

SCOMM

79:11

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 6, 1991

FURTHER REFERRALS:

Resources
Judiciary
Finance

Date of Committee Action: 3/11/91

The HOUSE SPECIAL COMMITTEE ON OIL AND GAS Committee considered:

HB 196

HOUSE BILL NO. 196

LIABILITY OF RESPONSE ACTION CONTRACTORS

"An Act limiting civil liability for acts or omissions of an oil spill response action contractor and establishing strict liability on responsible parties for certain acts or omissions of a response action contractor; amending the definition of 'response action'; and providing for an effective date."

RECOMMENDATIONS:

be replaced with

CS HB 196

[] the same title

[] a new title

[] have attached amendments(s)

[] do pass

[] do not pass

[] no recommendations

☒ individual recommendations

[] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS:

(Dept/Date)

[] fiscal impact _____

[] fiscal note(s) _____

☒ zero fiscal note ADEC.

[] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Bill Hurd</i>		<i>Mike Savane</i>		X	
<i>Jim [unclear]</i>		<i>Kay Brown</i>		X	
<i>Dave [unclear]</i>		<i>Carol [unclear]</i>			
<i>Frank Phillips</i>					

Bill Hurd
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 196

Revision Date: _____ Department Affected: DEC
 Title: Limited Liability for oil spill BRU: Environmental Quality
response action contractors Component: SPPM
 Sponsor: House Oil & Gas
 Requestor: House Oil & Gas COMPONENT SERIAL NO.

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Janice Adair Phone: 2600
 Division: Commissioner's Office Date: March 11, 1991
 Approved by Commissioner: *Janice Adair*
 Agency: AOEC Date: 3/11/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CSHB 196

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SPONSOR STATEMENT IN SUPPORT OF CSHB 196 (JUDICIARY)
Bill Hudson Chairman, House Special Committee on Oil and Gas

May 1, 1991

The need for strong and prompt oil spill cleanup capability is well recognized by the public. Spills from the *Torrey Canyon*, the Santa Barbara oil well incident, the IXTOC #1 blowout, the grounding of the *Arco Merchant*, the *Amoco Cadiz* and finally the *Exxon Valdez* incidents all gravely punctuated the need for new laws.

With the advent of Alaska's legislation requiring strict liability for spill damages (Ch. 112, SLA 1972), oil spill response action cleanup contractors (RAC's) became exposed to unlimited strict liability. This created a difficult situation for RACs and legislative efforts were then made to reduce the threat of such law suits (Ch. 39, SLA 1989 & Ch. 191, SLA 1990). Nevertheless, current Alaska law does not provide the same emergency response immunity to RACs as it does for other emergency responders.

CSHB 196 amends AS 46.03.822 and .823 and adds section .825 which proposes to shift the liability for certain acts of simple negligence during the first 15 days following the spill, so long as the RAC's act or omission is not contrary to the order of the state or federal On Scene Coordinator (OSC), or substantially deviates from the applicable oil spill contingency plan. "Substantial deviation" does not include minor departures from a plan that are inevitable in a crisis situation. Instead the phrase refers to a significant, and/or unjustifiable departure of a RAC from the fundamental requirements of an applicable plan.

CSHB 196 also calls for a complete study of the issues of RAC liability to be made by the legislature's Citizen's Oversight Council by January 15, 1992. To ensure that this will be done, the bill also contains a sunset provision of one year.

The bill also requires that a Response Action Contractor who seeks a demonstration of financial responsibility from a shipper or other potential client must accept any of the forms of financial responsibility that are acceptable to the State as described in AS 46.04.040(e) and as approved by the Department of Environmental Conservation. There is some question as to whether this amendment will actually expand access to response action services as it is possible that a RAC may simply elect to withhold service rather than accept financial responsibility in a format that it finds unacceptable.

The benefits of this bill extend beyond encouragement of rapid initial response. The implementation of HB 567 in June of this year will require the demonstration of significant

oil spill cleanup capabilities by the industry. Statewide, oil facilities and operations without the financial resources to have their own cleanup capability, will have to turn to spill cleanup cooperatives and cleanup RACs for the cleanup services required by law. At this time these operators have been reluctant to join cleanup co-ops partly because of their exposure to unlimited liability. In addition, cleanup contractors have become sensitized to the liability issue and are now reconsidering offering their services. This bill is intended to reduce some of the initial impediments to start-up of potential cleanup businesses and the formation of co-ops.

This bill also is expected to assist in the successful resolution of response action contracts in Prince William Sound that will assure uninterrupted supply and distribution of ANS crude to a wide array of companies that have been negatively impacted by Alyeska's requirements for \$1 Billion in financial responsibility from shippers. This bond requirement was established in response to Alyeska's interpretation of RAC liability under existing Alaska law. As a result some companies have already been excluded from the maritime transport of ANS crude (Cove Shipping, U. S. Refining); others have withdrawn from the trade (Mobile and reportedly Shell this summer); while others have had their supply and/or distribution threatened (Tesoro and Conoco).

In addition, by being more consistent with other states and the federal law, large RACs such as the Marine Response Corporation (MSRC) should be more inclined to respond to spills in Alaska and perhaps even locate here. This bill has no effect on the responsibilities for cleanup or on the planning standards enacted by the legislature in 1990.

In summary, CSHB 196

1. Shifts the liability for damages caused a RAC's simple negligence during the first 15 days of oil spill cleanup to the spiller so long as the RAC.
 - a. Does not cause personal injury.
 - b. Does not violate an order of the On Scene Coordinator.
 - c. Does not substantially deviate from the applicable oil spill contingency plan.
2. Calls for a study of the state's liability laws to be done by next legislative session.
3. Sunsets these provisions in one year so this legislature will be able to reconsider the issue.
4. Requires that a RAC who seeks a demonstration of financial responsibility from a shipper or other potential client must accept any of the forms of financial responsibility that are acceptable to the State as described in AS 46.04.040(e) and as approved by the Department of Environmental Conservation.

SECTION-BY-SECTION ANALYSIS OF CSHB 196 (JUDICIARY)

The 13 sections of CSHB 196 (Judiciary) fall into three categories:

1. Substantive sections: that is, those sections that either define the liability of oil spill response action contractors (RACs) or transfer that liability to the spiller;
2. conforming amendments to existing law; and
3. sections which merely set out existing law -- which will be "restored" after this legislation sunsets.

1. The Substantive Sections:

Section 8. This is the most significant section of the bill. It provides that oil spill RACs are responsible for damages caused by their cleanup activities if they were grossly negligent or acted with intentional misconduct. This limited liability, however, applies only during the first 15 days following the spill, and only if the oil spill RAC was not responsible for the spill itself. Nor is the oil spill RAC's liability limited if it substantially deviates from an approved oil spill contingency plan that was either prepared by that RAC, or which the RAC agreed to follow in a cleanup contract with the spiller.

Subsection (b) provides, in addition, that limited liability does not apply to actions for personal injury or death, or for actions for damages to tangible personal property not caused by the oil.

Subsection (c) provides that if, for any of the reasons stated

above, the oil spill RAC's liability is not limited to "gross negligence," the injured party will have to prove simple negligence in order to hold the oil spill RAC liable. However, if the oil spill RAC also caused the spill, the RAC will still be strictly liable.

Subsection (d) was added by House Judiciary and provides that a Response Action Contractor who seeks a demonstration of financial responsibility from a shipper or other potential client must accept any of the forms of financial responsibility that are acceptable to the State as described in AS 46.04.040(e). These include the following: 1) self insurance; 2) insurance; 3) surety; 4) guarantee; 5) letter of credit; and 6) insurance pools such as Protection and Indemnity Clubs ("P & I Clubs"). The intent is to assure that Alaska shippers and other users of spill response services have the same options for demonstrating financial responsibility to a RAC as they do to the State.

The requirements of this amendment are effective as to any response action contract entered into or renewed on or after the effective date of the legislation.

Subsection (e) limits those "response actions" for which liability is limited only to activities undertaken in response to an actual or imminently threatened spill.

Section 3. This section provides that, if an oil spill RAC's liability is limited under Section 8, the spiller is strictly liable for those damages.

Section 9. This section sets out the type of people who are covered by the limitation of liability in Section 8. It uses

existing law's definitions of "response action contract" and "response action contractors," with one important addition -- volunteers are now covered by the limitation of liability. See p. 7, l. 8.

Section 11. This section provides that the Citizens' Oversight Council on Oil and Hazardous Substances will prepare and submit a report to the legislature by January 15, 1992 on the liability issues covered by this bill. Since this legislation will "sunset" on July 1, 1992 (see below), the report is intended to aid the legislature in considering this issue next year.

2. The Conforming Amendments.

Section 1. Section 3, as we have seen, transfers certain liabilities from the oil spill RAC to the spiller. It does so by adding a definition of "damages" for which the spiller is responsible to Alaska's basic strict liability law (AS 46.03.822). Since Section 3 now sets out the damages for which the spiller is liable, there is no longer any need to repeat the now-redundant list in Section 822(a). Section 1 therefore deletes this now-surplus language (p. 1, ls. 11-13); otherwise, it makes no change in the liability statute. Except for the bracketed and capitalized language on page 1, all of Section 1 merely sets out existing law.

Section 4 and Section 6. Section 8 creates limitations on liability specific to oil spill response action contractors. AS 46.03.823 is an existing liability statute dealing with all hazardous waste cleanup contractors (including oil spill RACs). Section 4 and Section 6 remove oil spill RACs from the coverage of

Section 823 by inserting the words "other than oil" on p. 3, l. 28 and p. 4, l. 19. Except for these words, the remainder of these sections simply set out existing law, which will still be applicable to people involved in other types of hazardous substances cleanup.

Section 13. This section provides an immediate effective date.

3. "Sunset" Provisions.

Section 10 repeals the substantive provisions of this bill, and Section 12 makes that repeal effective July 1, 1992. Once the new law is repealed, it is necessary to restore the law as it exists today. Section 2, Section 5 and Section 7 of the bill accomplish this by setting out presently existing law, while Section 12 then provides that these existing laws will be "restored" on July 1, 1992.

QUESTIONS AND ANSWERS REGARDING CSHB 196 (JUDICIARY)

1. DOESN'T EXISTING LAW ALREADY LIMIT THE LIABILITY OF CLEANUP CONTRACTORS?

AS 46.03.823 adopts the common law liability rule of simple negligence. For RACs who had no involvement in the spill itself, that is not a limitation on liability. Additionally, AS 46.03.823 provides that, under a number of poorly defined circumstances, the innocent RAC may be strictly liable for any damage caused during spill cleanup.

2. WHY SHOULD WE LIMIT THE LIABILITY OF OIL SPILL RACS?

Oil spill RACs are responding to an emergency in a crisis atmosphere. As a result, they are particularly vulnerable to lawsuits. Alaska has recognized this by limiting liability to "gross negligence" for people who respond to other kinds of emergencies -- including medical emergencies and disaster emergencies. AS 09.65.090-091.

The threat of lawsuits can deter people from becoming oil spill cleanup contractors, and can cause unnecessary delays by existing contractors in implementing spill response.

3. BUT DOESN'T ALASKA HAVE PLENTY OF OIL SPILL CLEANUP CAPABILITY EVEN UNDER EXISTING LAW?

Yes, a lot of people came forward to help cleanup the Exxon Valdez spill. However, this was after Exxon, one of the largest companies in the world, acknowledged responsibility for cleanup. This is not always the case.

Moreover, there are many areas of the State that do not have

spill cleanup capability. Last year, the legislature significantly increased oil spill cleanup capability requirements. The new law takes effect this June, and in most places in the state, oil terminals and shippers -- particularly small ones -- are expected to be unable to meet those requirements.

We have already seen Alaska's cleanup liability laws threatening the availability of necessary oil spill cleanup services in Prince William Sound. People have been reluctant to join the new Cook Inlet spill coop (CISPRI) because of potential liability. A Juneau contractor testified in the House Resources Committee that it was reconsidering its entry into the field because of liability concerns. The oil industry's new nationwide cleanup corporation -- MSRC -- has made it clear that it is uninterested in locating assets in any state that does not limit oil spill cleanup contractor liability.

Aggravating the problem is the fact that the United States Congress, and the legislatures of California, Hawaii, Washington, Texas, Florida, Virginia and Delaware have already adopted a "gross negligence" standard for oil spill cleanup contractors. A number of other states will be following suit shortly. Being among a shrinking minority of states with unlimited cleanup contractor liability, Alaska will find itself at an even greater competitive disadvantage in attracting necessary resources.

4. ISN'T HB 196 A SPECIAL-INTEREST BAIL-OUT BILL TO HELP TESORO OBTAIN CLEANUP COVERAGE FROM ALYESKA?

As a result of existing law, Alyeska has conditioned the availability of cleanup services for Tesoro's transportation of

crude oil through Prince William Sound on financial responsibility terms that Tesoro can't meet. Whether or not Alyeska's demands are reasonable or constitute an overreaction to the problem, the existing liability problem that prompted Alyeska's decision is real. The Alyeska situation presents the most current, dramatic illustration of this larger problem. It is, however, only a symptom of Alaska's unreasonable liability rules for oil spill cleanup contractors -- one that has already spread to other areas of the state, and will spread further as Alaska's new cleanup requirements take effect.

5. ALYESKA HAS INDICATED THAT IT IS UNSATISFIED WITH CSHB 196 (JUDICIARY). WHY PASS THIS BILL IF IT WON'T FIX THE TESORO/CONOCO/ALYESKA PROBLEM?

The goal of this legislation is not to "fix" a private dispute. However, the Alyeska/Tesoro situation was precipitated, in substantial part, by an unreasonable liability environment. That is a legitimate legislative concern. CSHB 196 (Judiciary) would define an oil spill RAC's liability in essentially the same way as new federal law, and the laws of our sister coastal states. Whether a particular RAC -- be it Alyeska or anyone else -- chooses to remain unreasonable is not something that should influence this basic public policy decision.

6. CAN'T WE JUST PROVIDE THAT OIL SPILL RACS CAN BE INDEMNIFIED FOR THEIR SIMPLE NEGLIGENCE?

Congress, and other states, have considered, and rejected, indemnification as an alternative approach to limited liability. Indemnification has three different problems:

1. When a crisis occurs, there will be no time to negotiate

an indemnification agreement. Indemnification has been used to limit the liability of hazardous chemicals cleanup contractors, since that type of cleanup is normally preceded by months of study and negotiation. However, since oil spill cleanup RACs operate in a different environment, the federal government and other states have realized that the indemnification approach doesn't work here;

2. Indemnification does not prevent a person from being sued. It merely promises that someone might pick up the bill for the lawsuit later. The point of limited liability legislation is to remove the threat of litigation itself; and

3. Under HB 196, the liability for the cleanup contractor's negligence is transferred to the spiller. However, since oil spill cleanup is often done under contract with the state, an indemnification approach would transfer that liability from the RAC to the public. The spiller, rather than the people of Alaska, should pay for the consequences of good faith cleanup actions.

7. DOES THIS BILL "WEAKEN" ALASKA'S LIABILITY LAWS?

With respect to the spiller, the bill strengthens Alaska law by making it clear that the spiller is responsible for damages caused by cleanup contractors.

With respect to the cleanup contractor, the legislation strengthens existing law by attaching consequences to the cleanup contractor's failure to substantially comply with a contingency plan which it authored, or which it agreed to follow by contract. Remember that, under existing law, the RAC is neither the holder

of, nor legally responsible for, the contents of the contingency plan. That responsibility falls on the spiller (i.e. the tanker operator). This positive aspect of the legislation was a principal reason why the Prince William Sound Regional Citizens Advisory Committee, and the Citizens Oversight Council, withdrew any objections to the legislation.

8. TRANSFERRING THE LIABILITY TO THE SPILLER IS FINE, BUT WHAT HAPPENS IF THE SPILLER IS INSOLVENT, OR CAN'T BE FOUND?

As a result of recent state and federal legislation, the possibility of inadequate compensation from the spiller has been minimized.

First, with respect to tankers, Alaska law subjects both the tanker owner/operator and the owner of the oil to unlimited strict liability for all damages. This will often result in two "deep pockets" in the event of a spill.

Moreover, all major oil handling activities in the state must post substantial financial responsibility under both federal and state law. These financial guarantees are accessible by any injured party, irrespective of the spiller's financial solvency.

Finally, there now exists a state fund to insure the adequacy of state cleanup funds. More importantly, Congress has now created a \$1 billion/incident federal fund which is available to anyone who cannot obtain satisfaction from the responsible parties themselves.

**DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 7, 1991

SUBJECT: Response action contractor civil liability - (HB 196)

TO: Representative Bill Hudson

FROM: Michael F. Ford *m.f.*
Legislative Counsel

The following is a section by section analysis of HB 196:

Section 1 - Findings and Purpose.

Section 2 - Deletes provisions concerning the types of damages for which a person will be strictly liable. These provisions are reinserted in section 3.

Section 3 - Adds a definition of "damages." Provides that damages includes acts or omissions of a response action contractor for which the response action contractor is not liable, under the provisions of AS 46.03.823 or 46.03.825.

Section 4 - Excludes an oil spill response action contractor from the provisions of this section.

Section 5 - Provides that an oil spill response action contractor is not liable for damages resulting from the release or threatened release of oil, unless the liability would exist if the contractor had not responded to the release or threatened release, or the contractor acted with gross negligence or intentional misconduct. Also provides that in the event of a lawsuit to recover for personal injury or death, this section would not apply.

Section 6 - Adds definitions of "response action", "response action contract", and "response action contractor."

Representative Bill Hudson
March 7, 1991
Page 2

Section 7 - Repealer.

Section 8 - Effective date.

MFF:mi
91-047.mai

DIVISION OF LEGAL SERVICES
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MEMORANDUM

January 28, 1991

SUBJECT: Response action contractor liability (Work Order 7LS-0552)

TO: Representative Bill Hudson

FROM: Michael F. Ford *M.F.*
Legislative Counsel

You have asked for our opinion on legislation proposed by Tesoro Alaska Petroleum Company, regarding the liability of oil spill response action contractors. The proposed legislation would narrow the potential liability of a response action contractor with respect to a release or threatened release of oil, by eliminating liability for negligence in most instances.

Under AS 46.03.823, the potential liability of a response action contractor is generally limited to negligence, gross negligence and acts of intentional misconduct. This section also establishes a negligence standard that a claimant must show was violated in order to prove liability, and contains several exceptions to the general rule of liability. The exceptions are specific instances in which the legislature has decided that the general rule on liability should not apply.

The proposed legislation would narrow the liability of a response action contractor who responds to a release or threatened release of oil by limiting the liability to (1) gross negligence, (2) intentional misconduct, and (3) acts or omissions that would result in liability, even if the contractor had not carried out a response action. Therefore acts of negligence would not result in liability, unless the act or omission would be negligent even if the contractor had not carried out a response action. Finally, you should note that the proposed new section on oil spill response action contractors does not contain the exceptions to the general rule of liability written into law as AS 46.03.823(b)(2), (c), (d), (e), and (f).

The proposed legislation also raises a constitutional equal protection issue. If the exception for oil spill response contractors was enacted, there would be two different rules of liability, one for oil spill response contractors and one for all other response contractors. While this type of distinction does not always offend the constitutional equal protection clause, there must be a rational reason to distinguish between similar

Representative Bill Hudson
January 28, 1991
Page 2

groups in this manner. This may be the kind of distinction that would not survive a court challenge based on the equal protection clause. See Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988).

Please contact me if you have further questions.

MFF:gc
91-039.glc

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 196

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Page 1, line 3:

Delete "definition"

Insert "definitions"

Page 1, line 3, following "response action":

Insert "and 'response action contractor'"

Page 5, line 11:

Delete "and"

Page 5, line 14, following "contract":

Insert "; and

(C) a person who acts as a volunteer and is engaged in a response action"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 196

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Page 2, lines 21 - 23:

Delete all material and insert:

"(b) It is the purpose of this Act to

(1) define the liability of oil spill response action contractors in light of the crisis atmosphere in which they operate, and the uniquely severe consequences to the state of inadequate locally available oil spill cleanup capability;

(2) remove the existing deterrent to prompt and sufficient oil spill cleanup in this state;

(3) place this state on an equal competitive footing with other states in attracting oil spill cleanup capability to this state; and

(4) place the liability for good faith response action on the person responsible for the spill, rather than the response action contractor."

AMENDMENT

OFFERED IN THE HOUSE

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

TO: HB 196

Page 4, line 10:

Delete "a response plan or"

Insert "an"

Page 4, line 20, following "apply to":

Insert "(1)"

Page 4, line 21, following "death":

Insert "; or

(2) an act or omission contrary to a representation of the response action contractor asserting limited liability under (a) of this section, if

(A) the representation was incorporated into a contingency plan approved under AS 46.04.030 of a person responsible for the release or threatened release under AS 46.03.822; and

(B) the act or omission was the result of gross negligence or intentional misrepresentation"

CS FOR HOUSE BILL NO. 196 (OIL & GAS)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Offered:

Referred:

Sponsor(s): HOUSE SPECIAL COMMITTEE ON OIL AND GAS

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting civil liability for acts or omissions of an oil spill response action
2 contractor and establishing strict liability on responsible parties for certain acts or
3 omissions of a response action contractor; amending the definitions of 'response action' and
4 'response action contractor'; and providing for an effective date."

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

7 (1) oil spill response action contractors operate in a crisis atmosphere and are required
8 to make immediate decisions on the basis of often incomplete information and poor communications;
9 the emergency nature of oil spill cleanup sets the activity apart from other more long-term forms of
10 environmental remediation;

11 (2) oil spill response action contractors with no involvement in the oil spill itself, and
12 who respond to the oil spill in good faith, face an unreasonable risk of involvement in litigation over
13 the oil spill;

14 (3) the magnitude and immediacy of the risk to the state's environment from the

1 production, transportation, and storage of oil in large quantities, particularly near and across state water,
2 require that special measures be taken to ensure that adequate containment and cleanup equipment are
3 promptly available within the state; no other commercial or industrial activity in the state presents the
4 same risk of sudden and catastrophic harm or requires the same extensive advance provision of local
5 response services;

6 (4) the unreasonable legal risks borne by oil spill response action contractors hinders the
7 state's goal of encouraging prompt and sufficient oil spill response by

8 (A) discouraging oil spill response action contractors from doing business in the
9 state;

10 (B) causing oil spill response action contractors to hesitate during the first critical
11 hours following the spill; and

12 (C) causing oil spill response action contractors to make their services available
13 to the private and public sectors only under impractical insurance and indemnification terms;

14 (5) the United States Congress and the legislatures of several coastal states have recently
15 enacted legislation insulating innocent oil spill response action contractors from these unreasonable legal
16 risks; this has placed Alaska at a severe competitive disadvantage in attracting necessary oil spill
17 response services to the state; and

18 (6) damages occasioned by the good faith actions of an innocent oil spill response action
19 contractor, and the burdens of resultant litigation, should be borne by the persons responsible for the spill
20 rather than the response action contractor.

21 (b) It is the purpose of this Act to

22 (1) define the liability of oil spill response action contractors in light of the crisis
23 atmosphere in which they operate, and the uniquely severe consequences to the state of inadequate
24 locally available oil spill cleanup capability;

25 (2) remove the existing deterrent to prompt and sufficient oil spill cleanup in this state;

26 (3) place this state on an equal competitive footing with other states in attracting oil spill
27 cleanup capability to this state; and

28 (4) place the liability for good faith response action on the person responsible for the
29 spill, rather than the response action contractor.

30 * Sec. 2. AS 46.03.822(a) is amended to read:

31 (a) Notwithstanding any other provision or rule of law and subject only to the defenses

1 set out in (b) of this section and the exception set out in (i) of this section, the following persons
2 are strictly liable, jointly and severally, for damages [TO PERSONS OR PROPERTY,
3 WHETHER PUBLIC OR PRIVATE, INCLUDING DAMAGE TO THE NATURAL
4 RESOURCES OF THE STATE OR A MUNICIPALITY,] and for the costs of response,
5 containment, removal, or remedial action incurred by the state or a municipality, resulting from
6 an unpermitted release of a hazardous substance or, with respect to response costs, the substantial
7 threat of an unpermitted release of a hazardous substance:

8 (1) the owner of, and the person having control over, the hazardous substance at
9 the time of the release or threatened release; this paragraph does not apply to a consumer product
10 in consumer use;

11 (2) the owner and the operator of a vessel or facility, from which there is a
12 release, or a threatened release that causes the incurrence of response costs, of a hazardous
13 substance;

14 (3) any person who at the time of disposal of any hazardous substance owned or
15 operated any facility or vessel at which the hazardous substances were disposed of, from which
16 there is a release, or a threatened release that causes the incurrence of response costs, of a
17 hazardous substance;

18 (4) any person who by contract, agreement, or otherwise arranged for disposal or
19 treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous
20 substances owned or possessed by the person, other than domestic sewage, or by any other party
21 or entity, at any facility or vessel owned or operated by another party or entity and containing
22 hazardous substances, from which there is a release, or a threatened release that causes the
23 incurrence of response costs, of a hazardous substance;

24 (5) any person who accepts or accepted any hazardous substances, other than
25 refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person,
26 from which there is a release, or a threatened release that causes the incurrence of response costs,
27 of a hazardous substance.

28 * Sec. 3. AS 46.03.822 is amended by adding a new subsection to read:

29 (k) In this section, "damages" includes damage to persons or to public or private
30 property, damage to the natural resources of the state or a municipality, and damage caused by
31 acts or omissions of a response action contractor for which the response action contractor is not

1 liable under AS 46.03.823 or 46.03.825.

2 * Sec. 4. AS 46.03.823(a) is amended to read:

3 (a) A person who is a response action contractor with respect to a release or threatened
4 release of a hazardous substance other than oil whose acts or omissions are not contrary to a
5 response plan or order by a state or federal agency having jurisdiction over the release or
6 threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that
7 results from the release or threatened release unless the release or threatened release is caused
8 by an act or omission of the response action contractor that is negligent or grossly negligent or
9 constitutes intentional misconduct. To show negligence by a response action contractor, a
10 claimant must show that the acts or omissions of the contractor under the response action contract
11 were not in accordance with generally accepted professional standards and practices at the time
12 the response action services were performed.

13 * Sec. 5. AS 46.03 is amended by adding a new section to read:

14 Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who
15 is a response action contractor with respect to a release or threatened release of oil whose act or
16 omission is not contrary to an order of the federal or state on-scene coordinator is not civilly
17 liable for injuries, costs, damages, expenses, or other liability that results from the release or
18 threatened release, or from the response action contractor's act or omission in response to the
19 release or threatened release, unless the person bringing a claim against the response action
20 contractor proves by a preponderance of the evidence that

21 (1) the response action contractor would have been liable for the release or
22 threatened release under state or federal law even if that contractor had not carried out a response
23 action with respect to the release or threatened release; or

24 (2) the response action contractor acted with gross negligence or intentional
25 misconduct.

26 (b) The limitation on liability contained in (a) of this section does not apply to

27 (1) an action for personal injury or death; or

28 (2) an act or omission contrary to a representation of the response action
29 contractor asserting limited liability under (a) of this section, if

30 (A) the representation was incorporated into a contingency plan approved
31 under AS 46.04.030 of a person responsible for the release or threatened release under

1 AS 46.03.822; and

2 (B) the act or omission was the result of gross negligence or intentional
3 misrepresentation.

4 * Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

5 (14) "response action" means an action taken in mitigation or cleanup of a
6 hazardous substance release or threatened release, including investigation, evaluation, plan
7 development, mapping and surveying, engineering, design and construction, removal, and
8 equipment provision;

9 (15) "response action contract" means a written contract or agreement to provide
10 response action with respect to a release or threatened release of a hazardous substance entered
11 into by a person with

12 (A) the department;

13 (B) another person who has entered into an agreement with the department
14 that provides for response action subject to the department's oversight and control;

15 (C) a federal agency with jurisdiction over the release or threatened
16 release; or

17 (D) another person potentially liable for the release or threatened release
18 under state or federal law;

19 (16) "response action contractor" means

20 (A) a person who enters into a response action contract with respect to a
21 release or threatened release of a hazardous substance and who is carrying out the
22 contract, including a cooperative organization formed to maintain and supply response
23 equipment and materials that enters into a response action contract relating to a release
24 or threatened release;

25 (B) a person who is retained or hired by and is under the control of a
26 person described in (A) of this paragraph to provide services related to the response
27 action contract; and

28 (C) a person who acts as a volunteer and is engaged in a response action.

29 * Sec. 7. AS 46.03.823(g) is repealed.

30 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

HOUSE BILL NO. 196

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Introduced: 3/6/91

Referred: House Special Committee on Oil and Gas, Resources, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting civil liability for acts or omissions of an oil spill response action
 2 contractor and establishing strict liability on responsible parties for certain acts or
 3 omissions of a response action contractor; amending the definition of 'response action'; and
 4 providing for an effective date."

Response Action Contractor

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

7 (1) oil spill response action contractors operate in a crisis atmosphere and are required
 8 to make immediate decisions on the basis of often incomplete information and poor communications;
 9 the emergency nature of oil spill cleanup sets the activity apart from other more long-term forms of
 10 environmental remediation;

11 (2) oil spill response action contractors with no involvement in the oil spill itself, and
 12 who respond to the oil spill in good faith, face an unreasonable risk of involvement in litigation over
 13 the oil spill;

14 (3) the magnitude and immediacy of the risk to the state's environment from the

1 production, transportation, and storage of oil in large quantities, particularly near and across state water,
2 require that special measures be taken to ensure that adequate containment and cleanup equipment are
3 promptly available within the state; no other commercial or industrial activity in the state presents the
4 same risk of sudden and catastrophic harm or requires the same extensive advance provision of local
5 response services;

6 (4) the unreasonable legal risks borne by oil spill response action contractors hinders the
7 state's goal of encouraging prompt and sufficient oil spill response by

8 (A) discouraging oil spill response action contractors from doing business in the
9 state;

10 (B) causing oil spill response action contractors to hesitate during the first critical
11 hours following the spill; and

12 (C) causing oil spill response action contractors to make their services available
13 to the private and public sectors only under impractical insurance and indemnification terms;

14 (5) the United States Congress and the legislatures of several coastal states have recently
15 enacted legislation *insulating* ^{*States*} innocent oil spill response action contractors from these unreasonable legal
16 risks; this has placed Alaska at a severe competitive disadvantage in attracting necessary oil spill
17 response services to the state; and

18 (6) damages occasioned by the good faith actions of an innocent oil spill response action
19 contractor, and the burdens of resultant litigation, should be borne by the persons responsible for the spill
20 rather than the response action contractor.

21 (b) It is the purpose of this Act to ^{*1-2-3-4*} encourage prompt oil spill cleanup efforts by limiting the
22 liability of innocent oil spill response action contractors whose acts or omissions are a good faith
23 response to an oil spill ^{*7*}

24 * Sec. 2. AS 46.03.822(a) is amended to read:

25 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
26 set out in (b) of this section and the exception set out in (i) of this section, the following persons
27 are strictly liable, jointly and severally, for damages [TO PERSONS OR PROPERTY,
28 WHETHER PUBLIC OR PRIVATE, INCLUDING DAMAGE TO THE NATURAL
29 RESOURCES OF THE STATE OR A MUNICIPALITY,] and for the costs of response,
30 containment, removal, or remedial action incurred by the state or a municipality, resulting from
31 an unpermitted release of a hazardous substance or, with respect to response costs, the substantial

1 threat of an unpermitted release of a hazardous substance:

2 (1) the owner of, and the person having control over, the hazardous substance at
3 the time of the release or threatened release; this paragraph does not apply to a consumer product
4 in consumer use;

5 (2) the owner and the operator of a vessel or facility, from which there is a
6 release, or a threatened release that causes the incurrence of response costs, of a hazardous
7 substance;

8 (3) any person who at the time of disposal of any hazardous substance owned or
9 operated any facility or vessel at which the hazardous substances were disposed of, from which
10 there is a release, or a threatened release that causes the incurrence of response costs, of a
11 hazardous substance;

12 (4) any person who by contract, agreement, or otherwise arranged for disposal or
13 treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous
14 substances owned or possessed by the person, other than domestic sewage, or by any other party
15 or entity, at any facility or vessel owned or operated by another party or entity and containing
16 hazardous substances, from which there is a release, or a threatened release that causes the
17 incurrence of response costs, of a hazardous substance;

18 (5) any person who accepts or accepted any hazardous substances, other than
19 refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person,
20 from which there is a release, or a threatened release that causes the incurrence of response costs,
21 of a hazardous substance.

22 * Sec. 3. AS 46.03.822 is amended by adding a new subsection to read:

23 (k) In this section, "damages" includes damage to persons or to public or private
24 property, damage to the natural resources of the state or a municipality, and damage caused by
25 acts or omissions of a response action contractor for which the response action contractor is not
26 liable under AS 46.03.823 or 46.03.825.

27 * Sec. 4. AS 46.03.823(a) is amended to read:

28 (a) A person who is a response action contractor with respect to a release or threatened
29 release of a hazardous substance other than oil whose acts or omissions are not contrary to a
30 response plan or order by a state or federal agency having jurisdiction over the release or
31 threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that

1 results from the release or threatened release unless the release or threatened release is caused
2 by an act or omission of the response action contractor that is negligent or grossly negligent or
3 constitutes intentional misconduct. To show negligence by a response action contractor, a
4 claimant must show that the acts or omissions of the contractor under the response action contract
5 were not in accordance with generally accepted professional standards and practices at the time
6 the response action services were performed.

7 * Sec. 5. AS 46.03 is amended by adding a new section to read:

8 Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who
9 is a response action contractor with respect to a release or threatened release of oil whose act or
10 omission is not contrary to ^{an} a response plan or order of the federal or state on-scene coordinator
11 is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the
12 release or threatened release, or from the response action contractor's act or omission in response
13 to the release or threatened release, unless the person bringing a claim against the response action
14 contractor proves by a preponderance of the evidence that

15 (1) the response action contractor would have been liable for the release or
16 threatened release under state or federal law even if that contractor had not carried out a response
17 action with respect to the release or threatened release; or

18 (2) the response action contractor acted with gross negligence or intentional
19 misconduct

20 (b) The limitation on liability contained in (a) of this section does not apply to an action
21 for personal injury or death. *or - 2-A & B*

22 * Sec. 6. AS 46.03.826 is amended by adding new paragraphs to read:

23 (14) "response action" means an action taken in mitigation or cleanup of a
24 hazardous substance release or threatened release, including investigation, evaluation, plan
25 development, mapping and surveying, engineering, design and construction, removal, and
26 equipment provision;

27 (15) "response action contract" means a written contract or agreement to provide
28 response action with respect to a release or threatened release of a hazardous substance entered
29 into by a person with

30 (A) the department;

31 (B) another person who has entered into an agreement with the department

1 that provides for response action subject to the department's oversight and control;

2 (C) a federal agency with jurisdiction over the release or threatened
3 release; or

4 (D) another person potentially liable for the release or threatened release
5 under state or federal law;

6 (16) "response action contractor" means

7 (A) a person who enters into a response action contract with respect to a
8 release or threatened release of a hazardous substance and who is carrying out the
9 contract, including a cooperative organization formed to maintain and supply response
10 equipment and materials that enters into a response action contract relating to a release
11 or threatened release; and

12 (B) a person who is retained or hired by and is under the control of a
13 person described in (A) of this paragraph to provide services related to the response
14 action contract.

15 * Sec. 7. AS 46.03.823(g) is repealed.

16 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX O, JUNEAU, ALASKA 99811-1800

WALTER J. HICKEL, GOVERNOR

TELEPHONE
(907) 465-2600

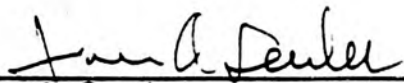
March 11, 1991

POSITION PAPER

HB 196

House Bill 196 proposes to shift the liability for simple negligence from an innocent oil spill response action contractor (RAC) to the party responsible for the spill so long as the RAC's act or omission is not contrary to a response plan or an order of the Federal or State on-scene coordinator.

The Department of Environmental Conservation supports HB 196 for the reasons set out in Section One of the Legislation, Findings and Purpose.



John A. Sandor
Commissioner

CSHB 196 Background

SECTION A.

No. 1



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 11, 1991

The Honorable Bill Hudson
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Greetings:

It has come to my attention that some of the major transporters of bulk petroleum products are in the process of reviewing their responsibilities under Ch. 191, SLA 1990, to prepare contingency plans and to clean up spills of oil and other hazardous substances by June 1, 1991. It is my understanding that the cost of preparedness, because of the lack of response action contractors willing to operate in Alaska, among other aspects of the Act, is so high that these transporters are reconsidering the economics of serving Alaska distributors.

We must quit the overall belief that spill responsibilities are limited to the multinational corporations (the worst possible event while ANWR and other national events towards wetlands and coastal exploration are on the Congressional minds would be a airlift or river barge loaded with fuel would cause a major spill and no clean up contractor available). The Juneau boat harbor is a situation that did happen and is documented in the following paragraph.

Last weekend the group here in Juneau that is organized to respond to oil spills was called out by the Coast Guard to clean up a spill caused by the sinking of a vessel in the small boat harbor. The group responded, but the next day they met to consider whether or not they would respond in the future because of the liability imposed on response action contractors under Ch. 191. I do not know what their decision was, or if they have reached a decision, but their concern may be an indicator that cooperatives organized to respond to spills either may refuse to respond to spills by persons who are not members of the cooperatives or that cooperatives may be forced to disband, leaving no organization available to respond to spills.

April 11, 1991

Emergencies could even cause a special session, which may be required if amendment cannot be achieved in this session and fuel supplies, especially for those areas of the state that are not equipped to clean up spills, are disputed or not delivered to those communities dependent upon bulk shipments, including the communities on the Interior river systems.

I am also concerned that even if the bulk transporters of petroleum products continue in the Alaska trade, the price of fuel may rise severely because of the necessity to cover the increased costs of spill response. This could have a major impact on the prices of home heating fuel, automobile gasoline and diesel fuel and fuel for electrical generation equipment throughout Alaska, but especially in the small, rural communities. If fuel deliveries are disrupted, the fishing season could be seriously affected.

I hope that you will look carefully at this problem to make sure that we are able to maintain fuel shipments and provide adequate spill response capability throughout the state at the same time.

Respectfully,

A handwritten signature in cursive script that reads "Bruce Kendall Sr".

Bruce B. Kendall, Sr.
Legislative Liaison

ALASKA'S POLICY ON EMERGENCY RESPONDERS:

AS 09.65.090...A person at a hospital or any other location **WHO RENDERS EMERGENCY CARE OR EMERGENCY COUNSELING TO AN INJURED, ILL, OR EMOTIONALLY DISTRAUGHT PERSON** who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

...This section does not preclude liability for civil damages as a result of **GROSS NEGLIGENCE OR RECKLESS OR INTENTIONAL MISCONDUCT.**

AS 09.65.091...A person who provides equipment or services on the request of a police agency, fire department, rescue or emergency squad, or other governmental agency **DURING A STATE OF EMERGENCY DECLARED BY AN AUTHORIZED REPRESENTATIVE OF THE STATE OR LOCAL GOVERNMENT** is not liable for the death of or injury to any person or damage to any property caused by that person's actions, except when the trier of facts finds that the person acted **INTENTIONALLY, RECKLESSLY, OR WITH GROSS NEGLIGENCE.**

"(iii) into or on the waters of the exclusive economic zone; or

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

"(B) In carrying out this paragraph, the President may—

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.—(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

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

"(B) Subparagraph (A) does not apply—

"(i) to a responsible party;

"(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(iii) with respect to personal injury or wrongful death; or

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

"(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

"(5) OBLIGATION AND LIABILITY OF OWNER OR OPERATOR NOT AFFECTED.—Nothing in this subsection affects—

"(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

"(B) the liability of a responsible party under the Oil Pollution Act of 1990.

"(6) RESPONSIBLE PARTY DEFINED.—For purposes of this subsection, the term 'responsible party' has the meaning given that term under section 1001 of the Oil Pollution Act of 1990."

(b) NATIONAL CONTINGENCY PLAN.—Subsection (d) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)) is amended to read as follows:

"(d) NATIONAL CONTINGENCY PLAN.—

"(1) PREPARATION BY PRESIDENT.—The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

"(2) CONTENTS.—The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

"(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

"(B) Identification, procurement, maintenance, and storage of equipment and supplies.

"(C) Establishment or designation of Coast Guard strike teams, consisting of—

"(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

"(ii) adequate oil and hazardous substance pollution control equipment and material; and

"(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

"(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

"(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

"(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

"(G) A schedule, prepared in cooperation with the States, identifying—

RAC Liability: Summary of Recent Legislation

State	No Liability for Negligence	Time Limit for Limited Liability	Liability for Gross Negligence	Liability for Intentional Misconduct	Liability for Personal Injury or Wrongful Death	Liability for Not Following Nat. Contingency Plan or Lawful Authority	Responsible Party Liable for RAC Negligence
PR 199	X		X	X	X	X	X
Federal	X		X§	X	X	X	X
California	X†*	X	X	X	X	X	X
Delaware	X		X	X	X		X
Florida	X		X	X	X#	X	X
Georgia	X		X	X	X	X	X
Hawaii	X		X	X	X#	X	
Miss.	X		X	X	X	X	X
Texas	X		X	X	X#	X	
Virginia	X		X§	X	X	X	X
Wash.	X†		X	X	X#		

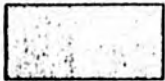
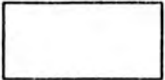
† Good faith requirement.

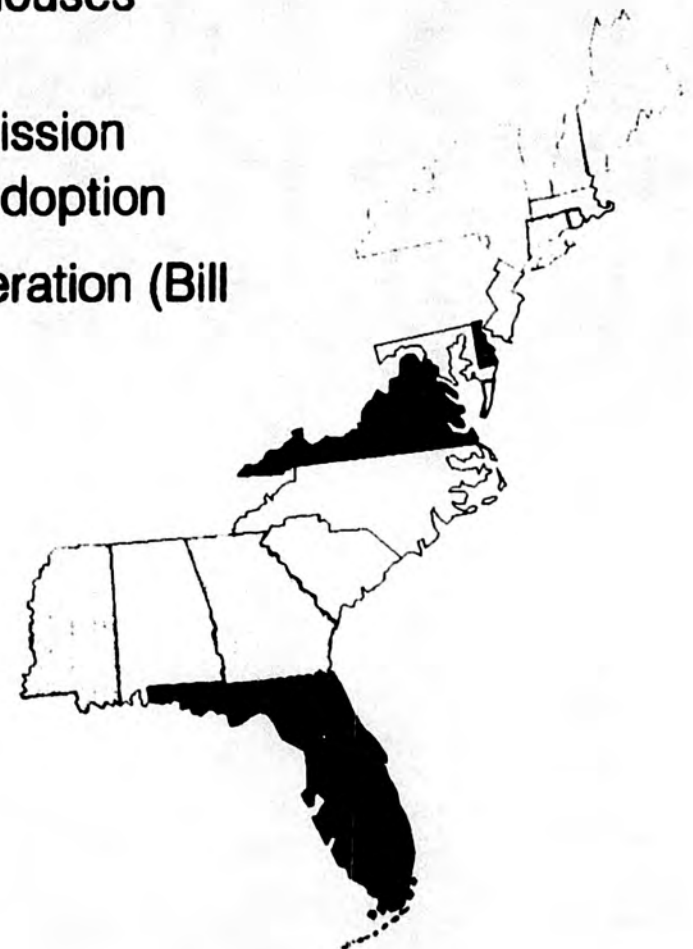
§ Act of God, act of war, and act of third party are defenses.

* Must be certified by State.

Personal injury and wrongful death not specifically mentioned.

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS

-  - Enacted
-  - Passed Both Houses
-  - Special Commission
Recommends Adoption
-  - Active Consideration (Bill
Introduced)
-  - No Activity



CSHB 196 Background
SECTION B,
No. 3

Alaska State Legislature

Legislative Research Agency



P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 165-3991
Fax: (907) 163-3331

February 26, 1991

MEMORANDUM

TO: Representative Bill Hudson

FROM: Glenn T. Gray ^{TG}
Legislative Analyst

RE: Oil Spill Response Contractor Liability Laws in Other States
Research Request 91.144

You asked about liability laws in other states concerning oil spill response contractors. Specifically, you requested information about states which have limited liability for contractors and their reasons for doing it. You also asked about states that have considered but rejected such legislation.

We contacted staff attorneys, resource agency officials or legislative staff in 16 states to obtain the information for this memorandum. An attempt was made to contact more than one person from each state to confirm information. For some states it was difficult to locate anyone who had a thorough understanding of the implications of response contractor liability statutes. We also contacted staff from several national organizations: the Coastal States Organization, the National Conference of State Legislatures, and the Marine Spill Response Corporation (MSRC).

This memorandum begins with background information about the effort to limit the liability of response action contractors. A brief description of how various states have dealt with contractor liability follows. The memorandum concludes with a summary of national trends regarding liability regimes for oil spill clean up contractors.

Background

Since the federal Oil Pollution Act of 1990 passed in August, many states report that the Marine Spill Response Corporation (formerly the Petroleum Institute Response Organization) and oil spill response contractors have lobbied them to limit the liability of response action contractors. The federal law limits liability for persons who respond to an oil spill in federal waters as long as they act consistently with the National Contingency Plan [33 U.S.C. 1321 (c)(4)]. Responders are still liable, however, for personal injury and wrongful death, and if they are grossly negligent or engage in wilful

CSHB 196 Background

SECTION B,

No. 4

misconduct. The act does not preempt states from enacting more stringent liability regimes [33 U.S.C. 1321(o)(2)].¹

Laws which limit liability for persons who respond to spills of oil or hazardous materials are commonly referred to as good samaritan laws. While some states exempt only people who are not compensated, other states have changed their laws to be consistent with federal law. Rather than holding contractors strictly liable, or liable for simple negligence, such states limit contractor liability to gross negligence, wilful misconduct, personal injury or wrongful death. Definitions of these different standards of liability may be found in Attachment A.

The federal Oil Pollution Act of 1990 requires that owners or operators of tank vessels and oil facilities develop response plans. These plans must show that owners or operators have personnel and equipment to "remove to the maximum extent practicable a worst case discharge . . ." [33 USC 321(j)(5)]. For many facilities and tankers, the MSRC provides the only feasible means to comply with this provision. The MSRC is a nonprofit organization funded by the Marine Preservation Association (MPA), a group of oil industry companies. According to David Larkin, director of government affairs for the MSRC, the organization operates independently from the MPA. The MSRC plans to have five regional response centers and 23 pre-staging areas where equipment will be stored. Mr. Larkin says that because an oil spill can spread across the jurisdictions of many states, it is important to have consistent liability standards. Otherwise, in the event of a spill, contractors would have to respond to different rules in each state. Mr. Larkin also says that insurance costs for unlimited liability are prohibitive, and if a state does not have adequate immunity for the responders, the MSRC will have to consider what its role will be in that state.

The MSRC's involvement in Alaska is unclear. According to Mr. Larkin, the MSRC has no plans to locate a pre-staging area in Alaska, and current liability standards do not provide an incentive to consider this option. The MSRC document in Attachment B does, however, refer to a planned pre-staging area in Alaska. Alyeska Pipeline Service Company currently provides spill response assistance for tankers transporting oil from the TransAlaska Pipeline. According to Gene Burden, a vice-president for Tesoro, Alyeska requires Tesoro to obtain one billion dollars of direct action insurance for it to transport oil in Prince William Sound. Such insurance is difficult, if not impossible to obtain (see Attachment C, Legislative Research Memorandum 90.200). Mr. Burden says that coverage through a Protection and Indemnity (P&I) club would

¹After an oil spill, state and federal authorities may bring separate actions against a contractor based on their individual standards.

not provide direct action and would be cost prohibitive for Tesoro.² Mr. Burden believes that insurance requirements would be reduced if Alaska limits the liability for response action contractors. He also says that frivolous litigation would be reduced by changing the current law.

Arkansas

According to Steve Weaver, chief legal council for the Department of Pollution Control and Ecology, Arkansas holds oil spill response contractors responsible for simple negligence. He says that in 1985 legislation was passed that held contractors responsible for gross negligence, but that the oil industry supported a law passed in 1989 making contractors liable for simple negligence. Mr. Weaver said that Arkansas wants to keep response contractors to as high a standard as possible.

California

The California General Assembly passed a bill last year that includes a provision to limit liability for people who respond to oil spills (other than for gross negligence, wilful misconduct, personal injury, or wrongful death). The law limits liability for people who act in good faith and in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the on-site coordinator or the United States Coast Guard. The act restricts the limitation of liability for response action contractors for 60 days after they begin cleanup with a possible extension of 30 days.

According to Dr. Jim Rote, principal consultant for the California General Assembly Office of Research, the provision limiting a response contractor's liability to 60 days resulted from a compromise between lobbying efforts of the California trial lawyers and response contractors. Dr. Rote believes that the limitation of liability for response contractors is justified because they respond to emergencies and may be compared to other emergency responders such as ambulance drivers and fire fighters. The 60-day limit encourages contractors not to become careless.

Connecticut

According to Charles Zieminski, principal emergency response coordinator for the Department of Environmental Protection, Connecticut has no cap on liability for negligence. Other than during a few oil spills in the early 1970s, Connecticut has not had much recent experience with response contractors. Mr.

²Direct action means that a claimant could recover costs directly from the insurer without going through Tesoro.

Representative Hudson
February 26, 1991
Page 4

Zieminski says that he is not aware of efforts to change current liability laws for oil spill clean up contractors.

Delaware

The Delaware General Assembly recently passed legislation consistent with federal law concerning liability of response contractors. The legislation is awaiting the governor's signature. According to Shari Wilson, staff attorney for the Attorney General's Office, contractors may be liable for simple negligence if they significantly increase the damage resulting from an oil spill. Contractors may get around this provision if they subcontract with a party who does not receive compensation for spill clean up, such as the MSRC.

Florida

Legislation passed last year by the Florida legislature limits the liability of persons responding to an oil spill as long as they are not grossly negligent (FS 376.09). This provision appears to include response action contractors, although a separate provision (FS 376.319) provides indemnification for response contractors for simple negligence if they have a written contract with the state. Several state officials with whom we spoke were unable to explain why the state would need to indemnify a contractor for simple negligence if the contractor were only liable for gross negligence and wilful misconduct.

Hawaii

The Hawaii legislature passed legislation during 1990 that apparently limits the liability of response action contractors. The law states that no person shall be liable "as a result of actions taken or omitted in the course of rendering care, assistance or advice in accordance with this chapter or at the direction of an on-scene coordinator," unless the actions resulted from gross negligence or intentional misconduct. There is a question whether the legislature intended to limit the liability of contractors because the language modifies section 107(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) instead of section 119 of that act (section 119 exempts response action contractors from strict liability for the clean up of hazardous substances).

Louisiana

Louisiana law currently holds response contractors strictly liable for their clean up efforts. MSRC has reportedly said that if Louisiana does not limit liability for response action contractors, the MSRC would reconsider its plans to locate one of its five regional centers in Louisiana.

Maine

Maine's good samaritan law currently limits the liability of people who respond to oil spills as long as they do not receive compensation. Response contractors receiving payment are liable for simple negligence. According to Barbara Foster of the National Conference of State Legislatures, the MSRC said that it would not provide an office in Maine if liability for response action contractors was not limited. The legislature is currently considering a bill to limit liability to gross negligence. Perry Cogburn, an oil and hazardous materials specialist for the Maine Department of Environmental Protection, says that there has not been a problem with response contractors and if the laws are too strict contractors may not respond to spills.

Maryland

Maryland currently does not limit the liability of response action contractors. The legislature is expected to consider a bill this session that has provisions similar to those of the federal government.

Last week during a regional response team drill in Chesapeake Bay, contractors refused to respond to the spill because of Maryland's liability regime.³ The drill proceeded under the assumption that an oil tanker had collided with a container ship carrying hazardous waste. The United States Coast Guard (USCG) took control of the "spill" but could not convince the contractors to respond. The USCG received verbal approval from the Governor of Maryland and written approval from the state's director of the Department of Environment to exempt contractors from liability during the drill. There were, however, concerns about the legality of such an exemption. According to Lt. Commander Shultz, coordinator for the National Response Team, the USCG considered towing the boats into Virginia waters much to the alarm of Virginia authorities. The drill will continue on March 12, with the beginning of the second day of the imaginary spill.

Mississippi

Mr. Charles Chism, director of the Office of Pollution Control, says that Mississippi does not limit the liability for response action contractors. A bill currently being considered by the state legislature would limit contractor liability. Mr Chism says he does not object to such a liability limitation.

³Although there was actually no accident or oil spill, authorities proceeded throughout the drill as if it was real.

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New York

Sherry Chrimes, assistant counsel for the Department of Environmental Conservation, says that New York has resisted attempts by the oil industry to limit the liability of response action contractors. The current law holds contractors liable for simple negligence. Ms. Chrimes said that the state often uses response contractors and that the current law is adequate. She says that response contractors should be held to the same standard of liability as other contractors.

North Carolina

Ed Gavin, of the Office of General Council for the Department of Natural Resources and Community Development, says that North Carolina has no limitation for liability for contractors who clean up oil spills. He says that there has not been much effort to change the current law, and that North Carolina has only a few oil terminals, a pipeline and a small oil refinery.

Oregon

Contractors responding to an oil spill currently have unlimited liability. The legislature, however, is considering limiting the liability of response contractors. Bruce Southerland, of the Department of Environmental Quality, said that because Oregon borders the Columbia River with Washington, the states usually try to have compatible oil spill legislation. (Washington currently limits the liability of contractors.)

Pennsylvania

Fred Osman, director of Environmental Emergency Response, says that the Pennsylvania legislature passed an act during November 1990 limiting response action contractor liability to wilful misconduct or gross negligence. He thinks that simple negligence is not a good standard for response action contractors because they respond to emergencies in an effort to prevent damage to the environment and property.

Virginia

David Orms, an environmental program manager for the Department of Environment, says that Virginia has patterned its contractor liability law after the federal Oil Pollution Act of 1990. He does not think that limiting contractor liability to gross negligence poses a problem.

Mr. Orms says that during a regional response team drill he attended last week in Chesapeake Bay, response action contractors refused to respond to the oil

spill in Maryland waters because that state does not limit liability for contractors. The contractors, however, said they would respond to the imaginary spill when it reached Virginia waters.

Washington

Washington limits the liability of response action contractors to a standard of gross negligence and wilful misconduct. The state is currently developing contractor standards for uncompleted work. According to Don Reif of the Department of Ecology, contractors will have to prove that they have a certain amount of insurance to pay for clean up work that they have not completed. Harry Reinart, legislative counsel for the House Environment Committee, says that because spillers have strict liability, it is not necessary to hold contractors to such a high standard. Mr. Reinart believes that it may be difficult to obtain contractors if they are held to too high of a standard.

Conclusion

Opinions differ concerning the extent a response contractor should be held liable for damage resulting from its actions. Some officials from other states believe that contractors should be held accountable for their actions during an oil spill clean up. They are concerned that a contractor may use cheaper, less efficient equipment if their liability is limited. They also express concern that a contractor may not be as careful when their liability is limited. One state official thought that in cases where the identity of a spiller cannot be determined or if a spiller were to go bankrupt, there would be no way to recover costs for damages resulting from the actions of a contractor if that contractor, was not liable and insured for simple negligence.

Several states have passed legislation that resembles liability standards found in the Oil Pollution Act of 1990, and additional state legislatures are considering such legislation. Some states have modified the federal legislation to require contractors to comply with state oil spill contingency plans or the direction of an on-scene coordinator. California limits the liability of contractors for 60 days with a possible 30-day extension while providing no time limit for volunteers. Officials from these states feel that response contracts should have limited liability similar to other emergency response personnel such as policemen and fire fighters. Many of these officials express concern that contractors would not be available if liability standards were too rigid.⁴ The high cost of insurance for simple negligence

⁴Lt. Commander Shultz, coordinator for the National Response Team, is not aware of any instances where contractors have refused to respond to a spill other than the regional response drill which occurred in Maryland waters last week.

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was also cited as a reason for limited liability. The MSRC supports state legislation resembling federal law so that there will be consistency during oil spills that reach the waters of more than one state.

The Federal Oil Pollution Act of 1990, however, permits states to require higher standards. David Slade, general council for the Coastal States Organization, says that while his organization does not recommend how states should respond to the liability question, one option available would be to keep the simple negligence liability standard but to place a cap on the amount of liability. This option would reduce the liability of response action contractors and give them some incentive to operate carefully. The Coastal States Organization expects to release a white paper next month about how states have responded to a number of issues relating to the Federal Oil Pollution Control Act of 1990. A copy of this paper will be forwarded to your office as soon as we receive it.

I hope this information is helpful. Please contact this office if we may be of additional assistance.

Attachments

CLEANUP CONTRACTOR LIABILITY FOR DAMAGES CAUSED BY CLEANUP OPERATIONS

CSHB 196 (Resources) and Federal Law vs. Existing Alaska Law

Liability Under Existing Alaska Law and
CSHB 196(R) After 15/30 Days

Liability Under CSHB(R) 196 for First 15/30
Days and Federal Law

Not
Even
Simply
Negligent

Simply
Negligent

Grossly
Negligent

Substantial
Violation
Of
Contingency
Plan

Violated
OSC
Order

Intentionally
Caused
Harm

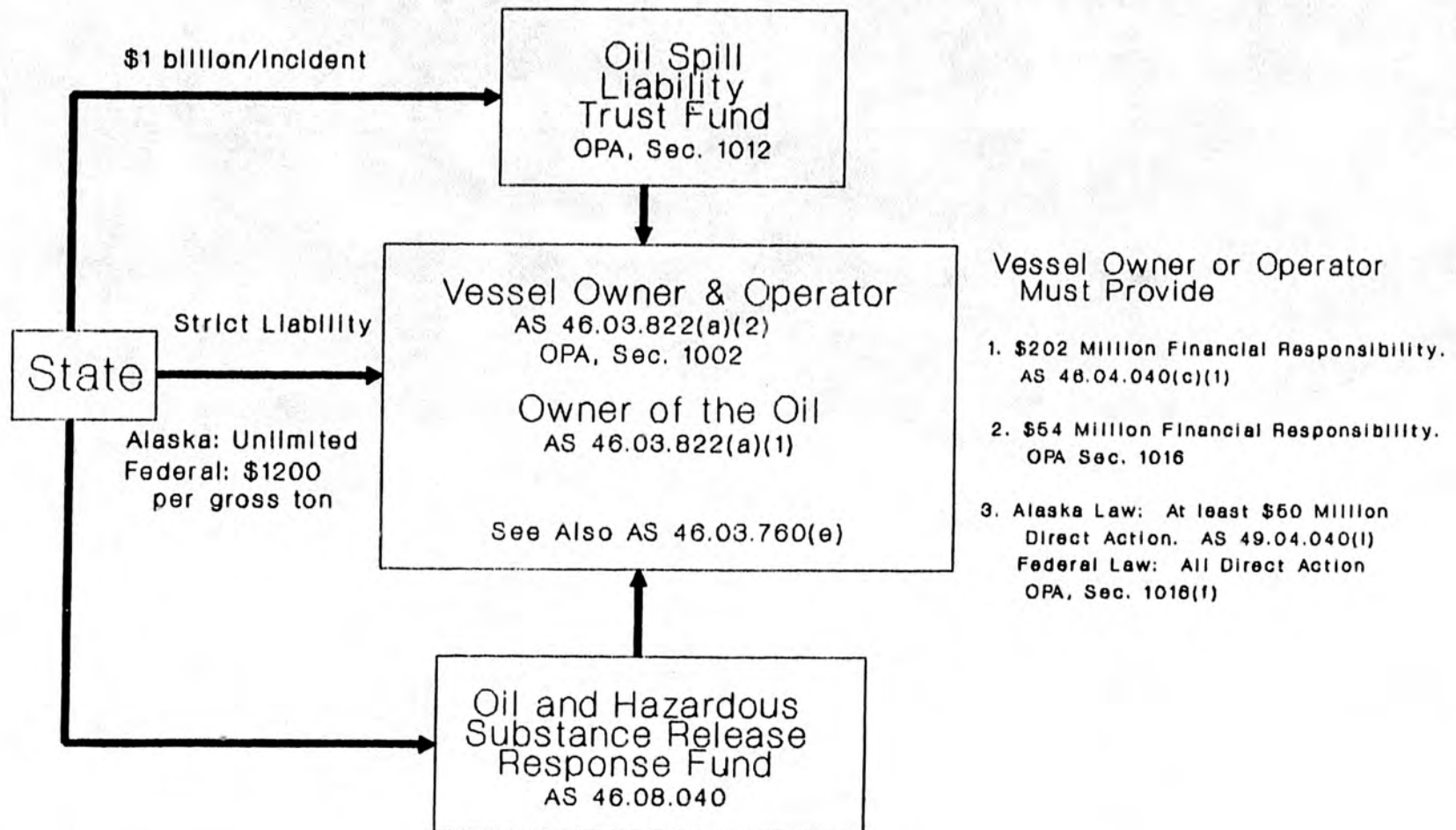
Caused
Personal
Injury
or
Death

Note:
Arguable
Liability
Here Under
Existing Law

Note: Vessel and Oil Owner Both Expressly Liable
for Simple Negligence of Cleanup Contractor
Under CSHB 196, Sec. 3.

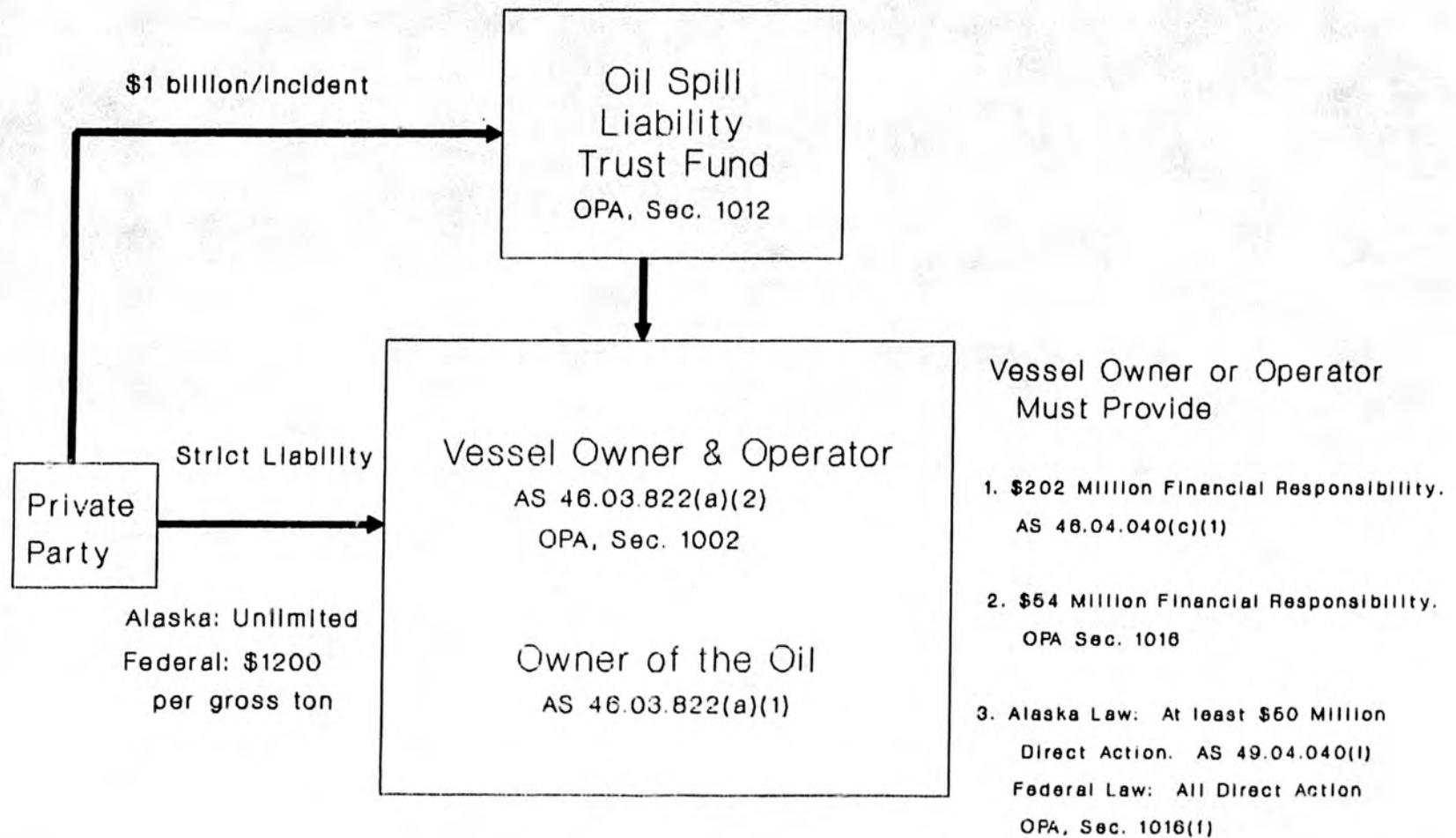
Vessel Owner and Operator Expressly Liable for
Simple Negligence of Cleanup Contract Under
Sec. 4201(a)(c)(4)(C) of OPA

RECOVERY OF CLEANUP COSTS CRUDE SPILL FROM 90,000 DWT OIL TANKER Under Both Existing Law and CSHB 196



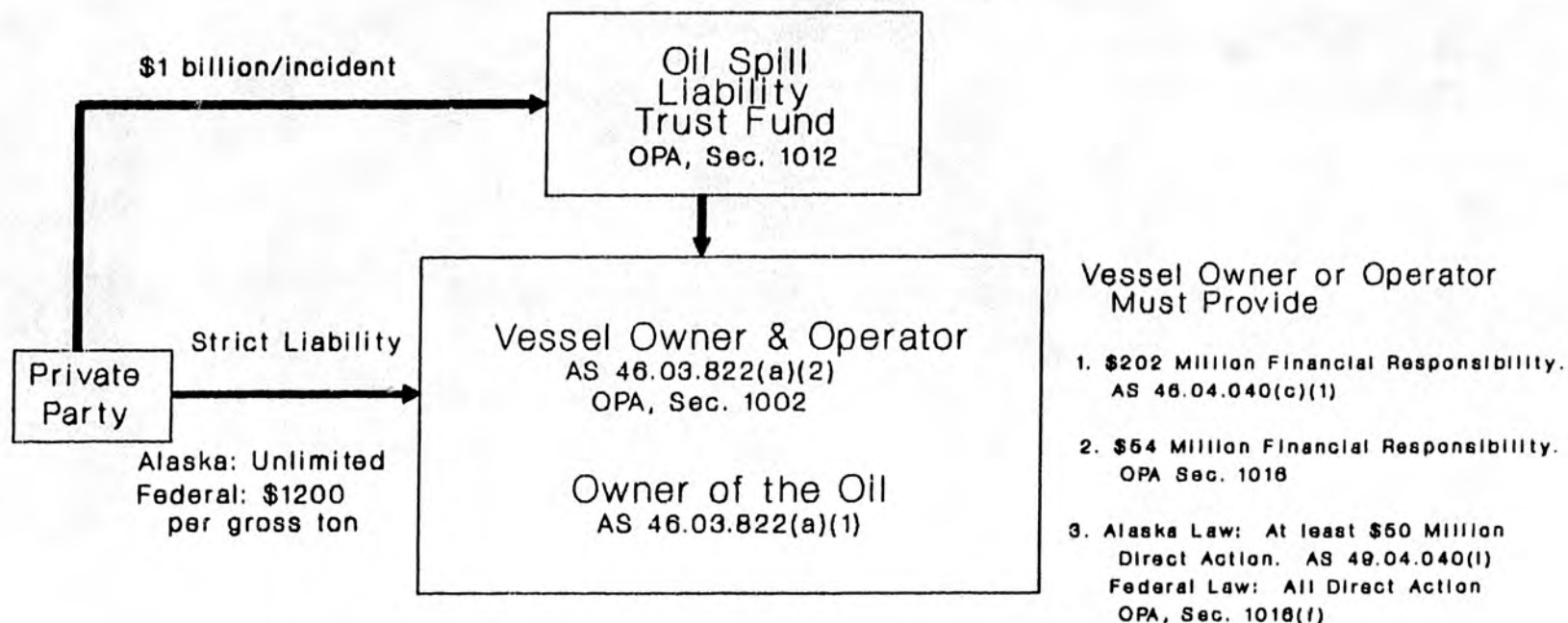
DAMAGE RECOVERY CRUDE SPILL FROM 90,000 DWT OIL TANKER

Under Both Existing Law and CSHB 196



DAMAGE RECOVERY FOR CLEANUP CONTRACTOR'S SIMPLE NEGLIGENCE*

Under CSHB 196



Note: Vessel and Oil Owner Both Expressly Liable for Simple Negligence of Cleanup Contractor Under CSHB 196, Sec. 3.

Vessel Owner and Operator Expressly Liable for Simple Negligence of Cleanup Contractor Under Sec. 4201(a)(c)(4)(C) of OPA.

•Based on a Crude Spill From 90,000 DWT Oil Tanker

Alyeska blasted for billion-dollar bond

Borough Mayor Don Gilman Wednesday blasted Alyeska Pipeline Service Co. for what he calls an "unreasonable" demand that threatens to shut down Tesoro-Alaska Petroleum Corp.'s Nikiski refinery.

Alyeska is requiring Tesoro to come up with a \$1 billion bond to continue shipping oil from the Alyeska pipeline terminal in Valdez to Cook Inlet.

Tesoro officials say they can't possibly meet the requirement. And since they get 90 percent of the crude oil for their Nikiski refinery from Valdez, the refinery would be in serious trouble if it was no longer able to ship from there, said Tesoro vice president Gene Burden.

Gilman said the major member companies of Alyeska — Exxon, British Petroleum and ARCO — are using Tesoro as a pawn in order to pressure the Legislature to pass a bill restricting Alyeska's liability in the event of a spill.

"They're using Tesoro," Gilman said. "They're being unreasonable."

But Alyeska spokesperson Marnie Isaacs said the \$1 billion requirement is necessary because of the liability Alyeska could be subject to if it responds to a spill from Tesoro or another shipper in Prince William Sound.

"Alyeska serves as the initial response action contractor for those vessels calling at the terminal in Valdez," she said. "Because of the state's liability requirements, Alyeska ... asked the owner-operator or charter of the vessels to pledge a billion dollar bond, which, simply put, indicates they would have access to funds to manage the claims arising from a spill."

The other five companies operating vessels in Prince William Sound — Exxon, BP, ARCO, Shell and Chevron — have been able to comply with the \$1 billion requirement, mainly by pledging \$1 billion in

corporate assets.

But Tesoro can't do that, Burden said.

"All five of those other companies are very, very large companies," he said. "Our whole company's only worth \$200 million. To come up with a bond of a billion dollars is just not possible."

He thinks Tesoro should not be required to put up as large an amount as the other companies because Tesoro transports only a small percentage of the oil coming from the terminal, its tanker loads are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

Alyeska and Tesoro have worked out a temporary agreement that allows Tesoro to continue operating in the Sound until June 1 with \$1 billion in insurance, rather than a bond.

Alyeska says it may lower its requirements if the Legislature passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

"The core of the problem rests with the state's current liability laws," Isaacs said.

The way the law stands now, the standard of liability is "simple negligence," which Isaacs said could mean if Alyeska responds according to its plan with the state, but inadvertently loses some oil from a boom, it could be held liable.

Alyeska wants the standard of liability for a spill responder to be "gross negligence," which is harder to prove in court than simple negligence.

Tesoro also favors such a bill because it would limit the liability for the Cook Inlet spill response cooperative of which Tesoro is a member.

But fishing and environmental groups are opposed to the idea because they believe it would lessen the incentive for spill responders to be prepared.

A compromise bill, which sought to limit liability but only for the first 15 days after a spill and only if a company does not "substantially deviate" from its contingency plan, was passed out of the House Resources Committee Tuesday.

But Alyeska is not satisfied with the language in the bill, Isaacs said. "The bill is helpful, but it doesn't go quite far enough," she said. "We feel present language does not allow us to relax our liability standards."

Mayor Gilman also favors legislation limiting spill responders' liability because the Kenai Peninsula Borough is a member of the Cook Inlet response cooperative and taxpayers could also be held liable for problems resulting from the cooperative's response to a spill.

But Gilman, a former state senator, does not believe the legislation will pass. He says the bill has to get through two more House committees and the full House

and the Senate, and he doesn't believe that will happen in the remaining 34 days of the legislative session.

He believes Alyeska is being inflexible about the bill.

"They don't want anything less than gross negligence," he said. "What I think is happening is Alyeska is trying to get the gross negligence standard, and they're doing it on the backs of Tesoro."

"The big three (Exxon, BP and ARCO) are using this thing unmercifully and unnecessarily," Gilman said.

Isaacs says that Alyeska is "very sympathetic to Tesoro's situation."

"We would like to find a way to accommodate Tesoro's needs and still protect the company's (Alyeska's) liability," she said.

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he does not believe that's the case, either.

"But if that's the fallout, they could care less," he said. "The big guys just don't care. They could care less if this refinery closed down."

The Kenai Peninsula Borough Assembly cares a great deal, however.

Tesoro employs about 150 people on the borough, according to Burden. The company provides a good chunk of borough tax revenues.

The Borough Assembly unanimously passed a resolution Tuesday night, which was supported even by fishing groups, urging the Legislature to intervene on Tesoro's behalf.

Burden says if Tesoro and Alyeska can't come to an agree-

ment, Tesoro will file suit against the pipeline company, which would include seeking an injunction to allow the company to continue shipping out of Prince William Sound after June 1.

SEC 7
Mc 1

A 18 Sunday, June 10, 1990 ★ ★ ★

San Francisco Examiner



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Oil spill groups need legal assist

CONSIDER WHAT might occur if a fire department responding to a blaze could be sued for damages resulting from its firefighting. A lawyer might ride on every truck. And a no-fault contract might have to be negotiated before a hose was unrolled.

Of course this would be silly, not to mention counterproductive. Yet such is the problem being confronted by organizations formed to respond to oil spills. Cleanup consortiums such as Clean Bay in the Bay Area and Clean Seas in Southern California remain under the threat of lawsuits. In Sacramento, legislators now are debating proposals that would add so-called Good Samaritan language to protect oil-cleanup groups from litigation except in situations of overt misconduct or negligence.

This dispute pits the oil industry, and environmental groups such as the International Bird Research and Rescue Center and the Coast Guard, against the California Trial Lawyers Association. There are two major oil spill bills now moving toward passage, AB 2603 authored by Assemblyman Ted Lempert, D-San Mateo, and SB 2040 by State Senator Barry Keene, D-Mendocino. Neither addresses this issue. It is essential that "Good Samaritan" sections be added.

The trial lawyers contend that the distinction between spillers and responders is not so clear as portrayed, since the responding organizations often are nonprofit entities created by the oil shippers. It has

been charged that laxness on the part of Alyeska, an oil company-owned cleanup company, contributed to damage caused by the grounding of the Exxon Valdez in Alaska.

That may sound legally sensible, but it is not a practical argument from the public's point of view. Rapid response is one of the keys to successful response. Time will cause the spill to worsen. Yet the threat of lawsuits may cause delay by cleanup crews until responsibility is made clear.

But while some are oil company-owned, other groups are not. The Ventura County Commercial Fishermen's Association created FORT — the Fisherman's Oil Response Team — to protect the sensitive Channel Islands and nearby coastal communities. Through FORT, fishermen on their own boats can be called upon by clean-up coordinators during an emergency. And they can be on the scene immediately, not days later. But FORT and its fisherman cannot place themselves in a position to accept unlimited liability.

Cleanup firms are willing to accept legal responsibility for willful misconduct, personal injury or wrongful death. They need protection from simple negligence because they must make quick decisions under difficult circumstances. Sometimes they may guess wrong. In most cases, they are not acting on their own, but under Coast Guard authority. The federal government, however, is protected in such circumstances from those seeking targets from which to recoup losses. Cleanup groups are not. They should be.

CSHB 196 Background

SECTION D.

No. 2



THE PBN COMPANY
1225 Eighth Street
Suite 600
Sacramento, CA 95814
(916) 444-3671

FOR IMMEDIATE RELEASE:
August 21, 1990

NEWS

CONTACT:
Carri Cummings
916/444-2671
or
Peter Necarsulmer and
Peter Bartelme
415/989-0536

STATEWIDE ADS HIT TRIAL LAWYERS FOR BLOCKING OIL SPILL CLEANUP BILL

SACRAMENTO -- Multi-million dollar lawsuits are not among the hazards Good Samaritans should face when they rush to help clean up an oil spill off the California coast, the state's residents are being told this week by a full-page advertisement running in 11 major newspapers.

Appearing today and Wednesday, the ad states that legislation California urgently needs to arm itself against the ravages of offshore oil spills is being blocked by the powerful California Trial Lawyers Association "for the oldest reason of all -- they want the fees."

Readers are urged in the ad to call a toll free number (1-800-325-6000, operator 9752), to send free mailgrams to their state legislators and express support for language providing limited immunity from lawsuits for oil spill cleanup teams.

The ad, sponsored by the International Bird Rescue Research Center, Ventura County Commercial Fishermen's Association, Clean Bay, Clean Coastal Waters and Clean Seas, was paid for by the non-profit Petroleum Industry Response Organization (PIRO), which is in the process of changing its name to the Marine Spill Response Corporation.

The California Trial Lawyers Association recently used its lobbying influence to remove the "Good Samaritan" language from the bill, SB 2040 by Sen. Barry Keene, D-Benicia. The Good Samaritan provisions give individuals and organizations trying to clean up an oil spill limited immunity from liability lawsuits. No change would be made in the liability faced by the spiller, and the immunity for cleanup teams would not extend to acts of willful misconduct or gross carelessness.

Similar Good Samaritan language was recently approved unanimously by Congress in the federal oil spill cleanup bill.

Keene's measure, which has broad support, creates a \$150 million oil spill emergency response mechanism funded by a 25-cents-per-barrel tax on all crude oil, either produced in California or imported into the state. The California State Senate approved SB 2040 by a 34-3 vote June 21.

However, Keene said, in the State Assembly, trial lawyers have thrown "a political roadblock" around SB 2040 in their battle to remove the Good Samaritan language. They succeeded in substantially watering down the language in the bill's first Assembly committee hearing and the response organizations have joined in a massive effort to have the protections restored.

-mc-

San Francisco Office: Two Embarcadero Center • Suite 2530 • San Francisco, CA 94111 • (415) 989-0536

AUG 22 '90 5:23

9164439663

CSHB 196 Background

SECTION D,

No. 3

5 by the Federal On-Scene Coordinator [or by the State official with responsibility for oil spill oil
6 response].
7 (b) Subparagraph (a) does not apply--
8 (1) to a responsible party;
9 (2) with respect to personal injury or wrongful death; or
10 (3) if the person is grossly negligent or engages in willful misconduct.
11 (c) A responsible party is liable for any removal costs and damages that another person
12 is relieved of under subparagraph (a).
13 (d) Nothing in this section affects the liability of a responsible party for oil spill
14 response under State law.

IF SHE'S NOT A GOOD SAMARITAN, JUST WHO IS?

The men and women who respond to an oil spill crisis are willing to accept many dangers. Good Samaritans in every sense of the word, they risk uncertain seas, fire and exposure.

But there's one risk that's truly unacceptable. A crippling lawsuit against the recovery team itself. Yet, because of an odd quirk in the law, that's a real possibility.

Right now, oil spill teams can be sued just for showing up to fight the damage. For events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions.

Is this reasonable? The Congress of the United States doesn't think so. The California State Senate doesn't think so. In fact, only one group wants to be able to make the people fighting the oil spill pay for the spill itself. The California Trial Lawyers Association.

This powerful special interest group has managed to block the final steps in enacting Good Samaritan protection for oil recovery teams. Why? For the oldest reason of all—they want the fees.

Senator Barry Keene and Assemblyman Ted Lempert are working overtime to protect California's coastline. And we have a major interest in their efforts. We are the people who fight oil spills. Some of us do so to protect our fishing grounds. Some to save innocent wildlife. Others, as part of a responsible petroleum industry. We believe that whoever spills the oil should be liable for the costs—not the people who clean it up.



We urgently need your help to pass Good Samaritan liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. Indeed, we stop everything to help an injured Earth when she needs it.

Please send in the coupons below and tell the California State Assembly to pass SB 2040 authored by Senator Barry Keene. It's the only way to keep some very Good Samaritans on the job.

Join Us In Saying NO To The Trial Lawyers, Yes on SB 2040.

CALL US.

We will send a FREE magnet in your name to your State Assembly member.

CALL TOLL FREE.
1-800-325-6000.
Ask for Operator 9752.

This is a toll free
Western Union Service.

WRITE US.

Fill out this coupon and send it to us:

YES! I support Senate Bill 2040 (Keene) and
provisions for California's oil spill recovery
teams. Please add my name to the list of
people who want to say yes to the environment.

NAME _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

Return to: International Bird Rescue
Research Center 125 9th Street, Suite 100
Sacramento, CA 95811

OR, TELL 'EM YOURSELF.

Please Mr. Senator:
Don't let the trial lawyers keep oil recovery
teams off the beach. Please join the U.S. Con-
gress and the California State Senate by enact-
ing Senate Bill 2040 (Keene).

NAME _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

Send to: Hon. V. _____

Capitol, Sacramento

CSHB 196 Background

SECTION D,

No. 4

SPONSORED BY
International Bird Rescue Research Center
Clean Bay • Clean Coastal Waters • Clean Seas
Ventura County Commercial Fishermen's Association
Marine Spill Response Corporation

ENDORSEMENTS OF CLEANUP CONTRACTOR LIMITED LIABILITY

Be it further resolved, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death.

...Pacific Fisheries Legislative Task Force, June 16, 1990 (Sitka)
Alaska Delegates: Sen. Eliason
Sen. Zharoff
Rep. Davidson
Rep. Navarre

In particular, I support the need for limited immunity for all oil spill responders other than liable parties, to the extent that it may be necessary to encourage such persons to take action promptly. Prompt action after a spill is essential to protect the marine environment of California from oil pollution.

As you know, the Oil Pollution Act of 1990 (P.L. 101-380) was signed by the President on August 18th. That Act provides limited federal immunity for all oil spill responders.

A law that does not address responder's concern about liability exposure, causing them to hesitate in responding to spills, would be counterproductive.

Oil spill response is not an exact science. Decisions often must be made with incomplete and sometimes conflicting information. Moreover, the operational environment is unpredictable. Liability standards must take those factors into account if effective programs are to be put in place.

...United States Coast Guard, August 28, 1990

Because unnecessary impediments to expeditious oil spill response should be minimized, we support the concept of immunizing spill responders by passing through their liability to the spiller, under the following conditions: none of the spiller's original liability is in anyway reduced, and there are adequate assurances that all damages will be paid, and that the injured parties can be made whole.

...The California Sierra Club, April 21, 1990

MORE ENDORSEMENTS OF CLEANUP CONTRACTORS LIMITED LIABILITY

Cleanup firms are willing to accept legal responsibility for willful misconduct, personal injury or wrongful death. They need protection from simple negligence because they must make quick decisions under difficult circumstances. Sometimes they may guess wrong. In most cases, they are not acting on their own, but under Coast Guard authority. The federal government, however, is protected in such circumstances from those seeking targets from which to recoup losses. Cleanup groups are not.

...The San Francisco Examiner, June 10, 1990

Right now, oil spill teams can be sued just for showing up to fight the damage. for events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions...

We urgently need your help to pass Good Samaritan liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. Indeed, we stop everything to help an injured Earth when she needs it.

...International Bird Rescue Research Center, et al., August 1990

Should qualified immunity not be granted to responder as outlined in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

...Ventura County Commercial Fishermen's Association, May 4, 1990

April 11, 1991

Representative Cliff Davidson
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

Re: CSHB 196 (Oil & Gas)

Dear Representative Davidson:

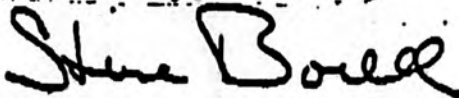
The Alaska Miners Association supports this bill.

Anyone involved in oil spill cleanup and response should be encouraged to concentrate on the work at hand, i.e. cleaning up the spill, without being concerned that their every decision and action will be subject to detailed scrutiny and possible liability.

Without this change/clarification at least two things will occur:

1. Cleanup efforts will be hampered and delayed through concerns for liability, and
2. The cost for all petroleum products to outlying areas of the state will increase unnecessarily as suppliers seek to protect themselves from frivolous charges, acts of omission, and honest mistakes.

Sincerely,



Steven C. Borell, P.E.
Executive Director

cc: Phil Holdsworth
Kent Dawson

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To	Al Hastings	From	Jon T
Co.		Co.	
Dept.	401546.3	Phone #	
Fax #		Fax #	

Alyeska pipeline
SERVICE COMPANY

1000 SOUTH BRADSHAW STREET, ANCHORAGE, ALASKA 99512, TELEPHONE (907) 876-1811, TELEFAX (907) 876-1817

March 15, 1991

Representative Bill Hudson
Capitol Room 111, MS 3100
Box V
Juneau, Alaska 99811

Re: H.B. 196

Dear Representative Hudson:

You recently asked Paul Richards to comment on H.B. 196 on behalf of Alyeska Pipeline Service Company. We have reviewed the issue of potential legislative changes to response action contractor liability in the context of the financial responsibility requirements in our Oil Spill Response Service Agreements. As a result of this review, we have developed the following statement of our position:

"Alyeska Pipeline Service Company, which operates the trans Alaska pipeline system, is an initial oil spill response action contractor for tank vessels in Prince William Sound. The vessels have incorporated Alyeska's initial response plan into their contingency plans. Under the terms of contracts between Alyeska and the owners, operators or charterers of these vessels, Alyeska is indemnified for costs and certain liabilities that might arise out of Alyeska's response on behalf of a vessel. The contracts also require that the party contracting on behalf of a vessel demonstrate financial responsibility to perform its indemnity obligations. Tesoro has been unable to demonstrate compliance with the financial responsibility provisions of the standard contract and is presently operating under a temporary agreement that expires on June 30, 1991. Alyeska has advised Tesoro that the temporary agreement will not be extended.

"Alyeska supports enactment of Alaska legislation that a response action contractor can be liable for simple negligence in its oil spill response activities ONLY when its acts are inconsistent with the National Contingency Plan or directives of the President or when its actions cause personal injury or death. Congress enacted this standard in section 4201(a) of the Oil Pollution Act of 1990. If such legislation becomes law in Alaska, Alyeska will reduce the financial responsibility requirements for all tank vessels contracting for its initial oil spill response

278-5026

SECTION E,
No. 3

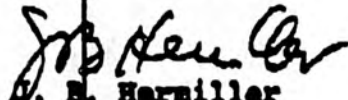
Representative Bill Hudson
March 15, 1991
Page 2

services. The amounts of such reduced requirements have not been determined. However, on the basis of Tesoro's current financial condition and available insurance coverage, and existing insurance coverage of owners of the vessel that Tesoro is using to transport its oil, Alyeska is confident that Tesoro will have no difficulty in arranging to meet such revised financial responsibility requirements.

"If the Alaska law ultimately adopted has a narrower exemption from liability for simple negligence than that provided by federal law, Alyeska will review the financial responsibility requirements of its contracts for initial oil spill response in light of the exposure to liability that remains under the new law. If substantial exposure to liability for simple negligence remains, Alyeska may not be able to reduce the financial responsibility requirements to a level that Tesoro can meet."

Please contact me or Mr. Richards if we may be of further assistance.

Sincerely yours,


D. B. Harniller
President

snk

cc: Gene Burden
Paul Richards

PACIFIC FISHERIES LEGISLATIVE TASK FORCE



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Senator Ron Betts/Specher

VICE CHAIRMAN
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EXECUTIVE DIRECTOR
Mary Morgan

PACIFIC FISHERIES LEGISLATIVE TASK FORCE RESOLUTION Concerning "Oil Spill Responder's Limited Immunity"

WHEREAS, it is in the interests of the citizens and resources of California, Oregon, Washington, Alaska, and Idaho to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to oil spills anywhere along our coastlines; and

WHEREAS, the success of the modern-day spill response organization depends upon countless fishermen, subcontractors, veterinarians, and other part-time specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities;

NOW, THEREFORE, BE IT RESOLVED by the Pacific Fisheries Legislative Task Force that the fishermen and other spill responders, who perform under adverse conditions to the best of their trained abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and

BE IT FURTHER RESOLVED, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in

cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and

FURTHER BE IT RESOLVED, where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damage caused by responder's simple negligence.

COPIES of this Resolution shall be transmitted to the Honorable George Bush, President of the United States; and Members of the United States Senate and the House of Representatives of Alaska, Washington, Oregon, California, and Idaho.

ADOPTED JUNE 16, 1990,
IN SITKA, ALASKA



Interoffice Communication

To D. L. Bowler
 From J. S. Haley
 Date February 26, 1991
 Subject Increased Cost to Milne Point Unit due to Alyeska's Oil Spill Response Service Agreement

Pursuant to a request from your office we have attempted to develop the additional costs to Conoco, the Overriding Royalty Interest Owners and the State of Alaska for Milne Point Unit production as a result of Alyeska's Oil Spill Response Agreement. The weighted average additional costs (which reduces the net-back value by an equal amount) are estimated as follows:

Increased costs/
(Reduced Net Back to Unit)

February 1991	\$3.69/Bbl
March 1991	\$0.39/Bbl
April 1991	\$0.10/Bbl*

*This number is not expected to continue in the future as it reflects a cycle in the markets that may not often be repeated. We expect this number to be higher in May and thereafter even under existing sales arrangements.

The above figures represent the volume weighted increased costs. These numbers represent our best estimate of the increased costs based on current contracts, some of which are tenuous at best, given the circumstances. We have been fortunate in selling our March and April production under terms that closely approximate pre-November 1990 sales. However, if we lost our best surviving market the cost per barrel could increase \$4.00 to \$5.00 per barrel or more over pre-November sales contracts. Our current market is very precarious and may be viewed as only a 30 day arrangement. Thus, it is imperative that we get some relief from the Alaska legislature to have any assurances that net-backs for Milne Point Unit crude are not significantly reduced because of implementation of Alyeska's Oil Spill Response Service Agreement.

The State of Alaska stands to share improved net-backs by the passage of the "Good Samaritan" law for companies shipping oil through Prince William Sound.

J. S. Haley
 JSH:it
 cc: J. R. Sverfoid
 D. R. Heinzer

FINANCIAL LOSS - STATE OF ALASKA

MILNE POINT ROYALTY - CURRENT STATUTE

Month	Loss M\$
1	0
2	317
3	37
4	10
5	43
6	422
7	436
8	450
9	424
10	432
11	427
12	450
TOTAL	3,448



April 10, 1991

CITY OF KENAI

"Oil Capital of Alaska"

210 Fidalgo Avenue
Kenai, Alaska 99611

TELEPHONE 283-7535

FAX 907-283-3014

Representative Bill Hudson, Chairman
House Oil and Gas Committee
State of Alaska
P.O. Box V
Juneau, AK 99811

RE: **[REDACTED] LIABILITY LIMITS FOR OIL CLEAN-UP
CONTRACTORS**

The City Council of the City of Kenai, at their meeting of April 3, 1991 unanimously stated their support of House Bill 196. The bill, as you are aware, is designed to afford limited immunity from lawsuits to citizenry groups responding to oil spills caused by another, unless the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death.

These groups consist of spill response contractors, countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared, on an emergency basis, to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information.

Exposure to unlimited liability in the course of response activities may deter responders from performing clean-up activities on behalf of the person or persons actually responsible for the spill.

The City Council of the City of Kenai supports House Bill 196 and encourages the Alaska State Legislature to pass this legislation. Where limitations on immunity are granted to responders, it is

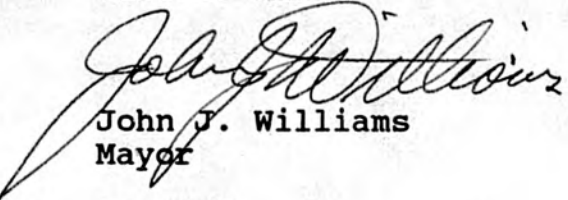
Representative Bill Hudson
April 10, 1991
Page 2

important that victims be fully protected and compensated for damages. The party responsible for the spill in the first instance should be liable for any damages caused by the responders' simple negligence.

Again, the City Council of the City of Kenai supports this legislation.

Sincerely,

CITY OF KENAI



John J. Williams
Mayor

JJW/clf



David N. Lakin
Director of Government Affairs

March 1, 1991

Patrick J. Malone, Aide
Representative Mike Navarre
Alaska State Legislature
P.O. Box V
Juneau, Alaska, 99811

Dear Mr. Malone:

MSRC indeed supports efforts to amend Alaska's current responder immunity law.

Basically, we believe oil spill responders should receive limited immunity to encourage them to become involved and act boldly in the chaotic and risky business of oil spill response. We are attempting to have responder immunity provisions at least as protective as those contained in the Oil Pollution Act of 1990 (Section 4201), adopted by coastal states and certain other jurisdictions of the U.S. The federal statute provides immunity from removal costs or damages to anyone rendering care, assistance or advice consistent with the National Contingency Plan (NCP) or as otherwise directed by the federal on-scene coordinator. We also believe that responder actions in accordance with the directions given by appropriate state officials should be immune. This limited immunity would not pertain to acts of gross negligence or willful misconduct or to cases of personnel injury or wrongful death. Furthermore, the responsible party (i.e., the owner or operator of the vessel or facility) would be made liable for any damages for which immunity is provided to responders.

Below are the answers to the questions submitted in your letter of February 22, 1991. If you need any additional information regarding this or related spill response issues involving MSRC or responder immunity, please contact me.

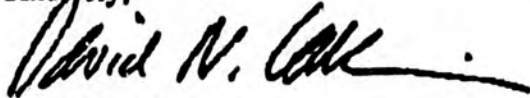
1. While no final decision has been made about whether MSRC will operate in Alaska, we consider the current state law to be a substantial disincentive to MSRC involvement. (We note however, that Alaska's statute predates the federal act). You should know that by resolution, our Board of Directors has reaffirmed the importance of state responder immunity provisions to the role MSRC could eventually have in a given state. As a national mutual benefit (not-for-profit) corporation, we must consider our total liability exposure so as not to jeopardize the entire national response system because of the laws of any particular state.

Mr. Patrick J. Malone
March 1, 1991
Page Two

2. Yes, four coastal states to date have adopted the federal immunity standard. In 1990, Florida, Virginia and Hawaii enacted such legislation. On January 31, 1991 the Governor of Delaware signed a similar law. Commissions and task forces in Alabama, Louisiana, Maine and Texas, which have closely examined the oil spill issue on a comprehensive basis, have all recommended the adoption of the federal responder immunity standard. So far this year, responder immunity legislation which tracks the federal law, has passed the state senates in Georgia and Mississippi. Our current information indicates the Oregon House Committee on Environment and Energy agreed to introduce the federal language as a committee bill on February 18.
3. California's comprehensive oil spill legislation contains the federal responder immunity provision. Unfortunately, it limits its time to a maximum of 90 days. Furthermore, there are several other provisions which we feel make it unsuitable for use as model state legislation.

I hope this information is helpful and provides with the background you need for Mr. Navarre to introduce his bill. As I stated before, if I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,



David N. Lakin
Director of Government Affairs

GSD/jlh



Key Questions About Limited Liability for Oil Spill Responders

1. Who are oil spill responders?

- The resources required to respond to a serious oil spill include a broad cross section of fishermen, barge operators, bird and animal rescue centers, spill response contractors and spill cooperatives. Each of these organizations and subcontractors need limited immunity if they are to be expected to respond unhesitantly to oil spills.

2. Why do spill responders need limited immunity?

- Without reasonable protection from liability, the countless private persons and organizations necessary to respond to a major oil spill will not be willing to participate unhesitantly in spill clean-up activities.

- Instead, like doctors intimidated by malpractice insurance costs, they will become inordinately concerned with the need for advice from their lawyers and the desire to have state or federal authorities clear every decision before proceeding. For many, the risk will simply be too great and they will decline to participate at all.

3. Why do spill responders need immunity now when they have been responding to spills for years without immunity?

- Since the Exxon Valdez spill, the costs and litigation exposure flowing from oil spills have escalated dramatically.

- Exxon and its responder Alyeska, for example, have spent nearly \$2 billion already and they face another \$3 to 5 billion in liability claims. With unlimited liability and uninsurable levels of exposure, the risks have become too high.

4. What is the "good samaritan" immunity provision being proposed?

- Under federal legislation and under the laws of the states of Florida, Virginia, and Hawaii spill response organizations (as distinct from those who are responsible for the spill) are not liable for removal costs or damages arising from their response activities, unless they act with gross negligence or willful misconduct, or cause personal injury or death.

- MSRC and the existing spill response organizations seek this same limited immunity for responders in the oil spill legislation before other state legislatures.

5. Are there precedents for this form of immunity?

- Yes. There are other examples of good samaritan immunity covering organizations like fire and police departments, emergency paramedics, medical personnel and others.

- In nearly every instance, the public policy justification for granting limited immunity is the same: the need to insure that highly trained personnel remain willing to respond unhesitatingly despite adverse and sometimes dangerous circumstances, and to ensure that they remain willing to make difficult decisions with less than complete information.

6. Doesn't granting limited immunity to the responder simply let the spiller off the hook thereby pushing the cost onto the innocent victim?

- To the contrary, where the responder is immune, the proposed amendment would expressly make the spiller liable both for its own spill related action and for the responder's acts or omissions as well.

- Moreover, where the spiller cannot compensate the injured party for its damages (e.g., where the spiller has been rendered bankrupt by the spill), the victim is compensated by the federal fund which is paid for entirely by the oil industry.

- Thus, the immunity provision works to allocate risk only as between the spiller and the responder; it does not deny the innocent victim full compensation.

7. Why should oil spill response organizations be granted limited immunity when those who handle hazardous waste disposal on land continue to operate without immunity?

- In the on-land hazardous waste response, the clean-up entity ordinarily has several weeks, if not months, to test, analyze and review appropriate response procedures before beginning clean-up operations.

- By contrast, in any major spill, the response organization literally has only a few hours to marshal its initial resources at the scene and to begin making outcome determinative decisions.

- These critical, time-sensitive decisions often must be made in the midst of nearly total chaos, adverse weather, fast moving currents, high seas and far less than complete information. Time is of the essence and there is no opportunity for the studied review available to the on-land hazardous waste response organization.

8. Why wouldn't the responders' concerns be satisfied by indemnification from the spiller?

- The concept of indemnification requires the defendant (responder) to exhaust all administrative and judicial remedies before the right to indemnification from the spiller arises. Given the high probability that negligence allegations will arise in nearly every catastrophic response, the responder's management would routinely be tied up in

years of time consuming and costly depositions, trial preparation and actual litigation before becoming eligible for consideration for indemnification.

- Moreover, a system which exposes the responder to these highly disruptive transaction costs will have an inherent chilling affect on responder's willingness to act boldly and decisively in future spills. Instead of rushing into the fray, responders will rush to their lawyers and await every opportunity to have some state or federal authority direct, and thereby insulate, their every move.

- Again, time is of the essence and responders must be encouraged to make difficult decisions under inordinately adverse conditions and with far less than complete information.

9. Won't limited immunity enable responders to be sloppy in the performance of their work?

- No. A sloppy or casual responder will quickly find that it has crossed the line between simple negligence, for which it is immune, and gross or willful negligence, for which it has no immunity.

- Oil spill response is fast becoming one of the most intensely monitored and regulated activities anyone can undertake. Federal, state and local authorities, not to mention the press, television, environmentalists, local fishermen and the public at large, monitor the responder's every move.

10. Isn't immunity just a special interest measure sought by the the oil companies that support the large spill cooperatives?

- No. While it is correct that some of the largest spill response organizations are funded by oil companies, the immunity is broadly supported by nearly everyone who wants to participate in the clean-up of spills caused by someone else.

- Throughout the country, local groups like fishermen bird rescue personnel are actively urging legislatures to grant immunity to those who respond to oil spills. Without immunity, they too cannot participate actively in oil spills without inviting unlimited and unacceptable liability exposure.

- Moreover, the U.S. Coast Guard and some environmental groups support responder immunity in recognition of the fact that without this provision, they will not have the resources needed to deal with oil spills.

- This growing call for responder immunity has been strongly and expressly endorsed by editorials in The San Francisco Examiner, the Wall Street Journal, and other newspapers all urging immunity be granted to oil spill responders.

A Model State Act Regarding Limited Immunity for Persons Responding to Oil Spills

proposed by the
Marine Spill Response Corporation

This model State Act makes State law consistent with new federal oil spill legislation that provides limited immunity from liability for removal costs and damages for those persons responding to an oil spill or the threat of an oil spill. The immunity applies if those activities are performed in a manner consistent with the Federal National Contingency Plan (NCP), or under the direction of the Federal On-Scene Coordinator (OSC) or the appropriate State official. Because the plans and orders may not cover every detail or eventuality of a spill response, actions that are in keeping with the overall objectives of the plans or Coordinator's orders are deemed to be within the scope of this Act.

Just as with response to fire, response to an oil spill must be immediate and decisive. Like firemen, oil spill responders cannot control the timing or location of their work. Both types of responders must take immediate action based on very limited information, attacking the problem quickly if there is to be any realistic chance of mitigating the worst harm. Limited immunity for firefighters has been long recognized because of these circumstances, and this bill extends similar protection to oil spill responders.

Without similar immunity, the enormous financial risks and liability exposures associated with spill response will deter those persons who are not responsible for the initial spill, such as cleanup contractors, fishermen, and barge owners, from prompt, aggressive cleanup, or even from any response at all. The United States Congress recognized the need to provide limited immunity to oil spill responders in the Oil Pollution Act of 1990. However, Congress did not preempt State oil spill liability laws, so a similar provision is needed in State law. Federal and State responder liability laws should be uniform. To respond decisively, responders must be able to act without being forced to consider the boundaries or interaction of varying liability regimes.

The liability for damages resulting from the oil spill cleanup efforts falls on the party responsible for the initial discharge, not on persons trying to help clean up or mitigate the damage. Under this bill, victims of oil spill damage will have a means of compensation. They may recover from the person responsible for the initial discharge or, where the responsible party is unidentified or unable to pay, from the federal Oil Pollution Fund (and, perhaps a State fund, if provided by State law). In addition, immunity for responders is limited. It does not extend to actions for personal injury or wrongful death, or for actions that rise to the level of gross negligence or willful misconduct.

