

HB

540

(File 2)

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

February 20, 1992

SUBJECT: Response action contractors - (SSHB 540)

TO: Representative Bill Hudson

FROM: Michael F. Ford
Legislative Counsel *M.F.*

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

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

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

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

Section 4 - Retroactive clause for section 3.

Section 5 - Effective date.

MFF:pl
92-116.plm

OCTOBER 26, 1991 DRAFT REGULATIONS

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

PART 2 -- PREVENTION PLAN

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

18 AAC 75.445. APPROVAL CRITERIA.

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

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

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

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

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

OIL DISCHARGE PREVENTION
AND CONTINGENCY PLAN APPROVAL

Name of plan holder
Address

Dear:

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

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

Plan Title: _____, consisting of ____ volumes

Supporting Documents, if any (list): _____

Plan Holder: _____

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

Covered Vessels or Facilities: _____

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

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

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

TERMS AND CONDITIONS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Regional Administrator
or
Regional Environmental Supervisor

Enclosures:

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

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



Alaska Department of
**Environmental
Conservation**

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

Release

Walter J. Hickel, Governor

John A. Sandor, Commissioner

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

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

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

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

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

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

- More -

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

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

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

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

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

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

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

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

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

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

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

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

The department also decided:

- To adopt the majority of the proposed prevention provisions now and make a commitment to continue to work on unresolved issues with the HB 567 Working Group, rather than delay the entire "prevention" package.
- To retain language to guard against company employee substance abuse or medical problems diminishing abilities to perform tasks that could prevent or reduce the size of a spill. The language has been reviewed by the Departments of Law and Health and Social Services.
- For non-crude carriers, to adopt a current planning standard that requires the operator to plan to contain or control 15% of the capacity of the vessel or barge within a 48-hour time limit, and clean up the full amount of any size spill within the shortest feasible time.
- To maintain provisions for drilling relief wells in the event of a blowout. The department was concerned about the possibility of a sustained major discharge from an oil formation occurring during adverse winter conditions that could make it impossible to regain control of the well until the following season. Language was

- More -

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

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

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

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

#

NEW STANDARDS FOR CONTINGENCY PLANS

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

CRUDE OIL TANK VESSELS OR BARGES:

- vessels smaller than 500,000 barrels of storage capacity must plan to contain or control and clean up a 50,000 barrel discharge

- Vessels with more than 500,000 barrel capacity must plan to contain or control and clean up a 300,000 barrel discharge

- All crude oil tank vessels or barges must demonstrate access to other equipment outside the region of operation to clean up a realistic maximum discharge and the ability to have that equipment deployed and operating at the discharge site within 72 hours.

NON-CRUDE TANK VESSELS OR BARGES—

- must plan to contain or control the greater portion of the total oil storage capacity of the vessel

- must clean up a discharge within the shortest possible time consistent with minimizing damage to the environment.

OIL SPILL PREVENTION, RESPONSE AND FINANCIAL RESPONSIBILITY

The Regulations Say:



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

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

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

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

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

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



Alaska
Department of
Environmental
Conservation

DEVELOPMENT OF ALASKA'S OIL SPILL REGULATIONS



Alaska
Department of
Environmental
Conservation

1989 MARCH 24
Exxon-Valdez oil spill

1990 JUNE 27, 1990
House Bill 567 takes effect

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

MARCH 15
Distribute working draft of regulations
for financial responsibility

MARCH 19
First meeting of HB 567 work group

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

JUNE 1
Incorporate public comments
Amendments to response plans due

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

JULY 8-AUGUST 21
Hold public hearings on all
regulations

AUGUST 21-OCTOBER 10
Incorporate final revisions

OCTOBER 10
Department of Law review begins

NOVEMBER
Lt. Governor review

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

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

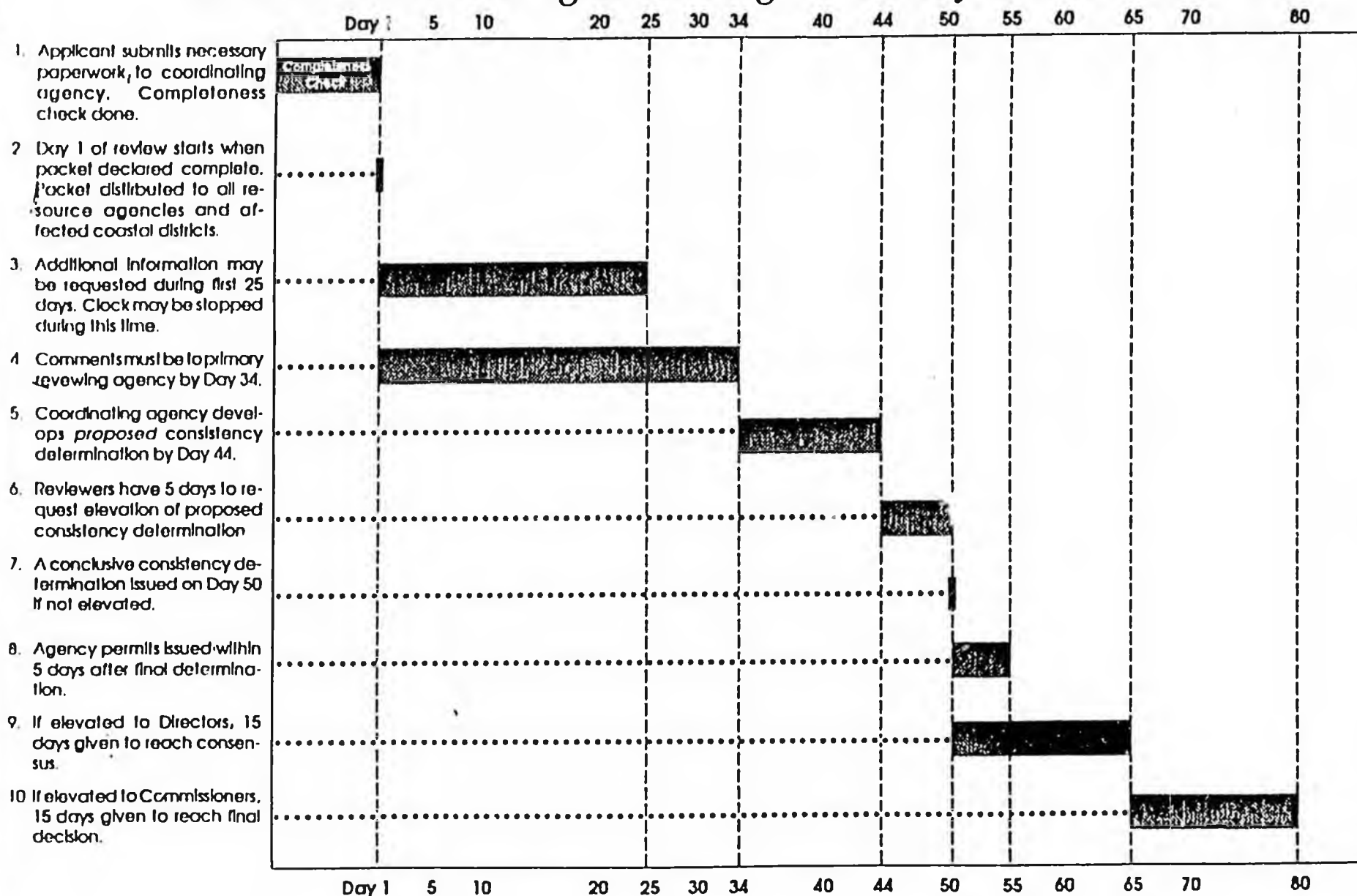
PROOF OF FINANCIAL RESPONSIBILITY

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

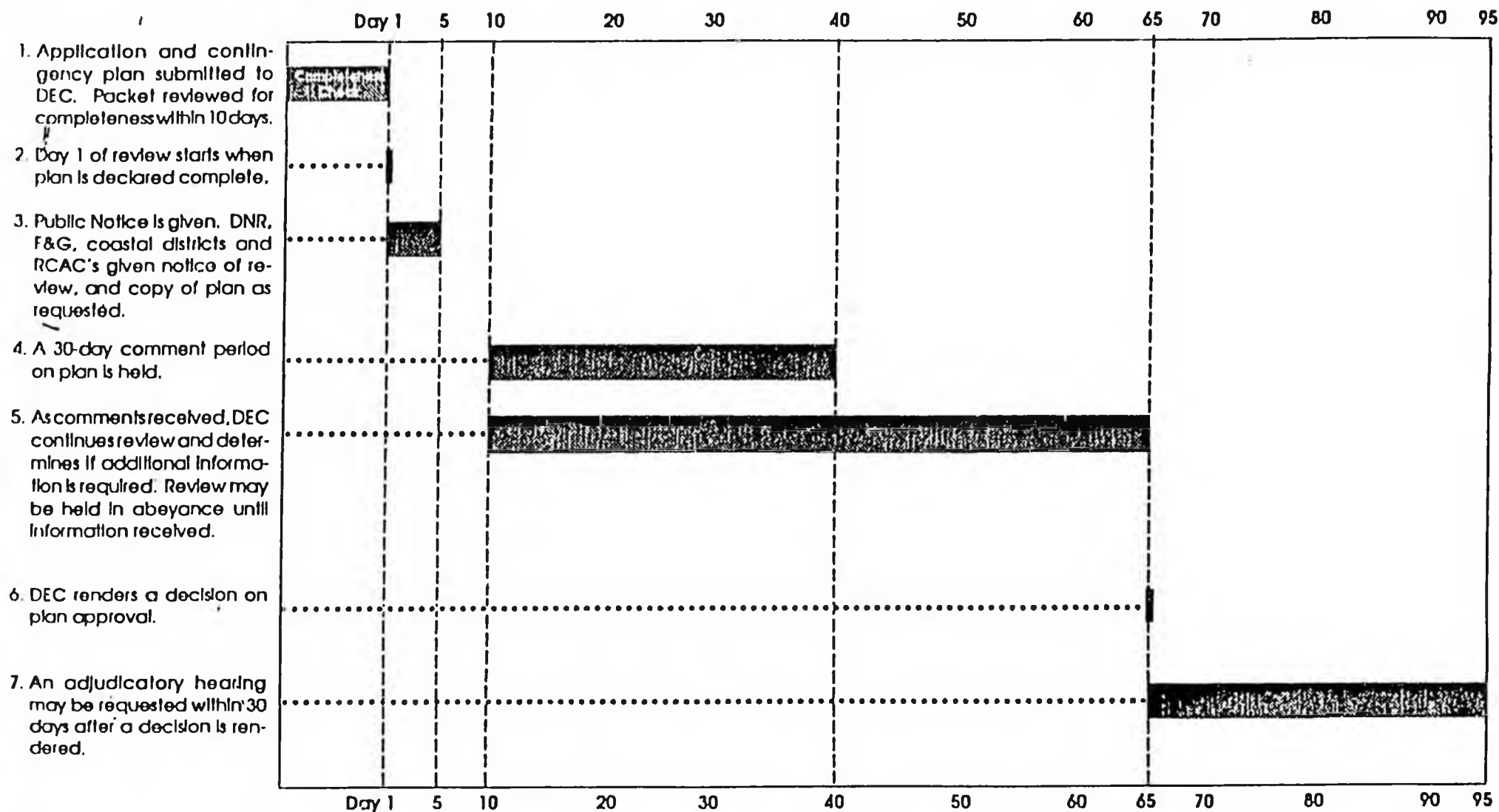


Alaska
Department of
Environmental
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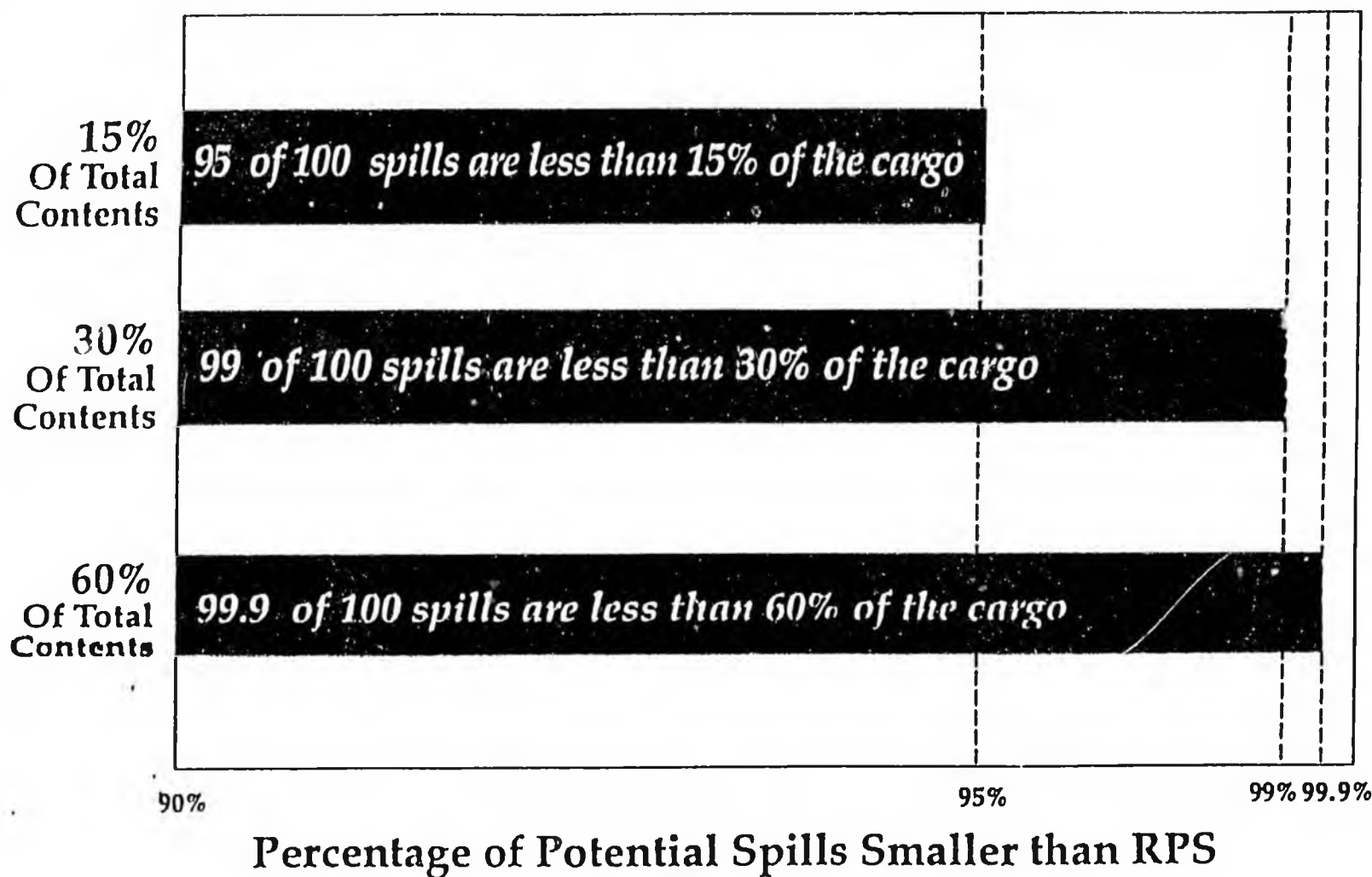
Alaska Coastal Management Program 50-Day Review Schedule



Oil Spill Contingency Plan Review Schedule Under HB567 Regulations



Vessel Response Planning Standards (RPS) vs Risk



Crude Oil Response Plan

MAXIMUM OIL ---
DISCHARGE
(MOD)

(procedures must be
in place to address a
spill of this size in the
shortest possible
time)

PREVENTION MEASURES

OUT OF REGION
REQUIREMENT

(additional resources
deployed and oper-
ating within 72 hours)

MIN

IN REGION
REQUIREMENT

(resources to
contain, control,
cleanup within 72 hrs)

*Response planning standards
must be met by the holder of a

essel tandards*



100%, total capacity

60% of total capacity

30% of total capacity

± 15% of total capacity
300,000 BBL
or
50,000 BBL

cleanup standards that

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

February 19, 1992

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

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

Dear Mr. Attorney General:

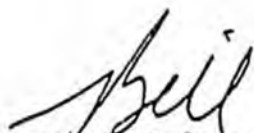
Enclosed you will find a sponsor substitute for HB 540, relating to limited liability for response action contractors.

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.

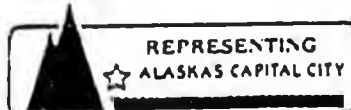
SSHB 540 is scheduled for a hearing in the House Special Committee on Oil and Gas on Monday, February 24, 1992 in Room 124 of the Capitol Building.

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



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 18, 1992

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

Dear Commissioner Sandor:

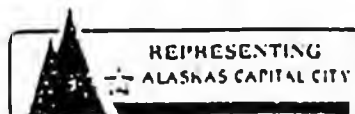
The Citizen's Oversight Council on Oil and Other Hazardous Substances recently presented their report as required by Section 11 of HB 196, Chapter 92 SLA 1991. I am enclosing for your convenient reference a copy of that report.

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

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

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

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



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

Respectfully,



Bill Hudson

Enclosures

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

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COMMITTEES

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Resources
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FINANCE SUBCOMMITTEE:

Department of Transportation
and Public Facilities

February 18, 1992

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

Dear Admiral Ciancaglini:

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

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

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

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

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



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

Respectfully,

A handwritten signature, likely of Bill Hudson, consisting of stylized initials and a surname.

Bill Hudson, Chair

Enclosures

Ray Gillespie
Gillespie & Associates
Lobbying & Governmental Affairs



10390 Mendenhall Loop Road
Juneau, Alaska 99801
Telephone: (907) 463-3375
Fax: (907) 463-5522

MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

FROM:  Ray Gillespie, for Crowley Maritime, Delta Western and Petro Marine

RE: Marine Pollution Insurance Problems

This will outline three problems non-crude carriers and operators are experiencing in obtaining marine pollution insurance to satisfy the financial responsibility and "direct action" provisions of Alaska law.

Briefly, these problems are:

1. Confusion created by apparent inconsistencies between statute and regulations concerning insurer liability/exposure when issuing a policy meeting the specific requirements of financial responsibilities statutes.
2. P&I club and insurance coverage with "direct action" endorsement is virtually unavailable to most Alaska operators in the present commercial insurance or P&I club market.
3. Whether D.E.C. has statutory authority to grant conditional operating permits to operators who have met the financial responsibility requirement dollar amounts, but can not satisfy the "direct action" endorsement due to its unavailability.

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

Environmental Conservation Regulation, 18 AAC 75.230 (b), requires a policy of insurance certificate or binder to carry an endorsement which reads in part as follows:

"Any other provision of this policy notwithstanding: (1) this policy insures against any liability the insured may incur under Alaska Statute 46.04.040 (i), or any provision cited in it as a result of an unlawful discharge of oil within or affecting Alaska lands or waters within the territorial jurisdiction of the State of Alaska; however, the insurer's liability does not exceed the limits of coverage set out in Section _____ of this policy...." (emphasis added)

Alaska Statute 46.04.040 (i) reads as follows:

"Financial responsibility under this section extends to loss compensable under AS 46.03.760 (e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760 (a) or 46.04.030 (g)."

This statute in combination with 18 AAC 75.230 (b) has led P&I clubs and insurance underwriters to conclude that their exposure under a policy may not be limited to the face amount of the policy even though it meets the other monetary requirements for financial responsibility (AS 46.04.030 (k)). In other words, because statutes generally supersede any inconsistent regulation, insurers have advised operators that the potential for unlimited liability and the uncertainty of a judicial interpretation of these statutes and regulations prevents insurance underwriters and P&I clubs from writing the insurance with the required endorsement.

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

"An action brought under AS 46.03.758, 46.03.759, 46.03.760 (a) or (e), 46.03.822, or AS 46.04.030 (g) may be brought in a state court directly against the insurer, the group, or any person providing evidence of financial responsibility. The applicant, and insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent or service of process in the state...." (emphasis added)

This provision requires that any insurer or P&I club submit directly to the Alaska jurisdiction and be subject directly to legal action against it in Alaska courts without first proceeding against the spilling operator. The State of Alaska or private party can, under this provision, proceed directly in Alaska courts against the insurer. Typically, P&I club coverage is an indemnity policy, which first requires a provable loss against the operator before the P&I club pays that loss. This is the so-called "direct action" provision which prevents many operators from securing coverage meeting the requirements of Alaska Statutes.

In the States of Washington and California recently enacted financial responsibility statutes do not require the "direct action" endorsement. In essence, California and Washington simply allow for P&I club and insurance coverage which meets the monetary financial responsibility requirements and requires no other showing of a "direct action" endorsement.

III.

UNCERTAINTY OF D.E.C. AUTHORITY TO ISSUE CONDITIONAL OPERATING PERMITS WHERE DIRECT ACTION ENDORSEMENTS ARE NOT AVAILABLE.

AS 46.04.040 (1) provides that under certain circumstances DEC may issue permits to an operator who has proof of financial

responsibility without the "direct action" endorsement. This provision has been interpreted as authority to issue conditional permits only upon proof of at least \$50 million in insurance or other financial responsibility which has the direct action endorsement. Since the maximum financial responsibility coverage for a non-crude operator (tank vessel and barges) is \$35 million under AS 46.04.040 (c) (2), the waiver or conditional permit provisions of subsection (1) is not available to them.

The D.E.C. has, however, been issuing conditional permits to non-crude operators which have complied with the monetary financial responsibility requirements, but are unable to get such coverage with the "direct action" endorsement. The "direct action" endorsement is unavailable in the market place to some, if not most, non-crude operators. Due to the commercial unavailability of financial responsibility with the required endorsement, the DEC is in the unpleasant predicament of denying operating permits to established responsible carriers who have been doing business in Alaska for years. Denial of such operating permits because of commercial unavailability of "direct action" endorsement is potentially devastating and would likely eliminate most non-crude refined product delivery to many Alaskan communities.

This provision should be revisited by the Legislature to reflect the realities of the insurance market and availability of coverage. As of last week, D.E.C. has suspended any Conditional Permits.

IV.

SUGGESTED SOLUTIONS

Legislation which:

1. Places explicit language in statute which limits the exposure of an insurer or P&I club to the face amount of the policy;
2. Eliminates the "direct action" requirement;
3. Provides a substitute mechanism to "direct action" which satisfies the State of Alaska and yet recognizes the realities of the available insurance or P&I club coverage;

4. Clarifies D.E.C. authority to grant conditional operating permits to non-crude operators who have otherwise complied with the monetary requirements for financial responsibility; or

5. Combination of the above.

W. Gene Burden
Vice President
Environmental Affairs & Government Relations

February 6, 1992

Representative Bill Hudson
Alaska State Capital
Room 114
P.O. Box V
Juneau, Alaska 99801

Subject: Response Action Contractor Liability

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

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

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

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

Representative Bill Hudson
February 6, 1992
Page 3

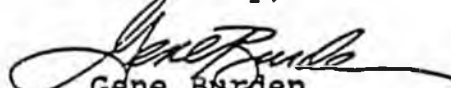
apply to RACs, since before the enactment of HB 196 the legislature had passed a statute extending liability to RACs for simple negligence (See AS 46.03.823). Moreover, AS 9.65.091 applies only to declared disasters, and only those persons whose services are requested by the state which would exclude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

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

1. A negligence standard threatens to unfairly embroil RACs in costly post-spill litigation. The crisis atmosphere and potential consequences of oil spills combined with the unacceptably high risk and cost of litigation is not offset at all by the promise of limiting jury instructions;
2. The threat of litigation deters RACs from freely entering a jurisdiction without limited liability which interferes with the formation of effective spill co-ops;
3. The enactment of the new federal liability fund as well as the State clean-up fund; unlimited strict liability on the discharger (including strict liability for any damages caused by the RAC); and federal and state requirements for proof of financial responsibility combine to make the possibility of leaving victims uncompensated for damages caused by the simple negligence of a RAC very, very remote.

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

Sincerely,


Gene Barden

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.

/

~~EVALUATION, PREQUALIFICATION AND CERTIFICATION~~
~~OIL SPILL RESPONSE CONTRACTORS~~
~~048018-10-19~~

NEGOTIATED RULEMAKING ISSUES: The following issues are submitted for discussion and/or resolution by the Negotiated Rulemaking Committee:

- * why oil spill response contractor certification is being considered;
- * the provisions of OPA 90 which provide for certification of prequalified response contractors;
- * the criteria and factors to be used in evaluating a response contractor's overall capability to respond;
- * the standard(s) to which contractors can be prequalified and the mechanisms for certification, inspection, validation and enforcement; and,
- * the benefits and costs expected from prequalification and certification of oil spill response contractors.

BACKGROUND DISCUSSION:

A requirement of the Oil Pollution Act of 1990 (OPA 90) amendments to the Federal Water Pollution Control Act (§311(j)(5)), is that the owner or operator of a tank vessel prepare and submit a comprehensive, spill response plan for U.S. Coast Guard approval. Paragraph (C)(iii) of that section, requires that owners/operators "identify, and ensure by contract or other means approved by the President the availability of private personnel and equipment necessary to remove...a worst case discharge" from the environment. For a tank vessel, "worst case discharge" is defined as a total loss of cargo in adverse weather. For the purposes of this rulemaking, and in accordance with the provisions of Section 311(C)(2), the USCG will address all spills in U.S. waters, not just those of "worst case" volume.

The intent of these requirements is to compel forward planning and to ensure that necessary existing resources - trained personnel, vital equipment, communications, finances, etc. - are available, operable and adequate for a future incident.

Developing response plans to meet regulatory requirements and to facilitate the rapid and effective cleanup of a major oil spill requires that there be some established standards of performance for equipment and contractor selection. Without such standards, and some means of certifying those contractors who meet them, there is no way for a tank vessel owner or operator to identify appropriate resources, or to select those contractual resources with whom he is required, by OPA 90, to establish a contractual relationship.

From a regulatory point of view, Coast Guard authority to approve or disapprove response plans carries a great responsibility to make that determination objectively. Establishing response requirements and defining standards of adequacy must be consistent throughout the United States. It cannot be determined locally. In the current regulatory and contractual environment, neither the USCG, nor the vessel owners can meet the intent of the law.

The provisions of Section 311(j)(5)(C)(iii), when implemented, can have important benefits to oil transportation interests and to the contracting industry. First, requiring owners/operators to have contractual relationships with oil spill response resources creates a demand for qualified contractors and provides an incentive to vessel owners to contract with the best value. It may involve both the vessel owners and the response industry in a symbiotic pursuit of better response capabilities. Second, by requiring contractual relationships with prequalified resources only for response plan approval the regulations can effectively limit the supply of acceptable contractors. While it is not necessary for there to be financial consideration in a contractual relationship, altering the supply-demand relationship makes it likely and may provide a means of funding contractor capitalization of response resources in exchange for guaranteed response to an oil spill.

Congress statutorily required that adequate resources reside in the private sector, not the public sector. Existing private resources in the United States include contractors ranging from small, established, waste-oil contractors and waterfront services to major hazardous waste contractors, marine spill contractors and OPA 90-inspired ventures such as NRC and a major industry cooperative, MSRC. Funding for private resources comes from subsidies by member organizations, as is the case with oil spill cooperatives, or from for-profit business activity. Ultimately, all funding comes from revenues and profits.

The existing state of the response industry (generally pre-OPA-90) is one that has developed to take advantage of profitable, routine-spill opportunities without risking the financial future of the enterprise by capitalizing for the unpredictable anomaly of a large spill. Without the requirement for (1) contractual relationships between owners and response contractors or cooperatives, (2) identifying means (i.e. certification) for selecting adequate resources and (3) a mechanism for profiting from response capability improvement there is no incentive for the private sector to improve beyond its existing status. If there were it would have already have done so.

The two most important resources in a contractor/cooperative's inventory are response equipment and trained people. Standardization of response equipment has been undertaken by Committee F20 of the American Society of Testing and Materials (ASTM). ASTM's charter includes the standardization of services, as well as products, and may include contractor performance standards. Because ASTM is a voluntary, consensus organization, however, it works slowly and will require 1-3 years to publish final standards for reference by the regulations. Any standards which develop in response to OPA 90 initiatives have scant chance of adoption in time to assist owners/operators or the USCG in meeting the response plan deadlines.

ISSUES FOR DISCUSSION/RESOLUTION:

Issue 3 - Contractor Prequalification and Certification

* Standards. The most useful standards for contractor/cooperative selection and reliability are performance related - i.e. how much oil recovery/dispersal/disposal/etc. capacity does the organization have.

Which contractor/cooperative capabilities can be measured and standardized?

On what should those standards be based?

How can they be developed in time to meet the statutory deadline, particularly given the time required by ASTM, or any other consensus organization, to issue standards?

* Certification or licensing. Licensing of marine spill response contractors requires a bureaucratic organization to set standards, monitor compliance and enforce regulations. It requires direct government action to prequalify and approve contractors. Of necessity, it establishes a new bureaucratic process to accept applications and fees, amend rules, and process and enforce the conditions of the license. A disadvantage of licensing is that once bureaucracy establishes licensing standards they may become inflexible and fail to keep pace with the development of technology. Eventually, inflexible licensing standards could serve to inhibit the industry whose very development we wish to stimulate.

Certification to consensus standards, on the other hand, is encouraged by the Federal Government (OMB Circular 119 and USCG instructions) and provides flexibility by involving already existing, private sector organizations with charters which call for mandatory, periodic review of standards to maintain currency.

Issue questions include:

Who should certify contractual resources?

Should there be several levels of certification to address different spill volumes and requirements and to consider the variety of contractors and cooperatives already in existence? If so, how many certification levels should there be and on what capabilities/requirements should they be based?

How should the following be weighted in certifying contractors: spill and exercise performance, inventory ownership, financial capacity, managerial skills, previous history of operational performance, (others?)?

Must a contractor/cooperative own necessary equipment in order to be certified or may an enforceable, contractual guarantee of resource availability suffice for certification?

Given that certification is not instantaneous, what can be done to facilitate prequalification and identification of appropriate and acceptable response resources until there is a workable certification system?

If certification of contractors is partially based on standardized equipment how can existing, non-standardized resources be "grandfathered" to consider its existing and continued value and usefulness but also promote the adoption of better, more capable equipment?

* Certification validation and enforcement: OFFICE OF MERCHANT MARINE SAFETY INSTRUCTION 16703.1 provides guidance on self-certification/attestation and other innovative regulatory techniques. Underwriters Laboratories and American Bureau of Shipping are both pursuing registration as "agents" of the International Standards Organization and provide quality and reliability services for a fee.

Either of the two bodies above, Federal and state agencies or a combination could be used for inspection, verification of inspection and/or validation of continued certification. The least expensive and most effective means is probably one which requires government oversight but not routine inspection by the Coast Guard at the contractor level.

Should the response industry be permitted or encouraged to measure itself with regular oversight and enforcement?

If not, how should the inspection, verification and validation process be managed?

Who should be responsible for what portions?

Given the requirement for a national standard, what role should State governments play?

What should the contractor/cooperative community's role be?

If we allow self inspection/attestation how should the Federal government manage quality assurance?

How should the process be funded?

Issue 2G - Overall capabilities of response resources identified in response plan

- o OPA 90 amendments require the vessel owner to identify, and ensure by contract or other means approved by the Coast Guard, the availability of private personnel and equipment sufficient to respond to a worst case discharge to the maximum extent practicable.
- o Meeting this will require either:
 - a written contractual agreement with a response contractor guaranteeing personnel and equipment availability and stipulating response times within specified geographic areas;
 - certification that the required personnel and equipment resources are owned and/or operated by the vessel owner/operator and are available within stipulated response times within specified geographic areas; or
 - active membership in a local or regional oil spill removal organization that has identified personnel and equipment available within stipulated response times over specified geographic areas.
- o The contractor's overall capability to respond, both existing and projected, must be considered when setting the "maximum extent practicable" planning standard.
- o Equipment and personnel availability varies between for-profit contractors, not-for-profit cooperatives, or other organizations such as Marine Spill Response Corporation or the National Response Corporation. No one organization has the capability to respond on their own to a worst case discharge.
- o Response resource capability assessment needs to account for relationships between commercial resources. These relationships need to be contractual to be acceptable for inclusion in a response plan.
- o Contractor/co-op response overall capability is based on a number of factors. These include the availability of containment and recovery equipment, both in inventory and through cooperative or contracting arrangements; required support services such as aircraft, temporary oil storage devices, vehicles, boats, etc. and the availability of personnel trained to OSHA HAZWOPER standards in 29 CFR 1910.120.

WORKGROUP # 2

Each factor has to taken into account when evaluating resource capability.

- o Issue 3 related to contractor certification discusses this in more detail.

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

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United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

JAMES H. ENGLISH, STAFF DIRECTOR
J. KEITH KENNEDY, MINORITY STAFF DIRECTOR

February 3, 1992

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

Dear Bili:

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

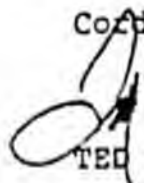
I have contacted the Coast Guard to inquire as to their response to you on this concept. You may also be interested to know that I helped draft provisions that were included in the Oil Pollution Act of 1990 (OPA) to help address the concern that you are raising.

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

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

With best wishes,

Cordially,


TED STEVENS

U.S. Department
of Transportation
United States
Coast Guard



Commandant
U.S. Coast Guard

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL

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

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

- The availability of a viable private sector response to oil spills and their threats is an essential element of a national oil pollution response system.

- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil spill response industry stressed the importance of limited immunity to its viability.

- As a result of the industry's presentation to Congress, Congress provided a limited immunity respecting removal costs and damages which result from actions taken or omitted to be taken in the course of providing care, assistance, or advice consistent with the Contingency Plan or as otherwise directed by the Commandant.

- The Coast Guard supports the principle of limited immunity under State law respecting liability for removal costs and damages to the extent that such immunity is necessary to assure a broad-based private sector capability. The Coast Guard urges that State law provisions be as consistent as possible with the federal immunity provision.

Marine Spill Response Corporation
Comments to

The Citizens' Oversight Council on Oil
and Other Hazardous Substances
1/31/92

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Thank you for the opportunity to be part of the process that will determine Alaska's law concerning a limited immunity for oil spill responders. I'd like to commend the Citizen's Oversight Council and the state for taking the initiative to thoroughly study such a complex matter.

The written specific comments that have been provided separately are linked to the material available to us: The Summary of Research Projects. While several of the summaries present conclusions that MSRC does not agree with, two of the summaries are of principal concern because we feel they may be indicative of a general condition, and that is that the full effect of OPA-90's many inter-linked provisions may not be clearly stated in the Research Summaries. This is important because we believe that the question of a limited responder immunity for Alaska should be addressed in a framework of full understanding of OPA-90.

