

WATER LOG



A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium

Special Issue: Alaskan Oil Spill – Lessons Learned?

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Mississippi-Alabama Sea Grant Legal Program

WATER LOG

The WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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Preface

In this special issue of WATER LOG, representatives from Exxon, the State of Alaska, and the Center for Marine Conservation examine the legal and policy implications of the massive oil spill that occurred in Prince William Sound on March 24, 1989.

The first contribution is a complete transcript of the keynote speech delivered by William D. Stevens, President of Exxon U.S.A. to the Offshore Technology Conference on May 2, 1989. President Stevens' remarks provide a thorough explanation of Exxon's performance during the first month of cleanup operations, and suggest actions that the oil industry should take to reduce the chances of similar spills in the future.

Dennis D. Kelso and Michele Brown of the State of Alaska have been intensively involved in the development and coordination of that state's cleanup and recovery efforts. Their article discusses the lessons that should be learned from the Alaskan spill and the need for policy changes to strengthen both prevention and response capability.

The last of our three guest contributions is by Bowen Brown of the Center for Marine Conservation. Mr. Brown summarizes the current federal regulatory regime governing oil spill liability and examines the strengths and weaknesses of proposed legislation.

We hope that this special issue of WATER LOG provides our readers with a greater understanding of the events that occurred after the Exxon Valdez ran aground on Bligh Reef. But even more importantly, we hope that the suggested oil spill policy improvements offered by our three guest commentators become part of the national debate and assist in the effort to prevent the continuing tragedy in Alaska from being repeated.

Transcript of Speech Delivered at the Offshore Technology Conference - Houston, Texas May 2, 1989

By
William D. Stevens
President, Exxon U.S.A.

Thank you, Don (Stacy). To begin, I want to extend my personal congratulations to this year's award winners. The Placid Oil Company and Bengt Johansson, along with their associates, can take great pride in being honored by this industry, which is unequalled in the record of technical achievement set by its international members.

Exxon has been a major participant in the Offshore Oil Industry since its earliest days, and has helped contribute to its development. In turn, and of greater importance, we at Exxon have benefited from the tremendous growth in off-

shore technology and know-how, advances deriving not only from this country, but also from companies headquartered in Canada, Europe and the Far East.

Just as Exxon and all offshore operators have benefited from the many positive advances, our companies likewise are broadly impacted by major adversities that occur in the industry—be they in the North Sea or in Alaska. Quite obviously, that's why I'm standing before you today.

Now, let me be absolutely clear on one point at the outset: it was Exxon's spill. From the first, we in Exxon have accepted responsibility for it. But it should be evident to everyone here that when one company suffers a major calamity, many companies in our industry may be affected.

Therefore, I welcome this opportunity to share with you the salient facts about the situation in Alaska. And I'll also share some preliminary thoughts on the lessons to be learned from this accident.

EXXON'S RESPONSE TO THE ACCIDENT

Despite much that you may have read and heard, let me say that the precise cause of the accident still is not known. Many unanswered questions remain. The National Transportation Safety Board hearing just two weeks from today will provide more information, and we look forward to having the results of that detailed investigation.

Confronted with the sudden release of approximately a quarter of a million barrels of crude into Prince William Sound in the span of a few hours, Exxon's response was prompt and fully consistent with the Oil Spill Contingency Plans in place.

The immediate on-scene response over the first day and one-half was the responsibility of Alyeska Pipeline Service Company in Valdez. The next phase was—and remains—Exxon's responsibility.

Upon learning of the accident in the early morning hours of Good Friday, Exxon Shipping Company acted immediately. Within three hours of the spill, a Response Center was set up and operating. In those initial hours, arrangements also were made for the first five of many subsequent flights to Alaska to airlift equipment from oil spill cooperatives and other organizations.

Although we had no operating organization in Alaska, Exxon's key response team members were on site in Valdez just 18 hours after the vessel grounding. Dozens more trained people and tons of supplies began arriving that same day.

On the scene, we were faced with urgent needs to move quickly on a number of fronts at the same time. Immediately, we had the task of preventing any further oil from being spilled from the seriously damaged tanker, which still carried over one million barrels of crude on board. Risky but carefully managed lightering operations over an 11-day period, involving three other Exxon tankers, assured that the spill did not become a 1.3 million-barrel spill. The degree of difficulty of this operation, and the skill with which it was successfully carried out in precarious conditions, can't be overstated.

Simultaneously, we set about to contain and clean up the oil which already had been spilled. The Oil Spill Contingency Plan developed by Alyeska, and approved by both federal

and state authorities in 1977 and as recently as January 1987, recognized that a spill of this magnitude could *not* be fully contained, and that a significant amount of oil would reach shore.

To substantially reduce the volume of oil which might reach land, the Plan emphasizes the importance of early use of dispersants and open burning. It was extremely unfortunate that delays were experienced in obtaining such approval from the authorities.

Then, a severe storm at the end of the third day spread the oil slick over a distance of 40 miles and onto island shorelines. At that point, containment was no longer possible, and cleanup became a key priority.

While these other operations were taking place, we took steps to limit damage from the spill in a number of ways. For example, we supplied equipment and worked with local fishermen's groups to place booms at key salmon hatcheries and to protect them from the oil. All of the critical hatcheries have been saved.

We immediately launched a scientific effort to assess impacts of the spill on water quality, sediment, and marine life. A team of environmental experts was taking water samples even before oil began to spread from the original site.

Within the first two to three days, we had treatment centers set up for oiled birds and sea mammals, manned by experts Exxon brought in from California wildlife institutions.

Also in the early days, we initiated steps to mitigate the economic impact of the spill on the local communities. Claims offices were soon established in Valdez and Cordova, and later at Homer and Seward. We have since worked with hatcheries, canneries, fishermen's groups, and many individuals to assure their financial viability, and to pay promptly those helping in the cleanup effort.

On yet another front, attention was devoted to preparing for the longer-term shoreline cleanup effort. By April 2, a group representing nine government agencies and Exxon began defining a cleanup strategy. Two days later the team had a preliminary plan, and by the 8th — two weeks after the spill — it was approved and field testing began. A more definitive plan was subsequently developed, and was approved by the Coast Guard on the 17th.

This is the comprehensive plan which will govern the cleanup of 305 miles of affected shoreline in Prince William Sound throughout this summer. It is being implemented through a completely new organization specifically created for the job.

A MASSIVE MOBILIZATION FOR CLEANUP

In dealing with the spill, it has been necessary for Exxon to mobilize in a remote area significant numbers of people and substantial quantities of material and equipment, working in close cooperation with the U.S. Coast Guard.

To illustrate the size and the speed of the buildup, consider that 24 hours after the spill Exxon had 35 employees on the scene, and had hired 200 others. After one week, there were 800 people employed. After one month, there were 3,000, and we are continuing to increase the number of personnel as the cleanup operation expands.

To date, 4.7 million pounds of material and equipment have been airlifted into the area from the lower 48 states, Canada, and several European countries. Greatly complicating the logistics of this operation is the fact that virtually all of the cleanup activities must take place 40 to 80 miles from the nearest operating base.

Some 465 vessels are being used, including 11 "mother ships" to house cleanup workers in the Sound, and 25 military-type landing craft to transport work crews and equipment to shore. More than 65 miles of boom have been deployed, and fifty-four skimmers are at work in the area. Twenty-six aircraft are operating in a support capacity.

Today, mobilization continues as necessary to meet the schedule set in the approved cleanup plan. Improvements to the plan are being made as we proceed, and some adjustments were included in the revised plan we submitted to the Coast Guard yesterday (May 1). Our firm intent is to complete the cleanup by the mid-September deadline.