Some States provide immunity only to those persons who do not charge for their services. Refusing immunity to persons who charge for their services in the context of catastrophic oil spills works to deny the public the benefit of cooperatives and subcontractors who have the expensive oil spill response equipment and trained personnel that are the key to mitigating damage from the spill, but who must be able to charge for their services in order to maintain their readiness. Volunteer responders have a role, too, but professional responders equipped with their equipment and training have the greatest likelihood of making a significant difference in the spill response. Thus, this act covers all responders, whether they volunteer or work for pay.

This draft State legislation was developed by the Marine Spill Response Corporation (MSRC), a nonprofit mutual benefit corporation organized exclusively to promote the welfare of the public by mitigating environmental damage to the coastal and certain upstream waters of the United States. This newly created organization seeks to establish a program to render its best efforts to contain and cleanup certain large oil spills beyond local response capabilities. It will use funds provided by the oil and shipping industries to build, staff and equip five regional response centers and numerous prepositioned equipment sites. Together with a host of other responders, MSRC hopes to dramatically improve this nation's ability to respond to large oil spills in coastal and tidal areas, in part through bold and decisive response to a spill event. Responder immunity is a critical requirement for that type of rapid response.

1 Section 1. *[Short Title.]* This act may be cited as the [State] Act Regarding Liability for
2 Persons Responding to Oil Spills.

1 Section 2. *[Definitions.]* For the purposes of this Act the term:

2 (1) "damages" means damages of any kind for which liability may exist under the laws
3 of this State resulting from, arising out of, or related to the discharge or threatened discharge
4 of oil.

5 (2) "discharge" means any emission (other than natural seepage), intentional or
6 unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting,
7 emptying, or dumping;

8 (3) "Federal On-Scene Coordinator" means the federal official predesignated by the U.S.
9 Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct federal
10 responses under subpart D, or the official designated by the lead agency to coordinate and direct
11 removal under subpart E, of the National Contingency Plan;

12 (4) "National Contingency Plan" means the National Contingency Plan prepared and
13 published under section 311(d) of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)),
14 as amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990);

15 (5) "oil" means oil of any kind or in any form, including, but not limited to, petroleum,
16 fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

17 (6) "person" means an individual, corporation, partnership, association, State,
18 municipality, commission, or political subdivision of a State, or any interstate body.

19 (7) "removal costs" means the costs of removal that are incurred after a discharge or
20 oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the
21 costs to prevent, minimize, or mitigate oil pollution from such an incident;

22 (8) "responsible party" means a responsible party as defined under § 1001 of the Oil
23 Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

1 Section 3. *[Exemption From Liability.]*

2 (a) Notwithstanding any other provision of law, a person is not liable for removal costs
3 or damages which result from actions taken or omitted to be taken in the course of rendering
4 care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed

Introduced by: Brown

KENAI PENINSULA CAUCUS

RESOLUTION NO. 91-5

A RESOLUTION OF THE KENAI PENINSULA CAUCUS CONCERNING "OIL SPILL RESPONDER'S LIMITED IMMUNITY."

WHEREAS, it is in the interest of the citizens of the State of Alaska and the Kenai Peninsula Borough to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to all spills; and,

WHEREAS, the success of a spill response organization depends upon spill response contractors as well as countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and,

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities.

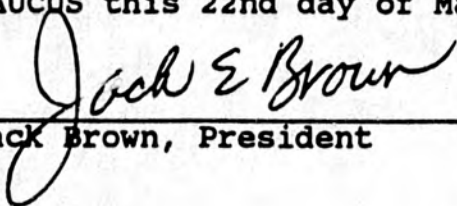
NOW, THEREFORE BE IT RESOLVED by the Kenai Peninsula Caucus that the spill response contractors, including fishermen, subcontractors and part-time professionals and specialists, who perform in response to an oil spill to be best of their abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and,

BE IT FURTHER RESOLVED, that the Kenai Peninsula Caucus supports and encourages Alaska State legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and,

FURTHER BE IT RESOLVED, where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damages caused by responder's simple negligence.

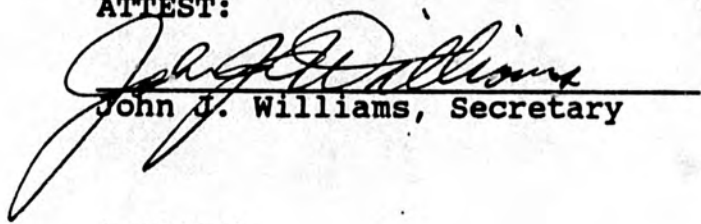
COPIES of this Resolution shall be transmitted to the Honorable Walter Hickel, Governor of the State of Alaska; and members of the Alaska House and Senate Resource Committees and Special Committees on Oil and Gas.

PASSED BY THE KENAI PENINSULA CAUCUS this 22nd day of March, 1991.



Jack Brown, President

ATTEST:



John J. Williams, Secretary

(3/8/91)

Introduced by: Brown, Superman
Date: April 16, 1991
Action: ADOPTED
Vote: UNANIMOUS

KENAI PENINSULA BOROUGH

RESOLUTION 91-37 (SUBSTITUTE)

A RESOLUTION SUPPORTING TESORO ALASKA

WHEREAS, the continued operation of the Tesoro Refinery is being threatened by an unreasonable demand by Alyeska management; and

WHEREAS, Alyeska is demanding Tesoro to secure a billion dollars insurance bond; and

WHEREAS, Tesoro Alaska has in good faith attempted to secure this bond; and

WHEREAS, Tesoro Alaska can provide a billion dollars of P and I insurance and Alyeska rejected this offer; and

WHEREAS, Tesoro Alaska contributes substantially to the tax base of the Kenai Peninsula Borough:

NOW THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

Section 1: That the Kenai Peninsula Borough Assembly urges the Alaska State Legislature to intervene on Tesoro's behalf and resolve this situation.

Section 2: That copies of this resolution be distributed to Governor Walter Hickel, the Alaska State Legislature, Tesoro Alaska and Alyeska.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH ON THIS
16th DAY OF April, 1991.


James W. Skogstad, Assembly President

ATTEST:


Acting Borough Clerk

Kenai Peninsula Borough
Resolution 91-37 (Sub
Page 1 of 1 Pages

CSHB 196 Background

SECTION E,
No. 6.1



Marine Spill Response Corporation
G. Stephen Duca
Vice President
Readiness and External Affairs

March 25, 1991

Representative Bill Hudson
Chairman
House Special Committee on Oil and Gas
Alaska House of Representatives
P.O. Box V
State Capitol
Juneau, Alaska 99811

Dear Mr. Chairman:

In your letter of March 6, 1991 addressed to our General Counsel Mr. Joseph E. Lees, you asked for **comments on HB 196**. We have carefully reviewed the bill. **Sections 1, 2, 3 and Sec. 5, (46.03.825) are of particular interest to MSRC.** In general, **MSRC supports state legislation that enacts a limited immunity for all oil spill responders as protective as the provision found in PL 101-380.** It appears that the intention of HB No. 196 is to accomplish this and therefore our comments are intended to help bring about this end. For your convenience I am enclosing model legislation on responder immunity that MSRC has prepared to assist states as they consider this legislative issue.

The language of H.B 196 concerns itself with "response action contractors", a defined term in the proposed legislation. **MSRC feels that limiting immunity to this category of responders is not in consonance with the intent of the legislation.** As noted in the bill/s preamble, limited immunity is needed because it is in the public interest to promote a bold, vigorous response during emergencies. Yet a "response action contractor" is a person who must act pursuant to a written contract or agreement to provide "response Actions". (See 46.03.826(15).) To assure themselves that they qualify for responder immunity however, they first have to assure that written contracts are in place. This could delay the response and thus by limiting immunity on the basis of a responders status as a "response action contractor", the state will limit the quality of the response needed during spills.

~~The language of Section 2 of the bill could be interpreted to make oil spill responders liable if a spill occurs from one of their vessels during response and cleanup operations. (See Sec. 46.03.822)). This is inconsistent with the stated purpose of the bill to provide responders with a limited immunity because they are required to act under emergency conditions. Oil spill containment vessels (barges, dracones, etc.) are a critical, integral part of a responder's offshore operations. To limit a responder's immunity with respect to such an important part of spill response operations renders all response operations hostage to the dangers of a simple negligence standard, rather than gross negligence or willful misconduct standard of the bill.~~

Specific comments, keyed to the draft bill, are provided in an additional enclosure. ~~In general these are clarifications of bill language to insure that:~~

- (1) all responders are provided with immunity irrespective of their status as operating under a contract, volunteer, etc.,
- (2) spills from response vessels will not convert the status of a responder to a responsible party.

Thank you for your opportunity to provide you with our insights into this important piece of legislation. Please don't hesitate to contact me if there is anything further you may need.

Sincerely,



G. S. Duca
Vice President
Readiness and External Affairs

Enclosures

A Model State Act Regarding Limited Immunity for Persons Responding to Oil Spills

proposed by the
Marine Spill Response Corporation

This model State Act makes State law consistent with new federal oil spill legislation that provides limited immunity from liability for removal costs and damages for those persons responding to an oil spill or the threat of an oil spill. The immunity applies if those activities are performed in a manner consistent with the Federal National Contingency Plan (NCP), or under the direction of the Federal On-Scene Coordinator (OSC) or the appropriate State official. Because the plans and orders may not cover every detail or eventuality of a spill response, actions that are in keeping with the overall objectives of the plans or Coordinator's orders are deemed to be within the scope of this Act.

Just as with response to fire, response to an oil spill must be immediate and decisive. Like firemen, oil spill responders cannot control the timing or location of their work. Both types of responders must take immediate action based on very limited information, attacking the problem quickly if there is to be any realistic chance of mitigating the worst harm. Limited immunity for firefighters has been long recognized because of these circumstances, and this bill extends similar protection to oil spill responders.

Without similar immunity, the enormous financial risks and liability exposures associated with spill response will deter those persons who are not responsible for the initial spill, such as cleanup contractors, fishermen, and barge owners, from prompt, aggressive cleanup, or even from any response at all. The United States Congress recognized the need to provide limited immunity to oil spill responders in the Oil Pollution Act of 1990. However, Congress did not preempt State oil spill liability laws, so a similar provision is needed in State law. Federal and State responder liability laws should be uniform. To respond decisively, responders must be able to act without being forced to consider the boundaries or interaction of varying liability regimes.

The liability for damages resulting from the oil spill cleanup efforts falls on the party responsible for the initial discharge, not on persons trying to help clean up or mitigate the damage. Under this bill, victims of oil spill damage will have a means of compensation. They may recover from the person responsible for the initial discharge or, where the responsible party is unidentified or unable to pay, from the federal Oil Pollution Fund (and, perhaps a State fund, if provided by State law). In addition, immunity for responders is limited. It does not extend to actions for personal injury or wrongful death, or for actions that rise to the level of gross negligence or willful misconduct.

Some States provide immunity only to those persons who do not charge for their services. Refusing immunity to persons who charge for their services in the context of catastrophic oil spills works to deny the public the benefit of cooperatives and subcontractors who have the expensive oil spill response equipment and trained personnel that are the key to mitigating damage from the spill, but who must be able to charge for their services in order to maintain their readiness. Volunteer responders have a role, too, but professional responders equipped with their equipment and training have the greatest likelihood of making a significant difference in the spill response. Thus, this act covers all responders, whether they volunteer or work for pay.

This draft State legislation was developed by the Marine Spill Response Corporation (MSRC), a nonprofit mutual benefit corporation organized exclusively to promote the welfare of the public by mitigating environmental damage to the coastal and certain upstream waters of the United States. This newly created organization seeks to establish a program to render its best efforts to contain and cleanup certain large oil spills beyond local response capabilities. It will use funds provided by the oil and shipping industries to build, staff and equip five regional response centers and numerous prepositioned equipment sites. Together with a host of other responders, MSRC hopes to dramatically improve this nation's ability to respond to large oil spills in coastal and tidal areas, in part through bold and decisive response to a spill event. Responder immunity is a critical requirement for that type of rapid response.

1 Section 1. *[Short Title.]* This act may be cited as the [State] Act Regarding Liability for
2 Persons Responding to Oil Spills.

1 Section 2. *[Definitions.]* For the purposes of this Act the term:

2 (1) "damages" means damages of any kind for which liability may exist under the laws
3 of this State resulting from, arising out of, or related to the discharge or threatened discharge
4 of oil.

5 (2) "discharge" means any emission (other than natural seepage), intentional or
6 unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting,
7 emptying, or dumping;

8 (3) "Federal On-Scene Coordinator" means the federal official predesignated by the U.S.
9 Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct federal
10 responses under subpart D, or the official designated by the lead agency to coordinate and direct
11 removal under subpart E, of the National Contingency Plan;

12 (4) "National Contingency Plan" means the National Contingency Plan prepared and
13 published under section 311(d) of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)),
14 as amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990);

15 (5) "oil" means oil of any kind or in any form, including, but not limited to, petroleum,
16 fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

17 (6) "person" means an individual, corporation, partnership, association, State,
18 municipality, commission, or political subdivision of a State, or any interstate body.

19 (7) "removal costs" means the costs of removal that are incurred after a discharge or
20 oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the
21 costs to prevent, minimize, or mitigate oil pollution from such an incident;

22 (8) "responsible party" means a responsible party as defined under § 1001 of the Oil
23 Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

1 Section 3. *[Exemption From Liability.]*

2 (a) Notwithstanding any other provision of law, a person is not liable for removal costs
3 or damages which result from actions taken or omitted to be taken in the course of rendering
4 care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed

5 by the Federal On-Scene Coordinator [or by the State official with responsibility for oil spill oil
6 response].

7 (b) Subparagraph (a) does not apply--

8 (1) to a responsible party;

9 (2) with respect to personal injury or wrongful death; or

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

11 (c) A responsible party is liable for any removal costs and damages that another person
12 is relieved of under subparagraph (a).

13 (d) Nothing in this section affects the liability of a responsible party for oil spill
14 response under State law.

Enclosure (2)

PAGE/LINE

REMARKS

1/1

Delete "civil". Statutes generally provide specific penalties for acts that are deemed to be criminal offenses. Removing the word "civil" clarifies the intent of the statute.

1/1-2

Delete "response action contractors" and replace it with "responders". ("Responder(s)" should be used wherever "oil spill contractor(s)" appears in the bill.) All responders to an oil spill need to have a limited immunity as they go about the work of responding to and mitigating the effects of a release, whether or not they have a response action contract. The basis for this limitation rests upon the need for bold, vigorous action in the face of the emergency conditions, lack of information/conflicting information, the responder's inability to control essential elements that directly affect his operations, such as the weather during a spill and the limitations of technology on the efficacy of the operations that he is able to undertake. For example bird/animal rescue and community volunteers face the same category of problems as those responding to the spill with mechanical cleanup capabilities.

2/21

"limiting the liability of innocent" should be changed to, "providing a limited immunity to".

2/22-23

Delete, "are...spill." and replace with, "do not constitute gross negligence or willful misconduct and are consistent with the National Contingency Plan (NCP) or as otherwise directed by the President or by a State official with responsibility for oil spill response. This immunity does not apply to cases of personal injury or wrongful death."

3/8-11

This subparagraph appears to make the responder liable for releases of hazardous materials from one of his vessels (barges, dracones, etc.) engaged in receiving recovered oil/oily wastes that would be categorized as hazardous substances. The collection of recovered oil/oily debris is a critical, integral task in the response and cleanup operational scenario. To limit his immunity with respect to such an important part of spill response operations renders all response operations hostage to

the dangers of a simple negligence standard, rather than gross negligence or willful misconduct standard of performance of the bill.

- 3/12-17 This sub-section also appears not to provide a limited immunity for a critical portion of response and cleanup operations. (See previous remarks for supporting rationale.)
- 4/8 Given the complexity of Alaska's liability laws, it is important that the immunity provision be begin with the phrase, "Notwithstanding any other provision of law,".
- 4/9-11 "act...coordinator". Recommend replacement of this portion of the bill with, "who renders care, assistance or advice for a release or threatened release of oil that is consistent with the National Contingency Plan (NCP) or as otherwise directed by the President or by the state official with responsibility for oil spill response." See previous remarks for supporting rationale.
- 4/15-17 This sub-section also appears not to provide a limited immunity for a critical portion of response and cleanup operations. Section 46.03.825(a)(1) provides an exception to responder immunity if the response action contractor would have been liable for the release or threatened release under state of federal law even "if that contractor had not carried out a response action" with respect to the release or threatened release. This section may simply be trying to prevent the spiller from taking advantage of the immunity. However this provision could apply to non-spiller responders too. For example, there may be liability under the Alaska law for a person who fails to comply with the terms and conditions of a response action contract of a remedial action plan, or a contingency plan. Thus, if a responder has a contract with a potential spiller to respond in a certain way, then under the state law the contractor must respond in accordance with the contract. This could make the responder liable for the release "if that contractor had not carried out a response action". As a result, the responder may be denied immunity.

4/after 21

Recommend add a provision that makes the responsible party liable for removal costs and damages that another person is relieved of under this section of the bill. (See MSRC model bill.)

North Peninsula Chamber of Commerce

P.O. Box 8053

Nikiski, Alaska 99635
NORTH PENINSULA CHAMBER OF COMMERCE

(907) 776-8369

FROM 907 659 8308

RESOLUTION

A RESOLUTION SUPPORTING OIL SPILL RESPONDER'S LIMITED IMMUNITY

WHEREAS, it is in the interest of the citizens of the State of Alaska and the Kenai Peninsula Borough to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to all spills; and

WHEREAS, the success of a spill response organization depends upon spill response contractors as well as countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities;

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF THE NORTH PENINSULA CHAMBER OF COMMERCE:

Section 1: That the spill response contractors, including fishermen, subcontractors and part-time professionals and specialists, who perform in response to an oil spill to the best of their abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and

Section 2: That the North Peninsula Chamber of Commerce supports and encourages Alaska State legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and

90.08.17 11:35

CSHB 196 Background

SECTION E,

No. 9

North Peninsula Chamber of Commerce

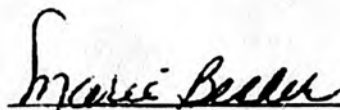
P.O. Box 8053

Nikiski, Alaska 99635

(907) 776-8369

Section 3: That where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damages caused by responder's simple negligence.

ADOPTED BY THE NORTH PENINSULA CHAMBER OF COMMERCE ON THIS
7th DAY OF March, 1991.


Marie Becker, President of THE
NORTH PENINSULA CHAMBER OF COMMERCE

FROM 907 659 8369

90.08.17 11:35



Please enter into the record my testimony to the

Resources

committee name

committee on

H.B. 196

dated

4-10-89

bill/subject

I've watched Tesoro's growth over the years and know how important they are to the peninsula and the state. I'm concerned about environmental protection and think that the Spill Responder should commence actions immediately. I also understand that Tesoro has no other source of crude oil feed to their refinery than through shipping via Elversor Washington from Valdez to Nikiski and that Alaska is demanding \$1 Billion in Insurance or cash that Tesoro can't meet. If Alaska does not change this requirement they (Tesoro) could be put out of business. I support a law that will treat Spill Responders like other emergency Responders. Tesoro has always made an effort to keep the area informed of their problems and projects. They have good credibility in our community and have a major impact on the economy here.

I strongly urge the Resources Committee to pass this Bill on and do everything possible to get it passed this session.

Signed:

Maki Beeler

Testifier

Public

Representing (Optional)

P.O. Box 8205

Address

Nikiski, Alaska 99635

Phone No.



Oil Reform Alliance



ORA/UFA JOINT POSITION PAPER

ON HB196

by Riki Ott

The Oil Reform Alliance and United Fishermen of Alaska are strongly opposed to the intent of HB196. We think a bill that reduces the state's liability standards for response action contractors (RACs) is both unnecessary and undesirable.

Our biggest concern with HB196 is that it weakens laws passed only last year, laws designed to strengthen oil spill prevention and response incentives. Alaska's current liability standard offers more protection to the public than the federal government's standard of gross negligence. The right of states to set higher standards than the federal government is a key provision of the Oil Pollution Act of 1990 (OPA90) and this right should not be dismissed lightly.

If HB196 is viewed from the perspective of fishermen and communities as victims, the inadequacies of this bill become apparent. HB196 effectively places another hurdle across the path of victims trying to get compensation for damages caused by a catastrophic oil spill. Further, it shifts the liability of spill response from RACs to taxpayers.

It is questionable whether someone can assume another's liability. The spiller retains the right to argue that they are not liable. The burden of proof, under HB196, lies with the "person bringing a claim against the RAC" (CS HB196 pg. 6, lines 19-20). Until the case is settled in a court of law, the victim remains uncompensated.

Arguments in favor of this bill state that Alaska's legal atmosphere and liability exposures that discourage new cleanup contractors from entering the state. But factually, the number of RACs has increased significantly since Exxon Valdez spill. In Alaska, RACs could also get the same cover of protection that they seek in HB196 by indemnification through contingency plans.

Tesoro's plea for immunity from Alaska's liability standards does not stem from a problem with existing law; rather, it stems from Alyeska's requirement of a one billion dollar direct action bond from all parties regardless of size. Last session countless hours were spent tailoring HB567 for both large and small operators. If Alyeska restructured its bonding requirement, Tesoro's problems evaporate.

Conoco's testimony of their recent response to a spill with an unknown responsible party is misleading. Conoco implied that "volunteer" response, in cases where the spiller is either unknown or insolvent, would be limited in the future unless RACs were immunized.

However under existing law, if the spiller is unknown or insolvent, the state assumes control of the cleanup - and reimburses RACs for reasonable expenses. It is important to realize that Conoco did respond to a spill with an unknown responsible party under existing law with existing liability standards.

Liability protection for small RACs, such as fishermen or communities, can be achieved through contractual indemnification. The problem with strict liability as perceived by Tesoro, Conoco, and even the community RACs simply does not exist.

Alaska's strict liability standard was watered down in 1989 by the legislature so RACs would be liable for injuries caused by their own response actions only if they were negligent or engaged in intentional misconduct. Under existing law, to show negligence by a RAC, a claimant must show that the acts or omissions of the contractor under the response action contract was not in accordance with generally accepted professional standard and practices at the time their response action services were performed (AS 46.09.823(a)).

Existing law provides ample protection for RACs and marginal protection for the public. To further weaken the state's liability standard would be a grave and regrettable step away from the lessons learned from the Exxon Valdez spill.



UNITED FISHERMEN OF ALASKA

Greg Seider
Executive Director

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Alaska
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Eliason
Zurloff
Davieson
Nauwne

PACIFIC FISHERIES LEGISLATIVE TASK FORCE



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Assemblyman Carl Meyer
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EXECUTIVE DIRECTOR
Mary Morgan

PACIFIC FISHERIES LEGISLATIVE TASK FORCE RESOLUTION Concerning 'Oil Spill Responder's Limited Immunity'

WHEREAS, it is in the interests of the citizens and resources of California, Oregon, Washington, Alaska, and Idaho to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to oil spills anywhere along our coastlines; and

WHEREAS, the success of the modern-day spill response organization depends upon countless fishermen, subcontractors, veterinarians, and other part-time specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities;

NOW, THEREFORE, BE IT RESOLVED by the Pacific Fisheries Legislative Task Force that the fishermen and other spill responders, who perform under adverse conditions to the best of their trained abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and

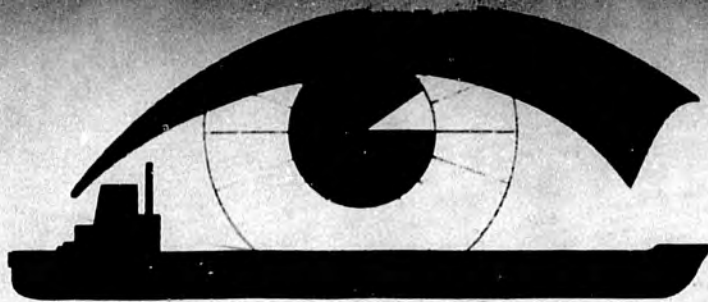
BE IT FURTHER RESOLVED, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in

cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and

FURTHER BE IT RESOLVED, where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damage caused by responder's simple negligence.

COPIES of this Resolution shall be transmitted to the Honorable George Bush, President of the United States; and Members of the United States Senate and the House of Representatives of Alaska, Washington, Oregon, California, and Idaho.

ADOPTED JUNE 16, 1990,
IN SITKA, ALASKA



REGIONAL CITIZENS' ADVISORY COUNCIL

WHAT IS THE REGIONAL CITIZENS' ADVISORY COUNCIL (RCAC)?

The Regional Citizens' Advisory Council (RCAC) was established in response to the Exxon Valdez oil spill to be a regional citizens' oversight organization. Alyeska Pipeline Service Company, the operator of the Trans Alaska Pipeline Terminal at Valdez, worked cooperatively with the citizens affected by the spill to form RCAC. Members include:

Communities in the affected area:

- City of Cordova
- City of Homer
- City of Kodiak
- City of Seldovia
- City of Seward
- City of Valdez (2)
- Kodiak Island Borough
- Kenai Peninsula Borough
- Alaska State Chamber of Commerce
- Chugach Alaska Corporation
- Cordova District Fishermen United
- Kodiak Village Mayors Association
- National Wildlife Federation
- Prince William Sound Aquaculture Corp

HOW WAS RCAC ESTABLISHED?

After the spill, the state required Alyeska to submit an aggressive new prevention and response (contingency) plan. The Alaska Oil Spill Commission had strongly recommended increased citizen involvement.

CSHB 196 Background

**SECTION E,
No. 12**

RCAC emerged from this process, incorporating as a nonprofit to insure independence. The resulting contract with Alyeska requires that it provide an annual budget of \$2 million for "as long as oil flows through the line" and ready access to all its facilities. The federal Oil Pollution Act of 1990 reinforced this action and specified terms.

WHAT IS THE STRUCTURE OF RCAC?

A sixteen-member board and staff accomplishes its goals primarily through three working committees:

- *Port Operations and Vessel Traffic Systems (POVTS)*
- *Oil Spill Prevention and Response (OSPRC)*
- *Terminal Operations and Environmental Monitoring (TOEM)*

Additionally, a *Scientific Advisory Committee (SAC)*, comprised of scientists and technical experts, reviews research proposals and advises the working committees and the council on technical issues.

The contract specifies that RCAC committees will perform:

- *independent research and monitoring of oil spill prevention and response efforts*
- *tanker safety*
- *environmental effects of terminal operations.*

RCAC uses this information to develop recommendations for environmental safeguards to Alyeska and government regulatory agencies.

THE RCAC IS INDEPENDENT OF ALYESKA

"The Council is willing to participate in the citizens' advisory process for the public and Alyeska on a permanent basis only on the conditions that it be truly independent from Alyeska and that Alyeska provide the Council with a permanent source of adequate funding." (Alyeska/RCAC contract)

WHY IS RCAC NEEDED?

A major lesson learned from the Exxon Valdez spill is that oil transportation is a risky business, and the people who bear the burden of

that risk must be involved at all levels of decision making. No substitute exists for local knowledge experience and commitment. Often we have been adversaries working against one another rather than citizens' cooperatively seeking progress and improvements.

STATUS AND UPDATE ON COMMITTEE ACTIVITY:

Oil Spill Prevention and Response Committee (OSPRC)

- Alyeska C-Plan Comments: To date, the OSPRC has provided comments on Appendix A. Scenarios, Appendix D. Training, and Appendix E. Community and Fishing Vessel Involvement. The Council has approved all three sets of these comments.
- State 1991 Response Plan for Exxon Valdez Oil Spill: OSPRC drafted comments on this plan and the council approved them.
- State Oil and Hazardous Materials Substance Discharge Prevention and Contingency Plan Comments: The committee provided comments to DEC on their draft Prevention and Contingency Plan and hired two experts to comment also. DEC requested additional comments and assistance from OSPRC to refine the plan in greater detail due to the caliber of comments and demonstration of commitment.
- Transition Issue Resolution: OSPRC drafted a resolution expressing concern with the 72-hour transition and nearshore response issues for address by the council. This position is being used by RCAC representatives in the Alyeska Contingency Plan Steering Committee and its working groups.
- Alyeska Contingency Plan Steering Committee and Working Groups: OSPRC members are actively involved in the technical working groups under the Steering Committee. Members work with others to improve the contingency plan. OSPRC members sit on the dispersants/burning/bioremediation, oily waste and the nearshore protection, and beach cleanup working group.
- "Safe Spill" Literature Search and RFP: Members of the committee supported a literature search for "Safe Spill," a non-toxic, biodegradable crude oil substitute. Currently, the draft RFP is in the final stages of development and should be forwarded to the council by the March 21-23 meeting.

- **White Papers:** The committee is contracting for white papers and briefings in several key areas and has identified potential experts for papers on small-boat technology, risk assessment, and bioremediation. The ECO risk assessment contract, which analyzes the Alyeska Risk Assessment Document by Technica, is under way. The small-boat technology contract was recently finalized and should be completed by May.

Port Operations and Vessel Traffic Systems Committee (POVTS)

- POVTS reviewed proposed changes in the Vessel Traffic System and a letter has been sent to the Coast Guard requesting information regarding its decision to utilize a dependent surveillance system in Prince William Sound.
- Vessel escort procedures have been reviewed, and letters have been sent to shipping agencies and pilots seeking their views on the desirability of having a tug attached during a portion of the transit. A subcommittee will address this issue. Its members have observed the operation of tractor and conventional tugs in Puget Sound March 1, 2, and 3 and will report its findings to the council.
- POVTS committee commissioned Jim Dickson, safety officer at the Sullom Voe Harbor Authority, Shetland Isles, to develop a document which identified oil spill prevention actions that are appropriate to Alaska and Prince William Sound. RCAC recently received the second draft of his report, and it is being circulated for public review through April 22, 1991.
- POVTS reviewed the proposed Coast Guard regulations pertaining to the requirement for double hulls on tankers drafted a position paper and submitted it to the council for its endorsement and support.

Terminal Operations and Environmental Monitoring Committee (TOEM)

TOEM opened an office in Valdez last month. Current activities include:

- Setting up a series of public meetings in the communities of Prince William Sound to identify the public's environmental concerns about oil industry activities. These meetings will likely take place in late April or early May.

- Soliciting a critical analysis of the design and modeling of Alyeska's air monitoring program in the Valdez area.
- Hiring a consultant to complete an inventory of actual and potential sources of environmental pollution stemming from terminal and tanker operations. These issues will be catalogued in a computerized "matrix" for ready access.
- Drafting a request for proposals for a report on the likely fate and effects of hydrocarbons emitted into the air during tanker loading at the Alyeska terminal. If warranted, the next step would be an actual field study.
- The ultimate task of the committee is to physically monitor effects on the environment caused by oil industry activities in Prince William Sound. This comprehensive environmental monitoring program is a significant scientific undertaking that will require extensive field work over several years. Most of what the committee is doing now is in preparation for this task.

Scientific Advisory Committee (SAC)

- SAC has established request for proposal procedures, completed a biological monitoring and socioeconomic modeling RFP for RCAC approval and has reviewed the OSPRC's "safe spill" RFP.

All committees meetings are open to the public, and in 1991 committees plan to hold their meetings in member communities to keep the public involved and informed.



SIERRA CLUB

CALIFORNIA

April 21, 1990

To: The Honorable Members of the Senate Judiciary Committee

From: Gordon E. Hart

Re: SB 2040 (Keene)

Although the Sierra Club does not yet have a position on SB 2040, we have been participating fully in negotiations with the author and the affected industries for over three months. Because of the substantial progress which has been made in these negotiations, we support the bill's passage out of the Judiciary Committee at this time, in order to further the negotiations.

The principal controversial issues in the negotiations which are before the Judiciary Committee relate to immunity for responders, and criminal penalties for spillers. With respect to criminal penalties for spillers, we strongly support the bill's current inclusion of criminal sanctions for spillers who reasonably should have known that they were discharging or spilling oil. We have, in the spirit of compromise, supported a variety of relaxations in the penalty section of the bill. This last relaxation sought by industry and resisted by the author would be unacceptable. Criminal sanctions are constitutional even if triggered to a strict liability standard. Although we would prefer a strict liability approach, we can accept the "reasonably should have known" standard, which imposes upon operators an appropriate, and critical, duty to regularly and diligently inspect their operations.

Because unnecessary impediments to expeditious oil spill response should be minimized, we support the concept of immunizing spill responders by passing through their liability to the spiller, under the following conditions: none of the spiller's original liability is in anyway reduced, and there are adequate assurances that all damages will be paid, and that the injured parties can be made whole. We are convinced that it is possible to draft language which meets these conditions, and we would support the inclusion of such language in SB 2040.

The issue of ensuring that injured parties can be made whole is intimately linked to the issue of the size of the oil spill response fund, which will be considered in the Appropriations Committee. In all of the various immunity proposals we have reviewed, there are a certain number of scenarios where damages must be paid from the oil spill response fund in order for the injured party to be made whole. We do not have a difficulty with

SB 2040, p.2

the limited use of the fund for this purpose, but we are very concerned that the fund is not large enough in the current language of the bill to assure that all damages can be paid. SB 2040 limits total payments, from the "upfront" fund, or the additional borrowing authority, to 500 million dollars. Since, in certain cases, the administrator will be assuming the obligations and liability of unknown or insolvent responsible parties, the 500 million dollar fund limitation imposes a de facto liability cap on those types of spills.

Since economically deprived fishermen and merchants, injured wildlife and obliterated habitat do not disappear simply because the spiller happens to be unknown or insolvent, we believe that the borrowing authority which supplements the 150 million dollar fund must be unlimited. In all potential oil spill scenarios, we must ensure that all injured parties can be made whole. The inclusion of responder immunity language therefore makes it doubly important to keep the borrowing authority unlimited.

We greatly appreciate Senator Keane's willingness to include us in these negotiations, and we look forward to continuing in the effort to provide the California Coast with the type of protection it deserves.

March 20, 1991

Senator Lloyd Jones
Chair, Senate Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Subject: Your Letter of Inquiry dated March 18, 1991
regarding CSHB 196

Dear Senator Jones:

Thank you for your interest in the potential impacts of CSHB 196 on our operations. Tesoro views the benefits from this bill to fall into two categories:

1. Broad Public Benefits

HB 196 will actually enhance the effectiveness of spill responders and will bring Alaska up to standards comparable with that adopted by many coastal states during the past year. Many of the general benefits of the bill have been communicated in previous correspondence and meetings. The major effect will be to make emergency spill response services available with terms that operations such as Tesoro can meet.

2. Specific Benefits to Tesoro

Tesoro operates a 80,000 bpd refinery at Kenai which relies on Alaska North Slope Crude Oil (ANS) for 90% of its feedstock. Approximately 45,000 bpd of this oil is purchased directly from the State. This oil is transported from Valdez to Kenai on the "Overseas Washington", a double bottom tanker chartered by Tesoro. In order to operate in Alaska waters the vessel must have a Oil Spill Contingency Plan. The availability of resources necessary to obtain approval of the Plan in Prince William Sound means that Tesoro must contract with Alyeska for the initial response services. Alyeska, as a Response Action Contractor, has established a requirement for \$1 Billion in directly actionable financial responsibility as a condition for making the necessary response services available. Tesoro has an estimated value of \$200 Million and is not able to provide this level of financial responsibility. Passage of HB 196 is expected to make it possible for Tesoro to reach a long term agreement for these vital spill response services.

The negative impact of failing to get this legislation passed is expected to include costly, and time consuming litigation between Tesoro and Alyeska with no guarantees to Tesoro that the outcome will result in a requirement Tesoro could meet. Tesoro's ability to maintain uninterrupted operations is threatened in the

Senator Lloyd Jones
March 20, 1991
Page 2 of 3

absence of an agreement with (or successful legal action to compel) Alyeska to provide the spill response services. There are no alternative crude oil supplies available to Tesoro. An interruption in operations could have significant impacts on the Company as well as the State of Alaska in the areas of PEOPLE, TAX BASE LOSS, and FUEL SUPPLY INTERRUPTIONS.

PEOPLE

Tesoro employees 222 people in the state with annual payroll of approximately \$11.6 Million. In addition Tesoro is the majority owner of Interior Fuels in Fairbanks with 26 employees and is a joint venture partner in Northstores Ventures which operates 7-11's in Alaska with 325 employees. The combined payroll of these 573 employees is approximately \$17.5 Million.

TAX BASE COST

Tesoro is also a major component of the Kenai Peninsula tax base with the most recent year's tax payment for Ad Valorem taxes of \$1.383 Million. The company is a major contributor to numerous civic and social organizations in the state and our employees are very active contributors of time and resources in the communities in which we operate.

FUEL SUPPLY INTERRUPTIONS

An interruption in Tesoro's operations would have immediate impacts on a large segment of Alaska. Tesoro is one of the largest suppliers of home heating oil; jet fuel, and gasoline. The enclosed charts illustrate the percentage of the Alaska market that is supplied by Tesoro products.

Gasoline Supplies

Tesoro supplied approximately 63% of the gasoline consumed in the State of Alaska during 1990. The gasoline is marketed by Tesoro's 120+ stations (including 7-11's), Chevron, and Texaco in South Central Alaska and the Interior.

Jet Fuel

Approximately 29.6% of 1990's Jet Fuel delivered in Alaska was manufactured by Tesoro. The international cargo operations, as well as passenger traffic of Anchorage International, would be threatened until alternative fuel supplies could be arranged for shipment via tanker to Anchorage. This product presently is

Senator Lloyd Jones
March 20, 1991
Page 3 of 3

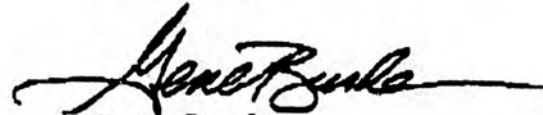
delivered to Anchorage via Tesoro's pipeline between the Refinery and Anchorage. The availability of an uninterrupted supply of jet fuel has contributed to the development of Anchorage as an international hub for cargo traffic.

Diesel

The Alaska fishing industry and home heating customers rely heavily on diesel fuel manufactured by Tesoro. During 1990 approximately 22.3% of the diesel fuel sold/distributed in Alaska was Tesoro's. The diesel and home heating fuel is distributed from Western Alaska to North Western Alaska including many interior locations.

The passage of CSHB 196 will contribute to the resolution of a difficult problem for our company that has significant implications to the State of Alaska. Again, I appreciate your interest and will be available to discuss these matters at your convenience.

Sincerely,

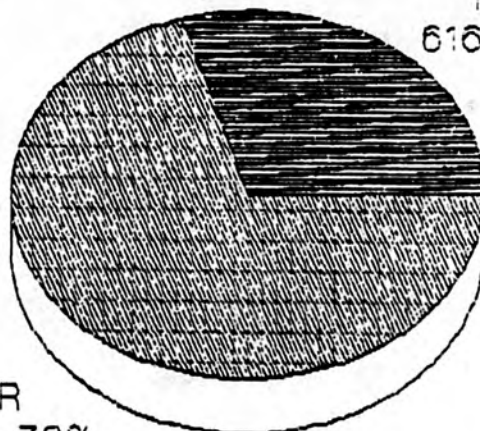


Gene Burden
Vice President -
Environmental &
Government Affairs

Enclosures

TESORO

JET FUEL SALES CY 1990 (BBLs)



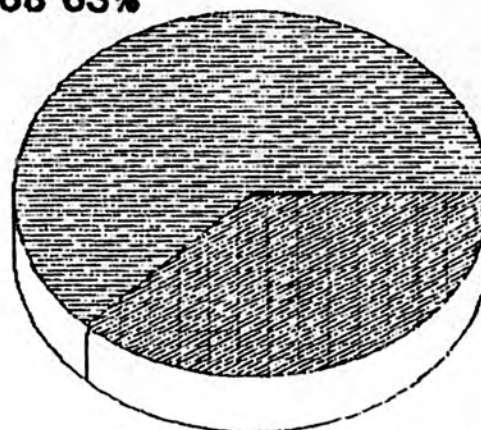
TESORO
6160073 30%

OTHER
14633650 70%



**GASOLINE FUEL SOLD IN ALASKA
(BBLs) CY 1990**

TESORO 3805168 63%



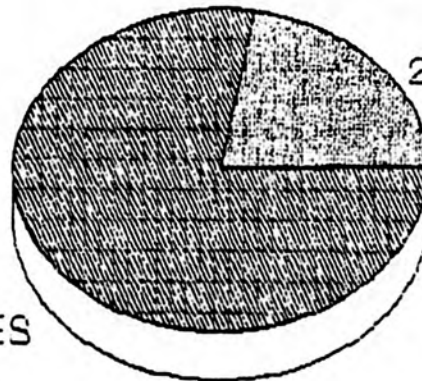
OTHER SOURCES 2265431 37%



DIESEL SALES IN ALASKA (BBLs) CY 1990



HOME HEATING OIL



TESORO
2660325 22%

OTHER SOURCES
9254077 78%

MARINE & FISHING FLEETS




UNITED COOK INLET DRIFT ASSOCIATION

P.O. Box 4049 KENAI, ALASKA 99611

(907) 283-3600

283-3600

FAX (907) 283-3306

**UCIDA OPPOSES HB 196 & ITS OBJECTIVE OF LOWERING
FURTHER LIABILITY STANDARDS FOR RAC'S**

April 2, 1991

1. In both 1989 & 1990 the Alaska legislature lowered the standard of liability for RAC's from the normal standard of "strict liability", i.e. liable for whatever injuries the person caused, whether he was negligent or not.

Presently

1. RAC's are ONLY liable if they are negligent or engaged in intentional misconduct.

2. RAC's are ONLY liable when his or her own acts or omissions cause injuries.

3. In 1989 legislature stated that:

"To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time their response action services were performed."

standards and practices at the time that response action

4. Negligence is found ONLY when it would be unreasonable to act as the liable party did, in the circumstances surrounding the response action.

CHANGED → 5. As proposed, the RAC would be immunized from liability for rogue actions taken that were contrary to applicable plans and orders of the agency directing the response.

Current standards are sufficient to cover the liability exposure of all RAC's - including fishermen and local communities

Then Matthews
Then Matthews

Post-It™ brand fax transmittal memo 7671	
To: <i>UFA-R-PR</i>	From: <i>UCIDA</i>
Co.:	Co.:
Dept.:	Phone #:
Fax #:	

CSHB 196 Background

**SECTION E,
No. 15**



UCIDA

UNITED COOK INLET DRIFT ASSOCIATION

P.O. Box 4649 KENAI, ALASKA 99611

(907) 283-3600

FAX (907) 283-3306

April 23, 1991

Representative Dave Donley
House Judiciary Chair

CSHB 196 Background

SECTION E,
No. 16

Dear Rep. Donley,

United Cook Inlet Drift Association (UCIDA) represents some 400 of the 585 Cook Inlet salmon drift permit holders. UCIDA would like to express our continued opposition to CS for House Bill No. 196 which was reported out of House Resources.

You have already received two presentations we made to House Resources on April 10 and April 16, 1991. Rather than repeat our positions we will try and briefly summarize:

1) Current liability statutes for RACs in fact do comprise Good Samaritan concepts. In 1989 and again in 1990, the legislature limited RAC liability. RACs are currently liable only for their own acts or omissions which cause damages if those acts or omissions "were not in accordance with generally accepted professional standards and practices at the time their response action services were performed." (AS 46.03.823(a)).

2) Current liability statutes constitute good public policy in balancing the public's interests and the legitimate concern of RACs. Under current legislation, damaged parties are not covered under all possible scenarios. This fact is outweighed, in part, by the public good that is served by a prompt response by RACs doing their best - i.e. "performing in accordance with generally accepted professional standards ... etc."

3) CS for HB 196 does not address the issue that is driving this legislation - bonding requirements by Alyeska - the "Seven

illusion that this is anything other than strong arm tactics by Alyeska aimed at lowering its own liability standards.

Recently, RACs other than Alyeska have jumped on the band wagon. It is only natural for any private enterprise to seek to insulate itself as much as possible from any liability for its actions. We would remind the committee that there has never been a spill in Alaska for which a RAC could not be found. Indeed, RACs fell all over themselves to get a piece of the action after the Exxon Valdez spill. Finally, in this regard, to the best of our knowledge the only RAC alleged to have acted negligently during the Exxon Valdez was Alyeska.

Alyeska has made statements referring to the "simple negligence" standard and how if it responds according to its plan with the state, but loses some oil from a boom, it could be held liable (Clarion 4/18/91, enclosed). This leads us to conclude that Alyeska either has not read AS 46.03.823(a) or that they are not prepared to fully inform the public about current state statutes.

It is obvious who stands to benefit from the lowering of RAC liability standards. The other side of the coin is that the cost of damages will shift to someone else.

Who may suffer? Since "strict liability" for an RAC's own acts or omissions has been already removed by current legislation for most instances, injured parties currently must show negligence - i.e. currently litigation is necessary to show that the RAC did not act "in accordance with generally accepted professional standards ...etc."

CS for HB 196 purports to place liability for the acts or omissions of a RAC for which the RAC is not liable under AS 46.03.823 (gross negligence) on the party strictly liable for the spill as defined in AS 46.03.823(a).

UCIDA has some doubt about the responsible party being forced to assume liability for damages caused by a RAC not directly under its control, let alone the actions of 2nd & 3rd party RACs or volunteers.

Indeed, it is somewhat surprising that attorneys for those owners who might be held strictly liable for the release are not very actively opposing this shift of liability on to their clients.

However, if we concede that it may be possible to shift this legal liability to "responsible parties strictly liable" for the release, UCIDA contends that for negligent acts by RACs, victims will often have no practical or legal resource for compensation for the following reasons:

- A) The responsible party may be unknown.
- B) The responsible party may have few if any assets.
- C) Under AS 46.03.758 3(h), the responsible party is not liable for civil penalties if the discharge occurred solely as a result of:
 - 1) An act of God,
 - 2) An act of a third party with whom the person charged has not been made jointly & severally liable,
 - 3) A negligent or intentional act of the state of Alaska or the United States, or
 - 4) An act of war

Finally, UCIDA understands the provisions found in the Federal Oil Pollution Act of 1990 (Sec. 4201) are being cited as precedents for the present legislation. Federal legislation of this type represents the lowest common denominator in terms of liability standards. Alaska and many of its fishing organizations, including UCIDA, fought long and hard to maintain the state's rights to craft legislation and set liability standards higher than the federal standards. The House Senate Conference Committee which drafted this legislation was not receptive to input from the public with respect to limiting industry liability.

In conclusion:

1) Tesoro has a legitimate concern with its bonding requirements, and UCIDA requests that to the extent possible this legislation be recrafted to address the bonding issue.

2) Legislation probably cannot be expected to resolve this dispute between members of the private sector.

U.S. Department
of Transportation
United States
Coast Guard



Commander
Eleventh Coast Guard District

Union Bank Bldg.
488 California
Long Beach, CA 90802-4300
Staff Symbol (d)

Ph: (213) 499-5201

5090

AUG 28 1990

The Honorable Willie L. Brown Jr.
Speaker, California State Assembly
State Capitol
Sacramento, California 95814

Dear Mr. Brown:

I am writing to you to express concern about legislation that is important to the interests of the United States Coast Guard and the State of California. The legislation, currently being debated in the Assembly, is Senate Bill 2040.

In particular, I support the need for limited immunity for all oil spill responders other than liable parties, to the extent that it may be necessary to encourage such persons to take action promptly. Prompt action after a spill is essential to protect the marine environment of California from oil pollution.

As you know, the Oil Pollution Act of 1990 (P.L. 101-380) was signed by the President on August 16th. That Act provides limited federal immunity for all oil spill responders. The Coast Guard did not object to that provision because we believe that the issue is related to the national interest in promoting quick, effective responses to oil spills and their threats. Effective response requires resources from both the public and private sectors.

A law that does not address responders' concerns about liability exposure, causing them to hesitate in responding to spills, would be counterproductive.

Oil spill response is not an exact science. Decisions often must be made with incomplete and sometimes conflicting information. Moreover, the operational environment is unpredictable. Liability standards must take these factors into account if effective programs are to be put in place.

I urge you to give full consideration to limited immunity provisions for all oil spill responders other than liable parties in your deliberations on SB 2040.

Sincerely,

M. E. GILBERT
Rear Admiral, U.S. Coast Guard
Commander, Eleventh Coast Guard District

CSHB 196 Background

SECTION E,

No. 17

U.S. OIL & REFINING CO.

5150 Wilshire Boulevard • Los Angeles, CA 90036
P.O. Box 36913 • (213) 938-7156 • TWX 9103213973

WILLIAM C. KITTO
Vice President
Crude Oil Supply

18 March 1991

Representative Bill Hudson
P.O. Box V
Juneau, Alaska 99811

Dear Representative Hudson:

U.S. Oil & Refining Co. and its wholly owned subsidiary, U.S. Oil Supply Co., have been involved in the business of transporting ANS crude oil from Valdez to the State of Washington and to other Alaskan ports by tankers for several years. This activity was necessary to supply U.S. Oil & Refining Co.'s refinery in Tacoma, Washington with crude oil as well as to supply other refineries such as Tesoro, Texaco, and Shell.

Alyeska had agreed to provide clean-up services to shippers of crude oil from Valdez in case such shippers spilled crude in Prince William Sound. When Alyeska decided, however, that its legal liability resulting from these services was unlimited even though it had not caused the spill, Alyeska demanded indemnity from such shippers in the amount of \$1 billion. Such a requirement could not be satisfied through insurance by the shippers or tanker owners and thus prevented U.S. Oil & Refining Co. and others from continuing to transport ANS crude. Of course, for the owners of Alyeska and other very large oil companies, the requirement was not impossible to meet. They just indemnify Alyeska by contract. This is not an option open to smaller companies such as ourselves.

We believe in taking responsibility for our own actions and insuring these activities to the extent possible. Ships which we used were members of TOVALOP and always provided \$700 million of P&I insurance; and we as shippers always met the financial responsibility requirements of the State of Alaska and are members of CRISTAL. However, to be required to indemnify others such as Alyeska for their negligence and in such a substantial sum as \$1 billion not only seems unreasonable but is in fact impossible. The result was our being prevented from continuing to transport ANS to our refinery in Tacoma. The economic impact of not buying barrels delivered on U.S. Oil vessels is estimated to be over \$5 million per year.

CSHB 196 Background

SECTION E.

No. 18

Representative Bill Hudson
18 March 1991
Page 2

The proposed House Bill No. 196 would limit the liability of the spill responders such as Alyeska. Since it would apparently satisfy Alyeska that its potential liability would be covered by insurance available to shippers, we are hopeful that companies such as ours would be able to transport ANS as they have done in the past. It does not avoid or limit the liability of anyone who spills oil nor do we believe it should. However, the oil spill responder who did not create the spill is then permitted to quickly respond to the clean-up need without taking on unreasonable responsibility for the spill created by others.

Your help in advancing the proposed legislation will be greatly appreciated.

Very truly yours,

U.S. OIL & REFINING CO.

W.C. Kitto

W.C. Kitto
Vice President

Ventura County Commercial Fishermen's Association

SERVING COMMERCIAL FISHERMEN SINCE 1987

V.C.C.F.A. * 1567 SPINNAKER DRIVE * STE. 203-199 * VENTURA, CALIF. 93001
(805) 985-9705

Honorable George Deukmejian
Governor of California
State Capital First Floor
Sacramento, CA. 95814

May 4, 1990

Dear Governor Deukmejian,

Ventura County Commercial Fishermen's Association (VCCFA) has developed the Fishermen's Oil Response Team (FORT). As you are aware this resource of certified commercial fishermen is designed to be called upon by clean up coordinators during an emergency. FORT would provide additional manpower, vessels, and aircraft as needed to respond within the first hours of an oil spill emergency not days later.

I have received information that California Trial Lawyers Association wishes to change the wording of SB-2040. Instead of providing qualified immunity for spill respondents, they prefer to negotiate indemnification of said respondents.

Please let me know your viewpoint on this important issue. Should qualified immunity not be granted to responders as outline in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

Because of the sensitive Channel Islands and nearby coastal region our association supports FORT's defensive capabilities towards oil spill recovery. I shudder at the thought of a "VALDEZ" type spill encircling the islands while bureaucrats negotiate indemnity clauses.

Your support is welcome. Enclosed is our newsletter and I would appreciate your subscription.

Sincerely,

Brian Janis

CSHB 196 Background

SECTION E,
No. 19

HOUSE AMENDMENT TO SENATE BILL NO. 2987

To the Secretary of the Senate:

This is to notify you that the House of Representatives adopted the following amendment(s):

AMENDMENT NO. 1

Amend by striking all after the enacting clause and inserting in lieu thereof the following:

8. SECTION 1. This act may be cited as the Mississippi
9. Liability of Persons Responding to Oil Spills Act.
10. SECTION 2. For the purposes of this act the term:
11. (a) "Damages" means damages of any kind for which
12. liability may exist under the laws of this state resulting from,
13. arising out of, or related to the discharge or threatened
14. discharge of oil;
15. (b) "Discharge" means any emission (other than natural
16. seepage), intentional or unintentional, and includes, but is not
17. limited to, spilling, leaking, pumping, pouring, emitting,
18. emptying or dumping;
19. (c) "Federal on-scene coordinator" means the federal
20. official predesignated by the U.S. Environmental Protection Agency
21. or the U.S. Coast Guard to coordinate and direct federal responses
22. under subpart D, or the official designated by the lead agency to
23. coordinate and direct removal under subpart E, of the National
24. Contingency Plan;
25. (d) "National Contingency Plan" means the National
26. Contingency Plan prepared and published under Section 311(d) of
27. the Federal Water Pollution Control Act (33 U.S.C. 1321(d)), as

28. amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104
29. Stat. 484 (1990);

30. (e) "Oil" means oil of any kind or in any form,
31. including, but not limited to, petroleum, fuel oil, sludge, oil
32. refuse and oil mixed with wastes other than dredged spoil; but
33. does not include petroleum, including crude oil or any fraction
34. thereof, which is specifically listed or designated as a hazardous
35. substance under subparagraphs (A) through (F) of Section 101(14)
36. of the Comprehensive Environmental Response, Compensation, and
37. Liability Act (42 U.S.C. 9601) and which is subject to the
38. provisions of that act;

39. (f) "Person" means an individual, corporation,
40. partnership, association, state, municipality, commission, or
41. political subdivision of a state, or any interstate body;

42. (g) "Removal costs" means the costs of removal that are
43. incurred after a discharge of oil has occurred or, in any case in
44. which there is a substantial threat of a discharge of oil, the
45. costs to prevent, minimize or mitigate oil pollution from such an
46. incident;

47. (h) "Responsible party" means a responsible party as
48. defined under Section 1001 of the Oil Pollution Act of 1990, Pub.
49. L. No. 101-380, 104 Stat. 484 (1990).

50. SECTION 3. (1) Notwithstanding any other provision of law,
51. a person is not liable for removal costs or damages which result
52. from actions taken or omitted to be taken in the course of
53. rendering care, assistance or advice consistent with the National
54. Contingency Plan or as otherwise directed by the federal on-scene
55. coordinator or by the state official with responsibility for oil
56. spill response.

57. (2) Subsection (1) does not apply:

58. (a) To a responsible party;

59. (b) To personal injury or wrongful death; or

60. (c) If the person is grossly negligent or engages in
61. willful misconduct.
62. (3) A responsible party is liable for any removal costs and
63. damages that another person is relieved of under subsection (1).
64. (4) Nothing in this section affects the liability of a
65. responsible party for oil spill response under state law.
66. SECTION 4. The Commission on Environmental Quality shall
67. promulgate any necessary rules and regulations in order to carry
68. out the provisions of this act.
69. SECTION 5. This act shall take effect and be in force from
70. and after its passage.

Further, amend by striking the title in its entirety and
inserting in lieu thereof the following:

1. AN ACT TO LIMIT THE LIABILITY OF PERSONS RESPONDING TO AN OIL
2. SPILL OR THREAT OF AN OIL SPILL IN A MANNER CONSISTENT WITH THE
3. NATIONAL CONTINGENCY PLAN AND THE OIL POLLUTION ACT OF 1990; TO
4. REQUIRE THE COMMISSION ON ENVIRONMENTAL QUALITY TO PROMULGATE
5. RULES AND REGULATIONS TO CARRY OUT THE PROVISIONS OF THIS ACT; AND
6. FOR RELATED PURPOSES.

CHARLES J. JACKSON, JR.
Clerk of the House of Representatives

By: Senators Bilbo, Hall

To: Environment Prot, Cons
and Water Res

SENATE BILL NO. 2987
(As Passed the Senate)

1. AN ACT TO LIMIT THE LIABILITY OF PERSONS RESPONDING TO AN OIL
2. SPILL OR THREAT OF AN OIL SPILL IN A MANNER CONSISTENT WITH THE
3. NATIONAL CONTINGENCY PLAN AND THE OIL POLLUTION ACT OF 1990; AND
4. FOR RELATED PURPOSES.

5. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

6. SECTION 1. This act may be cited as the Mississippi
7. Liability of Persons Responding to Oil Spills Act.

8. SECTION 2. For the purposes of this act the term:

9. (a) "Damages" means damages of any kind for which
10. liability may exist under the laws of this state resulting from,
11. arising out of, or related to the discharge of threatened
12. discharge of oil;

13. (b) "Discharge" means any emission (other than natural
14. seepage), intentional or unintentional, and includes, but is not
15. limited to, spilling, leaking, pumping, pouring, emitting,
16. emptying or dumping;

17. (c) "Federal on-scene coordinator" means the federal
18. official predesignated by the U.S. Environmental Protection Agency
19. or the U.S. Coast Guard to coordinate and direct federal responses
20. under subpart D, or the official designated by the lead agency to
21. coordinate and direct removal under subpart E, of the National
22. Contingency Plan;

23. (d) "National Contingency Plan" means the National
24. Contingency Plan prepared and published under Section 311(d) of
25. the Federal Water Pollution Control Act (33 U.S.C. 1321(d)), as
26. amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104
27. Stat. 484 (1990);

28. (e) "Oil" means oil of any kind or in any form,
29. including, but not limited to, petroleum, fuel oil, sludge, oil
30. refuse and oil mixed with wastes other than dredged spoil; but
31. does not include petroleum, including crude oil or any fraction
32. thereof, which is specifically listed or designated as a hazardous
33. substance under subparagraphs (A) through (F) of Section 101(14)
34. of the Comprehensive Environmental Response, Compensation, and
35. Liability Act (42 U.S.C. 9601) and which is subject to the
36. provisions of this act;

37. (f) "Person" means an individual, corporation,
38. partnership, association, state, municipality, commission, or
39. political subdivision of a state, or any interstate body;

40. (g) "Removal costs" means the costs of removal that are
41. incurred after a discharge of oil has occurred or, in any case in
42. which there is a substantial threat of a discharge of oil, the
43. costs to prevent, minimize or mitigate oil pollution from such an
44. incident;

45. (h) "Responsible party" means a responsible party as
46. defined under Section 1001 of the Oil Pollution Act of 1990, Pub.
47. L. No. 101-380, 104 Stat. 484 (1990).

48. SECTION 3. (1) Notwithstanding any other provision of law,
49. a person is not liable for removal costs or damages which result
50. from actions taken or omitted to be taken in the course of
51. rendering care, assistance or advice consistent with the National
52. Contingency Plan or as otherwise directed by the federal on-scene
53. coordinator or by the state official with responsibility for oil
54. spill response.

55. (2) Subsection (1) does not apply:

56. (a) To a responsible party;

57. (b) To personal injury or wrongful death; or

58. (c) If the person is grossly negligent or engages in
59. willful misconduct.

60. (3) A responsible party is liable for any removal costs and
61. damages that another person is relieved of under subsection (1).

62. (4) Nothing in this section affects the liability of a
63. responsible party for oil spill response under state law.

64. SECTION 4. This act shall take effect and be in force from
65. and after its passage.

Citation
DE LEGIS 5 (1991)
1991 Delaware Laws Ch. 5 (S.B. 6)

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R 1 OF 1

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DE-LEGIS P

DELAWARE 1991 SESSION LAW SERVICE
FIRST SESSION OF THE 136TH GENERAL ASSEMBLY
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Additions and deletions are not identified in this document.

Ch. 5
S.B. No. 6
HAZARDOUS WASTE **CLEANUP--LIABILITY** OF THIRD PARTIES

AN ACT TO AMEND TITLE 10, DELAWARE CODE, RELATING TO LIMITATION OF **LIABILITY**
FOR **OIL** AND HAZARDOUS MATERIAL DISCHARGE **CLEANUP**.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 81, Title 10 of the Delaware Code by adding thereto
a new Section to read as follows:

<< DE ST TI 10 s 8135 >>

"s 8135. Limitation on **Liability** of Third Parties Rendering Assistance in **Oil**
or Hazardous Material Discharge **Cleanup**.

(a) The provisions of any law, rule or regulation to the contrary notwithstanding, the **liability** of any person rendering care, assistance, or advice to prevent, minimize or mitigate **oil** or hazardous material discharge for any removal costs and damage caused by or related to such care, assistance or advice shall be limited to acts or omissions of such person which can be shown to have been the result of gross negligence, reckless, wilful, wanton and/or intentional acts of misconduct on the part of such person.

(b) The limit of **liability** as set forth in Subsection (a) of this Section shall not apply to the actions of any person responsible for the initial discharge.

(c) Any person responsible for the initial discharge is liable for any removal costs and damages that another person is relieved of under Subsection (a) of this Section.

(d) This Section shall not be construed to limit any **liability** of any person for personal injuries or wrongful death as a result of the acts or omissions of such person."

<< DE ST TI 10 s 8134 >>

Section 2. Amend Chapter 81, Title 10 of the Delaware Code by striking s 8134 in its entirety.

SYNOPSIS

This bill is proposed by the Delaware River and Bay Oversight Committee. The bill would limit liability for removal costs and damages (other than personal injury or wrongful death) of a third party who renders assistance in a cleanup operation to those acts which amount to gross negligence or reckless, wilful, wanton, or intentional misconduct.

Approved January 31, 1991.

DE LEGIS 5 (1991)
END OF DOCUMENT

1. any action brought by the state, a county, city, or district.
 2. (h) Except as provided in Section 1431.2 of the Civil
 3. Code, liability under this section shall be joint and
 4. several. However, this section does not bar a cause of
 5. action that a responsible party has or would have, by
 6. reason of subrogation or otherwise, against any person.

7. (i) This section does not apply to claims for damages
 8. for personal injury or wrongful death, and does not limit
 9. the right of any person to bring an action for personal
 10. injury or wrongful death under any provision or principle
 11. of law.

12. (j) Any payments made by a responsible party to
 13. cover liabilities arising from a discharge of oil, whether
 14. under this division or any other provision of federal, state,
 15. or local law, shall not be charged against any royalties,
 16. rents, or net profits owed to the United States, the state,
 17. or any other public entity.

18. (k) Any action which a private or public individual or
 19. entity may have against a responsible party under this
 20. section may be brought directly by the individual or
 21. entity or by the state on behalf of the individual or entity.
 22. However, the state shall not pursue any action on behalf
 23. of a private individual or entity which requests the state
 24. not to pursue that action.

25. (l) For the purposes of this section, "vessels" means
 26. vessels as defined in Section 21 of the Harbors and
 27. Navigation Code.

28. **8670.56.6.** (a) (1) Except as provided in subdivisions
 29. (b) and (d), and subject to subdivision (c), no person,
 30. including, but not limited to, an oil spill cooperative, its
 31. agents, subcontractors, or employees, shall be liable
 32. under this chapter or the laws of the state to any person
 33. for costs, damages, or other claims or expenses as a result
 34. of actions taken or omitted in good faith in the course of
 35. rendering care, assistance, or advice in accordance with
 36. the National Contingency Plan, the state oil spill
 37. contingency plan, or at the direction of the administrator,
 38. onsite coordinator, or the Coast Guard in response to a
 39. spill or threatened spill of oil.

40. (2) The qualified immunity under this section shall

1. not apply to any oil spill response action which is
 2. inconsistent with the directions of the Coast Guard, the
 3. director, or, in the absence of overriding directions of the
 4. Coast Guard or the director, is inconsistent with
 5. applicable contingency plans implemented under this
 6. division.

7. (3) Nothing in this section shall, in any manner or
 8. respect, affect or impair any cause of action against or any
 9. liability of any person or persons responsible for the spill,
 10. for the discharged oil, or for the tanker, barge, terminal,
 11. pipeline, or facility from which the oil was discharged.
 12. The responsible person or persons shall remain liable for
 13. any and all damages arising from the discharge, including
 14. damages arising from improperly carried out response
 15. efforts, as otherwise provided by law.

16. (4) The qualified immunity under this section shall
 17. only apply to response activity during the first 60 days
 18. after the spill for persons whose primary purpose is the
 19. business of responding to oil spills and who are regularly
 20. engaged in the business of responding to oil spills. No
 21. immunity shall attach to response activity after
 22. expiration of the first 60 days for the parties described
 23. herein.

24. (5) The qualified immunity under this section shall
 25. attach, without the limitation described in paragraph (4),
 26. to those responding parties that do not "regularly
 27. engage" in the oil spill response business and to persons
 28. and entities who are primarily dedicated to the
 29. preservation and rehabilitation of wildlife. There shall be
 30. no limitation on the duration of the immunity.

31. (b) Nothing in this section shall, in any manner or
 32. respect, affect or impair any cause of action against or any
 33. liability of any party or parties responsible for the spill, or
 34. the responsible party's agents, employees, and
 35. subcontractors, for the discharged oil, or for the tanker,
 36. terminal, pipeline, or marine facility from which the oil
 37. was discharged.

38. (c) The responsible party or parties shall:

39. (1) Notwithstanding subdivision (b) or (h) of Section
 40. 8670.56.5, or any other provision of law, be strictly and

1 jointly and severally liable for all damages arising
2 pursuant to subdivision (g) of Section 8670.505 from the
3 response efforts of its agents, employees, subcontractors,
4 or an oil spill cooperative of which it is a member or with
5 which it has a contract or other arrangement for cleanup
6 of its oil spills, unless it would have a defense to the
7 original spill.

8 (2) Remain strictly liable for any and all damages
9 arising from the response efforts of a person other than
10 a person specified in paragraph (1).

11 (d) Nothing in this section shall immunize a
12 cooperative or any other person from liability for acts of
13 gross negligence or willful misconduct in connection with
14 the cleanup of a spill.

15 (e) This section shall not apply to any action for
16 personal injury or wrongful death.

17 (f) As used in this section, a "cooperative" means an
18 organization of private persons which is established for
19 the primary purpose and activity of preventing or
20 rendering care, assistance, or advice in response to a spill
21 or threatened spills of oil.

22 (g) Except for the responsible party, membership in a
23 cooperative shall not, in and of itself, be grounds for
24 liability resulting from cleanup activities of the
25 cooperative.

26 (h) For purposes of this section, there shall be a
27 rebuttable presumption that an act or omission described
28 in subdivision (a) was taken in good faith.

29 (i) In any situation in which immunity is granted
30 pursuant to subdivision (a) and a responsible party is not
31 liable, is not liable for noneconomic damages caused by
32 another, or is partially or totally insolvent, the fund
33 provided for in Article 7 (commencing with Section
34 8670.46) shall, in accordance with its terms, reimburse
35 claims of any injured party for which a person who is
36 granted immunity pursuant to this section would
37 otherwise be liable.

38 (j) The immunity granted pursuant to subdivision (a)
39 shall apply to a cooperative only if that cooperative has
40 contracted with the administrator to respond to oil spills

1 in accordance with the state oil spill contingency plan
2 and this chapter. The administrator shall enter into
3 contract with any cooperative that is qualified and that
4 offers to contract on mutually acceptable terms, in
5 accordance with the state oil spill contingency plan and
6 this chapter.

7 (j) (1) The immunity granted by this section shall
8 only apply to response efforts that are undertaken after
9 the administrator certifies that contracts with qualified
10 and responsible persons are in place to ensure an
11 adequate and expeditious response to any foreseeable oil
12 spill that may occur in marine waters for which the
13 responsible party (A) cannot be identified or (B) is
14 unable or unwilling to respond, contain, and cleanup the
15 oil spill in an adequate and timely manner. In negotiating
16 these contracts, the administrator shall, to the maximum
17 extent practicable, procure the services of persons who
18 are willing to respond to oil spills with no, or lesser,
19 immunity than that conferred by this section, but, in no
20 event, a greater immunity. The administrator shall make
21 the certification required by this subdivision on an annual
22 basis. Upon certification, the immunity conferred by this
23 section shall apply to all response efforts undertaken
24 during the calendar year to which the certification
25 applies. In the absence of the certification required by
26 this subdivision, the immunity conferred by this section
27 shall not attach to any response efforts undertaken by any
28 person in marine waters.

29 (2) In addition to the authority to negotiate contracts
30 described in (1) above, the administrator shall also be
31 authorized to negotiate and enter into indemnification
32 agreements with qualified and financially responsible
33 persons to respond to oil spills that may occur in marine
34 waters for which the responsible party (A) cannot be
35 identified or (B) is unable or unwilling to respond,
36 contain, and cleanup the oil spill in an adequate and
37 timely manner.

38 (3) The administrator may indemnify response
39 contractors for (A) all damages payable by means of
40 settlement or judgment that arise from response efforts

1 to which the immunity conferred by this section would
2 otherwise apply, and (B) reasonably related legal costs
3 and expenses incurred by the responder, provided that
4 indemnification shall only apply to response efforts
5 undertaken after the expiration of any immunity that
6 may exist as the result of the contract negotiations
7 authorized in this subdivision. In negotiating these
8 contracts, the administrator shall, to the maximum extent
9 practicable, procure the services of persons who are
10 willing to respond to oil spills with no, or as little, right to
11 indemnification as possible. All indemnification shall be
12 paid by the administrator from the Oil Spill Response
13 Trust Fund.

14 (k) (1) With regard to a person who is regularly
15 engaged in the business of responding to oil spills, the
16 immunity conferred by this section shall not apply to any
17 response efforts by that person that occur later than 60
18 days after the first day the person's response efforts
19 commence.

20 (2) Notwithstanding the limitation contained in
21 paragraph (1), the administrator may, upon making all
22 the following findings, extend the period of time, not to
23 exceed 30 days, during which the immunity conferred by
24 this section applies to response efforts:

25 (A) Due to inadequate or incomplete containment
26 and stabilization, there exists a substantial probability
27 that the size of the spill will significantly expand and (i)
28 threaten previously uncontaminated marine or land
29 resources, (ii) threaten already contaminated marine or
30 land resources with substantial additional contamination,
31 or (iii) otherwise endanger the public safety or welfare.

32 (B) The remaining work is of such a difficult or
33 perilous nature that extension of the immunity is clearly
34 in the public interest.

35 (C) No other qualified and financially responsible
36 contractor is prepared and willing to complete the
37 response effort in the absence of the immunity, or a lesser
38 immunity, as negotiated by contract.

39 (3) The administrator shall provide five days' notice of
40 his or her proposed decision to either extend, or not

1 extend, the immunity conferred by this section.
2 Interested parties shall be given an opportunity to
3 present oral and written evidence at an informal hearing.
4 In making his or her proposed decision, the administrator
5 shall specifically seek and consider the advice of the
6 relevant Coast Guard representative. The administrator's
7 decision to not extend the immunity shall be announced
8 at least 10 working days before the expiration of the
9 immunity to provide persons an opportunity to terminate
10 their response efforts as contemplated by paragraph (4).

11 (4) No person or their agents, subcontractors, or
12 employees shall incur any liability under this chapter or
13 any other provision of law solely as a result of that
14 person's decision to terminate their response efforts
15 because of the expiration of the immunity conferred by
16 this section. A person's decision to terminate response
17 efforts because of the expiration of the immunity
18 conferred by this section shall not in any manner impair,
19 curtail, limit, or otherwise affect the immunity conferred
20 on the person with regard to the person's response efforts
21 undertaken during the period of time the immunity
22 applied to such response efforts.

23 (5) The immunity granted under this section shall
24 attach, without the limitation contained in this
25 subdivision, to the response efforts of persons who are not
26 regularly engaged in the business of responding to oil
27 spills. Persons who are not regularly engaged in the
28 business of responding to oil spills includes, but is not
29 limited to, (A) persons who are primarily dedicated to
30 the preservation and rehabilitation of wildlife and (B)
31 persons who derive their livelihood primarily from
32 fishing.

33 (l) As used in this section, "response efforts" means
34 rendering care, assistance, or advice in accordance with
35 the National Contingency Plan, the state oil spill
36 contingency plan, or at the direction of the administrator,
37 onsite coordinator, or the Coast Guard in response to a
38 spill or threatened spill of oil.

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT
SECOND SUBSTITUTE HOUSE BILL NO. 2494

Passed the House February 13, 1990
as amended
Yeas 98 Nays 0

Passed the Senate March 1, 1990
as amended
Yeas 42 Nays 1

March 6, 1990: The House concurred in the Senate amendments
and passed the bill as amended by the Senate.

Yeas: 96 Nays: 0

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that
the attached is enrolled SECOND SUBSTITUTE HOUSE BILL NO. 2494
as passed by the House of Representatives and the Senate on the dates herein set forth.

Alan Thompson
ALAN THOMPSON, Chief Clerk

1 ((department-at-its-office-in-Olympia,-or-a-regional-office--thereof,
2 of--such--discharge--or--entry)) coast guard and the division of
3 emergency management. The notice to the division of emergency
4 management within the department of community development shall be
5 made to the division's twenty-four hour state-wide toll-free number
6 established for reporting emergencies.

7 NEW SECTION. Sec. 25. (1) The following persons shall not be
8 liable for necessary expenses or property damage caused by an act or
9 omission of that person during the cleanup of oil spilled into the
10 navigable waters of the state, unless the act or omission was
11 performed in bad faith or with gross negligence:

12 (a) The state or any unit of local government;

13 (b) A person who volunteers to assist in the cleanup of the
14 spilled oil; and

15 (c) A person meeting the standards of section 4 of this act.

16 (2) This section shall not affect the liability of any person
17 responsible for the spilled oil or responsible for the facility or
18 covered vessel from which the oil was spilled.

19 NEW SECTION. Sec. 26. A new section is added to chapter 88.16
20 RCW to read as follows:

21 An oil tanker under escort of a tug or tugs pursuant to the
22 provisions of RCW 88.16.190 shall not exceed the service speed of the
23 tug or tugs that are escorting the oil tanker.

24 Sec. 27. Section 8, chapter 18, Laws of 1935 as last amended by
25 section 2, chapter 264, Laws of 1987 and RCW 88.16.090 are each
26 amended to read as follows:

27 (1) A person may pilot any vessel subject to the provisions of
28 this chapter on waters covered by this chapter only if appointed and
29 licensed to pilot such vessels on said waters under and pursuant to
30 the provisions of this chapter.

31 (2) A person is eligible to be appointed a pilot if the person is
32 a citizen of the United States, over the age of twenty-five years and
33 under the age of seventy years, a resident of the state of Washington
34 at the time of appointment and only if the pilot applicant holds as a
35 minimum, a United States government license as a master of freight

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL STATUTES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 342B-7, Hawaii Revised Statutes, is
2 amended by amending subsection (c) to read as follows:

3 "(c) If the director determines that [the] any person has
4 violated an accepted schedule[,] or an order issued under this
5 section, [any rule adopted pursuant to this chapter, any condition
6 of a permit or variance issued pursuant to this chapter, or has
7 continued to violate this chapter,] the director shall impose
8 penalties by sending a notice in writing, either by certified mail
9 or by personal service, to that person, describing such
10 nonadherence or violation with reasonable particularity."

11 SECTION 2. Section 342D-1, Hawaii Revised Statutes, is
12 amended by deleting the definition "individual wastewater system".

13 ["Individual wastewater system" means a facility which
14 disposes of treated or untreated domestic wastewater generated
15 from dwelling units or other sources generating domestic
16 wastewater of similar volume and strength such as: (1)
17 developments of a density not greater than one dwelling unit per
18 5,000 square feet of ultimate development; (2) developments with
19 buildings other than dwellings but involving the generation of

1 pollutant or contaminant concerned, taking into
2 consideration the characteristics of such hazardous
3 substance[,] or pollutant or contaminant, in light of
4 all relevant facts and circumstances; and precautions
5 were taken against foreseeable acts or omissions of any
6 such third party and the consequences that could
7 foreseeably result from such acts or omissions; or
8 (4) Any combination of the foregoing paragraphs.

9 [(c)] (d) No person shall be liable under this chapter or
10 otherwise under the laws of the State or any of the counties,
11 including the common law to any government or private parties for
12 costs, damages, or penalties as a result of actions taken or
13 omitted in the course of rendering care, assistance, or advice in
14 accordance with this chapter or at the direction of an on-scene
15 coordinator, with respect to an incident creating a danger to
16 public health or welfare or the environment as a result of any
17 release of a hazardous substance or pollutant or contaminant or
18 the threat thereof. This subsection shall not preclude liability
19 for costs, damages, or penalties as the result of gross
20 negligence or intentional misconduct on the part of such person.

21 (e) No county or local government shall be liable under
22 this chapter for costs or damages as a result of actions taken in
23 response to an emergency created by the release or threatened

ENROLLED

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

1 A bill to be entitled
2 An act relating to pollution; amending s.
3 206.9935, F.S., relating to taxes imposed for
4 coastal protection; providing for certain
5 offshore oil drilling activity; providing for
6 catastrophic discharge; creating s. 253.035,
7 F.S.; requiring commercial vessels to anchor in
8 designated anchorage areas; amending s.
9 310.071, F.S.; providing for evaluation of
10 certificated deputy pilots; amending s.
11 310.101, F.S.; providing additional grounds for
12 disciplinary actions by the Board of Pilot
13 Commissioners; providing certain accountability
14 in directing foreign vessels; amending s.
15 310.111, F.S.; providing for report of certain
16 marine incidents; amending s. 310.141, F.S.;
17 providing that certain vessels are subject to
18 pilotage, and reenacting s. 310.161, F.S.,
19 relating to penalties for piloting without a
20 license, to incorporate said amendment in a
21 reference thereto; creating ss. 313.21, 313.22,
22 313.23, and 313.24, F.S.; authorizing ports to
23 regulate certain vessel movements and adopt
24 certain guidelines for bottom clearance, vessel
25 movements, and traffic communications; amending
26 s. 376.031, F.S.; providing definitions;
27 amending s. 376.051, F.S.; providing for
28 issuance of spill prevention and response
29 certificates; amending s. 376.06, F.S.;
30 providing a penalty for operation of a terminal
31 facility without a required registration

1068,
22

CODING: Words stricken are deletions; words underlined are additions.

Fl. - Spill Response

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

1 certificate; increasing the maximum application
2 fee; amending s. 376.065, F.S.; prohibiting
3 operation of a terminal facility without a
4 spill prevention and response certificate;
5 providing requirements for application and
6 operation; providing a penalty; amending s.
7 376.07, F.S.; providing for rules of the
8 Department of Natural Resources; providing for
9 spill prevention, abatement, and cleanup and
10 for wildlife rescue and rehabilitation;
11 requiring adequate booming in the transfer of
12 pollutants; providing penalties; prohibiting
13 use of certain lobster traps after a specified
14 date; creating s. 376.071, F.S.; requiring
15 certain vessels to maintain spill prevention
16 and control contingency plans; providing
17 requirements; providing penalties; amending s.
18 376.09, F.S.; providing certain immunity from
19 liability for described persons; amending s.
20 376.11, F.S.; providing additional sources and
21 uses for moneys in the Florida Coastal
22 Protection Trust Fund; amending s. 376.12,
23 F.S.; increasing certain maximum liabilities
24 for pollutant cleanup costs and damages;
25 specifying conditions for limits on liability;
26 providing financial security requirements;
27 providing penalties; providing liability of
28 cargo owner; specifying conditions for use of
29 certain defenses; providing an exemption from
30 certain notification requirements; creating s.
31 376.121, F.S.; providing liability for damages

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CODING: Words stricken are deletions; words underlined are additions.

1 guilty-of a felony of the second degree, punishable as
2 provided in s. 775.082, s. 775.083, or s. 775.084, as required
3 in s. 837.012 ev-837-01.

4 (h) Requirements that any registrant causing or
5 permitting the discharge of a pollutant in violation of the
6 provisions of ss. 376.011-376.21, and at other reasonable
7 times, be subject to a complete and thorough inspection. If
8 the department determines there are unsatisfactory preventive
9 measures or containment and cleanup capabilities, it shall, a
10 reasonable time after notice and hearing in compliance with
11 chapter 120, suspend the registration until such time as there
12 is compliance with the department requirements.

13 (i) Such other rules and regulations as the exigencies
14 of any condition may require or as may reasonably be necessary
15 to carry out the intent of ss. 376.011-376.21.

16 (3) After July 31, 1990, no lobster trap or traps to
17 be deposited into waters of the state shall be impregnated
18 with a petroleum product that may be released from such trap
19 or traps. After July 31, 1993, no person shall deposit into
20 the waters of the state any lobster trap or traps that have
21 been impregnated with a petroleum product that may be released
22 from such trap or traps into the waters of the state.

23 Section 15. Section 376.071, Florida Statutes, is
24 created to read:

25 376.071 Spill contingency plan.--After December 31,
26 1990, any vessel operating in state waters with a storage
27 capacity to carry 10,000 gallons or more of pollutants as fuel
28 and cargo shall maintain an adequate written ship-specific
29 spill prevention and control contingency plan. Any such
30 vessel shall have on-board a "spill officer," designated by
31 the contingency plan, who is responsible for training crew

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NOTE: Words stricken are deletions; words underlined are additions.

1 members to carry out spill response efforts required in the
2 contingency plan and coordinating all on-board response
3 efforts in case of a spill. An adequate plan shall include
4 provisions for on-board response, including notification,
5 verification, pollutant incident assessment, vessel
6 stabilization, discharge mitigation, and on-board discharge
7 containment, in accordance with this chapter, department
8 rules, and the Florida Coastal Pollutant Spill Contingency
9 Plan. A plan in compliance with the federal requirement for a
10 ship-specific spill contingency plan shall satisfy the
11 requirements for an adequate ship-specific spill contingency
12 plan required by this section. On or after January 1, 1991,
13 the master of a vessel with a storage capacity to carry 10,000
14 gallons or more of pollutants as fuel and cargo, which vessel
15 is operating in state waters without an adequate contingency
16 plan, commits a noncriminal infraction. The master shall be
17 cited by the department and shall appear before the county
18 court for the county in which the violation occurred or the
19 county court closest to the location at which the violation
20 occurred. The civil penalty for such an infraction shall be
21 up to \$5,000. An adequate contingency plan must be submitted
22 to the department prior to the vessel reentering a Florida
23 port. Failure to submit the required plan shall result in a
24 civil penalty of \$10,000.

25 Section 16. Present subsections (5) and (6) of
26 section 376.09, Florida Statutes, are renumbered as
27 subsections (6) and (7), respectively, and a new subsection
28 (5) is added to said section to read:

29 376.09 Removal of prohibited discharges.--

30 (5) Notwithstanding the provisions in subsection (4),
31 any person who is authorized by the department or the federal

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CODING: Words stricken are deletions; words underlined are additions.

1 government or the person alleged to be responsible for the
 2 discharge, or by a designee thereof, to render assistance in
 3 containing or removing pollutants shall not be liable for
 4 costs, expenses, and damages, unless such costs, expenses, and
 5 damages are a proximate result of acts or omissions caused by
 6 gross negligence or willful misconduct of such authorized
 7 person.

8 Section 17. Subsections (2) and (6) and paragraph (c)
 9 of subsection (4) of section 376.11, Florida Statutes, are
 10 amended to read:

11 376.11 Florida Coastal Protection Trust Fund.--

12 (2) The Florida Coastal Protection Trust Fund is
 13 established, to be used by the department as a nonlapsing
 14 revolving fund for carrying out the purposes of ss. 376.011-
 15 376.21. To this fund shall be credited all registration fees,
 16 penalties, judgments, damages recovered pursuant to s.
 17 376.121, other fees and charges related to ss. 376.011-376.21,
 18 and the excise tax revenues levied, collected, and credited
 19 pursuant to ss. 206.9935(1) and 206.9945(1)(a). Charges
 20 against the fund shall be in accordance with this section.

21 (4) Moneys in the Florida Coastal Protection Trust
 22 Fund shall be disbursed for the following purposes and no
 23 others:

24 (c) All costs and expenses of the cleanup,
 25 restoration, and rehabilitation of waterfowl, wildlife, and
 26 all other natural resources damaged by the discharge of
 27 pollutants, including the costs of assessing and recovering
 28 damages to natural resources, whether performed or authorized
 29 by the department or any other state or local agency.

30 (6) The department shall recover to the use of the
 31 fund from the person or persons causing the discharge or from

1 the Federal Government, jointly and severally, all sums owed
 2 or expended from the fund, pursuant to s. 376.12(6)(3), except
 3 that recoveries resulting from damage due to a discharge of a
 4 pollutant or other similar disaster shall be apportioned
 5 between the Florida Coastal Protection Trust Fund and the
 6 General Revenue Fund so as to repay the full costs to the
 7 General Revenue Fund of any sums disbursed therefrom as a
 8 result of such disaster. Requests for reimbursement to the
 9 fund for the above costs, if not paid within 30 days of
 10 demand, shall be turned over to the Department of Legal
 11 Affairs for collection.

12 Section 18. Effective October 1, 1990, section 376.12,
 13 Florida Statutes, is amended to read:

14 376.12 Liabilities and defenses of terminal facilities
 15 and vessels.--

16 (1) Because it is the intent of ss. 376.011-376.21 to
 17 provide the means for rapid and effective cleanup and to
 18 minimize cleanup costs and damages, any vessel, or its agents
 19 or servants, who permits or suffers a prohibited discharge or
 20 other polluting condition to take place within state
 21 boundaries shall be liable to the fund for all costs of
 22 cleanup or abatement, up to an amount not to exceed \$50 \$14
 23 million or \$625 \$100 per gross registered ton of such vessel,
 24 whichever is the lesser. When the department can show that
 25 such discharge was the result of willful or gross negligence
 26 or willful misconduct within the privity or knowledge of the
 27 owner or operator or agent thereof, such owner or operator
 28 shall be liable to the fund for the full amount of such sums
 29 expended. When a discharge of pollutants occurs from a
 30 terminal facility, recovery of costs of abatement and cleanup
 31 shall be limited to an amount not to exceed \$25 \$8 million,

transferred in or by any facility or vessel covered by the plan that will necessitate a change in the plan and shall update the plan periodically as required by the Board, but in no event more frequently than once every thirty-six months. The Board, on a finding of need, may require an oil discharge exercise designed to demonstrate the facility's or vessel's ability to implement its oil discharge contingency plan either before or after the plan is approved.

C. The Board, after notice and opportunity for a conference pursuant to § 9-6.14:11, may modify its approval of an oil discharge contingency plan if it determines that:

1. A change has occurred in the operation of any facility or vessel covered by the plan that necessitates an amended or supplemented plan;
 2. The facility's or vessel's discharge experience or its inability to implement its plan in an oil discharge exercise demonstrates a necessity for modification; or
 3. There has been a significant change in the best available technology since the plan was approved.
- D. The Board, after notice and opportunity for hearing, may revoke its approval of an oil discharge contingency plan if it determines that:
1. Approval was obtained by fraud or misrepresentation;
 2. The plan cannot be implemented as approved; or
 3. A term or condition of approval has been violated. (1990, c. 917.)

Editor's note. — Acts 1990, c. 919, cl. 2 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this

section shall become effective on July 1, 1992. Clause 3 of this act also stated that the Board should regard certain considerations in adopting such regulations.

§ 62.1-44.34:16. Financial responsibility. — A. (For effective date see Editor's note) 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. Any such cash deposits received by the Board shall be held in escrow in the Virginia Underground Petroleum Storage Tank Fund.

B. If the Board determines that oil has been discharged in violation of this article or that there has been 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 this chapter.

C. The Board shall exempt an operator of a tank vessel from the cash deposit requirements specified in this section if the operator of the tank vessel provides evidence of financial responsibility pursuant to the terms and conditions of this subsection. The Board shall adopt requirements for operators of tank vessels for maintaining evidence of financial responsibility in an amount equivalent to the cash deposit which would be required for such tank vessel pursuant to this section. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any combination thereof, under the terms the Board may prescribe. To obtain an exemption from the cash deposit requirements under this section: the operator and insurer, guarantor or surety shall appoint an agent for service of process in the Commonwealth; any insurer must be authorized by the Commonwealth to engage in the insurance business; and 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 of this chapter by the operator up to, but not exceeding, the amount insured, guaranteed or otherwise pledged. An operator whose financial responsibility is accepted by the Board under this

subsection shall notify the Board at least thirty days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

D. Acceptance of proof of financial responsibility shall expire:

1. One year from the date on which the Board exempts an operator from the cash deposit requirement based on evidence of self-insurance, except that the Board may establish by regulation a different expiration date for acceptance of evidence of self-insurance submitted by public agencies;
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.

Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

E. 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 under this section or the requirements established by the Board pursuant to this section.

F. It is not a defense to any action brought for failure to comply with the cash deposit requirement or to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the tank vessel or the operator of the tank vessel had made the required cash deposit or possessed evidence of financial responsibility accepted by the Board. (1990, c. 917.)

Editor's note. — Acts 1990, c. 917, cl. 4 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective 90 days after the effective date of such regulations. Clause 4 also provides that in promulgating such regula-

tions, the Board shall provide that, if evidence of financial responsibility provided to the federal government or any other state meets the requirements of subsection C of this section, comments shall be accepted by the Board in full or partial satisfaction requirements of subsection A of this section as appropriate.

§ 62.1-44.34:17. Exemptions. — Sections 62.1-44.34:15 and 62.1-44.34:16 do not apply to a facility having a maximum storage or handling capacity of less than 25,000 gallons of oil or to a tank vessel having a maximum storage, handling or transporting capacity of less than 15,000 gallons of oil. (1990, c. 917.)

§ 62.1-44.34:18. Discharge of oil prohibited; liability for permitting discharge. — A. The discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth is prohibited. For purposes of this section, discharges of oil into or upon state waters include discharges of oil that (i) violate applicable water quality standards or a permit or certificate of the Board or (ii) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

B. Any person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat

of such discharge shall, immediately upon learning of such discharge or threat of discharge, implement any applicable oil spill contingency plan approved under this article or take such other action as may be necessary to contain and clean up such discharge or threat of such discharge, including any actions directed by any on-scene coordinator acting pursuant to the Federal Water Pollution Control Act. In the event of such discharge or threat of discharge, if it cannot be determined immediately the person responsible therefor, or if the person is unwilling or unable to promptly contain and clean up such discharge or threat of discharge, the Board may take such action as is necessary to contain and clean up the discharge or threat of discharge, including the engagement of contractors or other competent persons. The costs of such containment and cleanup shall be paid from the Underground Petroleum Storage Tank Fund or from any federal fund available for this purpose.

C. Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat of such discharge, shall be liable to:

1. The Commonwealth of Virginia or any political subdivision thereof for all costs of investigation, containment and cleanup incurred as a result of such discharge or threat of discharge;

2. The Commonwealth of Virginia or any political subdivision thereof for all damages to property of the Commonwealth of Virginia or the political subdivision caused by such discharge;

3. The Commonwealth of Virginia or any political subdivision thereof for loss of tax or other revenues caused by such discharge, and compensation for the loss of any natural resources that cannot be restocked, replenished or restored; and

4. Any person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, caused by such discharge.

D. Notwithstanding any other provision of law, a person who renders assistance in containment and cleanup of a discharge of oil prohibited by this article or a threat of such discharge shall be liable under this section for damages for personal injury and wrongful death caused by that person's negligence, and for damages caused by that person's gross negligence or willful misconduct, but shall not be liable for any other damages under this section that are caused by the acts or omissions of such person in rendering such assistance; provided, however, that such liability provision shall not apply to a person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge, or to such person's employee. Nothing in this article shall affect the right of any person who renders such assistance to reimbursement for the costs of the containment and cleanup under the applicable provisions of this article or the Federal Water Pollution Control Act, as amended, or any rights that person may have against any third party whose acts or omissions caused or contributed to the prohibited discharge of oil or threat of such discharge.

E. In any action brought under this article, it shall not be necessary for the Commonwealth, political subdivision or any person, to plead or prove negligence in any form or manner.

F. In any action brought under this article, the Commonwealth, political subdivision or any person, if a prevailing party, shall be entitled to an award of reasonable attorneys' fees and costs.

G. It shall be a defense to any action brought under subdivision C 2, C 3, or C 4 of this section that the discharge was caused solely by (i) an act of God, (ii) an act of war, (iii) a willful act or omission of a third party who is not an employee, agent or contractor of the operator, or (iv) any combination of the foregoing; provided that this subsection shall not apply to any action brought against (a) a person or operator who failed or refused to report a discharge as required by § 62.1-44.34:19; or (b) a person or operator who failed or refused to cooperate fully in any containment and cleanup or who failed or refused to effect containment and cleanup as required by subsection B of this section.

H. In any action brought under subdivision C 2, C 3, or C 4 of this section, the total liability of a person or operator under this section for each discharge of oil or threat of such discharge shall not exceed the amount of financial responsibility required under § 62.1-44.34:16 or \$10,000,000, whichever is greater; provided that there shall be no limit of liability imposed under this section: (a) if the discharge of oil or threat of such discharge was caused by gross negligence or willful misconduct on the part of the person or the operator discharging or causing or permitting discharge or threat of discharge or by an agent, employee or contractor of such person or operator, or by the violation of any applicable safety, construction or operation regulations by such person or operator or an agent, employee or contractor of such person or operator; or (b) if the operator or person discharging or causing or permitting a discharge or threat of discharge failed or refused to report the discharge as required by § 62.1-44.34:19, or failed or refused to cooperate fully in any containment and cleanup or to effect containment and cleanup as required by subsection B of this section. (1973, c. 417; 1976, c. 51; 1978, c. 816; 1989, c. 627; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 962 purported to amend §§ 62.1-44.34:2 and 62.1-44.34:3, which were repealed by Acts 1990, c. 917. The effect of these amendments was to add lands and storm drain systems in

the Commonwealth, along with state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, these amendments have been effectuated in this corresponding new Code section.

§ 62.1-44.34:19. Reporting of discharge. — Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands or storm drain systems within the Commonwealth or discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, lands, or storm drain systems within the Commonwealth, and any operator of any facility, vehicle or vessel from which there is a discharge of oil into state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters shall, immediately upon learning of the discharge, notify the Board and appropriate federal authorities of such discharge. (1978, c. 816; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 962 purported to amend § 62.1-44.34:4, which was repealed by Acts 1990, c. 917. The effect of this amendment was to add lands and storm drain systems in the Commonwealth, along with

state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, this amendment has been effectuated in this corresponding new Code section.

1 coastal waters or at any other place where, unless controlled or
2 removed, they may drain, seep, run, or otherwise enter coastal
3 waters.

4 (8) "Discharge cleanup organization" means any group
5 or cooperative, incorporated or unincorporated, of owners or
6 operators of vessels or terminal facilities and any other persons
7 who may elect to join, organized for the purpose of abating,
8 containing, removing, or cleaning up pollution from discharges of
9 oil or rescuing and rehabilitating wildlife or other natural
10 resources through cooperative efforts and shared equipment,
11 personnel, or facilities. Any third-party cleanup contractor,
12 industry cooperative, volunteer organization, or local government
13 shall be recognized as a discharge cleanup organization, provided
14 the commissioner properly certifies the organization.

15 (9) "Federal fund" means the federal oil spill
16 liability trust fund.

17 (10) "Fund" means the coastal protection fund.

18 (11) "Harmful quantity" means that quantity of oil the
19 discharge of which is determined by the commissioner to be harmful
20 to the environment or public health or welfare or may reasonably be
21 anticipated to present an imminent and substantial danger to the
22 public health or welfare.

23 (12) "Hazardous substance" means any substance, except
24 oil, designated as hazardous by the Environmental Protection Agency
25 pursuant to the Comprehensive Environmental Response, Compensation,

1 and Liability Act of 1980 (42 U.S.C. Sec. 9601 et seq.) and
2 designated by the Texas Water Commission.

3 (13) "Marine terminal" means any terminal facility
4 used for transferring crude oil to or from vessels.

5 (14) "National contingency plan" means the plan
6 prepared and published, as revised from time to time, under the
7 Federal Water Pollution Control Act [33 U.S.C. Sec. 1321 et seq.]
8 and the Comprehensive Environmental Response, Compensation, and
9 Liability Act of 1980 (42 U.S.C. Sec. 9601 et seq.).

10 (15) "Natural resources" means all land, fish,
11 shellfish, fowl, wildlife, biota, vegetation, air, water, and other
12 similar resources owned, managed, held in trust, regulated, or
13 otherwise controlled by the state.

14 (16) "Oil" means oil of any kind or in any form,
15 including but not limited to crude oil, petroleum, fuel oil,
16 sludge, oil refuse, and oil mixed with wastes other than dredged
17 spill, but does not include petroleum, including crude oil or any
18 fraction thereof, which is specifically listed or designated as a
19 hazardous substance under subparagraphs (A) through (F) of Section
20 101(17) of the Comprehensive Environmental Response, Compensation,
21 and Liability Act of 1980 (42 U.S.C. Sec. 9601 et seq.) and which
22 is subject to the provisions of that Act, and which is so
23 designated by the Texas Water Commission.

24 (17) "Owner" or "operator" means:

25 (A) any person owning, operating, or chartering

1 national contingency plan, in responding to the discharge the
 2 commissioner or the state-designated on-scene coordinator shall to
 3 the greatest extent practicable act in accordance with the national
 4 contingency plan and cooperate with the federal on-scene
 5 coordinator or other federal agency or official exercising
 6 authority under the national contingency plan.

7 (c) The commissioner or the state-designated on-scene
 8 coordinator may act independently to the extent no federal on-scene
 9 coordinator or authorized agency or official of the federal
 10 government has assumed federal authority to oversee, coordinate,
 11 and direct response operations.

12 Sec. 40.103. ASSISTANCE AND COMPENSATION. (a) Subject to
 13 the commissioner's authority under this chapter, any person or
 14 discharge cleanup organization may assist in abating, containing,
 15 or removing pollution from any unauthorized discharge of oil. This
 16 chapter does not affect any rights not inconsistent with this
 17 chapter that any such person or organization may have against any
 18 third party whose acts or omissions caused or contributed to the
 19 unauthorized discharge.

20 (b) Any person or discharge cleanup organization that
 21 renders assistance in abating, containing, or removing pollution
 22 from any unauthorized discharge of oil may receive compensation
 23 from the fund for response costs, provided the commissioner
 24 approves compensation prior to the assistance being rendered.
 25 Prior approval for compensation may be provided for in the state

1 coastal discharge contingency plan. The commissioner, on petition
 2 and for good cause shown, may waive the prior approval
 3 prerequisite.

4 Sec. 40.101. QUALIFIED IMMUNITY FOR RESPONSE ACTIONS.

5 (a) No action taken by any person or discharge cleanup
 6 organization to abate, contain, or remove pollution from an
 7 unauthorized discharge of oil, whether such action is taken
 8 voluntarily, or pursuant to the national contingency plan or state
 9 coastal discharge contingency plan, or pursuant to a discharge
 10 response plan required under this chapter, or pursuant to the
 11 request of an authorized federal or state official, or pursuant to
 12 the request of the responsible person, shall be construed as an
 13 admission of responsibility or liability for the discharge.

14 (b) No person or discharge cleanup organization that
 15 voluntarily, or pursuant to the national contingency plan or the
 16 state coastal discharge contingency plan, or pursuant to any
 17 discharge response plan required under this chapter, or pursuant
 18 to the request of an authorized federal or state official, or
 19 pursuant to the request of the responsible person, renders
 20 assistance or advice in abating, containing, or removing pollution
 21 from an unauthorized discharge of oil is liable for response costs,
 22 damages, or civil penalties resulting from acts or omissions
 23 committed in rendering such assistance or advice, except for acts
 24 or omissions of gross negligence or willful misconduct.

25 Sec. 40.105. EQUIPMENT AND PERSONNEL. The commissioner may

1 establish and maintain equipment and personnel at places the
 2 commissioner determines may be necessary to facilitate response
 3 operations.

4 Sec. 46.106. REFUSAL TO COOPERATE. (a) If a responsible
 5 person, or a person or discharge cleanup organization under the
 6 control of a responsible person, participating in operations to
 7 abate, contain, and remove pollution from any unauthorized
 8 discharge of oil, reasonably believes that any directions or orders
 9 given by the commissioner or the commissioner's designee under this
 10 chapter will unreasonably endanger public safety or natural
 11 resources or conflict with directions or orders of the federal
 12 on-scene coordinator, the party may refuse to comply with the
 13 direction or orders.

14 (b) The party shall state at the time of refusal the reason
 15 or reasons why the party refuses to comply. The party shall give
 16 the commissioner written notice of the reason or the reasons for
 17 the refusal within 48 hours of the refusal.

18 Sec. 46.107. PRESUMPTION OF NATURAL RESOURCES DAMAGES.

19 (a) In any action to recover natural resources damages, the amount
 20 of damages established by the commissioner in conjunction with
 21 state-designated natural resources trustees, according to the
 22 procedures and plans contained in the state coastal discharge
 23 contingency plan shall create a rebuttable presumption of the
 24 amount of such damages.

25 (b) The commissioner may establish the rebuttable

1 presumption by submitting to the court a written report of the
 2 amounts computed or expended according to the state plan. The
 3 written report shall be admissible in evidence.

4 Sec. 46.108. DERELICT VESSELS AND STRUCTURES. (a) A person
 5 may not leave, abandon, or maintain any structure or vessel
 6 involved in an actual or threatened unauthorized discharge of oil
 7 on public or private lands or at a public or private port or dock,
 8 in a wrecked, derelict, or substantially dismantled condition,
 9 without the consent of the commissioner.

10 (b) The commissioner may remove any vessel or structure
 11 described in Subsection (a) of this section and may recover the
 12 costs of removal from the owner or operator of the vessel or
 13 structure.

14 Sec. 46.109. REGISTRATION OF TERMINAL FACILITIES. (a) A
 15 person may not operate or cause to be operated a terminal facility
 16 without a discharge prevention and response certificate issued
 17 pursuant to rules promulgated under this chapter.