The two research projects I will comment on are: (1) Response Action Contractor Provisions in the Oil Pollution Act of 1990 and (2) other state's response action contractor provisions. The first summary is incomplete in that there is no mention of an absolutely critical element: the assumption of any responder liability (given that certain conditions are met) by the responsible party. The second summary is also incomplete as it lists eight states that have enacted such a statute. The fact is 19 coastal states have enacted

legislation as protective as OPA-90 over the last 18 months. The majority of the six remaining jurisdictions have old "Good Samaritan" legislation that is not in conformance with OPA-90. Furthermore, three national state legislative associations (NCSL, CSG and ALEC) support the federal standard. The point here is that MSRC believes those facts are a powerful testimony of the soundness of OPA-90's provisions as public policy -- yet the full story of how other coastal legislatures have acted is not fully exposed in the research report.

Several statements/conclusions reached in the Research Report Summaries are inaccurate principally because they do not fully recognize the new responsibilities and relationships established for removal (§4201) and planning (§4202) of OPA-90. Understood in context of all of the provisions of OPA-90, it is clear that the purpose of the immunity is to promote the public welfare by insuring that responders -- no matter who they are or how they are paid, etc.-- will not be inhibited from acting boldly and decisively when confronted with the emergency conditions and potential liability surrounding marine oil spills. I say respectfully, that these provisions do not unreasonably protect responders from negligence. Rather as a matter of sound public policy, OPA-90 distributes risk between responders and the spiller, making the spiller assume liability for good faith errors made by a responder so long as the responder's acts are consistent with the National Contingency Plan, or the acts are at the direction of the federal (or in the case of state law, the Alaska) on-scene coordinator and the acts do not rise to the level of gross negligence or willful misconduct. There is no responder immunity provided in cases of personal injury or wrongful death.

We believe that these provisions go to the heart of the matter of responder performance. They insure that responders act with due care because they are not protected if their acts rise

to gross negligence or willful misconduct. Additional protection is provided to insure that responders will not negligently perform, since only acts consistent with the National Contingency Plan or directed by government officials receive immunity. Since the responsible party is liable for any removal costs and damages that another person is relieved of; and since the provisions of OPA-90 raise limits of liability and make available a \$1 billion per incident trust fund as a source of monies for injured parties; there is now a strong incentive for spillers to act immediately with a bold response and not attempt to deflect liability to those whose purpose is to remove oil from Alaskan waters.

In the specific comments provided you will see that we feel that other research projects do not fully explain the important new relationships and responsibilities established in other sections of OPA-90. In the time I have left I would like to mention just two of these because they demonstrate the importance of considering all aspects of OPA-90 before making your recommendations on Alaskan law.

Statement: "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."

Rebuttal: This statement is not factually correct. Granting such limited immunity encourages a bolder response rather than a potential delay, while lawyers of responders attempt to determine who may be liable for a spill. Under OPA-90, the spiller executes the response in accordance with a previously approved plan; the state is a part of the plan approval process, while state and federal

coordinators control the responder through the spiller. Response and cleanup is sustained until the U.S. Coast Guard, after consultation with the state, determines a site is clean. Federal and/or state on-scene coordinators are directors of the response if they so choose, and response plans now must state how and with what private resources the spiller will respond. If a responsible party refuses to cooperate with directed removal actions there are new, serious penalties available to force compliance; i.e., the responsible party's liability cap is removed and becomes unlimited. Also, failure to comply with a removal order can result in civil penalties of up to \$25,000 per day or three times the costs incurred by the federal Oil Spill Liability Trust Fund.

Statement: "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.

Rebuttal: This speculative scenario cannot take place. Under OPA-90 a shipper must provide a Certificate of Financial Responsibility (COFR) to the U.S. Coast Guard up to his limits of liability before being permitted to transport oil in U.S. waters. A \$1 billion per incident trust fund has been established when a spiller's liability limits are reached. Moreover, a response plan must be submitted to the U.S. Coast Guard that identifies responders and their capabilities. This plan is subject to unannounced drills and inspections insure

that what is submitted can be executed.

MSRC believes the Citizen's Oversight Council needs to fully consider the federal liability regime that exists three miles off its coast today as it makes recommendations that might adopt differing standards. MSRC further believes that Alaska should enact the same limited responder immunity provision as OPA-90. We look forward to receiving your final full report and to seeing many of you at the legislative hearings in Juneau on February 11 and 12.

Marine Spill Response Corporation
Comments to

The Citizens' Oversight Council on Oil
and Other Hazardous Substances
1/31/92

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Research Project: Response Action Contractor Activity in Alaska

- Pg. 2 Statement: "The report concludes that the independent operators are the class of responders most suitable for liability limits."
- Rebuttal: It is not clear why independent operators are "most suitable"? For that purpose, OPA-90 does not differentiate between responders -- all responders are covered.
- Pg. 2 Statement: "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."
- Rebuttal: We believe that different degrees of immunity for different categories of responders would be counter productive. Such action misses the fundamental reason for providing the limited immunity for responders: To promote the most bold and aggressive response for the protection of the environment. OPA-90 requires that a responsible party cite private spill response resources in their contingency plans to respond to a worst case discharge in adverse weather conditions. Industry and other business interests have responded by upgrading existing spill response organizations. All responders (co-ops, for-profit and not-for profit contractors, fisherman, volunteers) work for the spiller during a spill. One type of responder should not be afforded certain privileges that others are denied. The spiller is still responsible for all removal costs and damages regardless of the actions of a fisherman, their own response organization, etc. unless of course the conditions for immunity are not present.
- Pg. 2 Statement: "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."
- Rebuttal: This statement is not factually correct. Granting such limited immunity encourages bolder response rather than a potential delay while lawyers of responders attempt to determine who may be liable for a spill and the risks to be assessed by responders under the current conditions and for every action

during a response and cleanup. Under OPA-90, the spiller executes the response in accordance with a previously approved plan; the state is part of the approval process. state and federal coordinators control the responder through the spiller. Response and cleanup is sustained until the U.S. Coast Guard, after consultation with the state, determines a site is clean. Federal and/or state on-scene coordinators are directors of the response if they so choose, and response plans now must state how and with what private resources the spiller will respond. If a responsible party refuses to cooperate with directed removal actions there are new, serious penalties available to force compliance; i.e., the responsible party's liability cap is removed and becomes unlimited. Also, failure to comply with a removal order can result in civil penalties of up to \$25,000 per day or three times the costs incurred by the federal Oil Spill Liability Trust Fund.

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

Pg. 2 Statement: "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."

Rebuttal: While true, the statement refers to pre-Valdez conditions. Valdez created an entirely new arena for litigation due to the adoption of OPA-90. Liability on removal costs and damages now associated with a spill the size of the Valdez can be in the billions of dollars. It should be noted that the Report Summary stated that the Alaska Department of Environmental Conservation was aware that responders are concerned about this potential liability. New categories of damages are created; i.e., natural resource damage, loss of subsistence use of natural resources, real or personal property damage, net loss of tax and other revenues, loss of profits or earning capability and costs of additional public services provided during or after removal actions. It is the chilling affect of potential liability of this magnitude that responders seek protection from.

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

Pg. 3 Statement: "The result is that private parties may be unable to recover damages for harm caused by response action contractors if there is no other financially solvent responsible party."

Rebuttal: This statement is not factually correct. Private and public parties are fully protected because there is always a source of funds! If a response action contractor responds to a spill or threat of a spill, all damages and removal costs

associated with that spill are the responsibility of the spiller under OPA-90. A responsible party also is liable for any removal costs and damages that another person (a responder) is relieved of. Responders are fully liable in cases of personal injury or wrongful death. To insure a source of funds, the spiller must provide the U.S. Coast Guard with a Certificate of Financial Responsibility before transporting petroleum/petroleum products in U.S. waters and in the case of a spill where the responsible party cannot be determined or his liability ceiling is reached, the U.S. Coast Guard has a \$1 billion per incident fund available from a tax on the transporters oil that pays removal costs and damages associated with the spill. There is universal agreement that OPA-90 reasonably protects injured parties by insuring the availability of funds first from the responsible party, then from the Oil Spill Liability Trust Fund.

Pg. 3 Statement: "Response action contractors and contingency plan holders also allocate liability for damages between each other through private contractual relationships."

Rebuttal: The research project well documents the complexity of these relationships. It is a lawyer's playground and because it is difficult for responders to understand the risks associated with sole and joint actions, and disagreements can only be resolved by litigation responders will not act with the boldness and decisiveness needed to quickly and effectively remove the oil out of the marine environment. On the other hand OPA-90's provisions encourage response by having all acts for which a responder is liable transferred back to the responsible party. This provides a twofold benefit: (1) There is no incentive for a responsible party to attempt to lay liability on responders because such liability will be assumed by him and (2) responders freed from the chilling affect of a simple negligence standard, can act boldly to promote the most effective response.

Pg. 3 Statement: "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."

Rebuttal: The state (and the federal government) have a variety of controls over response action contractors. OPA-90 requires that a response action contractor "... act in accordance with the National Contingency Plan or at the direction of the Federal On-Scene Coordinator ..." to be immune from removal costs or damages associated with rendering care, assistance or advice, etc. This is a strong incentive for responders to act with due care. The state is a party to drafting the requirements for response plans in the Local Area Planning Process and thus a party to the process of defining the response capabilities responsible parties must cite in response plans. OPA-90 requires

the Coast Guard to conduct periodic inspections of response equipment. OPA-90 requires proof of responder capability by holding unannounced drills. Also see penalty provisions previously mentioned for failure of a responsible party to comply with a removal order.

Pg. 3 Statement: "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 decision making and do not face an undue burden by being held to a standard of reasonable care under the circumstances."

Rebuttal: This issue of an emergency atmosphere will be determined as a matter of fact in court. Responders explicitly fear this potential litigation in that it provides an opportunity for the spiller to attempt to shift liability to the responder. This fear would have a chilling affect on response. The risks associated with good faith errors of the responder should fall on the spiller and not the responder reacting in an emergency situation. OPA-90 shifts the risk (for simple negligent acts) to the spiller, where it belongs.

Pg. 4 Statement: "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."

Rebuttal: The statement is factually incorrect. A punitive atmosphere for those responding under un-controlled circumstances; i.e., rain, wind, uncertain information defeats the purpose of initiating and sustaining a bold response. OPA-90 makes the responsible party liable for all removal costs and damages unless the responder acts with gross negligence, willful misconduct or in cases of personal injury or wrongful death. Moreover, only "approved" performance; i.e., within the National Contingency Plan or Federal On-Scene Coordinator/state officials receive immunity. If a responder acts outside these parameters then he is liable for damages. A state provision using fear of liability for responders will be directly counter to the main purpose of the federal standard. It will provide an opportunity for the responsible party to shift liability to responders. Moreover, OPA-90 provides the means to insure that injured parties will be promptly compensated. In a worst case scenario where the spiller is not identified, or the responsible party reaches his liability limit the Oil Spill Liability Trust Fund will pay removal costs and damages up to \$1 billion per incident.

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

Pg. 7 Statement: "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."

Rebuttal: This is correct, but the new OPA-90 planning standard for response plans is a very high one (See Section 4202 National Response System). Response plans must demonstrate, in detail, how a vessel owner/operator using private resources alone, would cleanup a worst case discharge (loss of all cargo) in adverse weather conditions to the maximum extent practicable. Initial indications are that federal rules will require a substantial response capability to meet Congressional intent.

Pg. 7 Statement: "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."

Rebuttal: This is factually incorrect and misleading. The Coast Guard approves (with state input into the process) response plans that are consistent with the National Contingency Plan and Area Contingency Plans for all vessels/facilities and those response plans describe the actions to be followed for a worst case spill. The capabilities of responders must be consistent with the response plan and the area plan. OPA-90 requires the U.S. Coast Guard to conduct unannounced drills, and an inventory inspection of response assets (OPA-90 §4202) as part of the means to insure that the performance of responders will be as stated in response plans. In addition, if a response is not taking place to the satisfaction of the U.S. Coast Guard, the federal government can take over full control at any time.

Pg. 8 Statement: "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.

Rebuttal: This speculative scenario cannot take place. Under OPA-90 a shipper must provide a Certificate of Financial Responsibility (COFR) to the U.S. Coast Guard up to his limits of liability before being permitted to transport oil in U.S. waters. A \$1 billion per incident Oil Spill Liability Trust Fund has been established for occasions when a spillers liability limits are reached. Moreover, a response plan must be submitted to the U.S. Coast Guard that identifies responders and their capabilities. This plan is subject to unannounced drills and inspections insure that what is submitted can be executed.

Research Project: Insurance coverage availability:

Pg. 8 Statement: "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."

Rebuttal: Item (2) will reflect all pre-Valdez experience. OPA-90 substantially increased liability limits and importantly, the categories of items for which damages can be paid. This item represents a new and very large potential exposure for responders. Therefore, insurance costs considering this formula are likely to be understated.

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

Pg. 9 Statement: "The conference committee explained that it wanted to avoid possible deterrence of prompt spill response because of liability fears."

Rebuttal: A major purpose of the liability standard of OPA-90 is to provide the fastest and most complete cleanup of the environment. One way it accomplishes this is by returning liability where it belongs . . . to the spiller. Moreover, there was considerable debate and further discussion on the issue inside the executive branch. For the provision to remain in the bill and for the bill to be unanimously passed by both houses of Congress, it had to receive the concurrence of the U.S. Coast Guard, Environmental Protection Agency, Department of Justice and Office of Management and Budget.

Statement
of
Mr. G. Stephen Duca
Vice President
Readiness and External Affairs
Marine Spill Response Corporation
before the
State of Alaska
Joint Hearing of the
House Special Committee on Oil and Gas
and
House Committee on Resources
February 12, 1992

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although we had not received the full Citizens' Oversight Council Report by the time we had to depart for Juneau, the recommendations appear to be an outstanding example of good government at work. MSRC is pleased that the Council, in recommendation # 1, has acknowledged the essential need for the "gross negligence and willful misconduct" standard.

Because with it comes the real foundation for assuring a bold and vigorous response to oil spills in Alaska, since responders will not unreasonably fear responding in the face of the risks and uncertainties surrounding oil spill response and cleanup. Adoption of this standard will create comity between the state and federal government. This is one of the things MSRC

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

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

1. It should apply to all responders, regardless of the category; i.e. volunteer, not-for-profit organization or for-profit organization,
2. It should only apply to acts or omissions taken in the course of rendering care, assistance or advice that are consistent with the NCP, or as otherwise directed by the President (USCG) or appropriate state officials,
3. It should not apply to the responsible party, or for acts under CERCLA,
4. It should not apply to acts that cause personal injury or wrongful death
5. And of *critical importance*, a responsible party should be held liable for any removal costs or damages that another person is relieved of.

We noted that the Council was silent about a time limit to accompany any immunity.

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

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

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

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

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

and effective whole.

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

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

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

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

- A. The state is intimately involved with the planning for the resources needed for a worst case spill; the federal government assures that response resources are inspected and
- B. That unannounced drills are conducted to assure that what has been written in the plans, (1) actually exists and (2) will perform as agreed upon in the plans and
- C. That Title V provides for the establishment of Regional Citizens Advisory Councils for special areas that have among their many advisory roles ones to:
 - 1. provide advice and recommendations...on the policies...and regulations relating to operation of...terminal facilities and tankers which may affect the environment
 - 2. monitor...the environmental impacts of the operation of the terminal facilities and crude oil tankers
 - 3. review...the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers...

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

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

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

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

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

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

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



John D. Costello
President

July 26, 1991

Mr. John A. Sandor
Commissioner
Department of Environmental Conservation
P.O. Box 0
Juneau, AK 99811-1800

Dear Commissioner Sandor:

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

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

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

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

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

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

- o **Fifteen Day Liability Limit.** This arbitrary limit is unrealistic given the nature of oil spill response operations. The statute does not provide a liability-free opportunity to exit the scene. These provisions are a major disincentive for responders to get involved in remedial actions in the first place. Moreover, there is less likelihood for prompt responder action in cases where there is only the threat of a spill.
- o **"Backdoor" Liability.** Joint and several liability is a real disincentive for any person involved in response activities who by contract arranged for disposal or treatment of hazardous substances possessed by such person, or who accepts hazardous substances for transport to a vessel from which a release occurs.
- o **Limits on Immunity when Conflicting Orders are Received from Officials.** This provision places the responder in a quandary if conflicting orders are received from the state and federal governments.
- o **Response Action Contract Requirements and Substantial Deviation from Oil Spill Contingency Plans.** Written contracts cannot contain all the actions that should be taken during a response, yet these are the only ones that would carry immunity (except for volunteers). This will discourage expedient actions while written agreement issues are

Mr. John A. Sandor
July 26, 1991
Page Three

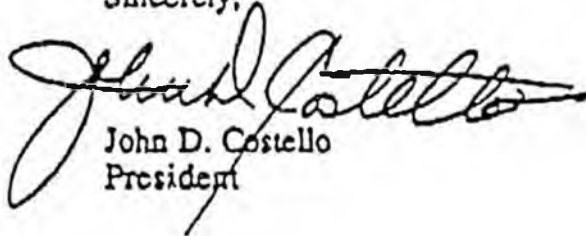
sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

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

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

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

Sincerely,



John D. Costello
President

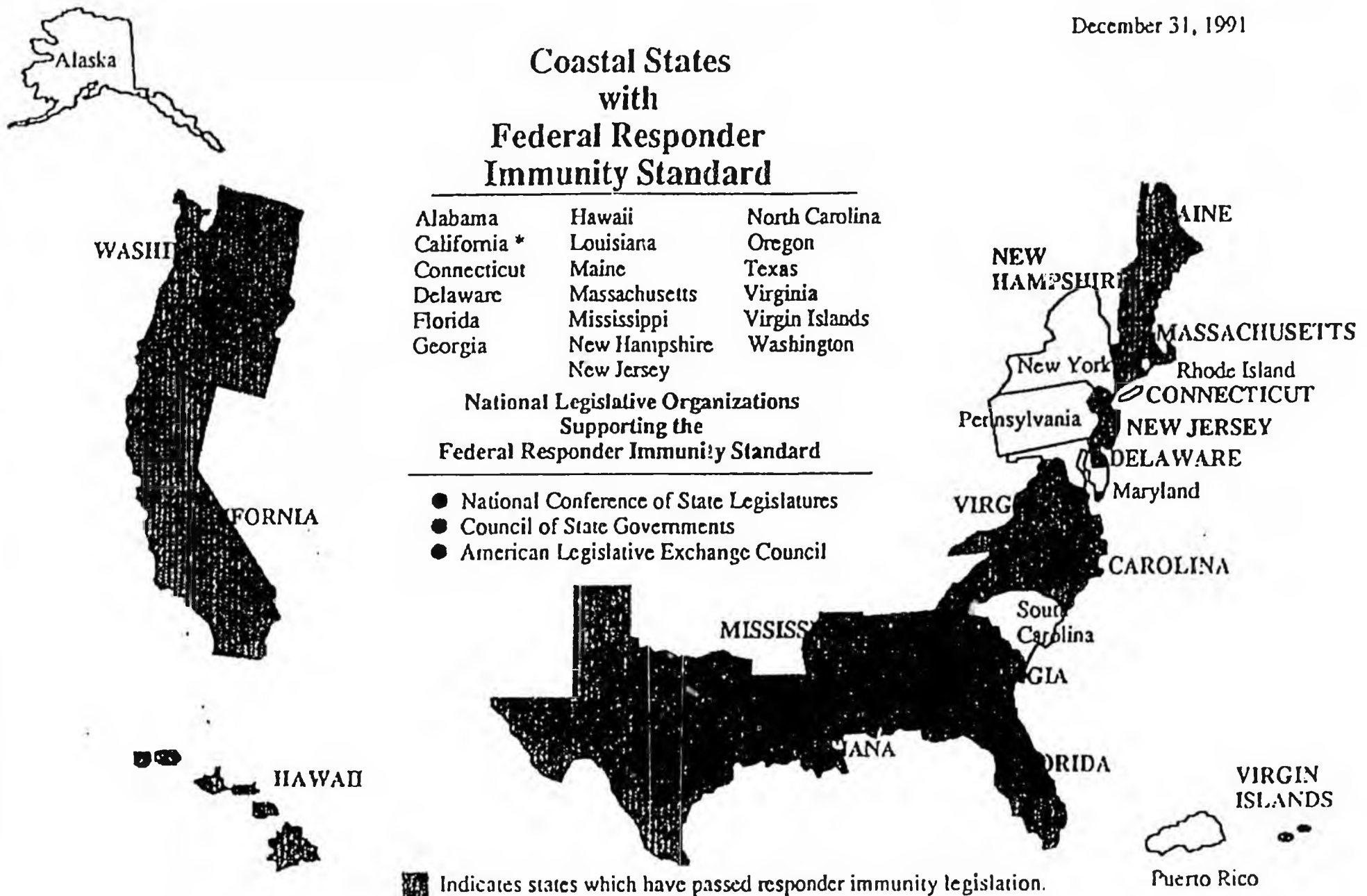
December 31, 1991

Coastal States with Federal Responder Immunity Standard

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

National Legislative Organizations Supporting the Federal Responder Immunity Standard

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



■ Indicates states which have passed responder immunity legislation.

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

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.

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

LDW56/cas

February 10, 1992

Comments Regarding "Oil Spill Response Action Contractors"

A Report by the Citizens' Oversight Council on Oil and Other Hazardous Substances

Alyeska Pipeline Service Company ("Alyeska") is pleased to provide these comments regarding a report recently submitted to the Alaska State Legislature by the Citizens' Oversight Council on Oil and Other Hazardous Substances ("COC"). The report is entitled "Oil Spill Response Action Contractors."

COC has developed seven recommendations. Alyeska's comments follow each one.

RECOMMENDATION #1: *The liability standard for oil spill response action contractors may be limited to gross negligence or intentional misconduct, with certain conditions that ensure a reliable response.*

Comments:

- We strongly agree. Even though responders are not liable for spills, without limited immunity, the financial risks and liability exposures associated with oil spill response would deter cleanup contractors, cooperatives, and others from joining into prompt, aggressive action.
- To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted responder immunity laws which are substantially similar to the federal model provided in the Oil Pollution Act of 1990.
- The immunity is limited and subject to several conditions. The response action must be consistent with the National Contingency Plan, or federal or state orders. Responders are liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

- We also strongly agree that this limited immunity ought to be available throughout the response action, and that it not be confined by an arbitrary time limit.

RECOMMENDATION #2: *Professional response action contractors should be certified by the state.*

RECOMMENDATION #3: *A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.*

RECOMMENDATION #4: *A certification program should authorize DEC to maximize coastal protection and to enhance regional response capabilities through response action contractor certification.*

Comments:

- For the sake of national uniformity, and to avoid inconsistencies (and possible preemption), the state may wish to examine this proposal in greater detail after ongoing U.S. Coast Guard rulemaking on the same subject is completed. If supplemental state standards appear necessary, they may be considered at that time.
- Additionally, pre-certification of response action contractors should not be an additional condition for one group of responders to qualify for limited liability. We must encourage effective, prompt response efforts no matter who provides any type of care, assistance, or advice during an oil spill response, so long as it is consistent with the nation's comprehensive scheme for oil spill response or government orders.
- In addition to the legal and constitutional issues raised by this proposed disparity, an incongruity is immediately apparent. Volunteers who may need the most supervision during a response for their own safety would meet no prequalification requirement. Likewise, state, municipal, and village responders currently enjoy limited immunity for response action without any certification under a separate statute.
- The state's comprehensive contingency planning process already empowers ADEC to insure that response action contractors demonstrate their obligation and availability to respond to a discharge and discharge exercises,

and the readiness and compatibility of their equipment and other spill response resources. These oil spill response personnel must be trained, and demonstrate through drills and inspections their competency to provide immediate, effective response.

- A certification program may even be less effective as an oversight mechanism than spill exercises. ADEC can assure that a RAC is adequately prepared by comparing its response to the role described for it in a response plan. This can be done best through drills.

RECOMMENDATION #5: Certified response action contractors must be subject to all orders of the state on-scene coordinator during an actual or threatened spill response.

RECOMMENDATION #6: Certified response action contractors should respond, when directed by the state on-scene coordinator, to mystery or orphan spills, except that regional cooperatives will not be required to respond outside their region of operation.

Comments:

- Under the state and federal comprehensive oil spill prevention and response programs, sufficient controls already exist to assure effective response action without direct government control of a planholder's contractors. Moreover, ADEC is authorized to enter into contracts with private organizations to provide the personnel, equipment, or other services or supplies that may be required to respond to mystery or orphan spills. When private contracting is not feasible, it may establish and maintain the cleanup personnel and equipment which are needed at locations in the state.
- State law requires that tank vessel owners, operators, or charterers hold approved oil discharge prevention and contingency plans in order to do business in Alaska. The planholder must demonstrate the ready availability of sufficient personnel, training, equipment, and other resources to prevent, contain, cleanup, and dispose of spilled oil within the parameters of the state's planning standards.
- To augment its own prevention and response resources, a planholder will necessarily sign agreements with response action contractors. The contractors must be identified and their capabilities described. ADEC may test their proficiency and training during drills and inspections. ADEC will

insure that contractors are contractually obligated to respond as part of its plan approval process.

- A planholder must also demonstrate financial responsibility to assure the adequacy of his response and to pay damages. Possible criminal and civil penalties may also be assessed for an inadequate response.
- A planholder is liable for his negligent acts and omissions in directing a spill response. Likewise, by prematurely demanding that it also control a planholder's contractors, the state will share that liability. It must also be prepared to indemnify or immunize planholders and contractors from liabilities they may face by following state orders. Moreover, during the time that the state issues orders, it should suspend imposition of penalties upon the planholder for failure to implement its plan.
- 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 is one of the purposes to be served by industry-financed oil spill response funds.
- Under the Oil Pollution Act of 1990, the U.S. Coast Guard by delegation is authorized to direct all federal, state, and private actions to remove an oil discharge. State control of response action contractors promises uncertainty and conflict during spill responses.
- Being generally required to respond to mystery and orphan spills would greatly increase the liabilities and risks to which RACs would be exposed. What responder will be in a position, in advance, as an additional price to be paid for limited immunity, to agree to provide services to state government without also having a specific contract which establishes the type and nature of response, types of hazardous substances, location, equipment, personnel needs, performance expectations, costs and billing arrangements, and indemnification? If a need for them currently exists, nothing prevents the state or federal government from negotiating "stand by" contracts now.
- Indeed, the State Oil and Hazardous Substance Discharge Prevention and Contingency Plan discusses mystery and orphan spills. It provides that whenever a spiller is unknown or a response is inadequate, the state or federal agency having jurisdiction has the authority to "take over the response and recover expenses from the spiller." Para. 411 at 400-14 (May 1991). This is consistent with federal and state law.

- 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.

9-55

DRAFT February 27, 1992

[Preamble Language]

Contractor Certification Program

a. Purpose and Scope

This regulation establishes a response contractor certification program. It has two major purposes.

First, many spill responders are expected to be named in multiple vessel and facility response plans, and the preparers of those plans need a common basis by which the responders will be measured and credited. Spill contractors' response services must be matched to the plan holder's requirements. Certification allows plan preparers to know in advance the value the plan reviewer will give for a particular contractor's capabilities. Plan preparers must assemble a sufficient number and mix of contractors to satisfy their response planning responsibilities. In addition, certification will allow contractors to know what credit their capabilities will be given, so they can better present or market their services. Contractor certification also will allow the contractor's capabilities to be evaluated and credited on a fair, consistent and efficient basis.

A second major purpose of certification is to verify that response resources do in fact exist and are available from that contractor. The plan holder has a responsibility to verify a contractor's capability and claims, because the plan holder is responsible for performance under the response plan. The public purpose of certification is to better assure that the increased response capability required by OPA to help protect the environment from the threat of oil spills does, in fact, come about.

Contractor certification does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors. Certification is not a generalized "seal of approval" or guarantee of performance. Contractor certification is not intended to establish professional standards or provide a judgment of the many important but unquantifiable factors that would be necessary to establish an overall evaluation of a contractor's competence and skill.

Certification is simply a process by which the President's designee (e.g., the Coast Guard) will verify the existence of certain "facts" -- i.e., management structure, personnel, and the inventory of response equipment, -- and, where possible, assign a particular "quantitative value" to that inventory for purposes of relating specific contractor's response services to a plan holder's particular spill size. Certification must be based whenever possible on objective and quantifiable measures. However, certain important subjective factors must be identified by the contractor in the contractor's application to provide a clearer understanding of a contractor's capabilities.

DRAFT February 27, 1992

The proposed regulation reflects this intent in the definition of the term "certification". One key element of that definition is that certification is a process. Response contractors, to be cited in vessel response plans, must first file an application with the Coast Guard, identifying the service being offered, the type, quantity and location of equipment, number, training and qualifications of personnel, including corporate and individual spill response experience, management structure and certain other information about associated support. This information is factual in nature, and therefore subject to straightforward verification.

The certification definition also recognizes that certification is fundamentally the responsibility of the President under OPA-90. The President has delegated this responsibility to the Coast Guard. The Coast Guard may use other organizations to assist it in the certification process. However, the responsibility for certification remains a governmental one, because certification derives from the President's responsibility to review and approve vessel and facility response plans.

The definition of "certification" refers to the assignment of one or more "Response Values," where possible, for each of the contractor's designated response services. The translation of the type, location and quantity of equipment and personnel into a quantified capability for response is inherently a matter of judgment, particularly given the recognized limitations in spill response technology and variability in the types and conditions of any particular spill.

Each oil spill, particularly any large spill, is unique. The capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder, just as in the analogous case of response to a fire. Accordingly, this proposed regulation carefully avoids any intimation that various planning assumptions are or ever should be viewed as performance standards.

Although a contractor's capabilities must be related to a certain size spill, the assignment of individual Response Values is necessarily artificial and somewhat arbitrary. The term "Response Value" is used in this proposed rule to reflect this reality.

Although a contractor may wish to suggest a "Response Value" for each of a contractor's designated response services, the federal government retains the ultimate responsibility for the assignment of that factor.

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b. Application for Certification

To obtain certification, a response contractor must first submit a certification application. The application must identify basic information about the contractor, as well as specific details regarding the contractor's available equipment, personnel, management structure and support. The type of information required, and the detail of that information, depends on the level and type of service that the contractor intends to offer. The application is intended to provide sufficient specific factual information to permit the application reviewer to assign one or more "Response Values" to each of the contractor's response services.

In addition to this quantifiable factual information, the response contractor also must provide descriptive information on certain important factors that bear on whether the contractor should be allowed to be cited in a spill response plan. For example, the application must list all notices of violation issued by the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and the Coast Guard related to oil spill response operations for the last five years, and a description of the disposition of those notices. In addition, the contractor may, as supplemental information, submit information that describes the contractor's experience.

The contractor must attest that the required factual information is true and correct to the best of the contractor's information and belief as of the date of attestation. Because the application is made to a federal agency for purposes of obtaining a governmental approval, knowing false statements would be subject to enforcement action under federal law. The contractor also is obligated to notify the COTP of significant changes in response capability (see below).

As a supplement to these factual matters, the response contractor may apply for and propose one or more "Response Values" to be assigned to the contractor's capabilities, by designated geographic area for each specific type of response service. (see below). The response contractor can supply supporting analysis or argument to support its proposal. The contractor may also submit supplemental information describing the contractor's experience, regulatory awareness or other factors which the contractor believes may be relevant to an understanding of the contractor's response capabilities.

The contractor may submit the application to the reviewer any time after the rule goes into effect. *[note: the Coast Guard will need to define who will act as reviewer of contractor applications. If the Coast Guard does not want to centralize all review of contractors, then it is recommended that a tiered approach such as follows be used:]* The reviewer, in the case of a contractor who requests certification only in a single Captain of the Port (COTP) zone, will be the COTP. If the contractor requests certification in more than one COTP zone, but not more than

one Coast Guard District, then the reviewer will be the District Commander. In the case of a contractor seeking certification in more than one District, the review shall be the Chief, Office of Marine Safety, Security and Environmental Protection.

c. Certification Process

Once a certification application is received, the reviewer must make an initial review of the application to determine if it is complete. If not, the application should be immediately returned to the applicant with an explanation of the additional information needed to process the application. Once a complete application is filed, the reviewer has 45 days to assign an initial "Response Value" to the contractor, based on the representations in the application. This determination is only interim, because it is subject to subsequent verification of the factual information in the application, as well as a more refined evaluation once the agency has the opportunity for in-depth review.

The process described above is expected to result in an "interim status letter." The "Response Value" in the interim status letter may be used by plan preparers until final review and certification is complete. It is expected, given the workload of contractor and plan reviewers, that the Response Values contained in interim status letters likely will be the basis for the initial submission of response plans that are required by February of 1993. If the Response Value established by certification varies from the value used in the interim status letter, plan holders relying on that interim status will be allowed a reasonable time to supplement their resources. This may be accomplished through upgrade of the contractor capabilities or by supplementing or replacing that contractor's resources with other certified contractors.

d. Certification Criteria

The reviewer must certify any contractor who submits a true and complete application demonstrating response resources that satisfy the approval criteria. Certification may be denied if information in the application is false, or if the contractor fails to meet the approval criteria for certification of any services. An important part of contractor certification is the assignment of a Response Value or Values to the contractor's response resources for purposes of preparation of vessel or facility response plans. The reviewer will assign Response Values based on a best judgment basis, as informed by certain presumptive planning criteria. These planning criteria will be made available to contractors to allow them to suggest appropriate Response Values. A contractor whose capability does not match these presumptive norms may submit information demonstrating the equivalency of its own resources. Planning assumptions used to arrive at the Response Value may also be adjusted based upon a demonstration that other planning assumptions are more accurate for the contractor's specific equipment or personnel.

The certification of a contractor also includes the concept of the credit due a contractor given the contractor's combination of mobilization time and location. Contractors, for a given response service for a given Port Area, would be assigned a classification. Class I for a given service for a given contractor requires a mobilization time of less than [2] hours and location of the resources associated with the service within the COTP Port Area. A Class II contractor service would be located within the Port Area, and mobilization within [12] hours, or a contractor with a combination of mobilization time and location that would allow the resource to be moving within the Port Area within the [12-hour] period. Similarly, Class III would be within [24] hours, Class IV within [48] hours, and Class V within [72] hours.

The Response Value would therefore be specific to a certain geographic area for a specific class of service. For example, XYZ Response Contractor could be certified for Class II on-water oil removal services for the offshore environment in a specified COTP port area in an amount of 10,000 barrels. The same contractor also may be certified for Class II on-water removal service for the nearshore harbor environment of 15,000 barrels.

Part of the certification process requires that contractors define their mobilization time. The primary goal is that equipment and/or personnel will be available and ready to deploy, upon notice, with prompt dispatch. The intent of this requirement is to ensure that first crews are dispatched and someone is working to fill any special requirements.

c. Denial of Approval and Appeals

If the reviewer finds that the contractor does not qualify, the contractor can be denied approval. The letter of denial must state why approval was denied, and explain any deficiencies, and explain the process for appeals and resubmittal. The reviewer also may approve a different Response Value for some or all of the contractor's designated services.

