

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2126 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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.

JLK/chh/0490I

14



NATIONAL CONSTRUCTORS ASSOCIATION

1101 15th Street, N.W., Suite 1000, Washington, D.C. 20005 (202) 466-8880

**NATIONAL CONSTRUCTORS ASSOCIATION'S
COMMENTS ON EPA'S PROPOSED GUIDELINES
ON RAC INDEMNIFICATION
PUBLISHED OCTOBER 31, 1989**

INDEX

	<u>Page</u>
Introduction.	1
Proposed Guidelines	
6. Definitions	11
7. Indemnification Request	
7(b)(ii) Efforts to Obtain Insurance Coverage from Non-Federal Sources	13
7(g) EPA Direction to Indemnified RACs to Purchase Insurance	15
8. Indemnification Terms and Conditions	
8(a) Indemnification Applying Only to Third Party Liability Not Compensated by Insurance	17
8(b)(i) Indemnification Limits and Deductibles	
8(b)(ii) -- Contract Aggregates	19
8(c)(ii) Applicability of Indemnification to Strict Liability and Negligence -- EPA Conflict of Interest	21
8(d)(i) Twenty Day Notice of Claim	23
8(e) Indemnification of Claims Arising and Reported During Performance of the Contract and Ten Years Thereafter	24
9. Subcontractors	
9(a) Indemnification of Subcontractors	26
9(c)	
10. RACs Working for EPA Under Cost Reimbursement Contracts	
10(e) Indemnification Limits and Deductibles -- Cost Reimbursement Contracts and Firm Fixed Price Sealed Bid Contracts	28

11. Indemnification of RACs Working for EPA with Firm Fixed Price (Sealed Bid) Contracts	
11(d) Indemnification Limits and Deductibles -- Cost Reimbursement Contracts and Firm Fixed Price Sealed Bid Contracts	28
11(d)(i) Indemnification of RACs Working for EPA with Firm, Fixed Price (Sealed Bid) Contracts -- Price Schedule for Indemnification	30
19. Other Terms and Conditions	
19(a) Work Directly Related to Site Cleanup . . .	32
19(b) Grounds for Cancellation of the Indemnification Agreement	33
19(c) EPA's Right to Add Other Terms and Conditions to the Indemnification Agreement	34

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

15

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), (8); 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,

18

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

local
licated
found
act on
uthors
local

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.

SCOMM

79:12

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date: _____ Department Affected: Natural Resources
Title: Confidentiality of Certain Oil BRU: Petroleum Management
and Gas Information Components: Petroleum Management
Sponsor: Representative Brown
Requestor: Committee on Oil & Gas COMPONENT SERIAL NO. 439

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
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						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of Current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Ken Boyd Phone: 762-2548
Division: Oil & Gas Date: 5-Apr-91
Approved by Commissioner: Harold Heinze Date: 5-Apr-91
Agency: Department of Natural Resources

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

Sponsor Statement HB 212 — Disclosure of Oil and Gas Well Data

Purpose

The fundamental purpose of House Bill 212 is to promote the exploration and development of oil and gas resources in Alaska. In order to promote the efficient and prompt exploration of our state's hydrocarbon resources, certain reforms in current law are needed to provide for the disclosure of certain data and information concerning the state's subsurface resources.

House Bill 212

House Bill 212 would repeal and re-enact certain provisions in existing law pertaining to the confidentiality of oil and gas well data filed with the Alaska Oil and Gas Conservation Commission (AOGCC). Under present law, as provided by AS 31.05.035, the AOGCC requires the filing of certain reports such as well logs, drilling logs, electric logs, lithographic logs, directional surveys and other subsurface information. As provided by current law at AS 31.05.035(c), this information is held confidential for 24 months unless the owner grants permission to release the data at an earlier date.

