

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6941 HOUSE JUDICIARY

the oil is sold; and the view that selling crude oil to Cook Inlet is a low volume, low profit operation.

Background

Insurance for tanker companies operating in Alaska waters is provided through private insurance companies and through so-called protection and indemnity clubs (P&I clubs). Insurance provided by private companies generally involves a complex system of reinsurance. The coverage is eventually provided by the London insurance market through such syndicates as Lloyds of London or the Institute of London Underwriters (ILU). P&I clubs are mutuals made up of a number of tanker and oil companies. In the event of a damage claim, the P&I club reimburses the shipper. Fifteen P&I clubs throughout the world belong to the International Group of Protection and Indemnity Clubs (IGPIC) based in London. When a club member makes a claim, the club provides coverage for the first \$1.6 million. Members of all of the clubs belonging to the IGPIC cover the next \$10.4 million and the IGPIC provides coverage for the next \$1.2 billion through reinsurance (Barker 1990).²

Under current Alaska state law, a person who causes an unpermitted discharge of crude oil in excess of 18,000 gallons is liable to the state for up to \$500 million in civil penalties (AS 46.03.759).³ P&I clubs provide the only available source for liability coverage as high as \$500 million.⁴ Companies

²Reinsurance is obtained through groups of insurance companies in London. The IGPIC is able to obtain a high level of reinsurance only because many companies belong to its component clubs. Normally, up to \$500 million dollars of the reinsurance covers pollution claims and the remainder covers other types of claims such as damage to other ships, cargo loss and personal injury. An option for additional coverage to \$700 million for pollution is available to companies who are covered by P&I clubs.

³Total liability for a large oil spill would far exceed the maximum \$500 million civil penalty. The company would also be liable for criminal penalties; civil claims by individuals for loss of wages; damage to the environment; and costs of containment and cleanup. In other words, in the event of a large oil spill, a tanker company would be liable for much more than what a P&I company would cover.

⁴Coverage through insurance companies, other than P&I clubs, rarely exceeds five to twenty million dollars in liability coverage and many brokers are unable to obtain \$20 million in coverage (French 1990). P&I clubs provide ninety percent of protection and indemnity coverage for the world's marine transportation industry (Barker 1990).

transporting crude oil, however, only have to show proof of one to twenty million dollars in liability coverage.⁵

Some independent tanker companies must obtain coverage from a state-approved insurance company, in addition to P&I club coverage, in order to comply with state liability insurance requirements. Current state law requires tanker companies to prove financial responsibility through one of four means: self-insurance, insurance, surety, or guarantee [AS 46.04.050(e)].⁶ P&I clubs may not be used for the purpose of proof of insurance because P&I clubs do not recognize state sovereignty and therefore do not provide certificates of insurance required by the state.⁷ Companies unable to prove financial responsibility through other accepted means (i.e., self-insurance, surety or guarantee) must have coverage through an insurance company approved by the

⁵AS 46.04.040 provides for several different levels of proof of financial liability for transporters of oil. Tank vessels or oil barges transporting trans-Alaska pipeline oil are required to prove that they have financial responsibility for \$14 million as provided by 43 U.S.C. 1653(c)(3). Other oil barges must show financial responsibility for one million dollars and other tank vessels are required to prove financial responsibility for \$20 million (unless the Clean Water Act requires a greater responsibility). SB 504 of the 16th Alaska State Legislature, if passed into law, would require a \$500 million proof of financial responsibility for any tank vessel or barge carrying crude oil.

⁶SB 504 of the 16th Legislature would broaden the means for proof of financial responsibility to include other security approved by the Department of Environmental Conservation (DEC). This provision would permit the DEC to approve P&I club coverage (Mertz 1990).

⁷P&I clubs pay claims for accidents in state waters but only issue certificates of insurance to the U.S. Coast Guard. If the P&I clubs recognized state sovereignty, they could potentially have to award double claims for a single incident if it were to occur on a border between two different states (Barker 1990).

state of Alaska.⁸ They also need P&I insurance to protect themselves in the event of a large oil spill.

P&I clubs do not reimburse claims for criminal penalties (Barker 1990). Civil penalties are generally covered but only if approved by the P&I club's claims committee after the claim is submitted (Willitzer 1990). Civil penalties are not covered if there was wilful misconduct leading to the incident.

Insurance Rates

Insurance rate hikes have resulted from the rising costs of claims from incidents such as the Exxon Valdez accident as well as from the recent increase in P&I club insurance coverage from \$400 million to \$500 million (Unsworth 1989). Since Exxon belongs to a P&I club, part of the costs related to the spill are shared by all members of P&I clubs and through IGPIIC reinsurance. Thus insurance rates for all P&I club members will increase. The decision by the P&I companies to raise coverage to \$500 million was not a result of Alaska oil spill legislation (French 1990; Barker 1990). The Exxon Valdez accident did, however, raise the perceived risk of operating in Alaska and this may be reflected in insurance rates.⁹

While Alaska oil spill legislation did not directly cause the rise in insurance rates, representatives of P&I clubs and Intertanko, the independent tanker industry's principal association, expressed grave concerns about effects of possible state and federal legislation. According to one P&I official, current legislation before the U.S. House of Representatives, if passed, will result in tankers becoming uninsurable and a possible boycott of tanker deliveries to the United States (Barker 1990). An official of Intertanko expressed concern

⁸Insurance coverage for tankers is usually provided through reinsurance by London-based companies such as the multitude of companies belonging to Lloyds of London and/or the ILU. The American alternative, the Water Quality Insurance Syndicate, does not recognize state sovereignty and only insures up to five million dollars (French 1990). The state of Alaska considers Lloyds of London an approved insurance company because it guarantees each of its sub-companies. The ILU does not guarantee its member companies and therefore each company named in an ILU policy must be approved by the state before a tanker company's coverage is accepted. While some insurance policies provide coverage on a yearly basis, spot charters are often insured on a single voyage basis. A policy for a five-day trip through Alaska waters costs between ten and fifteen thousand dollars (French 1990; Willitzer 1990).

⁹Rates are determined by such factors as past claims records, perceived risks associated with the place of operation, type of cargo being hauled, and nationality of the crew (Barker 1990).

that some states might propose legislation with unlimited liability. Should such a provision become law, tankers would be uninsurable (Uglesang 1990).

Tanker Tariffs

Tanker tariffs are negotiated on a case-by-case basis, but reference rates are provided by the Worldscale Association. This company provides base rates which are used as a bench mark when negotiating contracts. Worldscale calculates a base rate considering such expenses as fuel costs, pilotage fees and tug charges. The base rate for Valdez has remained relatively stable except for a temporary increase in January 1990 due to an increase in pilotage fees. After it was determined that Alyeska Pipeline Company was paying the increased costs and not the vessel owners, the base rate was deflated (Isman 1990). Actual market prices may differ from the base rate due to considerations not addressed in the Worldscale formula.

Patrick Callahan, an expert on Alaska tanker tariffs, said that the Alaska market differs from other markets around the world. Alaska oil must be shipped using United States tankers.¹⁰ While Alaska legislative action may affect operating costs for tankers, tariffs are also influenced by market forces of supply and demand. The decrease in Alaska oil production resulted in a lower demand for tankers during the past year. Additionally, California has received a greater portion of Alaska oil this year while Gulf refineries have received less, adding to a lower demand for tankers. The operating costs for tankers, however, have risen dramatically due to increased delays, higher insurance premiums and increased administrative costs. The combined result of these factors are detrimental to tanker operators in Alaska; their tariffs have remained relatively stable, yet their operating costs have increased (Callahan 1990).¹¹

¹⁰The Merchant Marine Act of 1920, also known as the Jones Act, requires shippers to use United States tankers to transport goods between two domestic ports. Even though Alaska oil is shipped to the Gulf of Mexico via a pipeline in Panama, the final destination is an American port and United States tankers must be used (Callahan 1990). The Jones Act results in higher tariffs than might occur elsewhere in the world (Barker 1990).

¹¹Low tanker tariffs make it difficult for tanker owners to justify replacing existing vessels. Worldwide, a better market for tanker operators permit higher tariffs, but the rates are still too low to provide an incentive to replace aging tanker fleets (*Oil & Gas Journal* 1990a; *Oil & Gas Journal* 1990b; *Petroleum Intelligence Weekly* 1990; Uglesang 1990).

Availability of Insurance

Insurance appears to be available to most vessel owners (Barker 1990; Uglesang 1990). Some smaller companies may find it difficult to afford insurance, but most vessels likely to carry Alaska oil are insured by a P&I club (French 1990; Willitzer 1990). Brokers may contact many different P&I clubs to locate the best rates for their clients (Sullivan 1990).¹²

While most vessel companies are covered by P&I club insurance, they do not always have insurance through a company approved by the state of Alaska. Such vessel owners must either prove capability for self insurance, possess a surety or arrange a guarantor for insurance. For a fee, larger companies who charter independent tankers will occasionally guarantee coverage in Alaska waters for the purpose of fulfilling the state of Alaska proof of insurance requirement (Adams 1990).

Small landing craft operators carrying oil, however, may have difficulty obtaining insurance coverage. Because a tanker is considered to be any self-propelled vessel carrying bulk oil as cargo, small landing craft vessels must have the same coverage as a large tanker (Adams 1990).

Reluctance to Transport Oil to Cook Inlet

B.P. Exploration has terminated shipments of crude oil to Cook Inlet as of December 1989. According to an article in the *Anchorage Daily News*, B.P. America spokesperson Marcia Meermans, of the company's headquarters in Cleveland, stated that new Alaska oil spill legislation makes the risk of selling oil in Cook Inlet too high (Kizza 1990). Jim Palmer of B.P. Exploration, cited additional reasons for the company's reluctance to ship oil into Cook Inlet, including the view that this market was a low volume, low profit operation; a concern about possible Alaska Department of Environmental Conservation requirements for oil spill response equipment; and uncertainty about new limitations imposed by proposed state and federal oil spill legislation. B.P. Exploration is wary of even selling oil from the Valdez terminal destined for Cook Inlet because of the uncertainty of continued liability after the oil has been sold (Palmer 1990).

Gene Burden, vice-president for Administration and State Government Relations for Tesoro America, expressed concern that many factors inhibit construction of new tankers worldwide, and he fears added requirements by the state of Alaska could make it difficult for vessel owners to operate in Alaska waters. Mr. Burden notes two problems with proposed changes to state law contained in

¹²Although most of the P&I clubs belong to the IGPIC and receive reinsurance from the same policy, rate quotes for a particular tanker company may vary from one club to another.

Senator Szymanski
March 12, 1990
Page 7

SB 504. First, provisions in this legislation would require \$500 million proof of financial responsibility for all vessels transporting crude oil regardless of the vessel's size. Mr. Burden thinks that proof of insurance requirements should be less for smaller tankers.¹³ Tankers operating in Cook Inlet tend to be much smaller than those operating in Prince William Sound. Second, Mr. Burden states that a provision in SB 504 appears to require oil terminal operators to have proof of financial responsibility for \$500 million for off-loading crude oil from vessels. He thinks that this provision would be an enormous increase from present requirements.

I hope this information is useful to you. If you have any questions, please contact this agency.

¹³Judy Willitzer, an insurance broker for Frank B. Hall, suggested that insurance requirements for tankers be based on tonnage.

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Resource Development Council

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4/11/91

RDC Position Paper HB 196-Liability of Response Action Contractors

The Resource Development Council for Alaska, Inc., supports the expeditious passage of HB 196 during the first session of the 17th Alaska Legislature.

Designed to re-order the priorities established under current law, the bill would enable oil spill response contractors to respond or attempt to respond to a spill - no matter how small or large - without fear of being sued unless they are grossly negligent. Legislation passed in 1990 reversed what RDC believes is the accurate order of priorities by preserving the right to sue before encouraging responsible clean-up efforts.

The proposed "good Samaritan" legislation would remove the onerous stipulations of the current law which hang over the heads of any who attempt to respond to a spill. RDC believes that HB 196 equitably addresses the problem and urges the Legislature to pass the bill prior to adjournment this year.

ATTACHMENT D
State Response Contractor Liability Statutes



SPONSOR: Sen. Minner, Rep. Carey,
Sen. Vaughn, Rep. D. Ernie

DELAWARE STATE SENATE

136TH GENERAL ASSEMBLY

SENATE BILL NO. 6 JAN 9 1991

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

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

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

3 §8135. Limitation on Liability of Third Parties Rendering Assistance in
4 Oil or Hazardous Material Discharge Cleanup.

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

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

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

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

22 Section 2. Amend Chapter 81, Title 10 of the Delaware Code by striking
23 §8134 in its entirety.

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

Author - Sen. Minnar

CH 90-54 Laws of Florida

Fl. - Spill Response

ENROLLED

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

CS for CS for SB's 1068 and 22

First Engrossed (ntc)

1 A bill to be entitled
 2 An act relating to pollution; amending s.
 3 206.9935, F.S., relating to taxes imposed for
 4 coastal protection; providing for certain
 5 offshore oil drilling activity; providing for
 6 catastrophic discharges; creating s. 253.035,
 7 F.S.; requiring commercial vessels to anchor in
 8 designated anchorage areas; amending s.
 9 310.071, F.S.; providing for evaluation of
 10 certificated deputy pilots; amending s.
 11 310.101, F.S.; providing additional grounds for
 12 disciplinary actions by the Board of Pilot
 13 Commissioners; providing certain accountability
 14 in directing foreign vessels; amending s.
 15 310.111, F.S.; providing for report of certain
 16 marine incidents; amending s. 310.141, F.S.;
 17 providing that certain vessels are subject to
 18 pilotage, and reenacting s. 310.161, F.S.,
 19 relating to penalties for piloting without a
 20 license, to incorporate said amendment in a
 21 reference thereto; creating ss. 313.21, 313.22,
 22 313.23, and 313.24, F.S.; authorizing ports to
 23 regulate certain vessel movements and adopt
 24 certain guidelines for bottom clearance, vessel
 25 movements, and traffic communications; amending
 26 s. 376.031, F.S.; providing definitions;
 27 amending s. 376.091, F.S.; providing for
 28 issuance of spill prevention and response
 29 certificates; amending s. 376.06, F.S.;
 30 providing a penalty for operation of a terminal
 31 facility without a required registration

1068

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

1 certificate; increasing the maximum application
 2 fee; amending s. 376.069, F.S.; prohibiting
 3 operation of a terminal facility without a
 4 spill prevention and response certificate;
 5 providing requirements for application and
 6 operation; providing a penalty; amending s.
 7 376.07, F.S.; providing for rules of the
 8 Department of Natural Resources; providing for
 9 spill prevention, abatement, and cleanup and
 10 for wildlife rescue and rehabilitation;
 11 requiring adequate booming in the transfer of
 12 pollutants; providing penalties; prohibiting
 13 use of certain lobster traps after a specified
 14 date; creating s. 376.071, F.S.; requiring
 15 certain vessels to maintain spill prevention
 16 and control contingency plans; providing
 17 requirements; providing penalties; amending s.
 18 376.09, F.S.; providing certain immunity from
 19 liability for described persons; amending s.
 20 376.11, F.S.; providing additional sources and
 21 uses for moneys in the Florida Coastal
 22 Protection Trust Fund; amending s. 376.12,
 23 F.S.; increasing certain maximum liabilities
 24 for pollutant cleanup costs and damages;
 25 specifying conditions for limits on liability;
 26 providing financial security requirements;
 27 providing penalties; providing liability of
 28 cargo owner; specifying conditions for use of
 29 certain defenses; providing an exemption from
 30 certain notification requirements; creating s.
 31 376.121, F.S.; providing liability for damages

1068

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

1 guilty of a felony of the second degree, punishable as
 2 provided in s. 775.082, s. 775.083, or s. 775.084, as required
 3 in s. 837.012 ~~sv-837-84~~.

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

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

16 (3) After July 31, 1990, no lobster trap or traps to
 17 be deposited into waters of the state shall be impregnated
 18 with a petroleum product that may be released from such trap
 19 or traps. After July 31, 1995, no person shall deposit into
 20 the waters of the state any lobster trap or traps that have
 21 been impregnated with a petroleum product that may be released
 22 from such trap or traps into the waters of the state.

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

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

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

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

29 376.09 Removal of prohibited discharges.--

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

CORRECTION

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

1 guilty-of a felony of the second degree, punishable as
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 6 provisions of ss. 376.011-376.21, and at other reasonable
 7 times, be subject to a complete and thorough inspection. If
 8 the department determines there are unsatisfactory preventive
 9 measures or containment and cleanup capabilities, it shall, a
 10 reasonable time after notice and hearing in compliance with
 11 chapter 170, suspend the registration until such time as there
 12 is compliance with the department requirements.

13 (i) Such other rules and regulations as the exigencies
 14 of any condition may require or as may reasonably be necessary
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 24 civil penalty of \$10,000.

