

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2020 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

A person responsible for a discharge of oil or the person in charge of the vessel or terminal facility from which the oil emanates, who knows of the discharge and who fails to give immediate notification to the commissioner shall be subject to a civil penalty of not less than \$500 nor more than \$250,000 for an individual or \$500,000 for a corporation and guilty of a Class A misdemeanor. § 40.251(b).

OTHER PENALTIES. A person responsible for a discharge of oil shall be subject to a civil penalty of not less than \$250 and not more than \$25,000 for each day of the discharge, or not more than \$1,000 per barrel of oil discharged. § 40.251(c).

A person responsible for a discharge of oil who, without sufficient cause, fails to abate, contain and remove pollution from the discharge pursuant to federal and state requirements and plans shall be liable for a civil penalty of not more than \$25,000 per day for each day the pollution is not abated, contained and removed, and not more than three times the costs incurred by the fund as a result of the discharge. § 40.251(d).

Any person who violates any provision, rule or order as to response and cleanup, payment of costs and damages and liability, shall be subject to a civil penalty of not less than \$100 nor more than \$10,000 per violation for each day of violation, not to exceed a maximum of \$125,000. § 40.251(f).

ADMINISTRATIVE PENALTIES. The commissioner may assess administrative penalties for the violations in the amounts as provided in § 40.251. In determining the amount of penalties the

commissioner shall consider the seriousness of the violation, the hazard or damage caused, the degree of cooperation and quality of the response, the degree of culpability and history of previous violations, the amount necessary to deter future violations and any other matter that justice requires. § 40.252.

VIII. DRILLS AND INSPECTIONS

DRILLS. The state coastal discharge contingency plan shall provide for practice drills for the response command structure and the state response teams. § 40.053(e)(5).

INSPECTIONS AND AUDITS. The commissioner may subject any vessel required to maintain a written c-plan, as a condition to being granted entry into any port of the state or a terminal facility, to an announced or unannounced audit, inspection or drill to determine the discharge prevention and response capabilities of the terminal facility or vessel. Any inspection shall be in cooperation with the United States Coast Guard.
§ 40.116.

ENTRY INTO PORT. Prior to being granted entry into any port in this state, the person in charge of a vessel required to maintain a written c-plan, may be required to report or show:

- (1) any unauthorized discharges from the vessel since leaving the last port;
- (2) any mechanical or operational problem creating the possibility of a discharge;
- (3) any denial of entry into any port during the current voyage of the vessel;
- (4) that the vessel has a c-plan and the trained personnel and equipment to implement it as required; and
- (5) that the vessel has evidence of financial responsibility as required.

§ 40.115.

SCOMM

78:6



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 31, 1992

Re: HB 196 Report

Enclosed please find a list and the full texts of the rebuttals and supplemental information that have been submitted to the Council. Please include it in your packet of background research materials for the HB 196 Section 11 Report.

Thank you.

enclosures

Council Members

Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak
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**SURVEY OF STATE LAWS
ON
GOOD SAMARITAN
OR
RESPONDER IMMUNITY PROVISIONS
FOR OIL SPILLS**

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**SURVEY OF STATE LAWS ON
GOOD SAMARITAN OR RESPONDER IMMUNITY PROVISIONS
FOR OIL SPILLS**

The following is a survey of state statutes, for states with navigable waterways, of good samaritan or responder immunity provisions dealing with oil spill prevention and response. Only statutory law has been surveyed and not case law or common law. The survey also includes references to 1992 pending legislation when such legislation either amends or adds to specific responder immunity provisions in current state law.

This survey is intended to be a reference guide only and is not to be construed as legal advice in any manner. The survey is subject to revision and changes as new laws are enacted. For a determination of specific liabilities and obligations of particular persons, vessels or facilities under the various state laws, the reader should consult the pertinent statutes or seek the appropriate advice of counsel. Any questions regarding this survey should be directed to Laurie A. Frost of the Maritime Department of LeBoeuf, Lamb, Leiby & MacRae.

January 1992

ALABAMA

Citation: Ala. Code § 22-22-1 et seq. (1989 Ala. Laws Ch. 470).

Good Samaritan Law: The statute provides that a person is not liable for removal costs or damages which result from actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator or by any state official with responsibility for oil spill response. The immunity does not apply to (i) a responsible party; (ii) with respect to personal injury or wrongful death; or (iii) acts of gross negligence or willful misconduct.

ALASKA

Citation: Alaska Stat. § 09.65.091; § 46.03.825; § 46.04.080; § 46.08.110; § 46.08.160 (1987, Supp. 1990 & 1991 AK Laws Ch. 92).

Good Samaritan Law: There are three provisions which limit the liability of persons responding to an actual or threatened release of oil:

(1) A person providing equipment or services on the request of a police agency, fire department, rescue or emergency squad, or other state 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, unless the person acted intentionally, recklessly, or with gross negligence. § 09.65.091. In addition, the actual or imminent occurrence of a catastrophic oil spill which is a discharge in excess of 100,000 barrels or any other discharge which the governor determines presents a grave and substantial threat to the economy or environment of the state, constitutes a disaster emergency. § 46.04.080(a).

(2) Volunteers who register with the division of emergency services in the Department of Military and Veterans' Affairs and agree to be trained by the division in techniques for containment and cleanup, and to be available on short notice to assist the division in containment and cleanup, are not liable for costs and damages as a result of actions taken in response to a release or threatened release, unless the actions taken constitute gross negligence or intentional misconduct. § 46.08.110 and § 46.08.160. Volunteers are entitled to per diem and expenses as determined by the division for training and for days spent in service to the state in containment and cleanup actions. Id., § 46.08.110(c).

(3) A person who is a response action contractor with respect to the release or threatened release of oil whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing the claim proves by a preponderance of the evidence that (a) the response action contractor would have been liable for the initial release or threatened release; (b) the response action contractor acted with gross negligence or intentional misconduct; or (c) the response action contractor, without approval of the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan, and the plan was either prepared by that contractor for a responsible party or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release. § 46.03.825(a).

The limitation on liability does not apply to an action for personal injury or death; to an action for personal property damage not caused by oil; or to an act or omission that occurs more than 15 days after the release. § 46.03.825(b).

If the limitation above does not apply, then the oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses or other liability that results from the response action contractor's act or omission with respect to a release or threatened release of oil unless the act or omission is negligent, grossly negligent, or constitutes intentional misconduct. § 46.03.825(c).

ARKANSAS

Citation: Ark. Code Ann. § 8-7-101 (1991).

Good Samaritan Law: No individual partnership, corporation, association, or other entity is liable for civil damages as a result of acts taken, voluntarily and without compensation, in the course of rendering care, assistance, or advice with respect to an incident creating a danger to person, property, or the environment as a result of actual or threatened discharge of hazardous materials, or in preventing, cleaning up, disposing of, or attempting to prevent, cleanup, or dispose of any such discharge. The limitation of liability does not apply to acts of gross negligence, defined as reckless, willful, or wanton misconduct. "Hazardous materials" means all materials and substances which are designated or defined as hazardous by law or regulation of the state or the federal government.

CALIFORNIA

Citation: Cal. Harb. & Nav. Code § 151, §§ 293-294 ; Cal. Gov't Code §§ 8574.1 - 8574.23, § 8670.1 et seq. (1978, Supp. 1991 & 1991 CA. Laws Ch. 300).

Good Samaritan Law: There are two provisions which limit the liability of persons responding to an oil spill:

(1) Under the Harbor Code: Any person including an individual, firm, corporation, association or partnership, who gratuitously and in good faith renders assistance at the scene of a vessel collision, accident or other casualty without objection by any person assisted shall not be held liable for any civil damages sought as a result of the rendering of assistance or for any act or omission in providing or arranging salvage, towage, medical treatment, or other assistance, where the assisting person has acted as an ordinary, reasonably prudent man would have acted under the same or similar circumstances. §§ 293 - 294.

(2) Under the Government Code: No person, including but not limited to, an oil spill cooperative, its agent, subcontractors, or employees, is liable under the laws of the state to any person for costs, damages, or other claims or expenses as a result of actions taken or omitted in good faith in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the administrator, on-site coordinator, or the Coast Guard in response to a spill or threatened spill of oil. § 8670.56.6(a)(1). The

qualified immunity does not apply to any oil spill response action which is inconsistent with the directions of the Coast Guard or is inconsistent with applicable contingency plans. § 8670.56.6(a)(2). Responsible persons remain liable for any and all damages arising from the discharge, including damages arising from improperly carried out response efforts. § 8670.56.6(a)(3).

The limited liability does not extend to a responsible party's agents, employees, and subcontractors remain liable for the discharged oil, unless these entities are immunized as provided by law. The limited liability also does not apply to a cooperative or other person for acts of gross negligence or willful misconduct in connection with the cleanup of a spill. § 8670.56.6(b); § 8670.56.6(d). "Cooperative" means an organization of private persons established for the primary purpose and activity of preventing or rendering care, assistance, or advice in response to a spill or after the administrator certifies that response contracts with qualified and responsible persons are in place to respond to an oil spill. § 8670.56.6(j). Only response efforts to which the certification applies obtain the qualified immunity of this section. Immunity for a person who is regularly engaged in the business of responding to oil spills is only effective for a period of 60 days after commencement of response efforts, but may be extended for a period of 30 days. § 8670.56.6(k).

CONNECTICUT

Citation:

Conn. Gen. Stat. § 22a-452 (1990); 1991 Conn. Laws Act 289.

Good Samaritan Law:

Connecticut has two provisions which limit the liability of persons responding to oil spills: One applies to oil as defined under the federal Oil Pollution Act of 1990; the other applies to oil mixed with hazardous substances and covered under the Comprehensive Environmental Response, Compensation and Liability Act, or to oil spilled into groundwater of the state.

(1) 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 to prevent, minimize or mitigate a discharge of oil to the surface waters of the state, provided the care, assistance or advice is consistent with the National Contingency Plan, or as otherwise directed by the federal on-scene coordinator, or to the extent that the federal coordinator has not given direction, the commissioner of environmental protection. The immunity does not apply to (1) a responsible party; (2) with respect to personal injury or wrongful death; (3) if the person is grossly negligent or engages in willful misconduct; or (4) negligence in the operation of a motor vehicle. 1991 Conn. Laws Act 289.

(2) No person, firm or corporation which renders assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of oil or petroleum or assists in the prevention, cleanup or disposal of any such discharge shall be held liable for oil damages as a result of any act or omission in rendering such assistance or advice, except acts or omissions amounting to negligence, recklessness, intentional wrongdoing, breach of contract or willful or wanton misconduct, unless compensated by an entity other than the Department of Environmental Protection for such assistance or advice for more than actual expenses. "Hazardous materials" means any material or substance designated as such by any state or federal law or regulation. The oil covered by this provision is oil mixed with hazardous substances

and regulated under CERCLA, or oil discharged into the groundwater or onto the lands of the state. § 22a-452(b), as amended by 1991 Conn. Laws Act 289. Immunity does not apply to responsible persons, or to persons under a duty to mitigate effects of such discharge or spill. § 22a-452(c).

Persons rendering assistance or advice are entitled to reimbursement for the reasonable costs expended for containment, removal or mitigation, if discharge or spill resulted from negligence of responsible party. § 22a-452(a).

DELAWARE

Citation: 10 Del. Code Ann. § 8135 (1991 Del. Laws Ch. 5).