If the reviewer denies certification, or selects a "Response Value" less than what the contractor applied for, the contractor may appeal the decision to ... *[note: appeal process to be specified by the USCG, but with the recommendation of at least one level of internal appeal, and with at least one appeal to Washington before going to the courts].*

f. Notification of Significant Changes in Response Capability

Once a contractor has been certified, certification is valid for a period of [5] years. However, contractors are required to notify the COTP of a significant reduction of capability, as specifically identified in the certification. The proposed regulation requires this notification to be in advance, if the significant reduction is

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planned, or no later than 24 hours after the contractor becomes aware of the significant change, if unplanned. The COTP can then determine whether to require plan holders to secure additional capability, or make other practicable arrangements to compensate for the reduced capability.

g. Effect on State Certification

The contractor certification established in this rule is designed to implement the requirements of OPA. Some states may have similar contractor certification requirements under individual state laws. Nothing in this rule is intended to preclude reliance on these certification rules or the federal certification process by states where it is appropriate to do so. In fact, States are encouraged to rely on the federal certification process, to the maximum extent practicable, taking into account any differences in the purposes and value of the federal certification process and the specific requirements of state law.

[REGULATORY LANGUAGE]

[NOTE: The regulations describing the contents of vessel and facility response plans will establish the types of services for which the response plan holder must rely only on certified primary response contractors]

Sec. XXX.00 Contractor Approval

(a) This section defines the process for certification of response contractor services to be cited in individual response plans.

(b) *Definitions.* For purposes of sections XXX.01-.05, the terms below shall have the following meanings:

(i) "*Certification*" is the process by which the President's designee will verify a primary oil spill response contractor's inventory of available spill response equipment, personnel, management structure, and support, and assign a Response Value for those resources within a standardized classification of designated response services, for a specific geographic area, for purposes of preparation of spill response plans.

(ii) "*Certificate*" is the final document issued following verification, inspection and final review by the reviewer.

(iii) "*Interim status letter*" means the letter sent by the reviewer to the contractor describing the initial Response Value assigned to the contractor pending verification of the factual information contained in the application and an in-depth review of the contractor's application for purposes of certification.

(iv) "*President's designee*" means the federal official delegated responsibility by the President under OPA-90 for approval of response plans. Pursuant to Executive Order 12777 the President has delegated responsibility for approval of vessel response plans and transportation-related onshore facilities to the Commandant of the Coast Guard. The Commandant has delegated responsibility for certification of primary response contractors to various "reviewers" under this rule.

(v) "*Response contractor*" is any person who provides designated response equipment or services under contract or other means approved by the President directly to an owner or operator of a tank vessel or facility required to have a response plan under 33 U.S.C. 1321(j)(5), which designated equipment or services are required to be available and identified in such plan.

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(vi) "*Reviewer*" means: (1) in the case of a response contractor seeking certification in a single COTP zone, the COTP; (2) in the case of a response contractor seeking certification in more than one COTP zone, but only one Coast Guard District, the District Commander; and (3) in the case of a response contractor seeking certification in more than one Coast Guard District, the Chief of the Office of Marine Safety, Security and Environmental Protection.

(vii) "*Response Value*" means the value, in terms of barrels of oil for a particular defined service in a defined geographic area, that is assigned to a primary response contractor for purposes of being identified as response capability in a vessel or facility response plan.

(viii) "*Mobilization time*" means the time in which initial personnel are able to begin movement of response resources to the spill scene.

Sec. XXX.01 Contractor Certification Application Content

(a) *Required Information.* A person desiring to be a primary response contractor must file an application that contains at least the following information:

- (i) Contractor's name, mailing address and phone number;
- (ii) The specific response services being offered for certification;
- (iii) The specific location of all spill response resources, and the areas in which spill response services using each resource is being offered;
- (v) A list of all Occupation Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and U.S. Coast Guard (USCG) notices of violation related to oil spill response operations and disposition of those notices for the last five years. Any applicant with less than five years under their current business name or organization shall provide the same information for any oil spill activities or businesses participated in by the principals in the new company within the last five years;
- (vi) an organizational diagram depicting the chain of command;
- (vii) a call-out list for the contractor's resources, and a description of the call-out procedure;
- (viii) For each type of service, the types of oil to which the contractor is willing and able to respond;
- (ix) For each type of service, the planned mobilization time for that resource.

(b) *Equipment.* For each type of service, the specific significant equipment available to be applied to that service, including:

- (i) type, quantity, age, and location;

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- (ii) whether the equipment is owned or under contract;
- (iii) If the equipment is contracted from another party, the application must identify:
 - (A) the name, address and telephone number of the owner of the equipment;
 - (B) the equipment's storage location and area of operation;
 - (C) the contractual terms regarding availability of the equipment to the contractor;
- (iv) a statement of the maintenance program for such equipment, together with a description of records of such maintenance;
- (v) identification of the number of operators necessary to operate the equipment over a sustained response (i.e., 30 days);
- (vi) for each piece of equipment, a description of: the make, model, type, and applicable design limits (e.g., suitability for different types of oils and operating environments, as related to adverse weather);
- (vii) a description of contractor's communications equipment, including the amount and frequencies, and identification of certified operators;
- (viii) for any equipment not located in the COTP zone for which certification is sought, a description of the transportation capabilities available for use in a response;
- (ix) a description of the readiness for mobilization of response resources and the means of mobilization.

Equipment shall be listed only if it is in a fully operable condition. Future equipment, ordered but not yet delivered and fully operable, may be listed, but it must be listed separately and so identified.

(c) *Personnel.* For each category of personnel identified as a spill response resource, the application shall, for each location:

- (1) list by job category;
- (2) match to the equipment list and scope of service, including the plan for how the equipment and people necessary to provide the service will be brought to bear in an incident from what source; and
- (3) list training and qualifications, including OSHA Hazardous Operations training and how additional personnel are planned to be trained within what timeframe if they will be required to meet the service listed.

The application shall also list the total personnel available.

(d) *Management Structure.* The application shall identify the management structure associated with the service(s) offered.

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(c) *Service-specific information* In addition to the general information described above, the applicant must submit the following service-specific information, as applicable to the service offered:

- (i) *Boom control/containment/protective booming services*
 - (A) Describe the platforms for deployment (number/type); and,
 - (B) Amount and condition (e.g., 2000' of offshore boom/vessel).
- (ii) *On-water recovery services*
 - (A) recovery platform (for owned vessel and vessel of opportunity recovery systems):
 - (1) name of vessel;
 - (2) size/class;
 - (3) location; and,
 - (4) contract terms of availability.
 - (B) skimming system:
 - (1) make;
 - (2) model;
 - (3) manufacturer's nameplate capacity; and
 - (4) applicable design limits (e.g., suitability for different types of oil and different operating environments, as related to adverse weather).
 - (C) personnel trained to operate the equipment:
 - (1) name;
 - (2) position description; and,
 - (3) training or experience.
- (iii) *Shoreline remediation services*
 - (A) number of persons available for beach cleanup
 - (B) description of supplies/support for beach cleanup
- (iv) *Transfer/storage services*
 - (A) type and capacity of storage/transfer facilities

[Services considered for certification but not included at this time are source control, non-mechanical removal, wildlife treatment, lightering, salvage, fire fighting, logistic support, disposal, analysis and testing]

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See proposal for
Spill Response
Management

(f) *Attestation.* A responsible corporate official of the contractor shall sign the application, affirming that the factual information contained in the application regarding the capabilities described in paragraphs (a)-(e) is, to the best of his knowledge and belief, true and accurate as of the time of signing.

(g) *Agreement for Inspection and Participation in Drills.* The contractor shall state that the contractor agrees to submit to inspection and verification

of the designated capability cited in the application. The contractor also agrees to make itself available to participate in drills as reasonably necessary to verify the contractor's application.

(h) *Self assessment.* A primary response contractor may submit with the contractor's application a suggested Response Value for each of the contractor's response services for each geographic area to be served. The applicant should provide an explanation and analysis to support the suggested Response Value, based on standardized planning factors identified by the reviewer, or such other planning factors as the contractor shall demonstrate more accurately reflects the contractor's response capabilities. The applicant may also include other information that may bear on an applicant's capabilities, including a description of the applicant's experience and regulatory awareness and compliance.

(i) *Mobilization.* The contractor shall state the time for initial mobilization of its resources. Equipment readiness shall include being available and able to be promptly dispatched to a spill site, not counting normal maintenance and repairs.

Section XXX.02 Contractor Certification Application Procedure.

(a) *Filing address.* Applications must be filed with the appropriate reviewer. The addresses are as follows:

[provide filing addresses]

(b) *Time for Filing.* Applications may be submitted at any time after adoption of this paragraph.

Section XXX.03 Contractor Application Review

(a) *Review for completeness.* Upon receipt of a response contractor certification application, the reviewer shall promptly evaluate the application for completeness. If the application is not complete, the reviewer shall return the application promptly, identifying the deficiencies in the application.

(b) *Review for interim status.* An application shall be reviewed within 45 days of receipt of a complete application. The reviewer shall send an interim status letter within 5 days of completion of a review. If, at a later time, the reviewing agency determines that the terms of the interim status letter should be limited, it shall so notify the contractor, who shall be given a reasonable time to provide acceptable numbers or types of response resources.

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(c) *Review for certification.* Following inspection and review of any drills or exercises, or information from other sources as necessary to verify the application and complete a detailed review of the application, the reviewer shall either issue or deny a certificate, in accordance with the standards in paragraph (d). A certificate may be denied if information in the application is false, or if the contractor fails to meet the approval criteria for certification of any services.

(d) *Standards for review.* Certificates shall be issued to primary response contractors subject to the following conditions:

(1) Equipment, equipment maintenance, and equipment and personnel deployment readiness must be verifiable by inspection by the office. Any resources not on site at the time of an inspection must be accounted for by company records;

(2) Response personnel must comply with all appropriate safety and training requirements of OSHA Hazardous Operations. Training records may be audited for verification;

(3) Determination of an acceptable safety history by review of pertinent records on a case-by-case, best-professional-judgment basis. Lack of a safety history will not be grounds for denying approval;

(4) For each COTP zone, the reviewer will assign a Response Value for each Response Service for each response area (e.g., offshore, nearshore, inland) on a best engineering judgment basis, as informed by certain presumptive planning criteria. These planning criteria will be made available to contractors to allow them to suggest appropriate Response Values.

[note: a policy issue is whether the presumptive planning criteria are described in the rule, incorporated by reference in the rule, or left to guidance. We also need to decide what the criteria is and how it would be applied.]

Section XXX.04 Appeals and Notices

(a) *Appeals.* If the reviewer denies certification, or assigns a Response Value less than the amount requested in the application, the applicant may appeal the decision:

[some appeal to centralized authority recommended].

[note: some favor a review in Headquarters of all appeals]

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(b) *Notice of Significant Reduction in Capability.* The reviewer shall identify specific reductions in equipment personnel, or management structure that require notification to the COTP where the equipment or personnel are located. A certified response contractor must provide notice to the COTP of such reductions in advance, if planned, or within 24 hours of becoming aware of such change, if unplanned. This notice may be oral, followed by writing within a reasonable time, or in writing, by facsimile or letter. The reviewer will maintain and make available to the contractors and plan holders detailed guidance on the types of changes that require notification.

Section XXX.05 Renewal and Revocation

(a) *Renewal.* Certification shall be for a period of [5] years. A contractor must file an application for renewal prior to the expiration of the certificate. The contractor shall remain certified until the reviewer acts on the application.

(b) *Revocation.* [note: Coast Guard will establish some process for revocation or adjustment of certification for cause.]

(1

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

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.

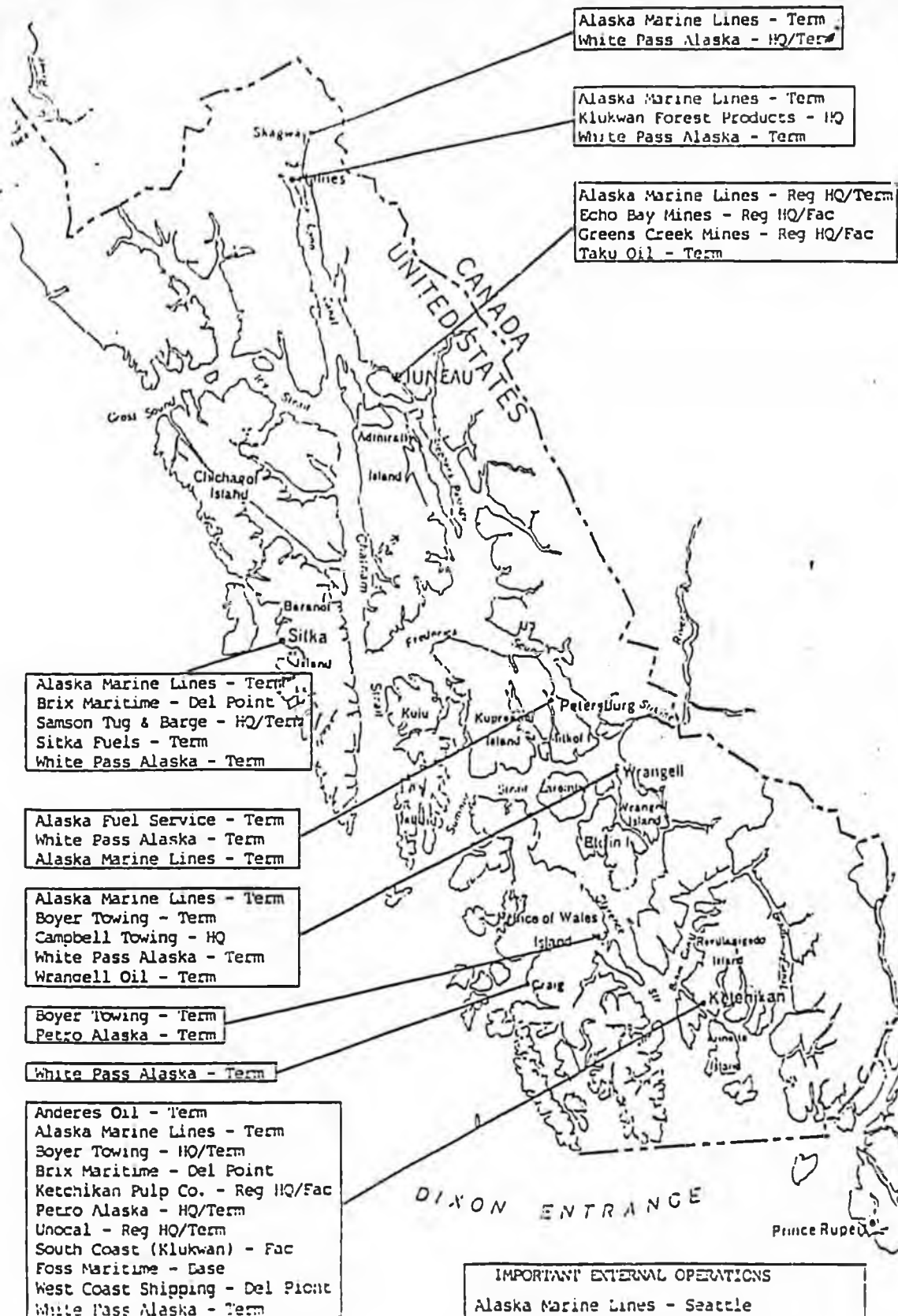
We find that their report seems to be strictly and narrowly aimed at perceived conditions in Prince William Sound, and to a lesser degree, Cook Inlet. It certainly does not accurately reflect environmental response conditions in our region, and we suspect that it does not accurately reflect conditions 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.

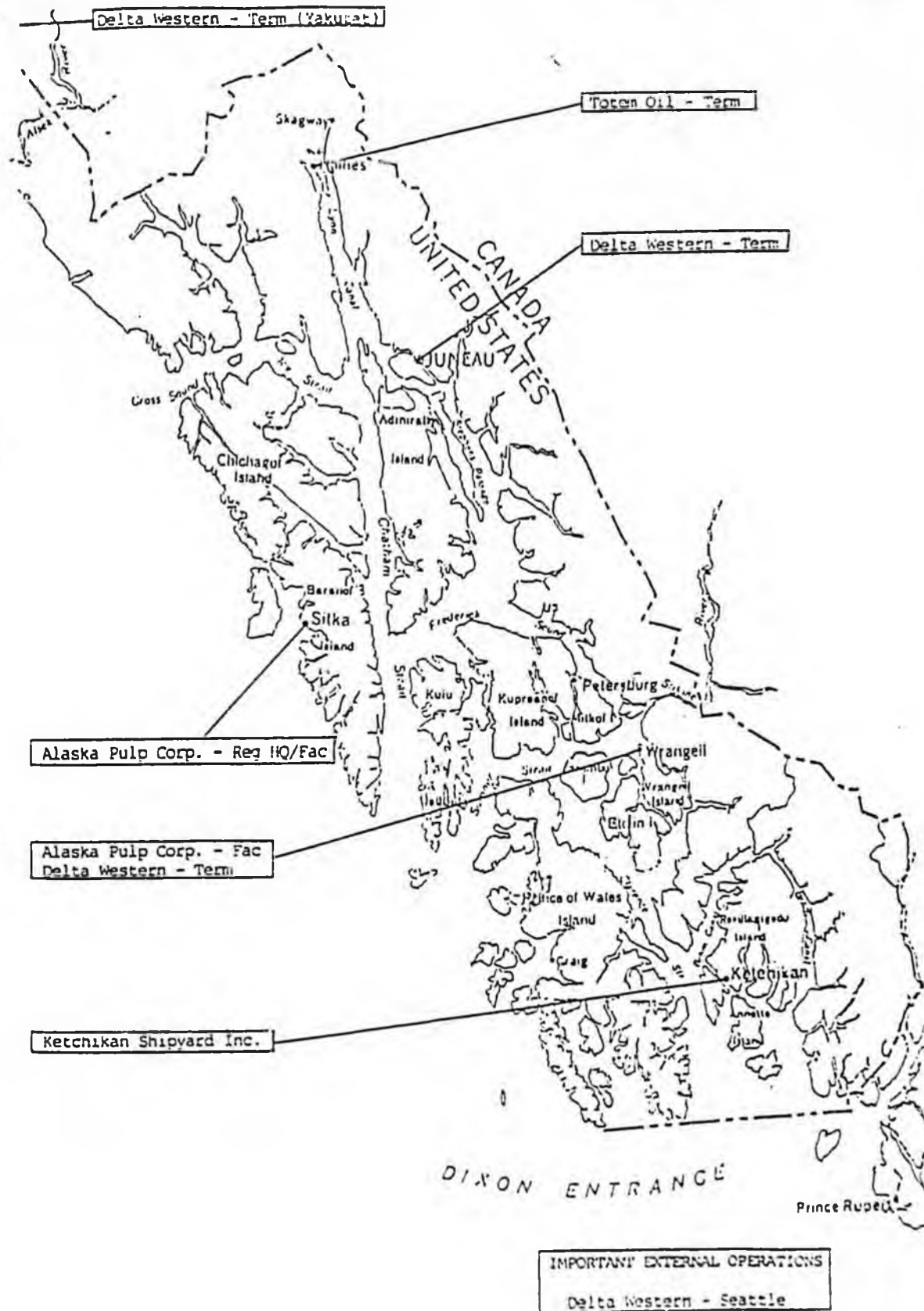
We believe that the state, like the federal government, should fix all obligations for clean up costs and damages resulting from a hazardous substance release on the responsible party, where it rightfully belongs.

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
Delta Western - Seattle

MORE ENDORSEMENTS OF CLEANUP CONTRACTORS LIMITED LIABILITY

Cleanup firms are willing to accept legal responsibility for willful misconduct, personal injury or wrongful death. They need protection from simple negligence because they must make quick decisions under difficult circumstances. Sometimes they may guess wrong. In most cases, they are not acting on their own, but under Coast Guard authority. The federal government, however, is protected in such circumstances from those seeking targets from which to recoup losses. Cleanup groups are not.

...The San Francisco Examiner, June 10, 1990

Right now, oil spill teams can be sued just for showing up to fight the damage. for events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions...

We urgently need your help to pass Good Samaritan liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. Indeed, we stop everything to help an injured Earth when she needs it.

...International Bird Rescue Research Center, et al., August 1990

Should qualified immunity not be granted to responder as outlined in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

...Ventura County Commercial Fishermen's Association, May 4, 1990

IF SHE'S NOT A GOOD SAMARITAN, JUST WHO IS?

The men and women who respond to an oil spill crisis are willing to accept many dangers. Good Samaritans in every sense of the word, they risk uncertain seas, fire and exposure.

But there's one risk that's truly unacceptable. A crippling lawsuit against the recovery team itself. Yet, because of an odd quirk in the law, that's a real possibility.

Right now, oil spill teams can be sued just for showing up to fight the damage. For events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions.

Is this reasonable? The Congress of the United States doesn't think so. The California State Senate doesn't think so. In fact, only one group wants to be able to make the people fighting the oil spill pay for the spill itself. The California Trial Lawyers Association.

This powerful special interest group has managed to block the final steps in enacting Good Samaritan protection for oil recovery teams. Why? For the oldest reason of all—they want the focus.

Senator Barry Keene and Assemblyman Ted Leeper are working overtime to protect California's coastline. And we have a major interest in their efforts. We are the people who fight oil spills. Some of us do so to protect our fishing grounds. Some to save innocents: wildlife. Others, as part of a responsible petroleum industry. We believe that whoever spills the oil should be liable for the cost—not the people who clean it up.



We urgently need your help to pass Good Samaritan Liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. In good, we stop everything to help an injured Earth when she needs it.

Please send in the coupons below and tell the California State Assembly to pass SB 2040 authored by Senator Barry Keene. It's the only way to keep some very Good Samaritans on the job.

Join Us In Saying NO To The Trial Lawyers, Yes on SB 2040.

CALL US

We will send a FREE envelope in your name to your local Assembly member.

CALL TOLL FREE

1-800-325-6000

Ask for Operator 9722

This is not the Voters' Union Service.

WRITE US

Fill out this coupon and send it to us:

YES! I support Senator Ted Leeper and Assemblyman Ted Leeper for California oil spill recovery teams. Please add my name to the list of people who want to say YES to the amendments.

NAME _____

ADDRESS _____

CITY _____

Return to: International Bird Rescue Research Center, 2225 First Avenue, Suite 201, Berkeley, CA 94704

OR, TELL 'EM YOURSELF

Please fill in:

Don't let the trial lawyers block oil recovery teams off the beach. Please give me U.S. Dollars and the California State Senate for drafting Senate Bill 2040 (Keene).

NAME _____

ADDRESS _____

CITY _____

STATE _____

ZIP _____

Send to: Ken, Willy L. Brown, J.L. Brown, Center, Sacramento, CA 95833

SPONSORED BY
International Bird Rescue Research Center
Clean Bay • Clean Coastal Waters • Clean Seas

Ventura County Commercial Fishermen's Association
SERVING COMMERCIAL FISHERMEN SINCE 1987

V.C.C.F.A. • 1567 SPINNAXER DRIVE • STE. 203-199 • VENTURA, CALIF. 93001
(805) 985-9705

Honorable George Deukmejian
Governor of California
State Capital First Floor
Sacramento, CA. 95814

May 4, 1990

Dear Governor Deukmejian,

Ventura County Commercial Fishermen's Association (VCCFA) has developed the Fishermen's Oil Response Team (FORT). As you are aware this resource of certified commercial fishermen is designed to be called upon by clean up coordinators during an emergency. FORT would provide additional manpower, vessels, and aircraft as needed to respond within the first hours of an oil spill emergency not days later.

I have received information that California Trial Lawyers Association wishes to change the wording of SB-2040. Instead of providing qualified immunity for spill respondents, they prefer to negotiate indemnification of said respondents.

Please let me know your viewpoint on this important issue. Should qualified immunity not be granted to responders as outline in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

Because of the sensitive Channel Islands and nearby coastal region our association supports FORT's defensive capabilities towards oil spill recovery. I shudder at the thought of a "VALDEZ" type spill encircling the islands while bureaucrats negotiate indemnity clauses.

Your support is welcome. Enclosed is our newsletter and I would appreciate your subscription.

Sincerely,

Brian Jonison



COOK INLET SPILL PREVENTION & RESPONSE INC.

CISPRI POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

MARCH 8, 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.

ENDORSEMENTS OF CLEANUP CONTRACTOR LIMITED LIABILITY

Be it further resolved, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death.

...Pacific Fisheries Legislative Task Force, June 16, 1990 (Sitka)

Alaska Delegates: Sen. Eliason
Sen. Zharoff
Rep. Davidson
Rep. Navarra

In particular, I support the need for limited immunity for all oil spill responders other than liable parties, to the extent that it may be necessary to encourage such persons to take action promptly. Prompt action after a spill is essential to protect the marine environment of California from oil pollution.

As you know, the Oil Pollution Act of 1990 (P.L. 101-380) was signed by the President on August 18th. That Act provides limited federal immunity for all oil spill responders.

A law that does not address responder's concern about liability exposure, causing them to hesitate in responding to spills, would be counterproductive.

Oil spill response is not an exact science. Decisions often must be made with incomplete and sometimes conflicting information. Moreover, the operational environment is unpredictable. Liability standards must take those factors into account if effective programs are to be put in place.

...United States Coast Guard, August 28, 1990

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

...The California Sierra Club, April 21, 1990

VIA U.S. MAIL AND FACSIMILE

February 5, 1992

The Honorable Bill Hudson, Chairman
House Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 196 Impact on Financial Responsibility Requirements for the
Alyeska/Tesoro Oil Spill Response Services Agreement

Dear Chairman Hudson:

You requested further explanation of the important change made to Alyeska's Oil Spill Response Services Agreement for Prince William Sound ("Agreement") after the legislature enacted HB 196, and adopted limited responder immunity, last year. The amendment created an alternative to the Agreement's \$1 billion financial responsibility requirement that Tesoro was not able to meet. The new alternative to financial responsibility allows companies to enter into an Agreement with Alyeska if there is \$700 million Protection and Indemnity Club ("P&I Club") coverage for a tanker and \$500 million comprehensive general liability ("CGL") insurance coverage for the company itself. Tesoro has been able to utilize this alternative to enter into an Agreement that will expire on June 30, 1992, which is the date the provisions of HB 196 will sunset, unless further action is taken by the legislature.

As you know, 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. As noted above, shippers have also signed an 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 (self-worth), such promises would, of course, be hollow.

We are aware that there is some concern because the insurance alternative to this financial responsibility requirement totals \$1.2 billion, which is a number that is obviously greater than the original \$1 billion. We believe this concern is based on a misunderstanding of the nature of the insurance alternative. To clarify this matter, we offer two important points. First, Tesoro was not able to meet the original requirement and is able to meet the new alternative. Obviously, the bill served an immediate purpose -- as a result of its enactment, Alyeska and Tesoro avoided the disruptive consequences of a disqualification of Tesoro to receive oil spill response services from Alyeska.

Second, the new alternative does not provide Alyeska the same amount or quality of protection that the original financial responsibility requirement provided. Alyeska decided that this reduction to accommodate Tesoro and others similarly situated was an appropriate risk to take in light of the partial limitation of response action contractor liability achieved through HB 196. Under the original financial responsibility requirement, four companies entered into agreements with Alyeska by demonstrating that they had available net assets in excess of \$1 billion. In order to gain the benefit of these companies' contractual promises to Alyeska, Alyeska only has to establish that the obligation exists. The funds are then available to satisfy the obligation.

Under the new insurance alternative, there are two important differences that illustrate the decreased protection offered to Alyeska by insurance. P&I Club coverage applies to the tanker itself, for the benefit of the tanker owner. P&I Clubs have made efforts to prevent Alyeska from making claims against that coverage for third party liability claims against Alyeska arising out of an oil spill response. In the case of Tesoro, Alyeska has done what it could to create a legal basis to achieve coverage for such claims under the P&I Club policies. The ultimate resolution of

Page 3
Letter to Representative Hudson
February 5, 1991

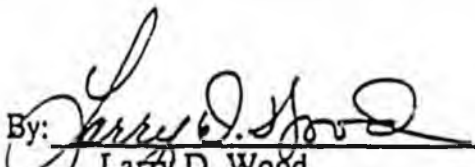
coverage would only occur after years of expensive litigation. It is possible the courts would determine that the P&I Club coverage provided no or only severely limited benefit to Alyeska. What remains then to provide coverage to Alyeska against third party liability claims is the \$500 million CGL insurance policy, which is one half the original amount of financial responsibility. Unlike financial responsibility, Alyeska's receipt of payment from the individual insurance underwriters that make up the \$500 million total is likely to face the additional hurdle of forcing these underwriters to pay, which involves overcoming defenses to coverage raised by the insurers.

Tesoro elected not to procure the full amount of \$500 million CGL insurance. Instead, Tesoro made up part of that total by a corporate guarantee. As a result, Alyeska's Agreement with Tesoro is even more complicated than what I have described.

Indeed, this is a complicated subject. If you would like more detailed information or the opportunity to discuss this, please contact Paul Richards or myself at your convenience.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: Mr. Paul M. Richards

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, damage 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.

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

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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

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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 Alaska 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.

February 4, 1991

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.

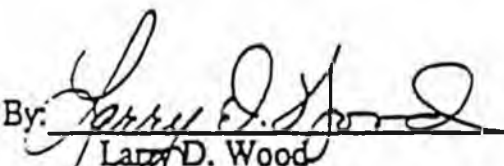
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

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.

January 30, 1992

Improving Good Samaritan Immunity for Oil Spill Response in Alaska

Good Samaritan laws encourage action to save lives and property during emergencies.

Alaska laws limit liability of individuals or organizations who provide emergency assistance. Examples include:

- Rendering care at accident scenes.
- Providing equipment or services requested by a police agency, fire department, or other governmental agency during a state of emergency.

Similarly, the federal Oil Pollution Act of 1990 ("OPA '90") and Alaska's HB 196 adopted responder immunity laws to encourage "immediate and effective" oil spill response action.

Without liability immunity, financial risks and liability exposures would deter cleanup contractors and cooperatives from prompt, aggressive action.

However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July 1992.

To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's responder immunity law should be improved and made permanent.

Although its scope is also limited, the federal response action immunity provision in OPA '90 (33 USC § 1321(b)(1)(c)(4)) is the best model.

To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted virtually identical laws.

OPA '90 limits liability under federal law for response action in federal waters if it is consistent with the National Contingency Plan or federal directions. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

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In comparison, last session's HB 196 is the most restrictive responder immunity law in the country.

There is limited liability for response action contractors under state law if such action is not contrary to federal or state directions. *But, the action must not "substantially deviate" from an applicable contingency plan.* The liability limitation does not bar claims for personal injuries and death, *personal property damage not caused by oil*, or gross negligence or intentional misconduct. *The response immunity only applies to an act or omission that occurs within 15 days after a release.*

The OPA '90 Good Samaritan provision will encourage oil spill response organizations to quickly provide personnel and resources when spills are threatened or occur.

- A. There is no 15-day or other immunity time limit in the OPA '90 Good Samaritan provision.

HB 196's 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. In addition, the uncertainty when a time limit begins and ends following a particular "release," may deter prompt and continuous response action for a spill or threat of a spill.

- B. All persons who render "care, assistance, or advice" have limited liability under OPA '90.

Although "response action contractors" in HB 196 includes "volunteers," nonvolunteers must be "carrying out [a response action] contract" or under the control of a response action contractor who is. But written contracts cannot describe all actions taken during a response. This unnecessary restriction will foster uncertainty regarding the scope of those persons and actions entitled to limited immunity under HB 196.

- C. Under OPA '90, the response action needs to be "consistent with" the National Contingency Plan ("NCP").

The NCP covers a broad array of actions "to minimize ... oil ... discharges." All actions within "the overall objectives of the NCP" fall within the immunity. In comparison, for response action contractors who have prepared or agreed to individual contingency plans, response action must not "substantially deviate" from such plans to claim limited immunity under HB 196.

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Individual contingency plans cannot describe all necessary response actions, yet "substantial" deviations from those plans will not fall within the scope of limited immunity. Delays may result where plan amendments are required. Moreover, uncertainty about "substantial deviation" will foster controversy and litigation.

- D. Damages to personal property need not be caused by oil to claim limited immunity under OPA '90.

Oil spills generate emergency actions other than those related to containing and cleaning up oil. HB 196's requirement that damage to tangible personal property be caused by oil to fall within the scope of the limited immunity is inappropriate and may have a chilling impact on responses.

- E. OPA '90 responder immunity, or similar laws, have been adopted by the states which have considered the federal standard.

Unlike HB 196, the federal standard will be applied in many jurisdictions. Uniformity of interpretations is anticipated. This uniformity will encourage response organizations to cross state borders in the event or in anticipation of oil spills.

The best course is to replace HB 196 responder immunity with the federal Good Samaritan standard; however, Alaska's limited immunity law can be improved.

- "SUBSTANTIALLY DEVIATED" MUST BE DEFINED TO DESCRIBE ONLY MANAGEMENT, NOT OPERATIONAL, LEVEL DECISIONS.

No contingency plan can anticipate every development, including weather, location, time of day, and season. The response must adapt to the event. Thus, errors by operations personnel reacting to exigencies is expected; this is a key reason for limited responder immunity.

Responders should not incur liability for good faith, but negligent, decisions by response personnel in the field. Without a definition, this language offers no predictable liability exposure and will encourage litigation. In the letter of intent which accompanied HB 196, the legislature recognized this uncertainty and asked that the matter of a definition be studied.

- ALASKA'S RESPONDER IMMUNITY LAW MUST NOT CHANGE RESPONSE PLANNING STANDARDS INTO CLEANUP STANDARDS.

HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. However, since response actions must not "substantially deviate" from a contingency plan to fall within the scope of HB 196 responder immunity, this analysis is inconsistent with HB 567. Clarifying language is needed.

- THE HB 196 15-DAY IMMUNITY TIME LIMIT MUST BE ELIMINATED.

This time limit is unrealistic given the nature of oil spill response operations; it is a major disincentive for responders to get involved and stay involved. Distant responders may be discouraged to send equipment, personnel, and other assistance because a short immunity period will largely expire during travel time. No time limit will encourage continuity of services and loaning of equipment in a massive spill response, and minimize turnover of experienced, skilled personnel.

- THE LIMITED IMMUNITY SHOULD BE EXTENDED TO ACTIONS TAKEN TO PREVENT AN OIL SPILL.

Prevention of an oil spill is, of course, the best course to protect our environment. Accordingly, the responder immunity laws in several states also offer limited protection to those who take actions to prevent such releases.

- DAMAGES TO TANGIBLE PERSONAL PROPERTY SHOULD NOT NEED TO BE CAUSED BY OIL TO FALL WITHIN THE SCOPE OF LIMITED RESPONDER IMMUNITY.