THE REAL STORY IN ALASKA

Looking back, I find it hard to believe that less than six weeks have passed since the accident. By our actions over this 40-day period, I believe we in Exxon have shown our commitment and our determination to deal responsibly with the spill and all its effects. We cannot undo what happened; however, we can, and we are, taking every possible action to limit the damage, clean up the mess, and otherwise mitigate the impacts.

I can understand if many of you, lacking direct knowledge of all that is being accomplished in Alaska, find it difficult to reconcile what you've seen in news reports with what you know of Exxon's standing in the industry as a responsible and highly capable operator. Having seen this complex, far-reaching effort take shape day-by-day since March 24, from my viewpoint it's a greatly different and more impressive story than I see depicted in news accounts.

Let me assure you that Exxon's values, and our commitment to technical and operational excellence remain unchanged. We are still the organization that the OTC has seen fit to honor at this luncheon no less than three times during the 1980s — twice as a company, and on another occasion for an individual's accomplishments.

LESSONS LEARNED

All this is not to say that we, along with the other parties directly involved in this incident, haven't learned some lessons and identified areas where changes should be considered.

A fundamental lesson relearned is that no business activity is ever totally free of risk where human factors are involved. A record of uneventful transit of over 8,700 tanker loads through Prince William Sound did not guarantee safe passage of our newest-class ship, the *Exxon Valdez*, which appears to have come to grief through human error. We at Exxon are considering the implications of this accident on operating practices.

More broadly, there is need for a general reappraisal of elements of all contingency plans in light of the experience gained following this spill.

One study area involves the decision-making and operating procedures to be followed in an oil spill emergency. In a crisis, decisions must be taken promptly. For this to happen, clear lines of authority for government agencies and with the company involved must be established before an incident occurs. Those *in charge* must be allowed to *take charge*. As events in this case clearly demonstrate, timely action is critical.

Given the importance of action taken early on, containment and cleanup resources locally available should be reevaluated. While the Alyeska Plan provided for a 200,000-barrel spill in Prince William Sound, a spill of that magnitude was considered unlikely.

The Plan anticipated mobilization of personnel, material and equipment from other locations to deal with such a large spill, knowing it would take time to assemble such resources. Consequently, the Plan recognized that should a spill of this size occur, a significant shoreline cleanup effort would be required.

Finally, our industry should identify areas of spill containment and cleanup know-how which could benefit from additional research. Several of these matters already are being studied by a task force recently announced by the API, which is chaired by Allen Murray of Mobil and composed of the chief executives or presidents of nine major companies, including Exxon.

These are only a few of our initial thoughts on what we in Exxon, as well as industry, must do as a consequence of the *Valdez* spill. I expect that many companies represented here today have other such efforts underway.

CREDIBILITY AND FUTURE ENERGY POLICY

There is no question that the petroleum industry must act decisively and responsibly to respond to the many lessons growing out of the Alaska accident. Equally important, the industry must be perceived by the public as responding meaningfully.

By acting forthrightly and constructively, industry can help to minimize the extent to which the very strong public reaction may tend to unwisely influence energy policy. Notwithstanding the *Valdez* accident, this industry's long-term record shows that it is possible to have a reasonable balance between supplying energy and protecting the environment. It is crucial that broad national energy policies extending into the next century not be dictated by a single accident.

By performing to its very best in Alaska, Exxon itself can exert a positive influence on the longer-term national perception. Our No. 1 priority is clear: we *must* successfully complete the task ahead of us and fulfill our commitment to the people of Prince William Sound, of Alaska, and the nation.

By thus enhancing Exxon's credibility, the industry will likewise benefit. You may be assured we are determined to see this through to the best outcome that can possibly be achieved.

The views expressed herein are those of the author and do not necessarily represent the opinions of the editors or the Mississippi-Alabama Sea Grant Consortium. □

Oil Spill Prevention and Response: Lessons from the Exxon Valdez

By

Dennis D. Kelso, Commissioner of the Alaska Department of Environmental Conservation and Michele D. Brown, Assistant Attorney General for the State of Alaska

Long before the *Exxon Valdez* slammed into Bligh Reef and dumped nearly 11,000,000 gallons of crude oil into Prince William Sound, the State of Alaska had readied itself for this tragic eventuality. The Alaska Department of Environmental Conservation had prepared a state emergency plan for oil spills to coordinate state and federal governmental response activities. The plan also established field communications and transportation systems, the procedures for spill documentation, and guidelines for the prevention of risks to the public.

The state had simultaneously required Exxon Shipping Company, the tanker operator, and Alyeska Pipeline Service Company, the oil terminal operator, to submit oil spill response plans. Alyeska has submitted oil spill contingency plans covering its Valdez Marine Terminal, Valdez Harbor, and Prince William Sound. Exxon complied with its oil spill contingency plan requirement for tanker operations by formally designating Alyeska as its agent for oil spill response.

Although primary responsibility for contingency planning rests with the tanker and terminal operators, the state required, over Alyeska's opposition, major enhancements to the proposed plan, including providing a response plan for a 200,000 barrel tanker spill scenario. The plan designated equipment and response times, and identified the shoreline areas that should be immediately defended against contamination. The state required successful completion of spill drills to prove industry's readiness.

The state also acted to ensure that the response to a spill in Prince William Sound would be timely: it preapproved the use of chemical dispersants in a large portion of the Sound that borders the tanker traffic lanes. Under federal law, use of chemical dispersants is subject to the approval of the Regional Response Team (RRT), the team of federal and state agencies responding to oil spills. Recognizing that an effective response to a major spill within Prince William Sound could, in some circumstances, include the use of dispersants, the state and other members of the RRT approved this area in advance for dispersant use if conditions were favorable. This foresight eliminated any governmental approval delays that might otherwise have arisen in the short time in which dispersants can be effective. The preapproval for dispersant use was the final prop on a stage already set for an effective spill response.

In short, all parties were, at least on paper, prepared for this tragedy. When it hit, state and federal agencies immediately implemented their respective emergency plans and

told Alyeska and Exxon to do the same. Nonetheless, the principal actors failed to reach center stage. Neither Alyeska nor Exxon responded according to their plans; neither took advantage of ideal conditions for mechanical containment and cleanup; and neither had sufficient dispersants or spraying equipment on site to even begin to mount an effective response.

This article will discuss briefly the responses of the parties in relation to their respective contingency plans. The lesson learned, however, is that contingency planning is not enough. We must do more to avoid the errors that delay or impede the implementation of contingency plans. We must ensure that the government, not the spiller, decides how to proceed in carrying out the contingency plan and sustaining the cleanup response. The remainder of the article will address ideas to better prevent these incidents and to ensure a response that leaves us far less vulnerable to inaction by those responsible for the incident in the first place.

THE RESPONSE

State of Alaska personnel mobilized purposefully and quickly in the immediate hours after the spill. A state field officer accompanied the first Coast Guard vessel to arrive at the stricken tanker. Before he departed to join the Coast Guard, however, that same field officer triggered the network of telephone calls that would result in a response organization larger than Alyeska's or Exxon's arriving in Valdez on that first day.

State personnel arrived by automobile before first light (a trip over two mountain ranges) and before the first planes could approach Valdez. Top state officials teleconferenced with the Governor at 8:30 a.m. on the first day to coordinate the state response, that was to be directed by the Department of Environmental Conservation and carried out with the cooperation and assistance of the Departments of Fish and Game, Military Affairs (Emergency Services), and Law.

On site in Valdez, Department of Environmental Conservation staff, under the direction of a state on-scene coordinator, divided into distinct areas of responsibility and moved into action, using a corner of the courthouse in Valdez. Groups were organized for spill tracking, spill response, operations and control, documentation, communication, and impact assessment. The Department of Fish and Game sent staff to Valdez immediately to assemble biological information on the Prince William Sound area and to prepare for the impact of crude oil on fish stocks in some of the world's finest fisheries. The state's Division of Emergency Services similarly sent staff and began mobilizing equipment from all over the state to assist in spill monitoring, spill response, and communications for each agency.