18 (b)(1) As a condition precedent to the issuance or renewal
 19 of a certificate, the commissioner shall require satisfactory
 20 evidence that:

21 (A) the applicant has implemented a discharge
 22 prevention and response plan consistent with state and federal
 23 plans and regulations for prevention of unauthorized discharges of
 24 oil and abatement, containment, and cleanup of pollution when such
 25 discharge occurs; and

... except for acts
 of willful misconduct.
 EQUIPMENT AND PERSONNEL. The commissioner may

SENATE BILL 179

By: Senator Coleman of the 1st, Allen of the 2nd and Hammill of the 3rd

AS PASSE

AN ACT

To amend Chapter 5 of Title 12 of the Official Code of Georgia Annotated, relating to water resources, so as to provide for limited immunity from liability for persons responding to an oil spill or threat of an oil spill; to provide for definitions; to provide for applicability; to provide for certain liability regarding removal costs and damages; to provide for liability with respect to certain responsible parties; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Chapter 5 of Title 12 of the Official Code of Georgia Annotated, relating to water resources, is amended by adding at the end thereof a new article, to be designated Article 7, to read as follows:

"ARTICLE 7

12-5-500. As used in this article, the term:

(1) 'Damages' means damages of any kind for which liability may exist under the laws of this state resulting from, arising out of, or related to the discharge or threatened discharge of oil.

(2) 'Discharge' means any emission, other than natural seepage, whether intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.

(3) 'Federal on-scene coordinator' means the federal official designated by the United States Environmental Protection Agency or the United States Coast Guard to coordinate and direct federal responses under subpart D or the official designated by the lead agency to coordinate and direct removal under subpart E of the National Contingency Plan.

(4) 'National Contingency Plan' means the National Contingency Plan prepared and published under Section 311(d) of the Federal Water Pollution Control Act, 31 U.S.C. 1321(d), as amended by the federal Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

(5) 'Oil' means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

(6) 'Person' means an individual, corporation, partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body.

(7) 'Removal costs' means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.

(8) 'Responsible party' means a responsible party as defined under Section 1001 of the federal Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

12-5-501. (a) Notwithstanding any other provision of law, a person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the federal on-scene coordinator or by any state official with responsibility for oil spill response.

(b) Subsection (a) of this Code section shall not apply:

- (1) To a responsible party;
- (2) With respect to personal injury or wrongful death;
- (3) If the person is grossly negligent or engages in willful misconduct; or
- (4) To a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. Section 9601, et seq.).

(c) A responsible party shall be liable for any removal costs and damages that another person is relieved of under subsection (a) of this Code section.

(d) Nothing in this Code section shall affect the liability of a responsible party for oil spill response under any applicable state law."

Section 2. All laws and parts of laws in conflict with this Act are repealed.

**STATES WITH ACTION SINCE
1990**

**LIMITING THE SPILL RESPONDER
FROM SIMPLE NEGLIGENCE
LIABILITY**



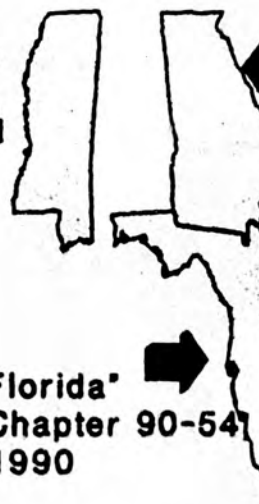
California:
Provides immunity for
first 60, 90 days
after the spill.
"Lempert-Keene Oil Spill
Prevention & Response Act"
of 1990 (Cal. Code 8670.56.6)

Virginia:
Sec.62.1-44.34:18 D.
1990



Delaware:
Senate Bill 6
Enacted 2/91

Mississippi:
Bill passed
Senate 2/91



Georgia:
Passed
Senate
61-0
2/91

Hawaii:
Act 298, 1990



Florida:
Chapter 90-54
1990

**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

WHO DOES THE BILL APPLY TO?

**The bill applies only to innocent cleanup contractors --
those who had no involvement in the spill itself.**

**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

DOES THE BILL SOMEHOW LESSEN THE SPILLER'S LIABILITY?

No! The bill makes it absolutely clear that the spiller's liability for damages includes any damages caused by the cleanup contractor's action for which liability is limited under the bill.

**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

**DOES THE BILL AFFECT A CONTINGENCY PLAN
HOLDER'S RESPONSIBILITIES TO MAINTAIN
CLEANUP EQUIPMENT?**

**No. Alaska law on spill contingency plans is unaffected.
The plan holder remains liable for penalties and damages
if it does not respond to a spill in accordance with the
promises made in that plan.**

SPILL RESPONSE CONTRACTOR LIMITED LIABILITY PROPOSAL

RESPONSE ACTION CONTRACTOR CURRENT LIABILITY EXPOSURE	PROPOSED LEGISLATION EFFECT
---	-----------------------------------

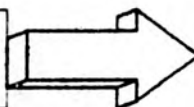
GROSS NEGLIGENCE

INTENTIONAL ACTS

SIMPLE NEGLIGENCE

PERSONAL INJURY

DEATH



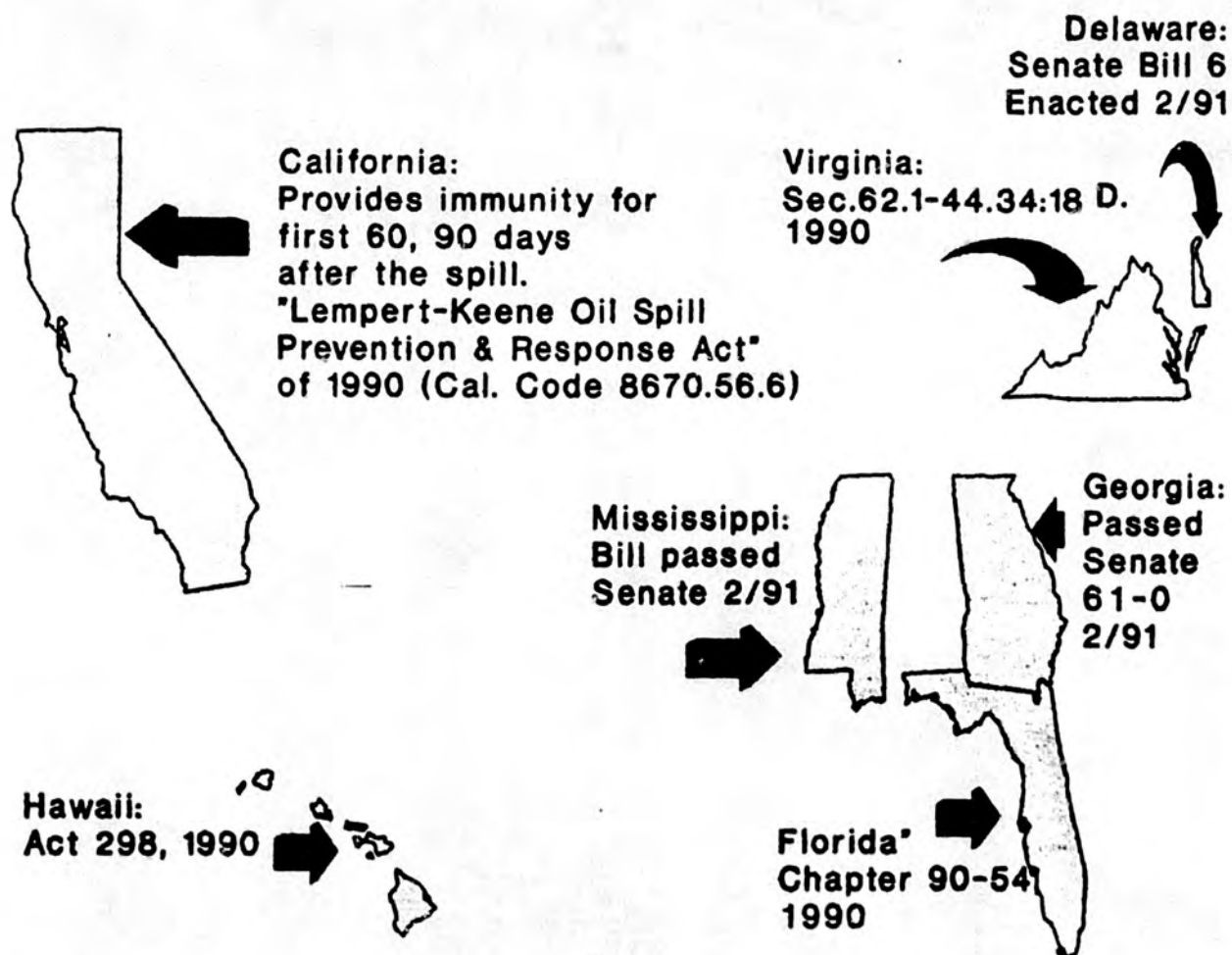
REMOVES:

SIMPLE NEGLIGENCE

And clarifies
that the spiller
is **STRICTLY LIABLE**
for damages that
are the result of
the limited immunity
granted the
response action
contractor

**STATES WITH ACTION SINCE
1990**

**LIMITING THE SPILL RESPONDER
FROM SIMPLE NEGLIGENCE
LIABILITY**



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U.S. Department
of Transportation
United States
Coast Guard



Commander
Eleventh Coast Guard District

Union Bank Bldg.
400 Ocasanga
Long Beach, CA 90822-4100
Staff Symbol: (d)
Ph: (213) 499-5201

5090

AUG 28 1990

The Honorable Willie L. Brown Jr.
Speaker, California State Assembly
State Capitol
Sacramento, California 95814

Dear Mr. Brown:

I am writing to you to express concern about legislation that is important to the interests of the United States Coast Guard and the State of California. The legislation, currently being debated in the Assembly, is Senate Bill 2040.

In particular, I support the need for limited immunity for all oil spill responders other than liable parties, to the extent that it may be necessary to encourage such persons to take action promptly. Prompt action after a spill is essential to protect the marine environment of California from oil pollution.

As you know, the Oil Pollution Act of 1990 (P.L. 101-380) was signed by the President on August 18th. That Act provides limited federal immunity for all oil spill responders. The Coast Guard did not object to that provision because we believe that the issue is related to the national interest in promoting quick, effective responses to oil spills and their threats. Effective response requires resources from both the public and private sectors.

A law that does not address responder's concerns about liability exposure, causing them to hesitate in responding to spills, would be counterproductive.

Oil spill response is not an exact science. Decisions often must be made with incomplete and sometimes conflicting information. Moreover, the operational environment is unpredictable. Liability standards must take these factors into account if effective programs are to be put in place.

I urge you to give full consideration to limited immunity provisions for all oil spill responders other than liable parties in your deliberations on SB 2040.

Sincerely,

M. E. GILBERT
Rear Admiral, U.S. Coast Guard
Commander, Eleventh Coast Guard District



THE CASE FOR LIMITED LIABILITY FOR OIL SPILL RESPONSE ACTION CONTRACTORS

TESORO ALASKA PETROLEUM COMPANY

October 24, 1990

For Further Information Contact:

Tesoro Alaska Petroleum Company
Government Affairs
Attn: Gene Burden
P. O. Box 3690
Kenai, Alaska 99611
(907) 776-8191

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EXECUTIVE SUMMARY

Since the Good Friday, 1989 grounding of the EXXON VALDEZ, the State of Alaska has enacted a number of statutes intended to increase both public and private oil spill cleanup capabilities. 1989 legislation, for example, required the Department of Environmental Conservation ("ADEC") to prepare both state and regional master oil spill contingency plans. Ch. 90, SLA 1989. 1990 legislation established stringent new requirements for private oil spill contingency plans, including the capability to contain a major oil discharge within 72 hours. Ch. 191, SLA 1990.

Unfortunately, the goals of the 1989 and 90 legislation may be unachievable. Current oil spill containment and cleanup assets in Alaska are insufficient to meet the demands of the new legislation. Accordingly, the public and private sectors need to encourage the creation and maintenance of new oil spill cleanup depots and services in the state.

Industry is attempting to respond to both Alaska's new demands, and those of Congress. After the EXXON VALDEZ spill, a group of oil producers, marketers, and transporters formed the Petroleum Institute Response Organization ("PIRO") with the goal of providing state-of-the-art response capability for any spill in United States waters. PIRO, in turn, led to the creation of the Marine Spill Response Corporation ("MSRC") -- a nonprofit corporation privately financed for the purpose of responding to catastrophic oil spills. Funding for MSRC will come through the separate Marine Preservation Association, whose initial membership is composed of owners, shippers and receivers of crude oil and petroleum products. MSRC organizers estimate that \$800 million in

industry funds will be invested in equipment, maintenance, research and personnel over the first five years of operations. The goal of Alaska state government, and Alaska industry, has been to attract a regional PIRO (or MSRC) depot to the state.

In oil spill legislative jargon, the people who provide oil spill cleanup services, such as MSRC, are called "response action contractors" ("RAC"). Unfortunately, Alaska's current legal environment discourages the presence of MSRC and other RACs within the state. Alaska law creates a substantial risk that a RAC will become embroiled in litigation arising from an oil spill -- even if the RAC had no involvement whatsoever in causing the spill. Whether the RAC ultimately extricates itself from that litigation is beside the point. Defense costs alone are enough to make the threat of litigation unacceptably high. That threat, in fact, is so great that it has resulted in the absence of sufficient, affordable insurance for RACs. A June 6, 1990 PIRO Board of Directors resolution made it clear that the possibility of innocent RAC liability would be a major factor in evaluating the organization's presence in any state. According to that resolution:

In the absence of qualified state immunity of the type provided in the pending federal legislation, PIRO will be forced to reconsider the role and vision of PIRO in each affected state.

In 1989 Alaska attempted to provide some protection from RAC liability. Ch 39, SLA 1989 (AS 46.03.823); amended §§3-7, Ch. 191, SLA 1990. The new law, however, is of little practical value, and may actually aggravate the situation. There is no sound public policy reason for ever holding an innocent RAC strictly liable for damages from an oil spill. Where a RAC's only involvement stems from its willingness to provide necessary aid, forcing liability on it without regard to fault is foolish. And, before enactment of

Alaska's 1989 legislation, it was at worst uncertain whether an innocent RAC would ever be held strictly liable for damages occasioned by cleanup activities. The 1989-90 legislation, however, implies that unless certain vague and cumbersome conditions are met, innocent RACs will be strictly liable for any damages caused by their cleanup activities. Moreover, the conditions for avoiding strict liability are so unclear and poorly worded that the statute provides virtually no assurance that strict liability will not attach in all cases.

In contrast to Alaska's legislation, Congress has recently enacted the Oil Pollution Act of 1990. Like the flurry of Alaska legislation arising from the EXXON VALDEZ, the federal law seeks to enhance the nation's oil spill cleanup capability. Unlike Alaska law, however, the 1990 legislation effectively furthers that goal by providing a straightforward limitation on RAC liability for oil spill cleanup activities. The new federal law not only unequivocally exempts oil spill RACs from strict liability, it also limits oil spill RACs' liability for negligence. It does so for three reasons. First, oil spill RACs are uniquely vulnerable to negligence claims because they must operate in a crisis atmosphere, making immediate decisions that are always subject to second guessing. As MSRC has observed:

[A]n oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.¹

1. Marine Spill Response Corporation, The World's Largest Oil Spill Response Organization, undated at 2. Attachment 1. All of the attachments to this summary and the report are included in a separate binder.

Second, protection from negligence liability is necessary if insurance is to become available for oil spill RACs. Third and finally, Congress recognizes that if there is damage caused by the good faith cleanup efforts of an oil spill RAC, the liability should fall on the person causing the spill.

The federal legislation, however, does not affect state oil spill liability laws. Alaska's RAC liability law therefore remains in effect. With the passage of the new federal legislation, and similar legislation in Washington, Hawaii, Florida, Virginia, and (with certain conditions) California, Alaska now finds itself at a severe competitive disadvantage in attracting adequate oil spill cleanup technology and expertise to the state.

Alaska's disadvantage has threatened its goal of encouraging a direct MSRC presence in the state. MSRC currently plans five regional response depots in New York/New Jersey, south Florida, Louisiana, Southern California and Seattle. While "the petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state,"² it is apparent that the unfavorable legal environment in a declining number of states -- unfortunately including Alaska -- will continue to deter necessary cleanup capabilities:

To insure the most prompt and effective response, the [new federal] legislation provides limited immunity for oil spill responders -- but not for spillers. This national immunity standard insures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. . . .

2. Questions and Answers: Marine Spill Response Corporation, undated at 4. Attachment 2.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder -- on one side of the state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose a serious problem in the future.

"Marine Spill Response Corporation: A New Weapon For Cleaning Up Oil Spills," undated at 2. Attachment 3.

As MSRC's president, retired Coast Guard Vice Admiral John D. Costello, observed:

The new federal law also allows states to enact responder liability standards different from the federal standard. In some states, existing standards can make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, MSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.³

To remove a substantial deterrent to the presence of MSRC and other RACs in the state, Alaska should conform its laws to recently enacted federal standards, and provide certain and sufficient protection from the unjustifiable inclusion of RACs in oil spill litigation. Legislation accomplishing that goal is Attachment 5 to this report.

3. Statement of Vice Admiral John D. Costello, September 6, 1990, at 2-3. Attachment 4.

I. THE PROBLEM OF POTENTIAL RAC LIABILITY

A. The RAC's Unique Exposure to Litigation.

Effective response to a major oil spill requires the immediate mobilization of personnel and equipment to the spill site. As Alaska's experience with the EXXON VALDEZ spill illustrates, there is a direct connection between the time it takes to respond to a spill and the amount of environmental damage that may ultimately result.

RACs are called to disaster scenes in the same crisis atmosphere as firefighters and paramedics, and are asked to make rapid assessments and formulate appropriate responses on the spot. There is little opportunity for planning and reflection. While all oil spill response will be subject to some advance contingency planning, the adequacy of that response will ultimately turn on snap decisions made in response to the unique dynamics of the particular spill.

The emergency environment in which an oil spill RAC must operate makes the company an easy target for negligence claims. As noted recently in the Tort and Insurance Law Journal, "in this day and age, when injury occurs, negligence is almost always found among one or more of the acting parties. The concept of an accident without fault is virtually unknown in modern tort law."¹ Even if a RAC had absolutely no involvement in the spill itself, plaintiffs' lawyers will have little trouble inventing theories for why the RAC should have acted differently.

1. "Hazardous Waste Liability and the Surety," Tort and Insurance Law Journal, Spring 1990, at 684. Attachment 6.

The crisis atmosphere in which an oil spill RAC must operate sets it apart from a RAC engaged in the long-term cleanup of hazardous waste sites. The hazardous waste RAC has weeks or months to investigate, review and analyze both the site and possible responses. The oil spill RAC, conversely, must make critical, time sensitive decisions often in an atmosphere of near total chaos, adverse weather, fast moving currents, high seas and far less than complete information. A RAC assisting in the long-term cleanup of a hazardous waste site will have the time to review carefully each step of its response with public regulators and its own attorneys. An oil spill RAC will not.

This distinction is important because, as we shall see, Alaska law lumps oil spill and hazardous waste site RAC liability together, using legislation that is patterned after federal law applicable only to hazardous waste site RACs.

At the height of the response to the EXXON VALDEZ spill, 10,000 people and over 75 vessels were engaged in containment and cleanup efforts. With this level of activity, and in today's litigious atmosphere, any responder who steps into the chaos of a major spill may quickly find itself exposed to high risk lawsuits designed to tie the responder's cleanup action or inaction to the negligence of the spiller. The RAC's principal risk is not in losing a lawsuit; rather, it is becoming enmeshed in complex oil spill litigation. Attorneys' fees, and the time demands that a lawsuit places on the RAC itself, are severe enough to dissuade a RAC from entering an uncertain legal environment, irrespective of the chances of ultimate potential liability.

There is no reported study on the defense costs associated with oil spill or environmental damage litigation in particular. However, a number of studies have been

performed with respect to other factually complex tort litigation such as medical malpractice and general liability. Those studies show that defense costs are at least a significant factor, and at times the primary factor, in the burdens of litigation. For example, in a 1987 study commissioned for the RAND Corporation, researchers found that of the total expenses for tort litigation (other than automobile accident cases), 57 per cent of those costs were attributable to attorneys' fees, the parties' time, and court fees. Only 43 per cent were attributable to compensation paid.²

Insurance Services Office, Inc., found similar results in a 1988 study. Defense attorneys' fees alone, the 1988 study found, equaled 34.3 per cent of compensation paid for general liability claims, and 36.6 per cent of indemnity costs for medical malpractice.³

Substantial defense costs are inevitable irrespective of the merits of the claim. For example, the 1988 ISO study found that fully 34 per cent of the total defense costs paid by insurers were for claims in which no payment whatsoever was made to the claimant. Id. at 8.⁴

In 1986, the RAND Corporation estimated that nationwide defense costs in tort litigation ranged between \$8 and \$10 billion. Id. at vii. The ISO's 1988 study found that

2. RAND Corp., "Costs and Compensation Paid in Tort Litigation," Kakalik and Pace at xiii (1986). Attachment 7.

3. Insurance Services Office, Inc., "Legal Defense: A Large and Growing Insurance Cost," at 3 (1988). Attachment 8.

4. In Alaska, a prevailing party is theoretically entitled to recover its attorneys' fees under Alaska Rule of Civil Procedure 82. However, that rule generally allows only partial recovery of attorneys' fees. See Malvo v. J.C. Penney, Inc. 512 P.2d 575 (Alaska 1973). Moreover, defendants often find that the plaintiff is impecunious, and that an attorneys' fee judgment is practically worthless. Finally, most environmental litigation ultimately settles, under terms that require each party to bear their own attorneys' fees.

"legal defense cost for the casualty lines of insurance amounted to \$12 billion" in attorneys' fees alone. Id. at 1. With this kind of exposure, not only RACs themselves, but their potential insurers as well, will look carefully at any legal environment that threatens to entwine oil spill RACs in prolonged litigation.

B. The Unavailability of Liability Insurance for RAC Contractors.

The potential liability of innocent RACs could be offset by affordable liability insurance. However, precisely because of that potential liability, insurance for RACs at reasonable rates, and with reasonable limits, is unavailable. As a practical matter, then, no responsible RAC may be willing to enter the market.

The unavailability of RAC insurance has been a driving force behind congressional limitations on RAC liability. In 1986, Congress reauthorized the federal "Superfund" program through the Superfund Amendments and Authorization Act of 1986 ("SARA") (P.L. 99-499). In §119 of that act (42 U.S.C. §9619), Congress authorized the U.S. Environmental Protection Agency ("EPA") to indemnify RACs from negligence liability for the cleanup of hazardous waste other than oil. See §III, post. That action was motivated principally by a concern over the unavailability of RAC insurance:

Throughout the 1986 Superfund reauthorization process which culminated in the enactment of SARA, EPA officials agreed with contractor testimony that adequate insurance coverage at a reasonable price was not available to them and was unlikely to be available in the near future. In fact, the lack of such insurance coverage was the underlying justification for the establishment of a federal negligence standard and indemnification program for superfund cleanup contractors.

Attachment 6 at 679.

Following enactment of SARA, the U.S. General Accounting Office ("GAO") issued a report entitled "Hazardous Waste, Issues Surrounding Insurance Availability" (GAO/RCED-88-2) (1987). The GAO found that:

Only one insurance organization is actively marketing pollution insurance. A few hundred companies are insured under its policies. The maximum annual coverage that can be purchased is \$12.5 million. Several other insurance organizations provide limited coverage pollution risk insurance.

Id. at 3; Attachment 9.

The GAO report explored the reason for the lack of insurance at meaningful policy limits, and concluded that the situation was unlikely to improve in the near term:

Few insurance companies are currently offering pollution insurance. According to insurance industry officials, the uncertainties created by potentially enormous claim payments and unfavorable legal trends have led most of the insurance industry to perceive pollution as an uninsurable risk. The near-term outlook for increased availability of pollution insurance does not appear favorable, and many insurers indicate that they may never offer pollution insurance. The insurance industry wrote about \$154.3 billion in direct premiums in 1985 for property/casualty insurance. We estimate that less than one-half of one percent (about \$65 million) of those premiums were written for EIL [Environmental Impairment Liability] insurance.⁵

Under SARA, EPA was required to establish guidelines for indemnifying RACs for negligence liability. In the 1989 Supporting Background Document accompanying the proposed final guidelines for SARA indemnification, EPA stated:

During the reenactment of CERCLA, the commercial insurance industry was recovering from the worst financial performance in its history. Insurance coverage for RACs was extremely restricted and, if available, very expensive. Commercial insurers asserted that it was extremely difficult to provide coverage for RAC loss events resulting from current operations that may not cause a loss until far into the future and may not result in a claim until even further into the future.

5. Id. at 17.

As a result of record underwriting losses in 1984 and 1985, by 1986 only two U.S. insurers remained in the market for pollution liability insurance. Even these two insurers scaled back considerably their pollution insurance programs after 1985.⁶

Moreover, the two remaining insurers referred to in the 1989 background document hardly provided adequate or affordable coverage:

On the more specific subject of pollution liability insurance for response action contractors, EPA itself concluded that only two U.S. property and casualty insurers, as of April, 1988, were offering specialized pollution liability insurance programs to response action contractors active in the superfund program....

The coverage offered by the two insurance companies was in the form of claims made policies, each carrying maximum limits of \$1 million per occurrence and \$2 to \$5 million annual aggregate, respectively. Each carried a minimum premium of \$25,000, one with a \$25,000 self insured retention and the other with a \$50,000 self insured retention.⁷

A \$1 million/occurrence limit, of course, is hardly adequate to protect a RAC from potential oil spill liability. And, for reasons discussed in §III, post, the publication of EPA's indemnification guidelines did little to improve the insurance market. According to recent telephone contacts with RACs operating in Alaska, PIRO and the American Insurance Association, adequate pollution liability insurance is still unavailable to RACs. Presently, just two companies are actively involved in the market. The American International Group/National Union Fire Insurance Company (AIG) and Reliance National/Planet Insurance Company, through Environmental Compliance Services (ECS), write most of the pollution liability insurance available in the country. AIG's policy limits are \$5,000,000

6. EPA, Supporting Background Document for Proposed Response Action Contractor Indemnification, at 4-86, 8-51, 8-52 (1989).

7. Attachment 6 at 679.

each claim and \$5,000,000 aggregate. ECS's policy limits are \$2,000,000 each claim and \$2,000,000 aggregate for blanket coverage, and \$3,000,000 each claim and \$6,000,000 aggregate for coverage on a project basis.⁸

The reason most often cited by the insurance industry for the continuing pollution insurance crisis, in addition to the cyclical nature of the industry, is the lack of a preemptive federal limitation on RAC liability and the resulting vague and conflicting nature of state liability laws. It remains unclear in many states, for example, whether RACs are subject not just to negligence liability, but to strict liability. This uncertainty causes many insurers to avoid the market altogether.

In sum, the uniquely high litigation risk faced by RACs has driven the insurance industry from the market. What little coverage is available today is absurdly inadequate to protect the RAC. On July 18, 1985, in a statement prepared for the Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, the National Constructors Association described the RAC liability insurance situation in terms as fitting then as they are today:

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed." As a result of

8. Contractors Pollution Liability Coverage, American Insurance Association (undated); Attachment 10.

the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste cleanup projects.⁹

9. Superfund Reauthorization: Judicial and Legal Issues, Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess., Serial No. 19 (1985), Testimony of National Constructors Association at 7. Attachment 11.

II. CURRENT ALASKA LAW

In 1989, the Alaska legislature enacted AS 46.03.823. Section 823 was patterned after §119 of CERCLA. There are, however, three important differences:

1. While both CERCLA and §823 are intended to protect an innocent RAC from strict liability for damages caused by the spill and cleanup, CERCLA also allows EPA to indemnify RACs from negligence liability. See §III, post. Section 823 contains no indemnification provision. As a result, §823's sole impact is on an innocent RAC's possible strict liability;

2. Section 119 of CERCLA applies only to the cleanup of hazardous substances other than oil. Alaska law, on the other hand, defines "hazardous substance" to include both substances governed by CERCLA, and oil. See AS 46.03.826(4). Congress has now recognized that different liability limitations are warranted for hazardous waste site cleanup on the one hand, and oil spill RACs on the other. See §IV, post. Alaska has not; and

3. Section 823 contains vague exceptions to even the strict liability limitations of the law -- limitations that deny the Alaska statute necessary certainty in defining the extent of RAC liability.

The basic premise of Alaska's law is flawed. In no event should a RAC be subject to strict liability for damages caused by an oil spill in which the RAC itself had no involvement. Alaska law recognizes that the handling of oil in large quantities is a hazardous undertaking, and that those who stand to make substantial profits from the

production, refining and transportation of petroleum ought to serve as guarantors against damage arising from its discharge. See AS 46.03.758-759; AS 46.03.822. These laws thus make the discharger liable for any damage caused by the spill (including damage caused by subsequent cleanup) even if the spill wasn't due to the discharger's negligence. That liability is an exception to the normal rule that fault is required to assess damages. It is premised on two assumptions: (1) that the discharger is engaged in an ultrahazardous business for which special care is needed to protect the public; and (2) the cost of imposing strict liability can be passed on to the consumer who benefits from its imposition.

On the other hand, there is no basis in common sense, equity or law for making an oil spill cleanup contractor (who was totally uninvolved in the discharge itself) strictly liable for damage occasioned by the cleanup. The result that "strict liability" was intended to prevent -- the discharge itself -- has already occurred, and the innocent RAC is simply trying to clean things up. Moreover, the risk presented by oil spill cleanup activities is inconsequential compared to the risk of not cleaning up the spill. Nor, particularly in light of the unavailability of insurance, is the RAC uniquely capable of absorbing the added costs of strict liability.

The case against strict liability for RACs was made by the National Constructors Association during 1985 Superfund oversight hearings before the House Judiciary Committee:

The courts of many states have imposed strict liability upon a variety of activities that are considered to be 'abnormally dangerous.' Although the traditional premises for the imposition of strict liability do not apply to

Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chain of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity. The premise of strict liability is to impose liability upon those persons who 'introduced into the community an abnormal risk of a serious character.' In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

The principal reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work. The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. . . . The remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. . . There simply is no justification for placing a remedial contractor under the burden of strict liability that applies to those who created the risk. . . .

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste

It is also clear that Superfund cleanup work is not 'an abnormally dangerous activity' as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is 'abnormally dangerous' [including] . . . (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes. Application of the fifth and sixth factors demonstrates that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate. . . . Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.

Attachment 11.

Absent the 1989 enactment of §823, it is doubtful whether a RAC would be "strictly liable" for damages occasioned by its participation in cleanup activities. Alaska's strict

liability pollution law, AS 46.03.822(a), lists the persons liable for a hazardous substance spill. Section 822(a)(5) includes as a "responsible party":

Any person who accepts or accepted any hazardous substances, other than refined oil, for transport or disposal to treatment facilities, vessels or sites selected by the person, from which there is a release...

That language is also borrowed from CERCLA, 42 U.S.C. §9607(a)(4), and is meant to include those involved in hauling hazardous waste for dumping. See Prudential Insurance Co. of America v. U.S. Gypsum, 711 F. Supp. 1244, 1253-56 (D.N.J. 1989). Section 822(5) comes the closest to including an oil spill RAC; even here, however, it is unlikely that the term would include an entity who first becomes involved after the spill occurs, and whose sole participation is its attempt to clean it up. Section 822(a)(5), like all of §822's subsections, requires some status or conduct of the responsible party before the release occurs, while a RAC will have no relationship to the discharge until after that fact.

Section 823, on the other hand, first establishes a negligence standard in subsection (a), then in subsection (b) calls that standard a "limitation" on liability that will apply only in certain circumstances. Section 823 thus suggests that innocent RACs will be strictly liable in those circumstances where "limited" negligence liability will not govern. Alaska's new legislation may therefore be making matters worse.

The case for ever imposing strict liability on an innocent RAC is weaker in the case of an oil spill RAC than a hazardous waste RAC. Congress has sensibly distinguished between the two types of RACs in its statutory liability limitations. See §§III-IV, post. Alaska should do the same.

Section 823's failure to distinguish between these two types of RACs manifests itself in §823(e). That subsection provides:

This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a:

- (1) response action contract or remedial action plan if one has been approved by the department; or
- (2) contingency plan approved by the department whether response action contractor is the plan holder.

In the case of a hazardous waste RAC, there will invariably be a detailed "remedial action plan" setting out each approved step of the hazardous waste cleanup. As a result, it will generally be easy for the contractor to determine whether its particular action is "in compliance" with the remedial action plan.

On the other hand, in the emergency atmosphere under which an oil spill RAC must operate, the RAC will be acting under only basic written instructions (if any), and hurried and incomplete oral advice from EPA, the Coast Guard and/or ADEC. Further, the oil spill RAC will often need to take its own initiative, responding to site-specific conditions that were not anticipated in its discussions and/or "contract" with the agencies. It would be easy for the agency, or a third-party plaintiff, to allege after the fact that the RAC did not operate "in compliance" with the agency's general and probably incomplete directives. As a result, an oil spill RAC can have no confidence whatsoever that the statute protects it from even strict liability.

This particular condition highlights the third fundamental problem with Alaska's law -- its uncertainty. As the Hazardous Waste Action Coalition¹⁰ has said:

Express statements of the extent of liability...are crucial...Every point of discretion or ambiguity represents a risk of litigation.¹¹

The point of limited liability is to avoid not only ultimate liability, but the cost of litigation itself. If state law simply exempted innocent RACs from liability, period, the innocent RAC would probably not be sued. Or if it were sued, it could extricate itself from the proceedings. On the other hand, every "if, and, and but" provides the plaintiff's lawyer with an opportunity to argue that the exemption does not apply, thus defeating the very purpose of the limitation.

The vague requirement that the RAC "comply" with the terms of a "response action contract" was part of 1989's original §823. In 1990, matters got worse. In the Senate Oil and Gas Committee, industry suggested alternative wording that would narrow the vague "compliance" condition. Specifically, industry suggested that the law require instead that:

1. the RAC comply with any specific contingency plan approved by the Department; and
2. the RAC not act "contrary" to any provision of a response plan. Compare Cal. Gov't. Code § 8670.56.6(a)(2).

10. The Hazardous Waste Action Coalition is a coalition of the American Consulting Engineers Council. It is comprised of RACs that operate throughout the United States.

11. Hazardous Waste Action Coalition, 1989 Review of State Laws Related to Response Action Contractors at 6 (1989).

A contingency plan contains relatively objective requirements for equipment and supplies. Whether the RAC has met its contingency plan obligations can thus be determined with relative certainty. Similarly, limiting liability except where the RAC acted "contrary" to a response action contract is narrower, and more objectively determinable, than whether it "complied" with that contract. This is particularly true in those common situations where the RAC was required, in an emergency atmosphere, to take unilateral action that was not contemplated by the contract. That kind of initiative would not be "contrary" to the RAC's contract, but it is uncertain whether it would be in "compliance" therewith.

Unfortunately, the Senate Oil and Gas Committee accepted industry's alternative conditions¹² and retained the more vague "in compliance with" proviso that the industry language was intended to replace. As a result, there are now not one, but three related provisos to the statute:

1. the RAC must not act "contrary" to a response action plan;
2. the RAC must act in "compliance" with the response action plan; and
3. the RAC must be in compliance with a "contingency plan approved by the department."

The effect of this, of course, is to render Alaska's law so cumbersome and riddled with overlapping conditions that it has become virtually useless.

12. Those provisions now appear in §823(e)(2) (contingency plan) and §823(a) (acting "contrary" to a response plan). See Ch. 191, SLA 1990 at 2-4. Attachment 12.

III. ONE ALTERNATIVE APPROACH TO LIMITING RAC LIABILITY:

INDEMNIFICATION

As part of SARA in 1986, Congress added §119 in response to the RAC industry's concern that sufficient commercial insurance for pollution liability was unavailable and unaffordable, and therefore RAC participation in Superfund cleanups was threatened. The issue of responder liability was taken up late in the legislative process. The resulting indemnification approach taken by Congress in §119 is viewed widely as the product of hurried compromise.

In addition to sensibly exempting RACs from strict liability under CERCLA, §119 provided EPA with the discretionary authority to indemnify RACs from negligent cleanup. Indemnity, however, is not automatic. It must be granted on a case-by-case basis within the terms of the response action contract. The indemnification agreement is available only when EPA determines that insurance is not available to the response action contractor at a fair and reasonable price. If indemnity is given in connection with a private party's cleanup, a claim may not be paid by the government unless the contractor has exhausted all administrative, judicial and common law claims for indemnification against all potentially responsible parties participating in the cleanup.

On October 6, 1987, EPA released its "Interim Guidance on Indemnification of Superfund Response Action Contractors Under §119 of SARA." These interim guidelines are still in effect. On October 31, 1989, EPA's proposed Final Guidelines were published. The indemnity amount under these guidelines is limited to \$50,000,000. That limit will

often be seriously inadequate. A study commissioned for EPA's Indemnification Task Force and performed by Tillinghast, Nelson & Warren, Inc., recommends limits of \$200,000,000.¹³

Beyond the inadequacy of the indemnity amount, the American Insurance Association (AIA) and the National Constructors Association (NCA) have identified six major shortcomings in EPA's indemnification approach. First, the proposed indemnification does not specifically run to contractor sureties; therefore, the surety loses any benefit of the indemnification if the contractor defaults. Secondly, on fixed price contracts the "costs" of indemnification are added to a RAC's bid. The "costs" are tied to the requested limit of indemnification and the amount of deductible. In other words, a contractor is penalized in the bidding process by requesting indemnification. Third, on negotiated contracts, the deductible amount is to be adjusted according to the limit of indemnification requested by the RAC. For example, there would be a \$3.5 million deductible for \$50 million indemnification. The AIA argues that this virtually eliminates participation by small contractors. Fourth, indemnification will cover only claims arising during the contract and for 10 years after completion. The NCA argues that 30-40 year protection is needed. Fifth, RACs must document that diligent efforts have been made to obtain adequate insurance at fair and reasonable prices. According to the AIA, "the EPA proposes to use this requirement to retroactively refuse to indemnify the RAC if the EPA determines that at the beginning of the contract the RAC failed to adequately document its diligent search for insurance." Finally, EPA proposes not to indemnify the

13. Attachment 6 at 676.

RAC if the RAC is found to be both strictly liable (presumably under one of the state laws that may impose a strict liability standard on RACs) and negligent and the cause of action is inseverable.¹⁴

In summary, the insurance and RAC industries believe that the interim indemnification offered by EPA have proven virtually useless. The requirements are cumbersome and virtually impossible to satisfy, and indemnification is entirely discretionary.

In addition to §119, six states currently have statutes authorizing some form of indemnification for RACs.¹⁵ The statutes vary greatly. For example, Massachusetts limits the amount of indemnification and requires evidence that insurance is not otherwise available.¹⁶ California offers case-by-case indemnity after that state's 60-90 day limited liability period has expired (see §V, post).¹⁷ Of the states surveyed, none has ever used its indemnification statute. In a survey of state laws related to Response Action Contractors, the Hazardous Waste Action Coalition concluded that "the net result of the

14. See American Insurance Association, Comments on Superfund Response Action Contractor Indemnification Guidelines, February 27, 1990 (Attachment 13); National Constructors Association, Comments on EPA's Proposed Guidelines on RAC Indemnification Published on October 31, 1989. Attachment 14.

15. The six include: California, Florida, Illinois, Louisiana, Massachusetts and Missouri. New Jersey's indemnification statute recently expired, and Washington's was replaced with a law similar to the new federal statute.

16. Mass. Gen. Laws Ann. Ch. 21E, §17 (West 1990).

17. Cal. Gov't. Code §8670.56.6(j)(3) (1990).

restrictions and qualifications on these [indemnification] laws is to render many of them not useful."¹⁸

Indemnification is an inherently unworkable approach. First, it fails to provide the certainty of limited liability that is necessary for RACs, and their insurers, to do business within the jurisdiction. Second, it is bad public policy. Indemnification by the government means that, as a practical matter, a portion of the damages caused by an oil spill may be paid by the government itself. On the other hand, by simply limiting the RAC's liability, the amount of damages that the RAC could otherwise be obligated to pay will be directly transferred to the responsible party. Since damages occasioned by good faith cleanup activities lie within the range of foreseeable harm flowing from the discharge itself, the discharger will be liable for those damages -- unless a poorly-conceived state law takes the discharger off the hook.

Finally, since government funds are directly involved in an indemnification scheme, legislatures and state agencies will inevitably insist on so many conditions and limitations - including those described above -- that, as a practical matter, the indemnification allowance will become useless.

As the next section of the paper will show, these deficiencies in the indemnification approach led Congress, in 1990, to abandon the approach for oil spill RACs in favor of a certain and straightforward limitation on liability.

18. 1989 Review of State Laws Related to Response Action Contractors, *supra* n. 16 at 43 (1989).

IV. 1990 FEDERAL OIL SPILL LEGISLATION

After the EXXON VALDEZ, several oil spill bills were introduced in Congress. First, the Senate passed S. 686, the "Oil Pollution Liability and Compensation Act of 1989," on August 4, 1989. It did not address the issue of oil spill RAC liability. Next, the House of Representatives passed H.R. 1465, the "Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989," on November 9, 1989. §311(a)(1)(D) of the House legislation provided that "those persons, other than responsible parties, who are retained or directed by the President to participate in a cleanup action will not be held liable for removal costs or damages as defined in the legislation, except in the case of gross negligence or willful misconduct."

On November 19, 1989, the Senate amended the House bill with the text of the Senate's bill -- S. 686. A conference committee was appointed. The conferees agreed to the following language regarding RAC liability, which became §4201(a) of the "Oil Pollution Act of 1990":

- (4) EXEMPTION FROM LIABILITY--(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.
- (B) Subparagraph (A) does not apply --
 - (i) to a responsible party;
 - (ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
 - (iii) with respect to personal injury or wrongful death; or

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

The President signed the "Oil Pollution Act of 1990" on August 18, 1990. P.L. 101-380; Attachment 15. Consequently, RACs will be subject to two different standards of federal liability depending on whether they are responding to an oil spill or engaged in remediation of a hazardous waste site under CERCLA.

Under the 1990 Act, the contractor will be liable only for its gross negligence or intentional misconduct in responding to an oil spill. It will not be liable for simple negligence. Under CERCLA, however, the contractor will be liable for negligence, subject to EPA's discretionary authority to indemnify.

The 1990 federal legislation has two fundamental virtues. First, it sensibly recognizes the distinction between oil spill RACs and those involved in long-term hazardous waste site cleanup. It also recognizes that the indemnification approach is uniquely ill-suited for oil spill RACs, since:

1. The mere possibility of case-by-case indemnification does not provide sufficient encouragement for oil spill RACs to locate and maintain necessary cleanup supplies and personnel; and
2. Given the emergency atmosphere attendant an oil spill, time will not permit the negotiations and fact-finding necessary for case-by-case indemnification.

Second, §4201 (a) is simple and certain. It is a straight-forward limitation on liability, the application of which leaves little room for doubt. As a result, an innocent RAC will be relatively certain that it will avoid entanglement in litigation; or, if joined in a lawsuit, will be able to extricate itself quickly.

V. THE APPROACH OF OTHER STATES

Currently, Washington, Hawaii, Florida and Virginia mirror the 1990 federal legislation by limiting RAC liability to cases of gross negligence or intentional misconduct.¹⁹ As part of its September, 1990 comprehensive oil spill legislation (SB 2040), California has also adopted a "gross negligence or intentional misconduct" standard for RACs. Cal. Gov't. Code §8670.56.6; Attachment 20. That limited liability, however, continues for only 60 days after the spill if the responding party "is regularly engaged in the business of responding to oil spills." *Id.* at subsections (K)-(M). There is no time limit on limited immunity for those "not regularly engaged" in the business, and even the 60-day limitation can be extended for an additional 30 days. *Id.* at (K)-(2). The limitation of liability applies only to those responding to a spill under contract with a public agency. *Id.* at (a)(1); (j)(1).

Massachusetts essentially follows the approach of §119 of CERCLA -- exempting RACs from strict liability, and authorizing indemnification for negligence.²⁰ The statutory language in other states varies a great deal, subjecting RACs to different, uncertain liabilities depending on the statute's terms and its subsequent interpretation. However, a majority of states have taken some statutory action to at least avoid the imposition of

19. See 1990 Hawaii Sess. Laws 298, §17 at 41 (Attachment 16); Section 16, CS for CS for SB 1068, amending Fla. Stat. §376.09 adding new subsection (5) (Attachment 17); Va. Code Ann. §62.1-44.34:18D (Attachment 18); Wash., HB2494, §25 (1990) (Attachment 19).

20. Mass. Gen. Laws Ann. Ch. 21E, §§ 16, 17 (West 1990).

strict liability on RACs. Eleven states, including Alaska, have codified some form of a negligence standard for RACs.²¹ Missouri has a \$3 million per occurrence statutory cap on RAC liability.²² States employing the indemnification approach are discussed in §III, ante.

PIRO has identified four areas where either pending state legislation or current statutes inadequately protect RACs. The first is liability protection that accrues to responders only if they act on a voluntary basis. New York law currently limits RAC protection in this way. Second, some state statutes limit liability protection to acts performed solely by the responder. PIRO argues that all response acts, including those performed by subcontractors and the original spiller, should be exempt from liability unless grossly negligent or intentional. Third are statutes that limit liability on the basis of the kind of costs charged by the responder. If only out-of-pocket costs are allowed, then only organizations like PIRO, a not-for-profit corporation, would have liability protection. Finally, some states provide immunity only if the responder has first been designated by state officials to respond. PIRO argues that it is unreasonable to have responders ready to act, but wait while state officials are located to decide whether responder services are required.

21. The twelve states that had adopted a negligence standard for RACs, as of 1989, include Alabama, Alaska, Arkansas, Louisiana, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania and Texas. See "1989 Review of State Laws Related to Response Action Contractors," supra n. 16 at 40.

22. See Mo. Rev. Stat. §260.552.

In sum, most states have recognized the need to protect innocent RACs from the possible imposition of strict liability. State legislation has tended to follow federal leadership. After the enactment of §119 of CERCLA, a number of states enacted their own indemnification laws. With the shortcomings of indemnification becoming more apparent, and with the passage of the 1990 federal oil spill legislation, one would expect a number of additional states to revisit their laws on RAC liability.

VI. CONCLUSION

An innocent RAC -- that is, one that had no involvement in causing the oil spill -- should never be subject to strict liability for engaging in cleanup activities. That result -- a result probably not required by Alaska liability laws other than §823 -- would be akin to holding doctors strictly liable for emergency room treatment, or firefighters strictly liable for damage caused in combating a blaze. The result of laws like those would be the quick disappearance of emergency room doctors and firefighters. The same is true of RACs. The possibility of strict liability threatens to drive RACs from the oil spill cleanup market, and already has driven away the pollution insurance industry.

Alaska's RAC liability law (AS 46.03.823) merely provides a conditional limitation on strict liability. The necessary implication of Alaska's law, of course, is that under some circumstances an innocent RAC will be strictly liable. As a result, §823 aggravates rather than alleviates the problem.

Moreover, whatever value §823 may have for RACs engaged in the long-term cleanup of hazardous waste sites, that "value" is not transferrable to RACs engaged in oil spill cleanup under emergency conditions. RACs operating in that atmosphere are uniquely vulnerable to negligence claims, and may end up paying part of the price for an oil spill that they did not cause.

As with tort law generally, the damages caused by good faith efforts to contain and cleanup an oil spill should be borne by the person causing the spill. To encourage the

kind of cleanup capability that Alaska has demanded in recent legislation, it is imperative that the state provide a clear limitation on liability for oil spill RACs.

An indemnification approach will not work. The approach is inherently flawed, and because of its shortcomings will inevitably be burdened with a host of conditions and limitations that will make it virtually useless. The United States, Washington, Hawaii, Florida, and Illinois are right -- what is needed is a simple, express limitation on innocent RAC liability to cases of gross negligence and intentional misconduct. A separate Alaska statute, modeled after the 1990 federal oil spill legislation and applicable only to oil spill RACs, will accomplish that goal.

Suggested legislation is Attachment 5 to this report.

THE CASE FOR LIMITED LIABILITY FOR
OIL SPILL RESPONSE ACTION CONTRACTORS

EXECUTIVE SUMMARY

TESORO ALASKA PETROLEUM COMPANY

October 24, 1990

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Kenai, Alaska 99611
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SPONSOR: Sen. Minner, Rep. Carey,
Sen. Vaughn, Rep. D. Ennis

DELAWARE STATE SENATE

136TH GENERAL ASSEMBLY

SENATE BILL NO. 6

JAN 9 1991

AN ACT TO AMEND TITLE 10, DELAWARE CODE, RELATING TO LIMITATION OF LIABILITY
FOR OIL AND HAZARDOUS MATERIAL DISCHARGE CLEANUP.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 81, Title 10 of the Delaware Code by adding
2 thereto a new Section to read as follows:

3 "§8135. Limitation on Liability of Third Parties Rendering Assistance in
4 Oil or Hazardous Material Discharge Cleanup.

5 (a) The provisions of any law, rule or regulation to the contrary
6 notwithstanding, the liability of any person rendering care, assistance, or
7 advice to prevent, minimize or mitigate oil or hazardous material discharge
8 for any removal costs and damage caused by or related to such care,
9 assistance or advice shall be limited to acts or omissions of such person
10 which can be shown to have been the result of gross negligence, reckless,
11 wilful, wanton and/or intentional acts of misconduct on the part of such
12 person.

13 (b) The limit of liability as set forth in Subsection (a) of this
14 Section shall not apply to the actions of any person responsible for the
15 initial discharge.

16 (c) Any person responsible for the initial discharge is liable for any
17 removal costs and damages that another person is relieved of under
18 Subsection (a) of this Section.

19 (d) This Section shall not be construed to limit any liability of any
20 person for personal injuries or wrongful death as a result of the acts or
21 omissions of such person."

22 Section 2. Amend Chapter 81, Title 10 of the Delaware Code by striking
23 §8134 in its entirety.

This bill is proposed by the Delaware River and Bay Oversight Committee. The bill would limit liability for removal costs and damages (other than personal injury or wrongful death) of a third party who renders assistance in a cleanup operation to those acts which amount to gross negligence or reckless, willful, wanton, or intentional misconduct.

Author - Sen. Minner

EXECUTIVE SUMMARY

Since the Good Friday, 1989 grounding of the EXXON VALDEZ, the State of Alaska has enacted a number of statutes intended to increase both public and private oil spill cleanup capabilities. 1989 legislation, for example, required the Department of Environmental Conservation ("ADEC") to prepare both state and regional master oil spill contingency plans. Ch. 90, SLA 1989. 1990 legislation established stringent new requirements for private oil spill contingency plans, including the capability to contain a major oil discharge within 72 hours. Ch. 191, SLA 1990.

Unfortunately, the goals of the 1989 and 90 legislation may be unachievable. ~~Current oil spill containment and cleanup assets in Alaska are insufficient to meet the demands of the new legislation.~~ Accordingly, the public and private sectors need to encourage the creation and maintenance of new oil spill cleanup depots and services in the state.

Industry is attempting to respond to both Alaska's new demands, and those of Congress. After the EXXON VALDEZ spill, a group of oil producers, marketers, and transporters formed the Petroleum Institute Response Organization ("PIRO") with the goal of providing state-of-the-art response capability for any spill in United States waters. PIRO, in turn, led to the creation of the Marine Spill Response Corporation ("MSRC") -- a nonprofit corporation privately financed for the purpose of responding to catastrophic oil spills. Funding for MSRC will come through the separate Marine Preservation Association, whose initial membership is composed of owners, shippers and receivers of crude oil and petroleum products. MSRC organizers estimate that \$800 million in

industry funds will be invested in equipment, maintenance, research and personnel over the first five years of operations. The goal of Alaska state government, and Alaska industry, has been to attract a regional PIRO (or MSRC) depot to the state.

In oil spill legislative jargon, the people who provide oil spill cleanup services, such as MSRC, are called "response action contractors" ("RAC"). Unfortunately, Alaska's current legal environment discourages the presence of MSRC and other RACs within the state. Alaska law creates a substantial risk that a RAC will become embroiled in litigation arising from an oil spill -- even if the RAC had no involvement whatsoever in causing the spill. Whether the RAC ultimately extricates itself from that litigation is beside the point. Defense costs alone are enough to make the threat of litigation unacceptably high. That threat, in fact, is so great that it has resulted in the absence of sufficient, affordable insurance for RACs. ^{ONLY IN ALASKA?} A June 6, 1990 PIRO Board of Directors resolution made it clear that the possibility of innocent RAC liability would be a major factor in evaluating the organization's presence in any state. According to that resolution:

In the absence of qualified state immunity of the type provided in the pending federal legislation, PIRO will be forced to reconsider the role and vision of PIRO in each affected state.

In 1989 Alaska attempted to provide some protection from RAC liability. Ch 39,

SLA 1989 (AS 46.03.823); amended §§ 7, Ch. 191, SLA 1990. The new law, however, is of little practical value, and may actually aggravate the situation. There is no sound public policy reason for ever holding an innocent RAC strictly liable for damages from an oil spill. Where a RAC's only involvement stems from its willingness to provide necessary aid, forcing liability on it without regard to fault is foolish. And, before enactment of

NEGLIGENCE?

Alaska's 1989 legislation, it was at worst uncertain whether an innocent RAC would ever be held strictly liable for damages occasioned by cleanup activities. The 1989-90 legislation, however, implies that unless certain ~~vague and cumbersome conditions~~ are met, innocent RACs will be strictly liable for any damages caused by their cleanup activities. Moreover, the conditions for avoiding strict liability are so unclear and poorly worded that the statute provides virtually no assurance that strict liability will not attach in all cases.

In contrast to Alaska's legislation, Congress has recently enacted the Oil Pollution Act of 1990. Like the flurry of Alaska legislation arising from the EXXON VALDEZ, the federal law seeks to enhance the nation's oil spill cleanup capability. Unlike Alaska law, however, the 1990 legislation effectively furthers that goal by providing a straightforward limitation on RAC liability for oil spill cleanup activities. The new federal law not only unequivocally exempts oil spill RACs from strict liability, it also limits oil spill RACs' liability for negligence. It does so for three reasons. First, oil spill RACs are uniquely vulnerable to negligence claims because they must operate in a crisis atmosphere, making immediate decisions that are always subject to second guessing. As MSRC has observed:

[A]n oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.¹

1. Marine Spill Response Corporation, The World's Largest Oil Spill Response Organization, undated at 2. Attachment 1.

LOOK UP FEIN

Second, protection from negligence liability is necessary if insurance is to become available for oil spill RACs. Third and finally, Congress recognizes that if there is damage caused by the good faith cleanup efforts of an oil spill RAC, the liability should fall on the person causing the spill.

The federal legislation, however, does not affect state oil spill liability laws. Alaska's RAC liability law therefore remains in effect. With the passage of the new federal legislation, and similar legislation in Washington, Hawaii, Florida, Virginia, and (with certain conditions) California, Alaska now finds itself at a severe competitive disadvantage in attracting adequate oil spill cleanup technology and expertise to the state.

Alaska's disadvantage has threatened its goal of encouraging a direct MSRC presence in the state. MSRC currently plans five regional response depots in New York/New Jersey, south Florida, Louisiana, Southern California and Seattle. While "the petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state,"² it is apparent that the unfavorable legal environment in a declining number of states -- unfortunately including Alaska -- will continue to deter necessary cleanup capabilities:

To insure the most prompt and effective response, the [new federal] legislation provides limited immunity for oil spill responders -- but not for spillers. This national immunity standard insures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. . . .

2. Questions and Answers: Marine Spill Response Corporation, undated at 4. Attachment 2.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder -- on one side of the state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose a serious problem in the future.

"Marine Spill Response Corporation: A New Weapon For Cleaning Up Oil Spills," undated at 2. Attachment 3.

As MSRC's president, retired Coast Guard Vice Admiral John D. Costello, observed:

The new federal law also allows states to enact responder liability standards different from the federal standard. In some states, existing standards can make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, MSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.³

To remove a substantial deterrent to the presence of MSRC and other RACs in the state, Alaska should conform its laws to recently enacted federal standards, and provide certain and sufficient protection from the unjustifiable inclusion of RACs in oil spill litigation. Legislation accomplishing that goal is included as Attachment 5 to this paper.

3. Statement of Vice Admiral John D. Costello, September 6, 1990, at 2-3. Attachment 4.



Marine Spill Response Corporation

The World's Largest Oil Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound, causing the biggest oil spill in the history of the United States. While thousands worked to clean up the spill, a small task force organized under the auspices of the American Petroleum Institute, began taking a hard look at the existing resources for responding to catastrophic oil spills. In June of 1989, the task force reported its sobering conclusion: The capability did not exist, either in industry or government, to successfully contain and remove a spill of the magnitude of the one in Alaska.

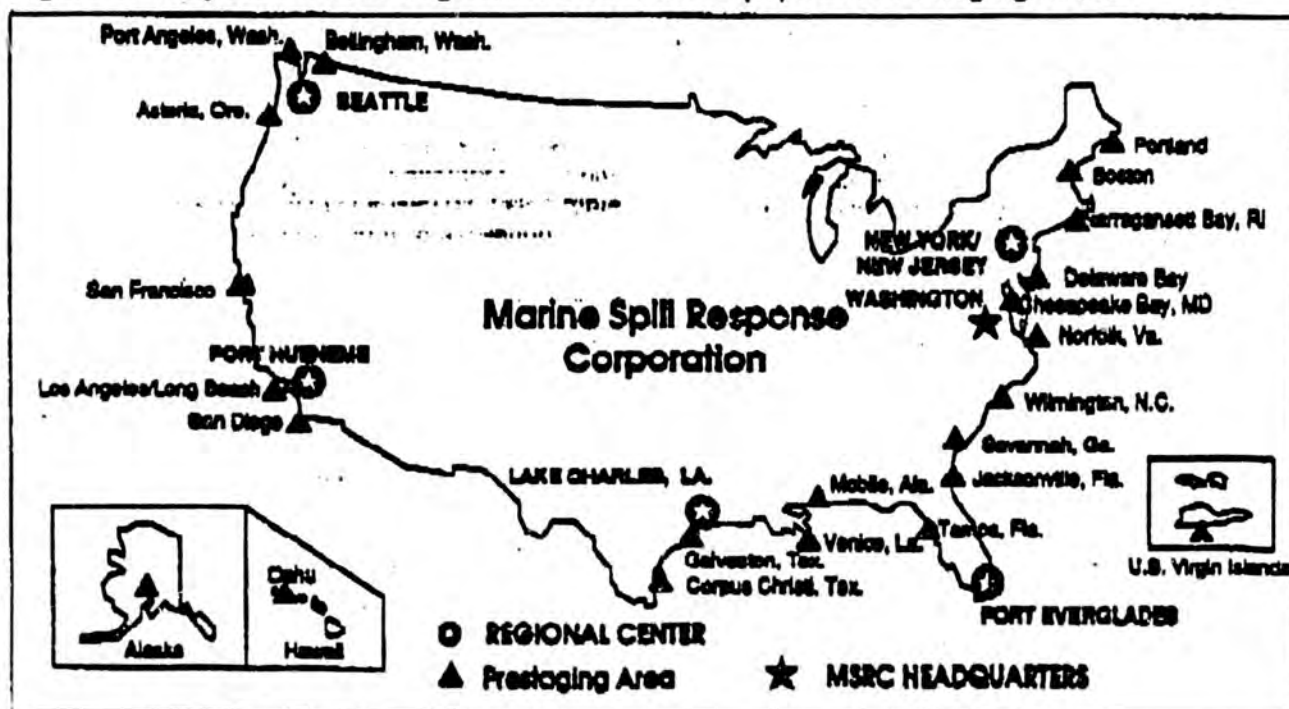
As a result of task force recommendations, 20 oil companies began the process of creating the Petroleum Industry Response Organization (PIRO) to manage catastrophic spills. In August 1990, the oil companies created two new organizations: the Marine

Spill Response Corporation (MSRC) and the Marine Preservation Association (MPA). MSRC, which succeeds PIRO, is an independent oil spill response organization. It will operate out of five regional response centers, each supported by several strategically placed equipment sites. MPA, an organization including oil companies and shippers and receivers of oil, will fund MSRC but will have no control over operations.

The following are some of the key elements of what is intended to be the largest spill response organization in the world:

□ **Geographic Coverage.** MSRC will have its headquarters in Washington, D.C., and will have five regional response centers in the New York-New Jersey

Figure 1. Proposed MSRC Regional Centers and Equipment Prestaging Areas



metropolitan area; Port Everglades, Florida, north of Miami; Lake Charles, Louisiana, near the Texas border; Port Hueneme, California, north of Los Angeles; and Seattle, Washington. Each region will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The proposed regional centers and prestaging areas have been picked to enable an initial quick response to a large spill wherever it might occur along the coast. (See Figure 1.)

Q Spill Cleanup. MSRC will provide a best-effort response to cleaning up spills of persistent oil (i.e., oils that do not evaporate or degrade quickly in U.S. coastal and tidal waters that are beyond the capacity of local response organizations). Each of the five regional centers are being designed to provide a best-effort response with the state-of-the-art technology to clean up an oil spill the size of the Alaskan spill—210,000 barrels. In the event of an even larger spill, the resources of two or more regional centers will be combined.

Q Relation to MPA. MPA members will pay annual dues, based on the number of barrels of oil they transported in the previous year. MSRC will use these funds to pay its annual operating, capital, and research and development costs. If an MPA member should become a spiller, MSRC will execute the spiller's response plan. The spiller—not MSRC—will pay for the actual clean-up.

Q Relation to Coast Guard. MSRC will execute the spiller's response plan under the direction of the Coast Guard, which has a presence around the nation's coasts and an effective military command control and communications structure. Coast Guard jurisdiction will not relieve oil spillers of their responsibility for the clean-up. It will, however, provide clear direction and coordination of cleanup operations when needed because the Coast Guard, by law, will have the ultimate authority in dealing with spills. In the event of a spill, Coast Guard supervision will cut through interagency red tape to eliminate delays during the crucial early hours.

Q Relation to Local Response Organizations. MSRC is not intended to replace existing oil spill cooperatives and independent response contractors. These entities have done a good job handling smaller spills. MSRC will act when this infrastructure does not have sufficient resources to handle a large spill. MSRC will use co-ops and independent responders as subcontractors, training and drilling them at its own expense.

Q Liability of the Responder. Under federal law, the responder to an oil spill has limited immunity. He is liable only for damages that result from acts of gross negligence or willful misconduct. Responders are liable for acts of simple negligence resulting in personal injury or wrongful death. Under some state laws, however, the responder is not provided this limited immunity. Since

federal authority will not preempt state law in this regard, MSRC is seeking state liability standards that are the same as the federal standard. This standard is appropriate because an oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.

Q Research and Development. MSRC will administer a comprehensive research and development program to improve the knowledge and technology used to respond to and clean up spills. This program will complement other programs in government, academia and industry. MSRC studies will include those on preventing loss of oil from ships, on-water oil recovery and treatment, preventing and mitigating shoreline impacts, fate and effects of spilled crude oil and products, mitigating impact on wildlife, and health and safety.

Q Standards. MSRC will develop standards for oil spill response equipment, techniques and training.

Q Cost. MSRC's five-year costs for operations, capital equipment and research and development are estimated at about \$800 million.

Q Remaining Implementation Tasks. A detailed implementation plan has been developed for MSRC, but most of the plan must still be implemented. Equipment and vessels must be constructed and purchased. Personnel—including subcontractors, who will actually do much of the work of transporting equipment to spill sites and operating it—must be hired and trained. Each region will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. Land and buildings must be purchased or leased for the regional centers and warehouses. Insurance must be procured. The research program must be launched.

Q Implementation Dates. MSRC must be fully operational within 30 months of enactment of the Comprehensive Oil Pollution Act of 1990. This act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause. Many will want to rely on MSRC rather than maintain their own cleanup capability.

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Questions and Answers: Marine Spill Response Corporation

MSRC: Organization and Implementation

Q: What is the Marine Spill Response Corporation (MSRC)? What is the Marine Preservation Association (MPA)?

A: MSRC is an independent, non-profit corporation dedicated to providing a best-effort response to help cleanup large spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. It will also respond to spills further up river when oil has been spilled from ocean-going tankers heading up river. The U.S. Coast Guard will direct MSRC to respond to a spill if it is too big for local response organizations to handle.

MSRC succeeds Petroleum Industry Response Organization Implementation, Inc. (PIRO Implementation), which was incorporated in September 1989 to plan and organize an oil spill response program. The president of PIRO Implementation, retired U.S. Coast Guard Vice Admiral John D. Costello, is now president of MSRC. MSRC is an independent corporation with a self-perpetuating board of directors.

MPA is a non-profit corporation, whose members—oil companies, shippers, receivers of oil and others—will pay dues based on the amount of oil they transport. The dues will finance MSRC and MPA. However, MPA will have no management involvement with MSRC.

MSRC will use the funds to pay for personnel, equipment, vessels and other facilities needed to be prepared to clean up oil spills. In the event of a spill,

the spiller—not MSRC—will pay for the actual cleanup.

MSRC will have nearly 400 full-time employees, most of whom will be located at the organization's five regional response centers. MSRC's estimated cost for its first five years is about \$800 million. MSRC will be supported by hundreds of subcontractor workers in its response to big spills.

Q: When will MSRC be ready to clean up oil spills?

A: MSRC must be fully operational within 30 months of enactment of the Oil Pollution Act of 1990. That's when the act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause.

This timetable is dictated by the myriad steps that must be taken to move a complex, large, wholly new organization from the drawing board to reality. A detailed plan has been developed for MSRC, but most of the plan still must be implemented. Equipment and vessels must be constructed or purchased. Personnel—including subcontractors who will actually do much of the work of transporting equipment to spill sites as well as operating it—must be hired and trained. Land and buildings for regional centers and equipment prestacking areas must be purchased or leased. Insurance must be procured. A \$35 million, five-year research and development program must be launched.

Q: Why didn't PIRO Implementation implement a spill response program sooner?

A: PIRO Implementation has been carefully planning how this response organization would work before

¹ Persistent oil—for example, crude oil—lingers in the environment. Products like gasoline are not persistent because they evaporate or degrade quickly.

taking any action to implement one. As this planning was progressing, Congress was considering the Oil Pollution Act of 1990. Several key provisions in this legislation needed to be resolved before operational planning and corporate organization could be fully developed.

For example, PIRO implementation needed to be sure that a duplicative federal response capability was not going to be included in the legislation. If the federal government had created such a capability, there would have been no need for MSRC.

Also, it was important that a single agency be clearly designated as the federal decisionmaker in oil spills.

Finally, PIRO implementation needed to be sure that the new law would recognize the unique risks faced in responding to spills. The new federal law does this by limiting responder liability damage owing to its own gross negligence or willful misconduct. MSRC will have to make difficult, quick decisions at a spill under chaotic conditions. If the law did not recognize the extra risks involved in spill response, it might have been impossible for MSRC to go forward.

The provisions of the bill, which became law in August 1990, satisfactorily resolve each of these concerns.

Q: How many oil companies have joined MPA?

A: As of today, 20 companies have joined MPA, the funding corporation. The volumes of oil these firms transport represent the large bulk of the oil transported into and out of American waters. There are other firms who have shown interest in joining, including utility and pipeline companies. We believe that as the regulations for submitting contingency plans are promulgated, additional companies will need MSRC services and that our clientele will grow accordingly.

Q: Will the MSRC organizational structure function efficiently? Won't control by MPA member companies still be present since they control MSRC's budget?

A: We believe the MSRC organizational structure will prove to be highly efficient. It provides for an independent board of directors, which insures that companies that pay dues to MPA do not manage MSRC.

MSRC: Response Capability

Q: Where and how fast will MSRC be able to respond to a spill—and to what size spill will it respond?

A: MSRC is designed to respond to large, catastrophic oil spills but will respond whenever a spill of any size exceeds the local capability to clean it up.

MSRC will immediately respond to catastrophic spills in U.S. tidal waters out to the limits of our 200-mile Exclusive Economic Zone. The quickest possible response will be made under whatever circumstances. Prepositioning equipment in warehouses at strategically placed prestaging areas and using equipment that can be flown in will reduce response times.

Each of five regional centers will be able to provide a best-effort response to contain and clean up an oil spill totaling 216,000 barrels—in other words, one about the size of the Valdez spill in Alaska in 1989. Combining the resources of more than one regional center will enable combatting even larger spills. Such a capability will exist nowhere else in the world.

Q: The Alyeska Corporation wasn't ready for the Valdez spill. How do we know MSRC will be ready for spills that may occur in the future?

A: MSRC will be ready because it will have sufficient quantities of the best available equipment and well-trained spill response personnel. MSRC will regularly maintain its spill cleanup equipment and will conduct frequent training for its spill response workers including simulation exercises. The new federal legislation requires periodic readiness exercises. On top of this, a rigorous operational audit program will be part of MSRC's normal way of doing business. Frequent announced and unannounced drills will be held to ensure maximum response and cleanup readiness.

Moreover, MSRC will operate in a completely open environment. It will have an independent, self-perpetuating board of directors to answer to, directors who are not affiliated with the petroleum industry. MSRC will operate with many different subcontractors around the nation. It will be impossible to keep MSRC activities—or lack thereof—from public scrutiny.

Q: Will MSRC have all the equipment it needs?

A: Yes. MSRC will buy approximately \$300 million worth of equipment—including vessels and barges, trucks, skimmers, booms, dispersants, wildlife and shoreline rehabilitation equipment, and lightering equipment (to remove oil from disabled vessels). This will provide a best-effort response capability with state-of-the-art equipment.

MSRC believes, however, that current oil spill containment and cleanup equipment needs to be vastly improved—as could methods for protecting and rehabilitating shorelines and wildlife. That is why it will conduct an extensive research program to explore new technologies and approaches. The program will research improvements in booms, dispersants, skimmers, the burning of oil, bioremediation, debris and waste disposal, and spill tracking and surveillance. It will look at techniques for rehabilitating wildlife and shoreline. And it will examine how oil affects environments over the long-term.

MSRC: Regional Centers and Coverage

Q: Where will the regional centers and prestaging areas be located?

A: The regional centers will be (1) in the New York-New Jersey metropolitan area (Northeast region), (2) in Port Everglades in South Florida, north of Miami (Southeast region), (3) in Lake Charles, Louisiana, near the Texas border (Gulf region), (4) in the Port Hueneme area of California, north of Los Angeles (Southwest region), and (5) in Seattle, Washington (Northwest region).

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The prestaging areas have been tentatively selected to enable an initial quick response to a large spill wherever it might occur along the Pacific, Gulf and Atlantic coasts or in Hawaii, Alaska, Puerto Rico and the Virgin Islands. Each location will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. The general locations of prestaging areas for each region are:

Q Northeast Region:

Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Chesapeake Bay, Maryland; Delaware Bay; Norfolk, Virginia.

Q Southeast Region:

Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; U.S. Virgin Islands.

Q Gulf Region:

Mobile, Alabama; Venice, Louisiana; Galveston, Texas; Corpus Christi, Texas.

Q Southwest Region:

San Diego, California; Los Angeles/Long Beach, California; San Francisco, California; Oahu, Hawaii.

Q Northwest Region:

Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; Alaska.

MSRC plans to have an appropriate response and cleanup role in Alaska. That role is not yet defined. It must consider already existing or planned primary response capabilities before settling on what other may be required. Discussions with industry and Alaskan state officials have not yet arrived at a point that allow complete description of the corporation's role.

Q: A year ago, a petroleum industry task force said regional centers would be in Norfolk and New Orleans. Now Norfolk is just the site of a prestaging area and there is nothing specifically in New Orleans. Why?

A: The task force made many assumptions about where regional centers and prestaging areas needed to be to ensure quick response. The task force's report stated that locations were tentative and would be subject to further analysis. Subsequent analysis identified a more effective mix of centers and prestaging areas. The changes take into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from particular locations to a spill. Location of highways, airports, piers and open water figured into the decisions.

Q: Are all of the regional centers the same size?

A: Almost. Any differences reflect differences in the transportation patterns in each region. Also, the capability of the existing oil spill response infrastructure has been factored into the equation. Despite

differences in size, the regional centers will possess equivalent response capabilities.

Q: Why won't MSRC respond to spills in the Great Lakes and in Alaska?

A: The nature of tanker traffic in the Great Lakes and other non-tidal waters is different from the coast-line traffic that MSRC is being created to deal with. Spills are likely to be smaller and to involve "non-persistent" oil (that is, petroleum products that are more volatile than crude oil and that largely evaporate before they can be cleaned up). Therefore, MSRC's charter does not envision operations in such waters.

However, that does not mean that a spill in the Great Lakes would not be quickly contained and cleaned up. Once enacted, the Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and clean up a worst-case spill. The result of this requirement is that some other private oil spill cleanup organization will be responsible for dealing with such spills.

The petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state. Meanwhile, Alaska's existing spill response capability is being expanded so that it will be bigger than one of the MSRC regional centers.

MSRC: Liability, Research and Cost

Q: Doesn't the law in some states still allow Good Samaritan oil spill responders to be held responsible for damage caused by their simple judgment mistakes during a spill cleanup?

A: Yes, that is correct. MSRC is now discussing the issue of limited responder immunity with several states. MSRC hopes that these states will recognize the importance and fairness of establishing the same limited liability standard (gross negligence or willful misconduct) the federal government will apply to responders nationwide.

Q: The original five-year cost estimate for PIR was \$275 million. Why have costs increased so much?

A: The original costs were an approximation of capital, operating and research and development

costs. As we gathered more detailed program data and refined it, additional requirements were identified. Costs have increased threefold because we have recognized additional capital requirements—principally ships and barges. We have also included additional prestaging sites to ensure adequate response coverage.

Q: Federal legislation has authorized a substantial government R&D program. Will MSRC reduce its program as a result?

A: We have no plans to reduce the size of the program. However, because a substantial increase in oil spill research by government has been authorized in the new law, we will need to monitor our program carefully to insure no duplication.

Q: Why are the results of MSRC's research program to be contributed to the public domain?

A: This arrangement is entirely in keeping with the not-for-profit nature of the corporation which has been created. From the outset, MSRC was never intended to be money-making. It was created because the petroleum industry found a void in the capability of both government and industry to protect the marine environment from catastrophic oil spills.

Q: Will MSRC really earn no profits and simply serve the public welfare?

A: Yes. MSRC will not have a profit line on its balance sheets. It will only recover its costs. Moreover, MSRC's charter requires that all discoveries and inventions from its R&D programs to improve cleanup technology be made available to anyone interested at no cost.

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Marine Spill Response Corporation: A New Weapon for Cleaning Up Oil Spills

On September 6, 1990, PIRO (Petroleum Industry Response Organization) Implementation Inc., an oil-spill response planning group created after the 1989 spill in Prince William Sound in Alaska, announced the formation of the Marine Spill Response Corporation (MSRC). When it is fully operational, MSRC will have a response capability larger than any other response organization in the world. The MSRC will be funded by oil companies and others involved in the shipment or receipt of oil by tanker through another newly created organization, the Marine Preservation Association (MPA). However, MSRC will operate completely independently of the MPA and its members. The MSRC will consist of a Washington, D.C., headquarters and five response regions with regional centers located in the New York-New Jersey metropolitan area (Northeast region), Port Everglades in South Florida (Southeast region), Lake Charles, Louisiana (Gulf region), Port Hueneme, California (Southwest region), and Seattle, Washington (Northwest region).

Background on the New Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound and caused the largest oil spill in U.S. history. Up to 10,000 workers, scores of vessels

and aircraft and tons of equipment were employed in cleanup efforts through the spring and summer, until the onset of prohibitive weather conditions. Those efforts were resumed in the spring of 1990. Within several weeks of the spill, eight major oil companies, under the auspices of the American Petroleum Institute, created a task force to examine questions and issues raised by such catastrophic tanker spills. The task force studied and evaluated existing prevention and response programs. It concluded that neither the government nor the industry had the equipment or personnel ready to deal with catastrophic spills. It also identified a need for further spill prevention efforts.

Consequently, in June 1989 the task force recommended that the industry undertake a broad new program to expand its ability to prevent, contain and clean up major oil spills. The task force recommended that a response program be operated by a new, independent organization, originally called the Petroleum Industry Response Organization (PIRO), which would be funded voluntarily by participating oil companies.

PIRO was envisioned as a response company capable of providing a best-effort response to a catastrophic spill from a tanker in, or posing a threat to, U.S. coastal waters (out to the 200-mile Exclusive

Economic Zone), harbors and river mouths. Since the seriousness of a spill depends on the type of oil spilled, the specific environmental risks involved and the prevailing weather and tidal conditions—in addition to the actual amount of oil spilled—the task force defined "catastrophic spill" simply as one beyond the capability of local response resources, as determined by the U.S. Coast Guard.

The task force recommended that PIRO have five regional response centers on the East, West and Gulf Coasts, each with several permanent staging areas along its coastline. Each region was to be capable of responding to a spill of up to 216,000 barrels. It envisioned the use of personnel, equipment and supplies from more than one region to respond to larger spills.

The task force also proposed new spill prevention initiatives and improvements in existing tanker safeguards and operating procedures. It also recommended broad-based research and development (R&D) and readiness auditing roles for PIRO.

The task force estimated PIRO's five-year operating, capital and R&D costs at \$275 million.

One month later, in July, 1989 the original eight companies that joined in the task force's initial effort were

joined by a dozen more in forming a PIRO implementation group and steering committee to begin examining in detail what would be required to fulfill the task force's goals and recommendations.

Retired Vice Admiral John D. Costello, former commander of the U.S. Coast Guard's Pacific Area, was named to direct these efforts.

The detailed work of the steering committee was reflected in the names of its eight working subcommittees: finance and procurement, communications, operations, staff activities, facilities acquisition, legal, insurance and research. Some 75 executives from participating companies looked into the many conceptual, procedural, legal and organizational questions that had to be addressed in the actual formation of the new response organization.

As their detailed study and planning progressed, the original five-year cost estimates were revised upward substantially—initially to \$400 million for the first five years and, most recently, to about \$800 million.

As work proceeded, additional companies became interested in affiliating with PIRO, including non-oil companies such as shippers and facilities that handle oil. Ultimately, this broader interest led to renaming of the new oil spill response organization to the Marine Spill Response Corporation (MSRC).

Legislative Developments

Planning and development of MSRC were influenced by the oil spill legislation that evolved in Congress through the fall and winter of 1989 and the spring and summer of 1990—and was signed into law by President Bush on August 18, 1990.

This legislation contains several provisions of critical importance to

MSRC. To ensure the most prompt and effective response, the legislation provides limited immunity for oil spill responders—but not for spillers. This national immunity standard ensures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. Liability on a simple negligence basis would be assumed in cases of personal injury or wrongful death.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder—on one side of a state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose serious problems in the future.

An additional provision of this legislation makes the President, through the U.S. Coast Guard, responsible for seeing that a spill is promptly cleaned up. Recent history has demonstrated that large-scale operations to clean up oil spills require a single decision-maker to resolve issues expeditiously. The legislation, while clearly putting the responsibility for cleanup on the spiller, also clearly makes the private sector the main source for the nation's cleanup capability, under the watchful, supervising eye of the Coast Guard.

Organization of MSRC

To assure the independence of MSRC, a second non-profit corporation was created—the Marine Preservation Association (MPA). The companies that participated in PIRO and in the development of MSRC are members of this associa-

tion. MSRC has neither members nor shareholders. Its board of directors is self-perpetuating and wholly independent of MPA or its member companies. MPA will not be involved in the management of MSRC.

Initial capital contributions and dues paid to MPA are based on the quantities of oil handled in the waters in which MSRC will operate. MPA contributions and fees are being used to finance creation of MSRC and to fund its ongoing operations. However, they will not be used to cover expenses that MSRC incurs in responding to spills.

MSRC will maintain a contractual relationship with the members of MPA, obligating MSRC to make its services, manpower and equipment available in the event of a major spill involving a member's vessel or facility. The expenses incurred by MSRC in responding to a spill will be recovered directly from either the member-spiller or his insurer. If costs exceed this compensation, or if a spiller cannot be identified, then cleanup costs will be borne by the newly established Federal Oil Spill Compensation Fund.

All MPA members must meet the spill response capability certification requirements of the new federal law. These requirements could be satisfied by a member's contractual relationship with MSRC.

MSRC's Response Role

Spills to Which MSRC Will Respond.

MSRC is designed primarily to provide a best-effort response to catastrophic spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. (Persistent oil—for example, crude oil—lingers in the environment. Non-persistent oil

products like gasoline tend to evaporate or degrade quickly.)

Each of MSRC's five regional response centers (and its associated prepositioned equipment sites within the region) is being designed to manage a spill of up to 216,000 barrels, as originally proposed. If the resources of all five MSRC regions were combined, its capability would be nearly 1.1 million. MSRC is being designed primarily for catastrophic spills of the size of the accident at Prince William Sound, but it will respond to smaller spills when they are beyond the capability of the local spill response infrastructure. The Coast Guard will judge when local response efforts are not sufficient to satisfactorily contain and cleanup the spill.

MSRC Headquarters, Regional Centers and Prestaging Areas.

MSRC headquarters will be located in Washington, D.C. and is expected to have 43 employees when fully staffed. These personnel will establish operating policy and provide normal staff support. In addition, the corporation's operational audit and R&D programs will be directed from headquarters.

The regional centers will be in (1) the New York-New Jersey metropolitan area (Northeast region), (2) Port Everglades in South Florida (Southeast region), (3) Lake Charles, Louisiana, near the Texas border (Gulf region), (4) Port Hueneme, California, north of Los Angeles and (5) Seattle, Washington (Northwest region).

The regional centers will be nearly equal in size. Variations will reflect differences in the territory each regional center will be responsible for and in the amount and location of oil tanker traffic and lightering.

Despite small differences in size, the regional centers will possess equivalent response capabilities. Together, they will have approximately 350 employees.

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located.

The general locations of prestaging areas for each region are:

□ Northeast Region: Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Delaware Bay; Chesapeake Bay, Maryland; and Norfolk, Virginia.

□ Southeast Region: Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and in the U.S. Virgin Islands.

□ Gulf Region: Mobile, Alabama; Venice, Louisiana; Galveston, Texas; and Corpus Christi, Texas.

□ Southwest Region: San Diego, Los Angeles/Long Beach, California; San Francisco, California; and Oahu, Hawaii.

□ Northwest Region: Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; and Alaska.

The locations of the regional response centers and prestaging areas were selected to ensure the quickest, most effective response to possible spills, taking into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from regional centers to a spill. Location of highways, airports, piers, navigable waterways and the availability of office and warehouse space were all factors considered in site-selec-

tion. Each location will have to be surveyed to assure that specific sites meeting MSRC operational requirements actually are available.

According to the API task force report, MSRC should play an appropriate response and cleanup role in Alaska. The definition of this role is not yet resolved. Primary response capabilities already in existence must be evaluated before it can be determined what else might be required. Discussions with industry and the state have not yet proceeded to the point where MSRC's role can be completely described.

The MSRC will not operate in the Great Lakes and other non-tidal waters. Historically, spills in the Great Lakes have been comparatively smaller and have involved "non-persistent" oil. The Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and cleanup a worst-case spill, most often through reliance on existing cooperatives and subcontractors.

Relationship of MSRC with Existing Co-ops and Subcontractors.

MSRC will coordinate its efforts with an estimated 150 existing oil-spill cooperatives and subcontractors. Over the years, such cooperatives and subcontractors have compiled a solid record of handling non-catastrophic, inshore spills—which account for some 99.9 percent of all spills. MSRC is designed to complement this existing capability—that is, to handle the infrequent, yet potentially devastating, catastrophic spills. Existing cooperatives and subcontractors would continue to handle smaller spills, except in instances in which MSRC's assistance might be required or when the Coast Guard requests MSRC's aid.

MSRC will employ about 350 people in the five regions. Existing cooperatives and subcontractors will also be called on or retained to provide additional manpower and equipment needed to deal with spills.

Identifying qualified subcontractors, arranging contractual agreements, reviewing contractor capabilities and training will be an ongoing function of MSRC's permanent staff.

The synergistic relationship between MSRC and existing, smaller responders is expected to result in joint training exercises, coordinated research, development and sharing of new oil spill response techniques and equipment and frequent exchanges of information and ideas.

MSRC Equipment.

MSRC will buy approximately \$300 million worth of equipment. All MSRC equipment will be prepackaged to permit easy movement by air, truck, vessel or rail. This equipment will include vessels and barges, trucks, skimmers, booms, communications equipment, dispersants, wildlife and shoreline rehabilitation equipment and firefighting equipment to remove oil from disabled vessels.

Booms are floating mechanical barriers that extend above and below the water surface to contain spilled oil for recovery and to move spilled oil into areas where recovery is easier. Since booms do not work well if currents are too swift and waves too high, deployment in rough weather can be a problem.

Skimmers are vessels that collect spilled oil from the surface of the water. Like booms, skimmers have trouble operating where currents are swift and waves high.

Chemical dispersants sprayed on oil can break it into small droplets, accelerating the removal of volatile hydrocarbons, facilitating the natural "decay" of the oil's components, and minimizing movement of the oil to shorelines. Dispersants can be rapidly and broadly applied by air over large areas and volumes of oil, even in adverse sea conditions.

MSRC's Research Program.

MSRC will conduct a five-year, \$35 million research and development program to improve oil spill response technology. This program will be a key element in attempting to improve the corporation's effective future response to oil spills. Proposed research will cover techniques for minimizing oil losses in the event of a spill and keeping them close to the vessel; recovering and treating oil after it begins to spread but before it reaches shore; preventing and reducing shoreline impact, which includes studies on bioremediation; the fate and effects of oil in the environment; reducing the impact of a spill on wildlife; and investigating the health and safety of persons exposed to spills.

Timetable for MSRC to Become Operational.

MSRC must be fully operational within 30 months of enactment of the

Oil Pollution Act of 1990, when the act will require shippers and others responsible for oil transportation and handling on offshore and tidal waters to show that they can contain and clean up an oil spill they might cause.

This federal timetable fits MSRC's schedule for implementation. There are myriad steps that must be taken to make a complex, large, wholly new organization operational. A detailed plan has been developed for MSRC, but most of the plan still must be implemented.

Equipment and vessels must be constructed and purchased. Personnel—including (subcontractors) who will actually do much of the work transporting equipment to spill sites, as well as operating it—must be hired and trained. Land and buildings must be purchased or leased to create the regional centers and equipment prestaging areas. Insurance must be procured.

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**Statement of Vice Admiral John D. Costello, USCG (Ret)
President, Marine Spill Response Corporation
September 6, 1990**

Good morning. I take great pleasure today in announcing the formation of the Marine Spill Response Corporation and the Marine Preservation Association.

Marine Spill Response Corporation is the new name for the Petroleum Industry Response Organization (PIRO) -- an oil spill cleanup organization that we have been working to create since June of last year, when plans for it were first announced. Funding for this corporation will be provided by the Marine Preservation Association, which is a separate organization of owners, shippers and receivers of oil. Both companies are not-for-profit entities. Each is independent of the other.

We have changed the name of the response corporation to reflect the expansion of its clientele, which now extends well beyond the conventional understanding of the term "oil industry." MSRC will serve others including independent tanker operators, public utilities -- in fact, any company that handles petroleum and petroleum products over coastal waters is now a prospective client. We have not, however changed the original objectives. MSRC will provide America:

- o A best-effort response capability to catastrophic offshore spills in coastal and tidal waters -- which consists of on-water as well as beach cleanup capability;
- o A program to audit, on an ongoing basis, the readiness of our spill response forces to meet their mission; and
- o A robust research and development program, intended to improve basic information about spills and the technology of oil spill response and cleanup.

Each of the corporation's five regional response centers is designed to manage a spill as large as the 1989 accident in Prince William Sound. They are to be located in the New York/New Jersey metropolitan area; Port Everglades, north of Miami; Lake Charles, Louisiana, near the Texas border; the Port of Buenos Aires, north of Los Angeles; and Seattle. By combining the resources of different centers, we will have the capacity to respond to even larger spills.

We will put the response centers and their associated equipment pre-staging areas in optimum locations for spill response. These locations reflect several critical factors, including oil transportation patterns, the volumes of oil being moved, sensitivity to the environment and ready access to highways and airports. That means we'll be able to promptly get the people and equipment to spills wherever they occur -- in the Atlantic, in the Gulf and in the

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Pacific. Heightened protection will also be given to the waters around Hawaii, Puerto Rico and the U.S. Virgin Islands.

As the original API task force report indicated, we intend to have an appropriate response and cleanup role in Alaska. The roles of industry, state government and the federal government have not yet been sufficiently defined at this time to permit NSRC to adopt an appropriate role. This notwithstanding, it should be noted that great improvements have already been made in Prince William Sound. The spill response capability there will be greater than the capability to be found in one of NSRC's regional response centers. A dialogue with appropriate industry, state and federal officials will be held to resolve NSRC's role in Alaska.

We're excited by the prospect of creating the world's largest, best equipped and best trained oil spill cleanup organization. I know of no other occasion when an industry has reacted on such a massive scale to help meet an urgent national need. What is being announced today is truly precedent-setting.

We estimate that the total spending over five years for the new response corporation will amount to over \$800 million, including capital, operational expenses and research and development funding. We think the organization is worth every dollar of that huge sum, which, I must underline, is three times the figure that was estimated a year ago.

The increase is the result of months of honing and refining the concept. The revised estimates include the staff, materials and equipment we feel will be necessary to do the job.

Even so, we recognize that present spill recovery and cleanup technology is inefficient. There can be weather and sea conditions that make response or cleanup operations impossible or too dangerous. Oil spill responders need better equipment and techniques. So the response corporation will support a significant expansion of research and development on oil spills. Neither the new response corporation nor any of the companies that join the funding association will benefit financially from any patents emerging from the research program. All will be donated to the public domain -- a measure intended to guarantee that any new inventions result in maximum protection of the marine environment.

The recently enacted Oil Pollution Act of 1990 recognizes that those who spill oil have the primary responsibility for cleaning up spills. But it gives a single government agency -- the U.S. Coast Guard -- the responsibility for initiating and directing action on spill cleanups. The law also grants "Good Samaritan" recognition to spill responders. Responders like NSRC are not responsible for spills. But they are essential to their cleanup. The new federal law insures recognition of the unique risks faced by those responders.

However, the new federal law also allows states to enact responder liability standards different from the federal standard. In some

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states, existing standards could make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, NSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.

Companies who join the funding company -- the Marine Preservation Association -- will have the right to report the response corporation as their designated cleanup organization. Dues will be paid to the association based on a per barrel fee for oil that is transported during the year. These fees will fund the buildup and day-to-day operations of the response corporation. However, when the NSRC responds to a spill, the spiller will have to pay for actual cleanup expenses incurred, whether or not it is a dues paying member.

NSRC should be fully operational in early 1993 -- as the new law requires -- but will be capable of providing some limited response before then.

The challenge of creating this urgently needed national capability is not taken lightly. We look forward to it eagerly but realistically. The NSRC team is confident that we will meet the challenge and are pleased to be a part of the solution to a national need.

At this time, we'll be happy to respond to any questions you have.

AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, ~~or other liability that results from the release or threatened release unless the release or~~ threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

AS 46.03 is amended by adding a new section to read:

Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a)

A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(2); and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

Spiller's Liability

Foreseeable

WHO ELSE supports/doesn't support.

THE CASE FOR LIMITED LIABILITY FOR

OIL SPILL RESPONSE ACTION CONTRACTORS

ATTACHMENTS

TESORO ALASKA PETROLEUM COMPANY

October 24, 1990

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Marine Spill Response Corporation

The World's Largest Oil Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound, causing the biggest oil spill in the history of the United States. While thousands worked to clean up the spill, a small task force organized under the auspices of the American Petroleum Institute, began taking a hard look at the existing resources for responding to catastrophic oil spills. In June of 1989, the task force reported its sobering conclusion: The capability did not exist, either in industry or government, to successfully contain and remove a spill of the magnitude of the one in Alaska.

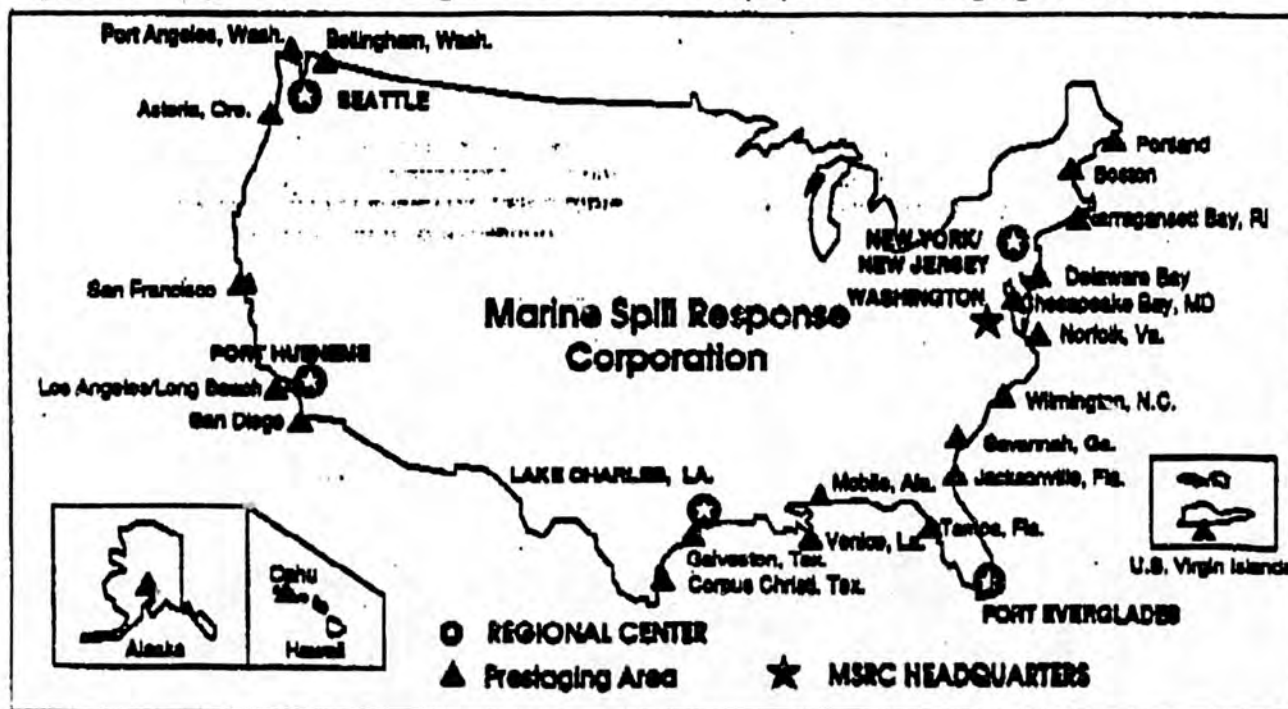
As a result of task force recommendations, 20 oil companies began the process of creating the Petroleum Industry Response Organization (PIRO) to manage catastrophic spills. In August 1990, the oil companies created two new organizations: the Marine

Spill Response Corporation (MSRC) and the Marine Preservation Association (MPA). MSRC, which succeeds PIRO, is an independent oil spill response organization. It will operate out of five regional response centers, each supported by several strategically placed equipment sites. MPA, an organization including oil companies and shippers and receivers of oil, will fund MSRC but will have no control over operations.

The following are some of the key elements of what is intended to be the largest spill response organization in the world:

□ **Geographic Coverage.** MSRC will have its headquarters in Washington, D.C., and will have five regional response centers in the New York-New Jersey

Figure 1: Proposed MSRC Regional Centers and Equipment Prestaging Areas



metropolitan area; Port Everglades, Florida, north of Miami; Lake Charles, Louisiana, near the Texas border; Port Hueneme, California, north of Los Angeles; and Seattle, Washington. Each region will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The proposed regional centers and prestaging areas have been picked to enable an initial quick response to a large spill wherever it might occur along the coast. (See Figure 1.)

Spill Cleanup. MSRC will provide a best-effort response to cleaning up spills of persistent oil (i.e., oils that do not evaporate or degrade quickly in U.S. coastal and tidal waters that are beyond the capacity of local response organizations). Each of the five regional centers are being designed to provide a best-effort response with the state-of-the-art technology to clean up an oil spill the size of the Alaskan spill—210,000 barrels. In the event of an even larger spill, the resources of two or more regional centers will be combined.

Relation to MPA. MPA members will pay annual dues, based on the number of barrels of oil they transported in the previous year. MSRC will use these funds to pay its annual operating, capital, and research and development costs. If an MPA member should become a spiller, MSRC will execute the spiller's response plan. The spiller—not MSRC—will pay for the actual clean-up.

Relation to Coast Guard. MSRC will execute the spiller's response plan under the direction of the Coast Guard, which has a presence around the nation's coasts and an effective military command control and communications structure. Coast Guard jurisdiction will not relieve oil spillers of their responsibility for the clean-up. It will, however, provide clear direction and coordination of cleanup operations when needed because the Coast Guard, by law, will have the ultimate authority in dealing with spills. In the event of a spill, Coast Guard supervision will cut through interagency red tape to eliminate delays during the crucial early hours.

Relation to Local Response Organizations. MSRC is not intended to replace existing oil spill cooperatives and independent response contractors. These entities have done a good job handling smaller spills. MSRC will act when this infrastructure does not have sufficient resources to handle a large spill. MSRC will use co-ops and independent responders as subcontractors, training and drilling them at its own expense.

Liability of the Responder. Under federal law, the responder to an oil spill has limited immunity. He is liable only for damages that result from acts of gross negligence or willful misconduct. Responders are liable for acts of simple negligence resulting in personal injury or wrongful death. Under some state laws, however, the responder is not provided this limited immunity. Since

federal authority will not preempt state law in this regard, MSRC is seeking state liability standards that are the same as the federal standard. This standard is appropriate because an oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.

Research and Development. MSRC will administer a comprehensive research and development program to improve the knowledge and technology used to respond to and clean up spills. This program will complement other programs in government, academia and industry. MSRC studies will include those on preventing loss of oil from ships, on-water oil recovery and treatment, preventing and mitigating shoreline impacts, fate and effects of spilled crude oil and products, mitigating impact on wildlife, and health and safety.

Standards. MSRC will develop standards for oil spill response equipment, techniques and training.

Cost. MSRC's five-year costs for operations, capital equipment and research and development are estimated at about \$800 million.

Remaining Implementation Tasks. A detailed implementation plan has been developed for MSRC, but most of the plan must still be implemented. Equipment and vessels must be constructed and purchased. Personnel—including subcontractors, who will actually do much of the work of transporting equipment to spill sites and operating it—must be hired and trained. Each region will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. Land and buildings must be purchased or leased for the regional centers and warehouses. Insurance must be procured. The research program must be launched.

Implementation Dates. MSRC must be fully operational within 30 months of enactment of the Comprehensive Oil Pollution Act of 1990. This act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause. Many will want to rely on MSRC rather than maintain their own cleanup capability.

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Questions and Answers: Marine Spill Response Corporation

MSRC: Organization and Implementation

Q: What is the Marine Spill Response Corporation (MSRC)? What is the Marine Preservation Association (MPA)?

A: MSRC is an independent, non-profit corporation dedicated to providing a best-effort response to help cleanup large spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. It will also respond to spills further up river when oil has been spilled from ocean-going tankers heading up river. The U.S. Coast Guard will direct MSRC to respond to a spill if it is too big for local response organizations to handle.

MSRC succeeds Petroleum Industry Response Organization Implementation, Inc. (PIRO Implementation), which was incorporated in September 1989 to plan and organize an oil spill response program. The president of PIR/O Implementation, retired U.S. Coast Guard Vice Admiral John D. Costello, is now president of MSRC. MSRC is an independent corporation with a self-perpetuating board of directors.

MPA is a non-profit corporation, whose members—oil companies, shippers, receivers of oil and others—will pay dues based on the amount of oil they transport. The dues will finance MSRC and MPA. However, MPA will have no management involvement with MSRC.

MSRC will use the funds to pay for personnel, equipment, vessels and other facilities needed to be prepared to clean up oil spills. In the event of a spill,

the spiller—not MSRC—will pay for the actual cleanup.

MSRC will have nearly 400 full-time employees, most of whom will be located at the organization's five regional response centers. MSRC's estimated cost for its first five years is about \$800 million. MSRC will be supported by hundreds of subcontractor workers in its response to big spills.

Q: When will MSRC be ready to clean up oil spills?

A: MSRC must be fully operational within 30 months of enactment of the Oil Pollution Act of 1990. That's when the act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause.

This timetable is dictated by the myriad steps that must be taken to move a complex, large, wholly new organization from the drawing board to reality. A detailed plan has been developed for MSRC, but most of the plan still must be implemented. Equipment and vessels must be constructed or purchased. Personnel—including subcontractors who will actually do much of the work of transporting equipment to spill sites as well as operating it—must be hired and trained. Land and buildings for regional centers and equipment prestacking areas must be purchased or leased. Insurance must be procured. A \$35 million, five-year research and development program must be launched.

Q: Why didn't PIRO Implementation implement a spill response program sooner?

A: PIRO Implementation has been carefully planning how this response organization would work before

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Persistent oil—for example, crude oil—lingers in the environment. Products like gasoline are not persistent because they evaporate or degrade quickly.

taking any action to implement one. As this planning was progressing, Congress was considering the Oil Pollution Act of 1990. Several key provisions in this legislation needed to be resolved before operational planning and corporate organization could be fully developed.

For example, PIRO implementation needed to be sure that a duplicative federal response capability was not going to be included in the legislation. If the federal government had created such a capability, there would have been no need for MSRC.

Also, it was important that a single agency be clearly designated as the federal decisionmaker in oil spills.

Finally, PIRO implementation needed to be sure that the new law would recognize the unique risks faced in responding to spills. The new federal law does this by limiting responder liability damage owing to its own gross negligence or willful misconduct. MSRC will have to make difficult, quick decisions at a spill under chaotic conditions. If the law did not recognize the extra risks involved in spill response, it might have been impossible for MSRC to go forward.

The provisions of the bill, which became law in August 1990, satisfactorily resolve each of these concerns.

Q: How many oil companies have joined MPA?

