occurred because

David F. Bouker
December 5, 1991
Page 3

NEC negligently failed to inspect the pipeline prior to its use? Design, supervision, inspection, and engineering by NEC are all mistakes of a professional nature which are excluded from coverage under the policy being offered to you. It would seem to me that a damaged party could be expected to make at least one of the above claims in any litigation against NEC resulting from an oil spill.

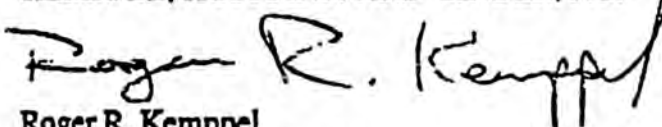
I am sure that this analysis does not give you or the board much comfort. It would certainly seem that we are insuring only a small part of the actual risk associated with our fuel deliveries for the premium dollars involved. This is especially true when you consider that neither this insurance nor the State's financial responsibility statute deals with one major cost which we know we will have in connection with any spill--NEC's own costs to clean up and dispose of oil-contaminated material.

Even given the above, I hesitate recommending, on the one hand, that NEC proceed without at least some insurance in this area. On the other hand, however, I cannot help but wonder whether NEC and the community of Dillingham might not receive more protection by expending the \$25,000 premium amount on items which would actually prevent or lessen the impact of an oil spill. Such items might include additional radios, additional personnel stationed on the barge, at the header, along the pipeline, and at the tank farm, additional inspections, pressure gauges, fail-safe valves, emergency shutoff valves, automatic sensor alarms, or improved flexible couplings on the dock. A good bit of additional oil absorbent boom could be purchased and/or deployed for this kind of money. I am not suggesting that we do not currently have a safe oil transfer operation. I am simply questioning whether these dollars might better be allocated toward prevention rather than insuring a relatively small portion of the loss should an oil spill occur.

If you or the board have any further questions, please feel free to contact me.

Sincerely yours,

KEMPPPEL, HUFFMAN AND GINDER, P.C.



Roger R. Kemppe
General Counsel for NEC

RRK:lka

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
P.O. BOX 0, JUNEAU, AK 99811-1800

Telephone No.
(907)465-2630

November 19, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

Re: Financial Responsibility

Dear Mr. Bouker:

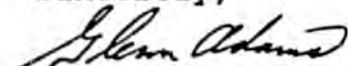
I just received the insurance information that you submitted. I was hoping that London would include the endorsement that is required by Regulation AAC 20.065(b) but they sent their standard policy.

If you read the first paragraph, it states " This insurance does not constitute evidence of financial responsibility under the oil pollution act of 1990 or any similar federal or state law and it is a condition of this insurance that it shall not be submitted to the United States Coast Guard or any other federal or state agency as evidence of financial responsibility. The underwriters do not consent to be guarantors."

Pretty strong language, I'm sure you can see that it does not meet State requirements. We have been telling other applicants in similar situations that in the event no proof other than insurance is available, we will allow use of insurance policies that meet all State requirements except direct action in state courts, provided that all other means of proof (letters of credit, self-insurance, surety bonds, and guarantee) have been exhausted. A letter is needed to explain why each of the methods of proof cannot be used, then a conditional/temporary approval can be issued while we wait for the insurers or legislators to make changes..

Another application form is enclosed, your approval period is determined by the date your insurance expired. Please contact me if you have questions.

Sincerely,



Glenn Adams
Financial Responsibility

File # 4.01.095

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
P.O. BOX O, JUNEAU, AK 99811-1800

Telephone No.
(907) 465-2630

October 25, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

▲
OCT 1991
Received
Nushagak
Electric/Telephone
Cooperative, Inc.

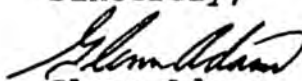
Re: Financial Responsibility

Dear Mr. Bouker:

Thank you for submitting your replacement insurance coverage, I thought that I had faxed a new application form to your office, a form is enclosed for your use.

I have reviewed the insurance coverage and found it does not have the endorsement required by regulation 18 AAC 20.065(b), last years policy did have it. Would you please contact you agent to see if they can have the endorsement added.

Sincerely,



Glenn Adams
Financial Responsibility

File # 4.01.095

London
November, 1990

LIMITED U.S. OIL POLLUTION INSURANCE POLICY

THIS INSURANCE DOES NOT CONSTITUTE EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT OF 1990 OR ANY SIMILAR FEDERAL OR STATE LAW AND IT IS A CONDITION OF THIS INSURANCE THAT IT SHALL NOT BE SUBMITTED TO THE UNITED STATES COAST GUARD OR ANY OTHER FEDERAL OR STATE AGENCY AS EVIDENCE OF FINANCIAL RESPONSIBILITY. THE UNDERWRITERS DO NOT CONSENT TO BE GUARANTORS.

I. INSURING AGREEMENT

In consideration of the premium stated herein and subject to all the terms, conditions and limitations contained herein, the Underwriters do hereby agree to indemnify the Assured for such amounts in excess of the Deductible shown on Item 3 of the Declarations as the Assured shall, (as owner or operator of the Vessel(s) or Facility(s) named on the Declaration page) have become liable to pay and shall pay, by reason of or with respect to:

FIRST: Liability under Section 1002 of the Act for a discharge of oil as defined in Section 1001(23) of the Act, or the substantial threat of a discharge of oil, (from a covered Vessel or Facility,) into or upon the navigable waters or adjoining shorelines or the exclusive economic zone of the United States for the following specified removal costs or damages:

1. Removal Costs:

- (a) removal costs incurred by the United States, a State, or an Indian Tribe under subsection (c), (d), or (1) of Section 311 of the Federal Water Pollution Control Act (33 U.S.C. (1321), as amended by the Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law insofar as such removal costs are recoverable under the Act; and
- (b) removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

2. Damage as specified in Section 1002(b)(2) of the Act;

SECOND: Liability under Section 1005(a) of the Act to a claimant for interest on an amount paid in satisfaction of a claim under Section 1002 of the Act;

CI00330 /009



SCOMM

78:39

TRANSPORTATION INSTITUTE



3201 Auth Way
Camp Springs, Maryland 20746
(301) 423-3335 (MD)
(202) 347-2590 (Wash., D.C.)
Telecopier (301) 423-0634

Pacific Coast Office
2505 2nd Avenue
Suite 720
Seattle, WA 98121
(206) 443-1738
Telecopier (206) 443-0917

JAMES L. HENRY
President

LAWRENCE H. EVANS
Director, Domestic Marine Affairs

WILLIAM D. LAWRENCE
Director, Pacific Coast Operations

ELIZABETH K. SIGEL
Director, Vessel Operations
and Maritime Initiatives

CERARD C. SNOW
Director, Government Affairs

BOARD OF DIRECTORS

HERBERT BRAND
Chairman

CAPTAIN LEO V. BERGER
President

Apex Marine Corporation

CARMINE J. BRACCO
Vice President

Bay Tankers, Inc.

J. WILLIAM CHARRIER, JR.
President

American Automar, Inc.

THOMAS B. CROWLEY
Chairman of the Board and

Chief Executive Officer
Crowley Maritime Corporation

PATRICK T. FAHEY
President and Chief Executive Officer

Delta Queen Steamboat Company

HARRISON R. GLENNON, JR.
President

Sea Mobility, Inc.

JACK GOLDSTEIN
President and Chief Executive Officer

OMI Corp.

RAN HETTENA
President

Maritime Overseas Corporation

ROBERT B. McMILLEN
President and Chief Executive Officer

Toten Ocean Trailer Express

RONALD C. RASMUS
President

Great Lakes Towing Company

NED SMITH
President and Chief Executive Officer

American Steamship Company

DAVID J. TOLAN
Senior Vice President

Sea-Land Service, Inc.

STEPHEN VAN DYCK
Chairman and Chief Executive Officer

Maritans Operating Partners, L.P.