Oil spill responses will generate many other emergency actions other than those related to containing and cleaning up oil. Personal property may be damaged other than by oil. To avoid a chilling effect on response efforts, HB 196's requirement that only oil-damaged personal property falls within the scope of limited responder immunity should be deleted.

- A TECHNICAL AMENDMENT SHOULD CLARIFY THAT THE STRICT LIABILITY STATUTE, AS 46.03.822(A), IS SUBJECT TO HB 196'S LIMITED RESPONDER IMMUNITY PROVISIONS.

AS 46.03.822(a) imposes strict liability for damages and for response costs on certain persons should a release of a hazardous substance occur. For example, the owner

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of, and the person having control over, the hazardous substance are included. Also included are those persons who arrange for and transport a hazardous substance which is released. Last year, HB 196 provided for limited responder immunity from this and other laws, but, as a technical matter, this intention should be clarified by an amendment to AS 46.03.822(a).

Proposed Amendments to HB 196, Alaska's Responder Immunity Law

1. Add to AS 46.03.822(a), after "... (i) of this section," the following:

" , and the provisions of AS 46.03.825, ".

2. Add to AS 46.03.825(a) two new subsections as follows:

"(4) In this section, "substantially deviated" means significant, unjustifiable, and unauthorized departures from the fundamental requirements of a plan by the executives, managers, and incident commanders of a response action contractor.

(5) Nothing in this section is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor."

3. Delete AS 46.03.825(b)(2), and AS 46.03.825(b)(3).
4. Add to AS 46.03.825(d), after "but not limited to", the following:
"prevention, ".

Oral Presentation to Citizens' Oversight Council, January 31, 1992
Prepared by Alyeska Pipeline Service Company

- Thank you for the opportunity to provide comment regarding the important issue of improving responder immunity in Alaska.
- We were also pleased to provide research materials regarding the laws of other states and trust that it was useful to the Council's work. We have also provided written comments relating to five reports submitted to as research and thank you for your consideration of them.
- Alyeska Pipeline Service Company ("Alyeska") operates and maintains the Trans Alaska Pipeline Service Company ("TAPS") on behalf of seven owner companies.
- The System stretches from Prudhoe Bay on Alaska's North Slope to Valdez where its 1,000 acre marine terminal loads southbound tankers with crude oil.
- Although neither Alyeska nor the pipeline owner companies own or operate tankers, it has contracted with tanker owners/operators/charterers to provide an initial response to an oil spill from their vessels in PWS.
- The State requires that crude oil tankers transiting PWS have oil spill contingency plans. Alyeska developed an initial response plan (the PWS Tanker Spill Prevention and Response Plan) which describes the services it offers to tank vessels as an initial response contractor.
- Other response action contractors could also provide these services.
- Under the terms of the initial response plan and the Oil Spill Response Service Agreements signed with tanker owners/operators/charterers, Alyeska provides the necessary response vessels, equipment, personnel and training to respond to an oil spill for as long as the first 72 hours following a release.
- During this time, management of the response will transfer from Alyeska to the contracting spiller or to the federal On Scene Coordinator.
- To provide these services, Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has ocean and rapid deployment boom, seaskimmers, and related response equipment.
- Alyeska has also 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 as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations.
- Several reports express opinions that response action contractor ("RAC") liabilities ought actually to be increased, not limited, when it comes to response action.
- For example, the Mertz and Straube reports suggest that RAC's ought to be subject to direct state control in the event that an insolvent or recalcitrant spiller refuses to finance.
- Imposing spiller liability on RACs to pay for the cost of oil spill response will deter or eliminate spill response, not promote it.
- This notion flies in the face of the comprehensive federal and state schemes to, on the one hand, encourage prompt, bold response action, and, on the other, require that spiller, his insurance, or, in some cases, industry-financed funds pay for it.
- In addition, this possibility described as a worst case scenario in the Mertz, Straube, and Frank reports is admittedly remote. It would depend for example on the simultaneous insolvency of a spiller, his financial responsibility, and federal and state oil spill response funds. Yet, it this possibility which in these individuals opinion ought to fuel a step toward closing out response action by imposing new liabilities.
- A fundamental reason spill funds exist is to provide a safety net for just the dark scenario which is described. But this point seems to have been lost.
- In an interesting paradox, the Mertz report indicates the justification for these new RAC duties and liabilities would be the possibility of all these insolvencies, yet, in the case where a mystery or orphan spill is most likely require a third party response, and the state moves in to do so, it will enjoy limited responder immunity under a separate statute. Why are there different rules for private RACs?
- The Frank report evidently recommends that Alyeska not be entitled to even limited responder immunity because, in this attorney's opinion, the holders of the federal pipeline right-of-way permit are liable for any tanker spills involved Alaska North Slope crude oil. For the reasons explained in Alyeska's written response, this is incorrect.

- Judge Holland in the ~~Exxon~~ *Exxon Valdez* litigation has already ruled that the people strictly liable under the Trans Alaska Pipeline Authorization Act are the vessel owner and operator, and the Trans Alaska Pipeline Liability Fund.
- In any event, the terms of most responder immunity laws state quite clearly that a RAC which is otherwise a responsible party for a spill is not entitled to assert limited immunity.
- In our response to the Vogt report, we point out that personnel and equipment to escort vessels and to respond to spills in PWS are required by state laws, and Alyeska has offered to provide those services in the absence of anyone else. The costs of Alyeska's initial response services for tanker owners/operators/charters are included by the TAPS carriers in the tariff charges for oil delivered to Valdez. This is an equitable distribution of the costs of those services amongst those who receive them.
- 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 in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Interestingly, if the state owned and used that equipment, the Mertz report explains that it would enjoy limited responder immunity in the event of a response.
- Lastly, the Mertz report is incorrect. Following the passage of limited responder immunity law year, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of requiring financial responsibility, that is a demonstration of self-worth, Tesoro now provides this evidence through insurance. Because of the perceived reduction in risk, Alyeska has accepted less in the overall quality of Tesoro's demonstration of that capacity as explained in our written remarks.
- For the balance of our remarks, we will refer to the attached position paper regarding improving responder immunity.

To: Mike Abbott

January 31, 1992

From: R.I. Shoaf *RI Shoaf*

Immediately prior to March 1989, Alyeska Pipeline had unilateral contracts with vessels calling at Valdez, through the Port Information Manual, whereby Alyeska would provide oil spill response for TAPS trade vessels. Under the terms of the Port Information manual, a contract was created between a vessel, and its operator, owner and charterer, and Alyeska each time a vessel lifted oil at Valdez. The contract required Alyeska to respond to a spill from the vessel according to Alyeska's oil spill contingency plan for Prince William Sound, which was approved by the state in 1987. The contract required a vessel to reimburse all of Alyeska's costs in responding to a spill and to indemnify Alyeska from third party claims. The contract did not require the vessels to demonstrate an ability to indemnify Alyeska. When the Oil Spill Response Services Agreements went into effect on November 1, 1990, bilateral contracts were formed that were similar to the unilateral contracts created under the Port Information Manual, but added the requirement that vessels demonstrate their ability to indemnify Alyeska. This requirement was added in direct response to the magnitude of claims asserted against Alyeska after the Exxon Valdez accident.

January 31, 1992

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

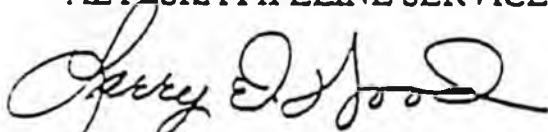
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'
Oversight Council on Oil and Other Hazardous Substances

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

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

January 31, 1992

**Response to Memorandum Relating to Contingency Plan Requirements Under
OPA '90 Prepared by Michele Straube****Summary**

The U.S. Coast Guard's disinclination to force a "... RAC [response action contractor] to respond if the Holder [of a contingency plan] did not concur" encourages prompt and aggressive response action, despite suggestions in this memorandum to the contrary. Page 10, footnote 29. If an RAC is aware that the state or federal governments will essentially impose spiller liability for response action if an RAC contracts to provide services to a spiller, the RAC will obviously refuse to offer those services. As noted by the Coast Guard, all of OPA '90's statutory requirements -- strict liability, treble damages, contingency planning, periodic drills -- illustrate the point that it is in the responsible party's best interest to respond to spills and to proceed expeditiously, without objection. *Id.* OPA '90 and state financial responsibility requirements and the safety net of industry-financed state and federal response funds make the "worst case scenario" (the apparent and simultaneous insolvency of a shipper, its insurance, and state and federal response funds darkly described on page 11) an extremely remote possibility.

Nonetheless, and fueled by this speculation, the memorandum implies that the state should move ahead, despite the recognized uncertainty of federal preemption and constitutional limitations, "by imposing liability on RACs [to bear the costs and liabilities of spill response should a spiller fail to]." Page 15. This step would most certainly defeat the comprehensive approach taken by federal and state governments to, on the one hand, insure prompt, effective response to oil spills, and, on the other, require that costs be borne by the spiller, his evidence of financial responsibility, and, in some cases, oil spill response funds. Unfortunately, the Coast Guards' answer to the "worst case scenario" question seems to have been largely ignored: "... the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund." Page 10. In addition, the memorandum fails to consider that the Coast Guard has urged the states to adopt the federal responder immunity standard to insure "the availability of a viable private sector capability to respond to oil spills and their threats ... [as] an absolutely essential element of a national oil pollution response system." Contractor Immunity Provision: State Oil Spill Laws, Commandant, U.S.C.G. (May 31, 1991).

LDW:straubi/cml

January 31, 1992

Response to HB 196 Report on Response Action Contractors Prepared by the Alaska Department of Environmental Conservation

Summary

This memorandum incorrectly states that "[n]one of the RACs have had experience with claims for damages due to spills or to alleged negligence***." Page 5. Alyeska Pipeline Service Company ("Alyeska") reported that such claims had been asserted in the Exxon Valdez litigation. It is our understanding that Exxon Shipping Company's long term response action contractor, VECO, has also been named as a defendant in virtually all of the spill litigation. Potential liabilities associated with such claims are, therefore, not an imagined concern.

The memorandum also incorrectly asserts that "[o]ther industry response organizations not so structured [to function independently] may not have a relationship similar to RACs. In some cases the owner companies may own and operate an oil terminal, tankers and the response organization." Page 9. However, Alyeska is an initial response action contractor which has agreed to provide initial response services to tanker owners/operators/charterers. Although Alyeska is the common operating agent for the seven holders of the federal and state rights-of-way for TAPS who own the pipeline, terminal, and related properties, none of these companies own tank vessels or consequently hold vessel oil spill prevention and response plans. To answer the agency's rhetorical questions on page 10, Alyeska, as agent for the pipeline owner companies, is under the same contractual obligations to provide initial response services to these tanker owners/operators/charterers as would be any other RAC that signed a response services agreement. The terms of that agreement call for Alyeska to assume responsibility for spill response operations for as long as the first 72 hours following the spill during which time the contracting tanker owner/operator/charterer will assume spill management responsibilities. Hence, during this time, and to the extent it provides continuing response services, Alyeska faces the same risks as other RACs and is entitled to the same immunity from liability available to RACs generally.

LDW/ADEC/cms

January 31, 1992

**ALYESKA PIPELINE SERVICE COMPANY'S
RESPONSE TO MEMORANDUM
REGARDING THE LEGAL RELATIONSHIP BETWEEN
OIL SPILL RESPONSE ACTION CONTRACTORS
AND OTHER PARTIES TO AN OIL SPILL**

Summary

The Citizens' Oversight Council should make its recommendations to the legislature regarding whether and to what extent it should reduce the limitation on liability for RACs after considering 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) potential damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Carriage of crude oil is not an "ultrahazardous" activity.

Limitation on liability for RACs will not prevent recovery of damages by injured parties.

The Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills.

The spiller is strictly liable for damages caused by oil spills. 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). Exemption cannot "lessen" its overall liability. The spiller will already have demonstrated financial responsibility to pay for response costs and damages.

Indemnity agreements do not allow parties who are strictly liable to "escape" liability. Indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The 15-day time limit on limited responder immunity is arbitrary and should be eliminated.

Competence of RACs can best be evaluated in advance of a spill by agency review of contingency plans and through DEC's authority to require training programs and spill drills.

Tanker owners/operators and response action contractors must define relative rights and responsibilities through contract. There is a distinction between industry co-ops and private contractors. Industry co-ops are voluntary, non-profit, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time.

Regarding Alyeska's \$1 billion dollar in financial responsibility, Alyeska must ensure that a shipper with whom it contracts can indemnify for liability to which Alyeska could be exposed in responding to a spill. In light of present liabilities, particularly in light of revisions to state and federal laws, this figure is reasonable.

Following passage of HB 196 last year and in light of a perceived reduction in the risks associated with spill response, Alyeska and Tesoro reached a practical solution to a difficult financial responsibility problem. Alyeska agreed to accept a substantial reduction in the overall quality of Tesoro's evidence of financial responsibility.

The State should not attempt to directly oversee RACs, unless the State becomes party to the contracts assumes spill management responsibilities, and agrees to pay the response costs.

Private RACs are entitled to the same limited responder immunity as presently enjoyed by the State and municipalities.

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 spill response funds than by imposing spiller liability on RACs. Reducing incentives to form RACs or spill cooperatives will only reduce the number of entities willing and able to respond to spills.

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 v. 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 seen 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. Alveska agrees with the statement at page 34 of the Report that the 15-day limit on the immunity provided is arbitrary. 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 after and because 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. The same exemption for RACs should be available.

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. 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. 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.

January 30, 1992

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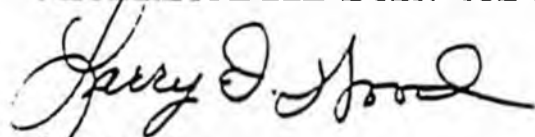
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act
Memorandum

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 . . .

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 statute 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 Alveska 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

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.



Regional Citizens' Advisory Council 601 West Fifth Avenue, Suite 500 Anchorage, Alaska 99501-2254 (907) 277-7222 FAX (907) 277-4523

MEMORANDUM: Regional Citizens' Advisory Council
Oil Spill Prevention and Response Committee
92-1

TO: Representative Bill Hudson
ATTN: Landa Holton
RE: Review of Draft ACCC Study
DATE: 1/14/92

The RCAC's OSPR Committee is requesting final comments on this draft Alaska Coastal Communities Cooperative Study (ACCC) by February 15, 1992.

Pursuant to a request from the Nearshore Working Group, RCAC undertook a feasibility study of the concept of a coastal communities oil spill cooperative. This co-op would provide the means for local involvement in spill response, with particular focus on shoreline protection and nearshore response, which are the major remaining gaps in the spill protection scheme for Prince William Sound and other coastal areas.

The OSPR Committee has already gone through one phase of soliciting comments on the concept; and these comments have been addressed in this draft of the study. We are forwarding a copy of this most recent draft of the feasibility study for your comments.

The RCAC endorsed the concept of a coastal communities cooperative at its December 1991 meeting. We will continue to refine the technical issues involved in creating such an organization. From those of you who cannot support this co-op concept, we invite suggestions for alternative methods to achieve our common goal.

DRAFT

A COASTAL COMMUNITIES OIL SPILL COOPERATIVE FOR ALASKA

A F E A S I B I L I T Y S T U D Y

*Oil Spill Response
By Alaskans, for Alaska.*



13. Environmental Organizations. Naturally enough, groups concerned about natural resources, wildlife and pollution have been and continue to be interested in assuring compliance with state and federal requirements for oil spill response. In addition to the enhancement of response capability that the ACCC would provide, these groups are likely to see the consolidation of response activities with ACCC as a plus from another standpoint: consolidation of local involvement in one organization will decrease the complexity of overseeing that local resources are being fully incorporated into contingency plans.
14. The Fishing Industry. Fishermen are concerned about protecting the fishing resources and the effective use of the fishing fleet's ability to protect those resources. The fishing industry is also the source of a significant number of small spills, and as such may find itself in need of the ACCC's services.
15. Local residents, businesses, charter vessel operators, and contractors. Many of these people depend on coastal resources for their livelihoods and recreation, and thus have a heightened interest in participating in the activities of the ACCC. Moreover, spill response is a growth industry in Alaska, and it is not unreasonable for those communities that suffer the most from oil spills to be able to offset their risk of loss somewhat by participating in a professional response organization.
16. Recreational Users and Providers. Tourism and recreation is an increasingly important part of the Alaskan economy. Indeed, many small businesses in coastal Alaska depend for their survival on income from recreational users. The interests and concerns of both the tourist industry and individual recreational users must be considered when making decisions about protection of coastal resources.
17. Academic and Research Institutions. These entities are potential participants in the planning, engineering and scientific support of the ACCC.

These groups fall into four basic categories: government, sponsoring and user entities, potential participants in the ACCC's planning and response activities, and interested parties. Some groups may belong in more than one category, for instance Native corporations may be participants and are obviously interested parties. The ACCC will be successful if:

1. The state is willing to assign the state agency depots and response corps role to the ACCC for coastal spills.
2. The coastal spill response needs of the entire state are met by the ACCC.
3. The state accepts the feasibility of creating a joint industry/government solution to the identified needs. The Corpus Christi Area Spill Control Association demonstrates that such a joint effort can succeed. It is a modest sized and simply organized cooperative compared to the large West Coast cooperatives. Nevertheless, it is highly successful in its geographic and environmental setting. Local government rather than industry provides its personnel reserve. Its local government orientation has led to very low response costs, even when contractors are used. Exorbitant rates are not tolerated by the cooperative's manager, who doubles as the City of Corpus Christi's Petroleum Director.

The Legislature is able to craft an acceptable, long-term solution to the issue of responder immunity from tort liability during the 1992 session.

SPACE RESOURCES

Space, particularly near the shoreline, will be of considerable importance to the ACCC. Shoreline operating space appears to be at a premium in Alaska. The ACCC will need one or more bases of operation with substantial indoor space (on the order of 50,000 to 80,000 square feet). This indoor space will be used for offices, response centers, classroom training, hands-on equipment training, communications, warehousing of materials and equipment, parts inventory and repair operations.

The ACCC will need substantial dock footage to service and equip barges, contract vessels, and first strike vessels. The large number of small barges and vessels will likely necessitate the availability of its own small dry-dock capability. Cranes, forklifts and other equipment will be needed for deployment and loading of vessels.

Tankage and flat storage areas will be necessary for interim storage of recovered oil. Open storage will be needed for bulky items and Conex storage units.

Similar but smaller scale space needs will exist at remote storage depots. Consideration is being given to deploying and docking self-contained, barge-based response depots at remote locations. These could periodically be rotated back to ACCC bases for maintenance and repair.

The availability of space is unknown at this time and would be the subject of a detailed search in subsequent studies or during early stages of the cooperative's implementation. Special leasing terms or donation of state, local, native corporation or industrial sites may well influence base location.

LEGAL FEASIBILITY

The first issue is the proper form of charter. MSRC has chosen to pursue the status of a not-for-profit corporation. Other cooperatives have chosen to remain partnerships of member companies.

The ultimate solution for the ACCC will likely hinge on issues such as state participation in a non-profit entity, the extent of tort liability, borrowing and purchasing policies, and whether a quasi-state entity has the flexibility to respond effectively under the pressure and timeables required by response scenarios.

The primary question appears to be whether to seek tax-exempt status. Doing so would severely restrict the cooperative from having a separate pricing structure for members and non-members. A not-for-profit corporation could be implemented as a quasi-government entity like the Alaska Housing Authority. This approach could make state participation easier.

Responder immunity is necessary for the ACCC to avoid tremendous liability exposure. It is anticipated that the state legislature will take up the issue of immunity for spill responders again during the upcoming session.

If the not-for-profit form is implemented, the most important contract will be to implement state funding. Discussion of a possible format will await agency decisions and specific legal advice. A contract covering professional service and placement of major equipment items could be negotiated with comparative fiscal and legal ease.

A host of other contracts would be needed with industrial members, other users of ACCC services, support vessel

and operators, as well as for facility acquisition and response contractors employed by the ACCC.

The issue of insurance will require much attention in this age of litigation. Six major areas are identified for later attention. The insurance topic has been subdivided into routine operations and spill response periods. Separate rates and perhaps even policies will apply. Indemnification clauses in contracts must also be considered.

In its contingency plan, Alyeska listed some 152 permits considered necessary to respond to an oil spill. The ACCC will need to proceed carefully to ensure that all regulatory obligations are met.

Discussions with the Clean Coastal Waters and Clean Sound Cooperatives indicate legal and insurance issues are significant, current problems; but these problems can be overcome for a reasonable cost.

Thus, although not without obstacles, the ACCC is legally feasible. (N.B. The overall concept of legal feasibility is being addressed by a professional maritime lawyer, and will be discussed in a separate document.)

TABLE 4: MAJOR LEGAL ISSUES FOR THE ACCC

1. Form of charter and management structure.
 - A. Not for profit
 - B. Not for profit - tax exempt
 - C. Quasi-government entity (similar to Alaska Housing Authority)
 - D. For profit corporation

2. Responder immunity: Extension of HB-196

3. Contracts with:
 - A. State of Alaska
 - B. Organizations contracting with the ACCC for its services
 - C. Vessel operators
 - D. Facility acquisition
 - E. Contractors and suppliers
4. Insurance during non-spill periods:
 - A. Director liability
 - B. Business liability
 - C. Payroll, including Jones Act
 - D. Vessel
 - E. Equipment and facilities
 - F. Employee health, life and disability

5. Insurance during spill response
6. Indemnity agreements
7. Permits
8. Funding guarantees for expenses during spill response operations

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS



- Enacted





Resource Development Council

for Alaska, Inc.

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

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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.

7-LS2045G

Ford

3/5/92

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 (O&G)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Offered:

Referred:

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

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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FAX COVER SHEET

DELIVER TO: Representative Bill Hudson

FROM: Tim Robertson

REGARDING: _____

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REMARKS:

VST-25

DRAFT February 27, 1992

[The work group agreed to leave off management, pending a proposal on how it would be handled. Below is a proposal of information that would be requested if response management is certified:]

- (ix) *Spill response management services for large spills:*
- (A) Names, experience, and background of management team
 - (B) Description of the training and experience of management team, including a description of familiarity with:
 - (1) clients' response plan(s)
 - (2) area contingency plans in area of service
 - (3) national contingency plan
 - (4) state requirements in area of service
 - (C) Description of communications system for command and control, including:
 - (1) number and type of equipment
 - (2) frequencies available
 - (3) mobility of equipment
 - (4) description of communications redundancy
 - (D) Description of logistic management system, including:
 - (1) transportation coordination
 - (2) material maintenance and support
 - (3) security
 - (4) inventory control
 - (5) resource management
 - (E) Description of operational management system, including:
 - (1) spill trajectory interpretation
 - (2) boom and skimmer tactical direction
 - (3) temporary containment direction
 - (4) natural and economic resource sensitivity
 - (5) nonmechanical removal direction
 - (6) manpower supervisory capacity
 - (F) Administrative management system, including:
 - (1) procurement system
 - (2) accounting system
 - (3) claims processing system
 - (G) Description of public information and dissemination system.]

(f) *Attestation.* A responsible corporate official of the contractor shall sign the application, affirming that the factual information contained in the application regarding the capabilities described in paragraphs (a)-(e) is, to the best of his knowledge and belief, true and accurate as of the time of signing.

(g) *Agreement for Inspection and Participation in Drills.* The contractor shall state that the contractor agrees to submit to inspection and verification



Citizens' Oversight Council
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Jay Nelson

**OIL SPILL RESPONSE ACTION
CONTRACTORS**

**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)**

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**



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HB 196, SECTION 11, REPORT OIL SPILL RESPONSE ACTION CONTRACTORS

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**HB 196, SECTION 11, REPORT
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COUNCIL'S RECOMMENDATIONS**

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HB 196, SECTION 11, REPORT OIL SPILL RESPONSE ACTION CONTRACTORS

RECOMMENDATIONS

OBJECTIVE

The Citizens' Oversight Council, as required by the Legislature, has reviewed the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. The Council's objective in formulating recommendations is to assess the adequacy of the current laws limiting liability for oil spill response action contractors and to propose, where appropriate, alternatives that further the public's interest in a timely and reliable response to an oil spill.

EVALUATION CRITERIA

The Council first analyzed the liability laws and the realities of spill response in Alaska. Whenever the Council identified a risk that there might not be a timely and reliable response to an oil spill, the Council considered various options to ameliorate that risk. The Council was guided by the following criteria in making its final recommendations:

- * minimizing interference with private choices
- * providing incentives for maximum best effort in response
- * allowing for adaptability for regional and unique circumstances
- * achieving maximum shoreline protection
- * offering administrative efficiency
- * assuring clarity and consistency in standards
- * assuring reliability and responsibility in performance

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**HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
RECOMMENDATIONS, continued
page 2**

RECOMMENDATION #1: The liability standard for oil spill response action contractors may be limited to gross negligence or intentional misconduct, with certain conditions that ensure a reliable response.

Problem Identified: There is a fear among response action contractors that they face serious potential liability for their actions taken in response to an oil spill and, consequently, they will not respond.

Rationale: The Council found that there is a public benefit in avoiding any deterrence of spill response due to fears of potential liability. The Council also believes that there is a public benefit in encouraging more cooperatively based, pooled response efforts. These goals can be furthered, in part, through limited liability provisions, provided there are conditions in place that do not allow this limit to reduce the quality of an oil spill response. These conditions are set forth below.

RECOMMENDATION #2: Professional response action contractors should be certified by the state.

Problem Identified: Response action contractors serve a vital function in oil spill response. Yet, the state currently has no means to verify the capability and the capacity of these contractors to perform.

Rationale: As the requirements for oil spill preparedness have increased, contingency plan holders have accordingly increased their reliance upon response action contractors to demonstrate to the state that the contingency plan holders have access to equipment and personnel to respond to a spill. There must be a means for the agency evaluating contingency plans to verify that the response action contractors relied upon in contingency plans are able to respond during the implementation of any particular contingency plan. The Department of Environmental Conservation should be authorized to promulgate regulations to develop a certification program for response action contractors. Response action contractors relied upon by contingency plan holders to demonstrate compliance with equipment and personnel preparedness requirements must be certified in order for the contingency plan to be approved. Professional response action contractors must be in compliance with certification provisions in order to be afforded liability limits.

**HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
RECOMMENDATIONS, continued
page 3**

RECOMMENDATION #3: A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.

Problem Identified: There is currently no professional standard set out in the law for the actions of oil spill response action contractors. Normally, that standard would be provided by the basic negligence standard for evaluating conduct that leads to injury. If response action contractors are relieved of the liability that attaches to a failure to exercise reasonable care, there is concern that there will be no incentive for the contractor to take the precautions and the care that it normally would.

Rationale: The Council believes that a professional standard should be incorporated into the certification program in order to provide an incentive that contractors maintain the quality of their performance. DEC should establish the criteria by which to certify response action contractors for minimum standards of personnel training and to verify the equipment, services, and response organization that the response action contractor offers. This will result in: a level playing field for standards; a means to assure that response action contractors will be able to perform as set out in a contingency plan; and a baseline of generally accepted professional standards and practices.

RECOMMENDATION #4: A certification program should authorize DEC to maximize coastal protection and to enhance regional response capabilities through response action contractor certification.

Problem Identified: There are substantial regional disparities in spill response capabilities, limiting effective response in parts of the state.

Rationale: If limiting liability is to have the benefits of encouraging improved response, there should be a more proactive approach to using those provisions well. Through the response action contractor certification program and DEC's contingency plan approval program, DEC could approach response in a broader, regional approach rather than piecemeal, individual contingency plan basis. This would enhance the most efficient use of response resources and reduce the agency's administrative burdens, as well as assure that regional differences in response needs will be fully addressed.

**HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
RECOMMENDATIONS, continued
page 4**

RECOMMENDATION #5: Certified response action contractors must be subject to all orders of the state on-scene coordinator during an actual or threatened spill response.

Problem Identified: The state currently has no means to ensure performance of a critical response action contractor. Currently, performance requirements are the subject of private contractual agreements between contingency plan holders and response action contractors. The state is neither a party to nor reviews those terms. Therefore, while the contingency plan may on its face offer sufficient equipment and personnel to handle a spill, there is no means to ensure that the equipment and personnel will indeed be deployed. This problem could be exacerbated if liability limits are granted.

Rationale: In order for a contingency plan to be a reliable document rather than merely a regulatory formality, there must be a duty to perform by all the key participants of a contingency plan. It is appropriate that there be private contractual arrangements between contingency plan holders and response action contractors to maximize the choices and to allow private operators to allocate duties and responsibilities privately among themselves. However, there must simultaneously be a means for the state to direct actual field performance of a response action contractor relied upon in an approved contingency plan to prevent dangerous response delays or failures to perform. Only response efforts meeting this duty should obtain the limited liability benefits.

RECOMMENDATION #6: Certified response action contractors should respond, when directed by the state on-scene coordinator, to mystery or orphan spills, except that regional cooperatives will not be required to respond outside their region of operation.

Problem Identified: There are frequently spills where the responsible party cannot be readily identified or forced to respond.

Rationale: Once the state has certified a cadre of professional oil spill responders and provided them limited liability, those responders should be available to respond to spills when it is in the public interest. The state would guarantee reimbursement for reasonable operational expenses.

HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
RECOMMENDATIONS, continued
page 5

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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HB 196, SECTION 11, REPORT OIL SPILL RESPONSE ACTION CONTRACTORS

I. INTRODUCTION

The 1991 legislature passed Ch 92 SLA (known as HB 196) which limits civil liability for acts and omissions of oil spill response action contractors. The terms of the legislation expire June 30, 1992. In order to determine the best policy for long-term legislation on this issue, the Legislature directed the Citizens' Oversight Council to prepare a report on whether further modifications to the laws are necessary. The Legislature also directed the Council to include in the report an analysis of whether the present state laws that authorize contingency plan holders to contract with response action contractors to carry out contingency plans are adequate to protect the public when an oil spill occurs.

II. REPORT METHODOLOGY

The Citizens' Oversight Council's role in preparing this report is to assemble and provide the Legislature with the information it needs to fully consider and balance the substantial interests on all sides of this issue. Shortly after the Governor signed HB 196 into law, the Council identified the core research issues. Those issues are set out in Appendix A. Those issues were reviewed for completeness and accuracy prior to the commencement of research by many of the groups and individuals which participated in the discussions of HB 196 during the 1991 legislative session.

Originally, HB 196 carried a fiscal note to cover the costs of the research and report preparation. The fiscal note was vetoed. Consequently, the Council requested assistance from others to prepare the research database. Assistance was generously provided by the Prince William Sound Regional Citizens' Advisory Council, Cook Inlet Regional Citizens' Advisory Council, Department of Environmental Conservation, Tesoro Alaska, Alyeska Pipeline Service Company, National Wildlife Federation, and various legislative staff members. All groups participating in the studies agreed upon the methodology for each report to ensure consistency and objectivity in preparation of the research database. After the research projects reports were submitted to the Council, the Council prepared a summary of each report (set out in Appendix B). The full text of each report is available upon request.

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Originally, the Council had planned to assemble an advisory panel to assist it in analyzing the information and developing recommendations. Unfortunately, due to the extra time it took to assemble all of the requisite background material, it was not realistic to undertake a panel analysis. Instead, the Council conducted a public meeting, teleconferenced to 9 sites, and took public comment on the issues. In preparation for this meeting, the Council provided full copies of all the research projects reports to all groups which had to date participated in the research. The Council also sent a direct mailing to approximately 100 groups or individuals who may have an interest in this subject. The mailing included notice of the public meeting and a copy of the summary of each of the research projects reports. A summary of the comments made at the Council's meeting is attached as Appendix F.

Although many groups and individuals participated in the preparation of the research projects, the views expressed in this report represent solely the views of the Citizens' Oversight Council. By widely disseminating the research material, the Council hopes that other groups will similarly express their views to the Legislature and that a fully informed policy discussion will ensue.

III. LEGAL FRAMEWORK

This section will briefly describe how Alaska law allocates liability for damages caused by an oil spill. It will also address who bears the duty to respond to an oil spill. This is an important distinction because the duty to respond to and abate an oil spill does not necessarily fall solely on the same parties responsible for paying damages for injuries caused by an oil spill. The federal government, throughout its various acts, also makes a distinction among parties with a duty to remove pollution and parties with a duty to pay for the damages caused by that pollution.

A. STATUTORY LIABILITY FOR DAMAGES FROM OIL SPILLS

Alaska law imposes strict liability for the release of hazardous substances under AS 46.03.822. Strict liability means that the persons designated as responsible for the spill have a duty to compensate those damaged by the spill without proving that the spiller failed to use reasonable care. The rationale is that those who participate in the handling of oil owe a duty to the public to exercise exceptional care because the risk of harm from a release is so high.

Under AS 46.03.822, those liable for damages include most parties connected with the ownership, storage, transportation, or disposal of the oil. For instance, the parties responsible for damages following an oil spill from a tanker could include the owner of the oil, the owner of the tanker, and the operator of the tanker. In theory, a response action contractor could be strictly liable, although AS 46.03.822(b) provides that the responsible parties are also liable for damages caused by a response action contractor responding to the spill. AS 46.03.822 (g) further states that, although liable parties may allocate the duty to pay damages among themselves, indemnification agreements will not relieve a liable party from liability or provide a defense to a damages claim.

In 1989, the legislature enacted AS 46.03.823, which provided that a response action contractor responding to hazardous substance spills (including oil) is only liable for damages caused by the response action contractor's negligence, gross negligence, or intentional misconduct if the response action contractor acts in accordance with generally accepted professional standards. This relieved the response action contractor from the burden of strict liability.

In 1991, the legislature passed HB 196 further limiting the liability for response action contractors involved in oil spill response. These provisions, found at AS 46.03.825, provide that a response action contractor is not liable for civil damages unless:

(a) the response action contractor would have been liable for the initial release under AS 46.03.822, even if the contractor had not been carrying out a response action (in other words, a party cannot be responsible for a spill and then claim response action contractor immunity);

(b) the response action contractor acted with gross negligence or intentional misconduct; or

(c) the response action contractor, without approval from the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved by the state when that plan was either prepared by that contractor for the responsible party or the contractor previously agreed to comply with the terms of that plan under a contract with the parties responsible for the release.

The limitations on liability also do not apply to actions for personal injury or death and for damages to tangible personal property not caused by oil. The limitations only apply within the first 15 days of the release. The parties responsible for the spill will be liable for damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable. HB 196 sunsets June 30, 1992 and the provisions of AS 46.03.823 will again apply. The full text of HB 196, including the provisions applicable after the sunset, is set out in Appendix D.

An additional possible limit on the liability of responders is found at AS 09.65.091. This provides that, during a declared emergency, a person (paid or volunteer) who responds at the request of a government agency (but not at the request of a private party) is not liable for damages unless the responder's actions were intentional, reckless, or grossly negligent. This limitation is not subject to the same exceptions as exist in AS 46.03.825, such as not being contrary to orders of the on-scene coordinators and not involving personal injury or death. Good Samaritan laws such as this are generally premised upon the fact that the good Samaritan has no obligation to act.

