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Citizens' Oversight Council

on Oil and Other Hazardous Substances

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Memo To: Senator Sam Cotten, Chair
Senate Oil and Gas Committee

From: Michele Brown, Executive Director

Date: January 15, 1992

Re: HB 196 Report

In preparation for the Citizen's Oversight Council presentation of its HB 196 report on response action contractors, enclosed please find a summary of the research project reports and copies of the full texts of the reports. As you recall, these reports were prepared by different groups to assist the Oversight Council and will form the basis for the Citizens' Oversight Council's report to the legislature on response action contractors as required in Section 11 of HB 196. Also enclosed is a copy of the original list designating these issues for study.

The Citizens' Oversight Council is analyzing these research project reports and will be meeting on January 31 in Anchorage (with multiple teleconference connections, including Juneau) to discuss these issues, take public comment, and direct staff in preparing the final report and recommendations to the Legislature. A copy of the Notice for the Council's meeting is enclosed.

The Council will adopt the final recommendations in a teleconferenced meeting on February 5 and present its report to the Senate Oil and Gas Committee on February 11.

Please do not hesitate to contact us if you have questions or suggestions. Thank you.

Council Members

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

P U B L I C N O T I C E



The Citizens' Oversight Council on Oil and Other Hazardous Substances

Invites you to a public meeting on the Council's
OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

FRIDAY, JANUARY 31 • 1:00 TO 4:00 PM

ANCHORAGE LEGISLATIVE INFORMATION OFFICE

3111 C STREET, 5TH FLOOR CONFERENCE ROOM

PUBLIC COMMENTS ENCOURAGED

The public meeting will be teleconferenced statewide —

At the State Capitol, Room 124, in Juneau, and at the Legislative Information Offices in Cordova, Homer, Kenai, Ketchikan, Kodiak, Sitka, Valdez and Whittier.

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

For more detailed information contact COC 561-2101.



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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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 SERV). Only CISPRI is separately incorporated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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		✓					✓	

REPORT ON
RESPONSE
ACTION
CONTRACTORS

**ALASKA DEPARTMENT
ENVIRONMENTAL CONSERVATION**

SOIL PREVENTION AND CONTROL

196 REPORT

ON

ACTION CONTROLS

HB 196 REPORT
on
RESPONSE ACTION CONTRACTORS

SUMMARY

Because of the significant difference between the straightforward contractual relationship with independent Response Action Contractors and the more complex commingled interests between industry spill response organizations and Contingency Plan holders the Department concludes that there is a significant difference in the contractual relationships between the spiller or contingency plan holder and RACs versus industry spill response organizations. Because of the complex multiple ownership interests that exist at many facilities and with tank vessels such as the Glacier Bay the Contingency Plan holder may not be the entity to respond to a spill from it's own vessel or facility. These relationships must be examined closely to ensure that response is a certainty in all cases and that the immunity afforded by the legislation is appropriately directed. Any loopholes should also be identified so that appropriate legislation can be introduced.

INTRODUCTION

HB 196 was signed into law during the 1991 session. Section 11 of this law requires the Citizens Oversight Council on Oil and Hazardous Substances to make a report to

the legislature concerning response action contractor civil liability and the status of oil spill contingency plan holders. The Department of Environmental Conservation has been tasked with gathering data to aid the Council in making this report.

Task 5 of the Report concerns response action contractor activity in the State. This includes geographic areas in which the contractors work, the type of services they provide and their interaction with potential responsible parties and volunteers. The information will be used to describe the current status of oil spill response in the State and what geographical regions may be lacking in response capability.

To accomplish this in a short time frame the Department sent a questionnaire to a list of known contractors in the State and obtained copies of "typical" contracts used by contingency plan holders from the Departments' regional offices. The questionnaires and contracts are appended to this report.

FINDINGS

An evaluation of the information indicates that there are two types of response contractors in State. These include independent response action contractors (RAC's) and groups consisting of oil industry companies organized for oil spill response. The RACs and industry spill response organizations considered in this report include:

Independent Response Action Contractors (RAC's)

Northwest EnviroService Inc.

Shannon and Wilson Inc.

Martech USA Inc.

VECO Inc.

Chempac Environmental Services (not incorporated)

Unitech of Alaska Inc.

VRCA Environmental Services Inc.

Industry Spill Response Organizations

Alaska Clean Seas (ACS) which primarily serves onshore and offshore north slope oil and gas development activities.

Cook Inlet Spill Prevention and Response Organization (CISPRI) which serves facilities in the Cook Inlet region.

Southeast Alaska Petroleum Organization (SEAPRO) which serves facilities in southeast Alaska.

Other Spill Response Organizations

Alyeska Ship Escort Response Vessel System (SERVS) which serves the Valdez oil terminal and tanker trade.

With the exception of SEAPRO all of the industry spill response organizations have been formally organized, possess some degree of response capability and are in operation. Their membership is included in the questionnaire appended to this report. SEAPRO is not yet formally organized and cannot yet actually respond to a spill.

SERVS is part of the Alyeska consortium and provides spill response to tank vessels who meet their contractual requirements.

There is also one industry spill response organization at the national level:

Marine Spill Response Corporation (MSRC) which provides nationwide response to its members for spills over a certain size.

The Department has chaired one meeting with MSRC to encourage them to extend their efforts to Alaska waters. At this point, however, they have not included Alaska as an area where they would respond to spills.

The information gathered shows that industry spill response organizations provided coverage of specific areas of operations for their membership while the independent RACs were not limited to any given area. The independent RACs covered the whole state and some even covered the west coast while the industry spill response organizations only covered an area of operations such as Prince William Sound or Cook Inlet. The industry spill response organizations have concentrated on crude and noncrude cleanup with only some of the independent RACs responding to hazardous substances. SERVS, for example, is only involved with crude oil response.

All of the organizations perform containment, control, cleanup and recovery with some providing services such as training, contingency plan preparation, and fire control. RACs provide material and services upon request under a contractual arrangement.

They do not control or direct a response and are never in overall charge of a response. Industry and other spill response organizations may during some portion of a response direct, control or be in overall charge of response actions.

None of the RACs have had experience with claims for damages due to spills or to RAC's alleged negligence, however, the majority are concerned that potential claims could be a hindrance to their operations. All but one RAC required the Responsible Party (RP) to indemnify them before services were provided. All the RACs said that their own general liability insurance would not cover all damages and all but one RAC said they would not respond for a RP who refused to indemnify them or was unable to do so.

The majority of the RAC's and industry spill response organizations are located or operate in and around Anchorage. SEAPRO is based in Ketchikan, CISPRI operates out of Kenai and SERVVS is based in Valdez. Several of the RAC's have service agreements with contingency plan holders throughout the state. Copies of these service agreements are attached. These RACs have the ability to respond to discharges in areas other than where they are physically located if the area is accessible by air. The weather in the State, and in southeast in particular, may delay response times to some discharges.

RAC's are in business for profit while industry or other spill response organizations are funded by their membership. They do not have any nonprofit corporate status with the exception of CISPRI.

Industry spill response corporations have been formed primarily to respond to spills of petroleum products both crude and noncrude while RAC's will respond to both oil and hazardous substances. SERVS and CISPRI are geared for large open water marine crude oil spills and ACS has both open water and onshore response capability.

RELATIONSHIP BETWEEN THE SPILLER, CONTINGENCY PLAN HOLDER AND THE RESPONSE ACTION CONTRACTOR OR INDUSTRY SPILL RESPONSE ORGANIZATION

The Department's review of contractor activity indicates that there are three principal parties or interests that may be involved in a spill response. These include the person responsible for the spill, the contingency plan holder and the response action contractor.

Alaska statutes establish that it is illegal for a "person" to discharge oil into or upon the waters or land of the state and further requires that the "person" causing or permitting the discharge to immediately contain and cleanup the discharge. The "person" doing so is commonly referred to as the responsible party (RP) for the spill and is defined by statute as:

....an individual, public or private corporation, political subdivision, government agency, municipality, industry, partnership, association, firm, trust, estate, or any other entity.....

AS 46.03.758, AS 46.03.759, AS 46.03.760 and AS 46.03.822 further define general and strict liability for discharges of oil or hazardous substances.

Similarly Alaska Statutes also establish that a "person" may not cause or permit the operation of an oil terminal facility, pipeline, exploration or production facility or tank vessel or oil barge unless an oil discharge prevention and contingency plan for the facility has been approved by the Department. The regulations further define the applicant for a contingency plan as the owner or operator of an oil terminal facility; the charterer, operator, owner or person with primary operational control for tank vessels and oil barges; or the leaseholder or operator for exploration or production facilities or pipelines. "Operator" is defined by statute as:

"the person who, through contract, lease, sublease, or otherwise , exerts general supervision and control of activities at the facility; the term includes , by way of example and not limitation, a prime or general contractor, the master of a vessel and the master's employer, or any other person who, personally or through an agent or contractor, undertakes the general functioning of the facility".

RACs

In most cases the RAC's in Alaska are completely autonomous and have no relationship to a Contingency Plan holder or the spiller. They have no contractual,

lease or corporate relationship by which they may exert influence, supervision or control over the general functioning of the facility. They are, when called to respond to a spill an independent third party, unencumbered by other relationships to the contingency plan holder other than their contractual relationship. They carry out their work in good faith and are the obvious party that the legislation was designed to protect. RAC's are independent separate companies whose relationship to a spiller or Contingency Plan holder is a straight forward contractual relationship for materials and services to be performed during a spill. There are a number of RAC's in the state who are contracted directly with Contingency Plan holders for certain spill response services. The RACs, by contract, work directly for the Contingency Plan holder.

INDUSTRY SPILL RESPONSE ORGANIZATIONS

The primary advantage of industry spill response organizations is that the high capitalization and operation and maintenance costs for spill response are made more affordable when membership companies pool their resources. Industry spill response organizations are formed to establish a certain in place baseline response capability that the members can use to demonstrate compliance with state requirements for response. Members are normally comprised of Contingency Plan holders and response is typically limited only to spills that are caused by it's members.