Good Samaritan Law: The liability of any person rendering care, assistance, or advice to prevent, minimize or mitigate an oil or hazardous material discharge for any removal costs and damage caused by or related to such care, assistance or advice is limited to acts or omissions of such person which can be shown to have been the result of gross negligence, reckless, willful, wanton and/or intentional acts of misconduct. Limitation of liability does not apply to the actions of any person responsible for the initial discharge, or to any person for personal injuries or wrongful death as a result of the acts or omissions of such person.

FLORIDA

Citation: Fla. Stat. Ann. § 376.09 (1988 & Supp. 1991).

Good Samaritan Law: Persons who voluntarily or at the request of the state agency responsible for cleanups render assistance in containing or removing pollutants are not liable for any civil damages to third parties resulting from such assistance, except for acts or omissions resulting from gross negligence or willful misconduct. § 376.09(4).

A person authorized by the state or federal government to render assistance in containing or removing pollutants is not liable for costs, expenses and damages except for those proximately caused by gross negligence or willful misconduct. § 376.09(5).

Persons who render assistance may be eligible for reimbursement of the cost of containment or removal, provided prior approval for the reimbursement is granted by the Department of Natural Resources. § 376.09(6).

GEORGIA

Citation: Ga. Code Ann. § 12-5-500 et seq. (1991 Ga. Laws Act 534).

Good Samaritan Law: A person is not liable for removal costs or damages which result from actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the federal on-scene

coordinator or by any state official with responsibility for oil spill response. § 12-5-501(a). Limitation of liability does not apply to a responsible party; with respect to personal injury or wrongful death; if the person is grossly negligent or engages in willful misconduct; or to a response under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980. § 12-5-501(b).

HAWAII

Citation: Haw. Rev. Stat. § 267-8(b); § 128D-1 et seq. (Supp. 1990).

Good Samaritan Law: Not specifically related to oil spill response and cleanup. However, any person who in good faith without remuneration or expectation of remuneration renders assistance at the scene of a vessel collision, accident, or other casualty without objection of any person assisted, shall not be liable for any civil damages resulting from the person's acts or omissions in providing or arranging towage or other assistance, except for damages as may result from the person's gross negligence or wanton acts or omissions.

No person shall be liable under Chap. 128D for costs, damages or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with Chap. 128D or at the direction of the on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance. This protection does not apply to liability for damages as the result of gross negligence or intentional misconduct. § 128D-6(e).

Pending Legislation: S. 2256: This legislation would provide immunity from liability for oil spill responders as long as the response is consistent with the National Contingency Plan, or as otherwise directed by the federal on-scene coordinator or appropriate state officials. The immunity does not extend to any actions of gross negligence or willful misconduct or with respect to personal injury or wrongful death.

IDAHO

Citation: Idaho Gen. Laws § 49-2210; § 39-7101 et seq. (1988, Supp. 1990 & 1991 Idaho Laws Ch. 242).

Good Samaritan Law: Idaho has two provisions which limit the liability of persons responding to oil spills:

(1) No person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened leakage, seepage, or other release of hazardous material, or in preventing, cleaning up, or disposing of or in attempting to prevent, clean up or dispose of any such leakage, seepage or other release, is subject to civil liabilities or penalties of any type. The immunities shall not apply to any person:

1. Whose act or omission caused in whole or in part such actual or threatened leakage, seepage or other release and would otherwise be liable therefor; or

2. Who received compensation, or is an employee of a person who receives compensation for services rendered in connection with the emergency, from a person whose act or omission caused in whole or in part the emergency, other than reimbursement for out-of-pocket expenses for services in rendering such assistance or advice.

3. Whose gross negligence or reckless, wanton or intentional misconduct caused damages.

(2) "Hazardous Substance Emergency Response Act." Any state emergency response team, local emergency response team, or other person who responds to a hazardous substance incident at the request of an incident commander shall not be subject to civil liability for assistance or advice. § 39-7113(2). The exemption from liability does not apply to (a) an act or omission that caused in whole or in part such hazardous substance incident or a person who may otherwise be liable therefor; or (b) any person who has acted in a grossly negligent, reckless, or intentional manner. A "hazardous substance" includes petroleum. § 39-7103(4)(b). The "incident commander" is the person in charge of all responders to a hazardous substance incident and who is identified in the Idaho hazardous materials emergency response plan. § 39-7103(5).

ILLINOIS

Citation: 61 Ill. Ann. Stat. § 700-11.1 (Supp. 1990).

Good Samaritan Law: No person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of hazardous materials, or in preventing, cleaning up, or disposing of or in attempting to prevent, cleanup or dispose of any such discharge, shall be subject to civil liability or civil penalties of any type growing out of such assistance or advice. The immunities do not apply to any person:

1. Whose act or omission caused in whole or in part such actual or threatened leakage, seepage or other release and would otherwise be liable therefor; or

2. Who received compensation, other than reimbursement for out-of-pocket expenses for services in rendering such assistance or advice.

3. Whose gross negligence or reckless, wanton or intentional misconduct caused damages.

INDIANA

Citation:

Ind. Stat. Ann. § 34-4-12.2-2 (1986 & 1990 Supp.).

Good Samaritan Law:

A person is not liable for any loss that results from an action taken or lack of an action by that person (i) during an emergency; and (ii) with intent to prevent or minimize harm from the emergency. The limitation of liability does not apply to a person (i) whose act or omission caused in whole or in part the emergency and who would otherwise be liable therefor; (ii) whose act or omission constituted gross negligence or willful or wanton misconduct; or (iii) who receives payment, or is an employee of a person who receives payment, for services rendered in connection with the emergency, from a person whose act or omission caused in whole or in part the emergency. Payment does not include reimbursement for expenses.

"Emergency" means an occurrence that involves a hazardous substance or compressed gas and that creates the possibility of harm to any person to property, or to the environment. "Hazardous substance" means a material or waste that has been determined to be hazardous or potentially hazardous to any individual, to property, or to the environment by the United States Environmental Protection Agency, the federal Nuclear Regulatory Commission, the United States Department of Transportation, the solid waste management board, or the United States Occupational Safety and Health Agency or any agent or designee of any of the above mentioned boards, agencies or commission; or any substance that may be potentially hazardous to any person to property or to the environment. "Loss" means injury to or death of a human being, or damage to property or to the environment. "Person" means an individual, a corporation, a partnership or unincorporated association, or a governmental entity that has qualifications or experience in (a) storing, transporting, or handling a hazardous substance or compressed gas; (b) fighting fires; (c) emergency rescue; or (d) first aid care; or is otherwise qualified to provide assistance appropriate to remedy or contribute to the remedy of the emergency.

IOWA

Citation:

Iowa Code Ann. § 455B.393 (1990).

Good Samaritan Law:

A person who provides assistance at the request of the department or by previous agreement with the department is not liable for damages as a result of that person's acts or omissions in rendering the assistance except, for acts or omissions which result from intentional wrongdoing or gross negligence, or if the person rendered assistance for payment beyond reimbursement for out-of-pocket expenses or with the expectation of such payment. Limitation of liability also does not apply if the person providing assistance is also the person having control over the hazardous substance which created the hazardous condition. "Hazardous Condition" means any situation involving the actual, imminent, or probable spillage, leakage, or release of a hazardous substance (defined to include oil and petroleum products) onto the land, into a water of the state, or into the atmosphere, which creates an immediate or potential danger to the public health or safety or to the environment. "Person having control over a hazardous substance" means a person who at any time produces, handles, stores, uses, transports, refines, or disposes of a hazardous substance, whether the

person owns the hazardous substance or is operating under a lease, contract, or other agreement with the legal owner of the hazardous substance.

KANSAS

Citation: Kan. State. Ann. § 65.3472 (1985 & 1990 Supp.).

Good Samaritan Law: Any person who renders assistance or advice concerning an emergency or accident involving threatened discharge of hazardous materials (defined to include oil and petroleum products) or the cleanup thereof is not liable for any civil damages for acts or omissions in mitigating or attempting to mitigate the actual or threatened discharge of hazardous materials.

The immunity provided does not apply to any person responsible for the discharge and who would otherwise be liable therefor or who receives compensation other than reimbursement for out-of-pocket expenses for its services in rendering such assistance or advice. Nothing in this section shall be construed to limit or otherwise affect the liability of any person for damages resulting from gross negligence or intentional misconduct.

KENTUCKY

Citation: Ken. Rev. Stat. Ann. §§ 411.460, 411.470 (1988 & Supp. 1990).

Good Samaritan Law: No person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge or disposal of hazardous materials (defined to include oil and petroleum products), or in cleaning up such discharge or disposal, is subject to any civil or criminal liabilities or penalties. This immunity does not apply to any person whose act or omission caused in whole or in part the actual or threatened discharge and who would otherwise be liable for the discharge. Also, this immunity does not apply to any person who provides assistance or advice for remuneration or with the expectation of remuneration, except that actual expenses directly incurred due to giving the assistance or advice may be recovered without losing the immunity. The limitation of liability does not extend to any person for damages resulting from such gross negligence, or reckless, wanton, or intentional misconduct.

LOUISIANA

Citation: La. Rev. Stat. Ann. § 30:2000 et. seq. (1989 & Supp. 1991; 1991 La. Lawr Ch. 7).

Good Samaritan Law: There are two provisions which limit the liability of persons responding to an unauthorized discharge of oil:

(1) A person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened hazardous condition or in preventing, cleaning up or disposing of or in attempting to prevent, clean up or dispose of a hazardous condition is not liable for damages resulting from the assistance or advice. La. Rev. Stat. Ann. § 455B.399(1) (1988). Limitation of liability does not apply to a person who (i) receives compensation other than reimbursement for out-of-pocket expenses for services in rendering the assistance or advice; or, (ii) for damages resulting from the person's gross negligence or reckless, wanton or intentional misconduct. § 455B.399.

(2) No action or omission taken by any person, including any discharge cleanup organization, to abate, contain, remove, cleanup, or otherwise respond to pollution from a threatened or actual unauthorized discharge of oil or to otherwise render care, assistance, or advice, whether such action or omission is taken voluntarily, or consistent with the National Contingency Plan or state oil spill contingency plan, or consistent with a response plan required under this Chapter, or consistent with the request of an authorized federal or state official, or consistent with the request of the responsible person, shall be construed as an admission of responsibility or liability for the discharge. Except for the responsible person, no person, including any discharge cleanup organization, that voluntarily renders care, assistance, or advice in an oil discharge cleanup operation is liable for removal costs, damages, or civil penalties, resulting from acts or omissions committed in rendering such care, assistance, or advice. Limitation of liability does not apply to actions for personal injury or wrongful death or for acts or omissions of gross negligence or willful misconduct. § 30.2466 (1991 La. Laws Ch. 7).

MAINE

Citation:

Me. Rev. Stat. Ann. tit. 38, § 552 Sub. 4 (1991 Me. Laws Ch. 380).

Good Samaritan Law:

A responder to an oil discharge is not subject to any civil liabilities or penalties for actions taken or omitted during the course of rendering care, assistance or advice consistent with the National Contingency Plan, a federal contingency plan, the State contingency plan or at the direction of the federal on-scene coordinator or the Commissioner of Environmental Protection unless: (i) the responder is found guilty of gross negligence or willful misconduct, except that any responder guilty of gross negligence or willful misconduct is liable only to the extent that the actions taken or omitted by the responder increase the costs or damages resulting from the spill; or (ii) the claim is for bodily injury to or death of a person. "Responder" means any person who provides assistance or advice in mitigating the effects of a threatened or actual discharge of oil or in the cleanup and removal of any discharge of oil, except for the person responsible for the discharge in the first instance.

