Oil Spill Cleanup Contractor Liability

2-12-92

W. Gene Burden
Vice President
Environmental Affairs & Government Relations

February 6, 1992

Representative Cliff Davidson
Alaska State Capital
Room 108
P.O. Box V
Juneau, Alaska 99801

Subject: Response Action Contractor Liability

Dear Representative Davidson:

The legislature passed HB 196 last year (Ch. 92, SLA 1991) which provided limited immunity to oil spill response action contractors (RACs) while maintaining liability in cases involving gross negligence, intentional misconduct, and where the RAC was involved in the spill itself. This bill has a one-year sunset and will expire on June 30, 1992 unless action is taken during this session. As you are aware, Tesoro Alaska put a lot of effort in the bill's passage as we viewed it as necessary to encourage RACs to provide immediate needed cleanup services following an oil spill.

The legislation was particularly critical to Tesoro as our continued operation was actually dependent on the bill's passage. The legislation was necessary to assure our continued access to spill response services provided by Alyeska in Prince William Sound. As a result of the bill's enactment, Tesoro was able to reach an interim agreement for obtaining these services following last year's legislature with the agreement's expiration coinciding with the present expiration of HB 196 on June 30, 1992. Unfortunately, unless the legislation is made permanent, Tesoro will again face the prospects of a loss of Alaska North Slope crude oil which threatens our ability to continue operations. This is of obvious concern to each of the 575 Tesoro employees in Alaska as well as their families. It also represents a potential significant negative to the economy of Southcentral Alaska, and particularly to the Kenai Peninsula.

During last year's debates on HB 196, we sought to communicate that while Tesoro's situation may have been the catalyst for the legislation, the bill also represents good public policy. The possibility of becoming embroiled in negligence litigation is a strong deterrent to agreeing to assist in any emergency situation - including the chaotic and time consuming circumstances of an oil spill response. The fact is that the threat of becoming involved in very costly litigation is, in and of itself, a powerful disincentive whether or not the lawsuit might be won. These facts have now been recognized in 19 coastal states where RAC immunity

legislation has been enacted that coincides closely with the legislation passed in the federal Oil Pollution Act of 1990. In each case the immunity granted by these states is broader than the limited immunity provided by Alaska's HB 196. Those states and the dates of passage of their immunity laws are as follows:

Alabama.....7/29/91	Louisiana.....4/23/91	Texas.....3/28/91
California..9/22/90	Maine.....6/20/91	Virginia....4/18/90
Connecticut.6/24/91	Mississippi....4/12/91	Virgin Is...12/9/90
Delaware....1/31/91	New Hampshire..5/13/91	Washington...5/15/91
Florida.....6/11/90	New Jersey.....8/13/91	
Georgia.....4/17/91	North Carolina.6/27/91	
Hawaii.....6/90	Oregon.....7/17/91	

*Source:Oil Spill U.S.Law Report, Vol.2, No. 1, 1/92, p.15

The recognition of the need for responder immunity in Alaska is reflected in the recently released draft proposal by the Prince William Sound Regional Citizen's Advisory Council's entitled "A Coastal Communities Oil Spill Cooperative for Alaska", January 1992 prepared by International Spill Technology Corporation, College Station, Texas. The proposal introduces an organizational structure and concept that is intended to improve the response against a major oil spill in the areas of shoreline protection, nearshore response, training, coordination of fishing vessels, and protection against non-crude spills. On page 19 of their proposal a number of conditions are described as required if the co-op is to be successful. Item No. 4 is for

> "[T]he Legislature is able to craft an acceptable, long-term solution to the issue of responder immunity from tort liability during the 1992 session."

This position is further clarified on page 24 of the same report under the heading "LEGAL FEASIBILITY" as

> "[R]esponder immunity is necessary for the ACCC to avoid tremendous liability exposure (emphasis added). It is anticipated that the state legislature will take up the issue of immunity for spill responders again during the upcoming session."

This is also identified as a "Major Legal Issue for the ACCC" in Table 4 on page 25 of the proposal.

Alaska has shared other states' recognition of the value of responder immunity for many years, as evidenced by AS 9.65.091 which shields people who respond to declared disaster emergencies from negligence liability. Unfortunately, that statute may not

apply to RACs, since before the enactment of HB 196 the legislature had passed a statute extending liability to RACs for simple negligence (See AS 46.03.823). Moreover, AS 9.65.091 applies only to declared disasters, and only those persons whose services are requested by the state which would exclude most oil spill situations as well as many volunteer responders.

We all spent a lot of time on HB 196 last year due in part because the issue was new to Alaska. Now, it is clear that the issue is not particularly controversial in the United States and is certainly not a revolutionary concept. As illustrated above it has become settled national and state policy that:

1. A negligence standard threatens to unfairly embroil RACs in costly post-spill litigation. The crisis atmosphere and potential consequences of oil spills combined with the unacceptably high risk and cost of litigation is not offset at all by the promise of limiting jury instructions;

2. The threat of litigation deters RACs from freely entering a jurisdiction without limited liability which interferes with the formation of effective spill co-ops;

3. The enactment of the new federal liability fund as well as the State clean-up fund; unlimited strict liability on the discharger (including strict liability for any damages caused by the RAC); and federal and state requirements for proof of financial responsibility combine to make the possibility of leaving victims uncompensated for damages caused by the simple negligence of a RAC very, very remote.

Tesoro suggests that in view of the above that the legislature's debate on this issue can be considerably shorter than last year and that the legislature should act to implement a continuation of HB 196 which will address the needs of spill responders in this state, improve our capabilities to respond, and solve a critical issue for our company. Thank you for your interest in this issue. If we may be of any assistance please contact me.

Sincerely,

Gene Burden

any action brought by the state, a county, city, or district.

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

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

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

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

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

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

(2) The qualified immunity under this section shall

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

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

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

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

(b) Nothing in this section shall, in any manner or respect, affect or impair any cause of action against or any liability of any party or parties responsible for the spill, ~~or the responsible party's agents, employees, and sub contractors,~~ for the discharged oil, or for the tanker, terminal, pipeline, or marine facility from which the oil was discharged.

(c) The responsible party or parties shall:

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

jointly and severally liable for all damages arising pursuant to subdivision (g) of Section 8670.56.5 from the response efforts of its agents, employees, subcontractors, or an oil spill cooperative of which it is a member or with which it has a contract or other arrangement for cleanup of its oil spills, unless it would have a defense to the original spill.

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

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

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

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

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

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

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

~~(j) The immunity granted pursuant to subdivision (a) shall apply to a cooperative only if that cooperative has contracted with the administrator to respond to oil spills in accordance with the state oil spill contingency plan and this chapter. The administrator shall enter into contract with any cooperative that is qualified and that offers to contract, on mutually acceptable terms, in accordance with the state oil spill contingency plan and this chapter.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

BEFORE THE JOINT HOUSE RESOURCES COMMITTEE
AND HOUSE SPECIAL SUBCOMMITTEE
ON OIL AND GAS

Comments on Summary of Research Project Reports
Prepared by the Citizens' Oversight Council
As Part of the Council's Report to the Legislature Under
Section 11 of HB 196 (Ch. 92 SLA 1991)

Presented by:
Jim Meitner
Spill Prevention & Response Coordinator
Tesoro Alaska Petroleum Company

February 12, 1992

On behalf of Tesoro Alaska, I want to thank the staff and Board members of the Citizens' Oversight Commission ("COC") for the effort and consideration that went into their recently released report and recommendations. Tesoro and its 575 plus Alaska employees were pleased to see that the Citizen's Oversight Commission's first recommendation favorably recognizes the concept of limited immunity for response action contractors that Tesoro sought during the last legislative session.

Tesoro's interest in this matter was discussed in detail last year; and in summary relates to 1) our interest in the Cook Inlet Spill Prevention and Response, Inc. ("CISPRI"); and 2) our reliance on continued access to Alyeska's spill response services in order to pick up our crude oil which is essential to our ability to stay in business. Tesoro is presently responsible for over 50% of the funding of CISPRI and has great reservations about CISPRI's deployment to a spill from a non-CISPRI members in the absence of

a state spill responder immunity law. The exposure to risk of costly litigation over alleged damages arising from simple negligence is viewed as a significant detractor from making CISPRI available beyond its own members needs. This need is reflected in the COC study and in recommendation number 1.

Tesoro also has an interest in having a final resolution of this matter due to our need to access the Port of Valdez in order to stay in business and continue employment of over 575 Alaskans. Alyeska has the only available initial spill response service in Prince William Sound and has placed a very high level of demonstrated financial responsibility on parties wanting access to that service. Last year's passage of HB 196 prevented a possible interruption to our ability to transport feedstock crude oil since we were unable to meet the Alyeska financial responsibility requirements in effect before the passage of HB 196.

Tesoro is willing to work with the Citizen's Oversight Council, other interested groups, and the legislature to address the other recommendations contained in the Council's report. We believe the report provides the legislature with sufficient information to meet the COC responsibilities under HB 196, and in so doing, should facilitate the legislature's prompt resolution of this matter by passing legislation that includes limited immunity for response action contractors in Alaska. Thank you for the opportunity to comment.

MSRC
Marine Spill Response Corporation

Mr. G. Stephen Duca
Vice President
Readiness and External Affairs

August 28, 1991

John A. Sandor
Commissioner
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811-1800

RE: Alaska State Department of Environmental Conservation Proposed Oil and Hazardous Substances Pollution Control Regulations

Dear Commissioner Sandor:

Our letter to you of July 26, 1991 dealt with issues prompted by our review of your oil pollution statute. We recently learned that your office has embarked on a new round of rulemaking regarding contingency planning. We share a mutual concern with the State of Alaska on creating a legal regime that is conducive to the most effective oil spill response. Since we will soon be meeting with you and other interests in Alaska we wanted to offer these comments on the draft rules in a spirit of cooperation.