The relationship between industry or other spill response organizations is substantially different. Unlike RAC's, the operation and activities of an industry spill response organization are to varying degrees influenced or controlled by the Contingency Plan

holders who are it's members. The extent of control or influence is determined by the way the organization is structured. In some cases the organization may have a separate board of directors, by-laws and articles of incorporation to set it apart. In other cases the relationship may be established by contract only. The structure of the organization establishes the degree of autonomy. Industry or other spill response organizations which are structured so as to be independent may have a relationship similar to independent RAC's and thus should be afforded the same degree of immunity. Other industry spill response organizations not so structured 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. Should a response organization created by the owners and under contract to the tankers and the terminal be afforded the same immunity as an independent response action contractor? Even more importantly, how can the Department ensure that a response will be sustained uninterrupted by an industry spill response organization if some of its members choose for whatever reasons to terminate the response? Who is in real control of the response? Does the industry spill response organization report to a separate board of directors or is it really part of the internal resources of a Contingency Plan holder or responsible party? Of the five industry spill response organizations (ACS, CISPRI, SERVS, SEAPRO, MSRC) examined only one, (CISPRI), has formally incorporated as a separate corporation within the state of Alaska.

Re: HB 196 Report, Response Action Contractor Activity In State
(Task #5)

Prepared by the Department of Environmental Conservation

This report was accompanied by the following attachments:

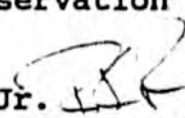
- Questionnaire responses by response action contractors,
independent contractors, and spill response organizations
- Sample response action contractor contracts
- Certificate of Incorporation for Cook Inlet Spill Prevention
and Response Incorporated

To obtain copies of any of these attachments, please contact Betty Cook at the Citizen's Oversight Council office, 561-2101.

LITIGATION
THREAT TO
RESPONSE
ACTION
CONTRACTORS

MEMORANDUM

NOV 04 1991
State of Alaska
Department of Law

TO	Citizen's Oversight Council on Oil and Other Hazardous Substances	DATE	October 30, 1991
		FILE NO.	663-92-0026(c)
		TEL. NO.	465-3600
THRU	Janice Adair, Special Asst. Dep't Env'tl. Conservation	SUBJECT	Litigation Threat to Response Action Contractors
FROM	Robert K. Reges Jr.  Assistant Attorney General Natural Resources Section - Juneau		

Task Number 7 on the list of research projects sought a brief analysis of whether response action contractors have been sued or found liable in Alaska or in other states for damages for oil spills when there was no other cause for liability. I believe the focus of this issue statement was slightly too narrow. If good Samaritans were sued or found liable for damages arising from marine catastrophes then their cases are probably applicable to response action contractors sued or found liable for damages arising from oil spills. Accordingly, this memorandum briefly analyzes cases involving good Samaritans at sea, and the scope of their liability.

I also briefly review legislative histories of other provisions in law that protect response action contractors because these other histories provide insight into the rationale for such provisions.

Research did not reveal any case involving "contractors" and "oil spills." However, to report only that dearth would give

the false impression that contractors do not face potential liability. Courts often rely upon cases analogous to the one they have before the bench. Cases involving good Samaritans can be analogous to cases involving contractors. Cases involving hazardous substances can be analogous to cases involving oil. Consequently, this analysis looks at cases arguably analogous to one that might arise in Alaska involving response action contractors and oil spills.

GOOD SAMARITAN CASES

Introduction

The law of admiralty has always sought to "encourage and induce men of the sea to go to the aide of life and property in distress." 1/ Toward that end the concept of a "good Samaritan" has long been incorporated in maritime law. 2/ As a general rule, the concept is this:

A good Samaritan has no obligation to act. If he does act, however, he must exercise due care. If,

1/ *Berg v. Chevron, U.S.A., Inc.*, 759 F.2d 1425, 1429 (9th Cir. , Alaska, 1985) quoting 3A M. Norris, *Benedict on Admiralty* § 234 (7th ed. 1980).

2/ *Indian Towing Company v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

by his actions the Samaritan leaves the injured party in worse condition, then the Samaritan is liable for all damages suffered by the injured party. 3/

There are two significant differences between this doctrine and the doctrine underlying AS 46.03.825. First, the Samaritan is under no obligation to act while a response action contractor is contractually obliged to act. Second, the Samaritan is sometimes held liable for simple negligence (although this is exceptional) while AS 46.03.825 would only impose liability on those who act with gross negligence or intentional misconduct. Bearing those distinctions in mind, the caselaw is noteworthy.

Reported Cases

- I. *Burgess v. M/V TAMANO*, 373 F. Supp. 839 (S.D. Me. 1974) (Tamano I), vacated by *Burgess v. M/V TAMANO*, 564 F.2d 964 (1st Cir. 1977) (Tamano II).

These two opinions set-out a factual scenario that is close to the factual scenario of concern to the Oversight Council. The Tamano opinions involve an oil spill and negligent response actions. But, since Tamano turns on *Indian Towing Co., Inc. v. United States*, *supra*, that case must be briefly explained first.

3/ Compare 46 U.S.C. § 2303 (c) (USCA 1991 Partial Revision).

Indian Towing involved the tug NAVAJO. Towing a barge laden with fertilizer, NAVAJO ran aground on Chandeleur Island, Mississippi. Water entered the barge and the cargo was ruined. Indian Towing Company, owner of the NAVAJO, was forced to pay for the lost cargo. It sued the United States for reimbursement. The Company contended that the Coast Guard had established a lighthouse on Chandeleur Island but had failed to properly maintain the light, allowing it to extinguish. But for its reliance on the light, the NAVAJO would have used other navigational tools. Had it used those tools, it would not have run aground. These were the Company's contentions.

The Coast Guard responded that it never had to establish the light in the first place and, therefore, it had no obligation to keep the light burning and no responsibility for losses occasioned by extinguishment of the light. The Supreme Court rejected this argument. A good Samaritan service -- such as establishment of a lighthouse -- need not be undertaken, said the court, but once undertaken the effort must be completed or carried-on with due care. If care is lacking, the Samaritan will be liable for damages arising from that lack of care. 4/

4/ Although Indian Towing turns on an interpretation of the Federal Tort Claims Act (FTCA), it has been widely cited for the proposition stated above. The FTCA merely waives sovereign immunity. Substantive legal duties applied in Indian Towing -- such as good Samaritan matters -- arose out of the maritime common law.

With this principle in mind, let me turn to the Tamano cases. In Tamano the Coast Guard had located a floating buoy, intending to mark "Soldier Ledge." Apparently it did so improperly, for the M/V TAMANO hit Soldier Ledge, spilling 100,000 gallons of Bunker C oil into Casco Bay. Various persons injured by the spill sued the Coast Guard alleging that the grounding resulted from misplacement of the buoy; that after the grounding the Coast Guard undertook responsibility for containing and cleaning oil; that this containment and clean-up failed, allowing oil to escape and spread; and, that such escapement occurred because the Coast Guard negligently performed its response actions.

In district court the Coast Guard was found to be liable. The district court's opinion, designated Tamano I, states:

. . . [I]f the Coast Guard undertook responsibility for stemming the flow of the oil from the TAMANO and for the cleanup operation, and the Coast Guard negligently discharged such assumed responsibilities, it is clear, as the United States concedes, that the United States may be found liable for any resulting damage on *Indian Towing* principles.

* * *

. . . [I]deed, those cases which have applied *Indian Towing* principles in an admiralty context make clear that the United States, in undertaking any "good Samaritan" task such as buoyage or pollution abatement, is liable in tort for the

consequences of its negligence to the same extent as a private person would be liable under similar circumstances.

The tort liability of a private person for the foreseeable consequences of his negligence is equally well established . . . [W]e look to see what natural forces and what human conduct should have appeared likely to come upon the scene, and we weigh the dangerous consequences likely to flow from the challenged conduct in the light of these interventions. And in this inquiry foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct. (citations omitted.) 373 F. Supp. at 844.

The district court then found that the Coast Guard had fallen below the standard expected of a private person although the "natural forces" and "human conduct" that "intervened" with clean-up were not explained.

The circuit court -- in an opinion designated Tamano II -- vacated that ruling. It found that negligence by a pilot aboard the M/V TAMANO had been a contributing cause to the initial spill; that the shipowner had to take responsibility for the pilot's negligence; and, that the government was not liable for any damages because it was not solely responsible for the initial spill. Accordingly, the ship's owner became liable for all costs notwithstanding the government's negligent clean-up activities.

A significant distinction between the district court opinion and the circuit court opinion is that the former relied on maritime common law (i.e. Indian Towing) while the latter relied on the Clean Water Act (CWA). The district court was correct when it opined that maritime law imposed liability on the government for negligent clean-up. The circuit court was correct when it opined that the CWA imposed liability on the ship's owner because the government was not "solely" responsible for the wreck and consequential spill. 33 U.S.C. § 1321(f)(1)(C). The question not answered by the circuit court is why imposition of this statutory liability on the ship's owner should eliminate the common law liability of the government. In other words, if the ship owner is liable under the CWA, and the government is liable under the principles of Indian Towing, it seems both possible and reasonable for a reviewing court to secure partial payment from each.

Such joint liability is not possible, however, if a statute so comprehensively covers a particular issue that the common law is deemed preempted. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972). Thus the circuit court in Tamano II must have assumed that maritime law was preempted by the CWA. This may or may not have been true in 1977. Given the comprehensive nature of the Oil Pollution Act of 1990 (OPA), federal common law on oil spills has, in all probability, been preempted now.

In any event the two Tamano decisions point up the importance of asking what law would apply in the absence of AS 46.03.825. If AS 46.03.825 was repealed, the OPA or CWA may be deemed to set the standard. In such a case the circuit court's ruling in Tamano II provides an appropriate guide. However, if maritime common law is deemed controlling, the district court's ruling in Tamano I may be the appropriate guide.

II. *United States v. Gavagan*, 280 F. 2d 319 (5th Cir., Florida, 1960), *cert. denied*, 364 U.S. 933 (1961).

This is a case in which the U.S.C.G. was found liable notwithstanding good Samaritan doctrines. This case, like Tamano I turned on maritime common law.

In 1956 the federal government established a national Search and Rescue Plan (SAR). In many ways the SAR is similar to the National Contingency Plan (NCP) which governs oil spill response activities. Both allocate responsibilities among federal agencies. Both provide for the U.S.C.G. to be on-scene-commander. Both establish a hierarchal command system to enhance efficiency of governmental response in emergency situations.