Exxon began mobilizing equipment, but unfortunately that equipment had to be transported from all over the country to Valdez. Alyeska, the company charged by law with the duty to respond, already had equipment on site in Valdez but completely failed to engage the oil spill response crews and equipment in any meaningful response activity. Alyeska's contingency plan had promised that Alyeska would arrive at a location even farther from Valdez than Bligh Reef within five hours. Despite repeated assurances to state officials that

response equipment was en route, Alyeska did not deploy its oil spill containment barge for fourteen hours. Alyeska did not boom the tanker or the leading edge of the oil. Late on the first day, Alyeska deployed two small skimmers, but they were floating in the middle of the slick, not collecting the oil at its leading edge. The result was — although conditions were ideal for mechanical containment and cleanup due to unusually calm wind, weather, and sea conditions — that nothing happened. The oil fanned out alarmingly and no effort was mounted even to contain the oil, let alone to commence effective cleanup.

Alyeska's failure to implement its contingency plan was exacerbated by its decision to hand off the clean up to Exxon as quickly as possible. Exxon exerted great effort to rise to that challenge, but simply could not create a hands-on, timely field-oriented response. Exxon had never before reviewed Alyeska's site specific contingency plan but nevertheless tried to create an ad hoc response from scratch. Equipment stacked up in Valdez, but there was no field organization to plan a strategy and direct a response.

The United States Coast Guard, during this same period, was properly focused on the removal of the remaining forty-two million barrels of oil on the tanker. Obviously, this crucial effort commanded attention. The Coast Guard ably supervised and directed the removal, but Alyeska and Exxon became so preoccupied with that activity that they became even further distracted from undertaking any effort to contain and pick up the oil already on the water.

Exxon's and Alyeska's preoccupation with the lightering of oil from the tanker and their lack of directed activity toward cleanup was compounded by an even more dangerous omission. Prince William Sound is home to rich herring and salmon fisheries and to populations of commercial fishermen and subsistence villagers whose lives depend on these fisheries. Alyeska's contingency plan identified the most sensitive resource areas in the Sound and Alyeska had promised in the plan to immediately defend and protect those areas. These areas should have been boomed immediately to exclude oil, because it was all too soon obvious that the oil was spreading at an alarming, uncontrolled rate. Neither Alyeska nor Exxon exercised any effort whatsoever to protect these critical areas.

Fisherman and state officials watched these events unfold with a sense of mounting frustration and loss. When the realization hit that the responsible parties were not going to act, state officials and local fishermen could wait no longer. Although normally a regulatory agency, the Department of Environmental Conservation and an energetic, resourceful group of local fishermen mounted their own response. The Department diverted two state ferries and the fishermen assembled a fleet of fishing vessels. Together they converged on three key fish hatcheries and Eshamy Bay, a highly productive and sensitive estuary, with boom and other equipment to defensively enclose those sensitive areas. The ferries were equipped with basic, low-technology cleanup tools: skiffs, boom, hand-thrown oil snares, and sorbent pads. Later the state and fishermen innovated by adding a modified vacuum truck, a "super sucker," mounted on a barge to collect oil from the water. This effort saved the hatcheries and

Eshamy Bay, areas which would otherwise have been fouled, ruining fish stocks for years to come.

Confronted with their own dismal response record, Exxon has tried to create a smokescreen by saying that its initial cleanup effort was hampered by a lack of approval for dispersant use and in-situ burning. This could not be more incorrect. Alyeska requested and the Department of Environmental Conservation immediately issued a burn permit. Alyeska conducted some burning, but ultimately stopped because it could not get the oil to ignite and because it lacked sufficient fire resistant boom to conduct large scale burning.

Dispersant use was already approved in the area where the bulk of the oil was located. Preapproval, however, did not necessarily mean that conditions would inevitably be suitable for dispersant application because dispersants are only effective when the oil is fresh and there is wave action and mixing of the water surface. The federal on-scene coordinator immediately authorized dispersant trials to determine whether dispersants would be an effective response tool under the wind and water conditions at the time. The first, second, and third trials were totally ineffective due to the lack of surface mixing energy and proper spray equipment. A fourth trial was partially successful and the federal on-scene coordinator gave clearance for full dispersant use. Nonetheless, Exxon did not attempt any further dispersant use for another day.

In any case, even if conditions had been suitable from the first moments after the spill, neither Exxon nor Alyeska had sufficient quantities of dispersants on-hand or the proper application equipment. Based on Exxon's recommended application rate of 20:1, about 500,000 gallons of dispersant would be required. Less than 5,000 gallons were in Valdez the day of the spill, and only 110,000 gallons were available six days later. Further, the early dispersant drops from a helicopter and fixed wing airplane could not properly apply the dispersants. The proper aircraft and spray equipment did not even arrive in Valdez until well after the window for effective dispersant use had closed.

FUTURE OIL SPILL RESPONSE PLANNING

The severity of the spill and the inadequacy of the response have underscored the need for policy changes to strengthen both prevention and response capability. Three main areas need to be addressed: oil spill response planning and implementation, tanker safety, and equipment/technology development.

Oil spill contingency plans and the implementation of those plans should be restructured so that the government directs rather than reacts. Under current law, spill response plans are developed by the regulated facility; the state may comment, ask for changes, and ultimately approve the plan. This can eventually produce a respectable plan — such as the one finally approved by the State of Alaska for the Alyeska Pipeline Service Company in Prince William Sound. But this practice takes far too long — the 10-year old Alyeska plan took a full 18 months to revise because the company resisted the state's efforts to strengthen it. This consumes resources that could be used for preparing spill drills, evaluating equip-

ment availability, or working with other oil handling facilities on their contingency plans. A better approach would be for the government to direct industry to meet specific performance standards. By developing and setting clear, stringent requirements — and then placing the responsibility on industry to bring in a plan meeting all of the requirements — contingency plans can be made more efficient and effective.

The best oil spill response plan will be effective only if it is implemented when a spill occurs. In the *Exxon Valdez* spill, the plan was virtually ignored; this hampered the containment and recovery of oil. Under current state and federal law, the responsible party (usually the spiller) has the right to initiate the spill response. The state and the Coast Guard can take over only if the responsible party refuses or if the response is inadequate. Unfortunately, the industry is not structured to carry out the kind of emergency action — virtually a military discipline — required in a spill. As a result, a spill may well be out-of-control before the state or Coast Guard can intervene. Obviously, that is too late.

Furthermore, it may be difficult to tell whether the spiller can actually handle the spill response. For example, if the responsible party first indicates its willingness to respond and initiates some containment work but is unable to sustain the recovery effort, at what point do state agencies and the Coast Guard conclude that they should take over the spill response? By changing policy so that the agencies have authority to direct the spill response, not just to monitor it — while the spiller or other responsible party remains obligated for the full costs of the response — these problems could be avoided.

TANKER SAFETY: DESIGN AND CONSTRUCTION, OPERATIONS CONTROLS AND TRAFFIC MANAGEMENT

The *Exxon Valdez* spill simply should not have happened. The vessel struck a plainly marked reef that was miles outside the tanker traffic lanes. There was no intervention from the Vessel Traffic System or from any other ship. Once aground, its cargo escaped from the damaged tanks so rapidly it appeared to boil as it rushed to the surface.

In light of this experience, it is essential to examine the adequacy of tanker design and construction. Some experts believe that the spill would have been substantially reduced if the *Exxon Valdez* had been constructed with a double bottom. All elements of tanker design pertaining to safety should be evaluated. This includes, for example, alternative hull architectures, and cargo volumes and configurations.