B. STATUTORY DUTY TO RESPOND TO AN OIL SPILL

Generally, there are three principal interests or roles involved on behalf of industry when an oil spill occurs: the discharger and/or others responsible for the spill, the contingency plan holder, and the response action contractors who

respond in the field. In some instances, these interests could involve multiple parties; in other instances, one party could serve all roles.

AS 46.04.020 requires that a person causing or permitting an oil spill must immediately contain and cleanup the spill. In addition, AS 46.04.030 requires that oil terminal facility operators and tank vessel owners must have oil spill contingency plans. Those contingency plans form the very heart of the spill prevention and response in Alaska. A contingency plan holder is required to implement the contingency plan. AS 46.04.030 (g).

The duty to respond to an oil spill falls upon the discharger and all other parties responsible for the consequences of a spill. The primary duty, however, to plan and to prepare for a spill response, and to ensure that the response is indeed implemented, belongs to the contingency plan holder.

IV. CONGRESSIONAL AND OTHER STATE ACTIONS

Much of the discussion about limiting response action contractor liability stems from the language set out in the Oil Pollution Act of 1990. 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.

This provision has little legislative history and was added into the Act late in the process. There is a written explanation that expresses the hope that this language would avoid possible deterrence of spill response due to fears of liability. Congress authorized states to adopt their own standards for contractor liability.

The Coast Guard has only just begun considering regulations to implement OPA '90, including the response action contractor provisions. In meetings to discuss the issues, the Coast Guard has stated that it will require a contingency plan holder to demonstrate that it has a contract for performance with any response action contractor the holder intends to rely upon. In order to further provide sufficient assurance that the contractor will indeed perform, the Coast Guard is considering how to define in regulations what it means for the President to "direct" a response and how that "direction" will provide authority over the response action contractor. The Coast Guard has also stated that it will certify response action contractors to guarantee a minimum level of capability and expertise.

Since the federal language was passed, several states have also considered the issue, largely due to the lobbying efforts of the Marine Spill Response Corporation (MSRC), a nationwide catastrophic spill response organization established by the Marine Preservation Association (MPA). The MPA members are oil industry participants who pay dues based upon the amount of oil they ship. MPA, in turn, funds the operations of MSRC. MSRC is establishing 5

regional response centers, but has stated that it currently has no plans to locate in Alaska.

Generally, the coastal states considering this issue have limited the liability of response action contractors to gross negligence or intentional misconduct. These states usually put some conditions on that liability limit, such as requiring that the response action contractor's activities be consistent with the national or state contingency plans or with orders of the state or federal on-scene coordinator. Four states (California, Texas, Washington, and New Jersey) require that response action contractors be certified or pre-approved by the state. Three states (Florida, Louisiana, and South Carolina) focus the liability limit on volunteers or those acting at the request of government. Only California limits the duration of the liability limit (60 days with a possible extension to 90 days). None of the states limiting liability allow that limit to be used if the contractor is otherwise a responsible party or has a duty to mitigate the effects of a spill.

V. RESPONSE ACTION CONTRACTORS OPERATING IN ALASKA

As Alaska's requirements for spill preparedness have increased, contingency plan holders have had to increase their reliance upon response action contractors to achieve a state of readiness. Contingency plan holders include the anticipated services of response action contractors in the contingency plans they submit for approval. In order to assess the duties owed by those response action contractors and the pros and cons of limiting their liability for the actions they take in responding to a spill, it is important that the different kinds of responders currently operating in Alaska be explored.

A. VOLUNTEERS

Volunteer responders are unpaid individuals or groups which assist during spill response. They are otherwise unconnected with the business of transporting oil or providing response services. Their role in response is very limited and generally task-specific.

B. PROFESSIONAL INDEPENDENT OPERATORS

Professional independent operators operate entirely independently from the parties for whom they provide services. They supply equipment, materials, personnel, and services through contractual arrangements with contingency plan holders or responsible parties. The contracts are either prearranged in the contingency plan or entered "on the spot". The independent operators may be business interests (in various forms, such as corporations, partnerships, sole proprietorships) or "paid volunteers": examples are VECO, Inc.; VRCA Environmental Services, Inc.; Martech USA, Inc.; and Chempro.

The independent operators have no common ownership or management with their clients, the contingency plan holders and responsible parties. They are not otherwise engaged in oil industry activities (eg., production, transportation, etc.).

They are not contingency plan holders in their own capacities nor are they potential responsible parties. When these operators participate in the field response to an oil spill, they do not control or direct the entire field response.

Generally, the professional independent operators will provide services in all areas of the state for spills of both petroleum products and hazardous substances. Their participation in response is governed through their private contractual arrangements with their clients. There is substantial diversity in the terms of these contracts. There may even be substantial differences in the terms one response action contractor negotiates with different clients. Most of the contracts require indemnification (i.e., the client must bear liability for response action contractor conduct causing damages); some for the response action contractor's negligence, others for the response action contractor's gross negligence. Most contracts do not specify the precise services to be performed, but rather recite an agreement to provide generic services when invoked by order of the client.

C. INDUSTRY SPILL RESPONSE COOPERATIVE ORGANIZATIONS

This category consists of organizations formed and financed primarily by contingency plan holders and potential oil spill responsible parties, such as oil terminal facility operators. The organizations -- Alaska Clean Seas ("ACS" - serving onshore and offshore North Slope oil and gas development), Cook Inlet Spill Prevention and Response, Inc. ("CISPRI" - serving Cook Inlet), and Southeast Alaska Petroleum Response Organization ("SEAPRO" - serving southeast Alaska) -- are formed to pool resources to enable contingency plan holders to more economically comply with the state spill response requirements.

These industry spill response organizations take different forms, but whatever their structure, their decisionmaking is controlled by their members. CISPRI is incorporated and its members (not all of whom are oil industry related) vote on management decisions through a Board of Directors. CISPRI's employees, including its management, work directly for CISPRI rather than CISPRI's members. ACS is an unincorporated partnership or joint venture of North Slope oil industry operators. ACS has its own management employees who work for ACS rather than for the industry members of ACS. Except for spill response, neither CISPRI nor ACS engage in any other oil related activities (eg., production, transportation).

These organizations respond predominantly within the geographic area of operation of their members for spills of the types of products handled by their members. ACS and CISPRI, depending upon who the spiller is, sometimes control and sometimes assist in the field response actions for some period of time. SEAPRO assists more in assembling response equipment. The contractual arrangements these organizations have with their members are generally detailed and sophisticated. Contract terms with members include provisions for indemnification of the response action organization for any liability it acquires and a requirement that the client maintain insurance

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

reasonable care so as not to cause injury to another through the contractor's own actions. If the contractor does not exercise the level of reasonable care that a reasonable person would under the circumstances, and if the contractor's actions cause foreseeable injury, the contractor is liable for the damages it causes. This is the basic negligence standard in law. There is some speculation that the contractor could even, under some circumstances, have a duty to compensate injured parties without regard to fault (strict liability), but to date no court has held that to be the case.

Under AS 46.03.823 (the liability limit law in place before HB 196 and which will again be in effect on July 1, 1992 unless new legislation is passed), the contractor will be liable for any negligence, gross negligence (generally thought of as recklessness), or intentional misconduct. A person claiming negligence by the contractor would have to show that the contractor did not act in accordance with generally accepted professional standards and practices. A contractor who does not follow a response plan or a governmental order could be held strictly liable for damages resulting from the contractor's activities, even if there were no showing of negligence.

Under HB 196 (AS 46.03.825), the contractors would be relieved of even the duty to act with reasonable care during the first 15 days of the spill because they would only face liability for gross negligence or intentional misconduct, unless the contractor substantially deviated from an approved contingency plan that the contractor prepared or agreed to adhere to under a contract with a responsible party.

B. RISK OF REDUCED COMPENSATION TO SPILL VICTIMS

Under all of the three provisions of law just described, the parties responsible for the spill retain liability for all damages caused by the spill, including those caused by the response action contractors. However, it is conceivable that injured parties could be left uncompensated by limiting liability of response action contractors. There could be a scenario where the responsible parties could be unknown or insolvent and the negligence of a response action contractor could cause damage for which there would be no one to provide compensation. Although the federally created liability funds offer some measure of relief for injured parties, those proceedings are cumbersome, lengthy, and may not provide full compensation because of the need to spread out the available funds to all those injured.

On the other hand, both sides of this argument tend to have predominantly speculative fears. The contractors fear extensive liability exposure by virtue of merely touching spilled oil. Victims fear that no one will be around to compensate them if some parties have their liability limited. Neither fear has been realized in actual court actions.

Response action contractors have not been held liable for their routine response actions. For victims, the circumstances are few when the response action contractor's negligent conduct will cause demonstrable damages

separate and distinct from those damages caused by the spill itself, and when there are no other responsible parties to pay for the damages. The lack of compensation to victims historically stems from the responsible parties' manipulation of the courts to avoid payment rather than from limiting the liability of response action contractors.

C. BALANCING LIABILITY AND COMPENSATION CONCERNS

Since both liability and damage fears are based upon hypothetical situations, it may be more instructive to look at the type of liability limit provided in law for other persons engaged in similar "emergency" operations. For instance, although the law is not entirely clear on this subject, firefighters and police officers retain liability for their conduct in implementing critical decisions. While there may be immunity from liability arising from a decision to undertake a certain response exercise, the actual implementation of that decision must be undertaken with reasonable care or liability could attach. If response action contractors are not held to the same degree of care as others in implementing their response activities, there is the risk that there will be less incentive to maintain equipment and drill personnel than there might be if there were a consequence for that behavior.

The question then becomes whether there is a sufficient public policy gain from providing an increased protection from liability to justify treating oil spill responders in a manner different from other emergency responders. For the volunteers and independent operators, there is no compelling reason to have them face, even hypothetically, a risk of acquiring liability for the damages caused by a spill because they are otherwise unconnected with the transactions that led up to a spill. However, there is good reason to expect them to perform the services they offer with a degree of care so as not to exacerbate the situation and because they hold themselves out as professionals.

Many of the objections raised to limiting the liability of responders really center on the nature of the particular responder. For instance, responders that are connected through commingled management or finances with contingency plan holders or responsible parties often raise the most concerns. There is a fear that there is a "corporate shell game" being played to hide assets. This is a concern with the industry cooperative organizations and with the industries' own response efforts. The cooperative organizations are generally a collection of shared response assets rather than another realistic "pocket" from which to draw damages. Although the cooperatives' liability fears may be speculative, those fears could deter them from entering into response operations. The broader public benefit may come, therefore, from encouraging the more cooperatively based response efforts, centralizing spill response, setting performance standards to assure a certain level of professionalism, and also requiring the cooperative organizations to respond to "mystery" spills in their geographic areas of operation at the direction of the federal or state on-scene coordinator. This is a particularly useful goal in those areas of the state where spill response preparedness is lowest but spill risks are high, such as Southeast and the Aleutian chain.

These types of joint efforts could amass more equipment and respond more thoroughly than the current system of relying upon individual spillers or contingency plan holders to acquire sufficient response equipment and trained personnel to respond effectively. Providing some relief from the fear of liability could have the benefit of encouraging the formation of pooled response efforts, particularly for spills of unknown origin, in areas currently not well protected. It could also perhaps reduce the insurance rates for such operations and thereby reallocate funds for equipment and personnel.

The industries' own response efforts cause the most concern in the discussion over limiting responder liability. Unlike the cooperatives which have some autonomy (in different degrees) from the responsible parties, this type of responder is virtually indistinguishable to the public from the responsible party. The corporations law allows members of a unified activity, such as producing and transporting oil down a single pipeline, to divide the responsibilities of that activity. Limiting responsibility for breaches of the safe handling of oil along the corporate lines drawn among those participating in that common activity concerns many people, particularly those potentially harmed by a breach of safe handling. Nonetheless, that unified interest in the common activity conducted by the various industry participants does not, in and of itself, negatively affect the ability of an injured party to recover damages in a manner different from the other classes of response action contractors.

In summary, the Citizens' Oversight Council believes that there is at least potentially a public benefit in avoiding any deterrence of spill response due to fears of potential liability and in encouraging pooled response efforts. These goals can be furthered, in part, through limited liability provisions without a particular designated time limit. However, in order to provide assurance that such a limitation does not reduce the incentive to maintain high response standards, there must be a performance requirement written into the law. The Council will address that issue in the next section.

VII. THE EFFECTS ON TIMELY FIELD RESPONSE IF RESPONSE ACTION CONTRACTOR LIABILITY IS LIMITED

The most significant potential effects from limiting the liability of response action contractors arise in the area of ensuring an effective and timely field response to a spill. Response action contractors state that they need limits on their potential liability to encourage them to take response steps. The state and the public likewise need some degree of assurance that, in fact, these response steps will occur.

A. RELIANCE UPON RESPONSE ACTION CONTRACTORS

Alaska's spill response system places the primary duty to prepare for and to respond to an oil spill on a contingency plan holder. Contingency plans set out the precise steps that the contingency plan holder will take in response to a spill. The state approves individual contingency plans, inspects the plan holder's operations to ensure that it is indeed capable of responding as

represented in the plan, and drills the plan holder in implementing the plan. The spiller has an obligation to cleanup the spill, but it is the contingency plan which forms the heart of the response operations and assures the public that there is a score for a well-orchestrated response.

After the Exxon Valdez spill, the Legislature substantially increased the requirements for the amount of equipment and personnel a contingency plan holder had to have access to in order to show an acceptable level of preparedness for a spill. Because it would be too expensive for every contingency plan holder to individually acquire all the requisite equipment, contingency plan holders have elected to rely on equipment/personnel suppliers or to form cooperative ventures to demonstrate, in their contingency plans, compliance with the preparedness planning standard. The arrangements for services between contingency plan holders and response action contractors are set out in private contracts to which the state is not a party. The state also exercises no regulatory supervision over the terms of the contracts.

The increased reliance by contingency plan holders upon response action contractors has created a problem for the state in assuring performance under the contingency plans approved by the state. The state's authority to compel implementation of the contingency plan is directed to the contingency plan holder and the spiller (if different from the contingency plan holder). Yet, the key actor to provide the equipment, personnel, and sometimes the expertise to the response is the response action contractor. If that contractor fails to perform for any reason, the entire premise upon which the response rests (ie., implementation of the contingency plan) fails. The state has no authority to direct the response action contractor to perform. The state in that case also lacks any meaningful ability to direct the contingency plan holder to perform because the holder's performance is linked to the response action contractor. Arranging for alternative equipment and supplies would consume the critical initial time for effective spill response.

For example, the state believed that Alyeska Pipeline Service Company was the contingency plan holder for vessels carrying TAPS crude in Prince William Sound at the time of the Exxon Valdez spill. The state looked to Alyeska, therefore, to conduct the response in accordance with its approved contingency plan. Alyeska, on the other hand, states that its initial response efforts were conducted on behalf of the spiller who, in Alyeska's view, should be solely responsible for the cleanup. Accordingly, Alyeska almost immediately turned over responsibility for the response activities to Exxon, even though the state objected to that "hand off." Exxon took over the field response approximately 24 hours after the spill. Exxon response officials did not use the Alyeska-prepared Prince William Sound site-specific contingency plan to direct their response activities. Instead, Exxon officials used their own generic spill plan with which the state was unfamiliar. The result was a loss of considerable valuable time in confusion and "reinvention of the wheel."

B. STATE REVIEW OF RESPONSE ACTION CONTRACTORS

In short, the heightened reliance upon response action contractors to implement contingency plans, when coupled with provisions to limit the liability for those contractors, could lead to serious confusion in the field, or worse, to a lack of response. In order to ascertain the impact a liability limit might have on this issue, it is necessary first to determine what, if any, duty to respond each of the categories of response action contractors owes.

The volunteers and independent operators, have no statutory duty to respond to an oil spill. They are neither in the class of responsible parties or contingency plan holders. They respond solely at the request and direction of the responsible party, the contingency plan holder, or a governmental entity which separately contracts with them. Whatever duties to assure performance these operators have are found solely in their private contracts and do not accrue to the benefit of the public.

The spill response organizations also have no independent statutory duty to respond to a spill or to implement a contingency plan. However, these organizations are comprised of members who do have that duty and who can control and direct the activities of the response organization. Again, the duties of these organizations are solely delineated in private contracts.

The actual contractual terms among these two types of responders and the contingency plan holders are significantly diverse. The terms and conditions differ dramatically. The Department of Environmental Conservation, when it reviews contingency plans, performs essentially a technical review of the plan's equipment list and deployment plan. DEC does not analyze all the contractual terms to determine if there will indeed be response action contractor performance. DEC staff is not trained to conduct legal reviews and it would be a monumental task to review the detailed response action contracts supporting every contingency plan.

Neither does DEC provide by regulation for response action contractors named in any particular contingency plan to be bound to perform. Provisions in DEC's new oil spill planning and response proposed regulations ask for a demonstration from the contingency plan holder that the contractor will perform and will maintain a state of readiness with all the equipment at its disposal. Yet, DEC does not verify what equipment or skills the response action contractor has and instead relies upon private contracts which the state does not have the ability to review and enforce. The result is that the state lacks control over those who have become the central actors in spill response. If the contractors liability is also limited, there is no provision in law to ensure that even minimum professional standards are maintained. This leads to the conclusion that the state must take some action to enable it : (a) to have criteria by which to readily assess the capability of a proposed response action contractor to perform; and (b) to direct performance in the event of a confused or inadequate response.

This is particularly true because the state's interests in response efforts may differ substantially from the the spiller's or the contingency plan holder's. For instance, a spiller/contingency plan holder could determine that it would rather

pay off liability claims than expend the costs for cleanup. Since the contingency plan holder is responsible for directing the services of the independent operators, the state lacks effective authority to direct a cleanup in a timely fashion. Even for those contingency plans where the initial response is conducted by a cooperative responder, the contingency plan holder is a member of that cooperative's decisionmaking and could at any time call off the response effort. That result is clearly not in the state's interest.

C. RESPONSE ACTION CONTRACTOR CERTIFICATION

Consequently, the Citizens' Oversight Council believes that the current laws authorizing contingency plan holders to contract with response action contractors to carry out contingency plans are not adequate to protect the public when a spill occurs because the response action contractors who, in many cases, are indispensable for the complete implementation of a contingency plan have not been made a full participant in response preparedness requirements. Limiting the liability of a response action contractor, therefore, without fixing this other system weakness, renders the entire contingency plan a mere formality rather than a "living" document.

The Council still believes that public policy is best served by limiting the liability of response action contractors, but simultaneously the system needs to be improved to ensure the performance of both contingency plan holders and the response action contractors these holders rely upon. The Council recommends that this be done through a response action contractor certification program to be developed and implemented by the Department of Environmental Conservation. The certification program will accomplish the same purpose as the "substantial deviation" provision did in the current version of I.B 196.

It is worth noting that the federal government and some coastal states are simultaneously grappling with the issue of response action contractor accountability. In those forums, the liability limitation laws passed, but now regulations are being promulgated in order to ensure that those limitations do provide assurance of a bold response. For instance, the Coast Guard has announced that it will require certification of response action contractors. California requires that the state's spill prevention and response administrator must certify that there is maximum coastal protection through pooled response efforts before response action contractors may enjoy the benefits of limited liability. Alaska's proposed oil spill prevention and planning regulations were promulgated before final responder immunity legislation was addressed. Now, it is advisable for the legislature to establish the basic standard for response action contractor accountability in law to enable DEC to promulgate the best program to achieve that standard.

The Council believes that a certification program for professional response action contractors should include the following elements:

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 charts. 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.



**Citizens' Oversight Council
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APPENDIX A

Issues List

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**



Citizens' Oversight Council

on Oil and Other Hazardous Substances

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HB 196, SECTION 11, REPORT RESEARCH PROJECTS

1. OTHER STATE LAWS. This task will compile and examine response action contractor immunity/liability laws in other states. This project will go far beyond merely compiling the statutory language from those states. This project will extensively research the legislative history behind the promulgation of other states' legislation, and will evaluate the immunity provisions in the entire context of any particular state's oil spill prevention and response regulatory structure.

Last session, the legislature did have before it several examples from other states. However, the lack of knowledge into how the particular immunity section fit into the state's overall regulatory structure handicapped the legislature. For instance, California does have a response action contractor immunity provision (60 days) and, therefore, the argument was made that there is no reason for Alaska to be any more strict. What the legislature did not have before it, though, was the fact that California simultaneously created a taxing mechanism with unlimited borrowing authority to enable the state to both respond to a spill and to have access to a fund for damages.

The National Wildlife Federation (which is a member of the Prince William Sound Regional Citizens' Advisory Council) has a legal intern, Pat Kingcade, who is available to begin work on this project this summer. When Pat returns to law school, the PWS RCAC Legislative Affairs Committee will see if it can pickup incidental expenses (telephone, mileage, etc.) to enable Pat to continue research. Also, Pat will prepare a proposal for the Vermont Law School to receive classroom credits and grant funds, since the compilation will be a useful addition to the school's environmental law library. Pat will begin the study with the states of California, Oregon, Washington, Texas, and New Jersey.

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**

2. OIL POLLUTION ACT OF 1990 PROVISIONS. This project will examine the response action contractor provision in OPA '90 and its intent, legislative history, and statutory context.

The PWS RCAC will consider funding a research contract through its OSPR Committee because it is information that the RCAC needs for other issues as well.

3. TAPS AUTHORIZATION ACT. This project will research the act and the legislative history to determine whether there was any discussion of Alyeska as a response action contractor or as a responder for tankers operating in the TAPS trade.

The Citizens' Oversight Council will conduct the research.

4. CONTINGENCY PLAN REQUIREMENTS UNDER OPA '90. The implementation of the provisions of OPA '90 for contingency plan response standards may have a major impact on both contractor liability and contingency plan holder status. The role of response action contractors in adhering to contingency plan requirements will be a key issue in the Coast Guard's implementation rules and may have the effect of superseding or rendering moot the state requirements.

The PWS RCAC will consider, through its OSPR Committee, a research contract for this project.

5. RESPONSE ACTION CONTRACTOR ACTIVITY IN STATE. This project will examine who the response action contractors are in Alaska and will identify the geographic areas in which the contractors work, the type of services they provide, their interaction with potential responsible parties and volunteers, etc. This project will describe precisely how oil spill response is happening in the state and what geographical regions may be lacking in response capability.

DEC staff will assemble this data.

6. CONTRACTUAL RELATIONSHIPS BETWEEN CONTINGENCY PLAN HOLDER AND RESPONSE ACTION CONTRACTOR. This project would look at the various contracts currently used in the state that describe the legal relationships between the contingency plan holder, a response action contractor, and possibly the state.

The COC will analyze these contracts and their historical evolution, if funding can be acquired.

7. LITIGATION THREAT TO RESPONSE ACTION CONTRACTORS. This will be a brief analysis of whether response action contractors have, in fact, been found liable or sued in Alaska or in other key states for damages for oil spills, when there was no other cause for liability. This will examine both government and private causes of action against entities that operate as response action contractors. This project is important to get a sense of whether the litigation threat is real or speculative.

DEC will request the assistance of the Attorney General's Office for this project.

8. LOCAL GOVERNMENT LIABILITY AS A MEMBER OF A RESPONSE CO-OP. This issue was raised during the legislative hearings last session. If a municipality or other governmental entity, which has sovereign immunity, joins a co-op formed to be a response action contractor, will the municipality retain its immunity against liability?

DEC will request the assistance of the Attorney General's Office for this project.

9. INSURANCE. This project will identify the different types of insurance coverage available for response action contractors, for contingency plan holders, and for oil spill responsible parties in the state. This will help establish the context in which all key players are operating and provide for realistic solutions.

10. STATE OF ALASKA'S POTENTIAL LIABILITY. Many people have questioned whether the state does or should bear some responsibility for spill response as an owner and shipper of crude oil. This project will look into the state's role and status as an owner of oil and its potential liability in order for those public policy questions to be fully examined.



Citizens' Oversight Council

on Oil and Other Hazardous Substances

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APPENDIX B

Research Reports Summary

Council Members

**Harry K. ...der, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**



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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)

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

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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 SERVUS). 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, 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.

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

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

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

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

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

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

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

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

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

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

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

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 holder. 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.

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.

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.

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

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APPENDIX C

List of Rebuttals / Supplemental Information

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
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Rebuttals or Supplemental Information

The following is a list of materials provided to the Citizens' Oversight Council as a response to or comments on the research projects described in the "Summary of Research Projects Reports." Please contact the Citizens' Oversight Council for copies of any of this material.

Document: Letter from Tesoro Alaska to the Cook Inlet Regional Citizens' Advisory Council dated November 13, 1991

Commenting on Report: "The Legal Relationship Between Response Action Contractors And Other Parties"

Document: Marine Spill Response Corporation comments on Oil Spill Response Contractor Liability Report, dated 1/31/92

Commenting on Report: All research projects

Document: Letter from Alyeska to the Citizens' Oversight Council dated 1/30/92 and "Response to Memorandum regarding Trans-Alaska Pipeline Authorization Act"

Commenting on Report: "Trans-Alaska Pipeline Authorization Act (TAPAA)"

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.

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

Rebuttals or Supplemental Information, continued
page 2

Document: "Study of State Laws On Good Samaritan Or Responder Immunity Provisions For Oil Spills", by LeBoeuf, Lamb, Leiby, & MacRae, provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/30/92

Commenting on Report: Other States' Laws On Response Action Contractor Liability

Document: Memorandum on "The Legal Relationship Between Oil Spill Response Action Contractors And Other Parties To An Oil Spill", provided to the Citizens' Oversight Council on 1/31/92 by Alyeska Pipeline Services Company

Commenting on Report: "The Legal Relationship Between Oil Spill Response Action Contractors And Other Parties To An Oil Spill"

Document: "Response to HB 196 Report on Response Action Contractors Prepared by the Alaska Department of Environmental Conservation", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "HB 196 Report on Response Action Contractors", by Alaska Department of Environmental Conservation - Spill Prevention and Response

Document: "Response to Memorandum Relating to Contingency Plan Requirements Under OPA '90", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "Contingency Plan Requirements Under OPA '90"

Document: "Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "The State Of Alaska's Participation In Spill Response And Preparedness In The State"

January 31, 1992

**Response to HB 196 Report on Response Action Contractors Prepared by the
Alaska Department of Environmental Conservation****Summary**

This memorandum incorrectly states that "[n]one of the RACs have had experience with claims for damages due to spills or to alleged negligence***." Page 5. Alyeska Pipeline Service Company ("Alyeska") reported that such claims had been asserted in the Exxon Valdez litigation. It is our understanding that Exxon Shipping Company's long term response action contractor, VECO, has also been named as a defendant in virtually all of the spill litigation. Potential liabilities associated with such claims are, therefore, not an imagined concern.

The memorandum also incorrectly asserts that "[o]ther industry response organizations not so structured [to function independently] may not have a relationship similar to RACs. In some cases the owner companies may own and operate an oil terminal, tankers and the response organization." Page 9. However, Alyeska is an initial response action contractor which has agreed to provide initial response services to tanker owners/operators/charterers. Although Alyeska is the common operating agent for the seven holders of the federal and state rights-of-way for TAPS who own the pipeline, terminal, and related properties, none of these companies own tank vessels or consequently hold vessel oil spill prevention and response plans. To answer the agency's rhetorical questions on page 10, Alyeska, as agent for the pipeline owner companies, is under the same contractual obligations to provide initial response services to these tanker owners/operators/charterers as would be any other RAC that signed a response services agreement. The terms of that agreement call for Alyeska to assume responsibility for spill response operations for as long as the first 72 hours following the spill during which time the contracting tanker owner/operator/charterer will assume spill management responsibilities. Hence, during this time, and to the extent it provides continuing response services, Alyeska faces the same risks as other RACs and is entitled to the same immunity from liability available to RACs generally.

LDW:ADEC/cas

January 31, 1992

**Response to Memorandum Relating to Contingency Plan Requirements Under
OPA '90 Prepared by Michele Straube****Summary**

The U.S. Coast Guard's disinclination to force a "... RAC [response action contractor] to respond if the Holder [of a contingency plan] did not concur" encourages prompt and aggressive response action, despite suggestions in this memorandum to the contrary. Page 10, footnote 29. If an RAC is aware that the state or federal governments will essentially impose spiller liability for response action if an RAC contracts to provide services to a spiller, the RAC will obviously refuse to offer those services. As noted by the Coast Guard, all of OPA '90's statutory requirements -- strict liability, treble damages, contingency planning, periodic drills -- illustrate the point that it is in the responsible party's best interest to respond to spills and to proceed expeditiously, without objection. *Id.* OPA '90 and state financial responsibility requirements and the safety net of industry-financed state and federal response funds make the "worst case scenario" (the apparent and simultaneous insolvency of a shipper, its insurance, and state and federal response funds darkly described on page 11) an extremely remote possibility.

Nonetheless, and fueled by this speculation, the memorandum implies that the state should move ahead, despite the recognized uncertainty of federal preemption and constitutional limitations, "by imposing liability on RACs [to bear the costs and liabilities of spill response should a spiller fail to]." Page 15. This step would most certainly defeat the comprehensive approach taken by federal and state governments to, on the one hand, insure prompt, effective response to oil spills, and, on the other, require that costs be borne by the spiller, his evidence of financial responsibility, and, in some cases, oil spill response funds. Unfortunately, the Coast Guards' answer to the "worst case scenario" question seems to have been largely ignored: "... the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund." Page 10. In addition, the memorandum fails to consider that the Coast Guard has urged the states to adopt the federal responder immunity standard to insure "the availability of a viable private sector capability to respond to oil spills and their threats ... [as] an absolutely essential element of a national oil pollution response system." Contractor Immunity Provision: State Oil Spill Laws, Commandant, U.S.C.G. (May 31, 1991).

LDW:straubi/cas

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



**Citizens' Oversight Council
on Oil and Other Hazardous Substances**

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APPENDIX D

**Text of 196
(set out pre and post sunset)**

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**

HOUSE BILL 196

**AN ACT LIMITING
LIABILITY**

FOR

OIL SPILL

RESPONSE

ACTION

CONTRACTORS

STRICT, JOINT AND SEVERAL LIABILITY FOR DAMAGES CAUSED BY AN OIL OR HAZARDOUS SUBSTANCE SPILLS (SECTION 1 & 3)

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

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

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

(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 is amended by adding a new subsection to read:

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

NEGLIGENCE STANDARD FOR HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS IF ACTIONS ARE NOT CONTRARY TO A RESPONSE PLAN OR ORDER OF THE STATE OR FEDERAL GOVERNMENT AND THE RESPONDER USED ACCEPTED PROFESSIONAL STANDARDS AND PRACTICES (SECTION 4)

* Sec. 4. AS 46.03.023(a) is amended to read:

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

DEFINITION OF RESPONSE ACTION (SECTION 6)

* Sec. 6. AS 46.03.024(g) is repeated and renumbered to read:

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

GROSS NEGLIGENCE STANDARD FOR OIL SPILL RESPONSE ACTION CONTRACTORS (SECTION 8)

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

Sec. 46.03.025 OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil whose act or omission is not contrary to an order of the federal or state on scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that

(1) the response action contractor would have been liable for the initial release or threatened release under AS 46.03.022 even if that contractor had not carried out a response action;

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

(3) the response action contractor, without approval by the federal or state on scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.044, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.022 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.022.

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

(1) an action for personal injury or death;

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

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

(c) If the liability of an oil spill response action contractor is not limited under (a) of this section or if the provisions of (a) of this section do not apply because of (b) of this section, the oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the response action contractor's act or omission with respect to a release or threatened release of oil unless the act or omission of the oil spill response action contractor is negligent, grossly negligent, or constitutes intentional misconduct. This subsection does not apply to an oil spill response action contractor who would have been liable for the initial release or threatened release of oil under AS 46.03.022 even if that contractor had not carried out a response action.

(d) In this section, "response action" means an action taken in response 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.

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

DEFINES RESPONSE ACTION CONTRACT AND RESPONSE ACTION CONTRACTOR (SECTION 9)

• Sec. 9. AS 46.03.820 is amended by adding new paragraphs to read:

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

(A) the department,

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

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

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

(15) "response action contractor" means

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

REPORT REQUIRED BY THE CITIZENS' OVERSIGHT COUNCIL (SECTION 11)

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

EFFECTIVE UPON PASSAGE OF HB 196

STRICT, JOINT AND SEVERAL LIABILITY FOR DAMAGES CAUSED BY AN OIL OR HAZARDOUS SUBSTANCE SPILL (SECTION 2)

• Sec. 2. AS 46.04.822(a) is repealed and reenacted to read:

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

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

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

TAKES EFFECT ON JULY 1, 1992

**NEGLIGENCE STANDARD FOR ALL RESPONSE ACTION CONTRACTORS IF THE
RESPONDER USED ACCEPTED PROFESSIONAL STANDARDS (SECTION 5)**

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

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

TAKES EFFECT ON JULY 1, 1992 (UNLESS NEW LEGISLATION IS ENACTED)

DEFINITION OF RESPONSE ACTION AND RESPONSE ACTION CONTRACTOR FOR OIL AND HAZARDOUS SUBSTANCE RELEASES (SECTION 7)

• Sec. 7. AS 46.03.823(g) is repealed and reenacted to read

(g) In this section:

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

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

(A) the department,

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

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

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

(3) "response action contractor" means

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

(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.

TAKES EFFECT ON JULY 1, 1992 (UNLESS NEW LEGISLATION IS ENACTED)

**REPEALS THE FOLLOWING SECTIONS:
SECTION 10**

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

TAKES EFFECT ON JULY 1, 1992



Citizens' Oversight Council

on Oil and Other Hazardous Substances

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APPENDIX E

PRINCE WILLIAM SOUND TANKER CONTINGENCY PLAN COVERAGE CHART

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska



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PRINCE WILLIAM SOUND TANKER CONTINGENCY PLAN COVERAGE CHART

CAVEAT:

The Citizens' Oversight Council prepared these charts as of January 30, 1992. However, there is no easily available, central source to ascertain who has the legal obligation to respond for any particular tanker. The Council cautions that there may still be some unanswered questions regarding which companies serve certain roles.

The information in these charts was obtained through interviews with: Department of Environmental Conservation (Kevin O'Shea), Tesoro (Damon King), Chevron Shipping (Charlie Lambert), Exxon (R.G. Dragnich), Arco (Jay Kitchener), Atlantis Agency, Inc., (Bill Williams, Joseph Gehegan), BP America (Tom Mullen, Joe Broderich), Keystone Shipping (Ralph Hill, Bruce Benn), Maritime Overseas (George Blake, Mark Lowe), Penn-Attranco (Captain Gilbert). Draft charts were reviewed by these people as well.