In Gavagan the SAR failed. Thus Gavagan provides some guidance on how a court would handle failure of the NCP.

In Gavagan the shrimp boat Donald Ray was disabled by rough seas. Radio communication was established, the Coast Guard was notified and the SAR was put into action. By 4:17 p.m. the Donald Ray had been positively spotted by a SAR airplane. Due to a compendium of human errors no rescue had been accomplished by 7 p.m. when darkness fell. Come morning the ship and her crew were gone.

Relatives of deceased crew members sued the U.S.C.G. for botching the rescue. In defense, the government claimed that it was a good Samaritan and, as such, it could not be liable because it did not leave the injured party in worse condition. Remember, the good Samaritan rule holds that the Samaritan is not liable unless his negligent conduct aggravates or worsens the condition of the injured party.

The Coast Guard's position was simple. Donald Ray was lost at sea when the Coast Guard began its rescue. Donald Ray was still lost at sea when the Coast Guard completed its "rescue." Since the ship's condition was not worsened by the Coast Guard's

action (or inaction), the Guard could not be liable for damages caused when the ship sank.

This argument was rejected by the court. It said:

In addition we are also of the opinion that the facts fully meet the requirements of the good Samaritan doctrine. The only element of any doubt is that of "worsening" the plight of the crew members of the Donald Ray. We think that adequately established.

The members of the families of the crew of the Donald Ray and . . . fishermen on the other fishing vessels in Mayport were greatly exercised. They were maintaining a very close contact with the Coast Guard. The Coast Guard was likewise anxious to keep in contact with them. Had these persons known the true facts, steps could have been taken to reach the Donald Ray in the time remaining up to 7:00 p.m. when darkness set in and visual contact was lost. As we pointed out, the SS Henry M. Dawes was in the vicinity -- not over five or six miles and 30 minutes away -- and ready to respond to a search. And the other fishing vessels in Mayport were available to go out as one did later that night and as several did during the succeeding days.

All of these interested persons were standing by, as they properly might, while the extensive, experienced facilities of the Coast Guard-directed search went on. But they were ignorant of several critical facts [namely, that the Coast Guard operation had gone awry.] Ignorance of these facts and continued reliance upon the Coast Guard's celebrated skill made independent action unnecessary. But it kept them from taking action which, in all probability, would have been successful.

The Coast Guard was liable for the loss of lives and property.

A set of facts like those presented in Gavagan probably constitutes "gross negligence." As such, AS 46.03.825 provides no protection. Furthermore, if AS 46.03.825 was repealed and a case similar to this one occurred, good Samaritan laws would provide no protection. The moral then is this. If a response action contractor makes a show of responding such that others are dissuaded from acting, and the contractor turns out to be totally incompetent, the contractor may well be liable for all spill-related damages.

Also, bear in mind that the U.S.C.G. was a volunteer, not a contractor, and it was acting pursuant to an approved contingency plan. In that light, Gavagan provides insight into the liabilities of all responders, not just contractors. Gavagan stands for the proposition that any responder can be liable for failing to properly implement a contingency plan, especially when there exists only a brief period of time in which to act and the responder's actions dissuade others from acting. Gavagan also stands for the proposition that a good Samaritan may be deemed to have worsened a situation even if he does not physically alter the injured party's condition.

III. *Patentas v. United States*, 687 F.2d 707 (3rd Cir., Penn., 1982)

On April 9, 1974, the Greek tanker ELIAS exploded while discharging its cargo of crude oil at the Fort Mifflin terminal in Philadelphia. The vessel was destroyed, thirteen people were killed and property damage totalled millions of dollars. One of the many consequential lawsuits focused upon the Coast Guard, claiming that the Guard had failed to exercise due care when it undertook to inspect the ELIAS shortly before the explosion.

Two days before the explosion, ELIAS had caught fire. The Coast Guard was aware of this fire -- which had been extinguished without injury -- and therefore two Guardsmen inspected the ship to see if it could operate safely. The Guard failed to locate the cause of the fire and a short time later the vessel exploded. Plaintiffs contended that the Guardsmen failed to properly carry out the inspection and, therefore, were liable for explosion-related damages.

The court found that the Coast Guard's risk of liability was no less nor greater than the risk of a private person acting as a good Samaritan. It also noted:

"The good Samaritan doctrine incorporates two theories of recovery, depending on whether the injured person is the direct beneficiary or a foreseeable third party beneficiary of gratuitously rendered services . . ."

Applying the Restatement (Second) of Torts § 324A (1965) -- which does not distinguish between a good Samaritan who acts for free (i.e. a volunteer) and one who acts for compensation (i.e. a paid response action contractor) -- the court found that plaintiffs were foreseeable third party beneficiaries of the inspection but that the Coast Guard had not increased their risk of harm. "Increased risk", said the court, "means some physical change to the environment or some other alteration of circumstances." The Coast Guard was not liable.

Patentas then, is important for two reasons. First, it introduces the concept of direct and foreseeable beneficiaries. Second, it shows a different approach to the "worsening" element. Where Gavagan did apply liability, Patentas did not. Perhaps this is because the injured persons in Gavagan were direct beneficiaries of the Coast Guard's rescue attempt while the injured persons in Patentas were merely foreseeable third party beneficiaries of the Coast Guard's inspection. Perhaps this is because the causal nexus in Gavagan was much easier to pinpoint. Everyone knew that someone had to rescue the Donald Ray or it certainly would be lost. No one suspected that the fire in Patentas was going to lead to an explosion. Or, perhaps this is an example where Samaritans are not liable for simple negligence (Patentas) but are liable for gross negligence (Gavagan).

IV. *Berg v. Chevron, U.S.A., Inc.* 759 F.2d 1425 (9th Cir.,
Alaska, 1985)

Ogie Berg was the master of the CAPELLA, bound for the waters of King Cove, Alaska. He struck the rocks at Cape Lazaref, puncturing CAPELLA's hull. The ALASKA STANDARD, owned by Chevron, responded to Berg's distress signal and began towing CAPELLA toward a port. Due to deteriorating weather the ALASKA STANDARD was forced to anchor off Fox Island. During the anchorage CAPELLA sank and most of her crew drowned.

Berg's estate sued Chevron for wrongful death (a personal injury tort). Although the federal district court imposed liability on Chevron, awarding Berg's estate 1.2 million dollars, the circuit court reversed. The circuit court held "that the proper standard of care is that a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue."

Inasmuch as this was a case involving Alaskan waters, it shows that -- absent statutory law -- the maritime good Samaritan doctrines define the scope of a responder's liability in Alaska. Of course, a response action contractor's liabilities are also defined by his contract and, at this time, by statute.

Berg is also helpful in pointing out that the occurrence of tragedy does not necessarily mean someone was negligent. The master of ALASKA STANDARD had been in nearly constant radio communication with Ogie Berg; had repeatedly offered to take Berg and crew on board but Berg had refused; had offered to bring the CAPELLA alongside but Berg had declined that invitation; and, generally, had endeavored to minimize the risk to CAPELLA's crew. After CAPELLA sank, ALASKA STANDARD's master had failed to undertake any rescue operations. But, this failure was excused due to the dangerous weather conditions. These considerations by the Berg court show that the question of whether a good Samaritan was or was not negligent turns on the specific facts and circumstances making up the incident in question.

V. *Wright v. United States*, 700 F. Supp. 490 (N.D. Cal. 1988)

Jack Wright's wooden boat came apart while at sea. The Coast Guard provided bilge pumps via helicopter and -- when a U.S.C.G. rescue boat arrived -- saved the crew. However, the Coast Guard was unable to save the boat. Wright sued the Coast Guard for the value of the boat. Wright lost.

In denying Wright's claim, the court attempted to outline parameters of the maritime good Samaritan doctrine. It said:

1. The Coast Guard has no affirmative duty to render aid to a vessel or person in distress;
2. If the Coast Guard does respond, it is not required to provide any particular kind of equipment;
3. The Coast Guard is not held to any higher standard of care in its rescue operations than a private person;
4. The standard of care exhibited by rescuers is measured by the unique circumstances of the rescue.

Some of these maxims are widely accepted. Others are not. Maxim #1 is widely accepted. Applying it to the oil spill context, we can say that in the absence of a statutory or contractual requirement no one is obliged to assist the oil-releasing vessel.

Maxim #2 is called into question by *Petition of the United States*, a case discussed *infra*. Wright's point may or may

not be valid. Assuming, for the sake of argument, that it is valid, a responder could respond with any equipment, no matter how ineffective. (Again, this is only true under common law. Alaska's statutes have, and contract provisions might, alter this maxim.)

Wright's third maxim raises a question. What standard (common negligence or gross negligence?) is a private person held to? Several cases discussed below attempt to answer this question and they appear to differ in their conclusions. Also, one of those cases, *Miller v. United States*, disagrees with Wright's third maxim, whatever the standard may be. But, if Wright is correct, governmental responders (local, state or federal) have neither more nor less protection than any other responder. Municipal corporations that join response cooperatives will want to note the benefits provided by this rule.

The validity of Wright's fourth maxim is confirmed by the *Berg* case; the issue of a good Samaritan's liability is highly fact-specific.

VI. *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir., Louisiana, 1969), cert. dismissed, 396 U.S. 1033 (1970).

When does a lack of due care by a Samaritan expose the Samaritan to liability? Is he liable for negligence or only gross negligence? In a broad discussion of "the Amphibious Good Samaritan" law, this court said:

"Of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property

[T]o eliminate a deterrent to voluntary, impulsive response to need as the forces of nature or man, or both, imperil ship or seamen, the law accords a considerable latitude in the standard of performance of the salvage service."

This suggests that a Samaritan is only liable for gross negligence. However, it may be that times have changed. Given the next case, Miller, it may be that a responder will -- in the absence of AS 46.03.825 -- find that courts no longer afford such "considerable latitude."

VII. *Miller v. United States* 614 F. Supp. 948 (D.C. Me. 1985)

This is a case where the Navy, acting as a good Samaritan, was held liable for simple negligence. Miller and his companion were attempting to sail a small wooden boat from New York to Washington via the Panama Canal. They ran out of water off the

coast of North Carolina but failed to stop and replenish their supply.