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

29 376.09 Removal of prohibited discharges.--

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

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

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

11 376.11 Florida Coastal Protection Trust Fund.--

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

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

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

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

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

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

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

16 (1) Because it is the intent of ss. 376.011-376.21 to
 17 provide the means for rapid and effective cleanup and to
 18 minimize cleanup costs and damages, any vessel, or its agents
 19 or servants, who permits or suffers a prohibited discharge or
 20 other polluting condition to take place within state
 21 boundaries shall be liable to the fund for all costs of
 22 cleanup or abatement, up to an amount not to exceed \$50 \$14
 23 million or \$625 \$188 per gross registered ton of such vessel,
 24 whichever is the lesser. When the department can show that
 25 such discharge was the result of willful or gross negligence
 26 or willful misconduct within the privity or knowledge of the
 27 owner or operator or agent thereof, such owner or operator
 28 shall be liable to the fund for the full amount of such sums
 29 expended. When a discharge of pollutants occurs from a
 30 terminal facility, recovery of costs of abatement and cleanup
 31 shall be limited to an amount not to exceed \$25 \$8 million,

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anced resources and...
 orces is vital to the econo...
 of surface and ground...
 est urgency and priority...
 ary source for potable...
 nly be served effectively...
 ate waters in as close...
 e taking into account...
 ecessary to provide...
 of public and private...
 er finds and declares...
 ation and disposal of...
 of the state and state...
 and escapes of pollut...
 es taken by private...
 the storage, transport...
 pose threats of g...
 nvironment of the state...
 er interests deriving...
 ccurred in the past, and...
 ture threats of poten...
 of which are expressly...
 aramount interests of...
 ion, and...
 tweigh any economic...
 ure upon those eng...
 ooping of pollutant's...
 is by the enactment of...
 ovide power of the...
 tment of Environmen...
 ental and health haz...
 age posed by such...
 and related activities...
 tainment and removal...
 and...
 on will enable the dep...
 restoration or replac...
 or potable private...
 at hazards exist du...
 which may include...
 orary basis after...
 source of potable...
 the following condit...
 a paragraph, the...
 of a contaminated...
 eets applicable...
 water quality criteria...
 nment or contact...
 where no such...
 ed, to a level wh...
 e level by the...
 t of Health and Re...
 ification of a filtra...
 ant filters as necessary...
 is or another treat...

method or methods designed to remove or filter out con...
 taminant from the water supply, and the term "replac...
 means replacement of a well or well field or con...
 for an alternative source of safe, potable water.
 For the purposes of the Inland Protection Trust...
 such restoration or replacement shall take preced...
 over other uses of the undedicated moneys within...
 the fund.
 Funding for activities described in this subpara...
 shall not exceed \$10 million for any one county for...
 one year other than for the provision of bottled wa...
 Funding for activities described in this subpara...
 shall not be available to fund any increase in the...
 capacity of a potable water system or potable private...
 over the capacity which existed prior to such resto...
 or replacement, unless such increase is the result...
 of use of a more cost-effective alternative than other...
 alternatives available.
 Provide for the inspection and supervision of ac...
 tivities described in this subsection, and
 Guarantee the prompt payment of reasonable...
 costs resulting therefrom, including those administrative...
 costs incurred by the Department of Health and Rehabil...
 itative Services in providing field and laboratory ser...
 vices, toxicological risk assessment, and other services...
 of the department in the investigation of drinking water...
 contamination complaints.
 The Legislature further finds and declares that...
 the preservation of the quality of surface and ground wa...
 ters is of prime public interest and concern to the state...
 in promoting its general welfare, preventing disease...
 and promoting health, and providing for the public safety...
 and that the interest of the state in such preservation...
 outweighs any burdens of liability imposed by the Legis...
 lature upon those persons engaged in storing pollutants...
 and related activities.
 The Legislature further declares that it is the in...
 tent of ss. 376.30-376.319 to support and complement...
 applicable provisions of the Federal Water Pollution...
 Control Act, as amended, specifically those provisions...
 relating to the national contingency plan for removal of...
 pollutants.
 s 94 ch. 83-310, s 5 ch. 94-338, s 10 ch. 86-159 s 1 ch. 29-188
 376.301 Definitions of terms used in ss. 376.30-...
 376.319.—When used in ss. 376.30-376.319, unless the...
 context clearly requires otherwise, the term:
 (1) "Barrel" means 42 U.S. gallons at 60 °Fahrenheit.
 (2) "Department" means the Department of Environ...
 mental Regulation.
 (3) "Discharge" includes, but is not limited to, any...
 leaking, seeping, pouring, misapplying, emit...
 ting, emptying, or dumping of any pollutant which oc...
 curs and which affects lands and the surface and...
 ground waters of the state not regulated by ss. 376.011-...
 376.21.
 (4) "Facility" means a nonresidential location con...
 taining any underground stationary tank or tanks which...
 contain hazardous substances or pollutants and have in...
 dividual storage capacities greater than 110 gallons, or...
 an aboveground stationary tank or tanks which contain...
 pollutants which are liquids at standard ambient temper...

ature and pressure and have individual storage capaci...
 ties greater than 550 gallons. This definition shall not in...
 clude facilities covered by ss. 376.011-376.21 except for...
 marine fueling facilities with underground or above...
 ground tanks where the facility has no one tank with a...
 capacity greater than 30,000 gallons, facilities covered...
 by chapter 377 or containers storing solid or gaseous...
 pollutants, and agricultural tanks having storage capaci...
 ties of less than 550 gallons.
 (5) "Operator" means any person operating a facility...
 whether by lease, contract, or other form of agreement.
 (6) "Owner" means any person owning a facility.
 (7) "Person" means any individual, partner, joint ven...
 ture, or corporation, any group of the foregoing orga...
 nized or united for a business purpose, or any govern...
 mental entity.
 (8) "Person in charge" means the person on the...
 scene who is in direct, responsible charge of a facility...
 from which pollutants are discharged, when the dis...
 charge occurs.
 (9) "Petroleum" includes:
 (a) Oil, including crude petroleum oil and other hy...
 drocarbons, regardless of gravity, which are produced...
 at the well in liquid form by ordinary methods and which...
 are not the result of condensation of gas after it leaves...
 the reservoir; and
 (b) All natural gas, including casinghead gas, and all...
 other hydrocarbons not defined as oil in paragraph (a).
 (10) "Petroleum product" means any liquid fuel com...
 modity made from petroleum, including, but not limited...
 to, all forms of fuel known or sold as diesel fuel, kero...
 sene, all forms of fuel known or sold as gasoline, and...
 fuels containing a mixture of gasoline and other prod...
 ucts, excluding liquefied petroleum gas and American...
 Society for Testing and Materials (ASTM) grades no. 5...
 and no. 6 residual oils, bunker C residual oils, interme...
 diate fuel oils (IFO) used for marine bunkering with a vi...
 scosity of 30 and higher, asphalt oils, and petrochemica...
 feedstocks.
 (11) "Petroleum storage system" means a stationary...
 tank not covered under the provisions of chapter 377...
 together with any onsite integral piping or dispensing...
 system associated therewith, which is used, or intended...
 to be used, for the storage or supply of any petroleum...
 product as defined herein, and which:
 (a) Is registered with the Department of Environmen...
 tal Regulation under this chapter or any rule promulgat...
 ed pursuant hereto;
 (b) Is located in a terminal facility registered with the...
 Department of Natural Resources under this chapter or...
 any rule promulgated pursuant hereto;
 (c) Is located in a storage facility licensed with the...
 Department of Revenue under s. 206.022 or is...
 206.9930, excluding off-site pipelines;
 (d) Is a system with respect to which notification has...
 been submitted to the Department of Environmental...
 Regulation under s. 376.303; or
 (e) Is a system with respect to which notification has...
 been submitted to the appropriate state agency under...
 Subtitle I of the Resource Conservation and Recover...
 Act.

(12) "Pollutants" includes any "product" as defined in s. 376.19(1), pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas.

(13) "Pollution" means the presence on the land or in the waters of the state of pollutants in quantities which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

(14) "Response action" means any activity, including evaluation, planning, design, engineering, construction, and ancillary services, which is carried out in response to any discharge, release, or threatened release of a hazardous substance, pollutant, or other contaminant from a facility or site identified by the department under the provisions of ss. 376.30-376.319.

(15) "Response action contractor" means a person who is carrying out any response action, including a person retained or hired by such person to provide services relating to a response action.

(16) "Secretary" means the Secretary of the Department of Environmental Regulation.

(17) "Hazardous substances" means those substances defined as hazardous substances in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767.

(18) "Person responsible for conducting site rehabilitation" means the site owner, operator, or the person designated by the site owner or operator on the reimbursement application.

(19) "Marine fueling facilities" means a commercial or recreational facility providing fuel to vessels, excluding bulk product handling terminals.

(20) "Bulk product handling terminal" means a coastal waterfront location where pollutants are received by tank vessel, pipeline, tank car or tank vehicle and are stored or blended in aboveground bulk tanks with individual capacities greater than 30,000 gallons, for the purpose of distributing such pollutants by tank vessel, pipeline, tank vehicle, or container.

History.—s. 34 ch. 23-310 s. 5 ch. 34-332 s. 11 ch. 36-159 s. 2 ch. 39-102.
*Note.—Section 3 of ch. 33-331 provides that the Department of Professional Regulation, effective January 1, 1989, adopts rules providing standards for the certification of response action contractors as defined in section 376.301, Florida Statutes, provided, however, that no certification shall be required for a professional engineer licensed under chapter 471, Florida Statutes. The Department of Environmental Regulation shall cooperate with the Department of Professional Regulation in the adoption of such rules and shall file a comment upon such rules prior to their adoption.
*Note.—The word "includes" was substituted by the editors for the word "means".
*Note.—Section 206.2930 does not exist.

376.302 Discharge of pollutants prohibited.—The discharge of pollutants into or upon any waters of the state or lands, which discharge violates any departmental "standard" as defined in s. 403.303(13), is prohibited.
History.—s. 34 ch. 23-310 s. 5 ch. 34-332

376.303 Powers and duties of the Department of Environmental Regulation.—

(1) The department has the power and the duty to:
(a) Establish rules, including, but not limited to, construction standards, permitting or registration of tanks, maintenance and installation standards, and removal or disposal standards, for

aboveground facilities and their on-site integral piping systems. Such rules may establish standards for underground facilities which store hazardous substances and pollutants, and marine fueling facilities and aboveground facilities which store pollutants not covered by ss. 376.311-376.321 or by chapter 377. Requirements for facilities with underground storage tanks having storage capacities over 110 gallons that store hazardous substances shall not be effective until January 1, 1991. The department shall maintain a compliance verification program for this section, which may include investigations or inspections to locate improperly abandoned tanks and which shall be implemented upon termination of the Early Detection Incentive Program established under s. 376.3071(9) or December 31, 1987, whichever is earlier. The department may contract with other governmental agencies or private consultants to perform compliance verification activities. The contracts may provide for advance of working capital to local governments to expedite the implementation of the compliance verification program. Counties with permit or registration fees for storage tanks or storage tank systems are not eligible for advance funding for the compliance verification program.

(b) For each tank registered with the department under this section, issue a registration placard listing all registered tanks at a facility, to be displayed in plain view in the office, kiosk, or other suitable location at the facility where the tanks are located. For new facilities, an initial registration fee of \$50 per tank is due and payable within 30 days after receipt of notification by the department. Owners or operators that upgrade their facilities by replacing their existing tanks are required to pay a tank replacement registration fee of \$25 per tank within 30 days after receipt of notification by the department. Owners and operators of new facilities and those with existing facilities replacing their tanks are required to notify the department 10 days prior to installation of any tanks, using approved department forms. An annual renewal fee in the amount of \$25 per tank shall be imposed upon the tank owner, to be due and payable by July 1 of each year, except that stationary tanks of 110 gallons or less at nonresidential locations and agricultural tanks of 550 gallons or less shall not be required to pay a registration fee. The department shall notify each registrant of the annual renewal fee requirement no later than June 1 of each year. Any payment over 30 days past due shall be deemed delinquent, and the registrant shall be required to pay an additional \$20 late fee for each tank with respect to which payment is delinquent. After January 1, 1990, marine fueling facilities are required to pay all registration fees specified in this section in full of the annual registration fees required under ss. 376.051 and 376.06. Any existing unregistered facility that fails to register by October 1, 1989, shall pay all previous registration fees that should have been paid in accordance with this section beginning on July 1, 1986, and which were avoided through noncompliance. Revenues derived from fees imposed upon tanks storing petroleum products

deposited in the Water Control Districts shall be deposited under s. 376.307.
Provide for the development of rules and plans to control the discharge of various pollutants.
Establish a requirement that any act be subject to compliance at reasonable times.
If a pollutant in violation of ss. 376.30-376.319 shall be fully investigated by the department to ensure that no violation continues to occur.
Keep an accurate record of the costs incurred for the investigation and, except as otherwise provided, after diligently to collect the costs incurred from the person responsible for the violation. The department may sue for the cost of the investigation or the likelihood of a violation.
Bring an action to enforce the liabilities imposed by ss. 376.30-376.319 of ss. 403.121, 403.131, and 403.132 to enforcement under ss. 376.30-376.319 shall extend to any violation not described in ss. 376.30-376.319.
(a) The department may require the owner of a pollutant storage tank to install a monitoring system on a storage tank as defined in s. 376.301. Such installation shall be required pursuant to the rules promulgated by the department. The minimum include:
1. A signed statement of compliance for the monitoring systems specified in s. 376.301, that such statement shall be filed with the department.
2. Signed statements by the owner or supervising the monitoring system for each tank, which statements shall be necessary for the compliance.
(b) The department may, at its discretion, contract with local government for the administration of its response action. Such contracts shall be subject to the jurisdiction of the department. However, no such contract shall be entered into unless the local government has approved such response action.
To this end, the department may promulgate rules and regulations as to the procedures and options hereunder. The department may apply to the court for an order to enforce such rules and regulations.
(c) The department may

ed collected and credited to the Trust Fund in accordance with ss. 206.9935(2) and 206.9935(3). Recoveries, reimbursements, recoveries, reimbursements, charges credited to the Trust Fund in accordance with ss. 376.3071 and 376.3072 shall be used by the department for carrying out the purposes of the Inland Protection Trust Fund provided in ss. 376.3071 and 376.3072. All excise taxes and credits pursuant to ss. 206.9935(2) and 206.9935(3) and all penalties, judgments, and charges related to the Inland Protection Trust Fund shall be credited to the Inland Protection Trust Fund for activities provided in s. 376.3071 and 376.3072. It is necessary to protect the welfare of the citizens of this state and the environment of contaminated potability systems. Carried out pursuant to the Florida Response Compensation Act (FLA) shall be carried out or authorized by the department. The department may, except that, upon a finding that sufficient unobligated moneys in the trust fund to adequately carry out the purposes of this subparagraph are not available, disburse available moneys for activities, or to withhold activities. On July 1, 1989, funds used for the purposes of this section shall be expended for water supply systems for contaminated potable water wells constructed after January 1, 1989, in accordance with standards adopted pursuant to s. 376.309(5). For existing water supply systems, provided that the present worth of the 10-year amortizing filters for the residents to be served by said system is less than the present worth of the 10-year cost of providing and maintaining filters for the residents to be served by said system, no filter shall be provided to provide water

and that is part of a supply system of development of a size that would, according to the department, be effectively served by a water supply system if such subdivision or development received its development order after January 1, 1989.

2. Subsidies to persons developing new water supply systems to be permitted and constructed after January 1, 1989, in accordance with standards adopted pursuant to s. 376.309(5) because of actual or potential contamination of potable water wells, provided that no such subsidy shall exceed one-half of the present worth of the 10-year cost of providing and maintaining filters for the residents to be served by said system.

3. The most cost-effective remedy as determined by the department, for wells drilled prior to January 1, 1989.

(5) Except as otherwise provided by law, the department shall recover to the use of the fund from a person or persons at any time causing or having caused the discharge or from the Federal Government, jointly and severally, all sums owed or expended from the fund, pursuant to s. 376.308, except that the department may decline to pursue such recovery if it finds the amount involved too small or the likelihood of recovery too uncertain. Sums recovered as a result of damage due to a discharge of a pollutant or other similar disaster shall be apportioned between the fund and the General Revenue Fund so as to repay the full costs to the General Revenue Fund of any sums disbursed therefrom as a result of such disaster. Any request for reimbursement to the fund for such costs, if not paid within 30 days of demand, shall be turned over to the department for collection.

(6) Moneys in the fund which are not needed currently to meet the obligations of the department in the exercise of its responsibilities under ss. 376.30-376.319 shall be deposited with the Treasurer to the credit of the fund and may be invested in such manner as is provided for by statute. The interest received on such investment shall be credited to the fund. Any provisions of law to the contrary notwithstanding, such interest may be freely transferred between this trust fund and the Inland Protection Trust Fund, in the discretion of the department.