Durability factors should also be scrutinized. Prior to the *Exxon Valdez* disaster, a disturbing trend toward structural cracking had been noted in the tankers operating out of Valdez. In January, the tanker *Thompson Pass* spilled 1,700 barrels of North Slope crude oil from cracks in her hull. As the tanker fleet has aged, this risk has increased the concern of Alaska's pollution control officials.

Operating systems and technology to back up human factors must also be examined. Much of the public attention following March 24 focused on the alleged culpability of the captain and crew. However, such attention misses the point.

The entire operating system failed. The backup safety devices, the management systems to strengthen operations accountability, drug and alcohol monitoring, and the adequacy of crew configurations are among the areas needing review.

Tanker movements in Prince William Sound and Valdez Harbor are monitored and controlled primarily through the Coast Guard's Vessel Traffic System. Rules of operation, Coast Guard radar, aids to navigation, and pilotage requirements all play roles in tanker safety. For operations in Prince William Sound — and wherever tanker traffic operates — the review should include at least the following additional items: continuous radio contact with vessels, improved radar coverage and alarm systems, escort by vessels capable of rendering assistance and deploying spill response equipment, current bathymetric surveys and chart revisions, and expanded areas requiring presence of local pilots. These considerations are relevant to most ports in the country.

EQUIPMENT AND RESEARCH AND DEVELOPMENT

When Exxon took over the spill response from Alyeska, it had virtually no equipment of its own in the spill area. As the company began mobilizing equipment, it became clear that there was no repository of information to identify or locate the available containment and recovery equipment. This meant losing valuable time in the response operation. To correct that problem, equipment should be immediately accessible in strategic locations. These depots should be integrated with the oil spill contingency plan. A computer database should be developed containing information on equipment by type, location, availability, and shipping requirements. In addition, a database should also be developed for information about coastal and weather characteristics. That information could be indexed with the equipment database to provide quick identification of equipment appropriate to the conditions in the spill area.

Early in the spill it also became obvious that containment and recovery equipment used in other countries (Norway, for example) was not available in the United States. These higher capacity containment booms, deployment vessels, skimming and other equipment probably would have been effective in the large slick from the *Exxon Valdez*, particularly since wind and sea conditions were ideal for mechanical recovery of the oil.

In summary, two things are needed in light of this experience. First, existing technology, wherever it is now in use, should be evaluated for use in the United States. If appropriate, it should be acquired and located in areas where additional response capacity may be needed. Second, a national research and development program is needed to improve oil spill response technology.

ALASKA POST-SPILL RESPONSE

The State of Alaska has taken specific steps to strengthen oil spill prevention and response. The Department of Environmental Conservation consulted with the pilot's association and oil spill experts and issued an emergency

order to Alyeska, the state's primary oil terminal operator, to address many of these issues. The emergency order requires, among other things, full time round-the-clock oil response crews that have spill response as their sole responsibility; tug and pilot accompaniment of cargo laden tankers; alcohol testing programs for command officers; and constant, direct radio contact between tankers and oil spill response vessels. The order also specifies oil spill response capability to recover at least 10,000 barrels per hour.

The Alaska Legislature also took action. The state's Oil and Hazardous Substance Release Response Fund was increased to \$50,000,000 to be funded and replenished through a 5¢ per barrel surcharge on crude oil moving through the Trans-Alaska Pipeline. Strict liability standards were adopted for discharges of oil and other hazardous substances. The Legislature authorized enhanced statewide and regional contingency planning for oil and hazardous substance releases, response equipment depots, strike teams, and local volunteer corps. The Legislature also strengthened the civil penalties for oil spills. With these new authorities and the funding to implement them, the State of Alaska is now able to maintain a wider safety margin.

CONCLUSION

The new legislation and the emergency order are only a beginning for improvements in Alaska; far more needs to be done on both local and national levels.

The States of Alaska, Washington, and Oregon have already joined with the Province of British Columbia, Canada, to form an oil spill task force to address these issues locally and regionally. Congressional action is imperative to ensure meaningful progress in oil spill prevention, response, and financial responsibility. It is equally imperative that state and local roles be maintained in all policy changes Congress enacts. More than ever, a coordinated and directive approach to oil spills is needed. It is essential now for all coastal states, the federal government and industry to add their voices in seeking policy changes to ensure that history does not repeat itself.

The views expressed in this article are those of the authors and do not necessarily represent the opinions of the editors or the Mississippi-Alabama Sea Grant Consortium. □

Preemption and Other Obstacles to Oil Spill Liability Legislation

By

*Bowen Brown, Policy Associate
Center for Marine Conservation*

On March 16, 1989, Congressman Walter B. Jones (D-N.C.) the Chairman of the House Merchant Marine and Fisheries Committee, introduced H.R. 1465 to deal with oil spill liability. At the time, one member of the committee said, "the

time to act is now, before a major spill occurs."

Eight days later, at 12:04 a.m., the tanker *Exxon Valdez* ran onto Bligh Reef in Prince William Sound and began leaking oil. Twelve hours after the grounding the first clean-up equipment arrived on the scene. One hour later, the Coast Guard estimated that 10.5 million gallons had been released into the Sound from the *Exxon Valdez* (estimates run as high as 11.2 million gallons). Thirty-two hours after the grounding the on-scene coordinator reported that oil had stopped flowing from the ship.

Over the next few weeks, a number of bills were introduced in Congress in reaction to the oil spill and its ramifications. But the bill that seems destined to be the most significant is the one that was introduced before the oil spill even took place. H.R. 1465 has been circulating in the House for fourteen years in one or another form. One might expect that after more than ten years of work on oil spill legislation, the House would have the perfect oil spill liability bill. Alas, this is not so. The bill is so riddled with problems that unless several serious faults are corrected, it may only worsen an already confused situation. A brief look at the federal and international situation as it stands today puts H.R. 1465 and its shortcomings into perspective.

CURRENT FEDERAL LEGISLATION

There are several federal laws that H.R. 1465 would replace. The Trans-Alaska Pipeline Authorization Act (TAPAA) established the Trans-Alaska Pipeline Liability Fund to pay any claims that might arise from an oil spill involving Trans-Alaska Pipeline oil. The liability limit under TAPAA is \$100 million - the first \$14 million coming from the spiller and the remainder coming from the Fund. Unpaid claims above the \$100 million limit can be asserted under other applicable federal or state laws.

The Clean Water Act (CWA) prohibits the discharge of oil or hazardous substances in harmful quantities into or upon the navigable waters of the U.S. The spiller is liable for cleanup costs in the amount of \$150 per ton or \$250,000, whichever is greater. To put this in perspective, the 95,000 ton *Exxon Valdez* could be held liable for \$14.25 million.

If, however, an oil spill results from willful negligence or willful misconduct the CWA provides that the owner or operator is liable to the U.S. for all removal costs, with one potential limitation. An 1851 law, The Liability Limitation Act, limits liability to the value of the "vessel and her freight then pending." It is uncertain how this statute, enacted long before oil was being transported by sea, meshes with recent laws enacted to deal specifically with oil spills. The fear that oil companies might use this statute to limit liability is part of the reason many feel changes are needed.

INTERNATIONAL LEGAL REGIME

These federal laws give some backdrop for H.R. 1465. To complete the setting it is necessary to look at the international legal regime.

Two international protocols have the greatest relation to the legislation before the House and the Senate. These two protocols amend the 1969 Civil Liability Convention (CLC) and the 1971 Fund Convention (FC). The conventions cover

oil spills from foreign vessels on domestic shores. The CLC applies when the shipowner is liable and the FC applies when the shipowner is not liable or when damages exceed the coverage of the CLC. Under the protocol to the CLC for instance, if the *Exxon Valdez* had been a foreign ship, the shipowners could potentially be held liable for approximately \$55 million to be paid *pro rata* to claimants. The protocols were agreed to in 1984 by the International Maritime Organization (IMO) in an attempt to get the U.S. to become a party to the conventions. Basically, the protocols amended the conventions to comport with U.S. wishes that liability limits be raised and geographic coverage expanded. However, if the spill is covered by the protocols then both federal and state laws are preempted and the only recovery permitted is through the protocols. These protocols do not currently apply in the U.S. because the Senate has not yet ratified them.