Current law also provides the opportunity for a well owner to qualify for "extended confidentiality" at the end of the two-year period. Under present law, if the Commissioner of the Department of Natural Resources (DNR) makes a finding that the reports and information filed with the Commission "contain significant information relating to the valuation of unleased land in the same vicinity, the commissioner shall keep the reports and information confidential for a reasonable time after the disposition of all affected unleased land...."

This extended confidentiality provision is a significant impediment to the timely dissemination of information needed to make informed decisions concerning new exploration and development opportunities. House Bill 212 would remedy this problem, encourage more competition and participation in exploration and development activities, and promote the development of oil and gas resources in Alaska. Specifically, House Bill 212 would 1) more narrowly define the kinds of well data that can qualify for extended confidentiality, and 2) provide for the routine disclosure of most data after two years.

House Bill 212 would still provide for extended confidentiality beyond two years in the case of certain specific types of well data. Section 2 provides that wells drilled solely for geologic information (ie, stratigraphic test wells) can

qualify for extended confidentiality (see page 1, line 12, subsection (g)). House Bill 212 would "grandfather" all well data filed with the AOGCC before the effective date of the act (July 1, 1991) and allow this well data to qualify for extended confidentiality as provided under current law.

Department of Natural Resources Access to Data

Subsection AS 31.05.035(j) is provided to expressly recognize the intent of the legislature regarding the use of confidential well data by DNR.

Prior to the establishment of the AOGCC by the passage of House Bill 830 in 1978 (ch. 158, SLA 1978), the Alaska Oil and Gas Conservation Act was administered by the Division of Oil and Gas Conservation within DNR. As was made clear in an attorney general's opinion on the subject, reports and information filed with the Division of Oil and Gas Conservation and made confidential for 24 months by AS 31.05.035(c) could be shared with and used by other divisions of DNR, such as the Division of Minerals and Energy Management without violating their confidential status. 1978 Inf. Op. Att'y Gen (May 19; Froelich).

There is no reason why the same principle should not also apply to confidential reports and information filed with the Division of Oil and Gas Conservation's successor agency, the AOGCC. However, AOGCC and DNR have apparently administered the confidentiality provisions of AS 31.05.035(c) conservatively so that DNR has not sought nor been given access to well data filed with AOGCC during the initial 24 month period of confidentiality (except where DNR has an independent contractual right to the data in the case of wells drilled on state oil and gas leases). On the other hand, once a well owner has requested extended confidentiality under the 1978 amendment to AS 31.05.035(c) (Sec. 5, ch. 160, SLA 1978) DNR necessarily gains access to the data in order to determine whether they "contain significant information relating to the valuation of unleased land in the same vicinity." DNR is then able to use the data, subject to maintaining its confidentiality, in furtherance of its other statutory duties as well. (A constitutional challenge to DNR's use of confidential well data from a private lease is currently on appeal to the Alaska Supreme Court. State v. Arctic Slope Regional Corporation, No. S-3400.)

In summary, subsection (j) makes it clear that DNR should not be deprived of access to well data during the two-year period of confidentiality. This language is advisable to eliminate any possible doubt cast on DNR's authority in this regard by the cautious administrative practice noted previously or by a sentence in a 1984 Attorney General's opinion that stated that DNR's review of well data under AS 31.05.035(c) "must be for the only purpose of determining whether confidentiality will be extended beyond the initial period." (1984 Inf. Op. Att'n'y Gen. (July 3; 166-523-84).

Sectional Analysis

HB 212 — Disclosure of Oil & Gas Well Data

Section 1

Conforming amendment to properly reflect the changes made in Sections 2 and 4 of the bill (repeal and re-enactment of AS 31.05.035(c)).

Section 2

Adds new subsections to existing law at AS 31.05.035 pertaining to the confidentiality and disclosure of certain kinds of oil and gas well data.

Subsection (f) provides that, except as provided by subsections (g) and (h), well data filed with the Alaska Oil and Gas Conservation Commission shall become public after 2 years.

Subsection (g) provides that an exception to the general rule of 2 years of confidentiality is provided in the case of wells drilled solely for geologic information (ie., stratigraphic test wells).

