HB

540

(File 1)

POSITION PAPERS OF SUPPORT FOR HB 540

City of Kodiak

City of Kenai

Homer Electric Association, Inc.

Kenai Chamber of Commerce

Resource Development Council

Alaska Clean Seas

Cook Inlet Spill Prevention and Response, Inc.

SEAPRO Southeast Alaska Petroleum Resource Organization

Tesoro Alaska Petroleum Company

North Peninsula Chamber of Commerce

Municipality of Anchorage

Victoria Askin, Individual

Cheryle Kent, Individual

Linda White, Individual

Georgia Poyner, Individual

Jackie Ansotegui, Individual

Susan Caswell, Individual

Carolyn Prince, Individual

Sharon Loosli, Individual

Susan Lacey, Individual

Micheal and Claudia Ussery, Individuals

Tiny Schasteen, Individual

Walter L. Gearning, Individual

John W. Lewis, Individual

Curt Rudd, Individual

Dale Greth, Individual

Bill Fallacaro, Individual

CITY OF KODIAK
RESOLUTION NUMBER 08-92

A RESOLUTION OF THE COUNCIL OF THE CITY OF KODIAK SUPPORTING THE PASSAGE OF HOUSE BILL 540, LIMITING THE LIABILITY OF AN OIL SPILL RESPONSE ACTION CONTRACTOR

WHEREAS, the House Special Committee on Oil and Gas filed House Bill 540 which limits the liability of an oil spill Response Action Contractor (RAC) for release or threatened release of hazardous substances, and for an act or omission that is not contrary to a state or national oil spill contingency plan; and

WHEREAS, House Bill 540 also relates to the liability of an RAC for an act or omission that is not contrary to the state or national plan or an order of an on-scene coordinator; and

WHEREAS, House Bill 540 repeals the requirements that liability is not limited in an action for damages to personal property not caused by oil and is only limited if the act or omission occurs within 15 days after the release of oil; and

WHEREAS, House Bill 540 is supported by Pacific Fisheries Legislative Task Force, California Sierra Club, International Bird Rescue Center, Citizens' Oversight Council on Oil and Other Hazardous Substances, Ventura County Fishermen Association, and Alaska Coastal Community Cooperative; and

WHEREAS, RAC's do not create the risk of a spill; and

WHEREAS, it is imperative to have uniform liability standards to attract RACs to establish in Alaska; and

WHEREAS, certification standards must be consistent with other states in the event of a spill, and RACs would be wanted to respond in Alaska from other states; and

WHEREAS, Alaska must attract response action contractors as no business will willingly assume the strict liability for another's actions that result in oil spill damages,

NOW, THEREFORE, BE IT RESOLVED that the Council of the City of Kodiak, Alaska, supports the passage of House Bill 540, and urges the Legislature to pass the bill.

BE IT FURTHER RESOLVED that copies of this resolution be sent to the members of the House Resources and Judiciary Committees, the Kodiak delegation, and the City's Juneau lobbyist.

PASSI

ATTEST:

PASSED AND APPROVED this 9th day of April, 1992.

CITY OF KODIAK

Walter E Johnson
MAYOR

ATTEST:

CITY CLERK

Homer Electric Association, Inc.

CENTRAL OFFICE: 3977 LAKE STREET • HOMER, ALASKA 99603 • (907) 235-8167

March 31, 1992

The Honorable Bill Hudson, Member
House Resources Committee
Room 124, Capitol Building
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Hudson:

REF: HOUSE BILL #540 (RESPONDER IMMUNITY)

Homer Electric Association supports HB #540, Responder Immunity.

Tesoro Alaska Petroleum Company operates a large refinery in Kenai, Alaska. Tesoro's operations support 575 jobs in Alaska. In addition to investing in a $20 million payroll in Alaska, Tesoro contributes approximately 55% of the cost of the Cook Inlet Spill Prevention and Response, Inc. (CISPRI).

Tesoro is the third largest borough taxpayer and supports the Kenai Peninsula community through charitable organizations, donating large sums of money and staff time. Tesoro is Homer Electric Association's largest consumer, purchasing in excess of 75 million kilowatt hours of electric energy each year. HEA is very committed to the support of Tesoro and the continuation of its enterprise on the Kenai Peninsula.

We urge you to support House Bill #540 and pass it out of the House Resources Committee.

Sincerely,

HOMER ELECTRIC ASSOCIATION, INC.

N. L. Story
General Manager

NLS:em

cc: RF - NLS
Rep. Mike Navarre
Rep. Gail Phillips
Sen. Paul Fischer
Sen. Jay Kerttula
Sen. Sam Cotten
HEA Board of Directors
Mark Necessary, Tesoro
Dave Hutchens, ARECA
Rep. B. Hudson
Rep. R. Taylor
Rep. B. Grussendorf
Rep. C. Davis
Rep. P. Parnell
Rep. R. Foster
Rep. L. Baker
Rep. D. Choquette
Rep. J. Gonzales
Rep. T. Martin
Rep. Mary Miller
Rep. Mike Miller
Rep. R. Phillips
Rep. B. Sharp
Rep. M. Hanley

Kenai Chamber of Commerce
402 Overland
Kenai, Alaska 99611
(907) 283-7989

April 8, 1992

Representative Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Alaska 99811-1182

Reference: House Bill 540

Dear Mr. Hudson,

Enclosed, please find a resolution from the Kenai Chamber of Commerce in support of House Bill 540.

The Kenai Chamber of Commerce is in strong support of House Bill 540. Without a limit of liability for oil spill responders, Tesoro Alaska Petroleum would have to post a bond of $1 billion to counter the effect of litigation due to any oil spillage occurring during transportation between Valdez to the Kenai refinery. This huge burden on Tesoro's cash flow could put their ability to operate in Alaska in jeopardy.

Tesoro Alaska Petroleum is a major employer in the Kenai area, and a major contributor to Alaska's economy. Their lack of presence in the Kenai area would have a major negative impact state wide, as well as locally.

The Kenai Chamber of Commerce is asking that your support of this bill be strongly considered.

Thanking you in this matter.

Sincerely,

Jeff Belluomini
President

Kenai Chamber of Commerce
402 Overland
Kenai, Alaska 99611
(907) 283-7989

RESOLUTION 92-3

RESOLUTION SUPPORTING TESORO ALASKA

WHEREAS, the continued operation of the Tesoro Refinery is being threatened by the unreasonable demand by Alyeska Pipe Line Service Co. management; and

WHEREAS, Alyeska Pipe Line Service Co. is demanding Tesoro to secure a billion dollars insurance bond: and

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

WHEREAS, Tesoro contributes substantially to the tax base of the Kenai Peninsula Borough; and

WHEREAS, The Alaska State Legislature is currently considering CSHB 540 which provides limited immunity for responders and a permanent solution to the issue:

NOW THEREFORE, BE IT RESOLVED BY THE GREATER KENAI CHAMBER OF COMMERCE:

Section 1: That the Greater Kenai Chamber of Commerce urges the Alaska State Legislature to intervene on Tesoro's behalf and resolve this situation.

Section 2: That copies of this resolution be distributed to Governor Walter Hickel, The Alaska State Legislature, Members of the House Resources Committee, Tesoro Alaska and Alyeska Pipe Line Service Co.

ADOPTED BY THE BOARD OF DIRECTORS OF THE GREATER KENAI CHAMBER OF COMMERCE ON THIS 3RD DAY OF APRIL, 1992

Jeff Belluomini
President
Kenai Chamber of Commerce

ATTEST:
Eleanor Thomson
Eleanor Thomson

Resource Development Council
for Alaska, Inc.
FOUNDED 1975

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone 907/276-0700 Fax 276-3887

Resource Development Council
Position Paper - HB 540
2/21/92

The Resource Development Council for Alaska, Inc., strongly supports HB 540 and urges the Alaska Legislature to carefully review and approve this legislation. RDC is a non-profit, pro-economic and resource development organization with a statewide board and membership.

RDC's primary concern with HB 540 is that it corrects prior legislation which wrongly placed the emphasis on preserving an avenue for future litigation that could result from an oil spill, as opposed to placing the emphasis on a good faith response. RDC believes the response action contractor (RAC) provisions contained in the Oil Pollution Act of 1990, which provide for simple negligence, are the appropriate approach in Alaska.

To increase the negligence standard to levels higher than those required by the federal government is not only unnecessary, but has threatened to shut down at least one major employer on the Kenai Peninsula, involving hundreds of jobs in that region. HB 540 addresses several concerns expressed by response action contractors, as well as those involved in the business of shipping oil.

RDC notes that 19 other coastal states have enacted legislation as protective as OPA-90 over the last 18 months, pointing to the integrity of the federal policy.

RDC firmly believes that response action contractors involved in controlling the release or threatened release of a substance should be held to the federal standard of simple negligence as outlined under OPA 90 and urges passage of HB 540.

(907) 345-3142
Fax (907) 345-2435
12350 Industry Way, Suite 200
P O Box 196010
Anchorage, Alaska 99519-6010

March 9, 1992

Alaska State Legislature
House Special Committee on Oil & Gas

Re: Position Statement - House Bill 540

Thank you for the opportunity to provide written comments to the House Special Committee on Oil & Gas regarding an Act to limit the liability for oil spill response action contractors. Alaska Clean Seas supports House Bill 540 and believes this legislation is urgently needed to maintain the high level of response capability presently available within Alaska.

A key element for success in any spill action is swift and effective response. It is imperative that the response not be inhibited or delayed by the issue of liability. To ensure that additional manpower and equipment can be brought to bear quickly on a spill response, ACS and CISPRI have implemented a mutual aid agreement for assisting one another in the event of a spill. This agreement incorporates indemnity provisions to transfer all liability arising out of a response to the spilling party, regardless of fault. The agreement was tested during the recent East Forelands spill. Upon receipt of a request for assistance from CISPRI, Alaska Clean Seas had personnel on site within four hours and fourteen responders on site with a complement of equipment within eight hours of notification of the spill. Without an effective indemnity agreement, such immediate mutual aid would not have occurred.

Oil spill cooperatives within the State (ACS, CISPRI and SERVS) represent the bulk of spill equipment available within Alaska. Collectively this is the largest supply of spill equipment in the world. By organization, these cooperatives are not for profit. They have no interest in weighing risk vs reward. If these cooperatives are not provided protection from liability they will not respond to spills outside of their membership or geographic area of coverage. It would be a tragedy to have the resources of the cooperatives made unavailable because of issues of liability. Equally important, this would have implications for the availability of personnel and equipment from other sources both nationally and internationally.

Under OPA 90, liability is clearly placed in the hands of the spiller. The notable exceptions are for the case of gross negligence, willful misconduct or violation of the law. House Bill 540 is consistent with this federal standard. Alaska has the right to differences to the federal standard. However, these differences should be

improvements and not detractions. Alaska Clean Seas views this Bill as making those improvements.

Alaska is presently in the fortunate position to have a cadre of well trained, experienced and professional spill response contractors operating within the State. This capability was obviously increased significantly as a result of the Exxon Valdez response and these organizations are now recognized throughout the United States and the world. They are actively involved in spill response, contingency planning, prevention and training. Without the provision of protection from liability it is questionable if this capability would continue to operate within the State of Alaska

In summary, the largest supply of spill equipment in the world is located in Alaska. Additionally some of the best trained and most experienced responders are located within the State, working either in the oil spill cooperatives or the private response contracting community. Unless House Bill 540 is made law, a significant portion of the personnel and equipment within the cooperatives would be unavailable for response to spills outside their defined jurisdiction. Additionally, a significant percentage of the expertise and equipment presently in existence through the contracting community will be lost from the State. The effort and work that has been expended over the last 3 years by the State of Alaska, the oil industry, citizens groups and the private contractor community to provide the best spill response capability in the world will have been for naught.

Sincerely,

Bruce McKenzie

per Norman Ingram
General Manager

COOK INLET SPILL PREVENTION & RESPONSE INC.

CISPRI POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

MARCH 6, 1992

CISPRI supports the liability relief language in OPA'90. We believe the Response Action Contractor should be relieved of liability except for gross negligence.

Currently, CISPRI By-Laws allow CISPRI to respond to any spill in Cook Inlet, whether or not the responsible party is a member of the cooperative or not. Without contractor liability relief, CISPRI members are reluctant to respond if there is not a clearly identified responsible party. Delays will occur while a contract is negotiated.

OPA '90 grants the Response Action Contractor relief but transfers that relief to the responsible party. If there were an orphan spill, no Response Action Contractor would ever respond for fear of being made liable for simply trying to correct someone else's responsibility.

The Kenai Peninsula Borough sits on CISPRI's Board of Directors. If there is not liability relief for CISPRI as a Response Action Contractor, they (Kenai Peninsula Borough) have been legally advised to withdraw from CISPRI.

CISPRI uses the Incident Command System and CISPRI responds to all decisions made as a result of the Unified Command meetings. If liability relief is not granted, are all members of the Unified Command responsible for CISPRI actions?

If the Response Action Contractor is made liable for damages, what happens to the lower level response contractors? Are the fishing vessels, vessels of opportunity and other response contractors liable?

The argument has been made that no Response Action Contractor has been sued. That is completely untrue. Cook Inlet Resource Organization (CIRO), is still involved in legal proceedings of the Glacier Bay Spill.

The 15 day liability relief granted in HB196 bill is not enough. During the small East Forelands Spill CISPRI had used nine days before all equipment was demobilized.

CISPRI supports HB 540 and requests that the legislature enact this legislation so CISPRI can continue rapid response to any spill in Cook Inlet.

seapro

Southeast Alaska Petroleum Resource Organization
540 Water Street Suite 202
(907) 225-7002
Ketchikan, Alaska 99901
Fax (907) 247-1117

February 27, 1992

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

Dear Representative Hudson,

In support of your bill HB 540, which limits response action contractor liability, I am enclosing our recently approved position paper on this subject. Also, since our organization is still rather new and little known, I have included a map which shows the major locations of our network, and a map which shows the eligible facilities which have chosen not to join our network.

As you will note in our position paper, we do not believe that all of the recommendations of the Citizen's Oversight Council on this subject are in the best interest of our region. We do believe, however, that HB 540 provides exactly the conditions we think will provide the best climate for further developing environmental protection capabilities in our region.

I will, of course, provide you with any information or other assistance you may need relative to environmental protection in Southeast, the remainder of the state, and the North Pacific region.

Respectfully,

R. M. Mullen
Manager

seapro

Southeast Alaska Petroleum Resource Organization
540 Water Street Suite 202
(907) 225-7002
Ketchikan, Alaska 99901
Fax (907) 247-1117

POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

February 25, 1992

SEAPRO and its nineteen member companies wish to record our observations and concerns about response action contractor liability, and its likely impacts on the current and future state of environmental response capability in Southeast Alaska. We are particularly concerned by the failure of the Citizen's Oversight Council to adequately investigate the state of environmental response in rural Alaska generally, and Southeast Alaska specifically, in reaching the conclusions and recommendations contained in their report to the legislature on this subject.

Overview of Response Action Contractors in Southeast Alaska

There is only one business in the Southeast Alaska region which holds itself out as a response action contractor. That firm has very minimal capabilities which are almost totally restricted to the immediate areas around Juneau. Our region has always had to rely on existing business organizations within the region to provide response to pollution incidents and other emergencies. In addition to oil transporters and terminals, these businesses have included logging companies, construction companies, float plane and helicopter operators, tug and barge companies, fishing vessels, and many others. All of these are therefore "Response Action Contractors" as defined by state law when they enter into agreements to help respond to spills.

The services of companies like VRCA, VECO, Burlington Environmental, Foss Environmental, etc., have rarely if ever been used to respond to environmental emergencies in our region. The reason for this is the typical small size of spills, the nature of the products involved, and the logistic difficulties of deploying to the region in time to be effective. One of the primary motivations our members felt for formation of SEAPRO was the lack of response action contractors within the region.

SEAPRO is not currently a response action contractor. We are a cooperative sharing organization of predominantly local small businesses who make up the fuel and lubricating oil transportation and distribution network for all of Southeast Alaska. We also include several local companies who consume or handle large quantities of oil in support of their business activities, but who are not in the "oil business". Our organization was originally formed to act as a sharing network only in Ketchikan, but rapidly expanded to cover the entire region. We have now reached the point in our evolution where we must consider purchasing pollution response equipment in the near future and becoming some form of response entity.

All of our collective experience, along with our judgment of operating conditions within the region, forces us to conclude that there will likely never be a response action contractor of any significant ability in Southeast. We have no expectation that this situation will change any time soon because there is insufficient financial justification for bona-fide environmental or emergency contractors to capitalize a response capability which would only be profitably employed on our historical average of once a decade.

Potential Impact of Liability to Southeast Alaska Spill Response Capability

With the exception of SEAPRO member companies, almost none of the companies who have previously participated in environmental response activities in this region are aware of their potential liabilities when current state law sunsets in a few months. Additionally, since none of these companies consider themselves to be "response action contractors", it is unlikely that they will make themselves aware of their liability exposures in advance of being asked to respond to an environmental emergency. It is equally unlikely that they would submit to a "certification" process recommended by the Citizen's Oversight Council, or to the verification/inspection process which would be necessitated by such certification.

If these companies were to discover the potential extent of their liability exposure for participating in a clean up action after the current limitations sunset, it is unlikely that they will respond in a timely manner, if at all, when they are needed. The worse possible situation will be for one or more of these companies to become the target of an opportunistic law suit allowed by a lack of liability limitation. Such a situation would guarantee that it would be difficult, if not impossible, to convince local companies to respond to future emergencies, even if action were subsequently taken to limit liabilities. Given the ever increasing propensity for opportunistic law suits in our nation, and the sensitivity of regional businesses to this phenomenon, we believe that merely the possibility of such a situation will have a chilling effect on the regions environmental response capability.

Any reasonable person responding to an oil spill assumes that all liability for damages and costs resulting from the clean up will flow to the responsible party. This is as it should be. It makes no sense to imperil a contractor acting in good faith, and within the boundaries of state or federally approved contingency plans, to bear any responsibility for damages which could result from someone else's spill. Except for gross negligence, willful misconduct, or violation of law by a contractor, all damages from a hazardous substance release are the rightful responsibility of the spiller, not the third party people cleaning it up. This principle has been codified in federal law and the laws of at least 18 other coastal states. Acceptance of this principle is a condition of membership in SEAPRO and most other cooperatives.

As stated earlier, SEAPRO has evolved to the point that it must consider becoming a response entity in some form. Currently, Southeast is the only region of the state, outside the crude oil producing regions, which has taken any tangible steps to improve its environmental response capability. The steps that have been taken to date, have been entirely on the initiative of the regions businesses. In spite of some initial skepticism on the part of state and federal agencies, we have forged ahead with investment in our organization, greatly enhancing the effectiveness of the response equipment, material, and personnel in the region. We have proposed to both the state and federal agencies, cooperative steps which can be taken to provide our region and the rest of the state with marked improvement in our mutual ability to combat environmental emergencies. We want to begin taking these steps this year with or without agency participation.

However, the prospect of facing clean up costs and other damages for actions the co-op may take to mitigate environmental damage will surely weigh heavily on our decision making when considering how we may use SEAPRO to further improve the regions total response capability.

Response Action Contractor Certification in Southeast Alaska

The Citizen's Oversight Council has recommended that response action contractor liability limitation be linked to an, as yet undeveloped, certification program. While SEAPRO does not object to compliance standards for environmental response organizations, whether private companies, cooperatives or some other form, we fail to see the practicality or necessity of "certifying" entities in Southeast Alaska which meet the definition of response action under current law.

The current legal definition of response action contractor is:

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

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

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

Looking at the history of spill response in Southeast, and the probable future response actions in the region, certifying the response action contractors defined above would mean establishing the standards and processes for certifying virtually every business, and many individuals in our region. This is a monumental task by any standards, and in our view, a nonsensical one.

The Citizen's Oversight Council made some very narrow assumptions of what constitutes a response action contractor, and even what constitutes a cooperative. It is our opinion that the Council did not consider the broad range of response actions that have taken place throughout this state, nor did they evaluate the complex mix of organizations and individuals who have participated, and are likely to be asked to participate in environmental response actions.

There could be some benefit to establishing certification criteria for certain categories of response action contractors, were those categories to be properly defined in the broader context of the entire state. But in any context, some agency will have to develop professional standards to measure contractor capability; will have to apply these standards through some sort of an inspection or verification process; will have to verify the continuity of certification levels, will have to measure actual contractor performance against certification standards; and will have to administer this entire process. In our view, the cost of the simplest of such a bureaucracy would be excessive for the benefit gained, especially in Southeast and other areas outside the crude oil producing regions. The time necessary to create such a system would be extreme, with no possibility that such a system could be in place before the current liability limitations sunset. And finally, it makes no sense to us to waste scarce state resources on creating such a system and supporting bureaucracy when the federal government is already in the process of doing exactly the same thing.

Summary

At no time prior to publishing its report did the Citizen's Oversight Council seek information about conditions in Southeast Alaska from either SEAPRO, its member companies, nonmember companies, or other organizations with whom we network. During their teleconferenced meetings on this subject, our representatives noted that Southeast Alaska was never discussed or even mentioned by the Council members. Additionally, it was our observation that the Council focused almost all of their attention on operations in the crude oil producing regions of the state, on one or two companies who are in the business of environmental response, on Alyeska Pipeline Company, on the Cook Inlet cooperative CISPRI, and infrequently on the Alaska Clean Seas cooperative.

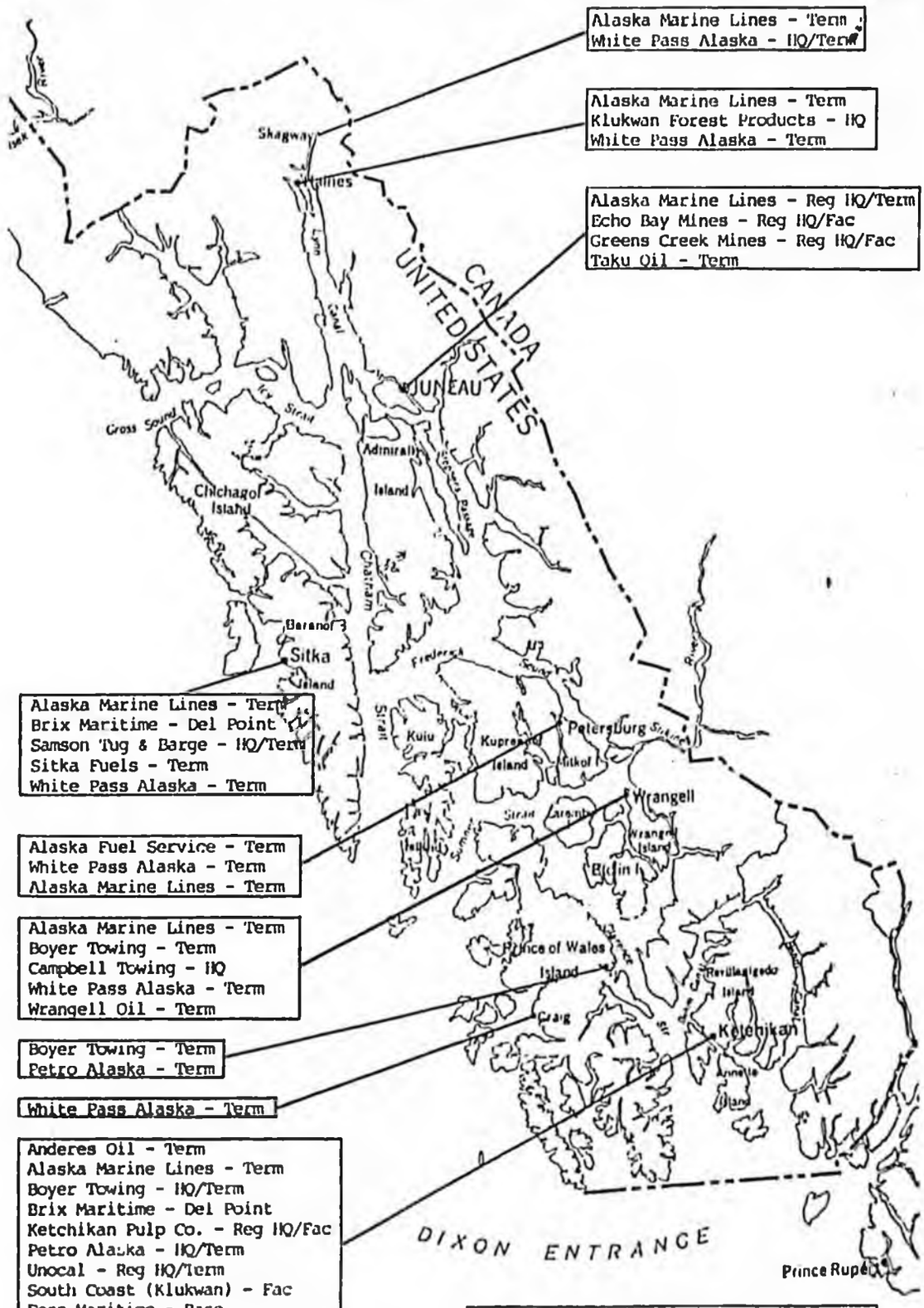
We find that their report seems to be strictly and narrowly aimed at perceived conditions in Prince William Sound, and to a lesser degree, Cook Inlet. It certainly does not accurately reflect environmental response conditions in our region, and we suspect that it does not accurately reflect conditions in other regions of the state. Consequently, this basic flaw places us in the position of not concurring with much of their rationale or their proposed solutions.