The files of the Department of Environmental Conservation were also researched. The Department does not have this information readily available. Instead, it is necessary to research through several files and contingency plans to determine the roles and responsibilities of the various operators and responders. Even then, unfortunately, the information supplied by the Department and by industry differed in many respects. Whenever there was conflicting information, the Council relied upon the information supplied by industry.

APPENDIX E

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
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VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
BP Oil Shipping Co., USA	Prince William Sound	Keystone Shipping	Shipco 667	Keystone Shipping	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping*
BP Oil Shipping Co., USA	OMI Columbia	OMI Corp.	OMI Challenger Transport Co.	OMI Challenger Transport Co.	Ocean Mgt., Inc.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Alaska	Maritime Overseas Corp.	Intercontinental Bulk Tank Corp.	Intercontinental Bulk Tank Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Boston	Maritime Overseas Corp.	Cambridge Tankers, Inc.	Cambridge Tankers, Inc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Chicago	Maritime Overseas Corp.	First Shipmor Assoc.	First Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Juneau	Maritime Overseas Corp.	Juneau Tanker Corp.	Juneau Tanker Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas New York	Maritime Overseas Corp.	Third Shipmor Assoc.	Third Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Ohio	Maritime Overseas Corp.	Second Shipmor Assoc.	Second Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Keystone Canyon	Keystone Shipping Co.	Shipco 2296, Inc.	Keystone Shipping	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Thompson Pass	Interocean Mgt. Corp.	Shipco 2298, Inc.	Interocean Mgt. Corp.	Interocean Mgt. Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Tonsina	Keystone Shipping Co.	Shipco 668, Inc.	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	BT Alaska	Marine Transport Line, Inc.	Bankers Trust Company	Marine Transport Line, Inc.	Marine Transport Line, Inc.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	BT San Diego (no longer calling)	Marine Transport Line, Inc.	Bankers Trust Company	Marine Transport Line, Inc.	Marine Transport Line, Inc.	Alyeska	BP Oil Shipping Co., USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
BP Oil Shipping Co., USA	Brooks Range	Interocean Mgt. Corp.	Shipco 2297, Inc.	Interocean Mgt. Corp.	Interocean Mgt. Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Aspen	Trinidad Corp.	653 Leasing Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Atigun Pass	Keystone Shipping Co.	Shipco. 6695, Inc.	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Glacier Bay	Trinidad Corp.	GNP Barge & Tanker Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Kenai	Keystone Shipping Co.	Connecticut National Bank	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Overseas Arctic	Maritime Overseas Corp.	Overseas Bulk tank Corp.	Overseas Bulk tank Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Admiralty Bay	Trinidad Corp.	652 Leasing Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	American Trader	Penn-Attransco Corporation	Penn-Attransco Corporation	Penn-Attransco Corporation	Penn-Attransco Corporation	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Chesapeake Trader (no longer calling in Alaska)	Penn-Attransco Corporation	Attransco, Inc.	Penn-Attransco Corporation	Penn-Attransco Corporation	Alyeska	BP Oil Shipping Co., USA

* Keystone Shipping provided COC with this information; however, BP said they alone, would provide secondary response.

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE CONTRACT	SECONDARY RESPONSE
N/A	ARCO Alaska	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Anchorage	Arco Marine Inc.	Northern Trust Co.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO California	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Fairbanks	Arco Marine Inc.	Bank of America National Trust Savings Assn.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Independence	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Juneau	Arco Marine Inc.	Bankers Trust Co.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
Arco Marine Inc.	M/V Overseas Philadelphia	Maritime Overseas Corp.	Philadelphia Tanker Corp.	Philadelphia Tanker Corp.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Sag River	Arco Marine Inc.	Oil Tankers Leasing Corp.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Spirit	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Texas	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
N/A	EXXON San Francisco	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Baton Rouge	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON North Slope	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON New Orleans	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Long Beach	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Benicia	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Baytown	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Philadelphia	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Amerada Hess Corporation	Southern Lion	Maritime Overseas Corp.	Interocean Tanker Corp.	Interocean Tanker Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Northern Lion	Maritime Overseas Corp.	Second United Shipping Corp.	Second United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Western Lion	Maritime Overseas Corp.	First United Shipping Corp.	First United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Eastern Lion	Maritime Overseas Corp.	Third United Shipping Corp.	Third United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	MT. Cabrite	Atlantis Agency Corporation	Serpentsea Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Saint Lucia	Atlantis Agency Corporation	Swansea Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Seal Island	Atlantis Agency Corporation	Seal Island Shipping Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Chevron USA	Chevron Washington	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Oregon	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Mississippi	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Louisiana	Chevron USA	Connecticut National Bank	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron California	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Tesoro Alaska Petroleum Company	Overseas Washington	Maritime Overseas Corp.	Fourth Shipmor Assoc.	Fourth Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	Tesoro Alaska Petroleum Company



**Citizens' Oversight Council
on Oil and Other Hazardous Substances**

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

APPENDIX F

Summary of Meeting Comments

Council Members

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska**



Citizens' Oversight Council on Oil and Other Hazardous Substances

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Citizens' Oversight Council Meeting January 31, 1992

Summary of Public Comments

The Citizens' Oversight Council met on January 31, 1992 to take public testimony regarding liability for oil spill response action contractors. The following is a summary of the comments that were received by the Council.

Tim Robertson, Prince William Sound Regional Citizens' Advisory Council (RCAC)

Tim Robertson testified, as the RCAC representative in the Coast Guard's negotiated rule making for the Oil Pollution Act of 1990, that certification of response action contractors will be part of the federal regulations.

Robertson also noted that California law ties response action contractor liability immunity to achieving maximum protection of the California coast. The administrator in California must certify that this protection has been achieved before response action contractors may receive immunity. The California approach has encouraged response action contractors, co-ops, tankers, and the oil transportation industry to cooperatively design and fund the best system for protection. Liability immunity has not yet been granted to any response action contractors in California. (see attached testimony for detail)

Tim Robertson was asked what type of certification the Coast Guard is considering. He answered that the Coast Guard was presently considering a broad range of options with little agreement at this time. The Working group on certification met for the first time 3 days ago and there is no consensus yet. Robertson listed possible criteria to be used in the certification process: scope of services, type of organization, experience, equipment and maintenance programs, personnel and training, mobilization time and response time and mandatory participation in drills.

It will take some time for certification to be implemented across the United States. At this time the Coast Guard is not making any determinations of the different types of response action contractors for purposes of certification.

Council Members

Harry R. Buder, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

Steve Ducca, Marine Spill Response Corporation (MSRC)

Several of the summaries present conclusions with which MSRC does not fully agree. Two of the studies were of particular concern to MSRC because the full effect of OPA 90's many provisions were not stated in the studies: (1) response action contractor provisions in the Oil Pollution Act of 1990; (2) and the summary of other states. The first summary is incomplete. There is no mention of assumption of liability by the responsible party. The second summary is incomplete because it lists only 8 states. In fact, 19 Coastal States have enacted legislation as protective as OPA 90 over the last 18 months.

The purpose of immunity is to promote the public welfare by ensuring that responders will not be inhibited from acting boldly and decisively when confronted with an oil spill. OPA 90 distributes risk between the responders and the spiller making the spiller assume liability for good faith errors made by a responder so long as the responder's acts are consistent with the national contingency plan or at the direction of the Federal On-scene coordinator and the acts do not rise to the level of gross negligence or willful misconduct. There is no responder immunity provided for cases of personal injury or wrongful death. These provisions ensure that the responders act with due care.

Other concerns with the studies include the following:

Page two of the summary, states that "...granting 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." MSRC feels that granting such limited immunity encourages a bolder response rather than a potential delay. Under OPA 90 the spiller submits a contingency plan. The responder is controlled through the spiller. If a responsible party (RP) refuses to cooperate there are serious penalties, the responders liability cap is removed and civil penalties up to 25,000 per day.

A second concern is the Straube report summary that states "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." MSRC feels this cannot occur because the federal government requires a certificate of financial responsibility and a \$1 billion per incident trust fund has been established when a spiller's liability limits are reached.

MSRC believes the Oversight Council needs to fully consider the federal liability regime that exists three miles off Alaska's coast today as it makes recommendations that might adopt differing standards. MSRC further believes that Alaska should enact the same limited responder immunity provision as OPA 90.

The Council asked if passage of responder immunity would encourage MSRC to come to Alaska. MSRC said it is unrelated. The Council asked if MSRC was

willing to operate in all 8 states outlined in the report. They said yes however they felt California's law has a time limit that they don't think is useful. There was some confusion over the New Jersey law. The Council seemed to have different information than MSRC.

MSRC stated that they felt certification and the demonstration of capability is an indispensable part of the way this nation has to clean up oil.

Steve Peterson. Crowley Maritime

Crowley, believes that the 15 day time limit in HB 196 should be eliminated because of distances response action contractors have to travel and because of the possible delay in responding in remote areas due to distance and weather. It is not reasonable to have a time limit in this state. The Mertz report discusses the worst case scenario where a spiller becomes insolvent. This scenario is precisely the reason why response action contractors need protection. If a spiller becomes insolvent the response action contractors could face financial ruin because they would be liable for simple acts of negligence. Crowley probably would not have responded to the Hyundai spill in October with these types of time limitations.

A member of the Council asked if a contingency plan holder's only asset is the barge and the financial responsibility certification is not valid or the tanker was insolvent, would the response action contractor still respond? Crowley answered that it would probably not risk exposure.

Crowley welcomes certification.

Mike O'Meara. Homer

Response action contractor liability is a complicated issue.

- 1) A responsible party should not be indirectly shielded by granting liability relief to a response action contractor that is that party's surrogate.
- 2) Private parties' right to recover damages by harms done by a response action contractor should be protected.
- 3) State and federal governments must have direct control over all parties in spill response including response action contractors. Indirect control is inadequate.

There is a serious question whether there is real need for HB 196 at all. There is no record of claims against response action contractors. They appear to already be protected.

If legislation stands and relief is granted it should be limited to those contractors that are truly independent.

Ann Rothe, Alaska Regional Representative of the National Wildlife Federation (NWF)

1. NWF is interested in establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills.
2. In the initial hours of a spill we want to ensure that responder utilizes the most effective system of management and the best available technology.
3. Responders should be held accountable for their actions. Workers should be adequately trained, equipment properly maintained and drill should be held regularly and equipment and manpower described in an approved contingency plan should be immediately available in the event of a spill. We want to ensure that oil spill contingency plans are the central guide for response, not just documents written to meet legal requirements.
4. We want to assure, that in the event of insolvency, that the on-scene coordinator has the ability to direct the contractor that has committed to initial response.
5. We are interested in establishing a regulatory regime that uses local knowledge, resources and volunteers in the event of an oil spill. By not providing immunity to volunteers, it might create a disincentive for residents and volunteers to become actively involved in a spill.
6. We want to ensure that contractors can perform in the manner they indicate and that they have the equipment and resources to respond as indicated in their contracts and that these resources are unencumbered and available for use. We support state and/or federal certification for response action contractors.
7. We want to ensure that any resource damages are adequately compensated and that these resources are fully restored.

The National Wildlife Federation will support immunity if along with immunity there is increased protections provided as outlined above. However, if immunity would result in a less rigorous standard of response with inadequate compensation for resource damages NWF will oppose any legislation that grants immunity.

Capt. Ducca of MSRC says insolvency is very remote. I think you should be aware that the regulations regarding financial responsibility have not yet been finalized.

A member of the Council asked NWF's view on the substantial deviation language? Rothe replied that once a plan is approved the responsible party should be held accountable to the plan; otherwise why involve the public in the review process.

A Council member asked if best available technology should be defined as boiler plate capacity or rather capacity under certain conditions. Rothe responded it should be the latter and the Coast Guard is not interested in looking at boiler plate either.

Scott Sterling, Prince William Sound Regional Citizens' Advisory Council (RCAC)

Sterling is the City of Cordova's representative on RCAC. RCAC is still reviewing all reports.

RCAC will submit comments in writing later, but its main concerns are:

1. A decision must be made whether immunity is necessary at all. There have been no claims experienced resulting from response action contractors responding to spills. Secondly, any cause of action will require that the jury account for the fact that the responder was working in emergency circumstances. The totality of the circumstances would have to be considered before anyone would be held liable. It should not be taken as a given that immunity is desirable.
2. Certification is being given serious consideration by the Coast Guard. RCAC believes certification deserves close scrutiny. Certification provides incentives for better response and improves statewide capability. Devising statewide solutions is appropriate, like the Statewide Coastal Community Co-op. We may have good response capabilities in Prince William Sound, but we don't necessarily have it elsewhere in the state.
3. State and/or Federal government should have direct control over a response action contractor. DEC may or may not be able to ascertain whether a response action contractor is able to respond as set forth in a contingency plan. We need to either (1) budget enough money for regulatory verification or (2) set up certification process as a condition of contingency plan approval so that the response action contractor will provide the services they say they will.

The reports do state realistic scenarios. Crowley's testimony shows that the potential worst case scenario outlined in Michele Straube's report can occur. If the contingency plan holders only asset is the vessel, will the response action contractor have any reason to respond. This should be addressed.

A Council member asked what RCAC thought different types of contractors should have different levels of immunity. Sterling responded that volunteers are trying to protect their livelihood. Immunity should probably granted to a Coastal Communities Cooperative type organization.

Larry Wood, Alyeska Pipeline Service Company

Wood distributed a brochure describing Alyeska's response capabilities, written comments, a position paper on HB 196, and specific comments on the reports done for the Council.

Alyeska is a response action contractor although they do operate the pipeline and the terminal. Neither Alyeska nor the seven owner companies own or operate tankers. Pipeline companies and the shippers are different corporations. Alyeska contracts with tanker owners/operators/charterers to provide initial response to an oil spill. Other response action contractors could provide these services. Alyeska transfers management of a spill response to the responsible party after 72 hours.

Several reports express opinions that response action contractor liabilities ought actually to be increased, not decreased. For example, Mertz and Straube suggest that response action contractors ought to be subject to direct state control in the event of an insolvent spiller. Alyeska feels this will deter response and flies in the face of the scheme to promote quick response and assure that there is someone to pay.

In addition, the worst case scenario described in the Mertz, Straube and Frank reports is remote. It would require the simultaneous insolvency of the spiller, his financial responsibility and the state and federal response funds. These spill funds, financed by the industry, exist to provide a safety net.

There is paradox in the Mertz report. In an orphan spill the state, federal government or a municipality would take over a spill. Why does the state enjoy limited immunity when they respond to a spill but not a private response action contractor? The very occasion you want the response action contractor to respond is where there is no responsible party.

The Frank report recommends that Alyeska not have immunity because the holders of the federal pipeline right-of-way permit are liable for tanker spills in Prince William Sound. Alyeska believes this is incorrect and explains why in their written response.

Judge Holland in the *Exxon Valdez* litigation ruled that people strictly liable under the Trans Alaska Pipeline Authorization Act (TAPAA) are the vessel owner and operator and the Trans Alaska Pipeline Liability Fund. Either way, under the terms of most responder laws the responsible party for the spill is not entitled to assert limited immunity as a response action contractor.

In response to the Vogt report, personnel and equipment such as escort vessels are required by state laws and Alyeska has offered to provide these services in absence of anyone else. Alyeska believes that costs for response being included by the TAPS carriers in the tariff charges is an equitable distribution of the costs of those services among those who receive them.

None of this detracts from Alyeska's status as a response action contractor. As the Mertz report points out, if the state owned and used the equipment it would enjoy responder immunity.

The Mertz report is incorrect. Following the passage of HB 196, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of showing financial responsibility through self worth, Alyeska is allowing them to show it through insurance.

Under OPA 90 anyone who provides response receives immunity.

Alyeska believes that a time limit for immunity will not encourage prompt response. This time limit will not encourage prompt response. When there is oil spilled the emergency could exist for some time.

As far as substantial deviation language in HB 196, Alyeska feels that the difficulty with the language is that it is difficult to put everything in writing. The legislature requested that this language be reviewed by the Council.

Alyeska disagrees that immunity should be granted only with adoption of certification. DEC already has authority to oversee what a response action contractor is doing. The state has the capability of reviewing plans and reviewing what a response action contractor can provide as well as require drills. I have not heard any opinions expressed by the department that there is a need for changes in the law. It is better to wait and see what happens at the federal level on certification.

Harry Bader asked, whether Alyeska is required under the right of way agreement to respond.

Wood responded that the Holland decision answered that question.

A Council member requested a copy of the opinion of Judge Holland.

Bader then asked, who is the contingency plan holder? Is it the owner of the cargo, is it the shipper, is it the owner of the ship? We had difficulty finding out this information. Michele Brown added that was difficult to pin down who is obligated to conduct the response. It was hard to track who fit into what categories and who was accountable and who is legally obligated.

Wood responded that the tanker owners and shippers have the responsibility to have a contingency plan. They have contracted with Alyeska. Alyeska stepped forward in the absence of anyone else. After 72 hours the response is transferred to the responsible party. The contracts and the contingency plan are very specific.

Bader then asked, why if Alyeska is a volunteer, during the 15 year period after the right of way agreements were signed, did Alyeska assert that they were obligated to respond and what motivated the change?

Wood replied that after the *Exxon Valdez* spill the state issued the Emergency Order that required Alyeska to develop response capability. However, the order is no longer in effect. DEC has adopted the new arrangement described above.

Bauer then asked why, prior to the spill, did Alyeska consider itself obligated as shown in their contingency plan and now they do not?

Wood replied that Alyeska does not believe their position has ever changed. We do not perceive an obligation to respond to tanker spills. There is in TAPAA an indication of who does have that responsibility. How could Alyeska be responsible for a tanker it does not own.

Bader then asked why Alyeska planned to respond to spills without contracts before the spill.

Wood replied that nothing in Alyeska's position has changed. These issues are still in litigation. Alyeska believes that these issues have been resolved by Judge Holland's decision.

Wood added that Alyeska should not be cut out for special consideration for responder immunity.

Kathryn Kinnear stated concern about whether Alyeska being a volunteer response action contractor gives any assurance to the citizens of Alaska? You say those worst case scenarios never happen. But some scenarios are bound to happen that we have not even thought of.

Alyeska responded that the plan holders have to submit a contingency plan, and demonstrate that they have a responsible party to carry it out. DEC has already approved the arrangement in PWS. The spiller has had to demonstrate financial responsibility. Finally, the state and federal funds provide for that worst case scenario. We shouldn't predicate our decisions on remote possibilities.

Sue Libensen, Executive Director Alaska Center for the Environment (ACE)

Legal liability affects response capability. The best response capability available doesn't assure we can pick up much oil. The record around the world is that it is difficult to pick up oil. ACE supports doing anything to increase preventative measures.

If we can trade immunity for protective measures, ACE would perhaps support immunity. She encouraged the Council to look at the techniques used in California.

Response action contractors should not be used as a corporate veil for responsible parties and spillers.

ACE supports certification because we need to ensure that the proposed response in the contingency plans actually exist. DEC needs authority to certify

response action contractors. You should consider the reality of DEC'S ability to certify contractors or oversee response action contractors and contingency plans because of the limitations of the state budget.

ACE questions the ability of the state to oversee 15 or so contingency plans for one facility. ACE supports required memberships in regional co-ops so DEC has the capability to oversee them.

There has been progress at Alyeska. Immunity hangs heavy over industry and it seems to have forced some cooperation in the goal of relieving industry of liability. ACE supports techniques to encourage cooperation and prevention.

Bill Stillings General Manager CISPRI -Cook Inlet

CISPRI supports the immunity standard in OPA 90. It would give the type of protection CISPRI needs to provide response to oil spills in Cook Inlet. The original by-laws provide for CISPRI to respond to any and all spills without regard to ownership. Industry pledged a \$1 million fund for orphan spills. However, with uncertainty in response action contractor law we have some concerns about whether it is advisable for CISPRI to respond to mystery spills. Everyone agrees that rapid immediate response is the way to handle an oil spill.

CISPRI does not have a contingency plan. We respond under our member companies contingency plans. We are a key part of their plan. Do we have to wait for the state or feds to assume responsibility of a spill before we can respond?

In the recent Kenai Pipeline spill, under the Incident Command System every decision was a joint state, federal, response action contractor, responsible party and RCAC decision. Are those parties going to be held responsible for actions taken? The Kenai Peninsula Borough has stated that they will have to resign from CISPRI if responder immunity is not passed.

In the KPL spill CISPRI's equipment was on the water for 9 days. So even in a small spill you could pass your 15 days. There was no shoreline impact in this spill.

In the Glacier Bay spill, the general manager of CIRO was sued individually. He was removed from the suit later. To say that response action contractors are not at risk is incorrect.

Kathryn Kinnear asked if CISPRI represents all of the operators in Cook Inlet that are required to have a contingency plan.

Stillings replied that CISPRI only represents 10 member companies that are the major crude oil operators and some clean product operators. There are operators who do not feel it is in their best interest to join CISPRI.

Steve Provant, Department of Environmental Conservation

There is no misunderstanding of our knowledge of the contingency plan holders. We know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is. There is no confusion with DEC. The present contingency plan was conditionally approved first in 1990 and again in June of 1991. During this time, we have worked with and gained experience with both responsible parties and response action contractors. We have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan. We have gone through that exercise with Exxon, BP, and ARCO and we are doing an exercise with Chevron this March.

There is no confusion with the hierarchy with regard to who ends up being the responsible party.

Gene Burden, Tesoro Alaska

Tesoro is responsible for over 50% of funding of CISPRI and has reservations on responding to mystery spills from non-members in the absence of a state responders immunity law because of the risk of litigation over damages from negligence.

Our position is that responder immunity is good for the state of Alaska. The 8 coastal states in the study have laws similar to the federal immunity in the Oil Pollution Act of 1990. 7 of the 8 states have limited immunity; there are some slight variations in 5 of the states.

Tesoro is one of the companies that transports oil from Prince William Sound. Tesoro is a small company. We made a conscious effort to protect the environment. We ship oil in a hydrostatically loaded vessels, we increased crews, and improved satellite and navigational systems.

Tesoro was faced with demonstrating a \$1 billion direct action bond. Tesoro reached a temporary resolution with Alyeska. Passage of HB 196 contributed to our ability to resolve our situation with Alyeska. If the legislature does not pass limited immunity legislation, we may enter into litigation with Alyeska. At this time we have \$1.2 billion financial responsibility through insurance.

Insolvency of a tanker is unlikely with the state financial responsibility requirements. Tesoro does not have a choice of response capability in PWS.

Bader asked that why if the state and Federal Financial Responsibility of \$212 million is adequate to protect the public, does a Alyeska as a response action contractor require 5 times that amount?

Gene Burden responded that from Tesoro's perspective there have been amiable discussions with Alyeska but they are diametrically opposed as to the appropriateness of the bonding requirement. Alyeska requires a \$1 billion

bond if it is provided through self insurance; however, if it is provided through an insurance combination, they require \$1.2 billion. \$1.2 billion is the maximum insurance available. Alyeska does not take into consideration the type of vessel or the vessel configuration when requiring the financial responsibility. There are indications that the coverage provided by the protection and indemnity clubs may be reduced after their anniversary date. Tesoro is going to continue to try to meet the requirements required by Alyeska but if they are unable to, they may have to litigate.

Leo Hannan asked for clarification of who the contingency plan holder and the vessel owner are.

Burden responded that Tesoro is the charterer. The owner of the vessel is First Shipmor Company who is also the contingency plan holder.

Harry Bader asked why Tesoro is not the contingency plan holder?

Burden responded that the contingency plan holder is the owner of the vessel. Tesoro provides, via contract with Alyeska, a means to allow the contingency plan holder to demonstrate adequate clean up capability.

Bader asked further, if the vessel owner is the contingency plan holder and it has no contractual relationship with Alyeska, does Tesoro, by virtue of chartering the vessel have an arrangement with the contingency plan holder that Tesoro will make an arrangement with Alyeska to be the response action contractor.

Burden responded that that is correct.

Bader asked, if there is a spill, who would DEC go to for response?

Burden replied that an Incident Command System would be set up. Tesoro would be acting on behalf of the ship owner.

Bader asked, if a vessel violates Alyeska's contract by going out of the shipping lanes, for example, can Alyeska terminate the contract?

Burden responded that there are a number of provisions that allow Alyeska to unilaterally discontinue the contract. However, if there is a spill, then Alyeska is contractually committed unless the contract was terminated before the spill. Under the contract, Alyeska will respond for at least 72 hours and give Tesoro 72 hours notice of the termination. The way Tesoro sees it, if the contract is in effect at the time of the spill, response will occur.

Bader asked whether the contract is terminated at the point of violation or terminated by mutual agreement of the two parties? Are the provisions for termination of the contract at the time of the violation or at the time of the spill?

Larry Wood from Alyeska responded, that there is a notice requirement prior to termination of the contract.

Bader asked Alyeska whether it can guarantee that if there is a violation of the response action contract and there is a spill that Alyeska will respond, no matter what?

Wood responded that it was a pretty awesome question. He stated that his understanding was the same as Tesoro's and that he would have to refer to what the contracts say.

Wood stated that the Mertz report was critical of the reasonableness of the \$1 billion bonding requirement. He continued to explain that Alyeska has to look at the risks involved. The claims from the Exxon Valdez oil spill are in excess of \$50 billion and concern Alyeska as a response action contractor.

Bader asked why the Oil Pollution Act of 1990 financial responsibility requirements are adequate to protect the state, but do not adequately protect the shareholders of Alyeska?

Wood explained the difference between self insurance and shoring up an obligation through a protection and indemnity club. He said that it is unclear to what extent Alyeska is covered by a protection and indemnity club.

Gene Burden added as the final comment that a number of coastal states have been willing to accept protection and indemnity club protection to meet financial responsibility requirements.

Written Comments submitted:

Ken Castner, Homer

The insurance provisions of OPA 90 are not yet in effect. He urged the council to review the provisions of OPA 90 specifically, sections 1002, 1003, 1004 and 1005.

If a response action contractor is controlled by the contingency plan holders, then the response action contractor is merely the response division of a company or consortium of companies.

If granted immunity, would Alyeska have any liability if an *Exxon Valdez* spill occurred again. Did Alyeska's conduct constitute gross negligence or willful misconduct?

From: ROBERTSONT Tim Robertson
To: SLAJER BCSB Research & Marketing
cc: OSPRC Joe Banta
COPELANDT Tom Copeland
GOTTEHRERS Sheila K. Gottehrer
ROBERTSONT Tim Robertson
ROTHEANN Ann Rothe
SAUNDERSP Patti Saunders, RCAC
STERLINGS Scott Sterling

Subj: COC Testimony

Can you please give this to Michele Brown and tell her I would like to testify at the COC hearing today. One thirty your time would be best for me, but I can be available later than that if necessary. Thanks. --TR

JANUARY 31, 1992

MR. CHAIRMAN AND COMMITTEE MEMBERS;

THANK YOU FOR THE OPPORTUNITY TO TESTIFY TO THE CITIZENS OVERSIGHT COUNCIL. I HAVE READ THE SUMMARY OF YOUR REPORT AND SOME OF THE INDIVIDUAL CHAPTERS AND FOUND THEM TO BE VERY INTERESTING. I VERY MUCH APPRECIATE THE WORK YOU ARE DOING AND I LOOK FORWARD TO YOUR RECOMMENDATIONS.

I'M IN WASHINGTON, D.C. TODAY REPRESENTING THE REGIONAL CITIZENS ADVISORY COUNCIL FOR PWS AT THE NEGOTIATED RULEMAKING (REG NEG) FOR VESSEL RESPONSE PLANS. MY PURPOSE FOR SPEAKING WITH YOU TODAY IS ONLY TO PASS ON INFORMATION. I AM NOT HERE TO REPRESENT ANY POSITIONS OF RCAC.

YOU MAY KNOW THAT THE USCG HAS DETERMINED THAT RESPONSE ACTION CONTRACTORS WILL BE REQUIRED TO BE CERTIFIED AS PART OF THE OPA 90 MANDATED UPDATES TO RESPONSE PLAN REGULATIONS. THE FORM AND DETAILS OF CERTIFICATION ARE BEING DEBATED NOW IN A WORKING GROUP AT THE REG. NEG.

MR. PETE BONTADELLI IS THE ADMINISTRATOR OF THE STATE OF CALIFORNIA OFFICE OF OIL SPILL PREVENTION AND RESPONSE. PETE IS SERVING WITH ME ON THE RAC CERTIFICATION WORKING GROUP. HE HAS TOLD ME SOME THINGS ABOUT CALIFORNIA'S APPROACH TO RAC LIABILITY RELIEF THAT I DID NOT KNOW AND THOUGH YOU MIGHT BE OF INTEREST TO YOU.

CALIFORNIA LAW TIES RAC LIABILITY IMMUNITY TO ACHIEVING MAXIMUM PROTECTION OF THE COAST. THE LAW GIVES THE AUTHORITY TO THE ADMINISTRATOR TO CERTIFY THAT THIS PROTECTION HAS BEEN ACHIEVED AND ONLY THEN DOES THE IMMUNITY EXIST FOR RACS. AS OF TODAY NO RAC IN CALIFORNIA HAS LIABILITY IMMUNITY BECAUSE THE CERTIFICATION OF MAXIMUM ACHIEVABLE PROTECTION HAS NOT BEEN GIVEN. HOWEVER, THE CERTIFICATION MAY BE GIVEN SOON BECAUSE THIS STRATEGY HAS CAUSED THE RAC COMMUNITY TO WORK TOGETHER TO ACHIEVE COAST WIDE PROTECTION. NO ONE GETS IMMUNITY UNTIL THEY ALL WORK TOGETHER TO GIVE THE STATE MAXIMUM ACHIEVABLE PROTECTION.

THUS THEY HAVE CONVINCED THE SMALL PRIVATE RACS TO WORK WITH THE CO-OPS. THEY HAVE CONVINCED THE FOUR MAJOR CO-OPS TO EXPAND THEIR SCOPE OF COVERAGE TO RESPOND ALONG

THE ENTIRE COAST. THEY HAVE CONVINCED THE CO-OPS TO SIGN MUTUAL AID AGREEMENTS WITH EACH OTHER AND CONTRACTS WITH THE STATE. THEY HAVE CONVINCED THE OIL SHIPPERS TO CHANGE SOME SHIPPING ROUTES TO REDUCE THE RISK OF SPILLS IN AREAS WHICH DO NOT HAVE ADEQUATE LEVELS OF RESPONSE CAPABILITY. FINALLY, THEY HAVE CONVINCED THE OIL INDUSTRY TO ADEQUATELY FUND THE RAC CO-OPS.

SEEMS TO ME THAT CALIFORNIA REALLY GOT SOMETHING IN RETURN FOR GRANTING RAC LIABILITY RELIEF. I'D ENCOURAGE YOU TO CONTACT MR. BONTADELLI FOR CLARIFICATION OF THIS REPORT. HIS PHONE NUMBER IS (916)445-9326.

I'D BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

TIM ROBERTSON
BOX 194, SELDOVIA, AK 99663.

Marine Spill Response Corporation
Comments to

The Citizens' Oversight Council on Oil
and Other Hazardous Substances
1/31/92

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Thank you for the opportunity to be part of the process that will determine Alaska's law concerning a limited immunity for oil spill responders. I'd like to commend the Citizen's Oversight Council and the state for taking the initiative to thoroughly study such a complex matter.

The written specific comments that have been provided separately are linked to the material available to us: The Summary of Research Projects. While several of the summaries present conclusions that MSRC does not agree with, two of the summaries are of principal concern because we feel they may be indicative of a general condition, and that is that the full effect of OPA-90's many inter-linked provisions may not be clearly stated in the Research Summaries. This is important because we believe that the question of a limited responder immunity for Alaska should be addressed in a framework of full understanding of OPA-90.

The two research projects I will comment on are: (1) Response Action Contractor Provisions in the Oil Pollution Act of 1990 and (2) other state's response action contractor provisions. The first summary is incomplete in that there is no mention of an absolutely critical element: the assumption of any responder liability (given that certain conditions are met) by the responsible party. The second summary is also incomplete as it lists eight states that have enacted such a statute. The fact is 19 coastal states have enacted

legislation as protective as OPA-90 over the last 18 months. The majority of the six remaining jurisdictions have old "Good Samaritan" legislation that is not in conformance with OPA-90. Furthermore, three national state legislative associations (NCSL, CSG and ALEC) support the federal standard. The point here is that MSRC believes those facts are a powerful testimony of the soundness of OPA-90's provisions as public policy -- yet the full story of how other coastal legislatures have acted is not fully exposed in the research report.

Several statements/conclusions reached in the Research Report Summaries are inaccurate principally because they do not fully recognize the new responsibilities and relationships established for removal (§4201) and planning (§4202) of OPA-90. Understood in context of all of the provisions of OPA-90, it is clear that the purpose of the immunity is to promote the public welfare by insuring that responders -- no matter who they are or how they are paid, etc.-- will not be inhibited from acting boldly and decisively when confronted with the emergency conditions and potential liability surrounding marine oil spills. I say respectfully, that these provisions do not unreasonably protect responders from negligence. Rather as a matter of sound public policy, OPA-90 distributes risk between responders and the spiller, making the spiller assume liability for good faith errors made by a responder so long as the responder's acts are consistent with the National Contingency Plan, or the acts are at the direction of the federal (or in the case of state law, the Alaska) on-scene coordinator and the acts do not rise to the level of gross negligence or willful misconduct. There is no responder immunity provided in cases of personal injury or wrongful death.

We believe that these provisions go to the heart of the matter of responder performance. They insure that responders act with due care because they are not protected if their acts rise

to gross negligence or willful misconduct. Additional protection is provided to insure that responders will not negligently perform, since only acts consistent with the National Contingency Plan or directed by government officials receive immunity. Since the responsible party is liable for any removal costs and damages that another person is relieved of; and since the provisions of OPA-90 raise limits of liability and make available a \$1 billion per incident trust fund as a source of monies for injured parties; there is now a strong incentive for spillers to act immediately with a bold response and not attempt to deflect liability to those whose purpose is to remove oil from Alaskan waters.

In the specific comments provided you will see that we feel that other research projects do not fully explain the important new relationships and responsibilities established in other sections of OPA-90. In the time I have left I would like to mention just two of these because they demonstrate the importance of considering all aspects of OPA-90 before making your recommendations on Alaskan law.

Statement: "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."

Rebuttal: This statement is not factually correct. Granting such limited immunity encourages a bolder response rather than a potential delay, while lawyers of responders attempt to determine who may be liable for a spill. Under OPA-90, the spiller executes the response in accordance with a previously approved plan; the state is a part of the plan approval process, while state and federal

coordinators control the responder through the spiller. Response and cleanup is sustained until the U.S. Coast Guard, after consultation with the state, determines a site is clean. Federal and/or state on-scene coordinators are directors of the response if they so choose, and response plans now must state how and with what private resources the spiller will respond. If a responsible party refuses to cooperate with directed removal actions there are new, serious penalties available to force compliance; i.e., the responsible party's liability cap is removed and becomes unlimited. Also, failure to comply with a removal order can result in civil penalties of up to \$25,000 per day or three times the costs incurred by the federal Oil Spill Liability Trust Fund.