On the next day they hailed a Navy vessel, the U.S.S. GUADALCANAL, seeking water and a position fix. Due to a series of misunderstandings and miscommunications, GUADALCANAL's captain thought Miller and his companion were in need of rescue. He succeeded in bringing the adventurers aboard but inadvertently sank their boat in the process. Miller sued the Navy.

The court employed a simple negligence standard. Navy lawyers argued that they should only be liable for gross negligence and that the captain's conduct was not gross negligence. Quoting another case, the Miller court responded:

In seeking exoneration, the government makes much of the principle that a salvor who is a "good Samaritan" is not held to ordinary standards of care. Whatever may be the limits of this principle with respect to volunteered salvage, we believe that if the Navy accepts a mission it should conduct its share of the proceedings with acceptable seamanship. We refuse to take the government's view, and be party to adding to the honored motto, 'Semper Paratus' [Always Ready] the words 'Interdum Prudens' [Sometimes Careful].^{5/}

^{5/} 614 F. Supp. at 954. Citations omitted.

Thus it appears that at least some good Samaritans can be held liable for simple negligence. If this is the case, AS 46.03.825 -- which only imposes liability for gross negligence -- provides significant protection over common law.

The Miller court also applied principles of contributory negligence. It is unclear whether, and to what extent, notions of contributory or comparative negligence apply in Alaska in any context. In the context of response action contractors those notions are muddled even more. However, as exemplified by this case, contributory negligence may be applied under maritime common law.

VIII. *Petition of the United States*, 255 F. Supp. 737 (D. Mass. 1966) (Petition I); *aff'd in part, reversed in part by United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967) (Petition II); *cert. denied* 389 U.S. 836 (1967).

Like Gavagan, this case exemplifies gross negligence. As the story unfolds Gerald H. McManus is commander of a 95 foot Coast Guard patrol boat assigned to the busy fishing district of George's

Bank, off the shores of Massachusetts. By the end of the story he is stationed at a desk, studying loran, on St. Paul's Island, Alaska. His grossly negligent "rescue" of a disabled fishing vessel would have been comical in a pathetic way but for the loss of lives that resulted. Suffice it to say that Commander McManus unquestionably left the persons he was "saving" in worse condition than when he found them. Given that fact the district court had no difficulty finding liability notwithstanding "good Samaritan" doctrines and concepts of sovereign immunity.

Unlike Wright, this court appears to agree with Miller that the Coast Guard can be held to a higher standard than private party responders. 255 F. Supp. at 748, 372 F.2d at 197. If that is true, (and Wright's third maxim is false), governmental responders who qualify as "response action contractors" within the meaning of AS 46.03.826 are afforded very substantial protection by AS 46.03.825. While common law holds governmental responders to a higher standard and imposes liability for simple negligence, Alaska's law holds all response action contractors to the same standard: gross negligence.

Another point where Petition I differs from Wright is in its holding that negligence arises if a responder does not have adequate equipment on hand, irrespective of how adeptly available

equipment is used. In this case the Coast Guard vessel was equipped with a defective loran, a defective gyro compass and repeater, a defective fathometer and a totally inoperative radio direction finder. In sum, this "rescue" ship was completely unable to fix its position at sea. The district court held that it was negligent for the Coast Guard even to send such an ill-equipped ship on a rescue mission, irrespective of the outcome of that mission.

The appellate court took a somewhat more conservative approach. It held that the government was not required to place any particular equipment on board its rescue vessels but that if the vessel was so poorly equipped as to be unable to effectuate its mission, the ship commander had a duty to make that shortcoming known to those who sought his assistance. 372 F.2d at 195-196. Under either interpretation, it seems clear this case differs from Wright's second maxim. Given Petition's concept, a response action contractor may be negligent if he fails to equip his vessel with such response equipment as is reasonably necessary.

It is unclear whether a lack of operative equipment constitutes "gross negligence." Assuming that it does not, AS 46.03.825 in its current form insulates the responder from Petition's concept. Absent AS 46.03.825, a court might apply the

Petition concept and impute liability to a responder whose lack of equipment increased the risk of loss.

LEGISLATIVE HISTORIES

The Oil Pollution Act of 1990

Section 4201 of the Oil Pollution Act (OPA) amended subsection 311(c) of the Clean Water Act (CWA). Section 311 deals with oil spills on navigable waters. Section 4201 empowers the President to ensure effective and immediate removal of oil or hazardous substances which have been discharged into the environment. The OPA goes on to add an exemption from liability for those persons engaged in such removal activities.

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.

It then goes on to limit the scope of this exemption but the concept of exempting RACs from liability remains.

Congressmen and Senators generally touted § 4201, "Federal Removal Authority" as a critical feature of the OPA. 6/ Of course the exemption provision is a critical feature of § 4201; it does little good to authorize the Coast Guard to commandeer clean-up workers if no workers are willing to clean up. The significance of this provision is evidenced by the fact that it was included in the earliest drafts of the OPA. 7/

Despite the importance of this provision, there is scant legislative history to explain it. All that I could locate was a brief comment by the conference committee that:

This section reflects the conferees' intention that responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response. 8/

6/ E.g. Comments of B. Clement (D-TN), 135 Cong. Rec. H7965 (Nov. 2, 1989).

7/ See comments of Thomas A. Luken (D-OH) 135 Cong. Rec. H 7959 (Nov. 2, 1989) in which he explains how § 4201 of the OPA has been modified so as not to run afoul of § 119 of CERCLA.

8/ 135 Cong. Rec H6273 (August 1, 1990).

The Comprehensive Environmental Response Compensation and Liability
Act

Section 119 of this Act, 42 U.S.C. § 9619, exempts response action contractors from liability for damages or losses resulting from a release or threatened release of hazardous substances unless the release is caused by the contractor's negligent or intentional misconduct. The provision also allows persons in charge of a response to indemnify response action contractors for those risks not covered by insurance.

Section 119 was added to CERCLA in 1986 after six years of experience with the Superfund clean-up program. Congress became aware that RACs, despite the exercise of due care and satisfactory performance of contract specifications, could be deemed a "potentially responsible party" and liable under Superfund. 9/ Because of such contingent liabilities, RACs were unable to insure their response activities and, absent insurance, were unable to obtain many response action contracts. 10/ Monopolies were inadvertently created for a few large contractors who could afford

9/ EPA Interim Guidance on Indemnification of Superfund Response Action Contractors Under Section 119 of SARA, from J. Winston Porter, Assistant Administrator to Regions I - X (April 1, 1987).

10/ Joint Explanatory Statement of the Committee of Conference on Superfund Amendments and Reauthorization Act of 1986, reprinted in Superfund Deskbook (ELI 1986) at 153.

to self insure. This, in turn, drove up the costs of clean-up as monopolistic opportunists were able to increase their rates.

11/ To ensure a competitive marketplace of insured contractors, RACs were exempted from liability.

The Oversight Council should note that CERCLA § 119(c)(8) required the Comptroller General to study and report on the use of CERCLA's response action contractor provision. That report was scheduled to be filed with Congress by September 30, 1989. If it has not done so already, the Council may wish to acquire and review that report as preparation for their HB 196 report.

CONCLUSION

A review of caselaw and legislative history for the OPA and CERCLA unearthed no specific instance where a response action contractor was held liable for non-negligent response activities. Case studies do reveal that common law concepts of limited liability for a good Samaritan will not protect against gross negligence or intentional misconduct and -- at times-- will not

11/ Armstrong, T.M.; Rock, W.G.; Butler, A.L., "Contractor Liability for Environmental Assessments and Remedial Action", Real Estate Law and Practice Course Handbook Series, The Impact of Environmental Regulations on Business Transactions 1989 (Practicing Law Institute 1989), available on westlaw, ENV-TP, 342 PLI/Real 435.

even tolerate negligence. CERCLA's history reveals that common law concepts are not adequate to assuage the concerns of insurers and therefore tend to restrict the market of available response action contractors.

At a minimum, then, Alaska's provision achieves two goals. First it protects contractors from liability for simple negligence. Second, it enhances insurability and thereby increase the number of available contractors.

LEGAL
RELATIONSHIP
BETWEEN
RESPONSE
ACTION
CONTRACTORS +
OTHER PARTIES

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

**A Report to the Cook Inlet
Regional Citizens' Advisory Committee
No. PROPS 003**

**Douglas K. Mertz
G. Thomas Koester**

December 6, 1991

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INTRODUCTION: PURPOSE OF THE REPORT

The Cook Inlet Regional Citizens Advisory Council has requested an analysis of the legal relationship between oil spill response action contractors and other parties, particularly the holders of oil spill contingency plans, i.e., the parties likely to be held legally responsible for oil spills. The study will consider what potential liabilities are placed on both types of entities and what methods have been used to shift or decrease the burden of legal liabilities. The study is also intended to encompass the duties and liabilities of the State of Alaska as a responder to spills itself and in its role directing response action by others. In particular, the study will examine how the combination of contractual liability-shifting arrangements and statutory changes (such as the grant of limited immunity to response action contractors by the legislature in 1991) combine to lessen the liability burden on responders and reallocate the burden to others.

This study has been conducted primarily through a combination of three methods: Review of contracts and questionnaires provided by response action contractors to the Alaska Department of Environmental Conservation; review of background materials, including legislative histories of legislation relating to the contractors; and personal interviews. Legal research into various topics has been conducted as well.

SUMMARY

Storage and transportation of petroleum obviously involves risks, as does handling the substance in the course of an oil spill cleanup operation. Thus there are obvious risks which an owner or spiller of oil normally bears. Likewise, a response action contractor at an oil spill also undertakes risks that its own actions will cause new damage or exacerbate existing damage.

Under the common law, any person causing damage through an oil spill would be liable for the damages, absent unusual circumstances. That liability could be strict, i.e., without regard to whether the person was negligent in its actions, if the activity were considered abnormally dangerous. The State of Alaska has modified the common law by making a larger group of persons strictly liable for oil spill damage. That group potentially includes response

action contractors. The Alaska Legislature has created statutory immunities from liability during response actions for the contractors, although there is a great deal of uncertainty as to what situations are covered and how the courts will interpret the immunities. The statutory immunities may make it more difficult for some injured parties to recovery for oil spill damage. Response action contractors in Alaska have so far encountered few claims based on damages in the course of spill response, but potential liability is a prime concern for them. Their reaction has been to attempt to limit liability further through contractual agreements with the entities on whose behalf they respond. In some cases those contractual arrangements provide significantly greater protections than the immunity statutes.