EDWARD P. WALSH
President

Waterman Steamship Corporation

FACSIMILE TRANSMITTAL

DATE:

2-20-92

MESSAGE TO:

Bill Lawrence

COMPANY:

FAX NUMBER:

907-463-5522

MESSAGE FROM:

Liz Buchard

FAX NUMBER:

(301) 423-0634

NUMBER OF PAGES:

12 (Including cover sheet)

IF THE FOLLOWING MESSAGE IS RECEIVED POORLY OR
INCOMPLETELY, PLEASE NOTIFY Kohn at (301)
423-3335.

COMMONWEALTH OF VIRGINIA
STATE WATER CONTROL BOARD

VR 680-14-08 - TANK VESSEL FINANCIAL RESPONSIBILITY REQUIREMENTS AND
ADMINISTRATIVE FEES FOR APPROVAL

§ 1. Definitions.

The following words and terms, when used in this regulation, shall have the following meaning, unless the context clearly indicates otherwise:

"Board" means the State Water Control Board.

"Containment and cleanup" means abatement, containment, removal and disposal of oil and, to the extent possible, the restoration of the environment to its existing state prior to an oil discharge.

"Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

~~"Facility" means any development or installation within the Commonwealth that deals in, stores or handles oil, and includes a pipeline.~~

"Oil" means oil of any kind and in any form, including, but not limited to, petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity. For the purpose of this regulation only, this definition does not include [non petroleum hydrocarbon based] animal and vegetable oils, [or petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that act".]

"Operator" means any person who owns, operates, charters by demise, rents or otherwise exercises control over or responsibility for a facility or a vehicle or vessel.

"Person" means any firm, corporation, association or partnership, one or more individuals, or any governmental unit or agency thereof.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction.

"Tank vessel" means any vessel used in the transportation of oil in bulk as cargo. For the purpose of this regulation, this definition includes tankers, tank ships, tank barges and combination carriers when carrying oil. It does not include vessels carrying oil in drums, barrels, on-deck portable tanks or other packages or vessels carrying oil as fuel or stores for that vessel.

"Vehicle" means any motor vehicle, rolling stock or other artificial contrivance for transport whether self-propelled or otherwise, except vessels.

"Vessel" includes every description of watercraft or other contrivance used as a means of transporting on water, whether self-propelled or otherwise, and shall include barges and tugs.

§ 2. Applicability.

Evidence of financial responsibility requirements apply to all tank vessels transporting or transferring oil upon state waters having a maximum storage, handling or transporting capacity of equal to or greater than 15,000 gallons of oil.

§ 3. Compliance dates.

This regulation shall be effective 30 days after publication in the Virginia Register. Cash or its equivalent shall be deposited with the Board as required by Va. Code § 62.1-44.34:16 and section 5.A of this regulation no later than 90 days after the effective date of this regulation. Operators seeking exemption from the cash deposit requirement shall submit their application and the evidence of financial responsibility no later than 60 days after the effective date of this regulation.

§ 4. Statement of purpose.

The purpose of this regulation is to establish requirements for financial responsibility on the part of operators of tank vessels transporting or transferring oil as cargo upon state waters. This regulation provides acceptable means of demonstrating the required level of financial responsibility therefore providing the Commonwealth with the necessary assurance that an operator of a tank vessel has the necessary financial stability to conduct a proper response to a discharge of oil.

§ 5. Financial Responsibility.

A. The operator of any tank vessel entering upon state waters shall deposit with the Board cash or its equivalent in the amount of \$500 per gross ton of such vessel. If the operator owns or operates more than one tank vessel, evidence of financial responsibility need be established only to meet the maximum liability applicable to the vessel having the greatest maximum liability.

1. All documents submitted shall be in English and all monetary terms shall be in U.S. currency.

2. A copy of the Board's acceptance of the required evidence of financial responsibility shall be kept on the tank vessel and readily available for inspection.

2. If the balance sheet and statement of income and surplus cannot be submitted in nonconsolidated form, consolidated statements may be submitted if accompanied by an additional statement by the involved Certified Public Accountant, certifying to the amount by which the operator's assets, located in the United States and acceptable under this part, exceed total liabilities and that current assets, located in the United States and acceptable under this part, exceed its current liabilities.

3. When the operator's demonstrated net worth is not at least 10 times the required amount, an affidavit shall be filed by the operator's treasurer (or equivalent official) covering the first six months of the operator's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

4. Additional financial information shall be submitted upon request by the Board, OR

b. provide evidence in the form of a marine insurance broker's certificate of insurance, [certificate of entry], or other proof satisfactory to the Board, that the operator has obtained oil pollution liability coverage through an operator's membership in a Protection & Indemnity (P&I) Club that is a member of the international group of P&I clubs, or through coverage provided by a pool of marine underwriters in an amount sufficient to meet the requirements of Va. Code § 62.1-44.34:16 and section 5.A.

2. Insurance: Any operator demonstrating evidence of financial responsibility by insurance shall provide evidence of insurance issued by an Insurer licensed, approved, or otherwise authorized to do business in the Commonwealth of Virginia. The amount of insurance shall be sufficient to cover the amount required by Va. Code § 62.1-44.34:16 and section 5.A. The operator shall provide evidence of such coverage in the form of a marine insurance broker's certificate of insurance or by utilizing a form worded identically to the insurance form found in Appendix II. The insurer must also comply with all requirements in Appendix II.

3. Surety: Any operator demonstrating financial responsibility through a surety bond shall file a surety bond utilizing a form worded identically to the surety form found in Appendix III. The surety company issuing the bond must be licensed to operate as a surety in the Commonwealth of Virginia and must possess an underwriting limitation at least equal to the amount required by Va. Code § 62.1-44.34:16 and section 5.A. The surety must also comply with all requirements in Appendix III.

B. If the Board determines that oil has been discharged in violation of applicable state law or there is a substantial threat of such discharge from a vessel for which a cash deposit has been made, any amount held in escrow may be used to pay any fines, penalties or damages imposed under such law.

C. Federal government entities whose debts and liabilities are debts and liabilities of the United States have the requisite financial strength and stability to fulfill their financial assurance requirements and are relieved of the requirements to further demonstrate an ability to provide financial responsibility under this regulation.

D. Operators of tank vessels may obtain exemption from the cash deposit requirement if evidence of financial responsibility is provided in an amount equal to the cash deposit required for such tank vessel pursuant to Va. Code § 62.1-44.34:16 and section 5.A of this regulation. The following means of providing such evidence, or any combination thereof, will be acceptable:

1. Self-insurance; Any operator demonstrating financial responsibility by self-insurance shall provide evidence of such self-insurance in a manner that is satisfactory to the Board. An operator demonstrating self-insurance shall:

a. maintain, in the United States, working capital and net worth each in the amount required by Va. Code § 62.1-44.34:16 and section 5.A. For the purpose of this regulation, "working capital" means the amount of current assets located in the United States, less all current liabilities; and "net worth" means the amount of all assets located in the United States, less all liabilities.

1. Maintenance of the required working capital and net worth shall be demonstrated by submitting with the application form an annual, current nonconsolidated balance sheet and an annual, current nonconsolidated statement of income and surplus, certified by an independent Certified Public Accountant. Those financial statements shall be for the operator's last fiscal year preceding the date of application and shall be accompanied by an additional statement from the operator's Treasurer (or equivalent official), certifying to both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States and are acceptable for purposes of this regulation.

4. Guaranty: An operator demonstrating financial responsibility through a guaranty shall submit the guaranty worded identically to the form found in Appendix IV. The guarantor shall comply with all provisions of paragraph D.1. for self-insurance and also comply with all requirements in Appendix IV.

E. To obtain exemption from the cash deposit requirements:

[1. The operator shall appoint an agent for service of process in the Commonwealth;]

[1.2.] The ~~operator and~~ insurer, guarantor, or surety shall appoint an agent for service of process in the Commonwealth;

[1.3.] Any insurer must be authorized by the Commonwealth of Virginia to engage in the insurance business; and

[1.4.] Any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument of insurance, guaranty or surety directly against the insurer, guarantor or surety for any violation by the operator of Article 11 of Chapter 3.1 of the Code of Virginia (Va. Code § 62.1-44.34:14 et seq.) up to, but not exceeding, the amount insured, guaranteed or otherwise pledged.