The fundamental problem with this rule is that it establishes unrealistic planning standards. Alaska's response planning standards for crude oil tank vessels and barges (18 AAC 75.438) sets response planning standards that provide that a 300,000 barrels discharge must be controlled, contained, and cleaned up within 72 hours. It also requires that all equipment, personnel, or other resources must be accessible to the plan holder and will be deployed and operating at the discharge site within 72 hours. In addition, 18 AAC 75.440 requires that resources in a contingency plan for non-crude oil tank vessel or barge must be adequate to contain and control 100 percent of the total cargo capacity within 48 hours. Even if these are just "planning" standards from a responder's perspective, they are unrealistic given the present state of technology. We know of no professional and experienced responder who can honestly claim the capability to meet those standards in practice.

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The planning factors are unrealistic because they ignore the large number of variables, many of them interrelated but uncontrollable, that affect a responder's ability and the time it takes to clean up a particular spill. For example, the biggest variable is weather. In adverse weather, it is often impossible or too dangerous to allow equipment and personnel to leave the shoreline even when the equipment is locally staged and ready to begin the response. Other factors include the following:

- the type of accident
- the remoteness of the location
- the rate of discharge
- the time of day
- the season
- currents and tides
- oil characteristics
- regulatory approvals
- inherent equipment limitations
- equipment mechanical difficulties
- the presence of debris
- health and safety considerations
- legal constraints
- political disputes
- inefficient decision-making processes
- accidents

Does the state have any evidence that anyone can perform to this planning standard, even under the best of conditions? We believe the state would be better served by focusing on how to develop a realistic and useful plan for the sustained effort it will take in the face of the inevitable uncertainties, difficulties and surprises. We think it does a real disservice to the public, and to the professionals in the spill response business, to require a plan for unachievable results. In fact, an unachievable planning standard is counterproductive: It encourages planners to depart from the hard realism that it takes to produce a plan that is effective in the real world.

Equally important, unrealistic planning standards encourage unrealistic public expectations. Such expectations ensure that, no matter how good the response, it will still be viewed as a failure. This result demoralizes and discourages good responders. It also creates serious legal risks to them, as it encourages plaintiffs to sue and courts to judge the reasonableness of responder's performance harshly. This hostile legal and public environment strongly discourages responders from getting involved at all.

We realize that Alaska's statutes may constrain what the agency can do to adjust this planning standard. However, we believe that we owe you an explanation of our strong opposition to this type of regulatory approach.

Mr. Commissioner, we share the basic goal of assuring adequate response capability and readiness. We support and recommend for your consideration what we believe is a realistic and useful approach to this matter. We believe that regulators should specify a presumptively acceptable equipment list. The equipment list would vary with the size of the hypothetical spill. Individual response plans that use the specified equipment list would be acceptable to the agency. If the plan holder has good reason to believe that different equipment is more appropriate, then the plan holder can make its case to the Department. This alternative approach can be analogized to specifying the equipment necessary for a fire house rather than requiring each fire station to show how it will put out any large building fire in "x" minutes (without a complete description of all the facts related to the fire). No plan or regulation can anticipate all the variables in any particular emergency response, and no two large oil spills (or fires) are exactly alike. We understand that the U.S. Coast Guard is currently considering this methodology and working on such a list, and we urge the department to consider such a unified approach.

There are also other requirements in the proposed rules that appear to be unrealistic. For example, the plan holder must demonstrate the availability of adequate temporary storage and removal capacity for recovered oil and oily wastes "at or near the site of the spill" to keep up with skimming and recovery operations. We agree that storage capacity for skimmed oily wastes is an essential element to consider in each response plan. Given the size of Alaska, however, the requirements for and number of approved sites, and the remote areas through which vessels travel, this appears to be of doubtful achievability.

We well understand the importance in Alaska of taking a very strong approach to oil spill response. However, we all know that legislative decrees cannot repeal the laws of nature -- simply declaring it so does not make it so. Laws and regulations will be most effective when they are built on a solid scientific foundation that recognizes the art of the possible. We believe in high standards, but a requirement to develop a plan for unachievable standards is counterproductive.

We offer this candid appraisal in a spirit of cooperation as helpful suggestions for our mutual goal of improving spill response. We look forward to our meeting on September 10.

Sincerely,

MSRC
Marine Spill Response Corporation
David N. Lakin
Director of Government Affairs

August 19, 1991

Representative Ronald L. Larson
Alaska State
House of Representatives
P.O. Box 53
Palmer, Alaska 99645

Dear Representative Larson:

I enjoyed meeting you at the National Conference of State Legislatures meeting in Orlando and discussing the Marine Spill Response Corporation (MSRC). I am enclosing brochures on MSRC and a map representing the states which have passed the federal responder immunity standard for oil spill response.

I wanted to take this opportunity to discuss with you the recently enacted H.B. 196 which would grant a limited immunity in certain instances for those acts that relate to an oil spill response. Unlike seventeen other coastal states, including its neighbors on the west coast (Washington, Oregon, Alaska, and Hawaii), Alaska has enacted a standard of limited immunity other than the federal standard. As responders, MSRC finds the standard enacted in Alaska insufficient to encourage bold and aggressive responses to a major oil spill. The main difficulties that MSRC has with this law are addressed below and are enclosed in a recent letter to Department of Environmental Conservation Commissioner John Sandor:

- Fifteen Day Liability Limit. This arbitrary limit is unrealistic given the nature of oil spill response operations. The statute does not provide a liability-free opportunity to exit the scene. These provisions are a major disincentive for responders to get involved in remedial actions in the first place.

- "Backdoor" Liability. Joint and several liability is a real disincentive for any person involved in response activities who by contract arranged for disposal or treatment of hazardous substances possessed by such person, or who accepts hazardous substances for transport to a vessel from which a release occurs.

- Limits on Immunity when Conflicting Orders are Received from Officials. This provision places the responder in a quandary if conflicting orders are received from the state and federal governments.

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◆ Response Action Contract Requirements and Substantial Deviation from Oil Spill Contingency Plans. Written contracts cannot contain all the actions that should be taken during a response, yet these are the only ones that would carry immunity (except for volunteers). This will discourage expedient actions while written agreement issues are sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

◆ Damages to Property not caused by Oil. Given that oil spills generate emergency operations, sometimes under adverse operating conditions, good faith accidents are sure to result. Thus, this limitation on responder immunity will have a chilling affect on response actions. As with OPA-90, the spiller -- not the responder -- should remain liable for these damages.

I hope you will find this summary and the enclosed information useful. I do, however, feel the need to point out that changes to the Alaska responder immunity statute will not be the determining factor of MSRC's participation in response efforts in Alaska waters. More importantly, consistency with the federal statute will allow responders of all kinds to make a best effort response to protect the pristine coast of Alaska. Again, it was a pleasure meeting you and should you have any questions please feel free to contact me at (202) 408-5795.

Sincerely,

Enclosure

MSRC
Marine Spill Response Corporation

John D. Costello
President

July 26, 1991

Mr. John A. Sandor
Commissioner
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811-1800

Dear Commissioner Sandor:

Thank you for your letter of July 2, 1991. As you know and reference in your correspondence, I wrote to your predecessor in March of 1990 requesting a meeting with appropriate state officials to discuss what role, if any, our organization might have in Alaska. We welcome the opportunity to begin this direct dialog and I have asked our Vice President for Readiness and External Affairs, Mr. G. Stephen Duca, to make the necessary arrangements.

Your letter indicated that the impediment for MSRC establishing a presence in Alaska was the nature of the state's responder liability statutes. This is really only one of our concerns. Several events have occurred in the intervening time since our letter to you that directly bear on answering the question of what role is an appropriate one for MSRC in Alaska. Since our last correspondence we have been incorporated as MSRC with a charter and by-laws that specifies our response and cleanup activities. It states in part, that we are to establish programs to render a best effort response to contain and cleanup catastrophic oil spills in coastal zone or tidal waters of the U. S., in particular open sea spills estimated to be in excess of 25,000 barrels and protected water spills estimated to be in excess of 40,000 barrels. We are specifically precluded from responding to spills of less than 1200 barrels unless certain conditions are met. This limitation was inserted into our by-laws for several reasons, one of which was to insure that we do not compete with the existing oil spill response and cleanup infrastructure. The existing infrastructure is generally recognized as having the capability to respond to the vast majority of the nations spills; i.e., small spills under 1200 barrels. In addition, you may recall that PIRO (now MSRC) was created to specifically fill a national response/cleanup capability void at the high end of the spill spectrum; i.e., the catastrophic spill.

In the aftermath of the Valdez spill and due in large part to the leadership of the Legislature and other state officials, Alyeska spill response capabilities have significantly increased in size and scope. My understanding is that current Alyeska capability is probably

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equal or greater to the size of a planned MSRC regional response center. A similar response and cleanup improvement process is underway in Cook Inlet and, presumably, will result in a capability there to meet the requirements of OPA-90; i.e., the capability to respond to a "worst case discharge". It is our understanding that between the resources of Prince William Sound and Cook Inlet well over 95% of the persistent oil transported in Alaska's marine environment will be covered. In the light of this considerable capability the question must be asked "Is there really any role or indeed need for MSRC in Alaska?".