Spill response has become increasingly the task of specialized response contractors. Because their work is done primarily under contract with potential spillers, rather than the State or another government, the response action contractors may not be as fully subject to governmental oversight as the spillers would be if they performed their own responses. It may be possible for the State to assert greater control over response action contractors by changes in contingency plan regulations to require the contractors to agree to direct State oversight. However, significant increases in the regulatory burden on the contractors may make participation in the spill response business less attractive and tend to remove response contractors as a tool for dealing with oil spills.

BACKGROUND

When a small oil spill occurs, the spiller or the owner of the oil may itself take steps to contain or clean it up. With large spills or spills into critical habitat, however, the party responsible for the spill is more likely to call for help from others. The help may take the form of specialized spill cleanup contractors with unique training and equipment; it may take the form of ordinary dirt-moving or transportation contractors whose main business is not oil-related; and it may take the form of volunteers. It may involve just a few persons, or, with a massive spill, may involve a worldwide effort by thousands working around the clock.

In Alaska the major companies involved in production and transportation of crude oil typically depend on a variety of independent contractors to provide necessary response services during all but the smallest spills. These response action contractors ("RACs") provide the muscle for most

spill responses, and depending on the contractual relationship with the party responsible for the spill, often direct the spill response as well. Some RACs work alone, while others may themselves employ other RACs. Most RACs working in Alaska are ordinary business corporations without any ownership relation to the clients for whom they provide response services. A few are cooperatives or consortiums of companies in the oil transportation business who have joined together to fight spills (CISPRI, in Cook Inlet, and Alaska Clean Seas (ACS), in the North Slope and Northwest Alaska). In yet another class is Alyeska Pipeline Service Company, the operator of the Trans-Alaska Oil Pipeline System, and which is itself owned by a consortium of major oil companies. Alyeska provides initial response services for spills in Prince William Sound for all vessels calling at Valdez for TAPS oil which have entered into response action contracts with Alyeska, whether the vessels are owned by one of Alyeska's owner companies or not. While CISPRI and ACS are owned by corporations which may become spillers, Alyeska is not only owned by potential spillers, it itself occasionally is a spiller due to its operation of TAPS.

This system of dependence of spillers on RACs for cleanup services may well be the most efficient way to handle oil spills. But it gives rise to significant legal and policy questions regarding the allocation of liability for spills. Obviously the original spiller bears primary responsibility for liabilities arising from the spill. In Alaska the owner of the oil is also responsible for the damages caused by the spill, and both the spiller and the owner are held strictly liable, i.e., their liability does not depend on a finding that they acted negligently.¹ But what of the response action contractor? The RAC is often called in during a crisis and has to operate in a crisis atmosphere. Mistakes may occur which result in failure to remove oil, exacerbate the damage from the spill, or cause secondary spills. As a matter of law, will the RAC be held to the same level of liability as the original spiller? Is there a way the RAC can protect itself? These legal questions -- which will be addressed here -- are of particular importance because of a widespread feeling among RACs that the risks of liability are too great to justify working on an oil spill unless there is some protection from the liabilities, risks from which, they feel, they cannot adequately protect themselves through whatever insurance is available.

The remainder of this report will examine a) the common law of oil

¹ Alaska Statute 46.03.822. See p. 10 *infra*.

spill liability in Alaska; b) how that law has been modified by statute to change the allocation of liability; and c) how the parties involved in spill response have modified that allocation of liability still further by contractual provisions. In the process the report will identify the major types of organizations involved in spill response and the typical features of their contractual obligations in the event of a spill.

COMMON LAW LIABILITY FOR OIL SPILLS

Common law is the set of legal principles which the courts apply in the absence of statutory law on the same point. Before most laws were codified in statutes, the courts of England and the U.S. had a highly developed set of common law principles which guided the judicial resolution of disputes. Even today the common law is still the basis for judicial determinations of rights where legislatures have not enacted differing statutory rules. The common law applies in Alaska unless inconsistent with the Alaska Constitution or state statutes. AS 01.10.010.

The common law allocating responsibility when one party injures another -- technically known as the law of torts -- has been the subject of many court decisions and much scholarly writing over the centuries. The following simplified discussion is intended to give the reader a framework from which to view the changes to the common law enacted by the legislature.

The common law assumes that all members of society have a duty to exercise reasonable care not to injure others. When a person breaches that duty and foreseeable injury results, that person must compensate the injured party to the extent of the injury. The usual legal measure of whether the duty to exercise reasonable care is breached, when the acts of one person injure the person or property of another -- including public property -- is whether the injuring person acted negligently. Negligence is generally stated as a level of care below that which an ordinary reasonable person would exercise in the same circumstances. If the party causing the injury is shown to have acted in such a negligent manner, and the negligence caused the injury, that party is liable for the resulting damages which were reasonably foreseeable.

This standard of liability -- requiring an injured party to show negligence by the injuring party -- was modified in the common law with respect to certain activities which pose abnormal danger to others. In the past this

category included the keeping of dangerous animals, the building of dams, and the release of hazardous substances. The common law maintained that with respect to these activities, where there was a greater than ordinary risk to others, the person conducting the activity had to bear a greater level of responsibility than that of ordinary care. The result was that persons conducting such activities were subject to strict liability, i.e., to the rule that if that activity injured others, the party would be liable for the damages even without a showing of negligence. Although the common law has never had a precise definition of what activities would give rise to strict liability, there is a growing trend to include storage and transportation of hazardous substances among them.²

For the purposes of this report, the importance of strict liability is that at common law a carrier of oil who spilled it could, if it were found an abnormally dangerous activity, be strictly responsible for the damages that resulted, whether or not negligence was involved. A second party -- a cleanup contractor, for example -- who handled the oil in such a way that the damages were increased, could likewise be strictly liable for the additional injuries caused by its actions, though again there would have to be a finding that the contractor's activities were abnormally dangerous.³

Finally, there is an open question whether the original spiller would

² It is not clear, however, that transportation and storage of crude oil in remote areas would be legally considered an abnormally dangerous activity. A number of factors would enter into the calculation, including the likelihood of danger, likely extent of injury, the extent to which the danger can be minimized, and whether the activity is normal or unusual for that setting. See Restatement (Second) of Torts, § 519, 520; Yukon Equipment Co. v. Fireman's Fund Insurance Co., 585 P.2d 1206 (Alaska 1978). There is a growing number of cases finding strict liability regarding hazardous waste releases, sometimes on the theory that it constitutes a public nuisance. See New York v. Shore Realty, 759 F.2d 1032, 1051 (2nd Cir. 1985). Some cases find transportation of gasoline to give rise to strict liability. See Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972), cert. den. 411 U.S. 983; Yommer v. McKenzie, 257 A.2d 138 (Md. App. 1969). But see Ozark Ind. v. Stubbs Transportation, Inc., 351 Fed. Supp. 351 (W.D. Ark. 1972). One court has found that the abnormally dangerous activity doctrine does not apply at all to transportation of goods at sea. EAC Timberlane v. Pisces, Ltd., 745 F.2d 715 (1st. Cir. 1984).

³ Damages caused by a response action contractor during a spill response, but not arising out of the actual handling of oil (for example, an auto accident by a contractor on the way to the scene), would probably be measured by the ordinary negligence standard, since no hazardous substance or abnormally dangerous activity was directly involved in causing the injury.

be vicariously liable at common law for the damages caused by its contractor. Unless those damages would have been foreseeable at the time of the original spill, it is not likely that they would be directly imputed to the original spiller even though the original spiller may have set all the events in motion.

However, the original spiller might still be held liable indirectly for damage caused by its cleanup contractor if the contractor is considered its employee, under the common law doctrine of respondeat superior. Under that doctrine, an employer is liable for damages caused by its employees as long as the damages result from actions broadly within the scope of employment. The doctrine does not apply when the party actually causing the damage is an independent contractor rather than an employee. Determining a party's status as an employee or independent contractor for vicarious liability purposes under the respondeat superior doctrine turns on the degree to which the employer directs or controls the contractor in carrying out its duties.⁴ The employer may be liable for the acts of a contractor if it controls or directs the actions of the contractor in any significant way. In short, in some situations -- such as when the original responsible party actively directs the cleanup of a spill -- that party may bear legal responsibility for damages caused by a response action contractor.⁵

In summary, the common law puts a heavy burden, including strict liability, on parties responsible for safe storage and transportation of oil, and often makes them liable for the acts of employees and contractors.

⁴ Stereud v. Chugach Elec. Ass'n, 640 P.2d 823, 826 (Alaska 1982).

⁵ This fact has resulting in varying provisions in RAC contracts regarding whether the RAC or the spiller has the controlling role in directing cleanup. See *infra* p. 27.

STATUTORY LIABILITY FOR OIL SPILLS

The Alaska Legislature has modified common law liability for oil spills in many respects over the years. Its most important modifications occurred in 1972 and in the three legislative sessions after the grounding of the Exxon Valdez in 1989. The modifications have regarded two major concerns: Who bears liability for particular spills, and what standard of care must be shown to have been breached in order for that liability to apply.

AS 46.03.822: Basic oil spill liability

The 1972 legislature enacted AS 46.03.822, entitled "strict liability for the release of hazardous substances." Although it has been modified many times since (most recently in 1991), it remains the basic standard for imposing liability for hazardous substance spills, including oil spills. Subsection (a) adopted the common law standard of liability for hazardous substance spills, i.e., strict liability, so that negligence need not be proven. But it imposes that strict liability on a larger number of parties than the common law would. The liable parties include a) the owner of the substance; b) anyone having control over the substance at the time of the spill; c) the owner and the operator of a vessel or facility from which a spill occurs; d) the owner or operator of a vessel or facility at which a hazardous substance was disposed of and from which there is a release; e) a person who arranges for disposal or treatment of a hazardous substance at, or transport to, to such a disposal facility from which a release occurs; and f) a person who accepts a hazardous substance (other than refined oil) for transport to a treatment or disposal facility selected by that person, and from which there is a release.

Under this subsection, then, virtually everyone connected with the storage, transportation, or disposal of oil would be strictly liable for a spill. On its face, this appears to include response action contractors. In AS 46.03.823 and 46.03.825, however, the legislature adopted provisions which generally relieve RACs from the strict liability they would be subject to under AS 46.03.822. (The special provisions for RACs are discussed in detail below.)