[1.5.] All forms of evidence of financial responsibility shall be accompanied by an endorsement that certifies that the Insurance policy, Evidence of self-insurance, Surety or Guaranty provides liability coverage for the tank vessel(s) in the amount required by Va. Code § 62.1-44.34:16 and section 5.A.

[6. Subsections E.2, E.3 and E.4 do not apply to operators providing evidence of financial responsibility in accordance with section 5. D. 1. of this regulation.]

F. Any operator whose financial responsibility is accepted under this regulation shall notify the Board at least thirty (30) days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

G. Acceptance of evidence of financial responsibility shall expire:

1. One year from the date that the Board exempts an operator from the cash deposit requirement based on acceptance of evidence of self-insurance;

2. On the effective date of any change in the operator's instrument of insurance, guaranty or surety; or

3. Upon the expiration or cancellation of any instrument of insurance, guaranty or surety.

H. All nonexempt tank vessel operators shall file with the Board the application form found in Appendix I for approval of the evidence of financial responsibility. This form shall be submitted with the required evidence of financial responsibility (cash deposit, proof of insurance, self insurance, guaranty or surety) and shall be completed insofar as it pertains to the tank vessel. The operator must sign and date the certification statement on the application form. All forms must be acknowledged before a notary public. If the operator is a corporation, the form must be signed by an authorized corporate official; if the operator is a Municipality, State, Federal or other public agency, the form must be signed by an authorized executive officer or ranking elected official; if the operator is a partnership or sole proprietorship, the form must be signed by a general partner or the sole proprietor.

I. Application for renewal of acceptance of proof of financial responsibility shall be filed with the Board thirty (30) days prior to the date of expiration.

J. All applications, notifications of changes, submissions and updates required by this regulation shall be directed to the Virginia State Water Control Board, Office of Spill Response and Remediation, P.O. Box 11143, Richmond, Va, 23230.

K. The Board, after notice and opportunity for hearing, may revoke its acceptance of evidence of financial responsibility if it determines that:

1. Acceptance has been procured by fraud or misrepresentation; or

2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility.

L. If evidence of financial responsibility provided to the federal government or any other state meets the requirements of this regulation, the Board may, upon review, accept it in full or partial satisfaction of the requirements of this regulation as appropriate. A certified copy of the document accepting the evidence of financial responsibility and a copy of the financial responsibility mechanism shall be provided to the Board for approval.

§ 6. ADMINISTRATIVE FEES.

A. This section establishes application fees for acceptance of evidence of financial responsibility.

B. An application for approval of evidence of financial responsibility will be accepted only when the fees established by this section have been paid.

C. Fees shall be paid by check, draft or postal money order made payable to the Virginia State Water Control Board and must be in U.S. currency.

1. Application fees for approval of evidence of financial responsibility for tank vessels are as follows:

a) Applicants shall pay an application fee of \$[~~200~~ 120].

b) Applicants shall pay a fee of \$[~~50~~ 30] for each additional tank vessel requiring a copy of the accepted evidence of financial responsibility.

D. Application fees are refundable upon receipt of a written request received by the Board no later than 30 days after submittal and prior to approval.

E. Overpayments of application fees are refundable upon written request. Overpayments not refunded will be credited for the applicants future use under this section.

§ 7. DELEGATION OF AUTHORITY

The Executive Director, or his designee, may perform any act of the Board under this Regulation, except as limited by Virginia Code §62.1-44.14.



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Mary Sue Terry
Attorney General
H. Lane Kneidler
Chief Deputy Attorney General
Deborah L. Bryant
Chief of Staff

May 21, 1991

K. Marshall Cook
Deputy Attorney General
Finance & Transportation Division

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Sterling Marshall
Deputy Attorney General
Judicial Affairs Division

Stephen D. Rosenthal
Deputy Attorney General
Public Safety & Economic Development Division

Robert A. Miller, CPCU, AIE
Deputy Commissioner
Property and Casualty Division
State Corporation Commission
Bureau of Insurance
Box 1157
Richmond, Virginia 23209

**Re: Draft State Water Control Board Financial Responsibility
Regulation For Tank Vessels (VR 680-14-08)**

Dear Mr. Miller:

David T. Ormes of the State Water Control Board ("SWCB") has sent me a copy of your letter dated May 13, 1991 regarding your review of the provisions of the referenced draft regulation pertinent to commercial insurance. He advises that you have been of invaluable assistance during the drafting process. I am writing to seek clarification of your review as to a specific provision of the draft regulation (copy attached).

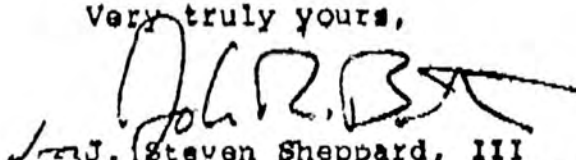
With respect addition to the appropriateness of the draft forms under the State Corporation Commission's regulations, this Office noted that § 4(D)(1)(b) (page 5) authorizes operators of tank vessels to demonstrate self-insurance by providing proof that the "operator has obtained oil pollution liability coverage through an operator's membership in a Protection & Indemnity (P&I) Club that is a member of the international group of P&I clubs, or through coverage provided by a pool of marine underwriters. . . ." When we learned that the legality of these clubs operating in Virginia had not been discussed with the Commission, we recommended that such contact be made.

Accordingly, to avoid any possible misunderstanding, I would appreciate your clarification as to whether the use of these clubs by owners of tank vessels would constitute the unlawful transaction of the business of insurance in the Commonwealth of Virginia under the Commission's regulations and applicable law. In addition, is the use of these clubs the transaction of fidelity or surety insurance in violation of the regulations or law?

Mr. Robert A. Miller
May 21, 1991
Page 2

Thanking you again for your assistance and cooperation, I am

Very truly yours,


J. Steven Sheppard, III
Assistant Attorney General
(804) 786-3588

6:50-c312/314J

cc: R. Claire Guthrie, Deputy Attorney General
David T. Ormes

STEVEN T. FOSTER
COMMISSIONER OF INSURANCE

COMMONWEALTH OF VIRGINIA



RAU 1167
RICHMOND, VA 23200
TELEPHONE: (804) 786-3741
TDD/VOIC: (804) 776-3804

STATE CORPORATION COMMISSION BUREAU OF INSURANCE

June 7, 1991



J. Steven Shoppard, III
Assistant Attorney General
Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Re: Draft State Water Control Board Financial Responsibility
Regulation for Tank Vessels (VR 680-14-08)

Dear Mr. Sheppard:

This is in response to your letter of May 21, 1991 regarding the operation of Protection and Indemnity (P&I) Clubs in Virginia. After consulting with the State Corporation Commission's Office of General Counsel, we believe that P&I Clubs do not come under the jurisdiction of the State Corporation Commission or the laws of Virginia because there is no insurance transaction taking place within the Commonwealth.

The P&I clubs are mutual non-profit making organizations which exist to provide services to shipowner members. One of the services extends to liability claims handling, including the appointment of lawyers, surveyors and other experts. The P&I Clubs, although competing for members between themselves, combine their resources in order to purchase reinsurance collectively. It is my understanding that the fifteen P&I Clubs insure the liabilities of over 95% of the world's ocean going merchant fleet. Most of the P&I Clubs are located in London and arrange for any primary insurance or reinsurance contracts from there. An insurance contract is not issued to individual ship owners, but instead they receive the benefits of the club's coverage via membership in the organization.

Mr. J. Steven Sheppard, III
June 7, 1991
Page 2

Section 5 of the proposed regulation permits membership in a P&T Club to be a permissible form of self insurance. Self-insurance is not considered the "business of insurance" and generally is not subject to oversight by the State Corporation Commission.

