

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672

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existed under the Clean Water Act: the owner who voluntarily undertook cleanup operations could not credit those expenses against his overall limit if the government subsequently effected further cleanup.¹⁰⁵ However, the new statute specifically allows states to impose additional liabilities, penalties, and other requirements on vessel owners for oil pollution.¹⁰⁶ Of particular note is the fact that the additional state liabilities are not subject to limitation either under the Act itself, or pursuant to the Limitation Act.¹⁰⁷ This provision represents a significant departure from the interaction of the Limitation Act and state statutes under the Clean Water Act. As most states now have unlimited liability statutes, the limits of the new Act are largely theoretical with respect to the actual exposure to which a vessel owner may be subject.

The Act specifically provides that the responsible party shall be liable to claimants for interest beginning 30 days after a claim is presented until the claim is paid.¹⁰⁸ The amount due in interest is not subject to the limitation provisions of the Act.¹⁰⁹

C. Increased Penalties

The Oil Pollution Act substantially increases the penalties which may be assessed against a responsible party. The mandatory civil penalty has been increased from \$5,000 for each offense to \$25,000 for each day of such offense, or up to \$1,000 per barrel of oil discharged.¹¹⁰ Previously, the penalty could be increased to \$50,000 by taking into account the gravity of the spill and the extent and success of the cleanup.¹¹¹ In the event of gross negligence or willful misconduct of a person specified in the Act, the penalty shall be not less than

105. Oil Pollution Act § 1004(a). This section provides, in pertinent part:

(a) GENERAL RULE.—Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed [specified limits].

Id. (emphasis added). See *supra*, note 23 and accompanying text.

106. Oil Pollution Act § 1012(c).

107. Oil Pollution Act § 1018(a).

108. Oil Pollution Act § 1005(b)(1). Generally, interest shall be paid from thirty days following the date on which the claim is presented to the guarantor. However, if the guarantor offers the claimant an amount greater than or equal to the amount finally paid, interest does not accrue until the offer is accepted. If the offer is made within sixty days after the claim is presented, interest does not accrue until the offer is accepted, if ever. § 1005(a), (b).

109. Oil Pollution Act § 1005(b)(5).

110. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(A)).

111. 33 U.S.C. § 1321(b)(6)(P).

\$100,000 and not more than \$3,000 per barrel of oil discharge.¹¹² Alternatively, administrative penalties for a discharge or failure to report a discharge may, subject to various hearing requirements, range from up to \$10,000 per violation through \$125,000.¹¹³ The penalty for failure to report a discharge has been increased from a fine of not more than \$10,000 or imprisonment of not more than one year, or both, to a fine of not more than \$250,000 for an individual or \$500,000 for an organization, or by imprisonment of not more than three years (five years for a subsequent conviction), or both.¹¹⁴

Negligently discharging oil will now also result in criminal penalties of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. Knowingly discharging oil will now result in criminal penalties of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three years. A violator who knows at the time of the discharge that he is placing another person in imminent danger of death or serious bodily injury shall be subject to a fine of up to \$250,000 or imprisonment for not more than 15 years, or both.¹¹⁵

Additionally, the Act increases the penalties assessed under a wide range of marine transportation safety laws.¹¹⁶

D. Direct Action Against Insurers

The Oil Pollution Act requires the responsible party for essentially all vessels¹¹⁷ to have evidence of "financial responsibility"¹¹⁸ sufficient

112. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(D)).

113. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(6)(B)(ii)). A person is not liable for civil penalties under paragraph (7) if one has been assessed under paragraph (6). § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(F)).

114. Oil Pollution Act § 4301(a)(2) (amending 33 U.S.C. § 1321(b)(5)).

115. Oil Pollution Act § 4301(c) (amending 33 U.S.C. § 1319(c) to impose penalties for violations of 33 U.S.C. § 1321(b)(3)).

116. Oil Pollution Act § 4302. For instance, penalties have been increased under laws regarding crew complements, coastwise and foreign commerce pilotage, and for dangerous operation of a vessel. Also, penalties under the Deepwater Port Act, the Intervention on the High Seas Act, and other acts have been increased. § 4302.

117. The requirements apply to:

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or
(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States

Oil Pollution Act § 1016(a).

to meet the relevant maximum liability provisions of the Act.¹¹⁹ The Act provides for a right of direct action against the guarantor for claims for removal costs and damages.¹²⁰ Failure to have on board the required evidence of financial responsibility will result in denial of the necessary clearances under customs laws, and may result in denial of entry or detention of noncomplying vessels.¹²¹ A noncomplying vessel found in United States navigable waters shall be subject to seizure and forfeiture to the United States.¹²²

E. Jurisdiction and Venue

A most regrettable feature of the Act, which will undoubtedly result in discharger interests incurring unnecessarily significant legal expenses in defending oil spill cases, is contained in the provisions relating to jurisdiction and venue.¹²³ The Act grants United States district courts federal question jurisdiction with regard to all controversies arising under the Act.¹²⁴ Venue is proper in any district in which the discharge, injury, or damages occurred.¹²⁵ It is easy to conceive of a situation in which the spill might affect several shorelines, thus causing injury in different districts, and loss of profits in yet

118. "Financial responsibility" is established by any one, or by any combination of the following methods which the Secretary or President determines to be acceptable:

- (1) evidence of insurance,
- (2) surety bond,
- (3) guarantee,
- (4) letter of credit,
- (5) qualification as a self-insurer, or
- (6) other evidence of financial responsibility.

Oil Pollution Act § 1016(c).

119. Oil Pollution Act § 1016(a). This amount does not include any potential liabilities under the Act for civil, administrative, or criminal penalties. In the case of an offshore facility, a responsible party must have evidence of \$150,000,000 of financial responsibility. § 1016(c).

120. Oil Pollution Act § 1016(f). In direct action cases, the guarantor is entitled to invoke all rights and defenses which would be available to the responsible party, the defense that the incident was caused by the willful misconduct of the responsible party, and any policy terms or defenses which have been approved by the Secretary. The guarantor may not, however, invoke any other defense that might be available to the guarantor if the claim had been brought by the owner or operator. *Id.* A guarantor may not be liable for amounts in excess of the financial responsibility provided. § 1016(g).

121. Oil Pollution Act § 1016(b)(2).

122. Oil Pollution Act § 1016(b)(3). The conference committee report states, "Each vessel must carry on board at all times a certificate, issued by the appropriate U.S. government agency, evidencing financial responsibility." H.R. CONF. REP. NO. 653, 101st Cong. 2d Sess. 119, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 722, 797.

123. Oil Pollution Act § 1017.

124. Oil Pollution Act § 1017(b).

125. *Id.*

another district. Additionally, venue is proper in any district in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.¹²⁶ Under this provision, a defendant might face suits all over the country for a single spill. A defendant in federal court may be able to consolidate all or part of the proceedings in a single forum;¹²⁷ however, a transfer rests to a large extent in the discretion of the court.¹²⁸

A more significant problem is that the Act also grants state courts jurisdiction to consider claims under the Act.¹²⁹ While state court actions under the Act may be removable to federal court, there is a very real prospect of a defendant facing suits in several different state courts, as well as in different federal courts. Furthermore, the device of the concursus available under the Limitation Act is not a part of the defendant vessel owner's arsenal for consolidating oil pollution cases.¹³⁰ These provisions are not conducive to a global and efficient resolution of disputes arising from an oil spill. Rather, the Act encourages piecemeal litigation of oil spill matters in various courts at added legal expense.

F. Non-Liability Elements of the Act

1. The Fund

The Act consolidates the funds previously established under federal law into the Oil Spill Liability Trust Fund (Fund).¹³¹ The Fund is available to pay for, *inter alia*, removal costs and certain other expenses, claims and damages, as well as obligations under the Clean Water Act.¹³² Once payments are made, the Fund becomes subrogated to the rights of the claimants or of a state who received them to recover from the responsible party.¹³³ Generally, a claim must be

126. *Id.*

127. See 28 U.S.C. §§ 1404, 1407 (1988).

128. 28 U.S.C. § 1404.

129. Oil Pollution Act § 1017(c).

130. Oil Pollution Act § 1018(a)(2). The language of the section is not entirely clear. It states that nothing in the Oil Pollution Act or the Limitation Act shall be construed to affect the obligations or liabilities of any person under state law, including the common law. Arguably, the concursus does not affect state imposed obligations or liabilities. The recognition of state court jurisdiction in section 1017(c) of the Oil Pollution Act is apparently inconsistent with, and hence preempts, the injunctive powers which a federal court is required to exercise for a concursus in a limitation proceeding.

131. Oil Pollution Act § 9001 (amending 26 U.S.C. § 9509 (1988)). The Oil Spill Liability Trust Fund was established by section 9509 of the Internal Revenue Code.

132. Oil Pollution Act §§ 1012, 9001 (amending 26 U.S.C. § 9509).

133. Oil Pollution Act § 1012(f).

presented to the responsible party or guarantor before being presented to the Fund.¹³⁴ The Act requires these parties to advertise, for at least thirty days, the procedures by which claims may be presented and identify themselves as the source of the discharge.¹³⁵

2. Double Hulls

A much publicized provision of the Act requires that all new vessels constructed for the carriage of oil shall be equipped with a double hull when operating in United States waters or the United States exclusive economic zone.¹³⁶ With regard to existing vessels, the double hull requirement is phased in over a period of years, starting in 1995, depending upon the age and size of the tanker.¹³⁷ By the year 2010, all vessels over 5,000 gross tons must have double hulls, except that those which currently have double bottoms or double sides may continue operating in United States waters until 2015.¹³⁸ The year 2015 is also the date by which vessels unloading oil at a deepwater port or offloading in lightering operations more than 60 miles from the coast must have double hull construction.¹³⁹

3. Prevention, Removal, and Other Provisions

The Oil Pollution Act modifies existing legislation aimed at prevention of spills, removal of oil, and protection of Prince William Sound. For instance, the Act contains sections permitting the government to examine records for drug and alcohol offenses of those applying for or seeking renewal of licenses, certificates of registry, and merchant mariners' documents;¹⁴⁰ alterations to manning standards for foreign tank vessels;¹⁴¹ changes to vessel communications equipment require-

134. Oil Pollution Act § 1013(a). The claim may be presented first to the Fund (1) where the President has advertised or otherwise notified claimants, (2) by the governor of a state for removal costs incurred by that state, or (3) by a United States claimant where a facility located in the territorial sea, or over the continental shelf of a foreign country, spills or substantially threatens to spill oil resulting in costs or damages within United States jurisdiction. § 1013(1).

Additionally, if a claim has been presented to the responsible party or guarantor and that party denies liability or fails to pay within a 90-day period, the claimant may elect to present his claim to the Fund. § 1013(c).

135. Oil Pollution Act § 1014(b).

136. Oil Pollution Act § 4115 (adding new section 3703a to 46 U.S.C.).

137. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(c)(3)).

138. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(c)(4)).

139. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(b)(3)).

140. Oil Pollution Act § 4101 (amending 46 U.S.C. § 7101).

141. Oil Pollution Act § 4106 (amending 46 U.S.C. § 9101(a), 46 U.S.C. § 6101, and 33 U.S.C. § 1228(a)).

ments;¹⁴² special provisions regarding navigation and facilities in Prince William Sound¹⁴³ (the site of the EXXON VALDEZ grounding); reforms to the land-based application of the Trans-Alaska Pipeline Authorization Act;¹⁴⁴ as well as other matters. The Oil Pollution Act also amends the Clean Water Act regarding the ability of the federal government to undertake cleanup efforts. This provision requires the President to ensure that effective and immediate removal actions are undertaken and allows the President to assume responsibility for the cleanup and seek reimbursement from the responsible party.¹⁴⁵ If a spill is of such size or character as to be a substantial threat to the public health or welfare of the United States, the President is required to direct all removal actions.¹⁴⁶

The National Contingency Plan, which was originally adopted pursuant to the Clean Water Act, is prepared by the President and provides for the coordination of the various public entities involved in a cleanup, the procurement and storage of equipment and supplies, the establishment of Coast Guard strike teams equipped and trained to deal with oil spills, as well as other matters deemed necessary to ensure a coordinated government response.¹⁴⁷ The National Contingency Plan must also establish procedures for a worst case discharge of oil (e.g., loss of an entire cargo) and include a fish and wildlife response plan.¹⁴⁸ The Act provides limited immunity from liability for those involved in cleanup operations consistent with the National Contingency Plan or those retained by the federal authority.¹⁴⁹ The Act establishes a national planning and response system,¹⁵⁰ and, importantly, requires that regulations be issued to mandate that owners and operators of tank vessels and facilities prepare and submit individual response plans to the President.¹⁵¹ The individual response

142. Oil Pollution Act § 4118.

143. Oil Pollution Act §§ 5001-5007.

144. Oil Pollution Act §§ 8001-8302 (Trans-Alaska Pipeline System Reform Act of 1990).

145. Oil Pollution Act § 4201(a) (amending 33 U.S.C. § 1321(c)).

146. Oil Pollution Act § 4201(a) (codified at 33 U.S.C. § 1321(c)(2)(A)).

147. Oil Pollution Act § 4201(b) (codified at 33 U.S.C. § 1321(d)).

148. *Id.*

149. Oil Pollution Act § 4201(a) (codified at 33 U.S.C. § 1321(c)(4)).

150. Oil Pollution Act § 4202 (amending 33 U.S.C. § 1321(j)).

151. Oil Pollution Act § 4202 (codified at 33 U.S.C. § 1321(j)(4)). Vessels which must submit such plans are those defined as "tank vessels" in 46 U.S.C. § 2101(39) (1988). A tank vessel within the meaning of that section is

a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—

(A) is a vessel of the United States;

(B) operates on the navigable waters of the United States; or

plan must, *inter alia*, identify an individual having full authority to implement removal actions, identify and ensure by contract that private personnel and equipment are available to remove a "worst case" discharge, and describe the training to be provided to personnel on a vessel to mitigate or prevent a discharge of oil.¹⁵² Compliance with this plan does not constitute a defense to the liabilities and fines imposed by the Act, but a failure to comply will result in a fine of up to \$25,000 per day of violation.¹⁵³

G. Missed Opportunities and Practical Effect of the Act

1. The International Conventions

One of the greatest disappointments of the Oil Pollution Act is the failure of Congress to make provision for the United States to adopt the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), and their 1984 protocols. The Act does contain a provision stating that it is in the best interest of the United States to participate in an international oil pollution regime that is at least as effective as United States law.¹⁵⁴ As a practical matter, however, ratification of these conventions is impossible. Ratification would have been possible only if the amount of the vessel owner's liability under the Oil Pollution Act would not have exceeded the amount imposed by the 1984 Protocol to the CLC Convention.¹⁵⁵ The Act's higher limits and the potential for unlimited liability under state law render ratification impossible.¹⁵⁶

(C) transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States.

46 U.S.C. § 2101(39).

152. Oil Pollution Act § 4202(a) (codified at 33 U.S.C. § 1321(j)(5)(C)).

153. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(C)).

154. Oil Pollution Act § 3001.

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

Id.

155. See Article III, para. 4 of the International Convention on Civil Liability for Oil Pollution Damage, reprinted in 6 BENEDICT, *supra* note 4, at 6-63 and Article 4 of the 1984 Protocol to the International Convention on Civil Liability for Oil Pollution, reprinted in 6 BENEDICT, *supra* note 4, at 6-79.

156. The House of Representatives bill originally contained an ingenious provision which would have permitted both ratification of the international conventions and the higher federal

Congress' failure to enact legislation compatible with the international conventions will undoubtedly weaken the influence of the United States in the negotiation of future maritime treaties. The United States took an active role in the negotiation of the 1984 Protocols. Higher liability limits were adopted in order to secure United States ratification. Now there is no prospect that the United States will be in a position to ratify the 1984 Protocols for the foreseeable future.

2. Insurance and the Future of Oil Transportation to, from, and Within the United States

Prior to the passage of the Oil Pollution Act, major oil tanker owners publicly adopted transportation policies in anticipation of the enactment of significant oil pollution legislation. On June 11, 1990, Shell announced that it would use only chartered vessels for carriage of its oil to the United States mainland, but would continue to use Shell-owned vessels solely to discharge oil at the Louisiana Offshore Oil Port (LOOP).¹⁵⁷ Shell explained that the risks of unlimited liability in the United States outweighed the commercial rewards.¹⁵⁸ Although Shell was able to obtain \$1,000,000,000 of insurance for oil spills, it viewed that amount as insufficient in light of the amount spent by Exxon in cleaning up the EXXON VALDEZ spill.¹⁵⁹ While Shell may have the economic muscle to be able to purchase \$1,000,000,000 of oil pollution insurance, many tanker operators have less economic might and remain even more exposed than Shell. Currently, the Protection and Indemnity Clubs offer \$500,000,000 of cover.¹⁶⁰ An additional \$200,000,000 of excess cover is also available from London underwriters through the Clubs; as of the February

and state limits. This provision would have required that amounts up to the limits established by the CLC Convention and its protocols would have been dealt with under the principles of the CLC Convention. Amounts imposed by state or federal laws on a responsible party in excess of the CLC Convention's limits would be defended and indemnified by the Oil Spill Liability Trust Fund. See *supra* notes 131-35 and accompanying text. In this way, claimants would have received the benefits of higher United States limits while the vessel owner's maximum liability would have been that imposed by the CLC Convention. Regrettably, this provision was struck from the bill in conference, apparently because certain influential senators were unwilling to include any provision which might lessen the ability of states to impose their own liabilities on vessel owners. See McLaughlin, *Major US Blow to Oil Protocols*, Lloyd's List, June 30, 1990, at 1, col. 7-8.

157. Smith, *Shell Halts Calls at US Mainland*, Lloyd's List, June 12, 1990, at 1, col. 2.

158. *Id.* at col. 3.

159. *Id.* See also *Insurance Problems Behind Shell Switch*, Lloyd's List, June 12, 1990, at 3, col. 2 (analysis of industry response to pollution liability).

160. Mulrenan, *Liability Crisis Looms for Owners*, Lloyd's List, July 4, 1990, at 11, col. 3.

1990 renewal period, two further excess layers were available.¹⁶¹ The extent to which this excess cover will be available in February 1991 is currently not clear.¹⁶² Certainly, the basic \$500,000,000 coverage is inadequate for a vessel owner with assets potentially at risk in the event of a major oil spill.

The unavailability of sufficient insurance also appears to have caused Elf Aquitaine, Teekay Shipping, Petrofina, Maersk, and A.P. Moller to announce that their vessels would boycott United States mainland ports.¹⁶³ Further, within the United States, some domestic coastal traders announced that they would cease doing business in states such as Maine which have enacted particularly onerous pollution laws.¹⁶⁴

Intertanko has warned that the new Act will merely encourage the use of genuine single vessel companies unrelated to the oil company whose oil is being transported. The oil tanker owners' organization has further stated that such a development would actually increase the risk of a spill by driving large, responsible fleets with deep corporate pockets out of the oil transportation business, leaving only the single vessel "rust bucket" companies shipping oil to the United States. As Nicholas Blenkey, editor of the *Marine Log* stated, "'At its worst [the bill] would mean American oil would be imported in tankers by dubious one-ship companies that will walk away from the ship in the event of a spill. That is very, very likely to happen.'" ¹⁶⁵ The extent to which these public pronouncements, issued while the Act was being considered by the conference committee, constitute genuine changes in policy or simply attempts to influence legislators, is unclear.¹⁶⁶

Interestingly, certain oil companies adopted a different approach. Arco, for instance, has taken the reverse position and declared that in

161. *Id.* at col. 4.

162. *Id.* at col. 5.

163. Smith, *Elf to Follow Shell in US Port Boycott*, Lloyd's List, June 22, 1990, at 1, col. 2; Prescott, *Teekay Tankers Join US Trade Boycott*, Lloyd's List, July 12, 1990, at 1, col. 3; *US Congress Ends 16-Year Stalemate on Oil Spill Legislation*, 13 OIL SPILL INTELLIGENCE REP. 1, 3 (1990) [hereinafter *Oil Spill Legislation*].

164. Bouchard Transportation has announced that it has stopped serving Maine and Maryland and is considering whether to continue trading in New Jersey. Prescott, *US Coastal Owners Ban Some Tracks*, Lloyd's List, July 12, 1990, at 1, col. 6. Texaco, Amerada Hess, and Maritrans Operating Partners have also decided to stop calling at Maine ports. *Wall Street Journal*, July 26, 1990, at B4, col. 3.

165. *Oil Spill Legislation*, supra note 163, at 3.

166. See Brewer, *Boycott Threat Seen as Lobbying Tactic*, Lloyd's List, July 4, 1990, at 10, col. 1.

the future it will transport as much of its oil as possible in Arco-owned tankers.¹⁶⁷ Arco's theory is that only if Arco can control the standards aboard its tankers can it adequately protect itself against the potential liability that would result if a state changed its law to hold cargo interests liable for spill of the cargo.

The future of oil transportation to the United States is unclear. It is likely that large oil companies will be unwilling to risk their corporate assets to potentially unlimited liability for an oil spill. However, it does not necessarily follow that the new Act actually will result in transportation by dubious, one-vessel companies. It is likely that companies specializing in the transportation of oil to, from, and within the United States will emerge and charge substantially increased freight rates due to higher insurance costs and significantly increased exposures resulting from the Act. These additional costs will be passed on to United States consumers.

3. The Escape of Cargo Owners

The Oil Pollution Act is the harshest oil pollution legislation to date; it imposes considerably higher limits of liability on a vessel owner than do the international conventions, allows for potentially unlimited liability against a vessel owner under the laws of individual states, and creates exposure to a formidable range of penalties. However, in spite of considerable congressional opposition, oil cargo interests pulled off the remarkable coup of escaping any form of liability under the Act for the discharge of oil from a tanker. The extent of this achievement is particularly noteworthy considering that even the more limited international conventions have recognized that oil cargo interests should share in the financial consequences of an oil spill. Indeed, one of the conventions specifically states that "the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should be borne in part by the oil cargo interests."¹⁶⁸

Additionally, part of the industry-sponsored voluntary pollution schemes includes CRISTAL,¹⁶⁹ which provides that when cargo

167. McLaughlin, *Oil Transport Changes Ahead*, Lloyd's List, July 4, 1990, at 10, col. 5.

168. International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1110 U.N.T.S. 57, 59 (preamble).

169. Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL) (in effect from 1971, substantially revised February 20, 1987), 10 I.L.M. 137, reprinted in 6 BENEDICT, supra note 4, at 6-148.4.

belonging to a CRISTAL member is transported in a TOVALOP¹⁷⁰ tanker, CRISTAL will pay claims above those payable under the TOVALOP supplement up to a tonnage based limit. It is estimated that eighty percent of oil cargoes are covered by CRISTAL.¹⁷¹ Finally, the House of Representatives original version of the Oil Pollution Act created secondary strict liability on the part of the cargo owner.¹⁷² While the limits contained in the original House bill were eventually enacted, the additional potential liability of oil cargo owners was rejected. This rejection could encourage the use of one-ship companies for transportation purposes due to the absence of potential liability of cargo interests.

V. CONCLUSION

The passage of the Oil Pollution Act begins a period of uncertainty regarding its meaning and the practical effects of its provisions. There is little doubt that the cost of shipping oil to, from, and within the United States will rise significantly, and these increased costs will be passed on to United States consumers. It will be interesting to see what effect the resulting increased oil prices will have and whether the Act will actually encourage safer methods of oil transportation and reduce the frequency and severity of pollution incidents. Undoubtedly, there will be a period of adjustment as the industry confronts the new legal regime.