A: As of today, 20 companies have joined MPA, the funding corporation. The volumes of oil these firms transport represent the large bulk of the oil transported into and out of American waters. There are other firms who have shown interest in joining, including utility and pipeline companies. We believe that as the regulations for submitting contingency plans are promulgated, additional companies will need MSRC services and that our clientele will grow accordingly.

Q: Will the MSRC organizational structure function efficiently? Won't control by MPA member companies still be present since they control MSRC's budget?

A: We believe the MSRC organizational structure will prove to be highly efficient. It provides for an independent board of directors, which insures that companies that pay dues to MPA do not manage MSRC.

MSRC: Response Capability

Q: Where and how fast will MSRC be able to respond to a spill—and to what size spill will it respond?

A: MSRC is designed to respond to large, catastrophic oil spills but will respond whenever a spill of any size exceeds the local capability to clean it up.

MSRC will immediately respond to catastrophic spills in U.S. tidal waters out to the limits of our 200-mile Exclusive Economic Zone. The quickest possible response will be made under whatever circumstances. Prepositioning equipment in warehouses at strategically placed prestaging areas and using equipment that can be flown in will reduce response times.

Each of five regional centers will be able to provide a best-effort response to contain and clean up an oil spill totalling 216,000 barrels—in other words, one about the size of the Valdez spill in Alaska in 1989. Combining the resources of more than one regional center will enable combatting even larger spills. Such a capability will exist nowhere else in the world.

Q: The Alyeska Corporation wasn't ready for the Valdez spill. How do we know MSRC will be ready for spills that may occur in the future?

A: MSRC will be ready because it will have sufficient quantities of the best available equipment and well-trained spill response personnel. MSRC will regularly maintain its spill cleanup equipment and will conduct frequent training for its spill response workers including simulation exercises. The new federal legislation requires periodic readiness exercises. On top of this, a rigorous operational audit program will be part of MSRC's normal way of doing business. Frequent announced and unannounced drills will be held to ensure maximum response and cleanup readiness.

Moreover, MSRC will operate in a completely open environment. It will have an independent, self-perpetuating board of directors to answer to, directors who are not affiliated with the petroleum industry. MSRC will operate with many different subcontractors around the nation. It will be impossible to keep MSRC activities—or lack thereof—from public scrutiny.

Q: Will MSRC have all the equipment it needs?

A: Yes. MSRC will buy approximately \$300 million worth of equipment—including vessels and barges, trucks, skimmers, booms, dispersants, wildlife and shoreline rehabilitation equipment, and lightering equipment (to remove oil from disabled vessels). This will provide a best-effort response capability with state-of-the-art equipment.

MSRC believes, however, that current oil spill containment and cleanup equipment needs to be vastly improved—as could methods for protecting and rehabilitating shorelines and wildlife. That is why it will conduct an extensive research program to explore new technologies and approaches. The program will research improvements in booms, dispersants, skimmers, the burning of oil, bioremediation, debris and waste disposal, and spill tracking and surveillance. It will look at techniques for rehabilitating wildlife and shoreline. And it will examine how oil affects environments over the long-term.

MSRC: Regional Centers and Coverage**Q: Where will the regional centers and prestaging areas be located?**

A: The regional centers will be (1) in the New York-New Jersey metropolitan area (Northeast region), (2) in Port Everglades in South Florida, north of Miami (Southeast region), (3) in Lake Charles, Louisiana, near the Texas border (Gulf region), (4) in the Port Hueneme area of California, north of Los Angeles (Southwest region), and (5) in Seattle, Washington (Northwest region).

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The prestaging areas have been tentatively selected to enable an initial quick response to a large spill wherever it might occur along the Pacific, Gulf and Atlantic coasts or in Hawaii, Alaska, Puerto Rico and the Virgin Islands. Each location will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. The general locations of prestaging areas for each region are:

Q Northeast Region:

Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Chesapeake Bay, Maryland; Delaware Bay; Norfolk, Virginia.

Q Southeast Region:

Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; U.S. Virgin Islands.

Q Gulf Region:

Mobile, Alabama; Venice, Louisiana; Galveston, Texas; Corpus Christi, Texas.

Q Southwest Region:

San Diego, California; Los Angeles/Long Beach, California; San Francisco, California; Oahu, Hawaii.

Q Northwest Region:

Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; Alaska.

MSRC plans to have an appropriate response and cleanup role in Alaska. That role is not yet defined. It must consider already existing or planned primary response capabilities before settling on what other may be required. Discussions with industry and Alaskan state officials have not yet arrived at a point that allow complete description of the corporation's role.

Q: A year ago, a petroleum industry task force said regional centers would be in Norfolk and New Orleans. Now Norfolk is just the site of a prestaging area and there is nothing specifically in New Orleans. Why?

A: The task force made many assumptions about where regional centers and prestaging areas needed to be to ensure quick response. The task force's report stated that locations were tentative and would be subject to further analysis. Subsequent analysis identified a more effective mix of centers and prestaging areas. The changes take into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from particular locations to a spill. Location of highways, airports, piers and open water figured into the decisions.

Q: Are all of the regional centers the same size?

A: Almost. Any differences reflect differences in the transportation patterns in each region. Also, the capability of the existing oil spill response infrastructure has been factored into the equation. Despite

differences in size, the regional centers will possess equivalent response capabilities.

Q: Why won't MSRC respond to spills in the Great Lakes and in Alaskan waters?

A: The nature of tanker traffic in the Great Lakes and other non-tidal waters is different from the coast-line traffic that MSRC is being created to deal with. Spills are likely to be smaller and to involve "non-persistent" oil (that is, petroleum products that are more volatile than crude oil and that largely evaporate before they can be cleaned up). Therefore, MSRC's charter does not envision operations in such waters.

However, that does not mean that a spill in the Great Lakes would not be quickly contained and cleaned up. Once enacted, the Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and clean up a worst-case spill. The result of this requirement is that some other private oil spill cleanup organization will be responsible for dealing with such spills.

"The petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state. Meanwhile, Alaska's existing spill response capability is being expanded so that it will be bigger than one of the MSRC regional centers.

MSRC: Liability, Research and Cost

Q: Doesn't the law in some states still allow Good Samaritan oil spill responders to be held responsible for damage caused by their simple judgment mistakes during a spill cleanup?

A: Yes, that is correct. MSRC is now discussing the issue of limited responder immunity with several states. MSRC hopes that these states will recognize the importance and fairness of establishing the same limited liability standard (gross negligence or willful misconduct) the federal government will apply to responders nationwide.

Q: The original five-year cost estimate for PIRO was \$275 million. Why have costs increased so much?

A: The original costs were an approximation of capital, operating and research and development

costs. As we gathered more detailed program data and refined it, additional requirements were identified. Costs have increased threefold because we have recognized additional capital requirements—principally ships and barges. We have also included additional prestaging sites to ensure adequate response coverage.

Q: Federal legislation has authorized a substantial government R&D program. Will MSRC reduce its program as a result?

A: We have no plans to reduce the size of the program. However, because a substantial increase in oil spill research by government has been authorized in the new law, we will need to monitor our program carefully to insure no duplication.

Q: Why are the results of MSRC's research program to be contributed to the public domain?

A: This arrangement is entirely in keeping with the not-for-profit nature of the corporation which has been created. From the outset, MSRC was never intended to be money-making. It was created because the petroleum industry found a void in the capability of both government and industry to protect the marine environment from catastrophic oil spills.

Q: Will MSRC really earn no profits and simply serve the public welfare?

A: Yes. MSRC will not have a profit line on its balance sheets. It will only recover its costs. Moreover, MSRC's charter requires that all discoveries and inventions from its R&D programs to improve cleanup technology be made available to anyone interested at no cost.

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Marine Spill Response Corporation: A New Weapon for Cleaning Up Oil Spills

On September 6, 1990, PIRO (Petroleum Industry Response Organization) Implementation Inc., an oil-spill response planning group created after the 1989 spill in Prince William Sound in Alaska, announced the formation of the Marine Spill Response Corporation (MSRC). When it is fully operational, MSRC will have a response capability larger than any other response organization in the world. The MSRC will be funded by oil companies and others involved in the shipment or receipt of oil by tanker through another newly created organization, the Marine Preservation Association (MPA). However, MSRC will operate completely independently of the MPA and its members. The MSRC will consist of a Washington, D.C., headquarters and five response regions with regional centers located in the New York-New Jersey metropolitan area (Northeast region), Port Everglades in South Florida (Southeast region), Lake Charles, Louisiana (Gulf region), Port Hueneme, California (Southwest region), and Seattle, Washington (Northwest region).

Background on the New Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound and caused the largest oil spill in U.S. history. Up to 10,000 workers, scores of vessels

and aircraft and tons of equipment were employed in cleanup efforts through the spring and summer, until the onset of prohibitive weather conditions. Those efforts were resumed in the spring of 1990. Within several weeks of the spill, eight major oil companies, under the auspices of the American Petroleum Institute, created a task force to examine questions and issues raised by such catastrophic tanker spills. The task force studied and evaluated existing prevention and response programs. It concluded that neither the government nor the industry had the equipment or personnel ready to deal with catastrophic spills. It also identified a need for further spill prevention efforts.

Consequently, in June 1989 the task force recommended that the industry undertake a broad new program to expand its ability to prevent, contain and clean up major oil spills. The task force recommended that a response program be operated by a new, independent organization, originally called the Petroleum Industry Response Organization (PIRO), which would be funded voluntarily by participating oil companies.

PIRO was envisioned as a response company capable of providing a best-effort response to a catastrophic spill from a tanker in, or posing a threat to, U.S. coastal waters (out to the 200-mile Exclusive

Economic Zone), harbors and river mouths. Since the seriousness of a spill depends on the type of oil spilled, the specific environmental risks involved and the prevailing weather and tidal conditions—in addition to the actual amount of oil spilled—the task force defined "catastrophic spill" simply as one beyond the capability of local response resources, as determined by the U.S. Coast Guard.

The task force recommended that PIRO have five regional response centers on the East, West and Gulf Coasts, each with several permanent staging areas along its coastline. Each region was to be capable of responding to a spill of up to 216,000 barrels. It envisioned the use of personnel, equipment and supplies from more than one region to respond to larger spills.

The task force also proposed new spill prevention initiatives and improvements in existing tanker safeguards and operating procedures. It also recommended broad-based research and development (R&D) and readiness auditing roles for PIRO.

The task force estimated PIRO's five-year operating, capital and R&D costs at \$275 million.

One month later, in July, 1989 the original eight companies that joined in the task force's initial effort were

joined by a dozen more in forming a PIRO Implementation group and steering committee to begin examining in detail what would be required to fulfill the task force's goals and recommendations.

Retired Vice Admiral John D. Costello, former commander of the U.S. Coast Guard's Pacific Area, was named to direct these efforts.

The detailed work of the steering committee was reflected in the names of its eight working subcommittees: finance and procurement, communications, operations, staff activities, facilities acquisition, legal, insurance and research. Some 75 executives from participating companies looked into the many conceptual, procedural, legal and organizational questions that had to be addressed in the actual formation of the new response organization.

As their detailed study and planning progressed, the original five-year cost estimates were revised upward substantially—initially to \$400 million for the first five years and, most recently, to about \$800 million.

As work proceeded, additional companies became interested in affiliating with PIRO, including non-oil companies such as shippers and facilities that handle oil. Ultimately, this broader interest led to renaming of the new oil spill response organization to the Marine Spill Response Corporation (MSRC).

Legislative Developments

Planning and development of MSRC were influenced by the oil spill legislation that evolved in Congress through the fall and winter of 1989 and the spring and summer of 1990—and was signed into law by President Bush on August 18, 1990.

This legislation contains several provisions of critical importance to

MSRC. To ensure the most prompt and effective response, the legislation provides limited immunity for oil spill responders—but not for spillers. This national immunity standard ensures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. Liability on a simple negligence basis would be assumed in cases of personal injury or wrongful death.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder—on one side of a state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose serious problems in the future.

An additional provision of this legislation makes the President, through the U.S. Coast Guard, responsible for seeing that a spill is promptly cleaned up. Recent history has demonstrated that large-scale operations to clean up oil spills require a single decision-maker to resolve issues expeditiously. The legislation, while clearly putting the responsibility for cleanup on the spiller, also clearly makes the private sector the main source for the nation's cleanup capability, under the watchful, supervising eye of the Coast Guard.

Organization of MSRC

To assure the independence of MSRC, a second non-profit corporation was created—the Marine Preservation Association (MPA). The companies that participated in PIRO and in the development of MSRC are members of this associa-

tion. MSRC has neither members nor shareholders. Its board of directors is self-perpetuating and wholly independent of MPA or its member companies. MPA will not be involved in the management of MSRC.

Initial capital contributions and dues paid to MPA are based on the quantities of oil handled in the waters in which MSRC will operate. MPA contributions and fees are being used to finance creation of MSRC and to fund its ongoing operations. However, they will not be used to cover expenses that MSRC incurs in responding to spills.

MSRC will maintain a contractual relationship with the members of MPA, obligating MSRC to make its services, manpower and equipment available in the event of a major spill involving a member's vessel or facility. The expenses incurred by MSRC in responding to a spill will be recovered directly from either the member-spiller or his insurer. If costs exceed this compensation, or if a spiller cannot be identified, then cleanup costs will be borne by the newly established Federal Oil Spill Compensation Fund.

All MPA members must meet the spill response capability certification requirements of the new federal law. These requirements could be satisfied by a member's contractual relationship with MSRC.

MSRC's Response Role

Spills to Which MSRC Will Respond.

MSRC is designed primarily to provide a best-effort response to catastrophic spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. (Persistent oil—for example, crude oil—lingers in the environment. Non-persistent oil

products like gasoline tend to evaporate or degrade quickly.)

Each of MSRC's five regional response centers (and its associated prepositioned equipment sites within the region) is being designed to manage a spill of up to 216,000 barrels, as originally proposed. If the resources of all five MSRC regions were combined, its capability would be nearly 1.1 million. MSRC is being designed primarily for catastrophic spills of the size of the accident at Prince William Sound, but it will respond to smaller spills when they are beyond the capability of the local spill response infrastructure. The Coast Guard will judge when local response efforts are not sufficient to satisfactorily contain and cleanup the spill.

MSRC Headquarters, Regional Centers and Prestaging Areas.

MSRC headquarters will be located in Washington, D.C. and is expected to have 43 employees when fully staffed. These personnel will establish operating policy and provide normal staff support. In addition, the corporation's operational audit and R&D programs will be directed from headquarters.

The regional centers will be in (1) the New York-New Jersey metropolitan area (Northeast region), (2) Port Everglades in South Florida (Southeast region), (3) Lake Charles, Louisiana, near the Texas border (Gulf region), (4) Port Hueneme, California, north of Los Angeles and (5) Seattle, Washington (Northwest region).

The regional centers will be nearly equal in size. Variations will reflect differences in the territory each regional center will be responsible for and in the amount and location of oil tanker traffic and lightering.

Despite small differences in size, the regional centers will possess equivalent response capabilities. Together, they will have approximately 350 employees.

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located.

The general locations of prestaging areas for each region are:

□ Northeast Region: Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Delaware Bay; Chesapeake Bay, Maryland; and Norfolk, Virginia.

□ Southeast Region: Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and in the U.S. Virgin Islands.

□ Gulf Region: Mobile, Alabama; Venice, Louisiana; Galveston, Texas; and Corpus Christi, Texas.

□ Southwest Region: San Diego, Los Angeles/Long Beach, California; San Francisco, California; and Oahu, Hawaii.

□ Northwest Region: Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; and Alaska.

The locations of the regional response centers and prestaging areas were selected to ensure the quickest, most effective response to possible spills, taking into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from regional centers to a spill. Location of highways, airports, piers, navigable waterways and the availability of office and warehouse space were all factors considered in site selec-

tion. Each location will have to be surveyed to assure that specific sites meeting MSRC operational requirements actually are available.

According to the API task force report, MSRC should play an appropriate response and cleanup role in Alaska. The definition of this role is not yet resolved. Primary response capabilities already in existence must be evaluated before it can be determined what else might be required. Discussions with industry and the state have not yet proceeded to the point where MSRC's role can be completely described.

The MSRC will not operate in the Great Lakes and other non-tidal waters. Historically, spills in the Great Lakes have been comparatively smaller and have involved "non-persistent" oil. The Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and cleanup a worst-case spill, most often through reliance on existing cooperatives and subcontractors.

Relationship of MSRC with Existing Co-ops and Subcontractors.

MSRC will coordinate its efforts with an estimated 150 existing oil-spill cooperatives and subcontractors. Over the years, such cooperatives and subcontractors have compiled a solid record of handling non-catastrophic, inshore spills—which account for some 99.9 percent of all spills. MSRC is designed to complement this existing capability—that is, to handle the infrequent, yet potentially devastating, catastrophic spills. Existing cooperatives and subcontractors would continue to handle smaller spills, except in instances in which MSRC's assistance might be required or when the Coast Guard requests MSRC's aid.

MSRC will employ about 350 people in the five regions. Existing cooperatives and subcontractors will also be called on or retained to provide additional manpower and equipment needed to deal with spills.

Identifying qualified subcontractors, arranging contractual agreements, reviewing contractor capabilities and training will be an ongoing function of MSRC's permanent staff.

The synergistic relationship between MSRC and existing, smaller responders is expected to result in joint training exercises, coordinated research, development and sharing of new oil spill response techniques and equipment and frequent exchanges of information and ideas.

MSRC Equipment.

MSRC will buy approximately \$300 million worth of equipment. All MSRC equipment will be prepackaged to permit easy movement by air, truck, vessel or rail. This equipment will include vessels and barges, trucks, skimmers, booms, communications equipment, dispersants, wildlife and shoreline rehabilitation equipment and lightering equipment to remove oil from disabled vessels.

Booms are floating mechanical barriers that extend above and below the water surface to contain spilled oil for recovery and to move spilled oil into areas where recovery is easier. Since booms do not work well if currents are too swift and waves too high, deployment in rough weather can be a problem.

Skimmers are vessels that collect spilled oil from the surface of the water. Like booms, skimmers have trouble operating where currents are swift and waves high.

Chemical dispersants sprayed on oil can break it into small droplets, accelerating the removal of volatile hydrocarbons, facilitating the natural "decay" of the oil's components, and minimizing movement of the oil to shorelines. Dispersants can be rapidly and broadly applied by air over large areas and volumes of oil, even in adverse sea conditions.

MSRC's Research Program.

MSRC will conduct a five-year, \$35 million research and development program to improve oil spill response technology. This program will be a key element in attempting to improve the corporation's effective future response to oil spills. Proposed research will cover techniques for minimizing oil losses in the event of a spill and keeping them close to the vessel; recovering and treating oil after it begins to spread but before it reaches shore; preventing and reducing shoreline impact, which includes studies on bioremediation; the fate and effects of oil in the environment; reducing the impact of a spill on wildlife; and investigating the health and safety of persons exposed to spills.

Timetable for MSRC to Become Operational.

MSRC must be fully operational within 30 months of enactment of the

Oil Pollution Act of 1990, when the act will require shippers and others responsible for oil transportation and handling on offshore and tidal waters to show that they can contain and clean up an oil spill they might cause.

This federal timetable fits MSRC's schedule for implementation. There are myriad steps that must be taken to make a complex, large, wholly new organization operational. A detailed plan has been developed for MSRC, but most of the plan still must be implemented.

Equipment and vessels must be constructed and purchased. Personnel—including (subcontractors) who will actually do much of the work transporting equipment to spill sites, as well as operating it—must be hired and trained. Land and buildings must be purchased or leased to create the regional centers and equipment prestaging areas. Insurance must be procured.

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**Statement of Vice Admiral John D. Costello, USCG (Ret)
President, Marine Spill Response Corporation
September 6, 1990**

Good morning. I take great pleasure today in announcing the formation of the Marine Spill Response Corporation and the Marine Preservation Association.

Marine Spill Response Corporation is the new name for the Petroleum Industry Response Organization (PIRO) -- an oil spill cleanup organization that we have been working to create since June of last year, when plans for it were first announced. Funding for this corporation will be provided by the Marine Preservation Association, which is a separate organization of owners, shippers and receivers of oil. Both companies are not-for-profit entities. Each is independent of the other.

We have changed the name of the response corporation to reflect the expansion of its clientele, which now extends well beyond the conventional understanding of the term "oil industry." MSRC will serve others including independent tanker operators, public utilities -- in fact, any company that handles petroleum and petroleum products over coastal waters is now a prospective client. We have not, however changed the original objectives. MSRC will provide America:

- o A best-effort response capability to catastrophic offshore spills in coastal and tidal waters -- which consists of on-water as well as beach cleanup capability;
- o A program to audit, on an ongoing basis, the readiness of our spill response forces to meet their mission; and
- o A robust research and development program, intended to improve basic information about spills and the technology of oil spill response and cleanup.

Each of the corporation's five regional response centers is designed to manage a spill as large as the 1989 accident in Prince William Sound. They are to be located in the New York/New Jersey metropolitan area; Port Everglades, north of Miami; Lake Charles, Louisiana, near the Texas border; the Port of Buenos Aires, north of Los Angeles; and Seattle. By combining the resources of different centers, we will have the capacity to respond to even larger spills.

We will put the response centers and their associated equipment pre-staging areas in optimum locations for spill response. These locations reflect several critical factors, including oil transportation patterns, the volumes of oil being moved, sensitivity to the environment and ready access to highways and airports. That means we'll be able to promptly get the people and equipment to spills wherever they occur -- in the Atlantic, in the Gulf and in the

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Pacific. Heightened protection will also be given to the waters around Hawaii, Puerto Rico and the U.S. Virgin Islands.

As the original API task force report indicated, we intend to have an appropriate response and cleanup role in Alaska. The roles of industry, state government and the federal government have not yet been sufficiently defined at this time to permit NSRC to adopt an appropriate role. This notwithstanding, it should be noted that great improvements have already been made in Prince William Sound. The spill response capability there will be greater than the capability to be found in one of NSRC's regional response centers. A dialogue with appropriate industry, state and federal officials will be held to resolve NSRC's role in Alaska.

We're excited by the prospect of creating the world's largest, best equipped and best trained oil spill cleanup organization. I know of no other occasion when an industry has reacted on such a massive scale to help meet an urgent national need. What is being announced today is truly precedent-setting.

We estimate that the total spending over five years for the new response corporation will amount to over \$800 million, including capital, operational expenses and research and development funding. We think the organization is worth every dollar of that huge sum, which, I must underline, is three times the figure that was estimated a year ago.

The increase is the result of months of honing and refining the concept. The revised estimates include the staff, materials and equipment we feel will be necessary to do the job.

Even so, we recognize that present spill recovery and cleanup technology is inefficient. There can be weather and sea conditions that make response or cleanup operations impossible or too dangerous. Oil spill responders need better equipment and techniques. So the response corporation will support a significant expansion of research and development on oil spills. Neither the new response corporation nor any of the companies that join the funding association will benefit financially from any patents emerging from the research program. All will be donated to the public domain -- a measure intended to guarantee that any new inventions result in maximum protection of the marine environment.

The recently enacted Oil Pollution Act of 1990 recognizes that those who spill oil have the primary responsibility for cleaning up spills. But it gives a single government agency -- the U.S. Coast Guard -- the responsibility for initiating and directing action on spill cleanups. The law also grants "Good Samaritan" recognition to spill responders. Responders like NSRC are not responsible for spills. But they are essential to their cleanup. The new federal law insures recognition of the unique risks faced by these responders.

However, the new federal law also allows states to enact responder liability standards different from the federal standard. In some

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states, existing standards could make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, NSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.

Companies who join the funding company -- the Marine Preservation Association -- will have the right to report the response corporation as their designated cleanup organization. Dues will be paid to the association based on a per barrel fee for oil that is transported during the year. These fees will fund the buildup and day-to-day operations of the response corporation. However, when the NSRC responds to a spill, the spiller will have to pay for actual cleanup expenses incurred, whether or not it is a dues paying member.

NSRC should be fully operational in early 1993 -- as the new law requires -- but will be capable of providing some limited response before then.

The challenge of creating this urgently needed national capability is not taken lightly. We look forward to it eagerly but realistically. The NSRC team is confident that we will meet the challenge and are pleased to be a part of the solution to a national need.

At this time, we'll be happy to respond to any questions you have.

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AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

AS 46.03 is amended by adding a new section to read:

Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a)

A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(2); and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

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Tort & Insurance Law Journal

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Editorial Statement

The *Tort & Insurance Law Journal* is published by the Section of Tort and Insurance Practice of the American Bar Association as a service to its members and for the benefit of lawyers and lay persons involved in the practice of tort law and insurance. As a publication of the Section, the Journal's interests mirror those of the Section which span thirty-three general substantive and procedural areas involved in or affecting the law of torts and insurance. These areas are listed in the Journal with the names of the present General Committee Chairpersons. Also, the Section has created Special Task Forces devoted to additional areas of concern such as AIDS, bankruptcy in tort litigation, Jonas Salk proposals project, legal education and long-term health care.

The *Tort & Insurance Law Journal*, known formerly as *The Forum*, adopted its new title commencing with the volume published for the 1985-86 Association year, to more appropriately reflect its commitment to the publication of articles which present scholarly analysis of and insight into issues affecting the broad scope of tort and insurance law and practice. The new title further reflects the standing of the Journal within the legal community as a focal point for the examination of timely legal issues confronting the judiciary, the tort and insurance bar, and the general insurance community. The Section actively seeks to serve as an umbrella for the varied and disparate special interest bars and organizations within the field of tort and insurance law. To that end, the *Tort & Insurance Law Journal* will continue to solicit and present the multiplicity of views that exist within our legal community. The Editorial Board trusts that each issue will be a significant contribution to practitioners and students.

HAZARDOUS WASTE LIABILITY AND THE SURETY

William F. Ryan, Jr., and Robert M. Wright

I. INTRODUCTION

The purpose of this article is to discuss issues which should be of concern to the contract bond surety with regard to hazardous waste liabilities. It is not the authors' intention to tilt at windmills in forecasting potential claims against the surety. It is also not our intention to endorse the theories of claims discussed in this article which would impose liability on the surety far beyond its traditional role of ensuring that the project is completed and all bills are paid. The surety industry must anticipate, however, that the Department of Justice, as well as state and local authorities, and certainly plaintiffs' counsel, will argue the broadest possible interpretation of the hazardous waste statutes and common law liability theories in order to impose financial responsibility upon whomever is financially capable of paying for the costs associated with a hazardous waste release. Any person, including a contract bond surety or principal, who is in any way associated with the hazardous waste may find himself the target of such an effort. As will be seen below, a literal reading of the hazardous waste statutes can create unusual and unexpected potential claims against the surety.

State and federal hazardous waste laws present at least three separate problems for the contract bond surety. First, the most difficult problem faced by the surety is the question of bonding contractors bidding on hazardous waste cleanup projects in light of the unique risk to the surety undertaking such an obligation. Second, the surety faces the potential inadvertent risk associated with the discovery of hazardous

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waste on a conventional construction project. Finally, the surety faces the potential inadvertent assumption of risk under the hazardous waste laws by acquiring property in connection with salvage.

While the legal framework for the cleanup of the nation's hazardous waste has been in place for approximately nine years, relatively few contracts for the cleanup of the major hazardous waste sites have actually been let. The complex nature of these sites has increased the time necessary to complete preliminary site investigations and feasibility studies and to select appropriate remedies. Most of the cleanup work that has been done to date has been of a relatively minor nature. As a result, the surety industry has not, until recently, been asked to make major bonding line commitments to hazardous waste cleanup contractors.

The major commercial sureties have begun to appreciate and understand the implications of issuing contract bonds for major hazardous waste cleanups. This past year, several owners on major projects have sought bonding, forcing sureties to focus upon their potential liabilities as well as the effect of these potential liabilities upon their contractor clients.

In addition, new concerns have surfaced regarding the availability of corporate surety bonds for hazardous waste cleanup projects as state and federal agencies grow increasingly concerned about the viability of the individual surety market. The Miller Act¹ and state "Little Miller Acts" require that bonds be posted for all cleanups contracted for by federal or state agencies. Up to this point, many of the minor cleanup projects have been bonded by individual sureties.² As government agencies have become increasingly concerned about the adequacies of individual sureties, particularly for major environmental cleanup projects, the issue of bonding capacity from commercial sureties has become increasingly important. In fact, it is likely that the surety industry will increasingly be asked for its views on the bondability of these projects and the steps which must be taken to assure the availability of bonding which will satisfy the Miller Act requirements.

The Superfund reauthorization in 1991 will undoubtedly be the forum for renewed discussion of the contractor liability/indemnification issue, among many others.³ The issue of the bondability of these projects will be a new topic to be discussed. For this reason alone, the surety industry should focus upon the problem and the potential market both for the sureties themselves and their clients.

1. 40 U.S.C. § 270a (1982).

2. Individual sureties have not been particularly satisfactory, and, as a result, new regulations have been proposed which will make it much more difficult to secure individual securities. See 53 Fed. Reg. 44,564 (Nov. 3, 1988).

3. The 1991 reauthorization process may dwarf the 1986 reauthorization in its scope and depth, and the controversy is now under way. EPA has come under increasing fire from the Office of Technology Assessment (OTA) regarding the adequacy of its cleanups and the contracting policies used to implement them. Contractor organizations continue to question the contractor liability/indemnification policy. Environmentalists are dissatisfied with the pace of the program.

It has been forecast that the potential market for hazardous waste cleanup work may approach \$100 billion over the next ten years, and estimates by organizations such as the Office of Technology Assessment (OTA) which exceed that number are gaining increasing credibility.⁴ This includes cleanups which are expected to be done by the federal government, by the states, and by private parties.

As surety companies examine their alternatives and decide whether to bond hazardous waste activities in this huge potential market, they must also be concerned about the effect of hazardous waste work being done by their clients on the entire bonding line for which the sureties are responsible. In other words, if a client is subjected to multimillion dollar liability on a hazardous waste project, it gives the surety little comfort that it did not bond that project if the contractor's financial distress causes default on millions of dollars of conventional construction work that the surety *has* bonded.

Many of the decision makers concerned with Superfund cleanup projects ask why there should be excessive concern by the surety industry over hazardous waste cleanup. Sureties have historically bonded very large projects where the potential for losses is huge. The factors that make this type of work unique and create concern to contract bond sureties are:

1. The inability to underwrite the project under normal underwriting standards due to:
 - The use of unproven technology;
 - The uncertain nature of the materials which may be encountered on site and which must be disposed of;
 - Stringent, and in some cases unrealistic, government standards which must be met under the contract as to what is "clean";
 - The potential of increasing liability exposure as the project progresses versus decreasing liability exposure on the conventional construction project; and
 - Long liability "tails" for hidden defects in the manner in which the work was done.
2. The potential for the application of strict liability to the contractor as to third-party claims.
3. Unavailable or inadequate pollution liability insurance and/or indemnity for the cleanup contractor.
4. The possible loss of the surety's traditional option to complete performance in the event of default.
5. The potential for "arranger" liability on the part of the surety.

All of these subjects are discussed in more detail on the following pages. In reviewing the general schemes of the hazardous waste laws, it is important to bear in mind that the contractor who is cleaning up someone else's mess is the party who is not only treating or disposing of the hazardous waste but who is also in control of the con-

4. OTA estimates \$500 billion over the next 50 years, excluding cleanup of Department of Energy sites. CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, *ASSESSING CONTRACTOR USE IN SUPERFUND* (January 1989).

struction site. In that role, the contractor is in control of the "facility" where the hazardous substance has been deposited. That factor, together with its "operations" on the site, in treating or disposing of hazardous waste, may make the contractor an "operator" of a hazardous waste "facility" under the language of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁵ and the Resource Conservation Recovery Act (RCRA).⁶ This is only the beginning of the problem. The balance of this article will explore the problem in more detail and, hopefully, suggest some useful solutions.

II. TECHNOLOGY

A number of technologies and combinations thereof are employed to effect cleanup at toxic waste sites. The technologies broadly fall into categories including removal and containment strategies, solidification/stabilization treatments and methods of destruction and detoxification, including incineration.⁷ Many remedies selected include complex combinations of these technologies, with the use of one procedure often dependent on the outcome of another.

While the technologies are still evolving, most are targeted at specific types of toxic wastes. Chemical fixation, stabilization and solidification treatments are often used to reduce mobility, particularly for toxic metals. Stabilization techniques essentially dilute or encapsulate hazardous material in a liquid which hardens; however, hazardous chemicals remain in the mass. Thermal destruction and chemical and biological treatment can irreversibly destroy or detoxify nearly all of some substances, although low temperature thermal treatments just volatilize some organic chemicals but do not destroy them. Some physical and chemical treatments separate organic and inorganic materials. Carbon adsorption, precipitation, soil washing, and solvent extraction allow the separation of the materials for placement in a landfill, sometimes calling for the separated materials to be further treated and destroyed. Another technology employed is *in situ* vitrification (ISV), which uses electrodes in the ground to pass electricity through the soil, melting it, vaporizing and at least partially destroying organic chemicals and leaving a chemically inert, stable, glass-crystalline mixture.

The Environmental Protection Agency (EPA) has been criticized for the selection of what OTA and others assert are impermanent technologies often selected because they are less costly, at least in the short term, over new and innovative technologies which may offer a more costly, but permanent remedy. OTA has stated its view that about 75 percent of cleanups are unlikely to work over the long term.⁸ One of the major problems facing cleanup contractors are the liabilities attendant to the development and testing of new technologies. In a 1987 Report to Congress, the United

5. 42 U.S.C. § 9601 (1982 & 1987 Supp.).

6. 42 U.S.C. § 6901 (1982 & 1987 Supp.).

7. For a recent general discussion of cleanup technologies, see CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, COMING CLEAN: SUPERFUND'S PROBLEMS CAN BE SOLVED 139-91, OTA-ITE-433 (Washington, D.C.: U.S. Government Printing Office, October 1989).

8. *Id.* at 3.

States General Accounting Office (GAO) stated that the experience of those firms which participated in EPA's Superfund Innovative Technology Evaluation Program "suggests that the lack of performance records for innovative technologies may create uncertainty about the long-term effectiveness of . . . new cleanup remedies." The GAO further found that "as technologies evolve and approach commercial application, the need for insurance may become more significant."⁹ In this connection, OTA has recently warned that "the rapid growth of the national cleanup effort, both in Superfund and many other cleanup programs, has meant that technical experience and expertise in the private sector has likely been spread very thin. . . . Currently, there are not enough appropriately trained and experienced engineers and scientists to implement a high quality and expanding national cleanup program."¹⁰ In fact, OTA's report points out that "[a]t the Iron Mountain Mines Superfund site in California, the responsible party has written EPA about actions by contractor personnel (under the direction of CH2M HILL, the REM contractor) *during cleanup* which are resulting in extensive migration of hazardous substances offsite."¹¹

The uncertainties of the available technologies are illustrated, to some extent, by the case of *USF&G v. United States*,¹² where the appellate court held that the discretionary function exception to the Federal Tort Claims Act barred USF&G (as a liability insurer) from recovering from the United States monies which USF&G paid to settle third-party property damage claims against a Superfund contractor insured by USF&G. At the direction of EPA's On-Site Coordinator, the contractor had sought to neutralize oleum, an extremely reactive sulfuric acid. The plan was to slowly drain the oleum into water so that the oleum would react in a controlled fashion. Unfortunately, the oleum apparently drained too quickly, causing a larger reaction than expected. The reaction formed a dense cloud of sulfur trioxide and sulfuric acid which migrated away from the site and caused respiratory injury to five persons. Thereafter, the drainage of oleum stopped when a valve through which it passed became clogged with sludge. To clear the valve, the contractor's employees inserted rods. Following the insertion of the rods, an explosion occurred and another cloud of sulfuric trioxide and sulfuric acid was released. Blown by winds, this cloud migrated

9. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, HAZARDOUS WASTE, ISSUES SURROUNDING INSURANCE AVAILABILITY 32 (October 1987).

10. CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND 4 (January 1989). OTA stated in this report that the constant shift of people from government to the private sector keeps the government work force inexperienced, which makes effective government oversight and management of contractor activities difficult if not impossible. As to the contractors, the report found that there was a high degree of mobility of the most experienced people as contractors competed to maintain their increased market share or business volume with the report concluding:

The result is a national cleanup work force which is expanding rapidly, which is in constant motion, with few people having institutional memories or loyalties, for whom information transfer and education through working with experienced people is minimal, with no substantial improvement in average level or experience, and where labor costs are increasing.

Id. at 191.

11. *Id.* at 29 (emphasis in original).

12. 638 F. Supp. 1068 (M.D. Pa. 1986), *rev'd*, 837 F.2d 116 (3d Cir. 1988).

into a nearby town, where it caused properly damage to over 500 motor vehicles, an airplane and several buildings. The point to be drawn from this illustration is that even the simplest of technologies carries large risks when applied to hazardous material remediation efforts.

III. GENERAL SCHEME OF THE HAZARDOUS WASTE LAWS

A. Federal Law

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act,¹³ which has become commonly known as either CERCLA or Superfund, in order to provide a mechanism to clean up hazardous waste sites. In essence, CERCLA subjects five categories of persons to strict, joint and several liability¹⁴ for the costs of responding to a "release or threatened release" of hazardous substances from a "facility,"¹⁵ as well as for damages to natural resources.

The persons subject to CERCLA liability are:

- The owner and operator of a vessel;
- The owner and operator of a facility;
- Anyone who at the time of disposal owned or operated any facility at which hazardous substances were disposed;
- Anyone who arranges for the transport, disposal or treatment of hazardous substances; and
- Any person who accepts hazardous substances for transport to a site selected by such person.¹⁶

The breadth of CERCLA's reach is demonstrated by the definitions which it gives to the following terms:

"Operator" is defined as "a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement."¹⁷

"Facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located," and specifically includes any:

- building
- structure
- installation

13. 42 U.S.C. § 9601 (1982 & 1987 Supp.).

14. CERCLA provides that its standard of liability is that which is imposed under Section 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1982, 1987 Supp.). See 42 U.S.C. § 9601 (32) (1987 Supp.). Cases interpreting § 311 of FWPCA hold that strict liability applies. See, e.g., *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978). Accordingly, the courts have held that CERCLA imposes strict liability. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

15. 45 U.S.C. § 9607 (1982 & 1987 Supp.).

16. *Id.*

17. 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6182. See also *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986), citing this definition as supporting the view that liability exists on the part of the owner of the property and also on the part of the operator if the operator is a different person than the owner.

- equipment
- pipe or pipeline (including any pipe into a sewer or publicly owned treatment works)
- well
- pit
- pond
- lagoon
- impoundment
- ditch
- landfill
- storage container
- motor vehicle
- rolling stock
- aircraft¹⁸

"*Hazardous substance*" is defined as those substances that are listed as hazardous under the Resource Conservation & Recovery Act of 1976,¹⁹ the Federal Water Pollution Control Act,²⁰ the Clean Air Act,²¹ and other materials specified by EPA. These substances exceed a thousand. Hazardous substances do *not* include petroleum, crude oil and natural gas.²²

"*Release*" is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment."²³

If one falls within one of the categories subject to CERCLA liability, there are only three potential defenses: (1) act of God; (2) act of war; and (3) where the release is caused by the act or omission of a third party and (a) the third party does not have a direct or indirect contractual relationship with the defendant and (b) the defendant establishes that (i) he exercised due care with respect to the substance concerned and (ii) he took precautions against foreseeable acts and omissions of the third party.²⁴ In an attempt to respond to the potential liability concerns of Superfund cleanup contractors, Congress exempted such contractors from strict liability under federal law and also provided EPA with discretionary authority to indemnify the contractors for releases arising out of negligent response action activities when it amended CERCLA with the passage of the Superfund Amendments and Reauthorization Act of 1986 (SARA).²⁵

18. 42 U.S.C. § 9601(9) (1987 Supp.).

19. 42 U.S.C. § 6901 (1982 & 1987 Supp.).

20. 33 U.S.C. § 1251 (1982 & 1987 Supp.).

21. 42 U.S.C. § 7401 (1982 & 1987 Supp.).

22. 42 U.S.C. § 9601(14) (1987 Supp.).

23. 42 U.S.C. § 9601(22) (1987 Supp.).

24. 42 U.S.C. § 9607(b) (1982 & 1987 Supp.).

25. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

1. Negligence Standard under SARA

Response Action Contractors²⁶ shall not be liable under CERCLA or under any other federal law for any liability which results from a release or threatened release of a hazardous substance unless the release is caused by conduct of the Response Action Contractor which is negligent, grossly negligent or which constitutes intentional misconduct.²⁷

By its terms, the section 9619 standard applies only to federal law. With regard to actions brought under state law, it does not preclude the courts from applying state statutory or common law standards, which may in some cases be strict liability.

B. State Law

In addition to statutory liabilities for additional cleanup costs, the hazardous waste cleanup contractor faces potential application of strict liability for third party claims under the common law doctrine of ultrahazardous or abnormally dangerous activities. While strict liability has generally not been applied to engineering and construction work, and while the traditional premises for the imposition of strict liability do not apply to hazardous material cleanup work,²⁸ there is no certainty that remedial contractors and engineers will not be swept into the chain of strict liability that may be applied under the common law to those persons who created the particular haz-

26. "Response action contractor" is defined as:

(A) Any (i) person who enters into a response action contract with respect to (A) any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such contract; and (ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to Section 11021(b) of this title; and (iii) recipients of grants (including sub-grantees) under Section 126 for the training and education of workers who are or may be engaged in activities related to hazardous waste removal, containment, or emergency response under this chapter; and (B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action. 42 U.S.C. § 9619(e)(2) (1987 Supp.).

A "response action contract" is defined as a written contract or agreement entered into by a Response Action Contractor with the President, any federal agency, a state or political subdivision or any potentially responsible party (private party) carrying out an agreement to provide any remedial action for removal under CERCLA of a hazardous substance or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for a facility. 42 U.S.C. § 9616(e)(1) (1987 Supp.).

27. 42 U.S.C. § 9619(a) (1987 Supp.).

28. The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character." PROSSER AND KEATON, THE LAW OF TORTS § 78 (5th ed. 1984). The Restatement of Torts sets forth six factors to be considered in determining if an activity is abnormally dangerous before strict liability principles will be applied: (1) the existence of a high degree of risk or harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes. Application of the fifth and sixth factors demonstrate that strict liability should not be applied to Superfund cleanup activity. See RESTATEMENT (SECOND) OF TORTS § 520 (1965). Under state law, however, each court would make a determination of whether strict liability should be applied to the activities of remedial contractors by analyzing these factors on a case-by-case basis. Given the general trend toward expanding theories of liability, the remedial contractors' potential liability is unpredictable.

ard that is the subject of the cleanup activity." Moreover, careful analysis of the statutory law of each state is necessary in order to evaluate the potential for statutory imposition of strict liability for additional costs resulting from a further release during the contractor's work. For example, New Hampshire's mini-Superfund law specifically provides that:

any person who . . . (c) by contract, agreement or otherwise arranged for disposal or treatment . . . of hazardous waste . . . shall be strictly liable for all costs incurred by the State in responding to a release or threatened release.¹⁰

Additionally, some states have "Good Samaritan" statutes which afford protection for civil liabilities to persons who engage in hazardous waste remedial work, but provide that the protection does not apply to those who work for compensation." Texas, on the other hand, specifically provides that a Response Action Contractor cannot be liable for additional cleanup costs which result from its cleanup activities unless the costs were caused by gross negligence or willful misconduct." Attached as Appendix A to this article is an outline as of April 19, 1989, of all of the state mini-Superfund laws which affect contractor cleanup activity."

In addition to strict liability in tort, state common law has also imposed liability without fault under the common law doctrines of nuisance and trespass against owners of properties containing hazardous waste." Trespass liability may exist in some jurisdictions." As far as nuisance liability is concerned, in general a private nuisance is an unreasonable interference with the plaintiff's use and enjoyment of its land. A nuisance cause of action can arise from air and noise pollution as well as surface and

29. See, e.g., *State v. Ventron Corp.*, 94 N.J. 473, 493, 468 A.2d 150 (1983) ("mercury and other toxic wastes are 'abnormally dangerous,' and the disposal of them, past or present, is an abnormally dangerous activity"). But see *Forrest v. Imperial Serv., Inc.*, 712 P.2d 488 (Colo. App. 1985), *rev'd on other grounds*, 741 P.2d 1251 (Colo. 1987) (court rejected application of strict liability on basis of ultra-hazardous activity to landfill disposal of hazardous substance which resulted in personal injury).

30. N.H. REV. STAT. ANN. § 147-B:10 (1987).

31. See, e.g., ALA. CODE § 6-5-332.1 (1988 Supp.); COLO. REV. STAT. § 29-22-109 (1986); CONN. GEN. STAT. ANN. § 22a-452 (1989 Supp.); FLA. STAT. ANN. § 768-128 (West 1986); IDAHO CODE § 39-4421 (1985); KY. REV. STAT. ANN. § 411.460 (Baldwin 1988); ME. REV. STAT. ANN. tit. 38, § 1403(2) (1988 Supp.); MISS. CODE ANN. § 17-17-29 (1988 Supp.); S.C. CODE ANN. § 44-56-320, 330 (Law. Co-op. 1976 & 1988 Supp.).

32. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 13(g)(9) (Vernon 1989 Supp.); compare § 8(i)(2).

33. The outline is based upon an update of a "Summary Matrix of State Law Information to Response Action Contractors," which is included in HAZARDOUS WASTE ACTION COALITION (HWAC), STATE LAWS RELATED TO RESPONSE ACTION CONTRACTORS (1988). HWAC is a coalition of the American Consulting Engineers Council. The authors of this paper are grateful for HWAC's permission to allow use of its format. Copies of the HWAC publication may be obtained from James W. Garvin, Editor, Donohue & Associates, Inc., 111 North Canal Street, Suite 305, Chicago, Illinois 60606.

34. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *State v. Ventron Corp.*, 94 N.J. 273, 468 A.2d 150 (1983).

35. *Martin v. Reynolds Metals Co.*, 221 Or. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960) (air pollution).

subsurface contamination.³⁶ Public nuisance actions are brought by a governmental authority on the public's behalf and damages generally are the governmental authority's cleanup costs and the costs of an injunction or abatement order.³⁷ Of course, a straight negligence action can also be brought. It is interesting to note that damages that have been claimed in hazardous waste actions include emotional distress because of concern about exposure to toxic waste, damages for the financial burden of medical surveillance, and damages for interference with the quality of life.³⁸

While hazardous waste may be obnoxious, it creates fertile ground for an injured party's counsel to plow.

IV. CONTRACTOR INDEMNIFICATION

A. *Indemnification under Federal Law*

The EPA has discretionary authority to provide *limited* indemnification to Response Action Contractors against liability for negligence arising out of the contractor's performance in carrying out response activities.³⁹

Indemnification is authorized for Response Action Contractors who are working under a written agreement with EPA, other federal agencies, a state or political subdivision which has entered into a contract or cooperative agreement with the federal government, or any potentially responsible party carrying out a cleanup agreement under CERCLA. It is critical to note from the surety standpoint that indemnification is provided only for a:

*release of any hazardous substance or pollutant or contaminant if such release arises out of response action activities. (Emphasis added.)*⁴⁰

This means there is no indemnification for expenses which might be incurred in connection with a threatened release to prevent the "release" from taking place or to minimize a "release." Such expenses may be totally unanticipated by the Response Action Contractor in its bid or, alternatively, be far beyond any contingencies provided for by the Response Action Contractor in its estimate.

The indemnification provisions were the product of extensive lobbying by the contractor community during the 1985-86 Superfund reauthorization process. The provision finally adopted in the statute does not closely resemble either the legislative proposals of the contractor organizations or the legislation initially passed by either chamber. Rather, the provisions were the product of hurried conference committee negotiations following passage of the respective bills, which negotiations categorized

36. See, e.g., *Soap Corp. v. Reynolds*, 178 F.2d 503 (5th Cir. 1949) (odors from soap factory created nuisance); *Signal Mountain Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944) (dust from cement plant); *Cook Indus., Inc. v. Caulson*, 334 F. Supp. 809 (N.D. Miss. 1971) (drainage of surface waters blocked); *Bostick v. Smoot Sand & Gravel*, 154 F. Supp. 744 (D. Md. 1957), *rev'd on other grounds*, 260 F.2d 534 (4th Cir. 1958) (dredging sand and gravel); *Iverson v. Vint*, 243 Iowa 953, 54 N.W.2d 494 (1952) (pollution of well water).

37. *State v. Charpentier*, 489 A.2d 594 (N.H. 1985); *State v. Schenectady Chem., Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984); *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982).

38. *Ayers v. Township of Jackson*, 202 N.J. Super. 106, 493 A.2d 1314 (1985).

39. 42 U.S.C. § 9619(c) (1987 Supp.).

40. *Id.*

the contractor liability issue as controversial and difficult to resolve, but relatively low in importance. In fact, although contractors expressed their liability concerns before three House panels considering the Superfund legislation, they had only a brief audience before the Senate Environment and Public Works Committee, which only became aware of the contractor liability problem rather late in its consideration of the reauthorization.

Contractors originally sought language in House legislation which would limit their liability to a gross negligence standard and establish a preemptive federal standard of liability for cleanup contractors. The House eventually adopted a preemptive standard of liability for contractor actions other than negligence and an indemnification program with certain limitations. Senate conferees would not accept a preemptive federal standard of liability, but agreed to an indemnification program. Compromise with the House on this issue during the final hours of conference committee action resulted in the final language of section 9619, which failed to meet the liability concerns of most in the contractor community, and specifically failed to preempt state law.

Much of the contractor liability dialogue during this process included discussion of the lack of insurance availability. Surety bonding was mentioned, but was not a central concern of prospective Superfund contractors. Commercial sureties were essentially left out of the debate.

1. Prerequisites for Indemnification

Indemnification can be provided only if the government determines that each of the following requirements is met:

- the liability covered by the indemnification exceeds or is not covered by insurance available, at a fair and reasonable price, to the Response Action Contractor at the time it enters into the response action contract;
- adequate insurance to cover such liability is not generally available at the time the response action contract is entered into;
- the Response Action Contractor has made diligent efforts to obtain insurance coverage to cover such liability; and
- in the case of a contract covering more than one facility, the Response Action Contractor agrees to continue to make diligent efforts to obtain insurance each time it begins work under the contract at a new facility.⁴¹

2. Limitations on Indemnification

All indemnification agreements "shall include deductibles and shall place limits on the indemnification to be made available."⁴²

3. Payment of Indemnification Claims

Indemnification payments are to be made from the Hazardous Substance Superfund (Fund). If sufficient monies are unavailable from the Fund, or if the Fund is repealed,

41. 42 U.S.C. § 9619(c)(4) (1987 Supp.).

42. 42 U.S.C. § 9619(c)(5)(B) (1987 Supp.).

the statute provides authorization to appropriate such monies as may be necessary to make such payments. Authorization for future appropriations does not necessarily mean, however, that a future Congress will appropriate such monies.

4. Indemnification Agreements on Private Projects with Potentially Responsible Parties

Limitations exist on Response Action Contractor indemnification agreements when the response action contract is with a private potentially responsible party.⁴³ First, a determination is made as to the extent to which the potentially responsible party is able to indemnify the Response Action Contractor and indemnity is offered under section 9619 only if the private party's indemnification is inadequate to cover the reasonable potential liability of the Response Action Contractor.⁴⁴ Additionally, the claims procedure is radically different. The claim is paid only *after* the Response Action Contractor has exhausted all possible remedies for indemnification against *all* potentially responsible parties participating in the cleanup of the facility.⁴⁵ Also, the Response Action Contractor must pay all of its deductible before there can be any recovery of any amount from either the potentially responsible party or under the indemnification agreement.

5. EPA's Interim Guidelines for Indemnification

EPA is required to promulgate regulations for carrying out the indemnification authorization and, prior to promulgation of the regulations, to develop guidelines to carry out this authority.⁴⁶ On October 6, 1987, EPA released its "Interim Guidance on Indemnification of Superfund Response Action Contractors Under Section 119 of SARA,"⁴⁷ which are still in effect.

The Interim Guidance contains general policy guidelines, procedural guidelines for EPA's contracting officers and model indemnification agreements for use by EPA for various classes of contractors. Significantly, the model agreements provide that (1) they will be modified by mutual agreement of the parties after EPA's promulgation of final guidelines; (2) they apply only to liability for negligence and, therefore, apparently do not indemnify against any strict liability which may apply under state law;⁴⁸ (3) they apply only to liability which results from a release and, therefore, not to a "threatened" release; and (4) they "apply only to liability not compensated by insurance or otherwise."

43. 42 U.S.C. § 9619(c)(5) (1987 Supp.).

44. 42 U.S.C. § 9619(c)(5)(C)(i) (1987 Supp.).

45. 42 U.S.C. § 9619(c)(5)(C)(ii) (1987 Supp.).

46. 42 U.S.C. § 9619(xc)(7) (1987 Supp.).

47. OSWER Directive 9835.5.

48. In fact, the Model State Cooperative Agreement for contractors who contract with a state or political subdivision expressly states that "the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence."

6. EPA's Proposed Final Guidelines for Indemnification

On October 31, 1989, EPA's proposed Final Guidelines were published with a request for public comment.⁴⁹ While the EPA expresses confidence that it is not necessary to provide indemnification in order to attract qualified Response Action Contractors, it has expressed concern in its comments to the proposed Final Guidelines that if indemnity is not provided, sureties may be unwilling to write performance bonds where adequate insurance protection is not available.⁵⁰ The proposed Final Guidelines are more restrictive than the Interim Guidelines as to the scope and availability of indemnity. The general characteristics of the guidelines are as follows:

- EPA's indemnity will indemnify the contractor only against "third party liability." If the contractor is working under a contract with the EPA or other federal agency or a state or political subdivision, the guidelines suggest that the indemnity does not protect the contractor from actions brought by the EPA or the state or political subdivision or any other entity which is a party to the contract. Therefore, consequential losses to an agency resulting from a release as well as indemnity or contribution actions brought against the contractor as a result of third party claims are not subject to indemnity under the guidelines. This appears to be contrary to 42 U.S.C. § 9619(a)(1) which states that the Response Action Contractor shall not be liable under federal law to "any person" including claims for indemnification or contribution. The statute contains no reference to limiting its protection to claims by "third parties."

- The indemnity amount is limited to \$50,000,000. A contractor may request in its bid or proposal any amount of indemnification coverage not to exceed \$50,000,000. Under cost reimbursement contracts, the deductible depends upon the indemnity limit chosen. The deductible ranges from \$10,000 for \$1,000,000 in indemnity to \$3,500,000 for \$50,000,000 in indemnity. Under firm fixed price (sealed bid) contracts, the Response Action Contractor may request any amount of indemnification up to \$50,000,000 and any deductible amount with a minimum deductible of \$10,000 subject to a "price schedule" penalty described below. It is not clear how EPA arrived at a \$50,000,000 indemnification limit. Depending upon the circumstances of a particular project, that limit may be seriously inadequate.

49. EPA, Superfund Response Action Contractor Indemnification, 54 Fed. Reg. 46,012 (proposed Oct. 31, 1989).

50. *Id.* at p. 46,016. In September, 1989, the GAO issued its report entitled *Superfund: Contractors Are Being Too Liberally Indemnified by the Government*, (GAO/RCED-89-160, Sept. 26, 1989), expressing the view that EPA blanket indemnification with no set limit under the Interim Guidelines resulted in excessive and unnecessary indemnification of Response Action Contractors. Their report suggests that indemnification be made an element of competition in the contract award process. The GAO recommended placing a dollar limit on indemnification and incentives making it competitively unattractive to obtain more indemnification than is needed. This is the scheme followed by the proposed Final Guidelines.

quate. A study commissioned by EPA's Indemnification Task Force done by Tillinghast, Nelson & Warren, Inc., recommended limits of \$200,000,000.

- For firm fixed price (sealed bid) contracts, the Invitation for Bid will include a "price schedule" for indemnification, with prices depending on the size of the indemnification limit requested and size of deductible amount requested. The "price schedule" for indemnification which is to be the source of the dollar amount added to a firm fixed price bid is not yet published. It is unclear what EPA's basis will be for establishing the "price schedule." EPA will add the amount from the "price schedule" to the bidder's requested price. In selecting the lowest bidder, the EPA will evaluate the "net bid" constituting the bid plus the value of any requested indemnification. A request for indemnification, therefore, becomes a penalty to the bidding contractor. A contractor who finds it necessary to request indemnity could find that it is unable to compete against those who do not. Contractors who may not request indemnity are not necessarily limited to those who are small or thinly capitalized. This group may also include those contractors who already have very large existing hazardous waste exposures by reason of the operation of a number of disposal sites. It is certainly possible the EPA's penalty scheme will have significant impact on the bidding process. From the surety's perspective, the indemnification scheme requires that the underwriter carefully examine its contractor's indemnification arrangement. It cannot be assumed that a contractor seeking a bond has requested and received indemnification.

- The period of indemnification is the period of performance of the contract plus any time within ten years after the contract term. For multisite contracts, the coverage term with respect to an individual site is the ten year period following the RAC's completion of work at the site. In this connection, however, there is no statutory time limit on the RAC's potential liability for future releases. Many Statutes of Repose at the state level may not apply to Superfund cleanups since they may be construed to apply only to traditional improvements to real property (buildings or other structures), and not to the elimination or removal of hazardous waste.

- The guidelines state that EPA will not indemnify subcontractors directly. With written consent of EPA, prime contractors can include subcontractors in their indemnification agreements, but EPA will enter into only one indemnification agreement per contract, with the agreement covering only the prime contractor. The effect of this is to require the prime contractor to share its indemnity with its subcontractors. Since there is no adjustment to the prime contractor's deductible, the contractor remains exposed for the subcontractor's negligence to the extent of the prime's deductible. If the prime contractor has a high deductible, this may well create a situation where a prime will give indemnity to a subcontractor

51. Letter from Tillinghast, Nelson & Warren, Inc., to Robert J. Mason, Environmental Protection Specialist, EPA CERCLA Enforcement Division, dated Aug. 7, 1987. Tillinghast, Nelson & Warren, Inc., is a consulting and actuarial firm. Their study mentions that at one time architects and engineers could purchase up to \$50,000,000 in umbrella coverage, with this limit now being decreased as a result of the more restrictive insurance market. If this was the basis for EPA's proposed \$50,000,000 liability limit, it is not necessarily relevant to hazardous waste disposal operations by remedial action contractors.

with a significantly smaller deductible than that of the prime contractor. An example would be a \$2,000,000 indemnity to a subcontractor with a \$200,000 deductible. If the prime's deductible is \$3,000,000, this arrangement requires the prime to fully indemnify the subcontractor out of its own pocket. It is important to the surety underwriter to appreciate that the prime contractor cannot necessarily reduce its exposure by the use of subcontractors unless the contractor is able to find subcontractors who are financially responsible and willing to perform the work without indemnity from the prime. To the extent that the surety is approached by subcontractors for bonding on hazardous waste projects, it is important for the underwriter to appreciate that EPA indemnity is not available except through the prime contractor and that the prime contractor may be unwilling to share its indemnity with its subcontractors.

- The indemnity applies only to negligence, and does not apply if the Response Action Contractor is found both strictly liable and negligent and the cause of action is not divisible. The Guidance also provides EPA with the right to direct or control the defense of any claim or action against a Response Action Contractor. This provision makes it impossible to know whether the indemnity will provide any protection whatsoever. Whether the cause of action is or is not divisible is dependent upon circumstances of a particular case and the law of the particular jurisdiction. Obviously these provisions put EPA in a conflict of interest, since it is in EPA's interest to have a Response Action Contractor found liable on a strict liability theory.

- The indemnity limit is a contract aggregate limit, while any deductible is a per occurrence deductible. Occurrence is not a defined term under the guidelines and could be construed to be a separate deductible for every claim which might arise from a single event. Additionally, if the surety is requested to bond a single contract covering multiple sites, the underwriter should note that the contractor could incur very significant liability for multiple claims within its deductible.

- The Response Action Contractor must notify EPA of any claim or action that may involve indemnification within 20 days of the date when the Response Action Contractor "knew or should have known of the claim or event." While the guidelines do not say so specifically, presumably if the 20 day notice is not given, EPA will deny liability under the indemnification agreement. Because the 20 day notice period is triggered by an "event," the Response Action Contractor must guess correctly as to what "event" may ultimately (and possibly many years later) give rise to a claim. This provision may also create a fact issue in every case as to when the Response Action Contractor "should have known" of the claim or event. The surety's underwriter should take particular note of this provision in its assessment as to whether the indemnity has any real value.

- the EPA will not reimburse the RAC for the cost of insurance to cover any deductible. All available insurance must be applied to the payment of the claim, and, additionally, the deductible must be exhausted before the indemnity is paid.

- To qualify for indemnity, all of the requirements of Section 119 must be satisfied regarding efforts to secure third party insurance coverage.

- The guidelines state that EPA will not indemnify Response Action Contractors under contract to Potentially Responsible Parties (PRPs). EPA may agree to indemnify Response Action Contractors working under state cooperative agreements but it is in EPA's discretion as opposed to an entitlement.
- EPA indemnity applies only to work "directly related to site cleanup."
- At any time the EPA may cancel its indemnification of a RAC due to a material misrepresentation or a "failure on the part of the RAC to provide necessary information." The term "necessary information" is undefined and therefore totally unclear in this context.
- The EPA reserves the right to add additional terms and conditions to the indemnification agreement "as it deems necessary" consistent with Section 119 of the statute. Does this mean EPA can further restrict limits or scope of indemnification after the agreement is issued since that would be consistent with Section 119? Perhaps not, at least as to fixed price contracts, since another section of the guidelines states that indemnification terms and conditions cannot be modified once included in a fixed price contract.

The EPA is soliciting comments from the industry on its proposed guidelines. Hopefully, some of the provisions which are of concern to the surety industry will be either eliminated or modified so as to make the indemnity reliable and worthy of consideration by the underwriter. As matters now stand, the surety's underwriter may be forced to disregard the indemnity as a positive factor in the underwriting decision.

B. Indemnification under State Law

A number of states have anti-indemnification statutes which void indemnification agreements for liability which arises out of certain design and construction contracts.⁵² Because nothing in section 9619 preempts the application of state anti-indemnity statutes, specific attention must be paid to state law when one analyzes the effect of an indemnity agreement.

Additionally, with regard to indemnification by state or local governments, some states have constitutional provisions or statutes similar to the Federal Anti-Deficiency Act,⁵³ which may make an indemnity obtained from a governmental entity unenforceable.⁵⁴

Ten states have passed legislation specifically authorizing governmental indemnification of Response Action Contractors. They are: California, Connecticut, Florida, Illinois, Louisiana, Massachusetts, New Jersey, Oregon, Texas and Washington.⁵⁵ Because most of the authorizations contain distinctions from one another, each stat-

52. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-305 (1984).

53. The federal indemnification authority is excepted from the Anti-Deficiency Act. 42 U.S.C. § 9619(c)(3) (1987 Supp.).

54. See, e.g., IDAHO CONST. art. VIII, §§ 1-2 (governmental liabilities in excess of \$2 million must be authorized by law which provides for method of repayment; KY. REV. STAT. ANN. §§ 157-58 (Baldwin 1988).

55. See Appendix A.

ute must be analyzed separately to determine the terms and conditions upon which indemnity is authorized. Texas, for example, forbids state indemnification of a contractor unless the federal government agrees to indemnify the state.⁵⁶

V. AVAILABILITY OF INSURANCE

Throughout the 1986 Superfund reauthorization process which culminated in the enactment of SARA, EPA officials agreed with contractor testimony that adequate insurance coverage at a reasonable price was not available to them and was unlikely to be available in the near future. In fact, the lack of such insurance coverage was the underlying justification for the establishment of a federal negligence standard and an indemnification program for Superfund cleanup contractors.

In response to concerns about the lack of insurance in the hazardous waste market in general, the GAO prepared a report dated October, 1987, which outlined the state of insurance availability in the hazardous waste field. The report concluded that "Only one insurance organization is actively marketing pollution insurance. A few hundred companies are insured under its policies. The maximum annual coverage that can be purchased is \$12.5 million. Several other insurance organizations provide limited-coverage pollution risk insurance."⁵⁷

On the more specific subject of pollution liability insurance for Response Action Contractors, EPA itself concluded that only two U.S. property and casualty insurers, as of April, 1988, were offering specialized pollution liability insurance programs to Response Action Contractors active in the Superfund program.⁵⁸ In addition, EPA has identified a captive insurance company, DEMETER, formed by the Hazardous Waste Action Coalition (HWAC) of the American Consulting Engineers Council (ACEC), as an alternative providing professional and general liability coverage on a claims-made basis to qualified members with a hazardous waste practice. The coverage includes pollution claims otherwise excluded from a member's professional liability or comprehensive general liability policy.

The coverage offered by the two insurance companies was in the form of claims-made policies,⁵⁹ each carrying maximum limits of \$1 million per occurrence and \$2 to \$5 million annual aggregate, respectively. Each carried a minimum premium of \$25,000, one with a \$25,000 self-insured retention and the other with a \$50,000 self-insured retention.

56. TEX. REV. CIV. STAT. ANN. art. 4477-7, § 13 (Vernon 1989 Supp.).

57. UNITED STATES GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE, ISSUES SURROUNDING INSURANCE AVAILABILITY 3 (October 1987).

58. In its April 25, 1988, issue, NATIONAL UNDERWRITER reported that Reliance, through underwriting manager Environmental Compliance Service, offers a claims-made contractor pollution liability policy for Superfund sites on a job-by-job basis. According to an article in the March 21, 1988, issue of BUSINESS INSURANCE, Reliance's limits at that time were \$1 million per claim and a \$2 million aggregate. The article also reports that "Reliance charges a minimum premium of \$20,000 for a \$1 million policy with a \$25,000 self-insured retention."

59. The "claims-made" policy generally provides coverage only for claims which are presented to the insurer during the effective dates of the policy.

Contractors point out that the coverage available is very low coverage, with restrictive terms and at high premiums. While the language of section 9619(c)(4) requires Response Action Contractors to make diligent and continuing efforts to obtain adequate insurance at a fair and reasonable price, there is no definition of what is "fair and reasonable" or "adequate."

EPA has expressed optimism regarding the future availability of insurance coverage for Response Action Contractors and envisions a phasing out of contractor indemnification as that insurance increasingly becomes available. It is unclear whether claims-made insurance will be considered by EPA to be adequate to address the potential long-term risks which concern Response Action Contractors. Response Action Contractors are legitimately concerned that they may be found liable for hazardous waste releases precipitated by some event occurring during the actual cleanup, but not discovered until years after completion of their contract. Claims-made insurance currently available will not, in their judgment, address that long-term risk.

VI. POTENTIAL CLAIMS AGAINST CONTRACT BONDS FOR HAZARDOUS WASTE LIABILITY

To date, there are no reported cases where either a governmental entity or private party has attempted to assert hazardous waste liability against a surety issuing a contract performance bond. This, of course, does not mean that the day will not come. The contract performance bond is, after all, the "insurance of last resort when all else fails." In a general sense, the surety's liability is coextensive with that of its principal, with any damages recoverable against the principal being recoverable from the surety. Like all general statements, this is subject to exceptions depending upon the circumstances. The potential claims which might be made against the contract bond surety are discussed below.

A. *General Liability Principles*

From the preceding discussion, it is obvious that the contract bond surety which is bonding a Response Action Contractor, whether on public or private contracts, has significant exposure for a "release" of a hazardous substance. This risk is recognizable by the surety when it is making the decision whether or not to underwrite the performance bond. More subtle is the potential risk to the surety on a conventional contract where the surety is not on notice that hazardous waste liability might be accepted by its contractor. In this connection, the bonded contractor might uncover unanticipated hazardous waste at the project site and agree by change order to participate in a cleanup or transport of the material. This would expose the contractor and the surety to strict liability under federal law.⁶⁰ All that would be happening in this scenario is the issuance of a change order, which may well be within the scope of the base contract. The issuance of such a change order would normally not discharge the

60. Under these circumstances the contractor would not be a "Response Action Contractor" because the contract would not be a "Response Action Contract" as defined by 42 U.S.C. § 9619.

surety, even without its consent, if either the contract or the bond documents permit the issuance of change orders without notice to the surety.⁶¹ Any dealing with the substance, once discovered, can constitute "arranging," "transport," "disposal" or "treatment" under CERCLA, and can subject the contractor to strict liability under federal and state law. It is even conceivable that such a contractor could be considered to be an "operator" of a "facility" under RCRA when hazardous waste is uncovered on a conventional construction site in control of the contractor, subjecting the contractor to the permitting requirements of RCRA and the surety to claims if the requirements of the permit are breached.

B. *Strict Liability and Negligence*

In our view, the contract bond surety would not be responsible for liability based on strict liability. Performance bonds, whether given under the Miller Act or privately, are conditioned upon the contractor performing and fulfilling all of the undertakings in its contract. A recovery in strict liability would not be based upon a breach of the contract or failure to perform any of its terms and conditions, whether categorized as a breach of contract or negligent failure to perform the contract. Most courts view the surety bond as being interpreted under traditional rules of contract interpretation, viewing the bond as a simple contract which should be interpreted in accordance with the intention of the parties.⁶² In this connection, it has even been held in a recent case that a surety is not liable where a contractor was found liable based upon negligence on the theory that a surety bond is conditioned only on breach of contract.⁶³ Unfortunately, this case could easily have been decided against the surety. Negligence, in addition to creating a cause of action in tort, also creates an action for breach of contract where there is a contractual duty to use reasonable care.⁶⁴

C. *Punitive Damages*

There are relatively few cases dealing with a contract bond surety's liability for punitive damages. In general, the state of the law today is that the contract bond surety is not liable for punitive damages if the surety is not an active participant in the act giving rise to the punitive damage liability.⁶⁵ A punitive damage claim against the surety is not likely to arise except in the context of indemnity claims by the obligee as a result of a third party tort claim.⁶⁶ Punitive damages under CERCLA are awarded for failure to properly provide removal or remedial action upon an order of the government. While such a claim is not likely, a claimant against the contract bond surety could theorize that, if the surety was notified of the governmental order and refused to ensure that its principal acted, then it was therefore a participant in the act justifying punitive damages. The surety's response would be that if the order was based

61. See generally 17 AM. JUR. 2D, *Contractors Bonds* § 26 (1964); AIA Form A311 (Performance Bond) (waiving notice of any "alteration" or "extension of time made by owner").

62. *Republic Ins. v. Board of County Comm'rs*, 68 Md. App. 428, 511 A.2d 1136 (1986).

63. *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 362 S.E.2d 723 (1987).

64. *Koppers Co., Inc. v. Inland Steel Co.*, 498 N.E.2d 1247 (Ind. 1986).

65. *Aiken County v. BSP Div. of Envirotech*, 657 F. Supp. 1339 (D.S.C. 1986).

66. See *infra* notes 66-67 and accompanying text.

upon the strict liability theory of CERCLA, and was under circumstances where the contractor receiving the contract could be entitled to extra compensation from the owner, which the owner refused to acknowledge, the contractor would not be in breach of its contract with the owner unless it had assumed hazardous waste liability by contract. Regardless of arguments that might be made that the surety is an "actor" in such a scenario by failing to ensure compliance, it remains very doubtful that the government, for policy reasons, would pursue the contract bond surety for punitive damages.

D. *Consequential Losses*

As a general rule, consequential damages to the owner are recoverable against the surety if such damages are recoverable against the principal under the bonded contract. Significant consequential losses exist in the hazardous waste context which are not encountered with conventional contracts. Consequential losses which might be recovered under CERCLA are the costs of removal where remedial action is incurred by the U.S. or a state consistent with the National Contingency Plan⁶⁷ or such costs incurred by any other third party consistent with the National Contingency Plan. In addition, damages for injury to natural resources and costs of any health assessment or health effect study are provided for. To the extent that the contractor is required by contract to store or dispose of the hazardous waste on site, RCRA⁶⁸ may categorize the contractor as an operator of a treatment or disposal facility where an RCRA permit is required.⁶⁹ That statute requires that the operator (contractor) take corrective action for all releases of hazardous waste or constituents from any treatment or disposal facility. If the contractor fails to perform its work under the contract and/or violates the permit by the release of any hazardous waste, a claim might be made against the contract bond surety to the extent of its bond penalty for any *on- or off-site corrective action* which may be required. This is not a normal risk undertaken by a surety in a performance bond. A surety is not normally required to go off the project site and do work on another person's property. This may be the case in a situation where the contractor under its permit is required to take corrective action if there is a release that requires cleanup on another's property.

E. *Third Party Tort Claims*

As to the liability of the surety to third parties other than the obligee under the performance bond, to date the case law has been consistent that where the performance bond contains a third party beneficiary clause prohibiting claims of third party beneficiaries other than the obligee, this language will be upheld as a valid contractual limit on liability. Such language reads as follows:

67. The National Contingency Plan is the general plan for removal of all hazardous substances from the environment under CERCLA. See 42 U.S.C. § 9605 (1987 Supp.).

68. 42 U.S.C. § 6901 (1982 & 1987 Supp.).

69. In this regard, EPA cannot indemnify owners or operators of facilities regulated under RCRA. 42 U.S.C. § 9619(5)(D) (1987 Supp.).

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of Owner.

Under this provision, no direct claim can be made on the performance bond by anyone other than the obligee.⁷⁰ Obviously, if the obligee is subject to CERCLA damage claims or third party tort claims, the obligee may make an indemnity claim against the contract bond surety under the indemnity clause appearing in the general contract which is incorporated into the performance bond by reference. For example, an adjacent landowner may sue the owner for a "release" caused by the operations of the bonded contractor. The owner may then file an indemnity claim against the surety for the recovery of these damages claiming they were proximately caused by the contractor's breach of contract. The claim could be based on cleanup costs or personal injuries sustained. In the circumstance where there is no casualty insurance covering the bonded contractor, the owner has every incentive to make such an indemnity claim against the performance bond.

Whether or not such a claim would be recognized against a performance bond surety is a matter of debate, with the absence of casualty insurance being an important factor.⁷¹ In a conventional construction contract where hazardous waste is encountered inadvertently under circumstances where it was not suspected, a surety might defend against the indemnity claim by contending that the damages did not naturally arise from a breach of the contract since the handling or disposing of hazardous waste was not within the contemplation of the parties at the time the contractor entered into its contract. Additionally, there may be significant differences in the surety's exposure depending on whether the principal is working as a Response Action Contractor for a private owner or whether it is working under contract to a federal or a state agency. In the latter case, either the federal agency or the state agency may be immune to third party tort actions by reason of governmental immunity.

F. Warranty Claims

Warranty claim liability for hazardous waste is a matter of serious concern, particularly to a surety considering bonding a cleanup contractor. The majority of cases hold that the contract bond surety is responsible for latent defects arising long after the final acceptance and final payment of the contract funds in circumstances where the contractor remains responsible under its contract.⁷² These circumstances are as follows:

70. *Rush Presbyterian v. Safeco Ins. Co.*, 825 F.2d 1204 (7th Cir. 1987); *Board of Educ. v. Ackerland & Assoc.*, 165 Ill. App. 3d 562, 519 N.E.2d 95 (1988).

71. Franklin, *Problems of the Performance Bond Surety with Casualty Insurance Exposures*, 16 FORUM 567 (1981); Fields, *Claims Against Surety For Personal Injury and Property Damage*, 31 INSURANCE COUNSEL JOURNAL 658 (1964).

72. E.g., *President of Georgetown College v. Madden*, 505 F. Supp. 557 (D. Md. 1980); Warin, *The Surety's Liability for Latent Defects* (ABA Fidelity and Surety Committee, January, 1985).

- Where there is a breach of contract by the contractor. The breach may be failing to build in accordance with applicable plans and specifications or failing to design adequately where the contract is "design-build."
- Where the owner is unaware of the defect at the time of final acceptance.
- Where the defect was not apparent upon reasonable inspection.
- Where the claim is otherwise made within the applicable period of limitations.

Where the contract involves the cleanup and disposal of hazardous waste, there is obviously a long "tail" on when the surety's principal could be sued by reason of a "release" of hazardous waste arising from the performance of a cleanup contract. As a practical matter, the "tail" could be virtually never-ending absent the applicability of a Statute of Repose. The risk is far less with a standard construction contract not involving hazardous waste cleanup.

G. Indemnification of Response Action Contractors—Can the Surety Count on It?

We have already commented upon the problems raised by EPA's proposed Final Guidelines. In addition, there are certain characteristics of the underlying CERCLA statute⁷³ providing for "indemnification" of Response Action Contractors which need to be understood. Indemnity is not automatic. It must be granted within the terms of the Response Action Contract. The indemnification agreement is provided only where it is determined that insurance is not available to the Response Action Contractor at a fair and reasonable price.⁷⁴ If the indemnity is given in connection with a *private party cleanup*, a claim may not be paid unless the contractor has exhausted all administrative, judicial and common law claims for indemnification against all potentially responsible parties participating in the cleanup of the facility.⁷⁵ Also, the contractor must pay any deductible established under the indemnification agreement.⁷⁶ For the contract bond surety considering whether to underwrite a private party contract, it must realize that it may well be financing a very long and protracted series of legal proceedings to exhaust administrative, judicial and common law claims before any reimbursement under the indemnity provisions of the cleanup contract is paid. Additionally, the contract bond surety should also realize that for other reasons the indemnity is to a large extent illusory. The indemnification provision indemnifies the contractor only against the contractor's negligence and not against gross negligence or intentional misconduct. In this day and age, when injury occurs, negligence is almost always found among one or more of the acting parties. The concept of an accident without fault is virtually unknown in modern tort law. Therefore, the indemnity provision is illusory since it indemnifies only for pure negligence and not for "gross negligence." What is more than likely to happen is that actions which would otherwise be characterized as merely "negligent" will now rise to the level of "gross negligence." It is the view of some industry representa-

73. 42 U.S.C. § 9619 (1982 & 1987 Supp.).

74. 42 U.S.C. § 9619(c)(4) (1987 Supp.).

75. 42 U.S.C. § 9619(c)(5)(C)(ii) (1987 Supp.).

76. 42 U.S.C. § 9619(c)(5)(B) (1987 Supp.).

tives involved with the lobbying of this statute that, in reality, the indemnity provisions have only eliminated strict liability, with the cleanup contractor still exposed for negligent conduct garbed in the concept of "gross negligence." The situation could become extremely uncomfortable and risky for a contract bond surety attempting to enforce the contractor's indemnity against a government agency which contends that the contractor's conduct was "grossly negligent" under the circumstances.

H. The Contract Bond Surety's Potential Liability after Default of the Bonded Contractor

Difficult as it may seem for the contract bond surety to face the problem of deciding whether to bond a hazardous waste cleanup contractor, consider the difficulties when the surety is faced with complexing such a contract after the default of its principal. Whether the surety elects to finance its principal to completion or to relet the contract to others, someone at some point will make the argument that the surety takes on all of the contractor's hazardous waste liability, thereby exposing the surety beyond the amount of its bond penalty. Ridiculous as it may seem, the surety itself may be viewed as the "operator" of a hazardous waste "facility," "disposing" of or "treating" hazardous wastes, in connection with its election to complete the contract.⁷⁷ The argument may also be made that the surety arranging for the completion of the contract has become an "arranger"⁷⁸ which is arranging for the disposal of hazardous substances and which therefore has CERCLA liability. Either of these findings exposes the surety to CERCLA liability beyond the amount of its bond penalty and subjects the surety to the risk of third party liability.

Obviously, the most dangerous situation is where the surety enters into a contract with another contractor to complete. In many cases, the surety may be unable to find a contractor willing to take on the project, much less a contractor who is bonded. Additionally, the default may well have occurred because the available technology could not meet the requirements of the contract. In these cases the surety will have little choice except to tender its bond penalty. If a completing contractor is available, the less dangerous course would seem to be to attempt to arrange for the completing contractor to enter into a contract directly with the owner, with the surety agreeing with the owner to finance progress payments in excess of the contract balances to the extent of the bond penalty. Presumably, this would not subject the surety to hazardous waste liability since it would not be actively completing the contract in a direct relationship to the owner.

What about financing the contractor? This activity raises the specter of the surety being subjected to derivative hazardous waste liability under circumstances akin to "domination" or as an "arranger." In *United States v. Mirabile*,⁷⁹ the court ruled that

77. The Miller Act does not necessarily immunize the Surety from state law liability for its conduct relating to the performance of obligations arising out of Miller Act bonds. See *K-W Indus. v. National Sur. Corp.*, 855 F.2d 640 (9th Cir. 1988).

78. 42 U.S.C. § 9607(a) (1982 & 1987 Supp.).

79. 15 Env't. L. Rep. (Env't. L. Inst.) 20994 (E.D. Pa. 1985).

a bank which was a secured creditor of a company operating a hazardous waste site was not liable for response cost under CERCLA by reason of the bank's action in monitoring a cash collateral account, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank. The court did hold, however, that a bank might be liable under CERCLA if it exercised control over the day to day operations of the hazardous waste facility and that control might be evidenced by frequent visits to the site by an auditor and other bank personnel, insisting on certain manufacturing changes, reassigning personnel, and day to day supervision of the debtor's employees by an employee of the bank. However, cases in other contexts have held the surety not to have exercised such control over its principal as to justify holding the surety derivatively liable to other parties.⁸⁰

At this juncture, there is no reason to believe that the ordinary activities which a surety undertakes in financing its contractor would subject it to any greater risk of derivative liability under the hazardous waste laws than in the ordinary "domination" case. There are two possible exceptions to this proposition. The first circumstance is where the surety is an "actor" under circumstances demonstrating that the surety, through the monitoring of its consultants, or otherwise, had reason to know that the contractor was negligent in its operations and was risking a "release." The second circumstance is if the courts find that the completing surety can be deemed an "arranger."⁸¹ Arranger liability under CERCLA applies to anyone who arranges for the transport, disposal or treatment of hazardous substances. There is no sound reason for viewing a performance bond surety as an "arranger." Judicial policy should not create results that discourage bonding companies from bonding projects which are necessary and in the public interest. Imposing "arranger" liability upon the surety would do just that.

As a practical matter, the risk to the completing surety of incurring hazardous waste liabilities in excess of its bond penalty may be such that the surety may be forced to post its bond penalty in all cases rather than inject itself into the completion process. All sureties must be absolutely sure that their bond forms do not require them to engage a completing contractor, but allow the surety simply to indemnify the owner for its completion costs beyond the contract balance without subjecting the surety to the risk that it has breached the bonding obligation.

VII. HAZARDOUS WASTE LAWS AND THEIR EFFECT UPON THE SURETY'S SALVAGE OPTIONS

One area which is frequently overlooked by sureties and their counsel is the exposure to the surety when it executes on real estate under collateral agreements or upon judgments against its principal and indemnitors. The surety should not take title to real estate until it is satisfied that no hazardous waste has been deposited on the property. In this connection, the surety is in the same situation as is a foreclosing bank. If

80. *Ser James E. McFadden, Inc. v. Baltimore Contractors*, 609 F. Supp. 1102 (E.D. Pa. 1985); *Irwin & Leighton, Inc. v. W.R. Anderson Co.*, 532 A.2d 983 (Del. Ch. 1987).

81. 42 U.S.C. § 9607(a) (1982 & 1987 Supp.).

there is any reason to suspect that hazardous waste has been deposited, the surety should consider an environmental investigation by consulting engineers before taking title to the real estate. The danger in not doing so is illustrated by *United States v. Maryland Bank & Trust Company*,⁸² where the United States sued a bank that had foreclosed on a hazardous waste site following the default of the debtor. The United States sued the bank because the bank had held title for a year and was the owner of the property which was the subject of an EPA cleanup costing in excess of \$500,000. The court granted summary judgment in favor of the United States and against the bank as to liability. The court reserved judgment as to whether the bank could prove the third party defense.⁸³ The third party defense is available if one can show that the release or threat of release is caused solely by a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant. This assumes that the defendant exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and that the defendant can also establish that he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. From a very strict reading of the statute, it is unclear whether this defense is available to the surety if the bonding relationship (contractual relationship) has existed during the period when the act or omission causing the release took place, particularly where the deposit of the hazardous substance was in some fashion connected with the principal's business operation.

VIII. CONCLUSION AND RECOMMENDATIONS

To date, there are a few instances of legitimate commercial sureties which have bonded hazardous waste remediation contracts. It is not clear whether these sureties have made a decision to participate in this market or whether they simply have not focused on the risks which might be encountered. It is also the authors' understanding that the reinsurance market has not yet refused to accept hazardous waste surety bond obligations. To the extent that sureties are uneasy about entering this market, the surety industry should become active in attempting to secure legislative relief to reduce the risk, both to itself and to its contractors. Areas of potential legislative relief are:

- Limiting the surety's liability to the cost of completing performance of the original contractual undertaking of the contractor, i.e., completion of "the work," thereby eliminating the risk for consequential damages and release the cleanup liability as well as indirect third party tort liability.
- Establishing a liability limit for Response Action Contractors and their sureties or, alternatively, more reasonable indemnity provisions.

82. 632 F. Supp. 573 (D. Md. 1986).

83. 42 U.S.C. § 9601(35)(A) (1987 Supp.).

- Reducing the required amount of the performance bond penalty on Miller Act and Little Miller Act jobs. This can be done by regulation under the Miller Act and under those state Little Miller Acts where the contracting officer has discretion as to the amount of the performance and payment bonds.
- Preemption of state law as to the liability of Response Action Contractors and their sureties.
- Clarification of RCRA permit requirements so its liabilities do not apply to Response Action Contractors and their sureties.
- Clarification that a surety is not to be deemed an "arranger" or "operator" of a "facility" in connection with any of its activities as a surety on a Response Action Contract.

All of the above deal only with limiting the surety's risk in bonding a Response Action Contract with a federal or state agency where the surety is not free to condition the terms of its bond. It does not cover a conventional construction contract where the contractor, by change order or otherwise, gets involved in cleaning up a hazardous waste. In private party cleanups, to the extent that private parties solicit bonding, the problems are not as severe because some of the limitations on potential liability can be secured by adjustments in the terms and conditions of the bond and the principal's construction contract. Additionally, where the private party is substantial, the Response Action Contractor may secure an effective indemnity provision in the contract that substantially reduces its liability risk and consequently that of its surety. However, potential liability of the contractor under CERCLA cannot be eliminated.

Insofar as those unusual cases where the surety and its contractor may risk liability under a conventional construction contract, the sureties should instruct their clients to place appropriate provisions in their contracts excepting all forms of hazardous waste work from the scope of the contract and from the operation of the changed conditions clause. The owner should be prohibited from directing the contractor, by change order or otherwise, to transport, dispose of, or to treat any form of hazardous substance.

The surety's underwriting process consists of an examination of the individual contractor, its experience and competence in light of the project in question and its probability of success on that project, combined with the effect of the project on its overall work program. This type of underwriting analysis is almost impossible in connection with a major hazardous waste cleanup contract. Any such analysis leads to the inevitable conclusion, under present law, that a substantial cleanup contract is very likely to be an unacceptable bonding risk to the surety. If Congress and the involved agencies expect the surety industry to participate in the cleanup of the nation's waste, they should be willing to limit both the sureties' risk and the Response Action Contractors' risk as suggested. Neither of these parties created the mess that they are being asked to clean up. For that reason, there is no justification for exposing them to responsibility for that risk under the guise of a Response Action Contract.

APPENDIX
SUMMARY TABLE OF STATE LAW
INFORMATION RELEVANT TO
RESPONSE CONTRACTORS (RACs)

<i>Last Update</i>	<i>State</i>	<i>Mini S. Fund Law</i>	<i>Strict Liability for RAC's by Statute</i>	<i>Indemnity Statutes for RAC's</i>	<i>Anti-Indemnity Statutes</i>	<i>Restrictions on Public Sector Indemnities</i>
5/89	Alabama	Pollution Control Grant Fund (§ 22-22A-16)	No. 22-22-9(m) includes wrongful acts, omis- sions and negligence.	No.	No.	Yes.
5/89	Alaska	No.	Yes, but RAC must have control over haz- ardous substances. (46.03.822)	No.	Yes, but does not apply to RACs (45.45.900)	Anti-deficiency statute is limited to mortgage has no application RACs. (34.20.100)
5/89	Arizona	Water Quality As- surance Revolving Fund (49-282)	No.	No.	Yes, for sole negligence in certain AE and con- struction contracts (34-226)	Yes. Section 34-154 precludes public sector indemnities unless funds are appropriated.
5/89	Arkansas	Remedial Action Trust Fund (8-7-508)	No. 8-7-420 holds RAC's to a negligence stan- dard.	No. 8-7-512 requires RAC's to indem- nify states.	No.	No. DPCE contracts with consultants and contrac- tors have received full state indemnification.

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<i>Last Update</i>	<i>State</i>	<i>Mini S. Fund Law</i>	<i>Strict Liability for RAC's by Statute</i>	<i>Indemnity Statutes for RAC's</i>	<i>Anti-Indemnity Statutes</i>	<i>Restrictions on Public Sector Indemnities</i>
5/89	California	Haz. Sub. Acct. (CA H&S Code, Ch. 68 § 25300-395)	Yes, if RAC is responsible for release (CA H&S Code, 25363) and if RAC causes or contributes to the discharge. (Proposition 65)	Yes, State can indemnify RACs for up to \$25 million (CA H&S Code 25364.6(d)(s), expires 1-1-92)	Yes. Indemnification of sole negligence unenforceable in design and construction contracts (CA Civil Code 2782(a))	No. Anti-deficiency statute applies by its terms to RACs.
5/89	Colorado	Hazardous Substance Response Fund (Colgo. RS 25-16-104.6)	None.	None. Public entity can seek reimbursement for those responsible for a "hazardous substance incident."	None.	No.
5/89	Connecticut	Emergency Spill & Relief Fund (229-451)	Yes, if RAC causes pollution and contamination	Yes, for any person etc. who contains, removes or mitigates hazardous waste (22a-452)	Yes, for sole negligence in certain construction contexts (52-572k)	No.

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5/89	Delaware	Hazardous Waste Management Act, § 6316, allows Department of Conservation to receive funds in carrying out Act.	Yes, if RAC treated or disposed of wastes (7DE Code 6301-6309)	No.	Yes, for negligence of all parties in all phases of design and construction projects (6 DE Code 2704)	Yes, sovereign immunity statutes exempt the state from liability (10 DE Code 4001, <i>et seq.</i>)
5/89	District of Columbia	None.	No.	No.	No.	No.
5/89	Florida	Hazardous Waste Management Trust Fund (403.725)	Yes, if RAC arranged for disposal or treatment (Fla. Stat. Ann. 403.727)	Yes, for state and local contractors (376.319)	Yes, For acts or omissions in certain construction contexts unless indemnification capped or consideration given.	No.
5/89	Georgia	Hazardous Waste Trust Fund (12-8-68)	Yes, if RAC contributes to the release (12-8-81)	No.	Yes, for sole negligence in certain construction contexts (13-8-2)	No.
5/89	Hawaii	None, but Director has authority, with approval of the Governor, to receive money from the Federal and State government	No, however, Director was authorized in 1988 to bring state into compliance with federal law	No.	Yes, for sole negligence in certain construction contexts (431-453)	No.

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	<i>Last Update</i>	<i>State</i>	<i>Mini S. Fund Law</i>	<i>Strict Liability for RAC's by Statute</i>	<i>Indemnity Statutes for RAC's</i>	<i>Anti-Indemnity Statutes</i>	<i>Restrictions on Public Sector Indemnities</i>
	5/89	Idaho	Hazardous Waste Training, Emergency and Monitoring Account. (39-4417)	No, liability would only be incurred for law violations (39-4401, <i>et seq.</i>)	No.	Yes, for sole negligence in certain construction contexts (29-114)	Yes, Constitution restricts debts or liabilities unless specifically authorized (Art. 8, SSH2)
692	5/89	Illinois	Hazardous Waste Fund (1022.2)	Yes, for persons who operate a facility used for treatment or storage, or who contract for same (111-1/2, <i>et seq.</i>)	Yes, for RACs working for state, with a \$2 million cap per occurrence. (HB 3207: 111-1/2)	Yes, for own negligence in certain construction contexts and (Ch. 29-s61) for transport of hazardous waste (1022.2(g))	Yes, for negligence
	5/89	Indiana	Hazardous Substance Response Trust Fund	Yes, potentially under 13-7-12-2- and 13-7-13-1	No.	Yes, for sole negligence in certain construction contexts (26-2-5-1) but no if liability insurance unavailable (26-2-5-2)	Yes.

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5/89	Iowa	Hazardous Waste Remedial Fund (455B.423)	Yes, if RAC has control over hazardous substance (455B.392), but no (negligence standard) if transport hazardous waste	No.	No.	Yes, no state indemnification if paid to do the work
5/89	Kansas	Environmental Response Fund (65-3454a)	No, liability only for gross negligence or reckless, wanton or intentional misconduct (65-3472)	No.	No.	No.
5/89	Kentucky	Hazardous Waste Assessment and Management Fund (224.876)	Yes, if RAC has possession or control over discharge or caused the discharge (224.877)	No.	Maybe. Kentucky Constitution §§ 50-177 arguably bars indemnification.	Yes.
5/89	Louisiana	Hazardous Waste Protection Fund (30:2198) and Hazardous Waste Site Cleanup Fund (30:2205)	No. Statutory negligence standard (9:2800.3(a))	Yes, holds harmless state contractors from property damage and personal injuries caused by negligence (30:1149-1)	Yes, applicable to owners of facility or any person liable for discharge or disposal (30:2278)	No.

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<i>Last Update</i>	<i>State</i>	<i>Mini S. Fund Law</i>	<i>Strict Liability for RAC's by Statute</i>	<i>Indemnity Statutes for RAC's</i>	<i>Anti-Indemnity Statutes</i>	<i>Restrictions on Public Sector Indemnities</i>
5/89	Maine	No, uses Federal Superfund Program (38 § 1366)	Yes. RAC can be considered a "responsible party." (38 § 1361, <i>et seq.</i>)	No. RACs may have to indemnify state (38 § 1367)	No.	No.
5/89	Maryland	Cont. Haz. Subs (Md. Health Env. Code Ann. Tit. 7:201, <i>et seq.</i>)	No.	No.	Yes, for sole negligence in certain construction contexts (S-305)	No.
5/89	Massachusetts	No State funding mechanism	No, but applies with respect to releases or threatened releases of hazardous materials (21 E. § 16(9); otherwise may be strictly liable under 21 E. § 5.	Yes, with \$2 million cap and certain restrictions. (21 E. § 17)	Yes, voids agreements by subcontractors to indemnify others for injuries not caused by subcontractor (Ch. 149 S29C)	No.
5/89	Michigan	Environmental Response Fund (299.609)	No.	No.	Yes, for sole negligence in certain construction contexts (691.991)	No.

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5/89	Minnesota	Environmental Response, Compensation and Compliance Fund (§ 115 B.20)	No, as long as RAC is working under State or Federal Acts (115 B.05)	No.	Yes, cannot transfer liability to another person (115 B.10)	No.
5/89	Mississippi	Hazardous Waste Facility Siting Fund (§ 115 B.20)	Yes, if it helps create necessity for cleanup (17-17-29(4))	No.	Yes, for own negligence in certain construction contexts (31-5-41)	No.
5/89	Missouri	Hazardous Waste Fund (260.391)	Yes, if RAC has control over hazardous substance (260.530), but liability capped at \$3 million per occurrence (260.552)	No, but RACs right to indemnification is preserved against other liable parties. (260.552: 1-(1))	No, 260.552:1-(1) recognizes right of a RAC to seek indemnification	No.
5/89	Montana	Environmental Quality Protection Fund (75-10-704)	No. Action taken to contain or remove a release is not an admission of liability for the discharge. (75-10-60, <i>et seq.</i>)	No.	Yes, for fraud or negligent violation of the law (28-2-702)	No.
5/89	Nebraska	None	No, but negligence standard for those who cause discharges.	No.	Yes, for own negligence in certain construction contexts (25-21, 187)	Yes. The State constitution provides for immunity from suits. (Art. III, S 18)

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5/89	Nevada	Contingency Fund for Hazardous Ma- terials (459.735)	Yes, if RAC was re- sponsible for spill or controlled the waste (459.750)	No, but RAC may have to reimburse state (459.760)	Yes, for workers' com- pensation but Courts have broadly construed the statutes to apply to contracts (616.265)	Yes, unless liability funded (353.255 and 353.260)
5/89	New Hampshire	Hazardous Waste Cleanup Fund (147-B:3)	Yes, if RAC arranged for disposal or treat- ment (147-B:10)	No.	Yes, for negligence for architects, engineers and surveyors (338-A:1)	No.
5/89	New Jersey	New Jersey Spill Compensation Fund (58:10-23.11i)	No, negligence stan- dard for RAC, but work must be in ac- cordance with proce- dure established pursu- ant to state and federal laws. (58:10-23.11g(1))	Yes, 58:10- 23.11(f). Expires 1/1/90.	Yes, for sole negligence in certain construction contexts, and for AEs surveyors (2A:40A-1,2)	No, anti-deficiency stat- ute

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5/89	New Mexico	Hazardous Waste Emergency Fund (74-4-8)	No.	No.	Yes, for negligence, acts or omissions in certain construction contexts unless certain actions excluded (56-7-1)	Yes. New Mexico has a sovereign immunity statute.
5/89	New York	Hazardous Waste Remedial Fund (NY Env. Cons. Law 27-0916)	No, negligence standard is applied (NY Env. Cons. Law 27-1321(3))	No.	Yes, for negligence in certain construction AE and surveying contexts (Gen. Ob. Laws 5-322.1, 5-323, 5-324)	Contracts cannot be let for amounts exceeding the appropriation (State Fin. Law 136)
5/89	North Carolina	Hazardous Waste Fund and Hazardous Waste Site Remedial Fund (130 A-298 <i>et seq.</i>)	Yes, if RAC has control of hazardous waste discharge (143-215.93)	No, but RAC may reimburse state for role in inactive hazardous waste site. (130A-310-7)	Yes, for negligence in certain construction contexts (22B-1)	Yes.
5/89	North Dakota	None.	No.	No.	Yes, for fraud or negligent violations of the law (9-08-02)	Yes, Article 1, § 21
5/89	Ohio	Hazardous Waste Clean-up Fund (3734.28)	Yes, if RAC transports or disposes of wastes. (3734.15, 16)	No. RAC may have to indemnify state. (3734.22)	Yes, for negligence in certain construction contexts (2305:31)	No.

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5/89	Oklahoma	None	Yes, for releases to waters of state (Title 82, 926.1); for disposal of controlled industrial waste (Title 63, 1-2001)	No, but indemnification specifically authorized for lawful activities (Title 15, 421, 422, but see also Title 15, 212, 212.1)	No.	No.
5/89	Oregon	Hazardous Substance Remedial Action Fund (466.590)	Yes, for the release of hazardous material under RAC control (466.640)	No.	Yes, for negligence in design and sole negligence in inspection in certain construction contexts (30.140)	Yes.
5/89	Pennsylvania	None	Clean Streams Act imposes strict liability on polluters. (691.316)	No.	Yes, for architect, engineer or surveyors' work or directions to others (Title 68 § 491)	No.

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	Pennsylvania (continued)	Solid Waste Management Act imposes strict liability on violators. (6018.401 + 503) No, RACs must meet conditions set forth in Hazardous Sites Clean-up Act, § 702(c)				
5/89	Rhode Island	Environmental Response Fund (23-19.1-23)	No. Absolute liability only for unauthorized transportation, storage or disposal (23-19.1-22)	No.	Yes, for negligence in certain construction contexts (6-34-1)	Yes, state liable in tort actions subject to period of limitations and monetary limitations (9-31-1)
5/89	South Carolina	Hazardous Waste Contingency Fund (44-56-160)	Yes, for unpermitted water discharges (48-1-90) and for transporting or disposing of hazardous waste without reporting to Agency. (44-56-130, 140)	No.	Yes, for sole negligence in certain construction contexts (32-2-10)	Yes.

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5/89	South Dakota	Regulated Sub- stance Response Fund (34A-12-3)	No.	No, but RAC may have to reimburse state (34A-12-6)	Yes, for sole negligence in certain construction contexts (56-3-18); for architects' or engineers' work or direction to others (56-3-16, 17)	Yes, specific legislative approval required
700 5/89	Tennessee	Hazardous Waste Remedial Action Fund	No, but transporters of hazardous substances at inactive sites are strictly liable (68-46-202)	No.	Yes, for sole negligence in certain construction contexts (62-6-123)	Yes.
5/89	Texas	Solid Waste Disposal Act (4477-7)	No. RAC not liable pursuant to Water Code, 26.303 (Water Code, 26.308 (f)); but strict liability if RAC handles, transports, processes or disposes of solid waste in context other than water pollu- tion. (4477-7 Section 8(a)(2))	Yes, but only if the federal government agrees to indem- nify the state (Wa- ter Code, 26.308(e))	Yes, for defects in archi- tects' or engineers' work or AE negligence in cer- tain construction con- texts. (Art. 249d)	Anti-deficiency statute specifies procedures for pledging state credit (4351)

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5/89	Utah	Solid and Hazardous Waste Act (26-14-1, <i>et seq.</i>)	Yes, if RAC contributed to the release. (26-14-19 (4))	No.	Yes, for sole negligence in certain construction contexts (13-8-1)	Yes.
5/89	Vermont	Solid Waste Management Assistance Fund (Tit. 10, 6618)	Yes, if RAC arranged for disposal of treatment (Tit. 10, 6605)	No.	No.	No.
5/89	Virginia	Virginia Waste Management Act (10.1-0402)	No.	No.	Yes. Voids agreements by contractors to indemnify other for sole negligence (11-4.1)	Waiver of sovereign immunity (8.01.192)
5/89	Washington	Hazardous Waste Regulation (70.105B.010)	No.	Yes, (70.105 B.100 (3))	Yes, for negligence in certain construction contexts (4.24.115)	No.
5/89	West Virginia	Hazardous Waste Emergency Response Fund (20-56-1)	No.	No.	Yes, for sole negligence in certain construction contexts (55-8-14)	No.

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RESPONSE CONTRACTORS (RACs)—continued

<i>Last Update</i>	<i>State</i>	<i>Mini S. Fund Law</i>	<i>Strict Liability for RAC's by Statute</i>	<i>Indemnity Statutes for RAC's</i>	<i>Anti-Indemnity Statutes</i>	<i>Restrictions on Public Sector Indemnities</i>
5/89	Wisconsin	Wisconsin Solid Waste, Hazardous Waste and Refuse (144.43, et seq.)	No.	No.	Yes, voids agreements that limit tort liability but does not void agree- ments which make one party the insurer for damages (895.49)	No.
5/89	Wyoming	None.	No.	No.	No.	No.