The responder immunity does not affect the liability of any other person liable for the damages arising from the discharge or from improperly executed response efforts. Id.

MARYLAND

Citation:

Md. Env't Code Ann. § 4-419 (1987 & Supp. 1990).

Good Samaritan Law:

Except for willful or intentional acts or omissions, a person is not liable for removal costs or damages as a result of acts or omissions taken in the course of rendering care, assistance, or advice in accordance with the statute, unless (1) the person is a person responsible for the discharge, or (2) it is shown by clear and convincing evidence that the damage to persons, property or the environment is significantly increased by the negligent acts or omissions of the person removing, mitigating, controlling, or rectifying an oil discharge. § 4-419(a). A person who gratuitously responds to a Department request for assistance in cleaning up an oil discharge, and who renders care, assistance or advice in accordance with the statutes, is only liable for damages caused by willful or intentional acts or omissions, or gross negligence. § 4-419(b). These provisions do not apply to any cause of action for personal injury or death resulting from an act or omission of a person responding to a discharge. § 4-419(c).

Pending Legislation:

S. 199: This bill would limit the liability of persons responding to oil spills as long as the response is consistent with applicable Maryland law, the National Contingency Plan, or as otherwise directed by the federal on-scene coordinator or appropriate state officials. The person responding would not be liable for costs of containment, cleanup and removal of the discharge. The immunity does not extend to any actions of gross negligence or willful misconduct or with respect to personal injury or wrongful death. The immunity also does not extend to persons defined in § 4-401(G) as being responsible for the discharge, or to responsible parties under the Oil Pollution Act of 1990.

MASSACHUSETTS

Citation:

Mass. Ann. Laws Ch. 21E § 4, § 16 (1988, Supp. 1990 & 1991 Mass. Laws Ch. 476).

Good Samaritan Law:

The federal responder immunity standard was added to Chapter 21E § 4 to limit the liability of any person, except the responsible party as defined under the federal Oil Pollution Act of 1990, for removal costs or damages which result from action taken or omitted in the course of rendering care, assistance or advice consistent with applicable state law, the National Contingency Plan or as directed by the federal on-scene coordinator. Limitation of liability does not extend to acts of gross negligence or willful misconduct; to personal injury or wrongful death. Any liability for removal costs and damages would be borne by the responsible party.

In addition, any person who provides care, assistance or advice in response to a release or threat of release of oil into or onto the tidal waters of the United States shall not be liable for removal costs or damages which result from actions taken or omitted to be taken in the course of providing such care, assistance or advice, as long as such care, assistance or advice is consistent with the National Contingency Plan, applicable state law, or as otherwise directed by the federal on-scene coordinator or by the state official with responsibility for oil spill response. 1991 Mass. Laws Ch. 476.

The statute also provides that response action contractors are not strictly liable to any person for injuries, costs, damages, expenses or other liability, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to real or personal property, or economic loss which results from a discharge, unless the response action contractor is otherwise a liable party. Ch. 21E, § 16.

MICHIGAN

Citation: Mich. Compiled Laws Ann. § 29.7 (1981 & Supp. 1990).

Good Samaritan Law: There are two provisions which limit the liability of oil spill responders:

(1) Any person including an individual, partnership, corporation or voluntary association, who provides assistance upon request of the state fire marshal following an accident or during an emergency which involves the handling, transportation, or storage of a hazardous material is not liable for damages as a result of an act or omission by the person arising out of and in the course of the person's good faith rendering of that assistance unless the person's act or omission was the result of gross negligence or wilful misconduct. Limitation of liability does not apply to a person rendering assistance for remuneration beyond reimbursement for out of pocket expenses in connection with the assistance.

(2) Any response activity contractor that renders assistance in any release is not liable for injuries, costs, damage or other liability, including, claims by third parties for death, personal injuries, illness, loss or damage to property or economic loss that result from the release. Qualified immunity does not extend to action by the response activity contractor that is negligent, grossly negligent, or constitutes intentional misconduct.

Pending Legislation: H. 4806: This bill would extend immunity to oil spill responders for response activity costs or damages incurred in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the federal on-scene coordinator. Qualified immunity does not apply to (i) the responsible party; (ii) an action with respect to personal injury or wrongful death; (iii) to acts of gross negligence or willful misconduct.

MINNESOTA

Citation: Minn. Stat. Ann. § 115E.06 (1991 Minn. Laws Ch. 305).

Good Samaritan Law: Any of the following persons rendering assistance in response to a discharge of a hazardous substance or oil is not liable for response costs that result from actions taken or omitted in the course of such assistance unless the person is grossly negligent or engages in willful misconduct:

(1) a member of a cooperative or community awareness and emergency response group in compliance with standards in rules adopted by the state pollution control agency;

- (2) an employee or official of the political subdivision where the response takes place, or a political subdivision that has a mutual aid agreement with that subdivision;
- (3) a member or political subdivision sponsor of a hazardous materials incident response team or special chemical assessment team designated by the commissioner of the department of public safety;
- (4) a person carrying out the directions of the commissioner of the pollution control agency, the department of agriculture, the department of natural resources, or the department of public safety; or the United States Coast Guard or the federal on-scene coordinator consistent with the National Contingency Plan under the Oil Pollution Act of 1990; and
- (5) a for-hire response contractor.

MISSISSIPPI

Citation: Miss. Code Ann. (1991 Miss. Laws Ch. 582).

Good Samaritan Law: 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 federal on-scene coordinator or by the state official with responsibility for oil spill response. Limitation of liability does not apply to a responsible party; to personal injury or wrongful death; or, if the person is grossly negligent or engages in willful misconduct. "Person" means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body.

MISSOURI

Citation: Missouri Ann. Stat. § 260.545 (1990 & Supp. 1991).

Good Samaritan Law: Any person who provides assistance, including equipment or materials, at the request of the department of natural resources or a political subdivision or volunteer fire protection district or by previous agreement with the department or political subdivision or volunteer fire protection district in the event of a release of a hazardous substance shall not be held liable in any civil action for damages as a result of that person's acts or omissions in rendering such assistance. "Hazardous substance emergency" includes any release of petroleum including crude oil or any fraction thereof. Nothing in this section shall relieve any person from civil damages in the following circumstances:

- (1) Where the release referred to is the result of the person's having control of a spilled hazardous substance;
- (2) Where the person rendered assistance for payment beyond reimbursement for out-of-pocket expenses or with the expectation of such payment; or

- (3) For acts or omissions which result from intentional wrongdoing or gross negligence.

NEBRASKA

Citation: Neb. Rev. Stat. § 81-1568 (1987 & Supp. 1990).

Good Samaritan Law: Any volunteer or any person who provides assistance or advice in attempting to mitigate or in mitigating the effects of an actual or threatened discharge of hazardous materials or who attempts to prevent, dispose of or clean up any such discharge is not subject to any civil liability or penalty, except that the person whose act or omission, in whole or in part, caused such actual or threatened discharge is liable for any negligence of such volunteer or other person. "Hazardous materials" means all materials and substances which are defined as hazardous by Nebraska or federal law or by the regulations of any Nebraska or federal government agency.

NEW HAMPSHIRE

Citation: N.H. Rev. Stat. Ann. § 146-A:7 (1991 N.H. Laws Ch. 92).

Good Samaritan Law: No oil spill cleanup organization or other person acting to contain, remove, clean up, restore or take other remedial or corrective action or measures with regard to the spillage or discharge of oil, or threatened spillage or discharge of oil, is liable for removal costs, penalties, fines or damages of any kind, including but not limited to, natural resources damages or civil damages to government or private parties, unless it is determined that their acts or omissions amounted to gross negligence or willful misconduct, provided that:

- (a) The oil spill cleanup organization or other person was rendering care, assistance or advice, consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator; or
- (b) The oil spill cleanup organization or other person was acting upon the request of the division of water supply and pollution control, or its designee, and pursuant to the division's response procedures. § 146-A:7.

NEW JERSEY

Citation: N.J. Stat. Ann. § 2A:62A-7; I. Stat. Ann. § 58.10-23.11(f); § 58.10-23.11g(1) (Supp. 1990) and 1991 N.J. Laws Ch. 260.

Good Samaritan Law: New Jersey now has four good samaritan laws:

- (1) "No individual, partnership, corporation, association, or other entity shall be liable for civil damages as a result of acts taken or omitted in anticipation or in preparation for, or in the course of rendering care, assistance or advice with respect to an incident creating a danger to person, property, or the environment as a result of

[a]... hazardous discharge." This limit on liability does not apply to the action of the person responsible for the discharge. It is applicable only to third parties rendering assistance. This does not preclude liability for civil damages as the result of gross negligence or intentional misconduct. § 2A:62A-7.

(2) No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assistance in containing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions of gross negligence or willful misconduct. § 58.10-23.11(f).

(3) The liability of any person performing hazardous discharge mitigation or cleanup services in accordance with procedures established by state or federal law for any injury to a person or property caused by or related to these services is limited to acts or omissions of the person shown to have been negligent. 58.10-23.11(g). Acts or omissions of a person performing cleanup services in accordance with generally accepted practice and state-of-the-art scientific knowledge, and utilizing the best technology available to the person at the time of services, creates a rebuttable presumption that the acts or omissions were not negligent. *Id.*

(4) A person is not liable for any cleanup and removal costs or damages of any kind that result from actions taken or not taken in the course of rendering care, assistance or advice with respect to the discharge or threatened discharge of petroleum into waters where the care, assistance or advice is consistent with the National Contingency Plan or as otherwise directed by the federal on-scene coordinator or appropriate State officials. Limitation of liability does not extend to personal injury or wrongful death; to acts of gross negligence or willful misconduct; or to persons otherwise liable for cleanup and removal costs of the initial discharge. A person liable for the initial discharge is liable for any cleanup and removal costs that another person is relieved of under this section. 1991 N.J. Laws Ch. 260.

NEW YORK

Citation: N.Y. Nav. Law, § 176.7(b) (McKinney 1989 & Supp. 1990).

Good Samaritan Law: Any person who gratuitously renders assistance in containing or removing a discharge is not liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering assistance, except for acts or omissions of gross negligence or willful misconduct. § 176.7(b).

Pending Legislation: A. 5327/S. 3429: These bills provide that a person is not liable for clean up and removal costs or damages which result from actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the federal on-scene coordinator or by the commissioner or his designee. However, limitation of liability does not apply (i) to a responsible party, (ii) with respect to personal injury or wrongful death, or (iii) if the person is grossly negligent or engaged in willful misconduct. A responsible party shall be liable for any cleanup and removal costs and damages that another person is relieved of under paragraph (a) of this subdivision. This bill would amend § 176. This bill was left pending in Committee when the legislature adjourned and may be reconsidered in the 1992 session.

§ 176: This bill provides that no person who gratuitously or as a result of proximity to the discharge and the immediacy of the situation renders assistance in containing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance except for acts or omissions of gross negligence or willful misconduct. This bill would amend § 176. This bill was left pending in Committee when the legislature adjourned and may be reconsidered in the 1992 session.

NORTH CAROLINA

Citation:

N.C. Gen. Stat. § 143-215.93A. (1991 N.C. Laws Ch. 432).