THE ENFORCEABILITY OF FORUM SELECTION CLAUSES IN MARITIME BILLS OF LADING: AN UPDATE

C. Andrew Waters*

INTRODUCTION

Within the maritime context, parties contracting for the transport of goods frequently stipulate an exclusive forum for settling disputes that arise from the performance of the contract. Such forum selection clauses are frequently used in contracts outside of the admiralty context when the transaction in question involves more than one jurisdiction.¹

While American admiralty courts were traditionally reluctant to divest themselves of jurisdiction simply because a forum selection clause specified another court as having exclusive jurisdiction,² federal courts have begun to accept and enforce the validity of such clauses. However, there are differing degrees of acceptance between the various circuits.³ In *M/S Bremen v. Zapata Off-Shore Co.*,⁴ the Supreme Court brought American law substantially into accord with the law of other common law countries by holding forum selection clauses generally enforceable.⁵ While post-*Bremen* cases have raised additional

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1. See generally Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964).

2. Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COM. 17 (1970).

3. See generally *William H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 1955 AMC 1687 (2d Cir.) (holding a forum selection clause enforceable unless unreasonable), cert. denied, 350 U.S. 903, 1955 AMC 2406 (1955). See also *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297, 1958 AMC 1335 (5th Cir. 1958) (holding a forum selection clause to be unenforceable), cert. dismissed, 359 U.S. 180, 1959 AMC 1327 (1959).

4. 407 U.S. 1, 1972 AMC 1407 (1972).

5. *Id.* at 10, 1972 AMC at 1414. The Supreme Court held "that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* For a listing of the decisions of the English courts, see *id.* at 11 n.12, 1972 AMC at 1415 n.12.

170. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Standing Agreement) (in effect from October 1969, as amended October 30, 1984), reprinted in 6 BENEDICT, *supra* note 4, at 6-136; Supplement to Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Supplement) (in effect from February 20, 1987), reprinted in 6 BENEDICT, *supra* note 4, at 6-145.

171. TOVALOP in *Oil Spill Payouts*, Lloyd's List, July 4, 1990, at 11, col. 1.

172. Oil Pollution Act § 1102.

the vessel before deciding what further action, if any, he should take. Applying this test to the facts of *Irvin v. Hine*, it is reasonably clear that the prudent uninsured owner would never have incurred the expense of drydocking, since even the insured owner refused to do so.

CONCLUSION

The prior discussion illustrates that shipowners have attempted to recover nearly every conceivable type of marine related expenses under the mantle of the Sue and Labor Clause.

Recent cases indicate the clause is back in fashion and enjoying a modest revival in both marine and land-locked affairs.

One need only attain journeyman soothsayer status to predict that the clause will enjoy good health, longevity and even broader usage in the future.

The Oil Pollution Act of 1990: An Analysis

THOMAS J. WAGNER*

INTRODUCTION

On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990, after the measure had been unanimously approved by both the House and the Senate. The new law establishes a comprehensive oil spill liability, response and compensation program which consolidates the various federal liability provisions into one statute, without preempting state liability laws or implementing the international oil spill conventions. The Act also prescribes an array of preventive measures and oil spill penalties and greatly modifies oil spill response activities.

Manifestly, the Act is a major change in the domestic program dealing with oil spills. The new law is acclaimed by one of its original sponsors as "a major leap forward" in safe transportation of oil¹ which will provide a readily accessible fund for prompt and certain recovery of pollution damages.² Prompt and fair claims compensation under a "simpler, clearer, more predictable legal and regulatory system" has long been a principal objective of this legislation.³ Critics suggest that the new law, while comprehensive in scope, has serious drawbacks because of its limp limitation provisions, overly complicated removal provisions, and the failure of the law to preempt inconsistent liability programs, which will perpetuate inordinate transactional time and litigation costs.⁴

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¹News release by Hon. Walter B. Jones, Chairman of the House Committee on Merchant Marine and Fisheries, August 19, 1990.

²Jones, *Oil Spill Compensation and Liability Legislation*, Vol. XIX, No. 8, *Env'tl. L. Rep.* (Env'tl. L. Inst.), at 10337 (Aug. 1989). ("Jones").

³*Id.* at 10333.

⁴See, generally, Letter of Samuel K. Skinner to Representative Jones, Chairman of the Conference Committee on Oil Spill Legislation, June 28, 1990; *Submission Made by the*

Part I will review the development of oil spill liability programs from 1970 to passage of the Oil Pollution Act. Part II will review particular facets of the new legislation dealing with its liability regime, removal requirements, prevention and penalty measures, relationship with other laws, and claims program. Part III will analyze these measures in light of principal objectives and in the context of certain experiences and lessons derived from the *Exxon Valdez* oil spill in Prince William Sound and the removal operations which followed.

I THE HISTORICAL DEVELOPMENT OF OIL SPILL LIABILITY REGIMES

The awakening of public concern over oil pollution began with the *Torrey Canyon* disaster off the southwest coast of England on March 18, 1967. The clean-up problems and costs associated with that pollution incident aroused previously indifferent public opinion to the hazards posed by the mass transportation of oil. The incident was soon followed in the United States by the oil spill off Santa Barbara, California, focusing American public opinion upon additional hazards associated with exploration facilities. Public concern over oil pollution produced two distinct responses: the national approach embodied in various Congressional enactments, and the international response embodied in international conventions dealing with oil spills.

The modern era of domestic oil spill legislation began with the enactment of the Federal Water Quality Improvement Act of 1970. This law, as expanded by the Federal Water Pollution Control Act Amendments of 1972 (FWPCA),⁵ declared a national policy prohibiting discharges of oil and imposing a regime of civil penalties and strict liability for federal clean-up costs. The FWPCA did not deal with damages of private interests, economic losses, or expenditures by local governments. Later, as source-specific pollution hazards were identified, Congress passed special measures to deal with these hazards. These included the Trans-Alaska Pipeline Authorization Act of 1973 (TAPA),⁶ the Deepwater Ports Act of 1974 (DPA)⁷ and the

Outer-Continental Shelf Lands Act Amendments of 1978 (OCSLA).⁸ Each measure dealt with source-specific oil pollution hazards, with differing liability, limitation and claims provisions and different areas of geographic coverage.

In view of the inconsistent federal enactments overlapping non-preempted state legislation, the need for a comprehensive spill program was long ago recognized.⁹ During the last 15 years, Congress considered several comprehensive oil spill measures to combine all state and federal oil spill liability laws into a uniform national program.¹⁰ While several comprehensive measures were approved in the House, no Senate agreement could be obtained until the aftermath of the Prince William Sound oil spill.

In contrast to the domestic approach, the international response developed a comprehensive program to deal with tanker spills of crude oil. At the request of the British government, the Intergovernmental Maritime Consultative Organization (IMCO), now the International Maritime Organization (I.M.O.), prepared an oil spill proposal for consideration at a Diplomatic Conference in Brussels in November 1969. The IMCO proposal was based upon a draft convention prepared by the Comité Maritime International (CMI) at its 29th International Conference, held at Tokyo in April of the same year. The IMCO proposal, with a few amendments, was adopted as the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention or CLC).¹¹ Subsequently, the International Convention for the Establishment of an International Fund for Oil Pollution Damage, 1971 (Fund Convention)¹² was adopted to supplement the compensation of pollution damage claims.

The CLC provides a program of strict liability and compulsory insurance for tanker spills. The convention covers pollution damages of public and private interests for tanker spills of crude and other persistent oil.¹³ The Fund Convention establishes an international

⁵ 43 U.S.C. § 1801 *et seq.*

⁶ Jones, *supra* note 2, at 10333; H.R. Rep. No. 1489, 94th Cong., Pt. 1; see also Straube, *Is Full Compensation Possible for the Damages Resulting from the EXXON VALDEZ Spill?*, Vol. XIX, No. 8, *Envtl. L. Rep.* 10338, 10349-50 (Aug. 1989) ("Straube").

⁷ Jones, *supra* note 2, at 10334-37.

⁸ International Convention on Civil Liability for Oil Pollution Damage, 1969, reprinted in 6 *Benedict on Admiralty* 6-60. (Cohen rev. 7th ed. 1983) ("Benedict").

⁹ International Fund for Compensation of Oil Pollution Damage, December 18, 1971, reprinted in 6 *Benedict* 6-100 ("Fund Convention").

¹⁰ CLC, *supra* note 11, Articles I, III. An excellent description of the development and coverage of the CLC and the Fund Convention appears in Jacobsen & Yellen, *Oil Pollution:*

International Group of P.&I. Associations Regarding Draft Oil Pollution Legislation in the United States (undated); James, *Legislative Reaction to Recent Oil Spills*, in 1990 *River and Marine Industry Seminar* ("James"); *Oil Spills*, Vol. 20, No. 10, *Env't. Rep. (BNA)* 432 (July 6, 1990).

¹¹ 33 U.S.C. § 1251 *et seq.*

¹² 43 U.S.C. § 1651 *et seq.*

¹³ 33 U.S.C. § 1501 *et seq.*

and derived from mandatory contributions by oil companies which receive bulk shipments by water in those countries which ratify the convention. The Fund Convention supplements the compensation payable to damaged public and private interests to the extent not compensated under the CLC.¹⁴

The international approach established a uniform liability regime for all public and private damages for tanker spills. However, the United States declined to ratify the conventions, largely because of dissatisfaction with the liability limits, the difficulty of increasing limits in the future, and concern for the states' role in pollution protection.¹⁵ Concern over the international limits was brought into sharp focus by the *Amoco Cadiz* spill off the coast of France in March 1978. This incident, which involved the loss of 68 million gallons (six times the amount of the *Exxon Valdez* spill), sharpened worldwide recognition that the international regime needed to be updated and the limits of liability increased to meet the requirements of a major catastrophe.¹⁶

A Diplomatic Conference was convened in London in 1984 to revise the CLC and the Fund Convention in light of these shortcomings. The U.S. delegation to this conference consulted with the House and Senate committees to identify the major domestic objectives needed for Congressional adoption of a uniform international plan. The U.S. delegation was able to achieve most of its objectives in the 1984 Protocols to the CLC and the Fund Convention. These included greatly increased limits of shipowner and fund liability, expanded geographic coverage, compensation for restoration of natural resources, economic losses and preventive measures, a simplified amendment procedure to expedite future increases in

The 1984 London Protocols and the AMOCO CADIZ, 15 J. Mar. L. & Com. 467 (1984) ("Jacobsen & Yellen").

¹⁴Fund Convention, supra note 12, Articles 4, 5, 10.

¹⁵Jones, supra note 2, at 10334-36; Jacobsen & Yellen, supra note 13, at 482; Temple, Barker & Sloane, infra note 17, at IV-3. Although there was obvious dissatisfaction with the international limits, it is interesting that those limits compared favorably with the limits available under then existing U.S. legislation. For example, in 1984 a tanker owner's limit of liability was \$150 per gross ton under the FWPCA. The owner's limits would have been approximately \$136 per ton under the CLC before they were increased by the 1984 Protocols. Jacobsen & Yellen at 473. Furthermore, the shipowner's liability limit was supplemented by the international fund, up to a maximum of \$46 million, which was not available under domestic law. In spite of the domestic dissatisfaction with the international limits, the domestic limits remained constant—roughly equal to the international limits—from 1978 to 1990.

¹⁶The problems associated with the conventions are outlined in detail in Jacobsen & Yellen, supra note 13, at 475-483 (1984).

limits, and partial non-preemption of state laws relative to state oil spill funds, response, and penalty requirements.¹⁷

With these objectives achieved, the Reagan Administration submitted the 1984 Protocols to the Senate for advice and consent to ratification. The Senate Foreign Relations Committee declined to take action on the Protocols, largely at the direction of Senate leadership. During the last three Congresses, the House of Representatives had proposed or passed comprehensive legislation which would have consolidated federal and state liability programs into a uniform national system and would have implemented the international regime as expanded by the 1984 Protocols.¹⁸ These measures, however, like ratification of the 1984 Protocols, were never acted upon by the Senate.

With the commencement of the 101st Congress, the House of Representatives, in H.R. 1465, again proposed comprehensive oil spill legislation. Unlike previously proposed legislation, H. R. 1465, as amended, redrafted and compromised, was ultimately approved unanimously by the House and the Senate. The obvious reason for passage was the impetus of public opinion reawakened by the *Exxon Valdez* spill in Prince William Sound.

II

A REVIEW OF THE OIL POLLUTION ACT OF 1990

The Oil Pollution Act of 1990 differs substantially from the original bill (H.R. 1465) and from former comprehensive proposals. The new law, while comprehensive in scope, neither preempts state law nor implements the international protocols. It expands the liability and limitation programs of former law and addresses particular concerns respecting prevention, removal and civil penalty programs. Like the international program, the new law channels liability to designated parties and provides a fund to respond for catastrophic losses and for claims which are not compensated by dischargers. The following review focuses upon particular facets of the legislation relating to

¹⁷Temple, Barker & Sloane, *The International Oil Spill Protocols: Should the United States Ratify?*, pp. IV-1-12 (1988) Temple, Barker & Sloane; Jacobsen & Yellen, supra note 13, at 475-483, 487, 488; Jacobson & Trotz, *The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention*, 17 J. Mar. L. & Com. 467 (1986). See also correspondence transmitting and submitting the 1984 Protocols to the Senate for advice and consent to ratification; President Reagan's Letter of Transmittal (Nov. 5, 1985); Secretary Schultz's Letter of Submittal (Oct. 5, 1985).

¹⁸Jones, supra note 2, at 10336, 10337.

liability, removal responsibilities, prevention and civil penalties, relationship with other laws, and claims procedures.

A. Liability, Defenses and Limitations

The Act imposes strict liability for removal costs and damages upon each responsible party for discharges of oil from vessels and facilities into navigable waters, onto adjoining shorelines, or into waters within the exclusive economic zone of the United States.¹⁹ Responsible parties are owners and operators of vessels, facilities and pipelines and licensees of deepwater ports.²⁰ Removal costs are defined to include all containment, removal and mitigation costs incurred by the United States, a state or an Indian tribe under § 311 of the FWPCA or under state law, and any such costs incurred "for acts . . . consistent with the National Contingency Plan."²¹

Recoverable damages include (a) natural resource damages, including loss of use and reasonable assessment costs, (b) damages to property, including economic loss, (c) damages for loss of subsistence use of natural resources, (d) (net) loss of taxes, royalties, rents, fees or shares of net profits, due to damage to property or natural resources, (e) damages for loss of profits or impairment of earning capacity due to damage to property or natural resources, and (f) damages for the net costs of increased public services caused by a discharge of oil.²² Natural resource damage includes the cost of restoring, rehabilitating or acquiring the equivalent of damaged natural resources, the diminution in value of the resources pending restoration, and reasonable assessment costs.²³

The Act specifies limited defenses to liability. A responsible party is not liable for removal costs and damages if the discharge was "solely" caused by an act of God, an act of war, an act or omission of a third party, or an combination thereof.²⁴ "Third party" is narrowly defined to exclude an employee or agent of the responsible party or of a party who acts pursuant to a contract with the

¹⁹Oil Pollution Act of 1990 § 1002(a) ("OPA").

²⁰*Id.*, § 1001(32).

²¹*Id.*, § 1002(a)(1); § 1001(30).

²²*Id.*, § 1002(b)(2).

²³*Id.*, § 1006(d)(1).

²⁴*Id.*, § 1003(a). The responsible party has the burden to establish these limited defenses.

responsible party.²⁵ There is no liability to a claimant whose gross negligence or willful misconduct caused the incident.²⁶ These defenses are not available if the responsible party "fails or refuses":

1. to report an incident as required by law;
2. to provide reasonable assistance requested by a responsible official in connection with removal activities; or
3. to comply with an order issued under FWPCA provisions without sufficient cause.²⁷

The Act provides for third-party liability consistent with the liability of the responsible party when the responsible party establishes that the discharge was solely caused by the act or omission of the third-party.²⁸

The Act sets new limits of statutory liability and removal costs incurred by the responsible party. The sum of its removal costs and its statutory liability is limited to the following amounts:

- (1) the greater of \$1,200 per gross ton or \$10 million for tank vessels of more than 3,000 tons;
- (2) the greater of \$1,200 per gross ton or \$2 million for tank vessels of less than 3,000 gross tons;
- (3) the greater of \$600 per gross ton or \$500,000 for all other vessels;
- (4) \$75 million, plus removal costs, for offshore facilities;
- (5) \$350 million for onshore facilities and deepwater ports.²⁹

No limitation is applicable if the incident was proximately caused by gross negligence or willful misconduct, or by a violation of a federal safety, construction or operation regulation by the responsible party, its agent, employee or person acting pursuant to a contract with the responsible party.³⁰ Likewise, no limitation is available if the responsible party "refuses or fails" to report the incident, to provide reasonable assistance requested by a responsible official, or to comply with certain FWPCA orders without sufficient cause.³¹ Notwithstanding the defenses and limitations noted above, federal, state

²⁵*Id.*, § 1003(a)(3). The "third party" defense is very restrictive. The responsible party must also establish its own due care and precautions as to foreseeable third-party acts and consequences.

²⁶*Id.*, § 1003(b).

²⁷*Id.*, § 1003(c).

²⁸*Id.*, § 1002(b).

²⁹*Id.*, § 1004(a). In general, these limitation amounts do not apply to interest on recoverable removal costs or damages under § 1005(b)(5).

³⁰OPA, § 1004(c)(1).

³¹*Id.*, § 1004(c)(2); see note 8, *supra*.

and removal costs for a discharge from an OCS³² facility or a vessel carrying OCS oil as cargo "shall be borne by the owner or operator."³³

B. Removal Responsibilities

Under the FWPCA, the President was authorized to act to remove an oil spill "unless he determine[d]" that such removal would be done properly by the owner or operator of the vessel or facility from which the spill emanated.³⁴ As amended by the Oil Pollution Act, the FWPCA now expressly empowers the President to remove the discharge and mitigate or prevent the threat of discharge, to direct or monitor all federal, state and private removal actions and, if necessary, to remove and destroy a vessel discharging or "threatening" a discharge.³⁵ If the discharge or threat of discharge is a "substantial threat to the public health or welfare" of the United States, the President "shall direct" all federal, state and private removal, mitigation or prevention activities.³⁶

Neither the Oil Pollution Act nor the FWPCA, as amended, expressly provides that the responsible party or discharger must undertake removal activities. However, the amended FWPCA provides that nothing in Subsection(c) (Federal Removal Authority) "affects . . . the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge of oil."³⁷ In the absence of an express statutory obligation, a responsible party may be obligated to remove discharged oil by Presidential order pursuant to § 311(c), or by other orders pursuant to § 311(e).³⁸ The statutory basis for such executive authority is not explicit. Presum-

³²Outer-Continental Shelf.

³³OPA, § 1004(c)(3).

³⁴FWPCA, § 311(c)(1) (33 U.S.C. § 1321(c)(1)).

³⁵*Id.*, § 311(c)(1) (33 U.S.C. § 1321(c)(1)), as amended by OPA, § 4201(a).

³⁶*Id.*, § 311(c)(2) (33 U.S.C. § 1321(c)(2)), as amended by OPA, § 4201(a).

³⁷*Id.*, § 311(c)(5) (33 U.S.C. § 1321(c)(5)), as amended by OPA, § 4201(a).

³⁸The 1990 Act imposes substantial penalties for failure to comply with removal orders, or with regulations concerning removal. These include the responsibility of each owner or operator of a tanker or facility to prepare and submit for approval response plans for handling worst case discharges or threatened discharges. FWPCA, § 311(c)(7)(B) (33 U.S.C. § 1321(c)(7)(B)), as amended by OPA, § 4301(b); FWPCA § 311(j)(5) (33 U.S.C. § 1321(j)(5)), as amended by OPA, § 4202(a). Failure to properly carry out a removal order subjects the owner, operator or person in charge to a civil penalty of up to \$25,000 per day while the violation continues, or three times the costs incurred by the Oil Spill Liability Trust Fund. Failure to comply with regulations under the National Response Systems may give rise to a civil penalty of up to \$25,000 per day of violation.

ably Presidential authority to order private removal is inferred from the amended language of § 311(c) that the President "may . . . direct or monitor all" federal, state and private actions, but a contrary inference could be drawn from the use of the word "direct" throughout other provisions of the statute.

The Act activates the Oil Spill Liability Trust Fund, established under the Internal Revenue Code, to be available for payment of pollution damages, and for costs of removal, assessment, restoration and operational activities.³⁹ The Act retains the requirement that removal activities be undertaken consistent with the National Contingency Plan (NCP), and persons rendering assistance consistent with the NCP are exempt from liability for removal costs and damages.⁴⁰ This exemption does apply to a responsible party, to a response under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁴¹ with respect to a personal injury or death, or in the event of gross negligence or willful misconduct.⁴²

The Oil Pollution Act further amends the FWPCA to provide an extensive network for responding to oil spills. A National Response Unit is created to compile records of worldwide resources, personnel and equipment, to conduct appropriate vessel and facility inspections, and to maintain contingency plans.⁴³ Coast Guard District Response Groups are established to provide technical assistance to federal on-scene coordinators and to maintain Coast Guard response equipment. Furthermore, at the designation of the President, area committees of federal, state and local agencies are established to prepare area contingency plans for worst case discharges in the involved area.⁴⁴

C. Prevention and Oil Spill Penalties

The Oil Pollution Act includes several new prevention provisions. The Act amends existing legislation with respect to issuance of licenses and certificates of registry. Specific requirements are imposed to mandate criminal and driving record checks, drug and

³⁹*Id.*, § 1012(a).

⁴⁰FWPCA, § 311(c)(4) (33 U.S.C. § 1321(c)(4)), as amended by OPA, § 4201(a).

⁴¹The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

⁴²FWPCA, § 311(c)(B) (33 U.S.C. § 1321(c)(B)), as amended by OPA, § 4201(a).

⁴³FWPCA, § 311(j)(2) (33 U.S.C. § 1321(j)(2)), as amended by OPA, § 4201(a).

⁴⁴FWPCA, § 311(j)(3) and (4) (33 U.S.C. § 1321(j)(3) and (4)), as amended by OPA, § 4201(a).

...training programs and temporary suspension of licenses and certificates in certain circumstances.⁴⁵ Section 4104 provides for the second-in-command to relieve the vessel's master of command temporarily when the two most senior licensed officers reasonably believe the master is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel. Specific pilotage requirements are extended and imposed for vessels operating in Prince William Sound.⁴⁶

The Act provides for review by the Secretary of Transportation of the vessel manning standards of a foreign country which issues documentation for tank vessels involved in serious marine accidents. Upon determination that such standards are not equivalent to United States or accepted international standards, the Secretary must, subject to certain exceptions, prohibit such documented vessels from entering United States waters.⁴⁷

Section 4107 amends the Ports and Waterways Safety Act⁴⁸ to provide for the construction, operation and expansion of vessel traffic service. It also mandates a study of the need for additional Coast Guard authority to direct vessel movements. The Secretary of Transportation must submit his report and recommendations within one year after enactment of the new statute.