(7) Except as otherwise provided by law, it is the duty of the department in administering the fund diligently to pursue the reimbursement to the fund of any sum expended from the fund for cleanup and abatement in accordance with the provisions of this section, unless the department finds the amount involved too small or the likelihood of recovery too uncertain. For the purposes of s. 95.11, the limitation period within which to institute an action to recover such sums shall commence on the last date on which any such sums were expended, and not the date that the discharge occurred.

History.—s. 94 ch. 83-310, s. 3 ch. 83-353, s. 10 ch. 84-338, ss. 3, 14, 34 ch. 85-159, s. 82 ch. 86-163, s. 4 ch. 88-393, s. 9 ch. 89-171.

Note.—The reference to "s. 376.11(4)(f)" was substituted by the editors for a reference to "s. 376.11(5)(g)" in consequence of the renumbering of s. 376.11(5) as a result of ss. 3, 8, and 34, ch. 86-159.

Note.—Section 14, ch. 89-171, provides that "[t]he Executive Director of the Department of Revenue is hereby authorized to adopt emergency rules pursuant to s. 218.05(9), Florida Statutes, for purposes of implementing the applicable provisions of this act. Rules of the Department of Revenue related to and in furtherance of the orderly implementation of the applicable provisions of this act shall not be subject to s. 120.54(17), Florida Statutes, drawout proceeding, but, once adopted, shall be

substituted for ss. 206.9935(2) and 206.9935(3) by the Legislature and the Department of State shall be substituted for ss. 206.9935(2) and 206.9935(3) by the Department of State.

376.3071 Inland Protection Trust Fund; creation; purposes; funding.—

(1) FINDINGS.—in addition to the legislative findings set forth in s. 376.30, the Legislature finds and declares:

(a) That significant quantities of petroleum and petroleum products are being stored in underground storage systems in this state, which storage is a hazardous undertaking.

(b) That spills, leaks, and other discharges from such storage systems have occurred, are occurring and will continue to occur and that such discharges pose a significant threat to the quality of the groundwaters and inland surface waters of this state.

(c) That where contamination of the ground or surface water has occurred, remedial measures have often been delayed for long periods while determinations as to liability and the extent of liability are made and that such delays result in the continuation and intensification of the threat to the public health, safety, and welfare in greater damage to the environment, and in significantly higher costs to contain and remove the contamination, and

(d) That adequate financial resources must be readily available to provide for the expeditious supply of safe and reliable alternative sources of potable water to affected persons and to provide a means for investigation and cleanup of contamination sites without delay.

(2) INTENT AND PURPOSE.—It is the intent of the Legislature to establish the Inland Protection Trust Fund to serve as a repository for funds which will enable the department to respond without delay to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety, and welfare and to minimize environmental damage.

(3) CREATION.—There is hereby created the Inland Protection Trust Fund, hereinafter referred to as the "fund," to be administered by the department. This fund shall be used by the department as a nonlapsing revolving fund for carrying out the purposes of this section and s. 376.3073. To this fund shall be credited all penalties, judgments, recoveries, reimbursements, loans, and other fees and charges related to the implementation of this section and s. 376.3073 and the excise tax revenues levied, collected, and credited pursuant to ss. 206.9935(3) and 206.9945(1)(c). Charges against the fund shall be made in accordance with the provisions of this section.

(4) USES.—Whenever, in its determination incidents of inland contamination related to the storage of petroleum or petroleum products may pose a threat to the environment or the public health, safety, or welfare, the department shall obligate moneys available in the fund to provide for:

(a) Prompt investigation and assessment of contamination sites;

(b) Expeditious restoration or replacement of potable water supplies as provided in s. 376.30(3)(c)1.

(11) VOLUNTARY CLEANUP.—Nothing in chapter 36-159, Laws of Florida, shall be deemed to prohibit a person from conducting site rehabilitation either through his own personnel or through responsible response action contractors or subcontractors.

(2) REIMBURSEMENT FOR CLEANUP EXPENSES.

(a) Legislative findings.—The Legislature finds and declares that, in order to provide for rehabilitation of as many contamination sites as possible, as soon as possible, voluntary rehabilitation of contamination sites should be encouraged, provided that such rehabilitation is conducted in a manner and to a level of completion which will protect the public health, safety, and welfare and will minimize damage to the environment.

(b) Entitlement; conditions.—To accomplish this purpose, for sites initially reported on or prior to midnight on December 31, 1988, any person conducting site rehabilitation under this subsection, either through his own personnel or through responsible response action contractors or subcontractors, shall be entitled to reimbursement from the fund at reasonable rates for allowable costs incurred on or after January 1, 1985, in connection with such site rehabilitation, subject to the following conditions:

1. Nothing in this subsection shall be construed to authorize reimbursement of any person or for any site excluded from participation in the Early Detection Incentive Program under subparagraph 1 or subparagraph 3 of paragraph (9)(b) or paragraph (9)(d).

2. The provisions of this subsection shall not apply to any site initially reported prior to July 1, 1986, where the department has initiated an administrative or civil enforcement action with respect to such site, unless the responsible party has, prior to July 1, 1986, undertaken, and made a reasonable effort to carry out, one or more of the following remedial actions at the site:

- a. Product recovery
- b. Groundwater restoration, or
- c. Soil removal.

3. Reimbursement under this subsection shall not be considered a state contract and shall not be subject to the provisions of chapter 287.

4. Site rehabilitation shall be completed in accordance with cleanup criteria established by the department pursuant to paragraph (5)(b).

5. Procedural requirements of this subsection shall have been met.

(c) Procedure to initiate and conduct site rehabilitation.—Any person initiating site rehabilitation pursuant to this section between January 1, 1985, and December 31, 1988, who intends to file for reimbursement shall submit written notice of such intent to the department prior to midnight on December 31, 1988, together with documentation of site conditions prior to initiation of cleanup. Within 60 days after receipt of such notice and sufficient documentation of site conditions prior to initiation of cleanup, the department shall determine whether the person is ineligible to apply for reimbursement under subparagraph (b)1 or subparagraph (b)2, and shall notify the applicant as to his eligibility in writing.

(d) Records.—The person responsible for conducting site rehabilitation, or his agent, shall keep and preserve suitable records of hydrological and other site in-

vestigations and assessments, site rehabilitation plans, contracts and contract negotiations, and accounts, invoices, sales tickets, or other payment records from purchases, sales, leases, or other transactions involving costs actually incurred related to site rehabilitation. Such records shall be made available upon request to agents and employees of the department during regular business hours and at other times upon written request of the department. In addition, the department may from time to time request submission of such site-specific information as it may require. All records of costs actually incurred for cleanup shall be certified by affidavit to the department as being true and correct.

(e) Application for reimbursement.—Any eligible person who performs a site rehabilitation program or performs site rehabilitation tasks such as preparation of site rehabilitation plans or assessments; product recovery; cleanup of groundwater or inland surface water, soil treatment or removal; or any other tasks identified by department rule developed pursuant to paragraph (5)(b), may apply for reimbursement. Such applications for reimbursement must be submitted to the department on forms provided by the department, together with evidence documenting that site rehabilitation program tasks were conducted or completed in accordance with department rule developed pursuant to paragraph (5)(b), and other such records or information as the department requires. The reimbursement application and supporting documentation shall be examined by a certified public accountant in accordance with generally accepted accounting principles. A copy of the accountant's report shall be submitted with the reimbursement application. Applications for reimbursement may not be approved for site rehabilitation program tasks which have not been completed, except for the task of groundwater cleanup.

(f) Review.—

1. Provided there are sufficient unencumbered funds available in the Inland Protection Trust Fund, the department shall have 60 days to determine if the applicant has provided sufficient information for processing the application and shall request submission of any additional information that the department may require within such 60-day period.

2. The department shall deny or approve the application for reimbursement within 90 days after receipt of the last item of timely requested additional material, or, if no additional material is requested, within 90 days of the close of the 60-day period described in subparagraph 1., unless the total review period is otherwise extended by written mutual agreement of the applicant and the department.

3. Final disposition of an application shall be provided to the applicant in writing, accompanied by a written explanation setting forth in detail the reason or reasons for the approval or denial. If the department fails to make a determination on an application within the time provided in subparagraph 2., or denies an application, or if a dispute otherwise arises with regard to reimbursement, the applicant may request a hearing pursuant to s. 120.57.

(g) Schedule for reimbursement.—Upon approval of an application for reimbursement, reimbursement shall be made

reasonable expenditures site rehabilitation program shall be due and payable to application, provided funds available in the fund. Payment shall be made to department, receipt of reimbursement payment for a program tasks shall be in accordance with department rule developed pursuant to paragraph (5)(b), and shall be the program tasks working towards meeting completion shall be a minimum reimbursement amount.

(h) Obligated funds.—Reimbursement of expenditures for site rehabilitation tasks prior to July 1, 1990, for such tasks are not reimbursable amount will revert to the Inland Protection Trust Fund.

(i) Liberal construction.—Reimbursement initiated or continued under this subsection shall be construed liberally by the department as authorized in this subsection. Particular records or information may accept as sufficient which meets the intent of this subsection.

(13) FINANCIAL AND TECHNICAL ADVISORY BOARD.

(a) Creation dates.—The Technical Advisory Board shall be created by the secretary of the department, with the assistance of the secretary of the Inland Protection Trust Fund, and shall be subject to the approval of the governor. The board shall be composed of representatives of the department, the Inland Protection Trust Fund, and other interested parties. The board shall have the authority to advise the department on matters relating to the department's policies and procedures and cost control. The board shall advise the department on matters relating to the department's policies and procedures and cost control. The board shall have the authority to advise the department on matters relating to the department's policies and procedures and cost control.

(b) Membership.—The board shall consist of the following:

- One representative of the department.
- One representative of the Inland Protection Trust Fund.

site rehabilitation plans, and accounts, including records from purchases involving site rehabilitation, available upon request to the department during regular business hours. Upon written request, the department may from such site-specific records of costs actually incurred by affidavit to the department.

Eligible site rehabilitation program or program tasks.—Any eligible site rehabilitation program or program tasks such as preparation or assessments, production or inland surface water or any other tasks defined pursuant to paragraph (b) shall be eligible for reimbursement. Such applications submitted to the department, together with the site rehabilitation project completed in accordance with the standards or information as required by the department, shall be examined in accordance with the principles. A copy of the application submitted with the reimbursement for site rehabilitation program or program tasks, except for the

unencumbered Inland Protection Trust Fund, the department shall determine if the application for processing of any submission of any application to the department may require

or approve the application 90 days after receipt of additional material, or, if not approved, within 90 days of the date described in subparagraph (b) or otherwise extension of the applicant

application shall be provided accompanied by a written explanation if the department fails to make a decision within the time provided in the application, or if a hearing pursuant to s.

department. —Upon approval of the application, reimbursement for

reasonable expenditures of a site rehabilitation program or site rehabilitation program tasks documented therein shall be due and payable within 90 days of approval of the application, provided there are sufficient unencumbered funds available in the Inland Protection Trust Fund. Payment shall be made in the order in which the department receives completed applications. Reimbursement payment for a site rehabilitation program or program tasks shall be made for activities completed in accordance with department rule developed pursuant to paragraph (5)(b), except that a person who undertakes the program task of groundwater cleanup and is working toward meeting the applicable cleanup criteria for completion shall be allowed to receive, upon request, interim reimbursement annually while the cleanup is taking place.

(h) Obligated funds.—Any funds obligated for reimbursement of expenditures for a site rehabilitation program task prior to July 1, 1989, shall remain obligated until July 1, 1990. If completed applications for such program tasks are not received by that date, the obligated amount will revert to the unobligated balance of the Inland Protection Trust Fund.

(i) Liberal construction.—With respect to site rehabilitation initiated prior to July 1, 1986, the provisions of this subsection shall be given such liberal construction by the department as will accomplish the purposes set forth in this subsection. With regard to the keeping of particular records or the giving of certain notice, the department may accept as compliance action by a person which meets the intent of the requirements set forth in this subsection.

(13) FINANCIAL AND TECHNICAL ADVISORY COMMITTEE.—

(a) Creation, duties.—There is created the Financial and Technical Advisory Committee, hereinafter referred to as the "committee," to review, at its discretion or upon request of the secretary, site rehabilitation projects or water restoration or replacement projects which the department, a local government, or any other person undertakes pursuant to the provisions of this section for the purpose of providing the department with constructive comments relating to technical and accounting procedures which may be employed and for the purpose of keeping the department abreast of the latest available technologies and potential improvements in management and cost control practices. In addition, the committee shall advise the department, any local government undertaking a project under contract with the department pursuant to s. 376.3073, or any other person undertaking site rehabilitation under subsection (12) with respect to any site rehabilitation project or water restoration or replacement project which the department, local government, or other person, as appropriate, reasonably anticipates will involve expenditures or actions which may obligate the fund in excess of \$500,000 for that one project, exclusive of related investigation and assessment costs.

(b) Membership.—The committee shall be composed of nine persons to be appointed by the Governor, as follows:

1. One hydrologist;
2. One hydrogeologist;

3. One toxicologist;
4. One community water supply expert;
5. One response action contractor;
6. One certified public accountant;
7. One person representing petroleum refiners;
8. One person representing petroleum marketers; and
9. One person representing the public's environmental interests.

No person who is a public official or public employee other than a member of the teaching or research faculty or other person holding an administrative or professional position within the State University System shall be eligible for appointment under this paragraph.

(c) Organization and terms; expenses; meetings.—

1. All members of the committee shall serve for 2-year terms, except that, in order to achieve staggered terms, two of the members appointed under subparagraphs (b)1-5 and two of the members appointed under subparagraphs (b)6-9 shall be initially appointed for 1-year terms.

2. A vacancy shall be filled for the remainder of the unexpired term by appointment in the same manner as provided for an original appointment.

3. The Governor shall designate one member of the committee to serve as chairman.

4. Members of the committee shall serve without compensation, but shall be entitled to travel and per diem expenses pursuant to s. 112.061.

5. The committee shall meet on a regular basis at the call of the chairman.

(d) Departmental support.—The department shall supply such information, assistance, and facilities as are deemed necessary for the committee to carry out its duties under this subsection and shall provide two staff members for the performance of required clerical and administrative functions of the committee. Departmental costs to comply with the provisions of this paragraph shall be considered administrative costs to be paid by the fund, except that no more than \$75,000 per year may be charged to the fund to cover these costs.

(e) Review of certain projects required.—

1. Whenever the department, a local government acting pursuant to a contract with the department under s. 376.3073, or other person undertaking a site rehabilitation under subsection (12), after conducting an investigation and assessment, has a reasonable expectation that a site rehabilitation project or water restoration or replacement project undertaken thereby will involve expenditures or actions which may require obligation of funds in excess of \$500,000, exclusive of investigation and assessment costs, the department, local government, or other person shall submit to the committee a request for review of the project, together with documentation of past and proposed expenditures and a proposed plan of action relative to such project, other than documentation of expenditures relating to investigation and assessment. Copies of such request, together with all associated documentation, shall be transmitted forthwith to every member of the committee.

2. Within a reasonable time after receipt of a request for review, the committee shall meet at the call of

the chairman for the purpose of reviewing the project. Such review shall address, but need not be limited to, the financial and technical feasibility of the proposed plan of action and its anticipated costs and whether other, more cost-effective alternatives are available which would protect the public health, safety, and welfare and minimize damage to the environment.

3. The committee shall report its findings and recommendations to the secretary, and to the local government in the case of a project undertaken pursuant to a contract with the department under s. 376.3073 or to the other person conducting a site rehabilitation project pursuant to subsection (12), which findings and recommendations shall be constructive in nature and shall be limited to the financial and technical feasibility of the proposed plan and its anticipated costs and whether other, more cost-effective alternatives are available which would protect the public health, safety, and welfare and minimize damage to the environment. Such findings and recommendations shall be advisory only and shall not be binding upon any party.

(f) Subsequent review. --With respect to any project which was previously reported to and reviewed by the committee as provided in paragraph (e), whenever it appears that costs, exclusive of investigation and assessment costs, for such project will exceed 150 percent of the costs originally anticipated and reported to the committee, or that a significant change in the plan of action for such project is called for, the department, local government, or other person, as appropriate, shall report the proposed additional expenditures or proposed change to the committee, and the committee may, in its discretion, review same as provided in subparagraphs (e) 2 and 3.

(g) Construction. --Nothing in this subsection shall be construed to restrict the department, a local government acting pursuant to a contract with the department under s. 376.3073, or other person undertaking site rehabilitation pursuant to subsection (12) from making expenditures or taking those actions deemed necessary to protect the public health, safety, or welfare or to minimize damage to the environment. The department or local government may submit to the committee for its review documentation regarding such expenditures or actions after the fact.