Good Samaritan Law:

A person is not liable under state or common law for removal costs or damages which result from, arising out of, or are related to the discharge or threatened discharge of oil, when such removal costs or damages result from acts or omissions in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President of the United States, the federal on-scene coordinator, the Governor, the Secretary, or any person designated to direct oil discharge removal activities. Limitation of liability does not apply to a responsible party, as defined under section 1001 of the Oil Pollution Act of 1990; with respect to personal injury or wrongful death; to a response under CERCLA/SARA; or when the person is grossly negligent or engages in willful misconduct. § 143-215.93A.

OHIO

Citation:

Ohio Rev. Code § 2305.232 (Supp. 1990).

Good Samaritan Law:

No person who gives aid or advice in an emergency situation relating to the release of hazardous material or to the cleanup of hazardous material that has been released, nor the employer of such a person, is liable in civil damages as a result of the aid or advice if (i) the aid or advice was given at the request of state officials or the owner or manufacturer of hazardous materials, or a hazardous material mutual aid group; (ii) the person acted without anticipating remuneration for himself or his employer; (iii) the person was specially qualified by training or experience to give aid or advice; (iv) neither the person or employer giving the aid or advice was responsible for the release; (v) the person giving the aid or advice did not engage in willful, wanton, or reckless misconduct or grossly negligent conduct in giving the aid or advice; (vi) the person giving the aid or advice notified the emergency response section of the environmental protection agency prior to giving the aid or advice. "Hazardous material" means any material designated as such under the "Hazardous Materials Transportation Act." "Mutual aid group" means any group formed at the federal, state, regional, or local level whose members agree to respond to incidents involving hazardous material whether or not they shipped, transported, manufactured, or were at all connected with the hazardous material involved in a particular incident.

OREGON

Citation:

Or. Rev. Stat. § 468.780 (1991 Or. Laws Ch. 606).

Good Samaritan Law:

A person is not liable for removal costs or damages that result from action taken or omitted in the course of rendering care, assistance or advice consistent with the National Contingency Plan or as otherwise directed by the federal on-scene coordinator or by a state official responsible for oil spill response. Limitation of liability does not apply to a responsible party; with respect to personal injury or wrongful death; or if the person is grossly negligent or engages in willful misconduct. A responsible party would be liable for any removal costs or damages for which a person is relieved of under this section. Nothing in this section would affect the liability of a responsible party for oil spill response under ORS 468.780 to 468.833.

PENNSYLVANIA

Citation:

General water pollution law. Pa. Stat. Ann. tit. 35 § 691.1 et seq. (Purdon 1977 & Supp. 1990).

Good Samaritan Law:

No statutory provisions relating to "Good Samaritans."

Pending Legislation:

H. 1867/9 (1992) This legislation would provide limited liability for oil spill responders for removal costs and damages which result from actions taken or omitted in rendering assistance that is consistent with the National Contingency Plan, or as otherwise directed by the federal on-scene coordinator or by the State official with responsibility for oil spill response. The limitation of liability does not extend to the responsible party or to acts of gross negligence or willful misconduct; or to personal injury or wrongful death.

RHODE ISLAND

Citation:

R.I. Gen. Laws § 46-12.3-3; § 46-12.6-1; § 46-12.3-8 (Supp. 1990).

Good Samaritan Law:

Rhode Island has three Good Samaritan provisions:

(1) Any nonprofit entity incorporated as such, which is authorized by the department or the federal government or by the person responsible for a discharge to render assistance in containing or removing petroleum or petroleum products from waters of the state is not liable for costs, expenses and/or damages, unless such costs, expenses and/or damages are a proximate result of acts or omissions caused by gross negligence or willful misconduct of the nonprofit entity. If the nonprofit entity is authorized to render assistance by the person responsible for the discharge, the person responsible is liable for the costs, expenses or damages resulting from the nonprofit entity's acts or omissions. § 46-12.3-3.

(2) Any nonprofit entity qualifying for tax exemptions from the IRS which is authorized by the department or the federal government or by the person responsible for a discharge to render assistance in containing or removing petroleum or petroleum

products from waters of the state is not liable for costs, expenses and/or damages, unless such costs, expenses and/or damages are a proximate result of acts or omissions caused by gross negligence or willful misconduct of the nonprofit entity. If the nonprofit entity is authorized to render assistance by the person responsible for the discharge, the person responsible is liable for the costs, expenses or damages resulting from the nonprofit entity's acts or omissions. § 46-12.6-1.

(3) Persons, other than those responsible for a discharge, who render care, assistance or advice with respect to the discharge of a pollutant into the waters of the state regarding the amelioration of environmental damage caused by the discharge, are not strictly liable for their acts or omissions. § 46-12.3-8.

Pending Legislation:

S. 987: This bill provides that any person who renders care, assistance or advice in cleaning up, containing, removing or otherwise responding to a discharge or threat of discharge of petroleum from the waters of the state, consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the director of the department of the environment, shall not be liable for any costs (including removal costs), expenses and/or damages of any kind (including natural resource damages); provided, however, that this limitation shall not apply to such costs, expenses and/or damages that are a proximate result of that person's gross negligence or willful misconduct. Provided, also, that a person responsible for the initial discharge shall be liable for any costs, expenses and/or damages for which a responder is relieved of liability under this section. This bill would amend § 46-12.3-8. This bill was left pending in Committee at the end of the legislative session and may be reconsidered in the 1992 session.

SOUTH CAROLINA

Citation:

S.C. Code Ann. § 48-43-560 (Law. Co-op. 1987 & Supp. 1989).

Good Samaritan Law:

Any person who, voluntarily or at the request of the Department of Health and Environmental Control, renders assistance in containing or removing pollutants shall not be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct. § 48-43-560(4). This section does not affect the right of any person who renders assistance to reimbursement for the costs of the containment or removal. § 48-43-560(5).

Pending Legislation:

Legislation is expected to be introduced to adopt the federal responder immunity standard in South Carolina.

SOUTH DAKOTA

Citation:

S.D. Codified Laws Ann. § 33-15-18.1. (1986 & Supp. 1990).

Good Samaritan Laws:

A person who provides assistance at the request of any emergency and disaster service agency in the event of an accident or other emergency situation involving the use, handling, transportation, transmission or storage of hazardous material is not liable in

any civil action for damages as a result of his acts of commission or omission in rendering assistance. Nothing in this section grants immunity to a person causing damages as a result of his business activities or by his willful or wanton act of commission or omission in rendering assistance or which takes place without the request of an emergency and disaster service agency. "Hazardous material," means any material, including but not limited to, explosives, flammable liquids, flammable compressed gas, flammable solids, oxidizing materials, poisons, corrosive materials and radiological materials, the loss of control or mishandling of which could cause person injury or death to humans or damage to property or the environment.

TENNESSEE

Citation: Tenn. Code Ann. § 68-27-202 (1987).

Good Samaritan Law: Any person, defined as any individual, partnership, corporation, association, or other entity, who in good faith and without compensation renders emergency care, assistance or advice, upon the request of any police or fire department, rescue or emergency squad, or any governmental agency at the scene of an accident or disaster involving the use, handling, transportation, transmission or storage of hazardous materials is not liable for damages as a result of conduct in rendering such care, assistance or advice unless the damage was caused by gross negligence. Gross negligence shall also include rendering care, assistance or advice with respect to matters in which the person does not possess the technical knowledge or skills concerning such matters. "Compensation" shall not be construed to include the reimbursement of the actual expenses exclusive of salaries of any person rendering such emergency care, assistance or advice; "hazardous materials" includes: a) materials designated as hazardous by any governmental agency; or b) materials where the fire or explosion of or spillage, or other discharge or release creates a hazard to person, property or the environment.

This section does not confer any immunity from liability to any person for actions taken prior to or after the rendering of care, assistance or advice, and shall not affect any potential liability that any person may have arising from the manufacture, generation, transportation, storage or handling of any hazardous material. Any person who is in the business, for a compensation of rendering care, assistance or advice in accidents or existing or impending disasters involving hazardous materials shall not be included under the immunity provisions. § 68-27-203.

TEXAS

Citation: Texas Code Ann. §§ 79.001 - 79.002 (1987 & Supp. 1991); § 40.104 (1991 Tex. Laws Page 3).

Good Samaritan Law: Texas has two Good Samaritan provisions:

(1) Except in the case of reckless conduct or intentional, wilful, or wanton misconduct, a person is immune from civil liability for an act or omission that occurs in giving assistance or advice with respect to an incident that has already occurred, is related to the storage or transportation of hazardous materials, and endangers

individuals, property, or the environment as the result of spillage or other release. § 79.002 (1987). "Hazardous material" is defined to include petroleum products. § 79.001 (1987). This section does not apply to any person giving advice or assistance for or in expectation of compensation from or on behalf of the recipient of assistance in excess of reimbursement for expenses incurred. § 79.002 (1987).

(2) No person or discharge cleanup organization that voluntarily, or pursuant to the National Contingency Plan or the state coastal discharge contingency plan, or pursuant to any discharge response plan required under this chapter, or pursuant to the request of an authorized federal or state official, or pursuant to the request of the responsible person, renders assistance or advice in abating, containing, or removing pollution from an unauthorized discharge of oil is liable for response costs, damages, or civil penalties resulting from acts or omissions committed in rendering such assistance or advice, except for acts or omissions of gross negligence or wilful misconduct.

§ 40.104 (1991 Tex. Laws Page 3).

VERMONT

Citation: Ver. Stat. Ann. § 1251 et. seq. (1984 & Supp. 1990).

Good Samaritan Law: There are no provisions currently exempting from liability "good samaritans" who assist in cleanups.

VIRGINIA

Citation: Va. Code Ann. § 62.1-44.34:18 (Supp. 1991).

Good Samaritan Law: A person who renders assistance in containment and cleanup of an oil discharge or a threat of discharge is only liable for damages for personal injury and wrongful death caused by that person's negligence, and for damages caused by that person's gross negligence or willful misconduct, but shall not be liable for any other damages that are caused by the acts or omissions of that person in rendering such assistance. § 62.1-44.34:18.D. This qualified immunity does not extend to persons discharging or causing or permitting a discharge or threat of discharge into state waters. Id.

WASHINGTON

Citation: Wash. Rev. Code § 90.48.383 (1991 Supp.); § 90.48.325 (1991 Wa. Laws Ch. 200).

Good Samaritan Law: Washington has two good samaritan provisions:

(1) A person is not liable for removal costs or damages that 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 federal on-scene coordinator or by the Department official with responsibility for oil spill response. § 304, added by 1991 Wash. Laws Ch. 200. The immunity does not apply to a

responsible party, with respect to personal injury or wrongful death, or if the person is grossly negligent or engages in willful misconduct. *Id.*

(2) A person who volunteers to assist in the cleanup of spilled oil, or a person who meets the standards established by the Department for contractors providing cleanup and containment services under approved contingency plans, or the state or any unit of local government are not liable for necessary expenses or property damage caused by an act or omission of that person during the oil spill cleanup unless the act or omission was performed in bad faith or with gross negligence. § 90.48.383(1).

WEST VIRGINIA

Citation: W. Va. Code § 15-5-11 (1991).