Section 4118 directs the Secretary to issue regulations, within the same one-year period, to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971⁴⁹ are equipped to receive radio marine safety warnings and engage in radio communications with the Coast Guard and with vessels and stations specified by the Coast Guard. Other safety measures concern specific equipment standards, such as tanker plating thickness and periodic gauging of plating thickness on older vessels.⁵⁰ Regulations are also mandated for warning devices to prevent overfills and devices to monitor pressure of oil tanks.⁵¹

Tanker construction standards are substantially amended by the new law. Double hulls are required on new tank vessels, and existing

vessels must be retrofitted with double hulls under a transition schedule, depending upon the age and size of the vessel.⁵²

The act greatly expands the criminal, civil and administrative penalties for prohibited discharges of oil. Under amendments to the FWPCA, an owner, operator or person in charge of a vessel or facility which has a prohibited spill may be assessed an administrative or civil penalty. The administrative penalty may be a Class I penalty of up to \$10,000 per violation (not exceeding \$25,000) or a Class II penalty of up to \$10,000 per day for each day the violation continues (not exceeding \$125,000). Alternatively, a civil penalty may be imposed upon the owner, operator or person in charge, of up to \$25,000 per day of violation or \$1,000 per barrel of oil discharged.⁵³ Substantially increased criminal and civil penalties are also imposed for negligent operations, load line and crew complement violations and violations pertaining to vessel operations under the Deepwater Ports Act and the Ports and Waterways Safety Act.⁵⁴

D. Relationship with Other Laws

The Act disavows any intent to preempt other domestic laws in certain areas. Section 1018(a) provides that nothing in the Act or in the Limitation of Liability Act of 1851⁵⁵ shall affect or preempt the authority of any state or political subdivision to impose "additional liability or requirements" with respect to oil pollution or removal activities. Further, neither act affects or modifies the obligations or liabilities of persons under the Solid Waste Disposal Act,⁵⁶ or under state law or "common law." The Act expressly preserves state funds for costs or damages related to oil pollution.⁵⁷ Lastly, nothing in the Act, the Limitation of Liability Act or the Internal Revenue Code setting up the domestic fund⁵⁸ affects the authority of the United States or any state or political subdivision to "impose additional liability or additional requirements" or to impose any oil spill civil or criminal fines or penalties.⁵⁹

⁴⁵OPA, §§ 4101-03.

⁴⁶*Id.*, § 4116. The pilot, who may not be a member of the crew, must be licensed under both federal and state requirements.

⁴⁷*Id.*, § 4106.

⁴⁸33 U.S.C. § 1223.

⁴⁹33 U.S.C. § 1203.

⁵⁰OPA, § 4109.

⁵¹*Id.*, § 4110.

⁵²*Id.*, § 4115.

⁵³§ 311(b)(6) and (7) (33 U.S.C. § 1321(b)(6) and (7)), as amended by OPA, § 4301(b).

⁵⁴OPA, § 4302.

⁵⁵33 U.S.C. § 183 *et seq.*

⁵⁶42 U.S.C. § 6901 *et seq.*

⁵⁷OPA, § 1018(b).

⁵⁸26 U.S.C. § 9509 *et seq.*

⁵⁹OPA, § 1018(c).

...the Act does not endorse or implement any international regime, convention or protocol. In Title III, Congress acknowledged that it is in "the best interests" of the United States to participate in an international regime which would be "at least as effective" as federal and state laws in preventing pollution and compensating claimants.⁶⁰

E. Claims Procedure

The Act provides a new program for compensation of pollution claims. In the event of an oil spill, the President must designate the source of the spill and notify the responsible party (if known) of this designation. The responsible party must either deny the designation within five days or advertise its designation, along with appropriate claims procedures. If the responsible party denies the designation, or if the discharge source was a public vessel, or if the President is unable to designate the source, the President must advertise or notify claimants concerning claim procedures against the domestic fund.⁶¹

Pollution damage and removal cost claims must be presented initially to the responsible party, except when the President has advertised procedures with respect to claims against the fund, as noted above.⁶² Upon a denial of liability by the responsible party, or a failure to settle the claim within 90 days, the claimant may elect to file an action against the responsible party or present his claim to the fund. Furthermore, if full compensation from the responsible party is unavailable, a claim for uncompensated damages and removal costs may be presented to the fund. No claim may be approved by the fund during the pendency of any action to recover costs included in the claim.⁶³

Any person, including the fund, who pays compensation for removal costs or damages, is subrogated to all rights, claims, and causes of action of the compensated claimant.⁶⁴ Following payment by the fund to a claimant, the Attorney General, at the request of the Secretary of Transportation, must proceed to recover all compensation paid, plus interest, administrative and adjudicative costs, and attorneys' fees. Such an action may be against the responsible party,

⁶⁰Id., § 3001.

⁶¹Id., § 1014.

⁶²Id., § 1013.

⁶³Id., § 1013(b)(2), (c) and (d).

⁶⁴Id., § 1015(a).

the guarantor, or any other person liable to the claimant or the fund "pursuant to any law."⁶⁵

The Act provides that the federal district courts have exclusive original jurisdiction of all controversies arising under the Act, except that state courts of competent jurisdiction "may consider" claims under the Act or state law.⁶⁶ This contradictory statutory language may be interpreted as empowering both federal and state courts to hear and determine pollution cases covered by the Act. State court judgments are valid and enforceable under the Act.

III AN ANALYSIS OF THE ACT

This part will analyze the Oil Pollution Act of 1990 from the viewpoint of certain original objectives of comprehensive oil spill legislation and from the context of the insight gained through the experience of the Prince William Sound response and removal operations. One of the principal goals of the comprehensive measure was to provide for prompt and fair compensation of pollution claims under a simpler and more predictable legal and regulatory system.⁶⁷ In addition, the legislation seeks to encourage a higher standard of care, while addressing particular concerns and problems identified during the Alaska clean-up effort. In their joint report⁶⁸ to President Bush, Transportation Secretary Skinner and EPA Administrator Reilly noted the following concerns and/or needs:

- comprehensive updating of compensation and liability laws to define the relationship between existing laws and to prevent costly litigation⁶⁹;
- potential increase of criminal and civil penalties and judicial and administration authority⁷⁰;

⁶⁵Id., § 1015(b).

⁶⁶Id., § 1017(b)(c).

⁶⁷Jones, *supra* note 2, at 10333. Pollution litigation is complicated and expensive. This is probably best evidenced by the history of the *Amoco Cadiz* litigation. That incident occurred on March 16, 1978. Six years later, the district court rendered its initial decision regarding liability. The decision on damages was not issued until January 11, 1988. Revised damage findings were submitted by the special master on February 21, 1989. Ultimately, on July 24, 1990, more than twelve years after the incident, the district court entered its judgment in favor of the damage claimants. Appeals and cross-appeals have been filed. Remuneration of the damaged parties may still be years away, when the appeal is finally decided.

⁶⁸Skinner & Reilly, *The EXXON VALDEZ Oil Spill*, prepared by the National Response Team (May 1989) ("Skinner & Reilly").

⁶⁹Id., at 35; see also Straube, *supra* note 9, at 10340.

⁷⁰Skinner & Reilly, *supra* note 68.

—contingency planning for realistic worst case scenarios, and better coordination of response activities with streamlining of decision-making;⁷¹

—implementation of the 1984 Protocols to the CLC and the Fund Convention to provide greater means to address tanker spills.⁷²

In this context, the Oil Pollution Act appears to achieve goals relating to its comprehensive scope, prevention provisions, and penalty program. However, the Act may fall well short of other goals respecting removal coordination, implementation of the international conventions and provision for prompt compensation of pollution claims.

A. Comprehensive Scope of the Act.

The most obvious achievement of the Act is the consolidation of disparate federal oil spill liability programs into a single statute which provides a single standard of liability with consistent defenses and specified limitations for oil spills from vessels, facilities and deepwater ports.⁷³ The statute covers both public and private claims, including removal costs, property and natural resource damage and economic losses. A domestic fund is activated to respond, as necessary, for removal costs, and to compensate public and private losses.

In the context of its comprehensive scope, the Act is a successful clarification of the former inconsistent federal provisions. As such, the new law appears to achieve the modernization called for in the joint report to President Bush.⁷⁴

B. Prevention and Oil Spill Penalties

The Act legislates major operational and technical changes to promote greater safety and improve the prospects of preventing oil

⁷¹*Id.*, at ES-1, ES-2, 29, 36. See also covering letters of Messrs. Skinner and Reilly to President Bush: *Straube*, supra note 9, at 10349.

⁷²*Skinner & Reilly*, supra note 68.

⁷³The only exception relates to the liability of OCS facilities and vessels carrying oil from such a facility. See § 1004(c)(3).

⁷⁴There is serious concern felt by some interests that the limitation standard is too "breakable." Section 1004 allows the limitation to be broken if there has been a violation of a federal safety, construction or operation regulation. In view of the myriad of applicable regulations, such a violation might easily result from simple negligence of almost anyone even distantly associated with a responsible party. In such a context, the Act practically provides limitless strict liability, which may be uninsurable. See *Oil Spills*, Vol. 21, No. 3, *Env't. Rep.* (BNA) 432 (July 6, 1990); *Env't. Rep.* 432 (July 6, 1990); *Submission Made by International Group of P&I Associations*, supra note 4, at p. 5; *James*, supra note 4, at p. 6.

spills. These include numerous provisions relating to personnel and equipment. While many of these provisions are controversial as to their overall safety value and/or effectiveness vis à vis other alternatives, the new law manifestly represents a substantial legislative undertaking to promote tanker safety and oil spill prevention.

The Act revises and substantially increases the administrative, civil and criminal exposures of persons responsible for oil spills. As such, the increased penalty exposure coincides with expanded liability limits to serve as a greater deterrent to unsafe operations.

C. Removal Responsibilities

Following the *Exxon Valdez* accident, there was considerable commentary regarding appropriate roles of the discharger and the federal, state and local governments in the removal process. Exxon undertook the lead role in the removal process amid criticism from several quarters.⁷⁵ Issues were raised and argued concerning the use of dispersants and/or bioremediation agents. Some called for "federalization" of the removal project, while others indicated that the discharger's clean-up activities were handled and executed effectively.⁷⁶ Alaskan officials, who wanted a firm say in the removal process, seemed to vacillate between supporting federalization and urging that Exxon remain the principal party charged with effecting the clean-up.⁷⁷ The issue of federalization was undermined by the paltry size of the federal funding available to respond to the clean-up. The federal government would have undertaken substantial financial obligations without an available appropriation if Exxon had declined to respond, or if the government had federalized the project.⁷⁸

The issue of removal responsibility was debated during the Congressional hearings on the proposed oil spill legislation. Some interests argued that the spiller should remain "on the front line," primarily responsible for and in charge of the clean-up process.⁷⁹ Others argued that while the discharger should be primarily liable for

⁷⁵See, generally *Skinner & Reilly*, supra note 68, at 12-23; *Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* (BNA) 2588, 2589 (April 14, 1989); Vol. 19, No. 51, *Env't. Rep.* (BNA) 2623, 2625 (April 21, 1989); Vol. 20, No. 48, *Env't. Rep.* (BNA) 1914 (March 3, 1990); Vol. 21, No. 2, *Env't. Rep.* (BNA) 155 (May 11, 1990); Vol. 21, No. 3, *Env't. Rep.* (BNA) 195 (May 18, 1990).

⁷⁶*Id.*

⁷⁷*Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* (BNA) at 2589, 2623-25.

⁷⁸*Id.*, at 2589, *Straube*, supra note 9, at 10340, 10341.

⁷⁹*Olney*, *Statement of the American Waterways Operators on Oil Pollution Liability, Cleanup and Compensation Legislation*, made to the Subcommittee on Water Resources, of the U.S. House Committee on Public Works and Transportation, June 28, 1989.

removal costs, the federal government was better suited to "manage" the process.⁸⁰ The debate was further complicated by the existing law and jurisprudence, under which the discharger was not statutorily responsible to conduct the removal. Accordingly, the discharger's removal expenses were considered "voluntary" and did not apply against the statutory limit of discharger's liability.⁸¹

Against this back-drop of confusion, disagreement and lack of appropriate funding, the Act provides access to a permanent domestic fund for removal operations.⁸² The Act does not, however, squarely designate the federal government or the discharger as the party primarily responsible to effect the operations. The new law mandates the President's role to "ensure effective and immediate" removal, while imposing substantial penalties and increasing the liability of a discharger who fails or refuses to comply with Presidential orders.⁸³ While the language regarding the federal government's role has been altered, it is unclear whether the new language places the government in any substantially different position than it was in under the former FWPCA language.⁸⁴

With respect to statutory limits, the language of the Act demonstrates that the limits are applicable to the statutory liability and removal costs⁸⁵ and appears to replace the jurisprudence under the FWPCA, which held that the discharger's clean-up efforts were "voluntary" and did not constitute a credit against statutory limits. This revision improves the removal process by encouraging the discharger to initiate removal activities even in the absence of a statutory obligation or Presidential order, since the expenditures will apply against the overall statutory liability of the discharger. To this extent, the Act represents a great improvement over the ambiguous and inconsistent removal obligations existing under the former law.

While the Act clarifies the limits applicable to removal costs, it is doubtful whether it effectively resolves the confusion and inefficiency associated with oil spill removal operations. Whether the responsible party or the federal government undertakes the clean-up, the new removal provisions add to an already complicated chain of uncoor-

dated command. The new statutory guidelines for removal activities under the National Contingency Plan require coordination among a large number of parties, including a national response unit, the on-the-scene coordinator, Coast Guard District Response Groups, area committee representatives, and state officials.⁸⁶ Vessel and facility plans must be coordinated with area plans which, in turn, must be in harmony with the National Contingency Plan.⁸⁷ In this unyielding hodgepodge of plans and personnel, the responsible party is statutorily obligated to render all "reasonable" assistance and cooperation requested by any "responsible" official.⁸⁸ The resultant prospect for duplicative, unnecessary or ineffective effort or expense becomes almost inevitable.

Rather than simplify and streamline the removal process by placing responsibility in a single agency, the Act exacerbates the already convoluted removal process. The kibitzing and finger-pointing which so drastically impeded the Alaskan clean-up effort will almost necessarily be compounded under any oil spill removal program in the future. In this respect, the Act appears to fall dramatically short of furnishing an improved removal process.

D. Relationship with Other Laws

The most glaring deficiency of the Oil Pollution Act is its failure to promote a uniform national and international approach through its relationship with domestic and international laws. As noted above, the Act makes marked strides in unifying under a single statute the various federal provisions dealing with oil spills. While such a program could serve to simplify the legal system associated with compensation of oil spill claims, the Act fails to achieve this objective, in not preventing duplicative and inconsistent state laws and remedies under the general maritime law and the common law. In effect, the Act replaces the former patchwork of inconsistent federal programs with a new hodgepodge—one federal statute overlapping numerous state provisions and general maritime law and common law remedies.⁸⁹

⁸⁰Id., § 4202.

⁸¹Id., §§ 4201(a) and 4202(a); FWPCA, § 311(c)(3)(d) and (j) (U.S.C. § 1321(c)(3)(d) and (j)). See also *Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* at 2697.

⁸²See *James*, supra note 4, at 6, 7.

⁸³The potential for duplication and confusion abounds as state laws and regulations proliferate. The joint House and Senate Conference Report does confirm that the Act preserves federal preemption of those areas within federal regulatory authority. *Conference Report on*

⁸⁰Rowland, *Testimony on Oil Spill Liability and Compensation Legislation and Oil Response and Clean-up*, before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, June 28, 1989.

⁸¹*United States v. Dixie Carriers, Inc.*, 736 F.2d 180 (5th Cir. 1984); *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 1979 AMC 1187 (4th Cir. 1979).

⁸²OPA, § 1012(a).

⁸³Id., §§ 1003(c)(2) and (3); 1004(c)(2)(B) and (C); 4201(a) and 4301(b).

⁸⁴See discussion supra.

⁸⁵OPA, § 1001(a).

Furthermore, the Act does not implement the international regime of the 1984 Protocols to the Civil Liability and Fund Conventions. If the international program had been implemented, crude oil tanker spills would have been covered by initial shipowner liability up to approximately \$78 million, supplemented by compensation from the international fund in amounts up to \$260 million.⁹⁰ In the event of a catastrophic spill with losses beyond these limits, the domestic fund would have been available, but only after compensation under the international fund had been exceeded. Thus, implementation of the Protocols would have provided access to a multimillion dollar international fund, financed by mandatory oil company contributions. In failing to tie the provisions of the Act to the fund, at it could have done, Congress effectively relieved the petroleum interests of substantial financial obligations.

In the final legislative compromise, concern over issues such as states' rights and discharger liability limits swayed an emotional Congress to abandon the long-pursued goal of a uniform national and international program for oil spills.⁹¹ In the balance, Congress may have severely compromised America's position with respect to future international safety and environmental conventions.⁹²

E. Claims Process

The procedure scheduled under the Act attempts to expedite claims compensation in a fashion similar to that of the international convention. The Act streamlines the process by channeling claims initially against the responsible party and subsequently against the domestic fund. However, each claimant must then elect whether to pursue additional or alternative state, common law or maritime claims. If the claimant pursues any claims under any theory, those claims must be adjudicated to a conclusion before the claimant can obtain approval and ultimate compensation of the claim from the domestic fund. As a result of the failure to preempt other inconsistent liability laws, the

⁹⁰H. R. 1465 § 1018, p. 122; see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Nonetheless, many states have rushed to enact their own oil spill legislation, see, e.g., Md. H. B. No. 392 (Apr. 24, 1990), or to propose their own regulations. See Cal. S. B. 2040 (Sept. 22, 1990); Fla. H. B. 517 (June 22, 1990); Fla. S. B. 1068 (June 11, 1990).

⁹¹See note 17, *supra*.

⁹²Implementation of the Fund Convention, which requires contributions from worldwide oil receiving interests, would have effected a sharing of removal costs and pollution damages among the international community, up to the international limits.

⁹³*Jacobsen & Yellen*, *supra* note 13, at 487, 488; *Temple, Barker & Sloane*, *supra* note 17, at VII-4.

claims process will necessarily become mired in a transactional and litigation mess.⁹³

The claims process is further stymied by the failure of the Act to designate a single forum for resolution of claims. The Act thus perpetuates the redundant process of identical claims for pollution loss and damage being adjudicated in multiple federal and state courts. The transactional costs and delay of such an unstructured program are exacerbated when no single forum has jurisdiction to oversee all claims and supervise consolidated pleading, discovery, motion and trial practice.

The net effect of the failure of the Act to preempt inconsistent liability laws and implement the international scheme may well perpetuate the litigation delays and transactional costs inherent in the typical adjudication of complex pollution incidents.

CONCLUSION

The Oil Pollution Act of 1990 culminates a 15-year struggle to enact comprehensive oil spill liability legislation. Spurred by public opinion in the wake of the *Exxon Valdez* spill, longstanding disagreement vanished as Congress unanimously approved this new law. In its rush to enact responsive legislation, Congress may have unwittingly compromised its original goal—to provide a simple, uniform program to ensure prompt compensation for oil pollution damages.

⁹³In contrast to the *Amoco Cadiz* litigation, claims under the international fund are handled more expeditiously. For example, payments in settlement of claims arising out of the 1980 *Tanio* spill in France, which was the most complicated and expensive incident handled by the international fund to date, were completed by 1985, with the great majority being made in the first four years. See *Information and Approval of Settlement of Claims (Tanio Incident)*, International Oil Pollution Compensation Fund (September 20, 1988).

V. CONCLUSION

The Louisiana Children's Code Committee's proposed statutory reforms²⁸² represent a practical, thorough and balanced approach to expanding putative fathers' constitutional rights. A putative father must show some interest in his illegitimate child to merit protection of his paternal rights. The proposed reforms would remove the barriers that currently prevent a putative father from blocking the adoption of his illegitimate child, while requiring affirmative steps on his part to establish a relationship with his child.

Additionally, the proposed reforms utilize the putative father registry, a statutory vehicle already in place in Louisiana, which has the potential to be a valuable tool to putative fathers who want to establish a relationship with their illegitimate children. Ideally, states could establish putative father registries that could allow cross referencing to prevent a natural mother from confounding the system by surrendering her baby for adoption in a neighboring state.

Although the proposed statutory reforms may slow down adoptive proceedings, as the Supreme Court noted in *Stanley v. Illinois*,²⁸³ "the Constitution recognizes higher values than speed and efficiency."²⁸⁴

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282. The Louisiana Children's Code Committee has proposed many reforms to both the private and agency adoption statutes. This Comment has highlighted only those pertinent to putative fathers' rights.

283. 405 U.S. 645 (U.S.)

284. *Id.* at 656-57.

THE DIRECT ACTION STATUTE AND OCEAN MARINE INSURANCE: CAN PROTECTION AND INDEMNITY INSURERS CONVINCE THE COURTS "TO MANACLE AN OLD AND BEATEN ENEMY?"

Direct action statutes generally give an injured person the unique right to name a tortfeasor's insurer as a direct defendant in an action based on an insured's tortious conduct.¹ Louisiana's Insurance Code contains such a statute.² The provisions of the Louisiana Insurance Code are limited, however, to "insurance *other than ocean marine* and foreign trade insurances. . . ."³ Despite the specific exclusion of ocean marine insurance from the provisions of the Insurance Code, federal courts, applying Louisiana's direct action statute, have upheld tort claims against ocean marine insurers.⁴ Recently, however, the Louisiana Supreme Court refused to apply another provision of the Insurance Code to ocean marine insurers in light of the ocean marine exclusion.⁵ This Comment will attempt to reconcile the Louisiana Supreme Court's latest proclamation on the ocean marine exclusion with the federal jurisprudence that holds that the direct action statute applies to ocean marine insurance. Specifically, the Comment will examine whether ocean marine insurers are exempt from direct action in the wake of the recent Louisiana decisions.

1. As a general rule, the common law bars a direct action by the claimant against the insurer because of an absence of privity of contract between them. Therefore, for the right of direct action to exist, a statute or a provision in the policy itself must prescribe the right to direct action against the insurer. G. COUCH, *COUCH ON INSURANCE* § 45:785 (2d ed. 1981).

Few states have adopted direct action statutes. These include: Louisiana, LA. REV. STAT. ANN. § 22:655 (West 1978 & Supp. 1991); Rhode Island, R.I. GEN. LAWS § 27-7-1, 27-7-2 (1989 & Supp. 1990); Wisconsin, WIS. STAT. ANN. § 632.24 (West 1980 & Supp. 1990); and Guam, GUAM GOV'T CODE § 43354 (1970).

2. The text of the statute provides in pertinent part:

B.(1) The injured person or his or her survivors or heirs . . . , at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, . . .

LA. REV. STAT. ANN. § 22:655(B)(1) (West 1978 & Supp. 1991).

3. *Id.* § 22:611 (emphasis added).

4. Johnson, *The Louisiana Direct Action Statute*, 43 LA. L. REV. 1455, 1528 (1983); see *infra* notes 25-76 and accompanying text.