H.R. 1465 AND PREEMPTION

Into this mixed field of federal, state, and international laws and protocols enters H.R. 1465. The bill makes spillers liable for cleanup costs and damages up to specified liability limits higher than current law. Under H.R. 1465 the liability limit for the *Exxon Valdez*, provided there is no negligence, would be \$47.5 million versus the \$14.25 million limit of the CWA. If full compensation was not available from the spiller, additional compensation up to one billion dollars would be provided from a fund financed by a tax on the oil industry. The bill replaces all other laws, federal and state, that attempt to legislate this matter. While this might achieve the worthy objective of clearing up the federal liability confusion, H.R. 1465 does the far greater injustice of preempting state law in the process.

At a recent House hearing on the bill, an amendment offered by Rep. Norman Shumway (R. - Ca.) prompted a heated debate on federal preemption. The amendment prevented any suit for damages from being brought except as provided under H.R. 1465, thereby preempting state law for the most part. A later amendment from Walter Jones (D-N.C.) essentially reformulating Shumway's amendment eventually was adopted by the full Merchant Marine and Fisheries Committee.

In response to protest, largely from the Laborer's International Union of North America (LIUNA), the preemption provision of the House Committee bill excludes actions for personal injury and wrongful death. This means that oil cleanup workers could still recover under state tort laws if they were injured or killed in the course of a cleanup. In addition, state - established funds could receive reimbursement under H.R. 1465 for cleanup and removal costs.

The coastal states, the administration, environmental groups, and some Senate leaders are all opposed to preemption of state oil spill liability laws. States argue that if they want to hold the oil industry to higher standards because of a particular concern for their coastal areas that they should be allowed to do so. Most of the others who oppose preemption do so for this very reason. Protecting the environment of a state is an area where the federal government and state government should both be able to legislate. Other en-

vironmental laws follow this concept and include provisions that there should be no preemption unless there is an overriding public need. For instance, the Superfund law does not preempt state law, nor do oil pollution laws governing deep-water ports and the outer continental shelf.

The groups supporting preemption are the oil industry and those supported by the oil industry. They argue for one system of oil spill liability legislation, the federal system, in order to eliminate confusion. Opponents counter that the reason there is so much confusion now is not because states have separate oil spill liability laws but because the federal systems is in such a confused state. Once the federal system is cleared up, then instead of four federal laws in addition to state law there will only be the reform bill and any existing state legislation.

The oil industry has prospered under both federal and state regulation of oil spill liability. Presumably the industry wants to limit its liability and is afraid that states will seek to recover for damages over and above those available under federal law.

PROBLEMS AND ALTERNATIVES

H.R. 1465 has other serious flaws. The House Committee on Merchant Marine and Fisheries added eleven amendments to the bill that only begin to correct some of these problems. Some other amendments adopted by the Committee only serve to make the bill worse.

For instance, H.R. 1465 was originally drafted with an inadequate per incident cap of \$500 million. This cap was then doubled by amendment to \$1 billion. Just as the \$100 million ceiling in the TAPAA fund quickly became outdated, so too will this \$1 billion cap. One of the reasons it will not last as long as committee drafters hoped is an amendment offered by Rep. Studds (D-Mass.).

The amendment seeks to ensure that natural resources destroyed by the oil spill are replaced or restored. Under this provision state and federal officials could draw on the oil spill fund to make assessments of damage and implement plans for restoring damaged resources. This is simply one more critical expense that the fund will have to handle. One solution to the problem is to raise the ceiling of the fund. Another solution is to tie the fund to future increases in oil cleanup costs.

In addition to the fund being too low, polluter liability is limited by H.R. 1465 to \$500 per ton of the vessel with a minimum of \$5 million and a maximum of \$60 million for both damages and removal costs. Although a \$60 million ceiling is an improvement over the \$14 million spillers could be held liable for under TAPAA, it still isn't enough. A more adequate scheme would be the one set forth in S.686 introduced by Senator George Mitchell (D-Maine). The Senate bill sets tanker limits at \$500 per ton of the vessel with a minimum of \$10 million and no maximum.

There are many minor problems in addition to these major ones. For example, H.R. 1465 limits states and local recovery of loss of taxes, rents, etc. to one year. Damage to the economy from an oil spill can easily last longer than one year. The House bill also rebates the money in the TAPAA fund, currently about \$248 million, to the oil com-

panies. On the other hand, the Senate bill transfers this money to the fund established by S. 686.

On the whole, H.R. 1465 is an unacceptable answer to a very serious problem. It needed much more work than it received. The Center for Marine Conservation hopes that the House Public Works and Transportation Committee will make the changes that need to be made with an eye to the need to respond to future oil spills, not to the demands of the oil industry. As both bills stand now, the Center finds the Senate bill a much more attractive alternative.

Senate bill 686 does not preempt state laws and places no restrictions on state created funds. Also, S. 686 has the higher limits, as discussed above. However, the Senate bill has its own flaws. While H.R. 1465 takes into account future ratification of the international protocols S. 686 does not. Certain key Senators don't support the protocols because they preempt domestic law and because the liability limits are too low.

S. 686 is before the Senate Committee on Environment and Public Works where no action has yet been taken. The House bill is at present under consideration by the House Public Works and Transportation Committee, which must finish work on the bill before it is reported to the full House.

The views expressed in this article are those of the author and do not necessarily represent the opinion of the editors or the Mississippi-Alabama Sea Grant Consortium. □

Common Law Oil Spill Liability – Who May Recover?

INTRODUCTION

When a major oil spill damages coastal waters and property, the scope of liability for the negligent wrongdoer as to private persons under the common law is not without limits. Fishermen, beach owners, hotel owners, and others may suffer injury to their property and their livelihood. In the common law situation, where there are no federal or state statutes to provide guidance, it is up to the courts to fix the outer boundary of legal liability and determine who may recover compensation and who may not.

RECENT DECISION

The Fifth Circuit Court of Appeals in the case of *Lloyd's Leasing, Ltd. v. Conoco*, 868 F. 2d 1447 (5th Cir. 1989), ruled that coastal property owners seeking to recover damages from an oil spill must show: (1) that the harm was foreseeable; and, (2) that the property owner suffered actual injury to his person or property and not purely economic or financial harm. Based upon the facts presented, the court held that the harm suffered by the plaintiff property owners was not foreseeable and that recovery should be denied.

In *Conoco*, property owners filed suit to recover damages caused by the spill. When the tanker *M/T Alvenues* ran aground off the Louisiana coast one of its tanks cracked and the ship spilled over 65,000 barrels of crude oil into the Gulf of Mexico. The resulting oil spill, swept by tides and winds,

washed ashore onto the beaches of Galveston Island, some 70 miles west of the grounding. Curious tourists and beachgoers later tracked some of the oil onto plaintiffs' properties (presumably commercial establishments such as hotels, restaurants, shops, etc.).

In its analysis, the court first examined whether the harm suffered by the property owners was foreseeable. If the harm was not foreseeable, then the defendant owed no legal duty of care to these property owners and the suit would be dismissed. The court stated that to be found liable, a defendant oil spiller must know that a danger is not merely possible, but probable.

The court acknowledged that it is reasonable to believe that the spilled oil would probably wash ashore someplace. Under the facts, however, the court determined that it was not foreseeable that a tanker grounded off Calcasieu, Louisiana would spill oil that would travel seventy miles to the west and wash ashore onto an inhabited, developed area of the Texas coast such as Galveston Island.