Three other provisions of AS 46.03.822 are relevant here. Section (b) sets out defenses to liability, including that the damage was caused by an act

of a third party; but it makes this defense unavailable to the responsible party when the damage was caused by a response action contractor. This provision maintains the original responsible party as liable for paying damages, even when the RAC might be relieved of liability.

Subsection g) states that

an indemnification, hold harmless, or similar agreement...is not effective to transfer liability...from a person who might be liable for a release...under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section....

This confused language⁶ was intended to say that, while a party can contract with another party to have part or all of its liability paid for by the second party, such an agreement does not itself relieve the first party of liability or provide a defense to a damages claim. In other words, the first party remains strictly liable for the damages, but it may be able to require a second party to pay the damages under their contract. The importance of this provision is that the first party cannot escape liability by contracting with another party; it can give itself the right to have the second party cover the liability. If the second party is unable to do so, the first party must pay.

Finally, Section (h) relieves the state, a municipality, or a village from liability for damages or costs as a result of response actions in an emergency caused by release of a hazardous substance, unless the actions constituted gross negligence or intentional misconduct.

(We note that AS 46.03.822 is not the only statute imposing liability for actions relating to oil spills. AS 46.03.745 (release of hazardous substances prohibited); AS 46.03.750 (discharge of contaminated ballast water prohibited); AS 46.03.758 and .759 (civil penalties for discharge of refined and crude oil, respectively); AS 46.03.760 (civil actions for discharges); and AS 46.03.780 (liability for restoration) all impose liability for damages or penalties on a party responsible for an oil spill. However AS 46.03.822 establishes the standards for

⁶ The provision is taken almost verbatim from federal law. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [CERCLA], Public Law 96-510, §107(e)(1).

imposing liability and the range of potentially liable parties, while AS 46.03.823 and .825, discussed below, establish immunities from liability for RACs extending to any liabilities under state law for oil spills, including all civil liability arising under statutes and the common law.)

AS 46.03.823 and .825: Special provisions for response action contractors

In Chapter 39, SLA 1989, the Alaska Legislature enacted AS 46.03.823, which gave RACs certain immunities from liability for actions in response to hazardous substance spills. In subsection (a), a RAC whose actions are not contrary to a response plan or order by a state or federal agency is not liable for damages as a result of the spills unless the damage is caused by the RAC's negligence, gross negligence, or intentional misconduct.⁷ Under subsection (b), however, a party otherwise responsible for a spill remains liable even if it carries out its own response action, i.e., it cannot qualify for immunity simply by responding to it. Under subsection (e), moreover, a RAC remains liable for damages resulting from failure to comply with a response action contract or a remedial action plan approved by the Alaska Department of Environmental Conservation [ADEC] or a contingency plan approved by ADEC, if the RAC is the plan holder.

In 1991 the legislature passed Ch. 92 SLA 1991, granting significantly greater immunities to RACs involved in oil spills. But the legislature carefully refused to make the change permanent; on July 1, 1992, the most advanced form of RAC immunities will be repealed and replaced.

The law in effect today with respect to RACs and oil spills -- and

⁷ The three levels of culpable conduct which can give rise to liability are negligence, gross negligence (sometimes referred to as recklessness), and intentional conduct. As noted above, negligence is a level of conduct below that which an ordinary reasonable person would exercise in the same circumstances. Gross negligence occurs when a person performs an act with knowledge that there is a strong probability that serious harm will be inflicted upon another person. (Restatement (Second) of Torts, §500.) Intentional conduct requires an intent to inflict the harm, whereas gross negligence or reckless conduct involves indifference as to whether harm will or will not result. As also noted earlier, when a legislature defines an act as giving rise to strict liability, as in AS 46.03.822, none of these states of mind is required for liability to arise, but merely the doing of an act and resulting harm.

until July 1, 1992, unless further legislative action occurs -- is found at AS 46.03.825. It essentially replaces the similar but generally somewhat weaker immunities under AS 46.03.823. Section 825 provides a complex series of immunities and exceptions to immunities. Its core, at Section (a), provides that a response action contractor is not liable for civil damages that result from the release or threatened release of oil, or from the RAC's act or omission in response to the release or threatened release. Read in conjunction with the reset of the statute, this essentially removes RAC liability for damages during response action based on strict liability or on the RAC's negligence. But the immunity disappears if any of the following are proven by the claimant:

a) The RAC 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 short, a party cannot cause a spill and then claim RAC immunity while carrying out its own response action);

b) the RAC acted with gross negligence or intentional misconduct; or

c) the RAC, without approval from the federal or state on-scene coordinator, "substantially deviated" from an oil spill contingency plan previously approved by the state and the 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.⁸

Section (b) makes the limitations on liability in Section (a) inapplicable to actions for personal injury or death and for damages to tangible personal property not caused by oil. It also limits the applicability of the limitations in Section (a) to acts or omissions within the first 15 days of the

⁸ The Letter of Intent accompanying this legislation indicated considerable legislative uncertainty regarding the definition of "substantial deviation," and indicated that the question of the definition should be studied during the next legislative interim. Letter of Intent -- CSHB 196 (Finance), Senate Special Committee on Oil and Gas, May 15, 1991 (Senate Journal p. 1313-1312). However, there may be few instances in which this language is at issue. There are few RACs which both produce contingency plans and carry them out (Alyeska is the prime exception). And we have seen no contracts in which a RAC explicitly agreed to comply with the terms of a contingency plan. There is at present nothing in the law which gives a RAC an incentive to make such a promise.

release.⁹

Section (c) provides further protections by stating in essence that even if a RAC does not qualify under (b) or (c) for the limitation of liability to situations where it is grossly negligent or engages in intentional misconduct, it will still not be strictly liable, but ordinary negligence must be shown.

Finally, "response action" and "response action contractor" are defined at AS 46.03.825(d) and .826(11) respectively. The definitions are broad, including as RACs those who enter into response contracts for compensation, subcontractors of other RACs, and volunteers. "Response action" is defined broadly enough to include any action to respond to a release or threatened release of oil, including, arguably, actions taking at distant sites and actions which do not directly involve field work. The provision in AS 46.03.825(a) which actually grants immunity from liability, however, effectively narrows the broadness of the definitions by limiting immunity to liability "that results from the release or threatened release, or from the response action contractor's act or omission in response to the release." Nonetheless there remains ambiguity regarding how far removed from actual field action directly involving oil an act or omission must be before the immunity disappears.¹⁰

It appears to have been the intent of the legislature that the immunity granted by Section.825 be accompanied by a clear laying of the burden for paying those damages on the party responsible for the original spill. That is set out in AS 46.03.823(c), which (until July 1, 1992) applies only to hazardous substances other than oil. (After that date it will apply to oil as well.) As to oil spills this intention is carried out in the current statute through the definition of "damages" in AS 46.03.822(k), which includes "damage caused by acts or omissions of a

⁹ The statute does not define "release", leaving open the question of whether the immunities of §§(a) would continue to apply during a continuing long-term release, such as from a well blowout.

¹⁰ For example, the crews hired to physically contain and remove oil fall within the definition of RACs, as do the people directing them at a response headquarters. Arguably, so do support staff at company headquarters in other locations. The definition may extend to independent jobbers or suppliers of materials and equipment and regular employees of the responsible party who are assigned, as part of their job duties, to perform spill response, as long as their actions "result from the release or threatened release."

response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825." Hence it appears that the party or parties bearing legal responsibility for the original spill also must bear responsibility for damages caused by response action contractors in connection with the spill.

This provision raises a number of unknowns in the way it will be applied by the courts, not even considering the difficulty caused by the indirect way in which a simple reallocation of liability was codified. What is the situation of the RAC which hires another RAC as a subcontractor and finds that the subcontractor has caused damage? It is arguable that the first-level RAC remains liable for the damages caused by the second-level RAC despite the fact that the first-level RAC may have immunity for its own misdeeds. Some potentially responsible parties have required their RACs to indemnify them for the RACs' damages; is this impliedly prohibited by this section? Was the intent actually to require the responsible party to bear all the damages caused by government and volunteer responders, so long as the damage did not result from grossly negligent or intentional acts? And finally, was it intended that RACs should be relieved of legal liability when there is no identifiable responsible party, or the responsible party is insolvent, to the same extent as if there were a financially responsible party able to bear the burden being shifted from the RACs? There is no clear answer to these questions, although we will address some of them further in this report.

Good Samaritan statute

At AS 09.65.091, the legislature provided:

A person who provides equipment or services on the request of a ... governmental agency during a state of emergency declared by an authorized representative of the state or local government is not liable for the death of or injury to any person or damage to any property caused by that person's actions, except...[when] the person acted intentionally, recklessly, or with gross negligence.

Hence in a declared emergency, when a RAC (apparently either paid or volunteer) responds at the request of a government agency (but not at the request

of a private party), the RAC enjoys immunity from liability for damages unless the RAC'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 persons in charge and not involving personal injury or death. It does apply to the efforts of governments themselves, acting as emergency responders.¹¹

The Good Samaritan statute raises some difficulties which the courts have not yet addressed. When a RAC contracts with a governmental agency to provide response services during a declared emergency, is it acting "at the request of a governmental agency" so that its liability is limited by the immunities granted by the Good Samaritan statute, rather than by the provisions of the contract? We believe that the contract terms (e.g., an agreement by the RAC to indemnify the State for the RAC's negligence) would probably be held to control, as an implied waiver by the RAC of its statutory immunities. But the result is far from certain and it is likely that a RAC in a potentially liable situation would make the claim to Good Samaritan immunities. Would the original spiller be immunized under the Good Samaritan statute if it took steps at the request of a government agency and those steps caused additional damages? It seems unlikely that the legislature intended to immunize the party causing the problem in the first place, when its response actions are arguably required by law, but the legislature did not state its intentions explicitly in the statute; whether this limitation should be read into the statute may need to be litigated before a clear answer emerges. Finally, the wording of the statute implies that a government which provides direct response services does not itself come within the immunities granted by the statute; but if the government's response is at the request of another governmental agency, it may well be covered by the statute. Clearly the Good Samaritan statute was not drafted with response action contractors and oil spills in mind, so it does not fit the situations likely to be encountered in the field very precisely. In any future overhaul of the main RAC immunity statutes, the Legislature would do well to harmonize the Good Samaritan statute at the same time.