5. See *infra* notes 78-129 and accompanying text.

THE DIRECT ACTION STATUTE

The concept of direct action arose in Louisiana in 1918 when the legislature passed an act⁶ to combat insurance companies who were escaping liability through "no action" clauses.⁷ Under "no action" clauses, insurers were not liable to an insured unless he had actually sustained loss through payment of a judgment to a person, based upon legal liability.⁸ If the insured had never paid a judgment because he was insolvent or had declared bankruptcy, under a "no action" clause, he suffered no "loss" and the insurer was not liable for payment to the insured or to the injured party.⁹ This inequitable result aroused public policy considerations because the fund created by the payment of premiums for the coverage was not being used.¹⁰ The 1918 act provided that the insolvency or bankruptcy of the insured would not release the insurer from liability, but would give the injured party a right of direct action against the insurance company "within the terms and limits of the policy."¹¹

In 1956, the legislature expressed the legislative intent behind the statute.¹² In an amendment, the legislature proclaimed that the purpose of the direct action statute was to give protection and coverage to "all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within . . . the terms and limits of said policy."¹³ One commentator¹⁴ on the direct action statute has observed that this amendment was probably a codification of the view expressed in *Lewis v. Manufacturers Casualty Insurance Co.*¹⁵ In *Lewis*, the court, commenting on the direct action statute, noted that "[t]he public policy of this State, announced time and again, is that an insurance policy against liability to the public is not issued primarily for the protection of the

6. Act approved July 11, 1918, No. 108, 1918 La. Acts 253.

7. Johnson, *supra* note 4, at 1457.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Act approved July 12, 1956, No. 946, 1956 La. Acts 175.

13. *Id.* Omnibus clauses provide coverage to persons who use a named insured's automobile with the permission of the insured. 15 W. McKENZIE AND H. JOHNSON, LOUISIANA CIVIL LAW TREATISE, INSURANCE LAW AND PRACTICE § 50 (1986).

14. Johnson, *supra* note 4, at 1465.

15. 107 F. Supp. 465 (W.D. La. 1952).

insured, but for the protection of the general public."¹⁶ Thus, by requiring that all insureds are entitled to insurance coverage under the terms of their policy, the direct action statute ensures that any victim of the insured's tortious conduct (i.e., the public at large) will have access to policy proceeds, even if the insured tortfeasor is judgment proof.

In short, the direct action statute allows an injured person (or his or her heirs) to sue an insurer without first obtaining a judgment against the insured. Specifically, the statute prohibits the insolvency or bankruptcy of the insured from releasing the insurer from the payment of damages.¹⁷ All that is required to prove that an insured is insolvent is a judgment against the insured tortfeasor which has become executory.¹⁸ For the statute to apply, the policy sued on need not have been written or delivered in Louisiana, provided the accident or injury occurred in Louisiana.¹⁹

Under the terms of the statute, a plaintiff has the option of suing the insurer alone, or the insured and the insurer jointly and in solido, with exceptions for circumstances where only the insurer may be sued.²⁰ The plaintiff's right of direct action, however, is limited to the terms and limits of the policy.²¹ Moreover, the insurer remains entitled to any lawful defenses available under the terms of the policy.²² Lastly, the statute sets forth the legislative intent that all liability policies are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable, and that the purpose of all liability policies is to give protection and coverage to all insureds whether they are named insureds or additional insureds.²³ A review of the statute's legislative history reveals that the legislature has never seen fit to address the Insurance Code's ocean marine exclusion, leaving interpretation of the exclusion to the courts.²⁴

16. *Id.* at 471.

17. LA. REV. STAT. ANN. § 22:655(A) (West 1978 & Supp. 1991).

18. *Id.*

19. *Id.* § 22:655 (B)(2).

20. *Id.* § 22:655 (B)(1).

21. *Id.*

22. *Id.* § 22:655 (C).

23. *Id.* § 22:655 (D).

24. Ocean marine insurance was not defined in the Insurance Code when the legislature adopted the ocean marine exclusion. See *supra* note 3 and accompanying text. In 1989, the legislature defined ocean marine insurance for the purposes of the Louisiana Insurance Guaranty Association law as follows:

ANALYSIS OF CASES INTERPRETING THE OCEAN MARINE EXCLUSION

The first court to address the applicability of Louisiana's direct action statute to ocean marine insurance was the United States District Court for the Eastern District of Louisiana in *Maryland Casualty Co. v. Cushing*.²⁹ In *Cushing*, the ocean marine exclusion issue arose after the JANE SMITH, a towboat, collided with a concrete pier and capsized in the Atchafalaya River.³⁰ Five seamen drowned in the collision. The owner and charterer of the JANE SMITH successfully petitioned the court to limit their liability under the provisions of the federal Limited Liability Act.³¹ The Limited Liability Act allows the owner of a vessel, and its charterer, to limit their liability to the value of the owner's interest in the vessel and her freight when loss, damage, or injury occurs without the owner's privity or knowledge.³² When a petition to

'Ocean marine insurance' includes marine insurance as defined in R.S. 22:6(13), except for inland marine, as well as any other form of insurance, regardless of the name, label or marketing designation of the insurance policy, which insures against maritime perils or risks, which are usually insured against by traditional marine insurances such as hull and machinery, marine builders' risks . . . , and marine protection and indemnity. Such perils and risks insured against include without limitation loss, damage or expense or legal liability of the insured for loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss or damage to the property of the insured or another person.

LA. REV. STAT. ANN. § 22:1379(9) (West 1978 & Supp. 1991). See *infra* notes 93-97 and accompanying text. In *Backhus v. Transit Casualty Co.*, the Louisiana Supreme Court defined ocean marine insurance as including protection and indemnity insurance. See *supra* note 109-110 and accompanying text.

25. 99 F. Supp. 681 (E.D. La. 1951), *rev'd*, 198 F.2d 536 (5th Cir. 1952), *reh'g den.* 198 F.2d 1021, *vacated on other grounds*, 347 U.S. 409 (1954).

26. *Cushing*, 99 F. Supp. at 682.

27. *Id.* at 682-83 (citing 46 U.S.C. § 183).

28. The Limitation of Liability Act provides in part:

(a) The liability of the owner of any vessel, whether American or foreign . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183 (1988).

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of [this chapter] relating to the limitation of the liability of the owners of vessels. . . .

46 U.S.C. § 186 (1988).

limit liability has been granted, suit against the vessel owner or charterer is precluded in any other action.³³ Nevertheless, in *Cushing*, the representatives of the drowned seamen sued the insurers of the vessel owner and charterer in a second action pursuant to the direct action statute.

The district court announced two principal reasons for dismissing the plaintiffs' direct action against the insurers.³⁴ First, the court noted that the insurance policies in question were protection and indemnity policies which protected the owner and charterer of the vessel against liability for personal injury and accidental death occurring on the vessel.³⁵ To determine whether the direct action statute applied to protection and indemnity insurance, the district court noted that the Louisiana Insurance Code defines and classifies the various types of insurance covered by the Code.³⁶ The court further observed that the Code draws a distinction between liability insurance³⁷ and marine and transportation (inland marine) insurance.³⁸ The court pointed out that the direct action statute is

29. The Supplemental Rules of Federal Civil Procedure for Certain Admiralty and Maritime Claims provide:

Upon compliance by the owner with the requirement of . . . this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

Supp. Fed. R. Civ. P. F(3).

30. *Cushing*, 99 F. Supp. at 682.

31. *Id.* at 682-83. Protection and indemnity insurance originated in England and America in the 1840s and 1850s to cover vessel owner's collision liabilities arising out of negligence. See A. PARKS, *THE LAW & PRACTICE OF MARINE INSURANCE AND AVERAGE* § 843 (1987). Prior to that time, standard hull policies traditionally covered the property aspect of marine insurance. As passenger services expanded and the field of tort law grew, a need for liability insurance developed. Protection and indemnity insurance was developed in response to this need. Today, the standard protection and indemnity policy covers many different risks, including excess collision damages, loss of life or injury to any person not covered under a state or federal compensation scheme, damages caused by vessels to docks and similar structures, pollution liabilities, and the expenses of investigation and defense.

32. *Cushing*, 99 F. Supp. at 683.

33. Section 6, subsection 4 provides:

Liability. Insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property.

LA. REV. STAT. ANN. § 22:6(4) (West 1950), cited in *Cushing*, 99 F. Supp. at 683.

34. Section 6, subsection 13(e) provides:

'Marine protection and indemnity insurance,' meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured

entitled "[l]iability policy . . . direct action against insurer" and relates solely to liability insurance as the Code defines it, but that the policies in question were policies of marine insurance, as defined under marine and transportation (inland marine) insurance.³⁵ The court reasoned that "[t]he legislature when it used the term 'liability insurance' in [the direct action statute] obviously intended to limit the application of that section to liability insurance. If [the legislature had] . . . intended [the direct action statute] to be applicable to marine insurance[,] it would have said so."³⁶ The court rejected the plaintiffs' argument that the term "liability insurance" used in the direct action statute is broader than the definition of liability insurance set forth in the Code.³⁷ The court found the argument to be unsupported by the basic principles of statutory construction. According to the court, "What purpose would there be in defining the types of insurance covered by the code if the very definitions given in the code are to be ignored by the code itself?"³⁸

The court's second and "more fundamental reason" for dismissing the direct action suit against the insurers was that the representatives of the drowned seamen had duplicated their claims against the shipowner and charterer because the plaintiffs had already filed claims for their injuries in the limitation of liability proceedings.³⁹ The court explained that if the plaintiffs received payment for their claims in the limitation proceeding, then the shipowner would have a right of reimbursement from his underwriters pursuant to his policy. If, however, the plaintiffs' direct action against the shipowner's underwriters were to proceed, and the underwriters paid the plaintiffs for their claims, the shipowner might be deprived of his right to indemnification from the underwriters.⁴⁰ In other words, if the underwriters' exposure on the policies was depleted in paying the seamen's claims, then the shipowner's right to be reimbursed by his underwriters would be extinguished.⁴¹ The court also explained that "[t]he effect . . . of

for personal injury, illness or death or for loss of or damage to the property of another person.

Id. § 22:6 (13)(e), cited in *Cushing*, 99 F. Supp. at 683.

35. *Cushing*, 99 F. Supp. at 683.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 683-84.

40. *Id.*

41. *Id.* at 684.

allowing these plaintiffs to proceed directly against the shipowner's insurers would be to force the owner to turn his insurance into the limitation proceeding as part of 'the interest of such owner in such vessel.' This the owner is not required to do."⁴² After discussing the purpose of the limitation of the liability statute and its origin,⁴³ the court held that

[t]o give effect to the direct action statute . . . by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress [in the Limitation of Liability Act] in a field already covered by that Act.⁴⁴

The court of appeals reversed, holding that the district court read the direct action statute too restrictively, and that the statute was nothing more than a permissible regulation of insurance authorized by the McCarran Act.⁴⁵ Moreover, the court concluded that permitting direct action would "not defeat the purpose of the federal limitation of liability statute, nor [would] it interfere with

42. *Id.* (quoting *City of Norwich v. Norwich & N.Y. Trans. Co.*, 118 U.S. 468 (1886)).

43. The court set forth that the purpose of the limitation of liability statute is to encourage the investment of capital in shipping and in ships in general. In adopting the Limitation of Liability Act, Congress embraced an essential difference between the limitation of liability statutes of the continental countries and that of England. In the continental countries, the amount surrendered in limitation was the value of the owner's interest *after* the collision, whereas in England, the amount surrendered was the value of the owner's interest *before* the accident. Under the continental statutes the shipowner could surrender the vessel in the condition in which it was *after* the accident, then claim his insurance and reimburse himself for any losses caused by the accident and incurred from the limitation. In contrast, the English law required the shipowner to include his insurance in the limitation proceeding. To encourage capital to come into the merchant marine and to provide for losses resulting from the perils of the sea, Congress adopted the continental view, thereby providing the shipowner with a method of not only limiting his liability, but also of protecting himself with insurance. *Id.*

44. *Id.* at 684.

45. *Cushing*, 198 F.2d at 539 (citing 15 U.S.C. § 1011, 1012). The McCarran Act provides in pertinent part:

Congress declares that the continued regulation . . . by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States.

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1011-1012 (1988).

the harmony or uniformity of admiralty law in its international or interstate relations."⁴⁶

On writ of certiorari, the United States Supreme Court, did not consider the lower courts' assessment of whether the direct action statute applied to marine insurance in light of Louisiana's Insurance Code ocean marine exclusion.⁴⁷ Instead, the Court focused solely on whether applying the statute would violate the "Jones Act, the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters."⁴⁸ The Supreme Court was split by a 4-1-4 vote and ultimately succeeded in merely ensuring

that . . . [direct actions] do not interfere with the Federal Limitation proceeding. To do this we need only require that the limitation proceeding be concluded first and the owner's liability settled under it. The petitioners could then discharge this liability, to the extent that their policies covered it, by paying into the limitation proceeding the proper sum. The door would then be left open for prosecution of direct actions against the insurance companies on the remaining coverage of the policies. Thus, whatever the insurers' liability may be under Louisiana law in the subsequent direct actions, the [vessel] owner's purse cannot be touched.⁴⁹

In sum, the *Cushing* decision merely established the procedural requisite that limitation proceedings precede direct actions against the vessel owner's insurer, and did not directly address the Louisiana Insurance Code's ocean marine exclusion.

In *Lovless v. Employers' Liability Assurance Corp.*,⁵⁰ the Fifth Circuit again addressed the direct action statute's interference with maritime jurisdiction. In *Lovless*, the plaintiff was injured aboard a tug delivering clam shells in the New Orleans New Basin Canal.⁵¹ The policy sued on was a "standard workmen's

46. *Cushing*, 198 F.2d at 539.

47. *Cushing*, 347 U.S. at 412.

48. *Id.*

49. *Id.* at 425 (Clark, J., concurring).

50. 218 F.2d 714 (5th Cir. 1955).

51. *Id.* at 715.

compensation and employers' liability policy" with a maritime endorsement.⁵² The insurance company moved for summary judgment, arguing that the direct action statute could not constitutionally apply to marine insurance because it would infringe on the exclusive maritime jurisdiction of federal courts.⁵³

The district court granted the insurer's motion for summary judgment, but the Fifth Circuit reversed. Without elaborating, the court distinguished the *Cushing* decision, on the grounds that, in *Cushing*, the vessel owner had petitioned for limitation of liability; whereas in this case, limitation of liability had not been invoked.⁵⁴ The *Lovless* court held that a plaintiff could sue jointly a vessel owner and its liability underwriter pursuant to the direct action statute where limitation proceedings had not been initiated.⁵⁵ Accordingly, the *Lovless* decision provided authority for the proposition that where limitation of liability was not involved, an injured party had a right of direct action against an insurer even if the policy covered maritime risks. With limitation of liability not at issue, however, the *Lovless* court had the opportunity to address directly whether the ocean marine exclusion precluded applying the direct action statute to marine insurance. The court elected instead to continue to view the issue as whether the direct action statute interfered with maritime jurisdiction.⁵⁶

Not until 1965, did a court directly address the ocean marine exclusion in the Insurance Code. In *Coleman v. Jahncke Services, Inc.*,⁵⁷ the plaintiff was injured when a barge in the tow of a Jahncke tug, THE CLARIBEL, hit a support piling of the Lake Pontchartrain Causeway, causing two spans of the causeway to collapse.⁵⁸ Additionally, a Winn-Dixie trailer-truck, which was crossing the causeway at the point of collision, was damaged and lost some of its freight.⁵⁹ The owner and operator of the causeway, the Greater New Orleans Expressway Commission, filed an in rem action against THE CLARIBEL, and an in personam action

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 341 F.2d 956 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966).

58. *Id.* at 957.

59. *Id.*

against the vessel's owner, Jahncke.⁶⁰ Both the Expressway Commission and Winn-Dixie sued Home Insurance Company under the direct action statute seeking coverage under a hull policy issued to Jahncke, which insured Jahncke and THE CLARIBEL against liability for personal injury or property damage caused by THE CLARIBEL.⁶¹

The district court attributed THE CLARIBEL'S unseaworthiness to Jahncke, thereby precluding application of the Limited Liability Act.⁶² Thus, the court's focus was not on whether the application of the direct action statute interfered with exclusive federal jurisdiction,⁶³ but whether Jahncke's policy, because it was marine in nature, was "excluded by statute from the application of the Louisiana Insurance Code, and hence from direct action."⁶⁴ The court succinctly rejected the insurer's argument that it could not be subject to the direct action statute because of the ocean marine exclusion, stating:

The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' Though historically no love has been lost between the direct action statute and the Fifth Circuit, we resist the temptation to manacle an old and now beaten enemy. 'There is no indication in [the direct action statute] that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others.'⁶⁵

60. *Id.*

61. *Id.* at 960.

62. *Id.* at 958. Under the terms of the Limitation of Liability Act a vessel owner cannot limit his liability if he has privity or knowledge of the damage that the vessel causes. See *supra* note 28. A vessel owner may be attributed with privity of the conditions that led to the unseaworthiness if, for example, he neglects to take adequate precautions after a faulty condition has been revealed to him. See 3 BENEDICT ON ADMIRALTY § 42 (7th ed. 1990).

63. The *Coleman* court expressed dissatisfaction over the *Cushing* holding, and stated: "Because of the Court's extraordinary division, it is impossible to say what the *Cushing* case stands for, beyond the fact that it presumably established a procedure to be followed by lower courts in handling similar cases until the Supreme Court further clarifies the issues." *Id.* at 960, quoting G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, § 715 (2d ed. 1975).

The *Coleman* court explained that the *Cushing* court was sharply divided with four justices maintaining that the direct action statute was repugnant to the policies of the Limitation Act, and not to be allowed where limitation was at issue, with another four proposing that the statute did not conflict with the limitation proceeding, and the remaining member thinking that the direct action should be stayed until conclusion of the limitation proceeding so that the shipowner's proceeds would not be exhausted before limitation. To break the deadlock the first four acquiesced in that solution. *Id.*

64. *Id.*

65. *Id.* (quoting *Cushing*, 198 F.2d at 538).

Thus, the court's rationale was that as long as a policy of insurance is a liability policy, the insurer is subject to the direct action statute.

The Fifth Circuit followed the *Coleman* court's reasoning in *Olympic Towing Corp. v. Nebel Towing Co.*⁶⁶ The action in *Nebel Towing* arose after the plaintiff's vessel, the M/V CARINTHIA, sank as a result of the alleged improper operation of Nebel Towing's vessel, the M/V G-H.⁶⁷ Nebel Towing successfully petitioned the court to limit its liability under the Limitation of Liability Act.⁶⁸ Nebel Towing's insurer was unsuccessful, however, in convincing the lower court that the limitation of liability defense was available to it under the Louisiana direct action statute.⁶⁹ On appeal, Nebel Towing's insurer contended that Louisiana's direct action statute did not apply to marine insurance policies, and that the protection and indemnity policy involved fell within the Insurance Code's ocean marine exclusion.⁷⁰

In analyzing the insurer's argument, the appellate court relied on the *Coleman v. Jahncke Services* decision.⁷¹ The court, quoting *Coleman*, stated:

The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' . . . There is no indication in . . . [the direct action statute] that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies by extending it to all others.⁷²

This language, according to the court, conclusively determined that the direct action statute applied to ocean marine insurance "until the Louisiana courts decide the matter differently."⁷³

The court also rejected the insurer's argument that because the policy at issue was a protection and indemnity policy, it was not subject to Louisiana's public policy which was that "liability insurance—including purported indemnity insurance—is issued

66. 419 F.2d 230 (5th Cir. 1969), cert. denied, 397 U.S. 989 (1970), overruled on other grounds, *Crown Zellerbach Corp. v. Ingram Indus. Inc.*, 783 F.2d 1296 (5th Cir.), cert. denied, 479 U.S. 821 (1986).

67. 419 F.2d at 232.

68. *Id.*

69. *Id.*

70. *Id.* at 236.

71. 341 F.2d 956.

72. *Nebel Towing*, 419 F.2d at 236 (quoting *Coleman*, 341 F.2d at 960-61).

73. *Id.* at 236.

primarily for the protection of the public rather than the insured."⁷⁴ Lastly, the insurers argued that because language in their policy required that the insured be held legally liable before the insurer would owe indemnity, the direct action statute would not apply.⁷⁵ In response, the court simply stated that the language relied on did not preclude a direct action.⁷⁶

In sum, federal courts have not specifically addressed the ocean marine exclusion when applying Louisiana's direct action statute to marine insurers. With the exception of the district court in *Cumming*, federal courts have not distinguished between the definitions that the Insurance Code provides for liability and marine insurance.⁷⁷ Instead, these courts have focused on the legislatively expressed intent that all policies of insurance, because they are issued for the good of the public, are subject to direct action. In two recent decisions, however, the Louisiana Supreme Court has looked past the policy considerations that the federal courts have underscored and focused instead on the contrasting definitions of liability insurance and marine insurance in applying the Insurance Code provisions to ocean marine insurance.

THE LOUISIANA SUPREME COURT INTERPRETS THE OCEAN MARINE EXCLUSION

In *Deshotels v. SHRM Catering Services, Inc.*,⁷⁸ the Louisiana Supreme Court proclaimed that the statutes which comprise the Insurance Code do not apply to ocean marine insurance.⁷⁹ In *Deshotels*, Joseph Deshotels was injured while working on a jack-up rig operating in the Gulf of Mexico.⁸⁰ Deshotels became ill, necessitating that he be transferred in a personnel basket to a crew boat.⁸¹ The crane operator, while lowering the personnel basket, slammed it into the crewboat's deck.⁸² Following the accident, Deshotels

74. *Id.* at 237 (citing *Musmeci v. American Auto. Ins. Co.*, 146 So. 2d 496, 501 (La. App. 4th Cir. 1962); *Mid-South Ins. Co. v. Lewis*, 236 F. Supp. 739, 741-42 (W.D. La. 1964), *aff'd sub nom. Jones v. Mid-South Ins. Co.*, 356 F.2d 887 (5th Cir. 1966)).

75. *Id.* at 236-37.

76. *Id.* at 237.

77. See *supra* notes 33-34 and accompanying text.

78. 538 So. 2d 988 (La. 1989).

79. *Id.* at 992.

80. *Id.* at 988.

81. *Id.* at 988-89.

82. *Id.* at 989.

sued his employer, SHRM, and Magnum-Marine,⁸³ the company that owned the rig and employed the crane operator, in federal court for negligence under both the Jones Act⁸⁴ and the general maritime law.⁸⁵ Additionally, he sued his employer for maintenance and cure and asserted a claim against Magnum-Marine, the rig owner, for breach of its duty to maintain a seaworthy vessel.⁸⁶

Deshotels's employer, SHRM, carried a standard workmen's compensation and employer's liability policy with a maritime endorsement through a Missouri insurer, Transit Casualty Company.⁸⁷ Subsequent to the institution of the action, Transit Casualty was declared insolvent.⁸⁸ Accordingly, Deshotels filed a third party demand against the Louisiana Insurance Guaranty Association [LIGA].⁸⁹ LIGA denied the claim, pointing to the "ocean marine" exclusion in the statute.⁹⁰ LIGA contended that the plaintiff was seeking to recover under maritime laws for maritime-related injuries that were risks normally and traditionally covered by ocean marine insurance.⁹¹

On these facts, the Louisiana Supreme Court characterized the issue as follows: "Does this claim for maritime-related injuries, brought on the Standard Workmen's Compensation and Employers' Liability policy with a marine endorsement, involve 'ocean marine insurance' so as to be excluded, by virtue of La. R.S. 22:1377, from the coverage of the Insurance Guaranty Association Fund?"⁹² The court initially noted that the Louisiana Insurance Code does not define "ocean marine" insurance.⁹³ The court did, however, note that the Insurance Code does define "marine and

83. Magnum-Marine filed for bankruptcy in Texas, thus staying all proceedings against it. *Id.*

84. 46 U.S.C. § 688 (1988).