Statement: "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.

Rebuttal: This speculative scenario cannot take place. Under OPA-90 a shipper must provide a Certificate of Financial Responsibility (COFR) to the U.S. Coast Guard up to his limits of liability before being permitted to transport oil in U.S. waters. A \$1 billion per incident trust fund has been established when a spiller's liability limits are reached. Moreover, a response plan must be submitted to the U.S. Coast Guard that identifies responders and their capabilities. This plan is subject to unannounced drills and inspections insure

that what is submitted can be executed.

MSRC believes the Citizen's Oversight Council needs to fully consider the federal liability regime that exists three miles off its coast today as it makes recommendations that might adopt differing standards. MSRC further believes that Alaska should enact the same limited responder immunity provision as OPA-90. We look forward to receiving your final full report and to seeing many of you at the legislative hearings in Juneau on February 11 and 12.



Working for the Nature of Tomorrow.

NATIONAL WILDLIFE FEDERATION

750 W. Second Ave., Suite 200, Anchorage, AK 99501 (907) 258-4800

COMMENTS OF ANN L. ROTHE
REGARDING RESPONSE ACTION CONTRACTOR LIABILITY
PRESENTED ON BEHALF OF
THE NATIONAL WILDLIFE FEDERATION
TO THE
CITIZENS OVERSIGHT COUNCIL ON OIL & OTHER HAZARDOUS SUBSTANCES
January 31, 1991

My name is Ann Rothe and I am the Alaska Regional Representative of the National Wildlife Federation. The National Wildlife Federation is the nation's largest conservation education organization. Founded in 1936, the Federation, its 5.4 million members and supporters, and 51 affiliated organizations, work to educate, empower and inspire individuals and organizations to conserve fish, wildlife and other natural resources, to protect the environment, and to build a globally sustainable future. I am here today to present the comments of the Federation in response to the Citizens Oversight Council's request for public input on the question of response action contractor immunity from liability for acts of simple negligence while responding to a oil spill.

I have received copies of the segments of the report on this subject prepared under the auspices of the Council. I have not had the opportunity to thoroughly evaluate these documents, but will be doing so in the next several days. I would like to compliment the Council for compiling a very comprehensive and thought-provoking body of information--a particularly laudable accomplishment considering the lack of funding and time constraints that you faced.

I would like to take this opportunity to present to the Council the interests and concerns of the National Wildlife Federation with regard to oil spill response that precipitates our involvement in the issue of response action contractor liability. While our interests have been very well represented by the Regional Citizens Advisory Council for Prince William Sound, of which we are a member, I thought it important to restate them in this forum.

1) We are interested in establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills. As time passes from the moment of initial discharge, the likelihood of successful recovery diminishes exponentially. We want to see a regulatory regime that encourages rapid and effective initial response.

6) We want to insure that response action contractors can perform in the manner they indicate, that they have available the equipment and facilities to respond as indicated in their contracts with responsible parties, that these resources are unencumbered and available for use, and that adequate manpower is trained and available as indicated. To this end, we support state and/or federal certification of response action contractors.

7) We want to insure that any damages to natural resources as a result of an oil spill are adequately compensated, and that these resources are fully restored or replaced.

If the interests and concerns I have articulated can be adequately addressed or even enhanced in a regulatory regime that provides for response action contractor immunity for acts of simple negligence, then we will not oppose legislation that provides such immunity. If, on the other hand, such immunity would result in a less rigorous standard of response with inadequate compensation for lost or damaged resources in the event of a spill, we will oppose any legislation that grants such immunity.

We look forward to working with the Citizens' Oversight Council and other interested parties on this issue. Thank you for the opportunity to express our concerns.

cc: Nancy Hemming, Wildlife Federation of Alaska
Sheila Gottehrer, Regional Citizens Advisory Council
Scott Sterling, RCAC Legislative Affairs Committee

Oral Presentation to Citizens' Oversight Council, January 31, 1992
Prepared by Alyeska Pipeline Service Company

- Thank you for the opportunity to provide comment regarding the important issue of improving responder immunity in Alaska.
- We were also pleased to provide research materials regarding the laws of other states and trust that it was useful to the Council's work. We have also provided written comments relating to five reports submitted to as research and thank you for your consideration of them.
- Alyeska Pipeline Service Company ("Alyeska") operates and maintains the Trans Alaska Pipeline Service Company ("TAPS") on behalf of seven owner companies.
- The System stretches from Prudhoe Bay on Alaska's North Slope to Valdez where its 1,000 acre marine terminal loads southbound tankers with crude oil.
- Although neither Alyeska nor the pipeline owner companies own or operate tankers, it has contracted with tanker owners/operators/charterers to provide an initial response to an oil spill from their vessels in PWS.
- The State requires that crude oil tankers transiting PWS have oil spill contingency plans. Alyeska developed an initial response plan (the PWS Tanker Spill Prevention and Response Plan) which describes the services it offers to tank vessels as an initial response contractor.
- Other response action contractors could also provide these services.
- Under the terms of the initial response plan and the Oil Spill Response Service Agreements signed with tanker owners/operators/charterers, Alyeska provides the necessary response vessels, equipment, personnel and training to respond to an oil spill for as long as the first 72 hours following a release.
- During this time, management of the response will transfer from Alyeska to the contracting spiller or to the federal On Scene Coordinator.
- To provide these services, Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has ocean and rapid deployment boom, seaskimmers, and related response equipment.
- Alyeska has also 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 as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations.
- Several reports express opinions that response action contractor ("RAC") liabilities ought actually to be increased, not limited, when it comes to response action.
- For example, the Mertz and Straube reports suggest that RAC's ought to be subject to direct state control in the event that an insolvent or recalcitrant spiller refuses to finance.
- Imposing spiller liability on RACs to pay for the cost of oil spill response will deter or eliminate spill response, not promote it.
- This notion flies in the face of the comprehensive federal and state schemes to, on the one hand, encourage prompt, bold response action, and, on the other, require that spiller, his insurance, or, in some cases, industry-financed funds pay for it.
- In addition, this possibility described as a worst case scenario in the Mertz, Straube, and Frank reports is admittedly remote. It would depend for example on the simultaneous insolvency of a spiller, his financial responsibility, and federal and state oil spill response funds. Yet, it this possibility which in these individuals opinion ought to fuel a step toward closing out response action by imposing new liabilities.
- A fundamental reason spill funds exist is to provide a safety net for just the dark scenario which is described. But this point seems to have been lost.
- In an interesting paradox, the Mertz report indicates the justification for these new RAC duties and liabilities would be the possibility of all these insolvencies, yet, in the case where a mystery or orphan spill is most likely require a third party response, and the state moves in to do so, it will enjoy limited responder immunity under a separate statute. Why are there different rules for private RACs?
- The Frank report evidently recommends that Alyeska not be entitled to even limited responder immunity because, in this attorney's opinion, the holders of the federal pipeline right-of-way permit are liable for any tanker spills involved Alaska North Slope crude oil. For the reasons explained in Alyeska's written response, this is incorrect.

- Judge Holland in the Exxon Valdez litigation has already ruled that the people strictly liable under the Trans Alaska Pipeline Authorization Act are the vessel owner and operator, and the Trans Alaska Pipeline Liability Fund.
- In any event, the terms of most responder immunity laws state quite clearly that a RAC which is otherwise a responsible party for a spill is not entitled to assert limited immunity.
- In our response to the Vogt report, we point out that personnel and equipment to escort vessels and to respond to spills in PWS are required by state laws, and Alyeska has offered to provide those services in the absence of anyone else. The costs of Alyeska's initial response services for tanker owners/operators/charters are included by the TAPS carriers in the tariff charges for oil delivered to Valdez. This is an equitable distribution of the costs of those services amongst those who receive them.
- 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 in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Interestingly, if the state owned and used that equipment, the Mertz report explains that it would enjoy limited responder immunity in the event of a response.
- Lastly, the Mertz report is incorrect. Following the passage of limited responder immunity law year, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of requiring financial responsibility, that is a demonstration of self-worth, Tesoro now provides this evidence through insurance. Because of the perceived reduction in risk, Alyeska has accepted less in the overall quality of Tesoro's demonstration of that capacity as explained in our written remarks.
- For the balance of our remarks, we will refer to the attached position paper regarding improving responder immunity.

January 31, 1992

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:
Gene Burden
Tesoro Alaska Petroleum Company

The Citizens' Oversight Commission ("COC") Report represents the contribution of many interested parties and provides evaluations of the laws of 8 other coastal states as well as the development of the current immunity language under federal law. My comments are limited to these two areas as Tesoro's objective remains very simple.

Tesoro is responsible for over 50% of the funding of the Cook Inlet Spill Prevention and Response, Inc. ("CISPRI") and has great reservations about the deployment of CISPRI for 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. The COC study results provide no mitigation to this concern and in fact illustrate sufficient bases for pursuing a continuation of limited immunity for responders.

The 8 coastal states evaluated serves to illustrate the preponderance of state actions that have implemented immunity similar to the federal immunity in the Oil Pollution Act of 1990. California, Washington, Hawaii, and Maine all have virtually the same language which provides immunity for simple negligence

provided the actions are consistent with the National Contingency Plan (NCP), the state contingency plan or the federal on-scene coordinator. Connecticut and Texas provide virtually the same immunity with less restriction. Florida's law is also similar and is extended subject to the Response Action Contractor (RAC) cooperating with the federal on-scene coordinator. It is possible to extend this comparison to other coastal states that have addressed this issue and have have adopted the federal standard. I understand that 19 coastal states now have the federal standard.

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 550 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. The 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.

In conclusion, 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 a permanent limited immunity law for response action contractors in Alaska.

Enclosure

OTHER STATES' RESPONSE ACTION CONTRACTOR LIABILITY LAWS

FEATURE COMPARED	C O N N E C T I C U T	C A L I F O R N I A	T E X A S	W A S H I N G T O N	H A W A I I	F L O R I D A	N E W J E R S E Y	M A I N E
1. Spiller obligated to pay damages caused by Response Action Contractors (RAC)	X	X	X	X	X	X	X	X
2. RAC liability limited except for gross negligence and intentional misconduct	X	X ¹	X	X ²	X ³	X ⁴		X ⁵
3. RAC liability limited except for negligence (defined as use of best of available technology)							X	
4. RAC liability limited in duration		X ⁶						
5. Certification of RACs required.			X					
6. State approval required for RAC's equipment and personnel resources		X					X	

¹Provided actions are consistent with the National Contingency Plan (NCP), the state contingency plan or the Federal On-Scene Coordinator (FOSC).

²Subject to the same condition as described in Footnote Number 1 above.

³Subject to same limitation as California and Washington (footnotes 1 and 2 above).

⁴Provided RAC does not fail to cooperate with the Federal On-Scene Coordinator (FOSC).

⁵Subject to the same limitation as California, Washington, and Hawaii (as described in Footnotes 1,2 and 3 above).

⁶Duration limited to 60 days following spill with option available to State to extend an additional 30 days.

February 3, 1992

Mr. Harry Bader
Chairman
Citizens Oversight Council

Via Telefax

Dear Council Members:

I would like to offer some comments concerning your review of HB 196.

The first issue concerns the provisions contained in OPA 90, which many of those testifying last Friday wanted the council to embrace. The Council should read carefully the liability provisions in sections 1002, 1003, 1004 and 1005. Section 1003, subsection (b) should be of particular pertinence to the matter you have before you. I'd also mention that the insurance provisions are not yet in effect, and there is some doubt concerning the ability of many shippers finding a willing underwriter.

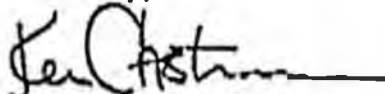
The second issue is in what constitutes a RAC. Is the RAC an independent company, the sole purpose of which is to attempt to obtain contracts and provide services in responding to oil spills? Is the RAC controlled, beyond the parameters of the contract, directly or indirectly, by the C Plan holders? If it is the latter, I would think that the RAC is merely the response division of a company or consortium of companies, and that the liability of the parent would be all-encompassing.

The third issue, and the question that I haven't seen answered, is whether or not Alyeska would have any liability given the same circumstances as occurred following the wreck of the *Exxon Valdez*. Did Alyeska's conduct and response reach the legal presumption of "gross negligence or willful misconduct"?

And, lastly, will the issue even be argued in state court?

I will be available in Homer, via teleconference, today and would be happy to answer any questions you may have.

Sincerely,



Ken Castner

P.O. Box 558

Homer, Alaska

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 effort, 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 Alaska 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.

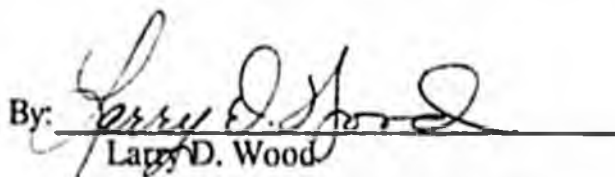
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

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.



Regional Citizens' Advisory Council / 601 West Fifth Avenue, Suite 500 / Anchorage, Alaska 99501-2254 / (907) 277-7222 / FAX (907) 277-4523

February 5, 1992

Mr. Harry Bader, Chair
Citizens Oversight Council on Oil
and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99503

Dear Mr. Bader:

At your request, the Legislative Affairs Committee of the Prince William Sound Regional Citizens' Advisory Council (RCAC) offers the following comments on the issue of oil spill response action contractor (RAC) liability and immunity as that subjects relates to Alaska law. We caution that our comments are tentative in nature and have not been reviewed or approved by the full RCAC Board of Directors. The RCAC will issue a detailed report containing our official position on all issues under review per House Bill 196 as soon as possible. Nonetheless, we appreciate this opportunity to have our limited comments placed on the record.

(1) Limited Time Period For Immunity

In 1991 the RCAC suggested, along the lines of the California statute, that a thirty day limitation on immunity protection be imposed. We continue to stand by that recommendation.

(2) RAC Certification

Certification by the authorities of RAC capabilities and availability is a reasonable approach to insuring that response plan holders utilize RACs of demonstrable competence. RCAC supports the concept of RAC certification.

(3) Prince William Sound Trade Relationships

RCAC is seriously concerned about the present response structure in Prince William Sound. The attached chart illustrates the confusing and complicated legal relationships between contingency plan holders, the responsible parties and their response action contractors. RCAC also has long-standing, documented concerns about Alyeska's plan to hand off spill response management to the spiller 72 hours after Alyeska's initial response.

While it may be true that the owners of the trans-Alaska pipeline, which are also the owners of Alyeska, do not directly

Mr. Harry Bader, Chair
February 5, 1992
Page 2

engage in the business of shipping oil from the Valdez Terminal, the attached chart demonstrates that some of the pipeline owner companies and some of the shipping companies are both owned or controlled by the same corporate parent, e.g., BP.

This complex of parent, subsidiary and sister corporations may or may not be able to work with and through Alyeska to effectively combat a major spill in Prince William Sound - but the fact that the actual contingency plan holder is, in many cases, an entity different from the parent company causes concern over which entity will ultimately respond to spills and be responsible for spill damages.

For its part Alyeska has done a commendable job in assembling a response action force, i.e., SERVIS, and worked very hard over the past three years to develop response plans and good working relationships with tanker owners, Alyeska and local residents. Nonetheless, since Alyeska takes the legal position that it is nothing more than a "volunteer" response action contractor for the Prince William Sound tanker trade, there can be no legal assurance that the present arrangement will endure. If for any reason Alyeska's owners decide to relieve themselves from their volunteer obligation, then who will respond when another major spill occurs in the Sound?

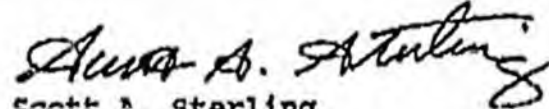
It would seem grossly premature to immunize Alyeska from liability as a response action contractor unless and until adequate legal assurances exist to protect the Sound and its residents from another Exxon Valdez. If, as the industry proponents of immunity argue, the purpose of immunity is to encourage prompt and bold response to spills, then it would seem logical to protect the environment and the public interest to legally require the beneficiaries of immunity to respond.

The RCAC is still in the process of studying the reports submitted to the Citizens Oversight Council and we will continue to be active in the development of legislation this year.

Mr. Harry Bader, Chair
February 5, 1992
Page 3

If you have any questions regarding our comments, please feel free to call me at 277-3533.

Sincerely,



Scott A. Sterling
Chair, Legislative Affairs Committee
Prince William Sound RCAC

cc: Christopher Gates, RCAC President
Sheila Gottehrer, RCAC Executive Director
Gary Bader, Alyeska Civic Group Liaison



Citizens' Oversight Council
on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

APPENDIX G
U.S. COAST GUARD POSITION

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska



16460

MAY 31 1991

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

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

2. In order to assure consistency in the position expressed in response to such requests, the points outlined below should be used in providing Coast Guard views on legislative measures pertaining to limited immunity for oil spill removal activities.

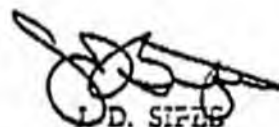
- The availability of a viable private sector capability to respond to oil spills and their threats is an absolutely essential element of a national oil pollution response system.
- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil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

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

3. The federal immunity provision is set out at section 311(c)(4) Federal Water Pollution Control Act (33 U.S.C. 1321(c)(4)), as amended by section 4201(a) Oil Pollution Act. Its terms are set out in Enclosure (1). The elements of that provision are:

- Person entitled to immunity - Person, other than a responsible party, providing care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator.
- Liability for which immunity is provided - Liability for removal costs and damages, other than with respect to personal injury or wrongful death.
- When immunity is not available - (1) When the response is under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), or (2) when the person is grossly negligent or engages in willful misconduct.
- Person liable when the immunity provision applies - A responsible party, as that term is defined under section 1001(32) Oil Pollution Act (33 U.S.C. 2701(32)).

4. District Commanders are requested to continue their monitoring of state activities within their districts and to apprise program offices of appropriate issues.



Chief, Office of Marine Safety,
Security and Environmental Protection

Encl: (1) Section 311(c)(4) and (6) Federal Water Pollution Control Act

SECTION 311(c)(4) and (6)
FEDERAL WATER POLLUTION CONTROL ACT

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

(B) Subparagraph (A) does not apply -

- (i) to a responsible party;
- (ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
- (iii) with respect to personal injury or wrongful death; or
- (iv) if the person is grossly negligent or engages in willful misconduct.

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

...

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

ENCLOSURE(1)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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 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.

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 278-3550
FAX: (907) 278-3897

☐ KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
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☒ P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

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.

Hon. Bill Hudson
House of Representatives

February 24, 1992
Page 3

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

March 9, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: CSHB 540 Providing for Limited Responder Immunity

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska"), strongly supports Good Samaritan immunity for oil spill response in Alaska. Without limited liability, financial risks and liability exposures will deter cleanup contractors and others from prompt, aggressive action when spills occur.

As you know, the federal Oil Pollution Act of 1990 ("OPA '90"), and Alaska's HB 196 last session adopted responder immunity laws to encourage immediate and effective oil spill response action. However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July. To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's response action contractor immunity law should be improved and made permanent.

Although its scope is also limited, the response action immunity provision in OPA '90 [33 USC & 1321 (b) (11) (c) (4)] is the best model. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted substantially similar laws.

OPA '90 limits liability under federal law for response action if it is consistent with the National Contingency Plan or directions of federal officials. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner or operator is liable for any removal costs or damages that response contractors are relieved of. We believe that the federal law draws the right balance between encouraging prompt, aggressive action by all potential response contractors, and

Letter to The Honorable Bill Hudson
March 9, 1992
Page 2

providing for recovery of property damages from the spiller if a response contractor has negligently caused them.

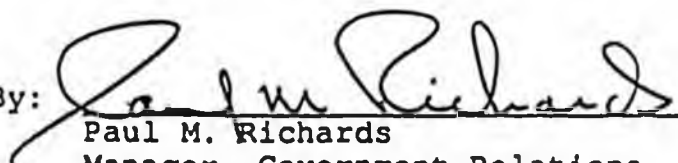
The United States Coast Guard has best described the important contribution limited immunity for response contractors made to the nation's comprehensive scheme for oil spill response and recovery under OPA '90. All response contractors must be encouraged to take action when spills occur, and to stay involved until an oil spill response is completed.

We urge the Committee's consideration of this important proposal to supplement the state's oil spill response laws. Alyeska Pipeline Service Company supports the adoption of Good Samaritan immunity for oil spill response action contractors on a state level, as presently stated in CSHB 540.

Very truly yours,

ALYESKA PIPELINE SERVICE COMPANY

By:


Paul M. Richards
Manager, Government Relations

PMR:ph

March 6, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: Prince William Sound Oil Spill Response Services

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills in Prince William Sound on behalf of companies that own, operate or charter tank vessels in the TAPS trade. We refer to those companies as "Contracting Vessels." The scope of services to be provided by Alyeska to those companies is described in Oil Spill Response Services Agreements between Alyeska and the Contracting Vessels. The Agreements incorporate the Prince William Sound Tanker Spill Prevention and Response Plan to describe Alyeska's response plans. Exhibit A of each Agreement lists the vessels covered by that Agreement.

Under these arrangements, for large spills, Alyeska is obligated to respond for up to 72 hours to spills in Prince William Sound, while the Contracting Vessel is mobilizing its resources to take over management of the spill response. The Plan and the Agreements describe how the management transition from Alyeska to the appropriate Contracting Vessel should occur. After the transition, Alyeska's resources, including the on-water-response equipment, will be available for use by the Contracting Vessel for as long as needed and until they can be replaced by other equipment. The Contracting Vessel is contractually obligated to replace Alyeska's core equipment as rapidly as possible so that normal terminal operations may resume as soon as the Coast Guard allows it.

If the Contracting Vessel fails to assume management of the spill response in the 72 hour period, Alyeska anticipates that the Coast Guard will federalize the response, directing and paying for the effort. Alyeska has recently reiterated its verbal understanding with the Valdez Captain of the Port that Alyeska will make its resources available to the Coast Guard under a federalized response. We have written to Admiral Ciancaglini asking for an opportunity to describe this arrangement in writing.

Please contact me if you would like any other information on these matters.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



M. F. G. Williams
Vice President-Environment & Contingencies

MFGW/RIS/md

Alyeska pipeline

SERVICE COMPANY

1825 SOUTH BRADAW STREET ANCHORAGE, ALASKA 99512 TELEPHONE (907) 278-1611 TELEX 090 25 127

March 2, 1992

Letter No. 92-9411-G

David E. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 25517
Juneau, Alaska 99802

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would be useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and reimbursement procedure.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1321(c) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under those circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

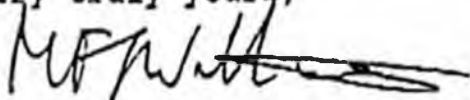
Name
March 2, 1992
Page 3

Letter No. 92-9411-G

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alyeska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'M.F.G. Williams', with a long horizontal flourish extending to the right.

M.F.G Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Sam Cotten

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1785

Telephone: 465-5050
FAX: 465-5070

February 23, 1992

HB 540

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

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

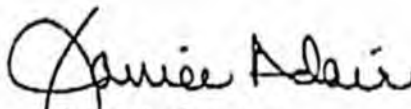
Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability", and "contractor certification". The most difficult issues seem to be defining response standards for "adverse weather" and "maximum extent practicable". These definitions have the potential to become substantially different than the counterpart provisions found in Alaska's laws, specifically the response planning standards given in AS. 48.04.030(k)(3-4).

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

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

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

Sincerely,


for John A. Sandor
Commissioner

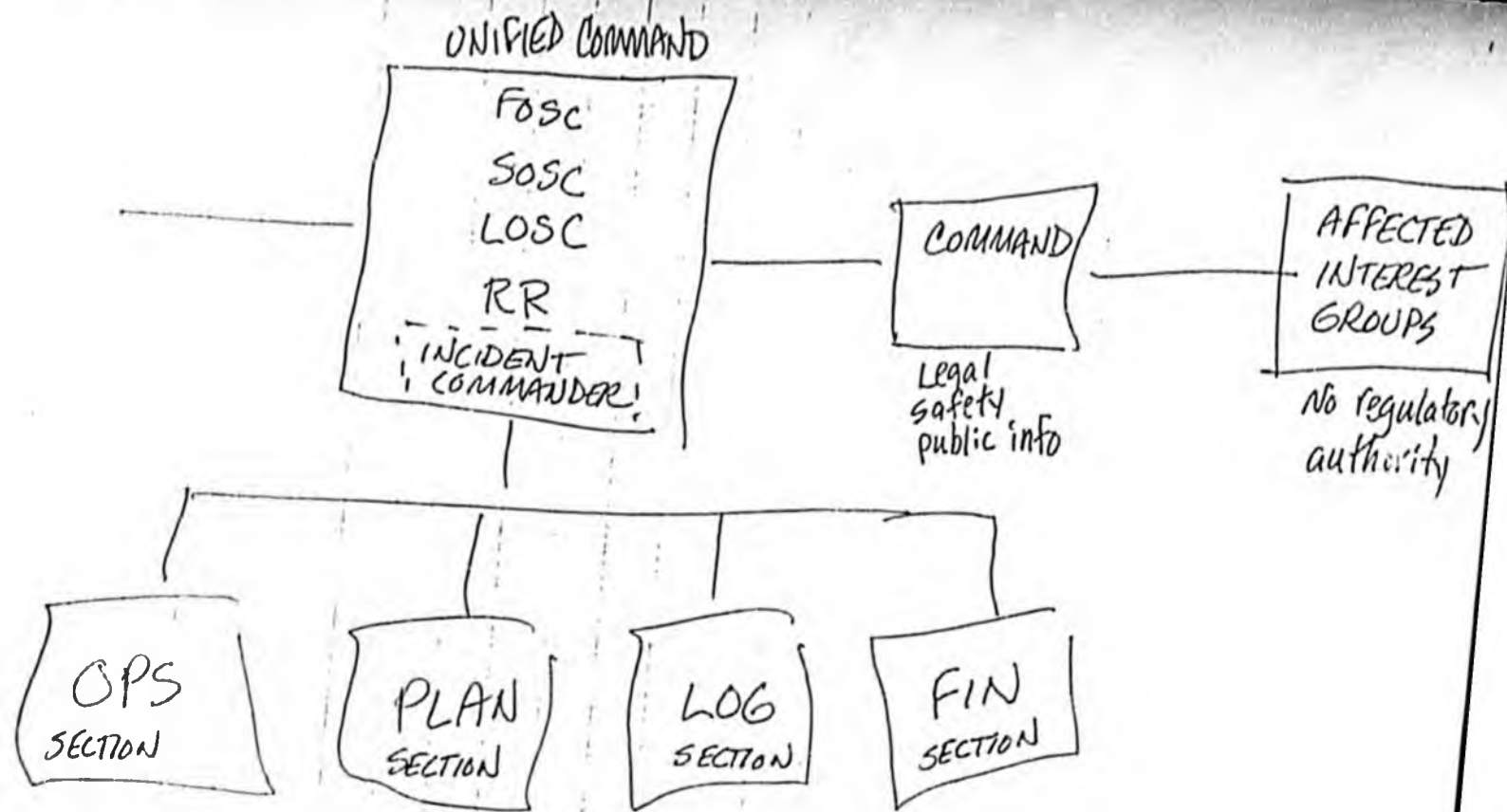
CJP/MAC/JA/tls

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

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

bcc:

Chris Pace
Tracy Sherrer



**UCIDA****UNITED COOK INLET DRIFT ASSOCIATION**

P.O. Box 389 • Kenai, Alaska 99611 • 0389

(907) 283-3600 • FAX (907) 283-3306

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 588 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 response 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
Administrative Assistant

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

**UCIDA****UNITED COOK INLET DRIFT ASSOCIATION**

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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 claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time 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 actionable. 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 liability statutes. Even the concept of a sunset provision and a 30 day window is poor public policy. Alyeska and other similarly situated RACs will turn over spill response 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, 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

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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 briefly 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, Amstar, 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 practical 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 respect 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 responsible parties and added expense for victims. Even if liability 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, 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



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UNIDA
PO BOX 1412
KENAI AK 99541

arion



Kenai's Marine Inn
scheduled to reopen

Page 8

l. 21, Issue 142

THURSDAY, APRIL 18, 1991 Kenai, Alaska

50 Cents

Alyeska blasted for billion-dollar bond

KATHY BROWN
Kenai Clarion

Enough Mayor Don Gilman Wednesday told Alyeska Pipeline Service Co. for what he calls an "unreasonable" demand threatens to shut down Tesoro-Alaska's Nikiiski refinery. Alyeska is requiring Tesoro to come up with a \$1 billion bond to continue shipping from the Alyeska pipeline terminal in Valdez 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 Nikiiski refinery from Valdez, the refinery would be in serious trouble if it was no longer able to ship from there, said Tesoro vice president Gene Burden.

Gilman said the major member 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 li-

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

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

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

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

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

He believes Alyeska is being inflexible about the bill.

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

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

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

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

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

does not believe that's the case, either.

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

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

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

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**

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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 to 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) Analyze 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 similar 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 CIRAC 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 potentially 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 recommend:

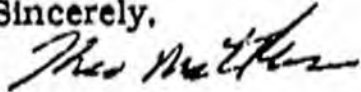
- 1) A more detailed analysis of the changes made by the legislature in 1989 and 1990 and the resulting status of RAC liability prior to the passage of AS 46.03.825 in 1991.

- 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 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



Regional Citizens' Advisory Council / 601 West Fifth Avenue, Suite 500 / Anchorage, Alaska 99501-2254 / (907) 277-7222 / FAX (907) 277 4523

March 6, 1992

Representative Kay Brown
P.O. Box V
Juneau, AK 99811

Dear Representative Brown;

While Mr. Hudson is correct that the United States Coast Guard is developing a certification system for response resources, it is my opinion that the State of Alaska would be wise to pursue a parallel course by making response action contractor certification a condition to the relief of liability immunity. If an industry is to be given an immunity to promote an increased response capability then that industry should be required to demonstrate that response capability does exist, is available, and is reasonably capable of mounting a credible performance in any future oil spills.

The following are answers to your questions.

1. What is the status of the federal RAC certification program?

Response action contractor certification is an issue being considered by the negotiated rulemaking committee for vessel response plan regulations. This is a supplement to the normal rulemaking process. While the Reg Neg committee may issue a recommendation for response action contractor certification, the final decision will not be made by the United States Coast Guard until the proposed rule undergoes a 45-day public review and a review by the Office of Management and Budget and the President's Council on Competitiveness. There are those that do not want response action contractor certification and they will have opportunity to be heard before the rule is published.

Has a decision definitely been made to proceed with a federal certification? No.

Thank you for considering my views on this matter. If I can answer any question please call me at 277-7222.

Sincerely,

Tim Robertson by JWP

Tim Robertson, Member USCG Negotiated Rulemaking Committee
Representing the Regional Citizens' Advisory Council

cc: Scott Sterling/PWS RCAC
Michele Brown/Citizens' Oversight Council
Representative Bill Hudson

Page 2 RAC Letter to Representative Brown

2. To what kind of RACs would a federal certification program apply? The envisioned program would apply to RACs desiring to be listed as a primary response resource in a vessel response plan.

Would the federal certification process being discussed fully address the concerns about competency and preparedness of RACs responding to oil and hazardous substance spills other than those by vessels? The proposed program would not apply to hazardous substance spills. The EPA has been charged with writing regulations for facility response plans, and MMS is charged with writing response plan regulations for offshore platforms. I understand both agencies are watching the USCG process closely, but they have not yet developed regulations.

3. Has the regulatory negotiating committee examined the possibility of complementary state and federal certification programs? Yes, it is part of the concept. The Reg Neg working group recognized the fact that states may want to have RAC certification programs for any number of reasons. There was participation from the states of Washington and California, which both have forms of RAC certification. We should strive for a program which is compatible with the proposed federal program.

4. In your view is the federal certification process that is under consideration by the committee fully responsive to Alaska's needs or do you feel that the state should develop a complementary certification program of its own? The federal program is designed to meet the needs of OPA 90. As you know the state has its own needs under the stronger statutes our legislature has passed. My personal advice is that you should require those RACs listed as responders in a state contingency plan to attest to the resources they offer, allow inspection of those resources, participate in drills necessary to assess the capability of the contractor, and submit that they are willing to work for the state under the same terms and conditions for which they are willing to offer themselves to contingency plan holders. I believe that it is time for the state to assure its citizens that the resources listed in contingency plans are actually available and can be employed rapidly by a trained crew. I think the state on-scene coordinator needs access to those resources when he or she finds themselves incident commander at a spill. I think the state deserves verification of the response capability they are trying to achieve by giving liability immunity.



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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.

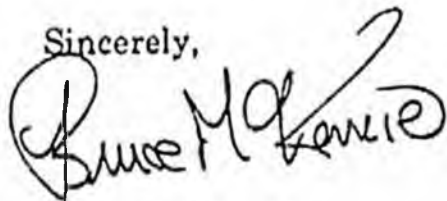
Under OPA 90, liability is clearly placed in the hands of the spiller. The notable exceptions are for the case of gross negligence, willful misconduct or violation of the law. House Bill 540 is consistent with this federal standard. Alaska has the right to differences to the federal standard. However,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

A handwritten signature in dark ink, appearing to read "Bruce McKenzie". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

 Norman Ingram
General Manager



Citizens' Oversight Council
on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

March 9, 1992

Representative Kay Brown
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Brown:

The Citizens' Oversight Council has received your letter of March 4, 1992. Specifically, you asked the Council whether it had considered the issue of potential state liability if the state conducts a certification program for oil spill response action contractors, and whether the state could protect itself from liability.

In general, the potential for state liability through certifying oil spill response action contractors is speculative and not substantiated in court decisions. However, if the legislature wants to further minimize that speculative risk, it could specifically limit the state's potential liability in any legislation the legislature chooses to enact on this subject.

State liability is established by AS 9.50.250 and as that provision has been interpreted by courts. The general rule is that the state is not liable in tort when a state employee exercises due care in the execution of a statute or regulation, or performs or fails to perform a discretionary act.

This rule is known as "sovereign immunity". This rule is intended to prevent another branch of government (i.e., the judicial) from interfering with the policy decisions of the executive branch. This rule protects the discretionary decisionmaking of an agency. However, once a decision is made, that decision must be implemented using due care. In the context of emergency response, this means that the agency's decision whether and how to respond may be protected from tort liability, but once the decision to respond is made, it must be carried out with reasonable care or liability could

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

Representative Kay Brown, continued
page 2

result. This distinction is why it is not entirely accurate, as continuously represented during the debate on this topic, that all other types of emergency responders are automatically fully immunized.

In any case, there does not appear to be precedent in state court caselaw finding the state liable for its actions in certifying, licensing, approving, or otherwise regulating conduct by professionals. Considering the considerable number of professions and individuals that the state licenses and certifies, that fact is significant in itself. However, there have been lawsuits brought on the theory that if the state licenses someone, the state is somehow "in the loop" for liability if the licensee causes compensable damage.