For these reasons we do not believe the insurance offered through membership in the clubs is the transaction of insurance in Virginia and accordingly, the State Corporation Commission does not have jurisdiction.

Sincerely,

Robert A. Miller, CPCU, AIE
Deputy Commissioner
Property and Casualty Division

RAH:dw

cc: Dave Ormes
State Water Control Board

able, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

(f) **CLAIMS AGAINST GUARANTOR.**—Any claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke (1) all rights and defenses which would be available to the responsible party under this Act, (2) any defense authorized under subsection (e), and (3) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(g) **LIMITATION ON GUARANTOR'S LIABILITY.**—Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility required under this Act which that guarantor has provided for a responsible party.

(h) **CONTINUATION OF REGULATIONS.**—Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) **UNIFIED CERTIFICATE.**—The Secretary may issue a single unified certificate of financial responsibility for purposes of this Act and any other law.

SEC. 1017. LITIGATION, JURISDICTION, AND VENUE.

(a) **REVIEW OF REGULATIONS.**—Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) **JURISDICTION.**—Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) **STATE COURT JURISDICTION.**—A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

(d) **ASSESSMENT AND COLLECTION OF TAX.**—The provisions of subsections (a), (b), and (c) shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, or to the review of any regulation promulgated under the Internal Revenue Code of 1986.

(e) **SAVINGS PROVISION.**—Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to the date of enactment of this title. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) **PERIOD OF LIMITATIONS.**—

(1) **DAMAGES.**—Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after—

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 1002(b)(2)(A), the date of completion of the natural resources damage assessment under section 1006(c).

(2) **REMOVAL COSTS.**—An action for recovery of removal costs referred to in section 1002(b)(1) must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery of removal costs at any time after such costs have been incurred.

(3) **CONTRIBUTION.**—No action for contribution for any removal costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) **SUBROGATION.**—No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim.

(5) **COMMENCEMENT.**—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

SEC. 1018. RELATIONSHIP TO OTHER LAW.

(a) **PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.**—Nothing in this Act or the Act of March 3, 1951 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from

NOTICE OF AVAILABILITY OF MODIFIED TEXT
TITLE 14, CALIFORNIA CODE OF REGULATIONS
SECTIONS 790-797
FINANCIAL RESPONSIBILITY

RISK MANAGEMENT

Notice is hereby provided that the Administrator for Oil Spill Prevention and Response (OSPR) proposes to readopt and amend its previously adopted emergency regulations found in Title 14 of the California Code of Regulations as follows:

Sections 790-797. Financial Responsibility.

AUTHORITY AND REFERENCE

Government Code Section 8670.37.54(b) grants the Administrator the authority to adopt regulations governing policy or other contractual terms, conditions, or defenses which are necessary or which are acceptable in establishing evidence of financial responsibility. Accordingly, the proposed regulations implement, interpret or make specific, Government Code Sections 8670.3 and 8670.37.51 through 8670.37.57, relating to financial responsibility.

INFORMATIVE DIGEST

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act ("the Act") (See Government Code Sections 8574.1 through 8670.71; and Public Resources Code Sections 8750 through 8760) created a new and comprehensive state oil spill program for marine waters. The new law greatly expands the authority, responsibilities and duties of the Department of Fish and Game under the direction of the Administrator for oil spill response. Government Code Section 8670.6 provides authority for the establishment of OSPR which contains staff to assist the Administrator in performing his or her duties under the Act.

The Act emphasizes oil spill prevention, contingency planning and response, as well as the Administrator's duties in connection therewith. As a result, OSPR is required to address navigational safety issues, establish effective response capability requirements and review and approve contingency plans.

The Act provides the Administrator broad authority to regulate the methods utilized by industry to transport oil in or near California marine waters in order to meet its goal of providing the best achievable protection of its valued coastal resources.

Consequently, regulations governing the financial abilities of responsible parties to pay for any damage they incur during the transportation or transfer of oil within the geographic parameters provided for within the Act, were adopted by OSPR and became

effective on August 15, 1991. These proposed regulations implement the financial responsibility requirements set forth in Government Code Sections 8670.37.51 through 8670.37.57, inclusive.

In order to assure that the affected public had a clear and timely understanding of the State's expectations of them under the new law, the original regulations were adopted on an emergency basis, filed with the Office of Administrative Law on August 5, 1991 (File No. 91-0805-01E) and became effective for a 120-day period beginning August 15, 1991 and ending December 13, 1991.

During this 120-day time period OSPR has provided a 45-day public notice of proposed regulatory adoption; held public hearings (November 13, 1991 in Northern California and November 15, 1991 in Southern California); requested and received public comment during its noticed 45-day comment period ending November 15, 1991 (see California Regulatory Notice Register No. 91,39-2); and received and reviewed applications for certification for over 800 vessels.

During the comment period and the review of applications several issues, which could not have been foreseen during the drafting of the original regulations, have arisen. Further, by extensive review of OSPR legal staff, certain amendments have been made to provide clarity for users of these regulations and consistency with all known federal laws.

WRITTEN COMMENTS

Written comments will be accepted by OSPR on the modified provisions only for a 15-day period beginning January 31, 1992 and ending February 14, 1992. Comments received in the CSPR office after February 14, 1992 will not be considered in the rulemaking process.

DOCUMENTATION

The text of the proposed regulations showing the specific modifications to the originally adopted text by using double-underlined, bold type for additions and strike out type for deletions, is available upon request along with the original initial statement of reasons. In addition, you may request for your review copies of any forms required for use by any provisions of the proposed regulations. All information which OSPR is considering as the basis for this proposal will be maintained in a rulemaking file, which is available for inspection at the OSPR office during normal business hours (8:00 a.m. to 5:00 p.m.).

Questions regarding this regulatory activity, as well as requests for the above-noticed documents may be directed to Kathy Verrue-Slater, Oil Spill Prevention and Response, P.O. Box 944209, Sacramento, California, 94244-2090 or telephone (916) 324-9813.

Please note that, following the comment period, OSPR may adopt the proposed regulations substantially as proposed in this notice or with modifications which are sufficiently related to the originally proposed text and notice of proposed regulatory activity. If modifications are made, the modified text with the changes clearly indicated will be made available to the public for at least 15 days prior to the date on which OSPR adopts the regulations. Requests for copies of any modified regulations should be addressed to the agency contact person identified above. OSPR will accept written comments on the modified regulations during any additional comment period.

FISCAL IMPACT DETERMINATIONS

OSPR has made the following determinations regarding this proposal:

LOCAL MANDATE

The Office of Oil Spill Prevention and Response has determined that the proposed regulations do not impose a mandate upon local agencies or school districts which must be reimbursed by the state pursuant to Section 17500 et seq. of the Government Code.

ECONOMIC IMPACT

The Office of Oil Spill Prevention and Response has determined that the proposed adoption: (1) will have no effect on housing costs; (2) will have no adverse economic impact on small business; (3) involves no significant nondiscretionary costs or savings to local agencies; (4) involves no increased costs or savings to any local agency or school district for which Government Code Section 17561 requires reimbursement; (5) involves no increased costs or savings to any state agency or in federal funding to the state; and (6) involves no significant costs to private persons or entities.

ALTERNATIVES CONSIDERED

In accordance with Government Code Section 11346.5(a)(7), OSPR must determine that no alternative considered by it would be more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected persons than the proposed action.

TITLE 14, CALIFORNIA CODE OF REGULATIONS
SUBDIVISION 4, OFFICE OF OIL SPILL PREVENTION AND RESPONSE
SECTIONS 790 - 797
CHAPTER 1. FINANCIAL RESPONSIBILITY

Text of Modified Regulations

OSPR has illustrated changes to the original text in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a line through the text; and additions to the language originally proposed are shown in double-underlined, bold text.