This conclusion apparently considers the improbability of several factors occurring together: (1) the vastness of the entire Texas coastline (340 miles) as opposed to the amount of developed coastline (60 miles); (2) the interplay of waves and winds to carry the harmful oil spill 70 miles westward to the beaches of heavily populated Galveston Island; (3) the intervention of beachgoers and tourists picking up some of the oil on their shoes; and (4) carrying it onto property owned by these plaintiffs. Consequently, the Court of Appeals affirmed the lower court's dismissal of the suit.

GENERAL RULE

The Fifth Circuit has chosen to adopt the general rule followed by the majority of circuit courts across the country, that the scope of liability for negligent oil spills is normally limited to foreseeable physical injury or property damage. The court may permit an exception, however, where an individual has sustained damage that is different in kind, rather than simply in degree, from that suffered by the general public.

FORESEEABILITY

Foreseeability, an important legal term in tort law, is the reasonable expectation that an act or omission will produce harm or injury. The *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) provides a good example of the rule on foreseeability. In this case, a grain company and a cargo carrier filed a damages suit for extra storage and transport expenses incurred following a chain reaction shipping accident triggered by a vessel that broke from its mooring. The accident blocked the river, causing an ice jam and widespread flooding. Transportation on the river was disrupted approximately two months. The court denied recovery under these facts because the financial injuries to the down river plaintiffs were held to be too remote, indirect, and unforeseeable.

Foreseeability applies with equal force where a person sustains actual physical injury. In *Brown v. Channel Fueling Service, Inc.*, 574 F.Supp. 666 (E.D.La. 1983), an employee filed suit against his employer for personal injuries caused while cleaning oil that covered the deck of a fuel barge. The oil spill was caused by an unrelated accident six miles

upstream involving a second barge. The court denied recovery to the employee because it found that it was not foreseeable that an oil spill from one ship would travel six miles downstream and splash upon the deck of another ship whose employee, two days later, would slip and fall and injure himself.

PHYSICAL HARM OR PROPERTY DAMAGE

While *Kinsman II*, and *Brown* illustrate the "foreseeability" requirement, another Fifth Circuit decision, *Louisiana ex rel. v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), interprets the terms "physical harm or property damage." In *Testbank*, two ships collided in a Mississippi River gulf outlet, causing a massive chemical spill that closed the outlet for nearly three weeks. Forty-one lawsuits were filed by shipping companies, marinas, seafood wholesalers and retailers, seafood restaurants, commercial and recreational fisherman, and others for lost profits and expenses incurred as a result of the accident.

The court dismissed all claims save those brought by commercial fishermen, shrimpers, crabbers, and the like, holding that a plaintiff may not recover for economic losses where no physical injury to a proprietary interest has been sustained. At least two arguments support this bright-line rule: predictability of results, and ease of application by the courts.

Purely financial harm is unlike property damage or personal harm in the sense that it involves only the loss of a prospective economic advantage. Some examples of financial or economic harm are lost profits, extra expenses, losses on a contract, or other reasonable commercial economic losses. In *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985), the ship *Donau Maru* spilled fuel into Boston Harbor. Unable to enter the harbor because of the spill, the second ship, owned by the plaintiff, was forced to dock at another pier and thereby incurred higher transport costs. The second ship never came into actual contact with the oil spill. The plaintiff brought suit to recover these economic losses. In denying recovery, the court reaffirmed the traditional rule that the plaintiff's tort action for negligence must show more than purely financial harm.

EXCEPTIONS TO THE TRADITIONAL RULE — FISHERMEN

In some situations, commercial fishermen may maintain a tort action for negligence causing purely financial harm. Commercial fishermen in *Union Oil Co. v. Oppen*, 501 P.2d 558 (9th Cir. 1974) brought a damages action for lost profits against the oil company for an oil spill off the coast of Santa Barbara, California that caused a sudden reduction in commercial fishing yields. The court ruled that these fishermen may sue for interference with their economic right to fish in public waters.

The court, acknowledging the general rule denying recovery for purely economic loss, stated that an exception exists where there is a special relation or duty between the parties. It cited statements made in previous decisions by other courts that a policy exception is recognized "in tradi-

tional maritime settings" and that "seamen are the favorites of admiralty law and their economic interests entitled to the fullest legal protection."

The court considered it foreseeable that negligent conduct resulting in an oil spill would harm aquatic life and injure commercial fishermen. Several policy considerations supported this conclusion: (1) this injury to marine life flows directly from the action of the escaping oil; (2) deep public disapproval of environmental pollution; and (3) the strong policy to prevent such damage. Accordingly, the court held that the oil company owed a duty to the fishermen to drill for oil in a reasonable and prudent manner so as to avoid negligent diminution of aquatic life.

The court cautioned, however, that the commercial fishermen must establish actual injury in order to recover. This requires a showing that the oil spill did in fact diminish aquatic life, and that this diminution reduced their profits. Moreover, reduction of profits must be established with certainty and must not be remote, speculative, or conjectural.

CONCLUSION

Under the common law, private individuals may recover damages from oil spills only where the harm is a foreseeable consequence of the negligent conduct; where the person suffered actual physical harm or property damage and not purely economic injury; and, where the person belongs to a class (such as fishermen) that has incurred harm different in nature and not merely in degree from the general public. In addition to any common law remedy available, coastal property owners who have been damaged by an oil spill may also be eligible for compensation under federal or state statute.

As more and more people live, work, and play in proximity to America's coastlines, concern over the threat of oil spills may grow. As development of coastal areas continues, the likelihood that an oil spill will affect a developed or inhabited area will undoubtedly increase. Faced with these changes, courts may encounter increasing pressure to broaden the traditional bright-line rule limiting the scope of tort liability. □

Jonathan Hunt

Recent Legislation: Mississippi

During its 1989 session, the Mississippi legislature passed several new bills and amendments to existing laws that concern natural resource and coastal issues. The following briefly summarizes the legislation.

PUBLIC TRUST TIDELANDS

Senate bill no. 2780 addresses problems resulting from the tidelands title dispute. Signed March 31, 1989, and effective on passage, the new law declares the legislative intent to provide a method for dispute resolution as to the boundary separating public tidelands from upland property and to confirm the mean high tide water boundary line as determined by the Mississippi Supreme Court, the laws of Mississippi, and this act.

The bill provides that the state's public policy seeks to preserve the public trust tidelands and their ecosystem unless a higher public interest requires alteration of specific tidelands. Besides providing for the creation of a special public trust tidelands fund, the bill directs the Secretary of State to prepare a preliminary map of public trust tidelands depicting the appropriate boundaries of both developed and undeveloped areas. The boundary for undeveloped areas is the current mean high water line, whereas the determinable mean high water line nearest the effective date (1973) of the Coastal Wetlands Protection Act serves as boundary for developed areas.

Upon publication of the map in coastal county newspapers, a copy of the map will be available for public inspection, comment, and if necessary, revision, for a period of 60 days. Resulting boundary determination agreements between the Secretary of State and consenting property owners shall be officially recorded and binding upon the state and other parties. In providing a procedure for resolving boundary disputes, the bill also states that parties are not precluded from pursuing remedies otherwise available at law.

Further, the bill creates the "Public Trust Tidelands Fund" to serve as depository for public trust tidelands lease funds not including mineral leases. Amending Miss. Code Ann. § 29-1-107 (Supp. 1988), the bill authorizes the Secretary of State to increase the period of tidelands leases to a maximum of forty years and further provides that the current lessee may re-lease such lands for an additional period of twenty-five years.

In addition to payment of rental fees, the lessee of public trust tidelands is responsible for local tax levies on the leasehold interest. Public projects of federal, state, or local governments that serve to promote, preserve, or enhance public trust tidelands are exempt from use or rental fees.