We believe that the state, like the federal government, should fix all obligations for clean up costs and damages resulting from a hazardous substance release on the responsible party, where it rightfully belongs.

We are concerned that failure to adopt liability limitations for environmental emergency responders, other than the responsible party, would negatively impact our regions ability to seek rapid and effective response actions from service providers outside the SEAPRO response network. Additionally, failure to provide this type of liability limitation would seriously threaten SEAPRO's ability to continue making further improvements in the total response capability of the region.

We cannot see substantial value to be gained within our region by creating a response action contractor certification process independent of that which will be created by the federal government. We also see no value in either waiting until a certification process is developed before granting liability limitation, or in tying liability limitations to any condition other than performance in accordance with federal and state contingency plans.

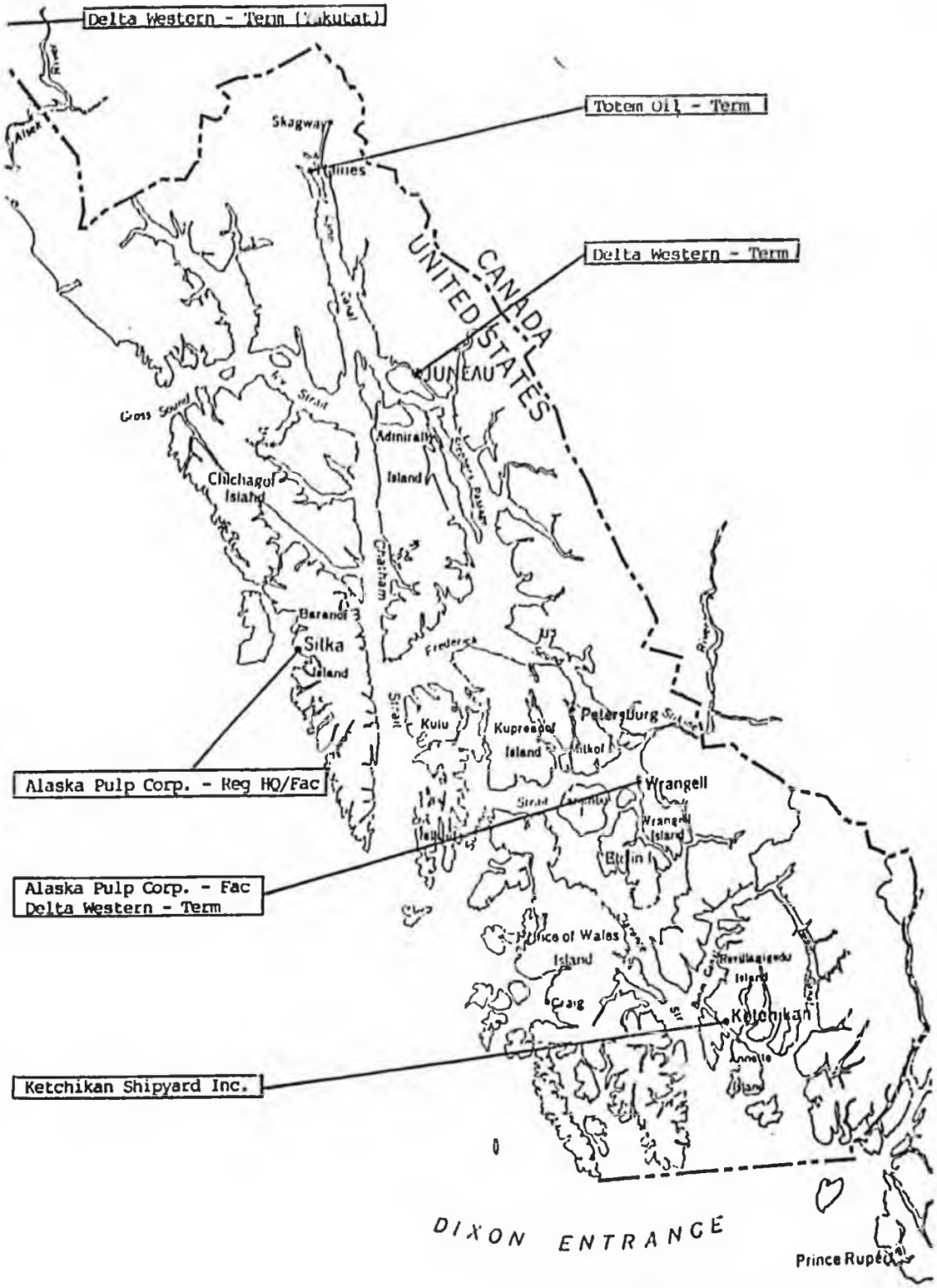
We believe that limiting the potential liability of responders, whether environmental contractors, cooperatives, other commercial entities, or volunteers is essential to improving the response capabilities of our region. This limitation should be similar, if not identical to that contained in the federal Oil Pollution Act of 1990.



IMPORTANT EXTERNAL OPERATIONS

Alaska Marine Lines - Seattle
Boyer Towing - Seattle
Brix Maritime - Seattle/Portland
Foss Maritime - Seattle
Klukwan Forest Products - Seattle
Samson Tug & Barge - Seattle
West Coast Shipping - Los Angeles
White Pass Transportation - Vancouver BC

SEAPRO Membership Major Physical Locations
February 1992



Significant Facilities Which Have Declined Membership
February 1992

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.

North Peninsula Chamber of Commerce

P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

NORTH PENINSULA CHAMBER OF COMMERCE
A RESOLUTIOON SUPPORTING HB 540 AND TESORO ALASKA

WHEREAS, HB 540 provides Response Action Contractors (RACs) limited liability unless the RACs acts with gross negligence, willful misconduct, causes personal injury, wrongful death or acts contrary to the direction of the state or federal on scene coordination; and

WHEREAS, it is imperative to have uniform liability standards to attract RACs to establish in Alaska; and

WHEREAS, not to provide limited liability for RACs will result in the failure of RACs to establish in Alaska. Shippers will then either be unable to ship heating fuel, gas, diesel fuel for electrical generation and other hazardous materials, or to keep home heating fuel, gasoline and crude and noncrude delivery, waivers will need to be granted to shippers, owners and handlers; and

WHEREAS, eighteen other coastal states have passed similar limited liability RAC laws; and

WHEREAS, Tesoro Alaska's ability to operate would be greatly jeopardized without the passage of HB 540 and the subsequent sunset of HB 196, and

WHEREAS, Tesoro Alaska contributes substantially to the economy and tax base of the Kenai Peninsual and Alaska; and

North Peninsula Chamber of Commerce

P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS of the NORTH PENINSULA CHAMBER of COMMERCE;

Section 1: That the North Peninsula Chamber of Commerce Board of Directors urges the Alaska State Legislature to pass HB 540.

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

ADOPTED BY THE BOARD OF DIRECTORS OF THE NORTH PENINSULA CHAMBER OF COMMERCE ON THIS 26th DAY fo MARCH, 1992.

Marie Becker

Marie Becker, President

ATTEST:

Audrey Hodgins

Secretary

Municipality of Anchorage

OFFICE OF THE MAYOR

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4431

TOM FINK,
MAYOR

March 27, 1992

Representative Cliff Davidson, Chairman
House Resources Committee
P.O. Box V
Juneau, Alaska 99811

Re: HB 540, Civil Liability for Oil Spills

Dear Representative Davidson:

The Municipality of Anchorage supports HB 540, Civil Liability for Oil Spills, and encourages the House Resources Committee to act expediently on this legislation.

If this legislation does not pass, the financial impact on the Municipality could be significant. HB 540 relieves certain civil liabilities to consultants who are hired to clean up an oil spill. If the bill is not moved forward, a scenario could develop in which consultants would not be willing to work on oil spills, and the only recourse would be to hire people as municipal employees to clean up spills.

HB 540 solves a problem that could be significant if lawsuits put clean-up consultants out of business. If this happens, the impacts will be major and will impede our ability to react to spill events.

I urge your support for this legislation.

Very truly yours,

Tom Fink

Tom Fink

cc: Representative Bill Hudson

1791 - 1991
CITY OF KENAI
"Oil Capital of Alaska"
210 FIDALGO KENAI, ALASKA 99611
TELEPHONE 283 - 7535
FAX 907-283-3014

MEMORANDUM

TO: Governor Walter J. Hickel
Senator Sam Cotten
Senator Lloyd Jones
Representative Mike Navarre
Representative Bill Hudson
Representative Cliff Davidson
Representative Jim Zawacki

FROM: Carol L. Freas, City Clerk
City of Kenai

DATE: April 2, 1992

RE: *HOUSE BILL 540*

Attached please find a copy of the City of Kenai's Resolution No. 92-18 concerning oil spill responder's limited immunity and House Bill 540.

If you have any questions, please contact Mayor John J. Williams, City of Kenai.

Thank you.

clf

SUGGESTED BY: Mayor Williams

City of Kenai

RESOLUTION NO. 92-18

A RESOLUTION OF THE COUNCIL OF THE CITY OF KENAI, ALASKA, CONCERNING OIL SPILL RESPONDER'S LIMITED IMMUNITY AND HOUSE BILL 540.

WHEREAS, it is in the interest of the citizens of the State of Alaska and the Kenai Peninsula Borough to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to all spills; and,

WHEREAS, the success of a spill response organization depends upon spill response contractors, as well as countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared on an emergency basis to act swiftly and without hesitance in the face of adverse circumstances and often with far less than complete information; and,

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

WHEREAS, twenty-one members of the House co-sponsored HB 540 which provides for limited immunity to oil spill response action contractors.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF KENAI, ALASKA, that it supports and encourages Alaska State legislation, such as HB 540, which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and,

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

COPIES of this resolution shall be transmitted to the Honorable Walter J. Hickel, Governor of the State of Alaska; and members of the Alaska House and Senate Resource Committees and Special Committees on Oil and Gas.

PASSED BY THE COUNCIL OF THE CITY OF KENAI, ALASKA, this first day of April, 1992.

John J. Williams

John J. Williams, Mayor

ATTEST:

Carol L. Freas

Carol L. Freas, City Clerk

(3/26/92)
clf

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: VICTORIA ASKIN
TITLE:
ADDRESS: PO BOX 178
CITY: KENAI ZIP: 99611
PHONE: 283-5129
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I STRONGLY SUPPORT THE PASSAGE OF HB540 FOR THE ECONOMY OF THE KENAI PENINSULA. THE FAILURE OF THIS BILL COULD RESULT IN LOSING A LARGE PORTION OF OUR TAX BASE WITH AN ADDITIONAL DRAIN PUT ON THE UNEMPLOYMENT AND WELFARE SYSTEM. AGAIN, I STRONGLY URGE YOU TO VOTE YES ON HB540.

POMID: 13154526
DATE: 92/03/26
TIME: 15:45:26
LIONAME: SOLDOTNA LIO

COPIES:	REPRESENTATIVES	REPRESENTATIVES	SENATOR
	DONLEY	ELLIS	FISCHER
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	IVAN	LEMAN	
	LINCOLN	MOYER	
	ZAWACKI	BAKER	
	C.DAVIS	FOSTER	
	NAVARRE	G.PHILLIPS	
	TAYLOR		

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: CHER E KENT
TITLE:
ADDRESS: BOX 636
CITY: KENAI ZIP: 99611
PHONE: 283-5129
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: PLEASE VOTE YES FOR THIS IMPORTANT ISSUE. I SUPPORT IT WHOLEHEARTEDLY

POMID: 13155526
DATE: 92/03/26
TIME: 15:55:26
LIONAME: SOLDOTNA LIO

COPIES:	REPRESENTATIVES	REPRESENTATIVES	SENATOR
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	LINCOLN	MOYER	
	ZAWACKI	BAKER	
	C.DAVIS	FOSTER	
	NAVARRE	G.PHILLIPS	
	TAYLOR	KUBINA	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: LINDA WHITE
TITLE:
ADDRESS: PO BOX 7453
CITY: NIKISKI ZIP: 99635
PHONE: 283-5129
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I AM IN SUPPORT OF HB540. BY NOT EXTENDING THIS BILL, UNDUE AND UNNECESSARY HARDSHIPS TO MANY ENTITIES WILL OCCUR. HARDSHIPS TO NOT ONLY INDUSTRY BUT TO GOOD SAMARITAN VOLUNTEER ORGANIZATIONS WILL OCCUR. TRAINED, KNOWLEDGEABLE VO LUNTEERS ARE A NECESSITY TO A VIABLE RESPONSE, AS ARE RESPONSE ACTION CONTRACTS THEMSELVES.

POMID: 13160232
DATE: 92/03/26
TIME: 16:02:32
LIONAME: SOLDOTNA LIO

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	IVAN	LEMAN	
	LINCOLN	MOYER	
	ZAWACKI	BAKER	
	C.DAVIS	NAVARRE	
	G.PHILLIPS	TAYLOR	
	FOSTER		

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: GEORGIA POYNER
TITLE:
ADDRESS: BOX 7397
CITY: NIKISKI ZIP: 99635
PHONE: 283-4304
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I SUPPORT THE PASSAGE OF HB540. COMPANIES LIKE TESORO ARE THE BACKBONE OF THE KENAI PENINSULA. LET'S NOT FINANCIALLY BURDEN THEM ANY FURTHER.

POMID: 13162122
DATE: 92/03/26
TIME: 16:21:22
LIONAME: SOLDOTNA LIO

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	PARNELL	CARNEY	
	DAVIDSON	FINKELSTEIN	
	IVAN	LEMAN	
	LINCOLN	MOYER	
	ZAWACKI		

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: JACKIE ANSOTEGUI
TITLE:
ADDRESS: BOX 3315
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-8405
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I URGE YOU TO SUPPORT THIS BILL. THANK YOU.

POMID: 13092708
DATE: 92/03/27
TIME: 09:27:08
LIONAME: SOLDOTNA LIO

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IVAN	
LEMAN	
LINCOLN	
MOYER	
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: SHEILA WEST
TITLE:
ADDRESS: PO BOX 82882
CITY: FAIRBANKS ZIP: 99708
PHONE: 474-8073
BILL NO:
SUBJECT: CHILD CARE GRANTS
MESSAGE: FULL FUNDING OF THE CHILD CARE GRANTS IS URGENTLY NEEDED. NO CUTS TO CHILDRENS PROGRAMS ARE ACCEPTABLE, WHILE OTHER AREAS SUCH AS TOURISM ARE GETTING MILLION DOLLAR INCREASES. PLEASE SHOW US WITH YOUR BUDGET - WHO'S FOR KIDS AND WHO'S JUST KIDDING. EOM

POMID: 07092158
DATE: 92/03/27
TIME: 09:21:58
LIONAME: FAIRBANKS LIO

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R.PHILLIPS	SHARP	STURGULEWSKI
TAYLOR	ULMER	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: SUSAN CASWELL
TITLE:
ADDRESS: BOX 3238
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-9554
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I URGE YOU TO SUPPORT THIS BILL.

POMID: 13092423
DATE: 92/03/27
TIME: 09:24:23
LIONAME: SOLDOTNA LIO

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CARNEY	
DAVIDSON	
FINKELSTEIN	
IVAN	
LEMAN	
LINCOLN	
MOYER	
ZAHACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: CAROLYN PRINCE
TITLE:
ADDRESS: BOX 1087
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4214
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I URGE YOU TO SUPPORT THIS BILL

POMID: 13092607
DATE: 92/03/27
TIME: 09:26:07
LIONAME: SOLDOTNA LIO

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LINCOLN	
MOYER	
ZAHACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: JANNA PRESTON
TITLE:
ADDRESS: 2700 WEST 34TH AVENUE
CITY: ANCHORAGE ZIP: 99517
PHONE: 248-5399
BILL NO: SB 157
SUBJECT: OPTOMETRISTS: AUTHORIZED PRACTICES
MESSAGE: HB 336: PLEASE SUPPORT THE OPTOMETRY BILL. /JSM

POMID: 03085620
DATE: 92/03/27
TIME: 08:56:20
LIONAME: ANCHORAGE LIO

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MOYER	NAVARRE	RODEY
PARNELL	G.PHILLIPS	SHULTZ
R.PHILLIPS	SHARP	STURGULEWSKI
TAYLOR	ULMER	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: SHARON LOOSLI
TITLE:
ADDRESS: BOX 935
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-4052
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I URGE YOU TO SUPPORT THIS BILL.

POMID: 13091426
DATE: 92/03/27
TIME: 09:14:26
LIONAME: SOLDOTNA LIO

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NAVARRE	
CARNEY	
DAVIDSON	
FINKELSTEIN	
IVAN	
LEMAN	
LINCOLN	
MOYER	
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: SUSAN LACEY
TITLE:
ADDRESS: BOX 1005
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-9256
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I SUPPORT HB540 AND I WOULD LIKE YOU TO DISTRIBUTE THE LIABILITY EVENLY.

POMID: 13082144
DATE: 92/03/27
TIME: 08:21:44
LIONAME: SOLDOTNA LIO

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DONLEY	ELLIS
FINKELSTEIN	FOSTER
GONZALES	GRUENBERG
GRUSSENDORF	HANLEY
IVAN	JACKO
KOPONEN	KUBINA
LARSON	LEMAN
LINCOLN	MACKIE
MACLEAN	MARTIN
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MOYER	NAVARRE
PARNELL	G.PHILLIPS
R.PHILLIPS	SHARP
TAYLOR	ULMER
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE HUDSON

NAME: VAL ISCHI
TITLE:
ADDRESS: 604 LAUREL DRIVE
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-3835
BILL NO: HB 540
SUBJECT: CIVIL LIABILITY FOR OIL SPILLS
MESSAGE: I AM IN SUPPORT OF HB540.

POMID: 13085213
DATE: 92/03/27
TIME: 08:52:13
LIONAME: SOLDOTNA LIO

COPIES:

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NAVARRE	FISCHER
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DAVIDSON	
FINKELSTEIN	
IVAN	
LEMAN	
LINCOLN	
MOYER	
ZAWACKI	

TO: Bill Hudson DATE: 3-28-92

Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

FROM: Micheal & Claudia Ussery
1508 Cara Loop
Anchorage, Alaska 99515

SUBJECT: House Bill 540 - Responder Immunity

I support HB 540, which was introduced in February, as a means to solve the issue of responder immunity. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency responders in Alaska. I urge you to work for a scheduled hearing of this bill, if it has not already been scheduled, and for passage of HB 540.

I am employed by Tesoro Petroleum. Tesoro contributes approximately 55% of the costs of the Cook Inlet Spill Prevention & Response, Inc. ("CISPRI"); has a total payroll of approximately $20 million; is the third largest taxpayer in the Kenai Peninsula Borough; and has contributed a large amount of money and employee time over the years to charitable organizations and public concerns. It was the first refiner to process a barrel of Alaska North Slope Crude on August 8, 1977. A shut down in crude supply last year was avoided by the passage of HB 196, which was passed for one year. HB 196 expires June 30, 1992.

Thank you for your attention and support of HB 540.

FAX MEMO

TO: House of Representatives Resource Committee
Cliff Davidson, Georgianna Lincoln, Pat Carney, David Finkelstein, Bill Hudson, Ivan Ivan and Tom Moyer
FAX (907)465-3444

FROM: Tiny Schasteen
Unalaska, Alaska

DATE: March 27, 1992

SUBJECT: House Bill 540

The purpose of this memo is to request your help in protecting the environment of Unalaska and the entire State.

As I understand HB 540 it's goal is to prevent a spill responder who responds to an oil spill from being held liable for the entire spill.

Currently if You or I attempt to cleanup a spill we will be held responsible for that spill even if we had nothing to do causing the spill. This makes it impossible for anyone, including a "Good Samaritan", from cleaning up any oil spill not caused by them.

Three months ago there was a 12,000 gallon spill in Unalaska to which I dispatched men and equipment. The company I manage has born all the costs for this cleanup even we had nothing to do with causing the spill. In fact the spill was all the way across town, in a different bay. The owners of my company didn't have a problem with the costs incurred, however due to the fact that when we responded to this spill we accepted FULL RESPONSIBILITY for this spill, I have been instructed not to respond to any spill not caused by our company.

This is totally unacceptable! If HB 540 does not pass, it will prevent people with good intent, like myself, from trying to clean up spills they are not responsible for.

IF HB 540 DOES NOT PASS IT WILL BE AN ENVIRONMENTAL DISASTER TO RIVAL THE EXXON VALDEZ!

TO: Bill Anderson

Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

DATE: 3 April 92

FROM: Christa L. St Jeanning
HC02 Box 7545
Palmer Alaska 99645

SUBJECT: House Bill 540 - Responder Immunity

I support HB 540, which was introduced in February, as a means to solve the issue of responder immunity. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency responders in Alaska. I urge you to work for a scheduled hearing of this bill, if it has not already been scheduled, and for passage of HB 540.


We don't need a State Tax

TO: Representative Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

DATE: 4-01-92

FROM: John W Reed
6471 Askeland Dr.
Anchorage AK 99507

SUBJECT: House Bill 540 - Responder Immunity

I support HB 540, which was introduced in February, as a means to solve the issue of responder immunity. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency responders in Alaska. I urge you to work for a scheduled hearing of this bill, if it has not already been scheduled, and for passage of HB 540.

TO: Bill Hudson DATE: 4-8-92

Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

FROM: Curt Rudd
Box 111483
ANC 99511

SUBJECT: House Bill 540 - Responder Immunity

I support HB 540, which was introduced in February, as a means to solve the issue of responder immuni[illegible]. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency responders in Alaska. I urge you to work for a scheduled hearing of this bill, if it has not already been scheduled, and for passage of HB 540.

Curt Rudd

TO: Bill Hudson

Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

DATE: 4-6-92

FROM: DALE GRETH
2411 S FNTRY # 1105
ANC 99508

SUBJECT: House Bill 540 - Responder Immunity

I support HB 540, which was introduced in February, as a means to solve the issue of responder immunity. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency responders in Alaska. I urge you to work for a scheduled hearing of this bill, if it has not already been scheduled, and for passage of HB 540.