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R-3391-ICJ

Costs and Compensation Paid in Tort Litigation

James S. Kakalik, Nicholas M. Pace

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**THE
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Executive Summary

COSTS AND COMPENSATION PAID IN TORT LITIGATION

Scope of This Study

Many people are concerned over the amount of society's resources being expended on civil liability litigation. But as with many long-standing issues, neither critics nor defenders of the tort system have had much solid evidence to support their views. Instead, anecdotes abound and misinformation is plentiful. The facts are hard to gather because most litigation costs and compensation payments are private expenditures, and are not reported publicly.

We undertook this study to provide empirical evidence on the following issues:

- What was the total expenditure nationwide for tort litigation¹ that was terminated in state and federal courts of general jurisdiction in 1985?
- How much of the total was spent for the various costs of the tort litigation system: plaintiffs' and defendants' legal fees and other litigation expenses, the value of litigants' time spent on their lawsuits, the value of time spent by insurance personnel, and the costs of operating the courts?
- How much of the total consisted of net compensation to plaintiffs?
- How do litigation costs and compensation paid differ for torts involving motor vehicles and all other torts?
- How fast is the tort system growing?

¹Cases involving civil wrong or injury, other than breach of contract, for which the court may provide damages, e.g., cases involving personal injury, death, or property damage.

We do not pass judgment on whether the costs of tort litigation and the compensation paid are too high or too low, nor do we make any policy recommendations for reforming the civil justice system. Indeed, we draw no conclusions on whether the system should undergo reform. Making such conclusions or recommendations would necessitate additional research on the costs of alternative reforms and on the benefits of the current court system and alternative systems.

This study focuses on lawsuits filed in federal district courts and in state trial courts of general jurisdiction—which account for about 92 percent of all compensation paid in tort litigation—because the most reliable data derive from those cases. The study excludes: (1) all expenditures for insured and self-insured claims that did not involve lawsuits, and (2) all expenditures for small claims and for tort litigation in courts of limited jurisdiction.

The study presents a range for the total bill for our current tort litigation system. We made two estimates. We used available published and unpublished information from the insurance industry, data from surveys of lawsuits and claims, and information on the number of lawsuits terminated in 1985. We made our first estimate from the top down, starting with the insurance industry's aggregate data on direct losses and expenses paid in 1985, adding self-insurance, and then deleting payments for claims that were not lawsuits. We made our second estimate from the bottom up, starting with data from surveys of individual tort lawsuits, appropriately projecting the numbers to 1985, and then multiplying by the number of tort lawsuits terminated in 1985 to make a national estimate.

OUR NATION'S BILL: TOTAL COSTS AND COMPENSATION PAID IN TORT LITIGATION

We estimate that the total expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985 was between \$29 billion and \$36 billion. These expenditures for the approximately 866,000 tort lawsuits terminated annually in state and federal courts of general jurisdiction² include compensation paid to plaintiffs, legal fees and related expenses for both plaintiffs and defendants, insurance company claims-processing costs for claims in suit,

²Approximately 866,000 tort lawsuits were terminated in state and federal courts of general jurisdiction in 1985: 827,000 in state courts and 39,000 in federal courts. Tort litigation related to motor vehicles constituted just over half of the total case terminations. Tort cases filed in 1985 were slightly higher: 869,000 in state and 42,000 in federal courts.

of tort litigation and nor do we make any justice system. Indeed, could undergo reform. could necessitate additions and on the benefits.

district courts and in account for about 92 percent—because the most widely excludes: (1) all cases that did not involve torts and for tort litigation.

Our current tort litigation data is based on the available published industry data from 1970 on the number of lawsuits, estimate from the top 100 courts, and then delete. We made our second survey of industries from 1970 to 1985, and terminated in 1985 to

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wide for tort litigation jurisdiction in 1985 expenditures for the annually in state and compensation paid to plaintiffs and defendants for claims in suit,

state and federal courts of 100 in federal courts. Tort of the total case terminated 100 in state and 42,000 in

the value of litigants' time spent, and the costs of operating the court system for these cases.

Since our \$29 billion and \$36 billion estimates are based on information of varying accuracy from several sources, neither can be taken as exact. However, although they were made using very different methods and using different sources for much of their data, they are similar enough to give us confidence that they are reasonably accurate.

We believe the true figure lies between our two estimates. The \$29 billion estimate, based primarily on insurance industry data, is probably somewhat low because it includes data from the major lines of insurance that pay for liability litigation (the auto liability, medical malpractice, general liability, and multiperil insurance lines) but excludes the relatively small liability expenditures buried in other lines of insurance (such as the marine and boiler and machinery lines). The \$36 billion estimate, based primarily on lawsuit survey data, is probably somewhat high because the survey response rate in the Civil Litigation Research Project was somewhat higher for lawsuits with higher amounts of litigation activity (and presumably higher costs).³ Lacking sufficient data to adjust our estimates to account for these factors, we therefore present a range of estimates.

TOTAL COSTS OF TORT LITIGATION

Of the \$29 to \$36 billion, an estimated \$16 to \$19 billion was spent for the various costs of the tort litigation system, not including the net compensation paid to plaintiffs.

The breakdown of the total costs for defendants, plaintiffs, and the courts is as follows:

Defendants' Costs of Litigation

Defendants' total costs were an estimated \$8 billion to \$10 billion: \$4.7 to \$5.7 billion for legal fees and related expenses, \$0.8 billion for insurance company costs of processing claims in suit, and about \$2.5 to \$3.5 billion representing the value of defendants' nonlawyer time and other expenses. (See Table S.1.)

³See David M. Trubek et al., *Civil Litigation Research Project Final Report: Vol. 1, Studying the Civil Litigation Process: The CLRP Experience*, University of Wisconsin Law School, Madison, March 1983, p. 1-120. Court records showed that the median case in the sample had 11 legal "events," while there were 13 legal events for the median case with a completed lawyer interview.

Table S.1

DEFENDANTS' COSTS OF TORT LITIGATION TERMINATED
IN STATE AND FEDERAL COURTS OF GENERAL
JURISDICTION IN 1985
(In \$ billion)

Type of Cost	Estimate 1, Primarily Based on Insurance Industry Data	Estimate 2, Primarily Based on Lawsuit Survey Data
Defendants' legal fees and expenses	4.7	5.7
Claims-processing cost for lawsuits	0.8	0.8
Value of defendants' time and other expenses	2.5	3.5
Total	8.0	10.0

The average⁴ tort lawsuit closed in 1985 resulted in an estimated \$5,400 to \$6,600 in defendants' legal fees and related expenses.

Plaintiffs' Costs of Litigation

Out of the total compensation that plaintiffs received, they paid \$6 billion to \$8 billion in legal fees and expenses, and the value of plaintiffs' time spent on the litigation was about \$1 billion. (See Table S.2.)

The average tort lawsuit concluded in 1985 resulted in an estimated \$7,300 to \$8,800 in plaintiffs' legal fees and expenses, which was approximately 30 to 31 percent of total compensation paid to plaintiffs.

Court Expenditures

Court expenditures are defined as those by any level of government (federal, state, or local) for processing tort cases in the court system. The total court expenditure nationwide, net of court fees paid by tort litigants, was an estimated \$0.5 billion.

⁴Throughout this report, the term "average" is defined as the arithmetic mean, and zero values always are included in the calculation. The average should not be interpreted as the typical value or as the median, which is the value below and above which there are an equal number of data values.

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GENERAL

Estimate 2,
Primarily Based
on Lawsuit
Survey Data

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Table S.2

PLAINTIFFS' COSTS OF TORT LITIGATION TERMINATED
IN STATE AND FEDERAL COURTS OF GENERAL
JURISDICTION IN 1985
(In \$ billion)

Type of Cost	Estimate 1, Primarily Based on Insurance Industry Data	Estimate 2, Primarily Based on Lawsuit Survey Data
Plaintiffs' legal fees and expenses	6.3	7.6
Value of plaintiffs' time and other expenses	0.7	1.1
Total	7.0	8.7

COMPENSATION PAID IN COMPARISON WITH TOTAL
COSTS OF TORT LITIGATION

Of the \$29 to \$36 billion total national expenditure in 1985, plaintiffs received \$21 to \$25 billion in total compensation, or about \$14 to \$16 billion in net compensation, after deducting all their litigation costs. (See Table S.3.)

The average total compensation paid per lawsuit concluded in 1985 in a court of general jurisdiction was in the range of \$24,000 to \$29,000. This average includes all tried, settled, and dismissed lawsuits.

Table S.3

COMPENSATION PAID IN COMPARISON WITH TOTAL COSTS OF
TORT LITIGATION TERMINATED IN STATE AND FEDERAL
COURTS OF GENERAL JURISDICTION IN 1985
(In \$ billion)

Type of Expenditure	Plaintiffs	Defendants	Courts	Total
Total compensation	20.7-25.1	20.7-25.1	NA	NA
Total costs of litigation	7.0-8.7	8.0-10.0	0.5	15.5-19.2
Net compensation	13.7-16.4	NA	NA	13.7-16.4
Total expenditure	NA	28.7-35.1	0.5	29.2-35.6

NOTES: The first number in the range is the RAND estimate primarily based on insurance industry data, and the second number is the RAND estimate primarily based on lawsuit survey data.

NA = not applicable.

To deliver this \$14 to \$16 billion in net compensation, the tort litigation system expended \$16 to \$19 billion in transaction costs. These costs included \$11 to \$13 billion in combined defendants' and plaintiffs' legal fees and expenses, \$0.5 billion in court expenditures, and an additional \$4 to \$5 billion in the value of the time spent by litigants and their employees.

In sum, of all the money paid in compensation and legal fees and related expenses of tort litigation, the injured plaintiff receives approximately 56 percent in net compensation. The litigation system consumes the rest. If we add the value of the time spent by the litigants to the costs, the injured parties' net compensation sinks to 46 percent of the total expenditures.⁵ All the components of expenditures are shown graphically in Fig. S.1.

COMPARISON OF AUTO TORT AND OTHER TORT LITIGATION EXPENDITURES

How do litigation costs and compensation differ between torts involving motor vehicles and all other torts? Auto torts accounted for about half of all tort filings in courts of general jurisdiction in 1985, and also about half of the total compensation paid. (See Table S.4.)

The legal fees and expenses paid by plaintiffs as a percent of total compensation were essentially the same for auto tort (31 percent) and other tort cases (30 percent). However, defendants' costs of litigation differ significantly. For auto tort cases, which are usually relatively straightforward, defense legal fees and expenses were an estimated 16 percent of total compensation. For other (nonauto) tort cases, which are often more complex, defense legal fees and expenses were much higher—28 percent of total compensation paid.

The plaintiffs' net compensation as a percentage of the total expenditures was 52 percent for auto torts and 43 percent for all other torts. This difference primarily reflects the relatively higher defendants' litigation costs for nonauto torts. All the components of auto and other tort litigation expenditures are shown graphically in Fig. S.2.

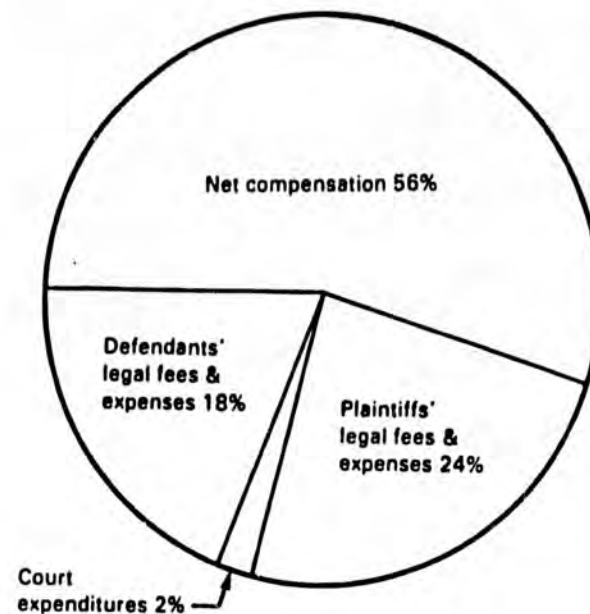
⁵Our two estimation techniques yielded similar results. The most important number, the plaintiffs' net compensation as a percentage of the total expenditures, was 47 percent using one method and 46 percent using the other.

...tion, the tort litigation costs. These defendants' and plaintiffs' expenditures, and amount spent by litigants and legal fees and plaintiff receives approximately the litigation system content by the litigants sinks to 46 percent of expenditures are

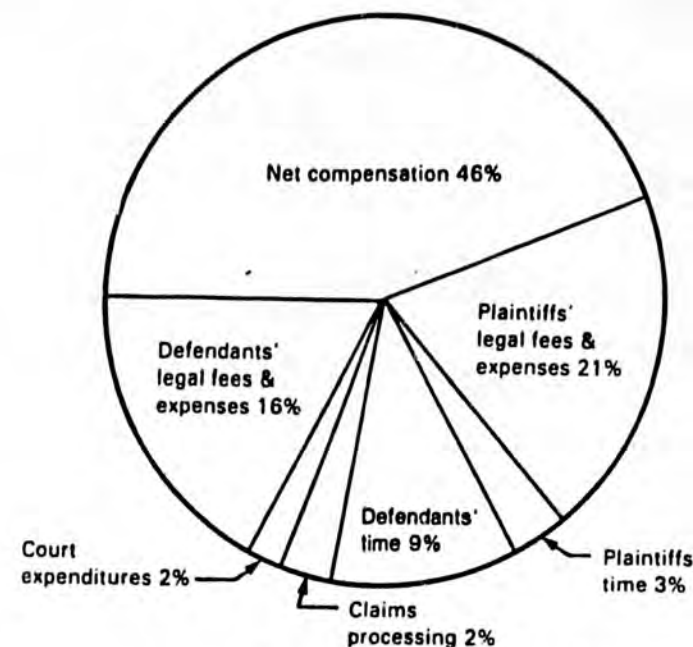
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...ffer between torts, torts accounted for jurisdiction in 1985, (See Table S.4.) is a percent of total tort (31 percent) and s' costs of litigation re usually relatively are an estimated 16 o) tort cases, which expenses were much of the total expenditure for all other torts. her defendants' litigants of auto and other Fig. S.2.

most important number, expenditures, was 47 percent



Percentages of total expenditures excluding value of litigants' time and claims processing



Percentages of total expenditures including value of litigants' time and claims processing

NOTE: Totals may not sum to 100 due to rounding.

Fig. S.1—Costs and compensation paid for the average tort lawsuit terminated in 1985 (average gross compensation paid = \$24,000 to \$29,000)

Table S.4

AUTO AND OTHER TORTS: COSTS OF LITIGATION AND
COMPENSATION PAID IN STATE AND FEDERAL
COURTS OF GENERAL JURISDICTION IN 1985
(In \$ billion)

Type of Expenditure	All Torts	Auto Torts	Other Torts
Costs to plaintiffs	7.8	3.3	4.5
Costs to defendants	9.0	2.8	6.2
Court expenditures	0.5	0.2	0.3
Total costs of litigation	17.3	6.3	11.0
Net compensation paid	15.1	6.9	8.2
Total expenditures	32.4	13.2	19.2

NOTE: Dollars shown are the average of Estimates 1 and 2.

GROWTH OF THE TORT SYSTEM

Although the main focus of our study has been analysis of litigation costs and compensation paid on cases terminated in 1985, in the course of our research we also compiled some data on the rate of growth in the tort system.

That growth rate depends on what part of the system you are considering. In terms of tort lawsuits filed, we estimate that the annual growth rate has averaged 3.9 percent since 1981—about 3.0 percent per capita.

The growth rate in the expenditures for the tort system has been higher. Although we do not have precise data on that rate for tort lawsuits, we can get a reasonable idea of that rate by looking at the growth rate in amounts paid per claim by insurers over the last five years. The following figures include both claims involving lawsuits and claims for which no lawsuit had been filed.⁶

The average annual growth rate in average compensation paid per liability claim over the past five years has been about 12 percent for auto claims and 17 percent for other tort claims—considerably higher than the 7 percent average growth in the Consumer Price Index during the same years. The average growth rate in insured defendants' average legal fees and expenses paid per liability claim over the past five years has been about 6 percent for auto and 15 percent for other tort claims. Thus, other nonauto tort expenditures per claim are growing faster than auto tort expenditures per claim.

⁶Of all insured liability compensation paid in 1985, we estimated 50 percent was paid for claims involving lawsuits.

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FEDERAL
IN 1985

ts	Other Torts
	4.5
	6.2
	0.3
1.3	11.0
1.9	8.2
1.2	19.2

imates 1 and 2.

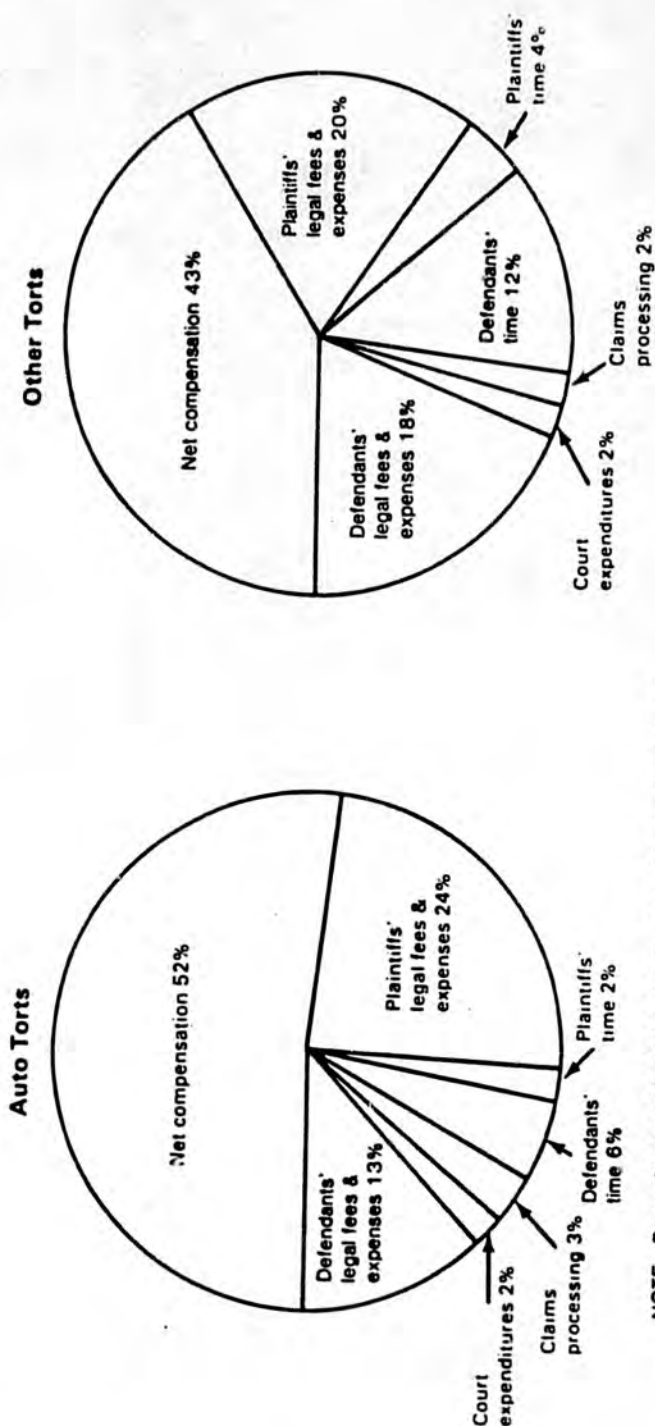
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NOTE: Percentages are based on the average of two estimates, and may not sum to 100 due to rounding.

Fig. S.2—Costs and compensation paid for the average auto and other tort lawsuit terminated in 1985

Because compensation payments and litigation expenditures are growing, the expenditures on cases filed in 1985 will be higher than they were on cases terminated in 1985.

SUMMARY

Plaintiffs with tort lawsuits terminated in 1985 in state and federal courts of general jurisdiction received approximately half of the \$29 to \$36 billion spent. The costs of litigation consumed the other half.

Table 4.2

**TOTAL VALUE OF PLAINTIFFS' TIME AND EXPENSES
OTHER THAN LEGAL FEES AND EXPENSES IN TORT
LITIGATION IN THE UNITED STATES IN 1985**
(In \$ billion)

Type of Tort Litigation	Estimate 1, Based on Insurance Industry Compensation Data and Low Percent	Estimate 2, Based on Lawsuit Survey Compensation Data and High Percent
Auto torts ^a	0.10	0.29
Other torts ^a	0.58	0.81
Total	0.68	1.10

^aNumbers have been proportionally reduced so they correctly sum to total.

**NATIONAL ESTIMATE OF TORT PLAINTIFFS'
TOTAL COSTS**

Plaintiffs' total costs of tort litigation in courts of general jurisdiction in the United States in 1985 were an estimated \$7.0 to \$8.7 billion, of which an estimated \$6.3 to \$7.6 billion was for legal fees and expenses, and \$0.7 to \$1.1 billion was the value of plaintiffs' time and other expenses. Details for auto and other tort cases are shown in Table 4.3.

Table 4.3

**TOTAL PLAINTIFFS' COSTS OF TORT LITIGATION
IN THE UNITED STATES IN 1985**
(In \$ billion)

Type of Tort Litigation	Estimate 1, Based on Insurance Industry Compensation Data			Estimate 2, Based on Lawsuit Survey Data		
	Legal Fees and Expenses	All Other Costs ^a	Total Costs	Legal Fees and Expenses	All Other Costs ^a	Total Costs
Auto torts	2.5	0.1	2.6	3.8	0.3	4.1
Other torts	3.8	0.6	4.4	3.8	0.8	4.6
Total	6.3	0.7	7.0	7.6	1.1	8.7

^aAll other costs include the value of plaintiffs' time and expenses other than legal fees and expenses.

Auto Tort Defendants' Legal Fees and Expenses Per Lawsuit.

How much was paid in defense legal fees and expenses on the average auto tort lawsuit terminated in 1985? The University of Wisconsin survey data show an estimated \$3,169 paid per auto tort lawsuit by all defendants combined in 1978.⁵ Updating this to 1985 using a 6.3 percent growth rate yields \$4,900 per lawsuit. (See App. D for derivation of this growth rate.)

Auto Tort Defendants' Legal Fees and Expenses Nationwide.

Approximately 461,000 auto tort cases were terminated in courts of general jurisdiction nationwide in 1985 (see Sec. II). Multiplying that number of lawsuits by the \$4,900 average defense legal costs paid per auto tort lawsuit yields an estimate of \$2.26 billion in 1985.

DEFENDANTS' LEGAL FEES AND EXPENSES IN OTHER TORT LITIGATION

We will make two estimates of the amount paid in defendants' legal fees and expenses for other (nonauto) tort litigation that terminated in 1985 in courts of general jurisdiction. Starting with aggregate insurance industry data, we will work down to a \$3.68 billion estimate for other tort litigation nationwide. Starting with lawsuit data, we will work up to an estimate of \$3.44 billion using data on the number of other tort lawsuits nationwide.

Defense legal fees and expenses as a percent of compensation paid calculated primarily using insurance industry data (estimate 1) are 29 percent, and calculated primarily using lawsuit survey data (estimate 2) are 27 percent.

Estimate 1: Other Tort Defendants' Legal Fees and Expenses Based on Insurance Data

The steps we took to make our estimate based on insurance industry data are outlined in Fig. 5.3 and are discussed below.

Insurance ALAE Paid. Recall that, based on discussions with various insurance industry executives, we understand that the overwhelming majority of tort litigation compensation (and hence ALAE) is paid through the auto liability, medical malpractice, general

⁵Estimate is based on data from App. A, Tables A.21, A.39, and A.45. Using data from the University of Wisconsin survey from 1978, we estimate that defendants' average legal fee and expenses were \$3,126 (26 percent of \$12,024 compensation) in state court and \$5,961 (13 percent of \$45,854 compensation) in federal court. Averaging these weighted by the number of auto tort lawsuits terminated in state and federal court in 1985 yields \$3,169.

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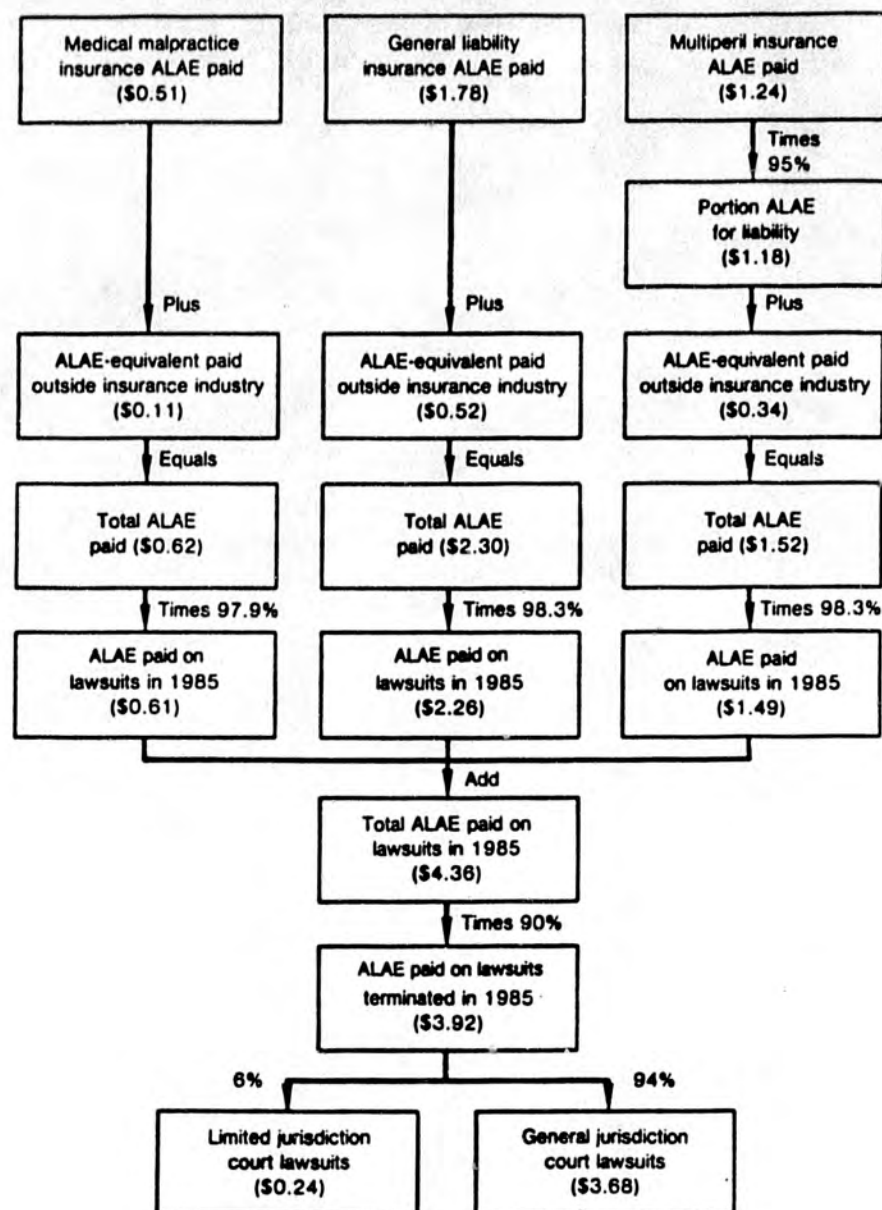


Fig. 5.3—Estimation of defendants' legal fees and expenses for other (nonauto) tort litigation terminated in 1985, based on insurance data (in \$ billion)

liability, commercial multiperil, and homeowners multiperil lines of insurance. We have already reviewed the auto data. Here we will review medical malpractice, general liability, and multiperil insurance data. In making our total estimate of tort litigation defendants' costs, we have not undertaken the difficult task of ferreting out the relatively small amounts of tort litigation costs that may be buried in other lines of insurance.

A total of \$511 million in direct ALAE was paid in 1985 for all medical malpractice claims with and without lawsuits.⁶

For the general liability line of insurance, an estimated \$1.78 billion was paid in 1985 in direct ALAE for all claims with and without lawsuits.⁷

For the multiperil lines of insurance, an estimated \$1.24 billion was paid in direct ALAE in 1985.⁸ Because these multiperil policies are not exclusively written for paying tort claims, we must estimate the percentage of ALAE that is used for that purpose. Discussions with Insurance Services Office (ISO) personnel indicated that precise data do not exist for multiperil insurance, but that as in other lines of insurance, nearly all ALAE is for legal fees and expenses, and nearly all multiperil litigation is over liability instead of fire, theft, or some other peril. We assume that approximately 95 percent of all multiperil insurance ALAE is for liability; we assume the remaining 5 percent is predominantly for miscellaneous nonlitigation ALAE for the fire, theft, and other nonliability components of the multiperil insurance. Thus, of the \$1.24 billion in direct ALAE paid in 1985, an estimated \$1.18 billion was for liability.

Other Tort Defendants' Legal Fees and Expenses Paid Outside the Insurance Industry. For medical malpractice, A. M. Best Company's and ISO's insurance statistics provide information on costs of the commercial insurers and many of the physician-owned insurers but do not report complete data regarding Joint Underwriting Associations, Patient Compensation Funds, Catastrophe Funds, and the self-insured hospitals, government agencies, and physicians that make up the balance of liability compensation sources. We must turn to other sources for those data.

Using A. M. Best's figures as a starting point, Milliman and Robertson, Inc., estimated the total medical malpractice insurance premiums

⁶See App. D, Table D.11, and associated text.

⁷See Table D.13 and associated text.

⁸See Table D.15 and associated text.

Multiperil insurance
ALAE paid
(\$1.24)

Times
95%

Portion ALAE
for liability
(\$1.18)

Plus

AE-equivalent paid
by insurance industry
(\$0.34)

Equals

Total ALAE
paid (\$1.52)

Times 98.3%

ALAE paid
in lawsuits in 1985
(\$1.49)

Legal expenses
in 1985,

(including "self-insured") in the United States for 1984.⁹ Their total is 22 percent larger than the amount reported by A. M. Best Company sources. Accordingly, the reported insurance industry medical malpractice data must be increased to obtain a national total. Using the ratio of 1.22 to 1 described above, and assuming that direct paid ALAE rises proportionally with direct premiums for all types of medical malpractice insurance, the nationwide direct ALAE paid for medical malpractice claims was an estimated \$623 million in 1985.

Our estimated total of \$2.96 billion in defendants' ALAE paid by insurers through general liability and multiperil policies also needs to be increased to account for "ALAE-equivalent" costs paid by the captive-insured, self-insured, uninsured, and government defendants. Again, we can use the results of the Conning and Company survey of the real extent of the property and casualty commercial market.¹⁰ We estimated in Sec. III that the total nonauto liability compensation paid (including self-insurance, captive insurers, and so forth) was 29 percent larger than the compensation paid by traditional insurance companies. We assume that, like compensation, the total legal fees and expenses paid for nonauto tort litigation are 29 percent larger than ALAE reported by traditional insurers. Multiplying 29 percent by the \$2.96 billion in general and multiperil insured ALAE yields an estimated \$0.86 billion in "self-insured" defendants' "ALAE-equivalent" costs paid in 1985.

Other Tort Defendants' Legal Fees and Expenses Paid for Litigation Terminated in 1985. Adding the total ALAE paid in 1985 for medical malpractice, general liability, and multiperil liability gives a total of \$4.44 billion. Next, we must estimate the portion of that total spent for other tort litigation, excluding expenditures for claims settled without a lawsuit.

For medical malpractice, the 1974 closed-claim survey conducted by the Insurance Services Office reported the allocated expenses of defending a claim (see Table 5.1). Note that the average defendants' costs were 29.6 percent of the average compensation paid, and that lawyer fees were 87.2 percent of the total costs.¹¹ The study found that

⁹Milliman and Robertson, Inc., *Actuarial Analysis of American Medical Association Tort Reform Proposals*, New York, September 1985.

¹⁰Conning and Company, *The Changing Property and Casualty Commercial Lines Markets*. Hartford, Connecticut, December 1980, p. 46. Conning and Company included the following in "other" liability: general liability, medical malpractice, and 40 percent of commercial multiperil insurance.

¹¹Defendants' costs in medical malpractice cases, unlike those for auto liability, constitute a comparatively substantial percentage of total compensation. Defendants in medical malpractice litigation have far more control over negotiations than do their counterparts in auto tort cases, and there is an increased tendency to withhold consent

Table 5.1

DATA ON DEFENDANTS IN MEDICAL MALPRACTICE CLAIMS

Claim Disposition ^a	Average Compensation (\$1974)	Average ALAE (\$1974)	Average ALAE as Percent of Average Award	Lawyer Fees as Percent of ALAE
Verdict	9,715	6,231	64.1	87.5
Settled	10,156	2,604	25.6	87.1
Not in suit	1,892	95	5.0	74.8
All claims in suit ^b	10,108	2,995	29.6	87.2

SOURCE: Insurance Services Office, *Report of the All-Industry Committee Special Malpractice Review: 1974 Closed Claim Survey: Technical Analysis of Survey Results*, American Insurance Association, New York, 1976, Tables 11.2a and 11.4a, pp. 59-61.

^aUntrended data including zero compensation claims.

^bWeighted average using 595 claims tried to verdict and 4,927 claims in suit that did not reach verdict.

97.9 percent of all ALAE paid was for claims in suit; only 2.1 percent was for claims without an associated lawsuit.¹²

The portion of the \$623 million in medical malpractice ALAE that is for claims with lawsuits is estimated by using the 97.9 percentage from the ISO closed-claim survey described above. Accordingly, lawsuit-related defendants' legal fees and expenses were estimated to be \$610 million in 1985.

For general liability insurance, we estimate the fraction of ALAE spent on lawsuits using the same method we used for compensation in Sec. III. That is, we assume that all claims paid with an ALAE greater than \$1,000 involved a lawsuit and that one-half of all the claims paid with an ALAE of \$1 to \$1,000 also were lawsuits. (See Table D.14 and associated text.) An estimated 98.3 percent of the general liability claim ALAE paid in 1984 was for lawsuits. Given that \$2.30 billion was paid in direct ALAE (and the ALAE-equivalent for self-insured defendants) in 1985, we estimate that \$2.26 billion of that amount was associated with lawsuits.

from potential settlement agreements that might adversely affect a physician's or surgeon's professional reputation. As a result, cases go further toward trial and incur greater defense costs.

¹²Calculated from data in Table 5.1 plus the fact that the ISO study collected data on 3,647 claims not in suit (p. D-33).

For the liability portion of multiperil insurance, we assume the percentage of ALAE that went for lawsuits was the same as it was for the general liability line of insurance (98.3 percent). (See App. D for a discussion of this assumption.) This yields an estimated \$1.49 billion in ALAE paid on lawsuits in 1985 in the multiperil lines of insurance and the ALAE-equivalent costs of self-insurance.

Adding the amounts for medical malpractice, general liability, and the liability portion of multiperil insurance yields a total of \$4.36 billion in ALAE paid on lawsuits in 1985.

We must adjust the insurance data on ALAE paid in calendar year 1985 to obtain an estimate for other tort cases terminated in 1985; the logic for the adjustment is the same as that which we used for auto tort cases earlier in this section. Since other tort case terminations are 95 percent of filings, we will adjust ALAE downward by 5 percent to account for the growth in the number of other tort cases (see Sec. II). Then we will adjust ALAE downward to account for the growth in expenditures, using a 15 percent annual growth rate (see App. D), and the assumption that the ALAE expenditures occur an average of six months before case termination. An annual rate of 15 percent for six months is 7.5 percent, less six months inflation of 2.2 percent (to correct to constant value dollars) yields an adjustment of 5.3 percent. Combining the 5 percent and 5.3 percent adjustments, we estimate that ALAE for other tort cases terminated was 90 percent of ALAE paid in 1985. Thus, we estimate that \$3.92 billion was paid in ALAE for other tort lawsuits terminated in 1985.

Other Tort Defendants' Legal Fees and Expenses Paid on Litigation Terminated in 1985 in Courts of General Jurisdiction. How much of that \$3.92 billion was paid for other tort lawsuits in state and federal courts of general jurisdiction? In Sec. III we estimated that 94 percent of all litigation compensation paid is paid on suits in courts of general jurisdiction. Assuming that the same ratio holds for legal fees and expenses, we estimate that \$3.68 billion is spent in defense legal fees and expenses on other (nonauto) tort lawsuits in courts of general jurisdiction.

Estimate 2: Other Tort Defendants' Legal Fees and Expenses Based on Lawsuit Survey Data

The steps we took to make this estimate are outlined in Fig. 5.4.

Other Tort Defendants' Legal Fees and Expenses Per Lawsuit. How much was paid in defense legal fees and expenses on the average other tort lawsuit terminated in 1985? The University of

assume the per-
as it was for the
App. D for a dis-
\$1.49 billion in
of insurance and

all liability, and
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in calendar year
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Expenses Per
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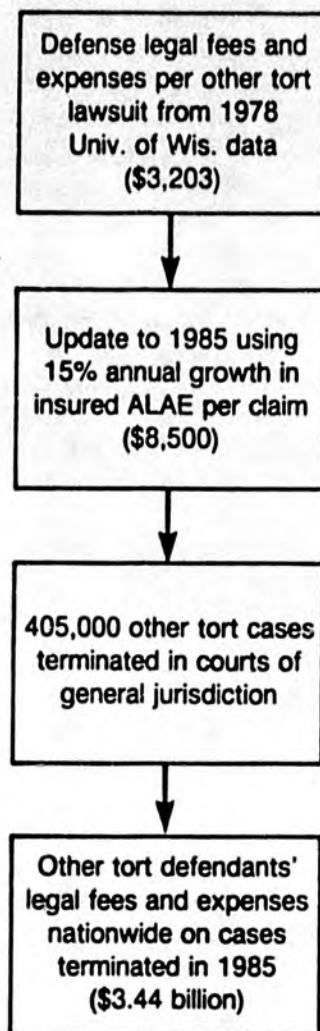


Fig. 5.4—Estimation of defendants' legal fees and expenses for other (nonauto) tort litigation terminated in courts of general jurisdiction in 1985, based on lawsuit survey data

Wisconsin survey data show an estimated \$3,203 paid per other tort lawsuit terminated in 1978.¹³

In recent years, medical malpractice ALAE per claim has grown 15.7 percent annually, while total general liability ALAE has grown at a 15.5 percent rate and multiperil ALAE has grown at a 14.9 percent rate. (See App. D, Tables D.12, D.13, D.15, and associated text.) Based on the available data, we estimate the growth rate in defense litigation costs for all other tort cases combined to be approximately 15 percent. Updating the 1978 data to 1985 using the 15 percent estimated annual growth rate in the average defense legal fees and expenses paid per other tort claim yields \$8,500 per lawsuit.

Other Tort Defendants' Legal Fees and Expenses Nationwide. Approximately 405,000 other tort cases were terminated in courts of general jurisdiction nationwide in 1985 (see Sec. II). Multiplying that number of lawsuits by the average defense legal costs paid per other tort lawsuit yields an estimate of \$3.44 billion in 1985.

NATIONAL ESTIMATE OF ALL TORT DEFENDANTS' LEGAL FEES AND EXPENSES

Combining the results for auto and other tort litigation terminated in state and federal courts of general jurisdiction yields a total of \$4.7 billion to \$5.7 billion nationwide in 1985. We again were gratified that our two estimation methods (working down from aggregate insurance industry data and working up from individual lawsuit survey data) yielded similar results (see Table 5.2).

The average growth rate in defendants' legal costs paid per claim over the past five years has been about 6 percent for auto and 15 percent for other tort claims. The average tort lawsuit concluded in 1985 resulted in an estimated \$5,400 to \$6,600 in defendant's legal fees and expenses.

CLAIMS-PROCESSING COSTS

In addition to defendants' legal fees and related expenses that constitute about 98 percent of what insurance companies call "allocated

¹³Estimate is based on data from App. A, Tables A.21, A.39, and A.45. Using overall data from the University of Wisconsin survey from 1978, we estimate that defendants' average legal fees and expenses were \$2,809 (37 percent of \$7,593 compensation) in state courts and \$7,791 (18 percent of \$43,288 compensation) in federal courts. Averaging these weighted by the number of other tort lawsuits terminated in state and federal courts in 1985 yields \$3,203.

Table 5.2

TOTAL DEFENDANTS' LEGAL FEES AND
EXPENSES PAID IN TORT LITIGATION
TERMINATED IN COURTS OF GENERAL
JURISDICTION IN 1985
(In \$ billion)

Type of Tort Litigation	Estimate 1, Based on Insurance Industry Data	Estimate 2, Based on Lawsuit Survey Data
Auto torts	1.05	2.26
Other torts	3.68	3.44
Total	4.73	5.70

loss adjustment expenses" (ALAE) for liability claims, the insurers also have "unallocated loss adjustment expenses" (ULAE). As discussed earlier in this section, the unallocated expenses are insurance company salaries, expenses, and overhead of processing claims (and suits) that are not allocated by the insurer to any specific claim.

When someone is injured or suffers property damage and files a claim for liability compensation, the insurer's claims department personnel will process the claim, ask for information about the incident and the injury or damage, and attempt to settle the claim; the associated costs are "unallocated" costs. If unsuccessful in arriving at a mutually acceptable settlement with the claimant whereupon a suit is filed, or if the initial claim is accompanied by a lawsuit, then legal counsel will spend time on the claim (and the associated costs will be recorded as "allocated" costs). However, the insurers' claims-processing personnel will continue to assist with the lawsuit; they still will handle paperwork and accounting matters, monitor and assist the lawyer, and follow settlement negotiations, since the insurer must approve any settlement negotiated by the lawyer. Thus, claims-processing costs (ULAE) are incurred both before and after filing a suit.

The ULAE are reported by insurers for all claims and lawsuits combined for each line of insurance. The total ULAE paid in 1985 were \$2.00 billion for auto liability, \$0.12 billion for medical malpractice,

\$0.31 billion for general liability, and \$0.35 billion for the liability portion of multiple-peril insurance policies. (See App. D, Table D.16.) Thus, the total ULAE in 1985 for all liability claims and suits was an estimated \$2.78 billion, of which \$2.00 billion was for auto liability claims and suits.

We adjusted this number upward to account for the equivalent claims-processing costs spent by "self-insured" people (using the same method and references we used earlier in this section for ALAE). The total rises to \$3.26 billion, of which \$2.26 billion was for auto liability claims and suits.

No industry-wide data are collected on how much of the total was for claims that were in suit, but we were able to locate one very detailed study by a large insurer.¹⁴ That study indicated that the average auto claim in suit required 1.62 times as much effort by claims-processing personnel as the average auto claim not in suit. The average other (nonauto) injury claim in suit required 2.15 times as much effort by claims-processing personnel as the average other injury claim not in suit. In light of our understanding of the claims process, this seems reasonable.

Using the above ratios plus the fraction of claims in suit¹⁵ yields an estimate that the ULAE for claims in suit totaled \$0.88 billion in 1985, of which \$0.44 billion was for auto liability claims in suit. Now we adjust these ULAE dollars spent in 1985 to ULAE dollars spent on lawsuits terminated in 1985, using the same method we used to adjust ALAE.¹⁶ The resulting estimate is that ULAE for lawsuits that terminated in 1985 were \$0.81 billion, of which \$0.41 billion was for auto torts.

Assuming that, like compensation, 92 percent of all ULAE for claims in suit goes for claims in suit in courts of general jurisdiction, we estimate that \$0.75 billion in ULAE was spent for claims in suit in general jurisdiction courts, of which \$0.37 billion was for auto liability.

The average claims-processing cost (ULAE) per tort lawsuit terminated in 1985 was \$866. Claims process costs (ULAE) amount to 4 percent of compensation paid in suit.

¹⁴These data were collected in a "time and motion" study of how much time claims personnel spent on various required tasks for various types of claims. One of the factors this large insurer considered was whether the claim was in suit. Cost figures developed included salary, fringe benefits, overhead, and miscellaneous claims-processing expenses. The data are unpublished, and the insurer has requested anonymity.

¹⁵Based on data presented previously, approximately 13 percent of all auto claims and 27 percent of all general liability claims are in suit.

¹⁶The auto tort numbers were reduced 6 percent and the other tort numbers were reduced 10 percent.

8

ISO Insurance Issues Series

Legal Defense: A Large and Growing Insurance Cost



Insurance Services Office, Inc.

Executive Summary

Why do people and businesses buy liability insurance? If the policyholder, through negligence or fault, causes injury to others or damages the property of others, the policyholder faces financial loss. Liability insurance provides financial protection against such a loss. In addition, most standard liability policies also provide for unlimited legal defense of the policyholder (until policy limits are exhausted by payments to those with injuries or damaged property) if a lawsuit results from an accident.

To shed some light on the legal defense cost component of liability insurance, Insurance Services Office, Inc. (ISO) examined insurer data—both financial and statistical. This study's findings can be divided into two areas: (1) an analysis of the casualty lines of insurance that quantifies the magnitude of legal defense costs; and (2) an analysis of the variability of general liability legal defense costs. The general liability analysis expands on some issues raised in the 1986 ISO study, *The Rising Costs of General Liability Legal Defense*.

The specific findings relating to the magnitude of legal defense costs are:

- For calendar year 1988, legal defense costs for the casualty lines of insurance amounted to \$12 billion, while insured losses for the same lines were \$95 billion.
- On an accident year basis, legal defense costs increased from 9.6% of losses for 1978 to 13.9% of losses for 1988—a 45% rise in the ratio of legal defense costs to indemnity costs—for all casualty lines of insurance combined.
- While legal defense costs affect all casualty lines of insurance, they are a proportionately larger cost for the longer-tailed general liability and medical malpractice lines.
- Indicated deficiencies in total loss adjustment expense reserves, which far exceed the estimated shortfalls in loss reserves, suggest that the true cost of insurance legal defense may be greater than insurers' current estimates of incurred legal defense costs.

The specific findings relating to legal defense costs for general liability are:

- Over the past 40 years, the ratio of legal defense costs to indemnity costs has tripled, indicating significantly more growth in defense costs than in indemnity costs.
- For all claims, the ratio of legal defense costs to indemnity costs increased the longer it took to settle claims.
- Claims closed without payment generated one-third of total legal defense costs. For most general liability claims, insurers incurred indemnity costs but paid zero legal defense costs.
- For claims where insurers paid both indemnity costs and legal defense costs, the ratio of legal defense costs to indemnity costs decreased as the size of the loss increased.

Background

Under most standard liability contracts, an insurer commits itself to unlimited legal defense of any covered claim until a settlement is reached, a judgment is entered, or the policy limits are exhausted by claim payments—regardless of the cost of providing that defense. The insurer is responsible for the defense of *any* suit by a third party against an insured, if the third party is claiming monetary damages that might be covered by the insurance. In the case of multiple claimants whose claims fall under the same limit on an insured's policy, the insurer must defend all the claims until settlements with, or judgments for, one or more of the claimants exhaust the policy limit. Only then may the insurer stop defending the remaining cases.

This study explores costs associated with providing legal defense for the casualty lines of insurance, which appear on Schedule P of insurers' Annual Statements:

- workers' compensation
- auto liability (personal auto and commercial auto)
- multi-peril (farmowners multiple peril, homeowners multiple peril, commercial multiple peril, ocean marine, aircraft, and boiler and machinery)
- general liability
- medical malpractice

Insurers are required to submit information about their business for several purposes in several forms. No one source provides adequate information with which to study insurance legal defense costs. Consequently, for this study, Insurance Services Office, Inc. (ISO), used information from several sources:

- insurer financial statements compiled and published by A.M. Best Company
- statistical data regularly reported to ISO
- special ISO calls for insurer expense data

These data were gathered and summarized on different bases—accident year, calendar year, and policy year. (See the Appendix for a more complete description of data sources and data organization.)

Loss Adjustment Expenses

Insurers incur two types of expenses when settling claims:

- Unallocated loss adjustment expenses (ULAE) include claim settlement functions ranging from claim reporting, processing, and investigation to issuing a check in settlement of a claim. These expenses are generally viewed as overhead claim settlement expenses. ULAE is not attributable to a particular case or claim.
- Allocated loss adjustment expenses (ALAE) are the direct costs attributed to settling specific claims. For liability insurance, the primary components of ALAE are the costs of attorneys and expert witnesses—legal defense costs, the focus of this study.

Legal Defense Costs in 1988

In calendar year 1988, the property/casualty insurance industry's legal defense costs for the casualty lines of insurance amounted to about \$12 billion, compared with \$95 billion for incurred losses. ULAE added \$7 billion. (See Figure 1.) That is, for every dollar spent on indemnity for liability insurance, another 13 cents went to legal defense costs. But defense costs differed by line of insurance.

Figure 1

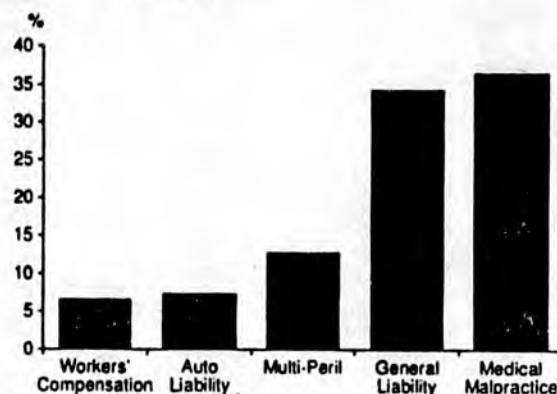
Legal Defense Costs, Overhead Claim Settlement Costs, and Indemnity Costs Liability Lines-1988



In 1988, legal defense costs amounted to \$12 billion, overhead claim expenses were \$7 billion, and incurred losses totaled \$95 billion.

Figure 2

Legal Defense Costs as a Percentage Of Incurred Losses Calendar Year 1988



Legal defense costs vary for the casualty lines of insurance, but are particularly significant in the longer-tailed lines of general liability and medical malpractice.

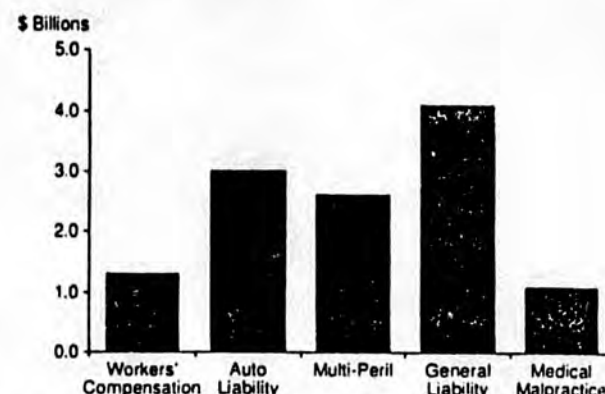
Workers' compensation settlements are usually determined by statute. In calendar year 1988, legal defense costs amounted to \$1.3 billion, or 6.6% of indemnity costs.

For auto liability, legal defense costs amounted to 7.4% of indemnity costs in calendar year 1988. Because auto liability indemnity costs are so large, legal defense costs represented an expenditure of \$3.0 billion, more than for any other line of insurance except general liability.

Multi-peril includes both property and liability coverages. While liability claims covered under multi-peril insurance often involve litigation, property claims by policyholders themselves involve investi-

Figure 3

Legal Defense Costs by Line of Business Calendar Year 1988



gation and settlement expenses but usually do not require litigation. Multi-peril legal defense costs were 12.9% of indemnity costs in calendar year 1988, or \$2.6 billion.

General liability legal defense costs in calendar year 1988 amounted to \$4.1 billion, or 34.3% of indemnity costs. Legal defense costs for medical malpractice totaled \$1.1 billion, or 36.6% of indemnity costs, in calendar year 1988. (See Figures 2 and 3.)

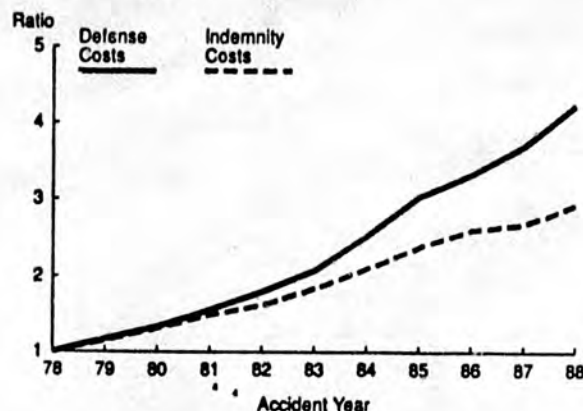
Legal Defense Costs Have Grown More than Indemnity Costs

Calendar year figures are a mixture of new and old costs. In practice, dollars earmarked or set aside for the payment of each claim already reported to the insurance company, but not yet settled, may be revised on a regular basis. Meanwhile, other new claims are continually reported to the insurer. Some liability claims can take more than a decade to settle, while many others settle in as little as one or two years. Accident year information—grouping together claims from accidents in a particular year—more accurately matches claim adjustment expenses with indemnity costs.

For all casualty lines of insurance combined, ultimate incurred legal defense costs rose an average of 16% per year from \$2.8 billion to \$11.8 billion—a 320% increase—from accident year 1978 to accident year 1988. During that same period, indemnity costs (losses) grew an average of 11% per year from \$28.9 billion to \$84.9 billion—a 190% rise. (See Figure 4.) Put in terms of the ratio of ALAE to indemnity, legal defense costs for the casualty lines of insurance increased from 9.6% of losses in accident year 1978 to 13.9% of losses in accident year 1988. (See Figure 5.)

Figure 4

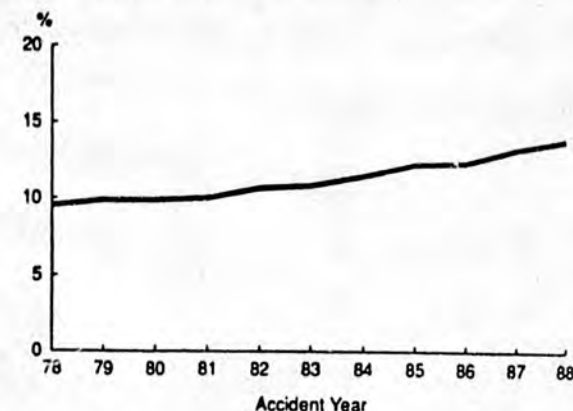
Rise of Legal Defense Costs and Indemnity Costs, 1978-1988
Schedule P Lines



Legal defense costs for accidents occurring in 1988 were 320% greater than legal defense costs for accidents in 1978. Indemnity costs rose 190% over the same period.

Figure 5

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Schedule P Lines



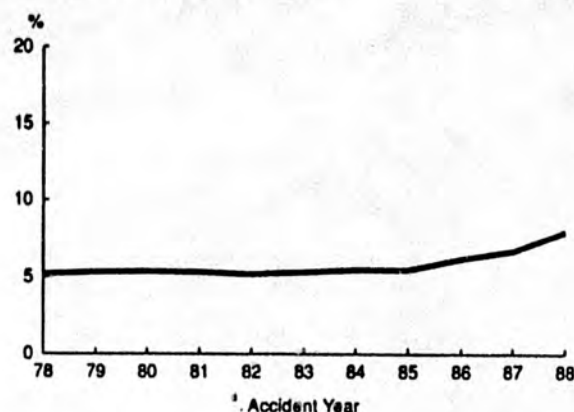
Legal defense costs for accidents occurring in 1988 were 13.9% of indemnity costs for all casualty lines of insurance—45% greater than the 9.6% legal defense cost ratio for accident year 1978.

The legal defense cost ratio for workers' compensation remained almost constant at 5% to 6% of indemnity costs from accident year 1978 to accident year 1985. The latest three accident years (1986-1988) saw a rise in these costs, and analysis of the financial data indicates that accident year 1988 will have a legal defense cost ratio of 8.0% when all payments have been made. (See Figure 6.)

The legal defense cost component of auto liability insurance was relatively stable during this 11-year period, increasing from 6.9% of indemnity costs in accident year 1978 to 8.0% in accident year 1988. (See Figure 7.) But that one percentage point translates to \$400 million of additional legal defense costs for accident year 1988.

Figure 6

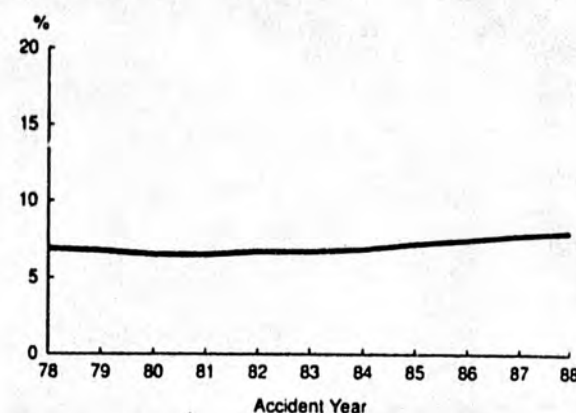
Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Workers' Compensation



Legal defense cost ratios for workers' compensation accidents have risen significantly since accident year 1985.

Figure 7

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Auto Liability



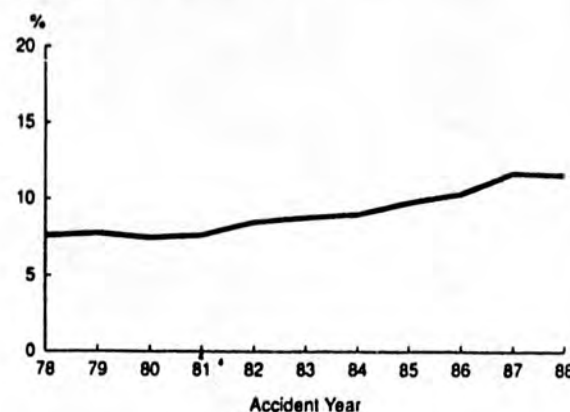
Legal defense cost ratios were relatively stable for auto liability from accident year 1978 through accident year 1988.

The ratio of legal defense costs to indemnity costs for multi-peril increased from 7.6% for accident year 1978 to 11.6% in accident year 1988. (See Figure 8.) This rise was significant for two reasons: (1) the legal defense cost ratio increase of more than 50% means that legal defense costs grew much faster than losses; and (2) multi-peril includes a large amount of property losses for which the legal defense cost component was very small. That is, the "ballast" of the property losses masked a significant jump in the legal defense cost component of the multi-peril liability coverage.

In accident year 1978, the ratio of legal defense costs to indemnity costs for general liability was 31.0%, and 24.3% for medical malpractice. For accident year 1978, legal defense costs amounted to approximately \$800 million for general liability and approximately \$250 million for medical malpractice. For accident year 1988, the general liability legal defense cost ratio is projected to exceed 40%, with ultimate legal defense costs of more than \$3.7 billion. (See Figure 9.) The medical malpractice legal defense cost ratio will also exceed 40%, with ultimate legal defense costs exceeding \$1.5 billion. (See Figure 10.)

Figure 8

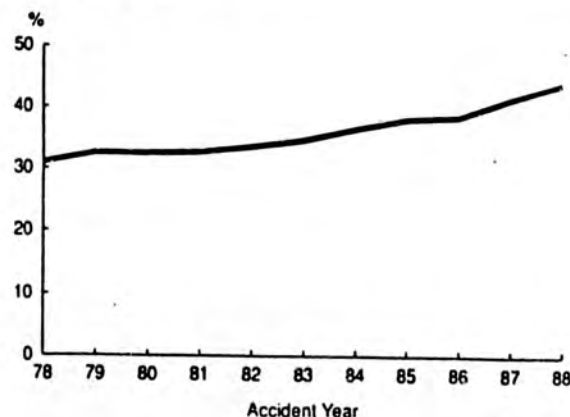
Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Multi-Peril



Legal defense costs for multi-peril grew faster than indemnity costs.

Figure 9

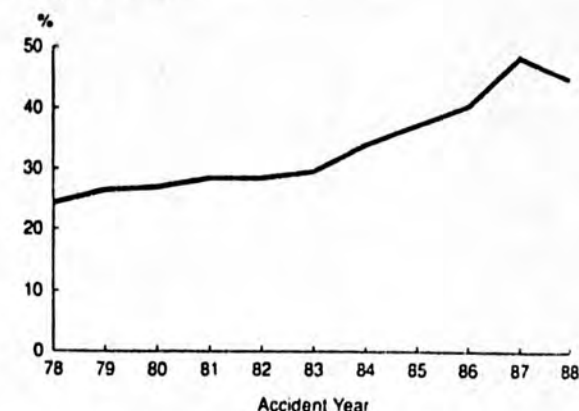
Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
General Liability



General liability legal defense costs have risen steadily.

Figure 10

Ratio of Legal Defense Costs to Indemnity Costs, 1978-1988
Medical Malpractice



Legal defense cost ratios for medical malpractice accidents have risen dramatically since 1983.

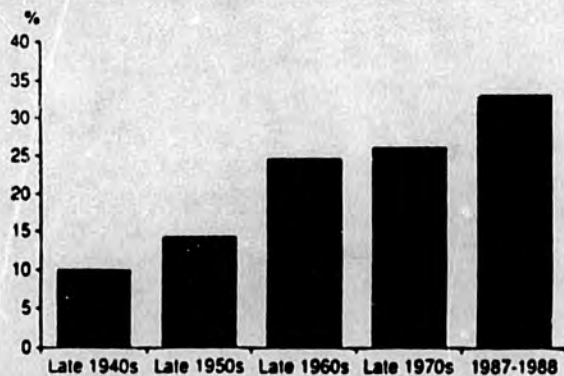
General Liability Legal Defense Costs Have Risen Steadily

Legal defense costs were not always so large. The cost of legal defense has risen steadily over the years. An examination of general liability legal defense cost data from the ISO special calls for expenses over the past four decades illustrates this movement. In the late 1940s, insurers spent about 10 cents on legal defense costs for every dollar spent on indemnity. By the late 1950s, this expense reached 14 cents for every dollar of indemnity payments. During the 1970s, that figure rose to 26 cents per dollar of indemnity. The ratio for calendar years 1987 and 1988 was 33%. (See Figure 11.)

In contrast, ULAE has decreased as a percentage of indemnity for general liability through the years. ULAE declined from 18% of indemnity costs in the 1940s to 9.9% of indemnity costs for 1987 and 1988. (See Figure 12.) But the growth in legal defense costs more than offsets these savings, causing total loss adjustment expenses to increase as a percentage of indemnity. (See Figure 13.)

Figure 11

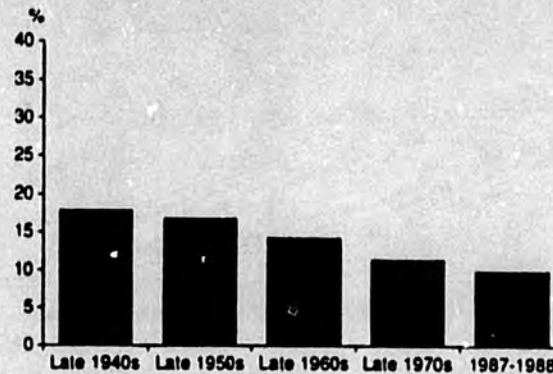
The Growth of Legal Defense Costs as a Percentage of Indemnity Costs General Liability



Over the past 40 years, general liability legal defense costs have risen steadily.

Figure 12

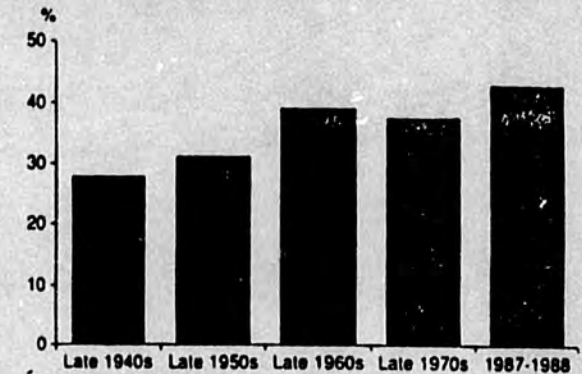
Overhead Claim Settlement Expenses as a Percentage of Indemnity Costs General Liability



For general liability, while overhead claim settlement expenses have decreased steadily over the past 40 years, relative to indemnity costs, total loss adjustment expenses (including legal defense costs) have increased.

Figure 13

Total Loss Adjustment Expenses as a Percentage of Indemnity Costs General Liability



General Liability Legal Defense Costs Have Varied with the Size of the Loss

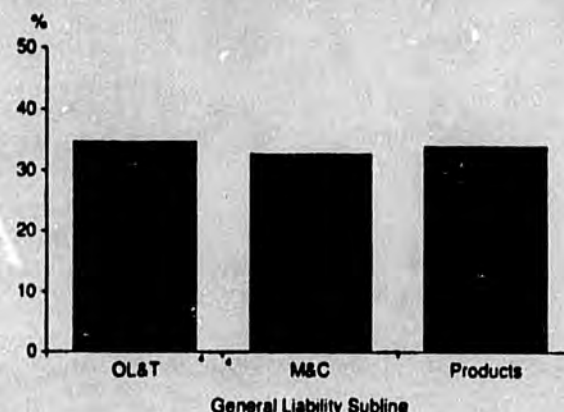
ISO studied the variability of legal defense costs by size of loss for the general liability line of insurance, separately examining a sample of loss statistics reported to ISO for the three general liability sublines—accident years 1980 through 1985 for owners', landlords', and tenants' liability (OL&T) and manufacturers' and contractors' liability (M&C); accident years 1974 through 1985 for products liability (products). The average cost (in dollars) of defending a large claim was greater than the average cost of defending a small claim. But the relative cost of defending a claim—the ratio of legal defense costs to indemnity payments—generally decreased as the size of the loss increased.

In addition to the cost of defending claims settled with a payment to a claimant, insurers spent significant amounts to defend policyholders successfully. In fact, one-third of total legal defense costs for general liability were attributed to claims closed without payment. This proportion was essentially the same for all three sublines examined. (See Figure 14.)

Just as there were claims for which insurers paid legal defense costs but incurred no indemnity costs, there were also many claims for which insurers incurred indemnity costs but paid no legal defense costs. In fact, this was the most common type of claim in all three sublines of general liability examined.

Figure 14

Percentage of Legal Defense Costs for Claims Closed without Indemnity Payment General Liability Sublines



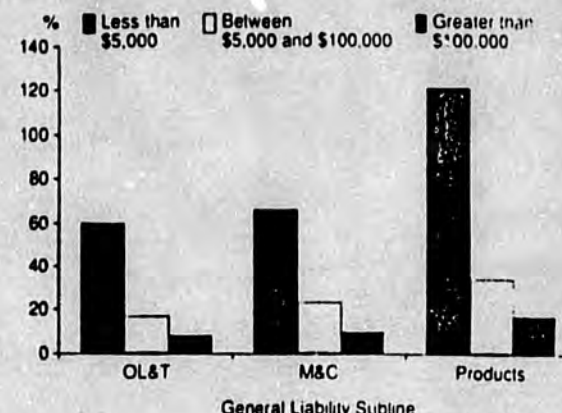
One-third of total legal defense costs for general liability are attributed to claims closed without payment.

For example, in OL&T, approximately 76% of the claims did not have associated legal defense costs. Restricting analysis to the 12% of OL&T claims with both an indemnity payment and a legal defense cost payment, ISO found that the ratio of legal defense costs to indemnity costs for claims less than \$5,000 was approximately 60%. For claims greater than \$100,000, this ratio was approximately 8%, with a ratio of approximately 17% for claims between \$5,000 and \$100,000.

In M&C, approximately 82% of the claims did not have associated defense costs. For the 9% of the M&C claims with both an indemnity payment and a legal defense cost payment, the ratio of legal

Figure 15

Legal Defense Costs as a Percentage of Indemnity Costs for General Liability Subline Size of Loss



For general liability claims with both an indemnity payment and a legal defense cost payment, the legal defense cost ratio decreased as the size of loss increased.

defense costs to indemnity costs for claims less than \$5,000 was approximately 66%. For claims greater than \$100,000, this ratio was approximately 10%, with a ratio of approximately 23% for claims between \$5,000 and \$100,000.

In products, approximately 65% of the claims did not have associated legal defense costs. For the 17% of products claims with both an indemnity payment and a legal defense cost payment, the ratio of legal defense costs to indemnity costs for claims less than \$5,000 was 121%. For claims greater than \$100,000, this ratio was 17%, with a ratio of 35% for claims between \$5,000 and \$100,000. (See Figure 15.)

General Liability Legal Defense Costs Have Varied by Settlement Lag

Using the same sample of general liability statistical data, ISO examined the relationship between the cost of legal defense coverage and the length of time between the accident and the settlement of the claim. A significant portion of the indemnity dollars paid within the first two settlement years had no associated legal defense costs. The remaining claims that closed in the first two settlement years had associated legal defense costs, but at a lower level than the claims that closed after the second settlement year.

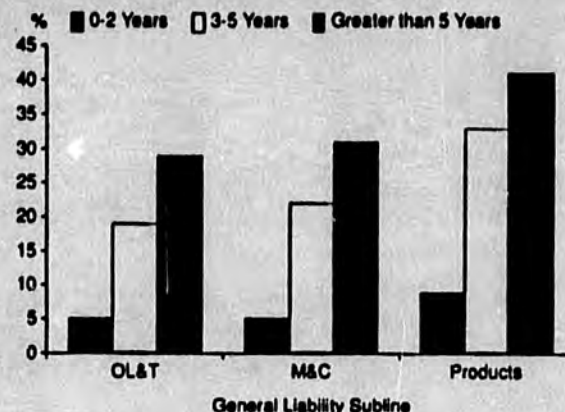
For OL&T, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years was about 5%. In settlement years three through five, the ratio rose to 19%. For later settlement years, it climbed to almost 29%.

For M&C, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years was also about 5%. In settlement years three through five, the ratio escalated to 22%. For later settlement years, it jumped to 31%.

For products, the ratio of legal defense costs to indemnity costs for all claims that closed in the first two settlement years amounted to 9%—almost double the ratio for OL&T and for M&C. In settlement years three through five, the ratio jumped to 33%. In settlement periods beyond year five, it shot up to 41%. (See Figure 16.)

Figure 16

Legal Defense Costs as a Percentage of Indemnity Costs for General Liability Sublines Years until Settlement



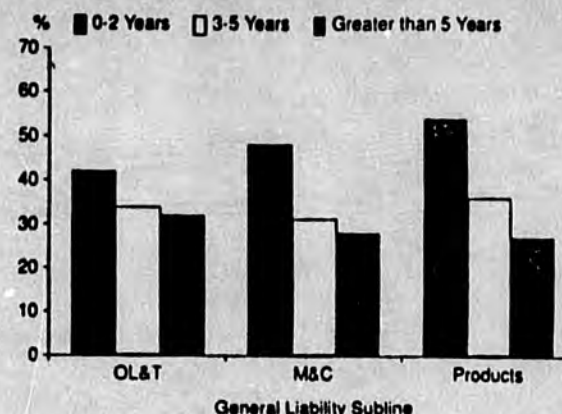
For general liability claims, legal defense cost ratios increased the longer it took to settle claims.

While larger claims tended to take longer to settle, some claims closed without indemnity payment also took many years to settle. The proportion of legal defense costs associated with such claims remained significant, even at very late settlement dates.

For OL&T, 42% of legal defense costs in the first two settlement years involved claims closed without indemnity payment. In settlement years three through five, the percentage fell to 34%. It dropped to 32% in later settlement years.

Figure 17

Percentage of Legal Defense Costs for Claims Closed without Indemnity Payment Years until Settlement



The proportion of general liability legal defense costs for claims closed without an indemnity payment remained significant even when such claims took years to settle.

For M&C, 48% of legal defense costs in the first two settlement years involved claims closed without payment. For years three through five, the percentage dropped to 31%. It slipped to 28% for later settlement years.

For products, the percentage of legal defense costs spent on claims closed without payment was almost 54% for the first two settlement years. The percentage plummeted to 36% for years three through five. It dropped to 27% thereafter. (See Figure 17.)

Perspective: Loss Adjustment Expense Reserves

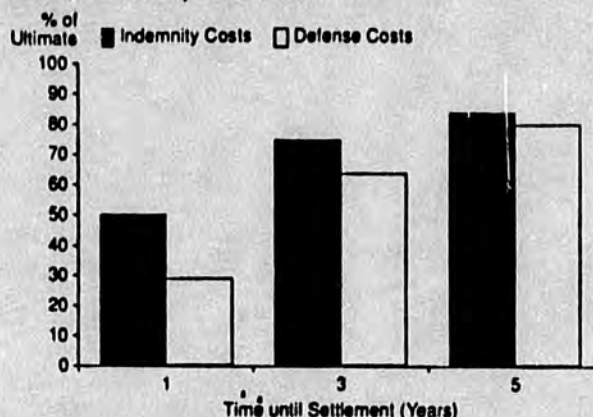
State regulations and accounting standards require that insurance companies establish reserves for unpaid losses and associated loss adjustment expenses (ALAE, or legal defense costs, plus ULAE, or overhead claim expenses). These reserves are reflected in company financial statements. In calendar year 1988, payments for losses and loss adjustment expenses for casualty lines of insurance amounted to approximately \$90 billion. At the end of calendar year 1988, the financial statement reserves for losses and loss adjustment expenses for these lines of insurance were approximately \$210 billion.

ISO analyses indicated that loss adjustment expense reserves were generally more deficient than loss reserves. Loss reserves for casualty lines at the end of calendar year 1988 were less than 10% deficient, while total loss adjustment expense reserves (ALAE plus ULAE) were at least 50% deficient at the end of calendar year 1988. These results are consistent with those at the end of calendar year 1987.

Factors such as different treatments of losses and loss adjustment expenses among reinsurance agreements and the practices of some insurers—including reserves for these loss adjustment expenses with the loss reserves, instead of establishing separate loss adjustment expense reserves—complicated the analysis. But the indicated deficiencies in loss adjustment expense reserves, which far exceed the shortfalls in loss reserves, suggest that the true cost of insurance legal defense may be greater than insurers' current estimates of incurred legal defense costs as presented in other sections of this study.

Figure 18

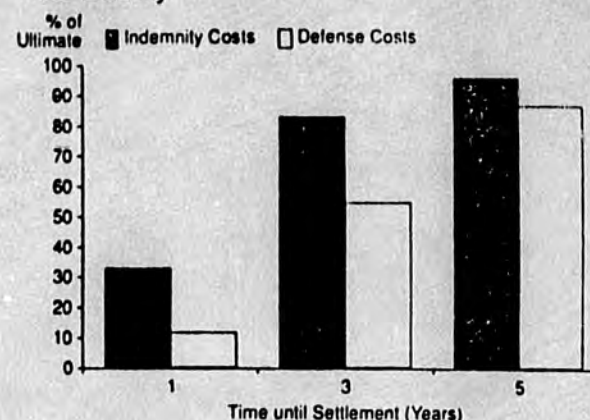
Industry Payout Patterns for Indemnity and Legal Defense Costs Workers' Compensation



Legal defense cost payments for most casualty lines of insurance were made later than indemnity payments. That is, legal defense costs emerged more slowly than indemnity costs.

Figure 19

Industry Payout Patterns for Indemnity and Legal Defense Costs Auto Liability



Furthermore, reserving for loss adjustment expenses is difficult because of the long-tail nature of the payments. Generally speaking, legal defense cost payments are made later than indemnity payments and, consequently, emerge more slowly. For example, according to ISO's analysis, 12% of total general liability indemnity for an accident year was paid in the first 12 months. At that same maturity, only 3% of legal defense costs was paid. For automobile liability, 83% of incurred indemnity was paid in the first three settlement years. At that same maturity, only 55% of the accident year's legal defense costs had been paid. (See Figures 18 through 22.)

Figure 20

Industry Payout Patterns for Indemnity and Legal Defense Costs
Multi-Peril

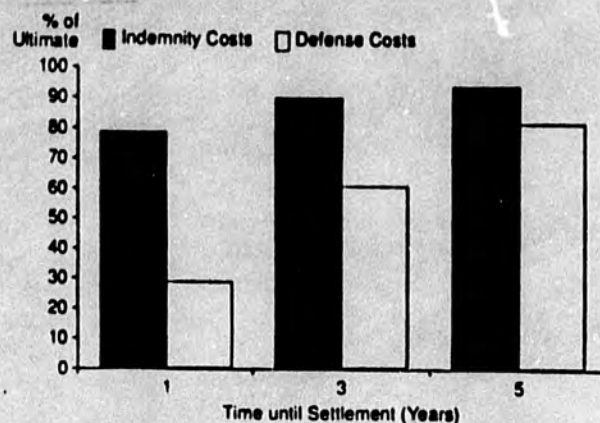


Figure 21

Industry Payout Patterns for Indemnity and Legal Defense Costs
General Liability

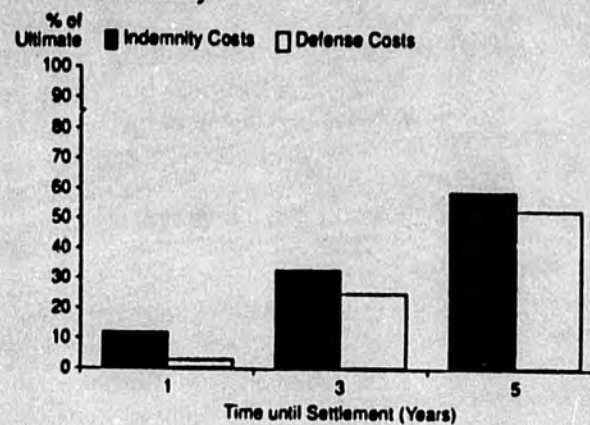
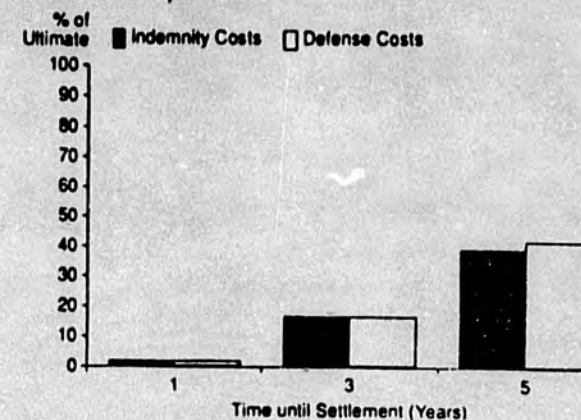


Figure 22

Industry Payout Patterns for Indemnity and Legal Defense Costs
Medical Malpractice



Legal defense cost payments for most casualty lines of insurance were made later than indemnity payments. That is, legal defense costs emerged more slowly than indemnity costs.

9

October 1987

HAZARDOUS WASTE

Issues Surrounding Insurance Availability



GAO/RCED-88-2

Comptroller General
of the United States

B-224651

October 16, 1987

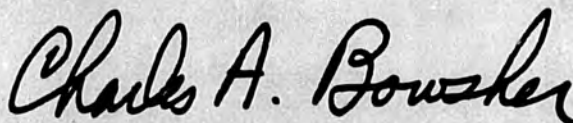
To the President of the Senate and the
Speaker of the House of Representatives

During the 1985-86 Superfund reauthorization process in the Congress, concerns were raised about the availability of pollution insurance. The Superfund Amendments and Reauthorization Act of 1986 directed that we determine the availability of insurance for individuals who may be liable for releases of hazardous substances into the environment. This report represents our analysis of this issue and discusses

- the current economic conditions in, and the outlook for, the pollution insurance market;
- effects on this market caused by trends in statutory and common law remedies and judicial interpretation of pollution insurance policies; and
- the frequency and severity of pollution claims closed by the insurance industry in 1985.

Copies of this report are being sent to appropriate House and Senate Committees; the Administrator, Environmental Protection Agency; and other interested parties. Copies will also be made available to others upon request.

This report was performed under the direction of Hugh J. Wessinger, Senior Associate Director, Resources, Community, and Economic Development Division. Other major contributors are listed in appendix IV.



Charles A. Bowsher
Comptroller General
of the United States

Executive Summary

Purpose

Many of the companies that handle toxic substances do not have insurance for their pollution risks. This has raised concerns about the availability of funds for pollution cleanup and victim compensation.

In response to this concern, the Congress mandated—in the Superfund Amendments and Reauthorization Act of 1986—that GAO determine the availability of insurance for individuals who may be liable for releases of hazardous substances into the environment. GAO was asked to examine the economic condition and outlook for the pollution insurance market; trends in statutory and common law remedies and the interpretation of insurance policies; and the frequency and severity of pollution claims closed in 1985.

Background

The 1976 Resource Conservation and Recovery Act (RCRA) sets standards for the disposal of hazardous wastes and requires licensed disposal facilities to show that they are financially capable of paying at least some of the damages that might result from their activities. The 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires parties responsible for conditions at the nation's worst hazardous waste sites to clean them up themselves or reimburse the government for cleaning them up. Persons suffering bodily injury or property damage have no legal remedies under federal law and must seek compensation through state courts.

Since the mid-1980s, most insurers have generally refrained from offering new insurance policies covering pollution-related damages. Insurers cite several reasons for withdrawing from the pollution market. Primarily, they contend that environmental legislation, as well as recent trends in common law and court interpretations of environmental law, have broadened their liability for pollution coverage beyond what was intended under past policies. This, they maintain, has left them exposed to potentially enormous payments for claims presented under these past policies.

Results in Brief

Pollution liability insurance continues to be generally unavailable. Although more than 100,000 companies generate, handle, or dispose of hazardous substances, few of them have insurance for pollution risks. Companies that do not have such insurance are self-insuring or are attempting to form risk-sharing groups. The Environmental Protection Agency (EPA) has established minimum financial responsibility requirements under RCRA, including insurance, for facilities that treat, store, or

dispose of hazardous wastes (currently numbering about 4,000) but has not established similar requirements pursuant to CERCLA for other classes of facilities with pollution risks.

In examining recent court cases involving liability standards, GAO found that CERCLA liability standards for cleanup costs have been consistently upheld by the courts. The ability to obtain compensation by those claiming to be victims of pollution for bodily injury and property damage is less clear. Regarding court interpretations of insurance contracts, the extent to which insureds who have been held liable for damages can recover from their insurers varies, with no clear trend yet emerging.

GAO's survey of pollution claims closed in 1985 showed that insurers were generally not making high claims payments at that time. However, these claims are not necessarily indicative of the eventual magnitude of the insurance industry's pollution claims payments. Data on pollution claims closed after 1985 would be needed to establish trends in pollution claims payments. Currently, there is no central information source to capture data on all pollution claims.

Principal Findings

Insurance Availability

Only one insurance organization is actively marketing pollution insurance. A few hundred companies are insured under its policies. The maximum annual coverage that can be purchased is \$12.5 million. Several other insurance organizations provide limited-coverage pollution risk insurance.

EPA Financial Responsibility Requirements

As mandated by RCRA, EPA established minimum financial responsibility requirements for facilities that treat, store, and dispose of hazardous wastes. These regulations were intended to ensure that firms have adequate financial resources to pay for cleaning up hazardous substance releases and compensating victims for bodily injury and property damage. CERCLA required EPA to develop similar financial responsibility requirements for certain facilities (which could include manufacturing locations that handle hazardous substances) not covered by RCRA or other federal law. Many of these companies are now without pollution insurance. As yet, EPA has not developed the minimal level of financial

responsibility for companies subject to pollution liability and has no timetable for doing so in the future.

Liability for Cleanup and Compensation

Courts have consistently ruled that insureds are liable for cleanup costs. However, pollution victims suffering bodily injury or property damage must seek compensation under various state statutes and common law. A significant change has been the willingness of some courts to permit recovery on new theories and types of evidence, or on theories and evidence which had earlier been rejected. While pollution victims have generally found it difficult to receive compensation, some courts have made awards in their favor. However states are enacting laws that may limit a victim's ability to obtain compensation.

Judicial Trends in Insurance Contract Interpretations

GAO found that court decisions regarding the interpretation of insurance contract coverage sometimes favored the insurer and sometimes the insured, with no clear trend emerging. Court decisions so far, however, do give insurers a basis on which to draft certain pollution liability policy provisions that may help reduce variability in such judicial interpretations in the future.

Pollution Claims Closed in 1985

Because there is no central source of information on pollution claims, GAO sent claims questionnaires to all U.S. insurance companies it could identify that wrote or may have written pollution insurance. Of the 104 contacted, 75 responded that they closed 382 pollution claims with payment in 1985. Fifty of them also reported that they had about 11,900 pollution claims unresolved at the end of 1985. Of the 382 claims closed, insurers provided cost information on 200. Payments totaled about \$6.6 million; the average payment was \$33,040 (the median payment was only \$5,000).

Insurers assert that pollution claims for 1985 mainly represent closures on easily resolved claims involving relatively small settlements and therefore are not indicative of the extent of their liability. They contend that most pollution claims have yet to be resolved or even presented and that these could involve much larger payments. Data on post-1985 claim payments not now available are needed in order to assess the extent of future claim payments.

Recommendation

Given the likelihood that most companies involved with hazardous substances may not obtain pollution insurance to cover their risks, it is critical that EPA develop and implement the financial responsibility regulations mandated by the Congress in the 1980 CERCLA. Because EPA has set no time frames for developing these regulations, GAO recommends that the Administrator, EPA, establish specific milestones leading to the timely implementation of financial responsibility regulations for risks associated with classes of facilities covered by CERCLA.

Matter for Congressional Consideration

Determining the amounts that insurers are paying for CERCLA cleanups and related third-party bodily injury and property damage is difficult because the insurance industry does not have centralized, comprehensive data on these indemnity payments. Given this situation, GAO believes that the Congress should consider requiring insurers or responsible parties, as appropriate, to report to EPA the amounts of indemnity payments made to cover pollution cleanups and related third-party bodily injury and property damage.

Agency and Industry Comments

EPA stated that the report accurately described the hazardous waste insurance problem and concurred with the appropriateness of the recommendation and matter for congressional consideration. The views of responsible officials representing state insurance regulators; insurers; persons who generate, store, treat, or dispose of hazardous substances; persons harmed by the release of hazardous substances; and consumer groups were also obtained during GAO's work and are incorporated in this report where appropriate.

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Abbreviations

AIA	American Insurance Association
AIG	American International Group
CBO	Congressional Budget Office
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CGL	comprehensive general liability
CMA	Chemical Manufacturers Association
DES	diethylstilbestrol
EIL	environmental impairment liability
EPA	Environmental Protection Agency
EPIC	Environmental Protection Insurance Company
GAO	General Accounting Office
GGD	General Government Division
HRD	Human Resources Division
IELA	Insurance Environmental Litigation Association
ISO	Insurance Services Office
NACC	North American Casualty Cooperative
OTA	Office of Technology Assessment
PLIA	Pollution Liability Insurance Association
RCED	Resources, Community, and Economic Development Division
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
SITE	Superfund Innovative Technology Evaluation
TSDF	treatment, storage and disposal facility
WILL	Waste Insurance Liability Limited

Introduction

Many chemicals used in industrial processes—along with the products, byproducts, and wastes of these processes—pose deadly threats to human health if improperly released into the environment. This harm can be sudden, as with the release of deadly methyl isocyanate in Bhopal, India; or it can be gradual, as at Love Canal, New York, where chemical wastes slowly contaminated groundwater that leaked into basements of local residents. Along with the human suffering it can cause, pollution from hazardous chemical substances can result in multi-million-dollar liabilities arising from bodily injury, property damage, and environmental cleanup costs. Industries involved with hazardous substances need to be in a position to cover potential pollution liabilities while still maintaining their financial viability.

In past years, commercial insurance offered one means of covering part of the cost of such liability. More recently, however, the availability of pollution insurance has dwindled, raising the question of how well industries involved with hazardous materials can cover their pollution liability without such insurance. This report reviews the current availability of pollution insurance, the possible causes of insurers' withdrawal from the pollution insurance market, and the outlook for increased availability of this insurance in the future. In addition, the report discusses the use of alternative methods of covering pollution liability, other than through traditional commercial insurance policies.

Legislative Responses to Pollution Risks

The risks involved with hazardous substances were dramatized by incidents in the 1970s involving the chemical contamination of drinking water, beef cattle, and milk. In 1972, for example, unsafe levels of the toxic chemical hexachlorobenzene were discovered in beef from a Louisiana cattle ranch. The chemical was apparently being spread from a nearby waste disposal site by air currents. Testing of local residents showed that they had high levels of this chemical in their blood.

In 1987, the Environmental Protection Agency (EPA) estimated that about 100,000 companies generated hazardous substances. Seventy-one percent of these wastes come from the chemical and petroleum industries, and the remainder from a wide range of other industries including metal finishing, general manufacturing, and transportation. The Congress took major steps in dealing with chemical pollution problems by passing the Resource Conservation and Recovery Act of 1976 (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Both of these laws include pollution liability provisions.

RCRA requires EPA to promulgate regulations to control the nation's hazardous chemical wastes from their generation to their final disposal. Among EPA's RCRA regulations are requirements that owners and operators of the nation's hazardous waste treatment, storage, and disposal facilities (TSDFs) demonstrate financial responsibility for bodily injury and property damage to third parties caused by pollution incidents. EPA has identified about 4,000 TSDFs that are currently operating RCRA facilities available to handle hazardous wastes.

Under RCRA regulations, TSDF owners and operators must maintain liability coverage for sudden and accidental pollution incidents of at least \$1 million per occurrence, with an annual aggregate of at least \$2 million, excluding legal defense costs. Owners and operators of surface impoundment,¹ landfill, or land treatment facilities must also maintain liability coverage for gradual ("nonsudden") pollution incidents of at least \$3 million per occurrence, with an annual aggregate of at least \$6 million, excluding legal defense costs. Liability coverage may be demonstrated in one of several ways: (1) by having liability insurance, (2) by passing a financial test, (3) by providing a corporate guarantee, (4) by using a combination of the financial test and insurance, or (5) by using a combination of a corporate guarantee and insurance. These options are discussed further in chapter 3.

CERCLA, more commonly known as Superfund, addresses the need to clean up the nation's worst hazardous waste sites. Under CERCLA, parties that contributed to the dangerous conditions at these waste sites are held liable for the cost of their cleanup. We have estimated that the number of sites needing cleanup could eventually grow from the current 951 to over 4,000, cost as much as \$80 billion, and take until the year 2017 to complete.²

Evolution of Pollution Insurance

Prior to the 1970s, the insurance industry provided coverage for a broad range of commercial liability due to accidental personal injury or property damage—which might have included pollution incidents—under comprehensive general liability (CGL) policies. Following increased awareness of the financial liabilities associated with pollution incidents, the insurance industry in the late 1960s began an ongoing process of revising, redefining, and limiting policy language that might apply to

¹ An open pond or lagoon in which liquid or semisolid wastes are stored.

² This estimate is in 1983 dollars. See *Cleaning Up Hazardous Wastes: An Overview of Superfund Reauthorization Issues* (GAO/RCED-85-69, March 29, 1985).

pollution damages. For example, a "pollution exclusion" clause was added to the standard CGL policy to specify that the policy covered only sudden and accidental pollution incidents. During the 1970s, some insurers developed entirely separate Environmental Impairment Liability (EIL) policies specifically to cover pollution risks. When RCRA financial responsibility requirements specified that liability coverage must include both sudden and gradual pollution, the insurance industry developed a standard form claims-made pollution liability insurance policy.³ By 1986, two new standard form CGL policies had been created: claims-made and occurrence CGL policies. These policies imposed aggregate dollar limits, as well as per-occurrence limits, and provided coverage for pollution damages only through separate endorsements ("coverage parts").

Controversy Over Causes of the Pollution Insurance Problem

Despite such policy revisions, by the mid-1980s many major property/casualty insurers were maintaining that the combination of the inherent risks associated with pollution (such as long-latency diseases), judicial decisions involving liability standards and insurance contract coverage, and broad liability established by federal environmental laws made pollution exposures uninsurable.

Insurers maintain that basic concerns of underwriting⁴ a risk—the fortuity of occurrence and predictability of loss—cannot be satisfied when dealing with pollution risks, thereby making these risks uninsurable. Specifically, they maintain that from a technical standpoint, leakage at hazardous waste sites is a virtual certainty and therefore not a fortuitous, insurable event. They also maintain that expanded legal liability standards have made the extent of losses from pollution incidents unpredictable because an insurer may have to pay for damages not caused by the insured party. Adding to these concerns is the insurers' dismay over what they maintain are misinterpretations by courts of coverage provisions of insurance policies. They believe that such adverse court decisions have obliged them to pay claims for incidents that their policies did not cover and for which they collected no premiums. As a result, insurers believe, they are faced with enormous potential liability for hazardous waste site cleanups under CERCLA, along with

³Under an occurrence-based policy, the incident giving rise to the claim must occur during the policy period, but the claim can be filed after the policy period has elapsed, even though many years may have passed. Under a claims-made policy, the claim must generally be filed during the term of the policy.

⁴Underwriting is the process of identifying and evaluating risks and setting the premium to be charged for risks accepted by the insurer.

other pollution incidents. They maintain that given this potential for losses, the effects of CERCLA liability standards and court interpretations of contract coverage provisions could place a severe strain on their financial capacity to write property/casualty insurance in the future.

The insurers' positions regarding the legal system and environmental law have been contested by critics of the insurance industry. These critics maintain that recent problems in the commercial liability insurance industry, such as the sharp downturn in profits in the mid-1980s and consequent affordability and availability problems, are due mainly to the insurers' own business practices, rather than to legal factors. For example, they maintain that record high interest rates in the early 1980s led insurers to charge inadequate premiums and underwrite poor risks in order to attract premium dollars, which could be invested at high interest rates ("cash-flow underwriting"). Some critics further maintain that insurers are using their recent financial difficulties to justify changes in the legal system that would, in effect, limit future insurance claims losses by limiting the ability of plaintiffs to recover damages through lawsuits. They note that insurers made a similar plea for legal reform during the previous "insurance crisis" in the mid-1970s.

Congress Mandates Insurance Studies

This controversy over the causes of the constriction in the availability of pollution insurance was aired during the 1985-86 Superfund reauthorization process. The Congress heard conflicting testimony from the insurance industry and its critics on basic issues related to the financial performance of the insurance industry, current trends in judicial decisions on liability standards and contract interpretation, and other alleged impediments to pollution insurance. In the end, insurers were unable to convince the Congress that changes in CERCLA's liability standards were needed, and the 1986 Superfund Amendments and Reauthorization Act (SARA) was passed with little change to the 1980 CERCLA liability standards.⁵

In passing SARA, however, the Congress directed GAO to review four key issues associated with insurance for handlers of hazardous substances:

- The liability of those who clean up hazardous waste sites.
- The liability of those associated with hazardous waste sites after their closure.

⁵SARA did, however, generally allow EPA to indemnify CERCLA cleanup contractors for certain liabilities if they could demonstrate that insurance was unavailable to them.

- The liability of those responsible for underground petroleum storage tanks.
- The availability of insurance for individuals who may be liable for the release of hazardous substances into the environment.⁶

This report addresses the fourth issue, found in SARA section 208. The other issues will be the subjects of future GAO reports. In addition to this work on environmental insurance, GAO reported in May 1986 on issues surrounding environmental restoration insurance issues facing the trucking industry.⁷

Objective, Scope, and Methodology

The objective of this report is to provide the Congress with the study mandated by SARA section 208 on the availability of insurance for persons who generate or handle hazardous substances, and the effects of liability on their standards of care with regard to these substances.

Section 208 delineated the scope of our study. This section directed us to review eight interrelated economic and legal issues regarding the availability of pollution insurance. Table 1.1 lists these items in abbreviated form and indicates where they are discussed. (See app. I for the full legislative language and app. II for a detailed discussion of our objective, scope, and methodology.)

Table 1.1: Items to Be Evaluated Under SARA Section 208

Item	Where discussed
A. Current/future conditions for commercial insurance.	Chapters 2, 3
B. Current trends in statutory and common law remedies.	Chapter 4
C. Impact of changes in liability standards on statutory and common law remedies.	Chapter 4
D. Effect of liability standards on the protection of the environment and availability of insurance.	Chapters 2, 3, 4
E. Current trends in the judicial interpretation of insurance contracts.	Chapter 5
F. Frequency and severity of pollution claims closed during 1985.	Chapter 6
G. Other impediments to acquisition of liability insurance.	Chapters 2, 3
H. Effects of liability standards and financial responsibility requirements on the development of innovative waste reduction technologies.	Chapters 3, 4

⁶In addition to these four insurance studies, SARA directed GAO to perform two others. One pertaining to Superfund work force issues will be issued in the fall of 1987 (GAO/RCED-88-1) and the other, to be performed in the future, concerns SARA's toxic chemical release provisions.

⁷Motor Carriers: The Availability of Environmental Restoration Insurance (GAO/RCED-86-150BR, May 19, 1986).

As directed by section 208, we consulted EPA officials; state insurance regulators; insurance industry officials; persons who generate, store, treat, or dispose of hazardous substances; persons harmed by the release of hazardous substances; and consumer groups. In addition to our individual interviews, we invited representatives from these groups to participate in a conference we convened in February 1987 to discuss our study's issues and audit methodology. We also made a draft of this report available to the representatives. We discussed the draft with them and incorporated their comments throughout the report where appropriate.

Our analysis was based on extensive interviews on the condition of the pollution insurance market with insurers, state insurance regulators, generators and disposers of hazardous waste, EPA, and state RCRA program officials. Because many of the financial data needed to perform this study are proprietary or unavailable in any readily accessible form, we relied on the voluntary cooperation of the insurance and hazardous substances industries to provide us with relevant information. We discussed pollution insurance issues with 12 insurance companies, 3 insurance brokerage firms, and 4 insurance trade associations. We also contacted five reinsurance companies, a reinsurance broker, and a reinsurance trade association. To obtain the perspective of the hazardous substance industry we spoke with 5 generators, 11 TSDFs, and 6 associations representing industries with potential pollution risks. In addition, we discussed insurance regulatory issues with nine state insurance commissioners and a Washington-based consumer organization dealing with insurance.

We also reviewed industry data from A.M. Best, a leading source for data on the insurance industry. Most of this information, however, deals with the general condition of property/casualty insurance, of which pollution insurance is a small part. We found no industry-wide quantitative data on pollution insurance alone. We therefore attempted to gather information and data on pollution insurance through reports in the insurance trade press, congressional testimony, and articles and analyses by insurers, consumer groups, and others. We also obtained data on the frequency and severity of pollution insurance claims closed during 1985 by means of questionnaires that we sent to 104 property/casualty insurance organizations.

Our legal work involved a review of CERCLA and its 1986 amendments under SARA, as well as case law for liability standards applied under CERCLA, as amended. We researched state statutes and common law

causes of action and remedies for injury and damage caused by pollution. We also reviewed legislative changes to tort law to determine the impact of possible changes in traditional standards of liability on the ability of persons harmed by hazardous waste to obtain remedies for their injuries.

Our review of trends in court interpretations of insurance contracts involved examining relevant case law and legal articles on this issue, as well as the development of comprehensive general liability and pollution liability insurance contracts over recent decades. We also discussed with members of the Insurance Environmental Litigation Association, and others, the possible impact of changes in pollution insurance contract language.⁸

Our review was conducted between October 1986 and August 1987 and was performed in accordance with generally accepted government auditing standards. We sent a draft of this report to EPA for formal comment.

⁸The Insurance Environmental Litigation Association is a trade association comprised of major property/casualty insurance companies. It was formed in part for the purpose of presenting the position of its members in environmentally related insurance law cases.

Limited Availability of Pollution Insurance

Few insurance companies are currently offering pollution insurance. According to insurance industry officials, the uncertainties created by potentially enormous claim payments and unfavorable legal trends have led most of the insurance industry to perceive pollution as an uninsurable risk. The near-term outlook for increased availability of pollution insurance does not appear favorable, and many insurers indicate that they may never offer pollution insurance.

We identified only one insurer that actively seeks to insure pollution risks. We also identified a few insurers that, as an accommodation, provide pollution insurance to selected clients who carry coverage by the insurer for other risks. However, the amount of coverage they offer is limited, expensive, and may be available to only relatively low-risk operations. In addition, we identified five participant-owned and -operated risk pools that provide insurance for catastrophic general liability losses and currently include coverage for sudden pollution releases but not gradual releases.

We also identified two new risk pools that are being formed as an option to traditional insurance. Like the risk pools that provide catastrophic insurance, these new risk pools will be participant-owned and -operated. They will offer only pollution insurance and will cover both sudden and gradual releases. Because these groups are still in the formative stages, however, it is too early to assess their effectiveness in meeting the insurance needs of their members and filling the void created by the general lack of pollution insurance available from the insurance industry.

The Insurance Industry and Pollution Insurance

Property/casualty insurance comprises about half of insurance industry premiums. Life insurance and health insurance account for the remainder. Property/casualty insurance includes, among other things, workers' compensation, homeowner, and auto insurance, as well as specialty insurance lines such as Environmental Impairment Liability (EIL) insurance. The insurance industry wrote about \$154.3 billion in direct premiums in 1985 for property/casualty insurance. We estimate that less than one-half of one percent (about \$65 million) of those premiums were written for EIL insurance.

We have completed several studies addressing key aspects of the insurance industry. In July 1987 we reported on the profitability of the property/casualty insurance industry.¹ Profitability in the insurance industry is determined by combining both underwriting and investment results. We found that despite incurring substantial underwriting losses over the 10-year period 1976 through 1985, the property/casualty insurance industry more than offset those aggregate losses with investment gains. We estimated that the industry had about \$81 billion in after-tax income during that period. The insurance industry disagreed with our profitability estimate of \$81 billion—its method of calculation showed \$54 billion. However, even the lower estimate shows that the industry's average rate of return on net worth has not been out of line with those of other industries.

As we noted in a 1986 report that examined the cyclical nature of the property/casualty insurance industry, the most recent loss cycle was more protracted in duration than usual, with underwriting losses resulting every year since 1980.² The continuation of the industry's underwriting losses was exacerbated by the industry's cash flow underwriting pricing strategy, which relied upon investment income to overcome underwriting losses. Basically, companies were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investment. This strategy changed, however, as underwriting losses became unacceptably high.