In summary, state statutes place a heavy burden of strict liability on a variety of persons involved with storage or transportation of oil when the oil is spilled. There already is a Good Samaritan statute affording

¹¹ Bunting v. United States, 662 F. Supp. 971 (D. Alaska 1987), aff'd 884 F.2d 1143 (9th Cir. 1989).

immunity from strict liability and liability for negligence to persons who respond at the government's request in a declared emergency. The legislature has also provided a broad set of exemptions from liability for all but grossly negligent and intentional acts, applying to most oil spill damages. But these exemptions are set to expire on July 1, 1992, when somewhat less generous immunities applicable to hazardous substance spills are set to take their place. It is possible that the current limitation on liability may prevent recovery of damages by parties injured by RACs in some situations where there is no other financially solvent responsible party.

CONTRACTUAL MODIFICATIONS OF OIL SPILL LIABILITY

As noted above, the Legislature modified common law liability for oil spills by its enactment of key oil spill statutes. In particular, enactment of AS 46.03.823 and .825 were promoted by RACs and segments of the oil industry as a means to reallocate -- and in some cases lessen -- the overall liability burden. But a second, and possibly equally effective method of shifting the liability burden, is through contractual arrangements. This section of the report will examine the contract terms negotiated by RACs and their employers. In particular it will examine indemnification provisions and insurance provisions, which are the main devices used in RAC contracts to shift the ultimate burden of spill liability. It will also focus on the differences in typical contract terms negotiated by small and large RAC businesses, and in the contracts of RACs which are normal business corporations and those which are consortiums of major oil companies.

As a preliminary, it should be noted that parties cannot alter a statute with a contract. Hence a party liable under AS 46.03.822 cannot actually make itself not liable by a contractual arrangement with another party. But a potentially liable party can -- as the contracts discussed below show -- arrange to have another party bear the burden of its liability, i.e., require the second party to pay amounts required to be borne by the first party under the statute. Hence, as long as the party agreeing to carry the actual burden is able to pay it, the party liable under the statute effectively escapes the liability.

The Contracts: A Brief Summary

The Department of Environmental Conservation has identified most of the entities providing professional response action services and sent each of them a questionnaire on RAC issues. We have obtained all of the questionnaires returned by this time as well as a collation by DEC of representative RAC service contracts.¹² Copies of the contracts and questionnaires are attached as an appendix to this report. The following is a brief summary of the common

¹² As part of the contingency plan approval process, every contingency plan holder which relies on a RAC for all or part of its spill response is required to submit a copy of the RAC contract to ADEC with the contingency plan. Naturally this does not include contracts which are negotiated on a spot basis at the time of an actual spill, but standing contracts for services which are a formal part of a contingency plan.

provisions found in the contracts.

The most striking fact is the diversity of the contracts. Generally, the larger and more sophisticated the business, the more professional is its contract drafting and the more likely it is to have carefully crafted provisions protecting the RAC's interests. This is particularly the case with the contracts written by Alyeska Pipeline Service Company (which provides RAC services to marine transporters of TAPS oil of Valdez) and by CISPRI and Alaska Clean Seas, the cooperatives made up of major oil producers for spill response in Cook Inlet and off the Arctic and west coasts of Alaska, respectively. At the other end of the spectrum are small companies for whom spill response is just one of their activities. It is a fair assumption that many smaller companies hired at the time of the spill to perform general work, e.g., earthmovers or haulers, have even less sophisticated contracts which provide even less protection against liability.

Also noteworthy is that even among established companies which have obviously used legal counsel in drafting contracts, there is no real uniformity of contract terms. Also, a single RAC may have different provisions in contracts with different employers, reflecting, it appears, the relative negotiating acumen of each employer. An example is the two contracts of VRCA, an established spill response company, with Tesoro and with Mapco, two medium sized refiners. VRCA's contract with Tesoro reflects careful draftsmanship, and gives significant protections to VRCA against bearing liability for mishaps during its cleanup. But when VRCA negotiated a later contract with Mapco, Mapco was able to negotiate significantly better terms for itself than Tesoro had.¹³

Reviewing all the contracts and questionnaires together, we can reach the following general conclusions on types of contractual provisions of special importance to RACs:

¹³ For example, Mapco obtained agreement that VRCA could be liable to Mapco for VRCA's own negligence or gross negligence; Tesoro agreed to language that can be interpreted to be a complete indemnification of VRCA for indirect damages, i.e., damages to a third party. Mapco obtained an agreement that VRCA could not subcontract without consent; Tesoro agreed that VRCA could subcontract without consent. Mapco obtained language agreeing that VRCA's actions were not under Mapco's control, while Tesoro stated that it could control VRCA's actions, a significant difference because the ability to control an independent contractor is a prime test of whether a principal can be vicariously held liable for the misdeeds of its agent (see below, p.27).

Obligations of Parties

The contracts we examined were all non-specific as to duties to be performed by the contractors. Typical provisions read, "scope of work...to respond to any cleanup effort requested"... "shall commence as soon as possible"... "an indefinite quantity of work/services". Most refer generally to spill "response" or "cleanup" without greater specificity, and only a few explicitly relate performance to contingency plans.¹⁴ The contracts are, by definition, contingency contracts, i.e., general agreements that a certain type of service shall be available upon some future contingency, and when the principal issues a work order or notice to proceed. They provide very little detail about specific services or products, and although the RAC in each case agrees to perform, the client must invoke the contract first by issuing a specific request for the services in the event of a spill. Alyeska's response contract is unique among those we reviewed in explicitly limiting response to the first 72 hours and requiring a hand-off of response duties to the client after that time. In none of the contracts is the client required to use the services of the RAC, i.e., the client chooses when and whether to invoke the contract. None of the contracts contain specific performance standards (e.g., x numbers of vessels and y personnel mobilized within z hours of call-out).

Most of the contracts do not have termination dates built in, while some have annual expirations. Some permit termination by either party upon a notice period, e.g., five days or thirty days. Alyeska's response contract requires six months notice for termination by either party, and also permits Alyeska to suspend work upon the insolvency of the client. Some contracts permit termination only upon default by the other party.

Most of the contracts we examined did not specify remuneration but indicated standard rates of the RAC at the time of use. Alyeska's contract simply calls for reimbursement of its expenses without setting out rates. In few cases the RACs declined to provide information on remuneration.

¹⁴ Alyeska's response contract does define its proposed services in terms of spill response services under contingency plans.

Concern regarding claims

The questionnaires we examined showed a near uniformity of responses regarding concern about adverse claims for damages caused during a spill response. Not a single RAC had experienced any claims arising from spill response.¹⁵ At the same time almost all of them considered the potential for claims to be a concern. We believe this dichotomy reflects the uncertainties that exist about spill damage claims and the great cost in both litigation expenses and liability when litigation actually occurs. Hence it is not surprising that RACs attempt to use means such as indemnification and insurance requirements to deflect potential exposure, even without a history of such claims.

Indemnification provisions

"Indemnification" generally means the obligation of one party to make good a loss suffered by another party.¹⁶ It is very common in contracts for one party or the other to attempt to shift to the other party the burden of bearing liability, either liability created by the first party's acts or by the second party's acts. The most common use of such provisions in RAC contracts is for RACs, as independent contractors, to require the other party to the contract (usually the responsible party for the oil spill) to indemnify the RAC for liability that results from the response action. A typical provision requires the responsible party to "defend, hold harmless, and indemnify" the RAC from claims arising out of the response action (essentially defend claims against the RAC and pay any judgments against the RAC). All of the contracts with indemnity provisions require at least that the responsible party is to indemnify the RAC for claims arising out of negligent acts by the responsible party and arising out of

¹⁵ There is one obvious exception which did not show up in the questionnaires. The response effort in the Exxon Valdez case resulted in numerous claims against Alyeska, the State, and the Federal Government for improper handling of the spill response. As defined in state law, all three of those entities were response action contractors. It is undeniable that in any sizeable spill the response itself will be examined critically and may be fertile grounds for legal claims, apart from the original spill. So far, however, there appears to be a distinction in whether RACs are targeted as defendants between actual field response companies and either governments or entities like Alyeska, which many plaintiffs may view as surrogates for the owners.

¹⁶ Fairbanks North Star Borough v. Kandik Constr. Co., 795 P.2d 793 (Alaska 1990).

compliance with government requirements; some require indemnification also for all claims arising out of the RAC's own negligence, or even out of the RAC's own grossly negligent or intentional acts; and some (notably those of Alyeska and the industry coops) require indemnification for all claims including those arising out of the RAC's actions, no matter who was at fault.¹⁷

To the extent that these contracts require another party to bear the burden of the RAC's own gross negligence or intentional acts, they go beyond the relief given RACs by AS 46.03.825, which maintains RAC liability for grossly negligent and intentional acts. It should also be noted that most of the contracts with aggressive indemnity provisions also do not have the exception in .825 for claims for personal injury or death.

Some RACs agreed to hold their clients harmless (i.e., indemnify them) for the RAC's own negligence. In only one of the contracts we reviewed was there a basic two-sided indemnity agreement. The Chempro contract has Chempro indemnifying the client for negligent or wilful acts by Chempro employees, and the client indemnifying Chempro for negligent or wilful acts by the client's employees or subcontractor's employees. Also, when Chempro causes a loss but not through Chempro's own negligence (e.g., through application of strict liability to a Chempro action), the client indemnifies Chempro. Hence the RAC is relieved of strict liability but both sides bear the burden for their own negligent or wilful acts.