As a responder, we have carefully followed the development of Alaska's comprehensive oil spill legislation. We fully support state legislation that enhances oil spill response and clean up capability, however you should know that here are certain portions of your existing statutes that we feel could be improved. For example, requiring a capability to remove 300,000 barrels of oil in 72 hours is an unrealistic planning standard given today's technology and the average weather conditions responders must face in your state. Although the statute attempts to provide for technical relief from this standard, we believe that a very false expectation of capability has been created. Moreover, such a standard invites litigation -- a chief element in discouraging prompt responder action.

We are of course, vitally concerned with state responder immunity legislation. We were happy to see that HB 196 recognized this as a critical element in promoting an effective oil spill response system. We note however, that it falls significantly short of the national standard of immunity provided for responders in OPA-90. Some of the major concerns we have with this law include:

o **Fifteen Day Liability Limit.** This arbitrary limit is unrealistic given the nature of oil spill response operations. The statute does not provide a liability-free opportunity to exit the scene. These provisions are a major disincentive for responders to get involved in remedial actions in the first place. Moreover, there is less likelihood for prompt responder action in cases where there is only the threat of a spill.

o **"Backdoor" Liability.** Joint and several liability is a real disincentive for any person involved in response activities who by contract arranged for disposal or treatment of hazardous substances possessed by such person, or who accepts hazardous substances for transport to a vessel from which a release occurs.

o **Limits on Immunity when Conflicting Orders are Received from Officials.** This provision places the responder in a quandary if conflicting orders are received from the state and federal governments.

o **Response Action Contract Requirements and Substantial Deviation from Oil Spill Contingency Plans.** Written contracts cannot contain all the actions that should be taken during a response, yet these are the only ones that would carry immunity (except for volunteers). This will discourage expedient actions while written agreement issues are

sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

o Damages to Property not Caused by Oil. Given that oil spills generate emergency operations, sometimes under adverse operating conditions, good faith accidents are sure to result. Thus, this limitation on responder immunity will have a chilling affect on response actions. As with OPA-90, the spiller -- not the responder -- should remain liable for these damages.

These are some of the issues we feel need improvement in the current statute. We believe, and parenthetically so do the legislatures of 17 other states that have enacted the federal standard over the past 18 months, that the provisions of Section 4202 of OPA-90 are sound public policy. It balances the issues of how to provide incentives for bold and decisive action with assuring that appropriate damages are allocated to the appropriate parties. The gross negligence willful misconduct standard of responder conduct is appropriate for emergency operations. Responder actions that cause personal injury and wrong death are not specially protected. Only acts that are consistent with the NCP or the directions of appropriate federal and state officials are protected. Enacting a statute that provides an immunity at least as protective as the federal standard would eliminate a major disincentive for responders in Alaska. Since the responder immunity law is subject to review including a report to the Legislature, MSRC would welcome the opportunity to work closely with you. Our role in Alaska notwithstanding, we want to ensure that your responder immunity legislation provides reasonable protection for responders. By doing so it will simultaneously facilitate a swift and effective response to help mitigate harm to your environment.

The foregoing provides you the major issues we see in Alaska in advance of our meeting so that you can have some insight into our perspective. We look forward to working up an agenda and meeting with you in the very near future,

Sincerely,

John D. Costello
President

MSRC
Marine Spill Response Corporation

Joseph E. Lees
Vice President &
General Counsel

May 13, 1991

Hon. Drue Pearce
Alaska State Senate
Box V
Juneau, Alaska 99811

Dear Senator Pearce:

Thank you for your telecopy of today regarding H.B. 196, the pending responder immunity bill, as well as certain proposed modifications of that bill. You asked me to provide you with comments on the bill and the modifications, and I am happy to do so. We previously provided comments on earlier versions of H.B. 196, which I enclose for your reference. Please note that my comments represent an analysis of the responder immunity provision only, and do not reflect any type of definitive list of MSRC concerns with Alaska law. They also do not represent the preconditions that would define MSRC's plans or willingness to respond in Alaska. In other words, inadequate responder immunity is one very significant barrier to MSRC involvement in Alaska, but it is not the only such barrier.

I will not repeat the detailed comments in our prior letter. Most of these comments are still applicable. Instead, I want to focus on the major issues that make the current provisions inadequate. I will take them in the order of importance.

First, the limitation on the time frame for responder immunity in H.B. 196 (15 days) is so tight as to make the responder immunity provision essentially useless for most responders. For very large spills, it is simply unrealistic to expect that a 15-day immunity period will be adequate to cover the time period when oil is still on the water. Such a limitation will not encourage spill responders to become involved in spill response or to act promptly and decisively when oil is on the water and time is of the essence. Further, it is an impractical standard -- if a release occurs over several days (e.g., an offshore facility or a sunken vessel) how is the time limit to be judged? Would each part of the oil slick have to be traced back to the date is was originally released?

MSRC's position is that there should not be a time limit on responder immunity. Any time limit is arbitrary, since one cannot predict ahead of time the specific circumstances of a spill. The larger the spill, the more difficult it will be to control within a short period of time, while the greater the potential damage and hence the potential liability will be. The proposed modification of the bill to extend the time limit to 60 days is a step in the right direction, but is still inadequate. The note suggests that the time frame is commensurate with the new California statute, but it differs from the California provisions in important ways. First, the

1350 I Street, NW Suite 300 Washington, DC 20005 Telephone 202 408 5700 Fax 202 371 0401

California statute allows for administrative extensions of the immunity provision beyond 60 days by the State oil spill coordinator. Second, the California provisions explicitly protects from liability a responder who withdraws from the spill response before the expiration of the responder immunity provision. Without such protection, the responder could be subject to liability based on grounds that once the duty of cleanup is assumed, then the responder cannot abandon that duty. Even with these protections, which are not provided in the Alaska bill, we believe the California bill still is unsatisfactory because of its arbitrary time restrictions.

Another major concern with H.B. 196 is that responder immunity provision is limited to response action contractors who, without approval by the federal or state onscene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822. We have always maintained that the appropriate linkage for spill response should be to the National Contingency Plan, not to a local plan. The National Contingency Plan provides the basic framework for an appropriate response; the local plan establishes one way of achieving those overall goals. Unfortunately, no single plan can anticipate every eventuality. A plan provides the starting point for response, but responses inevitably must adapt to the circumstances of the actual event. Responders should not be subject to loss of immunity for deviations from the individual plan.

The proposed modifications of H.B. 196, which defines when action has "substantially deviated" from a plan, is, again, a step in the right direction. It defines a substantial deviation in terms of a significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan. But it still links responder immunity to an individual plan rather than the National Contingency Plan.

Another major problem with H.B. 196 is that responder immunity does not apply to actions for damages to tangible personal property not caused by oil. MSRC's position is that responder immunity should apply to all removal costs or damages related to a response action, other than personal injury or wrongful death. It is not clear what "tangible" personal property is, or the degree of "causation" required. This appears to preclude immunity for claims, such as for damages resulting from the application of dispersants, or personal property damage from the placement of boom or local storage sites, etc. There is no justification for limiting responder immunity only to direct oil damage, when the response action will necessarily involve the movement of much machinery and equipment, etc. that is an integral part of the spill response. Limiting responder immunity to actions or omissions "consistent with the National Contingency Plan" provides a sufficient nexus between the type of damage and the spill response.

Finally, the proposed addition to Section 8 clarifying that nothing in this section is intended to create a cleanup standard is another positive and helpful provision. MSRC strongly opposes the setting of performance standards for oil spill cleanup as unrealistic and misleading. One cannot control an emergency situation, nor the circumstances of the spill, or the weather and other conditions of a spill response. One can only make one's best efforts with the equipment and personnel available. It is important that people realize that one cannot prevent damage in a major oil spill under all circumstances anymore than one can promise a certain damage level in a large fire.

Our other comments are contained in the attached materials. We hope this analysis is helpful to you. We encourage your efforts to amend H.B. 196 to make it less objectionable. Please let us know if you need anything further.

Sincerely,

Joseph E. Lees
Vice-President &
General Counsel

Statement

of

Mr. G. Stephen Duca

Vice President

Readiness and External Affairs

Marine Spill Response Corporation

before the

State of Alaska

Joint Hearing of the

House Special Committee on Oil and Gas

and

House Committee on Resources

February 12, 1992

Good morning Mr. Chairmen and members of the Committee. My name is G. Stephen Duca, I am the Vice President for Readiness and External Affairs at the Marine Spill Response Corporation. I welcome the opportunity to comment on the Citizens' Oversight Council recommendations and responder immunity.

Mr. Chairmen, MSRC is pleased to have been asked to participate in the public debate on Section 11 of H.B. 196 (Ch.92 SLA 1991). We have been part of this dialogue for some time, beginning with an appearance before Alaska's distinguished Oil Spill Commission in 1989 chaired by Mr. Parker and ending just last week with a statement via teleconference

presented to the Citizens' Oversight Council on Oil and Other Hazardous Substances. Our position on the issue of Responder Immunity in Alaska is therefore a matter of long public record. Attached is pertinent correspondence which specifically addresses our concerns with H.B. 196 -- a statute which places liability on a responder rather than the responsible party where it belongs. Such a condition violates a fundamental principle of the Oil Pollution Act of 1990 (OPA-90) -- "the polluter pays". I will not comment further on the particulars of H.B. 196 since our previous remarks and letters are available for your review.