Table 2.1 illustrates the most recent cycles in underwriting gains and losses, investment gains and losses, and profitability for property/casualty insurance from 1976 through 1985. As indicated in our July 1987 report, the most recent underwriting cycle peaked in 1978, then declined until it bottomed out in 1985 when the industry experienced record underwriting losses. The industry had after-tax profits, however, because of gains on investments during that same period. The Insurance Information Institute has reported that property/casualty insurance earnings improved substantially in 1986.³ On the basis of those data, we estimated that the after-tax net gain for property/casualty insurance increased from \$9.7 billion in 1985 to about \$17 billion in 1986. (On the

¹Insurance: Profitability of the Medical Malpractice and General Liability Lines (GAO/GGD-87-67, July 13, 1987).

²Tax Policy: Financial Cycles in the Property/Casualty Industry (GAO/GGD-86-56FS, April 9, 1986).

³The Insurance Information Institute is an organization sponsored by the insurance industry to provide information to the public and the Congress.

basis of the industry's method of calculation, the industry's after-tax income increased from \$1.9 billion in 1985 to \$12.7 billion in 1986.)

Table 2.1: Combined After-Tax Gains for the Property/Casualty Insurance Industry by Year, 1976-85

(in billions of dollars)					
Year	Underwriting gains (losses) ^a	Investment gains (losses) ^b	Pre-tax total	Federal income tax ^c	After-tax total
1976	(\$1.7)	\$7.2	\$5.4	\$0.1	\$5.3
1977	1.9	5.1	7.0	1.0	6.0
1978	2.5	7.8	10.3	1.4	8.9
1979	•	11.6	11.6	0.9	10.7
1980	(1.7)	15.9	14.2	0.6	13.6
1981	(4.5)	10.9	6.4	0.1	6.3
1982	(8.3)	18.4	10.1	(0.7)	10.8
1983	(11.1)	19.4	8.4	(1.2)	9.6
1984	(19.4)	17.9	(1.5)	(1.7)	0.2
1985	(22.6)	30.2	7.6	(2.0)	9.7
1976-85	(\$64.8)	\$144.3	\$79.5	(\$1.6)	\$81.1

Note: The data in this table are computed on a consolidated basis to eliminate double counting by excluding intercompany transactions between parent and subsidiary companies. Also, tables may not add up due to rounding of numbers.

^aNet premiums earned minus losses and expenses. These results are based on undiscounted reserves.

^bNet investment income plus realized and unrealized capital gains.

^cNegative federal income tax occurs because companies report losses for tax purposes and consequently generate negative income taxes. Negative income taxes can be applied to past taxes paid, which generate refunds or are carried forward to apply against future tax liabilities.

Source: Insurance: Profitability of the Medical Malpractice and General Liability Lines (GAO/GGD-87-67, July 13, 1987).

In regard to this table, trends in EIL insurance may differ from overall industry trends. The recovery in the insurance cycle that is indicated to have taken place probably does not reflect what has happened in the EIL market. Insurers tell us that this market has not made any significant recovery, although others argue that a broad market for EIL policies never really existed. Available estimates indicate that the 1984 annual premium volume for EIL insurance peaked at about \$65 million.⁴ We estimate that the 1986 premium volume was also about \$65 million. Although this does not appear to be a decline in nominal terms, it represents a decrease in total coverage offered, considering that rate increases, contractions of limits, and increases in deductibles occurred

⁴Because the insurance industry does not maintain data on pollution insurance separately, the data we present are estimates based on our discussions with insurance industry officials.

during this time period. Also, in 1984 and prior years, some sudden and accidental pollution releases were covered under CGL policies. By 1986, however, pollution coverage had been excluded from standard form CGL policies except by endorsement, according to insurance industry officials.

Current Pollution Insurance Providers

Today the supply of pollution insurance available to industries involved with hazardous substances is limited. We found only one supplier that actively markets pollution insurance: the American International Group (AIG). In addition, a number of other companies may occasionally write pollution insurance as an accommodation to their clients. One group that does this is the Pollution Liability Insurance Association (PLIA), a consortium of 18 insurance companies. Only two reinsurers of pollution insurance remain in the market. (Reinsurers are companies that assume, for a share of the premium, a portion of the potential liability risks that the insurance companies underwrite.)

American International Group

AIG, the principal current supplier of pollution insurance, is a holding company for approximately 110 member companies. American Home Assurance is the largest property/casualty insurance company within AIG and is the AIG member that underwrites pollution risks. AIG actively seeks to market pollution insurance. It is the only commercial insurance source we could identify that offers pollution insurance on a monoline basis (that is, without requiring the insured to carry any other AIG insurance).

AIG began writing EIL coverage in 1980 and wrote an estimated \$40 million in pollution premiums in 1986. Between 1980 and 1984, AIG offered policies with coverage up to \$20 million. Maximum coverage dropped to \$10 million in 1985 and 1986, which AIG officials attribute to a decline in the availability of reinsurance for pollution. Citing a gradual increase in reinsurance now available to them, the AIG officials we spoke with indicated that AIG recently raised its annual maximum policy limit to \$12.5 million, but noted that about half of the policies are at the RCRA liability requirement limit of \$6 million total annual coverage. These policies are written on a claims-made basis and provide gradual only, or gradual and sudden, pollution coverage.

According to its officials, AIG has the capacity to write more pollution insurance and would like to do so. They estimated that during the past year AIG approved 2,000 companies that applied for pollution insurance,

but only 400 companies took policies. The AIG officials thought that more companies did not take the offered coverage because perhaps the premium AIG wanted might have been higher than the companies were willing to pay or the coverage was narrower than what they were seeking to obtain.

AIG officials stated that a large portion of its policies are with hazardous waste treatment, storage, and disposal facilities (TSDFs) subject to RCRA regulations. AIG believes that certain types of pollution risks are assessable and insurable. The officials told us that a review of how the prospective insured manages a pollution risk is key to determining whether that risk is insured by AIG. The activities AIG covers include chemical manufacturing, mining, wastewater treatment, hazardous waste disposal, and petroleum storage terminals. However, AIG will not insure (1) older underground storage tanks because of difficulties regarding their structural integrity and (2) closed RCRA facilities because they are not actively managed.

AIG officials describe their initial entry into the pollution insurance market as cautious and attribute their successful participation to their history of adhering to very careful underwriting standards, including requiring detailed risk assessments and management assessments of each facility considered for coverage. They describe their competitors as underwriting pollution coverage less carefully, with insufficient emphasis on risk assessment and risk management.

Pollution Liability Insurance Association

PLIA is a consortium of insurance companies that reinsures the pollution business written by its members. PLIA was established in 1982 by a group of insurance companies that wanted to continue offering pollution coverage to their clients but were no longer able to obtain reinsurance for pollution policies. Each year PLIA's membership pool changes as insurance companies join and leave the group. Companies join PLIA if they have a need to offer pollution liability coverage to their clients and drop out if they do not. In 1984 PLIA's membership had reached 48 insurance companies that wrote \$2.4 million in pollution premiums. PLIA members wrote an estimated \$10 million in pollution premiums in 1985 and \$20 million in 1986.⁵ As of June 1987, PLIA membership was down to 18 companies. According to an association official, this reduction was due in part to PLIA's dropping 12 members that no longer met its financial standards.

⁵Data are not reported by individual member companies.

With the exception of pollution insurance for underground petroleum storage tanks, PLIA members do not market pollution insurance by itself.⁶ Rather, PLIA members, in general, offer pollution coverage as an accommodation to selected clients who carry coverage for other risks. As of July 1987, PLIA reported having about 150 such accommodation policies. The policy limits that PLIA offers are much lower than AIG's: \$1 million per occurrence and \$3 million annual aggregate. These limits meet the minimum RCRA liability coverage for sudden releases required for all TSDFs but not the minimum liability coverage for gradual releases that land disposal facilities are required to meet.

Just over half of PLIA's premium volume in 1986 came from policies on underground petroleum storage tanks. The PLIA underwriter who wrote the largest portion of the pollution policies on petroleum tanks stopped offering this coverage effective July 1, 1987; the tank owners are forming a risk retention group to provide for their future insurance needs.

Other Commercial Insurers

Representatives of major insurance industry trade associations and insurance brokers identified AIG and PLIA as the only important sources of pollution coverage among traditional insurance companies. They were unable to identify any other significant insurance industry suppliers, although some insurance companies we spoke with acknowledged writing pollution coverage to some extent now. However, their activity seems to be limited to either an accommodation to selected clients or continuation of a few older accounts. Citing the uncertainties created by potentially enormous claim payouts and unfavorable legal trends, the insurance industry representatives said most commercial insurers had withdrawn from the pollution insurance market and indicated they may never offer pollution insurance.

Reinsurance for Pollution Risks

Insurers spread the risks of insuring potential losses by selling a portion of those potential losses to reinsurers in exchange for a portion of the premium. As such, reinsurers play a key role in insurance availability to the extent that they are willing to reinsure particular risks. Currently, the availability of reinsurance for hazardous waste pollution risks appears to be limited, according to the five major reinsurers and the

⁶Petroleum is not subject to RCRA's financial regulations for TSDFs. EPA is developing specific financial regulations for petroleum underground storage tanks. Liability issues surrounding underground petroleum storage tanks will be addressed in a future GAO report.

reinsurance broker we spoke with. In the opinion of these representatives, reinsurance for pollution liability risks has declined sharply since 1984, when foreign reinsurers began leaving the market.

Neither could we obtain information on current reinsurance premium volume or rates for pollution risks. Simply identifying companies that currently write this business is difficult. We could identify only two companies that currently offer such reinsurance, and then only on a very selective basis: General Reinsurance Corporation and Munich American Reinsurance Company. We were told by industry representatives that quite a few other reinsurers may write this business on a selective basis but that the companies would not be willing to admit it because they would not want their other customers coming to them to reinsure pollution risks.

Outlook for the Supply of Pollution Insurance Is Uncertain

Although commercial insurers generally told us that they were unwilling to insure pollution liabilities, some coverage is available and sources outside the insurance industry are entering the market. In addition to the two industry sources (AIG and PLIA) that are currently offering pollution insurance, five risk pools that offer catastrophic insurance cover sudden pollution risks, and two risk-retention groups are entering the pollution market. However, it is not certain whether these kinds of insurance can meet the needs of those that handle hazardous substances.

The limited availability of adequate and affordable commercial pollution insurance has led generators and disposers to consider risk pooling as an alternative way of dealing with their pollution liability exposure. Both the catastrophic coverage pools already in operation, and the risk-retention groups that are in the process of forming, are member-owned and -operated insurance pools in which pollution liability risks are shared among the participants. It is precisely their potential for spreading the risk of individual generators and disposers that makes risk-retention groups a viable alternative to commercial pollution insurance. However, risk-retention groups targeting other areas, such as medical malpractice and product liability, have been slow to develop and have drawn criticism for not having sufficient capitalization to meet potential liabilities.

Risk Pools Provide Catastrophic Pollution Insurance

As mentioned earlier, insurers generally exclude pollution liability from their current CGL policies. However, some risk pools that provide excess general liability insurance (that is, coverage beyond the limits of normal primary coverage) include coverage for sudden pollution releases. Excess coverage is often referred to as catastrophic coverage because of the high level at which the coverage begins, usually above \$25 million or more in losses, and because of the quantity of coverage that can be purchased, up to \$140 million. This coverage extends to general liabilities not specifically excluded under the excess coverage agreement. Because excess coverage excludes gradual pollution releases, however, its usefulness to companies with potential gradual releases of hazardous substances, such as land disposal activities, is limited. Indeed, while there are more than 100,000 hazardous substance generators and about 4,000 TSDFs, the excess coverage pools that included pollution coverage had only about 678 participants as of March 1987.⁷

We identified five risk pools that include sudden pollution liability in the catastrophic coverage they provide. These pools, together with the approximate number of participants as of March 1987, are: ACE Insurance Company, Limited (300); Energy Insurance Mutual (28); PRIMEX Limited (20); Tortuga Casualty Company (30); and XL Insurance Company Limited (300).⁸

Two of the pools have membership restrictions: Energy Insurance Mutual limits its membership to electric and gas utilities and PRIMEX to medium-sized chemical companies. Also, PRIMEX's coverage begins at the lowest level of losses, providing \$15 million in coverage above \$1 million in losses, while Energy Insurance Mutual provides \$10 million to \$50 million in coverage above \$25 million in losses.

The other three groups have diverse industry participation. ACE, for example, has policyholders in manufacturing, transportation, financial and other services, mining, retail trade, construction, and wholesale trade. They also offer broad coverage limits: Tortuga provides up to \$50 million in coverage above \$25 million in losses; XL provides up to \$75

⁷EPA identified an estimated 85,000 large-quantity generators (who generate more than 1,000 kilograms of hazardous waste per month) since the passage of RCRA in 1976. Of those EPA estimates that 40,000 are currently operating. In addition, EPA estimates that over 100,000 small-quantity generators (who generate between 100 and 1,000 kilograms per month) are currently operating, although only about 60,000 had been identified by EPA as of July 1987. These figures do not include generators who do not generate a hazardous waste but do face potential pollution releases from hazardous substances used in the production process. These generators may number in the tens of thousands.

⁸Business Insurance, March 30, 1987.

million in coverage above \$25 million in losses; and ACE provides up to \$140 million in coverage above \$100 million in losses.

Risk-Retention Groups

Efforts to form risk-retention groups for those with potential pollution liability are being initiated by financial brokers and trade associations whose clients or members are unable to obtain pollution insurance from the insurance industry. Risk-retention groups emerged after the enactment of the Product Liability Risk Retention Act of 1981, which enables certain companies to form self-insurance associations or corporations that could provide insurance to cover their members' potential product liability risks when commercial product liability insurance became scarce. The act also preempts state laws prohibiting such pools. The viability of this option for pollution insurance was enhanced by two recent laws. First, the Risk Retention Amendments of 1986 expanded the concept of risk retention beyond product liability risks to allow a broader range of firms with common liability risks (not necessarily related to product liability) to form self-insurance pools. Second, section 210 of SARA specifies that risk-retention groups may operate to provide pollution liability insurance to their members.

During our review we identified three risk-retention groups that were in the process of forming to meet pollution insurance needs in the hazardous substance industry. All three anticipated being operational by late 1986 or early 1987. However, two have slipped their original start-up dates to late 1987 and the third effort was terminated in August 1987. The two ongoing efforts are Hypercept and the Environmental Protection Insurance Company (EPIC). These groups are targeting small to mid-sized firms. Hypercept plans to initially offer up to \$2 million total annual coverage to about 33 companies and, as participation increases, plans to increase coverage limits to \$6 million. EPIC plans to offer up to \$10 million annual coverage to about 200 companies. The third group, North American Casualty Cooperative (NACC), was targeting very large companies and planned to offer up to \$12 million to \$50 million annual coverage to 30 to 100 "Fortune 500" companies. NACC withdrew its offering when, according to its founder, companies were not willing to put up the initial capital contribution needed to begin operations.

Also, an earlier effort to form a risk-pooling group for hazardous waste disposers was abandoned in late 1986. That effort, called Waste Insurance Liability Limited (WILL), was undertaken by the National Solid Wastes Management Association in 1985. According to an official, the association attempted to develop an industry-owned insurance company

with coverage that would satisfy RCRA liability requirements for its members and protect their members' assets. Because the waste disposal industry is comprised of a few very large companies and many small companies, the association was unable to set initial capital contributions and annual premiums that prospective participants considered equitable. The association could not resolve these problems and decided that it would not go forward with its plan.

Summary

The supply of pollution insurance currently available to the hazardous substance industry is limited. Only one insurance industry source, AIG, is actively pursuing the pollution insurance market. A few other companies write pollution insurance for selected clients who carry coverage for other risks.

The remainder of the insurance industry, for the most part, regards pollution risks as uninsurable. These companies cite unfavorable legal trends and potentially enormous claim payments for their withdrawal from the market over the last few years and their reluctance to underwrite pollution risks. As we discuss in subsequent chapters, insurers maintain that the combination of the inherent risk of insuring against pollution, uncertainty about judicial decisions regarding liability standards and insurance contract coverage for pollution incidents, and broad liability established by federal environmental law made it too difficult for them to write new pollution insurance at a profit. More importantly, insurers claim that these aspects of current pollution liability may prevent their future reentry into the pollution insurance market, even as the overall insurance industry recovers its financial position.

In an effort to fill the void created by the lack of pollution insurance available from the insurance industry, risk-retention groups are forming. These participant-owned and -operated self-insurance pools are forming as an alternative to traditional insurance for firms that handle hazardous substances and want insurance for their potential pollution risks. However, risk-retention groups established to insure other types of liabilities have been slow to develop and may face capitalization problems. Because risk-retention groups for pollution liabilities are still in the formative stages, it is too early to assess their effectiveness in meeting the insurance needs of their members.

Agency Comments

We received both oral and written comments on a draft of this report from EPA. In elaborating on their written comments, EPA officials commented that they generally concur with the report's findings, conclusions, recommendation, and matter for congressional consideration.

EPA Needs to Develop Additional Financial Responsibility Requirements for Those With Potential Pollution Releases

TSDFs, generators, and innovators of waste reduction technologies who seek to protect themselves against losses arising from pollution liabilities are, for the most part, finding that pollution insurance is scarce and expensive. According to industry sources, chemical manufacturers generally do not have commercial pollution insurance, nor do many product manufacturers that use toxic materials in their production processes. Most hazardous waste land disposal facilities also do not have pollution insurance.

In order to ensure a minimum level of financial resources to cover certain pollution liabilities for TSDFs, RCRA required EPA to establish financial responsibility requirements. In response, EPA developed regulations allowing TSDFs to demonstrate financial responsibility through the use of insurance or by meeting financial responsibility tests. Due to the absence of insurance, many of the approximately 4,000 TSDFs are demonstrating financial responsibility through these tests. Similar requirements were mandated under CERCLA in 1980 for the broader range of facilities not covered by RCRA or other federal law. As yet, EPA has not established these requirements.

Insurance for TSDFs

According to EPA regional and most state RCRA program representatives, TSDFs with land disposal activities (specifically, land treatment, surface impoundments, and landfills) are experiencing the greatest difficulty getting insurance. Under RCRA, these facilities are required to have both sudden and gradual pollution coverage. However, as indicated in chapter 2, insurance companies, over the past few years, have practically withdrawn from the market of offering gradual pollution liability insurance.

According to an official of the National Solid Wastes Management Association, which represents about 130 companies that handle hazardous or infectious materials, pollution liability insurance is a major problem for all of its members. For the most part, member companies meet their pollution liability requirements through financial responsibility tests rather than with insurance. The association membership includes 18 disposal companies that together account for at least 75 percent of commercially disposed hazardous waste.

In a review of annual reports and other public documents, we found that the nation's two largest hazardous waste disposal companies had indemnified pollution insurance policies that do not transfer liability risk to the insurer except in the event of bankruptcy. On a Securities and

Exchange Commission form (SEC form 10-K) that publicly-owned corporations are required to file annually, these two disposal companies reported that, during 1985, they had indemnified pollution insurance policies in which they agreed to reimburse their insurer for claims paid on the policies. Officials at both companies told us that they still have indemnified pollution insurance policies and that the policies are with AIG. The officials said that reimbursement is provided under a separate contractual agreement and that the reason for having these policies is to comply with state regulations requiring insurance. However, neither regarded these policies as insurance and both said their companies use the financial test to meet federal RCRA financial requirements. According to AIG officials, AIG also does not regard indemnified policies as insurance, and as of July 1987, they had fewer than 10 of these policies in effect.

There is no centralized data system documenting how pollution insurance premiums and coverage levels have changed for the about 4,000 TSDFs identified by EPA as currently operating RCRA facilities available to handle hazardous waste. However, federal and state RCRA program representatives indicated, on the basis of their experience and knowledge of facilities within their respective states and regions, that pollution insurance premiums have increased several fold over the past few years while the level of coverage has decreased substantially. We have no basis for evaluating the appropriateness of the changes in premiums and coverage because other factors at the facilities may have affected the changes (e.g., expanding operations or increasing levels of hazardous waste activity). However, the regulators said these changes in premiums and coverage are examples of the situation facing TSDFs.

Insurance for Generators

There are over 100,000 facilities identified by EPA as hazardous substance generators. However, a relatively small number of companies accounts for most of the hazardous substances generated nationwide. The Chemical Manufacturers Association (CMA) represents 167 companies that produce about 90 percent of the basic industrial chemicals in the United States. CMA told the Congress in March 1986 that commercial pollution insurance (both for gradual and for sudden pollution releases) for its member companies has disappeared altogether.¹

¹Statement of CMA before the Senate Committee on Commerce, Science and Transportation, on the availability and cost of liability insurance, March 4, 1986.

Other industries are also experiencing difficulties obtaining commercial pollution insurance. For example, the National Association of Manufacturers, whose approximately 14,000 member companies account for 80 percent of our nation's manufactured output, is a potential market for pollution insurance because its member companies use toxic chemicals as product ingredients. An association official told us that while pollution insurance was not strictly unobtainable, it is difficult to obtain and very expensive. The National Association of Chemical Distributors, whose 280 member companies handle the movement and distribution of 25 percent of all manufactured chemicals, told us that pollution risk insurance is virtually unobtainable for its members.

CMA surveyed its members regarding past and present insurance availability and their insurance practices. Thirty-seven percent of its members (62 of 167 companies) responded to the survey conducted between February and June of 1987. The CMA summary results available to us indicated that 14 U.S.-based chemical companies had gradual pollution coverage under EIL policies in 1984; 4 had EIL policies in 1986, with much lower policy limits. Further, sudden and accidental pollution coverage was reduced in scope and became largely unavailable to the chemical industry in 1986.

From its survey results CMA concluded that insurers continue to demonstrate a reluctance to insure high-hazard liability risks; CMA also believes insurers will not insure chemical business in the near future. As an alternative, more chemical companies will have to self-insure pollution liabilities—a situation of greater concern to small and medium-sized chemical companies than to large ones.

We asked CMA to provide us with contacts among its member companies who would speak with us in detail about their experiences obtaining pollution insurance. We were told that individual companies were reluctant to do so because of concern about disclosing proprietary information that could hurt them competitively. However, CMA did identify officials of five chemical manufacturers who agreed to meet with us. All five told us that their companies have no true risk-transfer insurance for pollution risks. Two of the companies with TSD land disposal risks have fully indemnified policies to meet certain individual state requirements but generally use the financial test to meet their RCRA financial responsibility requirements. However, we have no way to assess the extent to which the reported experiences of these five companies mirror the rest of the industry.

Surveys by the Risk and Insurance Management Society present similar results. This group, which represents about 3,800 companies, service firms, nonprofit institutions, and governmental entities, surveyed its members' insurance coverage for 1985 and 1986. Those who responded to the pollution portion of the surveys (16 percent and 7 percent, respectively, for those years) reported a sharp cut in availability of pollution insurance in 1985 and further reductions in 1986. They also noted a marked increase in premiums and deductibles, together with restrictions in coverage for the same period.

Insurance for Innovators of Waste- Reduction Technologies

The rising costs of waste management and associated liabilities for waste disposal make waste reduction an increasingly more desirable objective. By reducing the generation of waste, industry can save waste treatment costs and achieve better protection for health and the environment. At present, the development of these alternative and innovative waste reduction technologies is primarily inhibited by economic factors other than the availability of insurance.

Economic Factors Cited as Primary Obstacle to Waste Reduction Effort

Recent major studies have considered the impact of several economic factors, including insurance, on emerging waste reduction technologies. In a 1986 Office of Technology Assessment survey, industry representatives said that economic factors were the most significant barriers to waste reduction.² A 1986 EPA report to Congress noted that even though waste minimization practices often lead to cost savings in the long run, availability of capital in the short run for plant modernization is often a significant obstacle to their implementation.³ A 1985 Congressional Budget Office report also found industry introducing only limited applications of waste-reduction technologies despite the long-term economic and environmental benefits of using them.⁴ We reported in 1986 that the adoption of permanent treatment technologies at Superfund sites faces initial barriers more significant than insurance, including economic and

²Serious Reduction of Hazardous Waste for Pollution Prevention and Industrial Efficiency, OTA, September 1986.

³Minimization of Hazardous Waste, Executive Summary and Fact Sheet, EPA, October 1986.

⁴Hazardous Waste Management: Recent Changes and Policy Alternatives, Congressional Budget Office, May 1985.

marketing uncertainties as well as a number of institutional, regulatory, and informational barriers.⁶

Insurance May Be an Obstacle in the Future

Our examination of the Superfund Innovative Technology Evaluation Program, now underway at EPA, indicates that as technologies evolve and approach commercial application, the need for insurance may become more significant. EPA established the program in 1986 to accelerate the development, demonstration, and use of new or innovative technologies. These technologies are being tested on cleanup activities at Superfund sites, but they may be useful for routine waste reduction as well. In its program plan, EPA states that liability concerns of technology developers and potential commercial users can be an important obstacle to both the development and use of new hazardous substance treatment technologies.⁶ The program plan acknowledges that developers of innovative technologies may find that liability insurance to cover their operational risks during development and testing of those technologies is difficult or impossible to obtain.

We spoke with representatives of 11 of the original 12 demonstrators participating in the program to determine their insurance status. According to 7 of the 11 representatives, as of August 1987, one company left the program because pollution insurance was unavailable, three had liability insurance to cover their operational risks during development and testing of their technologies, and three are relying on EPA to provide contractor indemnification for the demonstrations.⁷ Of the remaining four companies, one has decided to self-insure while the other three have not yet resolved how to cover their potential liabilities.

The experience of these demonstrators suggests that the lack of performance records for innovative technologies may create uncertainty about the long-term effectiveness of these new cleanup remedies. EPA officials responsible for the program told us that, because of this uncertainty, there may be a tendency within the insurance industry to impute a probability of failure to some alternative technologies. All participants

⁶Hazardous Waste: EPA's Consideration of Permanent Cleanup Remedies (GAO/RCED-86-178BR, July 7, 1986).

⁶Superfund Innovative Technology Evaluation (SITE) Strategy and Program Plan, EPA, December 1986.

⁷SARA section 119 generally allows EPA to indemnify Superfund cleanup contractors for their liabilities due to negligence arising from site cleanup activities.

said they are marketing or hope to market their technologies to the hazardous waste industry. At that point, a lack of appropriate pollution and product liability insurance may become a barrier to the commercial development of those innovative technologies.

Financial Responsibility Tests as an Alternative to Insurance

With the passage of RCRA in 1976, the Congress required that EPA establish financial responsibility requirements to ensure that hazardous waste TSDFs have adequate financial resources to cover certain pollution liabilities. In response, EPA developed and implemented what it regards as minimum liability standards and identified financial responsibility mechanisms, including liability insurance, that TSDF owners or operators may use to demonstrate financial responsibility. In 1980, with the passage of CERCLA, the Congress expanded the mandate for financial responsibility requirements to include certain facilities not covered under RCRA or other federal law. Although by 1983 EPA had promulgated the regulations for TSDFs under RCRA, it has not established financial responsibility requirements for those classes of facilities covered by CERCLA financial responsibility provisions, which could include generators and innovators of waste-reduction technologies.

Liability Requirements for TSDFs

EPA regulations developed pursuant to RCRA require that TSDF owners or operators maintain some specific financial responsibility for liabilities to third parties in case of bodily injury and property damages caused by sudden and/or gradual accidental pollution occurrences. EPA regulations allow TSDFs to demonstrate financial responsibility by any of the following mechanisms: insurance, financial test, corporate guarantee, combination of insurance and the financial test, or combination of insurance and a corporate guarantee. As table 3.1 shows, all TSDFs must maintain sudden accidental liability coverage of at least \$1 million per occurrence, with an annual aggregate of at least \$2 million. Additionally, land disposal facilities must maintain nonsudden (gradual) accidental liability coverage of at least \$3 million per occurrence, with an annual aggregate of at least \$6 million. The TSDFs may demonstrate liability coverage by using one of the specified mechanisms.

**Table 3.1: RCRA Third-Party Liability
Requirements for TSDFs**

Sudden accidental occurrences	Gradual accidental occurrences
An owner or operator of a TSDF must have liability coverage for at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.	An owner or operator of a land disposal facility must maintain at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.
This liability coverage may be demonstrated by one of the following mechanisms:	
Liability insurance	
Financial test ^a	
Corporate guarantee ^b	
Combination of insurance and financial test	
Combination of insurance and corporate guarantee	

^aThe financial test may be met by demonstrating either (1) a prescribed amount of working capital, tangible net worth, and U.S. assets or (2) a specified bond rating, a prescribed amount of tangible net worth, and U.S. assets.

^bA corporate guarantee is a written guarantee of liability coverage by the parent corporation of the TSDF owner or operator. To use this (1) the parent corporation must meet the financial test and (2) the state in which the parent corporation is incorporated and the state in which the demonstrating facility is located must report to EPA that the guarantee is legally valid and enforceable in that state.

As mentioned earlier, there is no centralized data system at the federal level that identifies the frequency with which TSDFs use the different financial options to demonstrate financial responsibility. However, most federal and state representatives responsible for administering the RCRA program in the 15 states contacted during our review told us that the financial test was the option most often used to meet the RCRA requirements.⁸ Insurance was cited as the second most often used option. These program representatives pointed out that smaller companies, in particular, are having a difficult time due to high insurance premiums and an inability to meet the financial test requirements.

To pass the financial test specified in EPA regulations, facility owners must demonstrate that they have sufficient assets to cover their potential liability for sudden or sudden and gradual occurrences. In lieu of an insurance policy, the owners must submit financial statements from an independent auditor to state representatives responsible for administering the RCRA program.

In addition to insurance and the financial test, RCRA regulations allow the use of a corporate guarantee, a combination of insurance and the

⁸The 15 states we contacted are Alabama, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas.

financial test, and a combination of insurance and a corporate guarantee. According to RCRA program representatives in the 15 states we contacted, very few TSDFs presently use the combination of mechanisms to satisfy the RCRA requirements. As of June 1987, 12 of the 15 states contacted allow the use of corporate guarantees. Other states are expected to allow the use of this option in the near future. EPA Region IV officials estimated that only about 14 percent of the facilities in the region, all located in Alabama, are currently using corporate guarantees.

Most TSDFs claim that they are able to meet RCRA financial responsibility requirements, even with the current general unavailability of pollution insurance. For instance, on November 8, 1985, TSDFs that were operating land disposal facilities had to certify compliance with RCRA groundwater monitoring and financial responsibility requirements. Of the 1,538 land disposal facilities operating at that time, only about 60 of the facilities failed to certify compliance with the financial responsibility requirements. (Approximately 1,000 of the 1,538 facilities failed to meet groundwater monitoring requirements and have been ordered closed.) An official of one major commercial disposal company told us that hazardous waste disposal companies use the financial test and corporate guarantee to demonstrate financial responsibility for closure, post-closure liability, and third-party liability requirements. He expressed concern that a company's corporate capacity to pass these tests may be strained as EPA issues other financial responsibility regulations using these tests for such programs as RCRA corrective action and CERCLA section 108(b). Because of these concerns, EPA and industry representatives have been meeting over the last year to discuss the adequacy of financial responsibility tests and to explore other options to ensure financial responsibility under environmental laws.

Liability Requirements for Others Have Not Been Implemented

Section 108(b) of CERCLA mandated the development of financial responsibility requirements, consistent with the degree of associated risks, for certain classes of facilities that handle hazardous substances and are not covered under RCRA or other federal law. The act required that beginning not earlier than 1985, EPA promulgate financial responsibility requirements for those facilities. These requirements were to be phased in over a period of not less than 3 years and not longer than 6 years.

SARA amended these requirements in 1986 by adding that financial responsibility may be established by any one or any combination of the

following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. Further, it directed that the financial responsibility requirements contained in forthcoming regulations be phased in "as quickly as can reasonably be achieved but in no event more than 4 years" after the regulations are issued.

EPA, up until 1983, performed several studies to define the scope of these requirements in terms of who and what they would apply to, and to lay out a conceptual framework for all the possible things they could do. However, according to the EPA staff person in charge of this effort, the work was stalled in 1983 because of lack of funds. He also said that an attempt to renew the work in early 1987 was again halted by EPA in June 1987. According to the official, EPA has no plans or time frames for developing the regulations. As a consequence, EPA has not established a financial safety net to protect those who may be harmed from releases of hazardous wastes by other than the owners or operators of TSDFs.

Conclusions

Although a few insurance sources are currently offering pollution insurance, most TSDFs, generators with pollution risks, and innovators of waste-reduction technologies are not now obtaining commercial pollution insurance and are operating without this coverage. EPA has implemented regulations under RCRA that set minimum financial responsibility requirements for TSDFs. In the absence of insurance, the requirements ensure that these facilities have at least a minimum level of internal financial resources to cover pollution liabilities, such as those involving third-party bodily injury and property damage.

EPA has not, however, established similar requirements under CERCLA for other classes of facilities with potential pollution liabilities. Given the general unavailability of insurance to cover risks associated with hazardous substances, it is critical that EPA develop and implement the 1980 CERCLA financial responsibility requirements for the potentially broad range of facilities covered by CERCLA section 108(b).

Recommendation to the Administrator, EPA

We recommend that the Administrator, EPA, establish specific milestones leading to the timely implementation of financial responsibility regulations for the risks associated with classes of facilities that EPA determines are covered by CERCLA section 108(b).

Legal Liability Standards and Remedies for Cleanup and Compensation

CERCLA was enacted to ensure the cleanup of the nation's abandoned hazardous waste sites. CERCLA liability standards, which were designed to facilitate actions by the federal government to compel cleanup and recover cleanup costs, have been consistently upheld by federal courts. However, the act does not address the need to compensate persons harmed by hazardous substance releases. For the most part, persons seeking redress for bodily injury or property damage bear the burden of proving liability under varying state laws. While changes brought about in some state courts have made it easier for alleged victims to seek compensation, in other states recent tort reform legislation may have made it more difficult.

Many major property/casualty insurers claim that the application of liability standards associated with cleanup under CERCLA is an extreme impediment to the availability of pollution insurance. They maintain that these standards create the likelihood that an insured's conduct will bear no relationship to the extent of his liability, thus making it impossible for insurers to predict pollution losses. Regarding compensation for bodily injury and property damage under state common law, insurers maintain that new theories of liability, new forms of recovery (such as for medical monitoring and impaired quality of life), and changes in statutes of limitations also undermine the predictability needed to underwrite pollution risks. In 1985, insurers reported to us that they made relatively modest amounts of claim payments involving pollution incidents, but that several thousand pollution claims had not been settled. Insurers assert that the value of these open claims and other future pollution claims could severely strain their capacity to write property/casualty insurance in the future.

The extent to which insurers may be held liable for the cleanup of old waste sites under CERCLA hinges on court interpretations of disputed insurance contract provisions. Regarding current and future TSDFs, however, RCRA established a program to manage hazardous waste from "cradle to grave" that should make it easier for insurers to underwrite pollution risks. The objective of this program is to ensure that hazardous waste is handled in a manner that protects human health and the environment. In addition, the program established specific technical standards for the design and safe operation of TSDFs.

This chapter discusses the liability standards faced by parties involved with hazardous wastes. Chapter 5 discusses how the courts are applying these liability standards to the parties' insurers through interpretation

of insurance policies. Chapter 6 presents data on the number and value of pollution claims paid by insurers in 1985.

Liability Standards and Remedies Under CERCLA

CERCLA's authority focuses on cleanup of hazardous waste sites that are characterized as abandoned or uncontrolled. Under CERCLA, responsible parties are held liable to clean up the sites themselves or to reimburse the government for expenses incurred in cleaning up the sites or mitigating losses to natural resources. This liability is retroactive, since responsible parties include not only any present owner or operator of the site but also any past owner or operator of the site at the time of disposal; transporters of hazardous substances who selected the site; and the generators of the substance. Although CERCLA does not provide redress for injuries or damages, it does establish the period of time in which an injured party may seek compensation under state law.

Since the enactment of CERCLA, courts have consistently upheld its broad standards of liability and causation. The following three standards were designed to make it easier for the government to seek cleanup by eliminating certain requirements for proof on the part of the federal government.

Strict liability. Courts have consistently held that CERCLA imposes strict liability, meaning that the government need not prove negligence, or failure to exercise due care, in order for defendants to be liable for cleanup costs. As a result, both current and past owners and operators of hazardous waste sites are liable for cleanup regardless of whether they caused the presence or release of the hazardous substance. In addition, generators who arranged for disposal or treatment are liable even if they did not select or were not aware of the site chosen for disposal. Transporters who selected a disposal site and carried substances to it are also considered liable even though they did not cause the release.

Joint and several liability. Although a number of parties may have contributed to the presence of hazardous wastes at a site, courts, under this standard, have ruled that the government can hold one responsible party liable for the entire costs of cleanup, not just for that portion that can be attributed to that party's wastes. As illustrated in the CERCLA case of *United States v. Chem-Dyne Corp.*,¹ joint and several liability is appropriate for most CERCLA cleanups because wastes have been comingled and it is difficult to establish "a reasonable basis for division

¹572 F.Supp. 802 (S.D. Ohio 1983).

according to the contribution of each."² As the court noted, only if the harm is divisible and there is a reasonable basis for apportionment of damages will each defendant be liable for the portion of harm he himself caused. Further, courts, as in the CERCLA case of United States v. South Carolina Recycling and Disposal,³ rejected the notion that relative volumes of waste that generators contributed to a site could be used as a means of apportioning liability.

Causation. Under CERCLA, a generator may be held liable for cleanup even without a specific determination that the generator's wastes were among the hazardous materials released at a site. Following a district court case in 1983, other districts have adopted a causation test that requires demonstrating only that a generator's wastes were sent to a site, that its wastes were at the site at the time of release, and that a hazardous substance was released and cleanup costs incurred.⁴

Effect of CERCLA Liability Standards on Insurability and Standards of Care

Under a negligence standard in lieu of strict liability, the government would have to demonstrate that one or all of the parties that caused the presence of hazardous wastes had been negligent, or had failed to exercise an appropriate standard of care. Further, even if the government were able to prove negligence, in the absence of joint and several liability, it would have to locate all responsible parties and could recover their proportionate share of cleanup costs only from those that were financially solvent; any remaining cleanup costs would have to be borne by the government.

Because CERCLA's strict, joint and several liability standards apply to any party responsible for the presence of hazardous wastes at a site, regardless of the extent of wastes contributed or the care taken to prevent contamination, the federal government can more easily seek cleanup than if it had to prove liability under other standards, such as negligence. Using an extreme example, a generator who disposed of one barrel of waste material at a land disposal facility 30 years ago could now be liable for all cleanup costs resulting from gradual seepage of wastes during the past 20 years. In practice, this extreme situation is

²572 F. Supp. at 811.

³14 E.L.R. 20,272 (D.S.C. 1984).

⁴United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). See also United States v. South Carolina Recycling & Disposal, Inc., 14 E.L.R. 20,272 (D.S.C. 1984).

not likely to take place. SARA section 122 includes a provision for settlement with *de minimis* (very small) contributors and also includes provision for the use of nonbinding allocations of liability among responsible parties in order to expedite the apportionment of CERCLA site cleanup costs. In addition, SARA section 113 provides that in resolving contribution claims, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."

Insurers assert, however, that CERCLA's liability standards make it impossible to define risks, predict losses, and establish appropriate premiums for insuring companies involved with hazardous wastes, since a policyholder could become involved in a joint and several liability situation through the conduct of another party. Depending on how the liability is applied, an insurer could find itself providing coverage for the conduct of persons other than its policyholder. For example, insurers cite their concern that generators who dispose of their hazardous wastes at common disposal facilities could become jointly and severally liable if the disposal facility did not have adequate resources to remedy releases that cause off-site property damage and bodily harm.

We believe, however, that the difficulties in predicting how CERCLA's joint and several liability may be applied have more to do with past insurance policies and losses related to previously unmanaged waste than with current or future policies. As noted earlier, RCRA requires all hazardous wastes to be stored or disposed of at permitted facilities whose owners and operators must meet federal standards of care to assure that hazardous wastes are handled in a manner that protects human health and the environment. Additionally, a generator and its insurer will not risk liability at a common disposal facility unless the facility owners/operators do not have adequate resources to cover their liabilities. Owners/operators must carry a minimum amount of insurance coverage or meet some other financial means test to cover liabilities associated with the facility's operation and its subsequent closure and post-closure care.

Insurers go on to assert that CERCLA's standards of liability not only have reduced the availability of pollution insurance, but also have affected the standard of care owed by generators, transporters, and owners/operators of TSDFs. They maintain that the liability standards undermine these parties' incentives to exercise due care to prevent pollution because the standard of care is not related to the potential for liability. However, an official of the largest commercial waste disposal

firm told us that standards of liability have in fact increased the standard of care taken by the industry. He told us that some of the larger generators are now investing in expensive equipment and facilities for their own on-site treatment and disposal facilities. Such generators can then keep total control of their waste and would not be subject to joint and several liability. Smaller firms that cannot afford the expensive outlays necessary for their own hazardous waste facilities are looking to commercial facilities that practice standards of care that will keep the generators free from this liability. He also told us that disposers are seeking additional ways to reduce the impact of CERCLA liability. He noted that his firm was developing innovative disposal technologies and working with generators to reduce their waste output.

A CMA official told us that CERCLA's standards of liability do not play a role in its member companies' standard of care. He said, "CMA members place the health and safety of their workers and the public as their highest priority." It should also be noted that the one insurer marketing pollution insurance (AIG) offers insurance only to companies that demonstrate that they exercise an appropriate standard of care through detailed risk assessments and risk management practices.

Victim Compensation

With the exception of several laws that provide compensation to victims under special circumstances—coal miners suffering from black lung disease, for example—federal law does not provide remedies for personal injury or damage due to hazardous substances. Persons alleging harm from hazardous waste must seek compensation under tort law (the body of law dealing with wrongful acts) in individual states. Although the Congress considered the appropriateness of federal victim compensation during deliberations in enacting the 1980 CERCLA and when first seeking to reauthorize the act in 1984, it decided against such provisions. However, in 1986 the Congress used SARA to standardize one element of state tort law by extending the period of time allowed for bringing action for injury or damages resulting from hazardous waste contamination.

Under state statutes of limitation, plaintiffs must bring suit within a certain period of time, generally ranging from 1 to 3 years, from when some action occurs. Before 1986, some states still considered this period to begin at the time of exposure. However, since illnesses brought on by exposure to hazardous materials typically have long latency periods, the statutory limitation periods could run out before the injury is discovered. SARA provided a federal statute of limitations setting the commencement date for state statutory limitation periods as no earlier than

the date on which the injury was discovered to be attributable to a hazardous substance.⁵

Bodily Injury and Property Damage Remedies Under State Law

In addition to federal requirements, 17 states have enacted hazardous waste cleanup laws, generally resembling CERCLA, with funds for emergency cleanup of hazardous substance spills.⁶ However, although Florida and New Jersey provide a fund for property damage, neither these laws nor federal law provides remedies for personal injury. Laws in two other states specifically provide for persons harmed by hazardous substances, but for the most part, alleged victims must seek redress for bodily injury or property damage under state common law.

State Common Law Remedies

Common law has evolved over time in each of the individual states. Under common law, someone seeking remedies for personal injury or property damage due to hazardous wastes must fit his or her case into the traditional causes of action—negligence, trespass, nuisance, and strict liability. These causes of action are not easily adapted to hazardous waste cases, in which there may be more than one responsible party and in which long periods of time may elapse before the injury is discovered.

For example, in a negligence action, the victim must demonstrate that he or she sustained an injury, that the injury was caused by a release of a hazardous substance, that the defendant had a duty to conform to certain standards of conduct to avoid risks to others, and that those standards were not met. Actions based on nuisance and trespass, used to obtain a remedy for harm to property, must prove interference with the victim's property use or possession. In an action based on strict liability, the victim must prove that the defendant was engaged in an ultrahazardous or abnormally dangerous activity, where risk of serious public harm could not be eliminated by the exercise of care.⁷

⁵SARA sec. 203, CERCLA sec. 309, as amended.

⁶These 17 states are Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, Tennessee, and Wisconsin.

⁷Several New Jersey cases have declared hazardous waste activities to be abnormally dangerous activities. See *Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 497 A.2d 1310 (Super. Ct. Law Div. 1985); and *New Jersey Dept. of Envtl. Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983).

A 1982 congressionally directed study examining legal remedies and barriers to recovery found that persons harmed by hazardous wastes face substantial barriers in an action to recover damages for personal injury or property damage.⁸ The principal barriers had to do with statutes of limitation, proof of causation, and apportionment of damages among multiple defendants. As noted earlier, SARA modified one of these barriers by changing the commencement date under state statutes of limitation from the time when injuries are caused to the time when they are discovered and connected with exposure to a toxic substance. However, proving causation and apportioning damages among several responsible parties remains difficult for those seeking remedies for hazardous waste injuries under state common law.

Because long periods of time may pass before injuries are discovered, persons harmed by a hazardous substance may face a formidable task in attempting to demonstrate the causal connection between a hazardous substance and their injuries or damages. Responsible parties must be identified, and documents and witnesses necessary for evidence must be located, including evidence of the hazardous substance and the victim's exposure to it. The injuries may not be clinically visible and may therefore be difficult to measure and prove. Persons harmed by hazardous substances must also be able to prove that their injuries were not caused by other factors, such as cigarette smoking. Finally, proving causation may require considerable medical and scientific testimony to demonstrate the epidemiological or statistical correlation between environmental exposure and the onset of illness. According to the previously cited study, the costs of providing this information can be a significant barrier to recovery for injuries.

Persons harmed by hazardous substances are also hampered by the fact that several parties may have stored or disposed of hazardous wastes at the site in question. Under common law, alleged victims have the burden of proving that a defendant's conduct was a substantial factor in the cause of injury. Thus, when a number of parties disposed of hazardous wastes, whether acting in concert or not, it may be impossible to demonstrate that any one defendant contributed substantially to the injury.

⁸Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies. A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (PL 96-510) by the "Superfund Section 301(e) Study Group." September 1982. The study group was made up of attorneys from the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General.

Court Decisions in Hazardous Waste Cases

Nationwide, there have been relatively few published decisions in hazardous waste cases, possibly because many of the suits filed are still in litigation or have been settled out of court.⁹ However, courts have allowed persons harmed by hazardous wastes to seek recovery for mental or emotional distress, immunological damage, impaired quality of life, and for medical monitoring. In addition, courts have allowed new types of evidence of causation and new methods of apportioning damages in analogous cases involving product liability that might have some bearing on future hazardous waste cases.

Insurers maintain that these developments constitute an evolution and expansion of liability that undermine their ability to predict losses. They assert that many underwriters fear that liability concepts developed in one jurisdiction could be adopted in other jurisdictions, thereby rendering invalid the loss estimates upon which insurance contract coverages were originally based.

Recovery for Mental or Emotional Distress

Traditionally, common law has limited recovery for emotional or mental distress, such as sleeplessness, weight loss or gain, and fear of cancer, to cases that can be supported by evidence of physical impact or bodily injury. That is, in some jurisdictions, courts require plaintiffs claiming mental distress to demonstrate that some physical impact occurred. For example, in the case of mental distress resulting from an auto accident, the automobile must actually have struck the plaintiff. In other jurisdictions, plaintiffs must support their mental distress claim with evidence of a bodily injury, with or without impact.

Recently, however, courts have allowed plaintiffs in hazardous waste cases to make claims for mental or emotional distress without such evidence. In a 1987 case involving a seaman who was accidentally soaked with toxic chemicals, the Fifth Circuit Court of Appeals rejected the physical injury or impact requirement. With or without physical injury or impact, the court ruled, the plaintiff was entitled to recover damages for mental distress arising from fear of cancer, so long as his fear was reasonable and causally related to the defendant's negligence.¹⁰

⁹ Although they involve toxic or hazardous wastes, we generally did not look at cases involving worker exposure, which are covered by different laws and legal principles.

¹⁰ *Hagerty v. L. & L. Marine Services*, 788 F.2d 315 (5th Cir. 1987). The court noted that, in any event, the plaintiff could have satisfied either requirement since he did suffer an injury from the drenching, which constituted an impact.

Other courts have also accepted claims based on fear of cancer. In a California case, for example, pesticide workers were allowed to maintain a suit for emotional distress induced by a fear of cancer, based solely on evidence of exposure to a toxic substance and evidence that the substances pose substantial cancer-causing risks.¹¹ In Sterling v. Velsicol,¹² plaintiffs were awarded damages for fear of cancer, but in this case, physical evidence of injury to their livers and kidneys was used to establish the reasonableness of their fears.

Elsewhere, courts that still require evidence of physical injury have allowed plaintiffs to use evidence of exposure to the hazardous substance by breathing or ingestion. In Laxton v. Orkin Exterminating Co.,¹³ for example, the Tennessee appeals court upheld the trial court's ruling that the plaintiffs had sustained a "technical physical injury" if it could be demonstrated that they had ingested any amount of the pesticide chlordane.

Recovery for Subcellular Damage

In two cases courts have allowed plaintiffs to seek recovery for subcellular damage (damage below the level of the cell) that is not readily observable and currently symptomatic. In the first case, a suit filed by residents of Woburn, Massachusetts, the federal district court ruled that although not visible or obvious, immune system damage could nevertheless be considered a physical injury and therefore compensable.¹⁴ In another case involving exposure to radon gas, the court held that the plaintiffs' alleged chromosomal damage, if proven, could constitute a present physical injury.¹⁵

Recovery for Impaired Quality of Life

In a 1985 case, affirmed by the New Jersey Supreme Court in 1987, a New Jersey court upheld a jury award of damages for infringement upon the victims' quality of life. In this case residents of Jackson Township had been unable to use their well water because it was contaminated. Their inability to obtain water from their own wells, the judge

¹¹ Arnett v. Dow Chemical Co., No. 72-9588 (Cal. Super. Ct. 1983).

¹² 647 F.Supp. 303 (W.D. Tenn. 1986).

¹³ 639 S.W.2d. 431 (Tenn. 1982).

¹⁴ Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986).

¹⁵ Brafford v. Susquehanna Corp., 586 F. Supp. 14 (D. Colo. 1984).

ruled, was an invasion of the plaintiffs' property interests, and their inconvenience, annoyance, and discomfort were compensable.¹⁶

Recovery for Medical Monitoring

Because the symptoms of exposure to hazardous substances can take long periods of time to develop, persons alleging harm from hazardous substances have sought to recover the costs of medical monitoring. In several cases involving plaintiffs exposed to carcinogens, the courts have permitted this claim, allowing as compensation the costs of physician fees and testing.

In the case involving Jackson Township,¹⁷ the New Jersey Supreme Court ruled that the cost of medical surveillance is a compensable item of damage. Because the plaintiffs had used reliable expert testimony to prove the significance and extent of their exposure, the toxicity of the chemicals, the seriousness of the diseases for which they were at risk, and the value of early diagnosis, the court ruled that surveillance to monitor the effect of exposure was reasonable and necessary. Similar decisions were reached in court cases in Pennsylvania,¹⁸ New York,¹⁹ and the Fifth Circuit Court of Appeals.²⁰

New Theories of Causation

Persons alleging harm from hazardous substances must overcome a difficult evidentiary burden in proving that their injuries were the result of exposure to a hazardous substance. Although courts have been reluctant to accept epidemiological studies showing statistical relationships between diseases and various causative factors, they have more recently allowed their use as evidence. For example, epidemiological studies were used as evidence in suits brought against tampon manufacturers by persons alleging harm from toxic shock syndrome²¹ and in suits brought against manufacturers of swine flu vaccines.²² Also, in one

¹⁶*Ayers v. Township of Jackson*, 202 N.J. Super.106, 483 A.2d 1314 (1985), *aff'd*, No. A-83184, *slip. op.*, N.J., May 7, 1987.

¹⁷*Ayers v. Township of Jackson*, No. A-83184, *slip. op.*, N.J., May 7, 1987.

¹⁸*Habitants Against Landfill Toxicants v. City of New York*, 15 E.L.R. 20937 (1985).

¹⁹*Askey v. Occidental Chemical Corp.* 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).

²⁰*Hagerty v. L. & L. Marine Services*, 788 F.2d 315 (5th Cir. 1987).

²¹See, for example, *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984).

²²See, for example, *In re Swine Flu Immunization Products Liability Litigation*, 508 F.Supp. 897 (D. Colo. 1981), *aff'd sub nom.*, *Lima v. United States*, 708 F.2d 502 (10th Cir. 1983).

of the highly publicized Agent Orange suits, brought against the manufacturer of the herbicide by Vietnam War veterans and their families, a New York district court found that epidemiological studies were the "only useful studies having bearing on causation."²³ In this case, however, the studies concluded that there was no evidence that the veterans' exposure to Agent Orange led to their health problems.

Alternative Theories of Liability

Several theories of liability have been developed, some just in recent years, that alleviate the plaintiff's burden of identifying the responsible defendant in cases where there are two or more defendants. Although none of these theories has yet applied in a hazardous waste case, they have been used in analogous cases and therefore might be available to persons seeking to show harm from hazardous waste. Each theory has certain distinct requirements that might limit its usefulness, however. These alternative liability theories are:

- **Concert of action.** Under this widely accepted theory in tort law, if the plaintiff can show that the defendants acted together in furtherance of a common plan, they are jointly and severally liable for all injuries to the plaintiff, without regard to which defendant actually caused the harm. In a case against a manufacturer of DES (diethylstilbestrol), a cancer-causing drug, the plaintiff was not able to identify the specific brand of DES ingested, but the defendant was held liable under the concert of action theory because there was evidence that the manufacturers of DES had joined in some form of common action. The finding of concerted action was based on the original cooperation by DES manufacturers in the approval process to market DES: pooling data, agreement on the same basic chemical formula, and model literature to be used as the package insert for joint submission to the Food and Drug Administration.²⁴ Because of the difficulty of proving a common action in a hazardous waste case, however, which could involve disposers, generators, and prior and subsequent landowners, among others, acting at different times, this theory might have only limited utility.
- **Alternative liability.** Also a widely accepted theory, alternative liability allows a plaintiff to recover, even though it may not be known which of several defendants (not acting in concert) actually caused the injury. The theory was developed in a 1948 case in which two hunters shot at

²³In re "Agent Orange" Product Liability Litigation, 611 F.Supp. 1223, 1231 (E.D.N.Y. 1985).

²⁴Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625, *aff'd*, 436 N.E.2d 182 (N.Y. 1982).

the same time; one shot accidentally hit the plaintiff. The plaintiff, however, could not determine which hunter had fired the wounding shot. Rather than requiring the plaintiff to determine the responsible hunter, the alternative liability theory shifted the burden to each hunter to prove that his bullet was not the one that injured the plaintiff. Here too, however, this theory may be of only limited use in hazardous waste cases, since plaintiffs must still prove that all of the defendants were negligent.

- **Enterprise liability.** More recently developed, enterprise liability combines features of both concert of action and alternative liability theories. It allows the burden of proof of causation to be shifted onto the defendants in cases where companies followed an industry-wide practice that the defendants knew to be harmful and that could have been avoided. Enterprise liability might be applied in a hazardous waste case by treating a particular waste site as an enterprise and apportioning liability among defendants on the basis of the volume and toxicity of the wastes they disposed of at the site. However, it would likely prove difficult, if not impossible, to measure the relative toxicity of each defendant's share, a problem that would be further complicated if the defendants included facility operators, landowners, and transporters as well as hazardous waste generators. For the same reason—a variety of types of defendants—it might not be possible to demonstrate a common practice.
- **Market share liability.** Under this theory, a plaintiff may sue some portion of the manufacturers of a particular product, so long as they represent a substantial percentage of the market. Like alternative liability, the theory has been applied in cases where it is unclear which of several defendants is directly responsible for the injury. The difference between the two theories is that instead of being held jointly and severally liable (or fully responsible for the entire injury), under market share liability, each defendant is liable in proportion to its share of the industry market. In another DES case, the plaintiff, unable to name the manufacturer of the pills her mother had ingested that had caused her cancer, sued 11 of the 200 companies that had manufactured DES.²⁵ The court applied the market share liability theory, requiring each defendant to prove that it had not produced the DES used by the plaintiff's mother. Unable to do so, each defendant was found liable for a percentage of the plaintiff's injury based on its share of the market for DES. Thus, for example, if the manufacturer had sold 10 percent of all DES sold, it was responsible for that portion of the plaintiff's injury. Although a hazardous waste site might be considered a "market" under this theory, it would still prove

²⁵*Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132; 607 P.2d 924 (1979), cert. denied 449 U.S. 912 (1980).

difficult to apportion liability because of the different types of parties involved (generators, operators, etc.) and the different types and toxicity levels of the substances stored at a single site.

Victim Compensation Statutes

Recognizing the difficulties facing plaintiffs in common law suits, four states—California, Florida, Minnesota, and New Jersey—have enacted legislation to provide compensation to victims of hazardous substances.

Minnesota's 1983 victim compensation law holds any person responsible for the release of a hazardous substance to be strictly liable for all economic damages, as well as for death, personal injury, or disease resulting from the release. The act defines damages for personal injuries and death to include the costs of medical treatment, rehabilitation, burials, loss of income, and pain and suffering. Although the Minnesota law originally held responsible parties jointly and severally liable, this provision was repealed in 1985.

The Florida and California statutes create state compensation funds for victims who are unable to seek compensation from the responsible party. The California Hazardous Substances Account Act, enacted in 1981, provides compensation to victims either because they cannot identify the source of the hazardous substance, or because the responsible party is insolvent. In these cases, victims may be compensated for all of their uninsured medical expenses and up to a certain amount of income lost as a result of physical injuries or property damage. The fund is comprised of taxes levied against hazardous waste handlers in California.

The Florida Hazardous Waste Management Trust Fund, established in 1980, is a cleanup fund that also provides compensation for real or personal property damage resulting directly from the release of hazardous substances. In both Florida and California, persons alleging harm from hazardous substances may also attempt to obtain any remedies available under common law. If another party is subsequently found liable, the liable party must reimburse the state fund.

New Jersey's Spill Compensation and Control Act, enacted in 1976, provides a fund for cleanup as well as the payment of real and personal property damage. Liability under the New Jersey law is strict; and after paying out damages to the victim, the fund may seek recovery from the responsible parties.

Tort Reform Legislation

At the same time that court decisions and a few state laws have made it somewhat easier for persons alleging harm from hazardous waste to attempt to recover for damages and injuries, a number of states have enacted legislation that may make it more difficult to obtain compensation. A growing number of states have in the last couple of years enacted so-called tort reform legislation that changes tort law doctrines, such as joint and several liability and punitive damages, and sets limits on noneconomic damages and attorneys' fees. In particular, these states have moved to limit

- joint and several liability, so that plaintiffs must prove liability of each defendant;
- punitive and noneconomic damages, thus restricting the amount that the victim can receive; and
- attorneys' fees to hold down costs.

With these changes, it could become more difficult for persons alleging harm from hazardous substances to receive compensation because (1) they must prove the liability of each defendant, (2) their award will be limited by a cap, and (3) it may be more difficult to obtain legal counsel with a limit on the amount of compensation that can be earned.

Table 4.1 shows that for 1986 and 1987, 24 states had enacted legislation to modify or abolish joint and several liability, although 9 made exceptions for pollution cases. Also, 12 states placed a cap on noneconomic damages, limiting the maximum award victims can receive for such damages as pain and suffering and emotional distress. Four states placed limits on attorneys' contingency fees. Limits on punitive damages were also established in 17 states in 1986 and 1987.

Chapter 4
Legal Liability Standards and Remedies for
Cleanup and Compensation

Table 4.1 Tort Reforms Enacted in 1986 and 1987

State	Abolish/ modify joint and several	Limit		Attorneys' fees
		Punitive damages	Non- economic damages	
Alabama		X	X ^a	
Alaska	X	X	X	
Arizona	X ^b			
California	X			
Colorado	X	X	X	
Connecticut	X			X
Florida	X ^b	X	X ^c	
Georgia	X	X		
Hawaii	X ^b		X	X
Idaho	X ^b	X	X	
Illinois	X ^b	X		X
Iowa		X		
Kansas		X	X	
Louisiana	X			
Maryland			X	
Michigan	X			
Minnesota		X	X	
Missouri	X	X		
Montana	X			
New Hampshire		X	X	X
New Mexico	X			
New York	X ^b			
Nevada	X ^b			
North Dakota	X	X		
Oklahoma		X		
Oregon	X		X	
South Dakota	X	X		
Texas	X ^b	X		
Utah	X			
Virginia		X		
Washington	X ^b		X	
Wyoming	X			

^aApplies only to medical malpractice cases.

^bExcludes pollution cases.

^cThe 1986-enacted cap was struck down by the state court in 1987.

Source: Table based on data supplied by the American Tort Reform Association.

These reforms limit the ability to seek recovery for injuries or property damage differently, which could result in victims' receiving different compensation for similar harm in different states. However, the impact of these changes on insurance claims payments for victim compensation is unclear. Our work on medical malpractice insurance, which is also affected by state initiatives in tort reform, led us to conclude that few state tort reforms were perceived as having a major effect on claims or awards.²⁶ We found that virtually every state, in response to the mid-1970s malpractice insurance crisis, enacted legislation modifying one or more aspects of its tort law governing medical malpractice. Although some of these reforms have since been declared unconstitutional, repealed, or allowed to expire, our report concluded that, with few exceptions, tort reforms have not had a significant impact on the number of claims filed, size of awards, or cost of insurance.

Conclusions

Insurers claim that CERCLA's liability standards, particularly joint and several liability, are an extreme impediment to the availability of pollution insurance. We believe that this may overstate the impact of these standards on current and future facilities that handle hazardous wastes. For instance, insurers have told us that they are concerned that generators who dispose of their hazardous wastes at a common disposal facility could become jointly and severally liable if the disposal facility did not have adequate resources to clean up its site and the site became eligible for cleanup under CERCLA. We recognize that some currently regulated disposal facilities may possibly become future CERCLA sites. However, RCRA regulations now prescribe the standards of care that must be followed by all hazardous waste facilities, and they require evidence of financial responsibility on the part of all owners and operators who are fully liable for hazardous waste releases at their facilities.

Moreover, although CERCLA's standard of strict, joint and several liability (which was designed to facilitate the cleanup of the nation's hazardous waste sites) holds persons connected with hazardous waste liable for hazardous waste releases, the extent to which their insurers will be held liable is still being decided in the courts (as discussed in ch. 5). It is therefore uncertain whether the insurers' financial capacity to write new insurance will be substantially affected by CERCLA cleanup costs.

²⁶Medical Malpractice: No Agreement on the Problems or Solutions (GAO/HRD-86-50, Feb. 24, 1986).

Regarding compensation for bodily injury and property damage caused by pollution, there is little information available on the number of persons who may have actually been harmed by hazardous waste and there are relatively few published court decisions in victim hazardous waste cases. In this area, too, it is unclear how legal changes affecting alleged hazardous waste victims have affected insurance availability. Indeed, the majority of changes that have occurred at the state level were intended to limit liability. On the other hand, the willingness of some courts to permit recovery by persons seeking compensation for harm from hazardous substances, whether on new theories and types of evidence or on theories and evidence which had earlier been rejected, represents a significant change.

Whether persons harmed by hazardous substances will find it more or less difficult to obtain recovery in the future will depend largely on courts' decisions and whether other state legislatures follow suit by enacting legislation to limit liability. However, with the exception of the federal rule for commencement of state statutes of limitations, victims' legal remedies vary under state law. If the number of perceived victims becomes substantial or if they are believed to be unfairly compensated, it may be appropriate for the Congress to consider again the issue of remedies for victims under federal law, which could include modifying state rules governing proof of causation and apportionment of damages.

Judicial Trends in the Interpretation of Insurance Contracts

Contract interpretation in pollution liability cases is currently unsettled. In the last two decades, the language used in standard commercial liability insurance contracts has undergone several changes and additions. In judicial decisions involving insurance contracts in pollution liability cases, the courts in recent years have focused on several key contract terms in resolving at least four common issues. They have often interpreted the key contract terms in different (and even opposite) ways—sometimes favoring the insurer, sometimes favoring the insured party.

According to representatives of the insurance industry, courts are interpreting insurance contracts far more broadly than the insurers intended (such as with regard to on-site cleanup costs), thereby holding insurers liable to pay large claims on risks that they never intended to insure and for which they have collected no premiums. Insurers believe that these broad interpretations expressly ignore the plain meaning of insurance policies for perceived public policy reasons. Insurers cite this situation as being a major cause of their withdrawal from the pollution insurance market. With respect to future insurability of pollution risks, insurers also claim that court interpretations have made it extremely difficult for them to draft new policy language that would enable them to reenter the pollution liability market. Insurers maintain that this lack of uniformity has created an unsettled underwriting and pricing environment that is unlikely to diminish until the courts agree on the nature of coverage provided by insurers.

Judicial diversity of opinion is not surprising or uncommon when, as in this situation, various state and federal courts simultaneously apply previously uninterpreted contract language to new situations. Furthermore, the court cases applying this contract language to pollution liability have been brought only recently, and many are still being appealed. Given this situation, the case law in this area should be viewed as being in an embryonic state.

We believe that while uniformity of insurance contract interpretation has not emerged in cases applying such contracts to pollution releases, court decisions rendered so far have given insurers some basis on which to draft future pollution liability policy terms that would more clearly define intended limits of pollution coverage. Some changes that may help insurers in this regard are discussed at the end of this chapter.

The Development of Pollution Insurance: A Legal Perspective

Insurers have provided comprehensive general liability (CGL) policies for U.S. businesses since about the 1880s. Generally, under such policies, insurers agree to assume liabilities that befall the insured party due to accidental personal injury or property damage, relating to property, persons, and losses covered by the policy. Certain pollution-related liabilities were not specifically excluded until the late 1960s and early 1970s, when the nature and cost of chemical pollution became more evident.

At that time, insurers changed key words and terms in the CGL policies, and also added a "pollution exclusion" clause, which insurers now claim was intended to exclude coverage for pollution incidents that develop gradually and potentially involve high claims costs. These contract changes, which figure prominently in disputes between the insured and the insurer over contract coverage, are discussed in detail below.¹

Court Interpretations of Contracts in Pollution Insurance Cases

There are two primary reasons why the determination of coverage for damages due to hazardous substance releases have often ended up in the courts. First, CGL policies written prior to the 1970s often were not specific regarding coverage of pollution risks. Second, references to pollution risks that were specified in some later policies presented interpretive questions regarding hazardous substance releases. The litigation often involved coverage under CGL policies for

- claims for property damage or personal injury brought by persons alleging that the insured party caused such damage by their release of hazardous substances, and
- claims for the cost of cleaning up hazardous waste releases.

These suits over insurance contract coverage are generally subject to the laws and legal precedents of individual states.

Our review of relevant decisions found that courts have tended to focus upon certain key contract terms. In the subsections that follow, we focus on judicial decisions involving five key contract issues that have been important in defining contract coverage in pollution cases. These issues are:

¹See also, *Hazardous Waste, Toxic Tort, and Product Liability Insurance Problems*, Sheila L. Birnbaum, Practising Law Institute (1986); *The Comprehensive General Liability Policy, A Critique of Selected Provisions*, Arthur J. Liederman, Ed., ABA Tort and Insurance Practice Section, ABA (1985).

1. Disputes over determining the time at which an accident or occurrence took place that triggers the insurance coverage.
2. Disputes over how to determine whether a pollution claim involves one or more than one occurrence.
3. Disputes over whether the pollution exclusion excludes from coverage damage resulting from an insured's release.
4. Disputes over whether pollution cleanup costs are covered "damages."
5. Disputes over whether costs incurred in cleaning up an insured's property are covered under the "owned property" exclusion.

To the lay person, many meanings assigned to contract language may seem to bear little relation to common usage of the term. However, when liability contracts are disputed, the court's job is to determine which side's interpretation is "right" so that it may affirm or deny liability. In its effort to rule on liability, the court must carefully scrutinize the language of the contract, upon which the whole dispute hangs, and must more precisely define and interpret words than is generally done. Courts have examined not only dictionary definitions of disputed terms, but the intended meanings of the words given the overall structure of the contract, as well as the history of the terms as used in older versions of CGL policies. As a result, courts have found words in contracts to have both broader and more specific meanings or interpretations than the general population may attach to them.

Oftentimes, CGL policy language is considered ambiguous by courts applying it to hazardous substance release damages. Where the courts hold an insurance contract is ambiguous, they often view favorably the position of the insured, because the insurer is presumed to have an advantage over the insured in that the insurer wrote the contract and may have dictated the contract's terms.

Before discussing the five key contract issues, it is important to understand the concept of the insurer's "duty to defend" and the evolution of the terms "accident" and "occurrence."

Duty to Defend the Insured

Typically, general liability insurance policies call for the insurer not only to indemnify the insured, but also to defend the insured in claims brought against the insured. For instance, one CGL policy drafted in 1966 contained the following language creating the insurer's duty to defend the insured:

"the [insurance] company shall have the right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent. . . ."

In an era of burgeoning and reportedly expensive hazardous waste litigation, this duty is an important aspect of insurance protection.

In other contexts, courts have long interpreted these duty-to-defend provisions broadly in liability insurance contracts, holding that they serve to protect insureds against the expenses of defending any arguably covered claims against them.² Thus, only if the damages are not even arguably covered by the policy does the insurer have no duty to defend. Because the insurer's obligation to defend is broader than its obligation to pay for alleged damage, an insurer may not ultimately be liable for damages claimed in such suits against insureds.

In the hazardous substance release context, many cases decided to date involving insurance issues have considered the insurer's duty to defend on claims brought against an insured. Because an insurer's duty to defend is broader than its obligation to indemnify, insurers may defend insureds responsible for damages resulting from the release of hazardous substances, but face no liability for such damages. Therefore, litigation expenses currently incurred by insurers may not indicate their future liability for damages.

In examining an insurance policy to determine whether the insurer must defend the insured, the courts focus on the same key phrases and terms as when determining coverage for any damages an insured is liable to pay as a result of litigation. These provisions are discussed below.

²See, generally, 14 Couch on Insurance 2d sections 46, 51 (rev. ed. 1982); 7C Appleman, Insurance Law and Practice sections 4684, 4685 (Bertal ed. 1979 and Supp. 1987) (hereinafter cited as Appleman).

Evolution of the Terms "Accident" and "Occurrence"

Many liability policies written before the 1960s covered liabilities resulting from what the insurance contract referred to as "accidents." The term "accident" was usually not defined in policies, and courts differed in their interpretation of the word.³ For instance, courts differed over whether the fact that an action was done intentionally precluded the resulting injury from being considered an "accident" eligible for coverage under the terms of the CGL policy. An example of this situation would be the intentional dumping of a flammable liquid into a sewer system, which triggers an explosion killing several firefighters. While dumping was intentional, the resulting injuries to the firefighters might be viewed as accidental because the injuries were neither expected nor intended.

In deciding cases on the basis of the interpretation of "accident," some courts viewed the expectedness or unexpectedness of the resulting injury from the victim's point of view. If the injury was accidental from that vantage, the loss was held covered by liability insurance. Other courts judged the expectedness of the injury from the standpoint of the insured.⁴ For example, if a trespasser vandalizing an insured's property causes a release of hazardous substances and is injured by the release, the insurance coverage for the injuries would be determined by asking whether the insured expected such injury to result, not whether the vandal expected injury to flow from the accident.

Perhaps in a move to clarify the types of incidents covered under the contracts, the term "accident" was replaced and amplified by the term "occurrence" in standard CGL policies during the 1960s. The term "occurrence" was at first defined in the policies to mean "an accident, including injurious exposure to conditions, which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." A later revision of the CGL policy in the 1970s defined an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured" (emphasis added). This revision also shifted reference to the timing of the injury or damage to the provisions defining bodily injury and property damage. Both definitions noted that the injury or damage must occur within the policy period to be covered.

³7A Appleman section 4492; Pfennigstorf, *Environment, Damages, and Compensation*, 1979 A.B.F. Res. J. 432-38; 1 R. Long, *The Law of Liability Insurance*, section 1.15 (1976).

⁴7A Appleman section 4492.02 (Bertal ed. 1979 and Supp. 1987).

These two definitions of "occurrence" established several criteria for coverage that were previously unspecified in insurance policies. For instance, the language specifically covers "not only the usual accident, but also exposure to conditions that may continue for an unmeasured period of time."⁵ The policy language changes, confirmed by judicial interpretation, also established that the injury resulting from an accident or occurrence, but not necessarily the accident or condition leading to the injury, must take place during the policy period in order for coverage to exist. Additionally, the definition notes that the expectation of injury is viewed from the insured's standpoint. Furthermore, under the revised definitions of "occurrence," it is clear that the unexpectedness or unintendedness of the resultant damage, not of the accident or condition causing the damage, is a criterion for coverage.

The changed wording thus provided greater clarity in many respects. However, when cases involving the application of these policies to releases of hazardous substances arose, courts found that several issues were not squarely resolved by the contract language. For instance, the contracts did not specify when long latency diseases, such as cancer, would be deemed to have caused injury, and they did not establish a standard for determining the number of occurrences resulting from a release. Each of these issues, and others relating to different contract provisions, has been the subject of varying, nonuniform judicial interpretation and will be discussed below.⁶

Decisions Regarding the Trigger of Coverage

The trigger of coverage refers to the determination of when the damage occurred for which a claim is made. In order to establish the date when damage occurred and, therefore, the policy covering the damage, a characterization of the damage must be made. In the hazardous substance release context, damage could be viewed as occurring at the time of exposure to the substance, at the time injury or harm is sustained due to the exposure, at the time disease, injury or harm becomes apparent, or any combination of the above.

⁵3 R. Long, *The Law of Liability Ins.*, App.-53 (1976).

⁶The definition of "occurrence" in CGL standard form policies was changed by ISO in 1986 to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy states that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, . . ." The insurance policy also provides that it covers only damage or injury occurring during the policy period, and that is caused by an "occurrence." See subsequent discussions for a description of the revised pollution exclusion.

The trigger of coverage becomes a particularly important issue in cases involving gradual pollution and long-latency diseases caused by pollution, where insurers may debate their liability to cover damages that occurred years ago but have just recently been confirmed or recognized. In such cases, the timing of events associated with the incident that caused the harm may be difficult to establish, thereby leaving open the question of whether or not covered damage fell within the policy period.

In deciding trigger-of-coverage issues in cases involving asbestos and other chemical exposures, the state and federal district and circuit courts have employed the following four different approaches to determining when the physical injury or damage was sustained:⁷

- **Injury-in-fact.** This theory sets the date of personal injury at the time of actual physiological change, regardless of whether or not the injury was diagnosable at that time. For instance, a person exposed to asbestos would be deemed injured under this theory when the asbestos actually caused harm to the person's body. This could have been years after exposure, but years prior to the development of any symptoms or diagnosis of the disease.⁸
- **Initial exposure.** Under this theory, bodily injury is deemed to have occurred upon the initial exposure to the toxic substance that caused bodily tissue damage. Thus, the person suffering asbestosis in the 1980s would be deemed to have suffered injury in the prior years when exposure took place—which could have been as long ago as the 1960s. This theory leads to liability attaching under each occurrence policy in effect at the time exposure occurred.⁹
- **Manifestation.** Under this theory, bodily injury or damage is held to have occurred at the time it becomes "manifest," apparent, or reasonably ascertainable. In other words, once the person exposed to asbestos begins to experience symptoms of asbestosis, or when a medical examination could detect the disease, injury is deemed to have manifested itself.¹⁰

⁷See, generally, Developments in the Law, Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1579-82 (1986).

⁸American Home Products Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760 (2d Cir. 1984).

⁹Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1219 (6th Cir. 1980), reh'g granted, 657 F.2d 814 (1981), cert. denied, 454 U.S. 1109 (1981), reh'g denied, 455 U.S. 1009 (1982).

¹⁰Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983).

- **Multiple trigger.** The fourth theory finds coverage for damages from initial exposure through and including time of manifestation of bodily injury. Courts employing this rationale contend that damage actually may begin to occur upon exposure and that it may continue to take place up until and including the time that the resulting disease becomes manifest.¹¹

Because releases of hazardous substances often involve exposure to those substances, a court's adoption of one of the above theories may be crucial in determining coverage under a liability policy. For instance, if neighbors to a leaking hazardous waste facility are found to have developed leukemia due to exposure to the leaking substances, several different insurers might be liable for indemnifying the facility owners, depending upon the trigger theory adopted. Under the exposure theory, the insurer at the time of exposure would be liable. Under the manifestation theory, the insurer at the time the damage becomes manifest would face liability. Similarly, the insurer at the time that an exposed person experiences physiological change due to the exposure would be liable for damages under the injury-in-fact theory. Under the multiple trigger rationale, however, all insurers from the time of exposure to the time of manifestation might be liable for coverage.

In government-ordered hazardous waste cleanup actions, the courts have not ruled uniformly on the trigger of coverage issue. The damages involved in cleanup actions have been found to take place at the time of release, at the time of discovery of release or harm, and at the time cleanup costs were assessed. One case recently decided in the federal court of appeals for the eighth circuit, for instance, ruled that "environmental damage occurs at the moment that hazardous wastes are improperly released into the environment and that a liability policy in effect at the time this damage is caused provides coverage for the subsequently incurred costs of cleaning up the wastes."¹²

A case decided in the federal court of appeals for the fourth circuit, however, held that because a hazardous waste release was not discovered within the insurance policy coverage dates, the insurer was not liable for reimbursement of the insured's cleanup costs.¹³ A lower federal

¹¹Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982), reh'g denied, 456 U.S. 951 (1982).

¹²Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., Inc., 811 F.2d 1180 (8th Cir. 1987), reh'g granted, March 30, 1987.

¹³Mraz v. Canadian Universal Ins. Co., Ltd., et al., 804 F.2d 1325 (4th Cir. 1986).

court has held that cleanup cost coverage is triggered when cleanup costs are assessed against an insured, while certain state courts have indicated that cleanup cost coverage is triggered by any continuing leakage of waste into the environment.¹⁴ Thus, an insurer's liability for cleanup costs may depend upon which trigger-of-coverage theory is applied by the court hearing its case.

Decisions Regarding the Number of Occurrences

Many insurance policies establish dollar limits to coverage on a "per occurrence" basis. In order to decide the extent of an insurer's liability, courts have been asked to determine how many occurrences can be said to take place as a result of a toxic substance release that affects several people or pieces of property. Generally, courts have held that the number of causes of the damage, and not the number of physical injuries or damaged properties, constitutes the number of occurrences under a liability policy. But again there has been no unanimity on this issue. A minority of courts have adopted a broader interpretation, characterizing the number of occurrences as the number of resulting injuries or damages flowing from the mishap.

One of the few cases to specifically address the question of the number of occurrences involved in the release of hazardous wastes is Township of Jackson v. American Home Assurance Co., et al., (Township of Jackson), now on appeal.¹⁵ In that case the municipality that oversaw a publicly-owned waste treatment and storage facility sought coverage under its liability insurance policy for damages caused by release of toxic chemicals from its facility into groundwater serving the wells used by nearby residents. The court found that "separate, independent causative events" involving the release of hazardous wastes into the environment comprised a "multitude of causes," each of which could have constituted an occurrence. The causes cited by the court included negligent siting, digging beneath the water table, providing inadequate cover, failing to inspect incoming tank trucks, and improper digging of waste cells. The court also noted that multiple occurrences took place under the minority "result" approach applied by some courts because the release of toxins into the groundwater had contaminated 97 separate wells.

¹⁴Idaho v. Bunker Hill Co., 647 F. Supp. 1064 (D. Idaho 1986); Industrial Steel Container Co. v. Fireman's Fund Ins. Co., C8-86-1135, C8-86-1197 (Minn. Ct. App. Jan. 13, 1987); Solvents Recovery Serv. of New England, Inc. v. Hartford Ins. Co., No. L-25610-83 (N.J. Super. Ct. Dec. 4, 1986).

¹⁵Township of Jackson v. American Home Assurance Co., et al., No. L-29236-80 (N.J. Super. Ct. Aug. 31, 1984) (Appealed, No. A-20138427); See also, Industrial Steel Container Co. v. Fireman's Fund Ins. Co. (Minn. Ct. App. Jan. 13, 1987).

The court in Township of Jackson did not decide on which of these two theories to rest its determination of multiple occurrences taking place. The court noted that under either approach, the number of occurrences established, multiplied by the amount of money the policy provided for each occurrence (\$500,000), was sufficient to cover the award for which the insured sought reimbursement. Therefore, as a result of the court's ruling, the insurer was held liable for the entire award to the victims. However, until the appeals are completed, the issue of defining the number of occurrences in this case will not be fully resolved.

A court's interpretation of the number of occurrences that result from a hazardous substance release would be of great significance to insurers whose policies with insureds responsible for such releases did not contain an aggregate limit to coverage. Such companies are at risk of facing liability for the maximum number of occurrences specified in the policy and, because of the large awards possible in such cases, the maximum dollar amount for each occurrence. However, it is important to note that decisions involving this issue in the hazardous substance release context are sparse, and case law in this area might well not follow the Township of Jackson analysis.

Decisions Regarding the Pollution Exclusion Clause

Pollution exclusion clauses were added to standard form CGL insurance policies in the 1970s. Insurers told us that pollution exclusions were added because of their growing perception of the potentially high cost of providing blanket coverage for pollution damages, especially those involving damage from gradual pollution.

The pollution exclusion contained in a widely used standard CGL policy form developed in 1970 read as follows:

"It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water-course or body of water; but the exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."¹⁶

¹⁶Standard form claims made and occurrence CGL policies developed in 1986 by ISO contain a pollution exclusion that excludes coverage for "[a]ny loss, cost, or expense arising out of any governmental direction or request that [the insured] test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants." It also generally excludes injury or damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants" at various locations over which the insured has control.

There is great disparity of opinion in the courts regarding interpretation of the pollution exclusion developed in 1970 when applied to hazardous substance releases. Many courts ruling on pollution exclusion clauses have held that contracts containing them are ambiguous as regards the damage that is covered. For instance, the Court of Appeals of Washington State noted in 1983 that

"the liability insurance policy on the one hand covers an 'occurrence,' which by policy definition includes conditions which are continuing in nature (as the insured argues), while on the other hand the pollution exclusion clause in the policy excludes from coverage damages arising out of the escape of liquids, gases and other substances unless the escape is sudden. . . . Both cannot be true, yet both positions are reasonable, hence the policy is ambiguous and requires judicial interpretation."¹⁷

Several courts have also noted that the words "sudden and accidental" in the exclusion are not defined in the liability policies in which they appear and do not have obvious meaning when applied to hazardous substance releases.¹⁸ Consequently, those courts have looked elsewhere to determine their meaning: dictionaries, the overall structure of the contract, history of the provision, or, in some cases, to indications of intended meanings of the words by the parties to the contract. In so doing many courts have held that the word "sudden" in the exclusion is not limited to an instantaneous happening and therefore could refer to releases that may have lasted for a prolonged period.¹⁹ Several courts have also viewed "sudden" as synonymous with "accidental." In one case, sudden was read to mean "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for."²⁰

Other courts, however, have interpreted "sudden" more temporally, "as describing an abrupt or precipitant event. . . ."²¹ Courts accepting this

¹⁷United Pacific Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262 (Wash. Ct. App. 1983); See also, City of Northglenn v. Chevron U.S.A. Inc., 634 F. Supp. 217 (D. Colo. 1986); Lansco, Inc. v. Dept. of Environmental Protection, 360 A.2d 520 (N.J. Ch. Div. 1975), aff'd 368 A.2d 322 (N.J. App. Ct. 1976), cert. denied, 372 A.2d 322 (1977).

¹⁸Buckeye Union Ins. Co. v. Liberty Solvents and Chem. Co., Inc., 477 N.E.2d 1227 (Ohio Ct. App. 1984); Lansco, Inc. v. Department of Environmental Protection 368 A.2d 363 (N.J. Ch. Div. 1975), aff'd, 368 A.2d 322 (N.J. App. Ct. 1976), cert. denied, 372 A.2d 322 (1977).

¹⁹Jackson Township Mun. Utilities Auth. v. Hartford Accidental and Indem. Co., 186 N.J. Super. 156 (1982).

²⁰Lansco, Inc. v. Department of Environmental Protection, 368 A.2d 363.

²¹Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 24 E.R.C. 1001, 1007 (N.C. Sup. Ct. 1986); City of Milwaukee v. Allied Smelting Corp. et al., 344 N.W.2d 523, 527 (Wis. Ct. App. 1983).

view of "sudden" differ as to whether the release, the dispersal of toxins through the environment, or the resulting damages need be "sudden." For instance, one state court found that the possibly sudden release of pollutants into the environment was of greater import than any subsequent gradual permeation of pollutants into the environment.²² "The behavior of the pollutants in the environment, after release, is irrelevant to" the pollution exclusion, the court noted.

In another early case, where both discharge and dispersals of pollutants occurred and the dispersal but not the discharge may have been sudden and accidental, the court held that coverage was not avoided under the pollution exclusion.²³

Many courts have considered whether the damage resulting from a release had to be accidental to fall outside the pollution exclusion or whether the accidental nature of the release itself was required for the exclusion not to apply. A common view among courts has been that "sudden and accidental" in the pollution exclusion referred to the nature of the resultant damages.²⁴ Under this interpretation, the pollution exclusion thus merely served to underscore the exclusion of intended or expected damage from coverage, which was also specified in the definition of occurrence.²⁵

Very recently, some courts have held the pollution exclusion to be more expansive, thus resulting in more limited coverage for such releases.²⁶ In these cases, coverage has been deemed to exist under liability policies only if the release itself, along with the resulting damage, was accidental. Under this view, even if damage resulting from an expected or intended release was unexpected, coverage would be denied under the pollution exclusion if the release was not accidental.

²²Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 225 (Me. Sup. Ct. 1980).

²³Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S. 2d 294, 296 (N.Y. App. Div. 1978).

²⁴Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294; Jackson Township Mun. Util. Auth. v. Hartford Accident and Indem. Co., 451 A.2d 900 (N.J. Super. Ct. 1982); Buckeye Union Ins. Co. v. Liberty Solvents and Chems. Co., Inc., 477 N.E.2d 1227.

²⁵See, Hurwitz and Kohane, The Love Canal - Insurance Coverage for Environmental Accidents, July 1983 Ins. Counsel J. 378, 379.

²⁶Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 24 E.R.C. 1001; Transamerican Ins. Co. v. Sunnes, 711 P.2d 212 (Or. Ct. App. 1985); reh'g denied, Feb. 14, 1986; cert. denied, 717 P.2d 631 (April 22, 1986).

Many courts have decided that when pollution is a natural consequence of the insured's business—particularly when toxic releases are continuous—no covered occurrence takes place, and property damage resulting from the pollution is excluded by the pollution exclusion.²⁷ Such decisions rest upon the presumption that releases that occur continuously and concomitantly with the insured's activities are not "sudden and accidental," and that resulting damages could not have been "unintended or unexpected."

Courts Disagree on Coverage of Property Damage

Two federal courts of appeals have reached conflicting conclusions as to whether costs associated with government-ordered cleanup of hazardous substance releases are covered under CGL policy language.²⁸ This policy language often provides coverage for sums that the insured becomes legally obligated to pay because of property damage caused by an occurrence and that occurs during the policy period. At present, the two federal courts of appeals that have addressed the issue have decided differently as to whether cleanup costs are covered under the CGL policy.

In Continental Insurance Companies v. Northeastern Pharmaceutical and Chemical Co., Inc., the court ruled that the CGL policy did cover cleanup costs that the government sought to recover from a pharmaceutical company.²⁹ The court held that the damage to the environment caused by the hazardous waste was a form of property damage under the policy. Even though the government did not own the contaminated land, the court noted, it did have a property interest on behalf of its citizens, and the environment generally, including the contaminated area, so that damage to the environment could be characterized as property damage to the government. The court found that CERCLA is consistent with this reading.

Although several lower federal courts and the New Jersey courts have reached similar conclusions, the Court of Appeals for the 4th Circuit has ruled that the CGL policy did not cover CERCLA cleanup costs for which

²⁷Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); American Mut. Liberty Ins. Co. v. Neville Chem. Co., No. 84-1614 (W.D. Pa. Jan. 7, 1987); American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984).

²⁸Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., Inc., 811 F.2d 1180; Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325.

²⁹Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., Inc., 811 F.2d 1180.

the insured was held liable.³⁰ The court in Mraz v. Canadian Universal Insurance Co., Ltd. held that government-ordered cleanup costs constitute an economic loss, not property damage covered under the policy. In that case the insurer was not held liable for reimbursement of the insured's cleanup costs.³¹ In Maryland Casualty Co. v. Armco, Inc., the Federal Court of Appeals for the 4th Circuit also found that the insured's liability for cleanup costs did not consist of "damages" as established in the CGL policy, but was more in the nature of an equitable order for relief.³² Thus, the insurer was held not liable for reimbursement of the insured's cleanup costs. The distinction between damages and equitable orders is rooted in the difference in our justice system between actions brought in law and actions brought in equity. Liabilities deriving from actions in law are termed "damages," while orders that emanate from actions in equity may be described by other terms. In hazardous waste site cleanup cost recovery suits, many insurers have argued that cleanup cost recovery suits brought by the federal and state governments are more in the nature of actions in equity than of actions brought in law, and thus that CGL references to coverage of "damages" do not apply to cleanup costs.

To date, state courts have differed in their analysis of this issue, and no clear consensus has surfaced.³³ The eventual resolution of this issue is key, however, to determining whether hazardous waste site cleanup costs will be borne in part by insurers.

Decisions Regarding the Owned Property Exclusion

Many CGL policies provided specific "owned property" exclusions for damage to property owned or controlled by the insured. As characterized by insurers, the owned property exclusion protects an insurer from becoming a guarantor of the insured's workmanship in his ordinary

³⁰United States v. Conservation Chem. Co., No. 82-0983-CV-W-5, 12 CWLR 518, 519 (W.D. Mo. July 10, 1986); Independent Petroleum Corp. v. Aetna Casualty and Surety Co., No. 83-3347 (D.D.C. 1986); Solvents Recovery Serv. of New England, Inc. v. Midland Ins. Co., No. L-25610-83, 12 CWLR 398 (N.J. Super. Nov. 17, 1986).

³¹Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325.

³²Maryland Casualty Co. v. Armco, Inc., No. 86-3125 (4th Cir. July 7, 1987) (Available July 20, 1987, on LEXIS, Genfed Library U.S. App. file).

³³International Mineral and Chem. Co. v. Liberty Mut. Ins. Co., No. 84 L 50879, 12 CWLR 581 (Ill. Cir. Ct. Jan. 6, 1987); CPS Chemical v. Continental Ins. Co., No. L-060537-84 (N.J. Super. 1987); Solvents Recovery Serv. of New England, Inc. v. Midland Ins. Co., 12 CWLR 398; Kutsher's Country Club Corp. v. Lincoln Ins. Co., 465 N.Y.2d 136 (N.Y. Sup. Ct. 1983); U.S. Aviax Co. v. Travelers Ins. Co., 336 N.W.2d 838 (Mich. Ct. App. 1983).

operations. The insurers maintain that insurance has never been available for maintenance-type activities, and that the vast majority of insurers are unwilling to provide coverage for cleanup of the policyholder's own property in order to maintain the incentive for the policyholder to manage and police his own property in a responsible fashion.

Several courts have held that owned property provisions do not exempt the insurer from liability for the cleanup of property owned by the insured when such cleanup is necessary to halt property damage to a third party or when cleanup of groundwater below the insured's property is involved.³⁴ For example, in the Michigan case United States Aviox Co. v. Travelers Ins. Co., the court ruled that groundwater is not the property of the landowner and so does not fit within the owned property exclusion.³⁵ The policy was thus determined to apply to the costs involved in correcting the groundwater contamination beneath the insured's land. In addition, several New Jersey courts and one lower federal court have ruled that cleanup of contaminated land owned by the insured is covered by CGL policies containing owned property exclusions when such cleanup is necessary to prevent contamination to a third-party's property.³⁶ The courts have noted that the policy exclusion does not specifically address coverage of owned property damage when it leads to third-party damage and that contamination to the third party's property would continue unless cleanup of the insured property took place.

In another New Jersey case, Summit Associates, Inc. v. Liberty Mutual Fire Co., the court also held that the owned property exclusion did not apply to the cleanup costs undertaken by an insured who innocently purchased property that was contaminated by prior owners.³⁷ Noting the state's strong interest in protecting the environment, the court ruled

³⁴United States v. Conservation Chem. Co., 12 CWLR 518; Broadwell Realty Serv., Inc. v. Fidelity and Casualty Co. of New York, No. L-081194-84 (N.J. Super. May 23, 1986) (Letter Opinion); E.C. Electro Plating, Inc. v. Federal Ins., No. L-062919-85, 11 CWLR 696 (N.J. Super. Feb. 18, 1986); Bankers Trust Co. v. Hartford Accident and Indem. Co., 518 F. Supp. 371 (S.D.N.Y. 1981), vacated 621 F. Supp. 685 (S.D.N.Y. 1981); See also, Fireman's Fund Ins. Co. v. Ex-Cello Corp., et al., No. 85-71371, slip op. (E.D. Mich. May 18, 1987); United States Aviox Co. v. Travelers Ins. Co., 336 N.W.2d 838.

³⁵U.S. Aviox Co. v. Travelers Ins. Co., 336 N.W.2d 838.

³⁶United States v. Conservation Chem. Co., 12 CWLR 518; Broadwell Realty Serv., Inc. v. Fidelity and Casualty Co. of New York, (N.J. Super. May 23, 1986) (Letter Opinion); E.C. Electro Plating, Inc. v. Federal Ins., 11 CWLR 696; See also, Bankers Trust Co. v. Hartford Accident and Indem. Co., 518 F. Supp. 371, vacated, 621 F. Supp. 685.

³⁷Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co., No. L-47287-84, 12 CWLR 1094 (N.J. Super. Feb. 25, 1987).

that when innocent purchasers of contaminated land incur cleanup costs, such costs should not be excluded from coverage under the owned property exclusion, because, among other reasons, the inability of landowners to pay for cleanup costs could lead to the depletion of the state's cleanup fund.

Environmental Liability Insurance

By the late 1970s and early 1980s, as instances of widespread damage resulting from the gradual release of hazardous substances at Love Canal, New York, and other sites became known, coverage for damages resulting from all but sudden and accidental pollution had been excluded from many CGL policies. By 1986, pollution coverage was virtually excluded from standard CGL policy forms and was available only by endorsements to such policies (see fns. 6 and 16). In 1981, however, the insurance industry developed a new policy, generally referred to as Environmental Impairment Liability (EIL) insurance, to provide coverage for gradual and sudden pollution. As noted in chapter 2, these EIL policies are, at present, generally not being marketed.

EIL policies—the standard form, as well as those drafted by individual insurers on their own—typically provide coverage for property damage as well as for bodily injury and other economic loss caused by pollution. Pollution is characterized in such policies by various terms, all of which contemplate a broad range of containment releases.

The standard pollution liability policy developed by the Insurance Services Office (ISO) in 1981 covered both sudden and gradual pollution incidents.³⁸ This policy enabled owners and operators of hazardous waste treatment, storage, and disposal facilities to comply with federal responsibility requirements contained in the Resource Conservation and Recovery Act of 1976. The policy covered policyholder liability for bodily injury and property damage resulting from either sudden or gradual pollution and for cleanup costs. Although we could not determine the extent to which this policy form was being used, insurance trade association officials told us that it has not been widely marketed.

We are aware of no significant litigation involving the terms of these most recent EIL insurance contracts, although it is always possible that

³⁸ISO is a national, voluntary association of property and casualty insurance companies that makes available advisory rating, statistical, actuarial, policy form and related services to U.S. property/casualty insurers. ISO is also a major statistical agent for the insurance industry that collects, summarizes, and reports on insurance companies' premiums and claims losses. State regulators use these data to make certain that insurance rates are not excessive, inadequate, or discriminatory.

cases involving the terms of EIL contracts may arise in the future. The cases referred to in this chapter primarily focus on pre-1986 CGL policies.

Changes in Contract Language May Make Liability More Predictable

Given the controversy over basic coverage terms in CGL contracts, we were asked by the Congress to determine whether "amendments in the language of" applicable insurance contracts and "the description of risks assumed" could affect judicial interpretation of the contracts. While we cannot predict precisely how new contract language might be applied by courts to individual situations, certain possible changes in language seem likely to clarify the contracts, and thus to render the liabilities covered under them more predictable.

Contract Amendments to Clarify Terms of Coverage

One change in a pollution liability endorsement to the standard form CGL policies, which is currently being considered by ISO, applies to sudden pollution coverage. The language eliminates the word "sudden," but in its place notes that "the [pollution] exclusion [contained in the CGL policy] does not apply to emissions that begin on a clearly identifiable day and last no longer than 15 days thereafter." This reference to the 15-day duration of a covered emission firmly establishes a calendar-specific time frame for releases as a criterion of coverage. With such contract language before them, courts would thus be likely to recognize a time limit to coverage of releases, a key dispute in recent litigation over the term "sudden" in relevant contracts. Therefore, if this language is employed, coverage might be less likely to be found for gradual releases under applicable policies or endorsements.

Another change in policy language adopted by a major insurance company clarified the method of determining the number of occurrences that might arise from the release of hazardous wastes. Under one such policy, the insurer considers as one loss all damages "arising out of the same or related pollution conditions at any one location." This language thus attempts to bypass two issues: (1) whether the cause or the effect theory of an occurrence should dictate the number of occurrences and (2) how many occurrences result from related releases at a single hazardous waste site. Because courts have differed over their treatment of these issues under prior CGL policies, clearer treatment of them as described above should lead to greater predictability in coverage.

Litigation over interpretation of the "owned property" exclusion indicates that greater specificity in that provision would clarify its application to hazardous waste cleanup costs. Language stating whether exclusion of coverage for damage to the insured's property includes cleanup costs incurred to alleviate damage to a third party's property would improve upon language currently being interpreted by the courts.

Contract Amendments Reducing Potential Risks to the Insurer

In 1981 ISO made final a "claims-made" environmental liability policy form, and in 1986 completed a claims-made CGL policy that excluded pollution coverage, except through endorsement. The two key features of this and other claims-made pollution liability contracts are that (1) coverage is provided only for claims filed during the policy period and (2) even if a claim is brought during the policy period, coverage is provided only for damages that take place during the policy period or during some preceding period—the so-called retroactive period—specifically defined in the policy.

Depending upon the retroactive date of the policy, claims-made policy coverage could exclude most prior damages caused by releases of hazardous substances. The policy is thus largely prospective in coverage. Because both the damage and the presentation of the claim must occur during the period specified in the policy coverage dates, and because the policy extends from the first policy's coverage date to the current policy's coverage period if the policy is continuously renewed, maintaining policy coverage is essential to recovery by the insured. Because of the potential for nonrenewal of a policy, which would end an insured's entitlement to coverage for past damages, the risks assumed by an insurer under a claims-made policy appear greatly reduced, compared with old "occurrence" CGL policies, which could cover claims filed after the policy period expired.

Although some insurers adopted this form in an attempt to limit expenses by reducing coverage, how the courts may interpret the claims-made environmental liability policy is still uncertain, largely because the form is greatly altered from prior occurrence-based liability contracts, about which a substantial body of cases has been developed.

Another change in pollution liability insurance contracts that might reduce potential coverage would be one that specifies that disputes over coverage be decided by an arbitrator rather than through the court system. While this change does not constitute any clarification of prior language, it would attempt to reduce the defense costs attendant to

litigation over both the insurer's duty to defend and indemnity obligations. The use of arbitration, if freely agreed to by both the insured and the insurer, could significantly reduce costs, because the procedures are greatly simplified in the arbitration process, although the lack of case precedent which would result could lead to revisitation of the same issue, and accompanying expenses.

Many insurance contracts applicable to pollution releases limited coverage to a fixed dollar amount per pollution incidence or occurrence. Some contracts also limited coverage on an aggregate basis so that, no matter how many incidences or occurrences took place, the insurer could be liable up to only the aggregate amount stated in the policy. By limiting coverage on an aggregate basis for pollution claims, insurers should be able to reduce their liability. This is particularly the case because hazardous substance releases might be characterized in future litigation as multiple incidences or occurrences—each entailing large damages. The magnitude of insurers' current potential liability may be due, in part, to the insurers' not including aggregate limits in prior policies.

Conclusions

In an increasing number of cases between insureds and insurers, courts across the nation are deciding whether OGL policies provided coverage for on-site cleanup costs and off-site damages resulting from the release of hazardous substances. In deciding such cases, courts are focusing on certain key terms in the contracts, such as "accident," "occurrence," and the wording of the pollution exclusion clause. Interpretations of these terms are varied, which should not be surprising because the several courts are simultaneously deciding cases that involve novel applications of relatively new or ambiguous contract provisions. Also, many of the cases we reviewed were still involved in the appeals process. The variety that now exists in analysis of coverage issues may, therefore, change when the cases reach final decisions.

One critical provision being interpreted in coverage contests is the pollution exclusion. Courts have found coverage for various types of releases, despite the language of this exclusion, by employing a wide range of rationales. Courts have also established several criteria for determining when damage occurs under liability policies, ranging from the time a release occurs to the time when physical injury or damage becomes manifest. The method for determining the number of occurrences—an issue not addressed in most liability policies—has similarly been decided in a few key cases, and will likely be a heavily-litigated issue. With regard to

hazardous waste cleanup cost coverage, courts have reached no consensus as to when such damages should be deemed to have occurred, and whether cleanup costs, such as at some CERCLA sites, should be covered as damages. Regarding future contracts, major property/casualty insurers told us that onsite cleanup costs would be excluded because they are uninsurable.

More precise contract language addressing these specific risks could make court interpretations of the contracts more predictable. Two examples of language currently contained in, or being considered for inclusion in, current policies are provided in this chapter. We believe that while judicial interpretations favorable to insurers on future contracts may not be assured, the likelihood of such outcomes will increase as experts within the industry draft more precise language addressing those issues currently being considered in the courts.

Frequency and Severity of Pollution Claims Closed During 1985

During CERCLA reauthorization hearings in 1985 and 1986, insurers expressed concern over the prospect of enormous losses from their pollution liability exposures under old OGL policies resulting from federal environmental liability standards (particularly CERCLA liability) and court decisions dealing with liability and contract interpretation. Yet, at that time, industry-wide data were not available on the actual pollution claims costs that insurers had incurred. In order to explore the extent of these costs, SARA section 208 directed us to review a sample of pollution claims closed during 1985—the year preceding the enactment of SARA—and to determine the frequency and severity of those claims.

Using surveys sent to 104 insurers, we found relatively modest frequency and severity levels for 1985 pollution claims. Of 75 insurers responding to our frequency survey, 25 reported that during 1985 they closed only 382 pollution claims with payment. Eighteen of these 25 insurers subsequently provided us with severity data on 200 of their closed claims. Indemnity payments on these 200 claims totaled about \$6,600,000. Although these results do not include data from some major insurers who did not reply to our surveys, we believe that the response obtained was sufficient to show the general character of pollution claims closed during 1985.