790. DEFINITIONS. The following definitions shall govern the construction of this chapter.
- (a) "Administrator" means the administrator for oil spill response appointed by the Governor.
- (b) "Assets", as defined by Generally Accepted Accounting Principles in the United States (GAAP), means probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events.
- (c) "Barges" means any vessel that carries oil in commercial quantities as cargo but is not equipped with a means of self-propulsion. For purposes of Chapter 1, Financial Responsibility, a "large barge" is differentiated from a "small barge" as those terms are defined in subparagraphs ~~(j)~~(k) and ~~(w)~~(v) of this regulation.
- (d) "California marine waters" means those waters subject to tidal influence, except for waters in the Sacramento-San Joaquin Delta upstream from a line running north and south through the point where Contra Costa, Sacramento, and Solano Counties meet.
- (e) "Certificant" means an owner or operator or a person accepting responsibility for the oil who has been issued a Certificate of Financial Responsibility under this chapter.
- ~~(e)~~ (f) "Barrel" means 42 United States gallons of oil at 60 degrees Fahrenheit.
- ~~(f)~~ (g) "Current assets", as defined by GAAP, means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.
- ~~(g)~~ (h) "Current liabilities", as defined by GAAP, means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets, or the creation of other current liabilities.
- ~~(h)~~ (i) "Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

- ~~(e)~~ (g) "Operating" means, in terms of a vessel, the transferring and/or transporting of oil as cargo.
- ~~(e)~~ (r) "Operator" or "Owner".
- (1) Owner or operator means any of the following:
- (A) In the case of a vessel, any person who owns, has an ownership interest in, operates, charters by demise, time charters, or charters, the vessel.
- (B) In the case of a marine facility, any person who owns, has an ownership interest in, or operates the marine facility.
- (C) Except as provided in subsection (D) below, in the case of any vessel or marine facility, where title or control has been conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to an entity of state or local government, the "operator" or "owner" is any person who owned, held an ownership interest in, operated, or otherwise controlled activities concerning the vessel or facility immediately prior to the conveyance.
- (D) An entity of local government which acquired ownership or control of a vessel or marine facility, when that entity has caused or contributed to a spill or discharge of oil into marine waters.
- (2) "Owner" or "operator" does not include a person who, without participating in the management of a vessel or marine facility, holds evidence of ownership primarily to protect his or her security interest in the vessel or marine facility.
- (3) "Operator" does not include any person who owns the land underlying a marine facility or the facility itself if the person is not involved in the operations of the facility.
- ~~(e)~~ (s) "Owners equity", as defined by GAAP, means the difference between total assets and total liabilities.
- ~~(e)~~ (t) "Person" means any individual, trust, firm, joint stock company, or corporation, including, but not limited to, a government corporation, partnership, and association. "Person" also includes any city, county, city and county, district and the state or any department or agency thereof, and the federal government or any department or agency thereof, to the extent permitted by law.
- ~~(e)~~ (u) "Proof of entry" means the documents that evidence that an owner of a vessel, or person named is covered for oil pollution liabilities by a Protection and Indemnity Club.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

TITLE 14, CALIFORNIA CODE OF REGULATIONS
SUBDIVISION 4, OFFICE OF OIL SPILL PREVENTION AND RESPONSE
SECTIONS 790 - 797
CHAPTER 1. FINANCIAL RESPONSIBILITY

Text of Modified Regulations

OSPR has illustrated changes to the original text in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a line through the text; and additions to the language originally proposed are shown in double-underlined, bold text.

790. DEFINITIONS. The following definitions shall govern the construction of this chapter.
- (a) "Administrator" means the administrator for oil spill response appointed by the Governor.
- (b) "Assets", as defined by Generally Accepted Accounting Principles in the United States (GAAP), means probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events.
- (c) "Barges" means any vessel that carries oil in commercial quantities as cargo but is not equipped with a means of self-propulsion. For purposes of Chapter 1, Financial Responsibility, a "large barge" is differentiated from a "small barge" as those terms are defined in subparagraphs ~~(j)~~(k) and ~~(w)~~(y) of this regulation.
- (d) "California marine waters" means those waters subject to tidal influence, except for waters in the Sacramento-San Joaquin Delta upstream from a line running north and south through the point where Contra Costa, Sacramento, and Solano Counties meet.
- (e) "Certificant" means an owner or operator or a person accepting responsibility for the oil who has been issued a Certificate of Financial Responsibility under this chapter.
- ~~(e)~~ (f) "Barrel" means 42 United States gallons of oil at 60 degrees Fahrenheit.
- ~~(f)~~ (g) "Current assets", as defined by GAAP, means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.
- ~~(g)~~ (h) "Current liabilities", as defined by GAAP, means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets, or the creation of other current liabilities.
- ~~(h)~~ (i) "Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

- ~~(j)~~ (j) "Intangible assets" means assets, such as trademarks, goodwill, patents, organization costs, computer programs, etc. which lack physical substance.
- ~~(k)~~ (k) "Large barge" means a barge with a cargo capacity of 150,000 or more barrels.
- ~~(l)~~ (l) "Liabilities", as defined by GAAP, means probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events.
- ~~(m)~~ (m) "Marine facility" includes:
- (1) A drill ship, semisubmersible drilling platform, jack-up type drilling rig, or any other floating or temporary drilling platform.
 - (2) Any facility of any kind, other than a vessel, which is or was used for the purposes of exploring for, drilling for, producing, storing, handling, transferring, processing, refining, or transporting oil and is located in California marine waters, or is located where a discharge could impact California marine waters unless the facility:
 - (A) is subject to Chapter 6.67 (commencing with Section 25270) or Chapter 6.75 (commencing with Section 25299.10) Division 20 of the Health and Safety Code; or
 - (B) is placed on a farm, nursery, logging site, or construction site and does not exceed a 20,000 gallon capacity in any single storage tank.
- ~~(n)~~ (n) "Marine terminal" means any marine facility used for transferring oil to or from vessels. For purposes of this chapter, a marine terminal includes all piping not integrally connected to a tank facility as defined in subdivision (k) of Section 25270.2 of the Health and Safety Code relating to above ground storage tanks.
- (o) "Mobile transfer unit" means any mobile marine facility, including trucks and trailers, used for the transferring of oil at a location where a discharge could impact California marine waters. For purposes of this chapter, a mobile transfer unit includes all hoses and piping connected to the mobile transfer unit.
- ~~(p)~~ (p) "Oil" means any kind of petroleum, liquid hydrocarbons, or petroleum products or any fraction or residues therefrom, including, but not limited to, crude oil, bunker fuel, gasoline, diesel fuel, aviation fuel, oil sludge, oil refuse, oil mixed with waste, and liquid distillates from unprocessed natural gas.

- ~~(e)~~ (q) "Operating" means, in terms of a vessel, the transferring and/or transporting of oil as cargo.
- ~~(e)~~ (r) "Operator" or "Owner".
- (1) Owner or operator means any of the following:
- (A) In the case of a vessel, any person who owns, has an ownership interest in, operates, charters by demise, time charters, or charters, the vessel.
- (B) In the case of a marine facility, any person who owns, has an ownership interest in, or operates the marine facility.
- (C) Except as provided in subsection (D) below, in the case of any vessel or marine facility, where title or control has been conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to an entity of state or local government, the "operator" or "owner" is any person who owned, held an ownership interest in, operated, or otherwise controlled activities concerning the vessel or facility immediately prior to the conveyance.
- (D) An entity of local government which acquired ownership or control of a vessel or marine facility, when that entity has caused or contributed to a spill or discharge of oil into marine waters.
- (2) "Owner" or "operator" does not include a person who, without participating in the management of a vessel or marine facility, holds evidence of ownership primarily to protect his or her security interest in the vessel or marine facility.
- (3) "Operator" does not include any person who owns the land underlying a marine facility or the facility itself if the person is not involved in the operations of the facility.
- ~~(e)~~ (s) "Owners equity", as defined by GAAP, means the difference between total assets and total liabilities.
- ~~(e)~~ (t) "Person" means any individual, trust, firm, joint stock company, or corporation, including, but not limited to, a government corporation, partnership, and association. "Person" also includes any city, county, city and county, district and the state or any department or agency thereof, and the federal government or any department or agency thereof, to the extent permitted by law.
- ~~(s)~~ (u) "Proof of entry" means the documents that evidence that an owner of a vessel, or person named is covered for oil pollution liabilities by a Protection and Indemnity Club.