85. 538 So. 2d at 989.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* LIGA is a non-profit, unincorporated entity created by the Louisiana legislature to pay covered claims, up to statutory limits, in the event that an insurer who is a member of the association becomes insolvent. LA. REV. STAT. ANN. § 22:1380, 1376 (West 1978 & Supp. 1991).

90. 538 So. 2d at 989. The exclusion provides that "[t]his Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance" LA. REV. STAT. ANN. § 22:1377 (A) (West 1978) (emphasis supplied).

91. 538 So. 2d at 989.

92. *Id.* at 990.

93. *Id.*

transportation (inland marine) insurance"⁹⁴ and that the definition includes insurance against liability of the insured for personal injury.⁹⁵ The court then outlined the various federal court decisions that have considered the meaning of "ocean marine insurance" and its exclusion from both LIGA coverage and the application of the direct action statute.⁹⁶ With regard to the direct action statute, the court cited federal cases which have held that the Louisiana direct action statute applies to claims classified as maritime or admiralty, despite the "ocean marine" exclusion.⁹⁷ After reviewing the federal case law, the court concluded that ocean marine insurance is excluded not only from LIGA coverage, but also from the entire scope of the Insurance Code, which includes the Louisiana direct action statute.⁹⁸ The court devoted the remainder of the opinion to prescribing a standard for determining whether a particular policy is "ocean marine" insurance so as to fall within the ocean marine exclusion.⁹⁹

To define ocean marine insurance, the court contrasted traditional marine insurance and the definition of marine protection insurance in the Insurance Code.¹⁰⁰ The court reasoned that "[i]n context, the term 'ocean marine' is used as a synonym for traditional marine insurance, that is, property insurance on hulls, freights and cargoes."¹⁰¹ Relying on the decision of Judge Heebe of

94. *Id.* (quoting LA. REV. STAT. ANN. § 22:6(13)(b)(e) (West 1959)).

95. LA. REV. STAT. ANN. § 22:6(13) provides in part:

(13) Marine and transportation (inland marine) . . .

(b) Insurance against loss or damage to persons or property in connection with or appertaining to marine, inland marine, transit or transportation insurance, including liability for loss or damage to either arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance, . . .

(e) 'Marine protection and indemnity insurance,' meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

LA. REV. STAT. ANN. § 22:6 (13)(b)(e) (West 1959).

96. *Deshotels*, 538 So. 2d at 990-91.

97. *Id.* at 991 (citing *Louless*, 218 F.2d 714 (5th Cir. 1955); *Cushing*, 99 F. Supp. 681 (E.D. La. 1951), *rev'd* 198 F.2d 536 (5th Cir. 1952), *reh'g den.* 198 F.2d 1021, *vacated on other grounds*, 347 U.S. 409 (1954); and *Coleman*, 341 F.2d 956 (5th Cir. 1965)).

98. *Id.* at 992.

99. *Id.* at 992-93.

100. *Id.* at 992.

101. *Id.* (emphasis added).

the Eastern District of Louisiana in *Blair v. Sealift, Inc.*,¹⁰² the court noted that an insurance policy that includes coverage for seaman's injuries is not a policy of ocean marine insurance.¹⁰³ Therefore, under this distinction, if a maritime policy included coverage for personal injuries, the *Deshotels* court would not deem it to be ocean marine insurance.

Also central to the court's reasoning was its observation that the Insurance Guaranty Association statute's exclusionary language entailed an enumeration of different kinds of insurance policies, rather than different risks.¹⁰⁴ The court pointed out that the LIGA statute states that Guaranty Association Insurance coverage applies "to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance."¹⁰⁵ The court reasoned that to determine whether a policy is ocean marine, the court should look to the type of policy involved, not the risks it encompasses.¹⁰⁶ Accordingly, the court concluded that "the exclusion for ocean marine insurance does not apply to employers' liability policies which incidentally cover risks associated with maritime activities."¹⁰⁷ The court held that the personal injury claim covered by a standard workmen's compensation and employers' liability policy with a maritime endorsement was not excluded from LIGA because the policy at issue was not ocean marine insurance.¹⁰⁸

Subsequent to the *Deshotels* decision, the Louisiana Supreme Court changed its analysis concerning what constitutes ocean marine insurance. In *Backhus v. Transit Casualty Co.*,¹⁰⁹ the court set forth that protection and indemnity insurance is ocean marine insurance even if it covers claims for personal injuries.¹¹⁰ The plaintiff in *Backhus* sued her employer's insurer and LIGA after she allegedly slipped and fell in a puddle of oil on the deck of an ocean-going vessel.¹¹¹ The court found that the policy in effect at

102. No. 84-5367 (E.D. La. 1986); consolidated on appeal with *Sifers v. General Marine Catering Co.*, 897 F.2d 1288 (5th Cir. 1990). See *infra* note 123 and accompanying text.

103. *Deshotels*, 538 So. 2d at 990.

104. *Id.* at 993 (citing LA. REV. STAT. ANN. § 22:1377 (A) (West 1978)).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. 549 So. 2d 283 (La. 1989).

110. *Id.* at 289.

111. *Id.* at 284.

the time of the accident was a protection and indemnity policy which provided coverage for personal injury claims.¹¹² LIGA contended that protection and indemnity insurance, even if it provides coverage for personal injuries, is ocean marine insurance for which it did not owe coverage.¹¹³

In analyzing what constitutes ocean marine insurance, the *Backhus* court recognized, as did the *Deshotels* decision, the absence of a legislative definition for ocean marine insurance.¹¹⁴ Unlike the *Deshotels* court, however, the *Backhus* court did not distinguish maritime insurance against loss of property (i.e. hulls, freights, cargoes) from maritime insurance that provides coverage against personal injuries. The court observed that although the Louisiana Insurance Code does not define "ocean marine insurance," it does define the closely related phrase, "marine and transportation (inland marine)" insurance.¹¹⁵ The court then noted that among the types of insurance included within that category is "marine protection and indemnity insurance," which includes insurance "against legal liability . . . of the insured for personal injury, illness or death or for loss of or damage to the property of another person."¹¹⁶ This definition, the court reasoned, supported the view that "protection and indemnity" insurance, even that which provides protection against liability for personal injuries, is a form of "ocean marine" insurance.¹¹⁷

Additionally, the court found that the Louisiana Insurance Code's definition of marine insurance corresponded with that found in several leading treatises and published articles concerning maritime insurance law.¹¹⁸ Employing the civilian principle that "words of art and technical terms must be given their technical

112. *Id.* at 286-87.

113. *Id.*

114. *Id.* at 287.

115. *Id.* (citing LA. REV. STAT. ANN. § 22:6(13) (West 1959)); see *supra* note 97 and accompanying text.

116. *Id.* at 288 (quoting LA. REV. STAT. ANN. § 22:6(13)(e) (West 1959)).

117. *Id.* at 289. The court reached this conclusion notwithstanding that in *Deshotels* the court held that insurance policies with coverage for a seaman's injuries are ocean marine insurance. *Deshotels*, 538 So. 2d at 990.

118. *Backhus*, 549 So. 2d at 288. The court cited definitions from maritime treatises, such as:

Ocean marine insurance, although usually thought of in connection with oceangoing vessels and their cargoes, . . . also covers 'the liabilities of shipowners, marinas, stevedores, and others for injuries or damage to third parties.' The property insurance aspect of marine insurance comprises hull insurance and cargo insurance, while the liability insurance consists of collision liability insurance the ('running down

meaning when the law involves a technical matter,"¹¹⁹ the court concluded that "[p]rotection and indemnity insurance is consistently treated as marine insurance within the industry."¹²⁰ Next, the court rejected the plaintiffs' argument that the "protection" aspect of protection and indemnity insurance was the type to which LIGA protection was intended to apply on the basis that nothing in the Louisiana Insurance Code indicated that the legislature intended to exclude from LIGA coverage "only that aspect of ocean marine insurance related to property interests."¹²¹ Finally, the court noted the anomaly that now exists with regard to LIGA responsibility for maritime personal injury claims:

Under *Deshotels*, the Louisiana Insurance Guaranty Association is responsible for maintenance and cure owed by an insolvent insurer under a workers' compensation policy with a maritime endorsement, because such a policy does not constitute 'ocean marine insurance.' The [LIGA] is not responsible, however, for maintenance and cure owed by an insolvent insurer under a protection and indemnity policy, because such a policy does constitute 'ocean marine insurance.' In the absence of more specific statutory definitions or statements authorizing expansive interpretation of [LIGA] coverage in spite of statutory exclusions, we are unable to find the language of the statute susceptible of any different meaning; accordingly, resolution of this anomaly must rest with the legislature.¹²²

Backhus established that a plaintiff who suffers an injury covered by a defendant insurer's protection and indemnity policy has no right of action against LIGA should the insurer be declared insolvent. This precept was acknowledged by the Fifth Circuit Court of Appeals and declared "the law of this circuit" in *Sifers v. General Marine Catering Co.*¹²³ Consequently, *Sifers* implicitly overrules the prior federal decisions which held that the direct action statute applies to ocean marine insurance.

clause'), protection and indemnity insurance, and other miscellaneous liability insurance.

Id. (citing 1 A. BRUNCK, V. SIMONE, & C. WILLIAMS, OCEAN MARINE INSURANCE § 1-4 (1988) (footnotes omitted)).

119. *Id.* at 289 (citing LA. CIV. CODE ANN. art. 11 (West 1978 & Supp. 1989)).

120. *Id.*

121. *Id.* at 291.

122. *Id.* at 291-92 (footnote omitted).

123. 892 F.2d 386, 391, *aff'd in part*, and *rev'd in part on rehearing*, 897 F.2d 1268 (1990) (holding that not only is protection and indemnity insurance covering personal injury ocean marine insurance, but protection and indemnity insurance against liability for damage to the property of third persons is also ocean marine insurance).

In *Delaune v. Saint Marine Transportation Co.*,¹²⁴ a recently published opinion, Judge Carr of the Eastern District of Louisiana granted summary judgment in favor of underwriters who provided protection and indemnity insurance and who had been sued pursuant to the direct action statute.¹²⁵ Citing *Sifers* and *Backhus*, the court noted that protection and indemnity policies constitute "ocean marine" insurance within the meaning of the Louisiana Insurance Code.¹²⁶ The court reasoned that because the direct action statute is subject to the ocean marine exclusion, it follows that the direct action statute applies only to insurance other than marine.¹²⁷ Furthermore, the court acknowledged that prior cases exist in which a plaintiff sued a protection and indemnity insurer under the direct action statute.¹²⁸ The court determined, however, that these cases were not binding because not only did they not address the ocean marine exclusion, but they were decided prior to *Deshotels* and *Backhus*.¹²⁹

CONCLUSION

The Louisiana Insurance Code prohibits the application of its provisions to ocean marine insurance.¹³⁰ The Insurance Code, however, lacks a definition of what constitutes "ocean marine insurance." Without such statutory guidance, federal courts faced with resolving whether Louisiana's direct action statute applies to marine insurance have looked to public policy considerations behind the statute's enactment.¹³¹ This public policy provides that all policies of insurance are issued for the good of the public, rather than the good of the insured.¹³² Accordingly, the federal courts initially faced with the applicability of the direct action statute, virtually ignored the ocean marine exclusion and applied the direct action statute liberally to hold that an injured party does have a right of direct action against a marine insurer.¹³³ Recent Louisiana

Supreme Court decisions, however, by defining ocean marine insurance to include protection and indemnity insurance,¹³⁴ seemingly provide that the ocean marine exclusion precludes an injured party from having a right of direct action against a protection and indemnity insurer.¹³⁵ These decisions, however, do not explicitly overrule prior federal jurisprudence that cites Louisiana law declaring that the direct action statute applies to marine insurance.

First, *Deshotels v. SHRM Catering Services, Inc.*,¹³⁶ was the first Louisiana decision to address the ocean marine exclusion contained in the Louisiana Insurance Code. The issue before the *Deshotels* court was not whether an injured party had a right of direct action against an insurer providing ocean marine insurance, but whether LIGA provided coverage to an injured party entitled to recover from an insolvent insurer pursuant to a standard workers' compensation policy with a maritime endorsement.¹³⁷ Thus, the Court's statement concerning the ocean marine exclusion is dicta.

The second Louisiana decision to address the ocean marine exclusion was *Backhus v. Transit Casualty Co.*¹³⁸ In *Backhus*, the court could have relied on the *Deshotels* dicta to determine that the plaintiff did not have a right of direct action against the ocean marine (protection and indemnity) insurer in that case. The *Backhus* court did not do so.¹³⁹ Instead, the court held that protection and indemnity insurance is ocean marine insurance, and therefore, excluded from LIGA coverage.¹⁴⁰ The court's holding was based on an absence of legislative intent to protect individuals entitled to recover under protection and indemnity policies.¹⁴¹ In contrast, the federal courts, when applying the direct action statute, have pointed to language in the statute that expresses the intent of the legislature that all liability policies are issued for the benefit of all injured persons.¹⁴² Implicit in this statement of intent

124. 749 F. Supp. 1463 (E.D. La. 1990).

125. *Id.* at 1473.

126. *Id.* at 1470-71.

127. *Id.*

128. *Id.* at 1468-70.

129. *Id.* at 1471. Judge Carr gives an expansive application to the Louisiana Supreme Court's holdings in *Deshotels* and *Backhus* by finding that these holdings apply not only to LIGA issues, but to actions brought pursuant to the direct action statute as well.

130. See *supra* note 3 and accompanying text.

131. See *supra* note 65 and accompanying text.

132. *Id.*

133. See *supra* notes 25-77 and accompanying text.

134. See *supra* notes 102-115 and accompanying text.

135. In fact, one United States district court has held that the direct action statute is subject to the ocean marine exclusion and dismissed a direct action against a protection and indemnity insurer. See *supra* notes 118-122 and accompanying text.

136. See *supra* note 78.

137. See *supra* note 87 and accompanying text.

138. See *supra* note 109.

139. See *supra* notes 109-122 and accompanying text.

140. See *supra* notes 109-122 and accompanying text.

141. See *supra* note 122 and accompanying text.

142. See *supra* notes 65 and 72 and accompanying text.

is arguably a desire on the part of the legislature to protect individuals entitled to recover from any liability policy, including a protection and indemnity policy.

For the courts to conclude that LIGA does not owe coverage to a claimant who is unable to collect from an insolvent insurer under a protection and indemnity policy is an entirely different matter from deciding that a protection and indemnity insurer is not subject to direct action. If, in actions for personal injuries, protection and indemnity insurers are exempt from an injured party's right of direct action against them, while insurers providing standard workers' compensation and liability coverage with a maritime endorsement are subject to direct action, the anomaly created will arouse the same public policy concerns that led to the enactment of the direct action statute in the first place: the fund created by the payment of premiums would not be used. Moreover, arguably, the legislature has an interest in limiting the number of claims for which the fund created by LIGA provides. Strictly construing the ocean marine exclusion is consistent with this interest. In contrast, the legislature has no corresponding interest in preventing a plaintiff from suing a protection and indemnity insurer directly. Instead, by ensuring that accident victims have all avenues of recovery available to them through legislation such as the direct action statute, the legislature is able to offer protection to the public.

This author submits that until the legislature expresses its intent regarding the applicability of ocean marine insurance to the direct action statute, the loopholes created by *Deshotels* and *Backhus* remain open, and the courts should uphold a personal injury victim's right of direct action against a tortfeasor's protection and indemnity insurer.

Cheryl L. Wilson

CASENOTES

MILES v. APEX MARINE CORPORATION: FROM ANOMALY TO ANOMALY IN SEAMEN'S REMEDIES

On July 18, 1984, Ludwick Torregano, a seaman, was savagely stabbed to death by a fellow crewman, Clifford Melrose, aboard the vessel M/V ARCHON in United States and Washington state territorial waters.¹ Mercedel Miles, Torregano's mother and administratrix of his estate, sued the vessel's operators, charterer, and owner (collectively Apex) in the United States District Court for the Eastern District of Louisiana.² She alleged negligence under the Jones Act³ for failure to prevent the assault on Torregano and further alleged "breach of the warranty of seaworthiness under general maritime law for hiring a crewman unfit to serve."⁴

Miles sought compensation for loss of support and services and for loss of society of her son.⁵ She also claimed punitive damages and sought compensation to Torregano's estate for his "pain and suffering prior to his death and for his lost future income."⁶

The district court granted Apex's motion to strike the punitive damages claim, "ruled that the estate could not recover Torregano's lost future income, and denied Miles' motion for a directed verdict" for the Jones Act negligence and the general maritime unseaworthiness claims.⁷

1. *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 320 (1990), *aff'g* *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989).

2. *Id.* at 320.

3. 46 U.S.C. app. § 688 (1988).

4. *Miles*, 111 S. Ct. at 320.

5. *Id.*

6. *Id.*

7. *Id.*

Isle shippers: Oil flow may not go

It's 'a potentially crippling problem'

By Gene Alshire
Advertiser Consumer Writer

State officials have called a meeting next week of utilities, sugar plantations, shipping and oil companies to discuss what one shipping official calls "a potentially crippling statewide problem."

The problem is how to make sure that the flow of oil into the state, and the shipment of fuel oil between islands, is not interrupted as a result of new state and federal laws.

Because of these laws, shippers are facing virtually unlimited liability for accidents such as major oil spills. This means the shipping companies either

will not be able to obtain insurance, which they must have to operate, or it will be prohibitively expensive, according to officials at Hawaiian Tug and Barge, a subsidiary of Hawaiian Electric Industries.

"This is a community dilemma that touches all of us," said barge company president Charles Swanson.

In February, one of Hawaii's two refineries, Pacific Resources Inc., announced it would stop shipping fuel oil to the Neighbor Islands. Primary users of fuel oil are the state's electrical utilities and sugar plantations, which also supply power to Neighbor Island utilities as a result of burning sugar by-products.

Hawaiian Tug and Barge said it would pick up the slack, shipping oil to the plantations on a

space-available basis. But the tug and barge company, which already ships fuel oil to its sister companies — Maui Electric Co. and Hawaii Electric Light Co. — has made clear it is not eager to make a career of this.

Chevron, which operates the state's other refinery, also has some existing contracts to ship fuel oil to the Neighbor Islands, which it will honor, regional manager C.P. "Chuck" Woodland said. "The real problem is going to come up as contracts start to expire in a year or 18 months," he said.

Chevron imports crude oil and some refined products such as gasoline into the state and would be affected by the national law if something isn't done to put a limit on the liability a shipper faces, Woodland said.

However, he said he is confident this national problem will be dealt with before the rules implementing the federal law come out next year.

In the future though, Woodland said, shippers are going to increasingly be asking themselves if it is worth the risk of liability to continue to ship fuel oil, which is produced during the refining process, and is a low-profit product.

Murray Towill, director of the state Department of Business, Economic Development & Tourism, said next week's meeting will bring together "...all of the parties involved, to make sure we're dealing with the same facts, the same information, and hopefully put together a group that can pursue options and solutions (to the problems.)"

PRI to stop interisland oil shipping

□ industries that sell electricity depend on oil and could be hit hard

By Russ Lynch
Star-Bulletin

Neighbor island fuel oil users are scrambling to find new ways to get supplies because of a decision by refiner Pacific Resources Inc. to stop shipments to them at the end of March.

PRI said it has no choice because it faces potentially unlimited liability for spills under new federal and state laws.

Chevron U.S.A., facing the same insurance problems, said it will continue to satisfy existing contracts but will seek no new fuel oil business on the neighbor islands.

Because alternatives may be found, there is no suggestion yet that the oil shipment problem might result in more power shutdowns or brown-outs on the other islands.

However, sugar plantations, which sell electricity to the neighbor island utilities to earn money to help compensate for low returns from sugar, could be hit hard.

"It's a big item for us, because of the contract with the utility," said Richard Cameron, president of Hawaiian Commercial and Sugar Co., which supplies power to Maui Electric Co.'s grid.

"We have this firm power contract with the utility," he said.

The sugar company, part of Alexander & Baldwin Inc., uses about 300,000 barrels of oil a

See OIL, Page A-4

Continued from Page A-1

year, shipped by PRI to Maui.

PRI has told the company it will not ship fuel oil to Maui after the end of February, Cameron said. HC&S's contract with PRI expired at the end of December, but PRI has continued to supply oil.

"We're in the throes, thrashing around like all the other users of heavy oils on the outer islands," he said. Cameron said he does not yet know how his company will get the oil it needs.

"The risk is just too great," said Andrea Simpson, spokeswoman for PRI, which owns the Hawaiian Independent Refinery at Barbers Point.

PRI's last neighbor island supply contract runs out on March 31. Beginning April 1, it will make the oil available at the barge harbor at Barbers Point but will not carry it to sea.

Provisions of the federal Oil Pollution Act of 1990 and new state laws could lead to oil carriers having to prove that they have

unlimited liability coverage, which no insurance company is willing to sell.

"It's part of our risk management," said Colleen Jones, marketing services pricing manager at Chevron. "We are honoring existing arrangements, but we are not taking on additional business to ship by barge."

A reliable oil supply is a big concern for the sugar companies who use hundreds of thousands of barrels of oil to run generators.

The Hilo Coast Processing Co., for example, had electricity sales of about \$9 million last year, about one-third of its total revenues. "It's significant to our operation because we have to use oil

whenever the sugar operation is down," said James Andrasick, executive vice president of C. Brewer & Co., majority partner in the Big Island cooperative with a few independent growers.

"We'd really be stuck between a rock and a hard place," Andrasick said. The contract with Hawaii Electric Light Co. allows Hilo Coast Processing only four weeks' total down time each year. Bagasse is burnt a lot of the time to heat the boilers that run the generators. But at best, Hilo Coast can maintain only a two-day supply of bagasse. Oil is essential.

The company could burn coal and has done so in the past but it is much more expensive than oil.

Andrasick said. "There would be an economic penalty." Since Hilo Coast's payment for oil is based on HELCO's costs, it would not rise if Hilo Coast's costs alone went up. Hilo Coast would have to absorb the difference.

A Brewer subsidiary, Brewer Environmental Industries, already ships bulk quantities of aggregates, sand and so on to the other islands and is looking into what it might be able to do with oil, he said.

The Hawaiian Electric Industries Inc. subsidiary that hauls oil and commercial goods between the islands is also concerned about how it is going to surmount the new requirements. Kent

Whitman, vice president of operations for Hawaiian Tug & Barge and Young Brothers Ltd., said that when the final rules and regulations are drawn up, they could be prohibitive.

"When they go into effect, it might be intolerable for the operators to actually continue. You couldn't buy enough insurance," Whitman said.

PRI said that the Maui and Big Island electric utilities have made arrangements to buy fuel oil from PRI at the barge harbor and ship it themselves. Gasoline and other light fuels are not affected by PRI's decision, only the hard-to-clean-up heavy oils such as those burned to heat boilers.