The state does not guarantee performance or even a certain level of performance by virtue of the state merely certifying or licensing someone. In order to find state liability, the claimant would have to prove that the state employee acted negligently in licensing or certifying the person causing the harm. In the case of oil spill response action contractors, this would mean that the state employee certifying the response action contractor did not use reasonable care in determining that the response action contractor met the standards for certification. The state should not face exposure for wrongful actions or the failure to perform by a response action contractor.

In summary, the potential for state liability is not significant. However, lawsuits could be brought. Therefore, the legislature could provide for additional protection against state liability by specifically including language that the state or state employee is not liable for acts or omissions related to the review of oil spill contingency plans and the certification of oil spill response action contractors.

The Council hopes that this information is helpful to you. Please contact us if we can be of any further assistance.

Sincerely,



Michele Brown

Executive Director

going discussions at the federal level concerning the question of RAC certification I would appreciate your comment on the following questions:

1. What is the status of the federal RAC certification program? Has a decision definitely been made to proceed with a federal certification program?
2. In Representative Hudson's letter he notes that the proposed federal certification process "will apply to all tank vessels" (emphasis added) defined under section 2101 of Title 46 USC, operating in navigable waters of the United States. To what kind of RACs would a federal certification program apply? Would the federal certification process being discussed fully address the concerns about competency and preparedness of RACs responding to oil or hazardous substance spills other than those by vessels (ie, a refinery or terminal spill not directly a result of vessel activities)?
3. Has the regulation negotiation committee examined the possibility of complementary state and federal certification programs?
4. It is my understanding that the regulation negotiation committee has been operating on the basis of consensus and that industry representatives make up a large majority of the committee. In your view is the federal certification process that is under consideration by the committee fully responsive to Alaska's needs or do you feel that the state should develop a complementary certification program of its own?

As you are probably aware, the House Oil and Gas Committee will be holding a hearing on House Bill 540 on Monday, March 9, at 3:00. This hearing will be teleconferenced. Any comment you could provide prior to that meeting would be of particular value.

Sincerely,



Representative Kay Brown

cc: Scott Sterling/PWS RCAC
Michelle Brown/Citizens' Oversight Council

U.S. Department
of Transportation
United States
Coast Guard



Commander
Seventeenth
Coast Guard District

P.O. Box 25517
Juneau, AK
99802-5517
Staff Symbol: d
(907)463-2025

16450
February 24, 1992

The Honorable Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Mr. Hudson:

Bill

I'm responding to your letter of 19 February 1992 in which you requested information on the Coast Guard's current efforts taken towards implementing various aspects of the Oil Pollution Act of 1990 (OPA-90). I have addressed each of these issues below.

You mention that it is your understanding the Coast Guard is in the process of developing national standards to certify response action contractors. There is no provision in OPA-90 to specifically certify response action contractors. However, Section 4202 of OPA-90 does require periodic inspection of containment booms, skimmers, vessels and other major equipment used by petroleum transporters to remove discharges. OPA-90 also requires the conduct of periodic drills to assess removal capabilities. A negotiated rulemaking committee is presently developing "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations. These regulations will address the spill response equipment and arrangements required of petroleum transporters to ensure that potential spills can be adequately addressed. In instances where petroleum transporters elect to have a response action contractor meet their spill response capabilities it is envisioned the Coast Guard will inspect the response action contractor's equipment. The Coast Guard is also in the process of working to develop performance standards for spill response equipment, i.e. skimmer effectiveness.

With respect to your comments on the Marine Spill Response Corporation (MSRC), neither the National Contingency Plan nor OPA-90 has a requirement for this organization to exist or to maintain a presence in Alaska. MSRC has been developed by the oil industry as a cooperative means of helping address the added spill response capabilities that will be required by the regulations developing from OPA-90. From the Coast Guard's perspective we simply require oil transporters to have equipment, resources and commitments available to respond to oil spills as required by the previously mentioned regulations. Whether they meet these requirements through use of MSRC or other companies is not an issue.

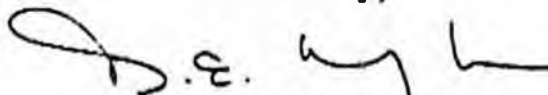
16450

February 24, 1992

You further question the National Contingency Plan's (NCP) requirements for Ship Escort Response Vessels (SERVS) and how they would be dispatched to respond to spills outside Prince William Sound. There is no requirement in the NCP for SERV's to respond to spills in or out of Prince William Sound, nor are there presently spill response requirements for spills emanating from tankers transiting offshore from Alaska to the "lower 48". OPA-90 does, however, require issuance of regulations that will require escort of oil laden tankers in specified areas of Prince William Sound. These regulations have not yet been developed. The previously mentioned "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations will prescribe how oil transporters will be required to respond to the above oil spill scenarios.

In summary, many of the regulations which will implement OPA-90 are still being developed. Should you require additional information on these issues please feel free to call me or Commander Ed Page, Chief of the Seventeenth District's Marine Environmental Protection Branch, PH: (907) 463-2210.

Sincerely,



D. E. CIANCAGLINI
Rear Admiral, U. S. Coast Guard
Commander, Seventeenth Coast Guard District



"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,

A handwritten signature in cursive script that reads "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



Oil Reform Alliance



3/17/92

A BRIEFING PAPER ON RESPONSE CONTRACTOR IMMUNITY (HB 540) & RELATED ISSUES

by Riki Ott

Response contractor immunity is no longer an issue which, as in 1991, can be considered in and of itself as HB 540 attempts to do. The Citizens' Oversight Council ("Council") report on oil spill response contractors to the legislature in 1992 opened everyone's eyes to all the issues at stake over immunity. The following attempts to identify, clarify and summarize these issues for those of you who do not have time to read the Council's excellent 133-page report.

Issue: Legislative History of Response Contractor Immunity

Last year, the legislature passed HB 196 which limited liability for response contractors for the first 15 days of a cleanup. The new law was effective for one year. The primary advocate in public for HB 196 was Tesoro, the primary advocate in private was Alyeska: in seeking to reduce its own exposure to spill cleanup liability, Alyeska required a \$1 billion direct action bond from Tesoro. The big oil companies loading in Valdez (Exxon, Arco, BP, and Amerada Hess) could pledge their assets, however the bond was more than Tesoro was worth and the requirement threatened to put the small independent out of business.

Faced with going out of business, or at a minimum a lawsuit with Alyeska, Tesoro asked the legislature to limit liability so Alyeska would reduce the bonding requirement. HB 196 was commonly known as the "Blackmail Bill." While public interest groups including the Oil Reform Alliance lobbied against HB 196 on the grounds that reducing the state's liability standard was bad public policy, the legislature felt compelled to do something for Tesoro. The legislature passed a compromise bill that limited liability for 15 days with a one year sunset clause and requested the Council to look into all the issues and report back to the legislature.

This year Tesoro is again taking a lead advocacy role (with Alyeska and its owner companies not far behind the scenes) for HB 540 which seeks to set the state's liability standard much lower

than the federal standard under the Oil Pollution Act of 1990 (OPA90). As many of you recall, Oil Reform Alliance member groups actively (and successfully) lobbied to preserve the right of states to set stricter standards than the federal government during the passage of OPA90. The oil industry lost this battle in Congress and has now lobbied in every coastal state to achieve "consistency with the federal legislation." Unfortunately, nineteen other coastal states have caved in to the oil industry's lobby and have provided immunity--with some noteworthy stipulations--for response contractors (p. 53-56). (Note: all citations are pages from the Council's report mentioned above.)

Issue: Negligence versus Gross Negligence

The basic negligence standard in law holds response contractors to a "duty to exercise reasonable care so as not to cause injury to another through the contractor's own actions. If the contractor does not exercise the level of reasonable care that a reasonable person would under the circumstances, and if the contractor's actions cause foreseeable injury, the contractor is liable for the damages it causes" (p. 24-25.)

HB 196 reduced the liability standard from "basic" to "gross" negligence for response contractors for the first 15 days of a cleanup; HB 540 would reduce it to gross negligence, period. The Council recommended a liability standard of gross negligence ONLY IF a complete package for improving response was adopted including their other recommendations discussed below (Rec. #1, p. 8).

Issue: Compensation for Damages

It is misleading for proponents of HB 540 to imply that the spiller will always be held liable for the contractor's negligent actions. In many instances, such as an act of God, war or simple negligence by the State of Alaska or the U.S. government, the liability of spill cleanup and compensation for acts of negligence by response contractors has been shifted to the public. Further, in the case of an orphan spill or an insolvent spiller, extending immunity to contractors will most likely result in private parties being unable to recover damages for harms caused by the contractors (p. 47).

Under Alaska law pre-dating passage of HB 196, the spiller and the response contractor were held "jointly liable" for damages caused by the response contractor. HB 540, by holding only the spiller liable, leaves the public nowhere to go for damages from response contractors in the cases mentioned above.

But the issue here is not simply a matter of compensating the public for damages. It is obvious the public doesn't care who pays for damages. It is vastly more important to prevent additional damages to natural resources from happening in the first place from no or poor response.

Removing the threat of liability provided by the basic negligence standard eliminates the strongest motivation for contractors to exercise reasonable care, that is, there will be no incentive for the contractor to take the precautions and the care that it normally would.

The Council recognized this problem and recommended that a certification program containing "minimum professional standards" for response contractors be implemented in conjunction with the reduced liability standard (Rec. # 3, p. 9). The Council expressed concern that if liability limits were granted without a corresponding certification program, damages to natural resources could increase (p. 10).

Issue: A Guaranteed Response

There is a problem with existing law in that the state currently has no way to order a contractor to respond to a spill. The law mandates contingency (c-) plan holders to respond and be subject to all orders of the state or federal on-scene coordinator. However, c-plan holders have become increasingly reliant upon response contractors to conduct the actual response. There is no way under the state's current approval process for c-plans to ensure that the contractors listed in the plans will actually respond.

Proponents of HB 540 argue that granting "immunity" (i.e., gross negligence) will ensure a "bold and decisive" response, because contractors, freed of worries from liability risks, will rush to respond to spills. Interestingly, several service contractors have testified this year that they will not respond unless they have immunity (gross negligence), yet DEC is approving c-plans which list these very same contractors as the responders. HB 540 does not set up a mechanism to clearly mandate in law that contractors listed in c-plans will indeed respond and will be subject to all orders of the on-scene coordinator. (HB 540 has been nicknamed the "Field of Dreams Bill": give them immunity and they will come.)

The Council recommended that the certification process include requirements for (1) a guaranteed response (duty to perform) including to orphan spills, and (2) language that subjects contractors to all orders of the on-scene coordinator (Rec. #2, #5, #6, p. 8-10).

Issue: Alternative Ways to Provide Immunity in Special Cases

The Council argues that providing immunity to contractors and requiring a response (as opposed to just requiring a response) is the only "fair" way to get contractors to respond to orphan spills.

There is an alternative approach not discussed in the Council report. The state could offer its responder immunity to a contractor it orders to cleanup a spill. For instance, the Coast Guard granted immunity to CISPRI when it ordered the contractor to respond to the Shumagin Islands barge spill cleanup.

Under existing law, if the spiller is unknown or not responding, the state assumes control of the cleanup and reimburses the contractors for reasonable expenses. However, also under existing law, the State of Alaska has immunity as a response contractor for itself, municipalities and villages. By providing case-specific indemnification through the state, liability relief would not have to be granted to all contractors as under HB 540.

This alternative approach would also gain immunity for the coastal community cooperative concept sponsored by the Regional Citizens' Advisory Council. The RCAC has requested funding for the co-op from the state's 470 Fund. It is possible that, should this be the funding source, the coastal co-op would receive immunity as a state-sanctioned contractor. (A letter requesting clarification on this point has been sent to the RCAC.)

Issue: Certification of Response Contractors

Proponents of HB 540 ignore the Council's recommendations and instead argue that the certification process should be left up to the Coast Guard who is in the midst of a negotiated rulemaking (reg neg) process to develop regulations for OPA90, including the certification issue.

The Oil Reform Alliance fought long and hard for Alaska's own contingency plan system (HB 567 in 1990). We need our own certification system to insure implementation of our own c-plan system. So far, the only people who advocate the Coast Guard position seem to be HB 540 sponsor (Hudson) and the oil industry including their service contractors.

The Regional Citizens' Advisory Council, which is participating actively in the Coast Guard reg neg process, reports the process is extremely biased in the oil industry's favour and strongly urges the state to develop its own certification process.

Issue: Categories of Response Contractors

HB 540 treats all response contractors equally and so distributes immunity (gross negligence) equally to all parties.

The Council, however, went to great lengths in its report to distinguish among types of response contractors such as volunteers, "paid volunteers" (like fishermen), service contractors (VECO), industry cooperatives (CISPRI), and lastly, industry operations (Alyeska). This distinction is important when making arguments which types of contractors should, or shouldn't, have liability limits.

These five types of contractors fall into two categories: primary and secondary. The primary contractors are those listed in contingency plans and who, therefore, are providing assurance to the state that they will respond. Primary contractors include only service contractors and industry cooperatives: these were the only types of contractors covered by the recommendations in the Council's report.

In a similar attempt to distinguish among types of contractors and their corresponding liability limits, "response contractor" was defined in California regulation as people who are regularly involved in oil spill cleanup; i.e., primary contractors. This eliminated liability concerns of fishermen and volunteers. Immunity for the latter two groups is covered by private contractual agreement and good Samaritan laws, respectively, in much the same way these groups were covered in Alaska prior to enactment of HB 196. (Under good Samaritan law in Alaska, "a person who responds at the request of the government to a declared emergency is immune from strict liability and negligence" p. 46).

Strong arguments can be made that response contractors who are in the business of oil spill cleanup like service contractors and industry cooperatives should be held responsible for their actions (basic negligence). It is unfortunate that proponents of HB 540 have tried to drag in all classes of potential contractors, such as volunteers, fishermen and even Alyeska, to argue the need for this bill when these classes are covered adequately by other laws.

Issue: Alyeska's Spill Response Operations

Although the case for volunteers and fishermen was discussed earlier, Alyeska is another issue entirely. The Council found Alyeska is bound by federal law (Trans-Alaska Pipeline Authorization Act) to respond to pollution caused by TAPS operations including tankers (Sec. V.D., VII. D., p. 48-49) and that Congress was clearly looking for a single entity to oversee pollution control. Since the Exxon Valdez spill, Alyeska is now claiming to be a "volunteer" responder to TAPS tanker spills and Alyeska has required individual contingency plans from nearly 30 companies.

Both of these actions by Alyeska compound matters for the state. Instead of one responder to tanker spills, there are dozens with dozens of contingency plans and multiple spill drills. Alyeska has created a management nightmare (p. 24). Further, the state is paying a 25% share of response costs with no legal assurance that Alyeska will respond to a TAPS tanker spill in Alaska waters (p. 33). This is bad business. The Council recommended that state legislation should mirror federal legislation in terms of requiring Alyeska to respond to all TAPS oil spills (Rec. #7 p. 11).

It is not clear whether the Council recommends immunizing Alyeska or not. We believe, arguably, that it does not because the Council states "that Alyeska has a duty to respond to and abate

pollution relating to the operation of the TAPS and, therefore, is not a response action contractor at all" (emphasis added p. 31). The Council recommends immunity (gross negligence) for response action contractors only (p. 8).

The Prince William Sound RCAC Legislative Committee seems to have interpreted that the Council does recommend immunizing Alyeska though, because the committee stated tentatively that "it would seem grossly premature to immunize Alyeska from liability as a response action contractor unless and until adequate legal assurances exist to protect the Sound and its residents from another Exxon Valdez" (p. 126). The RCAC is expected to take a formal position on response contractor immunity issues at the board meeting on March 19-21.

The more pressing concern, however, for both the RCAC and the Council is the issue of Alyeska as a "volunteer" responder to TAPS tanker spills. Both are clearly of the opinion that Alyeska has a duty to respond and that this should be reflected in state law. HB 540 makes no attempt to clarify the "volunteer" response issue.

For the time being, the ORA is resisting immunization for Alyeska under any legislative scenario out of concern that immunizing Alyeska from damages as response contractors may insulate Alyeska, its pipeline owner companies and, in turn, their owners, from tanker oil spill cleanup responsibilities (p. 49).

Issue: Tesoro's Bonding Requirement

Unfortunately, HB 540 does not solve the problem of Tesoro's bonding requirement. After the passage of HB 196 last session, Alyeska increased Tesoro's bond by 20% to \$1.2 billion instead of relieving Tesoro of the \$1 billion requirement as legislators had hoped. (Alyeska did allow Tesoro to meet the bond through an insurance combination instead of direct action which did provide marginal relief.)

The Council, however, found that the bonding requirement by Alyeska falls in the category of tariff costs which should be subject to review by either FERC (Federal Energy Regulatory commission) (p. 51) or, as we found by further investigation, APUC (Alaska Public Utilities Commission) as being reasonably necessary and nondiscriminatory.

In other words, a simple request for such a review from the Legislature could resolve this critical issue for Tesoro as an alternative to HB 540.

Issue: Maximum Coastal Protection

The really major problem with HB 540 is that it gives response contractors immunity with nothing in return for the public. The Council recommended achieving maximum coastal protection for

Alaska in "trade" for immunity (Rec. #4 p.9) similar to the achievements in California.

In California, the promise of immunity in return for maximum coastal protection convinced the small private response contractors to work with the large co-ops; the four major cleanup co-ops to expand their scope of coverage; the co-ops to sign mutual aid agreements with each other and contracts with the state; the oil shippers to change some shipping routes to reduce the risk of spills in areas which do not have adequate levels of response capability; and the oil industry to adequately fund the co-ops (p. 103).

This creative and cooperative atmosphere in California sharply contrasts with the hostile working relations among contractors in Alaska. Alyeska has attempted to essentially blackmail Tesoro by an unreasonable bonding requirement; Tesoro funds over 50% of CISPRI, but not all operators in Cook Inlet are members of CISPRI because some "feel it is not in their best interest to join CISPRI" (pg. 99); CISPRI "pledged a \$1 million fund for orphan spills" that could presumably include spills from non-members, but Tesoro has reservations about responding to orphan spills because of risk of litigation over damages...Further, large regions of our coastline remain at risk from spills like Southeast and Unimak Pass. The oil industry, including contractors, should be encouraged to look beyond their own region of operation and work together with the state and public to address these areas.

As the ORA has repeatedly testified, the public interest groups and volunteer responders from California endorsed the concept of immunity for contractors ONLY as a trade for maximum coastal protection. (A letter to this effect is being prepared by the California legislator who spearheaded the California bill as proponents of HB 540 repeatedly fail to make this distinction).

Also, significantly, at present, "liability immunity has not yet been granted to any response contractor in California" because "no one gets immunity until they all work together to give the state maximum achievable protection" (emphasis added pg. 91, 103). Further, the California immunity is only for 60 days, with a possible extension of 30 more days as opposed to HB 540 which does not put a time limit on the immunity.

And the really remarkable thing is that California achieved all this without an 11 million gallon spill. Alaska deserves at least the same.

The Oil Reform Alliance's Recommendations

1) Response contractor immunity is no longer an issue which should be considered separately from other inter-related issues: HB 540 is not a realistic approach to improving response and solving issues addressed in the Citizens' Oversight Council ("Council") report.

EITHER

2) Draft new legislation that includes, as a package, all the Council's recommendations EXCEPT immunity for response contractors. Note: The Cook Inlet RCAC voted to oppose HB 540, let HB 196 sunset and pass away, and endorse a liability standard of simple negligence except for vessels of opportunity which do not have contractual indemnification, for a limited time only.

OR

3) Adopt the Council's recommendations as a legislative package as follows:

a) certification for maximum coastal protection must be achieved prior to immunity being granted as per California

b) a time limit is put on the immunity as per California (as opposed to unlimited immunity as the Council recommends)

c) a STATE certification process must be in place and implemented prior to immunity being granted, and

d) Alyeska is not granted immunity as a responder.

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!

PRELIMINARY COMMENTS RELATING TO CS for SSHB 540

Section 1.

- Page 2, lines 15 - 24:

Delete proposed sovereign immunity for the acts and omissions of state employees who register and approve response action contractors, approve contingency plans, and direct spill response activities.

COMMENT: Granting immunity to the state for the acts and omissions of state employees who carry out their responsibilities always triggers important public policy considerations. For example, what will motivate state employees to carry out their tasks responsibly if, by virtue of this proposal, they will not be judged by the same standard of care applicable to other public employees and private employees? With respect to limited responder immunity, the spiller remains liable for damages in those instances where a responder is immune, but what fund will pay an injured party under this proposal if a state employee negligently approves a response action contractor or a contingency plan? If the state improperly takes over a spill response and misdirects it, from whom will the contingency plan holders, responders, and injured residents and others seek relief? Will the work of parole officers, fire marshalls, building inspectors, sanitation workers, etc., be similarly protected? The state has willingly and aggressively demanded a more active and responsible role in oil spill response activities and in prevention and contingency planning efforts. With that authority also comes a responsibility to carefully perform regulatory tasks and to stand ready to compensate those who are injured through the negligent acts and omissions of state employees.

Section 4.

- Page 4, line 13:

Delete this section.

COMMENT: This section cross references a definition of "damages" in the strict liability statute to an older 1972 definition appearing in AS 46.03.824. Yet, the current definition was apparently added during the HB 567 process. There is no explanation as to why this definition is needing any amendment, nor how such an amendment relates to limited responder immunity in this year's legislation.

Section 5.

- Page 4, line 22:

Insert "or" after the semicolon.

COMMENT: This appears to be an oversight.

Section 7.

- Page 5, lines 19:

Remove the proposed deletion of "but not limited to."

COMMENT: For an unexplained reason, the phrase "but not limited to" has been deleted from the definition of "response action." It is unclear whether this proposal reflects an attempt to place restrictions on the types of response subject to the limited immunity. Whether mitigation, clean up, removal, or some other response action is taken, it should be subject to the limited immunity. The language is purposefully general because of the difficulty in describing every conceivable response action.

Section 10.

- Page 6, lines 24 - 26:

Insert "contractor" after "action" on line 24. Delete subsection (a)(4) on lines 25 and 26. On line 24, replace the semicolon with a period; move "and" on line 24 to follow the semicolon on line 23. Add subsection (h) on page 7, line 24, to read: "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 a response action contractor."

COMMENT: HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. Likewise, language is necessary as stated above which will make it clear that nothing stated in this section concerning registration and approval of response action contractors will directly or indirectly erode that important provision. Moreover, circumstances related to spill response are variable depending upon weather, geography, remoteness, etc. Response efforts will require flexibility. To establish performance standards for response action contractors is unrealistic, and will not only invite controversy and litigation, it will chill immediate, bold and effective response efforts.

Page 7, line 2:

Insert "reasonably" before "necessary" on line 2.

COMMENT: Of course, fees to cover the costs of the registration program should be established and administered reasonably.



Alaska State Legislature

Please enter into the record my testimony to the

House Resources

committee name

committee on

HB540

dated

4-15-92

bill/subject

ution VESSALS or Vessel leaving port with a certain
nw amount of oil or hazardous substance; select
A bond for safe passage a Broker company or special Insurance to deal
with as a possible accident of a oil spill and both
Vessel ~~owner~~ and operator are insured going from port to port
with the product in transport and in case that there
is a accident that Coast Guard be notified immediately
and order a Response if necessary also that the State
get information ^{from} Coast Guard and Dept. of Conservation
to evaluate the situation and set up a committee
to respond immediately to the oil spill.
Also the Insurance Company be liable to the
State and Federal Dept. of Conservation and
Coast Guard also Oil Company that the Oil belongs to
and are liable for ~~to~~ damages ~~caused~~ by it accident
of a spill in question and pay claims to both
private, and State and Federal Dept. ^{caused} by spill
Insurance Company and ~~owner~~ ^{owner} of Product
and Vessel or Vessels owner and operators are
Governed by state, Fed. laws when leaving port
and arrives at port

Signed:

Raymond N. Rico

Testifier

myself personal opinion and Remark

Representing (Optional)

Gen Del Kodiak AK 99615

Address

mess- 486 907-5464

Phone No

L.I.O. Office
2 pgs Total

APRIL 16, 1992

TO: REPRESENTATIVE CLIFF DAVIDSON
HOUSE RESOURCE COMMITTEE

I AM TESTIFYING AS AN INDIVIDUAL NOT AS A MEMBER OF CIRCAC.
I DO SUPPORT IIB 540 IN ITS ORIGINAL FORM FROM HOUSE OIL AND GAS.

SINCERELY

Marie Becker

MARIE BECKER

CONTINGENCY PLANS

NATIONAL GENERIC LEVEL OF COVERAGE
NO SPECIFICITY

*offered
by Riki
OH
- not adopted*



STATE MODERATE LEVEL OF COVERAGE



INDUSTRY HB567/AS 46.04.030 (SLA 90)
TAILORED TO ALASKA AREAS



ADVANTAGES TO INDUSTRY C-PLANS (AS 46.04.030)

PROVIDES MOST DETAILED PLANNING & RESPONSE STANDARD

(Establishing Alaska's own contingency plan system was a direct result of the Exxon Valdez oil spill and enormous effort by legislators, the public, and the oil industry. It is unconscionable to waive the requirements to meet this standard only 3 years after the Exxon Valdez spill.)

PROVIDES MOST COST EFFECTIVE SPILL RESPONSE PLANNING

(If ADEC does their job in reviewing industry's c-plans, ADEC will ensure the primary responder is professional & able. Another level of bureaucracy, i.e., certification, shifts the focus off c-plans, costs money, and is totally unnecessary.)

PROVIDES MOST COST EFFECTIVE SPILL RESPONSE

(Certification of response contractors will not lead to a better response. Implementing industry c-plans as intended under existing law will provide adequate response to oil spills.)

EXAMPLES OF ANCILLARY DAMAGE UNDER
BASIC NEGLIGENCE STANDARD

• REFUSAL OF PRIMARY RESPONDER TO RESPOND

(Spiller responsible under OPA 90 4301 (b)(7).)

• RESPONSE EQUIPMENT NOT READY TO GO

(Responder responsible. After the wreck of the Exxon Valdez, the response vessel was loaded with response equipment and buried under snow. Basic negligence provides incentive to have response equipment ready to go. Gross negligence is such a high standard that it would be almost impossible to prove since Alyeska did have a response vessel and equipment on site.)

• BOOM FAILS BECAUSE IT'S POORLY MAINTAINED

(Responder responsible. Basic negligence provides incentive to have response equipment ready to go.)

• BOOM FAILS BECAUSE OF BAD WEATHER

(Spiller responsible.)

• BAY DAMAGED BECAUSE IT'S USED AS OIL CATCHMENT AREA

(Spiller responsible, assuming bay is damaged because the responder was following the orders of a FOSC or SOSC.

THE LEVEL OF CARE PROVIDED BY A STANDARD OF BASIC NEGLIGENCE
CANNOT BE IMITATED THROUGH A CERTIFICATION PROCESS.

ACTUAL DAMAGES

SPILLER	Responder ////////

"SIMPLE NEGLIGENCE"**WHY IT WORKS FOR RESPONSE CONTRACTORS****HIGH RISK AREAS**

The VEILED THREAT or FEAR that industry c-plan holders will loose their primary response contractors on June 1, 1992, and will not pump oil are UNGROUNDED. In many cases, industry owns the primary responder--they won't shut themselves down. Further, primary responders (SERVS, CISPRI) have contractual obligations to c-plan holders with reopener clauses of set time periods (90 days, 6 months).

Contractors are INDEMNIFIED from liability CONTRACTUALLY in agreements with c-plan holders. Indemnification in most cases is limited to acts that are strictly liable or simple negligence. If this level of care is acceptable to industry, why should the state be willing to indemnify these same contractors to a level of gross negligence?

LOW RISK AREAS

Ensuring response to spills in rural or isolated areas can be covered by competitive contractual agreements between the primary responder and the local municipality or villages. Contractors entering into an agreement with municipalities and villages receive limited immunity under AS 46.03.822. *Obtaining immunity*

SPECIAL CIRCUMSTANCES

Response to orphan spills is guaranteed when the state (municipality or village) orders a contractor to clean up a spill, because the state's immunity (AS 46.03.822) would extend to its responder.

Response to insolvent spillers is guaranteed when the federal or state government orders a contractor to clean up a spill, because the responder can apply to be reimbursed through the federal or state response fund.

Coastal community cooperatives, designed for nearshore response, can receive limited immunity by entering into agreements with the state, municipalities, or villages or by accessing the 470 Funds, such as requested by the Regional Citizens' Advisory Council in Prince William Sound.

WHAT IS NEEDED

Continue to hold Alyeska responsible.

PROTECTION FOR TESORO

While Tesoro can live with the existing \$1.2 billion dollar bonding requirements, there is no guarantee that the bonding requirements won't change when limited immunity (15 days of gross negligence) sunsets on June 1, 1992. Review of Alyeska's bonding requirements, such as provided in SS SB 270, would address Tesoro's concerns.

CHANGING THE GOOD SAMARITAN LAW

Suggested language in AS 46.03.822:

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

TO: Cliff Davidson

DATE: APRIL 3, 1992

Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

FROM: EDITH W. LANE
9100 CENTENNIAL DR. D108
ANCHORAGE, AK 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 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.



(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.

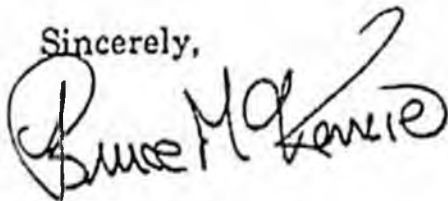
Under OPA 90, liability is clearly placed in the hands of the spiller. The notable exceptions are for the case of gross negligence, willful misconduct or violation of the law. House Bill 540 is consistent with this federal standard. Alaska has the right to differences to the federal standard. However,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



for Norman Ingram
General Manager

March 9, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: CSHB 540 Providing for Limited Responder Immunity

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska"), strongly supports Good Samaritan immunity for oil spill response in Alaska. Without limited liability, financial risks and liability exposures will deter cleanup contractors and others from prompt, aggressive action when spills occur.

As you know, the federal Oil Pollution Act of 1990 ("OPA '90"), and Alaska's HB 196 last session adopted responder immunity laws to encourage immediate and effective oil spill response action. However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July. To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's response action contractor immunity law should be improved and made permanent.

Although its scope is also limited, the response action immunity provision in OPA '90 [33 USC & 1321 (b) (11) (c) (4)] is the best model. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted substantially similar laws.

OPA '90 limits liability under federal law for response action if it is consistent with the National Contingency Plan or directions of federal officials. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner or operator is liable for any removal costs or damages that response contractors are relieved of. We believe that the federal law draws the right balance between encouraging prompt, aggressive action by all potential response contractors, and

Letter to The Honorable Bill Hudson
March 9, 1992
Page 2

providing for recovery of property damages from the spiller if a response contractor has negligently caused them.

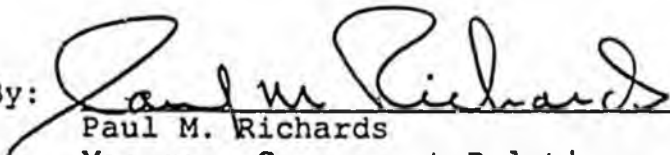
The United States Coast Guard has best described the important contribution limited immunity for response contractors made to the nation's comprehensive scheme for oil spill response and recovery under OPA '90. All response contractors must be encouraged to take action when spills occur, and to stay involved until an oil spill response is completed.

We urge the Committee's consideration of this important proposal to supplement the state's oil spill response laws. Alyeska Pipeline Service Company supports the adoption of Good Samaritan immunity for oil spill response action contractors on a state level, as presently stated in CSHB 540.

Very truly yours,

ALYESKA PIPELINE SERVICE COMPANY

By:


Paul M. Richards
Manager, Government Relations

PMR:ph

March 6, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: Prince William Sound Oil Spill Response Services

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills in Prince William Sound on behalf of companies that own, operate or charter tank vessels in the TAPS trade. We refer to those companies as "Contracting Vessels." The scope of services to be provided by Alyeska to those companies is described in Oil Spill Response Services Agreements between Alyeska and the Contracting Vessels. The Agreements incorporate the Prince William Sound Tanker Spill Prevention and Response Plan to describe Alyeska's response plans. Exhibit A of each Agreement lists the vessels covered by that Agreement.

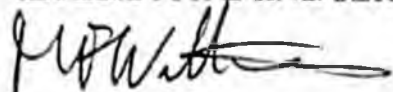
Under these arrangements, for large spills, Alyeska is obligated to respond for up to 72 hours to spills in Prince William Sound, while the Contracting Vessel is mobilizing its resources to take over management of the spill response. The Plan and the Agreements describe how the management transition from Alyeska to the appropriate Contracting Vessel should occur. After the transition, Alyeska's resources, including the on-water-response equipment, will be available for use by the Contracting Vessel for as long as needed and until they can be replaced by other equipment. The Contracting Vessel is contractually obligated to replace Alyeska's core equipment as rapidly as possible so that normal terminal operations may resume as soon as the Coast Guard allows it.

If the Contracting Vessel fails to assume management of the spill response in the 72 hour period, Alyeska anticipates that the Coast Guard will federalize the response, directing and paying for the effort. Alyeska has recently reiterated its verbal understanding with the Valdez Captain of the Port that Alyeska will make its resources available to the Coast Guard under a federalized response. We have written to Admiral Ciancaglini asking for an opportunity to describe this arrangement in writing.

Please contact me if you would like any other information on these matters.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



M. F. G. Williams
Vice President-Environment & Contingencies

MFGW/RIS/md

March 2, 1992

Letter No. 92-9411-G

David E. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 25517
Juneau, Alaska 99802

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would be useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and reimbursement procedure.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1321(c) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under those circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

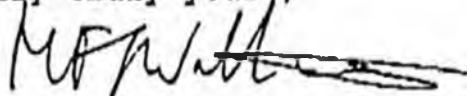
Name
March 2, 1992
Page 3

Letter No. 92-9411-G

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alyeska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,



M.F.G. Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Sam Cotten

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

Telephone: 465-5050
FAX: 465-5070

February 25, 1992

HB 540

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

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

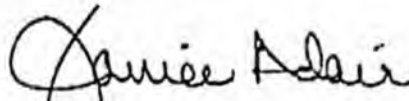
Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability", and "contractor certification". The most difficult issues seem to be defining response standards for "adverse weather" and "maximum extent practicable". These definitions have the potential to become substantially different than the counterpart provisions found in Alaska's laws, specifically the response planning standards given in AS. 48.04.030(k)(3-4).

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

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

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

Sincerely,


for John A. Sandor
Commissioner

CJP/MAC/JA/tls

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

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

bcc:

Chris Pace
Tracy Sherrer