Dale Greth

To: Bill HUDSON

Date: 4-5-92

Alaska State Legislature
State capitol
Juneau,Alaska 99801

From: BILL FALLAGARO
1403 NUNAKA DR
ANC 99504

Subject: House Bill 540-Responder Immunity

I support HB 540,which was introduced in February as a means to solve the issue of responder immunity. I believe the legislation is appropriate and that the responders in the state (such as CISPRI) should be granted immunity similar to that already provided other emergency respondes in Alaska. I urge you to work for ascheduled hearing of this bill,if it has not already been scheduled,and for passage of HB 540. In these very troubled times we're experiencing,what we do not need at this time is to run a prospering company such as Tesoro,out of business.Tesoro employs approximately 575 people in Alaska. I am fortunate to be one of the 575. Tesoro contributes approximately 55% of the costs of the Cook Inlet Spill Prevention and Response Inc., Is the third largest taxpayer in the Kenai Penninsula Borough, and has contributed a large amount of money and employee time over the years to charitable organizations and public concerns. I appreciate your immediate attention concerning HB 540. Thankyou.

William Fallagaro

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.

****

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.

****

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.

****

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.

****

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		✔					✔	

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

OIL SPILL RESPONSE ACTION CONTRACTORS

Summary of

A REPORT
To The
ALASKA STATE LEGISLATURE
SEVENTEENTH LEGISLATURE - SECOND SESSION
1992

Prepared By

The Citizens' Oversight Council
On Oil and Other Hazardous Substances
Pursuant to Section 11 of HB 196 (Ch. 92 SLA 1991)

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RECOMMENDATION #7: The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.

Problem Identified: There has been a substantial increase in spill response preparedness for the TAPS tanker traffic in Prince William Sound since the Exxon Valdez spill. However, for reasons which appear to relate to fear of liability for potential damages due to spills, there has been a confusing juggling of the parties who actually bear the legal responsibility for spill response efforts. The result is a commendable supply of equipment and personnel but very little, if any, clear duty to deploy it.

Rationale: The Trans-Alaska Pipeline Authorization Act provided that parties responsible for a spill related to TAPS are strictly liable for damages. However, Congress separately imposed upon the pipeline right-of-way holders the duty to respond to pollution. Congress' goal was to eliminate uncertainty in critical initial response without necessarily forcing the responder to simultaneously acquire all liability for the damages resulting from that pollution. Alyeska Pipeline Service Company is the operator of the TAPS and has also been designated by the pipeline right-of-way holders as their agent. Accordingly, Alyeska submitted for years contingency plans for spills throughout the pipeline, including in Prince William Sound.

After the Exxon Valdez spill, Alyeska has taken the position that it will not submit or hold a contingency plan, but rather is a volunteer response action contractor for spills from the tankers. For many reasons recited to the Council in public comment, Alyeska is significantly different from other response action contractors. Alyeska's self-denomination as a response action contractor has resulted in the anomaly that the central figure for response, Alyeska, which has all the response equipment (indirectly paid in part by the state) has no legal obligation to respond to a spill. However well-intentioned Alyeska may be in its plans to respond, there is insufficient assurance for the public that a response will occur and that there will be no confusion generated from Alyeska's mandatory 72 hour hand-off of the response to the spiller or contingency plan holder. Therefore, in order to maximize effective response in a region of grave risk, the Council believes that Alyeska, as the operator of TAPS, should have a clear duty to control and remove pollution related to TAPS crude in Prince William Sound.

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

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sufficient to cover some portion of the response action contractor's liability. CISPRI, for instance, requires its members to show at least $10 million in insurance.

D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS

This category of response action contractors is comprised of the oil industries' own efforts to provide spill response for its own or related activities which could result in oil spills. The chief example is Alyeska Pipeline Service Company.

Alyeska was formed by seven pipeline companies, all subsidiaries of parent oil companies, to be the agent for these companies in operating the Trans-Alaska Pipeline System (TAPS). In 1974, Congress passed the Trans-Alaska Pipeline Authorization Act (TAPAA) which set out the terms and requirements for the construction and operation of the TAPS. The TAPS operators also developed right-of-way agreements with both the state and federal governments. The Act and the agreements set out the terms and conditions upon which the TAPS right-of-way holders may operate.

Although Alyeska calls itself a response action contractor or a "volunteer" (see Alyeska letter of November 20, 1991) in providing spill response services in Prince William Sound and Port Valdez, Alyeska differs from the other categories of response action contractors in many respects. Alyeska, unlike the independent operators or industry spill response organizations, is not a separate entity established to conduct or perform some facet of spill response. Alyeska is fully engaged in other aspects of oil industry activity, as well as operating its response services activities (called "Ship Escort / Response Vessel System" or "SERVS"). Alyeska, also unlike the other types of responders, is a contingency plan holder itself for its own activities along the pipeline and at the Valdez Marine Terminal. Because of these activities, Alyeska is also (again, unlike the other categories of responders) a potential oil spiller.

In its current arrangement with the oil tanker owners and operators calling on the Valdez Marine Terminal, Alyeska has required detailed, complex, and sophisticated contracts before Alyeska will respond to a spill. Once a contract is signed, Alyeska will respond as a contractor, within the designated contract limits, to a spill in Prince William Sound (to Hinchinbrook Entrance) or to a spill in Port Valdez or at the terminal. Alyeska's response in the Sound is limited to the initial 72 hours, after which Alyeska hands over the spill response to the spiller. At the Valdez Marine Terminal, Alyeska holds an oil spill contingency plan for response. However, in that current plan, Alyeska states that "a spill from a tanker is not the responsibility of Alyeska," but that Alyeska will provide response services solely as a response action contractor.

Alyeska's contract to provide spill response services for tankers transiting Prince William Sound include several noteworthy provisions not found in the contracts of other types of response action contractors. First, Alyeska's contract is the only one to explicitly limit response services to an expressed time (the first

72 hours). Second, Alyeska's contract may be terminated on short notice (i.e., no services may be provided) for several listed reasons. Third, Alyeska requires a bond in excess of $1 billion from the tankers for which it provides services. And fourth, Alyeska is the only response action contractor to require complete indemnification from liability for its own actions from the tanker owners and operators, including from its own failure to perform.

As of January, 1992, six companies have response action contracts with Alyeska for tankers operating in Prince William Sound: Arco Marine, Inc., Exxon Shipping Company, BP Oil Shipping Company, U.S.A., Chevron U.S.A., Amerada Hess Corporation, and Tesoro Alaska Petroleum Company. Each of these companies, in turn, has agreements for spill response with tanker owners or operators. Approximately 51 tankers visit the Valdez Marine Terminal on a routine basis. 21 tanker contingency plans to cover these 51 tankers have been conditionally approved by the Department of Environmental Conservation.

Exxon Shipping Company, Arco Marine, Inc., and Chevron U.S.A. hold the contingency plans for tankers they own or operate. The remaining contingency plans are held by tanker owners or operators. All of these plans rely on Alyeska as the initial response action contractor by virtue of Alyeska's response action contracts with the six companies listed above. For example, BP Oil Shipping Company, U.S.A., enters into a contract with Alyeska for Alyeska to be a response action contractor for tankers chartered by BP Oil Shipping. BP Oil Shipping simultaneously enters into a contract with the tank vessel owner or operator in which BP Oil Shipping agrees to handle spill response for that tank vessel. The tank vessel owner or operator submits a contingency plan for state approval that designates Alyeska (through Alyeska's response action contract with BP Oil Shipping) as its principal response action contractor for the first 72 hours following a spill. After 72 hours, either BP Oil Shipping or a combination of BP Oil Shipping and the tanker owner or operator assumes control of the spill response. A chart setting out the Prince William Sound tanker contingency plan coverage is attached as Appendix E.

VI. THE EFFECTS ON DAMAGES RECOVERY IF RESPONSE ACTION CONTRACTOR LIABILITY IS LIMITED

In order to determine whether limiting response action contractor liability is good policy, it is necessary to look at the effects such a limitation would have on the ability of injured parties to recover damages and on the public's ability to count on an effective and timely field response. This section of the report will analyze the effects on damages recoveries from each category of responder. The next section will address the effects on the field response. The Council will discuss the benefits and detriments to limiting liability and suggest solutions to address the detriments identified.

A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY

All categories of responders have the same theoretical exposure to liability. Under the common law, response contractors have a duty to exercise

1. No contingency plan holder may rely on a contingency plan submitted for approval upon a response action contractor unless that response action contractor is certified;

2. DEC will certify response action contractors for minimum standards of personnel training and to verify the equipment and services the response action contractor offers and to ensure that response action contractors employ generally accepted professional standards and practices;

3. Once a certified response action contractor is listed, with its consent, upon a contingency plan approved by DEC, that response action contractor subjects itself to the orders of the state on-scene coordinator for performance under that particular contingency plan, regardless of the terms of the private contract between the response action contractor and the contingency plan holder that might provide otherwise. Only response efforts meeting this duty will obtain the limited liability benefits;

4. A certified response action contractor must respond, at state direction, to a spill of unknown origin or for which there is no responsible party (with state guarantee of reimbursement to the response action contractor), except that a regional cooperative will not be required to respond outside their region of operation;

5. Unpaid volunteer responders will not be subject to the certification process;

6. DEC will develop the certification program to maximize coastal protection and to enhance regional response capabilities.

D. ALYESKA PIPELINE SERVICE COMPANY

Finally, the Council believes that Alyeska differs significantly from other responders because it is at least arguable, for several reasons, that Alyeska has a duty to respond to and abate pollution relating to the operation of the Trans-Alaska Pipeline and, therefore, is not a response action contractor at all. The Council considered the following factors in reaching this conclusion.

First, 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 outside the right-of-way corridor. 43 U.S.C. 1653 (b). The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska their agent. Other sections of that Act impose liability for the damages caused from that pollution. By separately addressing the duties to pay damages and to remove pollution, it appears that Congress was looking for a single entity to oversee pollution control without that entity simultaneously acquiring all the liability for damages. The pollution removal 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 legislative history of these provisions is not conclusive but generally 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 which imposed the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The court found that Congress clearly established the cleanup requirements without regard to fault.

Second, 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 TAPS crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the 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. 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. Today, as distinct from years prior to the Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor to direct the field response for the first 72 hours. Alyeska's performance is governed by the private response action contracts with the companies which ship oil, most of whom are also members of the TAPS consortium. Some of Alyeska's response action contracts are with contingency plan holders. Others are with intermediaries, such as BP Oil Shipping Company, U.S.A. for vessels it charters. Alyeska does still submit a plan for the pipeline and the Valdez Marine Terminal. However, unlike previous terminal plans, Alyeska now states that it is not responsible for spills of tankers berthed at the terminal.

Third, Alyeska is unlike other response action contractors [illegible] the pipeline companies include the entire costs of spill response in their expenses. 25% of these expenditures are paid by the state through reduced tax revenues. No other category of response action contractor has state financial participation. Furthermore, the vast majority of those response 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 rather than on-shore pipeline spills. If Alyeska is solely a volunteer in marine response efforts, the state, despite its 25% share of response costs, 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 has to rely solely on Alyeska's volunteerism and good faith.

Fourth, Alyeska is physically the hub of all pipeline related activities, unlike other responders which engage in no activities other than response in other regions of the state. Alyeska prescribes tanker operations in its Port Information Manual as the conditions under which tankers may call at the terminal. A tanker's breach of the Manual even excuses Alyeska from performance as a response action contractor.

Fifth, Alyeska essentially occupies a monopoly position in spill response for Prince William Sound. Alyeska has amassed an exemplary spill response operation for which each shipper has paid and continues to pay through tariff costs. Yet, Alyeska unilaterally establishes the terms under which it will provide the service. It would be virtually impossible for these shippers to finance a separate cooperative organization in which they might have a voice on operations, since they would still have to be paying for Alyeska's SERVS operation through tariff rates.

Sixth, Alyeska differs from other responders in the terms of its limited 72 hour response and mandated transition provisions. During the most critical period of response, key personnel will be preoccupied with bringing in and transferring duties to new people.

And finally, as a practical matter, there is considerable confusion about who prepares, submits, and implements contingency plans for the Trans-Alaska Pipeline tankers transiting Prince William Sound. In some cases, there are successive response action contractors and agents (like Alyeska and BP) directing the response, but the only entity the state can actually direct is a distant tanker company (see Appendix E). At best, this system is confusing and lacks a clear line of authority in response. At worst, this system provides no legal assurance that the entity with the spill response equipment (i.e., Alyeska) has a duty to or will indeed respond.

For all of these reasons, the Council recommends that there should be a clear response entity for crude oil traffic in Prince William Sound. This will reduce administrative burdens, clarify field response, reduce confusion in transition requirements, and offer legal assurance, rather than a hope and a promise, that response will occur. The parties responsible for the spill will remain strictly liable for all the damages caused by the spill, but the duty to respond to and to remove the oil will not be spread out confusingly among all those potentially also liable for damages.

Although it is beyond the scope of this report to fully address this topic, the Prince William Sound situation highlights the need to consider whether the state might be better served by a more regionalized approach to spill response. Rather than a system of multiple contingency plans implemented individually, there could be regional cooperatives which would handle all spills in their regions. That cooperative could hold the general contingency plan for spills in

that region, with only individual facility or tanker differences treated separately. The cooperative's only obligation is to the state to adhere to the cooperative's contingency plan. It would not be liable for the damages caused by the spill. DEC would have significantly fewer plans to review and would not have to get involved in checking private contractual arrangements to see if response performance is assured. DEC could also inspect and drill in a far more efficient and focussed manner.

VIII. CONCLUSION

The Council concludes that, on balance, there is a public benefit to granting response action contractors limited liability in order to encourage aggressive spill response. However, just as the response action contractors desire an assurance that they will not face damages liability exposure, the public deserves the assurance that, indeed, an aggressive response will occur, as promised. The current system rests in large part on "volunteerism" and private contracts. Without disputing the good faith of that "volunteerism", there must be more certainty in spill response.

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

OIL SPILL RESPONSE ACTION CONTRACTORS

Summary of

A REPORT
To The
ALASKA STATE LEGISLATURE
SEVENTEENTH LEGISLATURE - SECOND SESSION
1992

Prepared By

The Citizens' Oversight Council
On Oil and Other Hazardous Substances
Pursuant to Section 11 of HB 196 (Ch. 92 SLA 1991)

****

RECOMMENDATION #7: The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.

Problem Identified: There has been a substantial increase in spill response preparedness for the TAPS tanker traffic in Prince William Sound since the Exxon Valdez spill. However, for reasons which appear to relate to fear of liability for potential damages due to spills, there has been a confusing juggling of the parties who actually bear the legal responsibility for spill response efforts. The result is a commendable supply of equipment and personnel but very little, if any, clear duty to deploy it.

Rationale: The Trans-Alaska Pipeline Authorization Act provided that parties responsible for a spill related to TAPS are strictly liable for damages. However, Congress separately imposed upon the pipeline right-of-way holders the duty to respond to pollution. Congress' goal was to eliminate uncertainty in critical initial response without necessarily forcing the responder to simultaneously acquire all liability for the damages resulting from that pollution. Alyeska Pipeline Service Company is the operator of the TAPS and has also been designated by the pipeline right-of-way holders as their agent. Accordingly, Alyeska submitted for years contingency plans for spills throughout the pipeline, including in Prince William Sound.

After the Exxon Valdez spill, Alyeska has taken the position that it will not submit or hold a contingency plan, but rather is a volunteer response action contractor for spills from the tankers. For many reasons recited to the Council in public comment, Alyeska is significantly different from other response action contractors. Alyeska's self-denomination as a response action contractor has resulted in the anomaly that the central figure for response, Alyeska, which has all the response equipment (indirectly paid in part by the state) has no legal obligation to respond to a spill. However well-intentioned Alyeska may be in its plans to respond, there is insufficient assurance for the public that a response will occur and that there will be no confusion generated from Alyeska's mandatory 72 hour hand-off of the response to the spiller or contingency plan holder. Therefore, in order to maximize effective response in a region of grave risk, the Council believes that Alyeska, as the operator of TAPS, should have a clear duty to control and remove pollution related to TAPS crude in Prince William Sound.

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

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sufficient to cover some portion of the response action contractor's liability. CISPRI, for instance, requires its members to show at least $10 million in insurance.

D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS

This category of response action contractors is comprised of the oil industries' own efforts to provide spill response for its own or related activities which could result in oil spills. The chief example is Alyeska Pipeline Service Company.

Alyeska was formed by seven pipeline companies, all subsidiaries of parent oil companies, to be the agent for these companies in operating the Trans-Alaska Pipeline System (TAPS). In 1974, Congress passed the Trans-Alaska Pipeline Authorization Act (TAPAA) which set out the terms and requirements for the construction and operation of the TAPS. The TAPS operators also developed right-of-way agreements with both the state and federal governments. The Act and the agreements set out the terms and conditions upon which the TAPS right-of-way holders may operate.

Although Alyeska calls itself a response action contractor or a "volunteer" (see Alyeska letter of November 20, 1991) in providing spill response services in Prince William Sound and Port Valdez, Alyeska differs from the other categories of response action contractors in many respects. Alyeska, unlike the independent operators or industry spill response organizations, is not a separate entity established to conduct or perform some facet of spill response. Alyeska is fully engaged in other aspects of oil industry activity, as well as operating its response services activities (called "Ship Escort / Response Vessel System" or "SERVS"). Alyeska, also unlike the other types of responders, is a contingency plan holder itself for its own activities along the pipeline and at the Valdez Marine Terminal. Because of these activities, Alyeska is also (again, unlike the other categories of responders) a potential oil spiller.

In its current arrangement with the oil tanker owners and operators calling on the Valdez Marine Terminal, Alyeska has required detailed, complex, and sophisticated contracts before Alyeska will respond to a spill. Once a contract is signed, Alyeska will respond as a contractor, within the designated contract limits, to a spill in Prince William Sound (to Hinchinbrook Entrance) or to a spill in Port Valdez or at the terminal. Alyeska's response in the Sound is limited to the initial 72 hours, after which Alyeska hands over the spill response to the spiller. At the Valdez Marine Terminal, Alyeska holds an oil spill contingency plan for response. However, in that current plan, Alyeska states that "a spill from a tanker is not the responsibility of Alyeska," but that Alyeska will provide response services solely as a response action contractor.

Alyeska's contract to provide spill response services for tankers transiting Prince William Sound include several noteworthy provisions not found in the contracts of other types of response action contractors. First, Alyeska's contract is the only one to explicitly limit response services to an expressed time (the first

72 hours). Second, Alyeska's contract may be terminated on short notice (i.e., no services may be provided) for several listed reasons. Third, Alyeska requires a bond in excess of $1 billion from the tankers for which it provides services. And fourth, Alyeska is the only response action contractor to require complete indemnification from liability for its own actions from the tanker owners and operators, including from its own failure to perform.

As of January, 1992, six companies have response action contracts with Alyeska for tankers operating in Prince William Sound: Arco Marine, Inc., Exxon Shipping Company, BP Oil Shipping Company, U.S.A., Chevron U.S.A., Amerada Hess Corporation, and Tesoro Alaska Petroleum Company. Each of these companies, in turn, has agreements for spill response with tanker owners or operators. Approximately 51 tankers visit the Valdez Marine Terminal on a routine basis. 21 tanker contingency plans to cover these 51 tankers have been conditionally approved by the Department of Environmental Conservation.

Exxon Shipping Company, Arco Marine, Inc., and Chevron U.S.A. hold the contingency plans for tankers they own or operate. The remaining contingency plans are held by tanker owners or operators. All of these plans rely on Alyeska as the initial response action contractor by virtue of Alyeska's response action contracts with the six companies listed above. For example, BP Oil Shipping Company, U.S.A., enters into a contract with Alyeska for Alyeska to be a response action contractor for tankers chartered by BP Oil Shipping. BP Oil Shipping simultaneously enters into a contract with the tank vessel owner or operator in which BP Oil Shipping agrees to handle spill response for that tank vessel. The tank vessel owner or operator submits a contingency plan for state approval that designates Alyeska (through Alyeska's response action contract with BP Oil Shipping) as its principal response action contractor for the first 72 hours following a spill. After 72 hours, either BP Oil Shipping or a combination of BP Oil Shipping and the tanker owner or operator assumes control of the spill response. A chart setting out the Prince William Sound tanker contingency plan coverage is attached as Appendix E.

VI. THE EFFECTS ON DAMAGES RECOVERY IF RESPONSE ACTION CONTRACTOR LIABILITY IS LIMITED

In order to determine whether limiting response action contractor liability is good policy, it is necessary to look at the effects such a limitation would have on the ability of injured parties to recover damages and on the public's ability to count on an effective and timely field response. This section of the report will analyze the effects on damages recoveries from each category of responder. The next section will address the effects on the field response. The Council will discuss the benefits and detriments to limiting liability and suggest solutions to address the detriments identified.

A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY

All categories of responders have the same theoretical exposure to liability. Under the common law, response contractors have a duty to exercise

1. No contingency plan holder may rely on a contingency plan submitted for approval upon a response action contractor unless that response action contractor is certified;

2. DEC will certify response action contractors for minimum standards of personnel training and to verify the equipment and services the response action contractor offers and to ensure that response action contractors employ generally accepted professional standards and practices;

3. Once a certified response action contractor is listed, with its consent, upon a contingency plan approved by DEC, that response action contractor subjects itself to the orders of the state on-scene coordinator for performance under that particular contingency plan, regardless of the terms of the private contract between the response action contractor and the contingency plan holder that might provide otherwise. Only response efforts meeting this duty will obtain the limited liability benefits;

4. A certified response action contractor must respond, at state direction, to a spill of unknown origin or for which there is no responsible party (with state guarantee of reimbursement to the response action contractor), except that a regional cooperative will not be required to respond outside their region of operation;

5. Unpaid volunteer responders will not be subject to the certification process;

6. DEC will develop the certification program to maximize coastal protection and to enhance regional response capabilities.

D. ALYESKA PIPELINE SERVICE COMPANY

Finally, the Council believes that Alyeska differs significantly from other responders because it is at least arguable, for several reasons, that Alyeska has a duty to respond to and abate pollution relating to the operation of the Trans-Alaska Pipeline and, therefore, is not a response action contractor at all. The Council considered the following factors in reaching this conclusion.

First, 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 outside the right-of-way corridor. 43 U.S.C. 1653 (b). The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska their agent. Other sections of that Act impose liability for the damages caused from that pollution. By separately addressing the duties to pay damages and to remove pollution, it appears that Congress was looking for a single entity to oversee pollution control without that entity simultaneously acquiring all the liability for damages. The pollution removal 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 legislative history of these provisions is not conclusive but generally 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 which imposed the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The court found that Congress clearly established the cleanup requirements without regard to fault.

Second, 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 TAPS crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the 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. 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. Today, as distinct from years prior to the Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor to direct the field response for the first 72 hours. Alyeska's performance is governed by the private response action contracts with the companies which ship oil, most of whom are also members of the TAPS consortium. Some of Alyeska's response action contracts are with contingency plan holders. Others are with intermediaries, such as BP Oil Shipping Company, U.S.A. for vessels it charters. Alyeska does still submit a plan for the pipeline and the Valdez Marine Terminal. However, unlike previous terminal plans, Alyeska now states that it is not responsible for spills of tankers berthed at the terminal.

Third, Alyeska is unlike other response action contractors, because the pipeline companies include the entire costs of spill response in their tariff expenses. 25% of these expenditures are paid by the state through reduced tax revenues. No other category of response action contractor has state financial participation. Furthermore, the vast majority of those response 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 rather than on-shore pipeline spills. If Alyeska is solely a volunteer in marine response efforts, the state, despite its 25% share of response costs, 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 has to rely solely on Alyeska's volunteerism and good faith.