History.--s. 15, 16 ch. 86-153 s. 3 ch. 87-274 s. 2 ch. 88-331 s. 4 ch. 89-188

Note.--The reference to s. 376.3031(a) was substituted by the editors for a reference to s. 376.3031(a) pursuant to s. 3 ch. 89-188

Note.--The reference to s. 376.11.4(e) was substituted by the editors for a reference to s. 376.11.5(1) in consequence of the renumbering of s. 376.11(5) as a result of ss. 2, 3, and 34 ch. 85-153

Note.--The word "Fund" was inserted by the editors

Note.--Expires October 1, 1996 pursuant to s. 16 ch. 86-153 and is scheduled to be repealed pursuant to s. 11.511

376.3072 Florida Petroleum Liability Insurance and Restoration Program. --

(1) PROGRAM OF INSURANCE. --There is hereby created the Florida Petroleum Liability Insurance and Restoration Program to be administered by the Department of Environmental Regulation. The department shall establish the Florida Liability Insurance and Restoration Program on or before January 1, 1999. Department rules shall provide that the restoration program is retroactive to January 1, 1989, for qualified sites that apply for the

program before September 1, 1989. The program must provide third-party liability insurance to qualified participants for incidents of inland contamination related to the storage of petroleum products regulated by department rules pertaining to storage tanks adopted pursuant to s. 376.303 and must provide restoration for eligible sites in the liability insurance program or for sites which are eligible for self-insurance under the provisions of this section. The program may not participate in the Florida Insurance Guaranty Association. Chapter 624 does not apply to the program. The program shall not be prohibited from recovering indemnities and expenses which are covered by the Florida Insurance Guaranty Association pursuant to coverage purchased by the program from a participating insurer.

(2) SCOPE AND TYPE OF COVERAGE. --The Florida Petroleum Liability Insurance and Restoration Program must provide up to \$1 million of liability insurance for each incident of inland contamination related to the storage of petroleum products. A site upon which a discharge was discovered prior to January 1, 1989, shall not be eligible to participate in the third-party insurance program until such time as the site shall be restored as required by the department or until the department determines that the site does not require restoration or the department's insurance carrier agrees to assume the risk for a new incident at the site. The third-party liability program shall provide up to \$1 million per incident with an annual aggregate of \$1 million of third-party liability insurance for owners or operators who have 100 or fewer petroleum storage tanks, and the program shall provide up to \$1 million per incident of third-party liability insurance coverage with an annual aggregate of \$2 million of liability insurance for owners or operators who have more than 100 storage tanks. The department may provide storage tank owners or operators who do not market petroleum products and whose output of petroleum products is less than 10,000 gallons per month with reduced third-party liability insurance of \$500,000 per incident with an annual aggregate of \$1 million for owners and operators with less than 100 tanks and \$2 million for owners and operators with more than 100 tanks. The program shall have a deductible of \$500 per incident and may offer higher deductibles for third-party insurance to be paid by the insured for the first two premium years. The department shall adopt a deductible schedule for the remainder of the program that shall not exceed \$100,000 per year to be paid by the insured. The department shall issue policies to eligible owners and operators. The policies shall be in compliance with the federal underground storage tank financial responsibility requirement contained in 40 C.F.R. 280.97. In order to implement the restoration program, the department may contract with an insurance company, a reinsurance company, or an insurance consultant to issue policies, to verify compliance with this section, to determine reasonable rates for allowable costs, and to manage response action contractors. The department must approve any insurance company, self-insurance, or any other mechanism used to achieve the third-party liability insurance requirements of the Florida Petroleum Liability Insurance and Restoration Program. In order to be approved by the department, an insurance company,

self-insurance or other means criteria establishment Agency for financial shall be registered or insurance. The purchase subject to chapter 25 occurred shall be an operator of the site liability insurance program requirements of this section reported prior to January given pursuant to s. 376 eligible for the third-party solely due to that discharge in the restoration program on or after January in compliance with the ing to storage tanks and the owner or operator and all pertinent actions site which had a discharge which is eligible for the program is also a condition program for any, on January 1, 1989. Restored laminated site will be the third-party liability is restored as required department determines restoration. A site where between January 1, 1989 which is in compliance pertaining to storage 376.303, may participate said discharge with or party liability insurance cost of restoration shall Restoration Trust Fund in operator to participate in the or operator must be in charge of petroleum or move from site to the system, if necessary, a tion as defined by regulation will be paid from Fund. The restoration criteria and procedure 376.3071. The Florida Restoration Program shall be to the storage of oil department rules pursuant to section 37 shall have an annual aggregate restoration per facility. The \$500 deductible shall department shall pay the remainder of the restoration \$25,000 per year to be restoration program. The and is meant to cover costs or to be used for purposes of the

376 3073. The department may not disapprove an application due to the population size of a county and may delegate compliance verification and enforcement to those local governments who agree to enforce the state's program jointly.

(5) The department is authorized to adopt rules that permit any county government to establish, in accordance with s. 403.182, a program regulating underground storage tanks, which program is more stringent or extensive than that established by any state law or rule regulating underground storage tanks. The department shall approve or deny a request by a county for approval of an ordinance establishing such a program according to the procedures and time limits of s. 120.60. When adopting the rules, the department shall consider local conditions that warrant such more stringent or extensive regulation of underground storage tanks, including, but not limited to, the proximity of the county to a sole or single-source aquifer, the potential threat to the public water supply because of the proximity of underground storage tanks to public wells or groundwater, or the detection of petroleum products in public or private water supplies.

(6) A county government may adopt an ordinance regulating underground storage tanks that is the same as any state law or rule regulating such tanks upon approval by the department of a completed application.

History.—s. 13 ch. 54-338 s. 23, ch. 36-159, s. 5, ch. 87-374 s. 18 ch. 38-156, s. 5, ch. 98-331 s. 7, ch. 99-188.

*Note.—The reference to "subsection (5)" was substituted by the editors for a reference to "subsection (4)" to conform to the renumbering of subsections by s. 7, ch. 99-188.

376.319 Response action contractors; indemnification.—

(1) The department may agree to hold harmless and indemnify a response action contractor who has a written contract with the department or who has a written contract with a local government which has contracted with the department to administer a program pursuant to chapter 86-159, Laws of Florida, for any civil damages to third parties:

(a) That result from the acts or omissions of the response action contractor in carrying out a response action; and

(b) That are caused by a discharge or release of a hazardous substance, pollutant, or other contaminant from a site upon which the response action is being carried out.

(2) The department, in determining whether or not to enter into hold-harmless and indemnification agreements, shall consider:

- (a) The availability of cost-effective insurance;
- (b) The immediate need for the response action;
- (c) The availability of qualified response action contractors; and
- (d) Restricting the applicability of such agreements to exclude gross negligence or intentional conduct.

(3) Any payment or cost, including the cost of defending such actions, which is incurred as a result of an agreement by the department to hold harmless or indemnify shall be payable from the Water Quality Assurance Trust Fund or the Inland Protection Trust Fund, whichever is appropriate, based upon the nature of the discharge or release.

(4) No state employee or employee of a political division who provides services relating to a response action while acting within the scope of his authority as a governmental employee shall be personally liable for actions undertaken by the department, the political division, or a response action contractor pursuant to this act. However, nothing in this section shall affect the liability of any other person.

(5) This section is repealed effective October 1, 1997, and shall be reviewed by the Legislature at the 1997 regular legislative session.

History.—s. 24 ch. 86-159 s. 7, ch. 38-331

376.40 Petroleum Exploration and Production Bond Trust Fund; creation; purposes; funding.—

(1) FINDINGS.—The Legislature declares that the financial resources of the state in the form of a bond trust fund, the limits of which are in excess of limits available to most operators, should be available to provide the Department of Natural Resources the surety for any cleanup and remedial action for operations which are not conducted in a safe and environmentally compatible manner.

(2) INTENT AND PURPOSE.—It is the intent of the Legislature to establish the Petroleum Exploration and Production Bond Trust Fund to serve as a repository of funds which will enable the Department of Natural Resources to respond without delay to incidents which affect safety or threaten to cause environmental damage or contamination as a result of incidents involving petroleum exploration and production activities and which are not otherwise handled in a timely manner by the operator or permittee. The useful life of facilities used to produce oil and natural gas in the state can be from 40 years and it is the Legislature's intent that safe, environmentally compatible operations be conducted for the economic life of any well, field, or production facility. It is the further intent of the Legislature that the trust fund make available immediately to the department funds sufficient to correct violations such as an operator's failure to adequately plug, abandon, or restore production sites or other test sites and facilities after operations cease, if the permittee or operator cannot correct the violations within a reasonable time. Furthermore, it is the Legislature's intent that if an operator in excess of the funds on deposit in the trust fund needed for remedial action, money from the Contaminant Protection Trust Fund be made available in the form of a temporary transfer of funds. The temporary transfer shall be repaid as soon as possible after the department obtains penalties, judgments, recoveries, or settlements.

(3) CREATION.—There is hereby created the Petroleum Exploration and Production Bond Trust Fund which shall be administered by the Department of Natural Resources. This trust fund shall be used by the department as a nonlapsing, revolving fund for carrying out the purposes of this section and s. 377.2425, and s. 377.2426, collected from permittees under ss. 377.2425, 377.2426(1), and 377.2408(1), and all penalties, judgments, recoveries, reimbursements, loans, and other charges related to the implementation of this section shall be deposited in the trust fund.

USES.—
When the department determines that there are signs of contamination or production wells, including, but not limited to, leaking wells, pressure wells, and related gas, the department shall require the permittee to take immediate remedial action. If the permittee does not take immediate remedial action, the department shall take prompt investigative action to determine the extent of underground contamination. Prompt remedial action shall be taken to return the affected site or local area to a safe condition. Rehabilitation of contaminated areas shall include clean-up of water, and surface damage; maintenance and repair of facilities which have been repaired or replaced; inspection and maintenance of facilities in this section; and payment of expenses incurred in its efforts to obtain cleanup or recovery of real property described in this section. Payment of any other costs shall be the responsibility of the permittee. The department may require the permittee to conduct routine monitoring of production wells, pressure wells, and related gas.

376.3073. The department may not disapprove an application due to the population size of a county and may delegate compliance verification and enforcement to those local governments who agree to enforce the state's program jointly.

(5) The department is authorized to adopt rules that permit any county government to establish, in accordance with s. 403.182, a program regulating underground storage tanks, which program is more stringent or extensive than that established by any state law or rule regulating underground storage tanks. The department shall approve or deny a request by a county for approval of an ordinance establishing such a program according to the procedures and time limits of s. 120.60. When adopting the rules, the department shall consider local conditions that warrant such more stringent or extensive regulation of underground storage tanks, including, but not limited to, the proximity of the county to a sole or single-source aquifer, the potential threat to the public water supply because of the proximity of underground storage tanks to public wells or groundwater, or the detection of petroleum products in public or private water supplies.

(6) A county government may adopt an ordinance regulating underground storage tanks that is the same as any state law or rule regulating such tanks upon approval by the department of a completed application.

History.—s. 13 ch. 94-338, s. 23 ch. 86-159, s. 5 ch. 87-374, s. 19 ch. 88-156, s. 5 ch. 89-331, s. 7, ch. 89-198

Note.—The reference to "subsection (5)" was substituted by the editors for a reference to "subsection (4)" to conform to the renumbering of subsections by s. 7, ch. 89-198

376.319 Response action contractors; indemnification.—

(1) The department may agree to hold harmless and indemnify a response action contractor who has a written contract with the department or who has a written contract with a local government which has contracted with the department to administer a program pursuant to chapter 86-159, Laws of Florida, for any civil damages to third parties:

(a) That result from the acts or omissions of the response action contractor in carrying out a response action, and

(b) That are caused by a discharge or release of a hazardous substance, pollutant, or other contaminant from a site upon which the response action is being carried out.

(2) The department, in determining whether or not to enter into hold-harmless and indemnification agreements, shall consider:

- (a) The availability of cost-effective insurance;
- (b) The immediate need for the response action;
- (c) The availability of qualified response action contractors; and

(d) Restricting the applicability of such agreements to exclude gross negligence or intentional conduct.

(3) Any payment or cost, including the cost of defending such actions, which is incurred as a result of an agreement by the department to hold harmless or indemnify shall be payable from the Water Quality Assurance Trust Fund or the Inland Protection Trust Fund, whichever is appropriate, based upon the nature of the discharge or release.

(4) No state employee or employee of a political subdivision who provides services relating to a response action while acting within the scope of his authority as a governmental employee shall be personally liable for any actions undertaken by the department, the political subdivision, or a response action contractor pursuant to this act. However, nothing in this section shall affect the liability of any other person.

(5) This section is repealed effective October 1, 1997, and shall be reviewed by the Legislature during the 1997 regular legislative session.

History.—s. 24 ch. 86-159, s. 7, ch. 88-331

376.40 Petroleum Exploration and Production Bond Trust Fund; creation; purposes; funding.—

(1) FINDINGS.—The Legislature declares that the financial resources of the state in the form of a bond trust fund, the limits of which are in excess of limits available to most operators, should be available to provide the Department of Natural Resources the surety for any clean-up and remedial action for operations which are not conducted in a safe and environmentally compatible manner.

(2) INTENT AND PURPOSE.—It is the intent of the Legislature to establish the Petroleum Exploration and Production Bond Trust Fund to serve as a repository for funds which will enable the Department of Natural Resources to respond without delay to incidents which affect safety or threaten to cause environmental damage or contamination as a result of incidents involving petroleum exploration and production activities and which are not otherwise handled in a timely manner by the operator or permittee. The useful life of facilities used to produce oil and natural gas in the state can be from 15 to 40 years and it is the Legislature's intent that safe and environmentally compatible operations be conducted for the economic life of any well, field, or production facility. It is the further intent of the Legislature that this trust fund make available immediately to the department funds sufficient to correct violations such as an operator's failure to adequately plug, abandon, or restore production sites or other test sites and facilities after operations cease, if the permittee or operator cannot or will not correct the violations within a reasonable time. Furthermore, it is the Legislature's intent that if an amount in excess of the funds on deposit in the trust fund is needed for remedial action, money from the Coastal Protection Trust Fund be made available in the form of a temporary transfer of funds. The temporary transfer shall be repaid as soon as possible after the department obtains penalties, judgments, recoveries, or reimbursements.

(3) CREATION.—There is hereby created the Petroleum Exploration and Production Bond Trust Fund, which shall be administered by the Department of Natural Resources. This trust fund shall be used by the department as a nonlapsing, revolving fund for carrying out the purposes of this section and s. 377.2425. All fees collected from permittees under ss. 377.2425(1), 377.24(1), and 377.2408(1), and all penalties, judgments, recoveries, reimbursements, loans, and other fees and charges related to the implementation of this section shall be deposited in the trust fund.

(4) USES.—

(a) When the department determines that incidents of contamination, including exploration or production of oil and gas, producing wells, private wells, and related activities, have caused or may cause environmental damage, or if the permittee does not take immediate corrective action, the department may use the funds available in the trust fund for:

1. Prompt investigation of underground contamination;
2. Prompt remedial action to restore the affected site to a safe condition;
3. Rehabilitation of contaminated groundwater, and surface water, and environmental damage;
4. Maintenance of facilities that have been repaired;
5. Inspection and monitoring as described in this section;
6. Payment of expenses incurred in its efforts to prevent or recover, or activities described in this section;
7. Payment of any other expenses.

(b) The department may use the trust fund to conduct investigations of production wells, private wells, and related activities.

by the Department of Insurance... each tank, for an owner or operator of a storage capacity of 550 gallons or more, required to register the tank pursuant to an amount determined by the Department of Insurance... the Department of Insurance for such tanks... may establish reduced premiums for storage tanks who operate in compliance with this chapter to stationary tanks adopted...

may establish reduced premiums for storage tanks based upon the condition of the storage tanks for...

all use the revenues derived from a tax imposed pursuant to... revenues derived from collection of... is imposed pursuant to... provide the restoration provided by the Florida Petroleum Liability Insurance Program... site restoration is eligible for... nable rate for allowable... h the rule relating to... uant to s. 376.303 and... reimbursement claims... rule relating to the priority of... ent adopted pursuant to...

use the premiums charged... collected from the owners... storage systems in order to... und manner, pursuant to... ility insurance coverage... ility Insurance Program to... ators who are in compliance... uirements have the opportunity insurance.

chases insurance and man... rd-party liability insurance... ection (8), the premiums... on for third-party liability... oval of the department, be... or.

LIABILITY FOR THIRD-PARTY... ERAGE.—... participant for the obligations... ty Insurance Program em... ty shall be individual, sev... joint, except as provided...

the Florida Petroleum Li... contain a statement of the... application for insurance... in contrasting color and in... the following statements:... cy. In the event the Florida...

Petroleum Liability Insurance Program is unable to pay its obligations, policyholders will be required to contribute on a pro rata earned premium basis the money necessary to meet any unfilled obligations.

(c) The Florida Petroleum Liability Insurance Program may assess from time to time policyholders covered for third-party liability, liable therefor under the terms of their policies and pursuant to this section, or the department may assess the policyholders in the event of liquidation of the Florida Petroleum Liability Insurance Program.