Good Samaritan Law: The State, any political subdivision, any agency of the State or political subdivision or, except in cases of willful misconduct, any duly qualified emergency service worker complying with or reasonably attempting to comply with this article or any order, rule, regulation or ordinance promulgated pursuant to this article, is not liable for the death of or injury to any person or for damage to any property as a result of such activity. This section shall not affect the right of any person to receive benefits or compensation to which he would otherwise be entitled under West Virginia law, any act of Congress or any other law.

As used in this section, "duly qualified emergency service worker" means any duly qualified full or part-time paid, volunteer or auxiliary employee of this State, or any other state, territory, possession or the District of Columbia, of the federal government, of any neighboring country or political subdivision thereof or of any agency or organization performing emergency services in this State subject to the order or control of or pursuant to the request of the State or any political subdivision thereof. A duly qualified emergency service worker performing his duty in this State pursuant to any lawful agreement, compact or arrangement for mutual aid and assistance to which the State or a political subdivision is a party shall possess the same powers, duties, immunities and privileges he would possess if performing the same duties in his own state, province or political subdivision thereof.

WISCONSIN

Citation: Wisconsin Stat. Ann. § 895.48 (1989 & Supp. 1990).

Good Samaritan Law: Any person is immune from civil liability for his or her good faith acts or omissions related to assistance or advice which the person provides relating to an emergency or a potential emergency regarding either i) mitigating or attempting to mitigate the effects of an actual or threatened discharge of a hazardous substance; ii) preventing or cleaning up or attempting to prevent or cleanup an actual or threatened discharge of a hazardous substance.

The immunity does not extend to any person:

- 1) whose act or omission causes in whole or in part the discharge and who would otherwise be liable for the act or omission;
- 2) whose act or omission constitutes gross negligence or involves reckless, wanton or intentional misconduct; or
- 3) who receives or expects to receive compensation, other than reimbursement for out-of-pocket expenses, for rendering the advice and assistance.

Any hazardous substance predictor or any person who provides the technology to enable hazardous substance predictions to be made is immune from civil liability for his or her good faith acts or omissions in making that prediction or providing that technology.

"Hazardous substance" means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department of natural resources. § 144.01 (4m).

January 31, 1992

**MEMORANDUM OF ALYESKA PIPELINE
SERVICES COMPANY REGARDING**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. The same exemption for RACs should be available.

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

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

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

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

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

January 31, 1992

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

Summary

The Citizens' Oversight Council should make its recommendations to the legislature regarding whether and to what extent it should reduce the limitation on liability for RACs after considering that: (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) potential damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

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

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

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

The spiller is strictly liable for damages caused by oil spills. Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). Exemption cannot "lessen" its overall liability. The spiller will already have demonstrated financial responsibility to pay for response costs and damages.

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

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

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

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

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

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

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

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

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

January 31, 1992

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

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

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

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

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

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

Introduction

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

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

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

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

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

2. Liability for Vessel Spills Under TAPAA

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

Under the comprehensive liability framework created by Congressional

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

1. The right-of-way holders are strictly liable for environmental damages occurring from their activities along or in the vicinity of the pipeline right-of-way.
2. The right-of-way holders must control and remove pollution along or adjacent to the pipeline right-of-way as a result of their activities.
3. Vessel owners and operators carrying oil transported through the pipeline are jointly and severally strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
4. Under TAPAA, Alyeska and the right-of-way holders are not strictly liable for spills from vessels. The right-of-way holders and Alyeska are not required by TAPAA to cleanup oil spilled from vessels in Prince William Sound.

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

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

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

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

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

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

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

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

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

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

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

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

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

LDW44/cas

January 30, 1992

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

January 30, 1992

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

Summary

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

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

LDW43/cas

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

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

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

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

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

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

We believe that these provisions go to the heart of the matter of responder performance.

They insure that responders act with due care because they are not protected if their acts rise

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

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

Statement: "The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained."

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

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

Statement: "The report raises concern over the following potential scenario: A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent.

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

that what is submitted can be executed.

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

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Research Project: Response Action Contractor Activity in Alaska

- Pg. 2 Statement: "The report concludes that the independent operators are the class of responders most suitable for liability limits."
- Rebuttal: It is not clear why independent operators are "most suitable"? For that purpose, OPA-90 does not differentiate between responders -- all responders are covered.
- Pg. 2 Statement: "The report asks whether it is appropriate for a response organization created by those with a duty to respond, (i.e., oil terminal and tanker owners) to be afforded that same degree of immunity."
- Rebuttal: We believe that different degrees of immunity for different categories of responders would be counter productive. Such action misses the fundamental reason for providing the limited immunity for responders: To promote the most bold and aggressive response for the protection of the environment. OPA-90 requires that a responsible party cite private spill response resources in their contingency plans to respond to a worst case discharge in adverse weather conditions. Industry and other business interests have responded by upgrading existing spill response organizations. All responders (co-ops, for-profit and not-for profit contractors, fisherman, volunteers) work for the spiller during a spill. One type of responder should not be afforded certain privileges that others are denied. The spiller is still responsible for all removal costs and damages regardless of the action of a fisherman, their own response organization, etc. unless of course the conditions for immunity are not present.
- Pg. 2 Statement: "The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained."
- Rebuttal: This statement is not factually correct. Granting such limited immunity encourages bolder response rather than a potential delay while lawyers of responders attempt to determine who may be liable for a spill and the risks to be assessed by responders under the current conditions and for every action

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

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

Pg. 2 Statement: "Research indicated that there were no cases in the U.S. where response action contractors were sued or held liable for damages from an oil spill by virtue of their response activities."

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

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

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

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

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

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

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

Pg. 3 Statement: "This means that the state has no way to force a response action contractor to comply with its contractual obligations. The report concludes that the state should take some action to ensure state control over response action contractors to avoid the risk that the response action contractor designated in a contingency plan could fail to perform."

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

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

Pg. 3 Statement: "The report also concludes that because the legal standard for negligence includes full consideration of the emergency atmosphere in which response action contractors operate, response action contractors are protected from the consequences of crisis decision making and do not face an undue burden by being held to a standard of reasonable care under the circumstances."

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

Pg. 4 Statement: "On the other hand, the only way to ensure that injured parties will be compensated is to require that response action contractors exercise due care or face liability."

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

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

Pg. 7 Statement: "The federal government will require a contingency plan holder to demonstrate that it has a contract with a response action contractor, but it is as yet unclear

what the precise requirements will be."

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

Pg. 7 Statement: "Currently, the Oil Pollution Act does not grant the federal government any direct authority over response action contractor activities; the government's only leverage is to give directives to the contingency plan holder who, in turn, presumably would direct the response action contractor to implement the federal order."

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

Pg. 8 Statement: "The report raises concern over the following potential scenario: A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent.

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

Research Project: Insurance coverage availability:

Pg. 8 Statement: "Costs are based upon the following factors: (1) revenues and/or payroll size; (2) historical loss experience; (3) contractual indemnities and their value; (4) statutory immunities; and (5) the general state of the insurance market."

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

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

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

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



John D. Costello
President

July 26, 1991

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

Dear Commissioner Sandor:

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

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

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

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

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

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

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

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

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

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

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

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

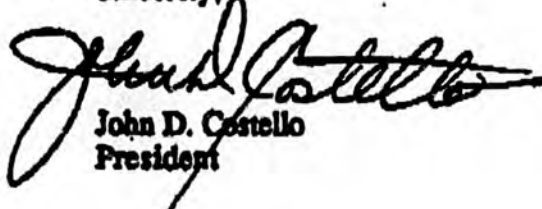
sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

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

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

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

Sincerely,



John D. Costello
President

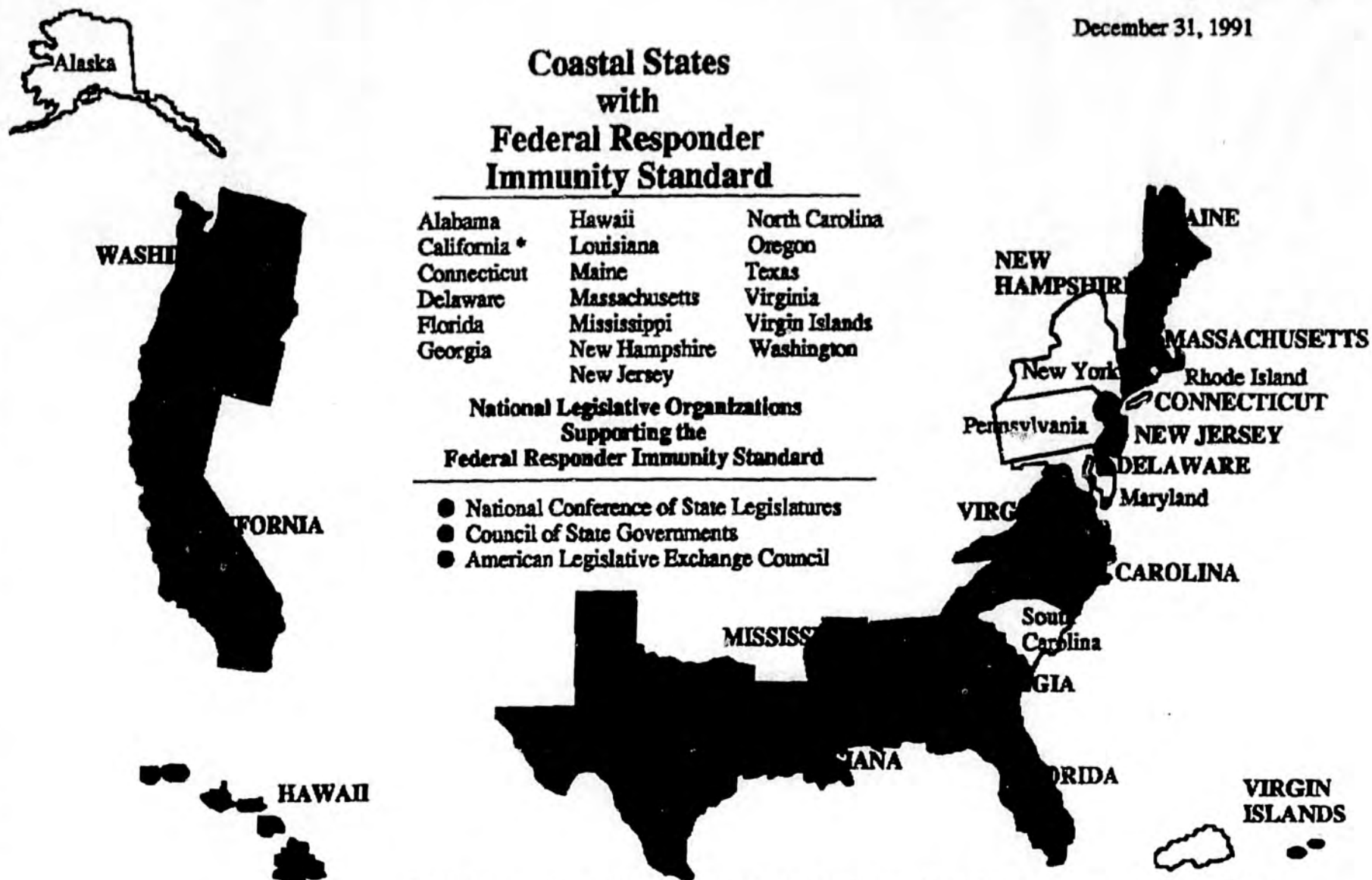
December 31, 1991

Coastal States with Federal Responder Immunity Standard

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

National Legislative Organizations Supporting the Federal Responder Immunity Standard

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



■ Indicates states which have passed responder immunity legislation.