Fourth, Alyeska is physically the hub of all pipeline related activities, unlike other responders which engage in no activities other than response in other regions of the state. Alyeska prescribes tanker operations in its Port Information Manual as the conditions under which tankers may call at the terminal. A tanker's breach of the Manual even excuses Alyeska from performance as a response action contractor.

Fifth, Alyeska essentially occupies a monopoly position in spill response for Prince William Sound. Alyeska has amassed an exemplary spill response operation for which each shipper has paid and continues to pay through tariff costs. Yet, Alyeska unilaterally establishes the terms under which it will provide the service. It would be virtually impossible for these shippers to finance a separate cooperative organization in which they might have a voice on operations, since they would still have to be paying for Alyeska's SERVS operation through tariff rates.

Sixth, Alyeska differs from other responders in the terms of its limited 72 hour response and mandated transition provisions. During the most critical period of response, key personnel will be preoccupied with bringing in and transferring duties to new people.

And finally, as a practical matter, there is considerable confusion about who prepares, submits, and implements contingency plans for the Trans-Alaska Pipeline tankers transiting Prince William Sound. In some cases, there are successive response action contractors and agents (like Alyeska and BP) directing the response, but the only entity the state can actually direct is a distant tanker company (see Appendix E). At best, this system is confusing and lacks a clear line of authority in response. At worst, this system provides no legal assurance that the entity with the spill response equipment (i.e., Alyeska) has a duty to or will indeed respond.

For all of these reasons, the Council recommends that there should be a clear response entity for crude oil traffic in Prince William Sound. This will reduce administrative burdens, clarify field response, reduce confusion in transition requirements, and offer legal assurance, rather than a hope and a promise, that response will occur. The parties responsible for the spill will remain strictly liable for all the damages caused by the spill, but the duty to respond to and to remove the oil will not be spread out confusingly among all those potentially also liable for damages.

Although it is beyond the scope of this report to fully address this topic, the Prince William Sound situation highlights the need to consider whether the state might be better served by a more regionalized approach to spill response. Rather than a system of multiple contingency plans implemented individually, there could be regional cooperatives which would handle all spills in their regions. That cooperative could hold the general contingency plan for spills in

that region, with only individual facility or tanker differences treated separately. The cooperative's only obligation is to the state to adhere to the cooperative's contingency plan. It would not be liable for the damages caused by the spill. DEC would have significantly fewer plans to review and would not have to get involved in checking private contractual arrangements to see if response performance is assured. DEC could also inspect and drill in a far more efficient and focussed manner.

VIII. CONCLUSION

The Council concludes that, on balance, there is a public benefit to granting response action contractors limited liability in order to encourage aggressive spill response. However, just as the response action contractors desire an assurance that they will not face damages liability exposure, the public deserves the assurance that, indeed, an aggressive response will occur, as promised. The current system rests in large part on "volunteerism" and private contracts. Without disputing the good faith of that "volunteerism", there must be more certainty in spill response.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ *1031 W 4th AVENUE SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☒ *P.O. BOX K— STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 24, 1992

Hon. Bill Hudson
House of Representatives
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Rep. Hudson:

We are responding to your inquiry of February 18, 1992, concerning several of the issues raised in the recommendations of the Citizens' Advisory Council on Oil and Other Hazardous Substances concerning response action contractors.

With regard to the Council's recommendation number 7, you asked our opinion of whether Alyeska Pipeline Service Company has a duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil. As you know, this issue is the subject of litigation in the Exxon Valdez case. The State has taken the position that under the provisions of the State Right-of-Way Lease Alyeska is required to contain and clean up crude oil spills within state waters, in particular in Prince William Sound. State of Alaska v. Exxon Corp., et. al., Case No. 3AN-89-06852 CI, ¶¶ 36, 96-102 at 13, 31-32. The United States has taken a similar position with respect to the federal right-of-way lease. The State has also alleged that Alyeska's oil spill contingency plan in effect at the time of the spill required them to respond to spills in Prince William Sound. Id. ¶¶ 36, 96-102, 132. The issue of Alyeska's duty to respond to vessel spills in the Sound pursuant to the Trans Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(a) & (b), is not an issue in the state court litigation. This section is, however, at issue in the United States' Exxon Valdez lawsuit. United States of America v. Exxon Corp., et. al., Case No. A91-082 Civ., ¶¶ 41-43, at 10. Since Alyeska disputes any obligation to respond to tanker spills under TAPAA, this obligation, like those described above, would likely be the source of future litigation. *See* Response of Alyeska Pipeline Service Company to Memorandum Regarding the Trans Alaska Pipeline Authorization Act Prepared by Michael J. Frank, at 4. While we believe that our litigation positions are sound, there is no way to reliably predict how a court will rule.

Secondly, you asked whether legislation clarifying Alyeska's duty to respond to vessel spills would affect existing contractual arrangements between Alyeska and the State of Alaska or the federal government. Given the Governments' positions that under these contractual agreements Alyeska is under an existing duty to control and remove oil spills from tankers, legislation clarifying and reaffirming this obligation would not pose a problem to the state.

With regard to which type of response action contractors ("RACs") deserve a grant of limited immunity to encourage response actions, we would defer to the Governor's Office for a policy statement. It is our understanding that the Department of Environmental Conservation is in the process of developing a position on various response action contractor liability issues.

As to your equal protection question, an intelligent response requires scrutiny of the various distinctions made between classes of RACs and the nature of the justifications for making those distinctions. Therefore without a specific proposal in hand it is difficult to make specific judgments. In general, the equal protection test employed under the Alaska Constitution by our State Supreme Court requires a three-step analysis. State v. Anthony, 810 P.2d 155, 157 (Alaska 1991). This "flexible 'sliding scale' test" is as follows:

> First, it must be determined . . . what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . .
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken . . . . At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

Id. (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)). Given that response action contractor immunity is essentially an economic interest, a court is more likely to apply a minimal scrutiny test. Under such a test, the state's purposes must be legitimate and any distinctions drawn by the statute must bear a fair and substantial relationship to the statute's purpose.

We trust that this response is of assistance. Please contact us if we be of further assistance.

Sincerely,

CHARLES E. COLE
Attorney General

By: Craig J. Tillery
for Breck C. Tostevin
Assistant Attorney General

BCT:tg

cc: Hon. Sam Cotten
Alaska Senate

Paul Fuhs
Senior Legislative Liaison
Office of the Governor

Deborah Behr, Assistant Attorney General
Legislation and Regulations Section - Juneau

Craig Tillery, Assistant Attorney General
Environmental Section - Anchorage

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

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

COMMITTEES

CHAIR
House Special Committee on Oil & Gas

MEMBER
Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE
Department of Transportation and Public Facilities

February 19, 1992

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

Dear Mr. Attorney General:

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

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

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

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

Respectfully,

Bill Hudson

Enclosure

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

February 18, 1982

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

Dear Mr. Attorney General:

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

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

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

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

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

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

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

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

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

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

Respectfully,

Bill Hudson

Mike Navarre

Enclosures

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ *1031 W 4th AVENUE SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☒ *P.O. BOX K— STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 24, 1992

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We are responding to your inquiry of February 18, 1992, concerning several of the issues raised in the recommendations of the Citizens' Advisory Council on Oil and Other Hazardous Substances concerning response action contractors.

With regard to the Council's recommendation number 7, you asked our opinion of whether Alyeska Pipeline Service Company has a duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil. As you know, this issue is the subject of litigation in the Exxon Valdez case. The State has taken the position that under the provisions of the State Right-of-Way Lease Alyeska is required to contain and cleanup crude oil spills within state waters, in particular in Prince William Sound. State of Alaska v. Exxon Corp., et. al., Case No. 3AN-89-06852 CI, ¶¶ 36, 96-102 at 13, 31-32. The United States has taken a similar position with respect to the federal right-of-way lease. The State has also alleged that Alyeska's oil spill contingency plan in effect at the time of the spill required them to respond to spills in Prince William Sound. Id. ¶¶ 36, 96-102, 132. The issue of Alyeska's duty to respond to vessel spills in the Sound pursuant to the Trans Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(a) & (b), is not an issue in the state court litigation. This section is, however, at issue in the United States' Exxon Valdez lawsuit. United States of America v. Exxon Corp., et. al., Case No. A91-082 Civ., ¶¶ 41-43, at 10. Since Alyeska disputes any obligation to respond to tanker spills under TAPAA, this obligation, like those described above, would likely be the source of future litigation. *See* Response of Alyeska Pipeline Service Company to Memorandum Regarding the Trans Alaska Pipeline Authorization Act Prepared by Michael J. Frank, at 4. While we believe that our litigation positions are sound, there is no way to reliably predict how a court will rule.

Secondly, you asked whether legislation clarifying Alyeska's duty to respond to vessel spills would affect existing contractual arrangements between Alyeska and the State of Alaska or the federal government. Given the Governments' positions that under these contractual agreements Alyeska is under an existing duty to control and remove oil spills from tankers, legislation clarifying and reaffirming this obligation would not pose a problem to the state.

With regard to which type of response action contractors ("RACs") deserve a grant of limited immunity to encourage response actions, we would defer to the Governor's Office for a policy statement. It is our understanding that the Department of Environmental Conservation is in the process of developing a position on various response action contractor liability issues.

As to your equal protection question, an intelligent response requires scrutiny of the various distinctions made between classes of RACs and the nature of the justifications for making those distinctions. Therefore without a specific proposal in hand it is difficult to make specific judgments. In general, the equal protection test employed under the Alaska Constitution by our State Supreme Court requires a three-step analysis. State v. Anthony, 810 P.2d 155, 157 (Alaska 1991). This "flexible 'sliding scale' test" is as follows:

> First, it must be determined . . . what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . .
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken . . . . At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

Id. (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)). Given that response action contractor immunity is essentially an economic interest, a court is more likely to apply a minimal scrutiny test. Under such a test, the state's purposes must be legitimate and any distinctions drawn by the statute must bear a fair and substantial relationship to the statute's purpose.

We trust that this response is of assistance. Please contact us if we be of further assistance.

Sincerely,

CHARLES E. COLE
Attorney General

By: Craig J Tillery
for Breck C. Tostevin
Assistant Attorney General

BCT:tg

cc: Hon. Sam Cotten
Alaska Senate

Paul Fuhs
Senior Legislative Liaison
Office of the Governor

Deborah Behr, Assistant Attorney General
Legislation and Regulations Section - Juneau

Craig Tillery, Assistant Attorney General
Environmental Section - Anchorage

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

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

COMMITTEES

CHAIR
House Special Committee on Oil & Gas

MEMBER
Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:
Department of Transportation and Public Facilities

February 19, 1992

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

Dear Mr. Attorney General:

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

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

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

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

Respectfully,

Bill

Bill Hudson

Enclosure

Alaska State Legislature
HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

February 18, 1982

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

Dear Mr. Attorney General:

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

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

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

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

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

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

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

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

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

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

Respectfully,

Bill Hudson

Mike Navarre

Enclosures

Summary of

ALYESKA PIPELINE SERVICE COMPANY COMMENTS

ON

IMPROVING LIMITED RESPONDER IMMUNITY

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY

DATE	DESCRIPTION OF COMMENTS	TAB
02/10/92	Citizens' Oversight Council Report (Responder Immunity; State Orders; Tanker Spill Responsibility)	A
02/05/92	Changes to Alveska/Tesoro Agreement After HB 196	B
02/05/92	Alveska Financial Responsibility Requirement	C
02/04/92	Responses to COC Issues (Time Periods for Response Immunity; ADEC Orders; Tanker Spill Responsibility; Financial Responsibility)	D
01/30/92	Improving Good Samaritan Immunity for Oil Spill Response in Alaska (OPA '90 v. HB 196)	E
01/31/92	Oral Presentation to Citizens' Oversight Council	F
01/31/92	PWS Contingency Plan Arrangements Prior to 03/89	G
01/31/92	Vogt Report (Costs of Alyeska's Prevention & Initial Response Services)	H
01/31/92	Straube Report (Imposing Spill Liabilities on RAC's)	I
01/31/92	ADEC Report (Alyeska as a Response Action Contractor)	J
01/31/92	Mertz Report (Responder Immunity Does Not Reduce Spiller Liability; Purpose of Oil Response Funds; Financial Responsibility Requirements; Changes to Tesoro/Alyeska Agreement After HB 196)	K
01/30/92	Frank Report (TAPAA Does Not Require Alyeska to Respond to Vessel Spills)	L

LDW56/cas

- No state requires that response action contractors individually agree, in advance, to accept direct state control and to handle mystery or orphan spills as additional conditions to limited immunity. These conditions will eliminate any hope of general uniformity of liability regimes amongst the various states to better encourage RACs to cross state lines, especially to join in efforts to contain and cleanup major spills.

RECOMMENDATION #7: *The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.*

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.

- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.

- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.

- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.

- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.

****

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512. TELEPHONE (907) 278 1611 TELEX 090 25-127

February 5, 1992

Alyeska Financial Responsibility Requirement

Alyeska operates the Trans Alaska Pipeline System on behalf of seven owner companies. Although none of these pipeline companies own, operate, or charter tankers, Alyeska has contracted to provide prevention and initial response services to tank vessel owners/operators/charterers ("shippers") in Prince William Sound. Shippers are required by state and federal laws to provide for personnel and equipment to escort vessels and to respond to tanker spills in Prince William Sound. Alyeska's prevention and initial response services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope crude oil. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

ADEC has approved the shippers' vessel contingency plans which incorporate Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan ("Plan"). The Plan describes Alyeska's prevention and initial response services. Shippers have also signed an oil spill response services agreement for provision of these services by Alyeska. As a contractual matter, shippers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that any shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of $1 billion, but an insurance alternative in the amount of $1.2 billion is also provided.

The financial responsibility and alternate insurance levels reflect a careful weighing of the risks which Alyeska faces as a responder, even after HB 196 and limited responder immunity passed last year. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and the cost of additional public services. State law likewise imposes liability for removal and

containment costs, civil penalties, damages related to injury to persons, damage to public and private property, and natural resources, and loss of income and economic benefits.

In addition, recall that Exxon has expended roughly $4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ oil spill. Additional third party claims faced by it, and Alyeska exceed $50 billion. Ironically, those who would suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date. and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is $1,200 per gross ton, or $10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of $240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that. to avoid this limitation, plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

Limited exemptions for responders liability for certain damages exist under both federal and state laws. But, there are no limitations for other responder liabilities under federal law. And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, $300, per incident, for each barrel of crude oil storage capacity, or $100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide for private parties to establish financial

responsibility requirements in response services agreements would be unhelpful and inappropriate. It would leave a responder unprotected. On the other hand, to promote more certainty when responders and shippers are negotiating the terms of financial responsibility provisions, the legislature may wish to adopt meaningful limitations of liability under state law.

Alyeska pipeline
SERVICE COMPANY
1835 SOUTH BRAGAW STREET ANCHORAGE, ALASKA 99512 TELEPHONE (907) 278-1611 TELEX 090-25-127

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

Harry R. Bader, Ph.D, Chairman
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: Limited Responder Immunity in Alaska

Dear Chairman Bader:

We appreciate the opportunity to provide additional information to you and the Council prior to your final deliberations regarding the important issue of responder immunity.

1. Time Limit for Response Immunity

You asked for a recommendation on an appropriate time limit for responder immunity during a response to a spill or threat of a spill. The appropriate duration of the limited responder immunity should extend through the entire response as established by the U.S. government and 17 of 24 coastal states plus the Virgin Islands that have considered the issue. The notion of a time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. No matter how remote, an "emergency" certainly exists for any community threatened by the impact of oil. In addition, the uncertainty when a time limit begins and ends following any particular "release," may deter prompt and continuous response action for a spill or a threat of spill.

For example, when will an arbitrary time limit begin and end for a mystery or orphan spill? What is the liability of a responder who responds to the report of a threatened spill only to discover a slow leak with no objective indication of when it started? As the arbitrary time limit draws to a close, won't responders be encouraged to withdraw? Will other responders be encouraged to enter the response at that time to insure continuity of personnel and equipment? What is the justification for an artificial barrier if the responder's immunity is only limited and

the original spiller is still financially responsible for any liability which a responder is relieved from?

Mr. Mertz also describes HB 196's time limit as "arbitrary." Indeed, crisis will certainly reign "far fewer days in some cases and far more in others." Page 34, Mertz report. Even California, which is the only other state to consider an arbitrary time limitation, recognizes that the initial 60 day period may have to be extended. In short, we urge the Council to avoid endorsing unnecessary and troublesome limitations upon federal and state efforts to ensure the availability of ample response resources when spills occur.

2. Classification of Responders

We understand that the Council may recommend that responders be classified according to how they are organized and funded: immunity would evidently be limited for some, more limited for others, and perhaps entirely unavailable in one case. As you know, discrimination amongst citizens, be they private or corporate, always calls for constitutional and other legal reviews to insure that principles of equal protection and fundamental fairness are not lost in government's efforts to regulate society.

Before legal analyses would even be undertaken, however, it seems clear that this responder classification proposal, if accepted by the legislature, would virtually insure that entire groups of responders may be unnecessarily driven out of the business. Again, the challenge we face is to support, not destroy or deter, the federal and state comprehensive oil spill response schemes by encouraging effective, prompt response efforts no matter who provides any type of care, assistance, or advice, so long as it is consistent with those schemes or government orders.

Dr. Bader, there is no rational basis for treating responders differently, particularly because response action should be encouraged from any source at any time throughout a release. Again, the spiller and his insurance will still be responsible for responder liabilities that are shielded by the proposed statute. Even under the exigencies of a spill response, a responder will only enjoy limited immunity; therefore, we can be assured that his actions will reflect that concern.

Finally, our materials also stress that Alaska should join with other states to adopt uniform laws in this area for the additional reason to promote uniformity of implementation and interpretation amongst the federal government and coastal states. This will, of course, encourage responders to cross state lines, and to loan

equipment and personnel, without suffering delays and uncertainties caused by an unwarranted, restrictive, and, possibly, oppressive limited responder immunity provision in Alaska.

3. Response to ADEC Orders

We understand that, as an apparent price to be paid for limited immunity, the Council may recommend that some response organizations be required, in advance, to agree to accept ADEC orders to respond to mystery or orphan spills in their area of operation.

As you may know, the United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This, of course, is one of the purposes to be served by industry-funded oil spill response funds. We are aware of no situation in Alaska where responders have purposefully failed or refused to provide services for the federal or state governments when requested to undertake or complete a spill response. Consequently, what justification is driving this proposal? Is it so important, and the prospects for the "worst case scenario" erroneously described in some reports to COC so imminent, as to require further limitation of responder immunity in our state? What responder will be in a position, in advance, to agree to provide services to the federal or state governments without also having a specific contract which establishes the type and nature of response, location, equipment and personnel needs, costs and billing arrangements, etc.? If a need for them exists, nothing prevents the state or federal government from negotiating those contracts now.

In short, requiring this and additional requirements as part of the price to be paid by responders for limited immunity promises instead to create confusion, uncertainty, and a reluctance to take action when oil spills occur.

4. The Pipeline Owner Companies Are Not Liable for Tanker Spills

We understand that COC may further recommend that the pipeline owner companies, as holders of the federal right of way permit, and Alyeska, as their operating agent, be directed under state law to respond to any tanker spill in Prince William Sound. We have already explained at some length that Mr. Frank's view that TAPAA already imposes such liability is flatly wrong, but we understand that special legislation may be recommended to "clarify" the matter and adopt Mr. Frank's view as a matter of state law.

Our materials explain that Alyeska operates the Trans Alask.. Pipeline System on behalf of seven pipeline companies which own it. None of these own, operate, or charter tankers. Under federal and state law, tanker owners/operators/charterers are responsible for tanker operations, and Alyeska cannot and does not manage or control them. Provision has been made by tanker operators to provide contingency plans and to demonstrate financial responsibility for those operations. In addition to the constitutional and legal issues presented by this proposal, we urge that the Council also recognize that it entirely ignores the comprehensive liability, response, and financial responsibility regime established by Congress and the legislature for tanker operations in our state and elsewhere.

As we have also explained, Alyeska does provide initial response services to tanker owners/operators/charterers, and that this service is described in a plan and in response services agreements. As a contractual matter, tanker owners/operators/charterers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of $1 billion, and Tesoro has been permitted to support its contractual capabilities with a combination of insurance and a corporate guarantee in the total amount of $1.2 billion.

We explained that, after enactment of HB 196 last year, Alyeska created this alternative to its $1 billion financial responsibility requirement. The insurance may consist of $700 million P&I marine insurance coverage for the vessel and $500 million comprehensive general liability coverage that names Alyeska as an additional insured. There is no way that Tesoro could provide a corporate guarantee, bond, or letter of credit, as originally required by Alyeska's financial responsibility standards, for either $1 billion or $1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and the added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

Nonetheless, the Council has indicated that it may view this arrangement as "unreasonable," and is concerned that Alyeska may use limited responder immunity to drive this and other TAPS trade tanker operations "out of business." Nothing could be farther from the truth. Alyeska worked diligently with Tesoro to reach a solution to keep it in business, and we need legislative assistance to keep that solution in place.

Although certainly adjusted in Tesoro case because of a perceived reduction in the risks faced by Alyeska when HB 196 passed, the financial responsibility level reflects a careful weighing of the risks which remain. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and additional public services. State law likewise includes removal and containment costs, civil penalties, and damages related to damage or injury to persons and to public and private property, natural resources, and loss of income and economic benefits. Limited exemptions for responders liability for certain damages exist under both federal and state laws.

In addition, recall that Exxon has expended roughly $4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ spill. Additional third party claims faced by it, and Alyeska exceed $50 billion. Ironically, those who suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is $1,200 per gross ton, or $10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of $240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that. to avoid this limitation,

plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, $300, per incident, for each barrel of crude oil storage capacity, or $100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

On the other hand, to promote more certainty when responders and responsible parties are negotiating the terms of financial responsibility provisions, COC may wish to recommend that the legislature adopt meaningful limitations of liability under state law. If enacted, those limitations would be reflected in Alyeska's financial responsibility requirements.

We trust that this information will be useful as the Council considers what recommendations it will present to the legislature. Please let us know if there is additional information which we can provide to assist those efforts.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: _____
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET ANCHORAGE ALASKA 99512 TELEPHONE (907) 279-1411 TELEX 090 25

January 31, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Coucil on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: Alyeska Comments Regarding Reports Submitted to the Citizens' Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to reports which have been submitted to the Council. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

Larry D. Wood
Senior Attorney - External Affairs

Attachments

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512, TELEPHONE (907) 278-1611

January 31, 1992

Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State Prepared by Deborah Vogt

Summary

This report, as well as several pages of the TAPAA report prepared by Michael J. Frank (pages 34 - 36), is committed in large part to debating whether Alyeska's prevention and initial response services provided to contracting vessel owners/operators/charterers in Prince William Sound are best handled as tariff charges for oil delivered to Valdez or as direct charges to vessels which contract for those services. In addition, the Vogt report contains a considerable amount of mathematical analysis which has not been reviewed for accuracy in the short time available.

Alyeska's November 20, 1991, letter which is attached to the Vogt report, explains at some length how and why the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. However, these services are not being provided pursuant to any common carrier obligations of the TAPS carriers or their agent, Alyeska. Personnel and equipment to escort vessels and to respond to spills in Prince William Sound are required by state and federal laws. In the spring of 1989, using a series of emergency orders and Consent Agreements, the State of Alaska compelled Alyeska to develop and provide a tanker escort system and to greatly increase response equipment and personnel beyond what had been approved in 1987. On November 1, 1990 Alyeska's Prince William Sound contingency plan and the 1989 emergency orders and Consent Agreements expired when the state approved vessel contingency plans, held by the owners or operators of those vessels, as required by AS 46.04.030(c). Those approved vessel contingency plans incorporated Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan, whereby Alyeska, as a response action contractor, is committed to provide certain prevention and initial response services to tankers that have a Response Agreement with Alyeska. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

These services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope ("ANS") crude oil. As a result, the pipeline may continue to carry ANS crude oil, and provide revenues for state services. The practice of including the costs of those services in tariff charges for oil delivered to Valdez is, in fact, an equitable distribution of the costs of those services amongst those who receive them. Finally, the owners of the Trans Alaska Pipeline System are not vessel owners (i.e., shippers). The shipping companies are separate and distinct from the carriers.