~~(t)~~ (v) "Protection and indemnity (P&I) club" means a mutual insurance organization formed by a group of ship owners or operators in order to secure cover for various risks of vessel operation, including oil spill costs, not covered by normal hull insurance.

~~(u)~~ (w) "Reasonable worst case oil spill formula" means:

(1) For small barges:

(A) the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500) by twenty-five percent (25%) of the maximum cargo capacity of the small barge.

(B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.

(C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant of a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.

(2) For marine facilities (except offshore platforms which are addressed below):

(A) except as provided in subparagraphs (3) and (4), the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500) by:

i) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus

ii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident

occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.

- (B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.
- (C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant for a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.
- (D) Except as provided in subparagraphs (E) and (F), below, in no event shall the amount determined pursuant to this paragraph be less than \$1,000,000 or in excess of \$100,000,000.
- (E) For mobile transfer units, the amount determined pursuant to this paragraph shall not be less than \$500,000.
- (F) For small craft refueling docks, the amount determined pursuant to this paragraph shall not be in excess of \$500,000.

(3) For offshore platforms:

- (A) the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500), by:

 - i) total tank storage capacity; plus
 - ii) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus
 - iii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency

shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.

- (B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.
- (C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant of a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.
- (D) In no event shall the amount determined pursuant to this paragraph be less than \$1,000,000 or in excess of \$100,000,000.

~~(4) For refueling docks:~~

- ~~(A) the product derived from multiplying the per barrel clean-up cost of spilled oil (\$12,500), by:~~
- ~~i) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus~~
 - ~~ii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.~~

~~(B)~~ The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant of a certificate for financial responsibility.

~~(C)~~ For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant for a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.

~~(v)~~ (x) "Responsible party" means any of the following:

- (1) The owner or transporter of oil.
- (2) A person accepting responsibility for the oil.
- (3) The owner, operator, or lessee of, or person who charts by demise, any vessel or marine facility, or a person or entity accepting responsibility for the vessel or marine facility.

~~(x)~~ (y) "Small barge", for the purposes of determining financial responsibility, means a barge with a cargo capacity of less than 150,000 barrels.

~~(w)~~ (z) "Recreational Marina" "Small craft refueling dock" means a marina which is a marine facility which is a refueling dock that dispenses fuel to small craft used by the public primarily for recreational purposes and which has a refueling deck having a total tank storage capacity not exceeding 20,000 gallons.

~~(y)~~ (aa) "Tanker" means any self-propelled, waterborne vessel, constructed or adapted to transport oil in bulk or in commercial quantities as cargo.

~~(z)~~ (ab) "Vessel" means a tanker or barge as defined in this section. For purposes of this chapter, "large barge" is differentiated from "small barge" as those terms are defined in subparagraphs (j) and (w) of this regulation.

~~(aa)~~ (ac) "Working capital", as defined by GAAP, means current assets minus current liabilities.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.3, and 8670.37.51-8670.37.57,
Government Code; Section 76.2, Harbors and Navigation Code.

791. PROCEDURES FOR APPLICATION FOR CALIFORNIA CERTIFICATE OF RESPONSIBILITY.

- (a) On or after January 1, 1992, all operators or owners of marine facilities and operators or owners of vessels must each first obtain a California certificate of financial responsibility (certificate) before operating in California. The Application for Certificate of Financial Responsibility for Operators or Owners of Vessels or Owners of Oil, revised as of August 14 December 13, 1991 (application) and Application for Certificate of Financial Responsibility for Marine Facility, revised as of August 14 December 13, 1991 (application) (collectively referred to as applications) shall be obtained from and, upon completion, submitted to the Office of Oil Spill Prevention and Response (OSPR) at the following address:

Office of Oil Spill Prevention and Response (OSPR)
Department of Fish and Game
P.O. Box 944209
Sacramento, CA 94244-2090

(b) General Application Procedures.

- (1) All applications and supporting documents shall be prepared in English and all monetary terms shall be in U.S. Currency.
- (2) All spaces on the application shall be completed with either the requested information or the phrase "Not applicable".
- (3) All applications shall be signed by the applicant or authorized representative of the applicant, whose title shall be indicated in the space provided on the application.
- (4) All applications shall be accompanied by a written delegation of authority to sign submit the application on behalf of the applicant where the person signing the application is an individual other than the individual applicant i the case of a sole proprietorship, a partner in the case of a partnership applicant, or an authorized representative officer or director of a corporate applicant.
- (5) Each applicant applying for a vessel or owner of oil certificate of financial responsibility shall designate a person to serve as the applicant's United States' agent for service of legal process.
- (5) (6) If, prior to certificate issuance, an applicant becomes aware of a material change in any of the facts contained in the application or supporting documents, the applicant shall, within five (5) business days of becoming aware of the change or changes, notify the Administrator in writing of the

change.

- ~~(6)~~ (7) Each certificate issued by the Administrator shall:
- (A) except as provided in subsection (b)(7 8) below, expire no later than two years following its issuance date; and
 - (B) bear its expiration date clearly on its face.
- ~~(7)~~ (8) The administrator may issue a certificate for a marine facility for a period of not longer than three years if the administrator finds that:
- (A) the facility was operating on January 1, 1991; and
 - (B) continued operation is necessary to finance abandonment of the marine facility; and
 - (C) the financial resources the operator is able to demonstrate are reasonably sufficient to cover any spill-related damages from the facility.

(c) Application Procedures for Owners or Operators of Tanker Vessels, Large Barges, and/or Owners of Oil

- (1) Owners or operators of tanker vessels, large barges, and/or owners of oil shall submit their applications with evidence of financial responsibility to OSPR no later than September 15, 1991, in order to obtain a certificate on or before January 1, 1992. Levels of financial responsibility and the criteria for demonstrating financial responsibility are set forth in Sections 792 and 795 of this chapter. Applicants shall be notified within 21 days whether the information contained in their application, evidence of financial responsibility, and any supplemental information provided is sufficient to meet the requirements of this chapter.
- (A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.
 - (B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was

received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(2) Applications for certificates issued after January 1, 1992, will be reviewed within 21 calendar days of receipt of a completed application for owners or operators of tanker vessels, large barges, and/or owners of oil. Certificates will be issued within that period provided that adequate information was furnished in the application and acceptable evidence of financial responsibility, as determined by the Administrator, has been received. Levels of financial responsibility and the criteria for demonstrating financial responsibility are set forth in Sections 792 and 795 of this Chapter.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(d) Application Procedures for Owners or Operators of Marine Facilities and Small Barges.

(1) In order to obtain a certificate on or before January 1, 1992, owners or operators of small barges and marine facilities shall submit their applications to OSPR ~~within five (5) business days of the effective date of these regulations~~, on or before August 22, 1991. Applicants will be notified of the amount of financial responsibility by the Administrator by October 15, 1991. Owners or operators of marine facilities and small barges must

submit acceptable evidence of financial responsibility to OSPR by November 30, 1991, in order to receive a certificate on or before January 1, 1992.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(2) Applications for certificates issued after January 1, 1992, will be reviewed and applicants notified of the amount of financial responsibility required within 21 calendar days of receipt of a completed application for owners or operators of marine facilities and small barges. Certificates will be issued for owners or operators of marine facilities and small barges upon receipt of acceptable evidence of financial responsibility, as determined by the Administrator. The criteria set for demonstrating financial responsibility is set forth in Section 795 of this chapter.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence

or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(e) Application renewals.