Insurers maintain that the relatively low frequency and severity levels found in our surveys are due to the fact that 1985 pollution claim closures generally involved easily resolved claims with relatively small settlements. The insurers strongly maintain that 1985 closed claims are not indicative of the magnitude of the thousands of open pollution claims that are pending closure or that will eventually be reported against old OGL policies. They contend that these impending claims will involve much greater payments.

Our survey does not provide a basis for making projections about the magnitude of these impending claims. In order to make such projections, more pollution claim closures—and data on these closures—are needed, particularly with regard to the claims associated with CERCLA and RCRA cleanups.

Data-Gathering Methodology

Since the insurers we met with believed that the number of 1985 closed pollution claims would be very small, we decided that representative sampling was methodologically inappropriate; instead, we attempted to survey every 1985 pollution claim closed with payment.

To do this, we contacted 104 insurance groups and individual insurance companies that were most likely to have written pollution insurance in the past and asked for frequency and severity data on all pollution claims that they closed with payment during 1985. We also asked for some basic information on their open pollution claims in order to gauge the extent of their unresolved claims. The 104 insurers included (1) the top 50 writers of "other liability," the insurance category under which most pollution insurance would be written; (2) all past and current members of PLIA; and (3) other insurers known by us to have written pollution insurance. We also included several major U.S. reinsurers to determine if they had written any direct pollution insurance.

We gathered the closed claims data by mailing to the insurers two short questionnaires, one on frequency and a second on severity. (The questionnaire forms are in app. III.) Participation in the survey was voluntary, since we do not have authority to require the insurers to respond. To encourage a good response rate, we extended a pledge of confidentiality to the insurers, promising that only summaries of aggregated data would be used in this report. We did not verify the survey responses because insurers consider their claims files to be confidential. A more detailed discussion of our survey methodology is found in appendix II.

Frequency of 1985 Pollution Claims

Of the 104 insurers to whom we sent our frequency survey, 75 responded with data.¹ Among these 75 respondents were 41 of the top 50 writers of "other liability" insurance (including all of the top 10, and 16 of the top 20). As indicated in table 6.1, the respondents reported closing relatively few pollution claims.

Table 6.1: Frequency of 1985 Pollution
Claims for 75 Responding Insurers

Claims status	Number of claims
Closed during 1985 with payment	382
Remaining open at the end of 1985	11,915

It is important to recognize that frequency is a count of the number of individual pollution claims. The number of pollution claims is not equivalent to the number of pollution incidents. For example, one pollution incident may result in several claims within one insurance company or

¹The cutoff date for our frequency survey was July 31, 1987. In addition to the 75 insurers who responded with data, 10 others responded that they were unable to provide us with the requested data.

among several insurance companies. With regard to the 11,915 open claims, insurers reported that only 697 involved EIL policies.

In table 6.2, the responding insurers are sorted into three groups, depending on their pollution claims activity in 1985.

**Table 6.2: 1985 Pollution Claims Activity
of 75 Responding Insurers**

Claims activity	Number of insurers
Had both open and closed pollution claims	25
Had only open pollution claims	25
Had no open or closed pollution claim	25
Total	75

As table 6.2 indicates, 50 of the 75 responding insurers had some sort of pollution claims activity in 1985. Most of this activity was concentrated within a small number of companies. Of the 382 claims closed, 296 are accounted for by 5 insurers (each of which reported closing 30 or more claims). Of the 11,915 open claims reported, 8,014 of them were accounted for by 9 insurers (each of which reported having 600 or more open claims).

Severity of 1985 Closed Pollution Claims

To determine the severity of the 382 closed claims, we sent a second set of questionnaires to the 23 of the 25 insurers that reported closing claims with payment.² We instructed the insurers to complete one questionnaire for each of their closed claims. The questionnaires asked the cost of the claim's indemnity payment, as well as some basic information on the type of insurance policy involved, the policy dates, the insured's business, the nature of the incident leading to the claim, and the amount of legal costs expended by the insurer in resolving the claim.

As of August 17, 1987, 18 of these 23 insurers responded to our severity questionnaires, providing us with data on 200 claims closed with an indemnity payment to the insured.³ These claims, nearly all of which involved CGL policies, resulted in payments totaling nearly \$6,600,000.

²Two insurers responded to the frequency questionnaire too late to be included in the severity survey.

³We received an additional 25 surveys providing information on claims closed without payment to the insured. We excluded these from our tabulations because our data request was only for claims closed with payments.

Cost of Pollution Indemnity Payments

We asked insurers to provide the total cost of each indemnity payment made for pollution claims closed during 1985. Specifically, these cost data were to include any lump-sum payments, as well as the cost to the insurer of any annuity purchased for future structured payments on the claims. To ensure that we were capturing the complete cost of the claims payments, we instructed the respondents to provide the total cost to their company prior to any amount they recovered from their reinsurers on the claim. (Ordinarily, the cost of a claim payment is borne by the primary insurer who wrote the policy, and by one or more reinsurers who assume part of the risk in return for a portion of the premium.) Since we asked respondents to report separately the legal costs associated with these claims, they are not included in these indemnity payment figures.

For the 200 claims for which we received responses, insurers paid out \$6,607,906. The indemnity payments ranged from under \$100 to about \$1,000,000, with the average payment being \$33,040. However, most of the claims were settled for considerably less than that, since the median payment was only \$5,000.⁴ Tables 6.3 and 6.4 break down the total payment figure by the insured's activity and the primary nature of the incident leading to the claim.

Table 6.3: Distribution of Indemnity Payments According to Insureds' Activity

Insureds' activity	Number of claims	Total amount	Average amount
Manufacturing	109	\$4,021,001	\$36,890
Petroleum	58	1,416,489	24,422
Mining/smeltering/ore processing	3	294,824	98,275
Municipal waste treatment/storage/disposal	3	23,033	7,678
Commercial waste treatment/storage/disposal	3	510,445	170,148
Other	24	342,114	14,255
Total	200	\$6,607,906	

⁴The median is the midpoint in an ordered array of values. The median in this case indicates that half of the claims involve payments of \$5,000 or less.

Table 6.4: Distribution of Indemnity Payments According to Primary Nature of Incident

Nature of incident	Number of claims	Total amount	Average amount
Release associated with treatment, storage, and/or disposal of waste products	100	\$2,333,916	\$23,339
Release associated with petroleum	56	1,348,576	24,082
Release associated with manufacturing process	20	2,284,124	114,206
Release associated with transportation	12	274,666	22,889
Other	12	366,624	30,552
Total	200	\$6,607,906	

The most frequent pollution incident—releases involving the treatment, storage, or disposal of waste products—occurred at manufacturing locations. Regarding the 56 petroleum releases, at least 29 of the claims involved underground storage tanks, as noted in some of the responses.

We also asked for the purpose of the indemnity payments. Table 6.5 provides a breakdown of the responses by the number of claims and the amount.

Table 6.5: Distribution of Indemnity Payments by Purpose

Purpose of payment	Number of claims	Total amount	Average amount
Cleanup/property damage/natural resource damage	119	\$5,641,893	\$47,411
Bodily/personal injury	72	849,898	11,804
All purposes above	7	111,077	15,868
Other	2	5,038	2,519
Total	200	\$6,607,906	

As table 6.5 indicates, most of these payments were for actions involving pollution cleanup, compensation for property damages, and restoration of the environment damaged by pollution. We did not ask whether any of these claims were associated with CERCLA cleanups.

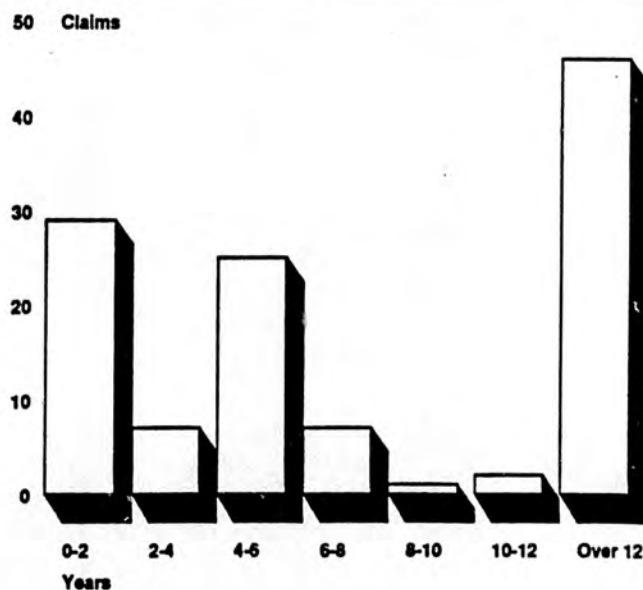
The "Tail" on Pollution Claims

The amount of time that can elapse between the end of the policy period and the date the claim is presented (called the "tail" by insurers) is an important issue in pollution insurance. Because pollution incidents and their effects on human health and the environment are not always detected promptly, many years may pass between the end of the policy

period and the presentation of a claim against that policy. For this reason, pollution liability is considered to be "long tail" by the insurance industry. Under "occurrence" policies, such as CGL policies, an insurer may be liable for pollution incidents that can be traced to the coverage period of an old policy, even though the policy period may have lapsed many years ago.⁵ Of the 200 closed claims for which we received severity questionnaires, 186 involved CGL policies. (Only 4 involved EIL policies; 10 involved other types of policies.)

In reviewing our questionnaire results, we found 78 claims were presented during the policy period and therefore had no tail, and 5 other responses had missing dates. The remaining 117 claims (all but 5 involving CGL policies) were presented after the expiration of the policy period. They had tails ranging from 1 month to 19 years, with the average being 7 years. Figure 6.1 shows the distribution of the claims by 2-year intervals.

Figure 6.1: The "Tail" on 117 Pollution Claims Closed in 1985



No values fall between the year groupings.

⁵For a discussion of the terms of an occurrence policy, see ch. 5.

Insurers have expressed concern about the possibility of large indemnity payments being made on very old policies. As figure 6.1 indicates, 46 claims had tails of more than 12 years. The payments on these claims totaled \$319,362. Nearly all of these claims stemmed from one pollution incident.

Legal Costs of Resolving Claims

Given the controversy over contract coverage (discussed in ch. 5), we asked whether the claim involved legal costs expended by the insurer in disputes with the insured party over terms of the policy's pollution coverage. In all, only five such disputes were reported. They all involved CGL policies, with legal costs totaling \$23,173 and averaging \$4,635 per claim (the median amount being \$4,019).

According to insurers, the legal costs of defending their insureds in lawsuits involving pollution claims can be substantial, and may in fact exceed the cost of the claim payment itself. Our questionnaire asked insurers whether their claims involved defense of such lawsuits and, if so, to specify the total dollar amount of legal expenses, court costs, and other related costs expended by the insurer in defense of the insured.

In all, 118 of the 200 closed claims involved the insurers' defense of suits brought by other parties against the insured.⁶ The total amount expended by the insurers in defending their insureds in these cases was \$2,247,670, averaging \$19,048 per case (the median was \$682). These 118 suits resulted in indemnity payments totaling \$4,348,157. (The average payment was \$36,849; the median payment was \$2,000.) Insurers reported that all but 3 of these claims were resolved through out-of-court settlements.

Limitations of Survey Results

When we developed our survey approach, insurers said that 1985 closed pollution claims would generally consist of relatively simple, inexpensive claims that could be resolved quickly. They predicted that our survey would show

- a low frequency of closed claims,
- relatively uncomplicated claims litigation, and
- low amounts of indemnity payments.

⁶Of these 118 lawsuits, 12 were brought by the federal government; 1 by a state government; 3 by county or local governments; 92 by citizens; and 10 by a combination of two or more of these parties.

The insurers strongly maintained that 1985 closed pollution claims would not be representative of the magnitude of their impending pollution liabilities resulting from past policies.

Given the fact that a number of insurers did not provide responses to our questionnaires, our results do not present a complete picture of the 1985 claims. Furthermore, we cannot be sure that the responses we obtained are representative of the complete picture. Also, given the small number of claims involved, it is possible that data on even a few additional claims not reported to us could significantly change average severity data. Nevertheless, we believe that enough insurers participated to give a good indication of the general character of 1985 pollution claims closed with payment, particularly since our survey results generally correspond to the insurers' predictions.

As predicted by insurers, the frequency of claims settlements is strikingly low, especially when contrasted with the much higher number of open claims (382 closed versus 11,915 open—about a 1:30 ratio). With regard to legal costs, only five of the claims involved disputes with the insured party over contract coverage, resulting in only about \$23,000 in legal costs to the insurers. Additionally, all but three of the claims involving the defense of the insured against lawsuits brought by other parties were reported to have been settled out of court, with insurers paying an average of only about \$19,000 per claim on defense costs. These data suggest that the claims generally did not involve prolonged litigation.

Perhaps the most important characteristic arguing for the simplicity of these claims is the low amount of the indemnity payments themselves. The 200 claims payments totaled only about \$6,600,000. And as indicated by the median payment of \$5,000, most of the claims involved far smaller payments than the average payment of about \$33,000 per claim.

Two other characteristics of the 200 surveyed claims that suggest their relative simplicity are noteworthy. First, only three claims involved pollution stemming from commercial treatment, storage, or disposal facilities—the type of facility that would be associated with CERCLA cleanups involving legal concerns over joint and several liability. Consequently, the surveyed claims may not have involved the liability concerns discussed in chapter 4, which insurers are most concerned about. Second, the surveyed claims did not involve costly bodily/personal injury settlements. Although 72 of the 200 settlements were exclusively for bodily/personal injury, only about \$850,000 was paid for them in total.

Our survey shows that the responding insurers generally did not make substantial pollution claims payments in 1985. However, since our survey represents only a slice of time, it does not provide a statistical basis for making projections about future pollution claims. Due to the small number of pollution claims that were closed in 1985 and the large number that remained open, it may take several more years of additional pollution claims experience before enough claims are closed to form a basis for making such projections. In the meantime, the extent of the insurers' impending pollution liability payments under old CGL policies remains an open issue.

Potential Usefulness of Additional Data on Pollution Claims

Although 50 insurers reported that they had nearly 11,900 open pollution claims at the end of 1985, we do not know how many of these will result in payments, let alone what the size of such payments might be.⁷ Our attempts to gather data on the amounts that insurers were reserving against open pollution claims were not successful because insurers consider this information to be confidential. Such information, in any event, might not be useful at this time. According to several major insurers, open pollution claims are generally still in a relatively immature phase of resolution, and it is difficult for insurers to estimate the ultimate expense of these claims.

As noted earlier, there was no central industry source on pollution indemnity payments at the time of CERCLA reauthorization in 1985-86. In 1987, however, ISO began to require insurers that reported data to it to indicate dollar losses due to environmental liability. These loss data will be broken down by payments for cleanup costs, property damage, and bodily injury. However, ISO's data will not capture all pollution claims. ISO's data are confined to data from CGL policies written by admitted insurers that form ISO's clientele.⁸ (ISO data represent about 75 percent of the commercial general liability market.) Pollution claims data for non-admitted surplus lines insurers are not being captured either by ISO or

⁷By way of comparison, 43 percent of an estimated 73,472 medical malpractice claims closed by insurance companies in 1984 were closed with payment. The average payment for injury was about \$81,000. The median was \$18,000. See *Medical Malpractice: Characteristics of Claims Closed in 1984* (GAO/HRD-87-55, April 22, 1987).

⁸An admitted insurer is one licensed by a state insurance commissioner to sell insurance within the state.

the state insurance departments.⁹ In our review, we were not able to determine the extent to which surplus lines carriers wrote pollution insurance in the past and, consequently, do not know how significant the lack of surplus lines data will be. Since no existing regulatory mechanism requires the collection of pollution data from the surplus lines market, this data void may well continue in the future.

A limited and sharply focused data collection effort might be useful in determining the extent to which insurers pay for pollution cleanup efforts. For example, although EPA gathers data on the dollar amounts paid by responsible parties at individual CERCLA site cleanups, it does not have data on how much of the responsible parties' costs are ultimately borne by their insurers. Data on the insurers' CERCLA-related payments would be key information in evaluating the insurers' contention that they are bearing a large portion of the expense of cleaning up the nation's most hazardous waste sites.

Conclusions

Our survey of pollution claims closed during 1985 shows that only 382 such claims were closed by the 75 insurers who responded to us. Additional data on the severity of 200 of these claims shows that indemnity payments were relatively modest, totaling about \$6,600,000—with an average of about \$33,000 per claim (with a median claim of \$5,000). These 200 closed claims did not, on average, involve substantial legal costs to the insurers, either over contract coverage disputes with insureds or in defense of the insured in lawsuits involving third parties. These 1985 results, however, cannot be used to project the magnitude of pollution claims that have not yet been resolved. Of the 75 responding insurers, 50 reported that they had about 11,900 unresolved pollution claims at the end of 1985.

Data on pollution claims closed since 1985 would be needed to monitor the magnitude of the insurers' pollution claims costs. Beginning in 1987, ISO is gathering data on an ongoing basis from most of the commercial liability insurance market on their CGL pollution claims losses. However, these data will not capture pollution payments made by all insurers under all types of policies.

⁹A surplus lines insurer is a company that generally underwrites risks or parts of risks for which insurance is not available through a company licensed in the insured's state. This business is, therefore, placed with a nonadmitted insurer (a company not licensed in the state) in accordance with surplus lines provisions of state insurance laws. (Source: A.M. Best.)

Matter for Consideration by the Congress

The extent to which insurers pay for pollution cleanups and related third-party bodily injury and property damage will almost certainly be raised by the insurance industry during the next CERCLA reauthorization. However, determining the amounts that insurers are paying is difficult because the industry does not have centralized, comprehensive data on these indemnity payments. Given this situation, we believe that the Congress should consider requiring insurers or responsible parties, as appropriate, to report to EPA the amounts of indemnity payments made to cover pollution cleanups and related third-party bodily injury and property damage.

Section 208 of SARA

SEC. 208. INSURABILITY STUDY.

Section 301 of CERCLA is amended by adding the following new subsection at the end thereof:

"(g) INSURABILITY STUDY.—

"(1) STUDY BY COMPTROLLER GENERAL.—The Comptroller General of the United States, in consultation with the persons described in paragraph (2), shall undertake a study to determine the insurability, and effects on the standard of care, of the liability of each of the following:

"(A) Persons who generate hazardous substances: liability for costs and damages under this Act.

"(B) Persons who own or operate facilities: liability for costs and damages under this Act.

"(C) Persons liable for injury to persons or property caused by the release of hazardous substances into the environment.

"(2) CONSULTATION.—In conducting the study under this subsection, the Comptroller General shall consult with the following:

"(A) Representatives of the Administrator.

"(B) Representatives of persons described in subpara-graphs (A) through (C) of the preceding paragraph.

"(C) Representatives (i) of groups or organizations com-prised generally of persons adversely affected by releases or threatened releases of hazardous substances and (ii) of groups organized for protecting the interests of consumers.

"(D) Representatives of property and casualty insurers.

"(E) Representatives of reinsurers.

"(F) Persons responsible for the regulation of insurance at the State level.

"(3) ITEMS EVALUATED.—The study under this section shall include, among other matters, an evaluation of the following:

"(A) Current economic conditions in, and the future out-look for, the commercial market for insurance and reinsurance.

"(B) Current trends in statutory and common law reme-dies.

"(C) The impact of possible changes in traditional stand-ards of liability, proof, evidence, and damages on existing statutory and common law remedies.

"(D) The effect of the standard of liability and extent of the persons upon whom it is imposed under this Act on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

"(E) Current trends, if any, in the judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed, could affect such trends.

"(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

"(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

"(H) The effects of the standards of liability and finan-cial responsibility requirements imposed pursuant to this Act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies, as well as waste generation minimization.

"(4) SUBMISSION.—The Comptroller General shall submit a report on the results of the study to Congress with appropriate recommendations within 12 months after the enactment of this subsection."

Objective, Scope, and Methodology

The objective of this report is to provide the Congress with the information sought by section 208 of SARA concerning the insurability of activities involving hazardous substances. Section 208 required us to review the liability and standard of care associated with the generation, transportation, storage, and disposal of hazardous substances. In conducting our work, the act directed us to consult with representatives of generators of hazardous substances, disposal facility owners or operators, persons liable for injury, groups comprised of persons adversely affected by releases of hazardous substances, groups organized for the protection of consumer interests, the Environmental Protection Agency, property/casualty insurers, reinsurers, and state insurance regulators.

This report concerns only the section 208 requirements. The other insurance and liability issues raised by the Congress in passage of SARA—cleanup contractor liability, post-closure liability, and petroleum tank liability—will be the subject of future reports. Environmental restoration insurance for the trucking industry was addressed in a May 1986 GAO report (Motor Carriers: The Availability of Environmental Restoration Insurance, RCED-86-150BR, May 19, 1986).

Because much of the data needed to perform this study are proprietary or unavailable in any readily accessible form, we relied on the voluntary cooperation of the insurance and hazardous substance industries. Specific data limitations are discussed in appropriate sections of this appendix.

SARA required an evaluation of eight specific issues, listed below (A through H).

(A) Current economic conditions in, and the future outlook for, the commercial market for insurance and reinsurance.

To determine the economic condition and outlook for commercial insurance, we reviewed the work already completed by GAO, the Congressional Research Service (CRS), and others on the economic conditions of the insurance industry and the data available in A.M. Best (the industry's statistical publication) on the economic conditions of the industry. However, the economic condition of the pollution line of the insurance market has not been documented, primarily because of the lack of specific pollution insurance data. As a result, we gathered data on this issue through discussions with insurance and reinsurance company executives, associations, and state regulators. We obtained opinions, anecdotal information, and other information on several issues:

- The status of the pollution insurance market as it relates to the economic condition of the industry as a whole.
- Which companies are writing pollution insurance, for whom, coverage provided, premiums charged, and the relative amount of premiums obtained by pollution liability insurance.
- Which companies have stopped writing pollution insurance and why.
- The lack of historical data on damages and risks needed to set premiums.
- The influence and control of insurers and reinsurers over the pollution liability insurance market.

In addition, we discussed with the insurance industry officials identified above the possible causes of observed changes in the pollution liability insurance and reinsurance markets and the impact on insurers of possible expansion and uncertainty of liability due to (1) recent court decisions under tort and other state and federal statutes and (2) technological uncertainty regarding the ability of waste handlers to safely store and treat hazardous materials.

Treatment, storage, and disposal facilities are required by RCRA to prove financial responsibility (with insurance being one method of doing this). We discussed the availability of pollution insurance with two associations representing TSDFs. To document financial responsibility requirements for TSDFs, we reviewed RCRA-mandated financial responsibility requirements and related implementing regulations. Through telephone contacts with hazardous waste officials in 15 states (Alabama, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas) that regulated 68 percent of the TSDFs, we obtained information on state financial responsibility regulations. From officials at EPA headquarters and in 8 of its 10 regional offices (Regions I through VIII) and officials in the 15 states we contacted, we obtained estimates of the extent that insurance is used by TSDFs and the impact of not having insurance coverage. In addition, we spoke to 11 TSDF owners/operators to determine how they covered their pollution liability. We also reviewed data contained in EPA's Hazardous Waste Data Management System, the Consolidated Data Base developed for 1,538 land disposal facilities, and EPA's July 1985 survey of the Loss of Interim Status facilities.

Generators, however, are not required to have insurance or report how they insure. Given the time frame for this work, it was not practical to systematically survey the 100,000 generators of hazardous substances.

Generator insurability information was obtained primarily through discussion with four associations and five individual companies that volunteered to discuss this information with us. We also contacted three risk-retention groups that were in the formative stage and one that was unable to get started to determine the type and extent of coverage offered, membership, and premiums.

(B) Current trends in statutory and common law remedies.

To determine trends in remedies, we reviewed CERCLA and its 1986 amendments under SARA and case law for the standard of liability applied under CERCLA, as amended. In addition, we researched various potential liability situations that can arise in hazardous waste activities for parties that may be liable for releases. We also researched state statutes that provide remedies for personal injury and property damage caused by releases of hazardous substances. We researched court decisions and legal commentaries, such as the CERCLA 301(e) study, to determine common law causes of action and remedies for hazardous waste releases.

(C) The impact of possible changes in traditional standards of liability, proof, evidence, and damages on existing statutory and common law remedies.

To determine the impact of possible changes, we reviewed legal theories that have been developed in product liability cases that suggest possible changes in traditional standards in hazardous waste cases. We also reviewed state legislation to change tort law doctrines, such as joint and several liability and punitive damages, to determine how these changes might affect the ability of a victim to obtain a remedy.

(D) The effect of the standard of liability and extent of persons upon whom it is imposed under CERCLA, as amended, on the protection of human health and the environment and on the availability, underwriting, and pricing of insurance coverage.

On the basis of the information developed under issue B above, we discussed with insurance underwriters and risk assessors how the standards affect the availability, underwriting, and pricing of insurance. In addition, we discussed the standards with EPA officials to determine the impact on the financial responsibility requirement regulations.

(E) Current trends, if any, in judicial interpretation and construction of applicable insurance contracts, together with the degree to which amendments in the language of such contracts and the description of the risks assumed could affect such trends.

We reviewed legal articles and relevant cases that illustrate current interpretations of certain key terms and coverage contained in insurance policies, including "occurrence," "sudden and accidental," the insurer's duty to defend, and coverage of damage to the insured's property. We also reviewed the development over recent decades of contracts for comprehensive general liability insurance and environmental impairment liability insurance. We obtained from the Insurance Services Office Inc. copies of these contracts and discussed with members of the Environmental Litigation Insurance Association the impact of possible changes in insurance contract language.

(F) The frequency and severity of a representative sample of claims closed during the calendar year immediately preceding the enactment of this subsection.

In the early stages of this survey, we met with insurance association officials and were told that there was no central source for identifying the universe of insurers that offered pollution insurance, either as part of a CGL policy or as a separate EIL policy. Given this situation, the American Insurance Association (AIA) suggested that we include in our survey the 20 top writers of "other liability," an insurance category under which they said most pollution coverage would be written. We adopted this approach, but we expanded the number of insurers to include the top 50 writers of "other liability." We did this to ensure that we were capturing the pollution claims activity at the smaller insurance companies that each write less than 1 percent of "other liability." Altogether, these 50 insurers constituted over 80 percent of the "other liability" market share in 1985.

We also included all past and current members of PLIA. PLIA is a reinsurance pool formed in January 1982 to provide 100-percent reinsurance and necessary services for member insurers who wish to offer pollution insurance.

In addition, we included insurers who have been known to write pollution insurance but were not included in the two groups defined above. We identified these companies through interviews, trade publications, and EPA documents. Included among these were major U.S. reinsurers

whom we contacted to determine if they had written any direct pollution insurance.

In all, we contacted 104 insurance groups and companies. Although we aimed to be comprehensive in our survey and worked closely with insurance experts and associations in defining our target companies, we cannot determine the extent to which these 104 insurers include the entire universe of insurers who closed pollution claims in 1985.

Given the relatively short amount of time available to develop and administer the survey, as well as to analyze and report on the results, we kept the scope of the survey tightly focused on basic frequency/severity information. In developing the survey, we consulted insurance trade associations and companies on technical issues, such as the definition of a "closed" pollution claim, and on the elements involved in measuring a pollution claim's severity. In the end, we decided to gather frequency and severity information by means of two short questionnaires sent directly to insurers. The first questionnaire gathered frequency data, and the second gathered severity data. Copies of these questionnaires are found in appendix III.

In our cover letters to the questionnaires, we noted that the insurers' participation in the survey was voluntary. We do not have authority to require their participation. However, we encouraged the insurers to complete the questionnaires by emphasizing the importance of the information to the Congress. We also encouraged participation by extending a pledge of confidentiality covering the data sent to us. We promised that no information on individual insurers would be included in our report — only summaries of aggregated data. As a further measure to insure the confidentiality of the data, the link between the mailing list and the company codes on the frequency questionnaires was broken at the conclusion of the survey. The severity questionnaires never contained insurance company identification numbers and remained anonymous. (The companies used a separate mailing to indicate that they had sent us their completed severity questionnaires.)

The survey results represent data provided to us by insurers. We did not attempt to verify these data, since insurers consider their claims files confidential.

(G) Impediments to the acquisition of insurance or other means of obtaining liability coverage other than those referred to in the preceding subparagraphs.

Other possible impediments were discussed with officials of all organizations contacted in carrying out this review.

(H) Effects of the standards of liability and financial responsibility requirements imposed pursuant to this act on the cost of, and incentives for, developing and demonstrating alternative and innovative treatment technologies and waste generation minimization.

To determine the effects of the standard of liability and financial responsibility requirements on alternative and innovative technologies, we contacted EPA officials and companies with new technologies to update past and ongoing GAO, Congressional Budget Office (CBO), Office of Technology Assessment (OTA), and EPA reports on RCRA and CERCLA concerning permanent disposal and minimization technologies. These studies include: the GAO report, Hazardous Waste: EPA's Consideration of Permanent Cleanup Remedies (GAO/RCED-86-178BR; July 7, 1986); OTA reports, Serious Reduction of Hazardous Waste for Pollution Prevention and Industrial Efficiency, (September 1986), Superfund Strategy (March 1985), and Technologies and Management Strategies for Hazardous Waste Control, (March 1983); and the CBO report, Hazardous Waste Management: Recent Changes and Policy Alternatives (May 1985).

We also reviewed RCRA financial requirements and discussed with representatives of hazardous waste generators, handlers, and disposers, and the insurance industry the impact of insurance on new technology development and implementation.

As indicated above, we met with representatives of generators of hazardous substances, disposal facility owners or operators, persons liable for injury, groups comprised of persons adversely affected by releases of hazardous substances, groups organized for the protection of consumer interests, the Environmental Protection Agency, property/casualty insurers, reinsurers, and state insurance regulators. In addition to addressing specific audit issues with these representatives, we brought them together early in our work to review and discuss our approach to carrying out the mandates of the act.

Frequency and Severity Questionnaires

U.S. GENERAL ACCOUNTING OFFICE



Pollution Claims Survey
Response Form

For the purposes of this survey, "pollution claims" are defined as (1) those types of claims presented against direct insurance policies providing coverage for sudden and/or gradual pollution, e.g., Environmental Impairment Liability (EIL) insurance, and (2) any direct insurance claims of the same type presented against Comprehensive General Liability (CGL) or similar policies. Do not include workers' compensation and non-environmental products liability claims.

Use your own organization's definitions of "open" and "closed" claims.

NOTE TO INSURANCE GROUPS: The data you provide should represent the aggregate number of pollution claims for all affected companies that are part of your insurance group. (Please call John Finedore or Erin Bozik (202)-382-4326 if group data is not available.)

1. For calendar year 1985, how many pollution claims did your group/company close with payment? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

Questions 2a-c, below, are included at the request of members of the insurance industry in order to help the Congress understand the extent of open pollution claims as of the end of 1985. Please provide this data if available.

- 2a. At the end of calendar year 1985, how many open pollution claims did your group/company have? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

- 2b. Of the number given in Question 2a, how many of these open claims were presented against EIL insurance? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

- 2c. Of the number given in Question 2a, how many of these open claims were presented against CGL policies in which a review of the facts, applicable law, and policy provisions revealed no coverage defenses? (FILL IN NUMBER. IF NONE, ENTER "0".)

NUMBER

Please detach this response form from the cover letter and return the form in the enclosed addressed, postage-paid envelope. In the event the envelope is misplaced, the return address is:

Mr. Hugh Wessinger
U.S. General Accounting Office
Room 4073A
441 G Street, N.W.
Washington, DC 20548

Thank you for your participation in this survey.

Appendix III
Frequency and Severity Questionnaires

U.S. GENERAL ACCOUNTING OFFICE

Survey of Pollution Claims Closed During 1985



INTRODUCTION

For the purposes of this survey, "pollution claims" are defined as (1) those types of claims presented against policies providing coverage for sudden and/or gradual pollution, e.g., Environmental Impairment Liability (EIL) insurance, and (2) any claims of the same type presented against Comprehensive General Liability (CGL) or similar policies. Do not include workers' compensation and non-environmental liability claims.

To avoid the double counting that would result from including reinsurance data, report only those pollution claims presented against direct insurance policies and provide claim costs prior to and exclusive of any reinsurance recoverable on the claim.

Complete one survey form for each pollution claim closed between January 1, 1985 and December 31, 1985, that resulted in a payment.

All information gathered on this survey will be kept confidential by the U.S. General Accounting Office. The data provided by you will be aggregated with data provided by other insurance companies. Only summaries of the aggregated data will be used in reporting information to the Congress. In order to assure confidentiality, this questionnaire contains no company identification code. The company code is found on the attached postcard. Detach the postcard and mail it separately when you mail the completed questionnaire. The postcard will let us know that your company has responded. A self-addressed, postage-paid envelope is provided so you can return your questionnaire(s).

In the event that the return envelope for the questionnaire is misplaced, the return address is:

Mr. Hugh Wessinger
U.S. General Accounting Office
Room 4076A
441 G Street, N.W.
Washington, DC 20548

If you have any questions about this survey, please call John Finedore or Erin Bozik on (202) 382-4326.

1. Against what type of policy was this pollution liability claim presented? (CHECK ONE.)

1. ☐ Comprehensive General Liability

2. ☐ Environmental Impairment Liability

3. ☐ Other (SPECIFY) _____

2. On what date did the insured first present the claim against your company? (FILL IN MONTH AND YEAR.)

_____/_____
Month / Year

3. Under what period(s) of the policy was this claim paid? (FILL IN DATES.)

FROM ____/_____
Month / Year

TO ____/_____
Month / Year

4. What is the primary business of the insured party? (CHECK ONE.)

1. ☐ Manufacturing

2. ☐ Mining/Smelting/Ore processing

3. ☐ Commercial waste treatment/storage/disposal

4. ☐ Municipal waste treatment/storage/disposal

5. ☐ Other (SPECIFY) _____

(QUESTIONS CONTINUE ON THE OTHER SIDE)

Appendix III
Frequency and Severity Questionnaires

5. What was the primary nature of the incident leading to this claim? (CHECK ONE.)
1. ☐ A release associated with a manufacturing process
 2. ☐ A release associated with the treatment, storage, and/or disposal of waste products
 3. ☐ A release associated with transportation (air, land, or water)
 4. ☐ Other (SPECIFY) _____

6. Were legal costs expended in a dispute between your company and the insured over the pollution coverage? (For example, a dispute over your company's duty to defend the insured.) (CHECK ONE.)
1. ☐ No ----> SKIP TO QUESTION 8
 2. ☐ Yes
7. What was the dollar amount of legal expenses incurred by your company in resolving this policy coverage dispute? (FILL IN DOLLAR AMOUNT.)
- \$ _____
8. Did this claim involve a suit against the insured? (CHECK ONE.)
1. ☐ No ----> SKIP TO QUESTION 11
 2. ☐ Yes
9. Please identify the party or parties that brought the suit. (CHECK ALL THAT APPLY.)
1. ☐ Federal Government
 2. ☐ State Government
 3. ☐ County/Local Government
 4. ☐ Citizen suit
 5. ☐ Other (SPECIFY) _____
10. What was the total dollar amount of legal expenses, court costs, and other related costs expended by your company in defense of the insured? (DO NOT INCLUDE COSTS YOU REPORTED IN QUESTION 7.)
- \$ _____
11. How was the amount to be paid on this claim determined? (CHECK ONE.)
1. ☐ Out-of-court settlement
 2. ☐ Jury/Judge award
 3. ☐ Other (SPECIFY) _____
12. What was the total cost to your company of the settlement/award on this claim prior to and exclusive of any reinsurance recoverable by your company on this claim? (INCLUDE THE AMOUNT OF ANY LUMP-SUM PAYMENT AND/OR THE COST OF ANY ANNUITY PURCHASED FOR FUTURE STRUCTURED PAYMENTS.)
- \$ _____
13. Which of the following were included under the terms of the settlement/award paid by your company on this claim? (CHECK ALL THAT APPLY.)
1. ☐ Cleanup (remedial/removal-type actions)
 2. ☐ Allegations of property damage
 3. ☐ Allegations of natural resource damage
 4. ☐ Allegations of personal/bodily injury
 5. ☐ Other (SPECIFY) _____

THANK YOU FOR
COMPLETING THIS QUESTIONNAIRE

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CONTRACTORS POLLUTION LIABILITY COVERAGE

Comparisons of the following policy forms outline the key provisions:

American International Group/
National Union Fire Insurance Company

Reliance National/
Planet Insurance Company

Please be advised that as of September 1, 1989, Reliance, through Environmental Compliance Services, has introduced a combined Professional Liability and Pollution Legal Liability form which is referred to as the Consultants Environmental Liability Policy.

CONTRACTORS POLLUTION LIABILITY COVERAGE COMPARISON

PLANET INSURANCE COMPANY

NATIONAL UNION FIRE INSURANCE COMPANY

Item	Planet Insurance Company	National Union Fire Insurance Company	Comments
INSURING AGREEMENT	To indemnify the insured against loss, the insured has become legally obligated to pay as a result of claims first made against the insured and reported to the company in writing during the policy period, or optional extended discovery period if applicable, for pollution conditions arising out of the performance by the named insured of operations designated in Item 5 of the declarations provided always that such pollution conditions are sustained in whole or in part subsequent to the retroactive date. It is a condition precedent to coverage under this policy that coverage is only afforded for operations performed by the named insured. Written notification of job status is reported to the company on a semi-annual basis.	To indemnify the insured against loss, the insured has or will become legally obligated to pay as a result of claims first made against the insured and reported to the company in writing during the policy period or extended discovery period if applicable, for pollution conditions emanating from locations designated in the declarations.	Insuring agreement format is similar and is typical claims made policy wording.
DEFINITIONS:			
1. Insured:	Insured means the named insured and any director, officer, partner or employee thereof while acting within the scope of his or her duties as such.	Insured means the named insured and any director, officer, partner or employee thereof while acting within the scope of his or her duties as such.	Difficult to name pure consultants as insureds.
2. Loss:	Loss means: 1. Monetary awards or settlements of compensatory damages arising from:	Loss means: 1. Monetary awards or settlements of compensatory damages arising from:	Loss definitions are the same.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	a. Bodily injury as defined herein, or b. Property damage as defined herein, and 2. Costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.	a. Bodily injury as defined herein, or b. Property damage as defined herein, and 2. Costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.	
3. Bodily Injury:	Bodily injury means bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death resulting therefrom, caused by pollution conditions arising out of the performance by the named insured of operations designated in Item 5 of the declarations.	Bodily injury means bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death resulting therefrom, caused by pollution conditions emanating from the locations in the declarations.	Wording is essentially the same in both policies.
4. Property Damage:	Property damage means: 1. Physical injury or destruction of tangible property, including the resulting loss of use thereof. 2. Cleanup costs. 3. Loss of use of tangible property that has been physically injured or destroyed; provided that such physical injury or destruction, clean up costs and/or loss of use are caused by pollution conditions arising out of the performance of the named insured of operations designated in Item 5 of the declarations.	Property damage means: 1. Physical injury or destruction of tangible property, including the resulting loss of use thereof. 2. Cleanup costs. 3. Loss of use of tangible property that has been physically injured or destroyed; provided that such physical injury or destruction clean up costs and/or loss of use are caused by pollution conditions emanating from the locations designated in the declarations.	Wording is the same in both policies.
5. Pollution Conditions:	Pollution conditions means the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants,	Pollution conditions means the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other	Wording is the same in both policies.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	contaminants or pollutants into or upon land, the atmosphere, any watercourse or body of water, which results in bodily injury or property damage.	irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in bodily injury or property damage.	
6. Claim:	Claim means the assertion of a legal right alleging liability or responsibility on the part of the named insured, arising out of pollution conditions and shall include but not necessarily be limited to lawsuits or petitions filed against the named insured.	Claim means the assertion of a legal right alleging liability or responsibility on the part of the named insured, arising out of pollution conditions and shall include, but not necessarily be limited to, lawsuits or petitions filed against the named insured.	Wording is the same in both policies.
7. Territory:	The territory includes the United States, its territories or possessions or Canada for claims made or brought in the United States whose territories or possessions are in Canada.	The policy only applies to claims arising from pollution conditions in the United States, its territories or possessions or Canada and made or brought in the United States, its territories, possessions or Canada.	Wording is similar in both policies.
EXCLUSIONS			
1. Prior to Inception Date:	Coverage does not apply to any loss arising from pollution conditions existing prior to the inception date of this policy if any officer, director, partner or other employee of the named insured responsible for the environmental affairs, control or compliance, knew or could have reasonably foreseen that such pollution conditions could have been expected to give rise to a claim.	The insurance does not apply to losses arising from pollution conditions existing prior to the inception date of this policy, if any officer, director or partner or other employee of the named insured responsible for environmental affairs, control or compliance, knew or could have reasonably foreseen that such pollution conditions could have been expected to give rise to a claim.	Wording is the same in both policies.
2. Pecuniary relief:	Insurance does not apply to any claims or suit seeking non-pecuniary relief.	Insurance does not apply to losses arising from claims seeking non-pecuniary relief.	Wording is the same in both policies.

(MISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
3. Offshore facilities:	Coverage does not apply to losses arising from the ownership or operation of any "offshore facility" as defined in the under continental shelf lands act amendments of 1978 or the clean water act of 1977 as amended in 1978, or the "deep water port" as defined in the deep water port act of 1974 as amended, nor shall there be any coverage or liability resulting from omissions of drilling fluid, oil, gas or other fluids from any oil, gas, mineral, water or geothermal well of any nature whatsoever.	Insurance does not apply to losses arising from the ownership or operation of any "offshore facility" as defined in the outer continental shelf lands act amendments of 1978 or the clean water act of 1977 as amended in 1978 or any "deep water port" as defined in the deep water port act of 1974 as amended, nor shall there be any coverage for liability resulting from emissions for drilling fluid, oil or gas or other fluids from any oil, gas, mineral, water or geothermal well of any nature whatsoever.	
4. Workers' Compensation:	Coverage does not apply to any loss arising under any workers' compensation, unemployment compensation or disability benefits or similar law.	The insurance does not apply to any loss arising under any workers' compensation, unemployment compensation or disability benefits law or similar law.	
5. Contractual:	Coverage does not apply to any loss arising as a result of liability of others assumed by the named insured under any contract or agreement, other than covered operations set out above in Item 5 of the declarations.	Insurance does not apply to losses arising as a result of liability of others assumed by the named insured under any contract or agreement, however this exclusion does not apply to those contracts or agreements between the named insured and its clients for the operation specified in Part M of the contractors coverage endorsement.	
6. Nuclear:	This policy contains the standard nuclear exclusion and definition.	Standard nuclear exclusion and definition.	
7. Willful Acts:	The policy does not apply to losses arising from pollution conditions based upon or attributable to the insured's intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice	The coverage does not apply to losses arising from pollution conditions based upon or attributable to the insured's intentional, willful or deliberate non-compliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice	

(MISCC)

ItemPlanet Insurance CompanyNational Union Fire Insurance CompanyComments

letter, executive order or instruction of any other governmental agency or body.

letter, executive order or instruction of any governmental agency or body.

8. Acid Rain:

Coverage does not apply to any losses arising from pollution provisions based upon or attributable to acid rain conditions.

The coverage does not apply to any loss arising from pollution conditions based upon or attributable to acid rain conditions.

9. Professional Services:

Coverage does not apply to losses arising out of the rendering or the failure to render professional services by the insured.

It is hereby understood and agreed that this insurance does not apply to loss arising out of the rendering of or the failure to render professional services by the named insured, including:

a. The preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications.

b. Supervisory inspection or engineering services.

10. Superfund Sites:

Coverage does not apply to losses arising from operations performed at sites indemnified as being either proposed for or on the final national priorities list or any state "superfund" list unless specifically scheduled in the policy by endorsement.

It is hereby understood and agreed that the insurance does not apply to losses arising from operations performed at sites identified as being a proposed or on the final national priorities list or any state, "superfund" list unless specifically scheduled into the policy by endorsement.

Exclusions can be deleted.

11. Transporting hazardous waste materials:

This policy does not cover losses arising from any waste or materials to be transported via automobile, aircraft, watercraft or rolling stock beyond boundaries of the jobsites where covered operations are being performed.

It is understood and agreed that this insurance does not apply to loss arising from waste or materials transported by automobile, aircraft, watercraft or rolling stock beyond the boundaries of the jobsite.

Note reference to jobsite boundaries.

12. Underground Tanks:

Coverage does not apply to losses arising from the repair, installation or

It is hereby understood and agreed that no coverage will be granted for the

Separate coverage available.

(NISCC)

<u>Item</u>	<u>Planet Insurance Company</u>	<u>National Union Fire Insurance Company</u>	<u>Comments</u>
	maintenance of underground storage tanks and associated underground piping.	repair, installation or maintenance of underground storage tanks and associated underground piping.	
13. Asbestos:	Coverage does not apply to losses arising out of exposure to asbestos. In addition, there will be new coverage for loss resulting from the removal, cleanup or disposal of asbestos products, fibers or asbestos dust.	It is hereby understood and agreed that this insurance does not apply to any liability for property damage, bodily injury or any claims (including defense costs) arising out of exposures to asbestos. In addition, there will be no coverage for claims resulting from the removal, cleanup or disposal of asbestos products, fibers or asbestos dust.	Separate coverage available.
14. Completed Operations:	Coverage available up to 5 years.	2 years C.O. extension available.	
15. Available Limits:	\$3MM/\$6MM (defense costs are included in the limit)	\$5MM/\$5MM \$1MM/\$5MM in blanket coverage	Planet hopes to have \$5MM/\$10MM available by the end of 1989.
16. Extended Discovery:	12 months	12 months	
A) Premium	Up to 200% of policy premium	Up to 200% of policy premium	
17. Loss Reporting:	Must be made in writing to the insured during the policy period and including the optional extended discovery period.	Must be made in writing to the insured during the policy period and including the optional extended discovery period.	
18. Duty to Defend:	Company shall have the right but not the duty to assume the adjustment of any claim.	Company shall have the right but not the duty to assume the adjustment of any claim.	
19. Blanket Coverage Available:	Yes - contractors doing similar jobs on one or more projects. Non-similar jobs can be added to blanket policy on a case by case basis.	Yes - contractors doing similar jobs on one or more projects. Non-similar jobs can be added to blanket policy on a case by case basis.	The larger the contractor and/or the jobs performed, the harder it is to obtain blanket coverage.

(MISCC)

PROFESSIONAL LIABILITY INCLUDING POLLUTION

The following professional liability policies for Response Action Contractors and Engineers provide coverage for pollution liability, subject to the terms of the complete policy contract and application.

These abbreviated summaries were prepared as an outline of the policy contracts and liberty has been taken in describing some of the sections and clauses.

American International Group

Reliance National/Planet Insurance Co.

Demeter Ltd.

H.S. Weavers Underwriting Agencies, Ltd.

AMERICAN INTERNATIONAL GROUP

Lexington Insurance Company
Response Action Contractor
Errors and Omissions Insurance

Declarations:

Limit of Liability:	\$5 mm	Each Claim
	5 mm	Aggregate

Deductible:	Each Claim
	Aggregate

Policy Form:	Claims Made and Reported
	Policy
	Application included as
	warranty

Scheduled Project:

Retroactive Date:	Policy Inception
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I. Insuring Agreement:

- 1) To Pay on Behalf of the Insured
- 2) Compensatory Damages, including personal injury and property damage
- 3) Liability for negligent acts, errors, or omissions
- 4) Solely in performance of a "response action contract"

II. Defense and Settlement:

- 1) Insurer has right and duty to defend claim
- 2) Subject to other collectible insurance, insurer in its sole discretion may investigate and settle any claim.
- 3) Defense expense reduces applicable limit of liability

- 4) Insurers duty to defend ends when limit of liability has been paid for damages, prejudgment interest, and defense expenses.

III. Exclusions:

- 1) Liability of any insured imposed under a statutory standard of strict liability ---
- 2) Workers' Compensation, disability benefits, unemployment compensation law ---
- 3) Employee when engaged in insured's employment
- 4) Dishonest, fraudulent, or criminal acts or omissions
- 5) Knowing violation of federal, state or local laws or regulation
- 6) Plagiarism, infringement of a copyright, trademark, patent or design patent, industrial piracy, theft of trade secrets or unfair business practices. Personal Injury exclusion.
- 7) Any act, error, or omission prior to inception date of policy.
- 8) Any act, error, or omission with effecting or maintaining any insurance or bond
- 9) Failure to complete drawings, plans, or specifications on time; exception if failure results from negligent act, error or omission
- 10) Express warranties or guarantees or estimates of costs or completion dates of scheduled projects.
- 11) The design or manufacture of any goods or products ----
- 12) Claims made against any insured by any party where an ownership interest exists ---
- 13) Joint Ventures, unless specifically endorsed
- 14) Liability from ownership, maintenance, operation or use of watercraft, automobile, aircraft or any kind of motor vehicle --
- 15) Liability of others assumed by contract
- 16) Liability resulting from the consignment of any waste or other material to a disposal facility
- 17) Punitive or exemplary damages ---
- 18) Nuclear Liability

IV. Definitions:

- 1) Claim
- 2) Defense Expense
- 3) Damages
- 4) Insured
- 5) Personal Injury
- 6) Policy Period
- 7) Response Action Contract
- 8) Scheduled Project
- 9) Property Damage

V. Limits of Liability:

- 1) Defines maximum limit of liability regardless of number of insureds, claims, or persons making claims.
- 2) Defines maximum limit as sum of all claims arising from one negligent act, error, or omission.
- 3) Deductible will apply to each claim
- 4) Application of Aggregate Limit and Aggregate Deductible

VI. Deductible:

- 1) Deductible is applicable to each claim and shall be paid by the insured.
- 2) Deductible is applicable to defense expense.

VII. Conditions

- 1) Insured's duties in the event of a claim
- 2) Assistance and Cooperation of the Insured
- 3) Bankruptcy
- 4) Action Against Company
- 5) Subrogation
- 6) Assignment
- 7) Changes
- 8) Examination of Books and Records
- 9) Cancellation: 30 Days - Any other reason
10 Days - Nonpayment of Premium
- 10) Representations
- 11) Inspection and Audit

VIII. Extended Reporting Period:

- 1) Available if Insurer cancels or refuses to renew policy
- 2) Twelve months effective at cancellation date or policy expiration.
- 3) Additional premium - not to exceed 200% of annual premium
- 4) Offer of different terms and conditions or higher premium does not constitute a refusal to renew policy.
- 5) Does not increase or reinstate limits of liability.

RELIANCE NATIONAL

Planet Insurance Company
Consultants Environmental Liability Policy

Declarations

Limit of Liability:	\$2 MM	Each Claim	Blanket Coverage
	2 MM	Aggregate	
	3 MM	Each Claim	Project Basis
	6 MM	Aggregate	

Retention:

Policy Form: Claims Made Policy
Application included as warranty

Retroactive Date: Policy Inception

I. Insuring Agreement:

Coverage A 1) To indemnify the Insured
 2) Liability for damages by reason of act, error, or omissions in Professional Services rendered or that should have been rendered.

Coverage B 1) To indemnify the Insured
 2) Liability for damages for Pollution Conditions arising out of the performance of Professional Services rendered by the Insured.

Both Coverage A and B subject to claims first made against the insured and reported to the company, in writing, during the policy period or optional extended discovery period.

No coverage for claim prior to inception date or retroactive date of the policy.

II. Definitions:

- 1) Insured
- 2) Claim
- 3) Damages
- 4) Policy Period
- 5) Professional Services
- 6) Pollution Conditions
- 7) Bodily Injury
- 8) Property Damage

III. Territory:

- 1) Claims from Professional Services rendered in United States, its territories or possessions or Canada and brought in this territory.

IV. Exclusions:

- 1) Dishonest, fraudulent, malicious, or knowingly wrongful act, error, or omission
- 2) Insured's services or capacity as officer, director --- of charitable organization --- pension or trust; a fiduciary under ERISA 1974
- 3) Any claim made by business enterprise --- in which an ownership interest exists
- 4) Any claim for bodily injury or property damage except as a result of an act, error or omission
- 5) To any claim arising out of false arrest, humiliation, detention or imprisonment, wrongful entry --- libel, slander --- Personal Injury exclusion
- 6) Claim arising out of discrimination ---
- 7) Claim arising out of violation of Securities Act of 1933
- 8) Liability of others assumed under any contract or agreement
- 9) Any claim arising from express warranties and guarantees; cost estimates of probable costs being exceeded.
- 10) Any claim arising out of the operation of any site or facility
- 11) Any claim arising out of errors and omissions resulting from laboratory analysis
- 12) Punitive damages or exemplary damages but defense will be afforded if suit also seeks Compensatory damages covered.
- 13) Any claim based on Insured's intentional, willful, or deliberate non-compliance with any statute, regulation ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body.

- 14) Nuclear Liability
- 15) Workers' Compensation, unemployment compensation or disability benefits law or similar law.
- 16) Any claim arising from injury to any employee, director, officer or partner of the Insured
- 17) Any claim arising out of the ownership, maintenance, use, operation of automobile, aircraft, watercraft or rolling stock
- 18) Any claim arising out of goods or products manufactured, sold, --- Products Liability exclusion
- 19) Any Claim due to Property Damage to goods or products manufactured, sold --- arising out of such goods or products
- 20) Any claim arising from Pollution Conditions based upon or attributed to acid rain conditions
- 21) War exclusion
- 22) Any claim from radioactive matter
- 23) Any claim arising from any waste or materials to be transported -- beyond the boundaries of the job sites where professional services are being performed.
- 24) To any claim arising from the repair, installation, or maintenance of underground storage tanks and associated underground piping
- 25) Any claim arising out of the exposure to asbestos.
- 26) Any claim under Coverage A or Coverage B arising from property owned or occupied or used by the insured; property in the care, custody or control of insured; or property the insured has sold, leased, abandoned, or given away.

V. Optional Extended Discovery Period:

- 1) Available if insurer cancels or refuses to renew policy
- 2) Additional premium - not to exceed 200% of annual premium
- 3) Twelve months effective at cancellation date or policy expiration
- 4) Different premium, retention, limits of liability or policy conditions does not constitute a cancellation or a refusal to renew.

VI. Limits of Liability and Retention:

- 1) Each claim: Indemnity includes loss payments and claims expense in excess of retention amount.
- 2) Policy Aggregate: Total liability of company shall not exceed aggregate for all claims first made against the insured during the policy period and the optional extended reporting period if purchased.

Retention:

- 1) Borne by the insured
- 2) Shall include loss payments and claim expense

Multiple Claims: Coverage A and B

- 1) Doesn't increase insurer's liability
- 2) Single claim - same or related acts, errors, or omissions or pollution conditions; one retained amount.

Multiple Claims: Coverage A and B Combined

- 1) Limit of liability for each claim is total for coverages A and B Combined for damages out of same or related acts, errors, or omissions or pollution conditions; one retained amount.

Claim Expense:

- 1) Fees by any lawyer designated by company
- 2) Fees by any lawyer designated by Insured with written consent of the company
- 3) All other fees, costs, prejudgment and post judgment interest, and expenses resulting from the investigation, defense and appeal of a claim, if incurred by the Company.

VII. Claim or Suit Provisions:

- 1) The company shall defend any claim.
- 2) Insured provides written notice
- 3) Insured shall cooperate
- 4) If Company recommends settlement within retention and Insured refuses, company is not liable for any amount in excess of retention.
- 5) Company shall not be liable for amount in excess of possible settlement amount, subject to Limits of Liability and Retention amounts.
- 6) Policy is void if Insured commits fraud in proffering any claim.

VIII. Conditions:

- 1) Application - personal representations
- 2) Audit
- 3) Cancellation: 30 Days
10 Days - Nonpayment of premium
- 4) Premium Adjustment: Gross Receipts
- 5) Action Against Company
- 6) Assignment
- 7) Subrogation
- 8) Changes
- 9) Sole Agent
- 10) Choice of Law: New York
- 11) Other Insurance

DEMETER LTD.

ENVIRONMENTAL IMPAIRMENT LIABILITY
INSURANCE POLICY

A wholly owned subsidiary of Terra Insurance Ltd. and is based in Bermuda. Among requirements for participation include being a member of Terra or HWAC.

Declarations:

Limits of Liability:	\$1 MM	Each Claim
	\$1 MM	Maximum Aggregate

Retention:	\$100,000	Maximum
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Premium:	\$300,000	Maximum
	\$ 75,000	Minimum

Policy Form:	Claims Made
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Retroactive Date:	Policy Inception
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Coverage:

- 1) To pay on behalf of the Insured
- 2) Damages and expenses caused by environmental impairment by reason of your actual or alleged operations, negligent acts, errors, or omissions.

Defense:

- 1) Expenses are included within the limits of liability
- 2) Insurer selects defense counsel and may settle claims within policy limit.
- 3) Obligation to defend claims ends when policy limit has been exhausted by payment of judgments, settlements, or expenses.

Limit of Liability:

- 1) Total limit of liability includes damages and expenses regardless of number of persons included in policy or number of persons making claims.
- 2) Limit of liability is in excess of the retention.

Extended Discovery Period:

- 1) Automatic 60 days discovery period if policy is cancelled or not-renewed by insurer.
- 2) Does not extend policy period, change scope of coverage, reinstate, or increase the limit of insurance.

Retention:

- 1) Applies to damages and expenses.
- 2) Policy limits apply excess of retention

Exclusions:

- 1) Prior Acts Coverage
- 2) for any DAMAGES that are not caused by ENVIRONMENTAL IMPAIRMENT;
- 3) arising from the manufacture or the manufacture and design of a product by YOU;
- 4) Asbestos exclusion
- 5) Arising from any condition on YOUR premises, including the dumping of toxic or radioactive substance, but this Exclusion will not be construed to include a CLAIM arising from YOUR testing activities or arising from the use, maintenance, or storage of substances used in YOUR testing activities;
- 6) Arising from:
 - a. implementation, construction, operation, or maintenance activities, of a waste disposal facility, whether or not at a waste disposal site; or

- b. the generation neutralization, transportation, storage or disposal of WASTE, except incidental to testing activities; or
 - c. ownership of any waste disposal site or facility;
- 7) Based upon or attributable to acid rain conditions;
- 8) Arising from ENVIRONMENTAL IMPAIRMENT in respect of which YOU were aware of noncompliance with any applicable statute or regulation or instruction relating to ENVIRONMENTAL IMPAIRMENT issued by competent authority;
- 9) Arising from YOUR actual or alleged OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS related to a contractual agreement or project for which YOUR work commenced prior to the Retroactive Date;
- 10. Arising from liability assumed by You under any written or verbal agreement or contract, including, but not limited to, hold harmless and indemnity provisions, warranties, guarantees, certifications or penalty clauses;
- 11. For any part of DAMAGES attributable to fines, penalties or the refusal to pay or demand to return all or part of professional fees;
- 12. Arising from liability arising out of the ownership, rental, leasing, maintenance, operation, loading or unloading, use or repair of any real or personal property. This includes, but is not limited to any automobiles, mobile equipment, aircraft, watercraft, or other conveyance of any kind;
- 13. Arising from liability for DAMAGES sustained by any of YOUR employees arising out of or in the course of their employment; workers' compensation, unemployment compensation or disability law, or under any similar law;
- 14. For DAMAGES to:
 - a. property YOU own, rent or occupy, or
 - b. property in YOUR care, custody or control, or
 - c. property over which YOU exercise physical control;

15. For liability arising out of YOUR failure to provide or maintain any form of insurance, suretyship or bond, or to advise or require others to do so;
16. Arising from dishonest, fraudulent, or criminal acts or omissions or acts of a knowingly wrongful nature committed intentionally by you or at YOUR direction, whether or not YOU intended the result;
17. For liability arising out of, due to or involving directly or indirectly YOUR insolvency, receivership, bankruptcy or liquidation;
18. Joint ventures unless designated;
19. Any claim made by any ownership entity with the insured.
20. Nuclear liability
21. Punitive or exemplary damages

Conditions:

1. Appeals: Insurer may elect to appeal a judgment at its expense
2. Arbitration: Hamilton, Bermuda under provisions of the Bermuda Arbitration Act of 1986. Three arbitrators
3. Assignment
4. Cancellation: Insured - 60 days
Insurer - 60 days
5. Notice
6. Premium Refund: Pro rata basis; payment made 30 days after cancellation date
7. Insurers Reasons for policy cancellation include:
 - a. non-payment of premium when due
 - b. unsatisfactory claims or loss experience
 - c. insured ceases to be eligible to the policyholder
 - d. insured files a materially false application

8. Changes
9. Insurer right to examine records, property, operation
10. Other insurance
11. Professional and Commercial General Liability Insurance
As a condition for any coverage under this policy YOU will maintain in effect professional and commercial general liability insurance policies written in forms acceptable to US.
12. Premiums
13. Recoveries
14. Severability
15. Your Agent
16. Subrogation
17. Territory: Insurance applies anywhere in the world.

Definitions:

1. Annual Premium
2. Cancellation Date
3. Claims
4. Claims Made
5. "DAMAGES" means:
 - a. amounts intended to compensate another person or organization for loss or injury to person property or for economic loss or;
 - b. the cost of identification, evaluation, control, removal, disposal, nullification, or neutralization of substances that cause ENVIRONMENTAL IMPAIRMENT.

6. "ENVIRONMENTAL IMPAIRMENT" means any one or a combination of the following actual, threatened or alleged:
 - a. release, emission, discharge, dispersal, disposal, escape, or seepage of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, asbestos, liquids, solids, or gases, WASTE, or other irritants, including thermal irritants, contaminants, or pollutants containing any of the foregoing on or into land, the atmosphere, or any watercourse or body of water.
 - b. generation of odor, noises, changes in temperature, or any other sensory phenomena.
7. Expenses
8. "OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS" means YOUR OPERATIONS, NEGLIGENT ACTS, ERRORS OR OMISSIONS arising out of the performance of YOUR architectural, engineering or related services or a series of related architectural, engineering or related services resulting in CLAIMS during the POLICY PERIOD.
9. Policy Period
10. Policy Year
11. "WASTE" means materials to be recycled, reconditioned or reclaimed.
12. "WE," "US," "OUR," or "OURS" means Demeter Ltd.
13. "YOU," "YOUR," and "YOURS" mean, the person or organization designated in the GENERAL DECLARATIONS Item 1, and
 1. any employee of YOURS while acting within the course and scope of that employee's duties for YOU and
 2. any executive officer, director or partner while acting within the course and scope of duties for YOU.

H.S. WEAVERS UNDERWRITING AGENCY
(LONDON)
PROFESSIONAL LIABILITY INSURANCE POLICY
FOR POLLUTION CONDITIONS

Declarations:

Limit of Liability: \$1MM Each Claim
 \$1MM Aggregate
 (Policy Period & Discovery
 Period)

Retained Limit: Negotiable

Policy Period: Negotiable

Retroactive Date:

Discovery Period:

Policy Form:

Claims Made "Cost Inclusive" Policy Coverage is not for full errors and omissions and does not provide a duty to defend. Application becomes part of policy.

Condition:

This policy requires the maintenance of Contractors Pollution Liability Insurance and Commercial General Liability Insurance.

Insuring Agreement:

- 1) To indemnify the insured excess of Retained Limit
- 2) Claims first made resulting from a circumstance
- 3) Arises out of a negligent act, error or omission
- 4) In rendering or failing to render those professional services as a Response Action Contractor
- 5) Which results from Pollution Conditions emanating from designated location.

Territory:

Anywhere in the World

Definitions:

- 1) Insured
- 2) Pollution Conditions: Alleged or threatened discharge, dispersal, release or escape of pollutants.
- 3) Pollutants: Any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- 4) Response Action Contractor
- 5) Subsidiary
- 6) Damages
- 7) Costs, charges and expenses
- 8) Policy Period
- 9) Claim
- 10) Policy Year
- 11) Discovery Period: See conditions

Limit of Liability:

- 1) Each claim
- 2) Policy Aggregate - includes policy period and discovery period

Retained Limit:

- 1) May vary in different policy years
(See declarations)
- 2) Must be paid by Insured as a prerequisite of any payment by underwriters

Defense and Settlement:

- 1) Insured has duty to defend its claims.
- 2) Underwriter has right to associate with defense at their own expense.
- 3) Settlement of claim needs consent of Insured and Insurer. If insured refuses to settle, underwriter's liability doesn't exceed settlement potential plus costs.

Exclusions:

- 1) Any act, error or omission caused intentionally by or at the direction of the Insured; or any dishonest fraudulent, criminal, or malicious act, error or omission committed by or at the direction of the insured;

- 2) Employment exclusion; Workers' Compensation, unemployment compensation, Employers' Liability, disability law or similar law.
- 3) Insolvency or bankruptcy of Insured; underwriters not relieved of their obligations
- 4) Express warranties or guarantees, estimates of probably construction cost or cost estimates being exceeded.
- 5) Failure to complete drawings, plans, specifications --- on time except if failures are the result of a negligent act, error or omission.
- 6) Ownership, maintenance, operation, or use of watercraft, automobile, motor vehicles, aircraft or mobile vehicle of any kind---except claims arising out of the rendering of or failure to render professional services.
- 7) The advising or requiring of, or failure to advise or require or failure to maintain any form of insurance, suretyship or bond, either with respect to the Insured or any other person;
- 8) Plagiarism, infringement of copyright, trademark, patent or design patent or unfair business or employment practices;
- 9) The withdrawal, inspection, replacement, closure, shutdown, or loss of use of any property unless it is established that the said withdrawal, inspection, replacement, closure, shutdown, or loss of use arose out of negligent acts, errors or omissions in rendering or failure to render professional services for others under a specific contract with others;
- 10) The non-payment of professional fees;
- 11) Any negligent act, error or omission which either at time of the circumstance giving rise to said claim or at the time said claim is first asserted, is insured by any other valid policy or policies whether such other insurance is collectible or not.
- 12) Claims arising out of the ERISA of 1974;
- 13) Libel, slander, injury to reputation, self-esteem or the right of privacy;
- 14) Asbestos --- except if insured encounters asbestos or asbestos conditions on any location designed which was not reasonably foreseeable at the commencement of the work
- 15) Liability in respect of any Deepwater Port as defined in the Deepwater Port Act of 1974 as amended.
- 16) Bodily injury or property damage arising from radioactive matter, except if the insured encounters radioactive matter on any location designated which was not reasonably foreseeable at the commencement of work.

- 17) Any claim or suit brought by the United States or any State Territory thereof as a result of or arising from administrative or enforcement proceedings instituted by the Environmental Protection Agency of the United States or any State or Territory thereof, or any claim or suit arising from the Insured's activities other than as a Response Action Contractor.
- 18) The Named Insured's conduct or participation in any joint venture, unless the Named Insured is identified in the Declaration as a joint venture.
- 19) The transportation of any wastes or hazardous materials or pollutants, beyond any location designated
- 20) The storage or disposal of any wastes or hazardous materials or Pollutants beyond the boundaries of any location designated.
- 21) Consequential damages or damages arising out of implied warranties unless the Insured's contract contains:
 - i) an absolute disclaimer of liability for consequential damages
 - ii) a disclaimer of implied warranties in a form sufficient to satisfy the requirements of the Uniform Commercial Code,
 - iii) a statement that where the Purchaser is given a remedy in the contract that such remedy shall be exclusive, and
 - iv) a release from liability of consequential damages, obtained from the Owner, where the Insured is not in privity of contract with the Owner

and any court or arbitration panel in which the action is pending refuses to apply the above mentioned limitations of liability.

- 22) Any liabilities assumed under contract by the Insured for which the Insured would not otherwise be liable.
- 23) Any services for which an architect or engineer is either not licensed or not qualified and services which are specifically related to the construction, installation, manufacture, erection, fabrication, supplying of materials or the administration, inspection, observation or supervision thereof.

Conditions:

- 1) Pollution Legal Liability Insurance: Insured required to have in full force
- 2) Other insurance
- 3) Warranty: Policy Application is part of policy

- 4) Conformity With State Statutes
- 5) Subrogation
- 6) Authorization
- 7) Action Against the Underwriters
- 8) Notice
- 9) Assignment
- 10) Changes
- 11) Cancellations: Underwriter: 90 days
Non-payment of Premium: 10 days
Insured: Short rate premium
- 12) Named Insured: Agent for all insureds
- 13) Discovery Period:
 - i) Retained Limit continues if applicable at beginning of Discovery Period
 - ii) If policy is cancelled by insured, there is no Discovery Period; No discovery if cancelled for non-payment of premium
 - iii) Insured has no right to provide Notice of Circumstance during Discovery Period
- 14) Audit
- 15) False and Fraudulent Claims
- 16) Service of Suit Clause

11

**SUPERFUND REAUTHORIZATION: JUDICIAL AND
LEGAL ISSUES**

OVERSIGHT HEARINGS

BEFORE THE

**SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS**

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

NINETY-NINTH CONGRESS

FIRST SESSION

ON

SUPERFUND REAUTHORIZATION: JUDICIAL AND LEGAL ISSUES

JULY 17 AND 18, 1985

Serial No. 19



Printed for the use of the Committee on the Judiciary



NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

July 18, 1985

STATEMENT FOR THE RECORD

Subcommittee on Administrative Law and
Governmental Relations
Committee on the Judiciary
The United States House of Representatives

Re: Superfund Legislation — HR 2817 (Superfund Amendments of 1985)

INTRODUCTION

The National Constructors Association represents many of the largest U.S. firms engaged in the design and construction of major industrial, commercial and process facilities worldwide. Our firms have been and continue to be very supportive of Superfund cleanup programs, and over long years of experience have acquired technical and managerial expertise which makes them some of the most capable potential contractors to undertake the cleanup of this nation's worst toxic waste sites. These firms, however, are extremely concerned that participation in cleanup activity will lead to imposition of liability without fault even though the cleanup activities are carried out with utmost care in accordance with the requirements of a response action plan which has been approved by the Environmental Protection Agency or the states.

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At present, a kaleidoscope of fifty different sets of state laws governs the standards of liability that may result from Superfund cleanup work. Moreover, the status of individual state law is ever-changing and often varies from case to case. Additionally, the strict, joint and several liability of Superfund itself may be construed to apply to remedial contractors. Clearly, the uncertain and unpredictable status of the law as it may be applied to Superfund cleanup work operates as a strong disincentive for responsible contractors to enter the marketplace of Superfund cleanup. It thus inhibits the original purpose of Superfund — to alleviate expeditiously the potential, but substantial, health risks posed by thousands of dumpsites across this country.

The public policy of this nation requires that a national uniform policy be adopted with respect to the legal standard of liability of those firms whose only connection to the hazardous waste site is the performance of cleanup services. NCA believes that the most sensible remedy is to adopt a national standard of liability which is based on misconduct in the performance of the particular Superfund contract and which is applicable to the states.

Such an approach has been included in HR 2817, the Superfund re-authorization measure under consideration by the Energy and Commerce Committee.

Additionally, a statutory maximum of financial responsibility as well as a uniform statute of limitations are necessary to create a reasonable business risk atmosphere so that qualified and responsible contractors can help carry out Superfund's purpose of cleaning up the environment.

It should be noted that the typical Superfund site involves four categories of responsible parties: (1) the generators of the wastes; (2) the persons who transported the waste to the site; (3) the persons who arranged for the transportation to the site and (4) the owners and operators of the site. Unlike

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laws governs the work. Moreover, cases from case to case Superfund itself may be uncertain and cleanup work is to enter the final purpose of legal, health risks

uniform policy be firms whose only cleanup services. legal standard of the particular

Superfund re- and Commerce

y as well as a e business risk elp carry out

our categories : persons who nged for the site. Unlike

the cleanup contractors, each of these responsible classes will remain subject to the full panoply of potential liability theories of the various states under our suggested approach.

Clearly, the cleanup of these old and abandoned waste sites is a national priority. It is equally clear that the complex difficulties and hazards associated with the removal and subsequent treatment or disposal of these abandoned wastes cannot be accomplished safely without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Thus, any legislative attempt to promote the cleanup of hazardous waste sites must address the closely related problem of the potential, yet real, liability risks that face those firms which undertake Superfund cleanup work.

Simply put, the legal standard of liability for a remedial contractor engaged in Superfund work should be uniform and not a patch-work quilt of various standards based on the provisions of different state laws and judicial interpretations in the various state and federal courts.

The spectre of an undefined and unending liability is a serious deterrent for responsible contractors who are interested in engaging in cleanup work.

Neither the Principal Reasons for the Imposition of Strict Liability Nor the Traditional Factors that Determine Whether an Activity is "Abnormally Dangerous" for Purposes of Applying Strict Liability Apply to Superfund Cleanup Work

The potential application of the doctrine of strict liability to Superfund cleanup work is one of the greatest deterrents to those firms that are interested in Superfund work. Strict liability, as that term is used by our courts, means

liability despite the exercise of the utmost care.¹ It is often referred to as liability without fault.² The courts of many states have imposed strict liability upon a variety of activities that are considered to be "abnormally dangerous."³ Although the traditional premises for the imposition of strict liability do not apply to Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chains of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity.⁴ The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character."⁵ In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

The principal reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work.

1 See, e.g., Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 517 F. Supp. 314, 317 (N.D. Ill. 1981).

2 Prosser & Keaton, The Law of Torts §75 at p. 534 (5th Ed. 1984).

3 See, e.g., Restatement (Second) of Torts §§519 and 520.

4 See, e.g., National Steel Service Center v. Gibbons, 693 F.2d 817 (8th Cir. 1982); (under Iowa law, doctrine of strict liability for abnormally dangerous activities applied to railroad hauling tank cars loaded with propane even though the railroad acted in conformity with federal and state regulations and without negligence); Chavez v. Southern Pacific Transportation Co., 413 F. Supp. 1203 (E.D. Calif. 1976) (railroad held strictly liable for harm resulting from explosion that occurred while transporting 18 bomb-loaded boxcars under a contract with the Department of Navy).

5 Prosser and Keaton, The Law of Torts §78 at p. 555. (5th Ed. 1984).

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The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. Rather, the risk was created by the generators of the substances found at the cleanup site and by those persons associated with the improper disposal. In short, the remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. In essence, the cleanup contractor acts as an instrument of the United States government in carrying out a governmental purpose. There simply is no justification for placing a remedial contractor under the burden of strict liability that applies to those who created the risk.

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste. Thus, while standards of strict liability may be appropriate for those who are responsible for creating the hazardous waste site, there is no rational basis for applying such standards to a remedial contractor.

In addition to the fact that the traditional justification for strict liability does not apply to Superfund work, it is also clear that Superfund cleanup work is not an "abnormally dangerous activity" as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is "abnormally dangerous" before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is

outweighed by its dangerous attributes.⁶ Application of the fifth and sixth factors demonstrates that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate — in fact, it is managed by the federal government and carried out under the direction and supervision of the EPA and the Corps of Engineers pursuant to a congressional mandate. Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.⁷

The National Constructors Association recognizes that some have raised the argument that remedial contractors should be held to a strict liability standard because such a standard will encourage the highest degree of care in the performance of Superfund work. This argument misperceives the nature of strict liability. The essence of the doctrine is that liability is imposed for undertaking the activity, not for the manner in which it is undertaken. Strict liability, therefore, deters the undertaking of the activity. Unlike liability imposed on the basis of a contractual obligation or negligence, it has no impact whatsoever on behavior once the activity is started.

Additionally, unlike the persons who are responsible for creating the site in the first place and who are presumably aware of the potentially harmful nature of their hazardous materials and, therefore, of the risks attendant to those materials, the remedial contractor often will not be in a position to weigh the risks inherent in a cleanup job before commencing physical work. This is particularly true with regard to abandoned sites because, more often than not,

6 Restatement (Second) of Torts §520.

7 Under state law at present, however, each court would make a determination of whether strict liability should be applied to the activities of remedial contractors by analyzing these factors on a case by case basis. Given the general trend toward expanding theories of liability, the remedial contractors' potential liability is extremely unpredictable and virtually impossible to insure against.

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the remedial contractor will have no way of knowing in advance what he will encounter during cleanup operations.

Simply put, there will be no blueprints to tell a remedial contractor what conditions or chemicals or gases are buried underneath the top soil of a hazardous waste dumpsite. No matter how carefully one plans and carries out a cleanup operation, it will be impossible to identify — let alone, eliminate — all risks before they are encountered. Thus, while it may be fair to impose strict liability upon those persons who created the problem on the basis that they, at least, were in a position to assess the risks of their enterprise, and they presumably created the risk for their own benefit, the reverse holds true for the remedial contractor who does not have sufficient initial information to assess the various potential risks of bidding on and receiving Superfund cleanup work.

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed."⁸ As a result of the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste cleanup projects.

The problem of adequate pollution liability insurance has been recognized by Congress as it has called for studies concerning the availability of pollution insurance protection on reasonable terms. These studies resulted in a March 1982 Treasury Department Report entitled "Hazardous Substance Liability Insurance." As this Committee is undoubtedly aware, the Treasury report concluded that serious problems exist with respect to insuring pollution risks due to "the particular combination of liability and financial responsibility provisions

⁸ Wall Street Journal, 3/19/85, "Risky Business: Insurers Are Shunning Coverage of Chemical and Other Pollution," p. 1.

which tend to render the liability exposure of the insurer too uncertain for traditional underwriting practices."⁹

The situation has not improved since 1982. It has become worse and is illustrated by the following letter that was written by an NCA member company during the first week of March 1985 to a state government regarding the company's decision not to bid work on an inactive hazardous waste site:

Thank you for considering us qualified to receive the subject RFP. We have carefully reviewed the terms and conditions of the RFP and attended the pre-bid conference but we find, at this time, we are unable to resolve what appears to be an unlimited liability exposure. We must therefore respectfully decline this opportunity to assist you in this important assignment.

I am sure we all recognize the current concerns in performing toxic and hazardous waste work. Specifically, a participating contractor is exposed to lawsuits, deservedly or not, for real or imaginary reasons, not only during his participation on site but for an unlimited period of time into the future. Given the fact that insurance protection for these risks is becoming essentially unavailable, without the hope of indemnification by the State, a contractor becomes a self-insurer against completely undefined risks.

SOLUTION TO THE DILEMMA OF UNLIMITED LIABILITY FOR CLEANUP CONTRACTORS

A. National Standard of Liability

NCA does not seek to exculpate remedial contractors from third-party liability. Rather, it urges Congress to establish a national standard of responsibility for remedial contractors that is based upon misconduct.

The purpose of this national standard of liability is to create an environment which encourages responsible contractors to enter the business of cleaning up hazardous waste. Such a provision will permit contractors to enter into contracts to provide response action with an ability to estimate and control, from the outset, their exposure to damages.

⁹ Department of the Treasury, Hazardous Substance Liability Insurance at v (March 1982).

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The authors of HR 2817 have taken that first step with the inclusion of a provision which establishes a national liability standard for remedial action contractors. This standard holds them responsible only for their own negligence. However, it does not in any way eliminate their exposure to liability should they be found negligent.

B. Maximum Liability Exposure

The National Constructors Association believes the establishment of a statutory limitation on liability is essential to encourage the broadest possible participation by qualified contractors in the cleanup process. This statutory limitation on financial responsibility would simply recognize the need to keep the potential liability of a remedial action contractor in some reasonable balance with the compensation being received for cleanup services. Responsible contractors, particularly those with significant assets and public firms with shareholders and boards to whom they must report, are understandably reluctant to risk their entire corporate assets for a contract which offers a low financial return for a potentially devastating risk.

Those who fail to appreciate this dilemma may misperceive the nature of the construction industry. Engineering and construction contractors are not unfamiliar with high-risk projects. However, they normally negotiate contracts which provide for a shared risk with the client. What risk they do assume is further minimized by insurance coverage.

Contractors, engineers and their clients also recognize that it is virtually impossible under the best of circumstances to build a perfect job or design a plan which anticipates all possible needs. Contracts routinely provide clauses to handle adjustments necessary to deal with unforeseen developments, changes, and errors.

There is almost no way under current law that a remedial action

contractor can protect itself against the potential liability which may result from such unforeseen circumstances in a hazardous waste cleanup. Insurance cannot be obtained to cover this risk, and state and federal clients have not or cannot assume the risk themselves. I should add at this point that margins of profit within the construction industry are extremely low — generally 3% to 10% of the contract price — and do not hold out the prospect of substantial rewards for the risk of hazardous waste work. On an average cleanup contract projected to be \$10 million the profit for the contractor would probably be as little as \$500,000 — a number unlikely to entice a major construction firm to risk tens of millions of dollars of potential liability.

Although the Army Corps of Engineers and EPA do not report a substantial shortage of contractors at this time, both have expressed concern about future capacity under an expanded Superfund program unless these liability concerns are addressed. Until this year many contractors were still able to insure their activities. As those who have been doing this work are notified of non-renewal of their insurance coverage the pool of qualified contractors may actually shrink at the same time the funding for the program increases under the new authorization.

Some states have already experienced procurement problems as they seek contractors to carry out their cleanup programs. The state of California was recently involved in protracted negotiations and a bid protest procedure as it attempted to award nine regional cleanup contracts. One NCA company was among several which refused to sign contracts awarded to them because of onerous liability provisions. The negotiations and bid protest process imposed considerable delays on that procurement process and added an additional layer of non-productive transaction costs which drain the funds available to perform cleanups themselves. We believe that Congress can head off future problems by

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adopting the national standard of liability provisions of HR 2817 and establishing a ceiling on the liability of remedial action contractors. The liability of remedial contractors should not be disproportionate to the compensation such contractors will receive from their cleanup activities, or financially responsible contractors will be deterred from participation in the cleanup.

Clearly the public interest is served by establishing a rational ceiling on liability for cleanup contractors. Such a ceiling coupled with the national standard of liability set forth in HR 2817 should:

- Eliminate the need for protracted contract negotiations and bid procedures.
- Lower the amount of non-productive transaction costs associated with cleanup contracts.
- Ensure the participation of an adequate pool of responsible, qualified contractors in the hazardous waste field.

C. Statute of Limitations

Contractors are also subject to undue exposure and deterrence because of the long period of time which may lapse between their performance of work and the manifestation of harm from a non-sudden release. In terms of time limits, there is no definable cut-off to liability since the Superfund law permits a claimant to bring an action within three years of his "discovery" of a loss. Given the nature of damages caused by toxic substances, "discovery" is a very elastic concept and could well occur many years in the future.

While the standard currently applies to claims and actions against a party which has created, owns, or operates a particular waste site, it is wholly inappropriate for application to a party whose sole activity at the site is to carry out a contract for response action services. A clean-up, or "response action" contractor would be engaged in activities designed to carry out the very

purposes for which the Superfund was created — the remediation of existing hazardous conditions and the prevention of future harm to persons, property, and the environment. Such a contractor would encounter a situation not of its own making, where actual or potential dangers already exist, and where future harm or loss may be inevitable but not yet discernible. Moreover, after a response action contractor's work is completed, it would not be involved in any continuing or additional activities of the owner or operator of the site. Thus, a response action contractor would have a discrete, limited relationship to the site, for the sole purpose of rectifying pre-existing conditions and limiting future harm. It is inequitable to subject a party acting for beneficial purposes to the same potentially extensive period of liability which applies to a party which caused the hazardous conditions.

The insurance industry has stated that, if pollution insurance is made available for cleanup work in the future, it will be offered on a "claims made" basis only. "Claims made" insurance, in order to fully protect a contractor under the current statute, will have to be maintained indefinitely. Contractors bidding on hazardous waste cleanup projects in the present have no way of calculating into their bids the cost or availability of pollution insurance many years from now. Indeed, they have no assurance that insurance coverage will be available at all in future years. Even if insurance coverage is at some time available, insurers will at any point have the option of cancelling individual coverage or coverage for the industry as a whole on the basis of bad claims experience. In order to reduce the deterrent to cleaning up the environment that this risk presents, and to ensure consistency among the states, a reasonable statute of limitations or repose should be established with respect to claims against remedial contractors.

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NCA urges Congress to enact legislation encompassing reasonable limits on the potential liability of cleanup contractors. Such legislation will permit contractors to proceed with cleanup contracts on the same basis on which they perform other contracts, being held liable for their own misconduct, but without the prospect of incalculable and potentially devastating liability which is beyond their control. Reasonable limitations on liability will encourage NCA members and other responsible contractors to proceed with the vital national enterprise of cleaning up the environment. We would of course be pleased to work with the members of this Committee to provide information and answer any questions which may assist in the Committee's consideration of this important problem.

Respectfully submitted,

National Constructors Association

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LAWS OF ALASKA

1990

Source

SCS CSHB 567(Fin)

Chapter No.

191

AN ACT

Relating to oil discharge prevention and contingency plan requirements, financial responsibility requirements related to oil, penalties, and inspection authority of the Department of Environmental Conservation; relating to the oil and hazardous substance release response fund and responses to oil and hazardous substance emergencies; authorizing the Department of Environmental Conservation and municipalities to enter into agreements pertaining to vessel traffic control and monitoring systems; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 18

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: June 26, 1990
Actual Effective Date: June 27, 1990

AN ACT

Relating to oil discharge prevention and contingency plan requirements, financial responsibility requirements related to oil, penalties, and inspection authority of the Department of Environmental Conservation; relating to the oil and hazardous substance release response fund and responses to oil and hazardous substance emergencies; authorizing the Department of Environmental Conservation and municipalities to enter into agreements pertaining to vessel traffic control and monitoring systems; and providing for an effective date.

* Section 1. AS 29.35.020 is amended by adding a new subsection to read:

(d) A municipality may enter into agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons relating to development and enforcement of vessel traffic control and monitoring systems for oil barges and tank vessels carrying oil operating in or near the waters of the state.

* Sec. 2. AS 46.03.759(c) is amended to read:

(c) Subject to the \$500,000,000 maximum set under (a) of this section the court shall assess four times the penalty set out in (a) of this section if the court finds

(1) the discharge was caused by the gross negligence or

Chapter 191

intentional act of the defendant;

(2) the defendant did not take reasonable measures to contain and clean up the discharged oil; or

(3) the defendant did not act or respond in accordance with an approved oil discharge prevention and contingency plan.

* Sec. 3. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

* Sec. 4. AS 46.03.823(b) is amended to read:

(b) The liability limitation under (a) of this section

(1) does not apply to a response action contractor who would otherwise be liable for the release or threatened release under state or federal law even if that person had not carried out a response action with respect to the release or threatened release; and

(2) does apply only to releases for which notification the department was provided and received in the manner prescribed under state law [STRICTLY LIABLE UNDER THIS SECTION].

* Sec. 5. AS 46.03.823(e) is amended to read:

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Chapter 191

(e) This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a

(1) response action contract or a remedial action plan if one has been approved by the department; or

(2) contingency plan approved by the department where the response action contractor is the plan holder.

* Sec. 6. AS 46.03.823(g)(2) is amended to read:

(2) "response action contract" means a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance, entered into by a person with

(A) the department; [OR]

(B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;

(C) a federal agency with jurisdiction over the release or threatened release; or

(D) another person potentially liable for the release or threatened release under state or federal law;

* Sec. 7. AS 46.03.823(g)(3) is amended to read:

(3) "response action contractor" means

(A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release; and

(B) a person who is retained or hired by and is under

Chapter 191

the control of a person described in (A) of this paragraph to provide services related to the response action contract.

* Sec. 8. AS 46.04.020(e) is amended to read:

(e) The department shall enter into negotiations for memoranda of understanding or cooperative agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons in order to

(1) facilitate coordinated and effective oil discharge prevention and response in the state, including agreements relating to development and enforcement of vessel traffic control and monitoring systems for tank vessels and oil barges operating in or near the waters of the state;

(2) provide for cooperative review of oil discharge prevention and contingency plans submitted to the department under AS 46.-04.030;

(3) provide for cooperative inspections of oil terminal facilities by the department and the United States Coast Guard or United States Environmental Protection Agency; and

(4) provide for cooperative oil discharge notification procedures.

* Sec. 9. AS 46.04.030 is amended to read:

Sec. 46.04.030. OIL DISCHARGE PREVENTION AND CONTINGENCY PLANS.

(a) A person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge prevention and contingency plan for the facility has been approved by the department and the person is in compliance with the plan [. THE DEPARTMENT IS ONLY STATE AGENCY WHICH HAS THE POWER TO APPROVE AN OIL DISCHARGE CONTINGENCY PLAN FOR THE PURPOSES OF THIS SECTION].

(b) A [AFTER JANUARY 1, 1981, A] person may not cause or permit

SCS CSHB 567(Fin)

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AMERICAN INSURANCE ASSOCIATION
LAW DEPARTMENT

1130 Connecticut Avenue N.W.
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(202) 828-7100
(202) 293-1219 FAX

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Mr. Tom Gillis
U.S. Environmental Protection Agency
OS-510
401 M Street, S.W.
Washington, D.C. 20460

Re: Comments of the American Insurance Association
on Superfund Response Action Contractor
Indemnification Guidelines

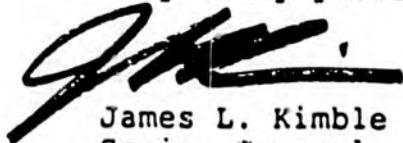
Dear Mr. Gillis:

Enclosed please find comments of the American Insurance Association to the Proposed Guidelines for Superfund Response Action Contractor Indemnification published in the Tuesday, October 31, 1989, Federal Register.

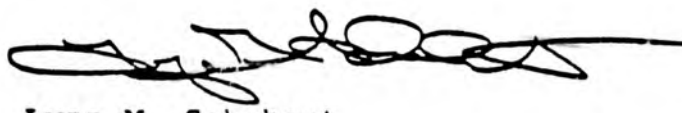
Should you have any questions, please do not hesitate to contact either of us on this matter.

Thank you for your consideration.

Very truly yours,



James L. Kimble
Senior Counsel



Lynn M. Schubert
Counsel

Enclosure

ROBERT J. VAIRO
CHAIRMAN

DEAN R. O'HARE
CHAIRMAN ELECT

ROBERT J. HAUGH
VICE CHAIRMAN

WILLIAM E. BUCKLEY
VICE CHAIRMAN

ROBERT E. VAGLEY
PRESIDENT

**COMMENTS OF THE AMERICAN INSURANCE ASSOCIATION
TO THE EPA DRAFT INDEMNIFICATION GUIDELINES
PUBLISHED IN THE TUESDAY, OCTOBER 31, 1989, FEDERAL REGISTER**

The American Insurance Association is a trade association representing major property and casualty insurers across the United States. Many of these insurers write both liability insurance and surety bonds. These companies are concerned with the indemnification guidelines published in the Tuesday, October 31, 1989, Federal Register from the perspective of both liability insurance and surety bonds.

These comments will be divided into two general sections. First, a discussion of the overall concerns of sureties regarding bonding hazardous waste projects, as well as the specific provisions of the Section 119 Indemnification Guidelines. Second, a discussion of the availability of pollution liability insurance for remedial action contractors (RACs).

Potential lack of indemnification is one of a number of problems which currently exist for insurers who wish to write surety bonds for contractors involved in hazardous waste cleanup projects.

SURETY ISSUES

OVERALL SURETY CONCERNS

Many sureties have expressed concern regarding bonding these projects due to a perceived lack of certainty as to their liability for claims other than those traditionally covered by performance and payment bonds, i.e., performance of the work in accordance with the plans and specifications and payment of covered subcontractors and suppliers on the project. Under the current state of the law it is unclear that a surety for a RAC will not be subjected to liability for tort claims as well as traditional payment and performance bond claims, perhaps even under strict liability. This liability might even be extended to claims which are not sustainable against the principal.

**Liability of a Surety is Coextensive
With That of Its Principal**

For example, under normal circumstances the liability of a surety is measured by the liability of its principal. Under Section 119 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) a cleanup contractor or RAC is no longer subject to "strict liability" for actions brought due to the hazardous waste site, but rather, is liable only under a negligence standard. However, under the Federal Comprehensive Emergency Response Compensation and Liability Act (CERCLA), any party who generates or contracts for the disposal, transport or treatment of hazardous waste may be strictly liable for claims made due to the removal. Should a RAC be defaulted on a project, the surety, under traditional surety principles, normally would have the right to hire a completing contractor to finish the project. However, under CERCLA it could be construed that the surety, by taking over a defaulted contract, has contracted for the removal of hazardous waste, and has subjected itself to strict liability, a standard greater than that of its principal. This is clearly inequitable, but not unfeasible under the current state of the statutes.

**A Surety Bond Does Not Compensate
Tort Liability Claimants**

Further, there is no statutory definition of the types of claims covered under the bonds. Normally performance and payment bonds do not provide coverage for liability claims, however, environmental law is an area rife with expansion of insurance liability far beyond those claims originally anticipated by the contracting parties. Twenty years from now when a liability claim is made on a hazardous waste cleanup project and there is no liability insurance and no RAC capable of satisfying the claim, the surety bond may be the only avenue left for payment to the injured party. Such a misconstruction of policy terms is not unheard of in current court decisions relating to personal injury and environmental damage.

**Design Should Not Be Included
in Bonded Contract**

Another concern of the sureties is the cleanup contract itself. A surety bond covers construction. It normally does not cover design. Many of the contracts being proposed for Superfund cleanup are design-build projects requiring surety bonds for the entire project, both the design of a state-of-the-art technology for disposing of the waste and construction of the requisite facility. While sureties do guarantee many contracts that include design liability, they

would be uncomfortable to underwrite a bond which would guarantee this type of state-of-the-art technology. This is traditionally covered by professional errors and omissions policies, which probably will not be available for these risks.

**Date Certain for Termination of
Bond Liability is Imperative**

There also exists the question of when the bond liability terminates. It is necessary that the liability terminate when the project has been completed and all appropriate claims by subcontractors and suppliers on the project have been paid. A surety bond is not a long-term insurance policy which is designed to pay claims far into the future. There must be a date after which no further claims will be entertained.

§119 INDEMNIFICATION PROPOSAL

The EPA §119 indemnification guidelines recognize that a lack of indemnification for the RAC could mean that sureties will be reluctant to provide performance and payment bonds for Superfund projects^{1/}.

Indemnification Must Run to the Surety

Indemnification by the EPA or the contracting authority could be of some benefit, but not as currently proposed.

Rather, the proposed indemnification guidelines would not solve even the one issue of protection of sureties from third party liability. The first and foremost problem is that the proposed indemnification does not specifically run to the surety. Therefore, if a surety who has written the statutorily required bonds for the RAC takes over and completes the project, it will not be provided with the same protection that its principal has under the same contract, regardless of whether it is considered an arranger or merely the completing surety. Since there is no viable pollution liability insurance, and no realistic expectation of any, indemnification is the only mechanism available for the protection of the RAC and the surety. However, unless the indemnification runs to the surety, the surety loses any benefit of the indemnification if the contractor defaults on the project. If indemnification is important to encourage RAC participation in Superfund cleanup, it is just as important for the surety. However, the indemnification must run to the surety.

^{1/} 54 Federal Register 46015.

The RAC and the surety are not the parties responsible for the creation of the hazardous waste site, but the ones who are cleaning up a toxic situation. These parties should be protected from the "probable and catastrophic risk" of loss cited by the EPA's Indemnification Task Force. ^{2/}

Congress contemplated that indemnification would relate to the "nature and magnitude" of the risks facing RACs, ^{3/} taking into account that liabilities may "potentially exceed both the contract amount and the company's net worth." ^{4/} EPA indemnification is to address "the legitimate long-term liability concerns of contractors." ^{5/} A surety which provides the required bond allowing the RAC to perform hazardous waste cleanup should be similarly protected.

§119 Indemnification Proposal Would Discourage Competition

The indemnification scheme proposed contains a number of flaws of more general concern. One of the underlying principles of public contracting is to achieve the best product at the lowest price through competition. One of the advantages to greater surety participation is the increase in the number of good contractors who will be able to bid on this work. However, some of the terms of the proposed indemnification guidelines will inhibit competition by a large number of contractors.

For example, on firm fixed price contracts, RACs are required to have added to their bids the "costs" of indemnification. The "costs" are tied to the limit of indemnification requested and the amount of the deductible.

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- ^{2/} U.S. EPA, Task Force on the Indemnification of Response Action Contractors (undated) at 1.
- ^{3/} Report of the House Committee on Judiciary, H.R. Rep. No. 99-253 (III), 99th Congress, 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News, 3038, 3050 [hereinafter Judiciary Report].
- ^{4/} Report of the House Committee on Energy and Commerce, H.R. Rep. No. 99-253 (I), 99th Cong., 2d Sess., 92 reprinted in 1986 U.S. Code Cong. & Admin. News, 2835, 2874.
- ^{5/} Judiciary Report, supra note 3, at 3050.

The contractor with the lowest price when the bid and indemnification "costs" are added will be awarded the contract. The concept behind this proposal appears to be to discourage RACs from requesting indemnification. However, due to the unavailability of liability insurance, this would leave the RAC with little or no coverage. This is not in the best interest of the public. Rather, this leaves the public at risk for damages incurred which are not compensable by the RAC.

For negotiated or cost reimbursement contracts the program calls for the deductible amount to be adjusted according to the limit of indemnification requested by the RAC. A contractor which requested the full amount of indemnification available, \$50 million, would be required to carry a deductible of -- \$3.5 million. This virtually eliminates the small contractor from participation in the program. Further it discourages sureties from wanting to write bonds for a contractor who must accept \$3.5 million in loss before it is indemnified.

The Amount and Time Period of the Indemnification are Inadequate

Two other major flaws in the program are the dollar limit of indemnification and the length of time of the coverage.

Indemnification is limited to \$50 million. Regardless of the deductible question, \$50 million is not enough to protect against the magnitude of losses which can reasonably be expected by RACs under this program. In fact, the consultant hired by the EPA to study this matter, Tillinghast, Nelson & Warren, Inc., recommended a \$200 million limit. 6/

The second issue, time, also needs to be addressed. The proposal states that indemnification will cover claims which arise during the contract and for ten years after completion. Ten years does not allow for the long term nature of health related claims. In fact, Section 119 does not require a time limit on indemnification. To fulfill the Congressional intent of RAC protection either no time limit or a much longer period must be included.

6/ Letter from Gregory Berg, Tillinghast, Nelson & Warren, Inc. to Robert J. Mason, Environmental Protection Specialist, U.S. Environmental Protection Agency, August 7, 1987, at 3.

Even in order to recover the limited indemnification proposed, RACs must demonstrate through documentation that diligent efforts have been made to obtain adequate insurance at a fair and reasonable price. Not only is this a burdensome and unnecessary requirement, but the EPA proposes to use this requirement to retroactively refuse to indemnify the RAC if the EPA determines that at the beginning of the contract the RAC failed to adequately document its diligent search for insurance.

**Proposal Increases Confusion as to
RAC Standard of Liability**

The EPA also proposes not to indemnify the RAC where the RAC is found both strictly liable and negligent and the cause of action is inseparable. Since RACs are not strictly liable for harm under Superfund, this must refer to instances where a state imposes strict liability on RACs under state law. Again this questionable nature of the indemnification will make this a less desirable bond to write from a surety prospective.

All in all there are a number of concerns which the surety industry would like to see addressed. Section 119 indemnification is one of these concerns. A more viable indemnification program for both RACs and their sureties would be an important first step toward making Superfund a workable program.

RESPONSE ACTION CONTRACTOR LIABILITY INSURANCE ISSUES

**THE PROPERTY/CASUALTY UNDERWRITING CYCLE
DOES NOT AFFECT THE AVAILABILITY OF RAC
POLLUTION LIABILITY INSURANCE**

We continue to be concerned about EPA's repetitive theme that the principal reason for the current unavailability of pollution liability insurance for response action contractors (RACs) and other pollution-related risks is the cyclical nature of the property/casualty insurance industry. While the dissertation in the Federal Register notice associated with "cash flow underwriting" and the property and casualty insurance market "business cycle" is generically accurate, it is irrelevant to the availability problems associated with pollution liability insurance. Property and casualty insurers did not abandon the pollution liability insurance market in 1984 because their financial capacity was limited due to underwriting losses.

There is no correlation between the availability of pollution liability insurance and the "insurance cycle." A review of the property/casualty insurance industry's return on net worth (GAAP) from 1984 through 1988 indicates that the most recent underwriting cycle peaked in 1986 and 1987.

Return on Net Worth (GAAP)	1984	1985	1986	1987	1988	7/
	1.8%	3.9%	13.0%	12.9%	11.5%	

There is no documentation that suggests that pollution liability coverage was more available during this period. In fact, while unavailability persists, coverage was less accessible in 1986-87 than it is today.

The pollution liability insurance market has never been robust. At its zenith, the market could best be described as a specialty insurance market with perhaps a dozen domestic property and casualty insurers providing pollution liability insurance coverage in response to the financial responsibility requirements in the Resource Conservation and Recovery Act (RCRA). As individual insurers became aware of the enormous retroactive liability exposure triggered by misinterpretations of the commercial general liability (CGL) policy for old or abandoned facilities, they ceased writing new coverage, and the market virtually disappeared.

Comparisons to other insurance markets such as medical malpractice insurance or product liability insurance are misleading. The CERCLA liability standard is retroactive, nearly absolute, joint and several liability, and the potential liability exposure exceeds the total assets of the property and casualty insurance industry. In addition, medical malpractice and products liability claims have not resulted in the massive case load of coverage dispute cases in which insurers and their policyholders dispute the meaning of contract language.

7/ Data for 1984 to 1987 is based on A.M. Best's Aggregates and Averages. The 1989 edition of this publication which contains 1988 data, will not be available until mid-summer 1989. Consequently, 1988 experience above is based on the ISO-NAII "Operating Results: Year-End 1988 Analysis," dated March 27, 1989.

**RAC POLLUTION LIABILITY INSURANCE
AVAILABILITY IS LIMITED**

The current pollution liability insurance market for RACS is extremely limited. A recent GAO study ^{8/} reports that there are three risk spreading entities currently providing pollution liability for response action contractors: the American International Group (AIG), Reliance Insurance Company, and one risk retention group, Demeter Limited. Even these risk spreading mechanisms provide coverage on a limited basis:

"The representative added that AIG will knowingly insure response contract activities only when it can assess the potential risks and that the policies would generally be site-specific. (page 31)

"The only RACs Reliance will insure, according to the representatives, are construction firms subcontracting for site-specific work. Reliance does not insure EPA prime contractors because they work at multiple sites, according to the representatives. (page 32)

"Demeter Limited... insures only professional engineering firms against pollution risks. Demeter will not insure remedial or construction contractors. A Demeter representative told us that Demeter has issued 13 policies to architectural and engineering firms. (page 32)

While the continuing emphasis on the insurance cycle is misleading, the background remarks do reference federal and state pollution laws, coverage dispute cases, unavailability of reinsurance, and underwriting difficulty as problems which have contributed to the unavailability of pollution liability insurance. In addition to these very real concerns, property casualty insurers are now faced with the conceptual development of toxic tort damage theories which are in a nascent, evolutionary stage.