Despite Ms. Vogt's suggestion, none of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity interest in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Alyeska's prevention and response resources are available only for vessels in the TAPS trade that have Oil Spill

Response Services Agreements with Alyeska. Under the terms of the vessels' approved contingency plans, those resources must be available in Prince William Sound, ready to respond. There are only a few exceptions to this requirement; for example a small percentage of the response resources may be sent to other areas for oil spill response with prior DEC approval. AS 46.04.030(o). Moreover, the premise that Alyeska, as agent for the holders of the federal pipeline right-of-way, is liable for tanker spills is flatly wrong as explained in Alyeska's comments to the Frank report.

The Federal Energy Regulatory Commission ("FERC") is authorized to determine whether costs that the carriers record should be included in their cost of service and whether those services are reasonable. However, it does not follow that FERC has the authority to decide whether financial responsibility and insurance requirements are appropriate. We are aware of no basis for Ms. Vogt's statement, at page 18, that FERC has such authority.

LDW:vogt/cas

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET ANCHORAGE ALASKA 99512 TELEPHONE 907 278 1011 TELEX 090 25 2

January 31, 1992

MEMORANDUM OF ALYESKA PIPELINE
SERVICES COMPANY REGARDING

THE LEGAL RELATIONSHIP
BETWEEN
OIL SPILL RESPONSE ACTION CONTRACTORS
AND
OTHER PARTIES TO AN OIL SPILL

Alyeska Pipeline Service Company (Alyeska) agrees with Mr. Mertz and Mr. Koester that in imposing liability on oil spill response action contractors (RAC): "The bottom line must involve balancing the need for fair and full compensation for all spill injuries with the need for a liability scheme that does not discourage response action contractors from acting to prevent spill damage." Mertz and Koester report (Report) at page 34. Generally, any public interest in expanding the number of parties who might provide compensation for damages does not outweigh the stronger public interest in encouraging rapid, aggressive response to oil spills. The Citizens' Oversight Council should balance all public interests in making its recommendations to the Legislature regarding whether and to what extent Alyeska should reduce the present limitation on liability for RACs. It should consider that (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Mr. Mertz and Mr. Koester discuss a number of basic legal principles: common law negligence, with special rules for "abnormally dangerous" activities; indemnification and the public duty exception; nondelegable duty; respondeat superior. The Report incorrectly implies that crude oil is a hazardous substance and that the carriage and release of crude oil is an "ultrahazardous" activity. Report at pages 3-6. Only a few activities that involve a risk of serious harm that cannot be eliminated by the exercise of "utmost care" by the parties involved are considered

"ultrahazardous" under Alaska common law. Matomco Oil Company, Inc. v. Arctic Mechanical, Inc., 796 P.2d 1336 (Alaska 1990).

Furthermore, common law legal principles have been developed by federal and state courts through decisions allocating the rights and responsibilities of the parties before them. The obvious conclusion to be drawn from the Report is that it is very difficult to predict what a party's liability may be for any act or failure to act. Legislatures have recognized their duty and responsibility to express public policies by adjusting these principles for categories of potential liability. For example, in response to concerns about rising medical and insurance costs, the Alaska Legislature and other legislatures set limits on liability and reallocated responsibilities for tort damages by eliminating joint and several liability. Similarly and appropriately, the Alaska Legislature correctly limited the liability of RACs.

Alyeska responds to comments and recommendations made in the Report as follows:

1. The limitation on liability for RACs will not prevent the recovery of damages by injured parties. The Report erroneously states that contract provisions and statutory exemptions for RACs reduce the overall liability to such an extent that parties who have been damaged may not be compensated. Report at pages 17, 33 and 34. This simply is not true. First, both the Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills. Second, under both federal and state law, the spiller is strictly liable for damages caused by spills. In fact, the Report acknowledges this by stating that even the common law has placed "a heavy burden, including strict liability, on parties responsible for the safe storage and transportation of oil, and often makes them liable for the acts of employees and contractors." Report at page 9.

Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). The Report states, correctly, that the legislature intended to lay the burden for paying for any damages caused by the RAC on the party responsible for the spill. Report at page 14. As a result of this provision, the responder exemption cannot "lessen" the overall liability burden as the Report asserts at page 18. The exemption is hardly "generous," as characterized by the Report.

The exemption encourages responders to act by assuring them that certain acts will not create liability. Conversely, potential liability would discourage effective response. The Report acknowledges this by stating, "Almost all [RACs] considered the potential for claims to be a concern." Report at page 21.

Similarly, indemnity agreements do not allow parties who are strictly liable to "escape" liability, as the Report asserts at page 18.. Under Alaska law, indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The Report states that "it is possible" that limitations on liability may prevent recovery of damages by parties injured where there is no other financially solvent responsible parties. Report at page 17. Importantly, such a possibility would depend upon state and federal errors in approving evidence of a spiller's financial responsibility to begin with and in administering state and federal funds which exist in part to clean up and to pay for "mystery" and "orphan" spills. Yet, this remote possibility fuels the reports' central premise that RACs should agree to adhere to the state's orders should a spiller and his insurers become simultaneously insolvent. Ironically, the report recognizes that the proposal would probably discourage response action and amount to an unlawful taking of private property. The Report acknowledges the taking issue in its statement at page 33 that requiring RACs to have a direct contractual relationship with the State "would probably be been as an illegal taking and could require compensation to the RAC itself."

Indeed, elevating RACs to the same level of liability as the spiller directly contradicts and defeats the comprehensive framework of state and federal oil spill response laws to, on the one hand, promote quick, effective action, and on the other, rely on spiller liability, financial responsibility, and federal and state industry-supported funds to pay for it. Instead of encouraging response action by imposing limited liability, the report proposal would largely deter or eliminate it by imposing spiller liability on responders in direct defiance of congressional and legislative intent. Remote possibilities should not likewise support the Council's recommendations; we urge that they be supported instead by a careful and realistic weighing of public interests and goals.

The Report also states that "obtaining compensation (from state and federal funds) may be too costly or complicated for the small injured party." Report at page 33. Taking away the limited immunity now provided to RACs will not provide direct compensation to an injured party seeking compensation. Liability would probably only be decided through costly and complicated litigation. A primary goal of the federal fund is to provide people faster, more efficient, compensation than can be gained through litigation.

2. <u>Alyeska agrees with the statement at page 34 of the Report that the 15-day limit on the immunity provided is arbitrary</u>. HB 196's time limit is unrealistic given the nature of oil spill response operations; every spill will be different. So long as

spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it.

3. As a matter of public policy, the liability of an RAC should be limited. An RAC is responding if, and only if, there already has been a spill. Thus, an emergency exists. Under exigent circumstances, all parties, including RACs and governments, should react and respond quickly and efficiently. Principles of negligence do not make sense, and it is difficult for anyone to determine, especially after the fact in a courtroom, what was "reasonable under the circumstances," as the Report implies at page 34.

On March 26, 1991, in addressing the House Resources Committee prior to adoption of House Bill 196, Representative Hudson noted that this bill would shift the liability for simple negligence from an innocent spill response action contractor to the party responsible for the spill. He correctly noted that under this exemption, in responding to a spill, an RAC assumes liability for any damage caused by its own recklessness or gross negligence. The committee also heard testimony from Jon Tillinghast on behalf of Tesoro and Conoco, that Pacific Fisheries Legislative Task Force, the U. S. Coast Guard, the California Sierra Club, the International Bird Rescue Research Center, and the Ventura County Commercial Fishermen's Association have supported RAC exemption provisions. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted virtually identical laws, that provide greater RAC immunity from liability than HB 196.

Later, on April 23, 1991, Representative Hudson commented to the House Judiciary Committee that by being more consistent with the laws of other states and federal law, national and regional RACs would be more inclined to respond to spills in Alaska.

4. The level of competence of an RAC and how it and the plan holder will respond can best be evaluated in advance of a spill by review of the oil discharge prevention and response plan and through DEC's authority to require training programs and spill drills.

5. Parties must be allowed to define their relative rights and responsibilities through contract. The Legislature has authorized limited state review of response action contracts. Regulations drafted by the Alaska Department of Environmental Conservation to implement House Bill 567 will require a plan holder who proposes to use the services of any RACs to (1) identify those RACs, (2) summarize each agreement or contract, and (3) describe the equipment and services to be provided by the RAC. However, the scope of indemnity provisions and the degree of control retained by the spiller are basic provisions that must be negotiated by the contingency plan holder and the RAC, based on circumstances and needs unique to the contracting parties, such as oil spill response

needs; whether the RAC is a full time, private response organization, an oil spill cooperative or a fisherman; and, certainly, the potential liability to which the plan holder is exposed by its operations.

The Report expresses surprise at the diversity among such contracts. Report at page 19. Of course the terms will vary from contract to contract. The contracts must reflect the needs of each party. However, the parties allocate their responsibilities for damages, they cannot avoid their liabilities to third parties and to the State and federal government, as stated in law.

Furthermore, the discussion of contracts, at least insofar as it relates to the two industry co-ops, (Report at page 19) wholly ignores the distinction between industry co-ops and private contractors. Industry co-ops are voluntary organizations of companies that have banded together to amass oil spill response equipment and response capabilities for their mutual benefit and, in the case of one of them, for social welfare purposes.

These co-ops are operated on a non-profit basis, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time. The co-ops are not intended to, and do not, operate in a way that would enable them to accumulate loss reserves or to purchase expensive insurance for their protection. The response action contracts they have adopted are established in their charters or bylaws and cannot be negotiated, at least with respect to indemnity. The terms of the indemnity agreements reflect not so much the business acumen or negotiation strengths of the co-ops as their status as voluntary, non-profit organizations.

In particular, the Report discusses the Alyeska response services agreements and implies that it is inappropriate for Alyeska to require one billion dollars in financial responsibility. Report at page 25. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Alyeska is not an insurer which could otherwise spread the financial burden of a loss amongst a number of insureds; each spiller must demonstrate the wherewithal to pay for all the costs associated with its spill. Particularly, in light of recent changes in the types of claims and variety of damages which can be associated with federal and state oil spill litigation, this financial responsibility requirement is reasonable. In light of the magnitude of claims filed after recent oil spill incidents, this figure is reasonable.

Additionally the Report states that Alyeska has "raised rather than lowered" the financial responsibility requirements for Tesoro. Report at page 25, n. 25. After the legislature limited the liability of RACs, thus reducing the perceived risks associated

with spill response, Alyeska carefully considered the matter and changed the manner in which Tesoro could demonstrate its capability to meet its contractual obligations to Alyeska. After enactment of HB 196, Alyeska created an alternative to its $1 billion financial responsibility requirement. This alternative allows any company to utilize insurance rather than a corporate guarantee. The insurance may consist of $700 million P&I coverage for the vessel and $500 million comprehensive general liability coverage that names Alyeska as an additional insured. Alyeska agreed to allow Tesoro to use the insurance alternative through a combination of marine insurance, comprehensive general liability insurance, and corporate guaranties, as opposed to a pre-existing requirement that it provide a corporate guarantee purely by the availability of cash and other self-worth. There is no way that Tesoro could provide a corporate guarantee, bond or letter of credit, as originally required by Alyeska's financial responsibility standards, for either one or $1 or $1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem <u>after</u> and <u>because</u> HB 196 passed last year -- despite the Report's implications to the contrary. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

6. <u>The same exemption for RACs should be available</u>.

Alyeska's concerns regarding limited immunity for RACs are identical to those expressed in the Report regarding the potential liability of the State or of a municipality for managing a spill response. Report at page 28. The Report acknowledges that the State, municipalities, and villages enjoy limited responder immunity. AS 46.03.822(h). In its discussion of the State's interest in shifting to the another party any potential liability, the Report notes that the State may "attempt to fend off liability from below by requiring RACs it employs to indemnify it for their misdeeds, and it could require indemnification for its own misdeeds." Report at page 28. But private industry has the same concerns. An RAC responding on behalf of industry must be treated the same as a public RAC. The public policy is the same: to encourage responders to respond quickly, aggressively and most effectively under the circumstances.

7. <u>The State should not attempt to exercise direct control over RACs. Through the contingency plan holder the State has sufficient ability to oversee RAC capabilities on behalf of the plan holder</u>. The Report notes that the State's direct authority over plan holders does not extend to authority over RACs. Report at page 31. However, it encourages the State to expand its authority over RACs. Report at page 32. This will not provide more effective spill response. The Report correctly notes that

while the State may have an interest in directing an RAC response to a spill, increases in the regulatory burden will discourage RACs altogether and "State restrictions on RAC contracts could simply result in fewer RACs willing to engage in response action." Report at pages 5, 26.

The Report recommends that RACs be subjected to the same governmental oversight as plan holders. Report at page 35. Such a system would eliminate the incentive of a party to enter into a response action contract, unless the state became a party to the contract and agreed to pay the response costs. This would be a dramatic change in spill response practices.

In conclusion, it is good public policy to encourage those who have the capacity and the skills to help in an emergency to do so. Private parties at risk from oil spill damage are better protected from insolvent spillers by financial responsibility requirements and by federal and state liability funds than by imposing liability on RACs. Reducing incentives to enter into RACs or to form spill cooperatives will only reduce the number of entities willing and able to respond to spills.

Alyeska pipeline
SERVICE COMPANY

635 SOUTH BRAGAW STREET ANCHORAGE, ALASKA 99512 TELEPHONE [illegible]

January 30, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act Memorandum

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to a memorandum by Mr. Michael J. Frank entitled "HB 196 Research Project: Trans Alaska Pipeline Authorization Act." A summary accompanies our remarks. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Attachments

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET ANCHORAGE, ALASKA 99512 TELEPHONE (907) 278-1811 TELEX 090 25

January 30, 1992

Response to Memorandum
Regarding the Trans Alaska Pipeline Authorization Act
Prepared By Michael J. Frank

Summary

The Trans Alaska Pipeline Authorization Act ("TAPAA"), 43 USC 1651 et. seq., makes the owner/operator of a vessel, not Alyeska or the holders of the right-of-way, strictly liable for any oil spill from that vessel in Prince William Sound. This statutory allocation of liability is consistent with other state and federal laws that make the owner/operator of a vessel responsible for responding to and cleaning up oil spills from the vessel.

TAPAA does not require Alyeska to respond to vessel spills, nor does it make Alyeska or the holders of the right-of-way strictly liable for damages caused by such spills. Indeed, the legislative history of TAPAA demonstrates that Congress rejected proposed statutory language that would have made the holders of the right-of-way strictly liable for vessel spills.

LDW43/cas

Memorandum Of Alyeska Pipeline Service Company Regarding Liability Under Trans Alaska Pipeline Authorization Act for Oil Spills From Vessels

Introduction

Alyeska Pipeline Service Company ("Alyeska") has reviewed the January 13, 1992, research project memorandum Michael J. Frank regarding the Trans Alaska Pipeline Authorization Act ("TAPAA"). 43 U.S.C. § 1651 et seq. Alyeska believes that the memorandum incorrectly states Alyeska's position with respect to spills from vessels in Prince William Sound, and that it reaches erroneous legal conclusions regarding Alyeska's liability for vessel spills under TAPAA. Accordingly, Alyeska is submitting this memorandum to the Citizens Oversight Council on Oil and Other Hazardous Substances to correctly state Alyeska's position.

1. Alyeska's Legal Posture Since the T/V EXXON VALDEZ Oil Spill.

Mr. Frank's memorandum asserts, at page 28, that "Since the T/V EXXON VALDEZ oil spill, Alyeska has publicly denied that it has ever been required to respond to a tanker spill of TAPS oil." This is not a correct statement of Alyeska's position.

Alyeska has acknowledged and continues to acknowledge (1) that at the time of the T/V EXXON VALDEZ oil spill, Alyeska had in effect an Oil Spill Contingency Plan that provided that Alyeska would respond to spills of TAPS oil from vessels within Prince William Sound; (2) that Alyeska was obligated to respond in accordance with its Contingency Plan; and (3) that, in light of federal and Alaska law

imposing responsibility for oil spills from vessels on the owner-operator of the vessel, Alyeska was obligated to provide an initial response to a vessel spill until such time as the owner/operator of the vessel arrived on scene and was in a position to assume responsibility for the response. Alyeska's intention to provide an initial response and then hand-off the response effort to the owner/operator of the vessel was approved by the State of Alaska, both in spill drills held before the T/V EXXON VALDEZ incident, and during the response to the T/V EXXON VALDEZ oil spill itself. At the time of the T/V EXXON VALDEZ spill, the ultimate responsibility of the owner/operator of the vessel to respond to vessel spills, to pay for the cleanup of such spills, and to compensate those public and private entities damaged by such spills was well established under both federal and state law. See, e.g., AS 46.03.822 (owner/operator of vessel liable for all public and private damages from oil spills); Clean Water Act, 33 U.S.C. 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); TAPAA, 43 U.S.C. § 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

2. Liability for Vessel Spills Under TAPAA

Mr. Frank's memorandum erroneously suggests that Alyeska and the holders of the right-of-way are strictly liable for vessel spills under TAPAA. As noted above, TAPAA makes the owner/operator of a vessel, rather than Alyeska or the holders of the right-of-way, strictly liable for vessel spills in Prince William Sound. 43 U.S.C. § 1653(c).

Under the comprehensive liability framework created by Congressional

authorization (TAPAA) of a federal grant of rights-of-way across federal land in Alaska for pipeline construction and operation:

1. The right-of-way holders are strictly liable for environmental damages occurring from their activities along or in the vicinity of the pipeline right-of-way.

2. The right-of-way holders must control and remove pollution along or adjacent to the pipeline right-of-way as a result of their activities.

3. Vessel owners and operators carrying oil transported through the pipeline are jointly and severally strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.

4. Under TAPAA, Alyeska and the right-of-way holders are not strictly liable for spills from vessels. The right-of-way holders and Alyeska are not required by TAPAA to cleanup oil spilled from vessels in Prince William Sound.

In oil spill litigation pending in Alaska federal court, Judge Holland has already ruled that, under TAPAA, only the owner or operator of the vessel and the Trans Alaska Pipeline Liability Fund are liable for vessel spills. "Those people strictly liable under TAPAA are the vessel owner and operator, and the Fund." In re Glacier Bay, No. A88-115 Civil (Order Filed July 26, 1991), at 20.

Mr. Frank nevertheless attempts to argue that Alyeska and the holders of the right-of-way are liable for vessel spills under subsections (a) or (b) of Section 1653. His analysis is seriously flawed. Both of these subsections are inapplicable to the discharge of oil from tankers in transit to and from the Valdez terminal.

Subsection (a) imposes strict liability on the holder of the pipeline right-of-way for "damages in connection with or resulting from activities along or in the vicinity of" the right-of-way. Of course, one could argue that, in a literal sense, every vessel spill from a tanker transporting Alaska North Slope crude oil is "in connection with" activities along the right-of- way. But for the activities along the pipeline right-of-way, the vessel could not have been loaded with ANS crude oil. But as the Ninth Circuit has made clear, common sense rather than a literal or mechanical approach must govern interpretation of 1653(a). See Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 873 (9th Cir. 1981). The Court held that although 43 U.S.C. § 1653(a) refers to "damages" generally and appears to be "clear and unambiguous," Congress' clear intent was to cover only environmental damages.

In Heppner, the Court noted that, were the statute construed literally and mechanically, damages from slanders, fights and automobile accidents along the right-of-way would all be encompassed by subsection (a). The Court stated this "raises serious questions whether we should read the strict liability language literally and should give it its broadest possible sweep." 665 F.2d at 873. The Court concluded it should not interpret 43 U.S.C. § 1653 (a) to give it its broadest possible sweep.

The same principles of statutory interpretation apply to determine whether 43 U.S.C. § 1653(a) imposes strict liability on the permit holders for spills from vessels. If vessel spills are "in connection with" activities along the pipeline right-of-way simply because the vessel contained ANS crude that had been transported along the right-of-way, then every vessel spill of ANS crude would be covered by subsection (a) whether it occurred in Prince William Sound, along the coast of British Columbia, or in Puget Sound. Indeed, spills of gasoline from vehicles in Los Angeles might be covered if the gasoline was refined from ANS crude. This was not intended by Congress.

Finally, and perhaps most important, it is an accepted canon of statutory construction that a court should not read the words of one subsection in isolation, but must consider them in context with the rest of the statute. "One provision of a comprehensive statues must be read in the context of the other provisions of the statute and in light of the general legislative scheme." Yamaguchi v. State Farm Mutual Auto Ins. Co., 706 F.2d 940, 948 n.11 (9th Cir. 1983). "The words of a statute must be construed in context and the statutes must be harmonized, both internally and with each other, to the extent possible." Pacific Mutual Life Ins. Co. v. American Guaranty Life Ins. Co., 722 F.2d 1498, 1501 (9th Cir. 1984).

When subsection (a) is read in context with subsection (c), it is apparent that Congress intended subsection (c) to cover vessel spills while subsection (a) was intended to cover environmental damage in and along the right-of-way caused by construction and operation of the pipeline. See Mt. Graham Red Squirrel v. Madigan, F.2d (9th Cir. Jan. 21, 1992) (since Congress dealt with two phases of construction project in two separate sections of statute, Congress clearly intended the two phases to

be treated differently; each section cannot be read in isolation; rather interpretation of each depends on "a reading of the statute as a whole . . . .").

Subsection (b) of Section 1653 provides that the holder of the right-of-way is liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder. . . ." (emphasis added). This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way. Of course, as previously indicated, in a literal sense every vessel spill of ANS crude is in some way connected to activities conducted by the holders of the right-of-way in that, but for the transportation of oil through the pipeline, the vessel never would have been loaded with ANS crude. When subsection (b) is read in context with subsection (c), however, it is apparent that Congress could not have intended this "but for" connection to be sufficient to invoke subsection (b). Mr. Frank's theory would produce the anomalous result that the owner and operator of the vessel would be strictly liable under subsection (c) only for $14 million, while the holders of the right-of-way would be strictly liable without any limits. Given the monetary limits elsewhere in TAPAA, including both subsections (a) and (c), one should not impute to Congress such a bizarre result. See Mt. Graham Red Squirrel v. Madigan, supra (court should not interpret statute in a manner that "makes no sense either practically or as a matter of linguistics").

Mr. Frank's reliance on Alyeska Pipeline Service Co. v. United States, 649 F.2d 831 (U.S.Ct.Cl.), cert. denied, 454 U.S. 964 (1981), is misplaced. That case

held that, under 1653(b), the owners and operator of the Trans-Alaska Pipeline are strictly liable for spills from the pipeline itself, since such spills constitute "pollution resulting from 'any activities conducted by or on behalf of them." 649 F.2d at 833-34. The holders' agent, Alyeska, operates the pipeline. All pipeline spills thus result from "activities conducted by or on behalf of" the holders, as those words are used in 1653(b). With respect to vessel spills, in contrast, neither the holders nor Alyeska operate the vessels. Spills from vessels thus do not result from activities conducted by or on behalf of the holders.