- (1) Certificate renewal applications shall be accepted by the Administrator no earlier than 90 days prior to the expiration date carried by the existing certificate. In order to receive a renewal certificate prior to the expiration date carried by the existing certificate, renewal applications must be submitted no later than 45 days prior to the expiration date.
- (2) If at any time after a certificate has been issued, a holder of a certificate becomes aware of a material change in any facts contained in the application or supporting documents, including the holder ceasing to be the owner or operator of the vessel or marine facility, or the owner of the oil, the holder of the certificate shall notify OSPR, in writing, within five (5) business days of becoming aware of the change.

(f) Requests for Reconsideration.

Applicants may submit a written request to the Administrator requesting reconsideration of any decision to deny issuance of a certificate, a renewal certificate, or the amount of financial responsibility that the applicant must demonstrate to obtain a certificate. Requests must be submitted within ten (10) calendar days from the date that the applicant receives notice of denial or of the amount of financial responsibility to be demonstrated. The request must contain the basis for requesting reconsideration and, if applicable, provide evidence which rebuts the basis for the Administrator's denial of the application, renewal application or financial responsibility determination. Within ten (10) calendar days from the date the request for reconsideration is received, SPR will advise the applicant of the Administrator's decision to grant or deny the request. Within 15 calendar days following the notice that the Administrator will grant reconsideration, the applicant will be sent a notice that the Administrator shall adhere to his or her earlier decision; a certificate shall be issued; or a revised notice of financial responsibility shall be issued.

(g) Destruction or Loss of Certificate.

- (1) In the event that a certificate has been lost or destroyed, the holder of the certificate shall

immediately notify the Administrator of the certificate's loss or destruction.

- (2) Certificate holders shall provide a written request to the Administrator for the issuance of a duplicate certificate which clearly states the reasons for the request.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Section 8670.37.54(b), Government Code.

792. CERTIFICATION REQUIREMENTS: VESSELS AND OWNERS OF OIL.

- (a) Effective January 1, 1992, each vessel operator or owner who transports oil across California marine waters or the owner(s) of all the oil contained in and to be transferred to or from the vessel, or the person accepting responsibility for the oil, shall obtain a certificate issued by the Administrator prior to operating in California marine waters. The certificate(s) shall be kept in their possession or control and, if applicable, on board the vessel.
- (b) To obtain a certificate, the operator(s) or owner(s) of tankers, large barges, or owner(s) of the oil contained therein, or the person accepting responsibility for the oil, shall demonstrate their current financial ability to pay at least 500 million dollars (\$500,000,000) for any damages arising from an oil spill during the term of the certificate.
- (c) Effective July 1, 1995, the required minimum level of financial responsibility for operators or owners of tankers, large barges, or owner's of, or persons accepting responsibility for the oil, shall increase to 750 million dollars (\$750,000,000).
- (d) Effective January 1, 2000, the required minimum level of financial responsibility for operators or owners of tankers, large barges, or owner's of, or persons accepting responsibility for the oil, shall increase to one billion dollars (\$1,000,000,000).
- (e) The required amounts of financial responsibility in no way restricts or sets financial limitations on any duty, obligation or liability of the responsible party to the State of California or any other public or private entity. This includes civil penalties assessed pursuant to all applicable federal, state and local laws.
- (f) When the owner(s) of all of the oil contained in the vessel, or the person accepting responsibility for the oil, hold the certificate(s) in lieu of the vessel operator or owner, the owner(s) or person accepting responsibility for the oil, shall provide a copy of documentation demonstrating ownership of, or responsibility for, all the oil contained in the vessel, a written statement authorizing application of the certificate(s) to the vessel, and a copy of the certificate to the vessel operator.

- (g) The original or a certified copy(s) of certificate(s) issued to the responsible party, e.g., the vessel operator or owner (or, in the case of an unmanned barge, a certified copy of the certificate) or, if applicable, the owner(s) of all the oil contained in the vessel or the person accepting responsibility for the oil, shall be carried on the vessel and be available for inspection at all times. If applicable, the documentation required pursuant to paragraph (f) shall be carried on the vessel and be available for inspection at all times.
- (h) If the operator or owner of a vessel intends to rely on the certificate(s) issued to the owner(s) of or person (s) accepting responsibility for the oil cargo, the vessel operator shall, at least 24 hours prior to transporting the oil across California marine waters, provide the Administrator with the following:
- (1) a copy or copies of the certificate(s) applicable to all of the oil at all times during the transport; and
 - (2) a copy of a written statement by the holder(s) of the applicable certificate(s) authorizing its (their) application to the vessel.
- (i) Operators who are not also the owners of the certificated vessels, shall carry on board such vessels the original copy of the charter-party or any other written document which demonstrates that the operators are the operators designated on the certificates.
- (j) The Administrator shall determine the amount of financial responsibility that operators or owners of small barges must demonstrate based on the "reasonable worst case oil spill formula" as that term is defined in Section 790(u) of these regulations.
- (k) Owners or operators of vessels used exclusively to respond to, contain, and clean up oil spills in California marine waters shall be exempt from the financial responsibility requirements set forth in this chapter, provided the owner or operator is indemnified by the responsible party, the Administrator, or is subject to the qualified immunity provisions set forth in Government Code Section 8670.56.6.

NOTE: Authority cited: Section 8670.37.54(b), Government Code. Reference: Sections 8670.37.52-8670.37.54 and 8670.56.6, Government Code.

793. CERTIFICATION REQUIREMENTS: MARINE FACILITIES.

- (a) Effective January 1, 1992, marine terminals and other marine facilities shall demonstrate the financial ability to pay for any damages resulting from the operations of the marine facility during an oil spill. The amount shall be based on the "reasonable worst-case oil spill formula", as that term is defined in Section 790(u) of this chapter.

- (b) Each marine facility operator or owner shall obtain a certificate of financial responsibility (certificate) for the marine facility from the Administrator.
- (c) The original or certified copy of the certificate shall remain on the marine facility premise and be available for inspection at all times.
- (d) Each operator or owner of a marine terminal within the state may only transfer oil to or from a vessel following receipt and verification of a copy(s) of the certificate(s) issued by the Administrator to the operator of the vessel or owner(s) of or person(s) accepting responsibility for the oil contained in the vessel, as well as all the oil to be transferred to or from the vessel.
- (e) Each marine terminal operator may only transfer oil to a vessel which is intended to be used for transporting oil to a second vessel located within 12 miles of the California shoreline and which is intended to be used for transporting such oil as cargo, following receipt and verification of a copy(s) of the certificate(s) issued to the person(s) responsible for both vessels or all of the oil contained in both vessels, as well as all the oil to be transferred to both vessels.
- (f) Each marine terminal operator may only transfer oil from a vessel which has been used for transporting oil cargo from a second vessel located within 12 miles of the California shoreline, following receipt and verification of a copy(s) of the certificate(s) issued to the person(s) responsible for both vessels or all of the oil contained in both vessels, as well as all the oil to be transferred from both vessels.
- (g) Each marine terminal operator shall be determined to have met the verification requirements set forth in subparagraphs (d), (e), and (f) of this regulation, when, at the time of oil transfer, the marine terminal operator has:
- (1) obtained verbal verification that the certificate(s) is (are) current and applicable to the vessel(s) and, if applicable, all of the oil contained in or to be transferred to or from the vessel from the person(s) responsible for the vessel(s) or from person(s) responsible for the oil to be transferred to or from the affected vessels or from person(s) authorized to provide this verification; and
 - (2) visually inspected all relevant manifests or similar documentation (e.g., U.S. Customs Cargo Declarations) to confirm the information ascertained pursuant to subparagraph (1), above; and
 - (3) assured that the information contained in certificates of responsibility, required to be obtained pursuant to this regulation, is consistent with the information acquired in subparagraphs (1) and (2), above.