However, I would like to underscore a couple of key points for the Committees' consideration. At the end of all the discussion related to H.B. 196, Alaska needs to enact a responder immunity provision at least as protective for a responder as Section 4201 of OPA-90. This is sound public policy -- which nineteen other coastal states have enacted as law. It is plain common sense that Alaskan law should be consistent with the federal liability regime that exists three miles off its coast. Oil moves swiftly from jurisdiction to jurisdiction and a responder should not be slowed in his cleanup by having to take valuable time to consider the legalities and risks associated with each action taken in Alaska's jurisdiction.

Please remember that the overarching purpose of this limited immunity is to insure a bold and vigorous response during uncertain and/or emergency operating conditions. Some would have you believe that this standard was trying to get someone "off-the-hook." This is not the case, rather it places the liability on the spiller, again in accordance with the maxim of: "the polluter pays". Working in concert with the other provisions of the Oil Pollution Act of 1990, this limited responder immunity if enacted in Alaska would:

1) Promote a bold and vigorous response by persons whose sole purpose is to remove as much oil from the environment as is possible, since responders (all categories of responders) are protected from liability for good faith errors (simple negligence) under very limited circumstances.

2) By riveting liability to the responsible party it doubly insures a bold response by encouraging his prompt action. Since any liability another person (responder) is relieved of is passed on to the responsible party, there is little incentive for the responsible party to attempt to deflect liability to a responder in the first place. His best course of action is to get as much response and cleanup capability to the scene and begin operations as soon as possible.

Mr. Chairmen, one cannot be part of this debate without soon confronting the central argument made against providing this limited immunity. The issue has, unfortunately taken on the mantle of a canard. The story goes like this -- 'the only way to insure that responders will act responsibly is to make sure they are punished (incur liability) if they don't act in a prescribed way (by a contract)'. This approach to providing emergency response services of any kind, not just oil spills, is absolutely wrongheaded. It defeats the main purpose of the immunity -- the encouragement of a bold and vigorous response -- in several ways. First, the contract would have to cover all of the circumstances likely to be faced in a spill. The larger the spill the larger the number of circumstances and the larger the contract. Can you imagine a bold and vigorous response to an oil spill occurring under a contract the dimension of an encyclopedia? Can Alaska's fishermen (who proved to be so vital a force during the Valdez spill) reasonably be expected to perform in every circumstance in a way prescribed by a

contract? What about tug and barge owners, operators and lessors? Every action they took could be subject to a lawsuit to determine if their actions were in accordance with the contract and therefore, was in fact covered or not covered by the immunity. Fishermen, tug and barge owners and other responders would need to rush to their lawyers to determine risk/exposure before rushing to the scene of a spill to begin the cleanup. It would be a lawyer's playground and have a chilling if not killing affect on a response effort.

Furthermore, such a condition defeats the cardinal rule of OPA-90 that "the polluter pays". Any liability that can be transferred from the spiller to other parties will be seen as an opportunity to defeat the responsibility for performance that a spiller should be held liable for. Having immunity flow to responders by way of a contract would shift the responsibility for response and cleanup performance during a spill to responders, not the spiller. OPA-90 lays the requirement for the execution of response plans on the spiller. The spiller must use private resources to cleanup, to the maximum extent practicable, a worst case spill. To enact a provision laying the responsibility for cleanup on responders would be a serious mistake, especially since there are already many protective provisions of OPA-90 that insure satisfactory performance of responders.

In your letter to MSRC President, Admiral Jack Costello you requested that I address two specific issues today: 1) MSRC's decision not to locate any of our corporation's national centers in Alaska and 2) Any disagreements that we may have with the report of the Citizen's Oversight Council.

As to the first Mr. Chairmen, I must take you back to the days just after the Valdez

spill. The industry recommended the creation of what it determined the nation did not have -- the capability to make a best effort response to catastrophic spills of persistent oils in the offshore environment. Most agree that the capability of the existing oil spill response infrastructure is sufficient to deal with the thousands of small releases that occur in the nation each year. What Valdez demonstrated was a lack of capability to deal with the catastrophic spill. MSRC closely analyzed the oil transportation patterns of persistent oils and made decisions on its operating sites based upon the threat posed by these patterns. Our analysis indicated that Alaska had two areas of likely threat - Cook Inlet and the TAPS terminus. When we reviewed the capability at these locations we found that Valdez had (and at the time was programmed to increase) a large capability to a considerable degree.

In fact, due in large measure to the work of the Alaska Legislature and Executive and Regional Citizens' Advisory Councils, Alyeska has a capability that would exceed one of MSRC's Regions and the capability of the Cook Inlet Cooperative is being upgraded. This led MSRC to conclude that there was not a need for MSRC capability in Alaska.

Although we had not received the full Citizens' Oversight Council Report by the time we had to depart for Juneau, the recommendations appear to be an outstanding example of good government at work. MSRC is pleased that the Council, in recommendation # 1, has acknowledged the essential need for the "gross negligence and willful misconduct" standard. Because with it comes the real foundation for assuring a bold and vigorous response to oil spills in Alaska, since responders will not unreasonably fear responding in the face of the risks and uncertainties surrounding oil spill response and cleanup. Adoption of this standard will create comity between the state and federal government. This is one of the things MSRC

has advocated for some time. MSRC wishes to commend the Council for its insight into recognizing the heart of a very complex problem. MSRC strongly urges this committee to enact this standard into any revision of H.B. 196.

The Council's recommendations then focused on conditions to assure response action contractor performance. We will speak to this below, but I want to underscore some key points with respect to the implementation of this limited immunity standard to ensure consistency with the federal standard.

1. It should apply to all responders, regardless of the category; i.e. volunteer, not-for-profit organization or for-profit organization,

2. It should only apply to acts or omissions taken in the course of rendering care, assistance or advice that are consistent with the NCP, or as otherwise directed by the President (USCG) or appropriate state officials,

3. It should <u>not</u> apply to the responsible party, or for acts under CERCLA,

4. It should <u>not</u> apply to acts that cause personal injury or wrongful death

5. And of *critical importance*, a responsible party should be held liable for any removal costs or damages that another person is relieved of.

We noted that the Council was . · ·bout a time limit to accompany any immunity.

We take this lack of a positive statement on this critical issue as a recommendation to eliminate this feature from future Alaskan law. We concur with this position.

Council recommendations two (2) through six (6) focus on the need for, and how, the state should assure that response action contractors satisfactorily perform. MSRC has no disagreement with the basic goal or the need for response action contractors to do a good job. We also do not object to a reasonable certification program and have supported certification in the Coast Guard's process to establish vessel response plan rules under OPA-90. We do however, believe that some of the recommendations may go too far. If certification establishes standards and requirements that are too burdensome, certification could severely limit the number of persons willing or able to be responders. These types of requirements also can serve to shift responsibility away from the spiller and on to the responder or even the state. Certification should not serve to advertently or inadvertently undermine or even negate the responder's immunity. The imposition of performance standards is problematical and any certification program must be implemented so that federal/state and local requirements are integrated into an effective and efficient whole consistent with OPA-90.

Recommendation two (2) asserts that the state "...currently has no (underlining supplied) means to verify the capability and the capacity of these contractors to perform...." While we do not believe this statement is technically accurate, the ability to verify the capability and capacity of responders certainly exists under OPA-90. Section 4202 of OPA-90 requires that the President, "...shall require- (A) periodic inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges and ... periodically conduct drills of removal capability, without prior notice, in areas for which Area Contingency

Plans are required...The drills may include participation by Federal, State and local agencies, the owners and operators of vessels and facilities in the area, and private industry. The President may publish annual reports on these drill, including assessments of the effectiveness of the plans and a list of amendments made to improve plans...."(Underlining supplied.) We believe that OPA-90 provides an excellent starting point to implement this recommendation and we urge the legislature to carefully consider if additional state requirements are really needed. We do not believe that tieing responder immunity to responder certification is good public policy. MSRC believes that all responders require the limited immunity of OPA-90, and so long as they act consistent with the NCP or as directed by federal and state officials that their limited immunity should be left intact. We urge the legislature not to adopt this portion of the recommendation.

Recommendation three (3) would provide for the design of "minimum professional standards" for responders. In theory this is laudable, but MSRC believes there are major hurdles to be overcome, not the least which is the creation of a bureaucratic nightmare. The Council's recommendation itself recognizes that such standards do not presently exist. Unless the program was very basic in its construct, identifying operational and logistics support performance standards and then attempting to come to some agreement on how to measure performance to these standards, while a worthy goal, will be an exceedingly arduous task for the state. One needs to ask the question, "and to what real benefit?", since there are existing provisions for the state (as well as federal and local agencies) to be a party to drills and exercises where shortfalls in performance will be identified and action plans generated to eliminate discrepancies. Returning back to our original statement - a certification program should only be implemented if federal/state and local requirements are integrated into a single

and effective whole.

We have no disagreement with the purpose of Recommendation four (4). We believe however, that this purpose can be achieved through the federally mandated Local Area Planning process found in Section 4202 of OPA-90. ADEC will be a full and active participant, among other interests in the state, in this process and therefore we urge that the need for any legislation in this area be the result of a complete review of the protection provided by the federal planning process.

Recommendation five (5) is problematical. It is assumed that the financial implication of giving direct orders to a responder, such as in the case of a mystery spill, can be worked out, but that notwithstanding, given the overarching structure of OPA-90 it is difficult to identify a real problem that needs to be solved. MSRC believes that implementation of this recommendation will create serious problems.