Finally, Mr. Frank erroneously interprets the legislative history of TAPAA. As he notes, Congress had before it a House Bill, H.R. 9130, Section 207(b)(1) of which would have expressly provided that the holder of the right-of-way is strictly liable for all damages resulting from spills from any vessel owned by the holder or by any "affiliate" of the holder. As Mr. Frank notes, see his memorandum at p. 14, the term "affiliate" was broadly defined. Thus, had Section 207(b)(1) been adopted, there is little doubt that the holders of the right-of-way would be liable for damages caused by the **EXXON VALDEZ** oil spill, as the **EXXON VALDEZ** was owned by an affiliate of one of the holders of the right-of-way. The flaw in Mr. Frank's analysis, however, is that Section 207 was rejected by the Conference Committee. The bill that came out of the Conference, which Congress ultimately enacted, contains nothing comparable to Section 207. Congress clearly made the vessel owner/operator, rather than the holders or any affiliates of the owner/operator, liable for vessel spills. 1653(c). Congress' rejection of a specific provisions before it that would have made the holders liable for vessel spills is relevant to interpretation of 1653 and shows that the statute as adopted was not intended to make the holders liable for vessel spills. See Fox

v. Standard Oil Co. of New Jersey, 294 U.S. 87, 96, 294 S.Ct. 333, 337 (1934); Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 58 (8th Cir. 1940).

LDW44/cas

January 30, 1992

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[1] As successors to the original holders of the federal right-of-way for TAPS, Amerada Hess Pipeline Corporation, ARCO Transportation Alaska, Inc., BP Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, are the present holders of the right-of-way grant. These common carrier pipeline companies own the pipeline and have chosen Alyeska to be their common operating agent.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

REPLY TO:

☒ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST, SUITE 400
FAIRBANKS, ALASKA 99701-4879
PHONE: (907) 452-1066
FAX: (907) 4561317

☐ PO BOX K — STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2520

February 25, 1992

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

Dear Representative Hudson:

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

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

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

Sincerely yours,

CHARLES E. COLE
ATTORNEY GENERAL

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

CJT:tq

for additional monetary damages for serious and repeated intimidation and harassment of whistleblowers.

Section 501(h) adds a new subsection (k) to section 210 of the Energy Reorganization Act which provides that the Nuclear Regulatory Commission may not delay any investigation of an alleged violation on the basis of a whistleblower complaint being filed or an investigation by the Secretary being initiated. A determination that a violation has not occurred shall not be considered by the Commission in its determination of whether any violation of the Act or the Atomic Energy Act of 1954 has occurred.

Section 501(i) redefines "Secretary" and corrects a mistaken section designation in the Energy Reorganization Act.

Section 501(j) provides that the amendments enacted by this section will apply to claims filed under section 211(b)(1) of the Energy Reorganization Act of 1974 on or after the date of enactment.

Title VI—Outer Continental Shelf

Subtitle A—Prohibition of Leasing and Preleasing Activity

PROPOSED FEDERAL LEGISLATION

Section 601 bars any prelea after January 1, 2002 in the On nia, North Atlantic, Mid-Atlant Florida and North Aleutian Pla

It also establishes environm planning areas with responsibili the oceanographic, ecological and socioeconomic information available, obtain additional information that might be necessary and subject it to peer review, and identify potential impacts of oil and gas activity in the region.

The secretary must certify adequacy of information before proceeding to lease in any area subject to a moratorium; in making leasing decisions in moratorium areas the Secretary must consider information developed and must give equal weight to the environment and oil and gas development.

Subtitle B—Buyback of Certain Leases

Section 602 amends section 5(2)(a) of OCSLA to require the Secretary to cancel leases upon a determination that it has resulted in or poses a serious threat of damage to wildlife, property, minerals, the national security or the environment. It also reduces from five years to one year the lease suspension period that must precede cancellation. Finally, section 602 authorizes the use of credits against future rents, royalties or bonuses as compensation to owners of canceled leases.

Title VII—Alaska

Subtitle A—Alaska Outer Continental Shelf

Section 701 provides that the Secretary of the Interior is prohibited from permitting any drilling or other exploration activity on existing leases and also prohibited from conducting additional lease sales in Bristol Bay Alaska [North Aleutian Basin Planning Area] until after January 1, 2002.

Alaska's Bristol Bay is one of the world richest fishing grounds and productive marine environments. Accordingly, the Secretary is directed to cancel the existing leases in Bristol Bay in conformance with the new criteria set forth in section 602 of this bill.

Section 702 provides that in conducting OCS leasing and related activities in Alaska, the Secretary is required to evaluate and minimize adverse impacts on subsistence pursuant to Section 810 of the Alaska National Interest Lands Conservation Act.

Subtitle B—Trans-Alaska Pipeline

Section 711 provides that Alyeska file an Oil Spill Contingency Plan for Prince William Sound with the Secretary of the Interior. Under existing law, Alyeska Pipeline Service Company, as agent for the seven companies which were granted the right-of-way for the Trans-Alaska pipeline, has a duty to respond to oil spills in Prince William Sound.

Section 712 provides that funds received by the United States from settlement of claims related to the Exxon Valdez oil spill be deposited in a Natural Resource Damage Assessment and Restoration Fund in the Department of the Interior. The Federal Trustees for the oil spill restoration (Interior, Forest Service and NOAA) are also required by section 207 of the FY-92 dire emergency supplemental appropriations act (P.L. 102-229) to submit their proposed use of such funds in the President's budget for Congressional review.

The President's FY 93 Budget estimates that over $400 million will eventually be received by the United States as its share of the Exxon Valdez civil settlement. In addition, $50 million in criminal restitutionary payments have already been deposited in the Fund. Consistent with the Committee's Views and Estimates on the President's Budget, section 712 requires that no less than 80 percent of the money received from the Exxon Valdez settlement shall be used to acquire or otherwise protect key fish and wildlife habitat in Prince Wil-

[COMMITTEE PRINT]

MARCH 31, 1992

102D CONGRESS
2D SESSION

H. R. ____

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To establish a national program and policy for the production of energy and the protection and preservation of the natural environment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE VII—ALASKA RESOURCES

Subtitle A—Alaska Outer Continental Shelf

SEC. 701. ALASKA LEASING AND DRILLING MORATORIA AND CANCELLATION.

The Outer Continental Shelf Lands Act (43 U.S.C. 1301 et seq.) is amended by adding at the end thereof the following:

"SEC. 31. ALASKA LEASING AND DRILLING MORATORIA AND LEASE CANCELLATION.—(a) The Secretary shall not prepare for or conduct any preleasing or leasing activity and shall not approve or permit any drilling or other exploration activity under this Act on lands within the North Aleutian Basin planning area in the Alaska region until after January 1, 2002.

"(b) Congress finds that the requirements pertaining to cancellation of leases in section 5(a)(2) of this Act have been met with regard to the North Aleutian Basin planning area in the Alaska region. The Secretary shall initiate cancellation of such leases within 90 days after the date of enactment of this section in accordance with this Act.".

SEC. 702. ALASKA OCS SUBSISTENCE REVIEW.

The Outer Continental Shelf Lands Act (43 U.S.C. 1301 et seq.), as amended by section 701 of this Act, is

further amended by adding at the end thereof the following:

"SEC. 32. ALASKA OCS SUBSISTENCE REVIEW.—Prior to issuing any five-year program under section 18 of this Act, conducting any lease sale, or approving any plan or permit for exploration, development, or production activities in the Alaska region authorized by this Act, the Secretary shall comply with section 810 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3120). In addition to other requirements, at the lease sale stage the Secretary shall fully consider the effects of exploration, development, and production upon subsistence uses.".

Subtitle B—Trans-Alaska Pipeline

SEC. 711. RESPONSIBILITY OF RIGHT-OF-WAY HOLDER.

Title II of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.) is amended by adding at the end thereof the following:

"RESPONSIBILITY OF RIGHT-OF-WAY HOLDER

"SEC. 208. In addition to the existing duties to respond to, contain, and clean up oil spills within the State of Alaska, including Prince William Sound, under section 204(b) of this Act and other laws and requirements, the holder of the right-of-way shall file an Oil Spill Contingency Plan for Prince William Sound with the Secretary of the Interior and other appropriate authorities.".

SEC. 712. EXXON VALDEZ SETTLEMENT FUND LAND ACQUISITION.

Title II of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), as amended by section 711 of this Act, is amended by adding at the end thereof the following:

"PUBLIC LAND ACQUISITION

"SEC. 209. Notwithstanding any other provision of law, no less than 80 percent of any amounts received by the United States pursuant to section 207 of Public Law 102-229 shall be utilized to acquire land and conservation easements, including timber rights, within the Chugach National Forest in the Prince William Sound region and in other Gulf of Alaska areas, including Kenai Fjords National Park, Afognak Island, and Kodiak National Wildlife Refuge.".

SEC. 713. SUBSISTENCE CLAIMS AGAINST TRANS-ALASKA PIPELINE LIABILITY FUND.

Section 204(c)(13) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)(13)) is amended—

(1) by striking out "and" at the end of subparagraph (A);

(2) by striking out the period at the end of subparagraph (B) and inserting in lieu thereof "; and"; and

(3) by adding after subparagraph (B) the following:

"(C) all injuries suffered by individuals or entities due to the impact of a discharge on people engaging in subsistence.

"In order to expedite compensation, the Fund shall certify a class action claim with respect to subparagraph (C).".

TITLE VIII—COAL, OIL, AND GAS

Subtitle A—Coal Development

Subtitle B—Coal, Oil, and Gas Leasing

SUBTITLE C—ABANDONED MIN. RECLAMATION FUND

SUBTITLE D—HEALTH, SAFETY, AND MINING TECHNOLOGY RESEARCH

Subtitle A—Coal Development

SEC. 801. COAL REMINING.

(a) MODIFICATION OF PROHIBITION.—Section 510 of the Surface Mining Control and Reclamation Act of 1977

7-LS2045\G.1
Ford
04/08/92

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE FINKELSTEIN

TO: CSSSHB 540(O&G)

Page 1, line 7, after "oil;":

Insert "**relating to the duty of, and charges or financial responsibility requirements related to that duty imposed by, the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system to control and contain oil discharges;**"

Page 4, after line 5:

Insert a new bill section to read:

"* Sec. 4. AS 46.04.020 is amended by adding new subsections to read:

(g) The common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline shall immediately contain and clean up a discharge of crude oil transported by or due to the operation of the trans-Alaska pipeline system or due to related activities, including operation of a tank vessel while berthed at a marine terminal or while traveling within state waters to or from a marine terminal. A charge or financial responsibility requirement imposed by the common operating agent for holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system on a tank vessel traveling on an intrastate voyage from a marine terminal for the purpose of containing and cleaning up a discharge of crude oil is subject to review by the Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441. Review of a charge or financial responsibility requirement allowed under this subsection may occur at the request of a tank vessel owner, operator, or lessee, or as allowed by the Alaska Public Utilities Commission.

(h) The department may waive an oil discharge containment and cleanup requirement imposed under (a) or (g) of this section if

(1) the department determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency, as appropriate, that containment or cleanup is technically not feasible; or

(2) the cleanup or containment activities would result in greater environmental damage than the discharge itself."

Renumber the following bill sections accordingly.

Page 4, line 7:

Delete "sec. 4"

Insert "sec. 5"

Congress and the State of Alaska Impose Liability and Financial Responsibility for Tanker Discharges Upon Vessel Owners and Operators, Not Upon the TAPS Owners and Operator

* The COC recommendation that "[t]he Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil" relies upon an erroneous legal opinion.

* The responsibility of the owner/operator of a vessel to respond to vessel spills, and to pay for the cleanup and damages related to such spills, is well established under federal and state law:

** AS 46.03.822 (owner/operator of vessel liable for all public and private property damaged from oil spills);

** Clean Water Act, 33 USC 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); and

** Trans-Alaska Pipeline Authorization Act, 43 USC 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

* Under federal law, the holder of the pipeline right-of-way for TAPS is only liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder...." This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way.

* None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators; so has the State of Alaska.

* Also, the state and federal Right of Way Agreements, executed in 1974, did not alter this scheme and did not impose upon the holders of the right of way the responsibility to clean up oil spills from tankers in trade with the Valdez Terminal. Rather, both the contingency planning and oil spill response provisions of those agreements impose obligations on the holders only with

respect to spills from the pipeline or from the Marine Terminal facilities.

* An internal State of Alaska memorandum written prior to pipeline start-up acknowledged that "[t]here is no legal or stipulative requirement for Alyeska to clean up oil in Prince William Sound. Their Contingency Plan for the Sound (i.e., beyond Middle Rock) has been volunteered...." Memorandum from R. Bayliss to J. Reinwand (January 13, 1977).

* The issue of whether Alyeska has a duty to contain and cleanup crude oil spills within state waters has been raised in the Exxon Valdez litigation where it will be resolved. The very fact that a request has been made to "clarify" this alleged responsibility reveals the proponents' uncertainty in their own arguments.

* In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who truly bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are...." An attempt to inexplicably shift that responsibility to pipeline owners who neither own nor operate crude oil tankers would be unlawful and fundamentally unnecessary. Congress' and Alaska's comprehensive oil spill response laws already place responsibility for tanker spills upon vessel owners/operators.

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET ANCHORAGE, ALASKA 99512. TELEPHONE (907) 278 1611 TELEX 090 25 . 7

February 20, 1992

ALYESKA PIPELINE SERVICE COMPANY
Prevention and Initial Response Services

- *Why are oil discharge prevention and contingency plans necessary?*

Under federal and state law, a vessel owner is responsible for the discharge of oil from its vessel. Crude oil tankers transiting Prince William Sound must have oil spill contingency plans, contract for various spill response resources, and post evidence of financial responsibility. Contingency plans allow the state to determine whether plan holders have access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil spills from tankers. The state also requires plan holders to demonstrate their ability to carry out contingency plans, including periodic training, exercises, and verification of ready access to equipment, supplies, and personnel. A tank vessel may not be operated within state waters without an approved contingency plan.

- *Who are the plan holders for crude oil tankers operating in Prince William Sound?*

As required by state law, tank vessel oil discharge prevention and contingency plans are held by tanker owners or operators. Alyeska operates the Trans Alaska Pipeline System on behalf of seven pipeline companies which own it. None of these own, operate, or charter tankers.

- *What are Alyeska's prevention and initial response services?*

Alyeska has developed an initial response plan (the Prince William Sound Tanker Spill Prevention and Response Plan or "Plan") which describes the services it offers to tanker vessels as an initial response contractor. The state has approved the Plan's incorporation into individual tanker contingency plans. Under the terms of the Plan and Oil Spill Response Services Agreements signed with tanker owners, operators, and charterers ("Contracting Vessels"), Alyeska provides response vessels, equipment, personnel, and training described in the Plan for as long as 72 hours following an oil spill. The initial response plan and the tanker contingency plans anticipate that, during the first 72 hours after a spill, the management of the response will transfer from Alyeska either to the appropriate Contracting Vessel or to the federal on-scene coordinator.

- *What resources has Alyeska developed to support these services?*

Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has also purchased ocean and rapid deployment boom, seaskimmers, and related response equipment. In addition, Alyeska has developed area response centers, placed fishing vessels on contract to supplement response efforts, and prestaged equipment to protect hatcheries and other sensitive areas. Escort/response vessels are used for day-to-day escort of loaded tankers in Prince

William Sound as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations. Storage capacity for recovered oil and water is unprecedented: five large barges, each ranging in true volume from 70,000 to 120,000 barrels, are part of the plan to receive collected oil and water. This capacity is also augmented by smaller barges. The selection of equipment has been balanced between using high-volume recovery equipment in the early stages of a spill, and to adjust response strategies and equipment as the oil becomes viscous and aged.

- *During the first 72 hours of an oil spill response, how will management of the response be transitioned from Alyeska to a Contracting Vessel?*

When Alyeska discovers or is advised that an oil spill from a covered vessel has occurred, it will provide the initial response, employing its response equipment and personnel. Alyeska will also notify the Contracting Vessel. Unless otherwise directed by the Contracting Vessel, or the U.S. Coast Guard, Alyeska may elect to manage and control the response to an oil spill of 1,000 barrels or less which can be contained and cleaned up by local Alyeska resources in accordance with the Plan. For larger spills, the company which has contracted for Alyeska's initial response services will assume management and control of the oil spill response either itself or through a third party approved by ADEC. The transfer of command and management of spill response operations from Alyeska must occur in a smooth and efficient manner satisfactory to the U.S. Coast Guard and ADEC. In addition, transition of spill response management could be from Alyeska to the U.S. Coast Guard in the event a spill response is federalized.

- *Following transition of the management of an oil spill response, will Alyeska resources exit the response?*

One of the requirements for transfer of command and management of spill response operations is agreement on present and future resources of people and equipment, including Alyeska resources. It is expected that Alyeska resources will remain fully engaged in a response following transition of management of spill response operations. As soon as reasonably practical, Alyeska's core equipment and personnel should be replaced in an orderly fashion with the Contracting Vessel's response organization and equipment so that Alyeska can resume normal operations at the Terminal, when tanker operations can be restored.

- *What will happen if a Contracting Vessel fails to assume management and control of an oil spill response within 72 hours?*

Under the terms of the response services agreement, Alyeska may tender management of the oil spill response directly to the U.S. Coast Guard, and acquire additional equipment and personnel, all at the Contracting Vessel's expense. When the spill management is federalized, Alyeska resources will be placed as directed by the U.S. Coast Guard.

****

To Linda (465-2299) Rep. Hudson

From: Jack Brown

Sponsored by: Brown

KENAI PENINSULA CAUCUS
RESOLUTION 92-2

A RESOLUTION OF THE KENAI PENINSULA CAUCUS SUPPORTING HB 540 AND TESORO ALASKA.

WHEREAS, HB 540 provides Response Action Contractors (RACs) limited liability unless the RACs acts with gross negligence, willful misconduct, causes personal injury, wrongful death or acts contrary to the direction of the state or federal on-scene coordination; and,

WHEREAS, it is imperative to have uniform liability standards to attract RACs to establish in Alaska; and,

WHEREAS, the absence of limited liability for RACs will negatively affect the development of RACs to establish in Alaska. Shippers may then be prevented from shipping heating fuel, gas, diesel fuel for electrical generation and other hazardous materials, gasoline, crude and other non-crude products; and,

WHEREAS, eighteen other coastal states have passed similar limited liability RACs laws; and,

WHEREAS, Tesoro Alaska is an Alaskan shipper whose ability to operate would be greatly jeopardized without the passage of HB 540 and the sunset of HB 196 on June 30, 1992; and,

WHEREAS, Tesoro Alaska contributes substantially to the economy and tax base of the Kenai Peninsula and Alaska.

THEREFORE, BE IT RESOLVED, that,

Section 1: The Kenai Peninsula Caucus urges passage of HB 540 by the Alaska State Legislature.

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

ADOPTED BY THE KENAI PENINSULA CAUCUS, this 13th day of April, 1992.

James E. Carter, Sr., President

ATTEST:

John J. Williams, Secretary

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To Jack Brown	From CL
Co.	Co.
Dept.	Phone #
Fax #	Fax #

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM April 15, 1992

SUBJECT: Sectional analysis (CSSSHB 540( ))

TO: Representative Bill Hudson

FROM: Michael F. Ford
Legislative Counsel

The following is a section by section analysis of CSSSHB 540( ), dated 4/14/92:

Section 1 - Limits the liability of the state for certain registration, approval, and response activities related to oil spills.

Section 2 - Provides that the limitation on liability provided to oil spill response action contractors under AS 46.03.825 is an exception to the strict liability imposed under AS 46.03.822.

Section 3 - Provides that the actions of a response action contractor do not qualify as third party acts that would relieve liability imposed under AS 46.03.822(b)(1)(B).

Section 4 - Amends the definition of "damages" to include the meaning given in AS 46.03.824.

Section 5 - Provides limited liability for a response action contractor who responds to an oil spill and whose actions are consistent with a contingency plan or as otherwise directed by the federal or state on-scene coordinator.

Section 6 - Provides exceptions to the limited liability granted under AS 46.03.852(a).

Section 7 - Adds a definition of "registered".

Section 8 - Provides that a person liable under AS 46.03.822 may not use the defense provided in AS 46.03.822(b)(1)(B) for damages caused by a response action contractor. Provides that except as provided under subsection (e), AS 46.03.825 does not apply to the liability of a person other than a response action contractor.

Section 9 - Prohibits approval of a contingency plan that relies on an oil spill response action contractor, unless the contractor is registered under AS 46.04.035.

Section 10 - Establishes a program to register oil spill response action contractors. Specifies certain regulations that must be adopted by the department.

Section 11 - Repeals certain sunset provision enacted by ch. 92, SLA 1991.

Section 12 - Transition section.

Section 13 - Retroactive effective date for section 11.

Section 14 - Applicability section.

Section 15 - Effective date.

Section 16 - Effective date.

MFF:lmb
92-088.lmb

COOK INLET
RCAC

"The mission of the Council is to ensure the safe operation of the oil terminals, tankers, and facilities in Cook Inlet so that environmental impacts associated with the oil industry are minimized."

March 20, 1992

The Honorable Cliff Davidson
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Davidson:

The Cook Inlet Regional Citizens Advisory Council (Cook Inlet RCAC) is a non-profit corporation organized exclusively for charitable, scientific, literary or educational purposes, within the meaning of *Section 501 (C)(3)* of the *Internal Revenue Code of 1986* as amended, including without limitation the oversight, monitoring, assessing and evaluation of oil spill prevention, safety and response plans, terminal and oil tanker operations, and environmental impacts of oil tanker and oil terminal operations in Cook Inlet under the provisions of *Section 5002* of the *Oil Pollution Act of 1990.*

On March 14, 1992, the Board of Directors voted to endorse a statutory simple negligence standard for response action contractors and expressed support for the introduction of legislation which provides for limited statutory immunity for "vessels of opportunity" that are not provided with indemnification pursuant to a contractual agreement. It is the position of Cook Inlet RCAC that the State of Alaska should do all within its powers to protect the environment and natural resources of this state, including its people. The Board believes enactment of a statutory simple negligence standard will provide the state with the necessary protection and ensure rapid response to an oil spill.

In addition to taking action on this issue the Board also took action in expressing opposition to the enactment of sponsor substitute for House Bill 540 (SSHB 540). Since the Council meeting of March 13-14, 1992 further modifications have been made to this proposed legislation. Cook Inlet RCAC respectfully requests the Council be kept informed of hearings and provided copies of any new language or legislation which are introduced and/or acted upon prior to the end of the legislative session.

In considering these issues Cook Inlet RCAC also discussed HB 196 which was enacted during the 1991 legislative session. The Board of Directors voted in favor of allowing HB 196 to sunset in June 1992.

Cook Inlet Regional Citizens Advisory Council
11355 Frontage Rd. • Suite 228 • Kenai, Alaska 99611 • (907) 283-7222 • FAX (907) 283-6102

As mentioned, Cook Inlet RCAC would appreciate being kept informed on these issues. Should you have any questions regarding the Council's position please do not hesitate to contact me either through our office (283-7222) or home (235-8252).

Sincerely,

Ken Castner

Ken Castner
Cook Inlet RCAC
Board of Directors

cc: Cook Inlet RCAC Directors
Prince William Sound RCAC
Citizens Oversight Council on Oil
and Other Hazardous Substances

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

RECEIVED MAR 3 0 1992

March 26, 1992 Sent by telefax - hard copy to follow

Rep. Cliff Davidson
Chair, House Resources Committee

Subject: CS FOR SPONSOR SUBSTITUTE FOR HB 540 (O & G)

Dear Rep. Davidson,

United Cook Inlet Drift Association (UCIDA) represents the 585 salmon drift permit holders in Upper Cook Inlet. Some 350 permit holders are current members of our association. UCIDA is also active at the state and federal levels as a member of the Executive Committee of United Fishermen of Alaska (UFA).

UCIDA opposed HB 196 which was passed with a one year sunset provision last year. CS for HB 540 is even a lesser standard of liability than HB 196 and, arguably, even a lesser standard than that found in Federal law. Both HB 196 and CS for HB 540 represent poor public policy. I've enclosed our comments from last year on HB 196. These comments are fully applicable to CS for HB 540.