SCOMM

79:19

(7)

HOUSE COMMITTEE REPORT

Date Referred: February 21, 1992

FURTHER REFERRALS:

Resources
Judiciary

Date of Committee Action: 3/9/92

The House Special Committee on Oil and Gas Committee considered:

SSHB 540

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540

HB 540 CIVIL LIABILITY FOR OIL SPILLS

"An Act limiting the liability of an oil spill response action contractor for an act or omission that is not contrary to a state or national oil spill contingency plan or, notwithstanding the state or national plan, that is not contrary to an order of an on-scene coordinator; repealing the requirements that liability is not limited in an action for damages to personal property not caused by oil and is only limited if the act or omission occurs within 15 days after the release of oil; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS SS HB 540 (049)

☐ the same title☒ a new title☐ have attached amendments(s)☐ do pass☐ do not pass☐ no recommendations☐ individual recommendations☐ additional referral to the 22 Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS:

(Dept/Date)

☐ fiscal impact _____☐ fiscal note(s) _____☐ zero fiscal note _____☐ zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	A*
<i>[Signature]</i>	☒	<i>Mike Savane</i>		☒	
<i>[Signature]</i>	☒	<i>[Signature]</i>		☒	
<i>[Signature]</i>	☒				
<i>[Signature]</i>	☒				

[Signature]
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SSHB 540 (0+6)

Revision Date: 3/10/92
Title: Responder Immunity
Sponsor: Hudson
Requestor: (H) Oil and Gas

Department Affected: Environmental
Conservation
BRU: Spill Prevention and Response
Component: Spill Prevention, Planning and
Management

COMPONENT SERIAL NO.

1	4	3	0
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

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

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

The committee substitute adopted by the House Oil + Gas Committee on 3/9/92 does not change this fiscal note. *Janice Adair*

Prepared by: Janice Adair
Division: Commissioner's Office

Phone: 465-5010
Date: 2/21/92

Approved by Commissioner: *Janice Adair*
Agency: Environmental Conservation

Date: 2/21/92

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 20, 1992

SUBJECT: Response action contractors - (SSHB 540)
TO: Representative Bill Hudson
FROM: Michael F. Ford
Legislative Counsel 

The following is a section by section analysis of SSHB 540:

Section 1 - Provides that an oil spill response action contractor whose act or omission is not contrary to the state or national oil spill contingency plans, or if contrary, is not contrary to an order of the state or federal on-scene coordinator, receives protection from certain civil liability.

Section 2 - Repeals two current exceptions to the limited liability provisions of AS 46.03.825(a). The first being an action for damages to personal property not caused by oil, and the second being an action based on an act or omission that occurs more than 15 days after the release of oil.

Section 3 - Repeals the sunset provisions enacted in HB 196, that would repeal the limited liability of response actions contractors.

Section 4 - Retroactive clause for section 3.

Section 5 - Effective date.

MFF:pl
92-116.plm

Chapter 92

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AN ACT

Limiting civil liability for acts or omissions of an oil spill response action contractor and establishing civil liability on responsible parties for certain acts or omissions of a response action contractor; amending the definitions of "response action" and "response action contractor"; relating to a report by the Citizens Oversight Council on Oil and Other Hazardous Substances; providing for the repeal on July 1, 1992, of changes made by this Act; and providing for an effective date.

46.03.822(a)

* Section 1. AS 46.03.822(a) is amended to read:

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

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

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CSHB 196(FIN)

(2) the owner release, or a threatened release, of a hazardous substance;

(3) any person operated any facility or vessel there is a release, or a threatened release, of a hazardous substance;

(4) any person treatment, or arranged with substances owned or possessed or entry, at any facility or hazardous substances, from incurrence of response cost.

(5) any person refined oil, for transport to a facility from which there is a release of a hazardous substance.

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

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

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

(2) the owner release, or a threatened release, of a hazardous substance;

CSHB 196(FIN)

Chapter 92

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

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

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

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

* Sec. 2. AS 46.03.822(a) is repealed and reenacted to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

46.03.822(a)

Chapter 92

substance;

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

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

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

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

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

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

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

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the response action services were

* Sec. 5. AS 46.03.823(a) is repealed

(n) A person who is a release of a hazardous substance order by a state or federal agency civilly liable for injuries, costs, or threatened release unless the response action contractor misconduct. To show negligence acts or omissions of the contractor with generally accepted professional services were performed.

* Sec. 6. AS 46.03.823(g) is repealed

(g) In this section, mitigation or cleanup of a release including investigation, evaluation, design and construction, removal

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

(g) In this section,

(1) "response cleanup of a hazardous substance plan development, mapping equipment provision;

(2) "response action with respect into by a person with

(A)

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that provides for

(C)

CSHB 196(FIN)

46.03.822(k)

46.03.823(a)

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1 the response action services were performed.

2 * Sec. 5. AS 46.03.823(a) is repealed and reenacted to read:

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

46.03.823(a)

13 * Sec. 6. AS 46.03.823(g) is repealed and reenacted to read:

14 (g) In this section, "response action" means an action taken in connection with the
15 mitigation or cleanup of a release or threatened release of a hazardous substance other than oil,
16 including investigation, evaluation, plan development, mapping and surveying, engineering,
17 design and construction, removal, and equipment provision.

46.03.823(g)

18 * Sec. 7. AS 46.03.823(g) is repealed and reenacted to read:

19 (g) In this section,

46.03.823(g)

20 (1) "response action" means an action taken in connection with the mitigation or
21 cleanup of a hazardous substance release or threatened release, including investigation, evaluation,
22 plan development, mapping and surveying, engineering, design and construction, removal, and
23 equipment provision;

24 (2) "response action contract" means a written contract or agreement to provide
25 response action with respect to a release or threatened release of a hazardous substance, entered
26 into by a person with

27 (A) the department;

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

30 (C) a federal agency with jurisdiction over the release or threatened

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1 release; or

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

4 (3) "response action contractor" means

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

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

13 * Sec. 8. AS 46.03 is amended by adding a new section to read:

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

21 (1) the response action contractor would have been liable for the initial release
22 or threatened release under AS 46.03.822 even if that contractor had not carried out a response
23 action;

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

26 (3) the response action contractor, without approval by the federal or state on-
27 scene coordinator, substantially deviated from an oil spill contingency plan previously approved
28 under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible
29 for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms
30 of that plan under a contract with parties responsible for the release under AS 46.03.822.

4.

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1 (b) The limitation on

2 (1) an action for

3 (2) an action for

4 (3) an act or o

5 (c) If the liability of a

6 section or if the provisions of

7 oil spill response action contr

8 other liability that results from

9 a release or threatened releas

10 contractor is negligent, gross

11 does not apply to an oil spi

12 initial release or threatened

13 carried out a response action

14 (d) In this section,

15 threatened release of oil, inc

16 or threatened release of oil.

17 * Sec. 9. AS 46.03.826 is amen

18 (14) "respon

19 response action with respect

20 into by a person with

21 (A)

22 (B)

23 that provides for re

24 (C)

25 release, or

26 (D)

27 under state or fede

28 (15) "resp

29 (A)

30 release or threat

CSHB 196(FIN)

46.03.825

Chapter 92

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

- (1) an action for personal injury or death;
- (2) an action for damages to tangible personal property not caused by oil; or
- (3) an act or omission that occurs more than 15 days after the release.

(c) If the liability of an oil spill response action contractor is not limited under (a) of this section or if the provisions of (a) of this section do not apply because of (b) of this section, the oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the response action contractor's act or omission with respect to a release or threatened release of oil unless the act or omission of the oil spill response action contractor is negligent, grossly negligent, or constitutes intentional misconduct. This subsection does not apply to an oil spill response action contractor who would have been liable for the initial release or threatened release of oil under AS 46.03.822 even if that contractor had not carried out a response action.

(d) In this section, "response action" means an action taken to respond to a release or threatened release of oil, including but not limited to mitigation, clean up, or removal of a release or threatened release of oil.

* Sec. 9. AS 46.03.826 is amended by adding new paragraphs to read:

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

- (A) the department;
- (B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;
- (C) a federal agency with jurisdiction over the release or threatened release; or
- (D) another person potentially liable for the release or threatened release under state or federal law;

(15) "response action contractor" means

- (A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the

46.03.826(14),
(15)

Chapter 92

1 contract, including a cooperative organization formed to maintain and supply response
2 equipment and materials that enters into a response action contract relating to a release
3 or threatened release;

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

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

8 * Sec. 10. AS 46.03.822(3), 46.03.825, 46.03.826(14), and 46.03.826(15) are repealed.

9 * Sec. 11. REPORT. The Citizens Oversight Council on Oil and Other Hazardous Substances
10 (AS 24.20.600) shall review the entire subject of response action contractor civil liability and the status
11 of oil spill contingency plan holders. The review of both subjects shall be completed and a report
12 submitted to the legislature before January 15, 1992. The report must address whether further
13 modifications are necessary to state laws on response action contractor civil liability, and include an
14 analysis of whether the present state laws that require shippers and owners to hold contingency plans
15 and that enable shippers and owners to contract with response action contractors to carry out contingency
16 plans are adequate to protect the public in the event of an oil spill.

17 * Sec. 12. Sections 2, 5, 7, and 10 of this Act take effect July 1, 1992.

18 * Sec. 13. Sections 1, 3, 4, 6, 8, 9, and 11 of this Act take effect immediately under AS 01.10.070(c).

Repealer

Eff. §§ 2,
5, 7, and
10 take
effect
7/1/92;
remainder
of Act
takes
effect
7/3/91

1 Relating to persons who s

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4
5 * Section 1. LEGISLATIVE P
6 hardships endured by the members
7 their country during World War I.

8 * Sec. 2. AS 05.15.210(34) is

9 (34) "veter

10 the state, or a branch of it

11 pecuniary profit, the most

12 armed services or forces of

13 Guard.

14 * Sec. 3. AS 16.05.341 is am

15 Sec. 16.05.341. F

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OCTOBER 26, 1991 DRAFT REGULATIONS

18 AAC 75.425. OIL DISCHARGE PREVENTION AND CONTINGENCY
PLAN CONTENTS.

PART 2 -- PREVENTION PLAN

(H) RESPONSE CONTRACTOR INFORMATION - if a plan holder proposes to use the services of a response action contractor to meet a requirement of AS 46.04.030 or this chapter, the plan holder shall include a true, correct, and complete list of each contractor, with name, address, telephone number, and affiliation by company, a summary of each agreement or contract, and the response equipment and services provided; the use of a contractor does not relieve the plan holder's responsibility to provide the information required by this subsection, and to meet all other applicable requirements of this chapter;

18 AAC 75.445. APPROVAL CRITERIA.

(i) RESPONSE CONTRACTOR INFORMATION. If a plan holder proposes to use the services of a response action contractor to meet a requirement of AS 46.04.030 or this chapter, the plan holder shall include a true, correct, and complete list of all contractors, with names, addresses, telephone numbers, and affiliation by company, and a copy of the contract or a summary which clearly demonstrates

(1) the contractor's obligation to respond if a discharge occurs, and the contractor's liability to the plan holder for the contractor's failure to respond or for an inadequate response;

(2) the contractor's availability to respond to a department-conducted discharge exercise as well as an actual discharge; and

(3) that equipment and other spill response resources to be provided by the contractor are maintained in a state of readiness and are compatible with the type of facility or operation and the oil product handled by the plan holder.



Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907)465-3744 or 4991

March 5, 1992

COMMITTEES

CHAIR
House Special Committee
on Oil & Gas
MEMBER
Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:

Department of Transportation
and Public Facilities

Mr. Greg Seider,
Executive Director
United Fishermen of Alaska
Juneau, Alaska

Dear Mr. Seider:

HB 540, legislation relating to limited liability for response action contractors will be heard in the House Special Committee on Oil and Gas on Monday, March 9, at 3:00 p.m.

Today you received a copy of my letter to Riki Ott of the Oil Reform Alliance. I also provided the members of the Executive Committee of the United Fishermen of Alaska a copy of that letter, including copies of the pertinent enclosures.

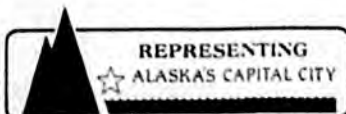
I am enclosing a copy of a resolution adopted by the Pacific Fisheries Legislative Task Force on June 16, 1990.

The Pacific Fisheries Legislative Task Force is comprised of legislators from Alaska, Washington, Idaho, Oregon and California. Delegates from Alaska at the June 1990 meeting included Senator Dick Eliason, Senator Fred Zharoff, Representative Cliff Davidson and Representative Mike Navarre.

The subject resolution and cover letter discuss the critical need for providing immediate, bold and coordinated response to an oil spill, and further, that if a state does not have limited liability for responders, that potential responders to a spill would decline to participate "out of fear that they would be exposed to the unlimited financial risks."

The resolution resolves to afford responders limited liability, and further, to support state and federal legislation granting responders to someone else's spill limited liability from all costs and damages "except for a responder's gross negligence, willful misconduct or causes personal injury or wrongful death."

It is my understanding that the UFA Executive Board will be meeting prior to the hearing of HB 540 on March 9. It would be very much appreciated if you would discuss the information I have provided

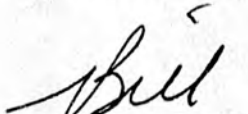


at that meeting of your Executive Board.

I look forward to your organization's support for this critically needed legislation.

If I can answer any questions, or if you need further information, please do not hesitate to contact me or Landa Holtan of my staff.

Respectfully,



Bill Hudson

BH:lh

cc: Senator Eliason w/enclosure
Senator Zharoff w/enclosure
Representative Davidson w/enclosure
Representative Navarre w/enclosure



Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907)465-3744 or 4991

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on Oil & Gas
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FINANCE SUBCOMMITTEE:
Department of Transportation
and Public Facilities

March 4, 1992

Ms. Riki Ott
Oil Reform Alliance
Juneau, Alaska

Dear Riki:

Earlier today we began a review of the issue of limited liability for response action contractors, and I very much appreciate your interest in this issue.

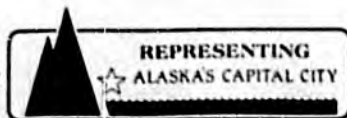
HB 540, legislation addressing the issue of limited liability for response action contractors will be heard in the House Special Committee on Oil and Gas on Monday, March 9 at 3:00 p.m. in Room 124 of the Capitol Building.

HB 540 is written to protect response action contractors. It does not change the strict liability provisions currently in statute which holds a spiller responsible for the spill.

It is not good public policy to hold a responder liable for a spill. It is good public policy to hold a spiller liable for the spill.

Responders will still be held responsible if it would have been liable for the initial release or threatened release under AS 46.03.822, even if that contractor had not carried out a response action; for gross negligence or intentional misconduct; or is acting in violation of the orders of the on-scene coordinator.

As we discussed, the Prince William Sound Regional Citizens Advisory Council recently developed feasibility study entitled "A Coastal Communities Oil Spill Cooperative for Alaska." Reference to the issue of immunity for responders is made on page 17: "The Legislature will also be called upon to resolve the issue of immunity for responders." Again reference is made to responder immunity on page 24: "Responder immunity is necessary for the ACCC to avoid tremendous liability exposure." (emphasis added.) Finally, on page 25, in table 4, issue number 2, "Responder Ms.



immunity: Extension of HB 196."

You and I also spoke about resolving the issue of responder immunity in the state of California. I would like to draw your attention to the enclosed letter from the Ventura County Commercial Fishermen's Association. In that letter to the Governor of California, the Association states: "Should qualified immunity not be granted to responde[r]s as outline[d] in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill."

Additionally, the California Sierra Club on April 21, 1990 stated: "Because unnecessary impediments to expeditious oil spill response should be minimized, we support the concept of immunizing spill responders by passing through their liability to the spiller, under the following conditions: none of the spiller's original liability is in anyway reduced, and there are adequate assurances that all damages will be paid, and that the injured parties can be made whole."

Moreover, the International Bird Rescue Research Center, et al., on August 1990 asserted: "Right now, oil spill teams can be sued just for showing up to fight the damage. for events that occur in the chaos of a recovery effort. for the land that is damaged as a result. And the price tag can run into the billions. . ."

Further, the San Francisco Examiner, June 10, 1990 edition reported: "Cleanup firms are willing to accept legal responsibility for willful misconduct, personal injury or wrongful death. They need protection from simple negligence because they must make quick decisions under difficult circumstances. . ."

HB 540 is limited liability for responders; it does not change the strict liability statutes pertaining to the spiller.

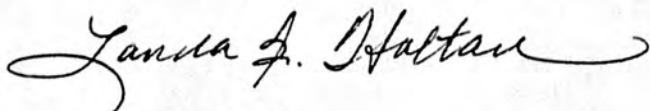
Finally, HB 540 is not legislation written for a specific region of the state or for a specific response action contractor - it is addressing all response action contractors in every part of this state.

Ms. Riki Ott

Page Three

Your careful review of this legislation and the materials I have provided will be very much appreciated, as is your interest and commitment to issues facing Alaska.

Best regards,

A handwritten signature in cursive script, reading "Landa A. Holtan". The signature is fluid and elegant, with a long, sweeping underline that extends to the right.

Landa Holtan,
Staff to the House Special
Committee on Oil and Gas

Enclosures

cc: United Fishermen of Alaska
Alaska Environmental Lobby

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907) 465-3744 or 4991

February 19, 1992

COMMITTEES

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House Special Committee
on Oil & Gas
MEMBER
Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:
Department of Transportation
and Public Facilities

Mr. Charles E. Cole,
Attorney General
Department of Law
Capitol Building
Juneau, Alaska

Dear Mr. Attorney General:

Enclosed you will find a sponsor substitute for HB 540, relating to limited liability for response action contractors.

The original bill, HB 540, referenced AS 46.04.030. The sponsor substitute correctly references AS 46.04.200 and AS 46.04.210 on line 12 of page 1 and line 1 of page 2.

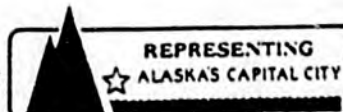
SSHB 540 is scheduled for a hearing in the House Special Committee on Oil and Gas on Monday, February 24, 1992 in Room 124 of the Capitol Building.

Accordingly, your earliest possible response to the joint letter by myself and Representative Mike Navarre of February 18, will be very much appreciated.

Respectfully,


Bill Hudson

Enclosure





Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

State Capitol
Juneau, AK 99801-1182

February 18, 1982

Mr. Charles E. Cole,
Attorney General
Department of Law
State of Alaska
Room 412 Capitol Building
Juneau, Alaska

Dear Mr. Attorney General:

The Citizens' Oversight Council on Oil and Other Hazardous Substances recently presented their report as required by Section 11 of HB 196, Chapter 92 SLA 1991. I am enclosing for your convenient reference a copy of that report.

Recommendation number seven, on page 11 states: "The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil."

It will be very much appreciated if you would review this recommendation, as well as the Council's rationale.

It is our understanding that there are contracts between Alyeska Pipeline Service Company and the state of Alaska for the state right-of-way agreements, between Alyeska Pipeline Service Company and the federal government for the federal right-of-way agreements, and between Alyeska Pipeline Service Company and the federal government for the Trans-Alaska Pipeline Authorization Act.

After your review of the report and the various state and federal contractual agreements, it would be very much appreciated if you would prepare a legal opinion discussing Alyeska's duty to control and remove pollution within state boundaries related to the transportation of TAPS crude.

We are also enclosing a copy of a document entitled "Memorandum of Alyeska Pipeline Service Company Regarding Liability Under Trans Alaska Pipeline Authorization Act for Oil Spills From Vessels." We believe your review of this memorandum will be necessary as you prepare your response to the questions we have posed.

Further, we would appreciate your discussion of the Legislature's passage of a statute to address Alyeska's duty to respond, and how it would affect the existing contractual agreements between Alyeska and the state of Alaska and the federal government.

Additionally, for the purposes of limiting liability for actions they take in spill response efforts, it has been suggested that response action contractors be categorized as 1. volunteers, 2. professional independent operators, 3. industry spill response cooperative organizations, and 4. industries' own spill response operations, specifically Alyeska Pipeline Service Company.

We would like your review of this recommendation. Is there an equal protection problem? Since the spiller is held strictly liable, is it in the state's best interest to delineate who is acting as a volunteer, especially given the fact that Alyeska Pipeline Service Company considers itself a volunteer response action contractor?

Finally, we am enclosing a copy of legislation introduced this morning, which we anticipate will be scheduled for committee deliberation as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,



Bill Hudson



Mike Navarre

Enclosures



Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907) 465-3744 or 4991

February 18, 1992

COMMITTEES

CHAIR

House Special Committee
on Oil & Gas

MEMBER

Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:

Department of Transportation
and Public Facilities

Mr. John Sandor, Commissioner
Alaska Department of Environmental
Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska

Dear Commissioner Sandor:

The Citizen's Oversight Council on Oil and Other Hazardous Substances recently presented their report as required by Section 11 of HB 196, Chapter 92 SLA 1991. I am enclosing for your convenient reference a copy of that report.

There are several recommendations set forth specifically addressing the issue of the state of Alaska's providing for certification of response action contractors. Specifically, recommendations two through six discuss response action contractor certification and the Council has set forth rationales for each of those recommendations.

I would appreciate your review of the issue of certification of response action contractors by the state of Alaska.

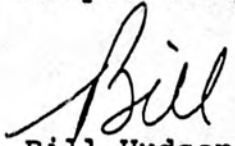
Please discuss the current efforts now underway by the task force comprised of coastal states, the public, the U.S. Coast Guard, and the oil industry to implement a national standard for certification of response action contractors, as required by the Oil Pollution Act of 1990. Specifically, I would like to know how far along the process is, and by when will the task force have in place certification standards?

It would be very much appreciated if you would provide in detail the task force, how it was organized, what states participate, the missions and goals, and any other aspects you feel will be beneficial to the Legislature as we consider pending legislation to limit the liability of response action contractors.



I am also enclosing a copy of legislation introduced this morning. I anticipate this legislation will be heard as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,



Bill Hudson

Enclosures

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
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COMMITTEES

CHAIR
House Special Committee
on Oil & Gas
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FINANCE SUBCOMMITTEE:

Department of Transportation
and Public Facilities

February 18, 1992

D. E. Ciancaglini,
Rear Admiral, U.S. Coast Guard
Commander, Seventeenth Coast
Guard District
Box 25517
Juneau, Alaska 99811

Dear Admiral Ciancaglini:

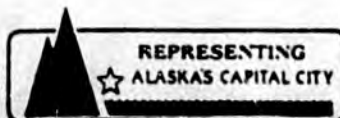
The Alaska State Legislature currently has before it the issue of limiting the liability of response action contractors who respond to marine oil spills. I am enclosing a copy of legislation introduced this morning.

It is my understanding that the U.S. Coast Guard, under provisions set forth in the Oil Pollution Act of 1990, is currently in the process of developing national standards to certify response action contractors.

Please discuss in detail the current efforts by the Coast Guard to establish such a certification program.

Additionally, I would appreciate your discussing in detail, the national contingency plan's requirements of the Marine Spill Response Corporation and how MSRC would be dispatched to respond to an oil spill in Alaska. As you know, MSRC has not placed one of the regional response centers in Alaska, and I am deeply concerned about the hundreds of miles of unprotected coast lines in Southeast Alaska and Western Alaska.

Additionally, I would appreciate your discussing in detail, the national contingency plan's requirements of the Ship Escort Response Vessels (SERV) and how SERV would be dispatched to respond to an oil spill by a tanker carrying TAPS crude from Prince William Sound to Cook Inlet as well as how the national contingency plan treats an offshore tanker spill on the down track followed by these crude oil laden tankers enroute to Lower 48 terminals.



I will be scheduling this legislation for a hearing in the House Special Committee on Oil and Gas as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,

A handwritten signature, appearing to be "B. Hudson", written in dark ink.