(d) Each policyholder's share of a deficiency for which an assessment is made shall be computed by applying to the premium earned on the participant's policy or policies during the period to be covered by the assessment the ratio of the total deficiency to the total premiums earned during such period upon all policies subject to the assessment. In the event one or more policyholders fail to pay an assessment, the other policyholders are liable on a proportionate basis for an additional assessment. The Florida Petroleum Liability Insurance Program, acting on behalf of all policyholders who paid the additional assessment, shall institute legal action when necessary and appropriate to recover the assessment from policyholders who failed to pay it.

(e) In computing the earned premiums for the purposes of this section, the gross premium received by the Florida Petroleum Liability Insurance and Restoration Program for the policy shall be used as a base, deducting therefrom solely charges not recurring upon the renewal or extension of the policy. This subsection does not apply if the department contracts for liabilities pursuant to subsection (8).

(f) No policyholder shall have an offset against any assessment for which he is liable on account of any claim for unearned premium or losses payable.

(6) SELF INSURANCE.—Any owner or operator of a petroleum storage system may elect not to participate in the Florida Petroleum Liability Insurance Program for third-party liability coverage if he demonstrates to the satisfaction of the department or its designee sufficient financial responsibility for such liabilities or if he meets United States Environmental Protection Agency tests for financial responsibility. An owner or operator who elects not to participate in the third-party liability coverage of the program is eligible for restoration insurance coverage under the program, if, prior to the occurrence of a discharge, a demonstration is made that the owner or operator is otherwise qualified.

(7) DISPOSITION OF PREMIUMS.—

(a) All premiums collected by the department or its designee from participating owners and operators pursuant to this section must be deposited into the Liability Insurance Account of the Inland Protection Trust Fund to be used for the Florida Petroleum Liability Insurance Program. However, if the department contracts for services pursuant to subsection (8), the department shall use the premiums to pay contract fees and deposit the remainder of the premiums into the Liability Insurance Account of the Inland Protection Trust Fund.

(b) The Liability Insurance Account of the Inland Protection Trust Fund must be maintained separately from the portion of the fund used for the purposes estab-

lished in s. 376.3073(4) a... The Liability Insurance Account may not be included as a part of the Inland Protection Trust Fund and must in all respects remain separate from that portion of the fund. A person may not sue against any portion of the Inland Protection Trust Fund or against the department, if the program has insufficient funds to pay any claim.

(8) PURCHASE OF SERVICES AND REINSURING LIABILITIES.—The department is authorized to purchase from an insurance company, a reinsurance company, or an insurance consultant such insurance management or underwriting services, including, but not limited to, risk and claims control and legal defense investigation and adjustment services, as may be required to establish and maintain the third-party liability coverage of the Florida Petroleum Liability Insurance Program. The department may reinsure liabilities arising from third-party coverage with an insurance company, reinsurance company, or through a reinsurance broker. This transaction is subject to approval by the Department of Insurance. The purchase of such insurance and management services is not subject to chapter 287.

(9) REPORTING OF THIRD-PARTY LIABILITY CLAIMS.—All third-party liability claims related to a discharge of petroleum products by a qualified participant in the program must be filed with the secretary of the department or his designee.

(10) RULES.—

(a) The department shall adopt rules for the proper management and maintenance of the Florida Petroleum Liability Insurance Program. In setting premium rates, the department shall receive the approval of the Department of Insurance.

(b) The Department of Insurance shall offer assistance as requested by the Department of Environmental Regulation in the development of necessary rules to implement the program.

(c) The department shall establish criteria for stationary storage tanks that have storage capacities of 550 gallons or less, that are required to be registered pursuant to s. 376.303, and that are not agricultural tanks. Compliance with such criteria is not required except for participation in the Florida Petroleum Liability Insurance Program. On and after September 1, 1989, an underground tank having a storage capacity of 550 gallons or less may not be installed unless it is required by the State Fire Marshal or it is protected against corrosion.

(11) DIVIDENDS.—The Florida Petroleum Liability Insurance Program shall obtain the approval of the Department of Insurance prior to paying any dividend or refund to its policyholders. No such dividend or refund may be approved until 12 months after the last day of the fiscal year for which the dividend or refund is payable or such later time as the insurance department may require in accordance with sound actuarial principles.

History.—ss. 376.3073, ch. 88-331, s. 5, ch. 89-188.
*Note.—Effective July 1, 1993 pursuant to s. 13, ch. 93-331

376.3073 Local programs for control of contamination.—

quire an owner or operator to submit documentation that is certified as true and correct to verify compliance with this section.

(b) The failure of any owner or operator of a storage system containing petroleum products to maintain compliance with this chapter and rules relating to stationary tanks adopted pursuant to s. 376.303 at any location will result in the cancellation of liability insurance provided through the program and eligibility for the restoration program for that location. Any owner or operator of a facility that receives a notice of cancellation for the liability insurance or restoration program that seeks reinstatement for that facility shall pay a reinstatement inspection fee of \$200 per facility to be deposited in the Inland Protection Trust Fund. For purposes of this paragraph, the department may, in its discretion, waive minor violations of this chapter or of rules adopted pursuant to s. 376.303, including, without limitation, violations of provisions relating to the form of inventory or reconciliation records or violations of registration requirements.

(c) The following are not eligible to participate in the restoration program or the liability insurance program:

1. Sites owned or operated by the Federal Government;
2. The owner or operator of a facility where the department has been denied site access.

(d) Any third-party claims relating to damages caused by discharges discovered prior to January 1, 1989, or before coverage under a policy issued pursuant to subsection (2) are not eligible under the liability insurance program.

(e) Any incidents discovered prior to January 1, 1989, are not eligible to participate in the restoration program. However, this exclusion shall not be construed to prevent a new incident at the same location from participation in the restoration program if the owner or operator is otherwise eligible. This exclusion shall not effect eligibility for participation in the EDI program or the reimbursement program.

(4) PREMIUMS FOR PARTICIPATION.—

(a) The department, or, in the event the department purchases insurance and management services for the third-party liability insurance program, the contractor, may collect premiums for funding the Petroleum Liability Insurance Account of the Inland Protection Trust Fund from the owner or operator of any petroleum storage system participating in the program.

(b) The premium for each tank, for an owner or operator of a petroleum storage system at a location at which the requirements of rules relating to stationary tanks adopted pursuant to s. 376.303 have been fully implemented and which is in compliance with all monitoring, control, and reporting requirements, will be in an amount determined by the department and approved by the Department of Insurance.

(c) The premium for each tank, for an owner or operator at any location where the replacement or retrofit requirements of chapter 17-61 of the Florida Administrative Code are being met within the schedules established therein and all monitoring and reporting requirements are being complied with to the satisfaction of the department, will be in an amount determined by the de-

partment and approved by the Department of Insurance.

(d) The premium for each tank, for an owner or operator of a storage tank having a storage capacity of 550 gallons or less who is required to register the tank pursuant to s. 376.303, will be in an amount determined by the department and approved by the Department of Insurance if the owner or operator is in compliance with the criteria established by the department for such tanks.

(e) The department may establish reduced premiums as approved by the Department of Insurance for owners or operators of storage tanks who operate many facilities each of which are in compliance with this chapter and the rules relating to stationary tanks adopted pursuant to s. 376.303.

(f) The department may establish reduced premiums as approved by the Department of Insurance for owners or operators of storage tanks based upon the relative degree of effectiveness of the storage tanks for protecting the environment.

(g) The department shall use the revenues derived from collection of the excise tax imposed pursuant to s. 206.9935(3) and the revenues derived from collection of the tank registration fees imposed pursuant to s. 376.303(1)(b) in order to provide the restoration provided under the Florida Petroleum Liability Insurance Program. An owner or operator of a petroleum storage system who elects to conduct site restoration is eligible for reimbursement at a reasonable rate for allowable expenses in accordance with the rule relating to reimbursement adopted pursuant to s. 376.303 and s. 376.3071. The payment of reimbursement claims must be in accordance with the rule relating to the priority of the payment of reimbursement adopted pursuant to s. 376.3071.

(h) The department shall use the premiums charged pursuant to this section and collected from the owners or operators of petroleum storage systems in order to provide, in an actuarially sound manner, pursuant to s. 627.062, the third-party liability insurance coverage under the Florida Petroleum Liability Insurance Program to assure that owners and operators who are in compliance with state environmental requirements have the opportunity to obtain petroleum liability insurance.

(i) If the department purchases insurance and management services for the third-party liability insurance program pursuant to subsection (8), the premiums charged pursuant to this section for third-party liability insurance may, with the approval of the department, be paid directly to the contractor.

(5) PARTICIPANT'S LIABILITY FOR THIRD-PARTY LIABILITY INSURANCE COVERAGE.—

(a) The liability of each participant for the obligations of the Florida Petroleum Liability Insurance Program emanating from third-party liability shall be individual, several, and proportionate, but not joint, except as provided in this section.

(b) Each policy issued by the Florida Petroleum Liability Insurance Program shall contain a statement of the contingent liability. Both the application for insurance and the policy shall contain, in contrasting color and in not less than 10-point type, the following statement: "This is a fully assessable policy. In the event the Florida

A BILL FOR AN ACT

RELATING TO ENVIRONMENTAL STATUTES.

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

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

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

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

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

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

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

award costs, including reasonable attorney and expert witness fees, to any party other than the commonwealth who advances the purposes of this chapter.

Added by St.1986, c. 554, § 3.

Historical Note

1986 Enactment

St.1986, c. 554, § 3, was approved by the People at the State Election held on Nov. 4, 1986, pursuant to the provisions of Article XLVIII of the Amendments to the Constitution, as amended by Article LXXIV of said Amendments.

Section 4 of St.1986, c. 554, provides:

"The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof."

an investigation required by section 16.1, which circulate to materials from the location investigation, stating whether there is a need deemed to be a priority disposal pursuant to this chapter. The said newspapers a press release

a municipality in which a disposal by a disposal site, the department is a priority to the affected public, and at the public in decisions regarding the disposal site. The department shall inform residents of potentially affected areas described in subsection (a). The department shall provide that interested members of the public and opportunity to comment to the department at the disposal site; that all such meetings shall be held at times convenient to the affected public. The department shall receive and make it available to the public for development of a public participation plan by the department in the

provision for limited grants to be given for the removal of hazardous materials from any site. The department shall obtain advice and technical assistance pursuant to this chapter. The department shall promulgate regulations specifying terms and

which a disposal site is located may be an individual, or individuals, to a local or regional authority shall be given the owner or operator to inspect such site for hazardous materials releases or

of St.1986, c. 554, provides: - The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof."

§ 16. Response action contractor liability

(a) A response action contractor with respect to any release or threatened release of oil or hazardous material shall not be strictly liable under this chapter nor under any other state law to any person for injuries, costs, damages, expenses or other liability including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to real or personal property or economic loss which results from such release or threatened release.

(b) The limitation of liability provided under subsection (a) shall apply only to response action contractor liability arising out of a release or threatened release of oil or hazardous material resulting from response actions conducted by the response action contractor.

(c) Any response action contractor who is otherwise liable under subsection (a) of section five for a release or threatened release of oil or hazardous material at a site shall not be entitled to any limitation of liability under this section by virtue of becoming a response action contractor at that site.

Added by St.1987, c. 642, § 2B.

Historical Note

1987 Legislation

St.1987, c. 642, § 2B, was approved Dec. 31, 1987. Emergency declaration by the Governor was filed on the same date.

§ 17. Indemnification agreement to hold harmless response action contractor

(a) The commonwealth may enter into an indemnification agreement to indemnify and hold harmless any response action contractor who meets the requirements of this section against any liability for negligence, including legal fees and costs, if any, in an amount not to exceed a figure established by the indemnification agreement pursuant to the terms of this section. In no event shall the amount of indemnification to be provided under an indemnification agreement exceed two million dollars for a single occurrence involving the release or threatened release of oil or hazardous material. No indemnification shall be provided pursuant to an indemnification agreement under this section if the response action contractor acted in a grossly negligent, willful or malicious manner or if the act or omission which gives rise to a claim was not within the scope of the response action contract.

(b) The indemnification provided by subsection (a) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a response action contractor. Nothing in this section shall affect the liability under this chapter or under any state or federal law of any potentially responsible party.

(c) Indemnification under this section shall apply only to response action contractor liability arising out of a release or threatened release of oil or hazardous material resulting from response actions conducted by the response action contractor pursuant to its response action contract.

requirements of this chapter, or the environment, the court may

21E § 17

OFFICERS OF THE COMMONWEALTH

(d) Indemnification may be provided under this section only if the response action contractor and the commonwealth or an agency thereof enter into an indemnification agreement. An indemnification agreement may be entered into by the commonwealth or any of its agencies only if the following requirements are met:

(1) The liability covered by the indemnification agreement exceeds or is not covered by insurance available to the response action contractor at a fair and reasonable price when entering into the response action contract, and adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

(2) The response action contractor has made diligent efforts to obtain insurance coverage for such liability from sources other than the commonwealth including diligent efforts to self-insure.

(3) In the case of a response action contract covering more than one site, the response action contractor agrees to make such diligent efforts to obtain insurance coverage each time the contractor begins to work under the contract at a new site.

(e) Any indemnification agreement entered into under subsection (d) shall include specific terms and conditions under which the commonwealth will indemnify the contractor, such as the establishment of premiums, deductibles and limitations on available indemnification, and the provision of notice to the commonwealth in the event that a claim is asserted against the response action contractor.

(f) The commissioner of insurance shall provide information necessary to make the determination specified in clause (1) of subsection (d) through the publishing of an annual report on the availability of insurance for response action contractors generally, and by providing guidance to agencies of the commonwealth on an ongoing basis. The first of such reports shall be published within thirty days of the effective date of this section.

(g) Amounts expended pursuant to this section for indemnification of any person who is a response action contractor with respect to any release or threatened release, shall be considered a cost of response incurred by the commonwealth with respect to such release, and the commonwealth may seek recovery of such costs from other parties liable under section five.

Added by St.1987, c. 642, § 2B.

Historical Note

1987 Legislation

St.1987, c. 642, § 2B, was approved Dec. 31, 1987. Emergency declaration by the Governor was filed on the same date.

§ 18. Promulgation of regulations

Any agency of the commonwealth is authorized to promulgate regulations as it deems necessary for the implementation and administration of sections sixteen and seventeen subject to the approval of the executive office of administration and finance. Failure to promulgate such regulations shall not affect any agency's right to enter into indemnification agreements under said sections sixteen and seventeen nor the validity or enforceability of said sections or agreements.

Nothing in sections sixteen or seventeen shall affect the liability of any person under any warranty, nor the liability of an employer who is a response action contractor to any employee of such employer under any provision of law, including any provision relating to workers' compensation.

Added by St.1987, c. 642, § 2B.

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Historical Note

1987 Legislation

St.1987, c. 642, § 2B, was approved Dec. 31, 1987. Emergency declaration by the Governor was filed on the same date.

CHAPTER 21F

Section

1. Purposes.
2. Definitions.
3. Designation of coastal city.
4. Harbor or waterfront improvement application for assistance.

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Chapter 21F of the

Code of Massachusetts Regulations
Executive office of environmental affairs
coastal facilities,

§ 1. Purposes

The purposes of this chapter are:

(a) to ensure that adequate resources are available for the commonwealth's fishing, marine and recreational resources;

(b) to provide flexible and effective management of coastal cities and towns so as to improve public coastal facilities;

(c) to improve planning for coastal resources by the executive office of environmental affairs;

(d) to encourage greater coastal resource development financed with public funds.

Added by St.1983, c. 589, § 19.

Historical Note

1983 Enactment. St.1983, c. 589, § 19, an emergency act, adding this chapter, this section and §§ 2 to 7, was approved Dec. 29, 1983.

For provisions of §§ 2B to 4B of chapter 21F relating to civil service status of employees of the division of water resources, see chapter 21B.

for facility or vessel subject to the provisions of article 12 in the state as his legal agent for service of process. The designation shall be filed with the secretary of state. The secretary of state shall be the officer in charge of process under this section.

Apr 16, 1985.

Oct 13, 1985.

However, that the department shall issue orders only on certification by the department if the applicant has implemented or is in the process of implementing the federal plans and regulations for the control of oil and removal thereof when a discharge occurs."

Oct 13, 1985, L 1985, ch 38, § 14, eff Apr 16, 1985.

designated par (a) and amd, L 1985, ch 38, § 14, eff Apr 16, 1985.

substituted "commissioner" for "commissioners". Deleted "the fund" and added italic matter.

Apr 16, 1985; amd, L 1986, ch 512, § 5, eff Apr 16, 1986.

Apr 16, 1985.

Apr 1, 1985, L 1985, ch 38, § 14, eff Apr 16, 1985.

Apr 16, 1985.

Apr 16, 1985.

Oct 13, 1985

However, that the department shall issue orders only on certification by the department if such registrant can provide necessary equipment and facilities for such discharges."

Apr 16, 1985, eff June 30, 1978 and shall be retroactive to the date of effect on and after April 1, 1978.

July 22, 1986, contingent on approval of vote of the people.

Apr 16, 1985, eff June 30, 1978 and shall be retroactive to the date of effect on and after April 1, 1978.