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

January 31, 1992

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

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

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

LDW:ADEC/cas

January 31, 1992

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

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

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

LDW:straubi/cas

SCOMM

78:7

Alaska State Legislature

Senate Committee on Oil and Gas

Senator Sam Cotten, Chairman
Senator Drue Pearce, Vice-Chairman
Senator Bettye Fahrenkamp
Senator Lyman F. Hoffman
Senator Dick Shultz



P. O. Box V, State Capital
Juneau, AK 99811
(907) 465-3711

To: Members, Senate Oil and Gas Committee

From: Sam Cotten, Chair

Re: Russell Douglass Confirmation (AOGCC)

Attached is the letter for your signature on the Russell Douglass confirmation. Mr. Douglass' resume is attached. If you have any questions, please contact Deborah Vogt of my staff.

After you have signed the letter, I would appreciate it if you would circulate it to the next senator named (except Senator Fahrenkamp) and, finally, return it to my office.

Thanks.



Alaska State Legislature

SENATE

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

Date May 8, 1991

The Honorable Dick Eliason
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

In accordance with AS 39.05.080, the Senate Special Committee on Oil and Gas reviewed the following with regard to confirmation of the Governor's appointment:

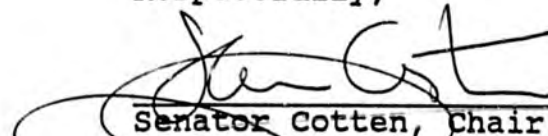
Alaska Oil and Gas Conservation Commission

Douglass, Russell - Anchorage

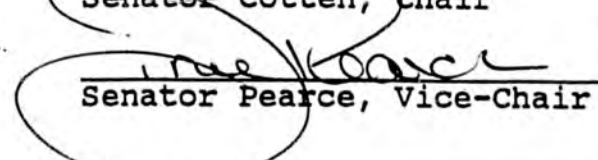
Term began 11/26/90 expires 12/31/94

There were no stated objections to the confirmation of the named individual by committee members. This does not reflect an intent by any of the members to vote for or against him during any further sessions.

Respectfully,

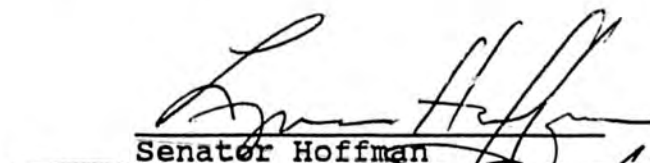


Senator Cotten, Chair

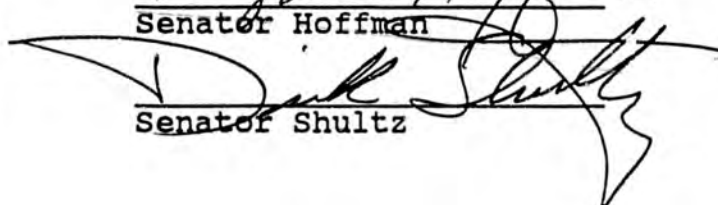


Senator Pearce, Vice-Chair

Senator Fahrenkamp



Senator Hoffman



Senator Shultz

Orig. to
Sen. Sec.
5/9



OFFICIAL BUSINESS

Alaska State Legislature
Senate

Office of the Secretary

PO. BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99801

April 26, 1991

M E M O R A N D U M

TO: Senator Cotten, Chair
Senate Special Committee on Oil and Gas

FROM: Nancy Quinto
Secretary of the Senate

RE: Confirmation of Governor's Appointees

Pursuant to AS 39.05.080, President Eliason has referred the position noted to your committee for a hearing, recommendation and report:

Alaska Oil and Gas Conservation Commission
Douglass, Russell - Anchorage
Term began 11/26/90 expires 12/31/94

w/attached resume

SENT BY XEROX TELECOPIER 10/20/81 2:10 PM

BOARDS & COMMISSIONS

Russell A. Douglass
6750 Teshlar Drive
Anchorage, Alaska 99507
Hm. (907) 349-5696
Bus. (907) 279-1433

FEB 14 1991

EDUCATION: B.S. in Petroleum Engineering, May 1973
Colorado School of Mines - Golden, Colorado

Graduate Courses, University of Alaska Anchorage
Spring 1981: Well Testing Analysis
Fall 1981: Waterflood/Secondary Recovery Technology
Fall 1978: Arctic Engineering

EXPERIENCE:

August 1984 - Present: Senior Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. In addition to responsibilities of the Reservoir Engineering position, prepare reports for the Commission concerning oil and gas reservoir performance in the State. Prepare draft conservation orders and administrative decisions relating to oil and gas operations in the state. Supervise two statistical technicians on the Commission staff.

July 1982 - August 1984: Petroleum Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Same responsibilities as Acting Reservoir Engineer.

December 1980 - July 1982: Acting Reservoir Engineer, Alaska Oil & Gas Conservation Commission. Responsible for updating 3-D reservoir model of the Prudhoe Bay Sadlerochit Reservoir. Gather and analyze well logs, well tests, fluid data and core data for ultimate input into 3-D simulator and overall reservoir surveillance. Preparation of reports and recommendations to Commission concerning model and reservoir performance (GOC movement, well test analysis, log analysis and well performance). Initiate studies of new fields and discoveries in Alaska.

August 1976 - November 1980: Petroleum Engineer for the Oil & Gas Conservation Commission. Responsible for reviewing oil and gas exploration and production operations taking place in the State of Alaska with particular attention to safety aspects, prevention of physical waste and protection of correlative rights. Make recommendations to Commission on problems and situations arising as a result of oil and gas operations in Alaska. Witness well tests and crude oil measurements to insure proper production accounting in the State's interest. Estimate reserves of oil and gas, reservoir potential and evaluate recovery methods and their efficiency. Furnish technical advice on problems associated with but not limited to well spacing, equipment, safety, pollution, unitization and secondary recovery methods.

May 1978 - June 1976: Petroleum Engineer with H.K. van Poolen and Associates Inc. Responsible for general petroleum engineering such as log interpretation, reservoir fluid analysis, well test design and analysis, well stimulation design and application, report writing and coordination of education course reviews and updates. Included field work in well testing, safety equipment inspection and workover operations.

HONORARY & PROFESSIONAL ACTIVITIES:

Licensed Petroleum Engineer--State of Alaska since August 16, 1979 EP4772.

Member, Society of Petroleum Engineers (SPE)

1988 - Present: Continuing Education Chairman

June 1990: Elected Treasurer for one year term

Member, Chugach Electric Association, Member Advisory Council (MAC)

Served one year as Vice-Chairman and one year as Chairman

REFERENCES: See attached

MEMORANDUM

State of Alaska

TO: Kevin Bruce, Special Assistant
Office of the Governor

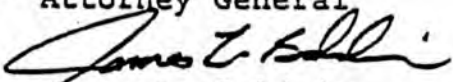
DATE: February 3, 1983

FILE NO: 366-391-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Withdrawal of
appointment


By: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You have asked if Governor Sheffield may refuse to forward to the legislature the name of a person appointed by the former governor to an office in the executive branch of state government.

We have attached a copy of our earlier memorandum of advice of December 10, 1979. In that memorandum we advised the governor that he may remove a person before confirmation by withdrawing the nomination, or if the name has not been forwarded to the legislature, by informing the person that he or she is no longer under consideration. We reaffirm that advice. However, you should consider the fact that no authority is cited for our earlier advice and that no Alaska case exists to guide us concerning the resolution of this issue.

If our reasoning expressed in the earlier memorandum is rejected by a court, and the appointment is not considered to be a nomination, then an appointee whose name is summarily withdrawn may have a cause of action for denial of a property right without due process of law. See Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981).

JLB/pjg

Enc.

Vicki A. Clayman
Office of the Governor

DATE: December 10, 1979

FILE NO: J-66-334-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Reappointments to
boards or commissions

By:

Rodger W. Pegues
Assistant Attorney General

You have asked whether, prior to the expiration of his own term, the Governor can make reappointments of members of boards or commissions whose terms expire thereafter. You also ask whether, if that is the case, the new Governor can revoke the reappointment and appoint someone else.

We believe that the answer to both questions is yes.

When a term for an office is set by law, the term continues until its conclusion, regardless of the actual tenure of any person who may hold the office from time to time. Thus, when an incumbent leaves office prior to the expiration of his term, his successor is appointed for the remainder of that term, and the successor must be reappointed if he is to hold the position beyond the end of that term. Accordingly, no matter what an incumbent may do, his term continues until its prescribed end.

Nothing, however, precludes the Governor, as appointing authority, from anticipating the end of terms of office and making present appointments to fill the offices as those terms expire in the near future. Indeed, he is required to do this during each session of the legislature with respect to offices which have terms which will expire before July 2, and to submit the names of his appointees to the legislature for confirmation. AS 39.05.080(1). Hence, the Governor, even though he may be leaving office in early December, may make appointments for terms which begin the following January.

If the appointments are subject to confirmation, they are not complete until the legislature confirms them. Prior to confirmation, the new Governor may withdraw the nomination. And indeed, he need not even submit it and can merely revoke the nomination outright. If the appointments are not subject to nomination, they take effect when the appointee qualifies and takes office. That cannot happen until the new term for the office begins. Until that time,

Ms. Vicki A. Clayman
December 10, 1979
Page #2

the appointment can, as a general rule, be revoked.

It is probably because each new Governor has the power to countermand any appointive actions taken by each outgoing Governor which remain pending that the latter have not established a history of making midnight appointments to terms of office which begin after they leave office. Where, as in the famous case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense. But where they remain pending, they will have been futile unless the incoming chief executive approves of them as well.

RWP/pjg

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MEMORANDUM

April 12, 1991

SUBJECT: Appointment of Oil and Gas Conservation Commission
Member (W.O. 17LS-1159)

TO: Representative Bill Hudson
Attn: Andy Spear

FROM: Jerry Luckhaupt *GPL LMB*
Legislative Counsel

QUESTIONS PRESENTED:

I. Is the appointment of Russell Douglass to the Oil and Gas Conservation Commission by Governor Cowper, prior to Governor Cowper leaving office, valid and binding on Governor Hickel?

ANSWER: Yes. See discussion I.

II. Can the legislature confirm Mr. Douglass' appointment absent any communication from Governor Hickel requesting Mr. Douglass' confirmation?

ANSWER: Yes. See discussion II.

III. What happens if the legislature does not act to confirm Mr. Douglass' appointment on its own or if the governor continues to fail to refuse to send Mr. Douglass' name down to the legislature for confirmation?

ANSWER: Mr. Douglass' appointment will be rejected by operation of law, AS 39.05.080(3), on the last day of the current legislative session. Governor Hickel will be free to appoint another person to Mr. Douglass' seat. See discussion III.

IV. Can Governor Hickel remove Mr. Douglas from his position on the Oil and Gas Conservation Commission and on what grounds?

ANSWER: Yes. For "cause" as provided in AS 31.05.007(d). See discussion IV.

FACTUAL BACKGROUND

The facts as I understand them are that a vacancy existed on the Oil and Gas Conservation Commission.^{1/} Governor Cowper in a letter to Mr. Douglass dated November 29, 1990, appointed Mr. Douglass to the vacant seat.^{2/} Mr. Douglass executed an oath of office, as required by art. XII, § 5 of the Alaska Constitution and AS 39.05.040, on December 4, 1990. Mr. Douglass remains in his position as a member of the Oil and Gas Conservation Commission and continues to be paid accordingly.^{3/} To date, Governor Hickel has not presented Mr. Douglass' name to the legislature for confirmation.