Bill Hudson, Chair

Enclosures

7-LS2045G

Ford

3/5/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 (O&G)**IN THE LEGISLATURE OF THE STATE OF ALASKA****SEVENTEENTH LEGISLATURE - SECOND SESSION****BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS****Offered:****Referred:**

Sponsor(s): REPRESENTATIVES HUDSON, Navarre, G.Phillips, Taylor, Zawacki, Grussendorf, C.Davis, Carney, Parnell, Foster, Baker, Choquette, Gonzales, Hanley, Leman, Martin, M.A.Miller, M.W.Miller, R.Phillips, Sharp

A BILL**FOR AN ACT ENTITLED**

1 "An Act limiting the liability of an oil spill response action contractor for release or
2 threatened release of a hazardous substance and for an act or omission that is not
3 contrary to a state or national oil spill contingency plan or, notwithstanding the state or
4 national plan, that is not contrary to an order of an on-scene coordinator; repealing the
5 requirements that liability is not limited in an action for damages to personal property
6 not caused by oil and is only limited if the act or omission occurs within 15 days after
7 the release of oil; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing
8 for an effective date."

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

10 * Section 1. AS 46.03.822(a) is amended to read:

11 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
12 set out in (b) of this section, [AND] the exception set out in (i) of this section, and the

1 limitation on liability provided under AS 46.03.825, the following persons are strictly liable,
2 jointly and severally, for damages, for the costs of response, containment, removal, or remedial
3 action incurred by the state, a municipality, or a village, and for the additional costs of a function
4 or service, including administrative expenses for the incremental costs of providing the function
5 or service, that are incurred by the state, a municipality, or a village, and the costs of projects
6 or activities that are delayed or lost because of the efforts of the state, the municipality, or the
7 village, resulting from an unpermitted release of a hazardous substance or, with respect to
8 response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

29 * Sec. 2. AS 46.03.825(a) is amended to read:

30 (a) A person who is a response action contractor with respect to a release or threatened
31 release of oil [WHOSE ACT OR OMISSION IS NOT CONTRARY TO AN ORDER OF THE

1 FEDERAL OR STATE ON-SCENE COORDINATOR] is not civilly liable for injuries, costs,
2 damages, expenses, or other liability that results from the release or threatened release, or from
3 the response action contractor's act or omission in response to the release or threatened release,
4 unless the person bringing a claim against the response action contractor proves by a
5 preponderance of the evidence that

6 (1) the response action contractor would have been liable for the initial release
7 or threatened release under AS 46.03.822 even if that contractor had not carried out a response
8 action;

9 (2) the response action contractor acted with gross negligence or intentional
10 misconduct; [OR]

11 (3) the act or omission of the response action contractor was contrary to an
12 order of the federal on-scene coordinator, or to the extent that the federal on-scene
13 coordinator has not otherwise ordered, to an order of the state on-scene coordinator; or

14 (4) the act or omission of the response action contractor

15 (A) was contrary in a material or substantial respect to the national
16 contingency plan prepared under 33 U.S.C. 1321(d), or to the extent that the national
17 contingency plan has not otherwise provided, to the state contingency plan prepared
18 under AS 46.04.200 or 46.04.210; and

19 (B) did not result from an order of the federal on-scene coordinator,
20 or to the extent that the federal on-scene coordinator has not otherwise ordered,
21 from an order of the state on-scene coordinator [THE RESPONSE ACTION
22 CONTRACTOR, WITHOUT APPROVAL BY THE FEDERAL OR STATE ON-SCENE
23 COORDINATOR, SUBSTANTIALLY DEVIATED FROM AN OIL SPILL
24 CONTINGENCY PLAN PREVIOUSLY APPROVED UNDER AS 46.04.030, AND THE
25 PLAN WAS EITHER PREPARED BY THAT CONTRACTOR FOR A PARTY
26 RESPONSIBLE FOR THE RELEASE UNDER AS 46.03.822 OR THAT CONTRACTOR
27 PREVIOUSLY AGREED TO COMPLY WITH THE TERMS OF THAT PLAN UNDER
28 A CONTRACT WITH PARTIES RESPONSIBLE FOR THE RELEASE UNDER
29 AS 46.03.822].

30 * Sec. 3. AS 46.03.825(b) is amended to read:

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

- 1 [(1)] an action for personal injury or death [;
2 (2) AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY
3 NOT CAUSED BY OIL; OR
4 (3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER
5 THE RELEASE].
- 6 * Sec. 4. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.
7 * Sec. 5. If this Act takes effect after June 30, 1992, sec. 4 of this Act is retroactive to June 30, 1992.
8 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

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United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

February 3, 1992

The Honorable Bill Hudson
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Bill:

Thanks for the copy of your letter to Commandant Kime and your suggestion that the Coast Guard Auxiliary be expanded to include marine oil spill response. Certainly the work done by the commercial fishermen during the Exxon Valdez oil spill proved to be invaluable in preventing that disaster from reaching even greater heights.

I have contacted the Coast Guard to inquire as to their response to you on this concept. You may also be interested to know that I helped draft provisions that were included in the Oil Pollution Act of 1990 (OPA) to help address the concern that you are raising.

Under section 4202 of the OPA (33 U.S.C. 1321(j)) tank vessels will not be able to operate off the coast of the United States or call on U.S. ports after August 18, 1993, without having onboard a vessel response plan approved by the Coast Guard. In order to approve a vessel response plan, the Coast Guard must determine that the vessel operator has, or has enforceable contracts for, sufficient personnel and equipment to respond to the maximum extent practicable to the loss of the vessel's entire cargo in adverse weather conditions. In addition, the Coast Guard must ensure that the region has available to it sufficient personnel and equipment to effectively supplement the vessel owner's resources to in fact handle the loss of the vessel's entire cargo.

If you have any questions concerning the provisions of the OPA, please contact Earl Comstock of my staff at (202) 224-3004.

With best wishes,

Cordially,


TED STEVENS



From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL

1. Within the past few months a number of State legislatures have considered measures designed to provide limited immunity from certain types of liability for certain persons engaged in oil spill removal actions. In some instances local offices have been requested to provide agency views in written or oral form to State legislatures or individual legislators.

2. In order to assure consistency in the position and response to such requests, the points outlined below are used in providing Coast Guard views on legislative proposals pertaining to limited immunity for oil spill removal actions.

- The availability of a viable private sector response to oil spills and their threats is an essential element of a national oil pollution response system.
- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil spill response industry stressed the importance of limited immunity to its viability.
- As a result of the industry's presentation to Congress, Congress provided a limited immunity respecting removal costs and damages which result from actions taken or omitted to be taken in the course of response care, assistance, or advice consistent with the Contingency Plan or as otherwise directed by the Commandant.
- The Coast Guard supports the principle of limited immunity under State law respecting liability for removal costs and damages to the extent that such immunity is necessary to assure a broad-based private sector capability. The Coast Guard urges that State immunity provisions be as consistent as possible with the federal immunity provision.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 25, 1992

Hon. Bill Hudson
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Hudson:

This letter is in response to your inquiry of February 25, 1992 regarding Alyeska's cleanup responsibilities.

We do not believe that legislation "clarifying and reaffirming" Alyeska's cleanup obligations under the existing right-of-way agreement and the TAPAA would improve the state's litigation position in the Exxon Valdez litigation with respect to those obligations.

If you have any further questions on this matter, please do not hesitate to contact me at your convenience.

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: *Craig J. Tillery*
Craig J. Tillery
Assistant Attorney General

CJT:tg

WALTER J. HICKEL, GOVERNOR

REPLY TO:

- ☒ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697
- ☐ KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317
- ☐ P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1795

Telephone: 465-5050
FAX: 465-5070

February 25, 1992

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

Dear Representative Hudson:

Thank you for the copy of the Citizen's Oversight Council's report on Oil Spill Response Liability. We have reviewed the issues raised in your February 18, 1992 letter concerning response action contractor certification and liability limitation in Alaska. We have also completed a preliminary review of HB 540.

I preface my comments at this point by saying that we are currently reviewing the Council's Report and developing our position on this subject and the associated legislation that is being developed. We are very interested in the input that will undoubtedly be provided during future committee hearings. The information and testimony given will assist in the development of our position. With that in mind I would like to offer our preliminary views on the issues you have raised.

The Department supports legislation limiting liability for response action contractors that is carefully crafted. We believe that it is in the state's best interest to ensure there will be a quick and ready response in the event of another catastrophic spill, as well as for those releases that are significantly smaller but just as important to contain and cleanup in the shortest possible time.

Beyond the contractual arrangement, there are no other legal assurances that response action contractors who have a pre-existing agreement with a contingency plan holder will respond and perform when a spill occurs. The Department does not legally review or pass judgement on the validity of these contracts and is not a party to them. However, the Department is developing emergency response contracts to provide the capability for responding to orphan spills (i.e., no responsible party) and spills where it may be necessary to take over or augment cleanup. Additional assurances are appropriate to increase the certainty of response by contractors who have contracted to provide a response with a contingency plan holder. In that regard we would support inclusion of language in Section 1 of HB 540 which would require response action contractors who have previously agreed to comply with the terms of a facility or vessel contingency plan to also comply and act pursuant with the terms of those plans unless otherwise directed by the SOSC or FOSC. This would provide an additional incentive for assuring response.

Certification of response action contractors is, in our view, a separate issue. Certification is currently being debated at the federal level. Some of the elements being considered include verification of equipment and personnel, validation of resources through inspections, certification of response capability, notification of down status and validity of response contracts, among others. The Department performs many of these functions already in the industry contingency plan review process. We participate in numerous spill drills, which are an excellent means for demonstrating response readiness and authenticating the capability of contingency plan holders.

Notwithstanding what might be done at the federal level, the elements of a certification program could be accomplished under existing authority by including appropriate parameters in the Department's oil and hazardous substances (commonly referred to as HB 567) regulations. A certification program in this case would only apply to response action contractors who have a contract with a contingency plan holder and the certification would occur in conjunction with the existing contingency plan review process. A separate certification review process would not be necessary. The program being contemplated at the federal level would likely require a separate review and approval process.

Regarding Recommendation #7 of the Council's report, we defer to the recent opinion from the Department of Law and we offer no further comments at this time.

I believe the "task force" referenced in your letter is the "Negotiated Rulemaking Committee" (REGNEG) that was formed by the Coast Guard to assist in drafting tank vessel regulations to implement the mandate of the Oil Pollution Act of 1990 (OPA 90). The State of Alaska was not selected to formally participate on this advisory committee (see enclosed letter from Admiral Henn). The State of California was selected as a member of the REGNEG Committee and has agreed to informally represent Alaska's and Washington's views as per our agreement under the States/British Columbia Oil Spill Task Force. However, Alaska is not bound in any way to a consensus that may be reached by the REGNEG Committee.

Other states selected for membership on the REGNEG Committee include Louisiana, Maryland and Wisconsin. Both of Alaska's Regional Citizen's Advisory Councils are on the committee. The majority of the committee membership is comprised of oil and shipping industry representatives. There is only one member from the environmental interest groups. The REGNEG Committee has been set up by the Coast Guard under the authority of the "Negotiated Rulemaking Act of 1990".

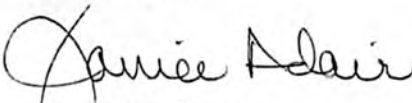
Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability", and "contractor certification". The most difficult issues seem to be defining response standards for "adverse weather" and "maximum extent practicable". These definitions have the potential to become substantially different than the counterpart provisions found in Alaska's laws, specifically the response planning standards given in AS. 46.04.030(k)(3-4).

Discussions at the REGNEG Committee on the subject of "contractor certification" have touched on the issues of type of services, capacity/quantity of service, location, self-assessment, and Coast Guard inspection/certification. Issues still under discussion include exactly how verification is to be achieved, frequency of verification/certification, the possibility of funding verifications, spill drills from the federal Oil Spill Liability Trust Fund, and contract validity. Enclosed is a copy of the Working Group issue paper concerning this matter.

We have a DEC staff member at REGNEG meetings this week. The next committee meeting is scheduled for the week of March 9 through 13 in Washington D.C. The Coast Guard plans to publish the "Notice of Proposed Rulemaking" in the Federal Register on or about May 1. The goal is to have an adopted rule in place, which may include RAC certification, by August, 1992 and in effect by February, 1993.

I hope these comments are responsive to your request and we look forward to working with you in the development of appropriate legislation.

Sincerely,


for John A. Sandor
Commissioner

CJP/MAC/JA/tls

Enclosure: January 7, 1992 letter from A. E. Henn

cc: Janice Adair, Special Assistant, Commissioner's Office
Mike Conway, Director, Division Spill Prevention and Response
Lynn Tomich Kent, Section Chief, SPPM

February 4, 1992 Revision

(G:\SPPM\CLERICAL\HB567\cplanrw.ltr)

OIL DISCHARGE PREVENTION
AND CONTINGENCY PLAN APPROVAL

Name of plan holder
Address

Dear:

Re: (Name of facility) Oil Discharge Prevention and Contingency Plan

The Alaska Department of Environmental Conservation (ADEC) has completed review of the (date of application) application for approval of the following oil spill contingency plan:

Plan Title: _____, consisting of _____ volumes

Supporting Documents, if any (list): _____

Plan Holder: _____

[Be specific, as in "ABC Oil Co., A Delaware Corporation."]

Covered Vessels or Facilities: _____

[If vessel, U.S. Official Number: _____]

PLAN APPROVAL: The (name of plan) plan is hereby approved, effective [_____, 199_].

A certificate of approval stating that the contingency plan has been approved by the department is enclosed. This approval is subject to the following terms and conditions:

TERMS AND CONDITIONS:

1. Revisions to contingency plans demonstrating full compliance with the implementing regulations for HB 567 must be submitted to the Department within 90 days of their effective date. The Department's implementation schedule for demonstrating compliance with the new regulations is contained in the enclosed January 7, 1992 letter from the Commissioner.

2. Notice of Changed Relationship with Response Contractor [DELETE THIS PARAGRAPH IF NO RESPONSE CONTRACTOR INVOLVED IN THE PLAN].
Because the plan relies on the use of response contractor(s) for its

implementation, the plan holder must immediately notify the Department in writing of any change in the contractual relationship with the plan holder's response contractor(s), and of any event including but not limited to any breach by either party to the response contract that may excuse a response contractor from performing, that indicates a response contractor may fail or refuse to perform, or that may otherwise affect the response, prevention, or preparedness capabilities described in the approved plan.

This condition is reasonably necessary because there are certain risks associated with allowing a plan holder to rely in part or total upon a response contractor instead of obtaining its own response capability. The risks arise, in part, because the certainty of the contractor's response is dependent upon the continuation of the legal relationship between it and the plan holder. Given this risk, the Department must be promptly informed of any change of the contractual relationship between the plan holder and the response contractor, and of any other event that may arguably excuse the response contractor from performing or that would otherwise affect the response, prevention, or preparedness capabilities described in the approved plan. The Department may seek appropriate modifications to the plan or take other steps to ensure that the plan holder has continuous access to sufficient resources to protect the environment and to contain, cleanup, and mitigate potential oil spills.

3. (Additional facility specific conditions and their basis should be included here)

EXPIRATION: This approval expires _____, 199_. After the approval expires, operation of the facility/vessel is prohibited by Alaska law until an approved plan is once again in effect.

RENEWAL: To renew the approval, the plan holder must submit a complete renewal application to this office on or before _____, 199_.

REVOCATION, SUSPENSION, OR MODIFICATION: This approval is effective only while the plan holder is in "compliance with the plan" and with all of the terms and conditions described above. The Department may, after notice and opportunity for a hearing, revoke, suspend, or require the modification of an approved plan if the plan holder is not in compliance with it, or for any other reason stated in AS 46.04.030(f). In addition, Alaska law provides that a vessel or facility that is not in "compliance with the plan" may not operate (AS 46.04.030). The department may terminate approval prior to the expiration date if deficiencies are identified that would adversely affect spill prevention, response or preparedness capabilities.

DUTY TO RESPOND: Notwithstanding any other provisions or requirements of this contingency plan a person causing or permitting the discharge of oil is required by law to immediately contain and cleanup the discharge regardless of the adequacy or inadequacy of a contingency plan (AS 46.04.020).

BEST AVAILABLE TECHNOLOGY: The contingency plan must provide for use by the applicant of the best available technology at the time it is submitted or renewed (AS 46.04.030 (e)).

NOTIFICATION OF NON-READINESS: Within three days after any significant response equipment specified in the plan becomes nonoperational or is removed from its designated storage location the plan holder must notify the department in writing and provide a schedule for the equipments substitution, repair, or return to service (18AAC 75.375).

CIVIL AND CRIMINAL SANCTIONS: Failure to comply with the plan may subject the plan holder to civil liability for damages and to civil and criminal penalties. Civil and criminal sanctions may also be imposed for any violation of AS 46.04, any regulation issued thereunder, or any violation of a lawful order of the Department.

INSPECTIONS, DRILLS, RIGHTS TO ACCESS AND VERIFICATION OF EQUIPMENT, SUPPLIES AND PERSONNEL: The Department has the right to verify the ability of the plan holder to carry out the provisions of its contingency plan and access to inventories of equipment, supplies and personnel through such means as inspections and discharge exercises, without prior notice to the plan holder. The Department has the right to enter and inspect the covered vessel or facility in a safe manner at any reasonable time for these purposes and to otherwise ensure compliance with the plan and the terms and conditions (AS 46.04.030(e) and AS 46.04.060). The plan holder shall conduct exercises for the purpose of testing the adequacy of the contingency plan and its implementation (18 AAC 75.385).

FAILURE TO PERFORM: In granting approval of the plan, the Department has determined that the plan, as represented to it by the applicant in the plan and application for approval, satisfies the minimum planning standards and other requirements established by applicable statutes and regulations, taking as true all information provided by the applicant. The Department does not warrant to the applicant, the plan holder, or any other person or entity: (1) the accuracy or validity of the information or assurances relied upon; (2) that the plan is or will be implemented; or (3) that even full compliance and implementation with the plan will result in complete containment, control, or clean-up of any given oil spill, including a spill specifically described in the planning standards. The plan holder is encouraged to take any additional precautions and obtain any additional response capability it deems appropriate to further guard against the risk of oil spills and to enhance its ability to comply with its duty under AS 46.04.020(a) to immediately contain and clean up an oil discharge.

COMPLIANCE WITH APPLICABLE LAWS: If amendments to the approved plan are necessary to meet the requirements of any new laws or regulations, the plan holder must submit an application for amendment to the Department at the above address. The plan holder must adhere to all applicable state statutes and regulations as they may be amended from time to time. Copies of those currently in effect are enclosed. The department is currently developing regulations to implement Ch. 191, SLA 1990.

Amendments to comply with the regulations will be necessary upon promulgation.

ADJUDICATORY HEARING: Any person who disagrees with the decision may request an adjudicatory hearing by serving upon the Commissioner a request for hearing that complies with the requirements of 18 AAC 15.200-310. The hearing request must be received by the Commissioner within 30 days from the date of this letter. Hearing requests must be delivered to the Commissioner of the Department of Environmental Conservation at 3220 Hospital Drive, P.O. Box 0, Juneau, AK 99811-1800 within 30 days of receipt of this letter. If a hearing is not requested within 30 days, the right to a hearing is waived and the decision becomes final.

If you have any questions, please do not hesitate to contact _____ of this office.

Sincerely,

Regional Administrator
or
Regional Environmental Supervisor

Enclosures:

1. Certificate of Approval
2. Alaska Statutes 46.03, 46.04, 46.08 and 46.09 (white statute book)
3. 18 AAC 75, Article 4
4. October 26 Draft Regulations
5. Commissioner's January 7, 1992 letter

cc: (To be completed by the regions. Standard distribution should include one copy to Central Office SPPM c/o Larry Dietrick)



Alaska Department of
**Environmental
Conservation**

P.O. Box 0
Juneau, Alaska 99811-1800

Release

Walter J. Hickel, Governor

John A. Sandor, Commissioner

Contact: Debby Bloom, 563-6529
L.J. Evans, 563-1126

DEC COMMISSIONER SANDOR SIGNS NEW OIL SPILL REGULATIONS AFTER EXTENSIVE PUBLIC PROCESS

October 26, 1991. Anchorage... DEC Commissioner John Sandor has signed oil spill regulations which raise spill prevention and response standards for approximately 300 tankers, barges, terminals, and on-shore exploration and production facilities operating in Alaska, as well as the Trans-Alaska Pipeline System, after 16 months of drafting and public review.

The regulations, which Sandor said are "the toughest in the nation--if not the world," set new standards for spill prevention and readiness on the part of companies handling oil; establish the amount of oil that a company must be prepared to control and contain in the first hours of a spill; and broaden the range of options for meeting financial responsibility requirements.

Alaska will require crude oil tankers to have enough equipment and personnel in the region within 72 hours of the onset of a spill to control or cleanup 60% of a vessel's total cargo capacity; operators must plan to clean up 100% of a spill as soon as practicable. In contrast, federal law does not set a minimum time period.

"With the help of the public, environmental and industry groups, citizens' organizations, and an outstanding working group, we have reached a key milestone in Alaska's effort to develop the regulations called for by the Legislature in 1990 in House Bill 567," said Commissioner Sandor. "These new rules will put Alaska out front in effective spill prevention and response. For that, and for their countless hours of good work, we sincerely thank all those who attended our many public meetings, and especially the citizens' working group that assisted the department in resolving several key controversies about how this law should be implemented."

- More -

"Our job now is to make sure equipment is in place and readiness is maintained," Sandor said. "All the equipment on earth will do no good unless people are trained to use it." The Commissioner said that DEC will enforce the law with frequent drills, including surprise drills, to test and maintain readiness and the effectiveness of plans and equipment.

The HB 567 Working Group was established in 1990 by DEC with representatives from state and federal agencies, citizen oversight groups, industry, and environmental organizations. The public participation process for the regulations included 18 public meetings last winter and spring throughout Alaska in addition to formal public hearings held last summer. The working group met many additional times throughout the process to advise the department on development of the regulations. DEC staff reviewed and considered 800 pages of comments on the draft regulations from members of the public.

"The response to the Exxon Valdez spill involved nearly all Alaskans, either in actual response activities or in terms of their concerns. We felt it necessary to likewise involve as many Alaskans as we could in developing a system to prevent future spills or to respond effectively if they ever happened. Now we need continued participation of Alaskans to implement the system and make sure it works," said Sandor. The Commissioner said that he has invited the Working Group to continue to advise DEC on implementation of the new regulations.

If the regulations are filed by Lt. Governor Jack Coghill following a review by the Department of Law, crude oil facilities will be asked to amend their current plans to conform with the new regulations by February 1, 1992.

Sandor said that Alaskans can already have more confidence in spill preparedness within the state. In most cases, the large companies have in place the necessary response equipment, personnel, and prevention measures. Alyeska Pipeline Company's SERVS system of escort vessels for tankers in Prince William Sound is an example.

The Commissioner indicated that the department will work with small companies covered by the law to form spill response co-ops throughout the state. The regulations encourage cost-sharing for increased prevention and response capabilities. Non-crude operators come under the law effective June 1, 1992.

The final step in developing the regulations was a set of decisions reached by the department on several key policy issues that remained unresolved at the conclusion of the public participation process.