Subsection (h) "grandfathers" well data filed before July 1, 1991 (the effective date of the act) and allows this data to qualify for "extended confidentiality" under existing law. (Under current law, an owner of a well may apply to have well data kept confidential beyond 2 years. If the Commissioner of Natural Resources finds that the data contains "significant information relating to the valuation of unleased land in the same vicinity," the Alaska Oil and Gas Conservation Commission must keep the data confidential until 90 days after the disposition of all affected unleased land.)

Subsection (i), provides that well location, depth, status and production data and production reports, required to be filed by the Commission under AS 31.05.035(b) become public immediately and may not be classified as confidential. For the purposes of this subsection, "production data" is defined to mean volume, gravity and gas-oil ratio of oil or gas after the well begins regular production. This is a restatement of part of the existing AS 31.05.035(c) and does not change existing law.

Subsection (j) is an express confirmation that the Department of Natural Resources can, for use in carrying out the department's duties, have access to confidential well data held by the Alaska Oil and Gas Conservation Commission.

Subsection (k) is a restatement of existing law that allows the owner of a well to authorize the Alaska Oil and Gas Conservation Commission to publicly release reports and information filed by the owner.

Section 3

Conforming amendment to recognize the repeal and reenactment of provisions presently codified at AS 31.05.035(c).

Section 4

Repeals current statutory language found at AS 31.05.035(c) pertaining to the confidentiality of oil and gas well data.

Section 5

Effective date of July 1, 1991



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

TO: Representative Bill Hudson, Chair
House Oil and Gas Committee

FROM: Representative Kay Brown

DATE: April 8, 1991

SUBJ: Proposed Amendments to House Bill 212/Oil & Gas Well Data

In response to comments on House Bill 212 received from the Alaska Oil and Gas Conservation Commission (AOGCC), please find attached three proposed amendments for consideration by the House Oil and Gas Committee.

Amendment 1: Stratigraphic Test Wells

This amendment would provide a specific definition for "stratigraphic test well" and is intended to further clarify what is meant by the legislation in regard to "wells drilled solely for geologic information."

Amendment 2: Disclosure of Development Well Data

This amendment would provide that development well data (ie, data associated with wells drilled to a defined oil or gas pool) shall be public and may not be classified as confidential.

Amendment 3: Definition of Affected Unleased Land

This amendment would provide specific guidance to the commissioner of natural resources regarding "the valuation of unleased land in the same vicinity" for purposes of determining eligibility for confidentiality. The amendment would provide a specific distance of three miles for purposes of making determinations regarding "affected unleased land."

enclosures

AMENDMENT 1

OFFERED IN THE HOUSE

BY REPRESENTATIVE BROWN

TO: HB 212

Page 1, line 13:

Delete "wells drilled solely for geologic information"

Insert "stratigraphic test wells"

Page 1, line 14, following "land.":

Insert "In this subsection, "stratigraphic test well" means a well that is drilled for the sole purpose of obtaining structural or stratigraphic information, or both, but that is not drilled with the intent of encountering oil or gas."

AMENDMENT # 2

OFFERED IN THE HOUSE
TO: HB 212

BY REPRESENTATIVE BROWN

Page 1, line 9:

Delete "(g) and (h)"

Insert "(g) - (i)"

Page 2, following line 5:

Insert a new subsection to read:

"(i) The reports and information required under (a) of this section for a development well are public information and may not be classified confidential. In this subsection, "development well" means a well drilled to a defined oil or gas pool."

Reletter the following subsections accordingly.

AMENDMENT

#3

OFFERED IN THE HOUSE

BY REPRESENTATIVE BROWN

TO: HB 212

Page 1, line 14, following "land":

Insert "within three miles of the well"

Page 2, lines 3 - 4:

Delete "in the same vicinity"

Insert "within three miles of the well"

Page 2, line 5, following "land":

Insert "within three miles of the well"