DISCUSSION

I

In answer to your first question, it appears that Mr. Douglass' appointment is valid and binding on Governor Hickel. AS 31.05.007(b) provides:

(b) A vacancy arising in the office of a commissioner shall be filled by appointment by the governor and confirmed by the legislature in joint session, and an appointee selected to fill a vacancy shall hold office for the balance of the full term for which the predecessor on the commission was appointed.

This section requires the governor at the time a vacancy exists to fill that vacancy by appointment, subject to the legislature's authority to confirm or fail to confirm the

^{1/} Sufficient information has not been provided to me so that I can determine if that vacancy was as a result of a resignation or by expiration of term. It appears that the vacancy was caused by resignation as the appointment by Governor Cowper was for a term ending December 31, 1994. Since Oil and Gas Conservation Commission members are appointed for six-year terms, AS 31.05.007, it appears that Mr. Douglass' appointment was for the balance of a full term. Regardless, the information that has been provided to me by your staff is that at the time of Mr. Douglass' appointment no one was currently occupying that particular seat on the Oil and Gas Conservation Commission and no one was receiving a salary for that position.

^{2/} Information supplied by your staff seems to indicate that the appointment occurred on November 26, 1990. The letter of appointment from Governor Cowper does not support this earlier date.

^{3/} The members of the Oil and Gas Conservation Commission are essentially full-time employees and receive an annual salary and are in the exempt service. AS 31.05.015.

appointee at a later time. This section is consistent with art. III, § 26 of the Alaska Constitution which states:

Section 26. Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.^{4/}

AS 39.05.080(4) further implements these sections. It provides:

(4) Pending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, and have the powers and be charged with the duties prescribed by law for the appointive positions or membership.

Based upon these provisions and the facts as presented, clearly there was a vacancy in the membership of the Oil and Gas Conservation Commission. Governor Cowper pursuant to statutory and constitutional directive appointed Mr. Douglass to fill that then existing vacancy. Mr. Douglass executed his oath of office, took office, and remains in the office to this day. Mr. Douglass' appointment appears to be entirely valid.

But is this appointment binding on Governor Hickel or may Governor Hickel withdraw Mr. Douglass' appointment because he has not been confirmed by the legislature? I believe that Mr. Douglass' appointment is binding on Governor Hickel and that Mr. Douglass may not be removed from office absent the legislature's failure to confirm him or the finding by Governor Hickel of sufficient "cause" as described in AS 31.05.007(d).

Support for this conclusion is found in the plain language of the Constitution and in the court decisions. The Constitution recites in art. III, sec. 26 that the members of those boards or commissions shall be "appointed" by the governor. To determine the meaning of "appointed" we can look to other provisions of the Constitution for assistance. Article II, sec. 5 of the Constitution refers to the terms "nominated,"

^{4/} It appears from an examination of their powers and duties that the Oil and Gas Conservation Commission is a regulatory, if not a quasi-judicial, commission as stated in art. III, § 26 so as to require that those appointed by the governor to a position on the commission are subject to confirmation by the legislature. In fact, AS 31.05.005(a) recites that the commission is an "independent quasi-judicial agency of the state. . . ."

"elected," or "appointed" as exclusive alternatives which are "clearly intended to catalogue the routes by which one may attain an 'office or position of profit.'" Begich v. Jefferson, 441 P.2d 27, 32 (Alaska 1968). In Alaska, "appointed" clearly does not mean "nominated."

That nominated and appointed are not synonymous terms in this state is further supported by the proceedings of the framers of our constitution. Art. III, § 26 of our constitution, as originally proposed in Committee Proposal No. 10a, by the Executive Branch Committee of the Alaska Constitutional Convention stated:

Whenever a board or commission is at the head of a principal department or of a regulatory or quasi-judicial body, the members thereof shall be **nominated and appointed** by the governor, with the advice and consent of the senate. . . .

This "nomination" language and reasoning was specifically rejected by the framers of our constitution as it was finally enacted.

The distinction between "nominated" and "appointed" is significant. In the federal system, the president "nominates" persons to the senate for confirmation. A federal "nominee" does not take office pending confirmation. In that situation:

There is no 'appointment' within the meaning of vesting final title to the office until acted upon affirmatively by the legislative branch of government. Justice Marshall states that until the legislature acts, the president is free to choose whom he will.

Munson v. Territory of Alaska, 16 Alaska 580 (1956). But, an "appointee" takes office and is vested with all the duties, powers, and responsibilities of the office subject only to the legislature's authority to fail to confirm the appointment. When a person is "appointed" and takes office and exercises the powers of the office, the governor has performed the "last act" necessary to vest the person with the powers of the office. The governor may not later withdraw or revoke the appointment except that he may remove the appointee as provided by law.

In Division of Elections v. Johnstone, 669 P.2d 537, 539-540 (Alaska 1983) the supreme court held that the term appointment as used in the Constitution means "to designate for office." The court also found that the appointment of a superior court judge was effective on the completion of the "last act" of the appointing authority, in that case, the letter of appointment issued to the judge by the governor.

The court cited McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930) in support of this proposition. In McChesney, the Kentucky Supreme Court was confronted with a situation where the governor, having the authority to appoint

members of a board subject to confirmation by the Senate, appointed in the interim (between sessions of the legislature), McChesney who entered upon and performed the functions of the office. Several months later, before the legislature had again convened, the governor removed McChesney without cause and appointed another person. McChesney sued to retain his office. The court held that the governor's purported removal of McChesney was illegal. The court stated that the governor by naming and appointing McChesney had exhausted his power to appoint and performed the "last act" necessary to vest McChesney with his office, subject only to the state senate's authority to confirm or fail to confirm and to the governor's authority to remove McChesney for cause as provided by law. The court further contrasted the situation where an officer is "appointed" subject to confirmation by the legislature (as exists in Alaska by art. III, sec. 26 of the Constitution) with the situation where an officer is "nominated" subject to confirmation (as exists for federal appointments) and said:

Furthermore, in cases where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested. But under our system the appointee of the Governor takes the office, enters upon the performance of its duties, and is charged with responsibility. He holds then subject alone to the action of the Senate. His status is not that of a nominee awaiting confirmation, but that of an officer invested with the powers, privileges, and responsibilities of the position until the Senate acts. A recall of his designation would operate as a removal from office. It is argued that appointment to the office consists of two separate acts, one by the Governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers do not act concurrently, but consecutively, and action once taken and completed by the executive is not subject to reconsideration or recall . . . What, then, constitutes an appointment insofar as the chief executive has to do with it? Appointment to an office by one possessing the appointing power is the designation of another person to discharge the duties of the office. [Citation.] It is completed when the appointing authority has performed the acts incumbent upon him to accomplish the purpose. [Citations.] The fact that the title to the office, and the tenure of the officer, are yet subject to the action of the Senate, does not render incomplete the act of the chief executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office, and constitutes the last act respecting the matter to be performed by the executive power. [Emphasis supplied].

McChesney, supra, at 587.

The court concluded by stating: "Such power as flows from the act of the Governor in making the appointment is invested by the statute in the appointee, and may not thereafter be recalled or bestowed upon another unless the consent of the Senate is withheld." See also Barrett v. Duff, 114 Kan. 244, 217 P. 918 (1923).

The rule discussed in McChesney v. Sampson has been variously stated by courts and commentators to be the "majority rule," the "general rule," and to be "universally held." See e.g., Barrett v. Duff, supra; State v. Essling, 128 N.W. 2d 307, 311 (Minn. 1964) ("well settled"); State v. Brewster, supra; 89 ALR 135 ("general rule").

McChesney and the rule discussed in it are based upon Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 159-60, 2 L.Ed 60, 68-69 (1803) in which Justice Marshall stated:

[W]hen the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.

While the principle of a strong executive is embraced by our Constitution and recognized by our courts, Bradner v. Hammond, 553 P.2d 1, 3, n.3 (Alaska 1976), that principle does not mandate a different conclusion than that reached by the United States Supreme Court, the McChesney court and their progeny. To state that a subsequent governor has the authority to recall the appointments of a previous governor, absent constitutional or statutory authority, would render appointments to office personal to the particular governor and his term. This is contrary to our Constitution which establishes an office of governor and provides for succession to that office. Under our constitution there is a governor and a governor there will always be, though the individuals occupying the office may come and go. See e.g., People v. Shawver, 30 Wyo. 366, 222 P. 11 (1924); Barrett v. Duff, supra; State v. Brewster, 84 S.E.2d 231, 246 (W. Va. 1954); Tappy v. State, 82 So.2d 161, 169 (1955).

The fact that Mr. Douglass executed his oath of office one day after Governor Cowper left office does not appear to be particularly significant. When Governor Cowper appointed Mr. Douglass, that is, named him to the office in the letter of appointment, there was a present vacancy on the Oil and Gas Commission. Under the rationale of the Alaska Supreme Court in Johnstone, supra, Mr. Douglass was appointed at that time, while Governor Cowper was still in office, with all the powers, duties, and responsibilities of the Governor of Alaska. If Governor Cowper had attempted to appoint Mr. Douglass to a position where a vacancy did not then exist,

but for which a vacancy was anticipated in the future (for example, a seat on a commission that was currently occupied but the occupant's term was due to expire, say January 1, 1991), then I would conclude that a purported appointment by Governor Cowper to take effect in the future, after Governor Cowper had left office, would not be binding upon the subsequent administration.^{5/} Such is not the situation here.

This distinction was recognized in an Alaska Attorney General's opinion issued from Rodger Pegues to Vicki Clayman on December 10, 1979. (Copy attached). In that opinion the attorney general opined that appointments by an outgoing governor to take effect beyond the governor's term are not binding upon and may be withdrawn by the new administration. That opinion, though, recognizes that if "the appointments can be accomplished in their entirety before the expiration of the appointing authority's own term of office, midnight appointments make some sense." Presumably, if they make sense, then they are also effective and binding upon the new administration. If there is a present vacancy in office and when the governor performs that "last act," in this case the letter of appointment, then the appointment is effective and binding upon the new administration, subject only to the legislature's power to confirm or not to confirm and the statutory authority of the new governor to remove the appointee "as provided by law."

Finally, support for this conclusion is found in the settlement of a lawsuit brought by a former member of the Alaska Commercial Fisheries Entry Commission, Michael Whitehead against the state. Mr. Whitehead was appointed to a position on the commission on October 16, 1982, by then Governor Hammond. Governor Sheffield took office in December, 1992, and on February 28, 1983, Governor Sheffield appointed another person to fill the position occupied by Mr. Whitehead. AS 16.43.030(a) provided that the members of the commission could only be removed for cause. Governor Sheffield contended that he had the authority to withdraw Mr. Whitehead's appointment as Mr. Whitehead had not as yet been confirmed by the legislature.^{6/} Mr. Whitehead then sued to retain his position on the commission. The state settled the lawsuit by paying Mr. Whitehead his salary and benefits as a member of the commission up to June 16, 1982, and an additional \$75,000.