^{8/} United States General Accounting Office, Report to the Congress, Superfund Contractors Are Being Too Liberally Indemnified by the Government, September 1989, GAO/RCED-89-160.

IMPEDIMENTS TO RAC INSURABILITY

The RAC Legal Standard in SARA Does Not Preempt State or Common Law

Although response action contractors are exempt from liability under federal law except in the case of a release caused by their negligence, gross negligence, or intentional misconduct, SARA Section 119 does not preempt conflicting state liability standards which could create a strict, joint and several liability standard for RACs. The RAC legal standard established in SARA is significant because it represents a departure, albeit limited, from the standard of strict, joint and several liability generally applied under CERCLA, but the provision does not alter or limit the liability of response action contractors which might arise under state or common law.

The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character." Prosser and Keaton, The Law Of Torts, § 78 at p. 555. (5th Ed. 1984). The Restatement of Torts sets forth six factors to be considered in determining if an activity is abnormally dangerous before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes. Application of the fifth and sixth factors indicates that strict liability should not be applied to Superfund cleanup activity. See Restatement (Second) of Torts, § 520. Under state law, however, each court would make a determination of whether strict liability should be applied to the activities of remedial action contractors by analyzing these factors on a case-by-case basis. Given the general trend toward expanding theories of liability, the remedial action contractors' potential liability is unpredictable.

In addition, twenty-three states adhere to a strict liability standard by statute for RACs who arrange for treatment, disposal or contributed to the release of pollutants.

Evolving Speculative Toxic Tort Damage Theories Are Extremely Difficult to Insure

A vast majority of situations that result in toxic tort damages involve gradual, repeated, or continuous discharges that

make it difficult to identify the "event" that generated the damages. Injuries allegedly resulting from hazardous discharges can stem from multiple causes and take a long time to develop. This makes it difficult to determine the exact cause of injury and forces the court to speculate on the nature and severity of future harm to the claimant.

State and federal statutory law and common law associated with environmental liability have responded to the vagaries of toxic tort causation by expanding the use of medical presumptions, applying strict, joint, and several liability; creating retroactive liability; constructing new damage theories; and eliminating or reducing defenses.

A menu of damage theories, including enhanced risk of future harm, mental anguish, immunotoxicity, and medical monitoring, is available to the claimant. In many instances, all these damage theories are alleged by plaintiffs in a single action. These toxic tort causes of action, combined with the use of epidemiological data to prove or disprove causation, have resulted in awards for injuries that may occur decades in the future or that may never occur.

Damages for enhanced risk of future harm, mental anguish, and medical monitoring are not new. These theories have been applied in the past in situations involving traumatic injuries with obvious causality. Traumatic accidents that result in manifest bodily injury may also result in the development of future injury -- for example, a head injury may cause epilepsy. These theories, however, are now being applied to nontraumatic medical conditions that may result in harm decades in the future. While these theories of damages may not be novel, proof of causation associated with a potential rather than an actuality is extraordinarily murky. Awards may be granted based on a biostatistician's ability to quantify contingencies.

Currently, these damages theories are acknowledged in a few states, and the court usually demands the traditional tort law preponderance of the evidence test for granting an award. However, emerging common law theories may quickly be exported to other states where traditional causation requirements may be ignored, particularly in instances in which the facts indicate that the defendants acted irresponsibly. Such a decision may be adopted as a precedent by other jurisdictions and applied to situations in which the defendant acted properly, compounding the difficulties in predicting trends in toxic tort liability law.

Future Damages

Although epidemiologists continue to debate the extent of bodily injury associated with hazardous substances, it is presumed that many such illnesses do not manifest themselves until the end of a latency period. Theories of damages that grant a present award based on the likelihood or potential for harm in the future are being rationalized and refined to respond to this complex problem.

A majority of toxic tort cases associated with enhanced risk of future harm and mental anguish demand a moderately high level of proof before granting an award. Requests for damages for enhanced risk of future harm generally call for an existing injury, e.g., asbestosis, and a reasonable medical probability that another disease will develop, e.g., cancer. In cases involving mental anguish, the court insists upon a present manifestation of injury, and the development of the future disease must be foreseeable or reasonably probable.

In isolated cases, however, juries are being asked to deliberate on increasingly conceptual notions, such as the sincerity of the plaintiff's fear. The courts are also placing more reliance on epidemiological studies, which represent an inexact science. The foreseeability and probability tests for an award in tort law may be met by applying biostatistics, which address causation as a potential regarding a control group rather than an actuality regarding a specific claimant.

Medical Surveillance Claims

The courts are increasingly recognizing the cost of medical surveillance as an independent element of damages. Ayers v. Jackson Township, 525 A. 2d 287 (1987), is the leading case advocating damages for medical surveillance.

A vast majority of the cases involving medical monitoring are linked to damages associated with increased risk of future harm. Medical surveillance awards hinge on a finding of "reasonable probability" that a future disease will develop. Some courts demand a quantifiable, greater than 50 percent, risk of disease before granting an award, while other courts ask the claimant to demonstrate a current physical injury. In some instances, the court does not ask for quantifiable proof of enhanced risk, but accepts any evidence tending to prove a medically significant increase of risk.

Immunotoxicity Claims

Immunotoxicity claims are interwoven with emotional distress and medical surveillance claims. Proponents of the immunotoxicity theory contend that exposure to chemicals adversely affects the immune system by suppressing cellular immunity and overloading the immune system, making it difficult for the body to eliminate harmful substances and rendering it more susceptible to disease. Once a diagnosis of immunotoxicity is made, plaintiffs' proceed to link a wide range of maladies to the particular exposure.

Causation and Epidemiological Data

Decisions on causation aspects of toxic tort litigation have created a trend of permitting an increasing assortment of proof. Expert medical testimony focused on the condition of the specific claimant may be supplanted by indirect or circumstantial modes of proof such as statistical studies, medical articles, animal studies or general biological principles.

The use of statistical or epidemiological evidence offered to prove or disprove an association between exposure and a disease is generally accepted today. However, debate over the weight to be assigned to epidemiological data persists. Evidence that disease can be reproduced in animals or human volunteers is, standing alone, currently not likely to be accepted as proof of causation. This type of evidence, however, remains controversial and has resulted in awards in isolated cases. In some instances, the sheer volume of studies may influence the court.

If courts rely more and more on epidemiology to establish causation, the defendant will pay for those illnesses that existed before the discharge ("background" or "baseline" cases) because there is no medical technique available that can segregate the disease caused by a toxic discharge from the normal incidence of disease.

Courts are currently struggling with the complex, practical and doctrinal problems that confront litigants in toxic tort cases. Factual vagaries and problems of proof associated with long-latency periods, multiple causes, and nontraumatic injuries must be reconciled with the speculative nature of unquantified enhanced risk and mental anguish. The process of separating real from imagined injuries and maintaining an appropriate degree of causal relationship between discharges and injuries is evolving primarily within the judicial system. Emerging toxic tort damage issues and the use

of biostatistics to address causal relationships will continue to stress traditional common law theories of liability and discourage insurers from providing coverage for these exposures.

Judicial Misinterpretation of Insurance Coverage Further Discourages Insurer Participation

Cleanup enforcement actions often trigger disputes between insurers and insureds as to whether general liability policies were intended to respond to the cost of cleanup. The courts have been extremely inconsistent in their interpretation of insurance policies never designed to respond to pollution exposures. Insurers no longer have confidence in the words and phrases of art in liability policies designed to articulate the extent of their coverage and on which their premium is calculated. If the insurer does not know the extent of its obligation, it cannot accurately calculate the risk. Consequently, coverage for pollution exposures, including RACs, remains generally unavailable.

The principal pollution coverage issues that have occupied the courts since 1984 include: (1) whether cleanup and other response costs constitute relief in the form of "damages" within the meaning of the standard commercial general liability (CGL) policy; (2) the proper interpretation of the standard "pollution exclusion" in the CGL; (3) whether the pollution caused by the insured was a "known risk" or was "expected or intended" from the standpoint of the policyholder; (4) whether the EPA "PRP letter" constituted a "suit" which activates the insurer's "duty to defend;" and (5) whether the pollution claim is excluded from coverage because it involves an injury to the insured's own property. Inconsistent determinations on these issues in declaratory judgment actions in both state and federal courts make it impossible for insurers to define their exposure through their policy language.

Damages Defense

Insurers maintain that response costs imposed by environmental statutes such as CERCLA are fundamentally different from traditional tort law "damages" insured by their policies. They are not compensatory in nature, but instead are regulatory and preventive. Sums polluters spend for cleanup or to reimburse the government or private party for the expenditure of such costs are a form of equitable relief, which traditionally does not come within the ambit of coverage provided by a general liability policy. State and federal courts continue to render inconsistent decisions on this issue.

Pollution Exclusion

The standard pollution exclusion contained in many general liability, umbrella, and excess liability policies contain two basic sections: an exclusion from coverage of all claims arising out of the "discharge, dispersal, release or escape" of pollutants, and a narrow exception to the exclusion that maintains coverage where the polluting discharges are "sudden" and "accidental."

In the past, some state courts have read the pollution exclusion out of the policy by interpreting it in a way that would make it synonymous with the "expected or intended damage" limitation. These earlier cases ignore the temporal aspects of "sudden" and focus on the conduct and intentions of the policyholder rather than the nature of the release. However, some recent appellate court cases and law review commentary have criticized these cases and have found the pollution exclusion to be unambiguous. However, there is no clear trend in the decisions.

Known Risk

An insurance policy does not cover losses that are known at the time the policy becomes effective. This principle is referred to as the "known loss" or "known risk" defense. Courts increasingly are recognizing that insurers provide coverage for a future, contingent, fortuitous event, not a present, certain one.

Expected or Intended

A number of courts have denied insurance coverage when evidence revealed that the insured knew of routine and continuing discharges of pollutants over a lengthy period of time. When dealing with a sophisticated commercial insured, an increasing number of courts are focusing on the objective standard of the insured's intent to act and what it reasonably should have known with respect to the likelihood of injury, rather than on the subjective standard of intent to cause a specific harm.

Duty to Defend

An environmental liability action is often preceded by a number of events, including the issuance of a "potentially responsible party" (PRP) letter, requests for information and preliminary site investigations. Case law remains inconsistent with respect to whether preliminary enforcement measures under

CERCLA or state statutes constitute "suits" within the meaning of the general liability policy or whether a "duty to defend" operates with respect to such measures.

Insured's Own Property Exclusion

The general liability policy excludes coverage "for property damage... to property owned or occupied by or rented to the insured." A number of cases have held that liability policies must be construed to cover pollution cleanup activities necessary to prevent damage to the property of others, even if cleanup activities take place on the insured's property. A majority of courts have disallowed coverage if the facts suggest that migration off-site is unlikely, and cleanup can be contained on the policyholder's own property.

CONCLUSION

There are significant difficulties with risk allocation for hazardous waste cleanup projects.

The American Insurance Association stands ready to work with the EPA in drafting an indemnification scheme which would encourage sureties to participate in this market and serve as an adequate replacement for the unavailable pollution liability insurance.

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NATIONAL CONSTRUCTORS ASSOCIATION

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**NATIONAL CONSTRUCTORS ASSOCIATION'S
COMMENTS ON EPA'S PROPOSED GUIDELINES
ON RAC INDEMNIFICATION
PUBLISHED OCTOBER 31, 1989**

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Attachment A

Projects NCA Member Companies Declined
To Bid Due to High Risk Factors

Attachment B

NCA Position Statement
Indemnification for Hazardous Waste Cleanup
(Adopted October 12, 1989)

INTRODUCTION

The National Constructors Association (NCA) represents some of the nation's foremost firms engaged in the design and construction of major industrial, commercial and process facilities worldwide. Five of the six largest U.S. contractors are NCA members, according to Engineering News-Record (ENR), as are 11 of the 26 contractors that grossed in excess of \$1 billion in 1988. In total, NCA member companies grossed in excess of \$50 billion in 1988 and employed more than 120,000 persons. Their projects utilized more than 75 million man-hours of labor in 1988 alone. The following is a list of the NCA member companies:

The Austin Company
Badger America Inc.
Bechtel Construction Company
Oscar J. Boldt Construction Company
Combustion Engineering Inc.
Ebasco Constructors, Inc.
Fluor Constructors International, Inc.
Kiewit Industrial Co.
Leonard Construction Company
Lummus Construction Company
Parsons Constructors Inc.
The Rust Engineering Company
Stone & Webster Engineering Corporation
Tompkins-Beckwith, Inc.
UE&C-Catalytic, Inc.
Wright Schuchart Harbor Co.

Affiliate member:
University Mechanical National Constructors Inc.

Companies such as those represented by NCA are needed for the successful execution of the Superfund program. These large construction companies have extensive experience in managing and constructing large, complex projects -- just the

type of project that many Superfund cleanups will be. As the pace of site remediation activities under the Superfund program accelerates, more and more of the companies that can do work at this level must be brought into the program for it to succeed.

These companies will bring substantial capability, expertise and experience to the Superfund program including:

- management and technical resources to staff and run complex projects;
- experience gained in successfully completing numerous large, complex projects;
- the stability of companies that have been in business for decades;
- financial strength to stand behind the lump sum contracts;
- skills in cost/schedule control, purchasing, accounting, and labor relations; and
- experience in construction subcontracting and claims and change order handling needed to effectively manage projects that have the uncertainty inherent in Superfund work.

NCA member companies have been and continue to be very supportive of Superfund cleanup programs and over long years of experience have acquired technical and managerial expertise which makes them some of the most capable contractors to undertake the cleanup of this nation's worst hazardous waste sites. However, serious concerns regarding the potential liability associated

with hazardous waste cleanup sites have restricted many firms' participation in this program.

Generally, NCA member companies have not bid hazardous waste remediation work because of concerns regarding potential liability exposure. While a small number of NCA member companies are performing a limited amount of hazardous waste remediation work, these firms are doing so only on a conservative and selective basis. These firms perform detailed pre-bid risk assessments to review available liability protection and to eliminate high risk sites from bidding consideration. No bid is submitted if a site scores poorly on factors such as: likelihood of release of hazardous material; proximity to population and potential for pathways to environmentally sensitive receptors; quantity and toxicity of the hazardous material; and physical state and containment of the hazardous material.

Due to liability concerns and in the absence of adequate indemnity, many large, well-qualified firms are not bidding on the remediation of those hazardous waste sites which pose the greatest danger to the public. NCA has surveyed its member companies performing selective hazardous waste cleanup work to determine what jobs they have declined to bid because of the liability issue. The survey has resulted in a not all-inclusive list of thirty-two (32) projects that one or more of these NCA member companies has declined to bid due to high risk factors. The list is attached as Attachment A.

These firms, and their sureties, are also very concerned over the increasing accumulation of pollution liability

risk as and if they take on more hazardous waste remediation work. These firms' continued commitment of financial and personnel resources to competing for and performing remediation work will not likely withstand the erosion of protection reflected in the EPA proposed guidelines, coupled with the unacceptable accumulation of potential liability associated with performing additional work in this area.

During the Congressional hearing process leading up to the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), NCA expressed concerns about the nature and magnitude of the potential liability facing Superfund cleanup contractors. NCA believed then, as it does now, that the uncertain and unpredictable status of the law regarding this cleanup work is a strong disincentive for responsible contractors to enter the Superfund cleanup marketplace.

Representatives of EPA and the Army Corps of Engineers, as EPA's contract agent for certain projects, have denied that there is any problem with availability of qualified contractors for the cleanup work. A closer examination of the procurement process for some of the more complex Superfund sites would seem to contradict their assertion. The bid process for some of these projects has been complicated by the lack of surety bond availability and other questions which have caused major delays in contracting the work.

A fair and reasonable indemnification formula will create an acceptable liability environment which (i) will cause those NCA member companies already in the hazardous waste cleanup

market to continue their involvement, and (ii) will induce several other NCA members not currently participating in this work to enter the market. The Superfund's program is increasing its emphasis on remediation. It is therefore in the Agency's and public's interest, from an economic, public health and environmental perspective, to ensure the participation of a competitive pool of highly qualified remediation contractors through the provision of adequate indemnification protection.

The unavailability of adequate insurance coverage to deal with these risks was apparent in 1986 and still exists today. Recent inquiries by NCA member companies regarding the availability of contractors' pollution liability coverage resulted in two quotations. One quotation offered \$5 million total liability per contract, with a minimum \$100,000 deductible for each claim. The second carrier quoted \$6 million total liability per contract, \$3 million per occurrence, with a minimum deductible of \$25,000 per claim. In both cases, quoted annual premiums were two to three percent of contract revenues, based on contract risk, with the premiums reviewable annually through a "look back" provision which would allow for an annual increase in premiums. Moreover, both quotations are on a claims made basis, and would not provide liability protection after completion of the contract except for a limited period of one to two years. Significantly, the policies can be terminated by the carriers at any time on 30 days' notice.

Congress clearly intended to encourage contractor participation in the hazardous waste cleanup program by providing

for Superfund indemnification to take the place of insurance coverage not available in the marketplace. It also intended for the indemnification program to encourage the participation of insurance companies in the market. EPA's indemnification proposal falls far short of both marks. Its proposed guidelines provide no incentives to prospective insurance carriers. And NCA member companies, which generally carry CGL limits as high as \$200 million, take small comfort in currently available pollution coverage -- claims made policies with \$5 million in coverage and premiums as high as \$500,000 per year.

It appears that EPA also has concerns regarding the adequacy and high premium cost of contractors' pollution liability coverage as is reflected in the backlog of insurance quotations now pending before the Agency. One carrier has informed us that 85 insurance quotations are now pending before EPA, with only three to four policies having been approved by EPA within the last six to nine months. It is our understanding that EPA's concern over the cost of premiums has resulted in a cessation of processing of the quotations provided to EPA in compliance with the "due diligence" requirements of the Agency.

Although the EPA's objectives are well-intended, we believe that the premise underlying the EPA's approach to indemnification -- that the creation of incentives for RACs to seek reasonably priced commercial insurance will encourage contractor participation and the development of a viable commercial insurance market -- is not valid for two reasons.

First, a strong demand for pollution liability insurance already exists (and has existed for several years). Nevertheless, the insurance industry is no more willing to assume the pollution liability risk than are the RACs, unless it receives sufficiently high premiums and protective terms and conditions. The incentive-based indemnification program suggested by the EPA is not likely to influence the insurance industry's determinations as to premium levels and terms and conditions of coverage.

Second, the pollution liability insurance coverage presently available and likely to become available does nothing to satisfy the critical concerns of large contractors with substantial assets such as those which are members of NCA. These contractors are concerned that a catastrophic loss may result in potentially unlimited liability which could threaten a company's overall financial viability.

In addition to the bleak insurance market, contractors currently considering the possibility of bidding on a cleanup contract now face the additional problem of a rapidly shrinking surety bond market for these contracts. In fact, some of these contractors have been informed that sureties with which they have traditionally done business not only will not bond a Superfund cleanup contract but may have concerns about bonding a traditional construction project for a firm engaged in hazardous waste cleanup activities.

The potential liability for Superfund contractors has not decreased since the enactment of SARA. There have been no

noteworthy improvements in insurance availability, and new concerns have been raised by the tightening surety bond market. Nevertheless, EPA has proposed indemnification guidelines which raise new and complex questions regarding potential liability, instead of providing the protections clearly envisioned by legislative authors of Section 119.

Although NCA is dismayed that EPA has taken this overall approach, we have chosen to address individual sections of the proposed guidelines on their merits/shortcomings in an effort to encourage the changes which we believe will most greatly improve this document. That approach should not be construed as an acceptance of the general principles EPA is applying in the development of this guidance document.

Most officials within GAO, EPA and other interested agencies acknowledge that the potential liability risk to Superfund cleanup contractors is difficult to assess. Although indemnification offered up to this point in the program has been virtually unrestricted, no claims for indemnification have thus far been made. Despite these acknowledgments, EPA's proposed guidelines would only cover those claims arising "within ten years after the contract term." These and other inconsistencies in EPA's approach are addressed individually in the specific comments which follow.

Unfortunately, NCA recognizes that some changes which we believe are necessary to create an acceptable liability atmosphere for Superfund contractors may require congressional intervention. The absence of protection against the application

of strict liability theories under state or common law is an example of a problem which demands congressional resolution. As such issues cannot be resolved through the regulatory process, we have sought instead to comment on those issues which we believe can be addressed through these guidelines.

It should be noted that certain of the issues addressed in these comments are of such importance that their successful resolution may determine the course of future participation in the Superfund cleanup program. At a minimum, their final form may dictate whether the typical NCA member company participates in the program at all. These issues include:

- Indemnification terms and conditions, including questions regarding coverage for negligence/strict liability, limits and deductibles, and duration of coverage;
- Indemnification coverage for subcontractors; and
- Requested Indemnification as a bid penalty.

Underlying all of NCA's comments is the fundamental conviction that the only means of ensuring the participation in the Superfund cleanup program of a sufficient number of large, well-qualified contractors is through the provision of a fair indemnification program which will be responsive to potential catastrophic losses. The NCA's recommendations as to limits and deductibles of a workable Superfund indemnification program are set forth in the NCA Position Statement on Indemnification for Hazardous Waste Cleanup, adopted by NCA on October 12, 1989, attached as Attachment B.

NCA has chosen to be brief in its comments in order to focus attention on the problems with the EPA proposal which it finds most troubling. NCA would welcome the opportunity to discuss these comments in person with appropriate EPA officials to expand upon its position.

6. Definitions

"Indemnification", for the purpose of these guidelines, means an agreement under which EPA will compensate certain losses suffered by a RAC, and the actual payment of that compensation. . . .

"Response Action Contractor", as provided in section 119(e)(2), means any person who enters into a response action contract to provide services directly related to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility, and any person hired or retained by such a person. It also includes recipients of cooperative agreements under section 311(b) and recipients of grants pursuant to section 126(g) of SARA.

"Response Action Contact", as provided in section 119(e)(1), means any written contract or agreement entered into by [a] RAC with the President, any Federal agency, . . .

Comment: Performance bond sureties are concerned about two aspects of the Contractor indemnification program. They question:

- (1) If they will have the benefit of any indemnification granted to the Response Action Contractor (RAC); and
- (2) If they will effectively become RACs as they take the steps necessary to honor their performance bond obligations.

The guidelines should make it clear that the EPA's indemnification of the RAC will extend to the surety to the extent that the RAC's surety suffers the imposition of third party or other liability ordinarily covered by the RAC's

indemnification as a result of the completion of a cleanup contract under its performance bond.

Additionally, the guidelines should make it clear that the definition of Response Action Contractor does not include a performance bond surety nor does the definition of a Response Action Contract include the performance bond itself. In order to ensure that bonding is available on hazardous waste cleanup projects, it is necessary to satisfy the surety industry that its responsibilities are limited to providing to the owner the means to complete the bonded contract and that under no circumstances will the performance bond surety be exposed as a liability insurer to a government agency, the owner or third parties.

Efforts to Obtain Insurance Coverage
From Non-Federal Sources

7. Indemnification Request

- 7(b)(ii) That it has made diligent efforts to obtain insurance coverage from non-federal sources (or, if it is a cost-reimbursement RAC, it has satisfied the minimum insurance requirements of 10(b), below);

Comment: Section 119 requires RACs only to make diligent efforts to obtain commercial "insurance." This proposed guideline would expand the scope of this obligation beyond the commercial insurance market, as proposed Guideline 6 defines "non-federal sources" as:

. . . commercial insurance, PRP indemnification, state indemnification, or other alternative risk transfer mechanisms.

Such an approach is inconsistent with the Congress's intent to provide RACs with catastrophic loss protection due to the unavailability of insurance. Congress enacted Section 119 to ensure that site cleanups would not be delayed by the absence of pollution liability insurance. Thus, a key provision is indemnification of contractors for whom liability insurance is not available on reasonable terms.

The only condition to a non-PRP indemnity agreement is that the RAC has made diligent efforts to obtain insurance coverage from non-federal sources to cover its liability and that:

. . . the liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide response action, and adequate insurance to cover such liability is not generally available at the time the Response Action Contract is entered into.

42 U.S.C. § 9619(c)(4)(A). Since proposed Guideline 7(b)(ii) does not cover indemnification of RACs employed by PRPs (see Guideline 17), the "non-federal sources" definition may be construed to require the contractor to pursue indemnification from not only the PRP but also the state before being granted indemnity. The definition can also be construed to require the contractor to pursue "alternative risk transfer mechanisms" that is an inherently vague requirement. All of these constructions would be beyond the requirements set forth in the statute, that clearly requires the RAC to pursue only commercial insurance which is available at a fair and reasonable price.

EPA Direction to Indemnified RACs to
Purchase Insurance

7. Indemnification Request

- 7(g) EPA reserves the right to change the frequency and content of documentation submittal requirements, and also to direct indemnified RACs to purchase insurance from insurers identified by EPA.

Comment: Section 119 requires that the terms and conditions of the indemnification be determined at the time of contracting and not thereafter. The last clause of proposed Guideline 7(g) above is contrary to this mandate. With the exception of contracts covering more than one facility, nothing in Section 119 suggests that Congress intended to require indemnified RACs to purchase insurance after the fact where its potential third party liability is not covered by insurance available at a fair and reasonable price at the time the contract to perform response action is entered into. The applicable statutory language is as follows:

In the case of a Response Action Contract covering more than one facility, the Response Action Contractor agrees to continue to make such diligent efforts each time the contractor begins work under the contract at a new facility.

42 U.S.C. § 9619(c)(4)(C). The guideline suggests that EPA can direct RACs to purchase insurance after the fact on contracts covering only one facility. In addition to exceeding congressional intent, such a potentiality is inconsistent with sound contracting and bidding principles as it disrupts the RACs' contract pricing structure requiring an additional cost

contingency to be included in the bid. This contingency is impossible to compute because the premium cost is unknown at the time of bid. This provision, therefore, increases the monetary "penalty" to RACs requesting indemnity, since RACs not requesting indemnity will not be required to purchase insurance. If this provision remains, the guidelines, at a minimum, should provide that the directive will not be issued unless any premium costs are added to the contract price. NCA suggests the following revision:

EPA reserves the right to change the frequency and the content of documentation submittal requirements, and also to direct indemnified RACs to purchase insurance from insurers identified by EPA, the cost of which shall be reimbursable and shall be added to the contract price.

Indemnification Applying Only to Third
Party Liability Not Compensated by
Insurance

8. Indemnification Terms and Conditions

- 8(a) Where EPA has agreed to indemnify [a] RAC, EPA will indemnify the RAC against third party liability (including the expenses of litigation or settlement for negligence arising from the RAC's performance in carrying out the response action contract. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of a hazardous substance, pollutant, or contaminant if such release arises out of the response action activities of the contract.

Comment: NCA suggests that the words "third party" be deleted from the first sentence and that the words "any action for negligence (including any action by EPA or any other federal agency or any state or political subdivision)" be inserted in their place so as to make it clear that EPA's indemnity would also apply to an action brought by EPA or any other federal agency or a state or political subdivision against a RAC for negligence causing damages as a result of a release. The overall intent of the indemnity provisions is to protect the RAC from ruinous consequential losses, whether or not the action is brought by EPA, or any other person or entity which is a party to the contract, since parties to the contract may bring claims against the RAC for consequential losses resulting from a release or they may bring indemnity or contribution actions against the RAC as a result of third party claims filed against them. The statutory standard contained in 42 U.S.C. § 9619(a)(1) states

that the RAC shall not be liable under federal law to "any person" including claims for indemnification or contribution for the indemnified damage with no reference to limiting this protection to claims by "third parties."

NCA suggests that the words "or otherwise" should be deleted. The purpose of Section 119 indemnification is to offer a substitute for the lack of affordable and adequate commercial insurance. Inclusion of the words "or otherwise" negates this objective as it limits indemnification to that liability (and presumably that portion of any liability) which cannot be "otherwise" satisfied by the RAC. A conclusion which could be drawn from such a broad indemnification exclusion is that indemnification will apply only where the RAC has no assets available to satisfy all of a particular liability. Such a situation is contrary to the very purpose of insurance, which is to protect one's assets.

Indemnification Limits and Deductibles
-- Contract Aggregates

8. Indemnification Terms and Conditions

8(b)(i) The indemnification limit is defined as a contract aggregate limit.

8(b)(ii) The indemnification deductible is a per occurrence deductible. There is no aggregate limit to the deductible.

Comment: These provisions should be modified because (1) there is an inconsistency between the application of the indemnification limit and the indemnification deductible and (2) the need to deal with multisite contracts.

Unlike the indemnification limit which applies to the contract generally, the indemnification deductible does not apply to the contract itself but rather applies as a "per occurrence deductible." "Occurrence" is not a defined term and, therefore, is susceptible to an interpretation that there is a separate deductible for every claim which may arise on account of the RAC's performance of activities under a single contract. This may be equivalent to no indemnification at all in situations where there are multiple "occurrences" during the performance of a single contract. Accordingly "occurrence" should, at a minimum, be defined so as to prevent twenty individual claims arising from a series of related events from subjecting the contractor to twenty times the amount of the deductible in unindemnified loss. NCA suggests that "occurrence" be defined as "an event, including continuous or repeated exposure to conditions, which results in claims against a RAC alleging a

release from RAC response action activity." This definition would be consistent with the definition of "claim" set forth in Section 6 of EPA's Proposed Guidance.

Where the RAC has a multiple site contract, the RAC's exposure increases significantly because of the increased possibility of multiple "occurrences." NCA suggests that there be an aggregate cap on deductibles equal to a defined percentage of contract value. This approach was originally suggested by EPA in its July 1988 draft proposal as being consistent with the commercial insurance approach, therefore providing a comparable substitute for what RACs would find in the commercial liability insurance market. At that time, EPA had suggested an aggregate cap of 3% of contract value. See 1988 Draft Proposal at 201.

Applicability of Indemnification to
Strict Liability and Negligence
-- EPA Conflict of Interest

8. Indemnification Terms and Conditions

8(c)(ii) EPA indemnification will not apply if the RAC is found both strictly liable and negligent, and the cause of action is not divisible.

Comment: NCA recommends that Paragraph (c)(ii) of Section 8 be revised to read as follows:

EPA indemnification will apply if the RAC is found both strictly liable and negligent without regard to whether the cause of action is divisible.

Section 119 provides expressly for indemnification against liability arising out of negligence. In the event that a RAC is held liable under a negligence standard, it should not be penalized because the law also imposes legal responsibility under a faultless, or strict liability, standard. The final clause, "and the cause of action is not divisible," does not provide any relief from the adverse impact of this provision. What is or is not "divisible" is not defined and, in fact, cannot be defined in advance because it is dependent upon the circumstances of a particular case and the law of the particular jurisdiction in which the action is brought. In short, the RAC's contractual right to indemnification is left dependent upon the creative pleadings of plaintiff's counsel in a future, but unknown, lawsuit and the vagaries of the potential application of strict liability principles to a fault-based situation. Thus, the RAC is left without any solid basis to make a determination at the

time of contracting as to whether any indemnification provision is worth the paper it is written on. A further concern is that ambiguity regarding the scope of indemnity generates increased difficulty for the RAC's performance bond surety as to the potential risks the surety is undertaking. The surety cannot make a solid underwriting determination as to the real value of the indemnity.

Additionally, and most significantly, this provision creates a conflict of interest situation for EPA. Section 20(e) of the Proposed Guidance provides EPA with the right to direct or control the defense of any claim or action against a RAC. Clearly, under Paragraph (c)(ii) of Section 8, it would be in EPA's interest to have a RAC found liable under strict liability principles.

Twenty Day Notice of Claim

8. Indemnification Terms and Conditions

8(d)(i) For the purpose of this guidance, "prompt" action is defined as action within twenty days of the date when the RAC knew or should have known of the claim or event.

Comment: This Section is unnecessary and should be deleted because claims notification is covered adequately by Section 20 of the Proposed Guidance. It is also inconsistent with the terms of Section 20 and is contrary to normal reporting procedures for liability claims. At a minimum, the words "or should have known" and "or event" should be deleted from Paragraph (d)(i) of Section 8.

Notice should be based on "a claim" and not the "event" which gives rise to the claim. Qualifying indemnification by requiring the RAC to give notice of an "event," without regard to a claim, would place the RAC in the untenable position of having to guess correctly as to what "event" may ultimately (and often many years later) give rise to a claim. Additionally, the words "or should have known" are a trap for the unwary since the notice clause is arbitrary and not based on any actual prejudice to EPA. Under state law, late notice to an insurance carrier is generally not sufficient to void coverage unless there is actual prejudice to the carrier. More importantly, this provision will create a fact issue in every case as to when the RAC "should have known" of a claim.

Indemnification of Claims Arising and
Reported During Performance of the
Contract and Ten Years Thereafter

8. Indemnification Terms and Conditions

- 8(e) Coverage Term: Subject to the other terms and conditions listed in this document, an EPA indemnification agreement will cover claims arising (and reported to EPA) during the period of performance of the contract, plus any time within ten years after the contract term. For multisite contracts, the coverage term, with respect to an individual site, is the ten year period following the RAC's completion of work (as specified in the Work Assignment or other relevant work order) at the site.

Comment: This provision should be deleted because it is inconsistent with Section 119 in two respects and is inconsistent with the basic need for indemnification. Under proposed subsection 8(e), indemnification would be limited to "claims arising [and reported to EPA] during the period of performance of the contract, plus any time within the ten years after the contract term." Section 119(c)(1), however, does not limit indemnification to "claims arising . . . and reported . . . during the period of performance of the contract," but rather authorizes indemnification for "negligence arising out of the contractor's performance in carrying out response action activities" without regard to when any such claims of negligence may arise. Additionally, the proposed limitation of indemnification to those claims which arise "within ten years after the contract term" would have the effect of negating the indemnification authorization, given the delayed nature (and long latency periods) of pollution-related liability claims. In fact, the

report of Tillinghast, Nelson & Warren, Inc., the actuarial firm retained for EPA's Indemnification Task Force, expressly recognizes that "the activities of a RAC may not give rise to a release until many years after the activity was completed." (p. 28.)

It should also be noted that under state law any applicable statute of repose may not apply to a hazardous waste cleanup, thereby leaving the RAC and its surety exposed far beyond ten years. In this connection, state statutes of repose may well be construed to apply only to traditional improvements to real property (buildings or other structures) and not to the elimination or removal of hazardous waste.

Indemnification of Subcontractors

9. Subcontractors

- 9(a) EPA will not agree to indemnify subcontractors directly. However, with the prior written permission of EPA, prime contractors can include subcontractors in their indemnification agreements with EPA. Thus, EPA will enter into no more than one indemnification agreement per contract, with that agreement affording coverage to the prime contractor, including any obligation the prime contractor may incur as a result of its indemnification agreements with its subcontractors. . . .
- 9(c) EPA indemnification limits and deductibles are unaffected by the number of subcontracts entered into by the prime contractor. That is, the limit of EPA's obligation and the deductible specified in an indemnification agreement with a prime contractor applies jointly to the prime contractor and all subcontractors.

Comment: This provision prohibits subcontractors from receiving their own indemnification. The prime contractor is required to share his indemnity with his subcontractors. Since there is no adjustment to the prime contractor's deductible, the contractor remains exposed for the subcontractor's negligence to the extent of the prime's deductible. If the prime contractor has a high deductible, it will be impossible for it to get any but the largest subcontractors to take the same deductible amount. This will, in all likelihood, create a situation where a prime will be required to give some indemnity to a subcontractor with a significantly smaller deductible than that of the prime contractor. An example would be \$3 million indemnity to a subcontractor with a \$250,000 deductible. As a practical matter, this arrangement requires the prime to fully indemnify the

subcontractor out of his own pocket if the deductible under the EPA indemnity agreement is in excess of \$3 million. Contractors are, therefore, not going to want to indemnify any of their subcontractors under these arrangements. This raises the question as to whether many desirable subcontractors may decline to bid the work, thereby creating additional disincentives preventing highly qualified prime contractors from entering the market.

With regard to contracts which are now ongoing where the indemnity provisions are subject to renegotiation, the proposed Guidelines put the prime contractor in an extraordinarily difficult position. If the prime contractor refuses to become the insurer of his subcontractors, many of these subcontractors may choose to terminate their contracts.

Indemnification Limits and Deductibles --
Cost Reimbursement Contracts and Firm
Fixed Price Sealed Bid Contracts

10. RACs Working For EPA Under Cost Reimbursement Contracts

- 10(e) Limits and Deductibles: Where EPA has agreed to indemnify a cost reimbursement RAC working for EPA, the limit of indemnification included in the indemnification agreement shall be requested by the RAC. The limit must be not less than \$1 million and not more than \$50 million. The deductible to be insured by the RAC will depend on the limit chosen. Both the indemnification limit and the deductible amount shall be specified in the indemnification agreement.

11. Indemnification Of RACs Working For EPA With Firm Fixed Price (Sealed Bid) Contracts

- 11(d) All indemnification agreements must contain a limit of indemnification and a deductible amount. A firm fixed price RAC may request any amount of indemnification coverage (not to exceed \$50 million), and any deductible (with a minimum deductible of \$10,000) as part of its bid.

Comment: The proposed \$50 million limitation is not adequate for a catastrophic loss. EPA's initial statement of its Task Force On Indemnification aptly stated that its primary objective was to:

Determine the limits of EPA indemnification (above deductibles, commercial liability insurance, and responsible party indemnification agreements) that are sufficiently adequate to offset probable and catastrophic risk for response action contractors (RACs) participating in the Superfund cleanup program.

Prior to the enactment of SARA, EPA recognized the potential for catastrophic losses by providing unlimited indemnification. The \$50 million limit is simply not adequate to "offset probable and

catastrophic risk for RACs participating in the program," particularly when the \$50 million limitation is without regard to the particular circumstances of a particular project. In fact, the Tillinghast, Nelson & Warren, Inc., study commissioned by EPA's Indemnification Task Force recommends limits of \$200 million. This study states:

Most RACs, EPA officials, and risk management professionals will likely agree that an occurrence could give rise to losses in the hundreds of millions of dollars.^{1/}

Currently, many NCA member companies carry general liability coverage with minimum coverage of \$200 million. This coverage is considered the minimum to adequately protect them in their traditional engineering and construction work. It cannot be seriously argued that the potential for catastrophic loss in performing a Response Action Contract far exceeds the risk inherent in traditional construction. If NCA companies cannot receive coverage significantly higher than \$50 million dollars, they cannot be expected to bid on Response Action Contracts other than those presenting the most minimal risk. Any Guideline which forces a company to bid conservatively on projects of this nature is not in the public interest.

^{1/} Mr. Berg's letter of August 7, 1987 to Mr. Mason, p. 3.

Indemnification of RACs Working for EPA
with Firm, Fixed Price (Sealed Bid)
Contracts -- Price Schedule for
Indemnification

11. Indemnification Of RACs Working For EPA With Firm,
Fixed Price (Sealed Bid) Contracts

- 11(d) (i) The Invitation for Bid (IFB) will include a "price schedule" for indemnification (with prices depending on the size of the limit and size of deductible amount). When EPA evaluates a bid, it will consider the requested indemnification coverage to be part of the bidder's requested remuneration. That is, when selecting the lowest bidder for a project, EPA will evaluate the "net bid", i.e. the bid plus the value (as reflected in the price schedule) of any requested indemnification. . . .

Comment: The provision for a "penalty" associated with an indemnification request is unworkable. It can be assumed that for most fixed price sealed bid contracts, the "spread" between bidders will be very close. The spread between bidders on a fully designed project is frequently 10% or less. Depending upon the price schedule for the assessment of "penalties," the penalty amount can make the difference between being low bidder and being second, third or fourth bidder. In New Jersey, for instance, which uses a similar system, an analysis of bids on three New Jersey projects shows that the penalties associated with an indemnification request can raise the bid price 12% on a \$15 million project and 83% on a \$3 million project, with the percentage decreasing as the dollar size of the contract decreases. Assuming that there are a number of contractors who will bid without an indemnification request, such a penalty makes

bidding on these projects a poor business risk. The cost of preparing the bid on a major project can be expected to exceed \$200,000. Contractors can not be expected to expend these sums unless they feel they have a realistic chance of securing the award. Any significant disincentive dictates a business decision not to bid. These provisions may effectively limit the market to a very small number of contractors, therefore limiting competition and expertise available to EPA and ultimately increasing prices. The "price schedule" scheme accomplishes nothing except giving a competitive advantage to undercapitalized, uninsured, unindemnified companies to whom the prospect of profit is more important than protection of their assets. More conservative contractors, with substantial assets to protect, will in almost all cases require indemnification. Since these are the contractors that EPA presumably wishes to attract, it does not make any practical business sense to discourage them from bidding.

Work Directly Related to Site Cleanup

19. Other Terms and Conditions

19(a) EPA will indemnify only RACs performing work directly related to site cleanup.

Comment: Section 119 authorizes indemnification for "carrying out response action activities." "Response" is a defined term under 42 U.S.C. § 9601(25). Subsection (a) of Section 19 is subject to a potential interpretation inconsistent with the definition of "response," as there is no defined standard as to what work is "directly related to site cleanup." Accordingly, 19(a) should be deleted as superfluous and potentially inconsistent with Section 119 due to its inherent ambiguity.

Grounds for Cancellation of the
Indemnification Agreement

19. Other Terms and Conditions

- 19(b) At any time, EPA may cancel its indemnification of a RAC due to a material misrepresentation or a failure on the part of the RAC to provide necessary information.

Comment: This is unnecessary and leaves the RAC subject to a hindsight negation of its indemnification for a purported failure "to provide necessary information." Any indemnification provision would, like any insurance contract, be subject to rescission on the basis of common law principles of material misrepresentation in the application. Therefore, this section is not necessary.

EPA's Right to Add Other Terms and
Conditions to the Indemnification
Agreement

19. Other Terms and Conditions

- 19(c) EPA reserves the right to add such additional terms and conditions to its RAC indemnification agreements as it deems necessary. Such terms and conditions will be consistent with CERCLA section 119.

Comment: This provision should be deleted. It is contrary to commercial contracting principles to allow one party to unilaterally change the terms of a contract after it is executed and performance commenced. It is impossible for the fixed price contractor to include a pricing contingency for such an unknown. Additionally, this provision will simply create litigation as to fixed price RACs in light of Section 11(d)(3) as to whether such additions to the contract constitute prohibited "modifications" or permissible "additional terms and conditions." If the provision is to remain, NCA suggests the following language:

EPA reserves the right to add such additional terms and conditions to its RAC indemnification agreements as it deems necessary. Such terms and conditions will be consistent with CERCLA Section 119. Provided, however, that the terms and conditions of indemnification of a fixed price RAC shall not be modified.

ATTACHMENT A

**Projects NCA Member Companies Declined
To Bid Due To High Risk Factors**

**PROJECTS NCA MEMBER COMPANIES DECLINED
TO BID DUE TO HIGH RISK FACTORS**

Shown by Location and Client

Alabama Army Ammunitions Plant, Alabama
(U.S. Army Corps of Engineers, Kansas City District)

Ameron South Gate, California
(Ameron and Los Angeles County, California - PRP)

Badger Army Ammunitions Plant, Wisconsin
(U.S. Army Corps of Engineers, Omaha District)

Bio Ecology, Texas
(Texas Water Commission)

Cloverdale, California
(Caltrans)

Combe Fill North, New Jersey
(New Jersey Department of Environmental Protection)

Commencement Bay Marine Outfall, Washington
(City of Tacoma, Washington)

Cornhusker Munition Site, Nebraska
(U.S. Army Corps of Engineers, Omaha District)

Fort Eustis, Virginia
(U.S. Army Corps of Engineers, Omaha District)

Fort George G. Meade, Maryland
(Department of Defense)

French Limited, Texas
(Texas Water Commission)

Hanscom, Massachusetts
(U.S. Army Corps of Engineers, Omaha District)

Hazardous Waste Cleanup, California (Various Sites)
(Superfund, State of California)

Helen Kramer, New Jersey
(U.S. Army Corps of Engineers, Kansas City District)

Lackawanna Refuse, Pennsylvania
(U.S. Army Corps of Engineers, Omaha District)

Lake City Army and Ammunition Site, Missouri
(U.S. Army Corps of Engineers, Kansas City District)

LaSalle, Illinois
(Illinois Environmental Protection Agency)

Lipari, New Jersey
(U.S. Army Corps of Engineers, Kansas City District)

Master Services contract, El Segundo, California
(Hughes Aircraft, El Segundo, California)

Material Treatment at Refinery, California
(Chevron)

Motco Hazardous Waste Cleanup, Texas
(Monsanto - Texas)

Navy Clean, Florida
(U.S. Navy)

New York State Stand By Contractor, New York
(New York Department of Environmental Conservation)

Onsite Disposal at Kesterson Reservoir, California
(BuRec)

Re-Solve, Massachusetts
(Environmental Protection Agency)

Riverton Uranium Mill Tailings Cleanup, Wyoming
(Department of Energy)

Savannah Army Depot Activities, Illinois
(U.S. Army Corps of Engineers, Kansas City District)

Sharp Army Depot, California
(U.S. Army)

Sikes Pit, Texas
(Texas Water Commission)

Surface Water Control Channels - Stringfellow Superfund Site,
California
(California Department of Health Services)

Total Army
(U.S. Army)

Tyndell, Florida
(U.S. Air Force)

ATTACHMENT B

**NCA Position Statement
Indemnification for Hazardous Waste Cleanup
(Adopted October 12, 1989)**



NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

NCA POSITION STATEMENT

INDEMNIFICATION FOR HAZARDOUS WASTE CLEANUP

The National Constructors Association (NCA) believes that indemnification by the federal government for catastrophic liability incurred in hazardous waste cleanups is essential if contractors are to participate in hazardous waste cleanup projects. A predominant number of the nation's large and competent contractors either have rejected entering the hazardous waste cleanup business or participate on a limited basis due to one primary factor: the potentially unlimited liability that they might incur in the event of catastrophic loss in connection with a cleanup project.

The construction industry considers hazardous waste cleanup to be an imprecise science. The risk of catastrophic liability is causing large contractors either to avoid altogether hazardous waste cleanup projects or to undertake these projects on a very selective basis after a careful assessment of the risk of catastrophic liability. The NCA believes that the remedial action contractor should not be saddled with an unreasonable liability exposure in cleaning up hazardous waste caused by someone else.

The Environmental Protection Agency's most favorable proposal for indemnification has been to offer relatively low limits of indemnity in excess of a low deductible amount. Large remedial action contractors will be unable to supplement such limited indemnification with environmental liability insurance. This insurance is simply not available with coverage beyond low limits of indemnity. Thus, large remedial action contractors lack protection against catastrophic liability that could drive them out of business.

The net result is that the public interest is not being served where, because of the lack of adequate protection against catastrophic liability: 1) victims of a catastrophe may not be able to receive appropriate compensation for their injuries; 2) many of the nation's largest, most competent and most reliable contractors either forego hazardous waste cleanup projects entirely or perform hazardous waste cleanup work only on a very limited and selective basis; and 3) many of those contractors who do perform hazardous waste cleanup work must include a substantial contingency in the contract price to attempt to cover the risk of catastrophic liability.

Moreover, the public is also not served when such work is undertaken by contractors either lacking insurance or assets to satisfy a judgement for a catastrophic amount, thereby reducing the protection available to the public in the event of catastrophic damage.

The NCA advocates indemnification of remedial action contractors by the federal government against catastrophic liability on hazardous waste cleanup projects, e.g., \$200,000,000 to \$250,000,000. The indemnity should have a duration which is long enough (e.g., 30-40 years) to provide protection against catastrophic injuries which may not become apparent until many years after a cleanup is completed. The indemnity should also clearly cover liability based on the strict liability principle, as well as negligence. A substantial deductible should also be part of the indemnification scheme, e.g., a graduated deductible with an upper limit of \$1,000,000 depending upon the contractor's annual gross revenues. The above approach would provide contractors with the assurance against catastrophic liability that they need to undertake these projects while simultaneously motivating contractors to do a good job, since contractors are at risk for the substantial deductible under this arrangement.

An effective indemnification arrangement will also do much to eliminate a related and emerging problem in performance bond availability. Remedial action contractors are encountering increasing difficulty in obtaining performance bonds for cleanup contracts. Sureties are concerned that future court decisions could make them the "insurer of last resort." An improved indemnity arrangement may be required in order to induce the sureties to bond these projects.

Adopted October 12, 1989

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to the same with an amendment as follows:

Section 1001. The matter proposed to be inserted by the Senate amendment insert the following:

SECTION 1. SHORT TITLE

This Act may be cited as the "Oil Pollution Act of 1990".

SECTION 2. TABLE OF CONTENTS

The contents of this Act are as follows:

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

- Sec. 1001. Definitions.
- Sec. 1002. Elements of liability.
- Sec. 1003. Defenses to liability.
- Sec. 1004. Limits on liability.
- Sec. 1005. Interest.
- Sec. 1006. Natural resources.
- Sec. 1007. Recovery by foreign claimants.
- Sec. 1008. Recovery by responsible party.
- Sec. 1009. Contribution.
- Sec. 1010. Indemnification agreements.
- Sec. 1011. Consultation on removal actions.
- Sec. 1012. Uses of the Fund.
- Sec. 1013. Claims procedure.
- Sec. 1014. Designation of source and advertisement.
- Sec. 1015. Subrogation.
- Sec. 1016. Financial responsibility.
- Sec. 1017. Litigation, jurisdiction, and venue.
- Sec. 1018. Relationship to other law.
- Sec. 1019. State financial responsibility.
- Sec. 1020. Application.

TITLE II—CONFORMING AMENDMENTS

- Sec. 2001. Intervention on the High Seas Act.
- Sec. 2002. Federal Water Pollution Control Act.
- Sec. 2003. Deepwater Port Act.
- Sec. 2004. Outer Continental Shelf Lands Act Amendments of 1978.

TITLE III—INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

- Sec. 3001. Sense of Congress regarding participation in international regime.
- Sec. 3002. United States-Canada Great Lakes oil spill cooperation.
- Sec. 3003. United States-Canada Lake Champlain oil spill cooperation.
- Sec. 3004. International inventory of removal equipment and personnel.
- Sec. 3005. Negotiations with Canada concerning tug escorts in Puget Sound.

TITLE IV—PREVENTION AND REMOVAL

- Subtitle A—Prevention
- Sec. 4101. Review of alcohol and drug abuse and other matters in issuing licenses, certificates of registry, and merchant mariners' documents.
- Sec. 4102. Term of licenses, certificates of registry, and merchant mariners' documents; criminal record review in renewals.
- Sec. 4103. Suspension and revocation of licenses, certificates of registry, and merchant mariners' documents for alcohol and drug abuse.
- Sec. 4104. Removal of master or individual in charge.
- Sec. 4105. Access to National Driver Register.
- Sec. 4106. Manning standards for foreign tank vessels.
- Sec. 4107. Vessel traffic service systems.
- Sec. 4108. Great Lakes pilotage.
- Sec. 4109. Periodic gauging of plating thickness of commercial vessels.
- Sec. 4110. Overflow and tank level or pressure monitoring devices.
- Sec. 4111. Study on tanker navigation safety standards.

- Sec. 4112. Dredge modification study.
- Sec. 4113. Use of tugs.
- Sec. 4114. Tank vessel manning.
- Sec. 4115. Establishment of double hull requirement for tank vessels.

- Sec. 4116. Pilotage.
- Sec. 4117. Maritime pollution prevention training program study.
- Sec. 4118. Vessel communication equipment regulations.

Subtitle B—Removal

- Sec. 4201. Federal removal authority.
- Sec. 4202. National planning and response system.
- Sec. 4203. Coast Guard vessel design.
- Sec. 4204. Determination of harmful quantities of oil and hazardous substances.
- Sec. 4205. Coastwise oil spill response endorsements.

Subtitle C—Penalties and Miscellaneous

- Sec. 4301. Federal Water Pollution Control Act penalties.
- Sec. 4302. Other penalties.
- Sec. 4303. Financial responsibility civil penalties.
- Sec. 4304. Deposit of certain penalties into oil spill liability trust fund.
- Sec. 4305. Inspection and entry.
- Sec. 4306. Civil enforcement under Federal Water Pollution Control Act.

TITLE V—PRINCE WILLIAM SOUND PROVISIONS

- Sec. 5001. Oil spill recovery institute.
- Sec. 5002. Terminal and tanker oversight and monitoring.
- Sec. 5003. Bligh Reef light.
- Sec. 5004. Vessel traffic service system.
- Sec. 5005. Equipment and personnel requirements under tank vessel and facility response plans.
- Sec. 5006. Funding.
- Sec. 5007. Limitation.

TITLE VI—MISCELLANEOUS

- Sec. 6001. Savings provisions.
- Sec. 6002. Annual appropriations.
- Sec. 6003. Outer Banks protection.
- Sec. 6004. Cooperative development of common hydrocarbon-bearing areas.

TITLE VII—OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

- Sec. 7001. Oil pollution research and development program.

TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

- Sec. 8001. Short title.
- Subtitle A—Improvements to Trans-Alaska Pipeline System
- Sec. 8101. Liability within the State of Alaska and cleanup efforts.
- Sec. 8102. Trans-Alaska Pipeline Liability Fund.
- Sec. 8103. Presidential task force.
- Subtitle B—Penalties
- Sec. 8201. Authority of the Secretary of the Interior to impose penalties on Outer Continental Shelf facilities.
- Sec. 8202. Trans-Alaska pipeline system civil penalties.
- Subtitle C—Provisions Applicable to Alaska Natives
- Sec. 8301. Land conveyances.
- Sec. 8302. Impact of potential spills in the Arctic Ocean on Alaska Natives.

TITLE IX—AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND, ETC.

- Sec. 9001. Amendments to Oil Spill Liability Trust Fund.
- Sec. 9002. Changes relating to other funds.

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

SEC. 1001. DEFINITIONS

For the purposes of this Act, the term—

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(3) "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) "claimant" means any person or government who presents a claim for compensation under this title;

(5) "damages" means damages specified in section 1002(b) of this Act, and includes the cost of assessing these damages;

(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "southern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509);

(12) "gross ton" has the meaning given that term by the Secretary under part J of title 46, United States Code;

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;

wise be denied the right to continue operating vessels in the trades in which the applicant operated prior to the taking effect of the statutory or regulatory change.

"(2) the applicant is presently engaged in transporting cargoes in vessels of the type and class that will be constructed or reconstructed under this section, and agrees to employ vessels constructed or reconstructed under this section as replacements only for vessels made obsolete by changes in operating standards imposed by statute;

"(3) the capacity of the vessels to be constructed or reconstructed under this title will not increase the cargo carrying capacity of the vessels being replaced;

"(4) the Secretary has not made a determination that the market demand for the vessel over its useful life will diminish so as to make the granting of the guarantee fiduciarily imprudent; and

"(5) the Secretary has obtained the provisions of section 1104A(d)(1)(A)(i)(I), (iv), and (v) of this title.

"(b) For the purposes of this section—

"(1) the maximum term for obligations guaranteed under this program may not exceed 25 years;

"(2) obligations guaranteed may not exceed 75 percent of the actual cost or depreciated actual cost to the applicant for the construction or reconstruction of the vessel; and

"(3) reconstruction cost obligations may not be guaranteed unless the vessel after reconstruction will have a useful life of at least 15 years.

"(c)(1) The Secretary shall by rule require that the applicant provide adequate security against default. The Secretary may, in addition to any fees assessed under section 1104A(e), establish a Vessel Replacement Guarantee Fund into which shall be paid by obligors under this section—

"(A) annual fees which may be an additional amount on the loan guarantee fee in section 1104A(e) not to exceed an additional 1 percent; or

"(B) fees based on the amount of the obligation versus the percentage of the obligor's fleet being replaced by vessels constructed or reconstructed under this section.

"(2) The Vessel Replacement Guarantee Fund shall be a subaccount in the Federal Ship Financing Fund, and shall—

"(A) be the depository for all moneys received by the Secretary under sections 1101 through 1107 of this title with respect to guarantee or commitments to guarantee made under this section;

"(B) not include investigation fees payable under section 1104A(f) which shall be paid to the Federal Ship Financing Fund; and

"(C) be the depository, whenever there shall be outstanding any notes or obligations issued by the Secretary under section 1105(d) with respect to the Vessel Replacement Guarantee Fund, for all moneys received by the Secretary under sections 1101 through 1107 from applicants under this section.

"(d) The program created by this section shall, in addition to the requirements of this section, be subject to the provisions of sections 1101 through 1103; 1104A(b)(1), (4), (5), (6); 1104A(c); 1104A(f); 1104A(h); and 1105 through 1107; except that the Federal Ship Financing Fund is not liable for any guarantees or commitments to guarantee issued under this section."

SEC. 1116. PILOTAGE

(a) PILOT REQUIRED.—Section 8502(g) of title 46, United States Code, is amended to read as follows:

"(g)(1) The Secretary shall designate by regulation the areas of the approaches to

and waters of Prince William Sound, Alaska, if any, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed under section 7101 of this title.

"(2) In any area of Prince William Sound, Alaska, where a vessel subject to this section is required to be under the direction and control of a pilot licensed under section 7101 of this title, the pilot may not be a member of the crew of that vessel and shall be a pilot licensed by the State of Alaska who is operating under a Federal license, when the vessel is navigating waters between 60°49' North latitude and the Port of Valdez, Alaska."

(b) SECOND PERSON REQUIRED.—Section 8502 of title 46, United States Code, is amended by adding at the end the following:

"(1) The Secretary shall designate waters on which tankers over 1,600 gross tons subject to this section shall have on the bridge a master or mate licensed to direct and control the vessel under section 7101(c)(1) of this title who is separate and distinct from the pilot required under subsection (a) of this section."

(c) ESCORTS FOR CERTAIN TANKERS.—Not later than 6 months after the date of the enactment of this Act, the Secretary shall initiate issuance of regulations under section 3703(a)(3) of title 46, United States Code, to define those areas, including Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington (including those portions of the Strait of Juan de Fuca east of Port Angeles, Hero Strait, and the Strait of Georgia subject to United States jurisdiction), on which single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels (as defined under section 2101 of title 46, United States Code) or other vessels considered appropriate by the Secretary.

(d) TANKER DEFINED.—In this section the term "tanker" has the same meaning the term has in section 2101 of title 46, United States Code.

SEC. 1117. MARITIME POLLUTION PREVENTION TRAINING PROGRAM STUDY

The Secretary shall conduct a study to determine the feasibility of a Maritime Oil Pollution Prevention Training program to be carried out in cooperation with approved maritime training institutions. The study shall assess the costs and benefits of transferring suitable vessels to selected maritime training institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills. The study shall be completed and transmitted to the Congress no later than one year after the date of the enactment of this Act.

SEC. 1118. VESSEL COMMUNICATION EQUIPMENT REGULATIONS

The Secretary shall, not later than one year after the date of the enactment of this Act, issue regulations necessary to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203) are also equipped as necessary to—

(1) receive radio marine navigation safety warnings; and

(2) engage in radio communications on designated frequencies with the Coast Guard, and such other vessels and stations as may be specified by the Secretary.

Subtitle B—Removal

SEC. 1201. FEDERAL REMOVAL AUTHORITY

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

"(c) FEDERAL REMOVAL AUTHORITY.—

"(1) GENERAL REMOVAL REQUIREMENT.—(A) The President shall, in accordance with the

National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance—

"(i) into or on the navigable waters;

"(ii) on the adjoining shorelines to the navigable waters;

"(iii) into or on the waters of the exclusive economic zone; or

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

"(D) In carrying out this paragraph, the President may—

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.—(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—(A) Each Federal agency, State, owner or operator, or other person, participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

"(4) EXEMPTION FROM LIABILITY.—(A) A person is not liable for removal action or discharge which results from actions taken or omitted to be taken in the course of removal action, investigation, or service consistent with the National Contingency Plan or as otherwise directed by the President.

"(B) Subparagraph (a) shall not apply—

"(i) to a responsible party;

"(ii) in a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(iii) with respect to personal injury or wrongful death; or

"(iv) if the person is actively engaged in response in oil spill mitigation.

"(C) A responsible party is liable for any removal costs and damages that another person is released of under subparagraph (A).

16

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL STATUTES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 342B-7, Hawaii Revised Statutes, is
2 amended by amending subsection (c) to read as follows:

3 "(c) If the director determines that [the] any person has
4 violated an accepted schedule[,] or an order issued under this
5 section, [any rule adopted pursuant to this chapter, any condition
6 of a permit or variance issued pursuant to this chapter, or has
7 continued to violate this chapter,] the director shall impose
8 penalties by sending a notice in writing, either by certified mail
9 or by personal service, to that person, describing such
10 nonadherence or violation with reasonable particularity."

11 SECTION 2. Section 342D-1, Hawaii Revised Statutes, is
12 amended by deleting the definition "individual wastewater system".

13 ["Individual wastewater system" means a facility which
14 disposes of treated or untreated domestic wastewater generated
15 from dwelling units or other sources generating domestic
16 wastewater of similar volume and strength such as: (1)
17 developments of a density not greater than one dwelling unit per
18 5,000 square feet of ultimate development; (2) developments with
19 buildings other than dwellings but involving the generation of

1 pollutant or contaminant concerned, taking into
2 consideration the characteristics of such hazardous
3 substance[,] or pollutant or contaminant, in light of
4 all relevant facts and circumstances; and precautions
5 were taken against foreseeable acts or omissions of any
6 such third party and the consequences that could
7 foreseeably result from such acts or omissions; or

8 (4) Any combination of the foregoing paragraphs.

9 ~~[(c)]~~ (d) No person shall be liable under this chapter or
10 otherwise under the laws of the State or any of the counties,
11 including the common law to any government or private parties for
12 costs, damages, or penalties as a result of actions taken or
13 omitted in the course of rendering care, assistance, or advice in
14 accordance with this chapter or at the direction of an on-scene
15 coordinator, with respect to an incident creating a danger to
16 public health or welfare or the environment as a result of any
17 release of a hazardous substance or pollutant or contaminant or
18 the threat thereof. This subsection shall not preclude liability
19 for costs, damages, or penalties as the result of gross
20 negligence or intentional misconduct on the part of such person.

21 (e) No county or local government shall be liable under
22 this chapter for costs or damages as a result of actions taken in
23 response to an emergency created by the release or threatened

17

CH 90-54 Laws of Florida

ENROLLED

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

1 A bill to be entitled
2 An act relating to pollution; amending s.
3 206.9935, F.S., relating to taxes imposed for
4 coastal protection; providing for certain
5 offshore oil drilling activity; providing for
6 catastrophic discharge; creating s. 253.035,
7 F.S.; requiring commercial vessels to anchor in
8 designated anchorage areas; amending s.
9 310.071, F.S.; providing for evaluation of
10 certificated deputy pilots; amending s.
11 310.101, F.S.; providing additional grounds for
12 disciplinary actions by the Board of Pilot
13 Commissioners; providing certain accountability
14 in directing foreign vessels; amending s.
15 310.111, F.S.; providing for report of certain
16 marine incidents; amending s. 310.141, F.S.;
17 providing that certain vessels are subject to
18 pilotage, and reenacting s. 310.161, F.S.,
19 relating to penalties for piloting without a
20 license, to incorporate said amendment in a
21 reference thereto; creating ss. 313.21, 313.22,
22 313.23, and 313.24, F.S.; authorizing ports to
23 regulate certain vessel movements and adopt
24 certain guidelines for bottom clearance, vessel
25 movements, and traffic communications; amending
26 s. 376.031, F.S.; providing definitions;
27 amending s. 376.051, F.S.; providing for
28 issuance of spill prevention and response
29 certificates; amending s. 376.06, F.S.;
30 providing a penalty for operation of a terminal
31 facility without a required registration

1068,
22

CODING: Words stricken are deletions; words underlined are additions.

Fl.-Spill Response

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

1 certificate; increasing the maximum application
2 fee; amending s. 376.065, F.S.; prohibiting
3 operation of a terminal facility without a
4 spill prevention and response certificate;
5 providing requirements for application and
6 operation; providing a penalty; amending s.
7 376.07, F.S.; providing for rules of the
8 Department of Natural Resources; providing for
9 spill prevention, abatement, and cleanup and
10 for wildlife rescue and rehabilitation;
11 requiring adequate booming in the transfer of
12 pollutants; providing penalties; prohibiting
13 use of certain lobster traps after a specified
14 date; creating s. 376.071, F.S.; requiring
15 certain vessels to maintain spill prevention
16 and control contingency plans; providing
17 requirements; providing penalties; amending s.
18 376.09, F.S.; providing certain immunity from
19 liability for described persons; amending s.
20 376.11, F.S.; providing additional sources and
21 uses for moneys in the Florida Coastal
22 Protection Trust Fund; amending s. 376.12,
23 F.S.; increasing certain maximum liabilities
24 for pollutant cleanup costs and damages;
25 specifying conditions for limits on liability;
26 providing financial security requirements;
27 providing penalties; providing liability of
28 cargo owner; specifying conditions for use of
29 certain defenses; providing an exemption from
30 certain notification requirements; creating s.
31 376.121, F.S.; providing liability for damages

1068,
22

CODING: Words stricken are deletions; words underlined are additions.

1 guilty-of a felony of the second degree, punishable as
2 provided in s. 775.082, s. 775.083, or s. 775.084, as required
3 in s. 837.012 s-837-01.

4 (h) Requirements that any registrant causing or
5 permitting the discharge of a pollutant in violation of the
6 provisions of ss. 376.011-376.21, and at other reasonable
7 times, be subject to a complete and thorough inspection. If
8 the department determines there are unsatisfactory preventive
9 measures or containment and cleanup capabilities, it shall, a
10 reasonable time after notice and hearing in compliance with
11 chapter 120, suspend the registration until such time as there
12 is compliance with the department requirements.

13 (i) Such other rules and-regulations as the exigencies
14 of any condition may require or as may reasonably be necessary
15 to carry out the intent of ss. 376.011-376.21.

16 (3) After July 31, 1990, no lobster trap or traps to
17 be deposited into waters of the state shall be impregnated
18 with a petroleum product that may be released from such trap
19 or traps. After July 31, 1995, no person shall deposit into
20 the waters of the state any lobster trap or traps that have
21 been impregnated with a petroleum product that may be released
22 from such trap or traps into the waters of the state.

23 Section 15. Section 376.071, Florida Statutes, is
24 created to read:

25 376.071 Spill contingency plan.--After December 31,
26 1990, any vessel operating in state waters with a storage
27 capacity to carry 10,000 gallons or more of pollutants as fuel
28 and cargo shall maintain an adequate written ship-specific
29 spill prevention and control contingency plan. Any such
30 vessel shall have on-board a "spill officer," designated by
31 the contingency plan, who is responsible for training crew

1 members to carry out spill response efforts required in the
2 contingency plan and coordinating all on-board response
3 efforts in case of a spill. An adequate plan shall include
4 provisions for on-board response, including notification,
5 verification, pollutant incident assessment, vessel
6 stabilization, discharge mitigation, and on-board discharge
7 containment, in accordance with this chapter, department
8 rules, and the Florida Coastal Pollutant Spill Contingency
9 Plan. A plan in compliance with the federal requirement for a
10 ship-specific spill contingency plan shall satisfy the
11 requirements for an adequate ship-specific spill contingency
12 plan required by this section. On or after January 1, 1991,
13 the master of a vessel with a storage capacity to carry 10,000
14 gallons or more of pollutants as fuel and cargo, which vessel
15 is operating in state waters without an adequate contingency
16 plan, commits a noncriminal infraction. The master shall be
17 cited by the department and shall appear before the county
18 court for the county in which the violation occurred or the
19 county court closest to the location at which the violation
20 occurred. The civil penalty for such an infraction shall be
21 up to \$5,000. An adequate contingency plan must be submitted
22 to the department prior to the vessel reentering a Florida
23 port. Failure to submit the required plan shall result in a
24 civil penalty of \$10,000.

25 Section 16. Present subsections (5) and (6) of
26 section 376.09, Florida Statutes, are renumbered as
27 subsections (6) and (7), respectively, and a new subsection
28 (5) is added to said section to read:

29 376.09 Removal of prohibited discharges.--

30 (5) Notwithstanding the provisions in subsection (4),
31 any person who is authorized by the department or the federal

1 ~~government or the persons alleged to be responsible for the~~
 2 ~~discharge, or by a discharge thereof, to render assistance in~~
 3 ~~containment or removing pollutants shall not be liable for~~
 4 ~~costs, expenses, and damages, unless such costs, expenses, and~~
 5 ~~damages are a proximate result of acts or omissions caused by~~
 6 ~~gross negligence or willful misconduct of such authorized~~
 7 ~~person.~~

8 Section 17. Subsections (2) and (6) and paragraph (c)
 9 of subsection (4) of section 376.11, Florida Statutes, are
 10 amended to read:

11 376.11 Florida Coastal Protection Trust Fund.--

12 (2) The Florida Coastal Protection Trust Fund is
 13 established, to be used by the department as a nonlapsing
 14 revolving fund for carrying out the purposes of ss. 376.011-
 15 376.21. To this fund shall be credited all registration fees,
 16 penalties, judgments, damages recovered pursuant to s.
 17 376.121, other fees and charges related to ss. 376.011-376.21,
 18 and the excise tax revenues levied, collected, and credited
 19 pursuant to ss. 206.9935(1) and 206.9945(1)(a). Charges
 20 against the fund shall be in accordance with this section.

21 (4) Moneys in the Florida Coastal Protection Trust
 22 Fund shall be disbursed for the following purposes and no
 23 others:

24 (c) All costs and expenses of the cleanup,
 25 restoration, and rehabilitation of waterfowl, wildlife, and
 26 all other natural resources damaged by the discharge of
 27 pollutants, including the costs of assessing and recovering
 28 damages to natural resources, whether performed or authorized
 29 by the department or any other state or local agency.

30 (6) The department shall recover to the use of the
 31 fund from the person or persons causing the discharge or from

1 the Federal Government, jointly and severally, all sums owed
 2 or expended from the fund, pursuant to s. 376.12(6)(3), except
 3 that recoveries resulting from damage due to a discharge of a
 4 pollutant or other similar disaster shall be apportioned
 5 between the Florida Coastal Protection Trust Fund and the
 6 General Revenue Fund so as to repay the full costs to the
 7 General Revenue Fund of any sums disbursed therefrom as a
 8 result of such disaster. Requests for reimbursement to the
 9 fund for the above costs, if not paid within 30 days of
 10 demand, shall be turned over to the Department of Legal
 11 Affairs for collection.

12 Section 18. Effective October 1, 1990, section 376.12,
 13 Florida Statutes, is amended to read:

14 376.12 Liabilities and defenses of terminal facilities
 15 and vessels.--

16 (1) Because it is the intent of ss. 376.011-376.21 to
 17 provide the means for rapid and effective cleanup and to
 18 minimize cleanup costs and damages, any vessel, or its agents
 19 or servants, who permits or suffers a prohibited discharge or
 20 other polluting condition to take place within state
 21 boundaries shall be liable to the fund for all costs of
 22 cleanup or abatement, up to an amount not to exceed \$50 \$14
 23 million or \$625 \$100 per gross registered ton of such vessel,
 24 whichever is the lesser. When the department can show that
 25 such discharge was the result of willful or gross negligence
 26 or willful misconduct within the privity or knowledge of the
 27 owner or operator or agent thereof, such owner or operator
 28 shall be liable to the fund for the full amount of such sums
 29 expended. When a discharge of pollutants occurs from a
 30 terminal facility, recovery of costs of abatement and cleanup
 31 shall be limited to an amount not to exceed \$25 \$8 million,

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transferred in or by any facility or vessel covered by the plan that will necessitate a change in the plan and shall update the plan periodically as required by the Board, but in no event more frequently than once every thirty-six months. The Board, on a finding of need, may require an oil discharge exercise designed to demonstrate the facility's or vessel's ability to implement its oil discharge contingency plan either before or after the plan is approved.

C. The Board, after notice and opportunity for a conference pursuant to § 9-6.14:11, may modify its approval of an oil discharge contingency plan if it determines that:

1. A change has occurred in the operation of any facility or vessel covered by the plan that necessitates an amended or supplemented plan;

2. The facility's or vessel's discharge experience or its inability to implement its plan in an oil discharge exercise demonstrates a necessity for modification; or

3. There has been a significant change in the best available technology since the plan was approved.

D. The Board, after notice and opportunity for hearing, may revoke its approval of an oil discharge contingency plan if it determines that:

1. Approval was obtained by fraud or misrepresentation;

2. The plan cannot be implemented as approved; or

3. A term or condition of approval has been violated. (1990, c. 917.)

Editor's note. — Acts 1990, c. 919, cl. 2 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective on July 1, 1992. Clause 3 of this act also stated that the Board should regard certain considerations in adopting such regulations.

§ 62.1-44.34:16. Financial responsibility. — A. (For effective date see Editor's note) 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. Any such cash deposits received by the Board shall be held in escrow in the Virginia Underground Petroleum Storage Tank Fund.

B. If the Board determines that oil has been discharged in violation of this article or that there has been 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 this chapter.

C. The Board shall exempt an operator of a tank vessel from the cash deposit requirements specified in this section if the operator of the tank vessel provides evidence of financial responsibility pursuant to the terms and conditions of this subsection. The Board shall adopt requirements for operators of tank vessels for maintaining evidence of financial responsibility in an amount equivalent to the cash deposit which would be required for such tank vessel pursuant to this section. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any combination thereof, under the terms the Board may prescribe. To obtain an exemption from the cash deposit requirements under this section: the operator and insurer, guarantor or surety shall appoint an agent for service of process in the Commonwealth; any insurer must be authorized by the Commonwealth to engage in the insurance business; and 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 of this chapter by the operator up to, but not exceeding, the amount insured, guaranteed or otherwise pledged. An operator whose financial responsibility is accepted by the Board under this

subsection shall notify the Board at least thirty days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

D. Acceptance of proof of financial responsibility shall expire:

1. One year from the date on which the Board exempts an operator from the cash deposit requirement based on evidence of self-insurance, except that the Board may establish by regulation a different expiration date for acceptance of evidence of self-insurance submitted by public agencies;

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.

Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

E. 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 under this section or the requirements established by the Board pursuant to this section.

F. It is not a defense to any action brought for failure to comply with the cash deposit requirement or to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the tank vessel or the operator of the tank vessel had made the required cash deposit or possessed evidence of financial responsibility accepted by the Board. (1990, c. 917.)

Editor's note. — Acts 1990, c. 917, cl. 4 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective 90 days after the effective date of such regulations. Clause 4 also provides that in promulgating such regula-

tions, the Board shall provide that, if evidence of financial responsibility provided to the federal government or any other state meets the requirements of subsection C of this section, comments shall be accepted by the Board in full or partial satisfaction requirements of subsection A of this section as appropriate.

§ 62.1-44.34:17. Exemptions. — Sections 62.1-44.34:15 and 62.1-44.34:16 do not apply to a facility having a maximum storage or handling capacity of less than 25,000 gallons of oil or to a tank vessel having a maximum storage, handling or transporting capacity of less than 15,000 gallons of oil. (1990, c. 917.)

§ 62.1-44.34:18. Discharge of oil prohibited; liability for permitting discharge. — A. The discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth is prohibited. For purposes of this section, discharges of oil into or upon state waters include discharges of oil that (i) violate applicable water quality standards or a permit or certificate of the Board or (ii) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

B. Any person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat

of such discharge shall, immediately upon learning of such discharge or threat of discharge, implement any applicable oil spill contingency plan approved under this article or take such other action as may be necessary to contain and clean up such discharge or threat of such discharge, including any actions directed by any on-scene coordinator acting pursuant to the Federal Water Pollution Control Act. In the event of such discharge or threat of discharge, if it cannot be determined immediately the person responsible therefor, or if the person is unwilling or unable to promptly contain and clean up such discharge or threat of discharge, the Board may take such action as is necessary to contain and clean up the discharge or threat of discharge, including the engagement of contractors or other competent persons. The costs of such containment and cleanup shall be paid from the Underground Petroleum Storage Tank Fund or from any federal fund available for this purpose.

C. Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat of such discharge, shall be liable to:

1. The Commonwealth of Virginia or any political subdivision thereof for all costs of investigation, containment and cleanup incurred as a result of such discharge or threat of discharge;

2. The Commonwealth of Virginia or any political subdivision thereof for all damages to property of the Commonwealth of Virginia or the political subdivision caused by such discharge;

3. The Commonwealth of Virginia or any political subdivision thereof for loss of tax or other revenues caused by such discharge, and compensation for the loss of any natural resources that cannot be restocked, replenished or restored; and

4. Any person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, caused by such discharge.

D. Notwithstanding any other provision of law, a person who renders assistance in containment and cleanup of a discharge of oil prohibited by this article or a threat of such discharge shall be liable under this section for damages for personal injury and wrongful death caused by that person's negligence, and for damages caused by that person's gross negligence or willful misconduct, but shall not be liable for any other damages under this section that are caused by the acts or omissions of such person in rendering such assistance; provided, however, that such liability provision shall not apply to a person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge, or to such person's employee. Nothing in this article shall affect the right of any person who renders such assistance to reimbursement for the costs of the containment and cleanup under the applicable provisions of this article or the Federal Water Pollution Control Act, as amended, or any rights that person may have against any third party whose acts or omissions caused or contributed to the prohibited discharge of oil or threat of such discharge.

E. In any action brought under this article, it shall not be necessary for the Commonwealth, political subdivision or any person, to plead or prove negligence in any form or manner.

F. In any action brought under this article, the Commonwealth, political subdivision or any person, if a prevailing party, shall be entitled to an award of reasonable attorneys' fees and costs.

G. It shall be a defense to any action brought under subdivision C 2, C 3, or C 4 of this section that the discharge was caused solely by (i) an act of God, (ii) an act of war, (iii) a willful act or omission of a third party who is not an employee, agent or contractor of the operator, or (iv) any combination of the foregoing; provided that this subsection shall not apply to any action brought against (a) a person or operator who failed or refused to report a discharge as required by § 62.1-44.34:19; or (b) a person or operator who failed or refused to cooperate fully in any containment and cleanup or who failed or refused to effect containment and cleanup as required by subsection B of this section.

H. In any action brought under subdivision C 2, C 3, or C 4 of this section, the total liability of a person or operator under this section for each discharge of oil or threat of such discharge shall not exceed the amount of financial responsibility required under § 62.1-44.34:16 or \$10,000,000, whichever is greater; provided that there shall be no limit of liability imposed under this section: (a) if the discharge of oil or threat of such discharge was caused by gross negligence or willful misconduct on the part of the person or the operator discharging or causing or permitting discharge or threat of discharge or by an agent, employee or contractor of such person or operator, or by the violation of any applicable safety, construction or operation regulations by such person or operator or an agent, employee or contractor of such person or operator; or (b) if the operator or person discharging or causing or permitting a discharge or threat of discharge failed or refused to report the discharge as required by § 62.1-44.34:19, or failed or refused to cooperate fully in any containment and cleanup or to effect containment and cleanup as required by subsection B of this section. (1973, c. 417; 1976, c. 51; 1978, c. 816; 1989, c. 627; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 962 purported to amend §§ 62.1-44.34:2 and 62.1-44.34:3, which were repealed by Acts 1990, c. 917. The effect of these amendments was to add lands and storm drain systems in the Commonwealth, along with state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, these amendments have been effectuated in this corresponding new Code section.

§ 62.1-44.34:19. Reporting of discharge. — Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands or storm drain systems within the Commonwealth or discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, lands, or storm drain systems within the Commonwealth, and any operator of any facility, vehicle or vessel from which there is a discharge of oil into state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters shall, immediately upon learning of the discharge, notify the Board and appropriate federal authorities of such discharge. (1978, c. 816; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 962 purported to amend § 62.1-44.34:4, which was repealed by Acts 1990, c. 917. The effect of this amendment was to add lands and storm drain systems in the Commonwealth, along with state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, this amendment has been effectuated in this corresponding new Code section.

19

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT
SECOND SUBSTITUTE HOUSE BILL NO. 2494

Passed the House February 13, 1990
as amended
Yeas 98 Nays 0

Passed the Senate March 1, 1990
as amended
Yeas 47 Nays 1

March 6, 1990: The House concurred in the Senate amendments
and passed the bill as amended by the Senate.

Yeas: 96 Nays: 0

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that
the attached is enrolled SECOND SUBSTITUTE HOUSE BILL NO. 2494
as passed by the House of Representatives and the Senate on the dates hereon set forth.

Alan Thompson
ALAN THOMPSON, Chief Clerk

1 ((department-at-its-office-in-Olympia,-or-a-regional-office--thereof,
2 of--such--discharge--or--entry)) coast guard and the division of
3 emergency management. The notice to the division of emergency
4 management within the department of community development shall be
5 made to the division's twenty-four hour state-wide toll-free number
6 established for reporting emergencies.

7 NEW SECTION. Sec. 25. (1) The following persons shall not be
8 liable for necessary expenses or property damage caused by an act or
9 omission of that person during the cleanup of oil spilled into the
10 navigable waters of the state, unless the act or omission was
11 performed in bad faith or with gross negligence:
12 (a) The state or any unit of local government;
13 (b) A person who volunteers to assist in the cleanup of the
14 spilled oil; and
15 (c) A person meeting the standards of section 4 of this act.
16 (2) This section shall not affect the liability of any person
17 responsible for the spilled oil or responsible for the facility or
18 covered vessel from which the oil was spilled.

19 NEW SECTION. Sec. 26. A new section is added to chapter 88.16
20 RCW to read as follows:

21 An oil tanker under escort of a tug or tugs pursuant to the
22 provisions of RCW 88.16.190 shall not exceed the service speed of the
23 tug or tugs that are escorting the oil tanker.

24 Sec. 27. Section 8, chapter 18, Laws of 1935 as last amended by
25 section 2, chapter 264, Laws of 1987 and RCW 88.16.090 are each
26 amended to read as follows:

27 (1) A person may pilot any vessel subject to the provisions of
28 this chapter on waters covered by this chapter only if appointed and
29 licensed to pilot such vessels on said waters under and pursuant to
30 the provisions of this chapter.

31 (2) A person is eligible to be appointed a pilot if the person is
32 a citizen of the United States, over the age of twenty-five years and
33 under the age of seventy years, a resident of the state of Washington
34 at the time of appointment and only if the pilot applicant holds as a
35 minimum, a United States government license as a master of freight

20

1. any action brought by the state, a county, city, or district.
 2. (h) Except as provided in Section 1431.2 of the Civil
 3. Code, liability under this section shall be joint and
 4. several. However, this section does not bar a cause of
 5. action that a responsible party has or would have, by
 6. reason of subrogation or otherwise, against any person.

7. (i) This section does not apply to claims for damages
 8. for personal injury or wrongful death, and does not limit
 9. the right of any person to bring an action for personal
 10. injury or wrongful death under any provision or principle
 11. of law.

12. (j) Any payments made by a responsible party to
 13. cover liabilities arising from a discharge of oil, whether
 14. under this division or any other provision of federal, state,
 15. or local law, shall not be charged against any royalties,
 16. rents, or net profits owed to the United States, the state,
 17. or any other public entity.

18. (k) Any action which a private or public individual or
 19. entity may have against a responsible party under this
 20. section may be brought directly by the individual or
 21. entity or by the state on behalf of the individual or entity.
 22. However, the state shall not pursue any action on behalf
 23. of a private individual or entity which requests the state
 24. not to pursue that action.

25. (l) For the purposes of this section, "vessels" means
 26. vessels as defined in Section 21 of the Harbors and
 27. Navigation Code.

28. **8670.56.6.** (a) (1) Except as provided in subdivisions
 29. (b) and (d), and subject to subdivision (c), no person,
 30. including, but not limited to, an oil spill cooperative, its
 31. agents, subcontractors, or employees, shall be liable
 32. under this chapter or the laws of the state to any person
 33. for costs, damages, or other claims or expenses as a result
 34. of actions taken or omitted in good faith in the course of
 35. rendering care, assistance, or advice in accordance with
 36. the National Contingency Plan, the state oil spill
 37. contingency plan, or at the direction of the administrator,
 38. onsite coordinator, or the Coast Guard in response to a
 39. spill or threatened spill of oil.

40. (2) The qualified immunity under this section shall

1. not apply to any oil spill response action which is
 2. inconsistent with the directions of the Coast Guard, the
 3. director, or, in the absence of overriding directions of the
 4. Coast Guard or the director, is inconsistent with
 5. applicable contingency plans implemented under this
 6. division.

7. (3) Nothing in this section shall, in any manner or
 8. respect, affect or impair any cause of action against or any
 9. liability of any person or persons responsible for the spill,
 10. for the discharged oil, or for the tanker, barge, terminal,
 11. pipeline, or facility from which the oil was discharged.
 12. The responsible person or persons shall remain liable for
 13. any and all damages arising from the discharge, including
 14. damages arising from improperly carried out response
 15. efforts, as otherwise provided by law.

16. (4) The qualified immunity under this section shall
 17. only apply to response activity during the first 60 days
 18. after the spill for persons whose primary purpose is the
 19. business of responding to oil spills and who are regularly
 20. engaged in the business of responding to oil spills. No
 21. immunity shall attach to response activity after
 22. expiration of the first 60 days for the parties described
 23. herein.

24. (5) The qualified immunity under this section shall
 25. attach without the limitation described in paragraph (4),
 26. to those responding parties that do not "regularly
 27. engage" in the oil spill response business and to persons
 28. and entities who are primarily dedicated to the
 29. preservation and rehabilitation of wildlife. There shall be
 30. no limitation on the duration of the immunity.

31. (b) Nothing in this section shall, in any manner or
 32. respect, affect or impair any cause of action against or any
 33. liability of any party or parties responsible for the spill, or
 34. the responsible party's agents, employees, and
 35. subcontractors, for the discharged oil, or for the tanker,
 36. terminal, pipeline, or marine facility from which the oil
 37. was discharged.

38. (c) The responsible party or parties shall:

39. (1) Notwithstanding subdivision (b) or (h) of Section
 40. 8670.56.5, or any other provision of law, be strictly and

1 jointly and severally liable for all damages arising
2 pursuant to subdivision (g) of Section 8670.565 from the
3 response efforts of its agents, employees, subcontractors,
4 or an oil spill cooperative of which it is a member or with
5 which it has a contract or other arrangement for cleanup
6 of its oil spills, unless it would have a defense to the
7 original spill.

8 (2) Remain strictly liable for any and all damages
9 arising from the response efforts of a person other than
10 a person specified in paragraph (1).

11 (d) Nothing in this section shall immunize a
12 cooperative or any other person from liability for acts of
13 gross negligence or willful misconduct in connection with
14 the cleanup of a spill.

15 (e) This section shall not apply to any action for
16 personal injury or wrongful death.

17 (f) As used in this section, a "cooperative" means an
18 organization of private persons which is established for
19 the primary purpose and activity of preventing or
20 rendering care, assistance, or advice in response to a spill
21 or threatened spills of oil.

22 (g) Except for the responsible party, membership in a
23 cooperative shall not, in and of itself, be grounds for
24 liability resulting from cleanup activities of the
25 cooperative.

26 (h) For purposes of this section, there shall be a
27 rebuttable presumption that an act or omission described
28 in subdivision (a) was taken in good faith.

29 (i) In any situation in which immunity is granted
30 pursuant to subdivision (a) and a responsible party is not
31 liable, is not liable for noneconomic damages caused by
32 another, or is partially or totally insolvent, the fund
33 provided for in Article 7 (commencing with Section
34 8670.46) shall, in accordance with its terms, reimburse
35 claims of any injured party for which a person who is
36 granted immunity pursuant to this section would
37 otherwise be liable.

38 (j) The immunity granted pursuant to subdivision (a)
39 shall apply to a cooperative only if that cooperative has
40 contracted with the administrator to respond to oil spills

1 in accordance with the state oil spill contingency plan
2 and this chapter. The administrator shall enter into
3 contract with any cooperative that is qualified and that
4 offers to contract, on mutually acceptable terms, in
5 accordance with the state oil spill contingency plan and
6 this chapter.

7 (j) (1) The immunity granted by this section shall
8 only apply to response efforts that are undertaken after
9 the administrator certifies that contracts with qualified
10 and responsible persons are in place to ensure an
11 adequate and expeditious response to any foreseeable oil
12 spill that may occur in marine waters for which the
13 responsible party (A) cannot be identified or (B) is
14 unable or unwilling to respond, contain, and cleanup the
15 oil spill in an adequate and timely manner. In negotiating
16 these contracts, the administrator shall, to the maximum
17 extent practicable, procure the services of persons who
18 are willing to respond to oil spills with no, or lesser,
19 immunity than that conferred by this section, but, in no
20 event, a greater immunity. The administrator shall make
21 the certification required by this subdivision on an annual
22 basis. Upon certification, the immunity conferred by this
23 section shall apply to all response efforts undertaken
24 during the calendar year to which the certification
25 applies. In the absence of the certification required by
26 this subdivision, the immunity conferred by this section
27 shall not attach to any response efforts undertaken by any
28 person in marine waters.

29 (2) In addition to the authority to negotiate contracts
30 described in (1) above, the administrator shall also be
31 authorized to negotiate and enter into indemnification
32 agreements with qualified and financially responsible
33 persons to respond to oil spills that may occur in marine
34 waters for which the responsible party (A) cannot be
35 identified or (B) is unable or unwilling to respond,
36 contain, and cleanup the oil spill in an adequate and
37 timely manner.

38 (3) The administrator may indemnify response
39 contractors for (A) all damages payable by means of
40 settlement or judgment that arise from response efforts

1 to which the immunity conferred by this section would
 2 otherwise apply, and (B) reasonably related legal costs
 3 and expenses incurred by the responder, provided that
 4 indemnification shall only apply to response efforts
 5 undertaken after the expiration of any immunity that
 6 may exist as the result of the contract negotiations
 7 authorized in this subdivision. In negotiating these
 8 contracts, the administrator shall, to the maximum extent
 9 practicable, procure the services of persons who are
 10 willing to respond to oil spills with no, or as little, right to
 11 indemnification as possible. All indemnification shall be
 12 paid by the administrator from the Oil Spill Response
 13 Trust Fund.

14 (k) (1) With regard to a person who is regularly
 15 engaged in the business of responding to oil spills, the
 16 immunity conferred by this section shall not apply to any
 17 response efforts by that person that occur later than 60
 18 days after the first day the person's response efforts
 19 commence.

20 (2) Notwithstanding the limitation contained in
 21 paragraph (1), the administrator may, upon making all
 22 the following findings, extend the period of time, not to
 23 exceed 30 days, during which the immunity conferred by
 24 this section applies to response efforts:

25 (A) Due to inadequate or incomplete containment
 26 and stabilization, there exists a substantial probability
 27 that the size of the spill will significantly expand and (i)
 28 threaten previously uncontaminated marine or land
 29 resources, (ii) threaten already contaminated marine or
 30 land resources with substantial additional contamination,
 31 or (iii) otherwise endanger the public safety or welfare.

32 (B) The remaining work is of such a difficult or
 33 perilous nature that extension of the immunity is clearly
 34 in the public interest.

35 (C) No other qualified and financially responsible
 36 contractor is prepared and willing to complete the
 37 response effort in the absence of the immunity, or a lesser
 38 immunity, as negotiated by contract.

39 (3) The administrator shall provide five days' notice of
 40 his or her proposed decision to either extend, or not

1 extend, the immunity conferred by this section.
 2 Interested parties shall be given an opportunity to
 3 present oral and written evidence at an informal hearing.
 4 In making his or her proposed decision, the administrator
 5 shall specifically seek and consider the advice of the
 6 relevant Coast Guard representative. The administrator's
 7 decision to not extend the immunity shall be announced
 8 at least 10 working days before the expiration of the
 9 immunity to provide persons an opportunity to terminate
 10 their response efforts as contemplated by paragraph (4).

11 (4) No person or their agents, subcontractors, or
 12 employees shall incur any liability under this chapter or
 13 any other provision of law solely as a result of that
 14 person's decision to terminate their response efforts
 15 because of the expiration of the immunity conferred by
 16 this section. A person's decision to terminate response
 17 efforts because of the expiration of the immunity
 18 conferred by this section shall not in any manner impair,
 19 curtail, limit, or otherwise affect the immunity conferred
 20 on the person with regard to the person's response efforts
 21 undertaken during the period of time the immunity
 22 applied to such response efforts.

23 (5) The immunity granted under this section shall
 24 attach, without the limitation contained in this
 25 subdivision, to the response efforts of persons who are not
 26 regularly engaged in the business of responding to oil
 27 spills. Persons who are not regularly engaged in the
 28 business of responding to oil spills includes, but is not
 29 limited to, (A) persons who are primarily dedicated to
 30 the preservation and rehabilitation of wildlife and (B)
 31 persons who derive their livelihood primarily from
 32 fishing.

33 (1) As used in this section, "response efforts" means
 34 rendering care, assistance, or advice in accordance with
 35 the National Contingency Plan, the state oil spill
 36 contingency plan, or at the direction of the administrator,
 37 onsite coordinator, or the Coast Guard in response to a
 38 spill or threatened spill of oil.

Approved by
March 8, 91

Bill limits spill contractors' liability

JUNEAU — Legislation that seeks to encourage prompt oil-spill cleanup by limiting the liability of response contractors has been introduced in the House. House Bill 196 would transfer liability for damages from good-faith actions to clean up a spill to the person or entity responsible for the spill. Contractors could only be sued for gross negligence, loss of life, intentional misconduct and violating an order, said Rep. Bill Hudson, R-Juneau. The measure was introduced Wednesday by the House Special Committee on Oil and Gas, which Hudson heads as chairman. Hudson said it was requested by Tesoro Alaska and Conoco Inc.



Computers C5



Commercial leasing C8

BACK ☐ TO
BUSINESS
The Anchorage Times

MONDAY
March 11, 1991

Oil rules to have spillover on costs

By **BERT TARRANT**

TIMES BUSINESS WRITER

Regulation that spells out who picks up the tab for future oil spills in Alaska waters goes into effect June 21.

But companies in Alaska from Tesoro Petroleum Corp. to Crowley Maritime Corp. say the new rules will drive transportation costs skyward and jeopardize everything from jet traffic at the Anchorage International Airport to fuel getting to remote bush villages.

The new regulations have forced Tesoro Petroleum, a San Antonio, Texas-based company with about \$767

million in annual sales, to add nearly \$1.2 billion in extra insurance and bonding to cover its transportation of crude oil in Alaska waters.

The regulations also could force some companies operating independent tankers to forego transporting crude oil and refined products in Alaska waters.

"We call it the 'Billion-dollar Boys Club,'" said E.W. "Bill" Cromey, Tesoro's senior vice president.

The regulations are the result of a bill signed into law last June by former Gov. Steve Cowper. The bill, among other things, outlined new requirements for financial responsibility related to crude

oil and petroleum products.

The requirements include proof of financial responsibility to the tune of \$300 for each barrel of storage capacity in a tanker.

In Tesoro's case, that amounts to \$203 million, up from a previous requirement of \$20 million, said Gene Burden, Tesoro's government relations manager.

Alyeska Pipeline Service Co., from whose terminal Tesoro ships a substantial portion of the crude it processes at its north Kenai refinery, is the oil spill response contractor responsible to clean up any spill that might come from the Tesoro tanker.

Because the new law places no limits on Alyeska's liability in cleaning up a spill, "Alyeska felt a \$1 billion indemnity was required so we could prove our capability to clean up a spill," said its spokeswoman, Marnie Isaacs.

"This indemnity is just as important as the spill contingency plan and spill response equipment," Isaacs said. "It will be real burdensome for some operators."

Tesoro's Cromey said the company has both requirements covered.

"This was a whale of a hit for us," he said. "We did it, but it was costly."

See Spills, page C3

Spills

Continued from page C1

Tesoro also has put other spill prevention measures into place, Burden said.

"We use a double bottom tanker, have increased crew levels and are hydrostatically underloading the tanker by 15 percent," he said.

Hydrostatic underloading creates a condition where the pressure of oil inside the tanker is less than the water pressure around it. This means if the tanker ruptures, water will rush in, preventing the escape of oil, Burden said.

Tesoro officials did not say how they met the increased requirements.

Rich Richmond, senior vice president and bond manager for insurance broker Corroon and Black in Anchorage, said the \$203 million requirement likely was met with insurance.

He said a 10-fold increase in insurance requirements could be met, depending on the circumstances, for between two and three times the original premium because premiums decline as the quantity of insurance purchased goes up.

The \$1 billion Alyeska indemnity is another matter, Richmond said.

"The \$1 billion would be a bonding situation," he said. "You would have a tough time finding the capacity in the market to put that together."

Burden said it is "too early to accurately assess the total economic impact" of the new requirements. "But in the last year and a half, we've seen a substantial increase in the cost of marine transportation."

Cromey said the cost eventually must be passed on to consumers, and that could have a dampening effect on demand for jet fuel, which comprises almost half of the fuels produced by Tesoro's Kenai plant.

"Of the 70,000 barrels of crude we refine a day, 43.5 percent is residual fuel which is shipped out of state, 25 percent is Jet A fuel, 20 percent is motor gasoline, 8 percent is diesel and heating fuel and the rest is propane and butane," he said.

"When you realize a Boeing 747-400 jet can choose to land at Anchorage or fly over it, if we're not competitive on jet fuel, they're not going to land here," Cromey said.

John Unger, the Anchorage-based controller for the Alaska International Airport System, said he does not expect major air carriers to stop using Anchorage

International because of a jet fuel price increase.

"This will, however, be reflected in higher cargo and passenger ticket costs," Unger said.

Tesoro is not the only company affected by the new regulations, said Janice Adair, special assistant to the commissioner of the Alaska Department of Environmental Conservation.

The new rules also affect Foss Maritime Co., Delta Western Fuels, Crowley Maritime and Mapco Inc., which ships fuel to villages along the Yukon River during summer months on its Nenana Fuel Co. barges.

The impact on Foss Maritime

is "whether or not we can get the liability insurance," said Vice President Joseph Langjahr. "We don't know what we are going to do. The state says we have to have it, and the insurance companies are saying we can't get it."

Crowley Maritime's vice president for risk management and environmental affairs, Charlie Nalen, said a central issue is a provision in the new law that allows for a direct access suit against a shipper's insurance underwriter.

Under the old law, a suit over an oil spill would first be directed at the shipper whose vessel was

involved in the spill, Nalen said.

"Our underwriters tell us insurance on a direct access suit is not available," Nalen said. "That means we have to purchase a surety bond in addition to our insurance. We are paying twice."

"If the state will not honor our certificate of responsibility as it stands, we can't do business in the state of Alaska," Nalen said.

Nalen said he was heartened by a meeting on the subject he had with Department of Environmental Conservation commissioner John Sandor and his staff.

Delta Western did not return telephone calls Friday.

Chevron USA Inc. spokesman

Bob Osmundson said his company's Kenai refinery also will be affected by the regulations.

"Our refinery is a small operation, and this additional overhead will be felt very quickly on the bottom line," Osmundson said.

Relief could be on the way in the form of House Bill 196, which was introduced Wednesday by the House Special Committee on Oil and Gas at the request of its chairman, Rep. Bill Hudson, R-Juneau.

The bill would amend the existing law by adding a section which limits the liability of the oil spill response contractor so long

as the contractor carried out the oil spill contingency plan and does not exhibit gross negligence in its actions.

Hudson's staff assistant, Andrew Spear, said the bill is an attempt to "bring Alaska law on oil spill responsibility in line with other states and the federal government."

Alyeska's Isaacs said the company supports the concept of HB 196 because "smaller operators don't have the corporate assets to self-insure."

"We are still reviewing the terms of the bill," she said.

A hearing on the bill is scheduled for today in Juneau.

Subsidies, and Public Transit, conducted by Drs. William Shughart and Mwangi Kimeyni of the University of Mississippi on the behalf of the Urban Mass Transportation Authority (UMTA), found that the cost of public transit rose as the amount of their public subsidy increased. The cost increases were greater when the subsidy

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and a short term savings of 24.5 percent. Public subsidies have been reduced under the ALEC model bill by 30 percent.

For additional information, contact Roop Mohunlall, director of ALEC's National Task Force on Transportation, at (202) 547-4646.

Limited Immunity for Oil Spill Cleanup Operations Adopted in 4 Coastal States

Delaware joined Florida, Hawaii, and Virginia this year by adopting legislation designed to limit the liability of organizations responding to an oil spill or the threat of a spill. The legislation adopted by these four states mirrors federal law in this regard, which similarly protects oil spill response teams from potential liability except for actions resulting in personal injury or wrongful death, or for actions that rise to the level of gross negligence or willful misconduct. Similar legislation has already passed the Georgia and

Mississippi State Senate and is awaiting action in the House.

Supporters of the measure point-out that victims of oil spill damage still have recourse from the party responsible for the initial discharge, the federal Oil Spill Pollution Fund, or a state fund if provided by law. Without such protections, organizations such as the Marine Spill Response Corporation (the largest independent, non-profit organization dedicated solely to the cleanup of oil spills) refuse to put themselves in legal jeopardy in the face of uncertain liability standards and statutes.

The issue of responder immunity has come to the fore due to the passage of the Oil Pollution Act of 1990, which permits individual states to establish their own independent oil spill requirements. While the private sector is more than capable (and willing) to provide for cleanup services at no charge to the state or federal governments, legal analysts believe that a number of obstacles which exist in many coastal state statutes precludes such service. These obstacles include limitations on the time a responder may receive immunity, restrictions on the kind of damages from which a responder may receive immunity, exclusion of for-profit responders or responder subcontractors from immunity, and requirements for a responder to get prior approval from the state before commencing cleanup operations as a condition for immunity (which would tend to hinder a timely and coordinated response).

Although these obstacles have been removed from federal law, they still exist in many state statutes. ALEC's National Task Force on Energy, Environment & Natural Resources is currently considering legislation similar to that which passed recently in Delaware, Florida, Hawaii, and Virginia for adoption as ALEC model legislation.

For further information, contact Jerry Taylor, director of ALEC's National Task Force on Energy, Environment & Natural Resources, at (202) 547-4646.