Section 4201 of OPA-90 states that the President "... shall ...ensure (underlining supplied) effective and immediate removal of a discharge...." It further states that in those cases where there is a substantial threat to public health or welfare that he "...shall direct all (underlining supplied) Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge...." All now agree that decision-making during a spill response cannot be diffused but must attach to a single professional. The citations above demonstrate that the President will be in charge. We believe that this responsibility is being taken very seriously by the federal government. The state is a partner in the direction of these response efforts as a member of the federal Regional Response Team and Area

Committees that will be developed. The way that OPA-90 insures response and cleanup performance is by placing the burden where it belongs - on the spiller. The spiller must demonstrate to government that his plan is a reasonable one to emove, to the maximum extent practicable, a worst case spill. We see no clear and present danger that equipment and personnel will not, in the words of Recommendation five (5),"... indeed be deployed...." Please also consider that under OPA-90:

A. The state is intimately involved with the planning for the resources needed for a worst case spill; the federal government assures that response resources are inspected and

B. That unannounced drills are conducted to assure that what has been written in the plans, (1) actually exists and (2) will perform as agreed upon in the plans and

C. That Title V provides for the establishment of Regional Citizens Advisory Councils for special areas that have among their many advisory roles ones to:

1. provide advice and recommendations...on the policies...and regulations relating to operation of...terminal facilities and tankers which may affect the environment

2. monitor...the environmental impacts of the operation of the terminal facilities and crude oil tankers

3. review...the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers...

There are considerably more of these types of advisory duties, but the sum of (A) (B) and (C) above is a very high level of inspection and verification of response capability by a variety of organizations. This appears to be adequate to insure that if Alaska wants to get

something done during a response that it has a more than reasonable assurance that the resources will be there to execute the orders.

There is one more important point to consider. T : recommendation speaks to a responders duty to perform. We believe that this inadvertently may deflect duty to cleanup the spill from polluters to responders. As stated above, we believe that responder performance will be demonstrated in a variety of ways; through drills and exercises - some to be unannounced, because acts must be consistent with the NCP, etc.. Likewise, inspections and inventories of equipment are part of federal law, enacted precisely for the purpose of insuring that what has been warranted in a plan can actually be delivered by the responsible party.

We believe that practically speaking, a problem does not exist in terms of the state gaining assurance that what is in a plan will be delivered and a limited responder immunity must not be held hostage to the orders of state on-scene coordinators.

Recommendation six (6) provides that certified response action contractors respond when directed by the state. Private responders have a tradition of responding if needed, however, they are not governmental resources. If the state wants to hire a contractor to perform response services it should do so as a matter of negotiated contract irrespective of responder immunity or certification.

In closing Mr. Chairmen, I want to again thank this committee for the opportunity to comment on the Citizens' Oversight Council recommendations and responder immunity in

Alaska. You know our reasons for asking you to enact legislation at least as protective as Section 4202 of OPA-90. We are encouraged by our discussions with many members of the legislature and the administration. We are encouraged by the report of your Citizens' Oversight Council. We urge you to join with the 19 other states and adopt Section 4201 of OPA-90. It is sound public policy. I would be happy to answer any questions which you may have.

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS

- Enacted

Testimony of Jon K. Tillinghast

ON BEHALF OF CONOCO INC. AND TESORO ALASKA PETROLEUM CORP.

House Resources and Oil and Gas Committees

February 12, 1992

As you know, Congress and the legislatures of 18 other coastal states have passed legislation limiting the liability of oil spill response action contractors ("RACs"). While Alaska joined that consensus last session with the enactment of HB 196, that bill was significantly more restrictive than the laws of any of these other jurisdictions. First, it limited liability only for the first 15 days following the spill. Second, it tied limited liability to the contingency plans of shippers and other large oil handlers.

The HB 196 sunset clause gave all of us an opportunity to reflect on whether the state's best interests are served by this kind of restrictive limited liability legislation. In the interim, here's what we found:

♦ Several additional states passed more complete limited liability laws. Since the legislature adjourned, Alabama, Connecticut, Maine, Massachusetts, New Jersey, North Carolina and Oregon have adopted laws essentially mirroring the federal standard--that is, a gross negligence standard without time limitations, and a requirement that RACs comply with the National Contingency Plan. As a result, Alaska, with its more restrictive law, finds itself at an even greater competitive disadvantage in attracting cleanup resources to the state;

♦ State officials have looked closely at the state

Jurisdictions With Gross Negligence Standard for RACS

- Federal Government
- Alabama
- California
- Connecticut
- Deleware
- Florida
- Georgia
- Hawaii
- Louisiana
- Maine
- Massachusetts
- Mississippi
- New Hampshire
- New Jersey
- North Carolina
- Oregon
- Texas
- Virginia
- Virgin Islands
- Washington

of cleanup readiness in areas of the state that don't get the attention of Prince William Sound, the North Slope and Cook Inlet, and have found that cleanup resources in some of these regions, such as Southeast Alaska, range from disturbingly inadequate to nonexistent. As they looked further, these officials found that unless Alaska creates a permanent legal environment that encourages the creation and expansion of cleanup services, this alarming inadequacy will probably continue;

- Proposals have been generated for new statewide and regional oil spill coops. However, participants in those proposals have cautioned that effective limited liability legislation is critical for those undertakings to succeed; and

- We have all been able to take a long look at the public policy justifications for limited liability legislation in the calm of the off-session, and have recognized that it's a good idea. Last year, HB 196 was passed in something of a crisis. Alaska's then-existing RAC liability laws, which if anything exposed RACS to more legal hazards than under common law, threatened to cutoff Tesoro and Conoco's access to necessary cleanup services in Prince William Sound, which in turn threatened the continued operation of the Tesoro refinery. Advocates of the legislation stressed that the Tesoro situation was only a symptom of a much larger public policy problem, but it was hard, as time was running out, to focus attention on those larger issues.

HB 196 did cure the problem in Prince William Sound. Alyeska dropped its demand for direct action insurance. To be sure, if HB 196 is allowed to lapse, Tesoro and Conoco will face precisely the same difficulties this summer, because the state's legal environment will have reverted to one of hostility. However, even though the legislature therefore faces the same time constraints that it did last session, the off-session has given us precious time to pause and reflect.

I hope that this time has convinced us all that limited liability for RACs is not a reckless, revolutionary fix for a private contract dispute. It is the national norm, the national custom, and it exists because, in its absence, RACs face an unreasonable risk of

becoming embroiled in spill litigation even when they had no involvement whatsover in the spill itself.

And, please, remember that term--"embroiled." It is almost beside the point whether a jury might ultimately decide that the RAC acted reasonably. Oil spill cases almost never go to trial, usually because the cost of oil spill litigation is so unusually high, and its duration so unusually long. Consider the doctor who drives past an automobile accident in a state without a Good Samaritan law. The fear the keeps him from stopping to help is not just the fear of ultimately being judged negligent, but the fear being sued. And while no existing limited liability law will ever wholly remove the risk of litigation, limited liability laws do minimize that risk, and may provide the means to extricate oneself from that litigation early in the process.

Limited liability laws with a gross negligence standard for emergency responders are not a recent invention. Alaska has long limited the liability of people who respond to other types of emergencies. Unfortunately, before 1989 those laws applied only to limited number of oil spill situations, and after the 1989 enactment of AS 46.03.823 may not apply to RACs at all. The existence of these other laws is thus not a reason to let HB 196 lapse; rather, those laws provide added assurance that in making HB 196 permanent, and in conforming it to the laws of our sister states, the legislature would be acting in the mainstream.

While limited liability for emergency responders is nothing new, state oil spill RAC liability laws followed the recent enactment of the federal Oil Pollution Act ("OPA"). There's a reason for that--one that goes beyond these states' desire to catch up with the federal standard. OPA, as you know, established a $1 billion per incident oil spill damage payment fund. That fund, piled on top of stringent strict liability laws on the spiller, and high proof of financial responsibility requirements, so minimized the risk of uncompensated spill damages that there was no longer any sound justification for exposing RACs to unlimited liability. Remember, to enjoy limited liability, the RAC must have had no

involvement in the spill itself. Even before OPA, the only motivation for involving the RAC in litigation was the search for another deep pocket--even though this particular deep pocket was blameless. Suing innocent deep pockets is bad policy to begin with. Now, with the enactment of OPA, even the economic justification for that unpleasant practice has been removed.

I know that any advocate, particularly in this state, can get only limited mileage by pointing to the practice of other jurisdictions. Here, however, the overwhelming legislative judgment of our sister coastal states is doubly important. First, it provides considerable comfort to anyone still hesitant about the propriety of limited liability. Second, it underscores the need for permanent legislation in Alaska. Nationwide, cleanup resources are limited. If Alaska choses an isolationist path by perpetuating a hostile legal environment towards oil spill RACs, the state will find itself unable to compete for those resources.

It's my hope, and my clients hope, that the basic issues are now behind us, and that the question this year will be whether Alaska should conform as closely as possible to the national norm, or whether there is some overriding local concern that requires Alaska, and Alaska alone, to bear the cost of uniquely restrictive legislation. Why, for example, should Alaska offer 15 days of limited immunity, when even California offers a minimum of 60, and 17 other coastal states place no time limit whatsoever? Why, too, can't Alaska adequately protect itself by tying the RACs' immunity to the National Contingency Plan, as our sister states have done? Last year, the issue was "why the bill?" This year, we believe the issue should be "why the restrictions?"--remembering, as we must, that every bell and whistle that we hang on an otherwise straightforward liability law makes the law more complicated, more conducive to the intervention of lawyers, and thus less attractive to cleanup services who will be deciding whether to locate here, in Alaska, or in other more secure legal environments.