Apr 16, 1985, § 3, eff Oct 13, 1985 and L 1985, ch 512, § 5, amending act referred to the other.

ICE AIDS:
L 1986, ch 512, § 5, eff Apr 16, 1986.

Case Law Review p. 249.

§ 1020-q; CLS St Fin § 97-b.

NOTES

The Department of Transportation (Navigation Law, § 174, subds 1, 2, 3), and pay a license fee of one cent per barrel transferred until the balance in the New York Environmental and Spill Compensation

Fund equals or exceeds \$25 million (Navigation Law, § 174, subd 4), which fund provides a source of payment for expenses incurred by the state for cleanup and removal of petroleum and property damage caused by oil discharges (Navigation Law, § 176), is not unconstitutional in that the fee is an impost and duty on imports in violation of clause 2 of section 10 of article 1 of the United States Constitution, since the license fee is imposed on the transfer of petroleum and not on the petroleum itself, and the license fee does not discriminate against interstate commerce, since the fee is not imposed only on those New York transfers where petroleum enters the State, but rather, the statute focuses on New York major facility transfers without reference to where the petroleum was produced; accordingly, in an action for a judgment declaring that article 12 is unconstitutional and to enjoin the enforcement of the provisions of article 12, plaintiff, a trade association whose members own and operate oil storage

terminals, has failed to establish a clear right to ultimate success or that article 12 is unconstitutional beyond a reasonable doubt, and a motion for a preliminary injunction was properly denied. Long Island Oil Terminals Asso. v Commissioner of New York State Dept. of Transp. (1979, 3d Dept) 70 AD2d 303, 421 NYS2d 405.

Department of Environmental Conservation lacks authority under 1983 Control of Bulk Storage of Petroleum Act (CLS ECL 17-1001 et seq.) to promulgate regulations subjecting existing major facilities licensed under Oil Spill Prevention, Control and Compensation Act of 1977 (CLS Navigation Article 12) to new regulations and new petroleum bulk storage code, since 1983 act requires department to establish code applicable only to "new and substantially modified facilities", specifically excluding facilities licensed under 1977 act. Consolidated Edison Co. v Department of Environmental Conservation (1986) 132 Misc 2d 790, 505 NYS2d 766.

§ 175. Notification by persons responsible for discharge

Any person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of section 192 of this article. Notwithstanding the provisions of any other law, such notification to the department shall be deemed to fulfill the notification requirements of any other state or local law.

HISTORY:

Add, L 1977, ch 845, eff April 1, 1978; amd, L 1985, ch 35, § 4, eff Oct 13, 1985. The 1985 act deleted at fig 1 "The department shall immediately inform the department of environmental conservation of such notification."

RESEARCH REFERENCES AND PRACTICE AIDS:

55 NY Jur 2d, Environmental Rights and Remedies §§ 116, 118.

§ 176. Removal of prohibited discharges

1. Any person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge. Notwithstanding the above requirement, the department may undertake the removal of such discharge and may retain agents and contractors who shall operate under the direction of such department for such purposes. The commissioner shall develop a system of immediate response type contracts with appropriate agents and contractors. Such contracts shall be subject to the approval of the state comptroller in accordance with section one hundred twelve of the state finance law, however, such approval shall not obligate to any particular contract any specific amount of monies from the fund but shall obligate from the fund on an individual basis as such contracts are utilized the actual amount required to effectuate any contract or any portion thereof. Any necessary approvals of availability of funds for a particular project in accordance with any provision of the state finance law shall be undertaken as soon as practical after clean up and removal procedures are undertaken, or such procedures are ordered by the commissioner.

2. (a) Upon the occurrence of a discharge of petroleum, the department shall respond promptly and proceed to cleanup and remove the discharge in accord with environmental priorities. The department shall be responsible for cleanup and

removal or as the case may be, for retaining agents and contractors who shall operate under the direction of that department for such purposes. Implementation of cleanup and removal procedures after each discharge shall be conducted in accordance with environmental priorities and procedures established by the department.

(Added, L 1987)

(b) Section eight of the court of claims act or any other provision of law to the contrary notwithstanding, the state shall be immune from liability and action with respect to any act or omission done in the discharge of the department's responsibility pursuant to this article; provided, however, that this subdivision shall not limit any liability which may otherwise exist for unlawful, willful or malicious acts or omissions on the part of the state, state agencies, or their officers, employees or agents or for a discharge in violation of section one hundred seventy-three of this article.

3. Any unexplained discharge of petroleum within state jurisdiction or discharge of petroleum occurring in waters beyond state jurisdiction that for any reason penetrates within state jurisdiction shall be removed by or under the direction of the department. Except for those expenses incurred by the party causing such discharge, any expenses incurred in the removal of discharges shall be paid promptly from the New York environmental protection and spill compensation fund pursuant to section one hundred and eighty-six of this article and any reimbursements due such fund shall be collected in accordance with the provisions of section one hundred and eighty-seven of this article.

4. Cleanup and removal of petroleum and actions to minimize damage from discharges shall be, to the greatest extent possible, in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311(c)(2) of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500, 33 U.S.C. 1251 et seq.)

5. The department¹ in consultation with the attorney general shall develop a standard contract form to be used when contracting services for the cleanup and removal of a discharge.

6. Whenever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon the money available in the fund. Such moneys shall be used to pay promptly for all cleanup and removal costs incurred by the department.

7. (a) Nothing in this section is intended to preclude cleanup and removal by any person threatened by such discharges,¹ who, as soon as is reasonably possible,² coordinates and obtains approval for such actions with ongoing state or federal operations and appropriate state and federal authorities. Notwithstanding any other provision of law to the contrary, the liability of any contractor for such person, where such person obtains approval from appropriate state and federal authorities for such cleanup and removal, and the liability of any person providing services related to the cleanup or removal of a discharge, under contract with the department, for any injury to a person or property caused by or related to such services shall be limited to acts or omissions of the person during the course of performing such services which are shown to have been the result of negligence, gross negligence or reckless, wanton or intentional misconduct. Notwithstanding any other provisions of law, when (i) a verdict or decision in an action or claim for injury to a person or property caused by or related to such services is determined in favor of a claimant in an action involving a person performing such services and any other person or persons jointly liable, and (ii) the liability of the person performing such services is found to be fifty percent or less of the total liability

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assigned to all persons liable, and (iii) services is not based on a finding of intentional misconduct, then the liability of the claimant for loss relating to injury to a person shall not be limited to, pain and suffering, or damages for non-economic loss. However, that the culpable conduct of each person causing or contributing to such injury shall be considered in determining any equitable distribution of damages. As used in this section, the term "person" shall not be deemed to alter, modify or abrogate any implied warranty under the uniform workers' compensation act or any other law. Section one hundred and eighty-four of this article.

(b) No action taken by any person rendering such assistance or willful misconduct. In the course of such discharge any detergent into the water shall be deemed to be an admission of liability. The commissioner of environmental conservation shall be deemed to be an admission of liability.

(Added, L 1989)

(c) A person may, without admission of liability, and with the consent of the commissioner of environmental conservation, the cleanup and removal of a discharge and upon the recommendation of the commissioner of environmental conservation and the consent of the fund undertake the cleanup and removal of petroleum. Upon determination by the commissioner of environmental conservation that the discharge, the person shall be deemed to be an admission of liability for necessary expenses incurred.

(Added, L 1989)

8. Notwithstanding any other provision of law, a person who performs cleanup, removal of discharge of petroleum or other services under this section shall be entitled to contribution.

HISTORY:

- Add, L 1977, ch 845, eff April 1, 1977.
- Sub 2, amd, L 1985, ch 35, § 5, eff July 30, 1985.
- Sub 2, par (a), formerly entire sub. 2, 1987 (see 1987 note below).
- Sub 2, par (b), add, L 1987, ch 536, § 7, eff July 30, 1987.
- Sub 3, amd, L 1985, ch 35, § 5, eff July 30, 1985.
- The 1985 act deleted at fig 1 "and jointly".
- Sub 7, par (a), formerly first sentence of section 176, eff July 30, 1987 (see 1987 note below).
- The 1987 act deleted at fig 1 "person obtaining".

- Sub 7, par (b), formerly second sentence of sub. so designated and amended, L 1987, ch 536, § 7, eff July 30, 1987 (see 1987 note below).
 Sub 7, par (c), add, L 1989, ch 712, § 2, eff Nov 21, 1989.
 Sub 8, add, L 1989, ch 712, § 3, eff Nov 21, 1989.

NOTES:

Laws 1987, ch 536, § 10, eff July 30, 1987, provides as follows:
 § 10. This act shall take effect immediately, and shall apply to causes of action arising out of services performed on or after the effective date of this act.

CROSS REFERENCES:

This section referred to in § 186.
 Accounting systems; approval of contracts, CLS St Fin Law § 112.

RESEARCH REFERENCES AND PRACTICE AIDS:

55 NY Jur 2d, Environmental Rights and Remedies §§ 116, 118.

CASE NOTES

Article 12 of the Navigation Law, the Oil Spill Prevention, Control and Compensation Act, which requires each operator of a major facility (Navigation Law, § 172, subd 11) to obtain a license from the Department of Transportation (Navigation Law, § 174, subds 1, 2, 3), and pay a license fee of 1 cent per barrel transferred until the balance in the New York Environmental and Spill Compensation Fund equals or exceeds \$25 million (Navigation Law, § 174, subd 4), which fund provides a source of payment for expenses incurred by the State for cleanup and removal of petroleum and property damage caused by oil discharges (Navigation Law, § 176), is not unconstitutional in that the fee is an impost and duty on imports in violation of clause 2 of section 10 of article I of the United States Constitution, since the license fee is imposed on the transfer of petroleum and not on the petroleum itself, and the license fee does not discriminate against interstate commerce, since the fee is not imposed only on those New York transfers where petroleum enters the State, but rather, the statute focuses on New York major facility transfers without reference to where the petroleum was produced; accordingly, in an action for a judgment declaring that article 12 is unconstitutional and to enjoin the enforcement of the provisions of article 12, plaintiff, a trade association whose members own and operate oil storage terminals, has failed to establish a clear right to ultimate success or that article 12 is unconstitutional beyond a reasonable doubt, and a motion for a preliminary injunction was properly denied. Long Island Oil Terminals Assn v Commissioner of New York State Dept. of Transportation, 70 AD2d 303, 421 NYS2d 405.

An operator of a petroleum storage facility acted responsibly when he hired a tank cleaning corporation to clean-up a spill of several thousand gallons of gasoline which would have flowed into

Lake Erie, since the operator was strictly liable to undertake clean-up efforts, even though not at fault under Article 12 of the Navigation Law. Furthermore, the spill was "sudden and accidental" within the meaning of the operator's Comprehensive General Liability Policy and the insurer could not therefore validly deny coverage for the clean-up work under the terms of the policy. Evans v Aetna Casualty & Surety Co. (1981) 107 Misc 2d 710, 435 NYS2d 933.

An insurer would be required to indemnify its insured and the state under a comprehensive general liability policy that afforded coverage for "property damage . . . caused by an occurrence" for the costs of cleaning up an oil spill, which initially occurred on the insured's premises, in a nearby swamp, since such costs constituted "property damage" within the meaning of the policy in light of the fact that the insured was strictly liable for the cleanup under Nav Law §§ 170 et seq., which statutory liability is not punitive in nature but rather reflects an exercise of the state's power to preserve public resources, since the insurer was precluded from disclaiming coverage due to its unexplained three month delay prior to issuing its disclaimer, and since the insurer was precluded from disclaiming coverage on the ground that the insured failed to give timely notice of its claim in that the insurer's attempted disclaimer on the ground that the cleanup costs were not "property damage" constituted a waiver of its right to disclaim coverage on other grounds; furthermore, the insurer would be required to defend its insured with respect to any statutory fines or penalties that the state might seek to impose, since any such fines or penalties could ultimately result in whole or in part from the insurer's dilatory or bad faith disclaimer or from its noncooperation. Kutsher's Country Club Corp. v Lincoln Ins. Co. (1983) 119 Misc 2d 889, 465 NYS2d 136.

§ 177. Emergency oil spill control network

1. The commissioner shall establish an emergency oil spill control network which

- shall be comprised of available equipment from county and state highway departments. Such network shall be employed in conjunction with the department and operator, the department and operator, the department and operator.
- The commissioner shall make an agreement with county and state highway departments that will be used in cleanup operations.
 - The commissioner shall have the authority to request assistance from a county, and state highway department.
 - The commissioner may request such assistance and data as will enable him to carry out the provisions of this section.

HISTORY:

Add, L 1977, ch 845, eff April 1, 1977.
 Sub 1, amd, L 1985, ch 35, § 6, eff July 1, 1985.
 The 1985 act deleted at fig 1 "the de".
 Sub 4, amd, L 1985, ch 35, § 6, eff July 1, 1985.
 The 1985 act deleted at fig 1 "the de".

CROSS REFERENCES:

This section referred to in CLS High

RESEARCH REFERENCES AND PRACTICE AIDS:
 55 NY Jur 2d, Environmental Rights

§ 177-a. Emergency oil spill relocation:

- The commissioner shall establish a network of health care services which shall be headed by the commissioner of health and shall be financed by services from county and state health departments.
- Such network shall be employed to provide health care in any area of the state where the network shall be employed in conjunction with the department and operator, the department or any fee.
- The commissioner of health shall make an agreement with county and state health departments for emergency oil spill relocation.
- The commissioner of health shall have the authority to request assistance from the state and local health departments to provide health care to persons residing in the area of the discharge.
- The commissioner of health shall make a certification of health care for individuals who, in his or her discretion, are in need of health care of the discharge and certify the amount of the discharge and certify the amount of the discharge by the commissioner of health exceeding thirty days, provided that the certification shall be made during successive thirty day periods. The certification shall not be admissible in any civil action for damages to the individuals certified for relocation.
- Notwithstanding any provision of law to the contrary, the cost of relocation and its associated expenses shall be considered as cleanup cost and shall be paid by the operator.

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

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

1. A change has occurred in the operation of any facility or vessel covered by the plan that necessitates an amended or supplemented plan;

2. The facility's or vessel's discharge experience or its inability to implement its plan in an oil discharge exercise demonstrates a necessity for modification; or

3. There has been a significant change in the best available technology since the plan was approved.

D. The Board, after notice and opportunity for hearing, may revoke its approval of an oil discharge contingency plan if it determines that:

1. Approval was obtained by fraud or misrepresentation;

2. The plan cannot be implemented as approved; or

3. A term or condition of approval has been violated. (1990, c. 917.)

Editor's note. — Acts 1990, c. 919, cl. 2 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective on July 1, 1992. Clause 3 of this act also stated that the Board should regard certain considerations in adopting such regulations.

§ 62.1-44.34:16. Financial responsibility. — A. (For effective date see Editor's note) The operator of any tank vessel entering upon state waters shall deposit with the Board cash or its equivalent in the amount of \$500 per gross ton of such vessel. Any such cash deposits received by the Board shall be held in escrow in the Virginia Underground Petroleum Storage Tank Fund.

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

C. The Board shall exempt an operator of a tank vessel from the cash deposit requirements specified in this section if the operator of the tank vessel provides evidence of financial responsibility pursuant to the terms and conditions of this subsection. The Board shall adopt requirements for operators of tank vessels for maintaining evidence of financial responsibility in an amount equivalent to the cash deposit which would be required for such tank vessel pursuant to this section. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any combination thereof, under the terms the Board may prescribe. To obtain an exemption from the cash deposit requirements under this section: the operator and insurer, guarantor or surety shall appoint an agent for service of process in the Commonwealth; any insurer must be authorized by the Commonwealth to engage in the insurance business; and any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument of insurance, guaranty or surety directly against the insurer, guarantor or surety for any violation of this chapter by the operator up to, but not exceeding, the amount insured, guaranteed or otherwise pledged. An operator whose financial responsibility is accepted by the Board under this

subsection shall notify the Board at least thirty days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

D. Acceptance of proof of financial responsibility shall expire:

1. One year from the date on which the Board exempts an operator from the cash deposit requirement based on evidence of self-insurance, except that the Board may establish by regulation a different expiration date for acceptance of evidence of self-insurance submitted by public agencies;

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

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

Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

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

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

2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility under this section or the requirements established by the Board pursuant to this section.

F. It is not a defense to any action brought for failure to comply with the cash deposit requirement or to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the tank vessel or the operator of the tank vessel had made the required cash deposit or possessed evidence of financial responsibility accepted by the Board. (1990, c. 917.)

Editor's note. — Acts 1990, c. 917, cl. 4 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective 90 days after the effective date of such regulations. Clause 4 also provides that in promulgating such regulations, the Board shall provide that, if evidence of financial responsibility provided to the federal government or any other state meets the requirements of subsection C of this section, comments shall be accepted by the Board in full or partial satisfaction requirements of subsection A of this section as appropriate.