DEC Deputy Commissioner Mead Treadwell said, "One of our toughest calls was the decision on the planning standard for crude oil carriers. In the public comments and working group there was no consensus on how much of a vessel's cargo the operator

should have to plan to clean up beyond the first 72 hours of a spill. HB 567 requires the department to set this standard, and operators must design their response plans accordingly. In the end we relied on statistical studies of spill situations and what we could expect to happen during an actual spill. It turned out that a 60% planning standard, the ability to clean up 60% of the cargo capacity, was the right answer in this case." Two DEC consultants independently reached this conclusion and made the recommendation to the department, Treadwell explained.

Under this requirement a plan holder must plan to clean up a total spill, but must demonstrate the availability of sufficient equipment and personnel deployed and operating within the region within the first 72 hours to clean up 60% of a vessel's cargo. The planning standard can be lowered through "prevention credits," but only for hydrostatic loading, double hulls or bottoms, or escort vessels. In no case will the planning standard be less than 30% of a vessel's cargo capacity.

"Another critical decision was whether to specifically enable DEC to require a facility or tanker to restrict operations, if conditions arise that would make it impossible for a plan holder to employ the methods outlined in this plan," said Treadwell.

He explained that this concern was for situations where conditions such as earthquakes, volcanoes, storms or other situations make an operator's proposed response methods ineffective. The regulations require a plan holder to describe scenarios when weather or environmental conditions would exceed maximum response limitations. Shutting down a facility is a decision limited to the DEC commissioner, either through an emergency order or by seeking a court injunction.

The department also decided:

- To adopt the majority of the proposed prevention provisions now and make a commitment to continue to work on unresolved issues with the HB 567 Working Group, rather than delay the entire "prevention" package.

- To retain language to guard against company employee substance abuse or medical problems diminishing abilities to perform tasks that could prevent or reduce the size of a spill. The language has been reviewed by the Departments of Law and Health and Social Services.

- For non-crude carriers, to adopt a current planning standard that requires the operator to plan to contain or control 15% of the capacity of the vessel or barge within a 48-hour time limit, and clean up the full amount of any size spill within the shortest feasible time.

- To maintain provisions for drilling relief wells in the event of a blowout. The department was concerned about the possibility of a sustained major discharge from an oil formation occurring during adverse winter conditions that could make it impossible to regain control of the well until the following season. Language was

- More -

added to include plans for other methods of well control in addition to relief wells.

-- To modify the review procedures for oil spill contingency plans related to the Alaska Coastal Management Program (ACMP). DEC regulations do not require a plan holder to go through full ACMP review, but during the decision-making process DEC will itself respond to the comments of coastal districts, regional citizens' advisory councils, and the Departments of Natural Resources and Fish and Game. DEC decisions can still be appealed by coastal districts through administrative procedures.

-- To follow the lead of the U.S. Coast Guard not to allow companies to use foreign assets as proof of their ability to self-insure against losses and damages resulting from oil spills. A provision is being added to the regulations to allow waiving working capital requirements for operators who conclusively show their financial strength through other means such as bond ratings.

For further information, or a copy of the regulations package, contact Lynn Kent, DEC Spill Prevention, Planning and Management, in Juneau at 465-2630.

#

NEW STANDARDS FOR CONTINGENCY PLANS

OIL TERMINAL FACILITIES must plan to contain, control and clean up a discharge equal to the capacity of the largest tank at the facility within 72 hours.

CRUDE OIL TANK VESSELS OR BARGES:

- vessels smaller than 500,000 barrels of storage capacity must plan to contain or control and clean up a 50,000 barrel discharge
- Vessels with more than 500,000 barrel capacity must plan to contain or control and clean up a 300,000 barrel discharge
- All crude oil tank vessels or barges must demonstrate access to other equipment outside their region of operation to clean up a realistic maximum discharge and the ability to have that equipment deployed and operating at the discharge site within 72 hours.

NON-CRUDE TANK VESSELS OR BARGES—

- must plan to contain or control the greater portion of the total oil storage capacity of the vessel
- must clean up the discharge within the shortest possible time consistent with minimizing damage to the environment.

OIL SPILL PREVENTION, RESPONSE AND FINANCIAL RESPONSIBILITY

The Regulations Say:



Regulations written to implement HB 567 tackle spill preparedness through the spill prevention and response plans that oil facilities and vessels are required to submit for State approval. The regulation now requires plans from onshore exploration and production facilities and pipelines in addition to oil tanks, tank vessels and oil barges. Plus, higher standards are required of all plans in three major ways:

Planning Standards — "Response Planning Standards" are one of the cornerstones of the new regulations, specifying the size of spill each vessel or facility operator must be prepared to clean up within 48 hours or 72 hours. The Response Planning Standard varies by amount of oil stored or transported, while response time depends upon type of facility.

Response Planning Standards directly affect the amounts—and thus costs—of equipment, supplies and personnel that companies must keep ready at all times in case of a spill.

Prevention — While vessels and facility operators have always been expected to prevent spills, the State now requires prevention plans and specific prevention measures that must be taken. The state will also consider the reduced risks of companies that incorporate significant voluntary prevention measures. This means that companies employing preventative techniques such as double hulls, for example, may have their required Response Planning Standard adjusted downward according to formulae written into regulations.

Financial Responsibility — Operators of vessels and facilities handling oil must give proof that they possess the financial resources to pay for cleanup and damages from potential spills. The regulations have been revised to broaden the acceptable forms of proof to include letters of credit and protection and indemnity clubs.

HB567 requires vessels and facilities to comply by June 1, 1992. Regulations are projected for adoption in December, 1991. Plan holders are required to upgrade their contingency plans as may be necessary to meet their new requirements and submit any amendments in time to receive approval by June 1, 1992.



Alaska
Department of
Environmental
Conservation

DEVELOPMENT OF ALASKA'S OIL SPILL REGULATIONS



Alaska
Department of
Environmental
Conservation

1989 MARCH 24
Exxon-Valdez oil spill

1990 JUNE 27, 1990
House Bill 567 takes effect

1991 MARCH 4, 1991
Mail out working draft of regulations
for C-plan standards and workshop
schedule

MARCH 15
Distribute working draft of regulations
for financial responsibility

MARCH 19
First meeting of HB 567 work group

MAR. 20 - MAY 2
Hold informational workshops at 18
locations

JUNE 1
Incorporate public comments
Amendments to response plans due

JULY 8
Complete draft prevention regulations
issue public notice for all regulations

JULY 8-AUGUST 21
Hold public hearings on all
regulations

AUGUST 21-OCTOBER 10
Incorporate final revisions

OCTOBER 10
Department of Law review begins

NOVEMBER
Lt. Governor review

DECEMBER
Final adoption of regulations on or
about Dec. 1. Effective date 30 days
later.

1992 FEBRUARY 1, 1992
Owners/operators complete amend-
ments to response plans

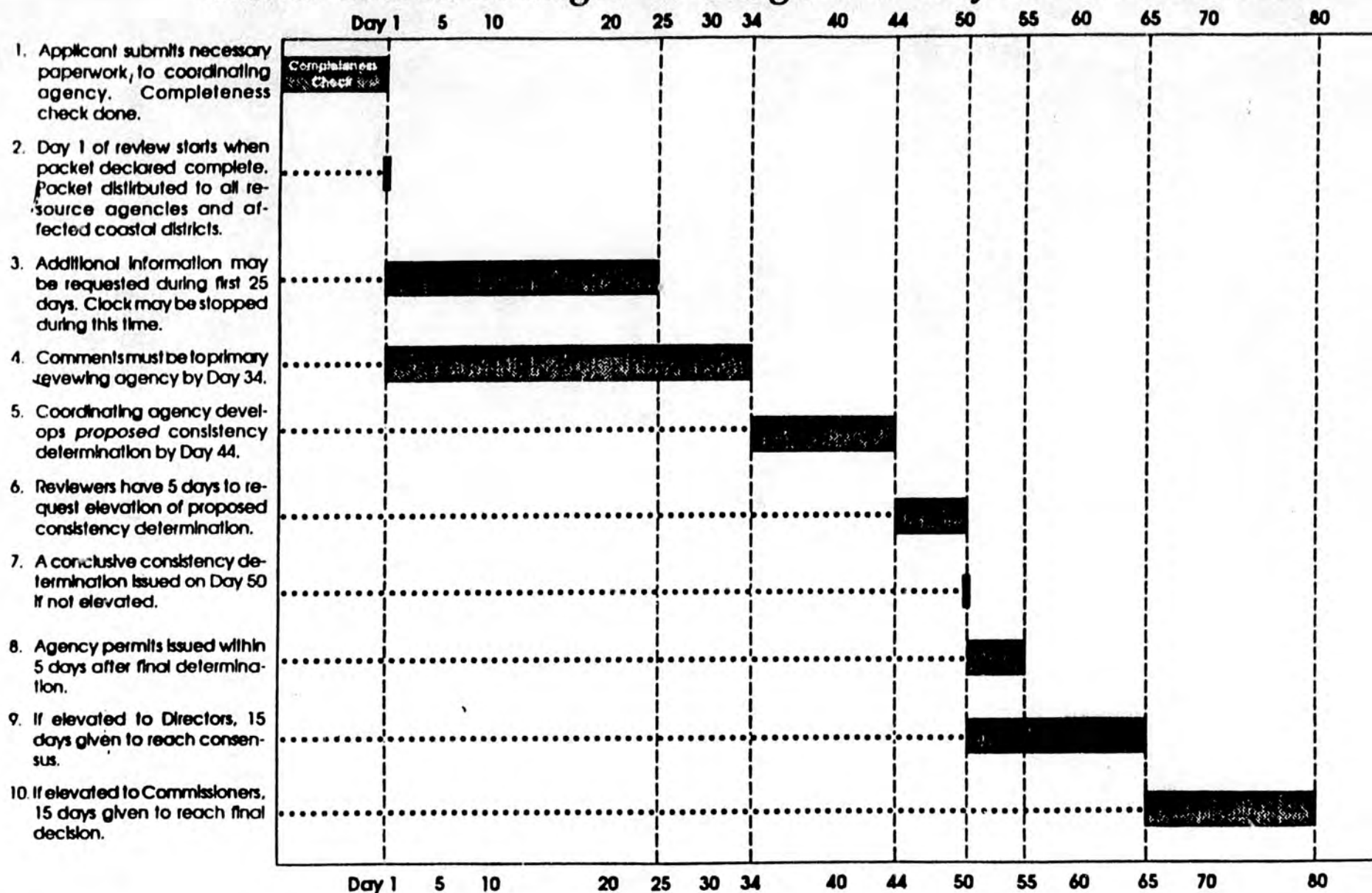
PROOF OF FINANCIAL RESPONSIBILITY

Type of Facility	Before June 1, 1991	After June 1, 1991
OIL TERMINALS		
Oil Terminals/Crude (5,000 barrel (bbl.) and up)	\$10 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum	\$50,000,000 per incident
Oil Terminals/Non-Crude (10,000 bbl. and up)	Same as above	\$25 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum
Oil Terminals/Crude and Non-Crude combined	Same as above	If mostly crude - \$50,000,000 per incident. If mostly non-crude - \$25 per bbl. of total capacity
PIPELINES & EXPLORATION FACILITIES		
Pipelines and Offshore Exploration or Production	\$35,000,000 per incident	\$50,000,000 per incident
Onshore Production	EXEMPT	\$20,000,000 per incident
Onshore Exploration	EXEMPT	\$5,000,000 per incident
VESSELS & BARGES		
Tank Vessel & Oil Barge/Crude	Trans-Alaska Pipeline related: \$14,000,000. Other tankers: per Clean Water Act or \$20,000,000, whichever is greater. Other barges: per CWA or \$1,000,000.	\$300 per bbl. per incident storage capacity or \$100,000,000, whichever is greater
Tank Vessel & Barge/Non-Crude	Same as above	\$100 per bbl. storage capacity per incident or \$1,000,000, whichever is greater, \$35,000,000 maximum

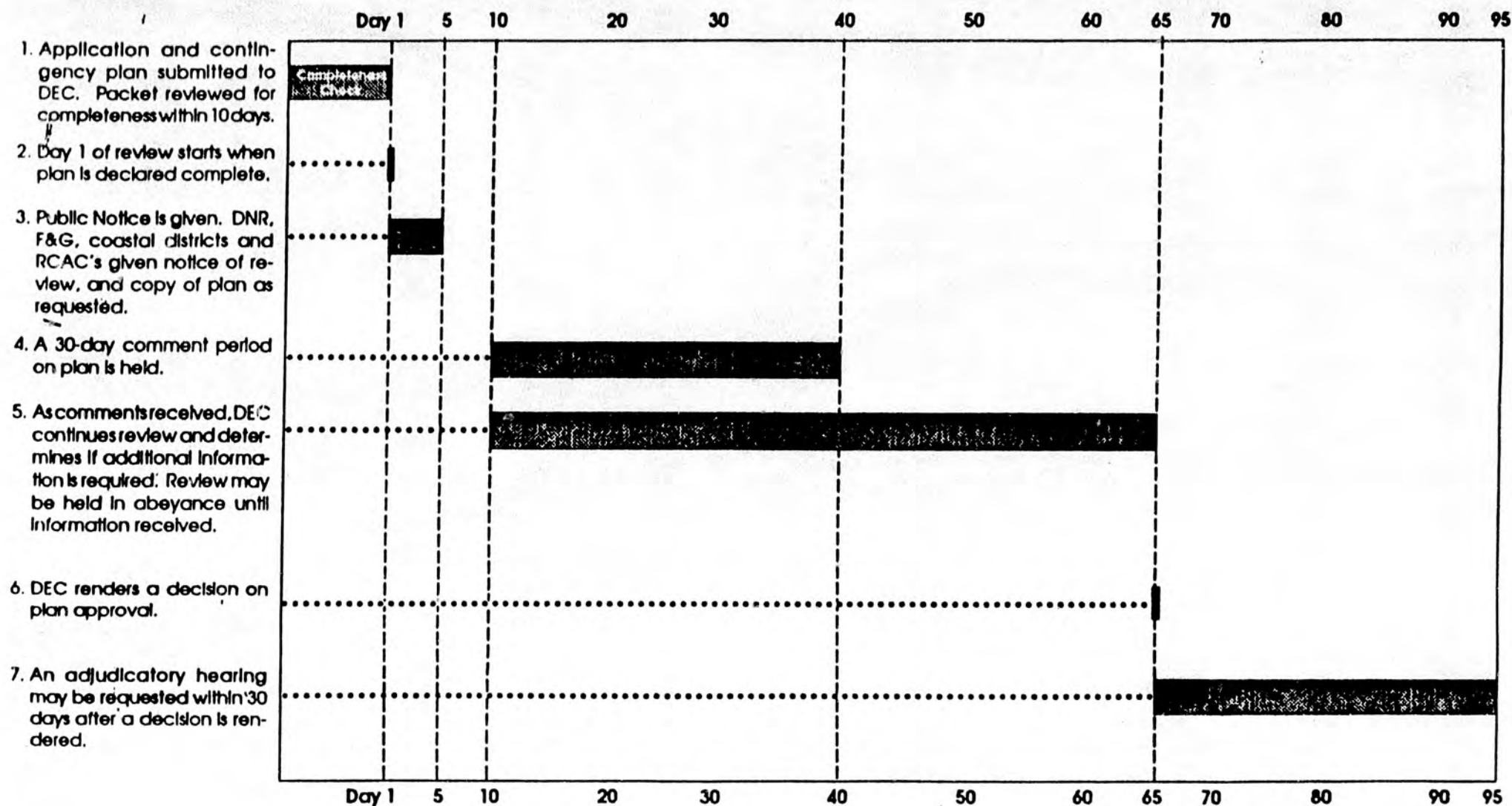


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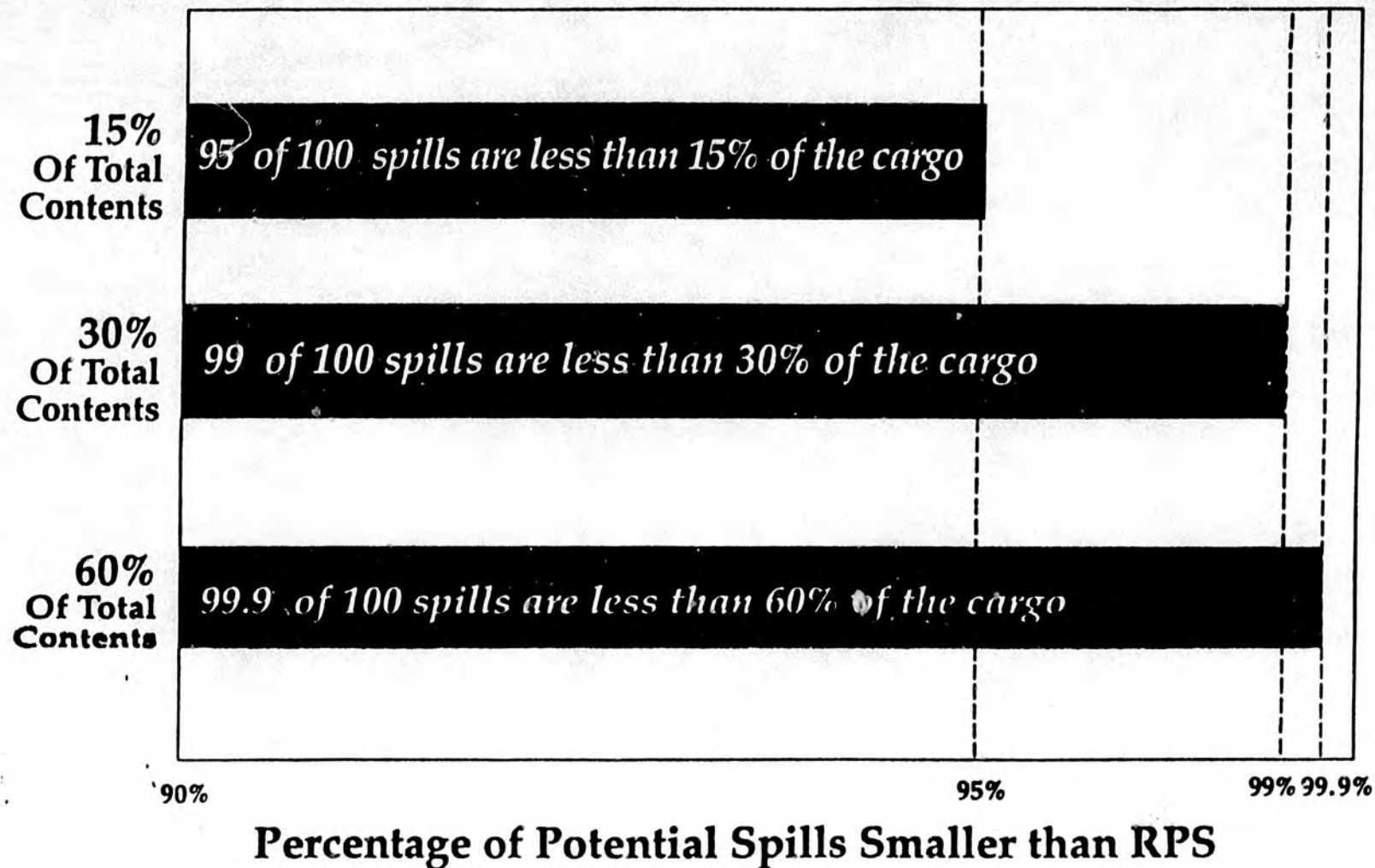
Alaska Coastal Management Program 50-Day Review Schedule



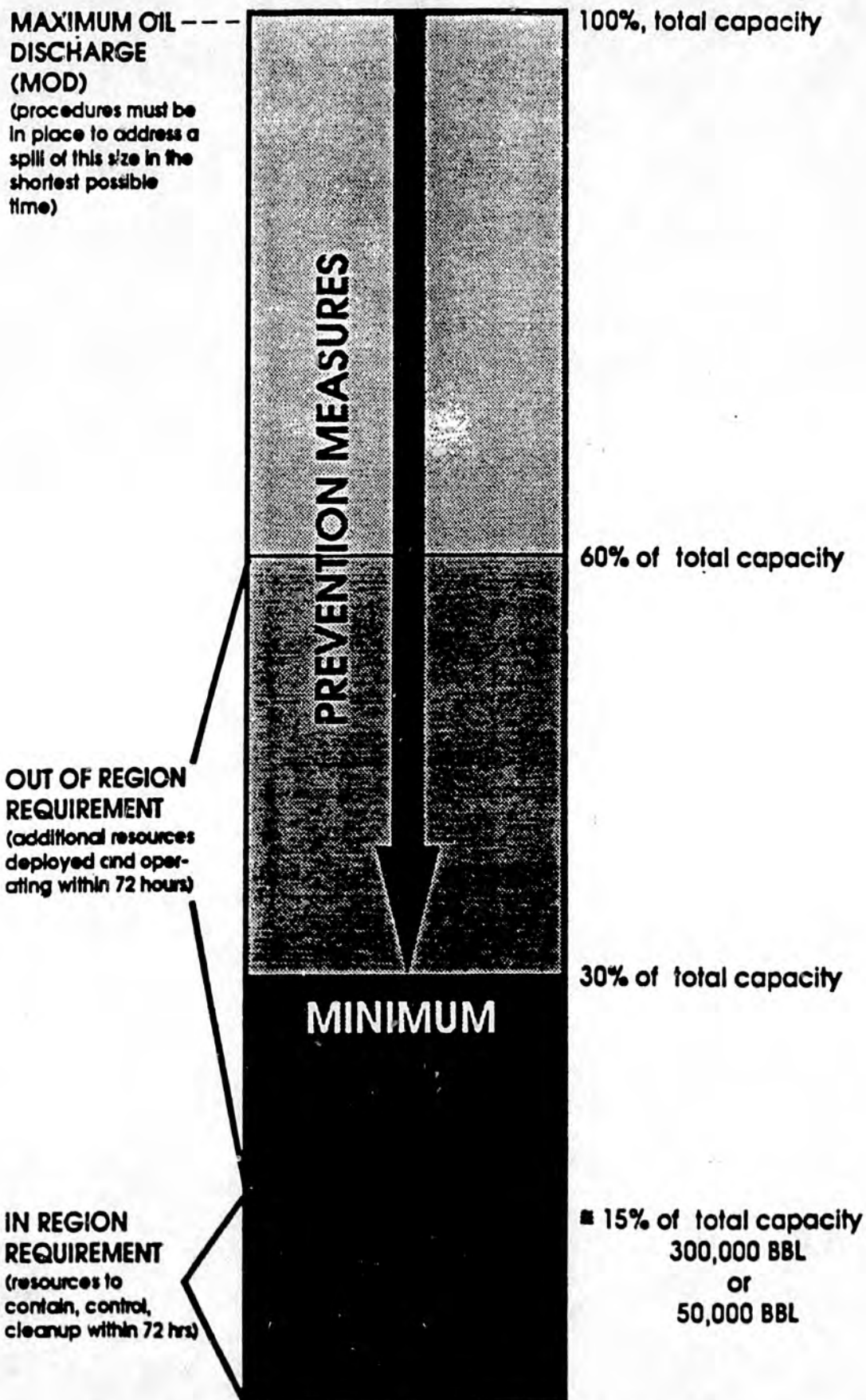
Oil Spill Contingency Plan Review Schedule Under HB567 Regulations



Vessel Response Planning Standards (RPS) vs Risk



Crude Oil Tank Vessel Response Planning Standards*



*Response planning standards do not constitute cleanup standards that must be met by the holder of a response plan