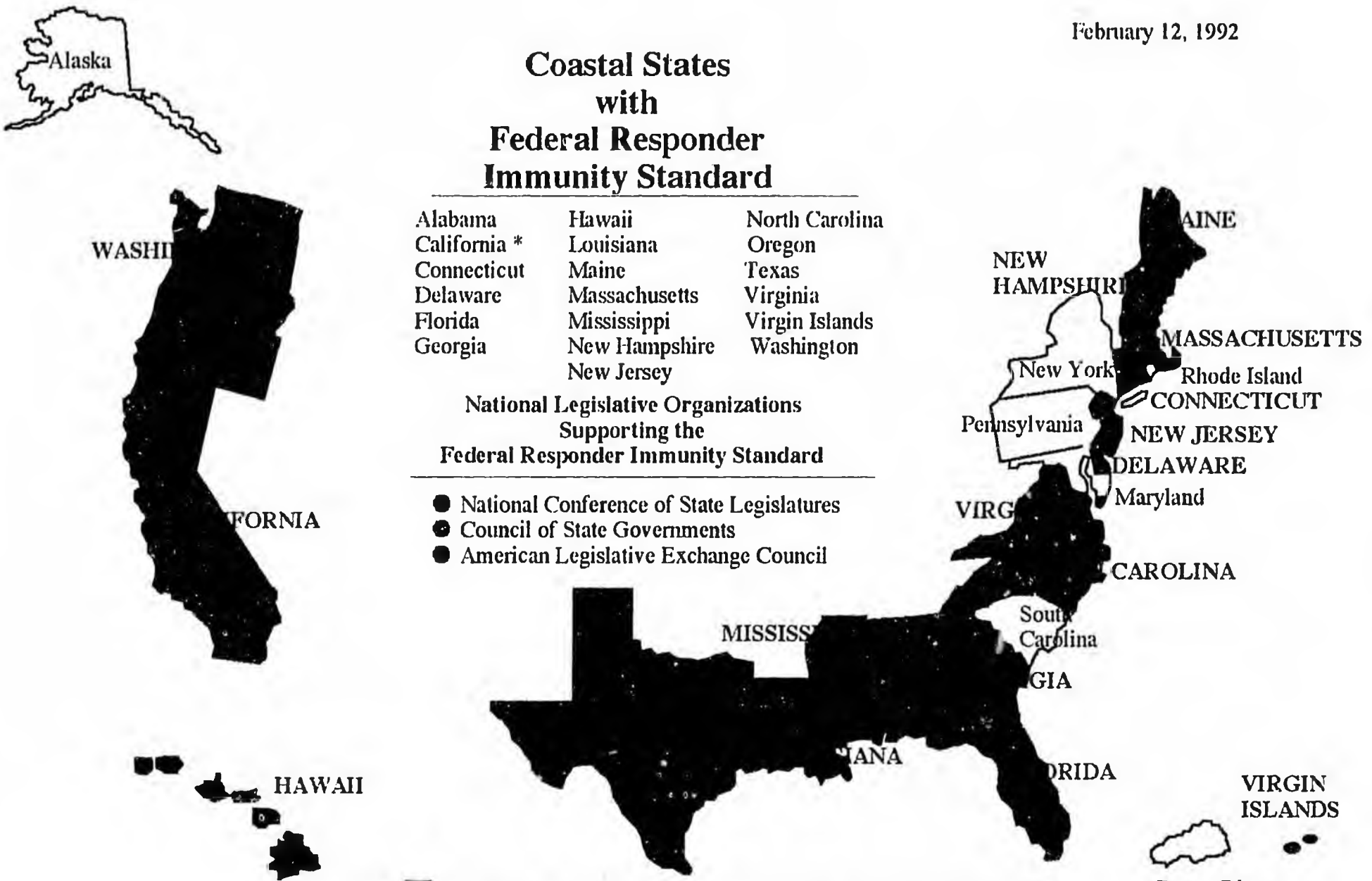
February 12, 1992

Coastal States with Federal Responder Immunity Standard

Alabama	Hawaii	North Carolina
California *	Louisiana	Oregon
Connecticut	Maine	Texas
Delaware	Massachusetts	Virginia
Florida	Mississippi	Virgin Islands
Georgia	New Hampshire	Washington
	New Jersey	

National Legislative Organizations Supporting the Federal Responder Immunity Standard

- National Conference of State Legislatures
- Council of State Governments
- American Legislative Exchange Council



■ Indicates states which have passed responder immunity legislation.

* Federal standard was adopted but only for a maximum of 90 days.

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

January 17, 1992

Representative Cliff Davidson
State Capitol
Juneau AK 99801-1182

Dear Representative Davidson:

The Citizens' Oversight Council On Oil and other Hazardous Substances is in the process of completing its report and recommendations to the legislature on liability standards for response action contractors.

In Section 11 of HB 196, the Citizens' Oversight Council was required to review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. In order to meet this requirement, several groups and individuals prepared research project reports for the Council. The Citizens' Oversight Council will base its recommendations to the legislature on the information provided in these research project reports.

The Council will be presenting its report and recommendations to the House and Senate in early February.

Attached is a summary of the research project reports and the public meeting notice for the Council's upcoming meetings.

If you have any questions or suggestions regarding this subject and process, please contact me at 561-2101.

Sincerely,

Michele Brown
Executive Director

enclosures

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

SUMMARY

of

RESEARCH PROJECTS REPORTS

PREPARED BY THE CITIZENS' OVERSIGHT COUNCIL
AS PART OF THE COUNCIL'S REPORT TO THE LEGISLATURE UNDER
SECTION 11 OF HB 196 (Ch. 92 SLA 1991)

TABLE OF CONTENTS FOR SUMMARY

RESEARCH PROJECTS REPORTS SUMMARY

Each research project report originated from an initial identification of subjects to be addressed to gain a full understanding of response action contractor immunity issues. The following is a summary of the findings of each report. The full text of each research project report is available upon request.

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Research Project: Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

Purpose: To identify the types of response action contractors operating in Alaska and to describe their areas of operation, their interactions and relationships with spillers and other responsible parties, their experiences with claims, and their field response structure.

Summary: There are essentially two types of response action contractors in Alaska -- independent operators and industry spill response organizations. Independent operators supply equipment, materials, and personnel through contractual arrangements with the spiller, governmental agencies, or other responsible parties. The independent operators do not control or direct the field response and have no other contractual, lease, or corporate relationship with the spiller or responsible party.

Industry spill response organizations are formed to pool resources to enable contingency plan holders to most economically comply with the state spill response requirements. The members of the organizations are generally contingency plan holders and may own or operate an oil terminal or tankers, as well as the response organization. The operations of the industry response organizations are to varying degrees controlled by the members. Industry response organizations generally control the field response to a spill for some period of time. Within industry spill response organizations, there are two types: the first are basically cooperatives with a management structure separate from its members (ACS, CISPRI, and SEAPRO), and the second is an operational unit of the industries' agent (Alyeska's SERVS). Only CISPRI is separately incorporated.

The independent operators tend to work throughout the state and handle spills of petroleum products and hazardous substances. The industry response organizations respond to petroleum product spills, predominantly crude oil, within the geographic area of operation of their members.

In a survey of response action contractors, none noted any experience with claims for damages due to spills or alleged negligence of the contractor. The majority of the contractors expressed concern that the potential for claims could deter their operations. All but one contractor required indemnification before services would be provided.

The report concludes that the independent operators are the class of responders most suitable for liability limits. The report asks whether it is appropriate for a response organization created by those with a duty to respond, (i.e., oil terminal and tanker owners) to be afforded that same degree of immunity. The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained.

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Research Project: Risk of litigation and liability exposure for response action contractors

Prepared By: Attorney General's Office, at the request of the Department of Environmental Conservation

Purpose: To analyze the situations where response action contractors have been sued or held liable for damages from oil spills.

Summary: Research indicated that there were no cases in the U.S. where response action contractors were sued or held liable for damages from an oil spill by virtue of their response activities. However, in some maritime casualty cases (not oil spills) a good Samaritan has been held liable for grossly negligent conduct, intentional misconduct, and occasionally negligence. The report raises the possibility that there is some risk of liability, albeit untested, which could cause uncertainty.

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Research Project: Contractual relationships among response action contractors, contingency plan holders, and the state.

Prepared By: Douglas K. Mertz and G. Thomas Koester, Attorneys at Law, on contract to the Cook Inlet Regional Citizens' Advisory Council

Purpose: To evaluate and analyze the contractual and legal relationships between response action contractors and others in order to determine how liability for damages will be allocated and whether the private contractual relationships affect field response to an oil spill.

Summary: The report first discusses the development of liability laws in Alaska for oil spill damages. The spiller and other statutorily designated responsible parties face strict liability for damages, including those damages caused by the activities of a response action contractor. However, under a good Samaritan law (AS 09.65.091), a person who responds at the request of the government to a declared emergency is immune from strict liability and negligence. HB 196 (AS 46.03.825), passed last year and in effect until July 1, 1992, expands that immunity to responders to an oil spill without the necessity of a governmental

order. The result is that private parties may be unable to recover damages for harms caused by response action contractors if there is no other financially solvent responsible party.