WETLANDS

Senate bill no. 2501 clarifies liability under Miss. Code Ann. § 49-27-55 (Supp. 1988). Effective July 1, 1989, the law declares that any person who performs a regulated activity without a permit or who violates any condition of the permit shall be liable to the state for restoration of the affected wetlands.

Senate bill no. 2698, amending section 49-27-11 of the Coastal Wetlands Protection Law, requires a permit to dredge an existing channel for navigational purposes. Section 49-27-25, which required that permits to dredge old channels be issued without bond, is repealed. The bill, approved March 8, 1989, is effective July 1, 1989.

Senate bill no. 294, amending Miss. Code Ann. § 65-1-51 (Supp. 1988), authorizes the Mississippi State Highway Commission to acquire public or privately owned wetlands or other lands suitable for creation as wetlands for the purpose of mitigating wetland losses or damage by development. This authorization is contingent upon agreement by some governmental agency to accept title, without compensation, to the lands acquired and to maintain such lands as wetlands in perpetuity. The bill became effective March 14, 1989.

MARINE LITTER

Senate bill no. 2675, entitled The Mississippi Marine Litter Act of 1989, prohibits disposal of garbage and any type of plastics into the marine waters of the state and requires marinas and boat access areas to provide proper on-site disposal facilities. The Commission on Wildlife Conservation is empowered to adopt the provisions of Annex V of the Protocol of 1978 of the International Convention for the Pollution by Ships, and is authorized to issue other regulations, as needed, to implement this act. First violation of this act is a misdemeanor punishable by a maximum fine of \$500. Subsequent violations, however, may incur fines up to \$10,000 and/or revocation of the boating license. This bill, effective July 1, 1989, has a repealer that shall become effective July 1, 1991.

WILDLIFE CONSERVATION

Senate bill no. 2776 amends Miss. Code Ann. § 49-15-15 (Supp. 1988) by authorizing the Commission on Wildlife Conservation to close over-harvested oyster reefs as well as to limit the taking of blue, peeler, and soft shell crab. The bill increases the penalty for violations of live bait dealer and live bait catcher boat laws and regulations by providing for the revocation of the dealer or boat license.

The bill also prohibits the Bureau of Marine Resources (BMR) from requiring any additional license other than a standard commercial fishing license for a resident commercial fisherman to sell his own lawfully taken daily catch. The BMR may distribute printed copies of new regulations to new licenses and other interested persons but may not charge a fee exceeding actual cost for such publications.

ENVIRONMENT

Senate bill no. 2052, in amending Miss. Code Ann. § 49-17-13 (Supp. 1988), designates the Mississippi Commission on Natural Resources as the state agency that shall participate in interstate or regional waste management agreements. The law is effective July 1, 1989.

House bill no. 146 amends Miss. Code Ann. § 17-17-15 (Supp. 1988) by authorizing the Department of Natural Resources to maintain a field office at certain hazardous waste facilities. A field office is required at any commercial hazardous waste incinerator site, but is optional, in the department's discretion, at any treatment or disposal facility that receives hazardous waste from more than one generator. Operation costs for the field office will be paid by the owner of the facility. The amendment is effective July 1, 1989.

Senate bill no. 2790 authorizes the Environmental Protection Council (EPC) to prepare final recommendations on the state's capacity assurance plan for hazardous waste, as required under section 104(k) of the federal Superfund Amendments and Reauthorization Act (SARA) of 1986 and to submit these recommendations to the Governor for inclusion in the plan. This law is effective July 1, 1989.

Senate bill no. 2802 amends Miss. Code Ann. § 49-21-1 (1972) and broadens the scope of the EPC to include the state's responsibilities concerning waste management under the Toxic Substances Control Act; the Federal Insecticide,

Fungicide and Rodenticide Act; the Asbestos Hazardous Emergency Response Act; the state's groundwater management responsibilities under the Safe Drinking Water Act and the Water Pollution Control Act; and the state's air pollution control needs under the Clean Air Act. The bill repeals the EPC after June 30, 1991.

House bill no. 1260, the Asbestos Accreditation and Certification Act, requires accreditation and certification of project designers, inspectors, contractors, management planners, workers and supervisors responsible for identification and abatement of asbestos-containing materials in public and commercial buildings as well as private elementary and secondary schools. The bill specifies the educational requirements for each position.

The bill directs that a commission be established to adopt a certification and accreditation plan by January 1, 1990. The accreditation plan shall include the requirements for all training courses and by October 1, 1989, the Board of Trustees of State Institutions of Higher Learning shall designate one university to offer all training courses set forth in the plan.

The commission has regulatory authority to administer and enforce this Act, including the power to assess fees and penalties, administer and expend funds, provide reciprocal arrangements with other states as well as apply for and expend federal and state monies. The commission is authorized to assess and collect certification fees and to set up a special revenue fund for asbestos treatment, but all expenditures from the fund must be made through the appropriation process. Violators of the act may face penalties up to \$25,000 for each violation, or reprimands, or suspension or revocation of certification.

The bill amends Miss. Code Ann. § 37-137-5 (Supp. 1988) to expand the definition of "school buildings" to include all areas of a school that may have asbestos-carrying materials. The bill became law April 4, 1989, except for the provisions for certification of the various workers, that take effect April 1, 1990.

PORT FUNDING

Senate bill no. 2877 amends numerous provisions of the Mississippi Business Investment Act to authorize the issuance of additional bonds under the act. The complicated bill further provides for: (1) increased authority for state-owned ports to apply for loans or grants; (2) the making of grants to a state-owned port on the Gulf of Mexico prior to July 1, 1990; and (3) a grant to defray the cost of the state's share in constructing the Mississippi and Louisiana estuarine areas project. The bill went into force April 4, 1989.

REORGANIZATION

House bill no. 659, the Mississippi Executive Reorganization Act of 1989, restructures the executive branch of state government. The act creates the Mississippi Department of Wildlife, Fisheries and Parks which shall be organized into three divisions: Wildlife and Fisheries; Parks and Recreation; and, Support Services. This new department shall merge with the Commission on Wildlife, Fisheries and Parks. The same department shall also merge with the Department of Natural Resources, Bureau of Recreation and Parks.

The bill creates the Mississippi Department of Environmental Quality which shall merge with the Commission on Natural Resources with the exception of the Division of Parks and Recreation. This department shall be composed of three bureaus: Geology and Energy Resources; Land and Water Resources; and, Pollution Control. Management of nuclear waste and other nuclear-related activities within the state is transferred from the Mississippi Energy and Transportation Board to the Department of Environmental Quality. It also creates the Nuclear Waste Policy Advisory Council and the Nuclear Waste Technical Review Committee.

This Act shall take effect from July 1, 1989, except that sections one through ten concerning general provisions and reorganization transition took effect upon passage on April 19, 1989.

CONCLUSION

The activity of the 1989 Mississippi Legislature concerning natural resource and coastal issues involved passage of several new bills and amendments to existing laws in the areas of licensing of certain coastal activities, conservation, and waste management. The Coastal Wetlands Protection Law of 1973 was expanded or amended in several ways and the method for determination of tidelands boundaries has been decided. Liability is clarified for failure to meet coastal activity permit requirements, while the need for a permit is extended to include channel dredging.

In other legislation, marinas must provide proper disposal facilities for all plastics and other garbage, and repeat polluters face stiff fines and possible revocation of their boating licenses. The legislature imposed crab and oyster catch limits as well as increased penalties for violations. It directed various state departments to assume greater conservation and waste management duties, authorized the State Highway Commission to acquire wetlands, and provided for further funding of state-owned ports. The legislature also addressed asbestos removal from schools and public buildings and ordered the reorganization of the executive branch of the government. □

Jonathan Hunt

Recent Legislation: Alabama

The Alabama Legislature passed several new bills and amendments to existing laws during the 1989 session concerning natural resource and coastal issues. This article provides a brief summary of the legislation.