It is not certain that the contractual indemnity provisions will actually succeed in shifting the burden of liability to another party. The courts have defined areas in which indemnification provisions will not be upheld because the

¹⁷ The Alyeska contracts are the best example of a RAC with bargaining power crafting contract terms to protect itself to the maximum. Its contracts require the client to give complete indemnification, including for liability arising out of Alyeska's own negligence. It is arguable that the Alyeska/BP contract also provides for indemnification for liability arising out of Alyeska's own gross negligence or intentional acts. (Tesoro was able to negotiate language that excludes indemnification for grossly negligent or intentional acts.) One compelling fact is that Alyeska, when it contracts with others to serve as RACs for itself, requires its RACs to indemnify Alyeska; hence it protects itself from both directions. Finally, as will be noted later, Alyeska requires its clients to maintain financial responsibility far in excess of what any other RAC requires from a client.

are contrary to "public policy", and would tend to promote a breach of a duty owed to the public at large.¹⁸ The activities identified in this category tend to be those in which there needs to be a constant guarding against negligence. In a case involving operations of an airport, for example, the Alaska Supreme Court refused to enforce an indemnification provision in favor of the State as airport operator because of the importance of avoiding a reduction in the State's incentive to avoid negligence.¹⁹ In contrast it permitted enforcement of an indemnity provision in a highway maintenance contract, because the clause was only a minor disincentive to proper highway maintenance.²⁰ These cases are not limited to indemnification of governments or other public entities, but include public utilities and common carriers. Generally the activity in question must be one in whose safety the public at large has a significant interest. There is an open question whether indemnification of RACs for their activities during a spill would be considered in violation of the public duty exception.²¹

The basic theme of a review of all the contracts is that there is no uniformity, but that most RACs make some attempt to shift some portion of potential liability to the responsible party through indemnification provisions. The questionnaires indicated that except for Alyeska and the two industry cooperatives, none of the RACs required indemnification for their own actions in all circumstances. Generally, we believe the degree of aggressiveness in demanding indemnification in RAC contracts corresponds to the RAC's business sophistication and its negotiating leverage. In the most

¹⁸ See *State of Alaska v. Korean Airlines*, 776 P.2d 315 (Alaska 1989); *Burgess Construction Co. v. State of Alaska*, 614 P.2d 1380 (Alaska 1980); *Northwest Airlines v. Alaska Airlines*, 351 F.2d 253, 258 (Ninth Cir. 1965).

¹⁹ *State of Alaska v. Korean Airlines*, 776 P.2d 315 (Alaska 1989).

²⁰ *Burgess Constr. v. State*, 614 P.2d 1380 (Alaska 1980).

²¹ AS 45.45.900 explicitly bars indemnification provisions for a variety of injuries in construction contracts, on the grounds that they are against public policy. This statute is basically a codification of the common law principle discussed above. However, in 1986 the legislature amended the statute to state that it did not affect the validity of an indemnification agreement "respecting the handling, containment or cleanup of oil or other hazardous substances..." Note that this amendment did not validate such indemnification agreements, but merely stated that the statute did not invalidate them. Hence it is still an open question whether the courts, applying common law principles, would uphold RAC indemnification agreements.

aggressive contracts, the shifting of liability goes well beyond that available to RACs under existing statutes.

Insurance requirements

Some -- but not all -- of the RAC contracts we examined require that the client carry insurance which would cover some portion of the total liabilities arising from the RAC's activities. Whether insurance is required, in what amount, and whether the insurance must explicitly identify the RAC as a third party beneficiary of the insurance, varies widely. And again the variances appear to depend on the sophistication and bargaining power of the RAC.

Insurance requirements appear to run in both directions in these contracts, i.e., in some cases the client requires the RAC to have insurance, and in some cases the RAC requires the client to have insurance. The latter instances are generally those in which the RAC also requires indemnification by the client. An insurance requirement is a natural corollary to indemnification, since indemnification is meaningless unless there exists the financial means to bear the liability.

What is particularly interesting is that most of the contracts requiring insurance do not specify particular amounts. This may reflect in part the difficulty of predicting liability exposure of either the client or the RAC in any particular instance, or it may reflect the assumption by RACs that insurance held by a client who is a potentially responsible party, to protect against the party's own liability, will also be adequate to protect the RAC.

The only contracts we found in which specific amounts of insurance were required by RACs were those of CISPRI, the Cook Inlet industry cooperative, and Alyeska. CISPRI requires its clients to show at least \$10 million in insurance which includes CISPRI as a named additional insured. Alyeska, in what to our knowledge is an entirely unique requirement, has in the past required one billion dollars in financial responsibility.²² Alyeska required that any insurance used to show financial responsibility be directly actionable,

²² "Financial responsibility" means proof of ability to pay liabilities, and generally entails a showing of some combination of insurance, "self-insurance" (a showing of net assets available to satisfy legal judgments), bonds, guarantees, and letters of credit.

i.e., it would permit an injured party to bring its claim directly against the insurer instead of having to sue the insured party first. This requirement presented a major problem for Alyeska's clients since direct action insurance is currently not available in the maritime insurance market. Starting in October 1991 Alyeska requires that if a combination of insurance and other means of demonstrating financial responsibility is used, the total which the client must show is \$1.2 billion. That amount must be made up of a combination of general business liability coverage, P&I insurance²³, and excess pollution coverage. However, according to Tesoro Alaska, Alyeska has dropped the requirement that insurance be directly actionable.

Alyeska officials have told us that the amount it now requires, \$1.2 billion, was arrived at by calculating the maximum amounts for which Alyeska could be held liable in responding to a spill. The amount certainly exceeds any figure that anyone has proposed for the State to require as financial responsibility for the same activities, or which, to our knowledge, any other response organization has required of a potential client. The requirement has caused a considerable amount of difficulty for some of Alyeska's clients²⁴ and was the prime motivating factor behind passage of the bill which became AS 46.03.825, limiting RAC liability.²⁵ Currently, there is no legal limitation on the extent to which a RAC may require insurance or other concessions before it enters into a

²³ P&I insurance is coverage for losses by protection and indemnity clubs whose members are vessel owners. P&I clubs are a primary and established form of maritime insurance.

²⁴ The chief difficulty was for Tesoro Alaska, which charters vessels to take TAPS oil from Valdez to its refineries, and which is the only entity now transporting oil from the Valdez terminal which is not either an owner company of Alyeska or a major oil company. Unlike the major companies, Tesoro is unable to make its showing of financial responsibility through "self-insurance" (a showing of net worth) and already available insurance. Since Alyeska dropped the requirement of direct action insurance, Tesoro has been able to arrange coverage meeting Alyeska's requirements, but the cost of insurance in such an amount puts companies which must obtain this insurance at a disadvantage compared to the larger owner companies which have enough assets to self-insure.

²⁵ A number of legislators involved in the passage of the bill expressed the belief that providing relief to response action contractors was necessary to convince Alyeska to lessen its requirements for providing RAC services in Prince William Sound, and hence relieve Tesoro of its heavy insurance burden. However, as noted above, following passage of the bill Alyeska raised rather than lowered its financial responsibility requirements for Tesoro.

contract with a client.²⁶ It may be possible for the State to legislate such restrictions -- for example, prohibiting financial responsibility requirements in excess of what the State itself requires for entities in similar situations -- but such legislation would raise legal and practical problems. Legally, if the result were to bar a business from protecting its assets in a reasonable way, it could be held that the State had performed a "taking", i.e., had appropriated some part of the business's value and was therefore required to compensate the business. The obvious practical problem is that the more risky the State makes a potential business opportunity, the less likely it is that businesses will enter into it. The State may prohibit certain contract terms, but it cannot require a business to enter into a contract in the first place. In short, State restrictions on RAC contracts could simply result in fewer RACs willing to engage in response actions.

In summary, it is to be expected that RACs which require indemnification also require proof of insurance adequate to fulfill the indemnification requirement. However, we are unaware of any situation in which a response organization has required the amount of financial responsibility required by Alyeska.

Control of Cleanup and Independent Contractor Status

One final aspect of the contracts we examined shows lack of uniformity regarding control of cleanup operations. Some of the contracts include acknowledgement that the client will control and direct the cleanup operations. A few are directly the opposite and include recitations that the client is only interested in the result and will not attempt to control the cleanup operations.²⁷ These contrasting provisions reflect real but incompatible concerns of the clients.

²⁶ If a RAC were discriminatory between different clients, for example putting heavier burdens (or impossible burdens) on some potential clients which it did not place on other clients with which it has a corporate relationship, it is possible that an antitrust violation could be found. Antitrust violations depend on specific facts, however, so it would be unwise to speculate in general terms about the success of such actions.

²⁷ See the CISPRI contract as an example of a client disavowing any control of the cleanup. Interestingly, the two VRCA contracts take opposite tacks on this point: VRCA's contract with Tesoro permits the client to control the cleanup while VRCA's contract with Mapco bars Mapco from control.

On one hand, clients, as potentially responsible parties for the original spill, are concerned that the liability laws are so broad that all damages from a spill which are reasonably foreseeable may be imputed to them, so they have an incentive to oversee the cleanup and maximize its efficiency. Naturally the clients are also concerned about their ability to keep a cap on expenses by RACs. But on the other hand, the clients are concerned to avoid vicarious liability under the theory of respondeat superior. Respondeat superior requires that an employer or principal bear the liability for acts of an employee or agent committed during the course of the employment. There is a recognized exception to the respondeat superior doctrine for acts of an independent contractor, but only if the client does not actively control the actions of the contractor.²⁸ Hence there appears to be a tactical difference of opinion among the clients of RACs over whether maximizing control over RAC activities is preferable or whether distancing oneself from RAC activities is more advantageous.²⁹

²⁸ See Restatement (Second) of Torts, §414; Prosser and Keeton, Law of Torts, §71 (5th Edition 1984); *Everette v. Alyeska Pipeline Service Company*, 614 P.2d 1341 (Alaska 1980); *Hammond v. Bechtel*, 606 P.2d 1269 (Alaska 1980).

²⁹ Several cases indicate that the responsible party which engages a RAC but disavows control of RAC activities may be held responsible for damages caused by the RAC, despite the independent contractor exception to the respondeat superior doctrine. The courts have held that the duty of due care in certain activities -- mainly those with a high potential for injury to the public and where the work itself is inherently dangerous -- is non-delegable. In other words, a party responsible for such an activity may not insulate itself from liability for the harm that results by engaging an independent contractor to do the work. Examples of such activities are common carrier duty to transport passengers safely, the duty of a railroad to fence its tracks, and the duty to provide lateral support for land adjacent to others; the duty to operate airports safely; and the duty to provide safe hospital emergency rooms. See *Jackson v. Power*, 743 P.2d 1376 (Alaska 1987); *Alaska Airlines v. Sweat*, 568 P.2d 916, 925-26 (Alaska 1977).