Response action contractors and contingency plan holders also allocate liability for damages between each other through private contractual relationships. There are significant variations in the contracts used by response action contractors and the contingency plan holders for whom they work. Some contracts are extremely complex, while others are relatively simple. Some are specific in the services to be provided; others merely recite that services will be performed as soon as possible. Indemnification provisions were generally in all contracts. Alyeska, CISPRI, and ACS required indemnification for any potential liability. Other response action contractors only required indemnification for their non-negligent activities. Alyeska was the only contractor who also required its subcontractor response action contractors to indemnify Alyeska. Some of the response action contractors require their clients to carry insurance. Only CISPRI and Alyeska specified the amount of insurance -- CISPRI requires $10 million; Alyeska requires $1.2 billion.

The most notable point in reviewing the contracts between response action contractors and contingency plan holders is the lack of uniformity in the terms establishing the performance obligations, the services provided, the scope of indemnification (including insurance provisions), the grounds for contract termination, the degree of control in the field over cleanup operations, and the requirements for consideration.

This wide variation in private contract terms is significant. As the state's requirements for spill preparedness have increased, reliance upon response action contractors to achieve that state of readiness has also increased. Yet, the state's control over cleanup activities is directed to the contingency plan holder or the spiller rather than the response action contractor, who may be actually performing the work in the field.

The state is not a party or third party beneficiary to any of the private contracts. Although the state approves the contingency plans which recite reliance upon response action contractors, the state lacks direct authority over the response action contractor who, in fact, implements the plan. This means that the state has no way to force a response action contractor to comply with its contractual obligations. The report concludes that the state should take some action to ensure state control over response action contractors to avoid the risk that the response action contractor designated in a contingency plan could fail to perform.

The report also concludes that because the legal standard for negligence includes full consideration of the emergency atmosphere in which response action contractors operate, response action contractors are protected from the consequences of crisis decisionmaking and do not face an undue burden by being held to a standard of reasonable care under the circumstances. On the

other hand, the only way to ensure that injured parties will be compensated is to require that response action contractors exercise due care or face liability.

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Research Project: Trans-Alaska Pipeline Authorization Act (TAPAA)

Prepared By: Michael J. Frank, Attorney at Law, on contract to the Citizens' Oversight Council

Purpose: To analyze TAPAA to determine whether Congress described the role of Alyeska Pipeline Service Company as a response action contractor for tanker spills in Prince William Sound or as the statutorily obligated responder for spills from tankers operating in the TAPS trade.

Summary: Under the terms of the Trans-Alaska Pipeline Authorization Act of 1973, the holder of the pipeline right-of-way must control and remove any pollution attributable to the activity of the holder, whether the pollution is within or without the right-of-way. 43 U.S.C. 1653 (b). This statutory duty is mirrored in provisions of the U.S. Department of the Interior *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* with the holders. The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska Pipeline Service Company their agent under the agreement.

The report describes considerable Congressional discussion preceding the enactment of TAPAA that recites the right-of-way holder's obligation to respond to pollution, related to the TAPS oil trade, including marine spills. Damages for such spills had to be borne by all responsible parties, but the duty to control and remove the pollution remained with the right-of-way holder. A court construing the language imposing the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though Alyeska argued that the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The report also describes the legislative debate during passage of the Oil Pollution Act of 1990, which discussion ratifies the TAPAA-imposed obligation on Alyeska (as agent for the right-of-way holders) to abate pollution in Alaska related to TAPS.

The right-of-way agreement requires Alyeska to have an approved oil spill contingency plan. After the flow of oil began through the Trans-Alaska pipeline, Alyeska submitted and received governmental approval of contingency plans covering spills that might occur from tankers berthed at the Valdez Marine Terminal, or elsewhere in Port Valdez and in Prince William Sound. Alyeska's 1978 plan stated that Alyeska, as required by the state and federal agreements, would direct cleanup operations resulting from tankers carrying Trans-Alaska Pipeline Service crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the T/V Exxon Valdez oil spill, Alyeska denied that it was required to respond to tanker spills in Prince William Sound. Alyeska now states that it is a "volunteer" response action contractor for

tanker spill response and cleanup. This issue is important in both the state and federal governments' lawsuits against Alyeska, and as yet is unresolved.

In Alyeska's current position as a volunteer response action contractor, it no longer formally submits a Prince William Sound contingency plan for approval with Alyeska as the contingency plan holder. Alyeska now even states in its Valdez Marine Terminal plan that Alyeska is not responsible for spills of tankers berthed at the terminal. Today, as distinct from years prior to the T/V Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor which will direct the field response for the first 72 hours. Alyeska charges no initial fee to the tanker owners, operators or charterers with which it enters into response action contracts, but does require $1.2 billion in bonding as part of an indemnification agreement. Alyeska also enters into response action contracts with, among others, corporations such as BP America, Inc., which, in turn, acts as a response action contractor for vessels chartered to carry oil belonging to BP's shipping company. The report raises concerns that immunizing Alyeska or BP from damages as response action contractors may insulate Alyeska, its pipeline owner companies and, in turn, their owners, from tanker oil spill cleanup responsibilities.

Moreover, the report notes that Alyeska, under TAPAA, is unlike an independent response action contractor, because the pipeline companies include the entire costs of the spill response operation in their tariff expenses. The vast majority of those costs relate to the prevention and cleanup of marine tanker spills which might occur at the Valdez Marine Terminal, elsewhere in Port Valdez, and in Prince William Sound. The report questions how costs described as discretionary, i.e., volunteered, can simultaneously be treated as ordinary common carrier expenses entitled to be included in the calculation of the tariffs charged for transporting oil through the TAPS. Furthermore, the report notes that while the State of Alaska indirectly pays for about 25% of these costs, as long as Alyeska is solely a volunteer in response efforts, the state has no legal assurance that Alyeska will respond the next time a spill of TAPS oil occurs from a tanker in Alaska waters. Instead, the public will have to rely on Alyeska's volunteerism and good faith in responding.

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Research Project: State of Alaska's participation in spill response preparedness through indirect expenditures

Prepared By: Deborah Vogt, Attorney at Law, on contract with the Citizens' Oversight Council

Purpose: To evaluate the state's role and status as an owner of oil in terms of the state's indirect contributions to oil spill response preparedness.

Summary: The state occupies two roles with respect to oil production -- a proprietary role, through which the state retains a royalty interest in oil produced from leases on state land, and a sovereign role, which levies taxes, like the severance tax, and exercises regulatory powers.

The state takes its royalty oil predominantly "in value." When the state takes its royalty oil "in kind," its actual physical possession exists for only an instant before transfer to the royalty purchaser. The state is never in actual possession of the oil and, thus, is not exposed to liability if the oil spills. However, the state's royalty interest places it in substantially the same position as any other producer of oil. Therefore, it is appropriate to consider whether the state should share commensurately in the costs associated with spill preparedness.

In the state's sovereign role, it levies several taxes on oil activities. Through some of those taxing structures, the state indirectly makes expenditures for oil spill response and preparedness. The primary expenditure the state makes is the loss in wellhead value -- and therefore in state royalties and severance taxes -- incurred because spill response expenditures are included in the transportation costs used to arrive at wellhead value.

An Alaska oil producer's liability for the state's royalty is based on the value of the oil at the point of production. Because most Alaska oil is not sold at the point of production, a "net-back" methodology is used to establish this value. Sales in the lower 48 states are netted back to the wellhead by deducting the costs of transporting the oil between Alaska and the market. This methodology means that there is a direct relationship between transportation expenditures (including spill prevention and response expenses) and wellhead value. The revenue effect of transportation expenditures for North Slope crude is approximately 25%. Thus, whenever spill response equipment and operating expenses are included in the costs of transporting oil, state revenues are reduced accordingly, and the state is, in effect, paying 25% of those charges.

The most significant spill-related element in the net-back methodology is the tariff effect of expenditures made by Alyeska Pipeline Service Company. Alyeska's expenditures for spill prevention and response are rolled into the TAPS tariff and have the effect of reducing wellhead value for both severance tax and royalty purposes. Alyeska's actual expenditures to date are $208.3 million with an additional $400 million projected through 1997. Assuming a 25% state revenue effect, the state's share of those expenditures is $152.1 million.

The report concludes that this raises a perplexing issue. The Trans-Alaska Pipeline Authorization Act and the Oil Pollution Act require the TAPS right-of-way holder to respond to spills out to the three mile limit. Alyeska states that it believes its role in Prince William Sound is a "volunteer" and that the provisions of its response services are "strictly a matter of commercial contract" between Alyeska (and not the TAPS carriers) and oil shippers. Alyeska does not charge for the spill response activity but requires a large bond. If Alyeska is solely a volunteer, the report questions how it is appropriate for Alyeska to pass the

costs of the spill response activities to the state, the TAPS owner companies, and the pipeline shippers who may not be the beneficiary of the service volunteered. If, however, the costs are appropriate tariff costs, then Alyeska's expenditures and requirements, including bonding, should be subject to review by the Federal Energy Regulatory Commission as being reasonably necessary and nondiscriminatory.

Finally, the report compares expenditures for spill response and preparedness (and the state's participation in those expenditures) between Cook Inlet and Prince William Sound. Although there are significant differences that make comparison difficult, the Cook Inlet response action contractor (CISPRI) spends considerably more, presumably due to lower volumes, on a per volume basis for spill protection than does the Prince William Sound response action contractor (Alyeska). When the state's participation in these expenditures is factored in, the difference becomes much greater.

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Research Project: The relationship between a response action contractor and a contingency plan holder under the Oil Pollution Act of 1990

Prepared By: Michele Straube, Attorney at Law, on contract to the Prince William Sound Regional Citizens' Advisory Council

Purpose: To determine whether the regulations implementing the Oil Pollution Act will address the issue of response action contractor accountability in adhering to the terms of a contingency plan.