§ 62.1-44.34:17. Exemptions. — Sections 62.1-44.34:15 and 62.1-44.34:16 do not apply to a facility having a maximum storage or handling capacity of less than 25,000 gallons of oil or to a tank vessel having a maximum storage, handling or transporting capacity of less than 15,000 gallons of oil. (1990, c. 917.)

§ 62.1-44.34:18. Discharge of oil prohibited; liability for permitting discharge. — A. The discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth is prohibited. For purposes of this section, discharges of oil into or upon state waters include discharges of oil that (i) violate applicable water quality standards or a permit or certificate of the Board or (ii) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

B. Any person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat

of such discharge shall, immediately upon learning of such discharge or threat of discharge, implement any applicable oil spill contingency plan approved under this article or take such other action as may be necessary to contain and clean up such discharge or threat of such discharge, including any actions directed by any on-scene coordinator acting pursuant to the Federal Water Pollution Control Act. In the event of such discharge or threat of discharge, if it cannot be determined immediately the person responsible therefor, or if the person is unwilling or unable to promptly contain and clean up such discharge or threat of discharge, the Board may take such action as is necessary to contain and clean up the discharge or threat of discharge, including the engagement of contractors or other competent persons. The costs of such containment and cleanup shall be paid from the Underground Petroleum Storage Tank Fund or from any federal fund available for this purpose.

C. Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat of such discharge, shall be liable to:

1. The Commonwealth of Virginia or any political subdivision thereof for all costs of investigation, containment and cleanup incurred as a result of such discharge or threat of discharge;

2. The Commonwealth of Virginia or any political subdivision thereof for all damages to property of the Commonwealth of Virginia or the political subdivision caused by such discharge;

3. The Commonwealth of Virginia or any political subdivision thereof for loss of tax or other revenues caused by such discharge, and compensation for the loss of any natural resources that cannot be restocked, replenished or restored; and

4. Any person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, caused by such discharge.

D. Notwithstanding any other provision of law, a person who renders assistance in containment and cleanup of a discharge of oil prohibited by this article or a threat of such discharge shall be liable under this section for damages for personal injury and wrongful death caused by that person's negligence, and for damages caused by that person's gross negligence or willful misconduct, but shall not be liable for any other damages under this section that are caused by the acts or omissions of such person in rendering such assistance; provided, however, that such liability provision shall not apply to a person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge, or to such person's employee. Nothing in this article shall affect the right of any person who renders such assistance to reimbursement for the costs of the containment and cleanup under the applicable provisions of this article or the Federal Water Pollution Control Act, as amended, or any rights that person may have against any third party whose acts or omissions caused or contributed to the prohibited discharge of oil or threat of such discharge.

E. In any action brought under this article, it shall not be necessary for the Commonwealth, political subdivision or any person, to plead or prove negligence in any form or manner.

F. In any action brought under this article, the Commonwealth, political subdivision or any person, if a prevailing party, shall be entitled to an award of reasonable attorneys' fees and costs.

G. It shall be a defense to any action brought under subdivision C 2, C 3, or C 4 of this section, that the discharge was caused solely by (i) an act of God, (ii) an act of war, (iii) a willful act or omission of a third party who is not an employee, agent or contractor of the operator, or (iv) any combination of the foregoing; provided that this subsection shall not apply to any action brought against (a) a person or operator who failed or refused to report a discharge as required by § 62.1-44.34:19; or (b) a person or operator who failed or refused to cooperate fully in any containment and cleanup or who failed or refused to effect containment and cleanup as required by subsection B of this section.

H. In any action brought under subdivision C 2, C 3, or C 4 of this section, the total liability of a person or operator under this section for each discharge of oil or threat of such discharge shall not exceed the amount of financial responsibility required under § 62.1-44.34:16 or \$10,000,000, whichever is greater; provided that there shall be no limit of liability imposed under this section: (a) if the discharge of oil or threat of such discharge was caused by gross negligence or willful misconduct on the part of the person or the operator discharging or causing or permitting discharge or threat of discharge or by an agent, employee or contractor of such person or operator, or by the violation of any applicable safety, construction or operation regulations by such person or operator or an agent, employee or contractor of such person or operator; or (b) if the operator or person discharging or causing or permitting a discharge or threat of discharge failed or refused to report the discharge as required by § 62.1-44.34:19, or failed or refused to cooperate fully in any containment and cleanup or to effect containment and cleanup as required by subsection B of this section. (1973, c. 417; 1976, c. 51; 1978, c. 816; 1989, c. 627; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 962 purported to amend §§ 62.1-44.34:2 and 62.1-44.34:3, which were repealed by Acts 1990, c. 917. The effect of these amendments was to add lands and storm drain systems in the Commonwealth, along with state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, these amendments have been effectuated in this corresponding new Code section.

§ 62.1-44.34:19. Reporting of discharge. — Any person discharging or causing or permitting a discharge of oil into or upon state waters, lands or storm drain systems within the Commonwealth or discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, lands, or storm drain systems within the Commonwealth, and any operator of any facility, vehicle or vessel from which there is a discharge of oil into state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters shall, immediately upon learning of the discharge, notify the Board and appropriate federal authorities of such discharge. (1978, c. 816; 1990, cc. 917, 962.)

Editor's note. — Acts 1990, c. 902 purported to amend § 62.1-44.34:4, which was repealed by Acts 1990, c. 917. The effect of this amendment was to add lands and storm drain systems in the Commonwealth, along with state waters, as places where the discharging of oil is prohibited. At the direction of the Code Commission, this amendment has been effectuated in this corresponding new Code section.

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT

SECOND SUBSTITUTE HOUSE BILL NO. 2494

Passed the House February 13, 1990 Passed the Senate March 1, 1990
as amended as amended
Yeas 98 Nays 0 Yeas 47 Nays 1

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

Yeas: 96 Nays: 0

CERTIFICATE

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

Alvin Thompson
ALVIN THOMPSON, Chief Clerk

Sec. 2

1 CARRY, OR THAT CARRIES, OIL IN BULK AS CARGO OR CARGO RESIDUE, AND
2 THAT:

3 (a) Operates on the waters of the state: OR

4 (b) Transfers oil in a port or place subject to the jurisdiction
5 of this state.

6 (20) "Technical feasibility" or "technically feasible" shall mean
7 that given available technology, a restoration or enhancement project
8 can be successfully completed at a cost that is not disproportionate
9 to the value of the resource prior to the injury.

10 ((12)) (21) "Waters of the state" shall include lakes, rivers,
11 ponds, streams, inland waters, underground water, salt waters,
12 estuaries, tidal flats, beaches and lands adjoining the seacoast or
13 the state, sewers, and all other surface waters and watercourses
14 within the jurisdiction of the state of Washington.

15 (22) "Worst case spill" means a spill of the entire cargo of a
16 tank vessel complicated by adverse weather conditions.

17 NEW SECTION. Sec. 3. (1) Each facility and covered vessel shall
18 have a contingency plan for the containment and cleanup of oil spills
19 from the facility or covered vessel into the waters of the state and
20 for the protection of fisheries and wildlife, natural resources, and
21 public and private property from such spills. The department shall by
22 rule adopt standards for the preparation of contingency plans. The
23 rules for facilities and, except as otherwise provided in this
24 subsection, for covered vessels shall be adopted not later than July
25 1, 1991. The department shall exclude from the rules to be adopted
26 by July 1, 1991, standards for tank vessels of less than twenty
27 thousand deadweight tons, cargo vessels, and passenger vessels
28 operating on the portion of the Columbia river for which the
29 department determines that Washington and Oregon should cooperate in
30 the adoption of standards for contingency plans. The department,
31 after consultation with the appropriate state agencies in Oregon,
32 shall adopt the rules for standards for contingency plans for this
33 portion of the Columbia river at the earliest possible time, but not
34 later than July 1, 1992. The department shall require contingency
35 plans, at a minimum, to meet the following standards:

the method of response to spills of

Sec. 3

1 various sizes from any vessel, ship, or facility which is covered by
2 the plan:

3 (b) Be designed to be capable in terms of personnel, materials,
4 and equipment, of promptly and properly, to the maximum extent
5 practicable, as defined by the department:

6 (i) Removing oil and minimizing any damage to the environment
7 resulting from a maximum probable spill; and

8 (ii) Removing oil and minimizing any damage to the environment
9 resulting from a worst case spill:

10 (c) Provide a clear, precise, and detailed description of how the
11 plan relates to and is integrated into relevant contingency plans
12 which have been prepared by cooperatives, ports, regional entities,
13 the state, and the federal government:

14 (d) Provide procedures for early detection of oil spills and
15 timely notification of such spills to appropriate federal, state, and
16 local authorities under applicable state and federal law:

17 (e) State the number, training preparedness, and fitness of all
18 dedicated, prepositioned personnel assigned to direct and implement
19 the plan:

20 (f) Incorporate periodic training and drill programs to evaluate
21 whether personnel and equipment provided under the plan are in a
22 state of operational readiness at all times;

23 (g) State the means of protecting and mitigating effects on the
24 environment, including fish, marine mammals, and other wildlife, and
25 ensure that implementation of the plan does not pose unacceptable
26 risks to the public or the environment;

27 (h) Provide a detailed description of equipment and procedures to
28 be used by the crew of a vessel to minimize vessel damage, stop or
29 reduce any spilling from the vessel, and, only when appropriate and
30 the vessel/safety is assured, contain and clean up the spilled oil:

31 (i) Provide arrangements for the prepositioning of oil spill
32 containment and cleanup equipment and trained personnel at strategic
33 locations from which they can be deployed to the spill site to
34 promptly and properly remove the spilled oil:

35 (j) Provide arrangements for enlisting the use of qualified and

Sec. 3

1 (k) Provide for disposal of recovered spilled oil in accordance
2 with local, state, and federal laws:

3 (l) State the measures that have been taken to reduce the
4 likelihood that a spill will occur, including but not limited to,
5 design and operation of a vessel or facility, training of personnel,
6 number of personnel, and backup systems designed to prevent a spill.

7 (m) State the amount and type of equipment available to respond
8 to a spill, where the equipment is located, and the extent to which
9 other contingency plans rely on the same equipment: and

10 (n) If the department has adopted rules permitting the use of
11 dispersants, the circumstances, if any, and the manner for the
12 application of the dispersants in conformance with the department's
13 rules.

14 (2)(a) Contingency plans for facilities capable of storing one
15 million gallons or more of oil and for tank vessels of twenty
16 thousand deadweight tons or more shall be submitted to the department
17 within six months after the department adopts rules establishing
18 standards for contingency plans under subsection (l) of this section.

19 (b) Except as otherwise provided in (c) of this subsection,
20 contingency plans for all other facilities and covered vessels shall
21 be submitted to the department within eighteen months after the
22 department has adopted rules under subsection (l) of this section.
23 The department may adopt a schedule for submission of plans within
24 the eighteen-month period.

25 (c) Contingency plans for covered vessels which are not required
26 to submit plans within the six month period prescribed in (a) of this
27 subsection and which operate on the portion of the Columbia river for
28 which the department must adopt rules not later than July 1, 1992,
29 shall be submitted to the department not later than January 1, 1993.

30 (3)(a) The owner or operator of a facility shall submit the
31 contingency plan for the facility.

32 (b) The owner or operator of a tank vessel or of the facilities
33 at which the vessel will be unloading its cargo shall submit the
34 contingency plan for the tank vessel. Subject to conditions imposed
35 by the department, the owner or operator of a facility may submit a
36 single contingency plan for tank vessels of a particular class that

Sec. 3

1 will be unloading cargo at the facility.

2 (c) The contingency plan for a cargo vessel or passenger vessel
3 may be submitted by the owner or operator of the cargo vessel or
4 passenger vessel or by the agent for the vessel resident in this
5 state. Subject to conditions imposed by the department, the owner,
6 operator, or agent may submit a single contingency plan for cargo
7 vessels or passenger vessels of a particular class.

8 (d) A person who has contracted with a facility or covered vessel
9 to provide containment and cleanup services and who meets the
10 standards established pursuant to section 4 of this act, may submit
11 the plan for any facility or covered vessel for which the person is
12 contractually obligated to provide services. Subject to conditions
13 imposed by the department, the person may submit a single plan for
14 more than one facility or covered vessel.

15 (4) A contingency plan prepared for an agency of the federal
16 government that satisfies the requirements of this section and rules
17 adopted by the department may be accepted by the department as a
18 contingency plan under this section. The department shall assure
19 that to the greatest extent possible, requirements for contingency
20 plans under this section are consistent with the requirements for
21 contingency plans under federal law.

22 (5) In reviewing the contingency plans required by this section,
23 the department shall consider at least the following factors:

24 (a) The adequacy of containment and cleanup equipment, personnel,
25 communications equipment, notification procedures and call down
26 lists, response time, and logistical arrangements for coordination
27 and implementation of response efforts to remove oil and hazardous
28 substance spills promptly and properly and to protect the
29 environment:

30 (b) The nature and amount of vessel traffic within the area
31 covered by the plan:

32 (c) The volume and type of oil or hazardous substances being
33 transported within the area covered by the plan:

34 (d) The existence of navigational hazards within the area covered
35 by the plan:

Sec. 3

1 and hazardous substances within the area covered by the plan;

2 (f) The sensitivity of fisheries and wildlife and other natural
3 resources within the area covered by the plan;

4 (g) Relevant information on previous spills contained in on-scene
5 coordinator reports prepared by the department; and

6 (h) The extent to which reasonable, cost-effective measures to
7 prevent a likelihood that a spill will occur have been incorporated
8 into the plan.

9 (6) The department shall approve a contingency plan only if it
10 determines that the plan meets the requirements of this section and
11 that, if implemented, the plan is capable, in terms of personnel,
12 materials, and equipment, of removing oil or hazardous substances
13 promptly and properly and minimizing any damage to the environment.

14 (7) Upon approval of a contingency plan, the department shall
15 provide to the person submitting the plan a statement indicating that
16 the plan has been approved, the facilities or vessels covered by the
17 plan, and other information the department determines should be
18 included.

19 (8) An owner or operator of a vessel, ship, or facility shall
20 notify the department in writing immediately of any significant
21 change of which it is aware affecting its contingency plan, including
22 changes in any factor set forth in this section or in rules adopted
23 by the department. The department may require the owner or operator
24 to update a contingency plan as a result of these changes.

25 (9) The department by rule shall require contingency plans to be
26 reviewed, updated, if necessary, and resubmitted to the department at
27 least once every five years.

28 (10) Approval of a contingency plan by the department does not
29 constitute an express assurance regarding the adequacy of the plan
30 nor constitute a defense to liability imposed under this chapter or
31 other state law.

32 NEW SECTION. Sec. 4. The department shall by rule establish
33 standards for persons who contract to provide cleanup and containment
34 services under contingency plans approved under section 3 of this
35 act.

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

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

- 12 (a) The state or any unit of local government;
 - 13 (b) A person who volunteers to assist in the cleanup of the
14 spilled oil; and
 - 15 (c) A person meeting the standards of section 4 of this act.
- 16 (2) This section shall not affect the liability of any person
17 responsible for the spilled oil or responsible for the facility or
18 covered vessel from which the oil was spilled.

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

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

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

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

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

Post-It™ brand fax transmittal memo 7671 # of pages 1

To	HOUSE JUDICIARY	From	Jack Benson KPB
Co.	COMMITTEES	To	ASSEMBLY
Dept.	RE. BILL # 196	Phone #	
Fax #	465-2299	Fax #	

HB 196

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

KENAI PENINSULA BOROUGH

RESOLUTION 91-37 (SUBSTITUTE)

A RESOLUTION SUPPORTING TESORO ALASKA

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

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

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

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

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

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

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

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

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

James W. Skogstad
 James W. Skogstad, Assembly President

ATTEST:

Maria Hudson
 Acting Borough Clerk

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

Alyeska blasted for billion-dollar bond

ATHY BROWN
 Peninsula Clarion

rough Mayor Don Gilman Wednesday
 ted Alyeska Pipeline Service Co. for
 t he calls an "unreasonable" demand
 threatens to shut down Tesoro-Alaska
 oleum Corp.'s Nikiski refinery.
 Alyeska is requiring Tesoro to come up
 a \$1 billion bond to continue shipping
 from the Alyeska pipeline terminal in
 lez to Cook Inlet.

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

Gilman said the major member compa-
 nies of Alyeska — Exxon, British
 Petroleum and ARCO — are using Tesoro
 as a pawn in order to pressure the Legisla-
 ture to pass a bill restricting Alyeska's lia-

bility in the event of a spill.

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

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

"Alyeska serves as the initial response
 action contractor for those vessels calling at
 the terminal in Valdez," she said. "Because

of the state's liability requirements,
 Alyeska ... asked the owner-operator or
 charter of the vessels to pledge a billion
 dollar bond, which, simply put, indicates
 they would have access to funds to manage
 the claims arising from a spill."