HB 196 should be allowed to sunset and we should return to the standard of "negligence".

As an active member of the Oil Reform Alliance (ORA), UCIDA is in agreement with the stand ORA has taken on this issue. It could be inferred from some of our comments on HB 196 that UCIDA feels that Alyeska is a RAC. We feel that studies undertaken by the Citizens Oversight Council, make it clear that Alyeska is required to respond to TAPS spills and that Alyeska is NOT a "voluntary" RAC. Furthermore, UCIDA feels that if Alyeska continues to claim to be a RAC and that, therefore, it is not required to respond to all TAPS spills, then the legislature must protect the public interest and require the Pipeline operators to create a response organization that will respond.

UCIDA represents fishermen who were severely impacted by two TAPS spills in three years - Glacier Bay (1987) and Exxon Valdez (1989).The issues of responce and liability, therefore, are of vital interest to our members.

As a final comment, I would like to note that the Cook Inlet Regional

Citizens Advisory Council created by OPA 90 is also opposed to this legislation.

I would appreciate it if you would distribute a copy of this letter and our comments on HB 196 to the members of your committee.

Sincerely,

Theo Matthews

Theo Matthews
Administrative Assistant

cc: House Sponsors, CS FOR HB 540
Senate Special Committee on Oil and Gas
Citizens Oversight Council
CIRCAC
Oil Reform Allianace
UFA

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

April 10, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

UCIDA OPPOSES CS for HB 196 & ITS OBJECTIVE OF FURTHER LOWERING LIABILITY STANDARDS FOR RAC'S.

In both 1989 & 1990, the Alaska legislature lowered the standard of liability for RAC's from the normal standard of "strict liability", i.e. liable for whatever injuries the person caused, whether he was negligent or not.

Presently

1. RAC's are ONLY liable if they are negligent or engaged in intentional misconduct.

2. RAC's are ONLY liable when his or her own acts or omissions cause injuries.

3. In 1989, legislature stated that:
"To show negligence by a response action contractor, a claiman: must show that the acts or ommissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practives at the time their response action services were performed.

4. Negligence is found ONLY when it would be unreasonable to act as the liable party did, in the circumstances surrounding the response action.

Current standards are sufficient to cover the liability exposure of all RAC's - including fishermen and local communities. Ucida feels that no change is needed.

UCIDA would, however, like to comment on the actual issue that appears to us to be driving this legislation. Alyeska has imposed on Tesoro financial requirements in a format that is directly actionalble. To the best of our knowledge such coverage that exceeds the $20 million ball park is impossible to get. Alyeska then requires $1 billion of such coverage of Tesoro. Tesoro then feels obliged out of self preservation to promote

legislation that will reduce Alyeska's liability exposure to incidents of gross negligence in the hope that, if successful, Alyeska will impose requirements that Tesoro can meet.

UCIDA regards the above scenario as little less than blackmail on the part of Alyeska. What will prevent them from requiring $5 billion in directly actionable insurance next year? UCIDA does recognize, however,that Tesoro has a legitimate problem with this bonding requirement - it literally has been placed by Alyeska between the proverbial rock and a hard spot. UCIDA has expressed both of these sentiments to our local Borough Assembly and to Tesoro representatives.

UCIDA respectfully requests that the legislature consider replacing this legislation - which is not needed- with language that addresses the real issue - bonding requirements that are reasonable but that can be capped in some manner to prevent industry from using them as a lever to undermine good public policy.

We would like to suggest two possible options:

1) Legislation that would limit a RAC's ability to require proof of financial responsibility to a level no greater than that required by the state in AS 46.04.040. UCIDA understands that the level set in AS 46.04.040 should not be static - it clearly will be adjusted from time to time by the legislature to conform to good public policy.

2) If an RAC requires bonding requirements above those set in AS 46.04.040, then the RAC should be required to accept oil pollution insurance syndicate coverage.

In conclusion, UCIDA does not support changing current state liablility statues. Even the concept of a sunset provision and a 30 day window is poor public policy. Alyeska and other similarilly situated RACs will turn over spill resonse to any spiller well within the 30 day window. Legislation is needed to address Tesoro's immediate dilemma and the general issue of bonding requirements in the future.

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant
UCIDA

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

April 16, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

UCIDA would like to follow-up on our comments of April 10, 1991 on CS for HB No. 196. UCIDA continues to oppose this legislation since we feel it represents bad public policy nd does not address or resolve the very issue that appears to be driving it - bonding requirements imposed by one sector of private industry (Alyeska) on another sector of private industry (Tesoro).

UCIDA doubts that public legislation will ever be able to resolve disputes between members of the private sector. To attempt to help one - in this case Tesoro - merely leaves the state vulnerable to open ended demands by the other - in this case Alyeska.

As we remarked on April 10, 1991, even if this legislation were to pass, what would prevent Alyeska from requiring $5 billion in directly actionable insurance next year?

Even though UCIDA does not support this legislation, we feel compelled to comment on a few points:

1) Sec 46.03.825 (a)

Speaks to an act or omission "not contrary to an order of the federal or state on-scene coordinator". The obvious defense in court of a RAC will be that if "we weren't told not to do it, we are not liable".

The point should be that when a RAC is acting under the direction of the federal or state coordinator, then some changes in liability rules might be expected.

2) Sec. 46.03.825 (a)(2)

Gross negligence is not defined by AS 46.03.823(a). However, "negligence" is defined by AS 46.09.823(a), therefore, whatever the definition of "gross negligence" may come to be, we know that the result of this seciton will be that a RAC whose acts or omissions under the response action contract was not in accordance with generally accepted professional standards and practices at the time their response action services were performed, will not be liable in many instances.

3) Sec. 46.03.825(a)(3)

Two points should be made:

a) "Substantially deviated" is not defined and we believe the standard should in any event be "deviated". We understand that industry would like a definition agreed to for the phrase "substantially deviated" and would propose that if industry would give us their defintion of "gross negligence" then perhaps an agreed definition of "substantially deviated" would be appropriate.

b) The and portion of 46.03.825(a)(3) seems clearly designed as another loophole designed for the use of 2nd and 3rd party RAC's who have not "previously agreed to comply with the terms of that plan". Further, it is often the case that a RAC will not be working for the parties responsible for the release. In this event, it appears you revert back to the "gross negligence" standards as a claimants' only grounds for action. If a RAC does not agree to comply with the oil contingency plan, they clearly should be afforded no relaxation in liability standards. The and portion of AS 46.03.825(a)(3) should be deleted.

In conclusion, UCIDA will continue to oppose the relaxation of liablility standards for RACs as a means of trying to resolve a dispute between members of private industry. If, however, the committee passes out this bill, a 1 year "sunset provision" would be appropriate. With such a provision, the committee could at least determine if the goal of affording Tesoro some relief was met and perhaps by then the legislature will be prepared to address the issue of bonding requirements.

Sincerely,

Theo Matthews
Administrative Assistant

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

April 23, 1991

Representative Dave Donley
House Judiciary Chair

Dear Rep. Donley,

United Cook Inlet Drift Association (UCIDA) represents some 400 of the 585 Cook Inlet salmon drift permit holders. UCIDA would like to express our continued opposition to CS for House Bill No. 196 which was reported out of House Resources.

You have already received two presentations we made to House Resources on April 10 and April 16, 1991. Rather than repeat our positions we will try and breifly summarize:

1) **Current liability statutes for RACs in fact do comprise Good Samaritan concepts.** In 1989 and again in 1990, the legislature limited RAC liability. RACs are currently liable only for their own acts or omissions which cause damages if those acts or omissions "were not in accordance with generally accepted professional standards and practices at the time their response action services were performed. "(AS 46.03.823(a)).

2) **Current liability statutes constitute good public policy in balancing the public's interests and the legitimate concern of RACs.** Under current legislation, damaged parties are not covered under all possible scenarios. This fact is outweighed, in part, by the public good that is served by a prompt response by RACs doing their best - i.e. "performing in accordance with generally accepted professional standards ... etc."

3) **CS for HB 196 does not address the issue that is driving this legislation - bonding requirements by Alyeska - the "Seven Sisters" (B.P., Exxon, ARCO, Unocal, Mobil, Amarada, Hess, & Phillips) - that Tesoro cannot meet.** No one should be under any illusion that this is anything other than strong arm tactics by Alyeska aimed at lowering its own liability standards.

Recently, RACs other than Alyeska have jumped on the band wagon. It is only natural for any private enterprise to seek to insulate itself as much as possible from any liability for its actions. We would remind the committee that there has never been a spill in Alaska for which a RAC could not be found. Indeed, RACs fell all over themselves to get a piece of the action after

the Exxon Valdez spill. Finally, in this regard, to the best of our knowledge the only RAC alleged to have acted negligently during the Exxon Valdez was Alyeska.

Alyeska has made statements referring to the "simple negligence" standard and how if it responds according to its plan with the state, but loses some oil from a boom, it could be held liable (Clarion 4/18/91, enclosed). This leads us to conclude that Alyeska either has not read AS 46.03.823(a) or that they are not prepared to fully inform the public about current state statutes.

It is obvious who stands to benefit from the lowering of RAC liability standards. The other side of the coin is that the cost of damages will shift to someone else.

Who may suffer? Since "strict liability" for an RAC's own acts or omissions has been already removed by current legislation for most instances, injured parties currently must show negligence - i.e. currently litigation is necessary to show that the RAC did not act "in accordance with generally accepted professional standards ...etc."

CS for HB 196 purports to place liability for the acts or omissions of a RAC for which the RAC is not liable under AS 46.03.823 (gross negligence) on the party strictly liable for the spill as defined in AS 46.03.823(a).

UCIDA has some doubt about the responsible party being forced to assume liability for damages caused by a RAC not directly under its control, let alone the actions of 2nd & 3rd party RACs or volunteers. Indeed, it is somewhat surprising that attorneys for those owners who might be held strictly liable for the release are not very actively opposing this shift of liability on to their clients.

However, if we concede that it may be possible to shift this legal liability to "responsible parties strictly liable" for the release, UCIDA contends that for negligent acts by RACs, victims will often have no practicle or legal resource for compensation for the following reasons:

A) The responsible party may be unknown.
B) The responsible party may have few if any assets.
C) Under AS 46.03.758 3(h), the responsible party is not liable for civil penalties if the discharge occurred solely as a result of:
    1) An act of God,
    2) An act of a third party with whom the person charged has not been made jointly & severally liable,
    3) A negligent or intentional act of the state of Alaska or the United States, or
    4) An act of war

Finally, UCIDA understands the provisions found in the Federal Oil

Pollution Act of 1990 (Sec. 4201) are being cited as precedents for the present legislation. Federal legislation of this type represents the lowest common denominator in terms of liability standards. Alaska and many of its fishing organizations, including UCIDA, fought long and hard to maintain the state's rights to craft legislation and set liability standards higher than the federal standards. The House Senate Conference Committee which drafted this legislation was not receptive to input from the public with repect to limiting industry liability.

In conclusion:

1) Tesoro has a legitimate concern with its bonding requirements, and UCIDA requests that to the extent possible this legislation be recrafted to address the bonding issue.

2) Legislation probably cannot be expected to resolve this dispute between members of the private sector.

3) Current liability standards represent good public policy and does not cover damages for all instances.

4) By using the gross negligence standard, the State will greatly increase the instances where damages from negligence cannot be recovered. Further, 2nd and 3rd party RACs subject only to a gross negligence standard pose a great risk to the public.

5) CS for HB 196 will add another layer of legal protection for RACS and reponsible parties and added expense for victims. Even if liablility can be legally shifted from RACs, victims will first have to go to court to attempt to show that the RAC was grossly negligent. Failing this, no responsible party would accept that liability.

UCIDA appreciates this opportunity to address your committee.

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA

Pe arion

l. 21, Issue 142 THURSDAY, APRIL 18, 1991, Kenai, Alaska 50 Cents

lyeska blasted for billion-dollar bond

ATHY BROWN
nsula Clarion

orough Mayor Don Gilman Wednesday ted Alyeska Pipeline Service Co. for it he calls an "unreasonable" demand threatens to shut down Tesoro-Alaska oleum Corp.'s Nikiski refinery.

lyeska is requiring Tesoro to come up a $1 billion bond to continue shipping from the Alyeska pipeline terminal in dez to Cook Inlet.

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

Gilman said the major member companies of Alyeska — Exxon, British Petroleum and ARCO — are using Tesoro as a pawn in order to pressure the Legislature to pass a bill restricting Alyeska's liability in the event of a spill.

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

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

"Alyeska serves as the initial response action contractor for those vessels calling at the terminal in Valdez," she said. "Because of the state's liability requirements, Alyeska ... asked the owner-operator or charter of the vessels to pledge a billion dollar bond, which, simply put, indicates they would have access to funds to manage the claims arising from a spill."

The other five companies operating vessels in Prince William Sound — Exxon, BP, ARCO, Shell and Chevron— have been able to comply with the $1 billion requirement, mainly by pledging $1 billion in

See ALYESKA, back page

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

Continued from page 1

corporate assets.

But Tesoro can't do that, Burden said.

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

He thinks Tesoro should not be required to put up as large an amount as the other companies because Tesoro transports only a small percentage of the oil coming from the terminal, its tanker loads are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

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

Alyeska says it may lower its requirements if the Legislature passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

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

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

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

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

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

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

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

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

But Gilman, a former state senator, does not believe the legislation will pass. He says the bill has to get through two more House committees and the full House and the Senate, and he doesn't believe that will happen in the remaining 34 days of the legislative session.

He believes Alyeska is being inflexible about the bill.

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

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

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

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

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he does not believe that's the case, either.

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

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

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

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

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

UCIDA

UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

November 14, 1991

Mr. Larry Smith, Chair
CIRCAC PROPS Committee
Kenai, Alaska 99611

Dear Mr. Smith,

I have reviewed the 10/28/91 DRAFT Report prepared for your committee by Mr. Mertz.

This report and others currently underway are a result of the passage last legislative session of HB 196 which effectively reduced the standard of liability from simple to gross negligence for RACs. UCIDA continues to oppose this reduced standard as bad public policy. Rather than detail our concerns in this letter, I have attached our comments to the 1990-91 Legislature for your Committee's information.

As noted in our letter of April 10, 1991, to Rep. Davidson, UCIDA feels that the passage of HB 196 relates not to good public policy but to what we feel was a temporarily successful attempt by Alyeska to blackmail Tesoro into spearheading a drive to reduce Alyeska's liability exposure as a RAC. Further, UCIDA recognizes the economic importance of Tesoro to the residents of Kenai Peninsula.

Two major issues drove and continue to drive the Alyeska/Tesoro issue:

1) The "direct action" bond originally demanded, i.e. the type of bond required, and the dollar amount of the bond required by Alyeska, and

2) Tesoro's natural desire to continue operations and the hope that passage of HB 196 would lead Alyeska to change its demands.

In the Specific Proposal Analysis of the RFP for the Mertz study:

- #1(b) addresses bonding requirements.

- #4 asks for an analysis of the effect of granting limited or complete immunity to RAC's.

It is with respect ot these two requests that I would like to address the majority of my comments.

Bonding Requirements: Type and Amount

Type

The **Draft** discusses the amount of "financial responsibility" requirements in several places but does not mention the various "forms or types" these requirements may take. Given the importance of this issue to Tesoro and Kenai Peninsula residents, I recommend that Mr. Mertz:

1) Analyze the difference between a "direct action bond" and "a combination of general business liability coverage" found in the Draft on p. 19.

2) Analyze whether or not a "direct action" demand by an RAC is even "reasonable" in light of the fact that all claims must be adjudicated and no insurance monies will be distributed to anyone prior to some final judgement.

3) Investigate the maximum amount of "direct action" coverage that is currently available.

4) Analyze what, if any, options are available for the State to require in statute that RAC's accept "a combination of general business liability coverage, ..." as noted in the Draft on p. 19.

5) Analzye whether or not a demand for a "direct action" bond in amounts that a RAC is aware are not available would constitute a criminal or civil offense - e.g. anti-trust or similiar statutes.

Amount

As noted above, we feel that Tesoro clearly hoped that the passage of HB 196 would lead to Alyeska changing both the type - direct action- and amount - $1 billion - of financial responsibility required of Tesoro. Apparently, Alyeska did drop the direct action requirement but, as noted by Mr. Mertz on p. 19, **Alyeska raised rather than lowered its financial responsibility requirements for Tesoro.**

In his Summary of Insurance Requirements on p. 19, Mr. Mertz merely notes that **"the amount of financial responsibility required by Alyeska, however, appears unique."** Mr. Mertz noted on p. 19 that "this requirement has caused a considerable amount of difficulty... and was the prime motivating factor behind passage of the bill which became AS 46.03.825, limiting RAC liability". Therefore, I feel that the public - whose interests CIRCAC should represent - should expect an in depth analysis of this requirement.

As noted in our correspondence with the legislature, given the current state of affairs, UCIDA can see nothing to theoretically prevent Alyeska next year from raising its financial responsibility requirements for Tesoro to $10

billion unless the legislature passes a bill exempting Alyeska from liability even in cases of gross negligence.

I would suggest the following be investigated by Mr. Mertz:

1) Can the state legally limit the demands place by one sector of private industry on another sector of private industry. If so, for what reasons?

2) Can the State require that an RAC adjust its financial responsibility requirements based on the capacity of a tanker - e.g. If Exxon must provide $1 billion for a super-tanker could the maximum demand for "1/2 a super-tanker" be limited to $500 million?

3) How have other states addressed this issue?

4) Are anti-trust or other civil offenses issues potenially at play?

The Draft by Mr. Mertz, covers a wide range of issues very well - but in broad strokes. UCIDA hopes there is time and adequate funding available for Mr. Mertz to provide a more in depth analysis of the two bonding issues we have raised. Further, UCIDA is aware of Mr. Mertz's past work in this field as Assistant Attorney General and would therefore hope that recommendations accompany his analysis.

Effects of Granting Limited Immunity to RACs

As noted in my introduction, UCIDA feels that the current statute AS 46.03.825 was not necessary and represents a bad public policy that resulted from the demands of one sector of private industry on another sector of private industry. The ultimate irony of the situation is that this further limitation of RAC liability did not even really produce the desired results for Tesoro.

Section #4 of the Specific Proposal Analysis ask "What is or would be the effect of granting limited or complete immunity to response action contractors?" Throughout the Draft Mr. Mertz makes references to concerns the public should note. I would reccomend:

1) A more detailed analysis of the changes made by the legislature in 1989 and 1990 and the resulting status of RAC liability prior to the passage of AS 46.03.825 in 1991.

2) The "upside" benefits from the passage of AS 46.03.825 from the perspective of a RAC is clear in the DRAFT. Mr. Mertz lists some questions which clearly require answers on p. 11 and also discusses the concerns the public should have **IN THE ABSENCE OF A RESPONSIBLE PARTY** . p.22-23. I would suggest the FINAL MANUSCRIPT should include a section listing all

of the identified "downside effects" for the public that have resulted from the passage of AS 46.03.825 as it is currently worded and any recommendations that Mr. Mertz has to offer. In this regard, I hope our comments to the legislature in 1991 may be of some service.

UCIDA appreciates the opportunity to comment. The DRAF represents a good initial effort effort and I hope my comments can be of some use to your Committee.

Sincerely,

Theo Matthews
Administrative Assistant

cjd
cc: Senator Lloyd Jones, Chair, Senate Resource Committee
Senator Paul Fischer
Rep. Cliff Davidson, Chair, House Resource Committee
Rep. Mike Navarre, Co-chair, House Finance Committee
Rep. Gail Phillips
Rep. Jim Zawacki
Kenai Borough Assembly
Gene Burden, Tesoro
Oil Reform Alliance
UFA

Work Draft #2.

WORK DRAFT

7-LS2045\S
Ford
4/15/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to liability for release or threatened release of a hazardous substance; relating to the liability of an oil spill response action contractor; relating to oil discharge and contingency plans; relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

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

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

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, [AND] the exception set out in (i) of this section, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function

or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

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

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c) and 46.03.825(e), an

intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,

(A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

* Sec. 3. AS 46.03.825(a) is repealed and reenacted to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan approved under AS 46.04.030 or prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d); or

(2) as otherwise directed by the federal or state on-scene coordinator.

* Sec. 4. AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death;

(2) a response action contractor who

(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;

(B) acts with gross negligence or intentional misconduct;

(C) is not registered with the department under AS 46.04.035, and who agrees in writing to be listed and who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, that is being implemented to respond to a release or threatened release of oil; or

(D) has agreed in writing to be listed and who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a release or

threatened release of oil that the response action contractor was required to respond to under its contract with the applicable contingency plan holder; this subparagraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the primary duty to respond [AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY NOT CAUSED BY OIL; OR

(3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER THE RELEASE].

* Sec. 5. AS 46.03.825(d) is amended to read:

(d) In this section,

(1) "registered" means registered under AS 46.04.035;

(2) "response action" means an action taken to respond to a release or threatened release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, or removal of a release or threatened release of oil.

* Sec. 6. AS 46.03.825 is amended by adding new subsections to read:

(e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(f) Except as provided in (e) of this section, this section does not affect the liability under this chapter or under any other state law of a person other than a response action contractor.

* Sec. 7. AS 46.04.030(e) is amended to read:

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. If a contingency plan submitted to the department for approval relies on the services of an oil spill response action contractor, the department may not approve the contingency plan unless the response action contractor is registered and approved under AS 46.04.035. The contingency plan must provide for the use by the applicant of the best

technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

(1) periodic training;

(2) response team exercises; and

(3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

* Sec. 8. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may apply to the department for registration as an oil spill response action contractor. The department shall adopt regulations governing the registration and approval of oil spill response action contractors. Regulations adopted by the department under this section must include

(1) minimum training standards for personnel;

(2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed; and

(3) minimum professional response action contractor standards and practices.

(b) Notwithstanding (a) of this section, the department may substitute a response action contractor approval program, and a subsequent process to approve response action contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations required under (a)(1) - (3) of this section if the approval program and subsequent process are developed by the United States Coast Guard.

(c) The department shall establish fees applicable to registration under this section in an amount reasonably necessary to cover the costs of the registration program. The fees shall be collected by the department.

(d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations under this section.

(e) The department shall develop and maintain a list of oil spill response action contractors registered under this section. The department shall provide the list on request to

interested persons.

(f) A response action contractor registered under this section shall annually provide to the department a list of all contingency plans approved under AS 46.04.030 in which the response action contractor has agreed in writing to be listed as a responder.

(g) Nothing in this section is intended to amend AS 46.04.030(l) or to create a cleanup or performance standard that must be met by a holder of a contingency plan or by a response action contractor.

(h) In this section,

(1) "oil" has the meaning given in AS 46.03.826;

(2) "response action" has the meaning given in AS 46.03.825;

(3) "response action contractor" means

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

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

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

* Sec. 9. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

* Sec. 10. TRANSITION. The Department of Environmental Conservation shall adopt regulations to implement AS 46.04.035(a), enacted in sec. 8 of this Act, on or before January 1, 1993.

* Sec. 11. If this Act takes effect after June 30, 1992, sec. 9 of this Act is retroactive to June 30, 1992.

* Sec. 12. APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to AS 46.03.822 and 46.03.825, made by secs. 1 - 6 of this Act, apply only to causes of action accruing on or after the effective date of secs. 1 - 6 of this Act.

(b) The provisions of AS 46.03.825(b)(2)(C) apply only to causes of action accruing on or after the effective date of that paragraph under sec. 13 of this Act.

* Sec. 13. AS 46.03.825(b)(2)(C), added by sec. 4 of this Act, and sec. 7 of this Act take effect July 1, 1993.

* Sec. 14. Except as provided in sec. 13 of this Act, this Act takes effect immediately under AS 01.10.070(c).