- (h) The operator of the marine terminal must retain a copy of the certificate(s) obtained in accordance with subparagraphs (d), (e), and (f) for a period of not less than one year.
- (i) The Administrator shall determine the amount of financial responsibility that marine facilities must demonstrate. The amount shall be based on the "reasonable worst case oil spill formula" as that term is defined in Section 790(u) of this chapter.
- (j) The required amounts of financial responsibility in no way restricts or sets financial limitations on any duty, obligation or liability of the responsible party to the State of California or any other public or private entity. This includes civil penalties assessed pursuant to all applicable federal, state and local laws.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.37.52-8670.37.54, Government Code.

794. MULTIPLE VESSELS/FACILITIES CERTIFICATIONS.

- (a) An owner or operator of more than one vessel or marine facility shall only be required to obtain one certificate for all of the vessels or marine facilities owned or operated, except as set forth in subsection (d).
- (b) Original certificates shall be issued, one for each vessel or facility listed on the completed application, following approval of the application by OSPR.
- (c) Total financial responsibility for multiple marine facilities shall be based on the facility determined by the Administrator to pose the greatest financial risk during an oil spill as determined pursuant to 790(u)(2).
- (d) An oil spill or spills occurring from one or more vessels or marine facilities within or outside of California marine waters, which cause the certificate holder(s) to be liable for damages exceeding five (5) percent of the total financial resources reflected by the certificate, as determined by the Administrator, shall cause the Administrator to:

 - (1) immediately review the certificate holder's financial resources to determine the applicability of this section to the certificate holder and notify the holder of the results of the review prior to issuing a determination that the certificate is inapplicable to any vessel or marine facility not associated with the spill; and
 - (2) where a determination is made that the certificate is inapplicable, provide the certificate holder reasonable time to cease necessary operations; and
 - (3) consider the certificate inapplicable to any vessel or marine facility not associated with the spill.

(e) Operators or owners holding certificates deemed inapplicable to any vessel or marine facility not associated with the spill(s), pursuant to subsection (d) above, shall reapply for a certificate for any or all vessel(s) or marine facility(s) not associated with the spill. Upon reapplication, the operator(s) or owner(s) shall demonstrate to the satisfaction of the Administrator that:

- (1) the operator(s) or owner(s) has (have) the amount of financial ability required pursuant to this chapter; and
- (2) the operator(s) or owner(s) has (have) the financial ability to pay all damages which arise or have arisen from the spill or spills which have occurred.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.37.55-8670.37.56, Government Code.

795. EVIDENCE OF FINANCIAL RESPONSIBILITY.

(a) Insurance.

- (1) The whole or portion of the amount of financial responsibility required may be demonstrated by providing evidence that the operator or owner is insured up to the amount determined pursuant to Sections 792 and 793 of this chapter.
- (2) Operators or owners of vessels or marine facilities, or owners of oil, or persons accepting responsibility for the oil may submit an insurance policy, or other documentation, or certificate of insurance that is acceptable to the Administrator specifying the nature, type, amount of insurance. At a minimum, the insurance policy or certificate must include the following information:
 - (A) Name and address of insured;
 - (B) Name and principal characteristics of vessel(s) or facility covered;
 - (C) Name and address of insurer(s);
 - (D) Policy number(s);
 - ~~(D)~~ (E) Effective date and term of coverage;
 - ~~(E)~~ (F) All conditions and limitations of the policy or certificate which may affect coverage in the event of discharge of oil and;
 - ~~(F)~~ (G) Evidence of dollar amounts of insurance policy or certificate of insurance- and;
 - (H) Amount of deductibles.

(3) Certificants or applicants, whichever is applicable, shall notify OSPR within five business days of the date such applicant certificant or applicant knows, or has reason to believe, that the policy of insurance submitted as evidence of financial responsibility will be terminated or any coverage thereunder will cease.

(4) At the Administrator's discretion, deductible provision which is greater than \$1,000,000, in any policy of insurance or certificate is only acceptable if:

(A) the applicant shows supplemental coverage for the amount of the deductible by means of other acceptable insurance, surety, guaranty, self-insurance, letter of credit, or other proof of financial responsibility acceptable to the Administrator; or

(B) the deductible provision provides for a loss reimbursement plan which contains language guaranteeing that the insurer will be responsible for payment of all claims on a first dollar basis, without waiting for the insured to pay the amount of the deductible.

(5) Certificants using insurance as evidence of financial responsibility shall submit written documentation acceptable to the Administrator evidencing the renewal of certificant's policy of insurance, within 30 days of expiration of the current policy period. Acceptable written documentation includes a copy of the renewal policy or a certificate of insurance, both of which incorporate the previous policy by reference and/or contain the minimum information set forth in subsection (A) (2) above, and any additional terms or limitations which may affect coverage including the renewal and new expiration dates.

(6) The Administrator shall have the ability to request the certificant to submit a supplemental certificate of insurance executed by the certificant's insurance company and/or the certificant's insurance broker or agent confirming that the certificant's insurance coverage used to demonstrate financial ability remains current and/or agreeing to notify the Administrator within 30 days of cancellation of the policy for any reason.

(b) Qualification as a self-insurer

(1) An applicant may satisfy financial responsibility requirements by demonstrating, to the Administrator's satisfaction that the applicant meets the requirements specified in this paragraph. To qualify as a self-insurer, the applicant must

meet the criteria of either paragraph (b)(1)(A) (Test I) or, (b)(1)(B) (Test II) or, (b)(1)(C) below.

(A) Test I - The applicant must have:

i. one of the following two ratios:

a) a ratio of total liabilities to net worth less than 1.5;

b) a ratio of cash flow (the sum of net income, after taking into consideration the effect of any extraordinary items, plus depreciation, depletion, and amortization) minus \$20 million to total liabilities greater than 0.1; and

ii. worldwide owners equity minus intangible assets (i.e., "tangible net worth") equal to at least \$20 million plus two times the amount of self-insurance to be established; and

iii. assets in the United States amounting to at least 90 percent of total assets or at least two times the amount of self-insurance to be established.

(B) Test II - The applicant must have:

i. A current rating of the applicant's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poors or Aaa, Aa, A, or Baa as issued by Moody's or commercial paper rating of A1, A2, or the equivalent; and

ii. Worldwide owners equity minus intangible assets (i.e., "tangible net worth") of at least \$20 million plus two times the amount of self-insurance to be established; and

iii. Assets in the United States amounting to at least 90 percent of total assets or at least two times the amount of self-insurance to be established.

(C) For owners or operators of recreational marinas small craft refueling docks, a declaration stating that they have the financial ability to pay for damages resulting from a reasonable worst case oil spill as defined in Section 790(u)(4) of this chapter.

(2) Applicants relying upon self-insurance provisions set forth in subsection (b)(1) of this section as evidence of financial responsibility shall submit the following additional documentation to the Administrator with the application:

(A) A letter signed by a financial officer if the applicant is a corporation; a general partner if the applicant is a partnership; or the proprietor if the applicant is a sole proprietorship stating:

i. he or she is a financial officer, general partner, or proprietor (as applicable) of the organization or business entity; and

ii. that the letter supports the applicant's use of the financial test to demonstrate financial responsibility in the amount and manner stated (the letter must state the specific amount of financial responsibility being demonstrated by self-insurance and show specifically how the tests have been applied) pursuant to this section; and

iii. the applicant or a subsidiary of the applicant is the owner or operator of the vessel or facility described in the application or the owner of oil; and

iv. The applicant or certificant, whichever applies, agrees to notify the Administrator by certified mail within five (5) business days if, at any time, the applicant or certificant fails to meet the self-insurance test criteria.

(B) Annual financial statements audited by an independent certified public accountant for the fiscal year ending immediately before each initial or renewal application. The applicant may submit, in lieu of audited financial statements, copies of the most recent Form 10-K and any subsequent Forms 10-Q filed pursuant to the Securities Exchange Act of 1934.

(3) Certificants relying upon self-insurance as the method for demonstrating financial responsibility and any persons required to demonstrate to the satisfaction of the Administrator that they meet the self-insurance requirements set forth in this section shall submit the most current documents described in subparagraph (2) (2) above, within 30 days of completion of the audit or forms described therein.