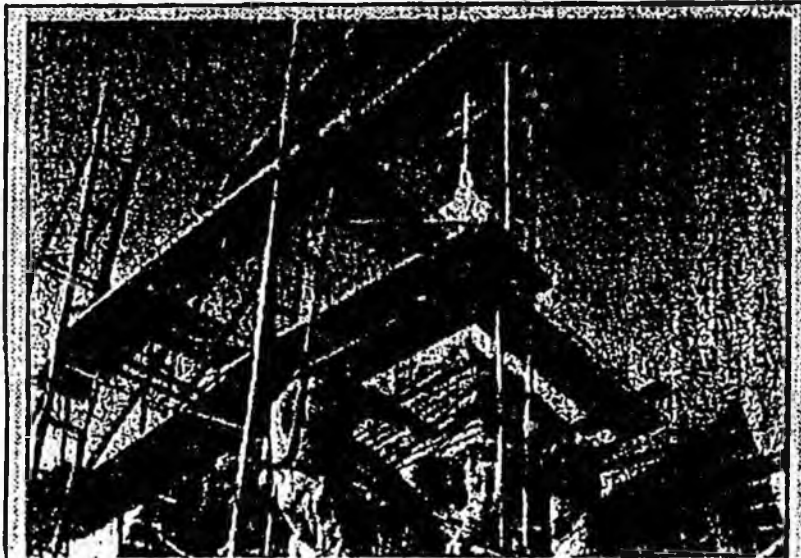
The other five companies operating ves-
 sels in Prince William Sound — Exxon,
 BP, ARCO, Shell and Chevron — have
 been able to comply with the \$1 billion re-
 quirement, mainly by pledging \$1 billion in

See ALYESKA, back page

Area guard unit may be expanding

JENNIFER SMITH
 Peninsula Clarion

The Kenai Armory may soon
 become headquarters for the "A"
 company of the Army National
 Guard, meaning 19 additional
 guard openings, two more full-
 time staff positions and a possible
 expansion of the armory grounds.
 Federal officials are expected



Area real estate market rebounds

By TONY LEWIS
 Peninsula Clarion

Slowly but surely, the peninsu-
 la's real estate market is recover-
 ing from the depressed conditions
 of the late 1980s, industry offi-
 cials said Tuesday.

"The real estate economy is
 moving. Things are improving,"
 Bob Schaafsma, an appraiser for

rule of economics — supply and
 demand.

In 1988, the market was flood-
 ed with houses for sale with no
 buyers. That drove the price of
 housing down, which in turn is
 now spurring buyers.

As more houses are bought,
 leaving fewer on the market,
 prices will increase again. Higher
 housing prices will make vacant

Alyeska: Company says state's liability laws are to blame

Continued from page 1

porate assets.

But Tesoro can't do that, Burden said.

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

He thinks Tesoro should not be required to put up as large an amount as the other companies.

Because Tesoro transports only a small percentage of the oil coming from the terminal, its tankers and tugs are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

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

Alyeska says it may lower its requirements if the Legislature

passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

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

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

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

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

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

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

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

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

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

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

He believes Alyeska is being inflexible about the bill.

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

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

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

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

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he

does not believe that's the case, either.

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

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

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

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

Burden says if Tesoro and Alyeska can't come to an agreement, Tesoro will file suit against the pipeline company, which would include seeking an injunction to allow the company to continue shipping out of Prince William Sound after June 1.

Guard: Headquarters may move

Continued from page 1

moving twice. The headquarters on the peninsula would centrally locate the unit and improve its effectiveness, Mosley said.

Kenai's guard, Detachment 1, "A" Company of the fifth battalion, 297th Infantry, is a combat unit with 31 members. It is charged with protecting the state's road network should an enemy invasion occur and provide a backup for pipeline security, Mosley said.

Gallery: Business in historic area scrutinized

Continued from page 1

split between opponents and backers of Pelozo's plan before it voted to stick to its original approval of a gallery, a white picket fence around the .68 acre property and landscaping. The approved plan also calls for arts and crafts classes and displays, some of which will be outside the build-

ing.

During the meeting the commission cautioned Pelozo, that he had to get the approval of the commission before any changes were made to his business.

In other business the council:

- Awarded a construction bid to Soldotna-based G&S Construction to build the Kenai Bicentennial Visitors and Cultural Center

for \$1,362 million.

- Approved transferring \$244,000 money from the city's general fund into the city's Airport Land System.

- Approved supporting the boroughwide upgrade of the present 911 emergency service number and the borough's funding request as a capital improvement program.

Kenai Peninsula Borough
Recycling Programs

NYE RV
CENTER



Kenneth J. Gaylord
P.O. Box 100262
Anchorage, Alaska 99510-0262
April 22, 1991

Representative Terry Martin
Rm. 600, Capitol
P.O. Box V
Juneau, Alaska 99811

Dear Representative Martin:

Upon re-reading my letter of 4-19. I noticed some errors. Please substitute this page for the first page of that letter.

In my opinion it is in the interest of the people of Alaska to continue to have Tesoro operate their refinery located on the Kenai Peninsula as they produce a lot of products used in Alaska and employ several hundred people in Alaska. It is my understanding that Tesoro's supply of north slope crude may be curtailed by Alyeska due their concern about being held liable for simple negligence claims as a response contractor.

I am writing to express my opinion about ~~SSRB 196~~. It is my understanding that a hearing will be held April 23, 1991 in the House Judiciary Committee, of which you are a member. to consider the bill. As this bill would provide some immunity as long as the response provider does not substantially vary from the terms of their contingency plan, I believe the it should be approved. Passing the bill should satisfy Alyeska's lawyers and still provide the cleanup response necessary to respond promptly to any oil spill.

In closing I would like to point out that a catastrophic spill from Tesoro's contracted ship the Overseas Washington is unlikely due to the following:

- a. The size of the cargo;
- b. The fact that Tesoro's vessel is hydrostatically loaded;
- c. The fact that Tesoro's vessel is double bottomed;
- d. The vessel operates with additional watch crew;
- e. The vessel uses state of the art satellite navigation systems.

Alyeska's obligation is for the initial response (minimum of 72 hours) and due to Tesoro's cargo size, Alyeska has 1/6 of the oil removal responsibility during this initial period as required for vessels with over 500,000 bbls. oil, are used by Alyeska's owner companies.



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Special Committee on Oil and Gas
Bill Hudson - Chairman

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

Official Business

April 24, 1991

To: House Judiciary Members
From: Representative Bill Hudson
Chairman, House Special Committee on Oil and Gas
Re: CSHB 196(Jud)

ISSUE DEFINITION

At the beginning of this session Tesoro and Conoco came to me with a problem they were experiencing which threatens the very existence of their respective companies which in turns threatens the royalty share of the state of Alaska for Milne Point oil and most importantly the jobs of over 500 Alaskans in the Kenai Peninsula. As the Chairman of the House Special Committee on Oil and Gas, I felt this was an appropriate area of concern for the committee and legislation was later introduced in an attempt to find a resolution to the problem. Several hearings have been held and as is often the case in the formulation of public policy, this legislation has been substantially modified.

Simply put, under current law oil spill response action contractors (RAC) in Alaska are experiencing a severe legal problem: specifically a RAC could be sued for its actions taken to clean up an oil spill, despite the fact that the RAC did not have any involvement in spilling the oil. Furthermore, a RAC could be held strictly liable for cleanup damages for a spill which they did not cause -- a dangerous standard to hold someone responding in a crisis atmosphere to.

In response to this situation, some RACs have sought to protect themselves from possible lawsuits by requiring that those companies contracting with them for clean up services be able to meet standards of financial responsibility. In the case of Tesoro and Conoco, they must provide \$ 1 billion dollars in direct action insurance before Alyeska, the RAC for PWS, will guarantee cleanup services for tankers under contract to these companies.

Tesoro and Conoco are unable to obtain the \$ 1 billion dollars in financial responsibility and unless the legislature acts this session are in danger of going under.

Although this matter will in all likelihood eventually be solved in court, the legislature, through passage of CSHB 196 (JUD) can remove any legitimate reason for a RAC's excessive insurance requirements.

Two companies have already withdrawn from the TAPs tanker trade as a result of Alyeska's provisions. This is a critical situation requiring immediate attention.

The United States Congress, California, Washington, Hawaii, Florida, Texas, Virginia, Delaware, Mississippi and Georgia have limited oil spill clean up contractors to a gross negligence standard. This is a nationally recognized problem. What CSHB 196 (JUD) proposes to do is to shift, not reduce, for 15 days, the liability for acts of simple negligence during an oil spill cleanup from the RAC to the party responsible for the spill so long as the RAC's act or omission is not contrary to the orders of the state or federal on scene coordinator or substantially deviates from the oil spill contingency plan. This change will keep Alaska's liability law as strong as any in the nation.

Passage of this legislation helps Tesoro and Conoco by removing any legitimate justification for the \$ 1 billion financial responsibility that Alyeska is requiring. Alyeska is not supporting this legislation; despite that fact that this bill gives Alyeska the federal standard it seeks with the one exception being that a RAC loses the federal standard of gross negligence if it substantially deviates from the contingency plan. Alyeska has no direct economic interest in seeing this problem solved this year - it is Tesoro, Conoco and others that will pay the price of our inaction. Alyeska has stated that it will not continue a response services agreement beyond June 30, 1991 absent some change in the current situation.

CSHB 196 (JUD) will directly help both Tesoro and Conoco and both companies have strongly urged its immediate passage. This legislation will also help other RACs throughout the state, for example CISPRI in Cook Inlet. During the last legislature, legislation was passed requiring substantial improvements in contingency planning, which often includes the use of cooperatives or contracts for cleanup services. Shippers in Cook Inlet have demonstrated a reluctance to join CISPRI because of their possible exposure to liabilities in responding to spills that are not their own. Passage of CSHB 196 (JUD) will specifically address that concern.

I urge you to carefully consider this legislation and hope you will join with me in endorsing its swift passage.

7-LS0797J /
Ford
4/23/91

**CS FOR HOUSE BILL NO. 196 (JUDICIARY)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION**

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

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

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting civil liability for acts or omissions of an oil spill response action
2 contractor and establishing strict liability on responsible parties for certain acts or
3 omissions of a response action contractor; amending the definitions of 'response action' and
4 'response action contractor'; relating to a report by the Citizens Oversight Council on Oil
5 and Other Hazardous Substances; providing for the repeal of changes made by this Act
6 in one year; and providing for an effective date."

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

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

9 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
10 set out in (b) of this section and the exception set out in (i) of this section, the following persons
11 are strictly liable, jointly and severally, for damages [TO PERSONS OR PROPERTY,
12 WHETHER PUBLIC OR PRIVATE, INCLUDING DAMAGE TO THE NATURAL
13 RESOURCES OF THE STATE OR A MUNICIPALITY,] and for the costs of response,

1 containment, removal, or remedial action incurred by the state or a municipality, resulting from
2 an unpermitted release of a hazardous substance or, with respect to response costs, the substantial
3 threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (g) In this section,

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

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

31 (A) the department;

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

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

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

7 (3) "response action contractor" means

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

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

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

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

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

27 (2) the response action contractor acted with gross negligence or intentional
28 misconduct; or

29 (3) the response action contractor, without approval by the federal or state on-
30 scene coordinator, substantially deviated from an oil spill contingency plan previously approved
31 under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible

1 for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms
2 of that plan under a contract with parties responsible for the release under AS 46.03.822.

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

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

5 (2) an action for damages to tangible personal property not caused by oil; or

6 (3) an act or omission that occurs more than 15 days after the release.

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

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

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

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

23 (A) the department;

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

26 (C) a federal agency with jurisdiction over the release or threatened
27 release; or

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

30 (15) "response action contractor" means

31 (A) a person who enters into a response action contract with respect to a

1 release or threatened release of a hazardous substance and who is carrying out the
2 contract, including a cooperative organization formed to maintain and supply response
3 equipment and materials that enters into a response action contract relating to a release
4 or threatened release;

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

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

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

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

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

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

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

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

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

1. The Substantive Sections:

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

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

Subsection (c) provides that if, for any of the reasons stated above, the oil spill RAC's liability is not limited to "gross

negligence," the injured party will have to prove simple negligence in order to hold the oil spill RAC liable. However, if the oil spill RAC also caused the spill, the RAC will still be strictly liable.

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

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

Section 9. This section sets out the type of people who are covered by the limitation of liability in Section 8. It uses existing law's definitions of "response action contract" and "response action contractors," with one important addition -- volunteers are now covered by the limitation of liability. See p. 7, l. 8.

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

2. The Conforming Amendments.

Section 1. Section 3, as we have seen, transfers certain liabilities from the oil spill RAC to the spiller. It does so by adding a definition of "damages" for which the spiller is

responsible to Alaska's basic strict liability law (AS 46.03.822). Since Section 3 now sets out the damages for which the spiller is liable, there is no longer any need to repeat the now-redundant list in Section 822(a). Section 1 therefore deletes this now-surplus language (p. 1, ls. 11-13); otherwise, it makes no change in the liability statute. Except for the bracketed and capitalized language on page 1, all of Section 1 merely sets out existing law.

Section 4 and Section 6. Section 8 creates limitations on liability specific to oil spill response action contractors. AS 46.03.823 is an existing liability statute dealing with all hazardous waste cleanup contractors (including oil spill RACs). Section 4 and Section 6 remove oil spill RACs from the coverage of Section 823 by inserting the words "other than oil" on p. 3, l. 28 and p. 4, l. 19. Except for these words, the remainder of these sections simply set out existing law, which will still be applicable to people involved in other types of hazardous substances cleanup.

Section 13. This section provides an immediate effective date.

3. "Sunset" Provisions.

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

(7)

Date Referred: March 6, 1991

FURTHER REFERRALS:

Resources
Judiciary
Finance

Date of Committee Action: 3/11/91

The HOUSE SPECIAL COMMITTEE ON OIL AND GAS Committee considered:

HB 196

HOUSE BILL NO. 196

LIABILITY OF RESPONSE ACTION CONTRACTORS

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

RECOMMENDATIONS:

be replaced with CS HB 196 the same title a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

fiscal impact _____

fiscal note(s) _____

zero fiscal note ADEC.

zero fiscal note(s) _____

SIGNING <u>DO PASS</u>	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Bill Hurd</i>		<i>Mike Swane</i>		X	
<i>Jim ...</i>	X	<i>Kay Brown</i>		X	
<i>David ...</i>	X	<i>Paul ...</i>			
<i>Gail Phillips</i>					

Bill Hurd
CHAIRMAN'S SIGNATURE

A M E N D M E N T

OFFERED IN THE HOUSE
TO: HB 196

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Page 1, line 3:

Delete "definition"

Insert "definitions"

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

Insert "and 'response action contractor'"

Page 5, line 11:

Delete "and"

Page 5, line 14, following "contract":

Insert "; and

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

A M E N D M E N T

OFFERED IN THE HOUSE BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS
TO: HB 196

Page 2, lines 21 - 23:

Delete all material and insert:

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

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

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

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

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

A M E N D M E N T

OFFERED IN THE HOUSE BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS
TO: HB 196

Page 4, line 10:

Delete "a response plan or"

Insert "an"

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

Insert "(1)"

Page 4, line 21, following "death":

Insert "; or

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

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

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

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

TELEPHONE
(907) 465-2600

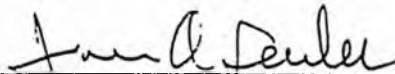
March 11, 1991

POSITION PAPER

HB 196

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

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



John A. Sandor
Commissioner

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 196

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

1	0	1	6
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Expenditures/Revenues: (Thousands of Dollars)

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

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

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Janice Adair Phone: 2600
 Division: Commissioner's Office Date: March 11, 1991

Approved by Commissioner: *Janice Adair*
 Agency: ADFC Date: 3/11/91

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

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

March 7, 1991

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

TO: Representative Bill Hudson

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

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

Section 1 - Findings and Purpose.

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

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

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

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

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

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Section 7 - Repealer.

Section 8 - Effective date.

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

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

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

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

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

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

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

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

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

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

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

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

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

"(B) Subparagraph (A) does not apply—

"(i) to a responsible party;

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

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

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

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

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

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

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

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

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

"(d) NATIONAL CONTINGENCY PLAN.—

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

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

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

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

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

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

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

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

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

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

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

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

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PACIFIC FISHERIES LEGISLATIVE TASK FORCE RESOLUTION

Concerning "Oil Spill Responder's Limited Immunity"

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

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

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

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

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

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

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

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

ADOPTED JUNE 16, 1990,
IN SITKA, ALASKA

Alaska State Legislature

Legislative Research Agency



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February 26, 1991

MEMORANDUM

TO: Representative Bill Hudson

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

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

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

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

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

Background

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

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

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

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

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

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

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

Arkansas

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

California

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

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

Connecticut

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

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

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

Delaware

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

Florida

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

Hawaii

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

Louisiana

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

Maine

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

Maryland

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

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

Mississippi

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

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

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New York

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

North Carolina

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

Oregon

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

Pennsylvania

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

Virginia

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

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

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

Washington

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

Conclusion

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

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

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