OYSTERS

Act No. 89-875 authorizes the State Board of Health to inspect waters in which oysters are harvested for human consumption and to close any oyster beds that the State Health Officer declares unsafe. The Act provides a penalty for violations. The Act became effective May 17, 1989.

HUNTING AND FISHING

Act No. 89-156, amending Ala. Code § 9-11-32 (1975), pro-

vides for a different license year of certain hunting and fishing licenses. Thus, the license year for those hunting or fishing licenses provided for in Ala. Code §§9-11-44 or 9-11-53 shall begin on August 1 of each year and shall expire on July 31 of each year, whereas the term for all other licenses under Ala. Code § 9-11-32 is from October 1 to September 30. This Act became effective March 28, 1989.

Act No. 89-300 amends Ala. Code § 9-11-65 (1975) and relates to certain lifetime resident hunting, fishing, and combination licenses, so as to increase license fees. The Act also amends Ala. Code § 9-11-49.2 to provide that nonresidents of Alabama shall not be entitled to those licenses provided for in Ala. Code § 9-11-65. The Act took effect April 20, 1989.

Act No. 810 establishes, creates, and provides for an annual "Free Fishing Day" for each calendar year beginning with 1989. The Act became effective May 16, 1989.

Act No. 89-534 amends Ala. Code § 9-11-246 (1975), relating to penalties for the taking of deer or turkey by means of bait or use of traps, nets, and poisons, so as to increase and further provide for the penalties for violations. This Act took effect May 4, 1989.

WASTE MANAGEMENT; PESTICIDES

Act No. 89-630 amends Ala. Code §§ 22-27-6, and 22-27-7 (1975), that relate to the authority of local governing bodies as to methods of waste collections and disposal, and the time for local government compliance with the solid waste laws, so as to provide further for the methods of waste collection and disposal facilities for solid wastes. The Act became effective May 5, 1989.

Act No. 89-786, amending Act No. 88-872 of the 1988 First Special Session relative to the tax levied on the disposal of hazardous waste generated outside the state, imposes a "prevailing rate" fee on such waste. The fees levied will not become effective until October 1, 1989. This Act became law May 11, 1989.

Act No. 89-787 amends Act No. 88-872, 1988 First Special Session, concerning hazardous waste, so as to impose certain additional per ton fees on operators of commercial sites for the disposal of hazardous wastes or hazardous substances. This Act became effective May 11, 1989.

Act No. 89-788, amending Ala. Code § 22-30-11 (Supp. 1988) relating to hazardous waste management, prohibits commercial hazardous waste treatment or disposal facilities from accepting hazardous wastes generated in another state that prohibits the treatment, storage, or disposal of hazardous wastes within its own borders or that refuses or fails to comply with the Comprehensive Environmental Response, Compensation, and Liability Act. This Act took effect May 11, 1989.

Act No. 89-824 requires development of a State Solid Waste Management Plan as well as the creation of a Solid Waste Management Advisory Committee to advise on the preparation of such plan. The Act also places a moratorium on the issuance or modification of permits for the construction or operation of certain solid waste management facilities for twenty-four months after the effective date of this Act. The Act became law May 16, 1989.

Act No. 89-653 amends Ala. Code § 2-27-11 (Supp. 1988), providing for issuance of permits to purchase restricted use pesticides, so as to delete the requirement that said permits must list the restricted use pesticides authorized to be purchased by the permit holder. This Act became effective May 11, 1989.

Act No. 89-743 amends Ala. Code § 2-27-9 (Supp. 1988), that provides for registration of pesticides, so as to increase registration fees to \$50 per year; and, to provide for registration of special local needs pesticides. The Act became effective May 11, 1989.

MISCELLANEOUS

Act No. 89-517 establishes an asbestos contractor accreditation plan for the state in compliance with Title II, Section 206 of the Toxic Substances Control Act. The Alabama Asbestos Contractor Accreditation Act became effective May 4, 1989.

Act No. 89-799 proposes an amendment to the Constitution to authorize the state to pay a portion of the capital costs of public facilities and works of internal improvement of the existing federal channel at Bayou La Batre and of general cargo handling facilities of the State Docks at the Port of Mobile. The Act authorizes the state to establish a bond commission with the power to issue interest-bearing general obligation bonds to finance these improvements. This Act became effective May 11, 1989.

Act No. 89-874 provides for and permits the breeding of farm-raised alligators for certain commercial purposes. The Act took effect May 17, 1989.

CONCLUSION

The 1989 Alabama Legislature passed several new acts and amendments concerning waste management, pesticides, hunting and fishing, oysters, and other environmental and coastal issues. Municipalities and county commissions assume greater authority to manage solid wastes; hazardous wastes came under stricter regulatory control; additional fees, and "prevailing rate" taxes; and, fees were increased for the registration of pesticides.

The legislature altered the renewal date of certain hunting and fishing licenses; increased fees; restricted certain licenses to state residents; declared annual "Free Fishing Day"; imposed penalties for illegal taking of deer or turkey and required that oysters harvested for human consumption come from safe oyster beds. Other legislation includes the Asbestos Contractor Accreditation Act; bond funding for improvements at Bayou La Batre and Port of Mobile; and the provision for commercial alligator farms. □

Jonathan Hunt

LAGNIAPPE

A Little Something Extra

The controversy over turtle excluder devices (TEDS) has resurfaced. Secretary of Commerce, Robert Mosbacher, has

agreed to relax enforcement of regulations requiring Gulf shrimp fishermen to use TEDS by May 1, 1989 while he looks into complaints that sargassum grass is clogging the devices and causing the loss of shrimp. In the meantime, threats of violence against fishermen using TEDS and civil protests such as symbolic TEDS burnings are becoming increasingly common. Congressmen from districts with large shrimp fishing constituencies are currently putting pressure on Secretary Mosbacher to suspend the regulations. Members of the environmental community are lobbying just as hard for their retention. WATER LOG will provide an update on this volatile situation in its next issue.

On May 23, 1989 Mississippi's Secretary of State filed suit against the State of Mississippi to receive a judicial determination on the constitutionality of a boundary provision of Mississippi's new public trust tidelands law (see *infra* page 12 for a summary of the law). The provision in question provides that the boundary between public and private coastal lands be established as the mean high water mark as of July 1, 1973. The Secretary of State contends that decisions by the U.S. and Mississippi Supreme Courts set the line at the oldest mean high water mark for which there are reliable records. In the view of the Secretary, establishing the boundary based on the 1973 date would amount to an unconstitutional donation of public lands to private parties. While the case is being decided in the courts, an interim program has been put into place to assist individuals who are having trouble selling coastal property because of the tidelands boundary dispute. Information about the interim program can be obtained from the Secretary of State's Coast Office, P.O. Box 97, Gulfport, MS 39502. Telephone: (601) 864-0254.

The Center for Marine Conservation has tabulated its findings from last summer's national beach cleanup effort and determined that beaches in states bordering the Gulf of Mexico, particularly in Louisiana, Mississippi, and Texas, had more trash per mile than any other area. Reasons given for the large quantities of trash and other marine debris on Gulf beaches included the lack of ocean flushing and heavy maritime traffic along the Gulf states. Plastics were the most prevalent type of debris, making up about 62 percent of the nearly 2 million pieces that were removed from U.S. beaches last summer.

A new organization called the International Coastal and Ocean Organization (ICO) has been formed to link professional planners, policy specialists, managers, institutions and organizations around the world concerned with the management, protection, and development of coastal and ocean resources and space. ICO intends to sponsor and participate in conferences and workshops on coastal and ocean resource management issues and to publish a newsletter and other suitable publications as the need arises. For further details write Richard Delaney at the Urban Harbors Institute, University of Massachusetts, Harbor Campus, Boston, MA 02125.