7-LS2045\M
Ford
4/8/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to the liability of the state for certain registration, planning, and response activities related to oil spills; relating to the liability of an oil spill response action contractor, registration of response action contractors, and to oil discharge and contingency plans; relating to liability for release of a hazardous substance; relating to the duty of, and charges or financial responsibility requirements related to that duty imposed by, the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system to control and contain oil discharges; and providing for an effective date."

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

* Section 1. FINDINGS. The legislature finds that

(1) 25 percent of the country's crude oil supply moves through Alaska state waters; in particular, 650,000,000 barrels of crude oil move through Prince William Sound each year;

(2) crude oil, once discharged into the environment, is highly damaging to the environment, to the resources of the state, to wildlife, and to the commercial and subsistence livelihoods of state residents; crude oil is also persistent in the environment and becomes increasingly difficult to remove the longer it remains in the environment;

(3) experience from oil spill response in the state and throughout the world has demonstrated that response activities must occur as aggressively as possible in the first few days following a spill in order to be effective; experience has also shown that the critical initial response has the best chance of success when it is conducted by trained personnel using a previously prepared, well-practiced, and site-specific contingency plan;

(4) following the oil spill from the tanker vessel Exxon Valdez, there was a confusing and time consuming transfer of spill response management from the oil spill contingency plan holder and one of the parties responsible for the oil spill; this transfer of management delayed efficient and effective response efforts in the critical period of initial response;

(5) under the provisions of the state Trans-Alaska Pipeline System Right-of-Way Agreement, the lessees, the holders, and their common operating agent are required to contain and clean up crude oil spills within state waters, in particular, in Prince William Sound;

(6) it is very important that initial oil spill response efforts be immediate, well-trained, well-drilled, and certain; the response should not be subject to successive management transfers or to the risk of interruption due to disagreements or disputes among contingency plan holders, parties responsible for oil spills, and private responders relied upon for oil spill response.

* Sec. 2. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance

or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; [OR]

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020(c); or

(5) arises out of

(A) registration and approval of an oil spill response action contractor under AS 46.04.035;

(B) approval of an oil spill contingency plan under AS 46.04.030; or

(C) an act or omission of the state, an employee of the state, or a person who contracts with the state in responding to or directing a response to a release or threatened release of oil, unless the act or omission resulted from gross negligence or intentional misconduct; in this subparagraph, "oil" has the meaning given in AS 46.03.826.

* **Sec. 3.** AS 46.03.822(a) is amended to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

in consumer use;

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

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

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

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

(6) a response action contractor who has agreed in writing to be listed and who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a release or threatened release of oil that the response action contractor was required to respond to under the contingency plan; this paragraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the primary duty to respond.

* Sec. 4. AS 46.03.822(b) is amended to read:

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c) **and 46.03.825(e)**, an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,

(A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

* Sec. 5. AS 46.03.822(k) is amended to read:

(k) In this section, "damages" **has the meaning given in AS 46.03.824 and includes** [INCLUDE] damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

* Sec. 6. AS 46.03.825(a) is repealed and reenacted to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan approved under AS 46.04.030 or prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d); or

(2) as otherwise directed by the federal or state on-scene coordinator.

* Sec. 7. AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death;

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

(3) an act or omission that occurs more than **60** [15] days after the release**; provided, however, that the period of time described in this paragraph may be extended for not more than 60 days by a written order of the state on-scene coordinator issued on or**

before the 60th day after the release;

(4) a response action contractor who

(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;

(B) acts with gross negligence or intentional misconduct; or

(C) is not registered by the department, who agrees in writing to be listed and who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, that is being implemented to respond to a release or threatened release of oil, and who has executed a written agreement with the contingency plan holder.

* Sec. 8. AS 46.03.825(c) is amended to read:

(c) If the liability of an oil spill response action contractor is not limited under (a) of this section or if the provisions of (a) of this section do not apply because of (b) of this section, the oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the response action contractor's act or omission with respect to a release or threatened release of oil unless the act or omission of the oil spill response action contractor is negligent, grossly negligent, or constitutes intentional misconduct. This subsection does not apply to an oil spill response action contractor who is liable under AS 46.03.822(a)(6) or who would have been liable for the initial release or threatened release of oil under AS 46.03.822 even if that contractor had not carried out a response action.

* Sec. 9. AS 46.03.825(d) is amended to read:

(d) In this section,

(1) "registered" means registered under AS 46.04.035;

(2) "response action" means an action taken to respond to a release or threatened release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, or removal of a release or threatened release of oil.

* Sec. 10. AS 46.03.825 is amended by adding new subsections to read:

(e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(f) Except as provided in (e) of this section, this section does not affect the liability under

this chapter or under any other state law of a person other than a response action contractor.

* **Sec. 11.** AS 46.04.020(a) is amended to read:

(a) A person causing or permitting the discharge of oil shall immediately contain and clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

(1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT FEASIBLE; OR

(2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

* **Sec. 12.** AS 46.04.020 is amended by adding new subsections to read:

(g) The common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline shall immediately contain and clean up a discharge of crude oil transported by or due to the operation of the trans-Alaska pipeline system or due to related activities, including operation of a tank vessel while berthed at a marine terminal or while traveling within state waters to or from a marine terminal. A charge or financial responsibility requirement imposed by the common operating agent for holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system on a tank vessel traveling on an intrastate voyage from a marine terminal for the purpose of containing and cleaning up a discharge of crude oil is subject to review by the Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441. Review of a charge or financial responsibility requirement allowed under this subsection may occur at the request of a tank vessel owner, operator, or lessee, or as allowed by the Alaska Public Utilities Commission.

(h) The department may waive an oil discharge containment and cleanup requirement imposed under (a) or (g) of this section if

(1) the department determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency, as appropriate, that containment or cleanup is technically not feasible; or

(2) the cleanup or containment activities would result in greater environmental damage than the discharge itself.

* **Sec. 13.** AS 46.04.030(e) is amended to read:

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. **If a contingency plan submitted to the department for approval relies on the services of an oil spill response action contractor, the department may not approve the contingency plan unless the response action contractor is registered and approved under AS 46.04.035.** The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

(1) periodic training;

(2) response team exercises; and

(3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

* Sec. 14. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may apply to the department for registration as an oil spill response action contractor. The department shall adopt regulations governing the registration and approval of oil spill response action contractors. Regulations adopted by the department under this section must include

(1) minimum training standards for personnel;

(2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed;

(3) minimum professional response action standards and practices; and

(4) minimum performance standards for oil spill response action contractors listed in an oil spill contingency plan approved under AS 46.04.030.

(b) Notwithstanding (a) of this section, the department may substitute a response action

contractor approval program, and a subsequent process to approve response action contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations required under (a)(1) - (3) of this section if the approval program and subsequent process are developed by the United States Coast Guard.

(c) The department shall establish fees applicable to registration under this section in an amount necessary to cover the costs of the registration program. The fees shall be collected by the department.

(d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations under this section.

(e) The department shall develop and maintain a list of oil spill response action contractors registered under this section. The department shall provide the list on request to interested persons.

(f) A response action contractor registered under this section shall annually provide to the department a list of all contingency plans approved under AS 46.04.030 in which the response action contractor has agreed in writing to be listed as a responder.

(g) In this section,

(1) "oil" has the meaning given in AS 46.03.826;

(2) "response action" has the meaning given in AS 46.03.825;

(3) "response action contractor" means

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

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

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

* Sec. 15. TRANSITION. The Department of Environmental Conservation shall adopt regulations to implement AS 46.04.035(a), enacted in sec. 14 of this Act, on or before January 1, 1993.

* Sec. 16. REPORT. The Department of Environmental Conservation shall report to the legislature by March 31, 1993, on the progress of the department in developing the ability of the state to respond

to oil spills of an unknown origin and enhance regional response and coastline protection.

*** Sec. 17.** Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

*** Sec. 18.** If this Act takes effect after June 30, 1992, sec. 17 of this Act is retroactive to June 30, 1992.

*** Sec. 19.** APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to AS 46.03.822 and 46.03.825, made by secs. 3 - 10 of this Act, apply only to causes of action accruing on or after the effective date of secs. 3 - 10 of this Act.

(b) The provisions of AS 46.03.825(b)(4)(C) apply only to causes of action accruing on or after the effective date of that paragraph under sec. 20 of this Act.

*** Sec. 20.** AS 46.03.825(b)(4)(C), added by sec. 7 of this Act, and sec. 13 of this Act take effect July 1, 1993.

*** Sec. 21.** Except as provided in sec. 20 of this Act, this Act takes effect immediately under AS 01.10.070(c).

7-LS2045\M
Ford
4/8/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to the liability of the state for certain registration, planning, and response activities related to oil spills; relating to the liability of an oil spill response action contractor, to registration of response action contractors, and to oil discharge and contingency plans; relating to liability for release of a hazardous substance; relating to the duty of, and charges or financial responsibility requirements related to that duty imposed by, the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system to control and contain oil discharges; and providing for an effective date."

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

* Section 1. FINDINGS. The legislature finds that

(1) 25 percent of the country's crude oil supply moves through Alaska state waters; in particular, 650,000,000 barrels of crude oil move through Prince William Sound each year;

(2) crude oil, once discharged into the environment, is highly damaging to the environment, to the resources of the state, to wildlife, and to the commercial and subsistence livelihoods of state residents; crude oil is also persistent in the environment and becomes increasingly difficult to remove the longer it remains in the environment;

(3) experience from oil spill response in the state and throughout the world has demonstrated that response activities must occur as aggressively as possible in the first few days following a spill in order to be effective; experience has also shown that the critical initial response has the best chance of success when it is conducted by trained personnel using a previously prepared, well-practiced, and site-specific contingency plan;

(4) following the oil spill from the tanker vessel Exxon Valdez, there was a confusing and time consuming transfer of spill response management from the oil spill contingency plan holder and one of the parties responsible for the oil spill; this transfer of management delayed efficient and effective response efforts in the critical period of initial response;

(5) under the provisions of the state Trans-Alaska Pipeline System Right-of-Way Agreement, the lessees, the holders, and their common operating agent are required to contain and clean up crude oil spills within state waters, in particular, in Prince William Sound;

(6) it is very important that initial oil spill response efforts be immediate, well-trained, well-drilled, and certain; the response should not be subject to successive management transfers or to the risk of interruption due to disagreements or disputes among contingency plan holders, parties responsible for oil spills, and private responders relied upon for oil spill response.

* Sec. 2. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance

or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; [OR]

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020(c); or

(5) arises out of

(A) registration and approval of an oil spill response action contractor under AS 46.04.035;

(B) approval of an oil spill contingency plan under AS 46.04.030; or

(C) an act or omission of the state, an employee of the state, or a person who contracts with the state in responding to or directing a response to a release or threatened release of oil, unless the act or omission resulted from gross negligence or intentional misconduct; in this subparagraph, "oil" has the meaning given in AS 46.03.826.

* Sec. 3. AS 46.03.822(a) is amended to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

in consumer use;

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

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

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

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

(6) a response action contractor who has agreed in writing to be listed and who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a release or threatened release of oil that the response action contractor was required to respond to under the contingency plan; this paragraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the primary duty to respond.

* Sec. 4. AS 46.03.822(b) is amended to read:

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c) and 46.03.825(e), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,

(A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

* Sec. 5. AS 46.03.822(k) is amended to read:

(k) In this section, "damages" has the meaning given in AS 46.03.824 and includes [INCLUDE] damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

* Sec. 6. AS 46.03.825(a) is repealed and reenacted to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan approved under AS 46.04.030 or prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d); or

(2) as otherwise directed by the federal or state on-scene coordinator.

* Sec. 7. AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death;

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

(3) an act or omission that occurs more than 60 [15] days after the release; provided, however, that the period of time described in this paragraph may be extended for not more than 60 days by a written order of the state on-scene coordinator issued on or

before the 60th day after the release;

(4) a response action contractor who

(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;

(B) acts with gross negligence or intentional misconduct; or

(C) is not registered by the department, who agrees in writing to be listed and who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, that is being implemented to respond to a release or threatened release of oil, and who has executed a written agreement with the contingency plan holder.

* Sec. 8. AS 46.03.825(c) is amended to read:

(c) If the liability of an oil spill response action contractor is not limited under (a) of this section or if the provisions of (a) of this section do not apply because of (b) of this section, the oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the response action contractor's act or omission with respect to a release or threatened release of oil unless the act or omission of the oil spill response action contractor is negligent, grossly negligent, or constitutes intentional misconduct. This subsection does not apply to an oil spill response action contractor who is liable under AS 46.03.822(a)(6) or who would have been liable for the initial release or threatened release of oil under AS 46.03.822 even if that contractor had not carried out a response action.

* Sec. 9. AS 46.03.825(d) is amended to read:

(d) In this section,

(1) "registered" means registered under AS 46.04.035;

(2) "response action" means an action taken to respond to a release or threatened release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, or removal of a release or threatened release of oil.

* Sec. 10. AS 46.03.825 is amended by adding new subsections to read:

(e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(f) Except as provided in (e) of this section, this section does not affect the liability under

this chapter or under any other state law of a person other than a response action contractor.

* **Sec. 11.** AS 46.04.020(a) is amended to read:

(a) A person causing or permitting the discharge of oil shall immediately contain and clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

(1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT FEASIBLE; OR

(2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

* **Sec. 12.** AS 46.04.020 is amended by adding new subsections to read:

(g) The common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline shall immediately contain and clean up a discharge of crude oil transported by or due to the operation of the trans-Alaska pipeline system or due to related activities, including operation of a tank vessel while berthed at a marine terminal or while traveling within state waters to or from a marine terminal. A charge or financial responsibility requirement imposed by the common operating agent for holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system on a tank vessel traveling on an intrastate voyage from a marine terminal for the purpose of containing and cleaning up a discharge of crude oil is subject to review by the Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441. Review of a charge or financial responsibility requirement allowed under this subsection may occur at the request of a tank vessel owner, operator, or lessee, or as allowed by the Alaska Public Utilities Commission.

(h) The department may waive an oil discharge containment and cleanup requirement imposed under (a) or (g) of this section if

(1) the department determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency, as appropriate, that containment or cleanup is technically not feasible; or

(2) the cleanup or containment activities would result in greater environmental damage than the discharge itself.

* **Sec. 13.** AS 46.04.030(e) is amended to read:

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. **If a contingency plan submitted to the department for approval relies on the services of an oil spill response action contractor, the department may not approve the contingency plan unless the response action contractor is registered and approved under AS 46.04.035.** The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

(1) periodic training;

(2) response team exercises; and

(3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

* **Sec. 14.** AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may apply to the department for registration as an oil spill response action contractor. The department shall adopt regulations governing the registration and approval of oil spill response action contractors. Regulations adopted by the department under this section must include

(1) minimum training standards for personnel;

(2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed;

(3) minimum professional response action standards and practices; and

(4) minimum performance standards for oil spill response action contractors listed in an oil spill contingency plan approved under AS 46.04.030.

(b) Notwithstanding (a) of this section, the department may substitute a response action

contractor approval program, and a subsequent process to approve response action contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations required under (a)(1) - (3) of this section if the approval program and subsequent process are developed by the United States Coast Guard.

(c) The department shall establish fees applicable to registration under this section in an amount necessary to cover the costs of the registration program. The fees shall be collected by the department.

(d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations under this section.

(e) The department shall develop and maintain a list of oil spill response action contractors registered under this section. The department shall provide the list on request to interested persons.

(f) A response action contractor registered under this section shall annually provide to the department a list of all contingency plans approved under AS 46.04.030 in which the response action contractor has agreed in writing to be listed as a responder.

(g) In this section,

(1) "oil" has the meaning given in AS 46.03.826;

(2) "response action" has the meaning given in AS 46.03.825;

(3) "response action contractor" means

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

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

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

* Sec. 15. TRANSITION. The Department of Environmental Conservation shall adopt regulations to implement AS 46.04.035(a), enacted in sec. 14 of this Act, on or before January 1, 1993.

* Sec. 16. REPORT. The Department of Environmental Conservation shall report to the legislature by March 31, 1993, on the progress of the department in developing the ability of the state to respond

to oil spills of an unknown origin and enhance regional response and coastline protection.

*** Sec. 17.** Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

*** Sec. 18.** If this Act takes effect after June 30, 1992, sec. 17 of this Act is retroactive to June 30, 1992.

*** Sec. 19.** APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to AS 46.03.822 and 46.03.825, made by secs. 3 - 10 of this Act, apply only to causes of action accruing on or after the effective date of secs. 3 - 10 of this Act.

(b) The provisions of AS 46.03.825(b)(4)(C) apply only to causes of action accruing on or after the effective date of that paragraph under sec. 20 of this Act.

*** Sec. 20.** AS 46.03.825(b)(4)(C), added by sec. 7 of this Act, and sec. 13 of this Act take effect July 1, 1993.

*** Sec. 21.** Except as provided in sec. 20 of this Act, this Act takes effect immediately under AS 01.10.070(c).

7-LS2045\J
Ford
4/6/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to registration of an oil spill response action contractor; limiting the liability of an oil spill response action contractor for release or threatened release of a hazardous substance and for an act or omission that is consistent with a state or national oil spill contingency plan or consistent with an order of an on-scene coordinator; amending certain exceptions to limited liability applicable to an oil spill response action contractor; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

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

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

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, [AND] the exception set out in (i) of this section, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial

action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

* Sec. 2. AS 46.03.825(a) is repealed and reenacted to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan prepared under AS 46.04.200, 46.04.210,

or 33 U.S.C. 1321(d); or

(2) as otherwise directed by the federal or state on-scene coordinator.

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

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

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

(2) a response action contractor who

(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;

(B) acts with gross negligence or intentional misconduct; or

(C) is not registered with the department under AS 46.04.035, and who agrees in writing to be listed and who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, that is being implemented to respond to a release or threatened release of oil [AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY NOT CAUSED BY OIL; OR

(3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER THE RELEASE].

* Sec. 4. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may register with the department as an oil spill response action contractor. The department shall require a person registering as an oil spill response action contractor under this section to verify the existence of resources, including personnel, equipment, services, and a deployment plan as required of that contractor in any contingency plan approved under AS 46.04.030 in which the contractor has agreed to be listed.

(b) The department shall develop and maintain a list of oil spill response action contractors registered under this section. The department shall provide the list on request to interested persons.

(c) In this section, "oil" and "response action contractor" have the meanings given in AS 46.03.826.

* Sec. 5. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

* Sec. 6. If this Act takes effect after June 30, 1992, sec. 5 of this Act is retroactive to June 30, 1992.

* Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

7-LS2045\P
Ford
4/14/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act relating to the liability of the state for certain registration, planning, and response activities related to oil spills; relating to liability for release or threatened release of a hazardous substance; relating to the liability of an oil spill response action contractor for release or threatened release of a hazardous substance; relating to oil discharge and contingency plans; relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

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

* Section 1. AS 09.50.250 is amended to read:

Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may

bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought under this section if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of a quarantine by the state;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; [OR]

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020(c); or

(5) arises out of

(A) registration and approval of an oil spill response action contractor under AS 46.04.035;

(B) approval of an oil spill contingency plan under AS 46.04.030; or

(C) an act or omission of the state, an employee of the state, or a person who contracts with the state in responding to or directing a response to a release or threatened release of oil, unless the act or omission resulted from gross negligence or intentional misconduct; in this subparagraph, "oil" has the meaning given in AS 46.03.826.

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

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, [AND] the exception set out in (i) of this section, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function

or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

* Sec. 3. AS 46.03.822(b) is amended to read:

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c) and 46.03.825(e), an

intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or omission of the third party and against the consequences of the act or omission; or

(C) an act of God; and

(2) in relation to (1)(B) or (C) of this subsection, that the person, within a reasonable period of time after the act occurred,

(A) discovered the release or threatened release of the hazardous substance; and

(B) began operations to contain and clean up the hazardous substance.

* Sec. 4. AS 46.03.822(k) is amended to read:

(k) In this section, "damages" <u>has the meaning given in AS 46.03.824 and includes</u> [INCLUDE] damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

* Sec. 5. AS 46.03.825(a) is repealed and reenacted to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan approved under AS 46.04.030 or prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d);

(2) as otherwise directed by the federal or state on-scene coordinator.

* Sec. 6. AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death;

(2) <u>a response action contractor who</u>

<u>(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;</u>

<u>(B) acts with gross negligence or intentional misconduct;</u>

<u>(C) is not registered with the department under AS 46.04.035, and</u>

who agrees in writing to be listed and who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, that is being implemented to respond to a release or threatened release of oil; or

(D) has agreed in writing to be listed and who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a release or threatened release of oil that the response action contractor was required to respond to under its contract with the applicable contingency plan holder; this subparagraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the primary duty to respond [AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY NOT CAUSED BY OIL; OR

(3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER THE RELEASE].

* Sec. 7. AS 46.03.825(d) is amended to read:

(d) In this section,

(1) "registered" means registered under AS 46.04.035;

(2) "response action" means an action taken to respond to a release or threatened release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, or removal of a release or threatened release of oil.

* Sec. 8. AS 46.03.825 is amended by adding new subsections to read:

(e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable person with respect to costs or damages caused by an act or omission of a response action contractor.

(f) Except as provided in (e) of this section, this section does not affect the liability under this chapter or under any other state law of a person other than a response action contractor.

* Sec. 9. AS 46.04.030(e) is amended to read:

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or

vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. **If a contingency plan submitted to the department for approval relies on the services of an oil spill response action contractor, the department may not approve the contingency plan unless the response action contractor is registered and approved under AS 46.04.035.** The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

(1) periodic training;

(2) response team exercises; and

(3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

* Sec. 10. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may apply to the department for registration as an oil spill response action contractor. The department shall adopt regulations governing the registration and approval of oil spill response action contractors. Regulations adopted by the department under this section must include

(1) minimum training standards for personnel;

(2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed;

(3) minimum professional response action standards and practices; and

(4) minimum performance standards for oil spill response action contractors listed in an oil spill contingency plan approved under AS 46.04.030.

(b) Notwithstanding (a) of this section, the department may substitute a response action contractor approval program, and a subsequent process to approve response action contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations required under (a)(1) - (3) of this section if the approval program and subsequent process are developed by the United States Coast Guard.

(c) The department shall establish fees applicable to registration under this section in an amount necessary to cover the costs of the registration program. The fees shall be collected by the department.

(d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations under this section.

(e) The department shall develop and maintain a list of oil spill response action contractors registered under this section. The department shall provide the list on request to interested persons.

(f) A response action contractor registered under this section shall annually provide to the department a list of all contingency plans approved under AS 46.04.030 in which the response action contractor has agreed in writing to be listed as a responder.

(g) In this section,

(1) "oil" has the meaning given in AS 46.03.826;

(2) "response action" has the meaning given in AS 46.03.825;

(3) "response action contractor" means

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

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

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

* Sec. 11. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

* Sec. 12. TRANSITION. The Department of Environmental Conservation shall adopt regulations to implement AS 46.04.035(a), enacted in sec. 10 of this Act, on or before January 1, 1993.

* Sec. 13. If this Act takes effect after June 30, 1992, sec. 11 of this Act is retroactive to June 30, 1992.

* Sec. 14. APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to AS 46.03.822 and 46.03.825, made by secs. 2 - 8 of this Act, apply only to causes of action accruing on or after the effective date of secs. 2 - 8 of this Act.

(b) The provisions of AS 46.03.825(b)(2)(C) apply only to causes of action accruing on or after the effective date of that paragraph under sec. 15 of this Act.

*** Sec. 15.** AS 46.03.825(b)(2)(C), added by sec. 6 of this Act, and sec. 9 of this Act take effect July 1, 1993.

*** Sec. 16.** Except as provided in sec. 15 of this Act, this Act takes effect immediately under AS 01.10.070(c).