Summary: Under the Oil Pollution Act, a response action contractor faces no statutory liability for its actions, as long as the actions are consistent with the National Contingency Plan. The exceptions are if the contractor is also an owner or operator of the facility or vessel causing the spill, or if the contractor causes response costs or damages due to gross negligence or willful misconduct, or if the contractor causes personal injury or wrongful death.

The federal government will require a contingency plan holder to demonstrate that it has a contract with a response action contractor, but it is as yet unclear what the precise requirements will be. The federal government is considering certifying response action contractors in order to guarantee a minimum level of capability and expertise.

The federal government will address what it means for the President to "direct" a response action in the proposed changes to the National Contingency Plan. Currently, the Oil Pollution Act does not grant the federal government any direct authority over response action contractor activities; the government's only leverage is to give directives to the contingency plan holder who, in turn, presumably would direct the response action contractor to implement the federal order. If the federal government decides to certify response action

contractors, it may gain authority over response action contractors through regulation.

The report raises concern over the following potential scenario: A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent. If a spill occurs and the response action contractor refuses to respond, the Coast Guard has no way to force a response short of hiring the response action contractor directly. There could be a critical delay in response because the Coast Guard has no direct authority over the response action contractor.

The Oil Pollution Act does not prevent the state from imposing any type of liability on response action contractors. Neither is the state preempted from adopting standards for the relationship between response action contractors and contingency plan holders. However, state standards must not contradict federal requirements.

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Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

Purpose: To identify the types and costs of insurance coverage available for response action contractors.

Summary: There is substantial variability in the availability and costs of insurance coverage for a response action contractor. Costs are based upon the following factors:(1) revenues and/or payroll size; (2) historical loss experience; (3) contractual indemnities and their value; (4) statutory immunities; and (5) the general state of the insurance market. Coverage is generally for:(1) hull and machinery; (2) protection and indemnity risks; (3) real and personal property; (4) comprehensive general liability; and (5) excess liabilities.

Coverage for a spill cooperative, such as CISPRI, with 15 employees and $10 million in capital equipment is estimated at $245,000. Coverage for a general environmental services company offering a variety of response services would be less expensive due to less capital investment.

The report also compares Tesoro's experience with contractual indemnity provisions in its contracts with response action contractors. Tesoro found that the spill cooperatives have much stronger indemnification requirements.

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Research Project: Response action contractor provision in the Oil Pollution Act of 1990

Prepared By: Gross & Burke, Attorneys at Law, on contract to the Prince William Sound Regional Citizens' Advisory Council

Purpose: To examine the response action contractors provision in the Oil Pollution Act of 1990 and its intent, legislative history, and statutory context.

Summary: The Oil Pollution Act provides that a person is not liable for removal costs or damages in the course of rendering assistance consistent with the National Contingency Plan or as directed by the President. This exemption from liability does not apply to: (1) a responsible party; (2) a response under CERCLA; (3) cases involving personal injury or wrongful death; and (4) gross negligence or willful misconduct.

The version of the Oil Pollution Act which passed the Senate did not include an immunity provision. The House Committee on Merchant Marine and Fisheries was the first to consider the issue of response action contractor liability. It added a provision limiting liability for a person retained or directed by the President, except for a responsible party, cases of personal injury or wrongful death, gross negligence, or willful misconduct. The committee expressed the hope that this provision would encourage individuals to assist in cleanup operations. The version of the bill which passed the House retained this limited liability provision.

During the conference committee negotiations to reconcile the Senate and House versions of the bills, a Senate conferee proposed language to limit liability for all persons (not just at the direction of the President) who render assistance consistent with the National Contingency Plan. Subsequently the conferees agreed to that concept in the language which ultimately became part of the Act. The conference committee explained that it wanted to avoid possible deterrence of prompt spill response because of liability fears. There was no debate or further discussion of this issue.

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Research Project: Other state's response action contractor provisions

Prepared By: Pat Kingcade, legal intern, on behalf of the Prince William Sound Regional Citizens' Advisory Council and the National Wildlife Federation; Alyeska Pipeline Service Company

Purpose: To examine the language of provisions related to response action contractors in other states' laws and the provisions' legislative history and relationships to other oil spill prevention and response laws.

Summary: Connecticut -- Any person who directly or indirectly causes a spill is liable for all costs. No person, firm or corporation which renders assistance in the clean up of a discharge of oil or hazardous substance is liable for civil

damages unless grossly negligent. Immunity does not apply to responsible persons, or persons under a duty to mitigate the effects of a discharge.

California -- Responsible parties are strictly and jointly and severally liable for all damages. Persons, cooperatives and response action contractors are immune from liability for costs, damages or other claims in the course of rendering assistance in accordance with the National Contingency Plan, the state contingency plan, or orders of a state or federal on-scene coordinator, except for gross negligence or willful misconduct, personal injury or wrongful death. This immunity extends only to response personnel whose contracts have been approved by the state and is limited to 60 days but may be extended to a total of 90 days if: (a) the spill is expanding to uncontaminated marine or land resources; (b) it is in the public interest because of dangerous conditions; or (c) no other qualified response action contractor will complete the response effort.

Texas -- A responsible party is liable for response costs and natural resources damages. No person or discharge cleanup organization that voluntarily or pursuant to the National Contingency Plan or the state coastal discharge plan renders assistance is liable for response costs, damages or civil penalties except for gross negligence or willful misconduct. Discharge cleanup operations must be certified by the state.

Washington -- Responsible parties are strictly liable for damages. A person is not liable for removal costs or damages in the course of rendering assistance consistent with the National Contingency Plan or as otherwise directed by the federal or state on-scene coordinator. This immunity does not apply to a responsible party, for personal injury or death or for gross negligence or willful misconduct.

Hawaii -- No person is liable for damages, costs, or penalties in the course of rendering assistance in accordance with state law or at the direction of the on-scene coordinator except for gross negligence or intentional misconduct. An additional good Samaritan law provides that any person who in good faith, without remuneration, renders assistance at the scene of a vessel collision, accident or other casualty shall not be liable for any damages resulting from providing or arranging towage or other assistance, except for gross negligence or wanton acts or omissions.

Florida -- Any person, authorized by the state or federal government or by the responsible party, who renders assistance in containing or removing pollutants is not liable for costs, expenses, and damages except for gross negligence or willful misconduct or if the responsible party does not report the spill or does not cooperate with the federal on-scene coordinator. A local discharge cleanup organization shall, upon state request, immediately contain and remove a discharge of unknown origin.

New Jersey -- Persons responsible for a discharge are strictly and jointly and severally liable. Response action contractors are liable upon a showing of

negligence. If the cleanup contractor demonstrates that its actions were in accordance with generally accepted practices and state of the art scientific knowledge and that it utilized the best technology reasonably available, there is a rebuttable presumption that the actions were not negligent. The state may contractually indemnify a discharge cleanup contractor against claims if the state determines that adequate environmental liability insurance is not available or unreasonably priced. Discharge cleanup organizations must register with the state and submit lists of qualified personnel and available equipment.

Maine -- Any person operating an oil terminal facility must obtain a license. Licenses issued to a terminal include any vessels under the control of that facility and vessels that are used to transport oil to and from that facility and that travel within state waters. Any vessel not under the direction or control of a fixed facility must obtain its own license. The licensee must demonstrate satisfactory evidence that it is implementing state and federal plans for control of oil discharges. Licensees are strictly liable for discharges occurring at facilities under their control or from vessels transporting oil to or from that facility within state waters. Responders are not liable in the course of rendering assistance consistent with the National Contingency Plan, a federal or state contingency plan, or as directed by the federal on-scene coordinator, except for personal injury or wrongful death, gross negligence or willful misconduct, or if the responder is the responsible party.

Other States' Response Action Contractor Liability Laws

	CONNECTICUT	CALIFORNIA	TEXAS	WASHINGTON	HAWAII	FLORIDA	NEW JERSEY	MAINE
Spiller obligated to pay damages caused by Response Action Contractors (RAC)	✔	✔	✔	✔	✔	✔	✔	✔
RAC liability limited except for gross negligence and intentional misconduct	✔		✔					
RAC liability limited except for gross negligence and intentional misconduct or failure to cooperate with the Federal On-Scene Coordinator (FOSC)						✔		
RAC liability limited except for gross negligence and intentional misconduct if actions are consistent with the National Contingency plan (NCP), the state contingency plan or the FOSC		✔		✔	✔			✔
RAC liability limited except for negligence (defined as use of best of available technology)							✔	
RAC liability limited in duration (60 days)		✔						
Certification of RACs required			✔					
State approval required for RAC's equipment and personnel resources		✔					✔	

PUBLIC NOTICE

The Citizens' Oversight Council
on Oil and Other Hazardous Substances

Invites you to a public meeting on the Council's
Oil Spill Response Contractor Liability Report

Friday, January 31 • 1:00 to 4:00 PM
Anchorage Legislative Information Office
3111 C Street, 5th Floor Conference Room
Public Comments Encouraged

The public meeting will be teleconferenced statewide —
At the State Capitol, Room 124, in Juneau, and at the Legislative Information Offices in Cordova, Homer, Kenai, Ketchikan, Kodiak, Sitka, Valdez and Whittier.

There will be a listen-only teleconference at the Anchorage LIO on February 5, from 2:00 to 4:00 PM to finalize recommendations to the Legislature. In Juneau, the teleconference can be heard in room 603, in the Court Building. All other sites listed above will also be connected.

For more detailed information contact COC 561-2101.