The similarities between the Whitehead case and the present case are numerous. The settlement by the state seems to support a conclusion that a subsequent administration may not withdraw or revoke the valid, effective appointments of a

^{5/} A purported "appointment" to take effect at some date in the future is in actuality a "nomination" because the "appointee" is not then, at the time of "appointment," vested with all the duties, powers, and responsibilities of the office.

^{6/} It was apparently the state's position that Mr. Whitehead was a "nominee" and that the "last act" necessary to make his appointment effective was confirmation by the legislature.

previous administration where the appointee has taken office and is exercising the powers, duties, and responsibilities of the office.

Be advised that the Alaska Attorney General in an opinion from James L. Baldwin to Kevin Bruce, dated February 3, 1983 (copy attached) advised the Sheffield administration that the governor had the authority to withdraw an appointment made by a previous governor. The opinion does not cite any authority for this position other than the Pegues opinion discussed earlier.

II

You have asked what the authority of the legislature is to hold confirmation proceedings for an appointee of the governor when the governor fails or refuses to transmit the name of the appointee, or notice of the appointment, to the legislature for confirmation.

Initially, in considering your question we must look to the constitution to determine the appointment power of the governor and the authority of the legislature to confirm or reject those appointments. Article III, sec. 25, of the Alaska Constitution provides:

The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of all principal departments shall be citizens of the United States.

And art. III, sec. 26 provides:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

These provisions provide that the governor has the authority to appoint the "head of each principal department" of the state and the members of each board or commission that "is at the head of a principal department or a regulatory or quasi-

judicial agency." These appointees are all subject to the legislature's constitutional authority to confirm or reject them.^{2/}

In Bradner v. Hammond, 553 P.2d 1, 7 (1976), the Alaska Supreme Court described the authority of the legislature to confirm the appointees described in sections 25 and 26 as:

not a distinct legislative power, but rather a part of the executive power of appointment which has in turn been delegated in some specific instances by constitution to the legislative branch of government.

Therefore, the power of confirmation of the governor's appointees to the "head of each principal department" and to membership on each board or commission that "is at the head of a principal department or a regulatory or quasi-judicial agency," though normally an executive branch function, has been exclusively delegated to the legislature by the Alaska Constitution.

To implement this confirmation power granted by the constitution the legislature has enacted AS 39.05.080. This section provides that the governor:

shall, within 30 days of the convening of the legislature in regular session, present to the legislature the names of the following persons: (A) persons appointed to a position or membership who have not previously been confirmed by the legislature or either house of it; (B) persons appointed subject to confirmation to fill an existing position or membership vacancy; (C) persons to be appointed subject to confirmation to fill a position or membership the term of which shall expire before July 2, following the session of the legislature. If an appointment is made after the deadline but while the legislature is in session, the appointing authority shall, within five calendar days after the appointment is made, present to the legislature for confirmation the name of the person appointed. The deadline may be extended by the legislature by the approval of a concurrent resolution. . . .

But what if the governor fails or refuses to transmit the names of his appointments, or a particular appointment, to the legislature? Is the legislature without authority to confirm or reject the appointment if the governor does not commence the confirmation process by transmitting the name? The Alaska Supreme Court has

^{2/}Other appointments subject to legislative confirmation include certain military officers, art. III, §19; the non-attorney members of the judicial council, art. IV, §8; members of the Commission on Judicial Qualifications, art. IV, §10, and members of the University of Alaska Board of Regents, art. VII, §3.

never considered this issue but the courts of several other states have. The leading case on the subject of the legislature's authority to confirm or reject a gubernatorial appointment in the absence of a communication by the governor appears to be People v. Shawver, 30 Wyo. 366, 222 P.2d 11 (1924). Shawver was cited by the Alaska Supreme Court in Bradner for the proposition that confirmation is actually a portion of the executive's appointment power that has been delegated to the legislature by the constitution. Bradner, supra, at 7, n. 19. In Shawver, the Wyoming Supreme Court after reaching this conclusion addressed the next part of the issue presented by that case: Whether the Wyoming Senate (granted the power to confirm the appointees of the governor by the Wyoming Constitution) could act to confirm or reject an appointee when the governor did not transmit the appointee's name to the Senate and did not ask that the appointee be confirmed? The case involved the appointment of an individual to a state office by a governor who was then succeeded by another governor. The new governor failed to submit the appointment to the Senate for confirmation. The court said:

But why may not the Senate act upon an appointment of which it has knowledge, if the Governor should refuse or neglect to ask for such action especially where the appointee is known to have entered upon the duties of the office? A provision for an appointment by the Governor with the consent of or to be confirmed by the Senate directs not only what shall be done, but also in effect what shall not be done. The affirmative act of the two governmental agencies is required to confer title to an office under such a provision. A completed appointment cannot be made in any other way than as so provided. [Citations omitted] While the Governor's act in selecting the person to be considered for an office may be the principal and perhaps the more important one of the two, it is not alone sufficient. A construction of such provision denying the right of the Senate to act in any case unless directly requested to do so by the Governor or by a communication from his office would obviously give him the power to ignore the coordinate right of the Senate, and might mean the abolition of that right, and certainly would make it entirely dependent upon the Governor's pleasure.

Shawver, supra, at 23 - 24. The court then held that the Wyoming Senate properly confirmed an appointee, though the governor had not requested the confirmation.

The Kansas Supreme Court reached a similar conclusion in Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). That case involved the appointments to state offices by a governor during a recess of the legislature. The appointees entered upon the duties of their offices. A new governor took office and attempted to appoint others to the offices and removed the previous governor's appointees. By constitution, the Kansas Senate had the authority to confirm the appointees of the governor and the governor

could not remove the state officers involved here except as provided by law, for cause. The court said:

The plaintiffs deny any force or validity to the action of the Senate in considering and confirming the appointments of defendants because of the failure of the executive to directly transmit the names of defendants. No good reason is advanced why the Senate would not consider such recess appointments without such direct word from the executive. Judicial notice or knowledge is the cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. Judicial notice means that the court will bring to its aid and consider, without proof of the facts, its own knowledge of those matters of public concern which are known to all well-informed persons. Legislative notice is far broader than judicial notice. 23 C.J. 58. The legislative department is equipped to deal with any condition, general or special, however manifested or brought to the knowledge of the law-making power. The mass of individual legislation found among the statutes of all the states demonstrates this legislative attribute. [Citation omitted].

The offices in controversy are all located in the capitol building, in which the Senate holds its deliberations. They are important departments of the state government. The Senate may, and often does, have official business with them. It receives reports from them. It considers the service which the departments are, by law, required to perform. It considers the extent of such service and its requirements. It considers and passes appropriations in order that they may lawfully and properly function. Under all the circumstances, the Senate cannot shut its eyes to the facts as to whether their respective offices are filled; whether they are functioning under the law, or whether there is a vacancy therein. . . . The Senate, which has official knowledge of all of the acts of another state department, may not close its eyes to an existing fact merely because the executive has failed to transmit a communication giving it the advice. The fact that the Senate is called upon to consent to or confirm appointments presupposes an investigation upon which to base its judgment as to whether or not it should confirm or reject the named appointee. It is a matter of common knowledge that the Senate of Kansas, likewise the Senate of the United States, may, and frequently does, investigate the character, fitness, and ability of the appointee submitted for its consideration. The Senate must be permitted to investigate on its own initiative, and without communication from the Governor, the status of offices; otherwise the Governor could fill and refill them at his pleasure by simply failing to advise the Senate. . . . We conclude that the Senate did not go beyond its powers

in making the investigation concerning the offices held by the defendants, and, having satisfied itself, that it could properly exercise its judgment thereon. While it is the usual and customary courtesy of the executive to transmit such facts to the Senate, we believe it the better view to hold that the Senate may, on its own initiative, if it so desires, ascertain the facts upon which to base its deliberative and final judgment in confirming or rejecting appointees of the Governor.

Barrett, supra, 925-926.

Virtually all other courts that have considered this issue have reached the same conclusion. See, e.g., Bell v. Sampson, 232 Ky. 376, 23 S.W.2d 575 (1930); McChesney v. Sampson, 232 Ky. 395, 23 S.W.2d 584 (1930); State v. Halladay, 219 N.W. 125 (S.D. 1928); State v. Brewster, 84 S.E.2d 231, 248 (W.Va. 1954); Commonwealth v. Stewart, 286 Pa. 511, 134 A. 392 (1926). Our research has disclosed only one court decision that has reached an opposite conclusion, Attorney General v. Warner, 299 Mich. 172, 300 N.W. 63 (1941). That court though, held that under the Michigan Constitution and that State's court decisions that the confirmation power of the legislature is a legislative power, not a delegation of the executive's appointment power. As such, its reasoning is contrary to the Alaska Supreme Court's decision in Bradner and is distinguishable on that ground.

Therefore, I conclude that the legislature may properly consider the confirmation or rejection of art. III, sec. 25 and 26 appointees of the governor, absent a communication from the governor of a particular appointment or appointments made during the interim and the session. While it is hoped that the governor will comply with the reasonable procedure for communication of appointments the legislature has provided in AS 39.05.080, if the governor fails or refuses the legislature may take notice of previous appointments and of the persons occupying the constitutional offices listed in sections 25 and 26. To hold otherwise would allow the governor to prevent the legislature from exercising its constitutional confirmation power at his whim, caprice, or neglect and would render the confirmation function a nullity. Shawver, supra. Such an absurd result was not intended by the framers of our constitution and would not, we believe, be embraced by our courts.

III

For your third question you ask what happens if the legislature does not act on Mr. Douglass' appointment on its own and if Governor Hickel continues to fail or refuse to transmit Mr. Douglass' name to the legislature for confirmation? The result of these inactions would be the failure of the legislature to confirm Mr. Douglass' appointment to the Oil and Gas Conservation Commission as required by art. III, § 26 of the Alaska Constitution. Such an act would be tantamount to a rejection under

AS 39.05.080(3) on the day the session adjourns.^{8/} Munson v. Territory of Alaska, discussed earlier in answer to question 1, reaches a similar conclusion.

Although, AS 39.05.080(3) does anticipate an orderly procedure for confirmation or rejection of all appointments by providing that all appointments will be presented to the legislature, (and if not confirmed they are rejected by operation of law), it does not anticipate the situation where an appointment has been made and a request for confirmation is not communicated to the legislature. But, just as the legislature may take notice of an appointment for the purpose of confirming an appointee, as discussed in answer to your second question earlier, so too, is the legislature charged with notice when it fails to confirm a gubernatorial appointee even without communication from the governor. Shawver, supra; Bell v. Sampson, supra. Therefore, if the legislature does not act to confirm Mr. Douglass with or without a communication from the governor, Mr. Douglass' appointment will have been rejected by the legislature on the day the legislature adjourns this session. At that time, there will be a vacancy on the Oil and Gas Conservation Commission and Governor Hickel will be free to appoint someone else to the seat.^{9/}

IV

The final question you posed was can the governor remove Mr. Douglass from his position on the Oil and Gas Conservation Commission and, if so, on what grounds?

AS 31.05.007(d) provides:

(d) The governor may remove a commissioner from office for cause including but not limited to incompetence, neglect of duty or misconduct in office. A commissioner, to be removed for cause, shall be given a copy of the charges and afforded an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings.

^{8/} AS 39.05.080(3) provides in part: "Failure of the legislature to act to confirm or decline to confirm an appointment during the session in which the appointment was presented is tantamount to a declination of confirmation on the day the session adjourns."

^{9/} This new appointment will, of course, be subject to confirmation at the next regular session of the legislature.